Neutral Citation Number: [2022] EWCA Civ 1319

Case No: CA-2021-000124

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND & WALES
BUSINESS LIST (ChD)
Mr Robin Vos (sitting as a Deputy Judge of the High Court)
[2021] EWHC 2475 (Ch.)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/10/2022

Before :

LORD JUSTICE LEWISON
LADY JUSTICE ASPLIN
and
LORD JUSTICE ARNOLD

- -

Between :

PSV 1982 LIMITED	**Claimant/ Respondent**
- and -	
SEAN ANTHONY EDWARD LANGDON	**Defendant/ Appellant**

- -
- -

Adam Chichester-Clark and **Mark Baldock** (instructed by **Michelmores LLP**) for the **Appellant**
Andrew Grantham KC (instructed by **MFB Solicitors**) for the **Respondent**

Hearing date: 27 July 2022

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Approved Judgment

This judgment was handed down remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 11.00 a.m. on 12 July 2022.

Lady Justice Asplin:

1. This appeal is concerned with the proper construction of section 217 Insolvency Act 1986 ("IA 1986"). The Respondent, PSV 1982 Limited ("PSV") commenced proceedings against the Appellant, Mr Langdon, in March 2020 in respect of a judgment debt against Discovery Yachts Group Limited, ("DYGL") in the sum of £1,125,824.67 which had been assigned to it. It was alleged that Mr Langdon was personally liable for the debt pursuant to sections 216 and 217 IA 1986. By an order of Deputy Master Bowles dated 30 March 2021, it was ordered that a number of matters be tried as preliminary issues on the basis of an agreed or assumed statement of facts.

2. The trial of the preliminary issues was heard by Mr Robin Vos, sitting as a deputy High Court judge in the Business and Property Courts. He held amongst other things, that: the effect of section 217 IA 1986 is that once a liability is established in proceedings against a company a defaulting director automatically becomes responsible for that liability [46] and [61]; Mr Langdon and DYGL were not privies [79]; it would not be an abuse of process for Mr Langdon to seek to defend the proceedings against him on the basis that DYGL was not, in fact, liable on the underlying claims made against it [88] and he was not estopped by his conduct from doing so [89]; and that the liabilities were incurred when DYGL breached the contract in question and not when the contract had been entered into [101]. The neutral citation for his judgment is [2021] EWHC 2475 (Ch).

3. The grounds of appeal are: (i) in respect of the first of the preliminary issues, the judge was wrong to construe section 217 as "automatically" establishing personal liability against a company director for a debt/liability which had been established against the company in previous proceedings to which the director was neither a party nor privy; and (ii) that he was wrong to find that a company incurred a "relevant" debt or liability for the purposes of section 217(3)(a) IA 1986 at the date of the alleged breach of contract (in this case, during contravention of section 216) rather than at the date the alleged contract was entered into (in this case being prior to any contravention of section 216) when the company assumed the underlying liabilities which gave rise to the subsequent breach.

The Preliminary Issues with which the Appeal is concerned

4. It is helpful to have in mind the preliminary issues to which the grounds of appeal relate. The preliminary issue with which the first ground of appeal is concerned was in the following terms:

> "1.1 Does the judgment of Teare J of 19 December 2019 ("the Judgment") following trial of proceedings in the Commercial Court in Claim No CL 2018 – 00288 ("the Commercial Court Proceedings") between Andrew France and Discovery Yachts Group Limited ("DYGL") (and the consequential orders of Teare J of the same date and Bryan J dated 26th June 2020 ("the Consequential Orders")) – notwithstanding that the Defendant was not a party to the Commercial Court Proceedings – and/or the acknowledgment of the debt in the Statement of Affairs signed by the Defendant on 10th February 2020 ("the Statement

> of Affairs") establish the alleged debt ("the Debt") for the purposes of Sections 216 and 217 of the Insolvency Act 1986 ("IA 1986") within these proceedings on any of the following grounds: "
>
> 1.1.1 That the Judgment and Consequential Orders are a matter of public record and therefore of themselves sufficient to establish the Debt;. . ."

5. The second ground of appeal relates to preliminary issue 1.3 which is as follows:

> "1.3 Whether the Defendant is personally liable under s.217 IA1986 for the debt alleged to have been incurred to the claimants in the Commercial Court Proceedings by DYGL, if and on the footing that in September 2017 (ie prior to the date of the liquidation of the Liquidating Company and of any contravention of s.216 IA 1986) DYGL entered into an agreement in respect of repairs to the Yacht thereby incurring the liability (as the Defendant characterises it) or obligation (as the Claimant characterises it) which gave rise to the alleged debt. "

The Agreed Facts

6. An agreed or assumed statement of facts was prepared for the purposes of the hearing of the preliminary issues and both that hearing and the appeal before us proceeded on the basis of those facts. It was expressly stated that the statement of facts was agreed solely for the determination of the preliminary issues and that neither party should dispute them for those purposes but that they were free to do so in connection with any other issues which might arise in the proceedings.

7. In summary and where relevant, the agreed facts were as follows. In October 2015, Mr Andrew France entered into a contract with Discovery Yachts Sales Limited ('DYSL') for the purchase of a yacht named "Elusive". At that stage, DYSL was owned by a Mr John Charnley. DYSL warranted that "Elusive" was free from defects in materials and workmanship under normal use and maintenance for a period of 12 months. Discovery Yachts Limited ('DYL'), which was also owned by Mr Charnley, built yachts and supplied them to DYSL for onward sale to DYSL's customers. In August 2016, Mr Langdon became a director of DYL and DYSL.

8. "Elusive" was delivered to Mr France in January 2017. He subsequently complained of a number of alleged defects.

9. In early April 2017, DYGL, known at that time as Tradewinds Marine Limited, purchased, amongst other things, the shares in DYSL and the business and assets of DYL. At that stage, Mr Langdon was DYGL's majority shareholder and by September 2017, he was also one of three directors, describing himself as managing director. He resigned as a director of DYL on 18 April 2017.

10. In September 2017, DYGL entered into the alleged "September Agreement" referred to in preliminary issue 1.3 and at [12] below.

11. DYL was placed into insolvent liquidation on 12 October 2017. "Discovery Yachts" became a prohibited name for the purposes of section 216(2) IA 1986 and Mr Langdon was in breach of section 216 IA 1986. That section prohibits a person who has been a director of a company which has gone into insolvent liquidation from being involved in the management of a company with a similar name. Mr Langdon was unaware that he could or might be made liable for the debts of the Discovery Yachts group companies if they continued to trade under the Discovery Yachts name after the liquidation of DYL. He did not make an application or obtain leave from the court or comply with the requirements of Rule 22.4 and 22.6 of the Insolvency Rules 2016 ("IR 2016") to continue to use the Discovery Yachts name.

12. In the meantime, in April 2018, Mr France and his company Elusive Yachting Ltd brought proceedings in the Commercial Court against DYGL and DYSL for damages for breach of contract, interest and costs (the "Commercial Court Proceedings'). In addition to a claim for breach of warranty, it was alleged against DYGL that in September 2017, one of its employees had given a contractually enforceable undertaking to procure that various repairs to "Elusive", set out in a "September Schedule", would be completed and that it had failed to do so in breach of that undertaking (the "September Agreement"). Mr Langdon was not joined as a party to those proceedings but he did sign a Defence on behalf of DYSL in his stated capacity as CEO and provide a witness statement.

13. On 5 December 2019, DYGL's board, chaired by Mr Langdon, resolved to place DYGL into administration and an administrator was appointed on 19 December 2019. It is now in insolvent liquidation.

14. DYGL and DYSL were not represented at the trial in the Commercial Court Proceedings nor did they defend the claim. Teare J lifted the stay of the claim imposed by the statutory moratorium triggered by the notice of intention to appoint the administrator and struck out the defence. However, he did not enter judgment in default but proceeded with the trial hearing witness evidence on behalf of the claimants and reviewing the documentary evidence.

15. Teare J handed down judgment on 19 December 2019: [2019] EWHC 3552 (Comm)). He found that DYGL had in September 2017 agreed to assume liability for ensuring that various repairs to "Elusive" would be completed and that DYGL had acted in breach of that agreement in January 2018.

16. By an order also dated 19 December 2019, it was ordered, adjudged declared and directed, amongst other things, that judgment be entered against DYGL in the sum of £262,957 together with interest up to 2 January 2020 of £22,867.67 and interest thereafter at 8%; DYGL was required to indemnify Mr France in respect of the reasonable costs of certain further repairs to Elusive; and DYGL and DYSL were ordered to pay the claimants' costs, to be assessed on the indemnity basis if not agreed, with a payment on account of £283,000. By a consent order made by Bryan J and dated 26 June 2020, DYGL and DYSL, which were both in liquidation by that time, agreed to pay £575,000 in relation to the claimants' costs of the Commercial Court Proceedings which included £283,000 they had already been ordered to pay on account. These orders are referred to together in the preliminary issues as the Consequential Orders.

17. At the request of DYGL's administrator, Mr Langdon signed a statement of affairs acknowledging a liability to Mr France and Elusive Yachting Limited of £568,824 (the judgment debt plus interest and the payment on account of costs).

18. On 18 March 2020, Mr France and Elusive Yachting Ltd's claims were assigned to PSV.

19. As I have already mentioned, in these proceedings, PSV seeks to recover £1,125,824 from Mr Langdon, on the basis that he is personally responsible for DYGL's debts and liabilities as a result of sections 216 and 217 IA 1986. That sum is made up of the judgment debt against DYGL of £262,957 plus interest of £22,867.67, the estimated costs of further repairs of £240,000 and costs which at the time the claim was issued, were estimated to be £600,000.

The Decision below in more detail

20. Mr Langdon accepted before the judge that from 12 October 2017, he was in breach of section 216 IA 1986 because: (i) he was a director of DYL until 18 April 2017; (ii) DYL entered into insolvent liquidation on 12 October 2017; (iii) at that time, he was a director of DYGL; (iv) "Discovery Yachts" was a prohibited name within the meaning of section 216(2) IA 1986; and (v) he did not obtain permission from the court to act as a director of DYGL following the entry into liquidation of DYL, and none of the exceptions in Rule 22 of IR 2016 apply ([32]).

21. It was also accepted that the debts and liabilities of a company for which a person who is in breach of section 216 is personally responsible are only those debts and liabilities which are incurred whilst there is a contravention of section 216 IA 1986: *ESS Production Limited v Sully* [2005] BCC 435, [2005] EWCA Civ 554 per Arden LJ at [75]. Hence the need to determine whether the "relevant" debt or liability was incurred in September 2017 when the September Agreement was made or in January 2018 when the breach allegedly occurred ([34] – [35]).

22. As I have already mentioned, the judge held that the effect of section 217 IA 1986 is that once a liability is established in proceedings against the company the defaulting director automatically becomes responsible for the liability. There is no need for the liability to be established in separate proceedings against the director ([46]). The judge rejected Mr Chichester-Clark's submission on behalf of Mr Langdon that it would be unjust for someone to be bound by a judgment in proceedings in which he had not been heard, or able to mount a defence; and that the language of s 217 IA 1986 was not sufficiently clear to indicate this is what Parliament must have intended.

23. He concluded that:

    i) giving the phrase "the relevant debts of a company" its ordinary and natural meaning it was difficult to see why that would not encompass a liability which had been established by proceedings against the company ([48]);

    ii) the underlying purpose of the legislation also supported that interpretation. Both parties had agreed that the purpose of the legislation is to protect creditors of the new company and, to that end, to penalise defaulting directors. Consistently with this, it would be surprising if Parliament had intended that a

creditor who had established a liability in proceedings against a company should have to prove that liability all over again, and incur afresh the costs of so doing, in order to recover the liability from the defaulting director ([49] – [51]);

iii) In principle, it is open to a creditor to join a director as a party to any proceedings against the company but the creditor may be unaware that there has been a breach of section 216 so that the director is jointly and severally liable with the company ([52]); but it was equally open to the director to apply to be joined as a party to put his case if the possibility of section 217 personal liability exists and it is also relevant that Parliament has provided mechanisms by which directors may protect themselves by application to the court. Both considerations support the interpretation of section 217 as creating an automatic liability ([54]);

iv) The potential injustice to a director in being fixed with a liability established in proceedings to which they were not a party was an important factor to take into account when determining the true meaning of the legislation ([57]). However, as far as injustice is concerned, a director is very different from a third party; and the director will necessarily have committed a criminal offence under section 216 IA 1986 ([58]);

v) Given all of the factors, Parliament intended any risk to lie with the director rather than the creditor ([61]); and

vi) There is no doubt about the penalty imposed ([62]).

24. Thus, whilst observing that "both possible interpretations have their drawbacks", the judge concluded that the approach adopted by PSV was less unsatisfactory and was much more closely aligned with the purpose of the legislation ([64]).

25. As to preliminary issue 1.3, the Judge held that in this case, the "relevant debts" of DYGL were "incurred" at the time the September Agreement was breached, in October 2018, such that DYGL's relevant debts and liabilities arose at a time when Mr Langdon was involved in its management and was in breach of section 216 ([91] – [103]). He rejected Mr Chichester-Clark's argument that DYGL's liability to pay damages as a result of the breach of the September Agreement was a secondary obligation arising under the agreement, and was therefore "incurred" at the time the agreement was entered into ([101]). The judge held that such a construction was more consistent with the purpose of the legislation ([102]). He recognised that this approach may give rise to an anomaly if a contract is entered into when there is a contravention of section 216, but there is a breach of the contract at a time when there is no longer any contravention of section 216 (e.g. because the company has changed its name to one which is not prohibited), the third party would have no recourse against the director. He concluded, nonetheless, that the interpretation proposed on behalf of PSV was less unsatisfactory than that proposed on behalf of Mr Langdon and therefore, it should not override the natural and ordinary meaning of the words used by the statute ([103]).

The Relevant Sections

26. Before turning to the grounds of appeal and the issues with which we are concerned, it is important to have sections 216 and 217 IA 1986 in mind. Where relevant, they are in the following form:

> "**216 Restriction on re-use of company names**
>
> (1) This section applies to a person where a company ("the liquidating company") has gone into insolvent liquidation on or after the appointed day and he was a director or shadow director of the company at any time in the period of 12 months ending with the day before it went into liquidation.
>
> (2) For the purposes of this section, a name is a prohibited name in relation to such a person if—
>
> (a) it is a name by which the liquidating company was known at any time in that period of 12 months, or
>
> (b) it is a name which is so similar to a name falling within paragraph (a) as to suggest an association with that company.
>
> (3) Except with leave of the court or in such circumstances as may be prescribed, a person to whom this section applies shall not at any time in the period of 5 years beginning with the day on which the liquidating company went into liquidation—
>
> (a) be a director of any other company that is known by a prohibited name, or
>
> (b) in any way, whether directly or indirectly, be concerned or take part in the promotion, formation or management of any such company, or
>
> (c) in any way, whether directly or indirectly, be concerned or take part in the carrying on of a business carried on (otherwise than by a company) under a prohibited name.
>
> (4) If a person acts in contravention of this section, he is liable to imprisonment or a fine, or both.
>
> . . .
>
> **217 Personal liability for debts, following contravention of s. 216**
>
> (1) A person is personally responsible for all the relevant debts of a company if at any time—
>
> (a) in contravention of section 216, he is involved in the management of the company,
>
> . . .

> (2) Where a person is personally responsible under this section for the relevant debts of a company, he is jointly and severally liable in respect of those debts with the company and any other person who, whether under this section or otherwise, is so liable.
>
> (3) For the purposes of this section the relevant debts of a company are—
>
> (a) in relation to a person who is personally responsible under paragraph (a) of subsection (1), such debts and other liabilities of the company as are incurred at a time when that person was involved in the management of the company, and
>
> . . .
>
> (4) For the purposes of this section, a person is involved in the management of a company if he is a director of the company or if he is concerned, whether directly or indirectly, or takes part, in the management of the company.
>
> . . .
>
> (6) In this section "company" includes a company which may be wound up under Part V."

Statutory interpretation

27. It is also important to bear in mind the principles which apply to the interpretation of section 2017 IA 1986. They are not in dispute. The starting point is that the language of an enactment is to be taken to bear its ordinary meaning when read in the general context of the Act as a whole: *R v Secretary of State for the Environment, Transport and the Regions, Ex p Spath Holme Ltd* [2001] 2 AC 349, at 396, recently endorsed by the Supreme Court in *R (on the application of the Project for the Registration Children as British Citizens) v Secretary of State for the Home Department* [2022] UKSC 3 at [29], [31]. The Supreme Court held as follows:

> "29. The courts in conducting statutory interpretation are "seeking the meaning of the words which Parliament used": *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591, 613 per Lord Reid. More recently, Lord Nicholls of Birkenhead stated: "Statutory interpretation is an exercise which requires the court to identify the meaning borne by the words in question in the particular context." (*R v Secretary of State for the Environment, Transport and the Regions, Ex p Spath Holme Ltd* [2001] AC 349, 396). Words and passages in a statute derive their meaning from their context. A phrase or passage must be read in the context of the section as a whole and in the wider context of a relevant group of sections. Other provisions in a statute and the statute as a whole may provide the relevant context. They are

the words which Parliament has chosen to enact as an expression of the purpose of the legislation and are therefore the primary source by which meaning is ascertained. There is an important constitutional reason for having regard primarily to the statutory context as Lord Nicholls explained in *Spath Holme*, p 397: "Citizens, with the assistance of their advisers, are intended to be able to understand parliamentary enactments, so that they can regulate their conduct accordingly. They should be able to rely upon what they read in an Act of Parliament.

30. External aids to interpretation therefore must play a secondary role. Explanatory notes, prepared under the authority of Parliament, may cast light on the meaning of particular statutory provisions. Other sources, such as Law Commission reports, reports of Royal Commissions and advisory committees, and Government White Papers may disclose the background to a statute and assist the court to identify not only the mischief which it addresses but also the purpose of the legislation, thereby assisting a purposive interpretation of a particular statutory provision. The context disclosed by such materials is relevant to assist the court to ascertain the meaning of the statute, whether or not there is ambiguity and uncertainty, and indeed may reveal ambiguity or uncertainty*: Bennion, Bailey and Norbury on Statutory Interpretation*, 8th ed (2020), para 11.2. But none of these external aids displace the meanings conveyed by the words of a statute that, after consideration of that context, are clear and unambiguous and which do not produce absurdity. . . .

31. Statutory interpretation involves an objective assessment of the meaning which a reasonable legislature as a body would be seeking to convey in using the statutory words which are being considered. Lord Nicholls, again in *Spath Holme* [2001] AC 349, 396, in an important passage stated:

> "The task of the court is often said to be to ascertain the intention of Parliament expressed in the language under consideration. This is correct and may be helpful, so long as it is remembered that the 'intention of Parliament' is an objective concept, not subjective. The phrase is a shorthand reference to the intention which the court reasonably imputes to Parliament in respect of the language used. It is not the subjective intention of the minister or other persons who promoted the legislation. Nor is it the subjective intention of the draftsman, or of individual members or even of a majority of individual members of either House. … Thus, when courts say that such-and-such a meaning 'cannot be what Parliament intended', they are saying

> only that the words under consideration cannot reasonably be taken as used by Parliament with that meaning."

28. Context is used in its widest sense and includes other provisions in the same statute, its preamble and the mischief which the Court can discern the stated to was intended to remedy: *Attorney-General v Prince of Hanover* [1957] 1 WLR 436, 461. In determining the mischief to which the provision is directed, the court may refer to a heading. Regard may also be had to the consequences of alternative proposed interpretations where there is ambiguity in a provision and a proposed literal meaning may be tested against its consequences so that absurd results are avoided: *Project Blue Ltd v Revenue and Customs Commissioners* [2018] UKSC 30, [2018] 1 WLR 3169 at [31], [42] and [110].

29. Further, the modern approach to statutory construction is to have regard to the purpose of a particular provision and interpret its language as far as possible in a way which best gives effect to that purpose: *Hurstwood Properties (A) Ltd v Rossendale BC* [2021] UKSC 16, [2021] 2 WLR 1125 at [10] and *Uber BV v Aslam* [2021] UKSC 5, [2021] 4 All ER 209 at [70].

30. It is also an important principle of statutory construction that a person should not be penalised except under clear law: *ESS Production Ltd (in admin) v Sully* per Arden LJ at [71] and [78]. In this regard, Arden LJ quoted a passage from the judgment of Simon Brown LJ in *Ad Valorem Factors Ltd v Ricketts* [2004] BCC 164 at para 30, as follows:

> "I turn to the other aspect of the district judge's judgment about which I am uneasy, his view that the legislative requirement that an association be merely 'suggested' indicates 'a very low threshold'. In construing this provision it is important to bear in mind the draconian consequences, both criminal and civil, which can all too easily flow from finding a company's name to be a prohibited name. As stated in s.271 of Bennion on *Statutory Interpretation* (4th ed., Butterworths) at p.705, the court should strive to avoid adopting a construction which penalises someone where the legislator's intention to do so is doubtful, or penalises him in a way which is not made clear. With this well-established principle of construction in mind, I would construe the phrase 'as to suggest' in s.216(2)(b) rather more stringently than indicated by the judgment below. To my mind the similarity between the two names must be such as to give rise to a probability that members of the public, comparing the names in the relevant context, will associate the two companies with each other, whether as successor companies or, as here, as part of the same group."

Does a personal liability arise against a company director under section 217 where a debt/liability is established against the company in previous proceedings?

31. In summary, Mr Chichester-Clark who appeared with Mr Baldock for Mr Langdon, submits that section 217 would have to contain clear words to justify the conclusion

that Parliament intended to deprive a director or former director of his right to defend himself from being held personally liable for a company debt which he disputes on substantial grounds, even where that liability has been established against the company. He says that the director is entitled to begin with a clean sheet and that the creditor must prove the debt against him. In this regard, he relies upon a passage in the judgment of Megarry V-C in *Gleeson v Wippell* [1977] 1 WLR 510 at 516B as follows:

> "Any contention which leads to the conclusion that a person is liable to be condemned unheard is plainly open to the gravest of suspicions. A defendant ought to be able to put his own defence in his own way, and to call his own evidence. He ought not to be concluded by the failure of the defence and evidence adduced by another defendant in other proceeding unless his standing in those other proceedings justifies the conclusion that a decision against the defendant in them ought fairly and truly to be said to be in substance a decision against him."

That was a case in which a defendant sought to strike out proceedings for copyright infringement on the basis that it had already been held in earlier proceedings against a different defendant that the shirt in question did not infringe the claimant's copyright and accordingly, it was frivolous, vexatious and an abuse of process to seek to litigate all over again what had already been decided against her. Megarry V-C declined to strike out the proceedings.

32. Mr Chichester-Clark says that: there are no clear words in section 217; it is not the purpose of the legislation to impose what he describes as a penalty; and if it were, the effect would be unjust to directors. Accordingly, the section should not be construed to deprive the director of the ability to dispute the company debt or liability because it has been proved in proceedings against the company to which he was not a party and was not privy. The director should be entitled to defend himself.

33. In oral submissions, Mr Chichester-Clark also relied upon *Ward v Savill* [2021] EWCA Civ 1378 in which Sir Julian Flaux CHC held that the appellants could not rely upon a declaratory judgment granted to them in earlier proceedings to which the respondent was not a party, to found claims against her in further proceedings. He held that it was clear that the declarations which had been made in the first proceedings were only made against the original defendants and not against the world ([76] and [77]).

34. The Chancellor also considered the rule in *Hollington v Hewthorn* which Mr Chichester- Clark says is relevant here. In that case, the plaintiff sought to rely in civil proceedings upon the defendant driver's criminal conviction for careless driving as evidence of his negligence. The Court of Appeal held that evidence of the conviction was inadmissible. The Chancellor stated at [33] of his judgment in the *Ward* case that although that conclusion was reversed by section 11 of the Civil Evidence Act 1968, the general statement of principle as to the effect of a judgment on someone who is not a party to it remains good law. He cited a passage from the judgment of Goddard LJ at [34] as follows:

> "A judgment obtained by A against B ought not to be evidence against C, for, in the words of the Chief Justice in the *Duchess of Kingston's Case* (1776) 2 Sm LC 13th ed. 644, "it would be unjust to bind any person who could not be admitted to make a defence, or to examine witnesses or to appeal from a judgment he might think erroneous: and therefore … the judgment of the court upon facts found, although evidence against the parties, and all claiming under them, are not, in general, to be used to the prejudice of strangers." This is true, not only of convictions, but also of judgments in civil actions. If given between the same parties they are conclusive, but not against anyone who was not a party. If the judgment is not conclusive we have already given our reasons for holding that it ought not be admitted as some evidence of a fact which must have been found owing mainly to the impossibility of determining what weight should be given to it without retrying the former case. A judgment, however, is conclusive as against all persons of the existence of the state of things which it actually affects when the existence of that state is a fact in issue. Thus, if A sues B, alleging that owing to B's negligence he has been held liable to pay *xl.* to C, the judgment obtained by C is conclusive as to the amount of damages that A has had to pay C, but it is not evidence that B was negligent: see *Green v. New River Co* (1972) 4 Term Rep. 589, and B can show, if he can, that the amount recovered was not the true measure of damage."

35. The Chancellor considered the scope of the rule in *Hollington v Hewthorn* further at [81] as follows:

> ". . . It is quite clear from that passage that the appellant's purported distinction between factual findings in a judgment which are not binding on a stranger to it and the legal effect of a judgment, which the appellants contend is binding on a stranger, is not a distinction recognised by the rule. The citation with approval form the *Duchess of Kingston's* case refers to "the judgment of the court upon facts found" distinguishing between the facts and the judgment and, as Mr Mather correctly pointed out, the circumstances of the *Duchess of Kingston's* case itself demonstrate that the rule is not limited to findings of fact but extends to the legal consequences of those findings, as determined by a court its judgment. "

Mr Chichester-Clark submits, therefore, that the judge's interpretation of section 217 is wrong because it would contravene the *Hollington v Hewthorn* principle.

36. In effect, therefore, Mr Chichester-Clark submits that section 217 should be construed to mean that despite the existence of a judgment debt against a company which was regularly obtained, where the director disputes the debt or liability of the company in question on substantial grounds, if the director was not party to the proceedings against the company, the creditor must commence separate further proceedings in

order to establish the debt as against the director in order to be able to avail itself of section 217.

The Proper interpretation of section 217(1)

37. In my judgment, the natural and ordinary meaning of the language used in section 217(1) is quite clear. A person is personally responsible for the relevant debts of a company if the remainder of the requirements in section 217 are met and the person is jointly and severally liable for those debts with the company and any other person who is liable for them. That meaning is consistent with the context in which the provisions arise, the mischief they are intended to address and their purpose.

38. The context in which sections 216 and 217 arise is clear. As Mr Grantham KC, who appeared on behalf of PSV pointed out, they are in that part of IA 1986 concerned with wrongful conduct on the part of directors and officers of insolvent companies. Chapter X, in which they appear is headed "Malpractice before and during liquidation; Penalisation of Companies and Company Officers; Investigations and Prosecutions" and the sub-heading before section 212 reads "Penalisation of Directors and Officers". Furthermore, section 216 makes it a criminal offence, punishable by imprisonment, a fine or both to use a prohibited name.

39. In his written submissions, Mr Chichester-Clark referred to the recommendations in Chapter 45 of the Report of the Review Committee on Insolvency Law and Practice (1982) (Cmnd 8558) (the Cork Report) and to paragraph 1813 of the Report as a means of identifying the mischief which the provisions were intended to address and therefore, the purpose of the sections. In fact, those proposals were not adopted. As Arden LJ explained at [3] and [4] of the *Sully* case, the background for the legislation was a report of the Steering Group of the Department of Trade's independent Company Law Review, entitled "*Modern Company Law for a Competitive Economy – Final Report*" of 2001.

40. The mischief to which the sections are directed was described by Lewison J (as he then was) in *First Independent Factors & Finance Ltd v Mountford* [2008] EWHC 835 (Ch), [2008] BCC 598 in the following terms:

> "17. The principal target of ss.216 and 217 is what is often called the "phoenix syndrome". The "phoenix" problem results from the continuance of the activities of a failed company by those responsible for the failure, using the vehicle of a new company. The new company often trading under the same or a similar name, uses the old company assets, often acquired at an undervalue, and exploits its goodwill and business opportunities. Meanwhile, the creditors of the old company are left to prove their debt against a valueless, shell and the management conceal their previous failure from the public. The phoenix company rises out of the ashes of the defunct company. However, although the "phoenix syndrome" is the principal target of the sections, the words of the sections encompass factual situations that cannot be described in those terms. The court should not adopt a strained interpretation of the words of the statute simply in order to confine its operation

> to true cases of phoenix syndrome: *Ricketts v Ad Valorem Factors Ltd* [2003] EWCA iv 1706· [2004] B.C.C. 164. As Mummery L.J. made clear in that case (at [18]), *Ad Valorem Factors Ltd v Ricketts* itself was not a phoenix case, yet the director was liable. Moreover, it is difficult to distinguish between good and bad phoenix situations and between honest and unscrupulous traders; and the sections do not attempt to do so: *Thorne v Silverleaf* [1994] B.C.C. 109; *ESS Production Ltd (in admin.) v Sully* [2005] EWCA Civ 554; [2005] B.C.C. 435. However, neither section should be construed to include transactions which are not within those sections on their fair interpretation. Moreover, since s.216(3) refers expressly to "such circumstances as may be prescribed" the sections should be construed together with the rules so as to produce a rational and coherent scheme: *ESS Production Ltd v Sully."*

Further, as His Honour Judge Purle QC put it in *HM Revenue and Customs v Yousef* [2008] BCC 805 at [33], section 217 "is concerned solely with protecting creditors and widening the range of people from whom recovery can be sought."

41. The purpose of section 217, therefore, is to protect creditors in the circumstances which Lewison J described and to widen the pool of people from whom the creditor may recover its debt. A director who contravenes section 216, in addition to the criminal penalty contained in that section, becomes personally responsible for the company's debts and liabilities if they are incurred whilst there is a contravention of section 216. It seems to me that the words are quite clear and no question of a doubtful penalty arises.

42. It also seems to me that no question of binding a stranger by a judgment to which he was not a party arises and the rule in *Hollington v Hewthorn* as explained in *Ward v Savill* has no application. The section itself provides that the director (in this case) becomes liable for the relevant debts of the company. In this case, there is no dispute that the judgment in the Commercial Court Proceedings and the Consequential Orders were binding as against DYGL. The only question is how to determine what that relevant debt is for the purposes of enforcing the remedy provided by sections 217(1) and (2) against Mr Langdon. In this case, Teare J's order dated 19 December 2019 provided that judgment had been entered against DYGL for certain sums and that it was liable to indemnify the first claimant in respect of reasonable costs. The amount of those costs was the subject of a subsequent consent order. The Consequential Orders create the judgment debt against DYGL. They are the source of that debt. They speak for themselves. It is explained at para 43-02 of *Phipson on Evidence* (19th ed) that:

> "Judgments being public transaction of a solemn nature are presumed to be faithfully recorded. Every judgment is, therefore, conclusive evidence for or against all persons (whether parties, privies or strangers) of its own existence, date and legal effect, as distinguished from the accuracy of the decision rendered. In other words, the law attributes unerring verity to the substantive, as opposed to the judicial portions of the record."

There is no need to look to Teare J's findings of fact or reasoning against DYGL in order to establish DYGL's liability. Nor is one concerned with the legal consequences of those findings. Until they are set aside whether by appeal or by other procedural means, the Consequential Orders are proof of the debt. It is no surprise that this is the way in which the matter was pleaded against Mr Langdon.

43. This is consistent with *Green v New River* (1792) 4 TR 590, 100 ER 1192 which was relied upon by Goddard LJ in *Hollington v Hewthorn* in the passage set out at [34] above. That was an action for damage to a horse allegedly caused by a burst pipe belonging to the defendant water company, owing to the company's negligence. The jury awarded the plaintiff £100 damages. The water company then sued its employee. In those proceedings it was entitled to rely upon the verdict of the jury in the previous case as to the amount for which it was held liable but not that there had been a finding of negligence in the previous action.

44. Furthermore, in this case, Teare J's order is sufficient not only to establish the amount of DYGL's debt but also that the debt is a "relevant" debt for the purposes of section 217(3). The order was made on 19 December 2019 when Mr Langdon was a director of DYGL. Accordingly, the requirements of section 217(3)(a) are met. Even if that were not the case, assuming that the judge was right in relation to when the debt/liability was incurred for the purposes of section 217(3)(a) IA 1986, the agreed facts contain the elements necessary to satisfy the "relevant" debt test.

45. Does this interpretation of section 217, nevertheless, produce a result which Parliament cannot have intended because directors and others who might fall within the section would subject to injustice? In my judgment that is not the result here. The position of the director who will have committed a criminal offence under section 216(4) must be weighed against the creditor who has suffered as a result of his conduct. In those circumstances it is hard to see that it is contrary to what Parliament must have intended that the creditor should, if possible, be saved the expense and time of further proceedings against the director to establish the company's debt. In any event, the director retains numerous protections: (i) in many cases the director will have been involved with the company at the time that when the debt or liability was incurred and will have knowledge of the factual background and the opportunity to participate in the action against the company; (ii) a person who is not a party but who is directly affected by a judgment or order may apply to have it set aside or varied: CPR r40.9 or in certain circumstances, might seek to appeal the judgment; and (iii) a director could avoid the consequences of the section altogether, either by making an application for permission to act in circumstances which would otherwise be prohibited under section 216 under Rule 22 of the Insolvency (England and Wales) Rules 2016 or by resigning as a director.

46. Mr Grantham conceded that if we were concerned with a debt based upon an invoice admitted to proof by the liquidator of the company, in reality a creditor would be unlikely to be able to sue the company on the invoice in order to obtain a judgment because of the statutory moratorium on proceedings. In those circumstances, if the director disputes the company's debt, it might well be necessary for the creditor to sue the director in order to be able to determine what the company's debt was and enforce his remedy under section 217. It was also accepted that in the case of an invoice, the director would not be able to challenge the admission to proof and the value placed on the liability by the liquidator unless he was a shareholder or creditor of the company,

other than in his capacity as the potential target under section 217. We are not concerned with such circumstances here.

47. For all the reasons set out above, I would dismiss the appeal on this ground.

When is a relevant debt/liability incurred for the purposes of section 217(3)(a)?

48. In my judgment, the judge was right to decide that in the case of a breach of contract, the relevant debt/liability is incurred when the contract is breached rather than when it is entered into. In fact, in this case, the underlying liability was subsumed in the judgment debt contained in the Consequential Orders and therefore, there can be no doubt but that it was incurred at a relevant time for the purposes of section 217(3)(a) IA 1986. Even if that were not the case in relation to the damages for breach of the September Agreement, it holds good in relation to the costs and interest which only arose at the time the Consequential Orders were made.

49. If I am wrong about the damages element contained in the Consequential Orders, it is necessary to consider whether that liability arose in September 2017 when the September Agreement was entered into or when it was allegedly breached in January 2018. If the liability arose at the earlier date, there was no "relevant debt" for the purposes of section 217(3)(a).

50. Mr Chichester-Clark submits that the liability to pay damages derives from the contract itself and is a secondary obligation which exists from the start. He accepts that a "liability" means "a liability to pay money or money's worth" (Rule 14(6) IR 1986) but points to the definition of debt or liability in Rule 14(5) which includes debts or liabilities, which amongst other things are "present or future . . . certain or contingent . . .". He says, therefore, that "relevant debts" in section 217(3)(a) should be construed to include contingent liabilities such as a contingent liability to pay damages for breach of contract which he says arises when the contract is entered into.

51. Mr Chichester-Clark relied upon the exposition of primary and secondary obligations in the speech of Lord Diplock *in Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827 at 848H. In particular, Lord Diplock stated that:

> "Leaving aside those comparatively rare cases in which the court is able to enforce a primary oblation by decreeing specific performance of it, breaches of primary obligations give rise to substituted or secondary obligations on the part of the party in default, and, in some cases, may entitle the other party to be relieved form further performance of his own primary obligations. These secondary obligations of the contract breaker and any concomitant relief of the other party from his own primary obligation also arise by implication of law - . . . . The contract, however, is just as much the source of secondary obligations as it is of primary obligations . . .
>
> Every failure to perform a primary obligation is a breach of contract. The secondary obligations on the part of the contract breaker to which it gives rise by implication of the common

> law is to pay monetary compensation to the other party for the loss sustained as a consequences of the breach . . ."

52. In my judgment, Mr Chichester-Clark's interpretation of section 217(3) cannot be correct. As Lord Diplock explained in *Photo Production*, the contract is the source of the secondary obligation on the part of a contract breaker to pay monetary compensation for the loss sustained as a consequence of the breach. That obligation to pay compensation arises, however, on the breach. Rule 14(6) IR 2016 makes clear that a liability is to pay money or money's worth. At the date of the September Agreement, the primary obligation was to carry out repairs to the "Elusive". There was no obligation to pay money or money's worth. A liability to pay money only arose on the alleged breach in January 2018 and it was incurred at that stage. It seems to me that it would be highly artificial to say that that liability was contingent from the very start when the September Agreement was executed and that section 217(3)(a) should be interpreted to mean that the liability was incurred when the contract was entered into.

53. It is said that this interpretation of section 217(3)(a) is contrary to the reasoning in *Re Millwall Football Club and Athletic Co (1985) plc* [1999] BCC 455. That was a case in which the joint supervisors of a company voluntary arrangement sought directions as to whether a creditor was bound by the terms of a CVA. The administrators of the club had dismissed its employees, including its chief executive and secretary. He had a contract of employment for a term of ten years. The contract having been terminated by a notice dated 10 February 1997, he notified the administrators of his claim for £263,130 made up of lost salary, pension, car and medical insurance. A proposal was made for interlinked CVAs of the relevant companies. Under the CVAs, certain creditors were to be paid in full whilst "moratorium creditors" would rank for a dividend. A moratorium debt was defined as having been incurred before 30 January 1998 and included future and contingent liabilities incurred before that date. Amongst other things, a question arose as to whether the chief executive was a moratorium creditor.

54. Rimer J held that the chief executive's damages claim was based on an obligation of which the source was his employment contract which was in existence on 30 January 1997 and was destined to give rise to his damages claim. The liability which arose in February 1997 could properly be characterised , as at 30 January, as a future, prospective or contingent liability within the meaning of moratorium debt. It seems to me that the decision turns of the definition of "moratorium debt" and does not assist us in the interpretation of section 217(3).

55. It follows that I agree with the judge's conclusion at [102] of the judgment that it is more consistent with the purposes of the legislation that section 217(3)(a) should be interpreted to mean that the debt or liability is incurred at the date of breach of contract. As the judge put it, one of the risks with phoenix companies is that the new company will be managed in a way which results in it failing to honour its obligations. It must, therefore, have been the intention of Parliament to provide the remedy under section 217 where there is a breach of contract at a time when there is a contravention of section 216 even if there was no contravention at the time the contract was entered into.

56. Furthermore, as Mr Grantham pointed out, section 217(2) which provides that the director is jointly and severally liable with the company and any other person who is liable for the debt, would make no sense if section 217(3) must be construed so that it may render a director potentially liable when the company is not. That would be perverse. On the contrary, section 217(3) should be interpreted to apply to liabilities in relation to which a claim could be made against the company.

57. Although the anomaly to which the judge refers at [103] arises in the reverse situation, it seems to me, as it did to him that Mr Chichester-Clark's interpretation is more unsatisfactory.

58. I would dismiss this ground of appeal and the appeal as a whole for the reasons set out above.

Lord Justice Arnold:

59. I agree.

Lord Justice Lewison:

60. I also agree.