SHERIFFDOM OF TAYSIDE CENTRAL AND FIFE AT FORFAR

[2019] SC FOR 83

SQ46/17

JUDGMENT OF SHERIFF GREGOR MURRAY

in Summary Application

by

THE ACCOUNTANT IN BANKRUPTCY

in relation to the Sequestration of

FRANK JAMES DOCHERTY

Accountant in Bankruptcy: DM Thomson QC; Harper Macleod LLP
Trustee: McIlvride QC, Tariq; Kepstone Solicitors

Introduction

[1] For at least a hundred and fifty years, the Accountant in Bankruptcy ("the AiB") has had power to ask a Sheriff to determine whether a Trustee in Sequestration has breached a legal duty imposed on him. Under the Bankruptcy (Scotland) Act 1985, before determining any such request by the AiB, the court must afford the Trustee an opportunity to be heard on the alleged breach. If it is found proved, wide discretion is conferred on the Sheriff to remove the Trustee from office, to censure him or to make such other order as is required.[1]

[2] In this Summary Application under those provisions, the AiB requests that Mr Docherty's Trustee, Kenneth Pattullo ("the Trustee") be censured and ordered to compensate the sequestrated estate as a consequence of alleged breaches of duty in relation to:-

- a heritable asset he abandoned during the sequestration

[1] Section 1A(2)

- the content of a related form which he submitted to the Land Register
- delay in compensating Mr Docherty's sequestrated estate
- his failure to submit a suspected offence report to the AiB regarding the conduct of a former business partner, Craig Mathieson ("Mr Mathieson")
- production of his files and audit of his fees.

[3] The Trustee denies that any breach of duty occurred and lodged Answers to the AiB's application. The Application and Answers were both adjusted and extensive productions and three Affidavits, one by Graeme Perry, the AiB's Head of Operational Policy and Compliance, and two by the Trustee, were lodged, on which I heard submissions at a Hearing on 2 November 2018. I was advised witness evidence was unnecessary. At my request, before making *avizandum* a further Joint Inventory of Productions was lodged containing correspondence regarding a parallel complaint by the AiB to the Trustee's professional body, the Insolvency Practitioners' Association ("IPA").

[4] I should make it clear that I indicated that I knew the Trustee both when the Application was first lodged and before the hearing commenced. However, on both occasions I was advised that as it was not uncommon for agents and Counsel to have acted for and against an Insolvency Practitioner in different cases, and as I was considered to have some knowledge of relevant law and practice, parties and agents wished me to deal with the case. I proceed on that basis.

Reasons for the Application

[5] As applications of this type are very rarely made and the circumstances of the sequestration are unusual, it is helpful to contrast what appears to have been intended to occur in the sequestration with what actually ensued.

[6] Mr Docherty was sequestrated in 2012. At the date of his sequestration, he had unsecured debt in his name of over £100,000 and secured debt in joint names of himself and his wife of just under £80,000. His earnings from employment were insufficient to permit him to contribute financially to the sequestrated estate. His only asset was a one-half share of heritable property in Montrose ("the family home"), valued around £38,000. However, as the family home was occupied by his wife, four children and, occasionally, his elderly parents, the Trustee was aware that he would probably need to seek a court order for permission to realise the asset[2] and, if such an application was opposed, it was far from certain that permission would be granted.[3]

[7] Mrs Docherty offered to purchase the Trustee's interest in the family home for £20,000 soon after sequestration. Though that sum only represented just over half of the asset's value, the AiB approved a request by the Trustee to accept it, as the discounted sum reflected the risk the Trustee faced if he applied to court. Mrs Docherty had already paid that sum to a business controlled by Mr Mathieson who, along with the Trustee, was also a partner member of Begbies Traynor (Central) LLP ("the LLP"). It therefore appeared an early interim dividend could be paid to the creditors and, barring a change in Mr Docherty's circumstances, the sequestration could be finalised soon after his discharge in 2013.

[8] What actually occurred was rather different – the £20,000 was not paid into the sequestrated estate until early 2018 and was paid by the LLP, not Mr Mathieson. The Trustee abandoned his interest in the family home three years before that occurred[4]. Though Mr Docherty has been discharged, the Trustee remains in office. Administration of the

[2] 1985 Act as then in force, section 40(1)
[3] 1985 Act, section 40(2)
[4] 1985 Act, section 39A

sequestration has lasted nearly seven years. The Trustee's fees have yet to be determined. It appears unlikely that any dividend will be paid.

[9] The causes of these differences can be found in the pleadings, Affidavits, Productions and reasonable inferences taken from them. However, some of them are buried beneath layers of misunderstanding, misstatement and inaccuracy. Not all appear to have been appreciated or considered. To fully comprehend and address the issues raised by the Application, it is necessary to identify then peel away each layer.

[10] It is also important to acknowledge that, as often occurs in unusual or unique circumstances, Sod's Law contributed to the progress of events and the worst possible outcome. As is now accepted by the Trustee, legal advice which he received from the LLP's General Counsel to abandon his interest in the family home was incorrect. However, by the time that became known to him, he had already implemented it. Separately, Mr Mathieson was himself sequestrated. Finally, as discussed later, the Trustee was wrong to think that Mr Mathieson's sequestration meant that there was no possibility of recovering the £20,000 from him.

[11] The chronology below also sheds light on two of the more remarkable aspects of the sequestration – the Trustee's ignorance of Mrs Docherty having paid £20,000 to Mr Mathieson and, separately, why for nearly three years neither Mrs Docherty nor her solicitor told the Trustee that she had done so.

[12] The most convenient way to explain the causes is to set out events chronologically then to put some of those events in their proper context. Timelines which have already been prepared by the Trustee[5] and the AiB[6], though helpful, only paint part of the picture.

[5] Second Affidavit
[6] Tab 1, Joint Inventory

Chronology of Events

[13] In March 2012, the LLP appointed Mr Mathieson as a partner member.[7] The Trustee was already a partner member. Though the Trustee was a registered Insolvency Practitioner, Mr Mathieson was not. The LLP was aware that Mr Mathieson had other business interests, in particular a debt management company CM Financial[8] and an insolvency fact find business, CM Consulting.[9] Prior to Mr Mathieson's assumption as a partner member of the LLP, the latter referred insolvency appointments to the LLP in exchange for payment.[10]

[14] In about May 2012, Mr Docherty sought financial advice from Paul Breen of PMB Taxation Services Limited in East Kilbride. Mr Breen referred Mr Docherty to Mr Mathieson, who was an existing business contact.[11]

[15] In early May 2012, another business owned and controlled by Mr Mathieson, CM Corporate Services Limited,[12] instructed DM Hall Chartered Surveyors to value the family home. On 8 May 2012, DM Hall sent a report to that company which valued the family home at £155,000.[13]

[16] Also on 8 May 2012, Mrs Docherty's bank account was credited with a payment of £15,000 from Spectrum Financial.[14] On 9 May, a further £1,400 was deposited into her account.[15]

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[7] Admission in Answer 8
[8] Trustee Production 4.1; Answer 8
[9] See AiB Production 23
[10] See AiB Production 23
[11] Accepted in submissions
[12] Answer 8.
[13] AiB Production 5
[14] AiB Production 18
[15] *ibid*

[17] On 14 May 2012, Mr Mathieson met Mr Docherty and Mr Breen at the LLP's office in Glasgow. At the meeting, agreement was reached that Mr Docherty would submit a Debtor Sequestration Application to the AiB and nominate the Trustee to act in his sequestration.[16] Mr Docherty completed the Application form that day.[17] In it, he disclosed (a) his unsecured debts of around £126,000 (b) the joint interests of himself and his wife in the family home and (c) an £82,500 joint mortgage over it with Santander.[18] The Application Form incorporated a Consent to Act and a Certificate for Sequestration, both of which were signed by the Trustee as at that date.[19] The latter was printed on the LLP's headed notepaper.[20] Mr Docherty's Application was then lodged with the AiB.

[18] On 17 May 2012, the AiB granted Mr Docherty's application and appointed the Trustee.[21]

[19] On 22 May 2012, CM Corporate Services Limited changed its name to CM Financial Group Specialists Limited.[22]

[20] On 22 May 2012, a further £3,700 was deposited into Mrs Docherty's bank account. On the same day, she electronically transferred £20,000 from her account to an account in the name of CM Business.[23]

[21] On 29 May 2012, Santander sent a letter to the Trustee confirming that the balance of the mortgage over the family home amounted to £78,343.[24]

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[16] AiB Production 17
[17] AiB Production 1
[18] *ibid*
[19] *ibid*
[20] *ibid*
[21] AiB Production 2
[22] Answer 8
[23] AiB Productions 17 and 18
[24] AiB Production 3

[22] On 5 July 2012, the Trustee sent a letter to Mr Docherty in which he valued his interest in the family home at £38,547 and asked him to intimate whether he wished to purchase the Trustee's interest in the property or allow it to be marketed and sold. The letter referred to the DM Hall valuation.[25]

[23] Mr Mathieson referred Mrs Docherty to Douglas Kilpatrick of Peterkins Robertson Paul, Solicitors, Glasgow, another of his business contacts, to enable a formal offer to be made on her behalf to purchase the Trustee's interest in the family home.[26]

[24] On 30 July 2012, a member of the Trustee's staff sent an e-mail to Mr Mathieson at business e-mail address 1 regarding a proposed offer from Mrs Docherty for the family home. Mr Mathieson replied by e-mail stating:-

"Met lawyer Friday. He is back from holiday and sending you letter this week".[27]

[25] On 21 August 2012, Mr Kilpatrick wrote to the Trustee offering £20,000 on Mrs Docherty's behalf to purchase the Trustee's interest in the family home.[28]

[26] On 28 August 2012, the Trustee wrote to the AiB seeking approval of Mrs Docherty's offer. He enclosed copies of the offer and the DM Hall valuation.[29]

[27] On 30 August 2012, the AiB approved the Trustee's request.[30]

[28] On 13 September 2012, a member of the Trustee's staff sent Mr Mathieson an e-mail reminder about Mrs Docherty's offer. Mr Mathieson replied from his business e-mail address 1 stating that he would phone Mr Breen.[31]

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[25] AiB Production 5
[26] Reasonable inferences from paragraphs 26 – 27, 63 and 86 below
[27] Trustee's First Affidavit, paragraph 6; Trustee Production 2.49
[28] AiB Production 6
[29] AiB Production 7
[30] AiB Production 8
[31] Trustee Production 2.47

[29] On 5 November 2012, Mr Mathieson sent an e-mail from his LLP e-mail address to Mr Kilpatrick asking about progress of her offer.[32]

[30] Throughout 2013, members of the Trustee's staff regularly reminded Mr Mathieson of the need to progress the proposed transfer. In response, Mr Mathieson sent occasional reminders to Mr Kilpatrick. On 19 November 2013, a member of the Trustee's staff sent an e-mail to Mr Kilpatrick intimating that in the absence of progress, the Trustee would consider taking the matter to court.[33]

[31] On 9 January 2014, Mr Mathieson and a qualified Insolvency Practitioner employed by the LLP formed a new business, CM Financial Limited, which directly competed with the LLP in the obtaining and administration of insolvency cases.[34] Mr Mathieson intimated his intention to resign as a partner member of the LLP with effect from 14 March 2014.[35]

[32] On 18 February 2014, Mr Mathieson sent an e-mail to a member of the Trustee's staff from business e-mail address 2. In it, he referred to the Trustee's threat to take the matter to court and indicated that Mrs Docherty's solicitor expected to conclude the transfer in three to four weeks.[36]

[33] On 28 February 2014, the LLP terminated Mr Mathieson's appointment as a partner member.[37]

[34] Throughout 2014, the Trustee's staff sent regular e-mail reminders to Mr Mathieson about the £20,000. He responded to each with a series of differing excuses for the transfer not having progressed.[38]

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[32] Trustee Production 2.46
[33] Trustee Productions 2.33 to 2.45
[34] Tab 36, Joint Productions
[35] AiB Production 23
[36] Trustee Production 2.32
[37] AiB Production 23

[35] On 8 January 2015, a member of the Trustee's staff sent Mr Mathieson a further e-mail threatening to take the matter to court if the transfer had not settled by 6 February 2015.[39] On 12 January, Mr Mathieson sent a letter in response enclosing a mandate from Mrs Docherty authorising him to act on her behalf.[40]

[36] On 6 February 2015, Mr Mathieson sent a further letter to the Trustee stating that Mrs Docherty was able to pay the £20,000 by four equal instalments of £5,000.[41] On 16 February 2015, he sent a further letter to the Trustee stating Mrs Docherty would pay the £20,000 in full by 10 March 2015.[42] In March 2015, in further e-mails to the Trustee's staff, Mr Mathieson falsely pretended that he had recently transferred £20,000 by BACS to the Trustee's bank account.[43]

[37] On 18 March 2015, Mr Mathieson was sequestrated. The AiB was appointed his Trustee.[44]

[38] On 24 March 2015, Mr Breen sent a letter to the Trustee which stated that Mrs Docherty had paid the £20,000 in May 2012 to Mr Mathieson in his capacity as a partner of the LLP.[45] The letter enclosed vouching for the payment.[46]

[39] Between 25 March and 1 April 2015, the Trustee consulted with and took legal advice on Mr Breen's letter from John Humphrey, the LLP's in-house General Counsel.[47]

[40] On 1 April 2015, the General Counsel advised the Trustee to forthwith release his interest in the family home.[48]

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[38] Trustee Productions 2.20 to 2.31
[39] Trustee Productions 2.15 to 2.20
[40] Trustee Production 2.19
[41] Trustee Production 2.17
[42] Trustee production 2.10
[43] Trustee Productions 2.01 to 2.14
[44] Admission, Condescendence 7
[45] AiB Productions 17 and 18
[46] AiB Productions 17 and 18
[47] Trustee Productions 3.1 – 3.6

[41] On 3 April 2015, the Trustee sent a letter to Mr Docherty intimating he was releasing his interest in the family home.[49]

[42] On 9 April 2015, the Trustee sent a Notice of Abandonment in relation to the family home for recording in the Land Register.[50] In it, he stated:-

> "the property has been abandoned in consideration of a payment of £20,000 which has been made to the sequestrated estate".

[43] On 17 May 2016, a pro-forma Case Review sheet on the Trustee's file was updated by a member of his staff.[51] The Trustee reviewed and approved it. It stated:-

> "It has now been established that the Trustee's interest in the property was paid to Craig Mathieson a number of years ago. The Trustee has therefore confirmed to the debtor that no further action is required from him…in return, the debtor will provide all evidence he has in relation to this matter….Once received the Trustee will appoint a legal agent to commence action against Mr Mathieson for the repayment of the £20,000".

[44] On 19 May 2016, the Trustee sent his files, including the Case Review, for audit to the AiB.[52]

[45] The Trustee has not appointed a legal agent to commence action against Mr Mathieson.

[46] On 22 September 2017, the AIB submitted a complaint to the IPA regarding the Trustee's conduct and practice during the sequestration.

[47] On 13 April 2018, the LLP paid £20,000 with accumulated interest from 14 May 2012 into its client account for the sequestration. [53]

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[48] Trustee Production 3.2
[49] AiB Production 19
[50] AiB Production 20
[51] AiB Production 9
[52] Trustee's Second Affidavit, paragraph 5; Mr Perry's Affidavit, paragraph 17
[53] Answer 14

[48] In July 2018, at the request of the Trustee, agreement was reached that determination of the AIB's complaint to the IPA would be deferred pending the outcome of the present proceedings.[54]

Context

[49] Both Senior Counsel submitted that it was for me to take a view on the evidence adduced. Having done so above, it is also important, as Senior Counsel for the AiB suggested, to place that evidence in context.

Legal

[50] The Trustee is obliged to realise Mr Docherty's estate and distribute the proceeds among his creditors[55]. He is subject to statutory supervisory jurisdiction and guidance by the AiB[56]. Some of that guidance is contained in *Notes For Guidance* which the AiB publishes and periodically updates. I discuss them in detail below. Additionally, the Trustee was subject to regulation and independent scrutiny, both as a registered Insolvency Practitioner[57] and as a member of the IPA[58]. Though he was appointed in this instance by the AiB, he was, and remains, subject to the orders of a competent court.

Insolvency in Scotland

[51] Relatively few people are directly employed in insolvency work in Scotland. However, their influence extends well beyond it. Many of them actively seek contacts to

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[54] Tabs 36 – 37, Joint Inventory
[55] Section 3(1)(a) and (b) 1985 Act
[56] Section 1A(1)(a)(ii) 1985 Act
[57] Part XIII Insolvency Act 1986
[58] e.g. IPA Ethics Code for Members found at www.insolvency-practitioners.org.uk

maximise their ability to obtain and/or pass on insolvency related work. The cultivation of a network of friendly bankers, accountants, solicitors, surveyors, valuers and auctioneers has long been recognised as a valuable source of insolvency appointments and consultancy work on the one hand and a means of obtaining specialist assistance on the other.

[52] Mr Mathieson was regarded as a serial networker in this small world, a kenspeckle figure with an enviable list of contacts.[59] However, he was not a qualified Insolvency Practitioner. As such, his work was not subject to direct independent regulation and scrutiny.

Mr Mathieson's Relationship with the LLP

[53] Unsurprisingly, Mr Mathieson's contact book brought him to the attention of the LLP, which is one of the largest firms operating in Scottish insolvency.[60] However, as noted, the LLP was not blind to his other business interests. It is helpful to consider the evidence of that in more detail.

[54] In a letter to the AiB dated 25 January 2017[61], the LLP acknowledged:-

> "prior to being appointed as a partner member of the LLP, Mr Mathieson provided fact find services to the LLP through his then business CM Consultants Limited. Monies were paid to Mr Mathieson's consultancy business in respect of the fact find services he carried out..."

[55] In an e-mail to the IPA on 6 December 2017, the Trustee acknowledged that the LLP:-

> "was aware during his tenure as a partner member, and after (leaving it), Mr Mathieson had certain other business interests, principally in a debt management business called CM Financial…".[62]

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[59] Page 1, Tab 36, Joint Inventory

[60] Trustee's Production 4.1; Joint Inventory Tab 36, page 1

[61] AiB Production 23

[62] Trustee Production 4.1.1

[56] The LLP's knowledge of and agreement to Mr Mathieson's involvement in these other businesses is, of course, corroborated by the e-mail correspondence between him and members of the Trustee's staff using e-mail addresses related to them.

[57] Ironically, those other business interests led to Mr Mathieson's departure from the LLP, as also explained in its letter of 25 January 2017:-

> "Mr Mathieson tendered his resignation as a partner member of the LLP by email on 14 January 2014. The relevant notice period was 3 months but the LLP ended Mr Mathieson's partnership on 28 February due to discovered breaches by Mr Mathieson of his partner member's agreement with the LLP in that evidence had come to light that Mr Mathieson was carrying on a competitive insolvency business, CM Financial Limited, which was now (sic) taking formal personal insolvency appointments in contravention of Mr Mathieson's partner members agreement with the LLP."

[58] From this evidence, it is reasonable to infer:-

a. before his membership of the LLP, Mr Mathieson provided fact find services to clients through CM Consultants Limited;

b. before Mr Mathieson became a member of the LLP, CM Consultants referred any personal insolvency appointments to the LLP which its client fact finds generated;

c. CM Consultants Limited was paid by the LLP for such referrals;

d. before, during and after his appointment as a member of the LLP, Mr Mathieson provided debt management services to clients through CM Financial Limited;

e. after he was appointed a member of the LLP, Mr Mathieson continued to complete fact finds and to refer personal insolvency appointments to the LLP. Instead of payment being made to CM Consultants Limited, Mr Mathieson was remunerated as a partner member of the LLP;

f. it was an express or implied term of the partnership agreement between Mr Mathieson and the LLP that his other business interests would not compete with those offered by the LLP;

g. in January 2014, CM Financial Limited employed an Insolvency Practitioner who commenced taking personal insolvency appointments in his/her name. By doing so, Mr Mathieson's business interests directly conflicted and competed with the LLP's. In consequence, the LLP terminated Mr Mathieson's membership;[63]

Payment of the £20,000

[59] As the chronology shows, Mrs Docherty appears to have borrowed £15,000 from Spectrum Finance on 8 May 2012, the same day as DM Hall's report was sent to CM Corporate Consultants Limited. Further deposits totalling £5,000 were credited to her bank account over the succeeding two weeks. On 22 May 2012, after the meeting between her husband, Mr Breen and Mr Mathieson in Glasgow and subsequent to Mr Docherty's sequestration, she transferred £20,000 to an account described in her bank statement as "CM Business". It was not disputed before me that CM Business was owned or controlled by Mr Mathieson.

The Certificate for Sequestration

[60] On 14 May 2012, as Mr Docherty was not apparently insolvent for any of the reasons defined in the 1985 Act,[64] he was only permitted to apply to the AiB to sequestrate himself if

[63] Joint Inventory, Tab 36

[64] 1985 Act section 7

an authorised person completed a Certificate for Sequestration confirming that he was unable to pay his debts as they fell due.[65]

[61] On that date, a Certificate for Sequestration required to be in a prescribed form[66], signed by an authorised person on headed notepaper.[67] The prescribed form *inter alia* provided that (i) the debtor had applied to the authorised person for such a Certificate (ii) the authorised person granted it "on the basis of information supplied to (him)" and (iii) the authorised person certified that the debtor was, in consequence, unable to pay his debts as they fell due.[68]

[62] As a registered Insolvency Practitioner, the Trustee was an authorised person for the purposes of the 1985 Act.[69] The Certificate for Sequestration dated 14 May 2012 which he provided to Mr Docherty was in accordance with the prescribed form.[70]

[63] These aspects of context noted, it is then necessary to analyse certain passages of the evidence and the Trustee's comments on them.

Analysis

Events on 14 May 2012

[64] In Answer 8 the Trustee avers:-

> "The Respondent believes and avers that the meeting referred to in Paul Breen's letter took place on or around 14 May 2012 before the Trustee was appointed on 17 May 2012. This would appear to be a pre-appointment meeting at which the Debtor received advice and completed the Debtor Application…"

[65] In a letter of 27 October 2017 to the IPA[71], the Trustee stated:-

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[65] 1985 Act, section 5B(1) – (3)

[66] Bankruptcy (Certificate for Sequestration) (Scotland) Regulations 2010, Regulation 5

[67] *ibid*, Regulation 3

[68] *ibid*

[69] 1985 Act, section 5B(1) and (5), 2010 Regulations

[70] AiB Production 1

> "I confirm that my files do not contain any notes of the meeting between Mr Docherty and Mr Mathieson in May 2012 as Mr Mathieson was not acting on my behalf as Trustee, as I had not, at that stage, even been appointed and so he did not provide me with any documentation regarding what was discussed at that meeting."

[66] In an e-mail to the IPA dated 6 December 2017[72] in relation to the events of 14 May 2012, the Trustee stated:-

> "What is not clear is whether at this meeting Mr Mathieson was acting in his capacity as a partner member of (the LLP) or whether he was in fact operating through his consultancy business in terms of carrying out initial debt advisory services for Mr Docherty. Following the initial meeting between Mr Docherty and Mr Mathieson, I was subsequently appointed as Mr Docherty's Trustee in Sequestration in the usual course. During the sequestration, it was subsequently agreed that £20,000 would be paid by Mr Docherty's wife to "buy out" Mr Docherty's share…"

[67] In places, those statements are confusing, misleading or inaccurate. The starting point is to recall that the Trustee and LLP were aware of and consented to at least some of Mr Mathieson's other business activities. One of those, the provision of debt management advice, demonstrably gave rise to the types of potential conflicts of interest and business overlap which the Trustee's regulatory body warns against in its Code of Ethics.[73] As discussed below, no evidence was produced to show that activity was internally regulated by the LLP *via* administrative systems and/or its partnership agreement with Mr Mathieson.

[68] For the reasons which follow, there was no basis for the Trustee to state in the e-mail that he was unclear what Mr Mathieson was doing on 14 May 2012. In fact, the contrary was the case, as that statement conflicts with his averment that it appeared to be a "pre-appointment meeting". On the evidence, that is a more accurate description; the Trustee was nominated to act because he was an Insolvency Practitioner and fellow member of the LLP,

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[71] Tab 26, Joint Inventory

[72] Trustee's Production 4.1.1

[73] See e.g. Para 31 IPA Code of Ethics

the person whom Mr Mathieson proposed be appointed. The meeting with Mr Mathieson was held at the LLP's office as part of the planning process to that end.

[69] That is corroborated by the fact that the planning process needed the Trustee, as he required to provide a Certificate for Sequestration to enable Mr Docherty to apply for sequestration. However, statutorily, the Trustee could only provide that Certificate if he certified on the basis of information presented to him by Mr Docherty that the latter was unable to pay his debts as they fell due. He must have been satisfied that was the case as he did so on 14 May.

[70] It follows that the statement in the letter of 27 October that there were no notes of the meeting on the Trustee's file and he received no documentation about it must either be inaccurate or, at least, is confusing and misleading. In fact and in law, the effect of the legislation and the Certificate for Sequestration produced is that the Trustee is deemed to have had knowledge of Mr Docherty's finances on 14 May 2012. I proceed on that basis.

Why the Trustee was Unaware the £20,000 had been Paid

[71] In Answer 7, the Trustee avers that he was unaware until he received Mr Breen's letter in March 2015 that the £20,000 had been paid and that none of Mr and Mrs Docherty, Mr Kilpatrick and Mr Mathieson advised him that had occurred. I accept that is true. However, it is then averred that each of those persons had opportunities in correspondence to disclose the payment to him and, for reasons unknown to him, failed to do so. On the evidence adduced, I do not accept that was the case except in relation to Mr Mathieson. There is nothing in the productions which suggests Mr or Mrs Docherty had any such opportunity or that Mr Kilpatrick knew the £20,000 had been paid.

[72] On the contrary, the evidence is that the Trustee missed opportunities to find out about it; I have already addressed his deemed knowledge of Mr Docherty's finances in May 2012. I narrate other potential missed opportunities below.

[73] Otherwise, Mr Mathieson's contact book and his willingness to be the middleman in the sequestration assist understanding why no-one told the Trustee. Put simply, by referring Mrs Docherty to Mr Kilpatrick, a contact who, it may reasonably be inferred, trusted him and by ensuring that he remained the point of contact between Mr Kilpatrick and the LLP, Mr Mathieson was able to plug any potential leak about the £20,000 having been paid.

[74] Even after his departure from the LLP, by drawing on his bank of contact debt and his knowledge of the LLP's staff and administrative systems, he was able to carry on doing so. I address the obvious conflict of interest which that caused below.

[75] From that position of control and the e-mail chains lodged, it is reasonable to infer Mr Mathieson was able to prevent the news emerging until 2015.

A Series of Missed Opportunities

[76] While a series of events contributed to what occurred, and Mr Mathieson was central to many of them, opportunities also existed for the Trustee to have prevented, anticipated and/or addressed some of them differently.

[77] The first arose when Mr Docherty and Mr Breen came into contact with the LLP. As noted, it was, or ought to have been, obvious to the Trustee that Mr Mathieson's handling of debt management clients through CM Consultants Limited on the one hand, and the passing on of insolvency appointments to the LLP on the other, could give rise to business overlap and potential conflicts of interest. Many of these are specifically identified in the IPA's Code

of Ethics.[74] Had a control mechanism operated to prevent such conflicts, the capacity in which Mr Mathieson met Mr Docherty would have been revealed at the earliest possible stage. While the correspondence with the IPA refers to the existence of an "ethical checklist and conflict review"[75] and the partnership agreement between the LLP and Mr Mathieson may have set out parameters within which each was permitted to work, neither has been produced. There is no evidence before me to show that any control mechanism existed.

[78] The second opportunity arose when Mr Docherty applied for sequestration. The Trustee could have learned of Mr Docherty's only asset and his wife's plan to purchase it when he investigated whether Mr Docherty was unable to pay his debts as they fell due.

[79] The third opportunity arose when Mr Mathieson provided the Trustee with a valuation from DM Hall which was instructed by a company controlled by Mr Mathieson which, from the Trustee's e-mail of 6 December 2017, the LLP had no knowledge of. The evidence was plainly stated on the cover page of the valuation and could have been picked up by the Trustee. He was certainly aware of the valuation as he sent a copy of it to the AiB a few weeks later.

[80] Alternatively, as members of the Trustee's staff communicated with Mr Mathieson at an e-mail address related to that company, the LLP may have been aware of its existence. If so, again, the potential for business overlap and conflicts of interest arose and, on the evidence, was not addressed. Separately, on that hypothesis, the Trustee's position would again have been misstated.

[81] The final opportunities arose sequentially after Mr Mathieson left the LLP. As he had been the main point of contact between the Trustee and Mrs Docherty's solicitor, it is

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[74] see e.g. paragraphs 8 and 20 - 48

[75] Trustee's Production 4.2.2

reasonable to assume that after Mr Mathieson departed, checks ought to have been made with the solicitor and/or Mr and Mrs Docherty about when payment was expected. Further, on 18 February 2014 Mr Mathieson sent an e-mail to the Trustee's staff from his new e-mail address. This effectively intimated his intention to continue to act as the principal point of contact between Mrs Docherty's solicitor and the Trustee, a state of affairs which continued throughout the succeeding year.

[82] On any view, this was a significant development. On 18 February 2014, Mr Mathieson remained a partner member of the LLP. Even after the LLP terminated his membership ten days later, it continued to be the case that he was fully conversant with the sequestration and how it was being handled within the Trustee's office. Nonetheless, he continued to correspond with members of the Trustee's staff and set out what he understood to be the position. When court action was finally threatened in January 2015, Mr Mathieson's staggeringly barefaced response was to commence acting directly for Mrs Docherty and propose an extended payment plan which added to the cost of the sequestration and was fundamentally to the detriment of creditors.[76]

[83] When Mr Mathieson intimated his intention to resign from the LLP and commenced trading through CM Financial, he no longer had any interest in the sequestration, which continued to be administered by the Trustee. Mrs Docherty was separately represented. There was no basis for Mr Mathieson to correspond with the Trustee at all. For him to do so, and in particular to commence acting for Mrs Docherty, was a blatant conflict of interest, one which ought to have been identified and acted on by the Trustee.

General Counsel's Advice to the Trustee

[76] Trustee Production 2.19

[84] On 24 March 2015, Mr Breen wrote to the Trustee disclosing and vouching Mrs Docherty's payment of £20,000 in 2012. As the letter also stated that the payment was made to Mr Mathieson as a member of the LLP, the Trustee understandably sought advice from its General Counsel.

[85] As the chronology shows, following a conference call in the succeeding days, the General Counsel sent an e-mail to the Trustee on 1 April 2015 *inter alia* advising him to forthwith release his interest in the family home.

[86] However, the factual basis upon which he reached that conclusion is not clear. In the e-mail, General Counsel stated:-

> "If we have received evidence that he paid the money to CM Financial at the time when Craig was a partner of the firm then we will struggle to claim that the debtor should have known not to pay (The LLP) as opposed to CM Financial- especially in light of the explanation offered in Docherty's tax adviser's recent letter. Also, Craig has acknowledged to you that he received the money and would pay it over…."

General Counsel advised the Trustee to *inter alia* advise Mr Docherty in writing:-

> "In addition, we have spoken to Mr Mathieson about this and he has admitted that the monies were paid over to his business CM Financial, something we will take up separately with him…"

[87] General Counsel's advice is clearly predicated on Mr Mathieson having received the payment through "CM Financial" and an admission by him to that effect. However, neither was the case – the funds were paid to "CM Business" (an entity which on the Trustee's own averments and correspondence the LLP had no knowledge of) and, as a member of the Trustee's staff advised General Counsel the following day, Mr Mathieson had made no such admission.

[88] Further, the evidence provided by Mr Breen, though strong, was not overwhelming. Mr Mathieson might deny having received the payment. There was no evidence Mr Mathieson controlled the bank account to which the funds were paid or that he had any

involvement with "CM Business". Even if there had been an admission, Mr Mathieson might still pay.

[89] It is not then clear why on 1 April General Counsel approved a draft letter from the Trustee to Mr Docherty which clearly stated no such admission had been made, nor why, six days later, the Trustee sent the Form 21 Notice of Abandonment to the Land Register. Both the letter and submission of the Form appear to fly in the face of the original factual basis for General Counsel's advice.

[90] Another apparently fundamental issue was not addressed – the interests of the creditors. While it was entirely reasonable for the LLP's General Counsel to advise on the legal implications for it, Mr Breen's letter also raised legal issues which directly impacted on the creditors' interests and the possibility of a dividend being paid. If the LLP accepted the sequestrated estate ought to have benefited from the £20,000 paid in 2012, how was that to be resolved? If the (apparently criminal) actions of one member of the LLP had caused loss to a sequestration being administered by another member, was it appropriate for the Trustee to continue to act? Did immediate civil action need to be taken against Mr Mathieson? If so, would that action be at the instance of the LLP or the Trustee? Who would bear the expense? Did the creditors need consulted? Should independent advice have been taken? Should the circumstances be reported to the criminal authorities? Should direction have been sought from the court or AiB?

[91] There is no evidence that the Trustee advised the creditors of what had occurred, far less sought their consent to purse Mr Mathieson. He does not suggest that he took independent advice on their best interests. Arguably, he required to do so in terms of Paragraph 4.1.1 of the AiB's *Notes for Guidance*. Had he done so, a consequential, but potentially important, point might have been noted and addressed – as the source of the

£20,000, Mrs Docherty was entitled to ask for title to the family home to be conveyed to her. The effect of General Counsel's advice and the way it was implemented was to leave title to it in joint names. The Trustee was fortunate that Mr and Mrs Docherty had not separated in the intervening period.

The Form 21

[92] It is in the context of General Counsel's advice that the Form 21 submitted by the Trustee to the Land Register on 7 April 2015 falls to be considered.

[93] The Trustee's statement in it that £20,000 had been paid to the sequestrated estate is plainly incorrect. However, it records the understanding of a member of the Trustee's staff that legal advice was to the effect that the £20,000 was deemed to have been paid to the Trustee. Though that advice may have been based on a misunderstanding of the true facts and, separately, is now accepted to have been legally incorrect, the reason for it being made is explained.

The Trustee's Case Review

[94] A document entitled "Case Review"[77] was referred to at the hearing. It appears to have been prepared by a member of the Trustee's staff. Its content is narrated in paragraph 44 above. It bears to be dated 17 May 2015.

[95] On closer inspection, the document can be seen to have been prepared much earlier, possibly in May 2015, then updated every six months including on 21 October 2015 and in May 2016, in other words after it bears to have been produced.

[77] Trustee Second Affidavit, Production 8

[96] From this and the chronology of events, I infer that the comments within it regarding the family home were inserted during the May 2015 review and the final paragraph was inserted during the May 2016 review, following which General Counsel did not respond to the query, causing the Trustee's files to be submitted for audit two days later.

[97] While the Trustee's position was accurately stated in May 2015, it was not updated to take account of his subsequent decisions that (a) Mr Mathieson's sequestration meant there was no possibility of the £20,000 being recovered and (b) that the LLP accepted liability to pay that sum to the sequestrated estate subject to (c) the Trustee's fees being ascertained. Had the Review been updated to that effect, much of the confusion which surrounded it at the hearing (and potentially the case generally) might have disappeared.

The Trustee's Failure to Pursue Mr Mathieson

[98] Mr Mathieson was sequestrated days before Mr Breen wrote to the Trustee in March 2015. Whether or not the two events are linked is a matter of conjecture. Nonetheless, at several points in his evidence[78] the Trustee states that Mr Mathieson's sequestration rendered any further action against him futile.

[99] As a matter of law, it may be doubtful whether the Trustee had title and interest to raise civil proceedings against Mr Mathieson for payment of £20,000. However, that was not in his mind when he took advice. At that time, it was his intention to do so, as the Case Review and other evidence demonstrates. However, when Mr Mathieson was sequestrated soon after, he thought there was no point doing so. In that context, his statements are misleading and inaccurate. It is often the case that a person's sequestration makes it

[78] See e.g. Trustee's First Affidavit para 11

pointless to raise civil proceedings. However, it is not always so. In this instance, had decree been obtained against Mr Mathieson, his sequestration did not discharge him from any liability for fraud or breach of trust[79] or to pay compensation in criminal proceedings[80].

[100] Further, concurrent civil and criminal proceedings could have been raised. Mr Mathieson's conduct is capable of being classed as embezzlement, the dishonest appropriation of funds by a person who holds them on behalf of another person to whom he owes a duty to account, and on whose behalf he is in the process of carrying out a course of dealing with it. A civil decree could have been enforced notwithstanding Mr Mathieson's sequestration. If criminal proceedings had been raised, there remained a possibility of the creditors being paid by a sentence which included a compensation order.

The Basis and Timing of the LLP's payment of £20,000

[101] Again, the evidence in relation to this issue has been misstated and, in places, is inaccurate and confused. It is necessary to consider the evidence in depth and make reasonable inferences from it to ascertain the true position.

[102] On record, it is variously averred:-

> "the Respondent then sought to pursue Craig Mathieson but due to his sequestration and the resulting shortfall in the Debtor's estate, (the LLP) agreed to reimburse the estate of the Debtor with the said sum of £20,000."
>
> "The Respondent has previously proceeded on the understanding that the sequestrated estate would recover the sum of £20,000 by way of set-off against the fees due to him as Trustee."
>
> "Before (the LLP) could seek to recover the sum of £20,000 from Craig Mathieson, the latter was sequestrated. Craig Mathieson's Trustee is the Applicant. (The LLP) lodged a claim in his sequestration in respect of sums due to them by Craig

[79] 1985 Act section 55(2)
[80] ibid

> Mathieson. Ultimately, the firm paid £20,000 to the account for the sequestration of the Debtor on around 13 April 2018. There has been no loss to the Debtor's estate."

[103] In his Second Affidavit, the Trustee states:-

> "…I now accept that, firstly, the remuneration paid to me is unlikely to exceed £20,000 and that, secondly, whether that were to be the case or not, at the time (Mr Mathieson's conduct was discovered) I should have arranged for a payment to the estate."

[104] Applying a coat of legal varnish to these statements, it is reasonable to infer that (a) the LLP accepted it was liable to pay the £20,000 to the sequestrated estate after it received General Counsel's advice (b) however, it considered that it was entitled to retain that sum as the Trustee's fees were estimated to exceed that figure (c) in any case, in the intervening period Mr Mathieson would be pursued for repayment (d) as the LLP accepted liability, the Trustee and his staff notionally regarded the £20,000 as having been paid as reflected in the Form 21 submitted to the Land Register (e) however, Mr Mathieson was then sequestrated and (f) it was only when the LLP received further advice in 2018 that General Counsel's opinion was erroneous that it paid over the £20,000 with interest.

[105] I address these inferences further below.

The Status of the AiB's Complaint to the IPA

[106] The AiB Complaint to the IPA is raised by the Trustee both in his Answers[81] and his First Affidavit.[82] In those he maintains, and his Senior Counsel submitted to me, that the complaint had been rejected. However, Senior Counsel for the AiB maintained it had essentially been sisted pending the outcome of these proceedings. In part, that issue led to the Joint Inventory being lodged.

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[81] Answer 11

[82] Trustee's First Affidavit para 9.3

[107] As it shows, the latter is the correct position and, moreover, shows that the Trustee asked for the sist. Once again, his position was misstated.

The AiB's Case

[108] On record, the AiB submits:-

i. his approval of Mrs Docherty's £20,000 offer was conditional on the Trustee receiving that sum in exchange for title to the family home being transferred. The Trustee's gratuitous abandonment of the family home was a completely different transaction. The Trustee should have sought directions from the AiB before he did so.[83]

ii. the Trustee was under no legal obligation to abandon his interest in the family home. Mr Mathieson's actions did not bind him *qua* Trustee. He ought to have refused to abandon his interest in the family home until the £20,000 was paid to the sequestrated estate.

iii. after he received Mr Breen's letter, the Trustee had no legal basis for coming to the view that he ought to pursue Mr Mathieson for the £20,000.

iv. at worst, Mr Breen's letter amounted to a change in circumstances upon which the Trustee ought to have sought direction from him.

v. when he became aware that Mr Mathieson had retained the £20,000, the Trustee ought to have submitted a Suspected Offences Report to him and in any event ought to have reported the circumstances to the police or Procurator Fiscal.

[83] 1985 Act, section 39(1)(c)

[109] The AiB avers[84] that the Trustee breached the following duties imposed him by the 1985 Act:-

i. Section 3(1) – to realise the estate's interest in the family home

ii. Section 1(b) – to distribute the estate among the creditors

iii. Section 3(3) – to submit a Suspected Offence Report or Reports in relation to Mr Mathieson's dealings with Mr Docherty and the Trustee

iv. Section 39(1) – to consult with the AiB regarding the £20,000 after it became clear it had been paid to Mr Mathieson

v. Section 43(1) – *esto* the Trustee was bound by Mr Mathieson's actions, to arrange for the LLP to pay the £20,000 immediately he became aware of them and to deposit the funds in an interest bearing account.

[110] The AiB also avers[85] those breaches have caused the creditors loss, in particular:-

i. £38,384, the value of the estate's interest in the family home, or such other sum as ought to have been renegotiated after it became known that Mr Mathieson had retained the £20,000

ii. the benefits they would have accrued from payment of an early dividend

iii. additional fees and outlays beyond anticipated conclusion of the sequestration in 2013.

[111] Finally, the AiB avers the Trustee's breaches of duty have also caused prejudice to Mr Docherty insofar as his details will remain on the Register of Insolvencies until a year has elapsed after the Trustee is discharged.

[112] For the AiB, Senior Counsel submitted:-

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[84] Condescendence 12

[85] Condescendence 13

i. in terms of section 1A(2) of the Act, the AiB was obliged to bring the Application.

ii. the matter ought to be determined summarily; it was accepted that some parts of the disputes might remain unresolved.

iii. section 1A conferred a wide discretion on the Sheriff.

iv. the Trustee's conduct had caused loss and was censurable. The original loss was detailed in the third crave, but it was accepted that some of it had since been paid.

v. these issues required to be considered in a context which included:-

- the statutory framework set out in sections 3, 39, 43 and 53 of the Act.
- the Appendix L application to the AiB by the Trustee seeking approval of Mrs Docherty's offer.
- the AiB's letter approving the offer and the reasons within it for that decision having been reached.
- Mr Breen's letter to the Trustee in 2015 by which the Trustee became aware of the payment in 2012.
- the terms of the Notice of Abandonment, particularly paragraph 3A, in which the Trustee positively stated that the £20,000 had been received by the sequestrated estate; that statement was unequivocally untrue.
- fitful attempts thereafter by the Trustee to progress the transaction.
- the Trustee's decision that the difficulty caused by Mr Mathieson was for him to resolve as he saw fit.
- the Trustee's belated acceptance in his second Affidavit that the legal advice he received was wrong and that his fees would not, in fact, exceed £20,000. This confirmed that his original thought process was erroneous.

- The Trustee's statement in his second affidavit that he did not consider Mr Mathieson's conduct to be criminal was also wrong. It clearly was criminal; in any event, the issue was one for the AiB to determine in the exercise of his supervisory role over the Trustee and that context ought to have been at the forefront of the Trustee's mind, as Mr Perry confirmed in his Affidavit.
- what ought to have occurred, as set out by Mr Perry in paragraphs 5 – 10, 13 and 15 – 18 of his Affidavit.

The Trustee's Case

[113] In his Answers, the Trustee refutes the AiB's criticisms of his actions, denies that he has breached any duties and disputes that any loss and/or prejudice has been caused to the creditors or Mr Docherty.

[114] In particular, he avers:-

i. having regard to the information available, the £20,000 was not paid to him *qua* Trustee; it is likely it was paid to Mr Mathieson before sequestration was awarded.[86]

ii. when he became aware in 2015 that the £20,000 had been paid to Mr Mathieson in 2012:-

- the issue formed part of an ongoing wider civil dispute between the LLP and Mr Mathieson which had not been resolved by the date of Mr Breen's letter.[87]
- he took appropriate advice from the LLP's General Counsel and acted on it[88] and

[86] Answer 8
[87] Answer 11
[88] Answers 9 and 11

- although he now accepted that advice was legally incorrect, he acted reasonably and in good faith and should not be criticised for doing so.[89]
- he did not require to seek further directions from the AiB; he had followed the AiB's own Notes for Guidance of Trustees; [90]Mrs Docherty had acted in accordance with her obligation to pay £20,000.[91]
- the LLP has paid £20,000 together with accrued interest; by doing so, it had followed advice which was most favourable to the sequestrated estate and least favourable to itself. Prior to that, it and the Trustee had proceeded on the hypotheses that (i) the £20,000 was recoverable by the Trustee from Mr Mathieson, failing which (ii) it could be wholly or partly compensated by the sum due to the Trustee for his fees and outlays. Consequently, the creditors had suffered no loss.[92]
- the Trustee elected to pursue Mr Mathieson personally, in accordance with the advice he had received. He had no basis for submitting a Suspected Offences Report and took advice from General Counsel to that effect.[93]
- The Trustee's actions had been fully investigated by the Insolvency Practitioners' Association following a complaint to it by the AiB. Though the complaint was sisted, no wrongdoing on his part had been found.[94] The Trustee had followed the AiB's own Notes for Guidance of Trustees.

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[89] *ibid*
[90] Paragraph 6.11
[91] Answers 13 and 14
[92] Answer 11
[93] *ibid*
[94] *ibid*

[115] In submissions, Senior Counsel for the Trustee confirmed he did not oppose an order under Crave 4 being pronounced which had the effect of enabling the Trustee's files to be audited. However, he submitted, in the circumstances, it was appropriate for the audit to be carried out independently.

[116] He stressed that the possibility of public censure was a matter of considerable concern to the Trustee and that such an order was likely to have serious consequences in relation to his registration as an Insolvency Practitioner.

[117] On the issue of how the evidence should be applied by the law, it was accepted there was no comparable recent authority. However, such cases as existed did provide some guidance. In *AiB* v *Cunningham*,[95] a Trustee took three attempts to comply with his statutory obligations. However, the only sanction imposed was to find him liable in the expenses of the action. In *AiB* v *Gow*,[96] though the court placed weight on the Trustee's consistent and repeated failures to comply with his duties, a similar result was reached. In neither case was censure ordered.

[118] Though the background was substantively different, further guidance could be obtained from the decision of the English Court of Appeal in *Branston* v *Haut*[97] in which a Trustee unreasonably and unsuccessfully attempted to recall the Debtor's discharge. The court emphasised[98] that the test for holding a Trustee responsible for administrative failures was a high one; in this case, in which the AiB argued the Trustee had no reasonable excuse for some of his actions, that bar had not been cleared.

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[95] (1859) 21 D 928
[96] (1862) 1 M 124
[97] (2013) 1 WLR 1720
[98] paras 68 – 69

[119] Thought again the facts and background were very different, further assistance could be derived from *Mellon* v *GMC*,[99] in particular from the speech of Lord Gill.[100] Essentially, a court considering censuring an officer of court for his actions in office would require to find misconduct in the sense explained there. That test was more difficult where, as here, the AiB's complaint to the IPA was still pending. It was understood that the IPA had come to the view initially that there was no *prima facie* case to investigated but that the AiB had appealed that decision and that the complaint was sisted pending the outcome of this application.

[120] Factually, there was no great dispute between the parties. The Productions and Affidavits were understood by all. General Counsel's advice had been erroneous. The true position was that the actions of Mr Mathieson as a member of the LLP and the Trustee as an independently appointed office holder were not linked. However, it was important to understand that the Trustee had, reasonably, acted on it and that the ultimate effect of it was to put the creditors in the best position possible. The erroneous advice had also caused the LLP to pay that amount, with statutory interest, to the sequestrated estate. What had occurred should be seen as an example of the Trustee having acted in good faith, however misconceived the advice.

[121] In the same vein, thought it was clearly not determinative, some weight ought to be afforded to the IPA's initial decision that the Trustee had acted appropriately. He had no obligation to consult the AiB when Mr Breen's letter arrived – his actions at all times were designed to implement a course of action which the AiB had approved, the disposal of the

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[99] 2007 SC 426

[100] para 18

estate's interest in the family home for a price of £20,000. It could not be said that no reasonable Trustee would have acted differently.

[122] The Trustee's decision to abandon his interest in the family home was a consequence of the erroneous advice followed in good faith; the crave which sought compensation from him in excess of the amount which the LLP had already paid was neither justified nor reasonable. Though there had been a delay in payment being made, at worst, the end result was neutral as interest had been paid; there had also been an implication throughout that the LLP would meet it.

Discussion

[123] The evidence shows that Mr Docherty came to be in touch with Mr Breen. As the former was a gardener from Montrose with a large tax bill and the latter was a tax consultant in East Kilbride it is possible, but futile, to speculate that Mr Mathieson brought them together.

[124] Mr Breen and Mr Docherty then came to be in touch with Mr Mathieson, because, it appears, Mr Docherty's tax problems could not be resolved without him entering into some form of personal insolvency. On the evidence it is reasonable to infer that as Mr Docherty was understandably anxious to avoid the family home being sold, Mr Mathieson advised Mr Docherty to apply to sequestrate himself as safeguards could be built in to ensure that the Trustee's interest in the family home could be purchased by his wife and the price assessed in advance.

[125] However, Mr Mathieson required assistance from the Trustee. As Mr Docherty was not apparently insolvent, a Certificate for Sequestration was required. In addition, if the LLP was to earn a fee from the sequestration, it was necessary to appoint the Trustee to

administer it and then to persuade the AiB that the price assessed in advance was reasonable.

[126] To enable the price to be assessed, DM Hall were instructed to value the family home. Chronologically, their instruction, their valuation, Mrs Docherty's application to Spectrum Finance for a £15,000 loan and the date the loan funds were credited to her bank account all prove that she must have been told before her husband was sequestrated that £15,000 would be needed.

[127] From the comments in Mr Breen's letter about what appears to have been a difficult meeting and the dates of the subsequent payments into Mrs Docherty's bank account, it is probable that the price was increased to £20,000 at the meeting on 14 May 2012. It is unlikely Mr Docherty would otherwise have applied to sequestrate himself without knowing the family home was safe. Mrs Docherty then obtained another £5,000 over the next eight days.

[128] The Trustee is deemed to have known about Mr Docherty's finances on 14 May 2012 as, that day, he signed a Certificate for Sequestration and a Consent to Act in Mr Docherty's sequestration. From the statutory duties he is deemed to have fulfilled completing these documents, he could have learned of Mrs Docherty's proposal that day.

[129] Though her husband had been sequestrated by the time she found the extra £5,000, Mrs Docherty could not pay the funds to the Trustee as the AiB's consent had to be obtained to the agreed price. Consequently, on 22 May 2012, the evidence is that she transferred the £20,000 to a bank account controlled by Mr Mathieson, to be held until the AiB approved her offer. Ironically, as Mr Breen records in his letter, that arrangement was necessary because Mr Mathieson perceived there to have been a conflict of interest. Meantime, Mr Mathieson passed on Mrs Docherty to another contact, a solicitor in Glasgow, who submitted an offer for £20,000 to the Trustee. The AiB then accepted the offer.

[130] For reasons which remain unclear, Mr Mathieson retained the £20,000. He was able to prevent that coming to light as he contrived to subsequently act as the main point of contact between the Trustee, the solicitor and Mr and Mrs Docherty before and after he left the LLP. He was able to do so because of his knowledge of insolvency, his contacts and administrative procedures within the LLP.

[131] Until late 2013, it reasonably appeared to the Trustee and other members of his staff that, as commonly occurs, Mrs Docherty was having difficulty sourcing £20,000 and was avoiding her solicitor. Though the staff members regularly chased Mr Mathieson for progress reports, he was in a position to successfully stall them.

[132] In early January 2014, after a dispute arose between Mr Mathieson and the LLP, he tendered his resignation. However, it did not take effect until early April.

[133] Before and after the LLP terminated his membership at the end of February, notwithstanding a clear conflict of interest which arose, Mr Mathieson continued to act as the main point of contact between Mrs Docherty, her solicitor and the Trustee. The Trustee took no objection to this. This enabled Mr Mathieson to continue to successfully stall the Trustee's staff for most of 2014.

[134] However, by late 2014 and in early 2015, he required to resort to falsely pretending that the money would be paid in instalments then, later, that it had been paid to the LLP but not received. Almost simultaneously, he was himself then sequestrated and Mr Breen wrote to the Trustee advising him that the £20,000 had been paid to Mr Mathieson in 2012.

[135] Though the Trustee promptly took legal advice, he took it from the LLP's General Counsel, not an independent source. For reasons which are not clear, but as is now accepted, the advice was wrong. As demonstrated above, it was also probably tendered without full consideration of the facts. It certainly did not take independent account of the creditors'

interests nor did it consider Mrs Docherty's right to have the family home transferred into her name. Nonetheless, the Trustee acted on the advice and abandoned his interest in the family home. The Form 21 which he submitted to the Land Register shortly after reflected the advice he had obtained.

[136] There is no doubt that the Trustee was unaware of Mr Mathieson's actions until 2015. However, the difficulties Mr Mathieson caused were then compounded by the Trustee. First, he wrongly maintained:-

a. it appeared Mrs Docherty paid the £20,000 before sequestration
b. he was appointed "in ordinary course"
c. he was entitled, in his capacity as Trustee, to rely on the advice of General Counsel
d. that advice was correct
e. the circumstances were "reported to the appropriate authorities"[101]
f. the IPA complaint had been resolved in his favour
g. the sequestrated estate had suffered no loss as his fees would exceed £20,000.

[137] Second, other statements which the Trustee has made to the court, AiB and/or IPA on other issues have been confused or misstated, in particular:-

a. he did not know in which capacity Mr Mathieson was acting when he met Mr Docherty on 14 May 2012. As demonstrated, at worst, he ought to have known.
b. he does not have notes of that meeting (nor, by extension, of the circumstances in which he came to sign the Certificate for Sequestration and Consent to Act). Again as demonstrated, he ought to have notes and/or be able to explain what occurred.
c. his administration of the sequestration was complicated by a civil dispute between the LLP and Mr Mathieson; no evidence of this has been produced.

[101] Joint Inventory, Tab 20, paragraph 3

d. he elected to pursue Mr Mathieson personally but could not then do so as a result of his sequestration. As demonstrated, if the Trustee had title and interest to pursue Mr Mathieson, the latter's sequestration was irrelevant.

e. the wording used in the Form 21.

f. he now seeks payment of his fees, having previously indicated he would waive them.

[138] Each misstatement, inaccuracy and element of confusion has hampered the court in resolving the issues which the case raises. I discuss these further below.

[139] To address parties' submissions on record and at the hearing, it is necessary to address the purpose of section 1A(2) of the 1985 Act as amended, the statutory provision upon which the application has been brought. As it relates to this case, it provides:-

> "If it appears to the AiB that a (Trustee) has failed without reasonable excuse to perform a duty imposed on him by any provision of this Act or by any other enactment (including an enactment contained in subordinate legislation) or by any rule of law, he shall report the matter to the Sheriff who after hearing (the Trustee) on the matter, may remove him from office or censure him or make such other order as the circumstances of the case require."

[140] The purpose of that provision is one consequence of the duty of supervision imposed on the AiB by section 1A(1) of the Act. So far as relevant, it provides:-

> "The AiB shall have the following general functions in the administration of sequestration…(a) the supervision of the performance by…(ii) Trustees…of the functions conferred on them by this Act or any other enactment (including an enactment contained in subordinate legislation) or any rule of law and the investigation of complaints made against them;"

[141] Section 1A(1) imposes a duty of supervision on the AiB in two areas – functions which a Trustee must legally exercise and the investigation of complaints, although the latter is in some respects an issue to be determined under the Insolvency Act 1986 by a Trustee's regulatory body. However, in the exercise of the former duty, the AiB is obliged to

bring an application under section 1A(2) if it appears to her, as she avers, that the Trustee has failed, without reasonable excuse, to perform some of those functions.

[142] No reported case provides guidance on the interpretation and application of section 1A. However, it is drafted in plain terms. In my opinion, the court's task is firstly to review the AiB's beliefs and the Trustee's responses (including any reasonable excuse for any breach) in light of the evidence and parties' submissions. Only if the AiB's belief is found to be justified is discretion conferred on the court to take action.

[143] I accept both Senior Counsel submissions that in order to determine the case summarily, I must make what I can of the evidence presented in context. I have already rehearsed the evidence and its context. I discuss that further below as it is first necessary to address the AiB's beliefs and the Trustee's responses.

[144] The AiB avers that the Trustee should have sought directions from her before gratuitously abandoning his interest in the family home. In that respect, the relevant legal function which the Trustee required to perform is contained in section 39(1) of the Act, which provides:-

> "As soon as may be after his appointment, the Trustee shall consult with the AiB concerning the exercise of his functions under s.3(1)(a) of this Act and….the Trustee shall comply with any general or specific directions given to him by….the AiB as to the exercise of those functions."

[145] Section 39(1) cannot be read in isolation, as the AiB has issued directions in her *Notes for Guidance of Trustees* as to how a Trustee is expected to fulfil the duty of consultation it creates. As they existed in 2012 they provided:-

> "4.1.2 The Accountant will regard the duty to consult to have been complied with provided there is submitted along with the trustee's first account of intromissions, a brief report indicating the trustee's opinion as to the likely outcome of the sequestration process and any intention to exercise or not, as the case may be, any of the general powers available to him, as provided by Section 39(2) of the Act.

> The trustee may of course consult with the Accountant or with the case officer at any time he considers it appropriate or prudent to do so…
>
> 4.1.6 Subject to the general duty to consult with the Accountant and to have regard to any advice offered by them, the trustee may do anything if in his opinion it would be beneficial to the administration of the sequestrated estate."

[146] The evidence presented does not include a copy of any "brief report" in relation to Mr Docherty's sequestration. However, the AiB does not suggest that it was not submitted and it is a matter of admission that soon after the award, the Trustee sought her consent to accept Mrs Docherty's offer. There is no evidence that the Trustee failed to comply with any other general directions from the AiB.

[147] While paragraphs 4.1.2 and 4.1.6 of the *Notes for Guidance* conferred wide discretion on Trustees to administer estates, regard must also be had to specific guidance in other paragraphs, in particular:-

> "PART 6
>
> ADVICE NOTES ON SPECIFIC ASPECTS
>
> 6.10 Heritage (includes the debtor's family home)….
>
> The trustee will wish to consider many factors before deciding how and when to realise the estate's interest in heritable property, including the debtor's family home...
>
> All heritable property should be actioned within 3 years. The Trustee is therefore required to take steps as soon as possible in a bankruptcy to realise or abandon heritage…
>
> - Are there arrears and, if so, has the secured creditor taken steps to repossess the property?
>
> - Is there any equity in the property? A valuation should be done as early as possible and the secured creditor should be asked to advise the amount outstanding on the loan.
>
> - Is the non-debtor spouse or a third party willing to buy out the trustee's interest? This would include settling the secured loan or

having it varied to transfer the debtor's liability to the spouse or third party…. Each party should bear their own legal costs.

- The Accountant recommends that the trustee should not wait for it to appreciate in value unless there is no co operation from the debtor, spouse or co owner. If the debtor does not wish a formal re conveyance the trustee should consider issuing the letter at Form 22 of the Statutory Instruments formally abandoning his interest.

- If it is a family home, will the relevant consent in terms of Section 40(1)(a) be given?

- If consent is not given or a co owner refuses to agree to a sale, is there enough equity to justify an application to the court for authority to sell?..

- If the negotiations to transfer title are likely to extend beyond the 3 years, has the inhibition been renewed"?

[148] At the relevant date, Part 6 recognised that certain factors, for example arrears and the interests of the debtor's family members that many factors might apply and, in consequence, also conferred wide discretion on Trustees to deal with heritable assets to enable them to be taken into account. However, Trustees were also bound to follow a specific direction that "All heritable property must be actioned within 3 years", in this case by 16 May 2015.

[149] In this case, the evidence is that Mrs Docherty made a formal offer to buy out the Trustee's interest in the family home. As directed, the Trustee put the offer to the AiB, who advised the Trustee to accept it. There was no reason for the Trustee at that time to believe that the agreed price would not be paid promptly. Though it was not, the subsequent "negotiations" with Mrs Docherty did not extend beyond the three year period. As the Notes implicitly recognise, in some sequestrations it can take longer for approved action in relation to heritage to be implemented.

[150] Consequently, for the purposes of section 39, there is no evidence that the Trustee failed to consult with the AiB or to comply with any general or specific directions issued to him. On the contrary, the evidence is that the Trustee complied with those duties. While many might think the unique circumstances strongly suggested that the Trustee ought to have consulted with the AiB, he was not legally bound to do so. While the Form 21 was carelessly worded and its content was factually and legally incorrect, it reflected legal advice which the Trustee had taken. More importantly, it was not submitted to me that he breached any duty by doing so.

[151] The AiB's second submission is that after he received Mr Breen's letter in 2015, the Trustee was under no obligation to abandon his interest in the family home and ought to have refused to do so until the £20,000 was paid to the sequestrated estate. It is convenient to address that submission in conjunction with her third and fourth submissions – that the Trustee had no legal basis for concluding he ought to pursue Mr Mathieson and, at worst, Mr Breen's letter justified him seeking direction from her. Mr Perry provides helpful clarification of the AiB's beliefs in his Affidavit.[102]

[152] The evidence of what the Trustee did on receipt of Mr Breen's letter is narrated and analysed in detail above – as was reasonable for him to do, he sought and took legal advice from Mr Humphrey. The advice he received was to *inter alia* abandon his interest in the family home; it was reasonable for him to have followed and implemented that advice. That it was now accepted to have been erroneous was irrelevant. Unfortunately, it took three years for the £20,000 to be paid by the LLP because (a) it wrongly thought it was entitled to retain that sum pending payment of the Trustee's fees, which were estimated to exceed that

[102] Paragraphs 8-10

figure and (b) before his sequestration intervened, it was intended that Mr Mathieson be pursued for the £20,000.

[153] Mr Perry takes the view that what occurred amounted to a material change in circumstances, one which the Trustee ought to have sought AiB guidance on, in relation to Mr Mathieson's actions and the effect of General Counsel's advice.

[154] By application of the Act and his signature on the Certificate of Sequestration, I have held that the Trustee was deemed to have had knowledge of Mr Docherty's finances as at 14 May 2012. Though I suspect that he ought to have known (through Mr Mathieson) of Mrs Docherty's interest in buying him out of the family home, it would be speculative to find that in fact, as there is insufficient evidence to do so. However, even if he did know, the matter is irrelevant as it is conceded that he did not know Mr Mathieson was about to receive the £20,000.

[155] By writing to Mr Docherty regarding the family home, thereafter receiving Mrs Docherty's offer, seeking and obtaining the AiB's consent to accept it, having regard to the AiB's specific directions in relation to heritage, the Trustee initially took appropriate steps designed to realise and ingather the asset in question. Though there may have been inadequate systems to identify and address any conflicts of interest created by Mr Mathieson's other business interests and there were a number of occasions on which Mr Mathieson's retention of the £20,000 might have been identified, it is accepted that the Trustee had no knowledge of that until Mr Breen's letter was received. It follows that the Trustee's decision to take legal advice on receipt of Mr Breen's letter was also entirely appropriate. Though that advice appears to have been based on a misapprehension of the facts, the Trustee cannot bear responsibility for that, as a member of his staff pointed out the correct facts to General Counsel.

[156] For these reasons, I do not think the court can consider this issue through a prism of correct legal advice. It was only after the application was raised that the Trustee accepted General Counsel's advice was legally incorrect. Though he was entitled, as the AiB submits, to have refused to abandon his interest in the family home until the estate was compensated, neither section 39 nor the *Notes for Guidance* obliged him to do so. At highest, the Notes indicated a willingness on the part of the AiB to assist Trustees if necessary; otherwise, with some exceptions, paragraph 4.1.6 conferred authority on Trustees to administer sequestrations as they saw fit so long as it benefitted administration of the sequestration. It would be artificial and serve no useful purpose for any court considering an application such as this to determine that a Trustee has breached a duty which, at highest, might have existed had correct advice been tendered. In these circumstances, I do not accept that the Trustee breached any duty to consult with the AiB when he received Mr Breen's letter.

[157] As I have made clear elsewhere, I do not accept that the Trustee ought to have concluded he had no basis for pursuing Mr Mathieson, quite the contrary. Nonetheless, the AiB's view that there had been an apparent breach of the Trustee's section 3 duties is obvious and understandable. The Trustee's actions, both at the time and subsequently, are open to criticism. Some have only come to light during the progress of the application and others have only been revealed during research for this decision. While the Trustee may not have breached any duty by abandoning the sequestrated estate's interest in the family home, it is appropriate for the court to critically analyse both his actions and his failures to act.

[158] The issues raised by Mr Breen's letter were, self-explanatorily, either unique or extraordinary, as was General Counsel's advice that the LLP was liable to compensate the sequestrated estate. One consequence of that advice was that the Trustee was duty bound to pursue, realise and distribute the proceeds of a claim against an entity in which he was a

partner member and which had a financial interest in his administration of the sequestration. Fundamentally, that placed his section 3 duties in direct conflict with his status as a partner member of the LLP. His belated recognition that General Counsel's advice was incorrect does not excuse his failure to recognise and act on what was, patently, a conflict of interest.

[159] As the Trustee does not comment on the conflict of interest in his pleadings or Affidavits, it therefore appears he either failed to appreciate it existed or simply ignored it. He also appears to have ignored the claim against the LLP. Had the LLP immediately compensated the sequestrated estate, the conflict arguably resolved itself. However, that did not occur.

[160] The reason it did not occur again reflects badly on him – the claim was not met because the LLP wished to set-off (or compensate) his estimated fees against it. In plain terms, by agreeing to or taking that course, the Trustee put his interests as a partner member of the LLP before those of the creditors.

[161] The effect of the conflict of interest was fundamental, as it impacted on the Trustee's statutory duties. As the LLP did not settle the claim, the conflict could have been addressed in a number of ways – the Trustee could have called a meeting of creditors; he could have sought independent legal advice from their perspective; he could have sought advice from his regulatory body on whether it was appropriate for him to continue to act; most obviously, though admittedly there was no duty on him to do so, the Trustee could have sought directions from the AiB.

[162] Had the conflict been identified and addressed, it is probable the estate would have been paid much sooner. Administration of the sequestration could have been concluded. A dividend might have still been possible. The Trustee would not still be in office. However,

none of these came to pass. Though the conflict of interest was patent, the Trustee took no action to address it. Worse, by seeking to compensate his fees against the claim of the LLP, he exacerbated the situation and appears to have ignored his duty to the creditors.

[163] I accept that the Trustee took legal advice which, though now recognised to be wrong, was accepted and implemented in good faith. I accept the circumstances were extra-ordinary. I accept that in most instances, taking and acting on legal advice may well reasonably excuse a Trustee's failure or breach of duty. I accept the *Notes for Guidance* afford Trustees wide discretion in the administration of sequestrations and that any discretion conferred affords scope to adopt a course of action which may later be reasonably accepted to have been erroneous.

[164] Nonetheless, on the evidence, the Trustee appears to have ignored or adopted a somewhat hubristic attitude to an obvious and onerous ethical issue. It is quite possible that this aspect of the Trustee's conduct was a breach of his section 3 duties. However, I am not requested by the AiB to consider that issue and in my opinion it would be wrong to interpret section 1A as conferring authority on me to do so independently.

[165] That leaves the AiB's fourth submission – that the Trustee breached a duty to submit a Suspected Offences Report to the AiB and to report the circumstances to criminal authorities. Section 3(3) of the 1985 Act provides:-

> "If the trustee has reasonable grounds to suspect that an offence has been committed in relation to a sequestration…
>
> b) by a person other than the debtor in that person's dealings with the debtor or the trustee in respect of the debtor's assets, business or financial affairs,
>
> he shall report the matter to the AiB."

[166] Was the duty placed on a Trustee by that provision breached in this case? The AiB submitted that it was, insofar as Mr Mathieson's failure to pay the £20,000 to the Trustee was

apparently criminal. Senior Counsel for the Trustee submitted, though not with any enthusiasm I detected, that whatever occurred did not fall within the ambit of section 3(3).

[167] On this point, the relevant facts are that Mrs Docherty paid £20,000 into a bank account which the Trustee later accepted was controlled by Mr Mathieson, for a purpose which the Trustee accepted. After the AiB accepted an offer to that effect from her solicitor, the funds ought to have been paid to the Trustee. They were not. Mr Mathieson then actively concealed that from everyone involved.

[168] For the purposes of section 3(3), Mr Mathieson was a person other than the debtor. His dealings were initially with the debtor, then with Mrs Docherty and finally with the Trustee. Throughout, his dealings related to one asset of the debtor, his interest in the family home. As such, in my opinion, his dealings may relevantly be classed as falling within the four walls of section 3(3). I reject Senior Counsel's submission to the contrary. It is a matter of admission that no Suspected Offences Report was submitted. Consequently, the Trustee breached his duty in terms of the section.

[169] Was there a reasonable excuse for that failure? The Trustee's response is that he took and relied on General Counsel's advice to pursue Mr Mathieson through the civil courts. In these circumstances, he had no basis for submitting a Suspected Offences Report.

[170] I have no difficulty accepting the Trustee took and followed that advice. However, for the purposes of section 3(3), that is irrelevant. The section imposes a discrete duty on a Trustee to report circumstances to the AiB. It does not require a Trustee to form a definitive view of them, simply to report his suspicion if there are reasonable grounds for its existence. There is no requirement to take legal advice. As the AiB's Notes make clear, it is for her to determine whether the issue needs reported to the criminal authorities:-

> "2.5.3 The Accountant will consider all received SORs against Crown Office and police guidelines on reporting offences to the Crown Office.
>
> The Accountant may decline to submit the offence report to the Crown Office if she considers the report does not meet Crown Office requirements. The trustee will be informed if the offence report is submitted to the Crown or rejected (with reasons)."

[171] In these circumstances, there was no reasonable excuse for the Trustee's failure to report the circumstances to the AiB.

[172] To summarise, after hearing parties and reviewing the evidence, one breach relied upon by the AiB, the Trustee's failure to submit a Suspected Offences Report, has been made out. There was no reasonable excuse for the breach having occurred. I turn to consider whether, in the exercise of the discretion conferred upon me by section 1A, any further order is required. In that regard, a number of factors need considered.

[173] First, the unusual circumstances of the case need taken into account. As already noted, some developments which were not reasonably foreseeable contributed to the outcome, in particular the apparently criminal behaviour of Mr Mathieson, the nature of his departure from the LLP, his subsequent sequestration and the advice of the LLP's General Counsel. These may have had a disproportionate effect on subsequent events. I also accept that I have been able to review the evidence with the benefit of hindsight, an advantage not available to the Trustee. Finally, some aspects of the evidence have still to be considered by the IPA; it is still possible that the AiB's complaint will have professional repercussions for the Trustee.

[174] In addition, I do not think significant weight can reasonably be attached to the Trustee's failure to submit a Suspected Offences Report. There is no suggestion that failure prevented or delayed criminal proceedings being investigated or taken against Mr Mathieson. Separately, the AiB has had knowledge of the circumstances for nearly four

years and has taken no action herself. It was not suggested that she considered them sufficiently serious or urgent to report them directly to the criminal authorities, as she is statutorily entitled to do.[103] Though it is possible the failure occurred due to commercial embarrassment on the part of the LLP, there is no direct evidence that was the case and it would be speculative to make such a finding based on reasonable inferences. The other, more serious, alleged breaches have not been proved. In these circumstances, an order censuring the Trustee is not required.

[175] The AiB's crave for compensation has largely been superseded by the LLP's subsequent payment of the £20,000 with interest. As noted, while I accept Mr Perry's evidence that the Trustee was entitled to have refused to accept the £20,000 and to seek either the whole value of his interest or sale of the family home, to adopt such a course would have fundamentally prejudiced the creditors, delayed finalisation of the sequestration and risked obtaining nothing if a court did not order a sale.

[176] Nonetheless, as explained, the manner in which the Trustee approached and reacted to the unforeseen developments compounded their impact. Several opportunities which might have prevented or minimised that impact were missed. His failure to take note of and address the conflict of interest which arose in February 2014 enabled Mr Mathieson to pretend for over a year that the £20,000 had not been paid. When Mr Breen revealed what had actually occurred, the Trustee ignored or failed to address the further conflict of interest caused by his preference of the interests of the LLP over those of the creditors. The result was that the sequestrated estate was deprived of £20,000 for three years. While that sum has now been paid with interest, during that period his administration of the sequestration continued at the creditors' expense. Some of the comments in his written pleadings and

[103] Section 1A(3)

correspondence with the AiB and IPA were confusing, inaccurate and misstated. He has changed his position several times. It has taken considerable effort and time for me to consider all the evidence and to draw these conclusions. In these circumstances, it is hardly surprising that the AiB felt it necessary to take the almost unheard of step of bringing this application.

[177] For these reasons, these factors assume relevance beyond the issue of expenses, an issue upon on which the Trustee's Senior Counsel was largely neutral. The court's discretion having been triggered, it would be wrong not to attach weight to them in the exercise of it, as they suggest that other orders are required.

[178] In addition, it was accepted at the hearing that orders were necessary to facilitate finalisation of the sequestration. I agree that is required.

Decision

[179] Having regard to the whole circumstances, I consider that an order is required which places parties and the creditors in the position they ought to have been in had the LLP settled the claim soon after Mr Breen's letter was received. As the AiB accepted, the Trustee is entitled to be paid for work until then. It seems reasonable to allow a further two weeks for the LLP to have settled the claim.

[180] I have provided for audit then payment of the Trustee's fees on that basis. As requested by the Trustee, the audit will be carried out by an experienced, independent person with no past or present connection to the case although, as is clearly appropriate, the Trustee shall bear that cost.

[181] As regards the expenses of this application, the AiB was entirely justified in bringing it. I have found the Trustee liable in expenses as taxed on that basis. Having regard to the

novelty of the application and the serious issues it raised, I have certified it as suitable for the employment of Senior Counsel.