



**David McIlroy**

Acting on behalf of the respondent to a claim under section 423 Insolvency Act, David McIlroy was successful in a contribution claim against the main shareholders of accountancy practice. The judge found that the transaction had been designed by the principal director to leave the creditors of the company high and dry, whilst lining his own pocket. The judge held that the shareholders were liable to contribute for the full value of the goodwill which was sold for £1, a sum yet to be quantified but expected to be in excess of £2 million.

David McIlroy was Instructed by Glaisyers Solicitors.

The full judgment can be read here:

<https://www.bailii.org/ew/cases/EWHC/Ch/2021/3209.pdf>



**Phillip Currie**

Acting on behalf of the Claimant in a claim for the repayment of unlawful dividends and transactions at an undervalue, Philip Currie secured judgment against the Respondents in an oral judgment delivered at the end of a 4 day trial. The unlawful dividends were declared by the Respondents as directors without interim accounts by which they could be justified, while the transaction at an undervalue claim concerned the receipt of funds from the Company which ought to have been paid by the Buyers under a share purchase agreement.

Of particular interest, the court agreed that the interpretation of the shareholders' knowledge requirement for the repayment of unlawful dividends in s.847 of the Companies Act 2006 (as explained by reference to EU law in *It's a Wrap (UK) Ltd (In Liquidation) v Gula* [2006] EWCA Civ 544) was not altered by Brexit or the European Union (Withdrawal) Act 2018.

Philip was instructed by Squire Patton Boggs, funded by Manolete.

This judgment was handed down orally by Judge Prentis so there is no written judgment.



## Darragh Connell

Darragh Connell instructed by Howes Percival LLP recently acted for the applicant joint liquidators in the 3-day trial of **AFM (1932) Limited & Ors v Belisco Estates Ltd [2021] EWHC 3460 (Ch)**. Judgment was handed down on 21 December 2021.

In the course of the trial, the Insolvency and Companies Court was required to consider a complex web of transactions involving a construction company, AFM (1932) Limited (“**AFM**”), which had entered compulsory liquidation on 17 June 2014. Prior to its liquidation, it was found that AFM had discharged liabilities of a BVI registered company for construction works carried out at a sizeable property in Essex without receiving any payment in return.

The Respondent at trial, Belisco Estates Limited (“**Belisco**”), relied *inter alia* upon two agreements entered in 2010 and 2013 by AFM (1932) Limited with a Dubai-registered entity known as Woodbridge Limited which had become a 44.5% shareholder of AFM on 8 May 2013. Further or alternatively, Belisco sought to set off payments made by it and on its behalf to third parties purportedly to discharge liabilities of AFM.

In handing down judgment, Insolvency and Companies Court Judge Jones repeatedly drew an analogy between the evidence at trial and one of the themes of *The Great Gatsby* that ‘*nothing is as it seems*’ as follows:

*“Mr Connell, counsel instructed on behalf of the Applicants (to be individually referred to as “AFM” and “the Liquidators”), opened this case with reference to “The Great Gatsby”. Whilst he had in mind Gatsby’s mansion, one of its themes is that nothing is as it seems. It is a theme which applies to this case. Mr Connell identified a key point for the claim as the fact that at no stage had the First Respondent (“BEL”), a BVI registered company and the owner of “Greenacres”, a property in Essex (“the Property”), paid AFM for or in connection with the building works carried out there during 2013 and 2014...”*

The court rejected the defence argument that Belisco could rely upon the 2010 and 2013 agreements entered by Woodbridge Limited to defeat the application:

*“... there was no consideration for AFM’s obligation to pay £250,000. Insofar as it is submitted that the £100,000 loan was included in that amount to provide consideration, that liability to repay already existed. The 2013 Agreement is not binding upon AFM as a result.”*

The court also rejected Belisco’s argument that it was entitled to set off payments made by it or on its behalf purportedly to discharge liabilities of AFM. First, it was found that AFM would have been entitled to reimbursement of the sums it had paid for works done at Belisco’s property. Secondly, even if AFM has not been entitled to reimbursement, any payment of a third party creditor of AFM would simply result in Belisco standing in the shoes of the third party creditor rather than the “mutual dealings” required by Rule 14.25 of the Insolvency Rules 2016.

Ultimately, the court concluded that the evidence established that, subject to certain assumptions as to quantum, a debt was owed by Belisco to AFM:

*“... the evidence before me has established a debt owed by BEL to AFM in the sum of £361,528.95 based upon the assumptions of proof identified in paragraphs 48-49 above. Those assumptions may yet be challenged within the context of an account, as previously explained. There is, however, no set off in reliance upon the 2013 Agreement. The £250,000 set off raised by BEL must fail for want of consideration. Subject to the assumptions summarised at paragraph 93 above being challenged upon an account, the set off claimed as a result of the payments to Watergates and Unidig by BEL itself and by Mr Dockerill and his companies also fails because all that has happened is that BEL has paid what are ultimately its own liabilities.”*

The insolvency application was advanced at trial primarily on the basis of section 238 of the Insolvency Act 1986 with an alternative claim in knowing receipt. The court concluded that the relevant sums were due to AFM from Belisco by way of a debt claim which, subject to pleading points and the potential payment of an issue fee for a Part 7 claim, negated reliance upon section 238.



As to the precise quantum of the liability to AFM, the court was prepared to direct that an account be taken if the parties were unable to resolve any issues still outstanding in the light of the judgment. Prior to the taking of any account, the parties did reach a settlement by way of Tomlin Order following circulation of the draft judgment.

As a post-script, Insolvency and Companies Court Judge Jones rejected Belisco's contention that the draft judgment was simply an interim judgment which should not be handed down. The court instead exercised its discretion to hand-down the judgment notwithstanding the settlement reached between the parties. In doing so, the court again cited the theme of *The Great Gatsby* that '*nothing is as it seems*'.

*"There has been a trial in open court, the decision has been notified to the parties subject to typographical corrections and the settlement will inevitably have flowed from its content. It is right for this judgment to be a matter of public record. It is also appropriate for there to be a record of the findings of fact for creditors of AFM to be able to read. In addition it is right for those facts to be a matter of record in case other problems arise from the scenario of events where things were not what they seemed."*

The full judgment can be read here:

<https://www.bailii.org/ew/cases/EWHC/Ch/2021/3460.html>

