[2023] EWHC 3020 (Ch)

Case No: CR-2019-003378

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
IN THE MATTER OF GAMENATION (UK) LIMITED
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

Rolls Building
London
EC4A 1NL

Date: 29 November 2023

Before :

DEPUTY INSOLVENCY AND COMPANIES COURT JUDGE RAQUEL AGNELLO KC

BETWEEN:

ANDREW ANDERSON KELSALL and LEE ANTHONY GRANT
As Joint Liquidators of Gamenation (UK) Limited
Applicants ners

— and —

(1) BILJANA STAJIC
(2) JELENA TOMIC FILIPOVIC
Respondents

Ms Faith Julian (instructed by Wedlake Bell**)** for the **Applicants**
Mr Daniel Lewis (instructed by FWJ Legal trading as Francis Wilks and Jones) for the **Respondents**

Hearing dates: 4 and 5 July 2023

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JUDGMENT

Introduction

1. This is the judgment of the Respondents' application to strike out/ seek summary judgment ('strike out/SJ') in relation to one part of the pleading, being the claim of dishonest assistance pursuant to section 212 of the Insolvency Act

1986 set out in the Applicants' Points of Claim against the Second Respondent. The second issues which I had to determine relates to the costs of the aborted part of the strike out/SJ application as well as the costs of the Applicants' amendment application which is no longer opposed by the Respondents. I confirm that I gave permission for the Applicants to amend their Points of Claim in accordance with the amendments set out in the attached draft amended Points of Claim to the amendment application.

Brief background and relevant chronology

2. I set out below a procedural chronology which is relevant to issue of costs which I need to determine. I concentrate in this first section on the background relevant to the dishonest assistance claim which I need to determine. Gamenation (UK) Ltd (the Company) was incorporated on 3 October 2014 and was acquired, 'off the shelf' around October 2015. Ms Biljana Stajic, the First Respondent, was appointed sole director and shareholder of the Company. The Applicants assert in their amended pleading that Ms Jelena Tomic Filipovic, the Second Respondent was a de facto director. However, the original pleaded case against the Second Respondent relied upon her involvement in the Company and raised a claim against her based on dishonest assistance. Shortly after the appointment of the First Respondent as director, the Company began to operate gaming subscription services which were available to mobile phones users who were charged a premium rate for using the service via their mobile phone bills. The Company was therefore subject to the regulation of Phone-paid Services Authority Limited (PSA) as being a provider of a 'premium rate service' within the meaning of the Communications Act 2003. The PSA has a Code of Practice approved by Ofcom and which must be complied with by those providing premium rate services. The PSA is empowered to conduct tribunal proceedings and to impose both financial and non-financial sanctions on the relevant service providers who breach the code.

3. As is set out in the Points of Claims, from about early December 2015, the PSA started receiving complaints about the Company's services. It opened an investigation into the Company's operations, making an informal request for information from the Company on 5 April 2016. A formal request for

information followed on 3 June 2016. It is alleged that the Company failed to reply to these requests. Thereafter, the Respondents sought to place the Company into administration. The Applicants question and challenge the payment made by the company to Love Limited, trading as VZX Consultancy £31,200 for unregulated insolvency advice. On or around 17 August 2016, the First Respondent instructed Southern Counties Valuers, a company connected to VZX, to value the Company's assets for the purposes of purchasing the assets out of an administration on a pre pack basis. The valuation fee of £3,000 was paid by the Company. On 2 September 2016, administrators were appointed. The statutory moratorium was lifted upon the application of the PSA who thereafter commenced tribunal proceedings. On 21 December 2016, the PSA Tribunal upheld the alleged breaches of the Code and fined the Company £200,000 with an order for the company to pay the PSA's administrative expenses in the sum of £9,462.45. The Company was placed into a creditors' voluntary liquidation on 4 September 2017. On 23 May 2019, the Applicants were appointed as Joint Liquidators with the dissolution of the Company having been deferred.

4. I have taken from Ms Julian's skeleton the broad summary of the Applicants' claims, being:-

    a. In causing or allowing the Third Party Payments / the Advice Fee / the Valuation Fee to be made, R1 breached her duties to the Company, and caused the Company loss in a like sum (being £397,790.91).

    b. In causing or allowing the Company to operate in breach of the Code, R1 breached her duties to the Company and caused the Company loss in the sum of £209,462.45 (being the total of the PSA fine, and the administrative charges).

    c. In causing or allowing the Third Party Payments / the Advice Fee / the Valuation Fee to be made, R2 dishonestly assisted in R1's breach of trust, and therefore became accountable for the Company's money or property in the sum of £397,790.91.

5. I set out below the relevant passages in the Points of Claim (unamended) in relation to the both the alleged breaches of duties of the First Respondent and the dishonest assistance claim against the Second Respondent.

'57. At all material times from her appointment on 20 October 2015, R1 owed the following duties (fiduciary or otherwise) to the Company, pursuant to common law and/or sections 171 to 175 CA 2006:

a. A duty to act in accordance with the Company's constitution and only exercise powers for the purposes for which they were conferred;

b. A duty to act in the way she considers, in good faith, would be most likely to promote the success of the Company for the benefit of its members as a whole. Further, where she knows or should know that the Company is or is likely to become insolvent, a duty to consider or act in the interests of the Company's creditors.

c. A duty to exercise independent judgment;

d. A duty to exercise reasonable care, skill, and diligence; and

e. A duty to avoid conflicts of interest.

58. It is further averred that R1 was at all material times from 20 October 2015 trustee of such of the Company's assets and property as were in her possession or control.

59. Paragraphs 14 to 31 above are repeated. In causing, effecting, permitting, or otherwise allowing the Third Party Payments to be made, R1 is guilty of misfeasance and/or has breached her duties to the Company, and/or has misapplied the Company's assets and or has committed a breach of trust. In so doing, R1 has caused the Company loss.'

60.Further, or in the alternative, insofar as R1 delegated her duties, roles, and functions to R2 or alternatively another third party, R1 failed to act with reasonable care and skill and/or failed to exercise independent judgment in causing, effecting, permitting, or otherwise allowing (whether by a failure of oversight or otherwise) the Third Party Payments to be made. R1 is therefore guilty of misfeasance and/or has breached her duties to the Company, and/or has committed a breach of trust. In so doing, R1 has caused the Company loss.

61.Paragraphs 39 to 45 above are repeated. In causing, effecting, permitting, or otherwise allowing the Advice Fee and/or the Valuation Fee to be paid by the Company, R1 is guilty of misfeasance and/or has breached her duties to the Company, and/or has misapplied the Company's assets and/or has committed a breach of trust. In so doing, R1 has caused the Company loss.

62. Further, or in the alternative, insofar as R1 delegated her duties, roles, and functions to R2 or alternatively another third party, R1 failed to act with reasonable care and skill and/or failed to exercise independent judgment in causing, effecting, permitting, or otherwise allowing (whether by a failure of oversight or otherwise) the Advice Fee and/or the Valuation Fee to be paid by the Company. R1 is therefore guilty of misfeasance and/or has breached her duties to the Company, and/or has committed a breach of trust. In so doing, R1 has caused the Company loss.

63.In the premises, and pursuant to section 212 IA 1986, the Applicants seek declarations to that effect, and an order that R1 contribute the value of the Third Party Payments, the Advice Fee and/or the Valuation Fee (being £397,790.91 ~~£607,253.36~~) to the Company's assets. Further, or in the alternative, the Applicants seek an order that R1 contribute to the Company's assets the difference in value between the services provided to the Company in exchange for the Third Party Payments, the Advice Fee and/or the Valuation Fee, and the price paid by the Company. Further, or in the alternative, the Applicants seek an order that R1 make such contribution, compensation, payment, or otherwise, in such other sum as the Court thinks fit.

64.Paragraphs 4 to 11, 32 to 38, and 47 to 52 above are repeated. In causing and/or allowing the Company to breach the Code as particularised in the Warning Notice, and/or failing to ensure that the Company complied with the Code and/or its regulatory obligations, and/or failing to put systems in place to ensure compliance with the Code, R1 is guilty of misfeasance, and/or has breached her duties to the Company, in particular but without limitation her duty to promote the success of the Company, and her duty to exercise reasonable care, skill and diligence. In so doing, R1 has caused the Company loss.

65.Further, or in the alternative, insofar as R1 delegated her duties, roles, and functions to R2 or alternatively another third party, R1 failed to act with reasonable care and skill and/or failed to exercise independent judgment in failing to retain oversight in respect of the Company's compliance with the Code and/or its regulatory obligations. R1 is therefore guilty of misfeasance and/or has breached her duties to the Company. In so doing, R1 has caused the Company loss.

66.In the premises, and pursuant to section 212 IA 1986, the Applicants seek declarations to that effect, and an order that R1 contribute the sum of £209,462.45 (being the value of the PSA Fines) to the Company's assets, or such other sum as the Court thinks fit.

Claims as against R2
*67.At all material times from 20 October 2015 R2 was concerned, or took part, in the promotion, formation or management of the Company, within the meaning of section 212(1)(c) of the Insolvency Act 1986 ("**IA 1986**"). More particularly, but without limitation, R2: -*
a. Prepared documentation appointing R1 director of and shareholder in the Company.
b. Filed documents at Companies House on behalf of the Company.

c.Registered the Company for VAT.
d.Arranged banking facilities for the Company.
e. Accessed and sent emails from R1's corporate email address, being biljana@gamenationuk.com, purportedly in the name of R1.
f.Inserted her own mobile telephone number, being +447951 578106, into R1's corporate email signature.
g.Liaised and communicated with one of the Company's Level 1 service providers, Wireless Information Network Limited, on behalf of the Company between around 12 February 2016 and around 25 March 2016.
h.Impersonated R1 in a telephone conference with Wireless Information Network Limited on or around 24 March 2016.
i.Liaised and communicated with PSA on or around 2 August 2016, 9 August 2016, and/or 22 August 2016.
j.Assisted R1 in placing the Company in administration.
k.Accessed, controlled, and made payments from the Company's sole bank account.

68.In causing the Company to make the Third Party Payments, and/or pay the Advice Fee and/or the Valuation Fee, or otherwise effecting the same, R2 misapplied or retained, or became accountable for the money and/or property of the Company, and in so doing caused the Company loss.

69. Further, or in the alternative, it is averred that:
a. The Service Revenue and/or the sums in the Bank Account constituted trust assets belonging to the Company.
b. R1 was a trustee of that trust and/or a fiduciary steward of the Company's assets, and committed a breach of that trust and/or fiduciary stewardship. In this respect, Paragraphs 59 to 62 above are repeated.
c. R2 induced or otherwise assisted in that breach of trust. Paragraphs 67 and 68 above are repeated.
d. R2 did so dishonestly. By reason of the facts and matters set out above, it was and must have been obvious to R2 that the Third Party Payments were made and/or the Advice Fee and/or the Valuation Fee were paid in breach of trust, and that the Service Revenue and/or the sums in the Bank Account constituted trust assets belonging to the Company. R2 therefore wilfully shut her eyes to the obvious; wilfully and/or recklessly failed to make such inquiries as an honest and reasonable person would make in the circumstances; had knowledge of circumstances which would indicate the facts to an honest and reasonable person; and/or had knowledge of circumstances which would put an honest and reasonable person on inquiry.
e.In so doing, R2 has become accountable for the Company's money and/or property.

70. In the premises, and pursuant to section 212(3) IA 1986, R2 is liable:
(a)To repay, restore, account to, and/or pay compensation to the Company in the value of the Third Party Payments, the Advice Fee, and/or the Valuation Fee (being £397,790.91). Further, or in the alternative, R2 is liable to repay, restore and/or account and/or pay by way of compensation to the Company the difference in value between the services provided to the Company in exchange for the Third Party Payments, the Advice Fee and/or the Valuation Fee, and the price paid by the Company, or alternatively such other sum as the Court thinks fit.
(b) Further, or in the alternative, to account to the Company (whether as constructive trustee or otherwise) in the value of the Third Party Payments, the

Advice Fee, and/or the Valuation Fee, or alternatively the difference in value between the services provided to the Company in exchange for the Third Party Payments, the Advice Fee and/or the Valuation Fee, and the price paid by the Company, or alternatively in such other sum as the Court thinks fit. Further, or in the alternative, R2 must make a contribution or compensation (whether equitable or otherwise) to the Company in an equivalent sum.'

6. I do not need to refer to the Points of Defence or Points of Reply save to note that the Respondents reserved their position to seek to strike out the pleaded case and to deny any wrongdoing. Mr Lewis, on behalf of the Second Respondent submits that the issue before me is a straightforward issue of law, namely that a claim of dishonest assistance does not fall within the confines of section 212 of the Insolvency Act 1986 (section 212 IA 86) and accordingly the dishonest assistance claim should be struck out or summary judgment entered in respect thereof. Ms Julian agrees that this is a point of law and submits that the pleaded case of dishonest assistance does fall within section 212 and that the strike our/SJ application should be dismissed.

Section 212 IA 86 and dishonest assistance.

7. Section 212 states as follows :-

(1) This section applies if in the course of the winding up of a company, it appears that a person who

(a) is or had been an officer of the company

(b) Has acted as a liquidator…or administrative receiver of the company, or

(c) Not being a person falling within paragraph (a) or (b), is or has been concerned, or has taken part, in the promotion, formation or management of the company

has misapplied or retained, or become accountable for, any money or property of the company, or been guilty of any misfeasance or breach of fiduciary duty or other duty in relation to the company'.

8. Accordingly, the last part of section 212(1) provides alternative ways in which a claim falls within section 212, being :-

(1) misapplied or retained or become accountable for, any money or property or other property of the company, or

(2) guilty of misfeasance, or

(3) breach of any fiduciary or other duty in relation to the company

9. Both Counsel are agreed that section 212 does not create any new statutory liability which does not exist outside of the confines of section 212. That is well established in the case law (*Manolete Partners PLC v Hayward and Barrett Holdings Ltd [2022] BCC 159* being one of the more recent cases). It is a summary procedure available to office holders allowing them to bring proceedings in their own name under the Insolvency Act 1986 proceedings rather than bringing such proceedings in the name of the company as a Part 7 claim. Mr Lewis accepts that the dishonest assistance claim could be brought as a Part 7 claim. Part of the application before me involves consideration of whether to grant permission for the claim to continue in its current form, subject to further directions, in the event that I hold that dishonest assistance does not fall within the confines of section 212.

10. Before turning to Mr Lewis' submissions in relation to dishonest assistance not falling within section 212, it is useful to set out in summary the requirements of dishonest assistance. Mr Lewis referred me to a passage from Lewin on Trusts (20th edition), which I have referred to below, but for current purposes I set out the useful summary set out in *FM Capital Partners Ltd v Marino [2018] EWHC 1768 (Comm)* at paragraph 82 which was also applied and approved in the later case of *Iranian Offshore and Construction Company v Dean Investment Holdings SA (formerly known as Dean International Trading SA and others [2019]EWHC 472* (at paragraph 153). Both these cases are referred to in the footnotes to the passages in Lewin which Mr Lewis referred me to. At paragraph 82 of *FM Capital Partners*, Mrs Justice Cockrill stated:-

' Dishonest Assistance
82. In this area, too, the law was not seriously in issue. The ingredients of liability in dishonest assistance are:

i) There must be a trust or fiduciary obligation owed by the trustee/fiduciary to the claimant. It suffices if the trust in question is a constructive or resulting trust: McGrath, Commercial Fraud in Civil Practice *(2nd ed.) at [9.34].*

ii) Because dishonest assistance is a type of accessory liability, there must be a breach by the trustee/fiduciary: Royal Brunei Airlines v Tan [1995] 2 AC 378 , 382, Novoship (UK) Ltd v Mikhaylyuk [2014] EWCA Civ 908; [2015] QB 499 . That is common ground for the purposes of my decision. However, I should note that Mr Ohmura reserves the right to argue, if this matter were to go to a higher court, that liability for dishonest assistance would not arise in relation to a breach of the kind that is alleged in this case.

iii) The breach by the trustee/fiduciary need not be dishonest: because liability of the third party is fault-based, what matters is the nature of their fault, not that of the trustee/fiduciary: Royal Brunei Airlines , 384-5, 392, Twinsectra Ltd v Yardley [2002] UKHL 12; [2002] 2 AC 164 at [109].

iv) The third party must have assisted in, induced or procured the breach. It is necessary to show that the relevant assistance played more than a minimal role in the breach being carried out, but there is no requirement to show that the assistance provided would inevitably have resulted in the beneficiary suffering a loss: Baden v Société General pour Favoriser le Development du Commerce et de l'Industrie en France SA [1993] 1 WLR 509 at [246].

v) The third party must have acted dishonestly in providing the assistance. The test in its modern incarnation derives from Royal Brunei Airlines at 386-7 and is now set out in Ivey v Genting Casinos (UK) t/a Crockfords [2017] UKSC 67 at [74]:

"When dishonesty is in question the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual's knowledge or belief as to the facts. The reasonableness or otherwise of his belief is a matter of evidence (often in practice determinative) going to whether he held the belief, but it is not an additional requirement that his belief must be reasonable; the question is whether it is genuinely held. When once his actual state of mind as to knowledge or belief as to facts is established, the question whether his conduct was honest or dishonest is to be determined by the fact-finder by applying the (objective) standards of ordinary decent people. There is no requirement that the defendant must appreciate that what he has done is, by those standards, dishonest."

vi) However, the standards in question are those of an ordinary honest person in the circumstances of the defendant. Thus, in applying the test of dishonesty, the Court must have regard to all the circumstances known to the defendant at

the time, and have regard to the defendant's personal attributes, such as their experience and the reason why they acted as they did: Royal Brunei Airlines v Tan at 391.'

11. Dishonest assistance therefore relies upon there being a fiduciary obligation or trust owed by a trustee or fiduciary to the claimant, but a constructive or resulting trust will also suffice. There must be a breach by the trustee/fiduciary because dishonest assistance is a type of accessory liability. In other words, it is parasitic upon the breach by the principal (the fiduciary/trustee) of the fiduciary obligation or trust. The dishonest assistance as pleaded here relies upon the breach of fiduciary duty and breaches of trust which are pleaded at paragraphs 57 to 66 of the Points of Claim against the First Respondent as a director of the Company.

12. Mr Lewis submits that on its very wording, the provision is clearly restricted to cases where a respondent owes a duty to the company. Effectively he submits that an accessory liability relating to a breach of duty or trust is incapable of falling within section 212. Mr Lewis submitted that liability pursuant to section 212 required there to be a breach of duty, such as a breach of trust or a breach of duty by the respondent against whom the dishonest assistance claim is made. Misfeasance, he submitted is a breach of duty. He submitted that knowing assistance does not therefore fall under section 212. In relation to a case of knowing receipt, something which I raised with him, he submitted that this was also not a breach of duty and therefore did not fall under section 212. A respondent needs to fall under section 212(1) (c) being a person who is or has been concerned or taken part in the promotion, formation or management of the company. Mr Lewis submitted that this meant that the person needed to be senior management.

13. Mr Lewis relied heavily in what is set out in *Re B Johnson & Co (Builders)ltd [1955] Ch 634.* That case concerned section 333(1) of the Companies Act 1948. That section differs from section 212 IA 86 in that it applies to, 'any person who has taken part in the formation or promotion of the company, or any past or present director, manager or liquidator, or any officer of the company, has misapplied or become liable or accountable for any money or property of the

company, or been guilty of any misfeasance or breach of trust in relation to the company, the court may……compel him to repay or restore the money or property or any part thereof respectively with interest ….or contribute such sum to the assets of the company by way of compensation…'

14. The wording in section 212 IA 86 is somewhat wider in that it states 'any person is or has been concerned, or has taken part, in the promotion, formation or management of the company'. Whilst section 333 of CA 1948 does refer to a person who is a manager as well as any past or present director, section 212 IA 86 refers to a person who has been concerned, or taken part in the management, formation or promotion without that person having to be considered as a manager. There is also a slight change of wording in that section 212 IA86 refers to a person who has misapplied or retained whilst section 333 CA 1948 refers to a person who has misapplied or become liable for.

15. In *Re Johnson*, the applicant had been, since incorporation, the chairman and manager of the company, which carried on business of builders and contractors. On 9 August 1947, pursuant to a debenture, the bank exercised its powers under the debenture and appointed the first respondent as receiver and manager of the company's property. A compulsory winding up order was subsequently made on 27 January 1948 with the second respondent thereafter being appointed as liquidator. The receiver was discharged in May 1949. Thereafter, a question arose relating to the conduct of the receiver whilst in office. The Applicant asserted that the receiver had been negligent in not continuing the company's business and instead had sold certain buildings resulting in a loss. The Court of Appeal held that that a receiver and manager of company's property appointed by a debenture holder was not an 'officer' of the company within the definition of 'officer' in section 455 of the Companies Act 1948, since any work of management he might do was not done by virtue of any office which he held of the company. Additionally, the Court held that the receiver was not a 'manager' of the company within section 333 of the Companies Act 1948 because such a receiver or manager was not managing on the company's behalf but was managing on the debenture holder's behalf to facilitate the enforcement of the

security. Accordingly, the receiver was not within the class of persons whose conduct could be the subject of an examination under section 333 CA 1948.

16. Mr Lewis relies upon various passages in the judgements. Firstly, he relies upon the fact that section 333 CA 1948 was held to be a procedural section which created no new cause of action and that acts covered by the section were acts which were wrongful in accordance with established rules of law and equity. Not every kind of wrongful act fell within the section, a good example being a case of negligence under common law. The claims against the receiver were claims of negligence and did not, according to the Court of Appeal, fall within section 333 CA 1948 because the receiver was not a 'person' to whom section 333 CA 1948 applied.

17. The reasoning for the Court of Appeal's finding in relation to the receiver is based upon established legal principles relating to the receivers appointed under debentures, being to realise the assets for the benefit of the security holder. The receiver does not therefore owe some duty to the company to carry on the business of the company and to preserve its goodwill (see page 645 Lord Evershed MR). Accordingly, the Master of the Rolls held that a person appointed as a receiver (called receiver and manager in the debenture documentation) is not appointed with any duties to carry on the business of the company in the best interests of the company. The receiver is appointed to realise for the debenture holders or mortgagees the security which they have over the relevant property. It is only for that limited purpose that the receiver has been given powers of management. The receiver is not a manager of the company but a manager of the relevant property of the company.

18. Accordingly, a receiver/manager is excluded from the word 'manager' in section 333 CA 1948 because the receiver/manager is only endowed for the purposes of his receivership with certain powers of management. On this basis, the Court of Appeal overturned the decision below and the appeal succeeded. The Court of Appeal then went on to consider the second point which had been raised and the Master of the Rolls considered that, '*it will be perhaps desirable that I should say something also on the second point, namely, whether the allegations made against the receiver were allegations of misfeasance as that*

word is understood in that section. That point raises the problem of the scope of section 333 not as regards the persons who are subject to the procedure ordained by that section, but as regards the nature of the claims which may be made under it.'

19. The Master of the Rolls stated as follows (page 648)

'There is no such distinct wrongful act known to law as "misfeasance". The acts which are covered by the section are acts which are wrongful, according to the established rules of law or equity, done by the person charged in his capacity as "promoter, director," etc. But it is clearly established that it is not every kind of wrongful act so done that is comprehended by the section. At one end of the scale it may, I think, be taken as prima facie clear that a wrongful act involving misapplication of property in the hands of the person charged would be covered by its terms. At the other end of the scale, a claim based exclusively on common law negligence, an ordinary claim for damages for negligence simply, would not be covered by the section. Nor is such a claim brought within the section by the mere expedient of adding epithets to the negligence charged, calling it " gross " or " deliberate." Nor, by that expedient, without more, can what in truth is mere negligence be converted into something else, namely, breach of trust. But in between the two extremes that I have mentioned there is obviously a large range of conduct which may (or may not) be within the section. I shall follow others in not attempting any precise definition of what does or does not fall within it.'

20. It is clear, in my judgement, that the Master of the Rolls was expressly not setting out a comprehensive definition of what fell within section 333 CA 1948 and what did not. The Master of the Rolls continued by referring to the case of Etic Ltd, which is also relied upon by Mr Lewis:- (pages 648 - 649)

21. *I would like, however, to cite a passage from the judgment of Maugham J. in* In re Etic Ltd·[[1928] Ch 861 at 873] *In that case the judge made reference to Coventry and Dixon's* case *and certain other cases, and then he said this, of the language of Sir George Jessel M.R. in* In re Anglo-French Co-operative Society; Ex parte Polly: *" The language of Sir George Jessel in dealing with the matter " in his decision in* Ex partc Pelly *strongly tends to show " that in his view section 215 " (now section 333 of the Act of 1948) " really only applies where there has been some " wrongful act by the director, manager, liquidator, or other "officer of the company, either of the nature of misfeasance, or "of the nature of breach of trust in a wide sense, including no " doubt a breach of trust by negligence, or something of that " kind." Later the judge, after further references to cases, including that of* Cavendish Bentinck *v.* Fenn, *said, ": The conclusion at which I have arrived is that section 215 is not applicable to all cases in which the company has a right of action*

against an officer of the company. It is limited to cases where there has been something in the nature of a breach of duty by an officer of the company as such which has caused pecuniary loss to the company. Breach of duty of course would include a misfeasance or a breach of trust in the stricter sense, and the section will apply to a true case of misapplication of money or property of the company, or a case where there has been retention of money or property which the officer was bound to have paid or returned to the company."

22. The Master of the Rolls also quoted from the earlier case of *In Re Kingston Cotton Mill Company (No.2) [1896] 2 Ch 279,* and a passage from Lord Justice Lopes which stated,

'The object of this section of the Act is to enable the liquidator to recover any assets of the company improperly dealt with by any officer of the company, and must be interpreted bearing that object in view. It doubtless covers any breach of duty by an officer of the company in his capacity of officer resulting in any improper misapplication of the assets or property of the company."

23. Starting with the express wording of section 212, in my judgment, this does not support Mr Lewis' submission as to the restrictive express nature of section 212. On its wording, the section encompasses more than just cases of breaches of fiduciary and/or other duties. In particular, the first limb covers cases of misapplication or retention of money or other property of the company and words expressly state, ' has misapplied **or** retained **or** become accountable for, any money or other property of the company, **or** been guilty of any misfeasance of breach of fiduciary duty or other duty in relation to the company'. The wording used is one of alternatives which in my judgment runs counter to Mr Lewis' submission. Additionally, the section divides up into three the persons who can be liable. These are clearly not restricted to those who are or were officers of the company but extend, in my judgment, to those who are not officers etc of the company. Section 212(1)(c) states, 'not being a person falling within paragraph (a) or (b)…'.

24. In my judgment, the case of *Re Johnson* and the other cases referred to therein are not authority for the preposition that section 212 is restricted to respondents who are in breach of a duty owed to the company or a breach of

some other duty such as a breach of trust. The Master of the Rolls expressly refused to define what fell within section 333 of the Companies Act 1948, instead providing examples at either end of the spectrum, being a case of a wrongful misapplication of the company property in the hands of the person charged and a case of negligence. As to the former, this, in my judgment, would also cover the example I gave to Mr Lewis of a knowing receipt case. The ambit of section 333 of the Companies Act 1948 was somewhat narrower than the ambit of those who fall within section 212, being that the latter includes those who have been concerned in the creation, formation and management of the company. Section 333 did not involve those concerned in the management save for those who fell within the definition of manager as explored in the case. Accordingly, the passages relied upon must be read with some caution, but in my judgment, the passages set out above do not support the restriction sought by Mr Lewis. A person who wrongfully misapplies company property and who falls under the definition of being concerned in the management of the company will, in my judgment be within section 212 without there being any necessity of that person being under a duty. This is clearly in line with the ultimate purpose of the section as described by Lord Justice Lopes in *Re Cotton Mill Company* set out above.

25. The aim of the section is to enable the liquidator to recover any assets of the company improperly dealt with by anyone who falls within the provision. Lord Justice Lopes referred to ‘an officer’ but the wording in section 212 is wider being anyone concerned with the promotion, formation and management of the company. In my judgment, a knowing receipt is clearly a misappropriation of company assets and a person concerned with the management will fall within section 212 for that misappropriation. That does not require the person to be under a duty to the company. Consider the case of a senior employee of the company who misappropriates company funds for his own benefit. Equally, in my judgment, a case of dishonestly assisting will also fall under section 212. Those who dishonestly assist in the misapplication of company assets are, in my judgment, within section 212 without having an additional requirement of owing some duty to the company or being in breach of trust. This accords with the clear wording set out in section 212 which

provide a series of alternatives relating to the types of claims which can fall within section 212. In my judgment, dishonestly assists falls within the first part, being 'has misapplied or retained, or become accountable for..'. This construction, in my judgment, accords with what is set out in *Re Johnson* and in particular the approach taken by the Master of the Rolls.

26. Someone who dishonestly assists is under a personal liability to account (see further the passages below from *FM Capital Partners*) and this arises regardless as to whether that person has actually misapplied the company property. This is not a case at one end of the spectrum such as negligence. It falls clearly under what the Mater of Rolls quoted from Maugham J in Re Etic Limited, being, '…*cases where there has been something in the nature of a breach of duty by an officer of the company as such which has caused pecuniary loss to the company.'* In my judgment a claim for dishonest assistance is clearly 'in the nature of a breach of duty by an officer of the company' because it relies upon there being a breach of duty (fiduciary obligation or breach of trust) of the principal (the fiduciary/trustee) as a requirement of liability. Furthermore, the passage from Lord Justice Lopes applies equally to a dishonest assistance claim as it applies to a claim against a director/officer of the company, with the appropriate modifications to expand the use of the word officer to what is now in section 212 IA 86. To my mind it would go against the clear wording of section 212 IA 86 as well as against the purpose behind the section to create a distinction as between the accessory liability of dishonest assistance and the principal liability of the fiduciary/trustee.

27. Mr Lewis also relied upon the remedy provision of section 212, being section 212(3) which states,

'The court may, on the application of the official receiver or the liquidator, or any creditor or contributory, examine into the conduct of the person falling within subsection (1) and compel him –

(a) To repay, restore or account for the money or property or any part of it, with interest at such rate as the court thinks just, or

(b) to contribute such sums to the company's assets by way of compensation in respect of the misfeasance or breach of fiduciary or other duty as the court thinks just'

28. Mr Lewis submits that subsection (a) is restricted to recipients and the second respondent is not a recipient, but she dishonestly assisted someone who was acting in breach of duty. He submits that even though a dishonest assistor is measured 'as though' the person was a trustee (as set out in Lewin on Trusts 43-05) he submits that this is different from repaying, restoring or account for the money or property or part of it. In other words, Mr Lewis restricts the remedy set out in subsection (a) to those who are recipients and therefore argues that as someone who may be treated as though he was a trustee, this does not enable that person to fall within subsection (a) and therefore the remedy provisions, at least on the basis of subsection (a).

29. As for subsection (b), he submits this is restricted to those who are liable by reason of their own misfeasance or breach of fiduciary or other duty as the court thinks fit. Mr Lewis relies on his construction of section 212(3)(a) and (b) in support of his submission that claim for dishonest assistance does not fall within section 212.

30. It is worth setting out paragraph 84 and 85 of Mrs Justice Cockerill's judgment in FM Partners which state:-

'84. If the requirements above are satisfied, the third party is liable to: (a) compensate for the losses resulting from the trustee/fiduciary's breach of duty; and/or (b) personally account for his or her profits: Snell's Equity[30-079] to 30-081; McGrath [9.137] to [9.138].

85. The defendant's liability is not limited to the loss caused by his assistance, but extends to the loss resulting from the relevant breaches of fiduciary duty. It is inappropriate to become involved in attempts to assess the precise causative significance of the dishonest assistance in respect of either the breach of trust or fiduciary duty or the resulting loss: Otkritie at [456]; Snell's Equity [30-081].'

31. Lewin on Trusts make the same points at 43-1015 which states,

‘ Where these requirements are satisfied against the defendant, the defendant is liable personally to account in equity in respect of the breach of trust as though he were a trustee. The remedy of dishonest assistance is a personal equitable remedy. Although a contrastive trust is imposed on the defendant, the constructive trust must not be understood in the sense of a trust imposed on any property which is or has been in the hands of the defendant, for there need be none. Rather, it must be understood in the sense of imposition of a personal liability to account on the basis applicable to a trustee. The term is simply used to describe the equitable obligation to account which is imposed on him. The defendant is made liable not because he is a trustee of any property but because he is a dishonest accessory to a breach of trust committed by someone else’

32. In my judgment, section 212(3) is consistent with the remedies relating to dishonest assistance. I reject Mr Lewis’ submissions on this point. The respondent is personally liable to account in equity and as set out above, must compensate for the losses resulting from the trustee’s/fiduciary’s breach of duty. Accordingly, the remedy for dishonest assistance falls either under section 212(3)(a), being an obligation to account or under section 212(3)(b), being under a liability to compensate in relation to the principal’s breach of fiduciary duty or breach of trust. In my judgement, the reference to misfeasance or the breach of any fiduciary or other duty in relation to the company encompasses the breach of fiduciary or other duty of the principal (fiduciary/trustee) rather than referring to the respondent liable for dishonest assistance. This subsection does not state that the breach of duty or trust must be that of the respondent. The words used are, ‘to contribute such sum to the company’s assets by way of compensation in respect of the misfeasance or breach of fiduciary or other duty as the court thinks fit’. This accords, in my judgment, with what is set out in the paragraphs from the judgment of Mrs Justice Cockerill relating to remedies in dishonest assistance cases. The compensation relates to the breach of duty or trust of the principal (being the trustee and/or fiduciary). For these reasons, I see no support for Mr Lewis’ case from section 212(3).

33. For the reasons set out above, I reject the strike out/SJ application relating to the claim for dishonest assistance and accordingly dismiss the application relating to that claim. By reason of the decision which I have made, there is no need to consider Part

7 issue which arises had I determined that the dishonest assistance claim did not fall within the section 212 IA 86.

<u>Costs issue</u>- who should bear the costs of the amendment application made by the Applicants, the costs of the strike out application (excluding that part which has been dealt with above)

34. The procedural background is relevant to this issue as well as the factual background which I have already set out above. The claim was issued on 18 January 2022 and no letter of claim was sent in advance. Mr Lewis asserts that this is important and could result in sanctions. However, in this case, the failure to set out the claim prior to the issue of proceedings is not really the cause of the current strike out/SJ application. A letter before action would not necessarily set out the claim in the detail required for a pleading. The claim came before the court on 28 March 2022 and directions were given for the service of Points of Defence and Points of Reply (being 9 May 2022 and 9 June 2022 respectively). A CCMC was listed for 12 October 2022. An extension of time for the service of the Points of Defence was sought and consented to by the Applicant. The Points of Defence, which were thereafter served, denied any liability on various grounds. In the Points of Defence, the claim for dishonest assistance was averred to have been insufficiently pleaded, ought to have been brought by a Part 7 and therefore should be struck out. I have dealt with above my decision on that point.

35. On 6 June 2022, at the same time as serving the Points of Defence, solicitors acting on behalf of the Respondents asserted in correspondence that the Applicants' claim was unsustainable in its entirety and stated the following, *'unless your clients discontinue the unmeritorious claim against our clients within 7 days, our clients will make an application to strike out your clients' claim in its entirety'*. By a reply dated 9 June 2022, the Applicants' solicitors wrote stating that they were in the process of considering the contents of the Points of Claim and matters raised, but that they would not be able to do so in the 7 day time limit set out by the Respondents' solicitors. They indicated they would be able to reply in 21 days. The Applicants' solicitors also sought further clarification relating to the dishonest assistance point being asserted. I pause here to observe that I can see no real reason for the position by the Respondents' solicitors of a 7 day time limit. The CCMC was listed for October

2022. Any application for a strike out/ SJ or an application to amend the Points of Claim was not going to interfere with any eventual trial date. Points of Defence had already been served. Additionally, no issue relating to limitation defences has been raised or indeed raised before me. It was accepted before me that in so far as I agreed with the Respondents in relation to the ambit of section 212 not covering a dishonest assistance claim, such a claim could still be issued pursuant to Part 7.

36. By letter dated 14 June 2022, the Respondents' solicitors replied by stating, *'we note you have focussed upon the question of scope of [s 212]..It will be obvious that this is but one ground for the application to strike out that our clients will be making shortly. Give your response, we will proceed with our clients' application, regardless of the outcome of dialogue on this discrete point'*. The Applicants replied requesting that the Respondents wait before issuing the proposed application so that the matter could be considered with counsel and revert in full. The points relating to the date of the CCMC, no limitation issue and that the Points of Reply were not due until 7 July 2022 were also made.

37. On 16 June 2022, the Respondents issued the application to strike out/SJ which is before me. It was served on the same day. The Applicants thereafter served Points of Reply on 7 July 2022 and also filed evidence in reply to the strike out/SJ application on 5 September 2022. On 16 September 2022, an application to amend the Points of Claim was issued and served. The draft amended Points of Claim was attached to that application. Directions were agreed between the parties in relation to the CCMC with those issues awaiting the outcome of the two applications, being the strike out/SJ application and the application to amend. Directions were given for evidence and the two applications were listed to be heard together, being the hearing before me. As is clear for what is set out above, before me the only two live issues were the dishonest assistance section 212 ambit and the costs issue.

38. Mr Lewis relied upon what he said was compliance with the CPR that an application to strike out/SJ must be made as soon as possible. I do not accept that this means, on the facts of this case, that a period of 7 days is a reasonable deadline to impose before issuing the strike out/SJ application. The Respondents had elected to serve their Points of Defence, the Points of Reply had as yet to be served and the

CCMC was not listed until October 2022. Clearly, the CPR requires applications to be made as soon as possible, but this does not mean that there is any justification for imposing a 7 day time limit on the facts of this case. Moreover, such times limits really serve no purpose on the facts of this case where there is no trial date, the pleadings have not closed and the CCMC is four months away.

39. After various exchanges of correspondence relating to the merits or otherwise of each side's position, by letter dated 31 March 2023, the Respondents' solicitors set out a conditional consent to the proposed amendments on the basis that (1) the Applicants pay all the costs occasioned by the amendments to the Points of Claim, and (2) the strike out/SJ application in relation to the dishonest assistance claim remained extant and that the Applicants pay the Respondents costs of the strike our/SJ application. The letter sought to set out in some detail as to why the amendments arose directly out of the strike out/SJ application which had been issued.

40. Before me Mr Lewis went through in some detail the proposed amendments in order to support his submission that the proposed amendments were a direct consequence of the application to strike out/SJ application. This is denied by Ms Julian. Mr Lewis submitted in the circumstances that the correct order for costs is the one sought in the letter dated 31 March 2023, being that the Applicants do pay the costs of the Respondent both in relation to the amendment application and in relation to the balance of the strike out/SJ application.

41. Ms Julian submits that (1) with the exception of the dishonest assistance claim which was argued before me, none of the other grounds relied upon in the strike out/SJ application would have succeeded, and (2) even if she is wrong on that, where a statement of case is found to be defective, the court would consider whether that defect might be cured by amendment, and if that were the case, then the party would be given an opportunity to amend rather than acceding to a strike out. This, she submits, is in line with established case law and in accordance with the overriding objective. Mr Lewis made no specific submission relating to this point. I agree with Ms Julian on this point, but would add that the costs of the strike out/SJ application which is not pursued by reason of an application to amend are not necessarily a

liability of the party who issued the strike out application. It remains an issue for the discretion of the court in determining the costs.

42. Ms Julian submits, also in furtherance with the overriding objective, that it must have been apparent to the Respondents, that on this type of application, a suitable amendment may well have been proposed, but that the facts demonstrate that the Respondents did not wait for the Applicants to consider the pleadings, as they had asked to do, before issuing the strike out /SJ application. I also note from what I have set out above, that the proposed amendments were served by the Applicants on 5 September 2022, being over 9 months before the hearing listed for July 2023. Even allowing for some time to consider those proposed amendments, there is no explanation as to why the position taken in the letter dated 31 March 2023 was not taken much earlier. The agreed directions for the purposes of the October 2022 CCMC expressly provided for the Respondents to file evidence in reply by 9 December 2022 and for any reply evidence from the Applicants by 20 January 2023. These directions were in relation to both the strike out /SJ application and the amendment application, but it does appear to me to be no explanation as to why it took the Respondents' solicitors until March 2023 to reach the position that the amendments would not be opposed and effectively the balance of the strike out/SJ application abandoned save for the dishonest assistance matter and the costs issue. Unnecessary time and costs were expended in the period between October 2022 and March 2023. It is clear to me that had the Respondents' solicitors considered the proposed amendments earlier, then no evidence would necessarily need to be filed. The dishonest assistance issue, was as both Counsel agreed, a legal issue and the issues relating to costs did not necessarily require much, if any evidence, to be filed.

43. Ms Julian accepts that, as she submitted, some costs should be payable by the Applicants in relation to the amendment application, being the costs of drafting of the amended Points of Defence. However, she submits that the costs of the amendment application itself should be paid by the Respondents to the Applicants because had the Respondents consented, the amendment application would have been more straightforward. She submits that after the draft amended Points of Claim had been served in September 2022, the Respondents should not have resisted them and

therefore she submits the Respondents are liable to the Applicants for the costs thereof.

44. In my judgment, the issue of the strike out/SJ application was issued prematurely. Even after the Applicants had the time to consider the issues which had been raised by the Respondents' solicitors in correspondence, they may well have not sought to amend, but equally they may well have sought to amend once they had fully considered the strike out/SJ application as they in fact did in September 2022. The issue relating to dishonest assistance was the issue which remained of the strike out/SJ application for me to determine. There was also no reason on what was before me for the delay by the Respondents in consenting to the balance of the amendment application rather than leave it as a fully contested matter up to the end of March 2023.

45. As is accepted by the Applicants' counsel, the general rule as to amendments is that the other party's costs of amendments are to be borne by the party who seeks the amendment. I cannot see on the facts of this case any reason to detract from that general rule. Accordingly, I direct that the Respondents be entitled to their cost of and occasioned by the amendments. That leaves the costs of the strike our/SJ application and the amendment application itself. In my judgment, the Respondents are entitled to their costs of the amendment application up to the date of the CCMC being 12 October 2022. By that date, the Respondents should have been able to indicate whether they consented or did not consent to the proposed amendments subject to the usual order for costs. Instead both parties filed evidence and prepared for the hearing from September 2022 until March 2023.

46. After 12 October 2022, in my judgement, the Applicants are entitled to a costs order against the Respondents in relation to the amendment application itself. That follows in my judgment from the unnecessary delay in consenting to the amendment application.

47. This leaves the costs of the strike out/SJ application. As I have set out above, Mr Lewis has taken me to the proposed amendments and is adamant in his submissions that most, if not all of them, are reactive to the strike out/SJ application.

Ms Julian is equally forceful in saying that the proposed amendments do not necessarily relate to the strike out/SJ application, but her submissions are that in reality the strike out/SJ application was bound to fail because the issues were adequately pleaded. I take into account, as I have set out above, that the application itself was issued prematurely but equally that even if an opportunity to respond had been given, that may very well not have prevented the strike out/SJ application being issued. The Applicants may well have taken the position which was espoused by Ms Julian that the strike out/SJ application was bound to fail on the basis that the pleading was adequate and therefore the amendments are not necessary.

48. In my judgment considering the unamended Points of Claim, I do not consider that the strike out/SJ would have succeeded overall. Considered carefully, it is clear from the pleading that the Respondents were aware of the case they had to meet. The proposed amendments provide some further detail in certain places, but this in itself does not necessarily mean that the strike out/SJ would have succeeded overall. However ultimately very shortly after the issue of the strike out/SJ application, the proposed amendments were served upon the Respondents. Had the position been taken prior to the CCMC listed for October 2022 that the strike out/SJ application no longer had to proceed based on the proposed amendments, then again, as with the amendment application, there would have been no need for evidence to have been filed.

49. In all those circumstances it seems to me that the proper order is one of no order for costs in relation to the strike out/SJ application relating to that part of the strike out/SJ application which was not pursued before me. The alternative to a no order for costs would have been for me to consider granting an order whereby the Respondents would have been entitled to their costs of that part of the strike out/SJ application up until October 2022 and thereafter an order for costs in favour of the Applicants. In the exercise of my discretion, the no order for costs I have directed is in my judgement more appropriate based on the factors and considerations I have set out above. I will deal with the costs of the dishonest assistance strike out/SJ application and any other issues at the hand down of this judgment.