

# Recent case summaries

The latest insolvency update from **Bobby Friedman**.

## CORPORATE INSOLVENCY ▾

### *Hunt v. Michie* [2020] EWHC 54 (Ch)

In this case, the court considered the extent to which a director's general duties under ss170–177 Companies Act 2006 (CA 06) survive the start of a formal insolvency process.

The company had been placed into administration, which later was converted into a CVL. The company was later dissolved (before being restored).

There were four heads of claim brought. Three of these were against the former director, Mr Michie, and two of those related to the extent to which his duties under CA 06 continued during the insolvency process: (1) the purchase by Mr Michie of a company property at an undervalue at a time when Mr Michie

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remained a director of the company but after the insolvency process had commenced – the purchase was said to be a breach of Mr Michie's duties under ss171 to 175 CA 06, including his fiduciary duty to act in the best interests of the company's creditors as a whole from the time at which the company was insolvent; and (2) causing or allowing payments to be made to certain creditors shortly after the commencement of administration, which was said to be a breach of Mr Michie's duties under s171, 172 and 174 CA 06 (such that Mr Michie was guilty of misfeasance under s212 Insolvency Act 1986 (IA 86)).

It was common ground that Mr Michie remained a director of the company notwithstanding that it had entered into administration and thereafter voluntary liquidation. A director of a company in administration may not exercise a management power without the consent of the administrator, except as provided for by s114 IA 86. On a company's entry into creditors' voluntary liquidation, all the powers of the director cease, save to the extent that the liquidation committee (or

absent that, the creditors) sanction their continuance.

What was the impact of the insolvency process on the ‘general duties’ at ss170–177 CA 06? It was argued by the respondents that once a company enters into administration or CVL, the ‘general duties’ only survive in respect of any exercise by that director of powers, qua director, preserved by or permitted in accordance with IA 86.

The court rejected this argument:

- Firstly, the ‘general duties’ extend beyond the exercise of powers as director. A director is, for example, required to avoid conflicts of interests, which is not dependent on the exercise of a given power qua director.
- Secondly, considering CA 06 as a whole, when provisions are intended not to apply in administration, compulsory liquidation or CVL, it is stated in terms.
- Thirdly, a director's duties are based on common law rules and equitable principles, and should be interpreted and applied in the same way. Such rules and principles are themselves sufficiently flexible to extend beyond the start of the insolvency process.
- Fourthly, s172(3) expressly preserves the duties of a director in certain circumstances ‘to consider or act in the interests of creditors of the company’.
- Fifthly, the judge relied on the common ground that directors remain in office once the formal insolvency process is underway.

The court therefore concluded that the ‘general duties’ remained, and that the start of the insolvency process imposes a series of additional, specific duties.

The judge found that the property had been transferred in breach of duty. The payments to creditors were also in breach of duty.

## PERSONAL INSOLVENCY ▾

### *Carter v. Hewitt* [2019] EWHC 3729 (Ch)

This was an appeal from a deputy district judge's decision to refuse to grant an order for possession and sale of the home of the bankrupt, Mr Hewitt.

The bankruptcy order was made in 2018 following a creditor's petition. The only substantial asset of the estate was Mr Hewitt's house, of which he was the sole owner and which had equity of around £160,000 against debts totalling £114,100. Mr Hewitt refused to engage with the trustees, which led to their application for an order for possession and sale of the property.

The lower court had wrongly

considered that s335A IA 86 was engaged. This section relates to ‘rights under trusts of land’ and in particular to an application by a trustee under s14 TOLATA 1996. The deputy district judge had applied that section and refused to make the order sought on the basis that he did not have sufficient information in front of him and that a further application could be made.

In fact, as the property was owned by Mr Hewitt outright, there was no trust over the property. The property vested in the trustees under ss283 and 306 IA 86, and it was only in cases where the bankrupt himself had not owned the property outright that there was a question of a trust arising. The lower court had therefore been wrong to consider that s335A applied at all.

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Under s283A(4) IA 86, the lower court's dismissal of the application for sale meant that the property had re-vested in Mr Hewitt (since the court had not ordered otherwise). This meant that the judge was also wrong to consider that a further application for possession and sale could be made, since this was barred and the effect of his order was that the trustee in bankruptcy could have no further recourse to the property.

Applying the correct principles, the application by the trustees fell to be considered under s363 IA 86. However, the court applied the criteria at s335A(2), which set out the matters to have regard to when an order is sought in a s14 TOLATA case – by parity of reasoning. On the facts, an order for possession and sale was made. □



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