



Neutral Citation Number: [2019] EWHC 1298 (Ch)

Case No: CR-2015-007093

**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**  
**INSOLVENCY AND COMPANIES LIST (ChD)**

Rolls Building  
Royal Courts of Justice  
7 Rolls Buildings  
London EC4A 1NL

Date: 23<sup>rd</sup> May 2019

**Before :**

**INSOLVENCY AND COMPANIES COURT JUDGE MULLEN**

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**IN THE MATTER OF PANTILES INVESTMENTS LIMITED (IN LIQUIDATION)**  
**AND IN THE MATTER OF THE INSOLVENCY ACT 1986**

**Between :**

**(1) PANTILES INVESTMENTS LIMITED** **Applicants**  
**(IN LIQUIDATION)**  
**(2) JAMES ASHLEY DOWERS**

**- and -**

**SABINE CHRISTEL KARINA WINCKLER** **Respondent**

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**Mr Joseph Curl** (instructed by **Devonshires Solicitors LLP**) for the **Applicants**  
**Mr Oliver Ingham** (instructed by **FidLaw LLP**) for the **Respondent**

Hearing dates: 19<sup>th</sup> to 20<sup>th</sup> March 2019  
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**Approved Judgment**

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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**INSOLVENCY AND COMPANIES COURT**  
**JUDGE MULLEN**

## ICC JUDGE MULLEN :

### Introduction

1. This application is brought by Mr James Dowers, the liquidator of Pantiles Investments Limited ('Pantiles' or 'the Company'), against its former director, Ms Sabine Winckler.
2. Pantiles was incorporated on 14<sup>th</sup> October 2009 and its sole *de jure* director and shareholder was at all times Ms Winckler. It did not engage in any activity until it purchased a property known as 656 Finchley Road, London NW11 6XX ('the Property') from Ms Winckler's long-standing friend and sometime employer, Mr Peter Goldbart. The Company was incorporated for the specific purpose of purchasing the Property. The Property was transferred to the Company on 15<sup>th</sup> February 2011 for the price of £550,000, apparently with a further payment of £50,000 being made for fixtures and fittings to Mr Goldbart's wife, Ms Reiko Iwamoto.
3. Ms Winckler did not contribute any monies to the purchase, and nor did Pantiles have any monies of its own. The monies to effect the purchase are said to have been provided by way of loans to it as follows –
  - i) BM Samuels Finance Group PLC ('BM Samuels') provided a loan of £345,000 on 15<sup>th</sup> February 2011, which loan was secured by a fixed charge over the Property and floating charges over the Company's assets.
  - ii) Goldbeck Investments (2009) Limited ('Goldbeck (2009)') is said to have made an unsecured loan of £270,000 on 15<sup>th</sup> February 2011. Ms Iwamoto was the director of Goldbeck (2009) and she and her son were the shareholders of Lynwood Property Investments Limited ('Lynwood'), which in turn held the entire issued share capital of Goldbeck (2009). These monies came from the sale of 4 Chandos Way, a property owned by Goldbeck Investments Limited (a separate company from Goldbeck (2009)).
  - iii) Mr Peter Steckelmacher made a loan of £70,000 in December 2010, which loan was repaid on 1<sup>st</sup> March 2011 from the proceeds of sale of another property in which Mr Goldbart was interested.

Mr Steckelmacher made a further advance pursuant to a deed dated 10<sup>th</sup> December 2011 ('the Second Steckelmacher Loan'). The deed was executed by Mr Steckelmacher as lender, the Company as borrower and Reiko Iwamoto as 'second borrower'. Under the terms of this deed. Mr Steckelmacher agreed to lend £70,000 to Pantiles for the purpose of assisting Ms Iwamoto 'to partially finance the purchase of 68, Abercorn Road, London, NW7 1JT'. The monies were paid to Ms Iwamoto, not the Company.
4. Mr Goldbart and Ms Iwamoto did not move out of the Property but entered into a tenancy agreement with Pantiles on or about 17<sup>th</sup> December 2010. Mr Goldbart was adjudged bankrupt on 5<sup>th</sup> October 2011 on a creditor's petition presented on 8<sup>th</sup> July 2011. On 5<sup>th</sup> January 2012, Mr Stephen Hunt of Griffins, a firm of insolvency practitioners, was appointed as his trustee in bankruptcy. Mr Peter Murray and Mr Andrew Foster of Griffins interviewed Ms Winckler on 31<sup>st</sup> May 2012 in connection with Mr Goldbart's bankruptcy.

5. The Property was then sold by the Company to a third party. Completion took place on 12<sup>th</sup> June 2012 for £899,000. The proceeds were paid away as follows:
- i) £21,252 was paid to Moreland UK, the estate agents acting on the sale;
  - ii) £6,080 was used to discharge the costs of Segens Blount Petre ('Segens'), the solicitors acting for the Company on the sale;
  - iii) £364,541.63 was paid to BM Samuels to discharge its secured loan;
  - iv) £75,307.50 was paid to Newman Law, the solicitors for Mr Steckelmacher, to discharge his secured loan of 10<sup>th</sup> December 2011;
  - v) £250,000 was paid to Mr Hunt as Mr Goldbart's trustee in bankruptcy in settlement of his claim that the transfer to the Company by Mr Goldbart in February 2011 had been at an undervalue; and
  - vi) the balance of £181,818.51 was paid to Goldbeck (2009).

6. Following the settlement of Mr Hunt's transaction at an undervalue claim, he came into possession of a letter from Mr Goldbart to Suzette Newman of Newman Law, dated 9<sup>th</sup> February 2010. Mr Goldbart referred to an opinion of Mr Joshua Swirsky of counsel and said:

'The actual proposed transaction is as follows:-

1. Peter has set up Pantiles Investments Ltd the sole shareholder and director is Sabine Winckler.

2. Sabine Winckler has executed a declaration of trust confirming that she holds the shares in Pantiles Investments Ltd as "bare trustee" for Peter.

3. What is omitted from Joshua's opinion is the fact that Pantiles Investments Ltd will also enter into a declaration of trust that it holds its interest in 656 Finchley Road, as "bare trustee" for Peter **The significance of this is that at no time does the actual beneficial interest in 656 Finchley Road actual [sic] depart from Peter.**

4. For commercial reasons in order to discharge the debt to Royal Bank of Scotland new funding has to be put in place.'

He went on to say that leases would be put in place for three or four years and the Property would then be sold when Mr Goldbart reached the age of 70. He said that he was trying to arrange finance to complete the purchase of the Property which would enable him to force the mortgagee of the Property to 'back off'. He concluded that he was not going to give up his home 'without putting up a fairly substantial fight' and that he would need to consider the implications of his 'impending bankruptcy'.

7. Mr Goldbart contended that this letter refers only to a scheme to mitigate stamp duty but, on the basis of it, Mr Hunt formed the view that the sale of the Property to the

Company, and the subsequent sale and distribution of the proceeds of sale by the Company, were part of a scheme to defraud Mr Goldbart's creditors. He consequentially sought disclosure from Segens of information as to the destination of the sale proceeds. In due course he commenced a claim seeking, amongst other things, a declaration that the shares in Pantiles were held on trust for Mr Goldbart and thus for him as Mr Goldbart's trustee. Mr George Bompas QC, sitting as a deputy High Court Judge, made such a declaration on 4<sup>th</sup> February 2016. He similarly concluded that Lynwood was a nominee for Mr Goldbart.

8. Pantiles was wound up on 3<sup>rd</sup> August 2015 on the petition of HM Revenue and Customs. Mr Dowers was appointed as liquidator of the Company on 22<sup>nd</sup> October 2015. Mr Dowers interviewed Ms Winckler as to the circumstances of Pantiles on 15<sup>th</sup> December 2015.
9. Mr Dowers issued an application in this court on 18<sup>th</sup> May 2018 by which he brings two claims against Ms Winckler –
  - i) The first is a claim for fraudulent trading under section 213 of the Insolvency Act 1986 ('the 1986 Act') on the basis that Ms Winckler was knowingly a party to the carrying on of the business of the Company with intent to defraud the creditors of Mr Goldbart. He seeks a declaration that Ms Winckler is liable to make a contribution to the assets of the Company in a sum equal to the deficiency to creditors and an order that she makes such a contribution.
  - ii) Secondly, pursuant to section 212 of the 1986 Act, he claims that Ms Winckler was in breach of her duties as director and guilty of misfeasance by allowing the business and day-to-day operation of the Company to be run or controlled by Mr Goldbart at a time when he was an undischarged bankrupt.
  - iii) Further, again pursuant to section 212 of the 1986 Act, he claims that Ms Winckler was in fraudulent breach of trust, breach of her duties as director and was guilty of misfeasance in causing or allowing the Company:
    - a) to pay away the sum of £181,818.51 to Goldbeck (2009);
    - b) to enter into a second charge on the Property in or around January 2012 to secure the loan from Mr Steckelmacher, when the sole beneficiary of that loan was Ms Iwamoto; and
    - c) to repay in full the said loan from the proceeds of sale of the Property in the sum of £75,307.50 without first seeking repayment by, or an indemnity from, Ms Iwamoto.

He claims declarations under section 212 and an order that Ms Winckler pay equitable compensation to the Company. He further claims compound interest on any sums that the court orders Ms Winckler to pay. It is common ground that, were I to conclude that Ms Winckler is liable under either section, a further hearing would be necessary to consider what the appropriate relief should be.

10. In summary, Mr Dowers' case is that Ms Winckler was a knowing front for Mr Goldbart, who was the real controlling mind behind the Company. He says that there is no evidence that Goldbeck (2009) made any payment towards the purchase of the Property. His primary case is that the repayment of this loan, and the repayment of the Second Steckelmacher Loan, were no more than devices to cause the sale proceeds of sale to be paid to Mr Goldbart's associates for his benefit. In entering into the Second Steckelmacher Loan she caused the Company to enter into a transaction that created a liability and conferred no benefit upon it. In paying the monies said to be due to Goldbeck (2009), she left the Company without assets to meet its liabilities. There was an inevitable tax liability, which was subsequently crystallised in the sum of £112,489.95. There is also a liability for costs of Mr Hunt incurred in the proceedings for a declaration as to the trusts on which the shares in Pantiles were held. This totals £54,882.35.
11. As to Ms Winckler's knowledge of this, he relies on the improbability of, and inconsistencies in, Ms Winckler's account of the circumstances in which she came to purchase the Property, the fact that Mr Goldbart gave instructions for the sale, using the Company's email address, to which Ms Winckler had access, and that Ms Winckler approved his instructions for the distribution of the sale proceeds. He further points to letters apparently sent by Mr Goldbart to Ms Winckler at the end of 2011, acknowledging her past and continuing help in his financial affairs. He relies on an email from Mr Goldbart giving instructions to Ms Winckler not to cooperate with Mr Hunt and actual non-cooperation by Ms Winckler in relation to the provision of her personal email address when asked for it at interview on 31<sup>st</sup> May 2012.
12. Ms Winckler accepts that the business of Company was carried on with intent to defraud Mr Goldbart's creditors but she says that, far from being a knowing party to that fraud, she is not a financially experienced individual and was also duped by him. Her case is that, in 2009, she had intended to purchase a property worth about £500,000 and let it in order to provide her with retirement income. Entirely by coincidence, the estate agent she visited first gave her the details of the Property and Mr Goldbart thereafter offered to help her with her project. He recommended the setting up of the Company. When she was unable to obtain a mortgage, he arranged the finance to enable the Company to buy the Property. She has produced documents relating to the loan made by Goldbeck (2009) and maintains that the loan was in fact made. When tenants could not be found, he and Ms Iwamoto agreed to take a lease of the Property. The project having turned into a 'nightmare' she wanted to sell the Property and, while she had hoped to make a £100,000 profit, she was happy with breaking even. She says that she did not know of Mr Goldbart's bankruptcy, or impending bankruptcy, until she was told of it by Mr Hunt.
13. She accepts that she allowed Mr Goldbart to have access to the Company's email account and to write letters on its behalf, providing that she knew about these. She contends that she looked to him for advice but took decisions as to what Pantiles should do herself. She accepts that she should not have allowed the Company to enter into a loan for Ms Iwamoto's benefit but submits that a claim in respect of this transaction is time-barred on the basis that the breach lay in entering into the loan agreement and granting the charge, which took place more than six years before issue of the application. On her case, the repayment of the loan in June 2012 is simply the

inevitable consequence of having entered into the loan and granted the charge, not a separate breach.

14. It is further accepted that the payment to Goldbeck (2009) of the sums said to have been loaned by it was in breach of duty at a time when Pantiles was insolvent. Ms Winckler says, however, that she acted honestly and reasonably and ought fairly to be excused pursuant to section 1157 of the Companies Act 2006. In particular, she complains that Segens should have alerted her to the fraud but, instead, they treated Mr Goldbart as their client. She points to a number of emails written by Mr David Isaacs of Segens to Mr Goldbart alone. She rarely accessed the Company's own email and did not see some of the correspondence sent to that address. Moreover, she states that she was suffering from anxiety and depression in 2012, which inhibited her ability to understand the contents of emails and participate in decision-making. She denies that she agreed to settle Mr Hunt's claim for £250,000 and was not consulted as to this. She maintains that Mr Isaacs should have prevented the Company from paying monies to Goldbart (2009) as an unsecured creditor and should have told her to seek separate advice.

**Applicable law as to claims under sections 212 and 213 of the 1986 Act**

15. Having summarised the parties' cases I shall set out the applicable law.

**(i) Section 212 – Misfeasance**

16. Section 212 provides as follows, insofar as it is material –

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

(a) is or has been an officer of the company,

...

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

...

(3) The court may, on the application of the official receiver or the liquidator, or of 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 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 just.’

Section 212 does not create a cause of action, but provides a gateway to pursue directors for breaches of their duties. The general duties owed by a director are set out

in Part 10 of the Companies Act 2006 ('the 2006 Act'). Section 171 sets out the duty to act with the director's powers:

'A director of a company must—

(a) act in accordance with the company's constitution, and

(b) only exercise powers for the purposes for which they are conferred.

17. Section 172 is headed 'Duty to promote the success of the company' and provides:

'(1) A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole...

(3) The duty imposed by this section has effect subject to any enactment or rule of law requiring directors, in certain circumstances, to consider or act in the interests of creditors of the company.'

The Court of Appeal has recently considered when the interests of creditors intrude for the purposes of subsection (3). In *BTI 2014 LLC v Sequana S.A.* [2019] EWCA Civ 112, David Richards, with whom Longmore LJ and Henderson LJ agreed, said:

'215 In my judgment, the test of a real, as opposed to a remote, risk of insolvency is not part of the present law as regards the creditors' interests duty, and it would not be appropriate, in the light of the policy considerations and other provisions of the Companies Act to which I have referred, for the courts to introduce such a test as a development of the common law.

216 I have, however, concluded that the duty may be triggered when a company's circumstances fall short of actual, established insolvency. This is certainly the view taken by many judges in the cases to which I have referred. However, for good reason, not least because it has rarely been necessary, judges have shied away from a single form of words, preferring instead a variety of expressions such as those that I have mentioned.'

He went on to say:

'220 Judicial statements should never be treated and construed as if they were statutes but, in my judgment, the formulation used by Sir Andrew Morritt C and Patten LJ in *Bilta v Nazir*, and by judges in other cases, that the duty arises when the directors know or should know that the company is or is likely to become insolvent accurately encapsulates the trigger. In this context, "likely" means probable, not some lower test such as that adopted by Hoffmann J in construing the statutory test for the making of an administration order: see *Re Harris Simons Construction Ltd* [1989] 1 WLR 368.

...

222 As I have earlier mentioned, an important issue is whether, once the creditors' interests duty is engaged, their interests are paramount or are to be considered without being decisive. This is not straightforward, and there has been a good deal of discussion about it in some of the cases and in the academic literature. It is not an issue that arises on the facts of this case and, in my view, it should be addressed on the facts of cases where it must be decided. I therefore express no view on it, save to say that where the directors know or ought to know that the company is presently and actually insolvent, it is hard to see that creditors' interests could be anything but paramount.'

18. In *Re Regentcrest Plc v Cohen* [2001] BCC 494 at [120] Jonathan Parker J (as he then was) described the nature of the duty as follows:

'The duty imposed on directors to act *bona fide* in the interests of the company is a subjective one (see *Palmer's Company Law* (Sweet & Maxwell) para. 8.508). The question is not whether, viewed objectively by the court, the particular act or omission which is challenged was in fact in the interests of the company; still less is the question whether the court, had it been in the position of the director at the relevant time, might have acted differently. Rather, the question is whether the director honestly believed that his act or omission was in the interests of the company. The issue is as to the director's state of mind. No doubt, where it is clear that the act or omission under challenge resulted in substantial detriment to the company, the director will have a harder task persuading the court that he honestly believed it to be in the company's interest; but that does not detract from the subjective nature of the test.'

This is subject to three qualifications set out by Mr John Randell QC, sitting as a deputy High Court Judge, in *Re HLC Environmental Projects Ltd (in liquidation)* [2014] BCC 337, 363 –

'(a) Where the duty extends to consideration of the interests of creditors, their interests must be considered as "paramount" when taken into account in the directors' exercise of discretion (per Mr Leslie Kosmin QC in the *Colin Gwyer* case (above) at [74]). Although I note the contrary view expressed by Owen J. in the Supreme Court of Western Australia that although "the directors must 'take into account' the interests of creditors [i]t does not necessarily follow from this that the interests of creditors are determinative" (*Bell Group Ltd v Westpac Banking Corp* [2008] WASC 239 at [4438]–[4439], applying the judgment of Mason J. in *Walker v Wimborne* [1976] HCA 7; (1976) 137 C.L.R. 1 ), so far as English law is concerned I respectfully agree with Mr Kosmin QC that his use of "paramount" was consistent with the judgment of Nourse L.J. in *Brady v Brady* (1987) 3 B.C.C. 535 (CA) at 552, where he observed that "where the company is insolvent, or even doubtfully solvent, the interests of the company are in reality the interests of existing creditors alone". I also note that this passage from Mr Kosmin QC's judgment was cited with apparent approval by Norris J. in *Roberts (Liquidator of Onslow Ditchling Ltd) v Frohlich* [2011] EWHC 257 (Ch); [2012] B.C.C. 407 at [85].



(b) As Miss Leahy submitted, the subjective test only applies where there is evidence of actual consideration of the best interests of the company. Where there is no such evidence, the proper test is objective, namely whether an intelligent and honest man in the position of a director of the company concerned could, in the circumstances, have reasonably believed that the transaction was for the benefit of the company (*Charterbridge Corp Ltd v Lloyds Bank Ltd* [1970] Ch. 62 at 74E–F, (obiter), per Pennycuik J.; *Extrasure Travel Insurances Ltd v Scattergood* [2003] 1 B.C.L.C. 598 at [138] per Mr Jonathan Crow).

(c) Building on (b), I consider that it also follows that where a very material interest, such as that of a large creditor (in a company of doubtful solvency, where creditors' interests must be taken into account), is unreasonably (i.e. without objective justification) overlooked and not taken into account, the objective test must equally be applied. Failing to take into account a material factor is something which goes to the validity of the directors' decision-making process. This is not the court substituting its own judgment on the relevant facts (with the inevitable element of hindsight) for that of the directors made at the time; rather it is the court making an (objective) judgment taking into account all the relevant facts known or which ought to have been known at the time, the directors not having made such a judgment in the first place. I reject the respondent's contrary submission of law.

93 Therefore, whilst I accept the respondent's submission that the general principle of subjectivity applies to directors' consideration of the interests of creditors as well as to their consideration of the interests of the company, that has no application to a situation such as the respondent suggested arose here, namely that (as his counsel submitted) it simply did not occur to him at the time of the Engenharia payments or the personal payments that FRIE Grupo was a creditor at all. In any event, I have found to the contrary on the facts.'

19. Section 173 of the 2006 Act further provides that a director is under a duty to exercise independent judgment. It states:

'(1) A director of a company must exercise independent judgment.

(2) This duty is not infringed by his acting—

(a) in accordance with an agreement duly entered into by the company that restricts the future exercise of discretion by its directors, or

(b) in a way authorised by the company's constitution.'

20. Finally for the purposes of this judgment, the duty to adhere to proper standards of care, skill and diligence is set out in section 174 of the 2006 Act as follows:

'(1) A director of a company must exercise reasonable care, skill and diligence.

(2) This means the care, skill and diligence that would be exercised by a reasonably diligent person with—

(a) the general knowledge, skill and experience that may reasonably be expected of a person carrying out the functions carried out by the director in relation to the company, and

(b) the general knowledge, skill and experience that the director has.’

(ii) Section 213 – Fraudulent Trading

21. Section 213 provides:

‘(1) If in the course of the winding up of a company it appears that any business of the company has been carried on with intent to defraud creditors of the company or creditors of any other person, or for any fraudulent purpose, the following has effect.

(2) The court, on the application of the liquidator may declare that any persons who were knowingly parties to the carrying on of the business in the manner above-mentioned are to be liable to make such contributions (if any) to the company’s assets as the court thinks proper.’

In *Morris v. Bank of India* [2004] BCC 404, Patten J (as he then was) set out the test for liability under section 213 at 419:

‘13. The liquidators have to show that BOI (through its relevant officers and employees) knew that the six transactions (or one or more of them) were being entered into either to defraud the creditors of BCCI or for a fraudulent purpose. They did not have to know every detail of the fraud or the precise mechanics of how it would be carried out, but clearly they did have to know, either from their own observation of what was being done or from what they were told, that BCCI was intent on a fraud. Knowledge, for this purpose, means what it says. There must have been an actual realisation on the part of BOI that BCCI would, or was likely to, engage in false accounting. A failure to recognise the truth of what was going on is not enough, however obvious that may now seem to have been. The relevant knowledge also has to be contemporaneous with the assistance that was given at the time by entering into the various transactions. Subsequent knowledge based on hindsight is not enough, nor is negligence the test of liability. Mr Hirst QC emphasised in his closing submissions that it is irrelevant whether BOI is open to criticism for slackness or negligence, however gross. The only issue is whether it knew at the time that it was participating in a fraud. I agree with that. But both sides accept that knowledge, for these purposes, includes so-called blind-eye knowledge, which exists when the party in question shuts its eyes to the obvious because of a conscious fear that to enquire further will confirm a suspicion of wrongdoing which already exists. Knowledge of this kind is part of the claimants’ case, and I dealt with the same point in para. 11 of my judgment in *Morris v State Bank of India*, where I said this:

“Knowledge includes deliberately shutting one’s eyes to the obvious, provided that the fraudulent nature of the transactions did in fact appear obvious to those who dealt with these matters at SBI at the relevant time. It is well established that it is no defence to say that one declined to ask questions, when the only reason for not doing so was an actual appreciation that the answers to those questions would be likely to disclose the existence of a fraud. But liability in such cases depends upon that stage of consciousness having been reached. His submission, which I accept, is that one needs to be careful to draw a distinction between a conscious appreciation of the true nature of the business being carried on and a failure, however negligent, to appreciate that fraud was being perpetrated. The case for SBI is that at no time during the course of these transactions did it in fact suspect that anything untoward was going on. The essentials of what is required in order to establish so-called blind-eye knowledge are set out in the speech of Lord Scott of Foscote in the recent decision of the House of Lords in *Manifest Shipping Co Ltd v Uni-Polaris Co Ltd* [2003] 1 AC 469, where Lord Scott at para.116 says this:

‘In summary, blind-eye knowledge requires, in my opinion, a suspicion that the relevant facts do exist and a deliberate decision to avoid confirming that they exist. But a warning should be sounded. Suspicion is a word that can be used to describe a state-of-mind that may, at one extreme, be no more than a vague feeling of unease and, at the other extreme, reflect a firm belief in the existence of the relevant facts. In my opinion, in order for there to be blind-eye knowledge, the suspicion must be firmly grounded and targeted on specific facts. The deliberate decision must be a decision to avoid obtaining confirmation of facts in whose existence the individual has good reason to believe. To allow blind-eye knowledge to be constituted by a decision not to enquire into an untargeted or speculative suspicion would be to allow negligence, albeit gross, to be the basis of a finding of privity.’”

Dishonesty as such is not in terms a condition of liability under s.213. But if knowledge of the fraud in either of the senses indicated above is established, Mr Hirst accepts that it must follow that BOI was dishonest. No evidence has been led to exculpate BOI on the basis that, although the bank through its officers realised what BCCI was doing, they saw nothing wrong in it, and it is not, therefore, necessary for me to consider whether that position, if established, would constitute a defence to the claim. The only defence relied on is simply a denial of knowledge. In relation, therefore, to the liquidators’ primary and original claim that BOI knew that BCCI was falsely misrepresenting the six transactions to its auditors by concealing its own use of the loans made to Maram, by representing the matching deposits with BOI as unencumbered, and by concealing the existence of the guarantees, no problems of defining the test of liability exist.’

It is accepted by Mr Curl for the purposes of this case that knowledge here similarly requires dishonesty.

22. For some years, dishonesty was considered to have two elements – the first element being objective and the second being subjective. In *R v Ghosh* [1982] QB 1053 the Court of Appeal considered the meaning of dishonesty in the context of the Theft Act 1968 and held that a jury had, first of all, to decide whether according to the ordinary standards of reasonable and honest people the defendant’s conduct was dishonest. If it was not dishonest according to those standards, the matter proceeded no further. If, however, the defendant’s conduct was dishonest by those standards, then the jury was required consider whether the defendant himself had realised that what he was doing was, by those standards, dishonest. The test was similarly applied to accessory liability in the civil context (see, for example, *Twinsectra Ltd v Yardley* [2002] 2 AC 164).
23. The test for dishonesty in the criminal context was recently considered by the Supreme Court in *Ivey v Genting Casinos (UK) Ltd (trading as Crockfords Club)* [2018] AC 391. Lord Hughes JSC said at 416:

‘74 These several considerations provide convincing grounds for holding that the second leg of the test propounded in *R v Ghosh* [1982] QB 1053 does not correctly represent the law and that directions based upon it ought no longer to be given. The test of dishonesty is as set out by Lord Nicholls in *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378 and by Lord Hoffmann in *Barlow Clowes International Ltd v Eurotrust International Ltd* [2006] 1 WLR 1476, para 10: see para 62 above. 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.’

Again, this approach to the test has been applied in the context of accessory liability in civil proceedings (see *Group Seven Ltd v Notable Services LLP* [2019] EWCA Civ 614). I accept that this is the test that I must adopt.

### **The evidence**

24. Having set out the tests I should apply I turn to the evidence. The application is supported by the statement of Mr Dowers dated 17<sup>th</sup> May 2018. Ms Winckler made a statement in answer, which is undated, and Mr Dowers has made a further statement in reply, dated 22<sup>nd</sup> October 2018. Mr Dowers was excused from attending for cross-examination. His statements simply set before the court the information he has gathered in the course of the liquidation of the Company. The only witness who gave live evidence was Ms Winckler.
25. I should add for the sake of completeness that Ms Winckler’s witness statement says that she had ‘summoned’ Mr David Isaacs, a partner in Segens. She confirmed in her

oral evidence however that a witness summons had not been issued in respect of him. There is no witness statement from him nor any witness summary.

26. Ms Winkler is a German citizen. She has lived in the United Kingdom for some years and her written and spoken English are fluent. It was not submitted on her behalf that she would have been unable to understand the terms of the documents signed or seen by her during the Company's life. It was, however, submitted that she was an unsophisticated person when it came to business affairs.
27. At the outset of the hearing I was provided with a letter from a Dr Kaufman, a physician, dated 14<sup>th</sup> March 2019. Dr Kaufman's letter stated that Ms Winkler was diagnosed with 'anxiety and depression in 2012 following meetings with trustees and bankruptcy issues.' The letter explained that she has been treated with antidepressant medication and that her condition means that she can become very anxious and struggle to recall events. It noted that Ms Winkler was anxious about the forthcoming trial and that Dr Kaufman was 'sure this will affect her ability to give a full and frank account of the issues and could affect her testimony.' Mr Ingham rightly did not ask me to adjourn the trial on the basis of this letter but instead asked me to take Dr Kaufman's opinion into account when considering Ms Winkler's evidence. The letter is not admissible opinion evidence and it does not suggest that the medication that Ms Winkler has been taking of itself has any impact on her ability to recall events or that her depressive illness would have impaired her ability to understand the transactions she entered into which are now the subject of this application.
28. I do, however, bear in mind that the stress of litigation and of giving evidence may well have an adverse effect on a witness's recollection and I accept that this might be particularly acute in witnesses with underlying anxiety and depression. I similarly accept that Ms Winkler is suffering from those conditions. Ms Winkler did not appear to be particularly anxious in the witness box. Her evidence was calmly expressed. She did, however, repeatedly state that she was unable to recall the advice given to her by Mr Goldbart, on which she says that she relied. I shall return to that later in this judgment.
29. With that in mind, I shall now turn to Ms Winkler's evidence in relation to the transactions on which the claim is founded.

(i) The identification of the Property and the transfer

30. Ms Winkler's evidence was that she had known Mr Goldbart for some years prior to the formation of the Company and the purchase of the Property. She had worked as his typist on occasion and this had included visiting the Property. Though she had not worked for him for some time, she continued to see him every two to three weeks or so. On her account, in 2009 she wished to purchase a property with a value of around £500,000 that she could let out in order to provide her with an income. She visited the estate agency that had negotiated the sale of her own flat. The agent, Mr Lee, told her of the Property. There is an inconsistency in Ms Winkler's account as to when she realised that it was Mr Goldbart's house. She does not refer to this in her witness statement but, when interviewed in connection with Mr Goldbart's bankruptcy on 31<sup>st</sup> May 2012, she stated:

‘I went to the agency that I bought my flat off, and talked to him and he just said that he’d got something in, the day when I went, and he just took me around to different places and all to that.’

Later in the same interview, when asked whether, when told about the Property by the estate agent, she had realised that it was owned by Mr Goldbart she said:

‘No, but he didn’t give me the name, he didn’t give me the address. He just said “Let’s go and have a look, and if not, then I’ll take you to another one”. I said, “Fine”. I had the day off. I said, “Well you drive me. I’ll have a look at things”. It was the first day. It wasn’t that I was planning to buy a house that day. It wasn’t like that. But I then stopped because of pure coincidence, that it was the house of Peter Goldbart, and we got talking. If this house had been shown to me three weeks down the line, probably I would have seen 20 houses before. They would have sent me papers, they would have sent me emails. But it never came to that.’

When asked about the decision to form the Company she said:

‘When I first looked at buying a property, I didn’t have the idea of I now create a company and then I buy the property. I didn’t look at it. That day, I just thought, “Okay, I’ll buy a property”. Then it all stopped on the sort of first day. Again, it’s because, by pure coincidence, I looked at the first property and it was Peter’s, and we just got talking about how to do it, what I wanted it for’.

When interviewed by Mr Dowers on 2<sup>nd</sup> December 2015 in connection with the insolvency of the Company, she described the purchase of the Property as follows:

‘It must have been before 2009 because in October I think the company was built. Perhaps the summer before that. I mean I can’t put a fixed date on that. But the idea was just privately to buy property rent it out and make some money on it. But because then when I went to the estate agent he showed me something that he hadn’t even on the books yet because he just came back from taking the details, and he gave me an address and I said well, I know this person. I didn’t know that he wanted to sell his property. But I knew when I heard the address that I know the house because I’ve been typing sometimes there or pass by there.

Then I spoke to Peter about this idea and he said well, it might be an idea if you do not privately but setting up a company.’

In summary therefore, Ms Winckler told Mr Goldbart’s trustee in 2012 that she was taken to the Property by the estate agent and realised it was Mr Goldbart’s property at that point. She told Mr Dowers at interview in 2015 that she had recognised the Property from its address. In oral evidence, she explained the inconsistency between the account given to Griffins and the account given to Mr Dowers by saying that the former interview had been conducted in a bullying manner and that she ‘probably had a blank’. Ms Winckler explained that the agent had taken her to two properties but did not take her to the Property itself.

31. Ms Winckler did not know whether Mr Goldbart had taken the Property off the market. The purchase was not completed until some 16 months later but there is no evidence that Mr Goldbart tested the market any further. It was put to Ms Winckler that the reason for this was that the transaction was a sham. She said that, looking at it now, that might well be the case but that she did not think that it was at the time. Contracts for sale were exchanged on 18<sup>th</sup> August 2010 with a completion date of 18<sup>th</sup> December 2010 but these contracts show the vendor as Goldbeck Investments Limited. It seems that both parties were content to allow this completion date to pass.

(ii) The funding of the purchase

32. Ms Winckler's evidence was that she had intended to purchase a property with a mortgage loan and about £220,000 that was to be given to her by her parents. In the event, her mother became ill and her parents were unable to part with the money. It is common ground that Ms Winckler did not use any of her own money, or money derived from her family, to fund the Company's purchase of the Property. Nor is there any evidence of a proposal by Ms Winckler's parents to make a substantial gift to her. Ms Winckler accepts that the Company was unable to obtain a conventional buy-to-let mortgage in the period between the Company agreeing in principle to buy the Property and completion of the sale. She said that three mortgage brokers had been approached, without success. This is not surprising as Ms Winckler said her annual income was around £17,000. It was therefore quite unlikely that she would be able to obtain a mortgage loan to fund a purchase for some £600,000. Instead, the purchase monies came from three short-term loans.

*(a) The BM Samuels loan*

33. BM Samuels offered to provide a loan facility of £345,000 to the Company by a letter dated 28<sup>th</sup> October 2010. Ms Winckler accepted the loan on and signed each page of the agreement on behalf of Pantiles on 23<sup>rd</sup> November 2010. The purpose of the loan was expressed to be to assist in the purchase of the Property. The facility was granted for a period of up to six months from the date of initial drawdown and was repayable on demand. The interest payable was £26,910 payable in six monthly instalments, or £4,485 a month, though the payment of some of this interest was rolled up into the total debt on advance.
34. Ms Winckler was asked how this loan was to be paid off and she stated that she anticipated that a mortgage would be obtained. She was unable to explain quite how a mortgage was to be obtained when attempts over the previous year or so had failed. The Property was let to Mr Goldbart and Ms Iwamoto for £2,000 a month and the rent would not have been sufficient to cover the interest. Ms Winckler, when taken to the interest provisions of this loan document said that, looking at it now, it was 'unbelievable'. She accepted that she would have read the loan agreement before signing it and that she had 'probably' asked Mr Goldbart for an explanation and that he had 'probably' given her an answer which satisfied her. She did not recall what that answer might have been. She described the loan agreement as 'a joke', in the sense of an absurdity, and that she now 'couldn't find words for it'.
35. Ms Winckler was asked why she did not simply wait to see if mortgage finance could be arranged. The purchase had not taken place for some 16 months after the Company

agreed to buy the Property. She said that ‘time was running out’ to complete the transaction.

*(b) The Goldbeck (2009) Loan*

36. Goldbeck (2009) is said to have lent the Company £270,000 on 15<sup>th</sup> February 2011 for the purposes of assisting the Company to purchase the Property. The documents that Ms Winckler has provided to support her contention that this loan was made is an unexecuted deed of that date, by which the Company agreed to repay the debt within five years and a letter to Newman Law from Goldbeck (2009). It purports to have been written by Ms Iwamoto but stylistically has the hallmarks of a document prepared by Mr Goldbart, in particular his idiosyncratic use of quotation marks. Ms Winckler accepts that this company was in fact controlled by Mr Goldbart.
37. Ms Winckler’s written evidence states that the loan monies were derived from the proceeds of sale of 4 Chandos Way, which was owned by Goldbeck Investments Limited, another company ultimately controlled by Mr Goldbart. It is not clear why the proceeds of sale of a property owned by Goldbeck Investments Limited came to be channelled through Goldbeck (2009), although the letter of 15<sup>th</sup> February states that, in fact, this property was owned by Goldbeck (2009).
38. There is no evidence that these monies were actually paid either to Pantiles or to Mr Goldbart. There is a reference in the completion statement prepared on or around 15<sup>th</sup> February 2011 by Newman Law showing the proceeds of sale of 4 Chandos Way in the sum of £163,844.89 to be ‘held on behalf of Pantiles’ but there is no reference in this document to these monies having been provided by Goldbeck (2009). Nor does the sum shown in the completion statement accord with the amount set out in the unexecuted deed. The letter suggests that the loan will also be used to discharge Mr Steckelmacher’s first loan but, again, this does not accord with the total loan claimed to have been made.

*(c) The First Steckelmacher Loan*

39. Mr Steckelmacher is the husband of Ms Newman, Mr Goldbart’s solicitor. He lent the Company £70,000 in December 2010. This was repaid in March 2011 from the proceeds of sale of 1A Maida Avenue, which was owned by another ‘Goldbeck’ company.

(iii) The Second Steckelmacher Loan

40. On 10<sup>th</sup> December 2011 a deed was executed by Mr Steckelmacher as lender, the Company as borrower and Reiko Iwamoto as ‘second borrower’. Under the terms of this deed. Mr Steckelmacher agreed to lend £70,000 to the Company for the purpose of assisting Ms Iwamoto ‘to partially finance the purchase of 68, Abercorn Road, London, NW7 1JT’, secured by a charge on the Property. This loan was to be repaid by 30<sup>th</sup> June 2012 and was subject to an interest rate of 18%. Ms Winckler said that she had not understood this loan and now accepted that she should not have signed it. At the time it was ‘a muddle’. When asked to explain why she had signed it she said that Ms Iwamoto had probably said that it was necessary and that she had probably said that the interest rate was common practice. She agreed that paragraph 1 of the deed, setting out the purpose of the loan, was quite clear but that Mr Goldbart and Ms Iwamoto must



have given her a good explanation or she would not have signed it. She did not say what that explanation might have been.

(iv) Ms Winckler's knowledge of Mr Goldbart's bankruptcy

41. Ms Winckler told Griffins in 2012 that she was aware that the reason that Mr Goldbart was selling the Property was because he had financial problems and needed to sell it. In evidence she said that she had not known this at the time of the Company's purchase but had been made aware of the reasons for sale since then. She denied being aware of Mr Goldbart's bankruptcy itself until she received a letter from his trustee in bankruptcy in January 2012. She was asked if she was quite sure that that was the earliest that she had been aware of it and she confirmed that it was. She was taken to a number of documents addressed to her in which reference is made to Mr Goldbart's impending or extant bankruptcy. The first of these in the evidence is a letter dated 30<sup>th</sup> September 2011 from Mr Goldbart to Ms Winckler on the Company's letter paper. He said:

'I wish to "put on record" my deep appreciation of your continued co-operation with regard to my financial affairs.

Your help has been / is / will be invaluable – especially in the light of my forthcoming bankruptcy on 5<sup>th</sup> October 2011!'

As a postscript to the letter he stated, 'For security I am delivering this by hand.' Ms Winckler has not, prior to the trial, denied receiving this letter but said that she could now only guess that she had not received it. She said that she had not denied receiving it before as there was so much paperwork relating to events which were now some seven or eight years ago.

42. On 5<sup>th</sup> October 2011 Mr Goldbart again wrote to Ms Winckler on the Company's letter paper and stated:

'Once again I wish to "put on record" my deep appreciation of your continued co-operation with regard to my financial affairs.

Your help has been / is / will be invaluable – especially in the light of my personal bankruptcy which "happened" – today – 5<sup>th</sup> October 2011!'

He again stated that he was delivering the letter by hand 'for security'. Ms Winckler denied receiving this letter and says that she only became aware of it when it was provided to her by Griffins. This is at odds with her statement to Mr Dowers, when shown the letter, that she must have become aware of Mr Goldbart's bankruptcy as at that date. She said 'Well, yeah, because obviously of that letter. So then that date, yes'. Ms Winckler said in evidence that she accepted this merely because she was being told that she received it.

43. On 19<sup>th</sup> January 2012 Mr Goldbart emailed Ms Winckler, using her personal email address, and said:

'This Firm Griffin & Co – Stephen Hunt to be precise – have been appointed "My Trustee in Bankruptcy"

Their function is to try and “Get more money for the Creditors”

They only get paid by “Realising Assets” belonging to the Bankrupt – namely ME.

As I have NO ASSETS there are going to be “Hard Pressed” to earn any fees out of MY Bankruptcy – I HOPE!

I am informing you of this “situation” so that you are aware of the basic facts.

I declared – of course – in my Bankruptcy Statements that 656 Finchley Road was sold to Pantiles Investments Ltd and gave Pantiles Address and some phone numbers.

If you are contacted by telephone or by a personal visit from someone purporting to want to talk about either Pantiles Investments Limited or Peter M. Goldbart simply refuse to say anything.

If asked about Peter M. Goldbart simply say “I have no authority to discuss Mr Goldbart’s affair” and put the phone down or refuse to let a Personal Visitor into the building.

If approached to talk about Pantiles Investments Ltd – simply say “Put in writing ANY questions you may have regarding this Company.”

If you are approached IN ANY WAY WHATSOEVER simply “Refuse to discuss anything” and immediately inform me of what has happened and we will decide what to do.

...

The last thing I want is for you to be “dragged into my affairs” MORE than I planned.’

Ms Winckler did not deny receiving this email. She was asked whether she thought there was anything untoward about Mr Goldbart instructing her not to cooperate with his trustee, whom Ms Winckler accepted that she knew to have an official function in Mr Goldbart’s bankruptcy. She said that Mr Goldbart was simply a strange person who wanted control and did not want her to be involved in his bankruptcy. When pressed as to whether she considered it improper for her to be told, as sole director and shareholder of the Company, not to discuss its affairs, she again replied that she thought that Mr Goldbart did not want her to talk about his bankruptcy. She said that it didn’t ‘click’ that the Company was involved at the time but that she now read the email ‘in a different way’.

(v) Email addresses used by Ms Winckler and the Company

44. When interviewed by Peter Murray on behalf of Mr Goldbart’s trustee, Ms Winckler was asked about whether she had a personal email address. Mr Murray said that he was aware that the trustee’s correspondence to Ms Winkler was being handled by Mr

Goldbart. She was asked whether she had a direct email address at which she could be contacted. She replied ‘No, I haven’t got any time to look at it. I can set up a new one if you want?’ Asked again, directly, whether she had a personal email she said, ‘Not for myself, no’.

45. That was untrue. Ms Winkler did indeed have a personal email address. It was the address to which Mr Goldbart had sent the 11<sup>th</sup> January 2012 email. In cross-examination, Ms Winkler said that it was her private address and was only used by her friends. It was put to her that the reason that she had withheld her personal email from the trustee was so that he would not find out about her correspondence with Mr Goldbart. This she denied. It is notable that Ms Winckler was content to provide her private email address when interviewed by Mr Dowers in 2015. Similarly, she used that email in correspondence with Mr Isaacs of Segens, who were acting on the sale of the Property.
46. On 17<sup>th</sup> April 2012 an email was sent from the company account to Mr Hunt, apparently by Ms Winkler. It was not however written by Ms Winckler but by Mr Goldbart and it employs his idiosyncratic use of quotation marks. It purports to answer enquiries made of Ms Winkler and states ‘I am the sole director and 100% Beneficial Shareholder of PANTILES INVESTMENTS LTD’ and ‘pantilesinvestments@gmail.com is the Company’s e-mail address and it is under my control’. The email concluded ‘I trust – now that I have provided you with ALL the information you have requested – there will be no need for a “Personal Interview”’.
47. Ms Winckler was asked whether she thought there was something very improper about Mr Goldbart impersonating her in this email and whether it made her suspicious. She said that it made her angry that he had sent the email without telling her but that she did not think that it was improper. She regarded him as her friend.
48. Mr Curl put to Ms Winckler that, by 31<sup>st</sup> May 2012 at the latest, she must have been aware that Mr Goldbart was doing something improper. She said that she had not really ‘got it’ and that Mr Goldbart kept saying that things would be ‘okay’ and ‘there will be a happy ending’. She said that, knowing what she now knew, she should have realised. Griffins had told her that the Company was being used for an improper purpose but she didn’t want to believe it because it made her seem stupid.

(vi) Sale and disposition of the purchase monies

49. On 4<sup>th</sup> May 2012 Mr Isaacs emailed Ms Winckler, copying the email to the Company’s email address, Mr Goldbart and Ms Iwamoto. He stated:

‘I am writing to confirm that I would not be prepared to enter into any Contract for the sale of this property on behalf of Pantiles unless and until there is a firm agreement with Peter’s Trustee in Bankruptcy as to what is to happen to the surplus proceeds of sale, i.e. the balance remaining after payment of the Mortgage, legal costs and agents fees.

I don’t know whether you would find someone else who would want to do that. If you do of course I would, subject to agreeing costs with you, pass them the papers but in any event I feel that you and particularly Reiko

would be very unwise to do this because it would simply be inviting Court proceedings.

As I said to Peter, whilst of course it is disappointing as a result of what the Trustee is doing you are not able to utilise the proceeds for Reiko's purchase then it would still perhaps be better off not to lose the sale and pay off the Mortgage and hopefully either persuade the Vendor of Abercorn to wait or, alternatively, to rent (not ideal I know) while matters are sorted out. However, I thought it right to make my position clear.'

Ms Winckler was asked why the Company's monies should be used to fund a purchase by Ms Iwamoto. She said that she was 'totally lost' about the purchase mentioned in this email and could not remember if she had replied to it to ask for further details. She thought that she might have asked Mr Goldbart about it but did not make the connection between Mr Goldbart's bankruptcy and the company. It was put to her that she was leaving decision-making to Mr Goldbart. She denied this, saying that she simply asked for advice.

50. On 18<sup>th</sup> May 2012, Ms Winckler wrote on behalf of the Company to direct that £350,000 from the anticipated sale of the Property should be held to abide the settlement of Mr Hunt's claim. The net proceeds were to be remitted to Goldbeck Investments, less £50,000 that was to be paid to Mrs Iwamoto. The letter appears to have been drafted by Mr Goldbart but it is signed by Ms Winckler. Ms Winckler could not recall why £50,000 was to be paid to Ms Iwamoto. She said that there was a list of people who were to be paid and Mr Goldbart had explained it to her and the explanation made sense. Again, Ms Winckler did not offer an account of what that explanation might have been. In re-examination she merely repeated that Mr Goldbart had told her that the Company had to repay certain people.
51. Again, on 12<sup>th</sup> June 2012 Mr Isaac sought Ms Winckler's express confirmation of the distributions of the net proceeds of sale that Mr Goldbart had set out. He emailed her alone, using her personal email address, and said:

I am confirming that I have today completed this matter. I attach a copy of Peter's email setting out the distributions. As a Director of Pantiles I should be grateful if you would send me an email which can be followed by a signed hard copy confirming your agreement to the distribution as stated. If you have any queries on this, please let me know.'

Despite Mr Isaacs' express invitation to Ms Winckler to raise any queries, she simply replied:

'I agree to the distribution of the monies as laid out by Peter.

I will send a hard copy by post as well'

The versions of the email chain in the trial bundle are indeed signed by Ms Winckler. She has signed both her reply to Mr Isaacs and the email from Mr Goldbart specifying the distributions that were to be made. Ms Winckler said in re-examination that Mr Goldbart had written the email but that she had signed it off.

*(vii) Mr Hunt's requests for information*

52. Mr Hunt then sought information as to where the monies had been sent. Mr Isaacs sought Ms Winkler's consent, again emailing her alone and using her personal email address. Her reply on 1<sup>st</sup> July 2012 stated:

'I thought a deal had been done with Griffins and the matter had come to an end, this is why I am not happy them to receive any further information.'

On 4<sup>th</sup> July 2012 Mr Isaacs tried again. He wrote:

"Dear Sabine,

You will have received my letters and whilst I have not given the Trustee the information as to where the money was sent because you have not so instructed me, I feel I should emphasise firstly that I think from your point of view if you do not do so and it transpires as is alleged that the money was in fact held in trust for Peter, you could be seriously involved in allegations of fraud on the creditors. Secondly, if as is bound to happen an Application is made to the Court requiring us, that is my firm, to disclose the information then I would need (to be fully indemnified as to costs because the Order would be against us and therefore whilst I don't quite know what is involved at the moment) a remittance for £1,000.00 on account."

53. Again, the response was negative. Ms Winkler replied on 5<sup>th</sup> July 2012

'I am sorry, but at the moment I have to refuse to give you permission to divulge any further information with regard to 656 Finchley Road in any respect.

I believe you have been asked to provide a copy of the documentation that you entered into with Debenhams Ottaway in consideration of them receiving on behalf of Griffins the sum of £250,000 in full and final settlement of anything to do with 656 Finchley Road.

Once you provide the requested documentation and if we agree that it is correctly worded, on the basis of seeing such documentation we may consider our decision with regard to disclosure.'

54. Ms Winckler was shown an internal memorandum between Mr Isaacs and Michael Sagen, dated 28<sup>th</sup> June 2012, in which Mr Sagen anticipated that Mr Goldbart's trustee would seek information as to the recipients of the sale proceeds. He wrote:

'The letter that Goldbart was stupid enough to leave behind and which has clearly been found by the Trustee (being the letter of 9th February 2010 to Suzette Newman) gives him a very severe problem indeed and had this come to light before we were instructed I think that we would have been entirely unable to do a deal. This is of course proof of what we all really knew, i.e. Pantiles only existed as a creature of Goldbart and he is directing it as well so he is running the risk of acting as a director whilst a bankrupt,

carrying out a transaction which is in my view designed to defraud his creditors (and or the Trustee in bankruptcy) and he will have implicated Sabine Winckler as a co-conspirator (even now I think she was pretty much unknowing about the whole thing but allowed herself to be used in this way). I don't think you should carry out any further work for Pantiles because it is entirely the creature of Goldbart and this is really a money laundering operation.'

### **Conclusion on the claim under section 213 of the 1986 Act**

55. I am satisfied on the balance of probabilities that Ms Winckler was a knowing party to an attempt to conceal the Property and the proceeds of its sale from Mr Goldbart's creditors from the outset. I say this for the following reasons –

- i) Ms Winckler's account of the purchase of the Property is inherently improbable. It is just about plausible that a person might seek a buy-to-let property and find that the very first property that he or she was shown or told of was owned by a friend of long-standing whom they saw every two or three weeks, leading them to end their search there. What is wholly implausible, and inconsistent with an arm's length investment transaction, is that such a person should be without the finances to fund such a purchase or to obtain a mortgage to do so, and would be prepared to wait for some 16 months only to complete the transaction hurriedly with expensive short-term finance, rather than wait to see if conventional mortgage finance could yet be obtained.
- ii) There is simply no rational explanation for the Company entering into a ruinous loan agreement that it had no real hope of servicing or repaying. One only has to set out the terms of the BM Samuels loan to appreciate the absurdity of the position. Ms Winckler accepts that she read the document and that it now appears to her to be 'unbelievable' and a 'joke'. While she claims that Mr Goldbart would have offered a convincing explanation for this she was unable to set out what this explanation might have been. This was a consistent theme of her evidence. The terms of the loan, however, would have been as clear to her then as they were at trial.
- iii) The only explanation that Ms Winckler was able to offer for completing the purchase with this finance was that 'time was running out.' In my judgment, she can only have meant that time was running out for Mr Goldbart. No other explanation was offered as to why the long-delayed purchase of the Property would have been completed at this time. This is again consistent with the transaction having been a device for the benefit of Mr Goldbart.
- iv) Again, no evidence has been offered to suggest that tenants were ever sought for the Property in accordance with what Ms Winckler claims was her plan for her property investment. Mr Goldbart and Ms Iwamoto simply did not move out. Instead they entered into a tenancy agreement with Pantiles at a monthly rent significantly below the interest payments on the BM Samuels loan by itself. Again, this is consistent with the transaction simply being a device to enable Mr Goldbart to remain in possession of the Property.

- v) I do not accept that Goldbeck (2009) made any advance to Pantiles at all. There is no evidence of such an advance. No executed loan documentation has been produced and the figures set out in the completion statement prepared by Newman Law are not consistent with such a loan having been made.
- vi) The Second Steckelmacher Loan was obviously of no benefit to the Company. Ms Winckler was again perfectly able to understand what the purpose of the loan was – it was designed to benefit Mr Goldbart’s wife. Ms Winckler now accepts that it was a breach of duty to enter into this loan but there is no reason why she should not have appreciated this at the time. The only explanation that she offered was that Mr Goldbart or Ms Iwamoto must have explained it to her in such a way as to convince her that it was necessary but, again, she was unable to recall, even in outline terms, what such an explanation might have been. In my judgment, Ms Winckler was simply content for the Company to be used for the benefit of Ms Iwamoto, as directed by Mr Goldbart.
- vii) On any footing, Ms Winkler was aware of Mr Goldbart’s impending bankruptcy by the end of September 2011 at the latest and was aware of the fact that a bankruptcy order had been made shortly after 5<sup>th</sup> October 2011. I do not accept that she did not receive the letters of 30<sup>th</sup> September 2011 and 5<sup>th</sup> October 2011. The email dated 19<sup>th</sup> January 2012, which Ms Winckler does not deny receiving, shows that Mr Goldbart was making no attempt to hide his bankruptcy from her. On the contrary, he was seeking her assistance in frustrating the enquiries of his trustee in a manner which strongly suggests that he believed that Ms Winckler would acquiesce in this. There is simply no reason why he should have written, but not delivered, the letters of 30<sup>th</sup> September 2011 and 5<sup>th</sup> October 2011. Indeed, Ms Winkler accepted in interview in 2012 that she had received the letter of 5<sup>th</sup> October 2011. It is only since these proceedings have been in prospect that her story has changed.
- viii) Despite her knowledge of Mr Goldbart’s bankruptcy, Ms Winckler was content to complete the sale of the Property and authorise the distribution of the proceeds of sale in June 2012, again as directed by Mr Goldbart, even though:
- a) Mr Goldbart had instructed her not to cooperate with Mr Hunt, whom, she accepted in evidence, she knew to have an official function in relation to the administration of Mr Goldbart’s bankruptcy estate;
  - b) Mr Goldbart had impersonated her using the Company’s email address in correspondence with Mr Hunt seeking to dissuade him from contacting her;
  - c) Griffins’ interview on 31<sup>st</sup> May 2012 expressly drew Ms Winckler’s attention to the criminal and civil consequences of fraudulent trading;
  - d) Griffins had already intimated a claim on the basis that the sale to the Company had been at a very significant undervalue; and

- e) She knew that there would be a tax liability on the sale, which the Company would obviously be unable to pay.

Despite all this, she did not ask Segens for advice as to what she should do prior to authorising the distribution of the sale proceeds, even when invited to do so. In my judgment, the reason that she did not do so is that by this point at the latest she knew full well that the Company was involved in a scheme to conceal Mr Goldbart's assets from creditors. At the very least she did not wish her solicitors to confirm Griffins' warning that the Company could be engaged in such a fraud. As she put it, she did not want to believe that what Mr Goldbart's trustee in bankruptcy had told her was true. That is a plain example of the sort of 'blind eye' knowledge referred to in *Morris v State Bank of India*.

- ix) I am satisfied however that Ms Winckler did know that it was true. That is why she did not cooperate with Mr Goldbart's trustee in bankruptcy on Mr Goldbart's instructions. She was prepared to mislead him as to the existence of her personal email address in May 2012. I do not accept Ms Winkler's explanation that she withheld this address because it was private. She was content to use it in correspondence with solicitors both before and after the interview. She withheld this address because she realised that this email account contained information that would reveal the instructions that she received from Mr Goldbart and did not want this to be made known to Mr Hunt.
- x) Similarly, she declined to provide Mr Hunt with information as to the distribution of the proceeds of sale despite Mr Isaacs' repeated advice that she should do so and that she would almost certainly be ordered to do so. She was warned that there might have been a fraud upon his creditors, yet she continued to refuse to heed Mr Isaacs' advice. That, in my judgment, demonstrates a clear recognition that the transactions in which she had been involved would not bear scrutiny by the trustee. That is entirely inconsistent with understanding that the transactions were proper.

56. Standing back and looking at the way in which the purchase and sale of the Property proceeded as a whole, one can see that it is entirely at odds with the explanation given by Ms Winckler for purchasing it. The purchase could never have worked as an investment. I am satisfied that Ms Winckler's account of her intention to buy an investment property and the circumstances in which she came to discover the Property and to incorporate Pantiles is untrue. Instead, in my judgment, she was aware at the time of the sale, as she told Griffins on 31<sup>st</sup> May 2012, that Mr Goldbart was in financial difficulties in 2009 and needed to sell the Property. She agreed to assist him. Indeed, it is likely that this is the 'invaluable' help in Mr Goldbart's financial affairs for which he thanked her in his letters of September and October 2011. While Ms Winckler's conflicting accounts of the circumstances in which she realised that the Property belonged to Mr Goldbart might, of themselves, be insufficient to call into question the substance of her story, in the context of the inherent improbability of that story, and her willingness to mislead and obstruct Mr Goldbart's trustee, I am satisfied that they are fabrications designed to conceal the fact that the Property was to be held for the benefit, ultimately, of Mr Goldbart.



57. I acknowledge that Mr Sagen, in the memorandum that I have quoted above, formed the view that Ms Winckler was ‘pretty much unknowing’ in her role in the scheme. He of course expressed that view without access to the material which formed the trial bundle and without having heard Ms Winckler’s oral evidence. Similarly, Mr Goldbart told Griffins at interview that she was ‘naïve’. I also bear in mind that the more inherently improbable the allegation, the stronger the evidence required to establish it. It is less likely that a person will commit a breach of duty dishonestly than through inadvertence.
58. On the basis of the evidence that I have seen and heard, however, it appears to me that, while Ms Winkler might lack commercial experience, she is an intelligent woman who was able to, and did, appreciate the nature and effect of the documents that she signed on behalf of the Company and the lack of commercial reality behind them at the time. Similarly, she chose to mislead Mr Goldbart’s trustee and to refuse to provide him with information.
59. While she might not have known every detail of Mr Goldbart’s scheme, she knew that Pantiles was being operated to keep the value of the Property out of the hands of Mr Goldbart’s trustee and she facilitated that by allowing the Company to be directed by Mr Goldbart and giving her approval to the purchase of the Property at an undervalue, the creation of a charge for the sole benefit of Mr Goldbart’s wife, and the distribution of the proceeds of sale to an entity she knew to be connected with Mr Goldbart, even though that rendered the Company insolvent because it would be unable to pay the tax that she knew would fall due. That, by any objective standard, was dishonest.
60. Mr Ingham invited me to accept that Ms Winckler too has been the victim of a ‘pernicious and clever deception’ on the part of Mr Goldbart. That submission might have force if Ms Winckler had been able to set out, even in broad terms and with the benefit of hindsight, what Mr Goldbart said, or might have said, by way of an explanation as to why the Company should purchase the Property, enter into ruinous loans or refuse to cooperate with his trustee in bankruptcy. Similarly, while Mr Ingham contends that Ms Winckler had nothing to gain by allowing the Company to be used by Mr Goldbart this overlooks Ms Winckler’s evidence that she had hoped to realise £100,000 from the onward sale of the Property. That is a remarkable profit to make from a property into the purchase of which she had put not a single penny.
61. In short, I am satisfied that Ms Winkler was knowingly a party to the use of the Company for the purposes of defrauding Mr Goldbart’s creditors.

### **Conclusion on section 212 of the 1986 Act**

62. Even if I am wrong that Ms Winckler was knowingly a party to the Company’s scheme, it is undoubtedly the case that she was at least in breach of her duty to act in such a way as she considered *bona fide* to promote the success of the Company in entering into a loan for the benefit of Ms Iwamoto. That much is admitted. There is nothing to suggest that Ms Winckler considered the interests of the Company at all when entering into the Second Steckelmacher Loan. This court thus has to look at the matter objectively. No explanation has been offered as to how it could possibly have been in the Company’s interests to secure a debt for the benefit of Ms Iwamoto on the Company’s only asset. It is impossible to see what benefit to the Company there could conceivably have been in the circumstances. Plainly it was in breach of her duty to promote the success of the Company to offer its sole asset as security for a debt from which it derived no benefit.

An intelligent and honest man in the position of a director of the company concerned could not have reasonably believed that the loan was for the benefit of the company. Similarly, it was a breach to repay that loan without seeking an indemnity or a repayment from Ms Iwamoto. As such it is plain that Ms Winckler was in breach of her duty under section 172 of the 2006 Act.

63. Similarly, the distribution of the sale proceeds of the Property to pay an unsecured creditor, Goldbeck (2009), (even assuming that Goldbeck (2009) did indeed make a loan to the Company to enable it to purchase the Property) was plainly in breach of the duty that Ms Winckler owed to creditors at the time of the distribution of the proceeds of sale. That too is admitted. The Company was not only likely to become insolvent as a result of paying away the sum of £181,818.51 – insolvency was inevitable. It left the Company without assets to meet the tax liability on the sale, or any other liability. Ms Winckler accepted that she knew that there were taxes to be paid on a profit, but there is nothing to suggest that the interests of creditors were considered at all. It is accepted on Ms Winckler’s behalf that the Goldbeck (2009) loan was not secured and should not therefore have been discharged in preference to the Company’s other liabilities. Again, that was a breach of her duty, preserved by section 172 of the 2006 Act, to consider properly the interests of the creditors. An intelligent and honest director would not have made the payment.
64. Finally, it is plain in my judgment that Ms Winkler simply abrogated her decision-making to Mr Goldbart. I do not accept that she merely sought his advice and exercised her own independent judgment in considering whether to accept it. There is no instance of her declining to follow his advice and the fact that she cannot recall that advice, or even attempt retrospectively to reconstruct what it might have been, demonstrates in my judgment that no such advice was given. Ms Winckler simply followed his direction. It is quite clear that she was in breach of her duty under section 173 of the 2006 Act to exercise independent judgment.

### **Limitation in respect of the Second Steckelmacher Loan**

65. The Second Steckelmacher Loan agreement is dated 10<sup>th</sup> December 2011 and this claim was commenced on 18<sup>th</sup> May 2018. Mr Ingham’s submission is that the claim for breach of duty in respect of this loan is time-barred. If Mr Ingham is correct that the relevant breach was the entry into the loan, and the repayment of it is not a separate breach of duty then, on the face of it, he is right that the claim is time-barred. Mr Curl however relies on sections 21 and 32 of the Limitation Act 1980 (‘the 1980 Act’) to preserve the limitation period.
66. Section 21 of the 1980 Act provides:

‘(1) No period of limitation prescribed by this Act shall apply to an action by a beneficiary under a trust, being an action—

(a) in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy; or

(b) to recover from the trustee trust property or the proceeds of trust property in the possession of the trustee, or previously received by the trustee and converted to his use.’

In *Burnden Holdings (UK) Ltd v Fielding* [2018] A.C. 857, paragraph 11, Lord Briggs JSC, with whom the other justices agreed, explained why directors are treated as if they were trustees for the purposes of this section –

‘It is common ground (and clear beyond argument) that, as directors of an English company who are assumed to have participated in a misappropriation of an asset of the company, the defendants are to be regarded for all purposes connected with section 21 as trustees. This is because they are entrusted with the stewardship of the company’s property and owe fiduciary duties to the company in respect of that stewardship: see *Paragon Finance plc v DB Thakerar & Co* [1999] 1 All ER 400; *JJ Harrison (Properties) Ltd v Harrison* [2002] 1 BCLC 162, in particular per Chadwick LJ at paras 25–29; *Williams v Central Bank of Nigeria* [2014] AC 1189, para 28 per Lord Sumption JSC and, most recently, *First Subsea Ltd (formerly BSW Ltd) v Balltec Ltd* [2018] Ch 25, para 50, per Patten LJ. By the same token, the company is the beneficiary of the trust for all purposes connected with section 21. Complications have arisen where, although a director, the defendant’s breach of duty did not involve the misapplication of company property: see for example *Gwembe Valley Development Co Ltd v Koshy (No 3)* [2004] 1 BCLC 131, but those difficulties (if indeed they survive the decision of the Court of Appeal in the *First Subsea* case) do not arise on this appeal.’

On that basis it is clear that no limitation period runs against the Ms Winckler as ‘trustee’ for the purposes of this section as against the Company as ‘beneficiary’ in respect of any fraud to which she was party. As with section 213 of the 1986 Act, section 21(1)(a) of the 1980 Act does not require the ‘trustee’ to have carried out the fraud himself, only to have been a party to it. Similarly, the section does not require the fraud to have been worked on the ‘beneficiary’ itself. It is sufficient for the ‘trustee’ to have been party to ‘any fraud’. That seems to me to be sufficiently wide to encompass a claim under section 213. I have found that Ms Winckler was knowingly a party to the carrying on of the business to defraud Mr Goldbart’s creditors and the Second Steckelmacher Loan was part of the scheme to so.

67. Mr Curl also referred me to section 32 of the 1980 Act. This provides:

‘(1) Subject to subsections (3) and (4A) below, where in the case of any action for which a period of limitation is prescribed by this Act, either—

(a) the action is based upon the fraud of the defendant; or

(b) any fact relevant to the plaintiff’s right of action has been deliberately concealed from him by the defendant; or

(c) the action is for relief from the consequences of a mistake;

the period of limitation shall not begin to run until the plaintiff has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it.

References in this subsection to the defendant include references to the defendant's agent and to any person through whom the defendant claims and his agent.

(2) For the purposes of subsection (1) above, deliberate commission of a breach of duty in circumstances in which it is unlikely to be discovered for some time amounts to deliberate concealment of the facts involved in that breach of duty.'

Mr Curl referred me to *Haysport Properties Limited v Joseph Ackerman* [2016] BCC 676. In that case, the defendant was sued for breach of duty as director in entering into certain transactions in 2005. He and others were removed as directors in 2011 and the claim was commenced in 2014. Peter Smith J held that time for the purposes of the 1980 Act did not begin to run until an independent board was put in place in 2011. I agree with Mr Curl therefore that, here, there has been deliberate concealment of facts relevant to Mr Dowers' right of action for the purpose of section 32(1)(b) by reason of the operation of section 32(2). There has been a deliberate commission of a breach of duty in circumstances in which it was unlikely to be discovered in this case. The entry into the Second Steckelmacher Loan was a deliberate act by Ms Winckler that constituted a breach of duty. It was not inadvertent. That act was done in circumstances where the breach of duty was unlikely to be discovered until someone other than Ms Winckler took charge of the Company's affairs. That was unlikely to happen until the Company was placed in responsible hands on a liquidation. Such liquidation took place only in 2015.

68. In my judgment therefore, the effect of both section 21 and section 32 of the 1980 Act is to disapply the primary limitation period in relation to the claim in relation to the Second Steckelmacher Loan, whether that breach is characterised as fraudulent or negligent.

### **Relief under section 1157**

69. The power of the court to relieve a director from liability for breach of duty is set out in section 1157(1) of the 2006 Act as follows:

'(1) If in proceedings for negligence, default, breach of duty or breach of trust against—

(a) an officer of a company, ...

it appears to the court hearing the case that the officer or person is or may be liable but that he acted honestly and reasonably, and that having regard to all the circumstances of the case (including those connected with his appointment) he ought fairly to be excused, the court may relieve him, either wholly or in part, from his liability on such terms as it thinks fit.'

I was referred to the judgment of Barling J in *Cullen Investments Ltd v Brown* [2017] EWHC 2793 (Ch) as to how this section should be approached. He said at paragraph 10 –

‘It is clear on the authorities that the question whether a director acted honestly is to be answered subjectively (see *Coleman Taymar Limited v. Oakes* [2001] 2 BCLC 749 , at [83]). It appears also to be clear that the test of reasonableness is to be answered objectively, by reference to the knowledge, skill and experience which might reasonably be expected of a person carrying out the functions in question (see *Coleman Taymar Limited v. Oakes* (above), at [83]).’

70. It is clear that the taking of advice does not automatically lead to relief (*Coleman Taymar v Oakes* [2001] 2 BCLC 749). It is however a factor which can be taken into account when considering reasonableness. In *Marsden v Regan* [1954] 1 WLR 423 at 434-435 it was said:

‘I, therefore, acquit the learned judge entirely of forming the view that merely taking advice, without more, is necessarily a passport to relief, but I think with him that, in all the circumstances of the present case and bearing in mind the grave difficulties with which the defendant was confronted, it was reasonable for her, having taken advice and paying regard to the advice which was given, to act on it as she did’

Mr Ingham accepted that it is the objective test of honesty that is to be applied. I have already found that Ms Winkler was a knowing party to the fraudulent activity of the Company and that she was dishonest by ordinary standards. If I am wrong as to that, and that she was in breach of duty through inadvertence for the purposes of section 212 of the 1986 Act, then I must consider whether she acted reasonably and ought fairly to be excused.

71. Ms Winckler essentially relies upon Segens’ failure to inform her of Mr Goldbart’s scheme or on the propriety of disposing of the proceeds of sale. Mr Ingham submits that Ms Winckler’s reliance upon solicitors is a strong starting point in establishing reasonableness. I reject this submission. Segens were asked to effect a conveyancing transaction. Ms Winckler had access to the relevant correspondence regarding this, either via the Company email address or her personal email address, and her failure to consider it was not reasonable. While it is true that there were emails where Mr Isaacs corresponds with Mr Goldbart using the latter’s email address, Ms Winckler was happy for Mr Goldbart to write on behalf of the Company and her authority was expressly sought for the distribution of the proceeds of sale. At no point were Segens asked by Ms Winckler to advise on the implications or propriety of the distribution. Nor did Ms Winckler contact Mr Isaacs to ask for advice when he expressly invited her to do so. Indeed, Ms Winckler declined to accept Mr Isaacs’ advice that she should provide Mr Hunt with the requested details of the destination of the proceeds of sale of the Property when he volunteered it, even in the face of his (undoubtedly correct) advice that Mr Hunt was entitled to an order requiring such disclosure. In my judgment the refusal to accept such advice is clear evidence that, far from relying upon Segens’ advice, Ms Winckler turned her face against such advice, on the basis that she was content to follow the direction of Mr Goldbart. As Mr Curl put to Ms Winckler, by the time she had been interviewed by Griffins on 31<sup>st</sup> May 2012, she should have realised, and I find that she did realise, that Mr Goldbart was the very last person whose advice she should seek in relation to the sale of the Property. In my judgment, even if Ms Winckler was wholly unwitting in her involvement in Mr Goldbart’s scheme, by 31<sup>st</sup> May 2012 it was

entirely unreasonable for her to continue to go along with it without seeking express confirmation from Segens as to the propriety of the Company's actions.

**Conclusion**

72. I will invite counsel to agree a form of order that reflects my judgment and provides for a hearing to consider the appropriate form of relief.