Neutral Citation Number [2022] EWHC 694 (Ch)

CR 2021 000136

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (ChD)
IN THE MATTER OF CHANGTEL SOLUTIONS UK LIMITED (IN LIQUIDATION)
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

Royal Courts of Justice
7 The Rolls Building
Fetter Lane
London
EC4A 1NL

Date: 01/04/2022

Before :

ICC JUDGE BARBER

- -

Between :

(1) CHANGTEL SOLUTIONS UK LIMITED (IN LIQUIDATION)
(2) NICHOLAS REED (JOINT LIQUIDATOR OF CHANGTEL SOLUTIONS UK LIMITED)
(3) JULIE PALMER (JOINT LIQUIDATOR OF CHANGTEL SOLUTIONS UK LIMITED)

Applicants

- and –

G4S SECURE SOLUTIONS (UK) LIMITED

Respondent

- -

Stephen Robins QC (instructed by Walker Morris LLP) for the **Applicants**
Julian Wilson (instructed by G4S Legal Department) for the **Respondent**

Hearing dates: 2 December 2021, 18 and 24 January 2022

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Approved Judgment

This judgment was handed down remotely by circulation to the parties' representatives by email. It will also be released for publication on BAILII and other websites. The date and time for hand-down is deemed to be 9.30 a.m on 1 April 2022

ICC Judge Barber

1. On 22 January 2021, Changtel Solutions UK Limited ('the Company') and its liquidators (together, 'the Applicants') issued an application ('the Application') against sixteen respondents, seeking to recover various sums allegedly paid by the Company to such respondents in the period between the presentation of a winding up petition against the Company on 7 June 2013 and the making of a winding up order against it on 28 January 2015.

2. This judgment addresses five payments totalling £47,053.28 alleged to have been made by the Company to the eighth respondent, G4S Solutions (UK) Limited ('the Respondent') in the period between 7 June 2013 and 28 January 2015. The Applicants allege that the five payments were made on the following dates and in the following sums:

(1) 11 June 2013:	£9,564.33
(2) 16 August 2013:	£9,411.98
(3) 17 September 2013:	£9,306.00
(4) 7 November 2013:	£9,358.99
(5) 10 December 2013:	£9,411.98
Total:	£47,053.28

3. The Applicants maintain that all five payments are void under s.127 Insolvency Act 1986. They seek repayment of the sums together with interest.

4. The Respondent opposes the application. It maintains that:

   (1) the Applicants' claim to recover the payments is time-barred under section 9 of the Limitation Act 1980 ('the 1980 Act');

   (2) the first of the payments (in the sum of £9,564.33) ('the First Payment') was actually made before presentation;

   (3) the court should validate the payments under section 127 of the 1986 Act; and/or

   (4) the Respondent changed its position and has a defence to the restitutionary claim arising by reason of section 127 of the 1986 Act.

5. In reply, the Applicants contend that:

   (1) the claim is not time-barred under section 9 of the 1980 Act, because the Application was issued less than 6 years after the making of a winding-up order;

(2) although the cheque in respect of the First Payment was signed before presentation of the petition, the Company's bank account was debited after the presentation of the petition, with the result that the First Payment is void under section 127 of the 1986 Act;

(3) the Respondent has not applied for validation and in any event, validation of the payments would not be of any benefit to the Company's creditors and there are no other grounds to justify the making of an exception to the basic principle of pari passu distribution;

(4) the 'change of position' defence is not available in a section 127 context. Alternatively even if it is, the Respondent has not discharged the burden of establishing a change of position defence.

Evidence

6. For the purposes of this judgment, I have read the witness statement of Nicholas Reed dated 22 January 2021 and the witness statement of Alan Cameron dated 8 March 2021. I have also considered other documents contained in agreed hearing bundles, to which reference will be made where appropriate.

Background

7. On 18 April 2013, Her Majesty's Revenue & Customs ('HMRC') presented a petition for the winding up of the Company ('the First Petition').

8. HMRC agreed not to advertise the First Petition. In breach of this agreement, however, HMRC advertised the First Petition. The Company applied for the First Petition to be struck out and, on 6 June 2013, Birss J struck out the First Petition.

9. On 7 June 2013, HMRC presented a further petition for the winding up of the Company ('the Petition').

10. The Company applied to strike out the Petition. This application was heard at the end of January 2014. On 21 March 2014, Mr David Donaldson QC (sitting as a Deputy Judge) (the Judge) acceded to the Company's application and struck out the Petition.

11. Somewhat curiously, on the same day, the Judge also granted an injunction in favour of the Company, restraining HMRC from advertising the Petition.

12. HMRC appealed against the Judge's decision.

13. On 28 January 2015, the Court of Appeal allowed HMRC's appeal and made a winding up order in respect of the Company ('the Winding Up Order'). The Court of Appeal dispensed with the requirement for advertisement of the Petition.

14. In the period between presentation of the Petition on 7 June 2013 and the making of the Winding Up Order on 28 January 2015, the Company's bank account was debited with the five payments listed at paragraph 2 above.

15. By this application, the Applicants are seeking to recover the payments on the basis that the payments are void under section 127 of the Insolvency Act 1986.

16. I shall now address the four key issues identified by the parties.

Is the entire claim statute-barred?

17. The Respondent contends that the Applicants' claim to recover all of the payments is time-barred under section 9 of the 1980 Act, because the Application was issued more than 6 years after the payments. The Applicants maintain that the cause of action accrued on the making of the Winding Up Order, which occurred less than six years before the date of the application. The question in respect of limitation is therefore whether the 'cause of action' within section 9 of the 1980 Act accrued immediately on the making of the payments (as the Respondent contends) or not until the making of the winding up order (as the Applicants contend).

18. Section 9(1) of the 1980 Act provides:

> 'An action to recover any sum recoverable by virtue of any enactment shall not be brought after the expiration of six years from the date on which the cause of action accrued'.

19. A claim to recover a post-petition payment is an action 'to recover any sum recoverable by virtue of any enactment'. The enactment by which the sum is recoverable is the 1986 Act, because no such claim would exist without section 127.

20. The Applicants maintain the cause of action did not accrue until the making of the winding up order. For these purposes, they maintain that a cause of action is 'simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person' (Letang v Cooper [1965] 1 QB 232 per Diplock at 242-243) and that a cause of action consists of 'every fact which it would be necessary for the claimant to prove, if traversed, in order to support his right to the judgment of the court': Coburn v College [1897] 1 QB 702 per Lord Esher MR.

21. Accordingly, they contend, a cause of action accrues 'when there are present all the facts which are material to be proved to entitle the claimant to succeed': Halsbury's Laws vol 68, para 1022, citing Cooke v Gill (1873) LR 8 CP 107 at 116 per Brett J.

22. Section 127(1) of the 1986 Act provides:

> 'In a winding up by the court, any disposition of the company's property …. made after the commencement of the winding up is, unless the court otherwise orders, void.'

23. The Applicants submit that:

(1) Section 127 begins with the words: 'In a winding up by the court'.

(2) Until the making of a winding up order, there is no 'winding up by the court'. There may be a petition but there is not yet any winding up by the court.

(3) It follows that the cause of action accrues with the making of the winding up order.

24. The Respondent maintains that 'it is not an ingredient of the accrual of the cause of action under s.127 that a winding up order has been made and the company is in the course of being wound up': skeleton argument para 20. In support of this contention, the Respondent relies upon Re A I Levy (Holdings) Ltd [1964] Ch 19, in which Buckley LJ (at pp27-28) stated:

> 'It appears to me that the object of the section is to protect the interests of the creditors from the possibly unfortunate results which would ensue from the presentation of a petition, and to protect their interests as much during the period while the petition was pending as after an order has been made on it. What the section provides in its present terms is that any disposition of the property of the company made after the commencement of the winding up shall be void in the winding up of the company unless the court otherwise orders; that is to say, if and when the company comes to be put into liquidation the transaction is to be as if it had never taken place.
>
> It does not appear to me, with the utmost respect to Vaisey J., that the language of the section necessarily requires an order to be made in respect of a company which is in fact being wound up by the court at the date when the order under section 227 is made, that is to say after the date of the winding up order. If that were the true effect of the section, the present case would demonstrate that the section is ill designed to meet the kind of risk to the creditors of a company against which one would have expected it to be intended to protect.'

25. The Respondent maintains that 'The action under the enactment in s.127(1) IA 1986 accrues when (1) a Petition has been issued; and (2) there has been a post-petition disposition of the Company's property. Time begins to run from the making of the post-petition disposition following which, as we have seen above [a reference to Levy], actions under the enactment can be made to prospectively validate it or declare it void before the Winding Up order.' (Respondent's skeleton, para 17).

26. In my judgment, this argument is misconceived. The case of Re A I Levy is authority for the proposition that under section 127 (or its predecessor, section 227), it is open to the court *prospectively to validate* a given transaction. It is in that context that the extract from Buckley LJ's judgment relied upon falls to be considered. Buckley LJ was not addressing the issue of when a cause of action under s.127 arose. He was addressing the issue of whether it was open to the court to grant prospective validation. Ultimately this authority is of no assistance to the Respondent.

27. The prospective nature of the relief granted is readily apparent from the standard wording used in a prospective validation order; it is couched in terms which provide that *in the event that* a winding up order is made, a given transaction *shall not be void*. Moreover, even if a prospective validation order is refused, the court refusing to

validate a given post-petition transaction does not, as suggested in the Respondent's skeleton argument, 'declare' the transaction void there and then. That would be premature. The transaction will only be void in the event that a winding up order is made.

28. As rightly submitted by the Applicants, the purpose of section 127 is to preserve the pari passu principle in a liquidation. Until the making of a winding up order, that principle is only prospectively engaged. It is the winding up order which finally brings it into operation. It follows that, until the making of a winding up order, a post-petition payment is only prospectively void by section 127. If the petition is dismissed, it will be valid. If a winding up order is made, the disposition will be retrospectively avoided.

29. I accept the Applicants' submission that section 127 does not have the effect of finally avoiding a payment unless and until the winding up order is made. No action could be brought to recover a post-presentation disposition if (on the facts) no winding up order had yet been made.

30. As explained by HHJ Paul Matthews in Officeserve Technologies Ltd (in compulsory liquidation) v Annabel's (Berkeley Square) Ltd [2019] Ch 103 at [21]:

> 'in the context of section 127 … the legal consequence of the transaction **at the time it was carried out** depends on what happens **subsequently**. If the winding up order is eventually made, the disposition is and always was void from the beginning, although the court has the power to validate it in an appropriate case. If, however, the winding up order is not made, the disposition is and always was valid' [emphasis in original]

31. The Respondent sought to rely upon section 129(2) of the 1986 Act, which provides that 'the winding up of a company by the court is deemed to commence at the time of the presentation of the petition for winding up'. The Respondent maintained that if the winding up is deemed to commence at the time of presentation, the last factual ingredient to occur was actually the making of the payments; on this basis, the respondent says that the cause of action under section 127 accrued on the making of the payments.

32. This argument, however, overlooks the opening words of section 127: 'In a winding up by the court'. These words require proof that the company in question is being wound up, that is to say, that a winding up order has been made. As rightly noted by Mr Robins, if the Respondent was right, the words 'in a winding up by the court' at the beginning of section 127 would be merely duplicative of the subsequent words 'after the commencement of the winding up'. In my judgment Mr Robins is correct in submitting that the two phrases serve different purposes. The opening words 'In a winding up by the court' serve the purpose of identifying when section 127 comes into operation - namely, on the making of a winding up order. The subsequent words referring to the 'commencement of the winding up' serve an entirely different purpose, defining the period to which section 127 applies. Thus, section 127 comes into effect on the making of a winding up order, but the payments which are

retrospectively avoided by it are those which occurred after the presentation of the petition. In this way, the words 'In a winding up by the court' are not otiose.

33. The Respondent referred me to Sevcon Ltd v Lucas CAV Ltd [1986] 1 WLR 462. In that case the House of Lords held that the cause of action for the infringement of a patent ran from the date of infringement, even though the claimant did not have the right to sue for infringement until the patent was sealed. The Respondent relied in particular on a passage from Lord Mackay's judgment at p467F, in which he said:

> 'The appellants contended that the conclusion which, for the reasons I have set out appears to be the correct one, would lead to results which offend the policy of Parliament as manifested in the Limitation Act as a whole. They submits that the exceptions, for example, for those under disability, show that Parliament did not intend time to run where a person was not in a position to pursue his claim. However, the true principle as illustrated in the cases to which I have referred is that time runs generally when a cause of action accrues and that bars to enforcement of accrued causes of action which are merely procedural do not prevent the running of time unless they are covered by one of the exceptions provided in the Limitation Act itself. …'

34. Developing that argument, the Respondent argued that if procedure dictates that the liquidator doesn't get the right to sue until later, it doesn't prevent the running of time, as this is only a procedural bar to enforcement, and not an ingredient of the cause of action.

35. I am not persuaded by that argument and am not assisted by Sevcon. The statutory provision under consideration in that case was s.13(4) of the Patents Act 1949, which is in materially different terms to s.127. Under s.127, post-petition transactions are not void until the making of the winding up order. The cause of action is not complete until that point.

36. The Respondent also referred me to an article by A.McGee and G Scanlon in Company Lawyer 2004 entitled 'Section 127 Insolvency Act 1986: practical problems in its application'. I have read the article with interest, but disagree with its conclusions. Having rightly accepted as a general principle that 'an action governed by either s.8(1) or s.9(1) of the Limitation Act 1980 will accrue when the claimant is able to assert "every fact which it would be necessary for the claimant to prove, if traversed, in order to support his right to the judgment of the court", the authors fail to take appropriate account of the fact that a post presentation disposition is not avoided under s.127 until a winding up order is made. The winding up order is an essential ingredient of the cause of action. Without it, the transaction is not void and no cause of action arises.

37. For all these reasons, I am satisfied that for limitation purposes, time runs from the date of the winding up order and not the date of payment.

Is the First Payment caught by section 127?

38. It is common ground (as confirmed at paragraph 15(2) of the Applicants' skeleton argument) that (i) the Company provided the Respondent with a cheque in respect of the First Payment on 31 May 2013 (ie 7 days before the presentation of the petition) but (ii) the company's bank account was not debited in respect of the First Payment until 11 June 2013 (ie 4 days after the presentation of the petition).

39. The Respondent contends that the 'disposition of the company's property' within section 127 of the 1986 Act occurred when the Company delivered the signed cheque to the Respondent, which occurred before the presentation of the petition, and that accordingly the First Payment is not void under section 127 of the 1986 Act.

40. The Applicants do not accept this analysis and contend that the relevant 'disposition of the company's property' for the purposes of section 127 occurred when the money was debited from the Company's bank account.

41. The question in respect of the First Payment is therefore whether the relevant 'disposition of the company's property' within section 127 was the delivery of the cheque to the Respondent or the debiting of the money from the Company's bank account.

42. The Australian case of Re Loteka Pty Ltd (1989) 7 ACLC 998, considered in vacuo, lends support to the Respondent's stance on this issue. At 1005 McPherson J said:

> 'It seems to me, therefore, that, although there was a disposition of property of the company, it took place not when the cheques were paid but on the date or dates on which each cheque was issued; and that the disponee in each case was not the bank but the particular creditor in whose favour the cheque was drawn and delivered'.

43. The Australian analysis of this issue was however rejected by Blackburne J in Hollicourt (Contracts) Ltd v Bank of Ireland [2000] 1 WLR 895 at 903, where he said:

> 'The debiting to the customer's account of the amount of his cheque on presentation for payment (by paying out that amount to the third party in satisfaction of the cheque) seems to me to be in every sense a disposition of the company's property'.

44. Blackburne J also held that the paying bank could be liable under section 127. Whilst this aspect of Blackburne J's decision was overturned by the Court of Appeal ([2001] Ch 555), Blackburne J's treatment of the debiting of the customer's account as a disposition went unchallenged.

45. Mr Robins submits that the Court of Appeal's reasoning in Hollicourt involved a tacit acceptance of Blackburne J's treatment of the debiting of a company's account as a disposition. At p 563, for example, Mummery LJ reasoned as follows (with emphasis added):

> 'In our judgment the policy promoted by section 127 is not aimed at imposing on a bank restitutionary liability to a company in respect of the payments made by cheques in favour of the creditors, in addition to the unquestioned liability of the payees of the cheques. The bank operated the company's account as agent for the company. In accordance with its mandate it debited the account with the amounts of the cheques. Those amounts have been received by the payees of the cheques in consequence of the bank duly honouring the cheques drawn in their favour by the company. *The section impinges on the end result of the process of payment initiated by the company*, i.e. the point of ultimate receipt of the company's property in consequence of a disposition by the company. The statutory purpose … is accomplished *without any need for the section to impinge on the legal validity of intermediate steps, such as banking transactions,* which are merely part of the process by which dispositions of the company's property are made….
>
> Consistent with that legislative policy *the only dispositions* of the company's property affected by the section in this case *are the payments to the payees of the cheques drawn, after the presentation of the petition, on the company's bank account.* What is needed for the section to operate is a disposition amounting to an alienation of the company's property: see Mersey Steel and Iron Co v Naylor Benzon & Co (1884) 9 App Cas 434, 440 per Earl of Selborne LC. The bank in honouring the company's cheque obeys as agent the order of its principal to pay out of the principal's money in the agent's hands the amount of the cheque to the payee: see Westminster Bank Ltd v Hilton (1926) 136 LT 315, 317, per Lord Atkinson'.

46. At p566, Mummery LJ confirmed that this 'does not enable the company to recover the amounts from the bank, which has only acted in accordance with its instructions as the company's agents to make payments to the payees out of the company's bank account'.

47. At p567, Mummery LJ concluded:

> 'The section only avoids 'dispositions' of the company's property … It does not in terms avoid all or any related transactions. As already explained, the purpose of the section is achieved by only avoiding dispositions of the company's property to the ultimate payees of the cheques (ie the end result) without the need to affect the validity of any intermediate contracts or transactions occurring during the course of the agency relationship between the company and the bank. Section 127 did not avoid, revoke or countermand the

> company's mandate to the bank to make payments of money out of its account to meet cheques sent by the company to the payees and subsequently presented for payment..… Section 127 impinges on the dispositions to the creditors, but not on the authority of the bank to act on the instructions of the company or on contracts and other intermediate transactions between the company and the bank as part of the process leading to the ultimate disposition of the company's property to the payees.'

48. Mr Robins maintains that the relevant disposition for the purposes of section 127 is accordingly the 'ultimate disposition' or 'end result', consisting of the payment of monies to the creditor. He argues that the various intermediate steps leading up to that result are not the relevant 'dispositions' for these purposes. It follows, he submits, that relevant 'dispositions of the company's property' within section 127 occurred when the First Payment was *debited from the company's bank account*. This occurred after the presentation of the petition.

49. The Respondent argued that in Hollicourt, Mummery LJ (at page 565) relied on and approved the passage from McPherson J's judgment in the Australian decision of In Re Loteka Ltd at p330 referred to at paragraph 42 above. I do not read Mummery LJ's judgment in Hollicourt in this way. The reference to Re Loteka occurs in the context of a summary of a number of different authorities cited to the court. Mummery LJ's reference to In re Loteka Ltd at p330 must be read in the context of other passages in his judgment including, importantly the passages from p563 and 567 quoted previously in this judgment.

50. Moreover ultimately, the focus of the Court of Appeal in Hollicourt was not on whether a disposition occurred on delivery of a cheque or on payment of it, but rather, on whether a bank honouring instructions to pay a cheque post-presentation could itself be held liable to make restitution pursuant to s.127 in the event that a winding up order was subsequently made.

51. The Respondent further argued that the decision in Hollicourt was 'consistent with the general law relating to cheques. A cheque is payable on demand and is treated like cash in that the court does not permit set off in an action on a dishonoured cheque, see the cases referred to in the White Book at 24.2.7': (skeleton argument para 56). Whilst there is a superficial appeal to this argument, however, it does not stand up to close scrutiny. A cheque may be treated as 'cash' for certain purposes (such as the 'no set-off' rule in Part 24 proceedings), but it does not render the payee of the cheque a secured creditor pending payment for the purposes of the Insolvency Act 1986 and Rules. If a company issues and delivers a cheque to a creditor but enters liquidation before payment is made on the cheque, the creditor remains an unsecured creditor within the liquidation and must share rateably with other unsecured creditors. The creditor may have an unanswerable claim for the amount of the cheque, but it remains an unsecured claim.

52. It is perhaps against that backdrop that Mummery LJ in Hollicourt at p563 made reference to the 'end result':

> 'The section impinges on the end result of the process of payment initiated by the company, i.e. the point of ultimate receipt of the company's property in consequence of a disposition by the company. The statutory purpose … is accomplished without any need for the section to impinge on the legal validity of intermediate steps, such as banking transactions, which are merely part of the process by which dispositions of the company's property are made….'

53. The focus on the 'end result' in an insolvency context is entirely understandable. The reasons for this are clear. The issue and delivery of a cheque by a company to a creditor may well be a disposition (the passing of property in the cheque at least -and possibly a cluster of rights attendant upon that). That disposition of itself, however, does not take a creditor very far in an insolvency context, for reasons explored above; a creditor holding an uncashed cheque is no better off than a creditor with a simple money judgment which has yet to be executed: both are unsecured and must share rateably with other unsecured creditors in the event that the company enters into insolvent liquidation. For the purposes of s.127, any payment made from funds on a company's account in satisfaction of a cheque drawn on that account *is a separate disposition*. In this regard I adopt with gratitude the words of Blackburne J in Hollicourt at first instance:

> 'The debiting to the customer's account of the amount of his cheque on presentation for payment (by paying out that amount to the third party in satisfaction of the cheque) seems to me to be in every sense a disposition of the company's property'

54. The fact that the disposition *of the cheque itself* took place pre-presentation, therefore, does not prevent a post-presentation *payment out on that cheque* being rendered void under s.127.

55. For all these reasons, I am satisfied that the relevant disposition of the company's property under s.127 of the 1986 Act was the debiting of money from the Company's bank account in respect of the First Payment and not the issue and delivery of the cheque which led to that payment. It follows that the First Payment was post-presentation and therefore void under s.127 unless validated.

Validation

56. The Respondent next contends that the Payments should be validated. The Applicants object to any validation. They maintain that the Respondent has not applied for validation; there is no application notice and no application fee has been paid. Formalities aside, the Applicants further argue that validation of the Payments would not be of any benefit to the company's creditors and that there are no other grounds to justify the making of an exception to the basic principle of pari passu distribution.

57. On the question whether a formal application for validation is required, the Applicants referred me to the case of Officeserve Technologies Ltd (In Liquidation) v Annabel's (Berkeley Square) Ltd [2019] Ch 103, where HHJ Paul Matthews at [17] said:

> "Whether the transaction would or would not be retrospectively validated by the court is irrelevant, if no application is ever made by the recipient for such validation. In the absence of such an application, the court must proceed on the basis that the disposition of the Company' property is void, as the statute says it is. In this connection, I accept the evidence filed on behalf of the applicants, that the recipients have been invited to make any applications which they wished for the validation of the payments they received, and yet none of them has done so".

58. On behalf of the Respondent, Mr Wilson submitted that the issue of whether or not to validate the payments was already before the court, in the context of the Applicants' application for a declaration that the payments were void. To the extent that Mr Wilson was seeking to suggest that the issue of whether or not to validate a given payment is implicit in any application for a declaration that the payment in question is void under s.127, I am not persuaded by that argument. Absent a request for validation, the court would not ordinarily spend time on an application for a declaration that post-presentation payments were void considering whether or not to validate the payments.

59. Mr Wilson further submitted that even if a request for validation was required, that request need not be made by way of formal fee paid application notice and could instead be made by way of evidence in response. In this regard he relied upon the case of Rose v AIB Group (UK) plc [2003] EWHC 1737 as an example of a case in which no cross application was issued. From the report of Rose before me, however, it is not possible to tell whether or not a cross application was issued; the headnote refers to a 'request' for validation and paragraph 1 of the judgment states that the bank 'seeks' validation. Such language is equivocal.

60. Mr Robins rightly reminded me that rule 12.1 of the Insolvency Rules 2016 provides for CPR to apply. CPR 23.3 provides that the general rule is that anyone wishing to make an application to the court must file an application notice; and that any application can only be made without an application notice if (a) a practice direction so provides or (b) the court dispenses with the need for an application notice. He argued that dispensing with such a notice is not a formality; good reason must be shown, such as that the application is one of urgency or that the relief is being sought by a litigant in person. In the present case, he argued, the Respondent is professionally represented. There was no excuse.

61. I accept Mr Robins' submission that a party seeking validation should do so by way of fee paid application notice. The fact that on some occasions the court may have dispensed with a formal application notice does not mean that CPR 23.3, as applied by rule 12.1 IR 2016, can simply be ignored. The Respondent cannot contend that it was not live to the issue. The Respondent was invited in correspondence on several occasions to confirm whether or not it would be issuing an application for a validation order, indicated at times that it would, and yet declined to issue an application. The lack of a formal application was also expressly raised in Mr Robins' skeleton argument, exchanged ahead of the hearing; and as the matter went part-heard on two occasions, the Respondent has had ample opportunity to issue an application notice prior to the final hearing: yet still, the Respondent has not done so. There was a

degree of obduracy about the Respondent's approach to this issue which bordered on the discourteous. The best that Mr Wilson was prepared to offer in submissions, somewhat grudgingly, was that if the Court insisted, he could get instructions to offer an undertaking to issue an application notice and pay the fee. This is not the way to conduct litigation.

62. In this case however, I consider that it would be disproportionate and ultimately would serve little purpose for the court to decline validation simply on the ground that no fee paid application notice has been issued. The Respondent by its evidence in response, filed in March 2021, expressly requested that the payments be validated and has set out in its evidence the basis upon which that request was made. The Applicants have thus been on notice since receipt of such evidence that validation would be sought and have had an opportunity to file evidence in response on that issue. Both skeleton arguments addressed the issue of whether the Payments should be validated and I have heard full oral submissions on the same, coupled with appropriate reference to authority.

63. I shall therefore proceed to consider the substantive arguments on validation.

64. The leading case is Express Electrical Distributors Ltd v Beavis [2016] 1 WLR 4783. In that case Sales LJ (Patten LJ and Sir Terence Etherton C concurring) held that:

(1) It is a basic concept of the law governing liquidation of insolvent estates of individuals and companies that the free assets of the insolvent at the commencement of the liquidation shall be distributed rateably amongst the insolvent unsecured creditors as at that date. This is the pari passu principle (at [20]).

(2) It may sometimes be beneficial to the company and its creditors that the company should be enabled to complete a particular contract or project, or to carry on its business generally in its ordinary course with a view to the sale of the business as a going concern (at [20] and [21]).

(3) In considering whether to make a validation order, the court must always do its best to ensure that the interests of the unsecured creditors will not be prejudiced (at [20]).

(4) Since the policy of the law is to procure so far as practicable rateable payments of the unsecured creditors' claims, it is clear that the court should not validate any transaction or series of transactions which might result in one or more pre-liquidation creditors being paid in full at the expense of other creditors, who will only receive a dividend, in the absence of special circumstances making such a course desirable in the interests of the unsecured creditors as a body (at [20]).

(5) Thus, the policy of the law in favour of distribution of the assets of an insolvent company in the course of the liquidation process on a pari passu basis between its unsecured creditors is a strong one; and it needs to be shown that special circumstances exist which make a particular transaction one in the interests of the creditors as a whole before a validation order will be made to override the usual application of the pari passu principle (at [20]).

(6) There may be circumstances in which a validation order is not sought in advance of a transaction, but only retrospectively. The same principles apply (at [24]), although the range of evidence available is likely to be different. In a case where a retrospective order is sought it may have become clear whether a particular transaction or the carrying on of the company's general business in fact turned out to be for the benefit of the general body of creditors or not. Observations of Buckley LJ in Gray's Inn Construction [1980] 1 WLR 711 at pp 720B and 723F-724C suggest that, in a retrospective case, the court should look at the matter with the benefit of hindsight.

(7) It is incorrect to say that a disposition carried out in good faith in the ordinary course of business at a time when the parties are unaware that a petition has been presented will normally be validated by the court (at [36], [40]-[41] and [56]). Validation on such a basis could well prejudice the interests of the body of unsecured creditors. The making of such a validation order instead depends upon a more searching enquiry whether it is in the circumstances in their overall interest that the transaction in question should be validated (at [36]).

(8) Therefore, save in exceptional circumstances, a validation order should only be made in relation to dispositions occurring after presentation of a winding up petition if there is some special circumstance which shows that the disposition in question will be (in a prospective application case) or has been (in a retrospective application case) for the benefit of the general body of unsecured creditors, such that it is appropriate to disapply the usual pari pasu principle (at [56]).

(9) Accordingly, where the evidence shows that the company traded at a loss, validation orders should not be made in respect of the operation of its bank account used for its ordinary trading to the extent of such loss (at [37]). That is an approach which accords with the pari passu principle.

65. The Respondent maintains that the court should validate the payments. As summarised at paragraphs 7(b), 27 and 36-40 of Mr Wilson's skeleton argument, the Respondent maintains that:

(1) the payments were made in 'special circumstances', in that they paid for the guarding and preservation of the Company's premises and contents and contributed to the value of those assets being realised as a benefit to all the creditors; and/or

(2) the payments were made in 'exceptional circumstances', in that the petition was never advertised, with the result that creditors were not given notice of the petition and were thereby denied the opportunity to learn that they might be adversely affected by s.127, were denied equal treatment at the petition date, and were denied the right to seek prospective validation for payments in the period between presentation of the petition and the winding up order; and/or

(3) there are other 'discretionary factors … which support retrospective validation', which are said to be:

(i) the Payments did not result in any significant loss to the unsecured creditors as a whole, as the total of the Payments 'is not enough to affect any dividend';

(ii) the Payments were not intended to prefer the Respondent over any other creditors; the Company continued to trade normally for 6 months after the date of the petition, entering into many transactions with a substantial number of suppliers;

(iii) pari passu treatment is impracticable; there were so many post-petition payments to so many suppliers, domestic and overseas, only some of which can be practically pursued, that a pari passu distribution of assets at the petition date is 'unachievable'; and

(iv) the payments were received over seven years before the application was made. That delay has caused prejudice as the payments were inclusive of VAT paid by the Company, which the Respondent accounted for to HMRC in the usual way in its quarterly returns. If the Respondent is required to repay the payments to the Company, it will not be able to recover the VAT for which it has accounted to HMRC because of the four-year time limit in correcting errors in accounting for output VAT.

Special Circumstances

66. I turn first to consider whether the 'special circumstance' threshold is cleared in this case.

67. It was common ground that a creditor's lack of awareness that a petition has been presented and receipt in good faith of a post-presentation payment in ordinary course of business are not of themselves 'special circumstances' justifying validation: Express at [56].

68. A 'special circumstance' may arise where it is shown that the disposition in question will be (in a prospective application case) or has been (in a retrospective application case) for the benefit of the general body of unsecured creditors, such that it is appropriate to disapply the usual pari passu principle (Express Electrical at [56]; Re MKG Convenience [2019] BCC 1070 at [47]). It is conceded by the Respondent that the court in considering whether to make a retrospective validation order 'has the benefit of hindsight and can take the outcome into account: Express at [25]-[26]' (Respondent's skeleton argument, para 28(m)).

69. If the recipient of a post-presentation disposition seeks retrospective validation on the 'special circumstance' ground, the onus is on the recipient in question to satisfy the court on a balance of probabilities that the disposition has been in the overall interests of the general body of unsecured creditors.

70. In the present case the payments were made in consideration for the provision of security guards at the Company's premises at Stafford Park 6, Telford ('the premises') during the day and at night for a period of approximately 7 months up to December 2013 whilst the Company continued trading at a loss. Similar security services had been provided at the premises by G4S/Securicor group companies continuously for 17 years. The payments were made in advance for such services.

71. The Respondent maintains that the payments benefited the unsecured creditors as a class because (a) they formed part of transactions which preserved the value of the Company's assets from harm (Re Grays Inn Construction Co Ltd [1980] 1 WLR 711

at 719) and/or (b) were a necessary part of some wider transaction which was beneficial: Express at [44].

72. Mr Wilson maintains that the fact that the passage from Re Grays Inn at 719 was quoted in Express at [35] suggests that the Court of Appeal in Express accepted the proposition. The judgement of Sales LJ in Express however must be read as a whole. Reading the judgment as a whole, it is clear that the correct 'special circumstance' test is whether unsecured creditors are better off, or at the very least no worse off, as a result of the post -presentation disposition. At [36], for example, Sales LJ refers to the 'searching inquiry' required as to 'whether it is in the circumstances in their [the unsecured creditors'] *overall* interest that the transaction in question should be validated' [emphasis added]. The need to look at the 'bigger picture' is again emphasised in the following passage (at [36]): 'The transaction *might be part of a course of trading* by the company *at a loss*, which would *not* be in the interests of the general body of creditors' [emphasis added]. See too para [37], in which Sales LJ approved of the proposition that in a retrospective validation case, where a company had traded at a loss post presentation, validation orders should not be made in respect of the operation of its bank account used for ordinary trading to the extent of such loss. That proposition, he concluded, 'accords with the pari passu principle'.

73. In the current case, therefore, it is not sufficient to state (i) that the payments were in respect of security services, (ii) that security services by definition protect assets, (iii) that it must be in the interests of creditors as a whole to protect the company's assets; and (iv) that therefore, the payments were for the benefit of the unsecured creditors as a whole. On that narrow, a priori analysis, post presentation payments in respect of security services would always be validated. The position is more nuanced than that. To adopt the words of Sales LJ in Express, a more searching inquiry is required. The court must consider the context in which the payments were being made.

74. In this case, the Company was part of a corporate group ('the Enta group') which also contained a company known as Entatech UK Limited. The Enta Group had at one time an annual turnover in excess of £100 million. Jason Tsai was the founder and former managing director of the Company. He used the Company as a vehicle to commit a fraud on HMRC in the form commonly referred to as a 'missing trader intra-community' (or 'MTIC') fraud. The full background to the MTIC fraud is set out in the judgment of the Court of Appeal on the winding up petition referred to at paragraph 13 above.

75. From April 2012, at a time when HMRC's investigations into the Company were at an advanced stage, the Company's business was transferred to Entatech UK for no consideration. In early 2012, the Company's customers were transferred to Entatech UK. On 25 March 2013, HMRC wrote to the Company threatening winding up proceedings if payment was not made in respect of 15 assessments totalling £15,589,167.65. On 18 April 2013, HMRC presented the first winding up petition against the Company. For reasons previously explored, on 6 June 2013, the First Petition was struck out. The very next day, on 7 June 2013, HMRC presented the Petition. The Company applied to strike out that petition as well.

76. In the meantime, notwithstanding presentation of the Petition, the Company continued to purchase goods from its existing suppliers and then sell those goods onto Entatech

UK, at a negligible mark-up of in the region of 0.01%, for on-sale by Entatech UK; an arrangement which appears to have been designed to give Entatech UK the benefit of the Company's existing supplier relationships. Given the negligible mark-up on goods supplied by the Company to Entatech UK and the other arrangements in place, the Company was bearing a disproportionate amount of Entatech UK's administrative expenses over this period and traded at a significant loss.

77. Pending the hearing of the application to strike out the Petition (which was not heard until January 2014), from around August 2013, the Company's trading was run down. By 1 January 2014, the Company had transferred the remainder of its assets (including the freehold to the premises) to Entatech UK and had ceased trading altogether. In January 2014, Entatech UK transferred its shareholding in the Company into the name of Jason Tsai's then sister-in-law, Shu Hua Chang, in January 2014, for a purported consideration of £600,000. The Applicants believe that this was done with a view to putting the Company's assets beyond the reach of its creditors.

78. Turning back, then, to the payments made to the Respondent over the period June-December 2013, on the evidence before me, it is clear that the payments were made in respect of services provided by the Respondent to the Company at a time when the Company was trading at a loss. The payments (and the provision by the Respondent to the Company of security services) ceased when the Company ceased to trade in December 2013 and wrongly transferred its remaining assets (including the freehold title to the premises) to Entatech UK. This was not a case in which continued trading at a loss over the course of June – December 2013 enabled the Applicants to sell the Company's business as a going concern for the benefit of the creditors as a whole. This was a case in which continued trading over the course of June – December 2013 simply bought those in control of the Company a little more time in which to empty the Company of any of its remaining value in favour of Entatech UK and others, in the teeth of the winding up petition.

79. It is correct to state that once appointed, the Applicants challenged the transfers of the Company's assets to Entatech UK and ultimately achieved a settlement of sorts. On behalf of the Respondent, Mr Wilson submitted that the settlement ultimately achieved by the Applicants with Entatech UK rendered the payments made to the Respondent for the benefit of the unsecured creditors of the Company as a whole. I reject this submission.

80. At paragraph 28 (d)-(h) of his skeleton argument, Mr Wilson summarised the position thus:

> (d) The [premises] being guarded and secured were a major asset of the Company. Their value was stated in the Company's last filed Financial Statements for the period ended 28 February 2013 at £3.4m before depreciation: Cameron/48(a) and see Note 7 to the Financial Statements. That Note shows the net book value after depreciation for the freehold, fixtures, fittings, equipment and motor vehicles was £2.3 m.
>
> (e) The Applicants' first Progress Report, for the period 5 June 2015 to 4 June 2016, at Section 4… states that:

(i) the Company owned the freehold of the premises at the time the Payments were made;

(ii) this was subsequently transferred around December 2013 as part of the Company's business and assets to an associated company called Entatech UK Limited; but

(iii) the Applicants of the Company challenged that transfer and received a settlement from Entatech UK Limited in respect of it.

(f) The Applicants did not give full details of the confidential settlement reached with Entatech UK in their first Progress Report but, subsequent to the settlement being paid, Entatech UK entered administration and there is publicly filed in both the Gazette and at Companies House a document by KPMG entitled Joint Administrators' Proposals of 26 June 2017 which in the section 'Background and events leading to the administration' discloses the financial terms and states:

"The Company [ie Entatech UK] reached an agreement with the liquidator of Changtel in February 2016 to pay £1.2m in full and final settlement of all claims made against [Entatech UK]. [Entatech UK] paid 0.5 million of this in February, 0.2 million was paid in April 2016 with the balance to be repaid over 30 months at £23,333 per month."

g) The Applicants' later Progress Report … states that the settlement amount debt owed by Entatech UK was secured including by a legal charge on the [premises] pending full payment. By a later Report, the Applicants reported that the settlement terms had been fulfilled by the Administrators of Entatech UK.

(h) The Payments were therefore made and received to pay for the guarding of assets, the value of which have been realised by the Applicants as part of a wider transaction for the benefit of the creditors as a whole.

(i) Had the premises been left unguarded, they and their contents could obviously have been damaged by fire, vandalised or stolen, diminishing the value realisable for the Company's creditors…..

(m) The court in considering whether to make a retrospective validation order has the benefit of hindsight and can take the outcome into account: Express at [25]-[26]. The making of the Payments in consideration for the guarding services turned out well for the creditors because the premises and their contents were safeguarded and their value was preserved to be realised

> as part of the transaction by way of settlement with Entatech UK to the benefit of the creditors as a whole'

81. Even on the Respondent's own account, it will be seen that the Applicants had to pursue claims against a third party (Entatech UK) in respect of Company property wrongly transferred to it - and that the monetary settlement ultimately received in full and final settlement of all claims was £1.2m, significantly less than the net book value of £2.3m given for the freehold of the premises, fixtures, fittings, equipment and motor vehicles in the Company's last filed Financial Statements for the period ended 28 February 2013 after depreciation.

82. The Company's draft accounts for the year ending 28 February 2014 showed a loss of approximately £6.1 million.

83. The Applicants have produced two estimated outcome statements in respect of the Company. The first estimated outcome statement shows the Applicants' best estimated outcome for creditors had the Company entered into liquidation on the petition date. The second estimated outcome statement shows the Applicants' best estimated outcome for creditors of the Company as at the date of the winding up order. These estimated outcome statements, the accuracy of which was not disputed and which I accept, indicate that the outcome for the general body of creditors would have been significantly better if the Company had entered into liquidation on the petition date -with a dividend of 19.9 to 38.2 pence in the pound versus a de minimis amount available as at the date of the winding up order: Reed (1) para 35.

84. Overall, on the evidence before me, the Respondent has failed to satisfy me that the unsecured creditors as a whole are any better off, or even no worse off, as a result of the Payments.

85. Quite the contrary, on the evidence before me, the post-petition period of trading appears to have been disastrous for the creditors as a whole and the Payments formed part of the overall cost of that trading. The argument that if the Respondent had ceased to provide security guards, the premises might have been broken into and the Applicants might have received less than £1.2m as a final settlement with Entatech UK is, as rightly noted by Mr Robins, speculative and fanciful. The settlement of £1.2m related to numerous claims involving the assets transferred to Entatech UK, both pre and post presentation, including but not limited to the premises and their contents. The sum of £1.2m was markedly below the book value of the Company's assets as stated in its last filed accounts. The evidence before me falls far short of establishing that had the premises been broken into and stock stolen, the settlement achieved by the Applicants with Entatech would have been materially lower than £1.2m.

86. Mr Wilson also sought to argue that had the Applicants been appointed in June 2013, it was 'likely' that they would have wanted the Respondent to continue to provide the guarding services during the 6 month period for which the payments were made, pointing to (i) the history of security services provided at the premises over the years and (ii) disbursements incurred in the liquidation to pay for security services at other properties (in the name of Mr Tsai) which the Applicants were pursuing on behalf of the Company.

87. The security services provided at the premises when the Company was still trading, however, are no yardstick for the security arrangements required at the point at which the Company ceased (or should have ceased) trading. Moreover, as rightly noted by Mr Robins, the fact that the Applicants considered it appropriate to pay for security services to guard some of Mr Tsai's properties (which on instruction he informed me were being broken into and vandalised) does not lead inexorably to the conclusion that they would have continued to hire the Respondent or to pay for equivalent services at the premises. It would depend on the facts and the requirements of the insurers selected by the Applicants. Ultimately, it cannot be said that the costs represented by the Payments would inevitably have been incurred.

88. As an alternative, Mr Wilson submitted that the circumstances suggest that the Respondent 'would have' obtained a prospective validation order for the payments or some of them during the second half of 2013 had the Petition been advertised. I do not find this submission persuasive. Leaving aside the fact that it does not sit at all well with Mr Wilson's concession that in retrospective validation cases, the court can (and in my judgment should) take the outcome into account (skeleton, para 28(m)), in my judgment it is most unlikely that the court, if properly apprised of the circumstances, would have validated prospectively payments in respect of the 24 hour security services provided by the Respondent over the period June to December 2013. The security services in question were provided in the context of ongoing trading of the Company at a loss; trading which was being maintained largely (if not exclusively) for the benefit of Entatech UK and to the detriment of the Company, pending the wrongful transfer of the Company's remaining assets to Entatech UK. I do not consider it at all likely that the Court would have validated prospectively payments to the Respondent in such circumstances.

89. For all these reasons, the Respondent has not made out its case of 'special circumstances' warranting a validation of the payments.

90. I turn then to consider the Respondent's alternative case, of 'exceptional circumstances'.

Exceptional Circumstances

No advertisement

91. Mr Wilson maintains that the payments were made in 'exceptional circumstances', because the petition was never advertised.

92. It is not in issue that the petition presented on 7 June 2013, which ultimately led to a winding up order against the Company on 28 January 2015, was not advertised. Nor is it in issue that in the 19 months between the date of presentation (7 June 2013) and the date of the winding up order (28 January 2015), the Company had continued to trade for approximately 6 months, from 7 June 2013 until 1 January 2014. Its bank account remained unfrozen over that period.

93. Mr Wilson submitted that the fact that the petition was not advertised was an 'exceptional circumstance'. He argued that:

(1) advertisement in the Gazette is the mandatory process which is deemed to give constructive notice to the world: 'advertisement of a petition is notice to the world of the presentation of the petition '; Rose v AIB Group (UK) plc [2003] 1 WLR 2791 at [45]; In re Leslie Engineers Co Ltd [1976] 1 WLR 293 at [304];

(2) The purposes of advertisement include the giving of notice to those who might be adversely affected by s.127 IA 1986: In re a Company (No 007 of 1994) [1995] 1 WLR 953. In that case, Nourse LJ stated at p958:

> 'It is helpful to start with a consideration of the purposes of advertisement. The primary purpose must be to give notice of the petition to those who are entitled to be heard on it, namely the creditors - whether actual, contingent or prospective - and contributories of the company … The secondary, but no less important, purpose of advertisement must be to give notice to those who might trade with the company during the period between the presentation of the petition and its final determination and who might thus be adversely affected by the provisions of section 127 of the Act of 1986'

See also Waite LJ at 960D.

(3) Advertisement is mandatory unless the court otherwise directs because it 'is designed to ensure that the class remedy of winding up by the court is made available to all creditors': see Practice Direction: Insolvency Proceedings (2014) [2014] BCC 502 at [11.5]

(4) Rule 7.10 of the IR 2016 provides that a petition must be advertised, unless the court otherwise directs.

(5) The 'equal footing' treatment which the pari passu rule is designed to protect is undermined if, at the petition date, the petitioning creditor and anyone with informal notice has notice of the petition, whilst the general body of creditors do not because it was not advertised. Suppliers to the company with notice can cease supply or apply for prospective validation. Those without notice cannot. They are in a different position to creditors who failed to spot advertisement because, whilst the latter have constructive notice by reason of the advertisement and the opportunity to obtain actual notice by diligently reading the Gazette or the warning notices of their credit reference agencies, the former are denied any such opportunities.

94. In my judgment, the fact that the petition was not advertised is not an exceptional circumstance warranting validation. As HHJ Paul Matthews held in Officeserve at [17]:

> 'The fact that goods or services were supplied in good faith does not affect the operation of section 127 in making the disposition of the Company's property void. There is no exception in the section for receipt in good faith … The same applies to the fact of the absence of knowledge of the existence of the petition. The disposition is nevertheless void, because

> Parliament has said it is, and once again there is no exception for transacting without knowing of the petition. The legislature has chosen to make a policy decision that prefers the interests of the Company and its creditors to those of the innocent third parties who deal with it. The court has no power to ignore that policy decision. Indeed, so far as carried into execution by the words of the statute, it is its duty to enforce it'.

95. When a petition follows the conventional procedure and is advertised, there is in any event a period of at least 7 days between service of the petition and advertisement which is prescribed by the Insolvency Rules 2016; in some cases, when the petitioner and the company against whom the petition is presented are in discussion, the period between presentation and advertisement may be far longer. There is no 'carve-out' in respect of the window of time between presentation and advertisement. Section 127 provides that on the making of a winding up order, *all* post-presentation dispositions are void, regardless of whether they occurred before or after advertisement. The fact that a post-presentation disposition occurred prior to (or in the absence of) advertisement is not an exceptional circumstance.

96. I am fortified in this conclusion by the approach adopted in Express Electrical. In Express Electrical, the post-presentation payment of £30,000 in issue was *paid prior to the petition being advertised*: Express at [10]. This, however, did not lead the Court of Appeal to conclude that the payment should be validated. Mr Wilson sought to explain this inconvenient truth away on the basis that the payment in Express Electrical had not been in the ordinary course of business (Respondent's skeleton, para 30, relying on Express at [57]). Reading the judgment of Sales LJ as a whole, however, and in particular, paras [33], [36] and [56], it is in my judgment clear that Sales LJ did not base his decision on the payment being otherwise than in the ordinary course of business. Paragraphs [33], [36] and [56] provide as follows:

> '[33] However, Mr Knox sought to rely on another passage in the judgment of Buckley LJ, at p.718F-G:
>
> "A disposition carried out in good faith in the ordinary course of business at a time when the parties are unaware that a petition has been presented may, it seems, normally be validated by the court …"'
>
> '[36] I confess that I have difficulty in following some of Buckley LJ's reasoning in these passages. First, I do not see why Buckley LJ appears to accept the bold proposition that a disposition carried out in good faith in the ordinary course of business at a time when the parties are unaware that a petition has been presented should normally be validated by the court (p718F-G). Validation on that basis could well prejudice the interests of the body of unsecured creditors, unless the making of such a validation order depends upon a more searching enquiry whether it is in the circumstances in their overall interest that the transaction in question should be validated. The transaction might be part of the course of trading by the

> company at a loss, which would not be in the interests of the general body of creditors. It is not easy to square this proposition with the reasoning of Oliver J in the J Leslie Engineers case, which Buckley LJ cited with approval.'
>
> [56] In my judgment, the time has come to recognise that the statement by Buckley LJ at p718F-H cannot be taken at face value and applied as a rule in itself. The true position is that, save in exceptional circumstances, a validation order should only be made in relation to dispositions occurring after presentation of winding up petition if there is some special circumstance which shows that the disposition in question will be (in a prospective application case) or has been (in a retrospective application case) for the benefit of the general body of unsecured creditors, such that it is appropriate to the supply the usual pari passu principle'

97. It is plain from the quoted passages that Sales LJ did not view the fact that the disposition occurred pre-advertisement as, of itself, an exceptional circumstance. Moreover, it is against the backdrop of the passages quoted above that paragraph [57] of Sales LJ's judgment in Express Electrical, which is the passage relied upon by Mr Wilson, falls to be considered (with emphasis added):

> '[57] Finally, *as a footnote* to the discussion above, I would add this. *Even if - contrary to my view* – the pari passu policy and the basic principle in applying section 127 *were* to be treated as qualified by what Buckley LJ says at p.718F-G, in my opinion it *would still not be appropriate* to make a validation order in this case. The payment of the £30,000 was not made by Edge in the ordinary course of business …'

98. For all these reasons, I am satisfied that the lack of advertisement is not an exceptional circumstance warranting validation in this case.

99. Mr Wilson maintained that there were other exceptional or 'discretionary' factors that pointed in favour of validation.

No significant loss

100. Mr Wilson contends that the payments did not result in any significant loss to the unsecured creditors as a whole, as the total of the payments 'is not enough to affect any dividend'. As summarised in Mr Wilson's skeleton argument, this proposition is put forward on the basis that 'the current dividend rate at the time of the application was estimated by the Applicants at 19.9p to 38.2p: Cameron/54(a)' and 'Adding the Payments to the amount available to unsecured creditors does not change that dividend rate: Cameron/54(b)'. This however ignores the fact that the Applicants are pursuing numerous post-presentation payees; the fact that any one of a number of such payees might argue that recovery of the sums paid to it, viewed alone, would not materially affect the dividend, is neither here nor there. This is not an 'exceptional circumstance' for current purposes. It would have been easy for Parliament to limit

the effects of section 127 to transactions above a certain size but that has not been done. There is no monetary threshold in section 127 of the 1986 Act. Moreover, as noted by Mr Robins in submissions, 'materiality' or 'significance' cuts both ways. On present facts, the Respondent is an extremely large company sporting annual profits in the region of £5.5 million; viewed in vacuo, repayment of the sums sought would have no material impact on the Respondent's net assets either.

No intention to prefer

101. Mr Wilson also submitted that the payments were not intended to prefer the Respondent over any other creditors; the Company continued to trade normally for 6 months after the date of the petition, entering into many transactions with a substantial number of suppliers. In my judgment, the absence of a desire to prefer is not an exceptional circumstance for current purposes. The caselaw now makes clear that the absence of a desire to prefer is not a relevant factor when deciding whether a given payment should be validated. Indeed, as rightly noted by Mr Robins, the effect of validation would of itself be to prefer the Respondent. As Chief Registrar Baister said in Re D'Eye [2016] BPIR 883 at [54],

> 'It would be wholly unjust to allow any of the parties who has been paid by the bankrupt or on his behalf out of his estate to retain the sums they have received to the detriment of other creditors. To do so would be to prefer those persons over the creditors in the bankruptcy (or other creditors in the bankruptcy) and would defeat the statutory purposes to which I have alluded'.

Pari Passu impossible

102. Mr Wilson also argued that pari passu treatment was now impracticable. He contended that there were so many post-petition payments to so many suppliers, domestic and overseas, only some of which could be practically pursued, that a pari passu distribution of assets at the petition date was 'unachievable'. In my judgment the fact that some creditors have not yet paid back the full amount they owe by reason of section 127 is irrelevant. It is not an exceptional circumstance for current purposes. It is not open to a creditor to seek validation on the basis that other creditors have not yet paid. As noted by Mr Robins, if that were correct, every creditor would always be able to ask the court to validate the transaction on the basis that some other creditors have not yet paid what they owe. I would add that the fact that some monies are now considered to be irrecoverable is no bar to the pursuit of those monies which are.

Single creditor insolvency

103. In submissions, Mr Wilson also asserted that the court should give less weight to the pari passu principle in this case because it is a 'single creditor insolvency'. For the avoidance of doubt, this is incorrect. This is not a single creditor insolvency. The creditor position has to be considered as at the date of presentation. As at the date of presentation, it is clear that there were a number of creditors, some of whom were subsequently paid in full, to the detriment of the creditors as a whole.

Delay

104. Mr Wilson further submitted that the payments should be validated because the Applicants delayed in making the application. As I have found, the application has been made within the limitation period. The onus is on the Respondent to demonstrate special or exceptional circumstances justifying validation. On the evidence before me, the Respondent has not satisfied me that any delay in issuing the application qualifies as an 'exceptional circumstance' warranting validation on the facts of this case. Whilst the Respondent claims that it was prejudiced by the delay, Mr Cameron's witness statement is silent on the point at which the Respondent acquired knowledge of the facts entitling the Applicants to restitution. The winding up order of itself was a matter of public record; the Respondent has not by its evidence confirmed when it had notice of that order. On any footing however, the Respondent had knowledge of the facts entitling the Applicants to restitution by August 2017 at the very latest. By letter dated 15 August 2017, the liquidators wrote to the Respondent, confirming the date of the winding up order, the date of the Petition and the date of their appointment, listing the Payments by date and amount, explaining the impact of section 127 and seeking repayment of the Payments. Email correspondence in evidence confirms that the letter of 15 August 2017 was received and considered by the G4S Finance Shared Service Centre Team in August 2017.

105. I shall return to this issue in the context of the assertion of a 'change of position' defence, which is addressed below.

Change of Position

106. The parties were at odds on the issue whether the change of position defence was available in s.127 cases.

107. On behalf of the Respondent, Mr Wilson submitted that:

(1) Section 127 is an invalidating provision. It does not itself spell out the appropriate remedy of the company when the disposition is avoided. The right of recovery of the company's property is restitutionary and arises by reason of the disposition being void: Hollicourt [2001] Ch 555 per Mummery LJ at [22]; Re J Leslie Engineers Co Ltd [1976] 1 WLR 292 per Oliver J at p298.

(2) Change of position is recognised as a defence to monies had and received if the defendant's circumstances have changed detrimentally as a result of receiving the enrichment: Lipkin Gorman v Karpnale [1991] 2 AC 548 HL at 578, 580F per Lord Goff .

(3) Rose v AIB Group (UK) plc [2003] 1 WLR 2791 is authority for the proposition that a claim for restitution based on s.127 could be met by a change of position defence. At [41], Nicholas Warren QC, sitting as a deputy high court judge, stated as follows:

> '… I do not consider that change of position can be entirely ruled out as a possible way of resisting a claim for repayment by a liquidator. It seems to me that the question of validation of a disposition is distinct from the question of actual recovery

> if the disposition is not validated. I do not see why the defence should not be available where, for instance, a creditor did not know and could not have known (because it had not yet been advertised) of the existence of the petition. After all, in other cases where payments can be treated as void or ultra vires, it is commonplace that restitution is available subject to restitutionary defences….'

(4) As put by Mr Wilson: 'A fortiori in the present circumstances where [the Respondent] did not know and could not have known of the existence of the petition because it had never been advertised.'

108. On behalf of the Applicants, Mr Robins submitted that the passages in Re Rose suggesting that the defence of change of position was available in a s.127 context were obiter. He further submitted that if they were not, Re Rose was no longer good law (if it ever was) and that in the light of subsequent authorities it should not be followed.

Obiter or ratio decidendi?

109. The facts in Rose were that at the date of presentation of the petition, the company's account with its bank was overdrawn and the bank held a charge. After presentation of the petition but before it had been advertised, the bank accepted post-petition payments from the company to pay off the overdraft. The petition was later advertised. In due course a compulsory winding up order was made. The liquidator raised no claim on behalf of the company against the bank for a long time. The bank, knowing of the petition and the risk of a restitutionary claim by reason of s.127, released its charge assuming that the liquidator was not going to seek restoration of the payments to the company so late in the day. The company sought a declaration that the post-petition payments to the bank were void and sought an order for repayment. The bank sought validation and, in the alternative, argued that it had a change of position defence based on its release of the charge.

110. The court rejected validation, finding that the late advertisement of the petition had not prejudiced the bank because at the time of advertisement, when it had notice, it still had its charge [24]. The court further found that, when the bank released its charge, it was not acting in reliance on the validity of the payments it had received. Having had notice of the petition, it was taken to have appreciated the s.127 risk. It had proceeded on a faulty assumption that no s127 claim would be made [29], [55].

111. Against that backdrop, Mr Robins argued that the observations of the deputy judge in Rose at [41] were not a 'necessary step' in arriving at his conclusion. He contended that it was important not to place too much emphasis on the 'order of play', as he put it; whilst the deputy judge had addressed the law first and then the facts, he could easily have dealt with the facts first and, having done so, could properly have concluded that it was unnecessary, on the facts of the case before him, to rule on the point of law.

112. It was for that reason that HHJ David Cooke, sitting as a deputy high court judge in Re MKG Convenience Ltd [2019] BCC 1070, at [62] said of the observations of Nicholas Warren QC in Rose at [41]:

> '[62] …. These observations were obiter, because on the facts the judge held that the defence was not available to the defendant bank which had known of the liquidation at the time it was said to have acted to its detriment (by releasing a charge) and to have taken its own risk that a claim might be made to recover payments previously made to it .'

113. Mr Wilson submitted that paragraph [41] of Rose was part of the ratio decidendi. He contended that the ratio decidendi of a case is any ruling on a point of law "expressly or impliedly treated by the judge as a necessary step in reaching his conclusion, having regard to the line of reasoning adopted by him": Cross & Harris, Precedent in English Law, 4th ed (1991), Chapter 2 p.72. He further reminded me that this approach to identifying the ratio of a case was approved by Buxton LJ in R (Kadhim) v Brent London Borough Council Housing Benefit Review Board [2001] QB 955 and applied in Regina (Youngsam) v Parole Board [2020] QB 387 at [21] and [39].

114. Mr Wilson submitted that the ratio is not identified by the outcome on the facts. In this regard, he referred me to Broad Idea v Convoy Collateral [2021] UKPC 24, a case in which by a 4 to 7 majority, the Board held that even though it had decided the case on the facts, it was not precluded from deciding the point of law raised and that its decision on the point of law would not be merely obiter. In his majority judgment (with whom Lords Briggs, Sales, and Hamblen agreed), Lord Leggatt stated (at [119]):

> 'Nor does the fact that the Board has upheld the conclusion of the Eastern Caribbean Court of Appeal on the facts preclude or make it inappropriate to decide the power issue - any more than was the case, for example, in Channel Tunnel where a similar situation obtained. Another analogy is Hedley Byrne & Co Ltd v Heller & Partners Ltd [1964] AC 465, where the conclusion that, on the facts, the defendant had successfully disclaimed responsibility for its misrepresentation did not prevent the House of Lords from deciding the important issue of principle that there can be liability in tort for a negligent misrepresentation in the absence of a contract between the parties : see eg WB Anderson & Sons Ltd v Rhodes (Liverpool) Ltd [1967] 2 All ER 850, 857'.

115. There is no doubt that in Rose, the issue of whether the change of position defence was available in a section 127 context was the subject of full submissions. In Rose, Mr Prentis, as Counsel for the liquidator, had submitted that the change of position defence was not available at all in the context of section 127 and that, even if that was wrong, it was not available on the facts [31]. Addressing these submissions, Nicholas Warren QC, sitting as a deputy high court judge, reasoned as follows:

'[35] The general principle in relation to change of position is stated very widely by Lord Goff in the Lipkin Gorman case, at p580:

"… I do not wish to state the principle any less broadly than this: that the defence is available to a person whose position has so changed that it would be inequitable in all the circumstances to require him to make restitution, or alternatively to make restitution in full ."

This general principle is to be developed and refined on a case-by-case basis.

[36] It would appear that the defence of change of position may not be available at all in relation to some restitutionary claims. For instance, it may not be available in relation to a claim against recipients of a legacy under a will, although Goff & Jones, The Law of Restitution, 6th ed (2002), p.824, para 40-002 consider that the court should no longer feel bound to reject the defence in such a context.

[37] Mr Prentis submits that there is simply no need, or room, for a defence of change of position in the context of section 127. In other words, if a disposition is not validated under the section, it is not open to the defendant to assert a change of position in resisting the claim for restitution. That section, he says, not only provides the foundation for the applicant's claim (by rendering void the relevant disposition of the company's property) but also provides within its terms a remedy to avoid injustice (the power of the court to validate transactions)…..

[39] The interrelation between section 127 and restitutionary principles is not a matter which has been the subject of any English judicial decision or academic writing. There is one relevant Canadian decision: Trustee of Principal Group Ltd v Anderson (1997) 147 DLR (4th) 229. That case concerned section 95 of the Bankruptcy and Insolvency Act concerning preferences. A transaction to which section 95 applies is "deemed fraudulent and void as against the trustee in the bankruptcy". A defence of change of position was held not to be available as a defence to the trustee in bankruptcy's claim to recover monies from innocent recipients. Having analysed the purpose of the legislation is being to treat all creditors equally and to see that they receive a pro rata distribution of assets, the court said, at p.234:

"the whole idea of the defence of change of position is that the equity lies with the payee and not with the payor who wants to get back his payments. But where a trustee in bankruptcy carries out a duty to sue to undo a fraudulent payment, it is

> difficult to say that change of position makes the trustee's suit inequitable"
>
> Mr Prentis for the liquidator relies on that decision in support of his submission that the change of position defence is simply unavailable in the context of claims to recover monies the payment of which, as a result of section 127, is rendered void.
>
> [40] I find that case of little help. It concerns a provision significantly different from section 127, that section containing as it does the power for the court to validate transactions. Further, there is no discussion of the relevant restitutionary principles, nor did the court even refer to the Lipkin Gorman case [1991] 2 AC 548.
>
> [41] Attractively as the argument was presented by Mr Prentis, I do not consider that change of position can be entirely ruled out as a possible way of resisting a claim for repayment by a liquidator. It seems to me that the question of validation of a disposition is distinct from the question of actual recovery if the disposition is not validated. I do not see why the defence should not be available where, for instance, a creditor did not know and could not have known (because it had not yet been advertised) of the existence of the petition. After all, in other cases where payments can be treated as void or ultra vires, it is commonplace that restitution is available subject to restitutionary defences. The purpose behind the discretion conferred on the court to validate a disposition is not the same as the purpose of the change of position defence, albeit that both are based on an overarching concept of fairness. The former is directed principally at achieving a pari passu distribution of assets whilst permitting transactions which are, or are likely to be, of benefit to the company to take place; the latter is an inherent qualification to the right of restitution and which, in its very nature, will be detrimental to the company and distorts the pari passu distribution of assets. …
>
> [43] However, whether the change of position defence succeeds will then depend on the individual facts. It is clear, for instance, that a payee cannot rely on a change of position defence if he knows, when he changes his position, that the payment to him was invalid. It might be said that this is because he is not acting in "good faith" or not acting on "the faith of the receipt".'

116. In Rose, having considered the evidence, and having concluded (at [55]) that the change of position in releasing the charge was not made in reliance on the validity of the credits to the overdrawn accounts, but rather in reliance upon an assumption that no claim would be made to assert that the credits were invalid, the learned deputy continued at [60] (with emphasis added):

> '[60] My conclusion is based on my analysis that this is not a case where the bank could say … that, when it released the charge, it had simply overlooked the petition and the effect of section 127 altogether. If that had been the position, then the result could well have been different. It could be said that, *following my decision that a defence of change of position is, in principle, available and is not altogether excluded by the statutory context*, and given the rejection in the Dextra case [2002] 1 All ER (Comm) 193 of the proposition that relative faults comes into the balance, it follows logically that the bank, having acted in good faith even if carelessly, had a good defence …'

117. In my judgment, reading the judgment of the deputy judge in Re Rose as a whole, and having regard in particular to the passages quoted above, it is clear that the learned deputy *did* treat his ruling on the point of law (ie whether the change of position defence is available in s127 cases) as a necessary step in reaching his conclusion. Whether it was strictly necessary for him to do so, given his conclusion on the facts, is not determinative of the issue. The key question is whether the ruling on the point of law was *treated by the learned deputy as a necessary step* in reaching his conclusion. It plainly was. He heard submissions on it and ruled on it. He regarded himself as having decided the point: [60].

Should Re Rose be followed?

118. I turn next to the question whether Re Rose should be followed, in light of subsequent authority. As the decision in Re Rose was that of a deputy high court judge, it binds this court unless there is a later decision of a judge of equal rank in conflict with it. Where there are two conflicting decisions of courts of co-ordinate jurisdiction, the later decision is to be preferred, provided that it was reached after consideration of the earlier decision, unless the third judge is convinced that the second was wrong in not following the first: Colchester Estates (Cardiff) v Carlton Industries Plc [1986] Ch 80 per Nourse J at 84F-85H. For these purposes, it is not enough for third judge to conclude that the second judge was wrong in some unimportant particular; the third judge must be convinced that the second was wrong *in not following the first*.

119. In the present case, Mr Robins relies on the decision of HHJ Cooke, sitting as a deputy high court judge, in the case of MKG Convenience Ltd [2019] BCC 1070. This, he contends, is a conflicting decision of a court of coordinate jurisdiction. He submits that in accordance with the guidance given in Colchester Estates, this court should prefer the later decision of HHJ Cooke, reached after full consideration of the decision in re Rose, unless this court is convinced that HHJ Cooke was wrong in not following Mr Warren QC in Re Rose.

120. Mr Wilson submits that the decision in MKG Convenience does not conflict with that in Rose.

121. I turn, then, to consider the decision in MKG Convenience.

122. The liquidators of MKG Convenience Ltd (MKG) applied for orders declaring that various payments taken by the Respondent ('NISA') by way of direct debits from the bank accounts of MKG after the date of presentation were void pursuant to s127 IA 1986. The Respondent accepted that the direct debit payments were void but by its cross application sought a validation order. In the alternative it resisted an order for repayment on the basis that it had changed its position in good faith in reliance upon the validity of the direct debit payments.

123. At the material time, NISA was a members' organisation existing to support and promote small independent traders operating grocery and convenience stores trading under the NISA brand. It provided central purchasing of goods which it sold onto its members and charged them for central services such as marketing and the use of its brand. MKG was a member of NISA and operated a number of stores, some of which traded under the NISA brand. MKG gave NISA a direct debit authority in respect of its three bank accounts, for the purpose of taking payment for goods supplied and attendant marketing charges. Direct debit payments were taken on a weekly basis.

124. A winding up petition was presented against MKG on 16 March 2015. The petition was advertised on 7 April 2015 and a compulsory winding up order was made at the first hearing on 7 May 2015. The Applicants were appointed by a Secretary of State appointment on 14 May 2015.

125. The direct debit payments in issue ran from 18 March 2015 until (variously across MKG's three bank accounts) 13 May 2015 or 20 May 2015. There were 28 payments in all, totalling £162,307.36. Each direct debit payment related to invoices issued 2-3 weeks previously in respect of goods delivered.

126. The judge accepted NISA's unchallenged evidence that it had no notice of the petition until after the Applicants wrote informing NISA of their appointment [17], [51].

127. Having noted that it was common ground that each of the direct debit payments from MKG's bank account after 16 March 2015 were void under s.127 unless the court made a validation order, at [42], HHJ David Cooke continued:

> '[42] S 127 does not however specifically provide a remedy for the Applicants in relation to any such void disposition, that being left to the general law. In the case of a void disposition of property other than money, the company remains the owner of the property and may recover it by asserting its rights as owner. In the case of a disposition of money, including payments out of a bank account, the remedy is a restitutionary one against the person to whom payment has been made, see Claughton (as Liquidator of Hollicourt (Contracts) Ltd) v Bank of Ireland [2001] Ch 555… It is this which leads the respondent to argue that if the court does not make a validation order it is nevertheless entitled to raise a defence of change of position to the restitutionary claim against it.'

128. On the issue of whether a validation order should be made, counsel were agreed that the relevant principles are now set out in Express Electrical, a case which was

recognised by the judge as representing 'a substantial change in emphasis as to the approach to be taken by the court in the exercise of its discretion' [43].

129. At [45] and [46], HHJ David Cooke quoted extensively from paragraphs 19, 20, 24, 33-36, 40, 42, 43, 55 and 56, of the judgment of Sales LJ in Express Electrical, concluding at [47]:

> '[47] This judgment therefore makes clear that the starting point for the court is a strong legislative policy of ensuring that the assets of the company at the commencement of the winding up (ie normally … the time of presentation of the petition) should be made available for distribution among its creditors at that date. It is not sufficient for an applicant for a validation order to show (a) that a disposition to him was in the ordinary course of business and/or (b) that he was unaware of the presentation of a winding up petition and/or (c) that he acted in good faith, though no doubt all of these will be relevant matters to consider in the exercise of the court's discretion. He must demonstrate the special circumstances referred to by Sales LJ, ie that the transaction will be or has been beneficial for creditors generally, or other 'exceptional circumstances', the possible example given being where a director of the company aware of the petition has deceived a person into entering a transaction, in which case the merits would have to be argued between the liquidator and the innocent party.'

130. On the evidence before him, the judge was not satisfied that the direct debit payments produced any benefit to MKG or its creditors in the period after presentation [56]-[58]. This was not a case, he added, in which MKG could be said to have entered into a special transaction for the benefit of creditors (such as a bona fide sale of an asset at full value) or in order to preserve its business as a going concern. At its highest, NISA's evidence was that it 'simply continued to supply and take payments in the ordinary course of dealing' [59]. The learned deputy was not satisfied that NISA continued to act 'in the normal course' but said that 'even if it had, in the light of Express Electrical that would not be sufficient on its own to justify a validation order' [59].

131. At [61], the judge concluded that he was 'not satisfied that any special circumstances have been shown that would justify disapplying the normal provisions of the statute by making a validation order in respect of any of the direct debit payments'.

132. Having declined to validate the direct debit payments, the learned deputy next turned to consider the change of position defence.

133. NISA contended that it had changed its position in good faith in reliance on the validity of the payments, by continuing to make supplies, and that this gave rise to a defence to the equitable remedy of restitution on which the liquidator relied to recover the payments rendered void by s127. In this regard NISA relied upon Rose at [41]. Reference was also made in Re MKG Convenience to the decision of HHJ Paul Matthews in Officeserve Technologies [2018] EWHC 2168 (Ch), in which HHJ

Matthews (at [40]-[41]) referred to Rose with approval, noting that a claim for money had and received (or now unjust enrichment) is 'ordinarily subject to the defence of change of position' and adding 'in my judgment there would have to be some good policy reason why that defence should not apply to the claim for money paid even in the insolvency context'. HHJ Matthews in Officeserve had found the reasoning of Mr Nicholas Warren QC in Rose 'compelling' and concluded that 'in principle it would be open to any of the respondents in the present case to defend the claim brought against them by showing a change of position in good faith in reliance on the payment': [41].

134. Counsel for the Applicants in Re MKG Convenience argued that the defence of change of position was not available in answer to a restitutionary claim based on s127. At [64] the arguments were summarised thus:

> '[64] Mr Comiskey submits that I should despite these dicta hold that the defence of change of position is not available in a claim for recovery of payments invalidated by insolvency legislation. Contrary to HHJ Matthews' view, he submits that the reasoning of Mr Warren QC is not compelling, and in any event his view that the defence should in principle be available cannot survive the policy approach to s127 set out in Express Electrical. If such a defence was allowed, ex hypothesi it must be a case in which a validation order has been refused, and it would undermine the policy imperative if circumstances (such as receipt in good faith in the ordinary course of business) that were held in Express Electrical not to be sufficient to justify a validation order achieved the same effective result by a different route. Although that case was cited to HHJ Matthews, it does not appear to have been argued that its effect was to exclude the possibility of raising a change of position defence. Since the defence could only apply to restitutionary claims for return of money and not proprietary claims to other forms of asset, its existence would create an unjustifiable distinction between the two. The possibility of exceptional justification for retaining the benefit of a disposition despite an absence of benefit to creditors would be better catered for by the potential for making a validation order in such exceptional circumstances that was recognised by Sales LJ.'

135. HHJ Cooke agreed with these submissions 'to a certain extent though not entirely' [65]. In the learned deputy's view (at [67]) 'the resolution is to be found by stepping back and considering the reason why change of position is recognised as a defence to restitutionary claims at all', which is that

> 'in the circumstances in which the defence is held to be made out, the court necessarily finds that it would be inequitable to allow the claim to restitution to proceed (see per Lord Goff in Lipkin Gorman v Karpnale [1991] 2 AC 548 at 577-80, including the following: "… why do we feel that it would be unjust to allow restitution in cases such as these? The answer

> must be that, where an innocent defendant's position is so changed that he will suffer an injustice if called upon to repay or to repay in full, the injustice of requiring him so to repay outweighs the injustice of denying the plaintiff restitution")'.

136. At [68]-[70], Judge Cooke concludes (with emphasis added):

> '[68] In other words, the strength of the equitable claim of the person seeking restitution is not such as to make it unconscionable for the defendant to retain the benefit he has received. A balance is being struck between the equities in favour of the claimant and those in favour of the defendant. In striking that balance, the court is bound to have regard to the nature of the equitable claim being asserted, and in the context of a claim being made to give effect to the legislative policy to preserve and where necessary return assets for the benefit of creditors in insolvency that requires the court to recognise the strength imparted by that policy to the claim. If it is to be denied, it must be because the circumstances of the defendant are such as to outweigh the policy imperative and show that that enforcement of the policy would be unjust on the particular facts.
>
> [69] Looked at in this way, the result would be that although the defence [of unjust enrichment] is in principle as a matter of jurisprudence available, the circumstances in which it can succeed are *constrained in the same way and for the same reasons as the exercise of the court's discretion to validate*. That seems to me a more satisfactory approach than to hold that a form of defence is available against some claimants but not others. It is not easy to think of circumstances in which the court would decline to make a validation order, but nevertheless find it inequitable to order repayment of a benefit received, particularly when one takes account of the availability of "exceptional circumstances" as justification for a validation order.
>
> [70] On that basis, and for the same reasons as lead me to refuse a validation order, in my judgment NISA has not shown that by reason of any change in its position it is unjust to require it to repay any of the sums sought by the Applicants.'

137. Having considered the decisions in Rose and MKG Convenience at some length, I have concluded that they are in conflict. Mr Warren QC in Rose proceeds on the footing that the change of position defence may be available in a s.127 context when validation *is not*: see by way of example [29]. See too [41]: 'It seems to me that the question of validation of a disposition is distinct from the question of actual recovery if the disposition is not validated… The purpose behind the discretion conferred on the court to validate a disposition is not the same as the purpose of the change of position defence…'. Judge Cooke, however, proceeds on the footing that, whilst in

principle a change of position defence is available in a s.127 context, 'the circumstances in which it can succeed *are constrained in the same way and for the same reasons as the exercise of the court's discretion to validate'*: [69]. See too [70]; also the reference to the alternative position at [71] if the defence of change of position is available 'without these constraints'.

138. The two decisions are therefore in conflict. Both are decisions of deputy high court judges. The fact that Judge Cooke considered Rose at [41] to be obiter is of limited significance in my judgment, as (1) Judge Cooke was acting as a judge of coordinate jurisdiction and was not bound by the decision of Mr Warren QC in any event and (2) he reached his decision after full argument on Rose. In accordance with the guidance given by Nourse J in the Colchester case, I must follow the later decision of Judge Cooke unless 'convinced' that Judge Cooke was wrong in not following Rose: Colchester Estates, loc cit at p.85G.

139. Having considered both judgments in some depth, I am *not* convinced that Judge Cooke was wrong in not following Rose. I am fortified in this conclusion by the jurisprudence which has developed since the time that Rose was decided.

140. Re Rose has been the subject of significant criticism. To understand why, the case must be considered in context.

141. In Re Gray's Inn Construction Limited [1980] 1 WLR 711 at 718, Buckley LJ held that a disposition carried out in good faith, at a time when the parties were unaware of the petition, would normally be validated. This was repeated by Fox LJ as his seventh proposition in Denny v John Hudson & Co Ltd [1992] BCC 503, at 505.

142. The learned deputy in Rose [2003] EWHC 1737 (Ch) referred to this principle at [14], saying:

> 'A disposition carried out by the parties in good faith at a time when they were unaware that a petition had been presented would normally be validated'.

143. Against that backdrop, the learned deputy in Rose went on to rule (at [41]) that change of position was available as a defence to a claim under section 127, saying 'I do not consider that change of position can be entirely ruled out as a possible way of resisting a claim for repayment by a liquidator '. He went on to state that 'I do not see why the defence should not be available where, for instance, a creditor did not know and could not have known (because it had not yet been advertised) of the existence of the petition'.

144. The Court of Appeal's decision in Express Electrical [2016] 1 WLR 4783 changed the landscape. Sales LJ (with whom Patten LJ and Sir Terence Etherton C agreed) held in Express Electrical at [55]-[56] that Buckley LJ's principle (at paragraph 141 above) was 'misleading as a general proposition' because it 'does not marry up in a coherent way with the basic principles' and that 'the time has come to recognise that [it] cannot be taken at face value'. Sales LJ went on to hold:

> 'The true position is that, save in exceptional circumstances, a validation order should only be made in relation to dispositions

> occurring after presentation of winding up petition if there is some special circumstance which shows that the disposition in question will be (in a prospective application case) or has been (in a retrospective application case) for the benefit of the general body of unsecured creditors, such that it is appropriate to disapply the usual pari passu principle'.

145. In Skandinaviska Enskilda Banken AB v Conway [2019] UKPC 36, the Board considered a statutory provision under Cayman law (s.145(1) of the Cayman Islands' Companies Law (2013 rev)), which provided for automatic invalidation of preferences within the statutory avoidance period and contained no provision for validation. The question that arose in Conway was whether, in the absence of a statutory discretion, change of position was available as a defence to a restitutionary claim based on a payment rendered invalid by s.145. The liquidators argued (a) that s.145 created a statutory entitlement to repayment which is unqualified, and that the common law relating to restitution was simply irrelevant and (b) alternatively that a defence of change of position was inconsistent with the statutory aim of s.145 'since it would subvert the fundamental principle of pari passu distribution of an insolvent company's assets'.

146. The first of these arguments was rejected, but the second was accepted. The argument was in part based on the views of Professor Sir Roy Goode in 'Goode: The Avoidance of Transactions in Insolvency Proceedings and Restitutionary Defences in Mapping the Law: Essays in Memory of peter Birks (2006) at pp 307-8:

> '… Whilst common-law defences against a statute may be available in litigation between private parties where no others have an interest, it is quite another matter where the statutory provisions in question are concerned to protect the wider interests of the public or a section of the public. In such cases neither estoppel nor change of position should be available as a defence. The court's task is to implement the policy of the statute. As we have seen, the insolvency avoidance provisions are designed to ensure pari passu distribution. To allow a defence such as estoppel or change of position would be to promote the interests of a particular party who had received a benefit to which he was not entitled over those of the general body of creditors whom the statute is designed to protect.'

147. In Conway, the Board considered Rose and noted (at [116]) that it had been the subject of criticism. Whilst the Board considered that it was 'not the occasion' on which to decide whether or not the reasoning in Rose was correct, it did emphasise the importance of the statutory code for pari passu distribution and, as put by Trower J in the later case of Bucknall v Wilson [2021] EWHC 2149 (Ch) at [53], the discussion of the Board in Conway at paras [113] to [117] is

> 'sympathetic to a conclusion that the availability of a change of position defence (properly so-called) to a statutory clawback claim would be wrong in principle'.

148. In Bucknall v Wilson [2021] EWHC 2149 (Ch), Trower J heard an appeal from an ICC Judge who had found that the elements of a preference claim under s339 were satisfied but had nonetheless refused any relief on the ground, inter alia, that the defendant had changed her position.

149. Whilst Bucknall was a case concerning s.339 and not s.127, it is clear from Trower J's judgment that he heard full submissions on Rose. At [86], Trower J said that the reliance which the Judge below had placed on Rose was '*not well placed in light of further developments in the law',* adding (with emphasis added):

> 'I also think that, even if it is appropriate in a general sense to treat change of position as an inherent qualification to the right of restitution (which was how Mr Warren QC and the judge analysed its relevance), I have difficulty in seeing how that is a helpful approach *divorced from the context of the court's power to validate what would otherwise be void and the law which has developed as to the circumstances in which the exercise of that power is appropriate'*.

150. Trower J further confirmed in Bucknall (at [90]) that the summary of the approach to be taken on a validation application set out at para [14] of Rose (which included Buckley LJ's principle set out at para 140 of this judgment, that 'a disposition carried out by the parties in good faith at a time when they were unaware that a petition had been presented would normally be validated unless there are grounds for thinking that the transaction was an attempt to prefer the disponee')

> '.. no longer reflects in all respects the approach which the court is required to adopt on a validation application',

referring to the now prevailing guidance on validation applications set out in Express Electrical at [55].

151. Trower J held that change of position does *not* provide a defence to a claim under s.340 of the 1986 Act (at [94(i)]) but that there may be

> 'exceptional circumstances in which the facts that would establish a change of position defence (if it had been available) will weigh in the balance when the court is determining how to exercise its discretion': (at [94(ii)]).

152. Trower J went on to confirm, however, that change of position cannot be a 'strong factor' in the exercise of the discretion because that would '*give insufficient weight to the underlying policy considerations illustrated by Conway and the difficulty of balancing the interests of a class against the interests of an innocent transferee*' (at [94(iii)). Rather, *'[the] policy that underpins the statute means that the balance is only likely to come down in favour of the transferee where the circumstances are sufficiently out of the norm to be exceptional*' (at [95]).

153. Whilst both Conway and Bucknall concerned different statutory provisions and are not binding on this court in the context of the present application, the reasoning of Trower J in Bucknall, considered against the backdrop of Conway, serves to

demonstrate why Judge Cooke was right to depart from Rose and why the change of position defence in a s.127 context must be constrained to circumstances in which validation would be ordered.

154. For all these reasons, following the guidance given in Colchester Estates, I confirm that (1) I am satisfied that the decision of HHJ Judge Cooke, sitting as a deputy high court judge in MKG Convenience, was reached after full consideration of the decision of Mr Nicholas Warren QC, sitting as a deputy high court judge in Re Rose and that (2) I am not convinced that Judge Cooke in MKG was wrong in not following Mr Warren QC. I shall therefore proceed on the basis that the circumstances in which a change of position defence can succeed are constrained in the same way and for the same reasons as the exercise of the court's discretion to validate. The principles governing the circumstances in which validation should be ordered are those set out in Express Electrical.

155. As helpfully summarised at paragraphs 46 and 49 of Mr Wilson's skeleton argument (which in turn is based on the evidence of Mr Cameron, filed on behalf of the Respondent), the Respondent puts its position on change of position thus:

> '46. The present case was one where, in the absence of any advertisement of the petition, the Respondent was not alerted to the adverse effects s.127 might have. The Respondent therefore accepted payment from the Company for its guarding services after the petition date and changed its position to its detriment in the belief that payment was valid:
>
> (a) by continuing to provide its services for six months rather than terminating them immediately as the contract permitted and as it would have done if it had notice: Cameron/47, 56 and 26. This was detrimental to it because if it were required to repay the Payments, it would have to bear the expense of the services it gave the Company by the provision of the security guards, including the employment costs of the guards, who could have readily been deployed on other contracts, and the administration costs on the contract for this period, all of which would have been saved had it had notice of the Petition: Cameron/58;
>
> (b) or by not seeking a validation order in relation to payments for its subsequent services: Cameron/57;
>
> (c) by accounting for VAT on the Payments it received. [The Respondent] accounted to HMRC for the output VAT arising from the Payments in the usual way in its ordinary quarterly returns. If [the Respondent] is required to repay the Payments to the Company, it would not now be able to recover the VAT for which it has accounted to HMRC [as there is a four-year cut-off point]: Cameron/59'.

156. Paragraph 49 of Mr Wilson's skeleton argument goes on to contend that:

> '49. In summary, the 'equities' favour [the Respondent] and it would be unjust to require [the Respondent] to repay because:
>
> (a) the exceptional circumstances of this case led to the absence of advertisement, so that [the Respondent] was never given notice, or the opportunity to learn, of the Petition and was on an unequal footing to those with knowledge. An important part of the insolvency regime, of which the pari passu policy is part, was therefore omitted. (Exceptional circumstances may outweigh the policy imperative according to Express.. and should for the purpose of this balancing exercise);
>
> (b) the absence of advertisement denied [the Respondent] the opportunity to exercise its contractual right to terminate its services;
>
> (c) the absence of advertisement led to [the Respondent] being unaware that it might be adversely affected by s.127 and, therefore, believing the Payments were valid, it accepted them and continued to supply its services;
>
> (d) [the Respondent] received the Payments in good faith in the ordinary course of its business;
>
> (e) the Payments were in respect of guarding services which preserved the value of the Company's assets and contributed to those assets being realised as a benefit to all the creditors…
>
> (f) [the Respondent] has incurred the expense of the services and accounted to HMRC for the VAT on the Payments;
>
> (g) non-restoration of the Payments would not cause a significant reduction in the Company's assets to the prejudice of the interests of the unsecured creditors as a class because the Payments are not material in the scheme of things;
>
> (h) the Company's application seeking restoration of the position at the date of presentation is brought very late in the day, over seven years after the last of the Payments was received;
>
> (i) the exceptional circumstances of this case resulted in there being so many post-Petition payments to so many different creditors large and small, domestic and overseas, that it is not practically achievable to ensure that the assets of the company at the petition date can be made available for pari passu distribution in the winding up. The policy imperative therefore weighs less heavily in the balancing of the equities'.

157. With regard to paragraph 46(a) of Mr Wilson's skeleton (quoted at paragraph 155 above), in my judgment the mere continued provision by the Respondent of services (which were ultimately of no benefit to the creditors as a whole) in exchange for advance payment does not qualify as a change of position rendering it unjust to require the Respondent to repay any of the sums sought by the Applicants.

158. The Respondent maintains that this was 'detrimental' because 'if it were required to repay the Payments, it would have to bear the expense of the services it gave the Company by the provision of the security guards, including the employment costs of the guards, who could have readily been deployed on other contracts, and the administration costs on the contract for this period, all of which would have been saved had it had notice of the Petition: Cameron/58'.

159. In Lipkin Gorman v Karpnale [1991] 2 AC 548 at 580, Lord Goff said of the defence of change of position (with emphasis added)

> '… I do not wish to state the principle any less broadly than this: that the defence is available to a person whose position has so changed that it would be inequitable in all the circumstances to require him to make restitution, or alternatively to make restitution in full. I wish to stress however that the mere fact that the defendant has spent the money, in whole or in part, does not of itself render it inequitable that he should be called upon to repay, because the expenditure might in any event have been incurred by him *in the ordinary course of things'*.

160. In the present case, whilst the evidence filed by the Respondent does not state expressly whether the security guards and other operatives provided by the Respondent to the Company were salaried employees or self-employed, paragraph 58 of Mr Cameron's statement strongly suggests that they were salaried. Mr Cameron refers to the 'employment costs of the guards' and goes on to assert: 'I understand and believe that the guards would have been readily deployed on other contracts.' The emphasis on deployment on other contracts (rather than saving the costs of hiring freelance guards for a given job) is in my judgment consistent with the guards and other operatives in question being salaried employees. There is nothing in Mr Cameron's statement to suggest that the 'administration costs' incurred by the Respondent in connection with the provision of security services to the Company involved freelance administrators rather than employees either. Given the size of the Respondent, it is in my judgment highly unlikely that it would leave its administration to freelance operatives. I consider it legitimate to conclude that it did not.

161. On the evidence before me, the Respondent has not established on a balance of probabilities that the employment costs of the guards and administration costs incurred by it in connection with the provision of security services to the Company were incurred *otherwise* than '*in the ordinary course of things'*: (Lipkin Gorman per Lord Goff at p580). To the contrary: on the balance of probabilities, I am satisfied that the security guards and other operatives deployed by the Respondent at the Company's premises, and those involved in the Respondent's administration of such security services, were salaried employees. Their salaries would have to be paid either way. I so find.

162. To the extent that the Respondent's case on change of position rests on having been precluded from making money on *other* contracts, by deploying the security guards and operatives deployed at the Company's premises over the material period *elsewhere*, it is extremely thin. The only witness evidence filed on behalf of the Respondent is that of Mr Cameron. At paragraph 4 of his statement, Mr Cameron states that he has 'no direct knowledge of the background facts concerning the Payments' and that he makes his statement from the knowledge he has derived from enquiries he has made 'within the G4S Group (including of Mr Steve Poole, UK&I Head of Transactional Services)' and the documents referred to in his statement. Mr Cameron does not state, specifically, the source of his 'understanding and belief' that the guards deployed at the Company's premises would 'readily' have been deployed on other contracts, or the gist of what he was told in that regard. In context, his statement of 'understanding and belief' that the guards deployed at the Company's premises would readily have been deployed on other contracts is little more than a bald assertion. I was taken to no documentary evidence identifying or substantiating any of the 'other contracts' on which it is said that the guards in question 'would have been readily deployed' had they not been deployed at the Company's premises. Mr Cameron's witness statement did not identify, even in narrative terms, which 'other contracts' he had in mind. I remind myself that the burden is on the Respondent on this issue. In my judgment the Respondent has failed to discharge that burden.

163. I would add that, even if, contrary to my conclusions set out at paragraphs 161 and 162 above, the Respondent has made out an adequate case on the evidence that (1) the employment costs of the guards and administration costs incurred by the Respondent in connection with the provision of security services to the Company were incurred otherwise than 'in the ordinary course of things' and (2) the guards in question could have readily been deployed on other contracts, in my judgment the Respondent has not established a change of position which renders it unjust to require it to repay any of the sums sought by the liquidators.

164. As rightly noted by Mr Robins, if such factors amounted to a defence in the current context, the defence would apply in practically every case in which section 127 operates and would render the section ineffective.

165. It is clear from the reasoning of Express Electrical, read as a whole, that on a claim for the return of money paid pursuant to a disposition which is void by reason of s.127, it is not a defence for the recipient of the payment to show that he had acted in good faith, without notice of the petition, in the ordinary course of business and has given valuable consideration for the payment. Any such recipient could argue that he has been put to irrecoverable expense, or that he could have put the 'valuable consideration' which he provided to better use, had he known of the petition.

166. Moreover, even if such factors do amount to a 'change of position' on the part of the Respondent, that change of position is but one of many factors to consider in the current context. It is not a strong factor when weighed against the policy imperative. It does not render it unjust to require repayment of the Payments. To adopt with gratitude the words of Trower J in Bucknall (albeit there employed in a different context), to characterise it as strong would be 'to give insufficient weight to the underlying policy considerations illustrated by Conway and the difficulty of balancing the interests of a class against the interests of an innocent transferee'.

167. As confirmed by Judge Cooke in MKG Convenience,

> '[68] …. In striking that balance, the court is bound to have regard to the nature of the equitable claim being asserted, and in the context of a claim being made to give effect to the legislative policy to preserve and where necessary return assets for the benefit of creditors in insolvency that requires the court to recognise the strength imparted by that policy to the claim. If it is to be denied, it must be because the circumstances of the defendant are such as to outweigh the policy imperative and show that that enforcement of the policy would be unjust on the particular facts.'

168. Turning next to paragraph 46(b) of the Respondent's skeleton argument (quoted at paragraph 155 above), the Respondent has not established on the evidence that it changed its position to its detriment in the belief that the payment was valid 'by not seeking a validation order in relation to payments for its subsequent services'. Mr Cameron does not state in terms that the Respondent *would have* sought a prospective order; at best he states (at [56]) that it '*could have*' sought such an order. Given that the Respondent failed to apply for a retrospective validation order even after being put on notice of the Applicant's proposed claim, it cannot readily be assumed that it would have applied for a prospective order. Moreover, even if had it done so, for reasons already explored, it is extremely unlikely that the court would have granted the order. In context therefore, this point adds little to those addressed at paragraphs 157 to 167 above.

169. Turning next to the points raised in paragraph 46(c) of the Respondent's skeleton argument (quoted at paragraph 155 above), on the evidence before me, the Respondent has failed to satisfy me on a balance of probabilities that its failure to recover the VAT paid within the relevant four-year time limit for each Payment was as a result of its continued belief in the validity of such Payment throughout the entirety of the relevant four-year period. The winding up order made against the Company was a matter of public record. Whilst Mr Cameron (at paragraph 47 of his statement) states that he 'feels certain' that the Respondent 'had no awareness *that a Petition had been issued'*, his statement is singularly silent on the point at which the Respondent acquired knowledge of the facts entitling the Applicants to restitution.

170. In this regard I remind myself that the burden of proof is on the Respondent to make out a change of position in relation to the VAT payments relied upon. For these purposes, it is not sufficient to establish that the VAT payments were *made* in the belief that the Payments were valid; the Respondent must also show that it continued to believe that the Payments were valid (and so failed to reclaim them) until after the expiry of the four-year period applicable to each VAT payment. On the evidence before me, it has failed to do so. Absent such evidence, I am not satisfied that the Respondent remained unaware of the winding up order and continued to believe the Payments were valid until after the expiry of the four-year period governing each VAT payment.

171. Quite the contrary: on the evidence before me, I am satisfied that on any footing, even if one were to put to one side the fact that the winding up order was a matter of public

record, the Respondent had knowledge of the facts entitling the Applicants to restitution by August 2017 at the very latest. As previously noted, by letter dated 15 August 2017, the liquidators wrote to the Respondent, confirming the date of winding up order, the date of the Petition, the date of their appointment, listing the Payments by date and amount, explaining the impact of section 127 and seeking repayment of the Payments. The Payments were made on 11 June 2013, 16 August 2013, 17 September 2013, 7 November 2013 and 10 December 2013. The Respondent's relevant VAT accounting periods were the quarters ending 31 July 2013, 31 October 2013 and 31 January 2014. Even if the four- year time limit for reclaiming VAT is assumed to run from the quarter end date rather than the end of the month following the quarter date, it will be noted that on any footing, the Respondent had time following receipt of the liquidators' letter dated 15 August 2017 to reclaim VAT on four of the five Payments and failed to do so. It cannot sensibly be said that the Respondent's failure to reclaim VAT on those four Payments was in continued reliance on the validity of such payments: see by way of analogy the example given in Rose at [48]. Moreover, the fact that the Respondent failed to reclaim VAT in respect of the last four Payments, when it was indisputably on express notice of the invalidity of the Payments, puts the Respondent in considerable difficulty in establishing that it would have responded any differently in relation to the first of such Payments had the liquidators sent their letter in, say, June 2017 rather than August 2017. The Respondent's conduct, following receipt of the liquidator's letter dated 15 August 2017 and the initial exchanges thereafter, is entirely consistent with it having elected not to reclaim VAT in reliance upon an assumption that no claim would be made.

172. Moreover, even if, contrary to my conclusions on the evidence set out at paragraphs 169 to 171 above, the facts surrounding the VAT payments (and the failure to reclaim any of them in the relevant four-year periods) do amount to a change of position on the part of the Respondent, that change of position is but one of many factors to consider in the current context. In my judgment, for the reasons explored in paragraphs 166 to 167 above, it is not a strong factor when weighed against the underlying policy considerations illustrated by Conway, Bucknall and MKG Convenience. It does not render it unjust to require repayment of the Payments.

173. The factors raised in paragraph 49 of the Respondent's skeleton argument (quoted at paragraph 156 above) have already been individually addressed. For present purposes I repeat my conclusions on the same mutatis mutandis.

Conclusions on Validation and Change of Position

174. On the evidence before me, considering all factors relied upon by the Respondent both individually and cumulatively, I am not satisfied that any special or exceptional circumstances have been shown that would justify the making of an exception to the principle of pari passu distribution in relation to the Payments or any part thereof. I therefore decline to make a validation order in relation to the same. On the evidence before me and for the reasons explored in this judgment, the Respondent has not persuaded me that by reason of any change in its position it is unjust to require it to repay any of the sums sought by the Applicant.

Conclusions

175. For the reasons given,

(1) the claim is not time-barred under section 9 of the 1980 Act, because the Application was issued less than 6 years after the making of the winding-up order;

(2) although the cheque in respect of the First Payment was signed and delivered before presentation of the Petition, the Company's account was debited after presentation, with the result that the First Payment is void under s127 of the 1986 Act;

(3) the Respondent has not established any special or exceptional grounds justifying validation of the Payments or any part thereof;

(4) the Respondent has not persuaded me that by reason of any change in its position it is unjust to require it to repay any of the sums sought by the Applicant.

176. For all these reasons, I shall order the Respondent to pay the amount of the Payments to the Applicants together with interest under section 35A of the Senior Courts Act 1981 at a rate to be fixed. I shall hear submissions on interest and costs on the handing down of judgment.

ICC Judge Barber