Neutral Citation Number: [2018] EWHC 2943 (Ch)

Case No: HC-2016-003094

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Rolls Building, Fetter Lane, London, EC4A 1NL

Date: 30th November 2018

Before :

HIS HONOUR JUDGE EYRE QC
(Sitting as a Judge of the High Court)

- -

Between :

KULDIP SINGH BIRDI	**Claimant**
- and -	
1) ALAN PRICE	**Defendants**
2) GARY PETTIT	

- -
- -

Mr. Duncan Macpherson (instructed by **Montpelier Solicitors**) for the **Claimant**
Miss. Tina Kyriakides (instructed by **Ashteds**) for the **Defendants**

Hearing dates: 8th, 9th, 10th, 11th October 2018

- -

JUDGMENT

HH Judge Eyre QC :

Introduction.

1. The Claimant was formerly bankrupt. The First Defendant was his trustee in bankruptcy and was succeeded in that position by the Second Defendant. In July 2013 the First Defendant seized certain items of equipment owned by the Claimant and subsequently sold the same. The Defendants say that the equipment formed part of the bankruptcy estate and was properly seized and sold. The Claimant says that the equipment was necessary for use personally by him in his employment, business, or vocation and by reason of section 283 (2)(a) of the Insolvency Act 1986 ("the Act") did not form part of the bankruptcy estate. Accordingly, he says that the First Defendant's actions were a conversion for which he seeks damages against the First Defendant and in respect of the proceeds of which he says that the Second Defendant should account to him. The Defendants say that the claim is misconceived and that even if the claim against the First Defendant was otherwise meritorious it is precluded by reason of his release and the operation of section 299 (5) of the Act.

The Factual Background.

2. The Claimant is a skilled motor technician who specialized in work on Italian "supercars" in particular in work on Ferrari motor cars and who had been engaged in that field since 1986. He owned premises at units 2, 8, 9, and, 10 Hayes Metro Centre in Springfield Road in Hayes. Until about December 2011 the Claimant traded from those premises as a sole trader under the style "Verdi Performance Cars". From about 2010 Verdi Ferrari (After Sales) Ltd also traded from those premises. That company was owned by the Claimant's son. The Claimant was a director of that company until 15th March 2010 and appears to have performed some work for it. By December 2011 the Claimant had ceased to trade as Verdi Performance Cars and Verdi Ferrari (After Sales) Ltd was placed in compulsory liquidation. From about January 2012 Precision Engineering Auto Ltd ("Precision") operated a specialist business in respect of supercars from units 9 and 10 ("the Premises") and the Claimant was engaged in that work. There is dispute between the parties as to the relationship between the Claimant and Precision and also as to the rôle the former took in the business of the latter. The Claimant says that he was engaged as a consultant to or as an employee of Precision working as a motor technician. The Defendants say that the Claimant was in fact the owner of Precision and was a shadow or de facto director of that company. They say that he ran the business of Precision and to the extent that he himself undertook work on cars that was not his main function. The business of Precision used sundry items of equipment ("the Equipment") which were at the Premises. The Equipment in broad terms fell into four categories: heavier fixed (or not readily portable items) such as vehicle lifts, presses, and transformers together with sundry ancillary items; equipment making up an MOT testing station; specialist diagnostic and testing equipment ("the Diagnostic Equipment"); and a toolbox of specialist tools ("the Tools"). The Claimant says that Precision occupied the Premises pursuant to a non-exclusive licence and had a licence to use the Equipment apart from the Diagnostic Equipment and the Tools. He says that the Diagnostic Equipment and the Tools were his personal items which he did not allow others to use apart from, as in the case of his former apprentice, by

way of a personal favour. The Defendants do not accept this and point to the answers which the Claimant had given in his Bankruptcy Preliminary Information Questionnaire in July 2012 and at other times to the effect that Precision had a lease of the Premises and of all the Equipment.

3. The Claimant was adjudged bankrupt on 21st March 2012 on the petition of HM Revenue and Customs. The First Defendant was appointed as trustee in bankruptcy on 20th July 2012. The Claimant was discharged from his bankruptcy on 4th July 2013 but on 27th February 2015 he was made subject to a Bankruptcy Restriction Order running for nine years from 4th September 2014. In the meantime on 9th July 2013 the First Defendant had entered the Premises and seized the Equipment. That was sold at auction on 10th September 2013 realizing a gross figure of £68,454. The First Defendant retired from practice as an insolvency practitioner in February 2014. By an order made on 28th May 2014 the First Defendant was removed as trustee of the Claimant's bankruptcy and replaced by the Second Defendant. That order provided that the First Defendant's release pursuant to section 299 (3)(c) of the Act was to take effect from the date of the order.

4. The Claimant commenced proceedings in November 2016 having first intimated a potential argument along these lines in March 2016. As originally formulated the claims and allegations made were very much more wide-ranging than the current Particulars of Claim and included a number of other defendants. In orders made on 14th March 2017 and 20th July 2017 Newey J struck out some of the claims and granted summary judgment against the Claimant in respect of others. However, he permitted the current claim to continue. On 20th December 2017 Master Bowles gave directions providing, inter alia, for completion of a Scott Schedule and for a trial limited to liability and it was that trial which was before me.

The Parties' Contentions in Brief.

5. The Claimant says that the Equipment was not part of the bankruptcy estate because it was within the exception created by section 283 (2)(a) of the Act. The seizure or sale of the Equipment was accordingly a conversion for which the First Defendant is liable. The Claimant says that the First Defendant did not have reasonable grounds for believing that he was entitled to seize or dispose of the Equipment and so is not able to rely on the protection given by section 304 (3) of the Act. He says that the effect of sections 299 (5) and 304 (3) taken together is that the First Defendant's release did not operate to discharge him from liability in respect of these acts.

6. The Claimant originally contended that the Second Defendant, as the successor to the First Defendant and being in receipt of funds from the First Defendant, held the proceeds of the sale of the Equipment on trust for the Claimant and/or was liable to account to him by way of a tracing of the proceeds of the conversion or by reason of the Second Defendant's unjust enrichment. Those lines of claim were supplemented by the contention that the Second Defendant should be required to disgorge the funds by application of the principle laid down in *Ex p James* (1874) LR 9 Ch App 609. Before me Mr. Macpherson for the Claimant sensibly and properly abandoned the

contentions in relation to trust, tracing, or unjust enrichment and relied solely on the principle in *Ex p James.*

7. The Defendants contest each of these propositions. They say that the Equipment did not fall within the section 283 (2)(a) exception and so all of it formed part of the bankruptcy estate. In those circumstances the First Defendant was entitled and obliged to seize and dispose of it. Even if the Equipment was not part of the bankruptcy estate the First Defendant had reasonable grounds for believing that it was and so has the benefit of the defence given by section 304 (3). In any event it is said that by virtue of section 299 (5) the release of the First Defendant operated to discharge him from any liability. Moreover, the Defendants say that the Equipment had been leased to Precision with the consequence that the Claimant had no right to possession of it and no entitlement to bring a claim in conversion. The Defendants say that there is no basis for any recovery from the Second Defendant and that the sum of £1,360.95 which was the total amount received from the First Defendant by the Second Defendant does not represent any part of the proceeds of the sale of the Equipment.

8. The Scott Schedule described items by way of the numbering used at the auction of the Equipment but not all of the items sold were the subject of the proceedings and so the Scott Schedule did not replicate the entire sale catalogue. Moreover, in the course of the trial the Claimant accepted that a number of items on the Schedule could not form the basis of a claim against the Defendants being either the property of persons other than the Claimant or stock or work in progress or not capable of being described as a tool or an item of equipment.

<u>The Assertions which the Claimant has made about the Value of and the Rights in the Equipment and the Premises.</u>

9. The bankruptcy order was made by Registrar Derrett at 11.09am on 21st March 2012. Either that day or the day before (there is a difference between the dates on the fax cover sheet and the printed fax header) the Claimant had faxed to the court an "assets and liabilities statement". In the cover sheet the Claimant said that he had assets beyond the amount being sought by HM Revenue and Customs and requested an adjournment of the hearing of the petition so that he could raise cleared funds. That statement valued "equipment" at £50,000; "spare parts and MOT station" at £550,000; and "Ferrari testing equipment" at £20,000. It also included various properties and asserted that the balance of the Claimant's assets exceeded his liabilities by £1,792,800. Although that statement made reference to some mortgages it did not include all the mortgages to which the Claimant's properties were subject.

10. The Claimant instructed insolvency practitioners to prepare a proposal for an individual voluntary arrangement. The Claimant signed the draft proposal on 3rd April 2012. This proposal was never submitted to creditors but is of note because it must have been prepared on instructions given by the Claimant. The proposal contained a form on which the Claimant's assets were listed. The section of the form relating to "business assets" was struck through and so the

proposal signed by the Claimant stated that the Claimant had no business assets.

11. On 4th July 2012 the Claimant completed a Bankruptcy Preliminary Information Questionnaire and signed a statement of truth in respect of the same. In response to the questions asking for details of "machinery, plant and equipment" and "fixtures and fittings" the Claimant answered "none". On 5th July 2012 the Claimant was interviewed by Mr. Burchall of the Official Receiver. The Claimant signed the record of interview and made a statement of truth in respect of the same. In the course of the interview the Claimant was referred to the statement of assets and liabilities which had been sent to the court in March 2012 and in which he had said that he had assets of substantial value. He said that the values which he had placed on the equipment and the like in that statement had been an estimation made "without seeing the equipment"; that he did not know whether the items were in fact in the units; that the tools and equipment had been there for many years; and that some of them "won't have any value".

12. On 29th November 2012 the Claimant, together with a solicitor, met with the First Defendant. I find that the First Defendant's attendance note is a substantially accurate account of that meeting. The Claimant said that in his view "the assets which included the lifts [and] diagnostic computers probably had little value now". He said that he had "no idea" who prepared the statement of assets and liabilities which had been faxed to the court and "would not accept he had anything to do with the preparation of the document". The Claimant said that the figures in that statement were overvaluations and he valued the equipment at "about £5,000"; the spare parts and MOT station at "£15,000"; and the testing equipment at "no more than £6,000 to £7,000". The Claimant said that the Premises had been rented to Precision. Initially he said that this had been for £400 per month but then said that the first year was rent free. He initially said that there were a number of leases but then said that there was one lease covering all the units and all the fixtures, fittings, and equipment. The Claimant said that he would provide copies of the lease or leases but did not do so.

13. On 21st May 2013 the Claimant was again interviewed on behalf of the Official Receiver and signed a statement of truth in respect of the record of that interview. He said that he believed his copy of a lease in relation to the Premises and a hire agreement in relation to the Equipment had been stolen from his para-legal adviser's car. He said that he would try to get copies from Mr. Khot "who signed the agreements on behalf of Precision". He said that the lease had granted a rent-free period of two years.

14. On 26th June 2013 the Claimant was publicly examined under oath before Registrar Derrett. He said that Mr. Khot had the originals of the lease and hire agreement. The Claimant said that the values put in the statement faxed to the court had been inflated. He put a value of "about £40,000" on the spare parts and MOT equipment and said the other equipment was "just bits and bobs". The Claimant said that the lease and the hire agreements had both provided for a two or three year rent free period. The Claimant made it plain that he was referring to separate lease and hire agreements. There was a resumed public

examination on 28th August 2013 before District Judge Jones. The Claimant said that despite Mr. Khot's denials (to which I will refer more fully below) there was a lease and that Mr. Khot had a copy of it.

15. In March 2016 the Claimant sought an injunction against the Defendants and others. The application was made in an attempt to forestall possession proceedings against his matrimonial home. In this application the Claimant referred to the seizure and sale of the Equipment saying that this included, inter alia, "highly specialised diagnostic and test equipment" with a value of more than £200,000; "tools of trade" worth more than £60,000; "fixtures, fittings, ramps and other equipment" worth more than £30,000; and "engine remapping hardware and software" worth more than £250,000; and "parts and accessories of high value".

16. The Particulars of Claim of July 2017 assert that the Claimant gave Precision "a non-exclusive licence … to occupy the Premises and to use the items of Equipment" save for the Diagnostic Equipment and the Tools.

17. The Claimant's witness statement was signed on 25th July 2018. That statement goes into considerable detail about the Claimant's career and work as a specialist technician; about the nature of a number of the items of equipment; and about the circumstances of the seizure of the Equipment. However, the only reference to Precision in the statement is an assertion that the Claimant worked as a consultant to that company from some unspecified time after 2011. There is no reference at all in the statement to the alleged licence or to the basis on which Precision occupied the Premises and used the Equipment. In that regard at trial the Claimant relied on the assertion in the Particulars of Claim confirmed by a statement of truth.

18. When he was cross-examined the Claimant said that he had not leased the Equipment as well as the Premises to Precision. He said that he had not disclosed the Equipment as an asset in the Bankruptcy Preliminary Information Questionnaire because he had thought that the questions related to assets which he had at his home. I cannot accept that explanation. The Claimant is an intelligent man and I find that he knew that the questionnaire was asking about all his assets wherever located. The Claimant went on to say that when in the public examination he had referred to leasing equipment to Precision he had been referring to the fixtures and fittings and items which were bolted down but not to his tool box or to the diagnostic equipment.

19. The Claimant went on to say that Precision was in possession of the Equipment because he had foreseen what was coming. He had been making plans for the bankruptcy and did not want "to lose everything" in the bankruptcy. He said that the agreement reached with Precision had been to ensure that he would not lose everything. The Claimant described his attitude at that time thus: "why should I lose everything?"; "what was the point of that?"; "just over a small amount I owed to HMRC". The Claimant accepted that he had made the various statements set out above but said that he was doing so in order to fight his way out of the situation. When it was put to the Claimant that he had no regard for the truth he gave the telling answer: "my regard for the truth depends on who is sitting in front of me".

20. It follows that the Claimant has given markedly different accounts at different times. The Claimant accepts that he arranged matters so as to protect his assets from the impact of a potential bankruptcy; that he was making assertions and giving sworn evidence with the same aim; and that his regard for the truth is cavalier. Mr. Macpherson urged me to give the Claimant credit for this frankness and to accept that the account which the Claimant was giving at the trial was a truthful one. I am not able to take that approach. In that respect it is of note that although the Claimant did accept the matters I have just rehearsed his approach to giving evidence was not straightforward. I remind myself of the care which is needed in basing conclusions on the demeanour of a witness when giving oral evidence. Nonetheless I formed the firm view that the Claimant was evasive when being cross-examined and that he sought to avoid addressing the matters which were put to him. This is an approach which the transcripts of the two public examination hearings strongly suggest he had adopted in the past. To the extent that the Claimant accepted that he had given false or misleading accounts in the past his stance was not one of apology but one in which he appeared to be contending that he had been entitled to take that approach to protect his assets from the consequences of his bankruptcy. The Claimant's position was not that of a witness frankly acknowledging past errors and now seeking to put the record straight but one in which he did not accept that any criticism of his past accounts was merited and in which he made his current assertions without apology for what had been said before.

21. The history demonstrates that even when giving sworn evidence and when providing information in formal settings the Claimant has been quite prepared to set out the account which he, at the time, believed best suited his purposes regardless of the accuracy or truthfulness of what was being said. In partial explanation the Claimant sought to say that he had been shocked and upset by the way in which he was being treated by the First Defendant. There is no basis in the evidence or documentation before me to suggest that the First Defendant's actions as trustee in bankruptcy were improper or out of the ordinary. I accept that the Claimant found the bankruptcy a stressful experience but I am satisfied that he was fully aware of what he was doing and was acting deliberately with a view to what he regarded as his best interests. Thus when in March 2012 it suited the Claimant's purposes to inflate the value of his assets he did so. I am satisfied that after the bankruptcy order had been made the Claimant believed that asserting that the Premises and the Equipment had been leased to Precision gave a better prospect of keeping those assets out of the hands of the Official Receiver and of his trustee in bankruptcy and so that was what he said. It now suits the Claimant's purposes to say that such rights as Precision had to the Equipment were those of a licensee and I cannot be satisfied that in saying that the Claimant is not once more saying what he believes suits those purposes rather than what he believes is an accurate account of what happened.

22. It follows that I cannot regard the Claimant as a reliable witness. There is a paucity of contemporaneous documents against which to assess the accuracy and truthfulness of what I was told by the Claimant. In those circumstances I have concluded that I must exercise extreme caution in accepting anything which the Claimant told me and that I must assess his assertions against such

background material as there is and in the light of the intrinsic likelihood or unlikelihood of particular events.

23. My conclusion as to the reliability (or rather the lack of reliability) of the Claimant's evidence will be relevant for my findings on the issues I have to determine. The history of differing accounts; of evasiveness; and of implausible explanations is highly relevant in a further respect. It will be relevant when assessing the First Defendant's state of mind and the reasonableness of his actions at the time of the seizure and sale of the Equipment.

24. On the balance of probabilities I find that there was no document or documents constituting a lease of the Premises and/or the Equipment and/or a hire agreement in respect of the Equipment. The account which the Claimant had previously given of the only copies of the relevant documents having been stolen from his para-legal adviser's car was inherently implausible. There was a lack of consistency as to the number of documents and as to their terms. Most significant is the fact that the Claimant's contention in the immediate aftermath of the bankruptcy order was that there had been a lease of the Premises and of the Equipment. I am satisfied that if there had in fact been a formal lease or hire agreement the Claimant would have produced a copy. I also find that there was no formal licence agreement nor any arrangement in which it was expressly agreed that Precision was to be regarded as the Claimant's licensee. I make that finding because of the differing accounts which have been given by the Claimant; because the assertion of such an arrangement now suits the Claimant's case and so must be viewed with considerable reservation; and because I am satisfied that such arrangements as there were between the Claimant and Precision were marked by informality.

25. The position, however, was that Precision was a legal entity separate from the Claimant which was being held out to the world as operating a business from the Premises using the Equipment. I will consider the effect of this in due course when addressing the question of whether the Claimant had a right to possession of the Equipment. I will also have to have regard to the nature of the Claimant's relationship with Precision and it is to that which I will now turn.

<u>The Claimant's Relationship with Precision and his Occupation and Employment Status at the Time of his Bankruptcy.</u>

26. The differences between the accounts which the Claimant has given of his occupation and his rôle in the business of Precision are not as stark as those in relation to the value of and the rights in the Equipment. There are nonetheless telling differences of detail and emphasis.

27. In the Bankruptcy Preliminary Information Questionnaire signed on 4th July 2012 the Claimant said that he had been employed by Precision since approximately December 2011. In the interview with Mr. Burchall the following day he variously said that he had stopped operating as a sole trader through Verdi Performance Cars in 2010/11; 2009; and 2010. The Claimant then said that he was currently employed by Precision as a "consultant"

earning £1,000 per month and that he was "not in charge of running the business [but was] just employed by them."

28. The Claimant met the First Defendant on 29th November 2012 and again said that he was an employed as a consultant and did not run the business (the attendance note purports to record the Claimant as saying that he ran the business but in context a "not" or similar wording is clearly missing through error). By that stage the First Defendant had been provided with a copy of an agreement purportedly made between the Claimant and Precision on 12th December 2011. This was described as a "self-employed contract provision". It provided that the Claimant was engaged by Precision as a sub-contractor for the period of 12 months to provide services which were listed and that he was to do so "to the standard expected of a fully competent Mechanical Technician".

29. The record of the 21st May 2013 interview with the Official Receiver records the Claimant as saying that he was currently employed by Precision; that he had ceased trading as Verdi Performance Cars in "late 2009"; and that thereafter he had been employed by Verdi Ferrari (Aftersales) Ltd. He also said that he had traded for a while as "Verdi for Ferraris"; that he did not know for how long he had used that trading style; but that he had ceased using that style by "around December 2011".

30. In the public examination of 26th June 2013 the Claimant had said that Mr. Khot was the director of Precision and was asked if he, himself, had any connexion with Precision and replied "I work for them sometimes. I am on the phone to them if I need help." In context it is clear that the Claimant was actually saying that Precision phoned him if they needed help because he went on to say that he was paid "sometimes £200, £250". He was asked in terms if he was formally an employee and said that he was not. On being asked to explain the terms of the consultancy the Claimant described an ad hoc arrangement in which he responded to phone calls and attended to assist with problems on request. He said that he would charge £20 for an hour's work and that on occasion he would do 20 hours work a week for Precision. At the further public examination the Claimant was challenged as to his contention that he was just an employee of or consultant to Precision but he maintained his stance and referred to the contract with Precision.

31. In his witness statement the Claimant stated in stark terms that he had worked as a consultant to Precision from some time after an unspecified date in 2011. However, he did not in that statement set out any details of the consultancy; of the work he actually did; or of the payment arrangements. When the Claimant was cross-examined about his relationship with Precision he said that Mr. Khot was the sole director and that he, the Claimant, had no interest in Precision other than as an employee.

32. In her closing submissions Miss. Kyriakides drew my attention to these differences. Mr. Macpherson took issue with this saying that the differences ought to have been put to the Claimant in cross-examination but had not been. I take account of the fact that I do not have an explanation from the Claimant for these differences. However, I note that it would have been open to the

Claimant to explain the relationship with Precision more fully in his witness statement and also there to explain these differences but he chose not to do so. That omission is all the more telling because the Defence contained an express averment that the Claimant was the beneficial owner and a shadow or de facto director of Precision. Moreover, as I have explained above, I have found that the basis on which the Claimant decided what to say in the various questionnaires and in the public examination hearings was his judgement as to what would advance his interests rather than a scrupulous concern to give an accurate account of his understanding of the history.

33. The First Defendant approached Mohammed Khot for information about the affairs of Precision. By an e-mail of 28th November 2012 Mr. Khot said that the Claimant worked for Precision as a senior technician on a self-employed basis responsible for the general day to day running of the business but specializing in addressing "high level performance related issues". At that time Mr. Khot provided the First Defendant with a copy of the December 2011 agreement. However, Mr. Khot then resiled from that position. In a letter of 19th February 2013 and in a meeting with Mr. Price on 2nd July 2013 (a meeting in which Mr. Khot was accompanied by a representative) Mr. Khot gave a very different account. He said that he had no control over Precision and no involvement in its business. Mr. Khot said that he had allowed his name to go forward as the director of Precision at the instigation of a man called Alam Khan. Mr. Khan had approached Mr. Khot on behalf of the Claimant and Mr. Khot said that the company was created and the arrangement for him to be a director was put in place in order to save the Claimant's business from his imminent bankruptcy. Mr. Khot said that the Claimant had continued to run the business and that on the one occasion when Mr. Khot had attended the Premises for work to be done on his car there were some mechanics in the workshops and the Claimant was in the office.

34. Mr. Khot did not give evidence before me. There was no opportunity for his account of matters to be challenged in cross-examination on behalf of the Claimant. In those circumstances I do not treat the material emanating from Mr. Khot as evidence of the Claimant's activities. Although I do note that the Claimant made no comment at all in his witness statement on Mr. Khot's assertions and has not suggested any other person as the controller of Precision. The material from Mr. Khot was, however, highly relevant as part of the information which was available to the First Defendant. It was material which together with the other material resulting from his investigations and provided to him by the Official Receiver caused the First Defendant to conclude that in reality the Claimant was in control of the business being operated at the Premises and that the Claimant was a shadow director of Precision. The First Defendant said that conclusion was reinforced when he went to the Premises and seized the Equipment on 9th July 2013. The First Defendant said that although there were mechanics present and working at the Premises the Claimant was not there initially. The First Defendant accepted that given the size of the Premises it was possible that the Claimant had been present but out of his sight when he had arrived but explained that his recollection was that the Claimant had come later. The scene which he found at the Premises reinforced the First Defendant in his view that the Claimant

was overseeing the business rather than himself engaging in the work of a technician. The Claimant says that he was present at the Premises when the First Defendant and others arrived on that day. I have already explained that I cannot regard evidence given by the Claimant as reliable and that I am bound to exercise extreme caution in accepting any assertion by him. I am satisfied that at the very least the Claimant's presence was not apparent to the First Defendant when the latter arrived at the Premises on 9th July 2013 and that the First Defendant genuinely believed that the Claimant had arrived later.

35. The Claimant accepted that as at 2013 he was not himself carrying on MOT testing and that the MOT testing being undertaken at the Premises was carried out by Paul Hilton with occasional assistance from another employee.

36. In my judgement it is also of note that those items of the Diagnostic Equipment which were in carrying cases were found in the office in the Premises rather than in one of the workshops. It was the Claimant's case that these were his personal tools which he did not allow others to use. If that is correct then the fact that they were kept in the office is an indication (albeit a modest one) that the office was controlled or at least used by the Claimant.

37. In the light of that material I have concluded on the balance of probabilities that the Claimant was controlling the operation which was conducted by Precision at the Premises with the bulk of the physical work being done by other mechanics. Even if that was not the position I find that the material which the First Defendant had was such that it was entirely reasonable for him to conclude that it was the position. Accordingly, I find that the First Defendant believed and believed on reasonable grounds that the Claimant was running the operation of Precision. However, for the reasons I set out more fully below when addressing the particular items of Equipment I did find credible the Claimant's assertion that he continued to undertake some work as a technician. In that regard I find that the Claimant was not solely engaged in oversight of the Precision operation but that he himself undertook some of the technical work. Also for the reasons set out below I find that he retained personal control of the Tools and of some of the Diagnostic Equipment.

Was the Equipment part of the Bankruptcy Estate?

38. Section 306 of the Act provides that a bankrupt's estate vests in his trustee immediately upon the latter's appointment taking effect.

39. Section 283 (1) defines a bankrupt's estate in the following wide terms:

> "**Definition of bankrupt's estate.**
>
> (1) Subject as follows, a bankrupt's estate for the purposes of any of this Group of Parts comprises—
>
> (a) all property belonging to or vested in the bankrupt at the commencement of the bankruptcy, and
>
> (b) any property which by virtue of any of the following provisions of this Part is comprised in that estate or is treated as falling within the preceding paragraph."

40. However, section 283 (2)(a) provides that sub-section (1) does not apply to

> "(a) such tools, books, vehicles and other items of equipment as are necessary to the bankrupt for use personally by him in his employment, business or vocation;"

41. Section 436 (1) defines "business" as including "a trade or profession".`

42. The application of the section 283 (2)(a) exception to the facts of this case is a key issue here. There is no binding authority directly on the point and the applicable approach has to be determined by reference to the language of the section; to the purposes of the Act; and to such guidance as can be derived from those authorities addressing similar provisions or commenting upon the operation of this section.

43. In *Toseland Building Supplies Ltd v Bishop* (28th October 1993) the Court of Appeal considered the operation of the now repealed section 138 (a) of the Senior Courts Act 1981. This excepted from execution by way of fieri facias against a judgment debtor "such tools, books, vehicles, and other items of equipment as are necessary to [the debtor] for use personally by him in his employment, business or vocation". The Court was determining an appeal from a decision of Sir Michael Ogden QC as a deputy High Court Judge. He had held that the exception did not apply to a JCB digger which the debtor had himself driven and operated in his groundworks business but which had also been driven and operated from time to time by other persons whom the debtor had employed to drive it on his behalf. The Deputy Judge described the purpose of section 138 (a) as being "to protect the tools of the trade of the individual worker" and had concluded that the use of the vehicle by employees of the owner took it outside the exception.

44. That approach was upheld by the Court of Appeal. Steyn LJ said that the Deputy Judge had been "very wise" not to attempt to define the words of section 138 (a). He went on to say:

> "Likewise, I will not seek to define the operative words of Section 138. The words "necessary" and "personal" are among the commonest words in the English language and do not require definition. The answer to the question before us is simply to be found in the application of those words to the facts of the present case.
>
> That brings me to the submission that was advanced before us this morning, namely that the judge's decision was against the weight of the evidence. Here it is important to bear in mind what the correct approach is in a case like this. The general principle is that prima facie all the judgment debtor's goods are liable to seizure under a writ of Fieri Facias. If a judgment debtor claims the benefit of a statutory exemption, the burden of showing that the exemption applies rests squarely on him. On the evidence this was not a simple case of tools of the trade used by an individual worker. The Appellant ran a business in which a JCB digger was the most important piece of equipment. Sometimes he drove it, and sometimes his employees did. In these circumstances the judgment debtor has not demonstrated that it is necessary to him `for use personally by him in his business'."

45. As Mr. Macpherson pointed out the Court of Appeal was there addressing a different Act from that with which I am concerned and was doing so in the context of particular facts. Nonetheless, section 283 (2)(a) of the Act and section 138 (a) of the Senior Courts Act are in identical terms save for the reference in the former case to the bankrupt and in the latter to the judgment debtor. Accordingly, the approach taken by the Court of Appeal is at the very lowest highly persuasive.

46. In *Church of Scientology v Scott & others* (1997) BPIR 418 an issue was raised as to the application of section 283 (2)(a) to tools and equipment which were not in the bankrupt's physical possession at the time of bankruptcy but in respect of which the bankrupt had a right to recover possession. Millett LJ (with whose judgment Phillips and Neill LJJ agreed) concluded that it was not necessary to decide that issue but expressed a tentative view in these terms:

> "This raises a question of some importance which I would be reluctant to decide on this appeal unless it were necessary do so. I would tentatively question the correctness of the submission on the basis that, given the width of the definition of the estate which does vest in the trustee in bankruptcy and, in particular, the fact that the property which vests includes choses in action, it may be necessary to give a similarly wide definition to the exception in subsection (3). If so, it would extend not only to the tools, books, vehicles and other items of equipment in the actual possession of the bankrupt, but also to the rights to recover their possession by action if necessary. The consequences of a connotation to the opposite effect would be very odd. But I do not decide the point because, in my judgment, it is unnecessary to do so."

47. That was avowedly a tentative view but it does provide some support for the argument by Mr. Macpherson that a wide approach is to be taken to the section 283 (2)(a) exception.

48. In *Official Receiver v Lloyd & Lloyd* [2015] BPIR 374 the two bankrupts had sold machines and tooling which they had owned as partners to a company which allowed the equipment to be used by a new company which the bankrupts had formed and by which they were employed. It is not clear from the report of the decision whether that new company had other employees in addition to the bankrupts but it appears to have been at least contemplated that there might be other employees using the machines. DJ McCloughlin had to determine as a preliminary issue whether in those circumstances the machines and tooling fell within the section 283 (2)(a) exception. He concluded that they did not saying, at [12]:

> "In my judgment, in the modern world, the court should approach the resolution of the question in a broad and pragmatic way. It may be, for example, that a designer who uses expensive software programs on expensive computers and associated equipment might value them at many thousands of pounds. Similarly, a craftsman who owned an extremely expensive lathe to turn out intricate pieces of jewellery or even parts of engines may have such kit, as may the designer, properly described as `personal tools of their trade'. It depends on the facts. It seems to me it depends on the scale, on the value and, importantly, on the context. These were clearly industrial machines set up within an industrial unit for that purpose, to be used not only by [the bankrupts] but by anybody they employed. They are not, in my judgment, tools personal to either of them.

> Certainly they were not, for the purposes of the Act, necessary to them because they sold them although they continued to use them by virtue of being employed by the very people who had leased them from the people they had sold them to."

49. Mr. Macpherson prays this approach in aid as indicating that a broad approach should be taken and that a skilled craftsman's specialist equipment can fall within the exception even if it is valuable and physically substantial. For the Defendants Miss. Kyriakides points to the District Judge's conclusion that a person who has parted with ownership of equipment cannot say that the equipment is necessary for his or her business even if that person in fact continues to use the equipment in question.

50. In *Wood v Lowe & others* [2015] EWHC 2634 (Ch), [2015] BPIR 1537 HH Judge Saffman had to make findings in respect of a large number of chattels determining the ownership of some and determining in respect of others whether they formed part of the bankruptcy estate in question. The learned judge set out his conclusions in respect of the particular items in an appendix. He identified certain items as "tools". The report of the judgment does not indicate what precise form these took but they appear to have been for use in construction work. The bankrupt had contended that these fell within the section 283 (2)(a) exception. The trustee in bankruptcy's argument appears to have been that the exception could not apply because the bankrupt "no longer works with his hands". Judge Saffman rejected that as a matter of fact saying that the evidence showed that the bankrupt had been working in construction work "until recently". He went on to say:

> "I do not think that the exemption ceases to apply because a bankrupt is unable to use the tools for a time due to ill health. There is no evidence that [the bankrupt] at some future date may not be able to use them. The exemption is there so that a bankrupt is not deprived of earning power. It appears that [the bankrupt] used them to that purpose as recently as December 2014 [which was four months before the trial] and I am not satisfied that it is unlikely that he will do so again.
>
> Furthermore, even if I am wrong, subject to representations by counsel that may convince me otherwise, I do not see the exemption in s283(2) as requiring that the bankrupt himself physically uses the tools in any event. A bankrupt may for example set up a small business (as long as he is not a director or shadow director of a company and as long as he is aware of the restrictions on taking credit etc) in which the tools may be used by another. They still provide the bankrupt with the facility to earn, which is the rationale of the exemption."

51. Mr. Macpherson places considerable emphasis on the second of those paragraphs. He invokes it as a correct interpretation of the section. He relies on Judge Saffman's dictum that the bankrupt does not physically have to use the tools to be within the exception and relies on the view that the exception can operate even where a bankrupt employs other persons to use the tools and to generate profits for the bankrupt.

52. I will explain below why I am compelled to conclude that Judge Saffman's dictum in that second paragraph is not a correct expression of the law. However, it suffices to say at this point that it was avowedly not the primary

basis for the learned judge's decision; that it was made without the benefit of argument or the citation of authority on this point; and that it was expressed to be subject to revision in the event that submissions were made. The dictum was clearly the result of consideration and thought but it was obiter and that consideration was without the benefit of argument.

53. In *Mikki v Duncan* [2017] EWCA Civ 57, [2017] 1 WLR 2907 the Court of Appeal considered whether section 283 (2)(a) operated to cause a bankrupt to retain the benefit of a hire purchase contract in respect of a car which he used in his photography business. It concluded that the Act could not be interpreted so as to have that effect. At [34] – [38] Mann J giving the judgment of the court explained that the policy underlying the section 283 (2)(a) exception could be regarded as having been summarised in the Cork Report (1982, Cmnd 8558) and in particular at paragraph 1096 of the Report which said:

> "A further aim of the bankruptcy code is to enable the individual debtor to achieve his rehabilitation as a useful and productive member of society. Certain assets necessary for this purpose are accordingly exempted from vesting in his trustee and are allowed, on the contrary, to be retained by the debtor."

54. I note that aspect of the policy of the bankruptcy code and of the purpose behind the exception. That policy has to be seen alongside the other policies of that code and in particular the aim that all the assets of a bankrupt should be made available to the bankrupt's creditors in return for the protection which bankruptcy gives against further pursuit in relation to the debts and liabilities existing at the date of the bankruptcy. In that regard I take account of the wide definition of property at section 436 (1) of the Act as including "money, goods, things in action, land and every description of property wherever situated and also obligations and every description of interest, whether present or future or vested or contingent, arising out of, or incidental to, property" and of section 283 (1)(a) which provides that the bankrupt's estate comprises "all property belonging to or vested in the bankrupt at the commencement of the bankruptcy" together with such further property as the Act treats as being such property.

55. Finally by way of assistance from authority reference can be made to *Lavell v Richings* [1906] 1 KB 480. There the Court of Appeal was concerned with the question of whether a cab hired by a professional cab-driver was a "tool [or] implement of his trade" for the purposes of section 147 of the County Courts Act 1888 and so protected from distraint by the owner of stables at which the cab-driver kept the cab. It had been argued that the cab-driver did not have to drive the particular cab but could still earn a living by hiring a different cab from elsewhere. This argument was rejected. The Court accepted the plaintiff's argument that "implement of trade" meant an "existing implement of an existing trade" and that it was "no answer to say that a man might go elsewhere and make use of other implements". Mr. Macpherson relied on this decision to say that equipment could be within the section 283 (2)(a) exception even if it was equipment of a kind which could be acquired elsewhere. At first sight there appeared to be substantial force in this argument. On reflection, however, I have concluded that I must exercise considerable caution before

placing undue weight on this decision. The Court of Appeal was considering a particular and different provision from that with which I am concerned. In that regard it is of note that section 147 did not include the requirement which is present in section 283 (2)(a) that the equipment in question is "necessary" to the bankrupt for use in his employment, business, or vocation. Accordingly, the Court of Appeal was concerned with the question of whether the cab in question was in fact an implement of the cab-driver's trade and not whether it was necessary to that trade.

56. Some, albeit very limited, assistance can be derived from the language used in section 308 of the Act. This provides for a trustee in bankruptcy to claim certain excepted items from the bankrupt and to provide a reasonable replacement to him or her in cases where the value of the excepted chattel exceeds the cost of the reasonable replacement. What is of note is that section 308 (1)(a) describes the section 283 (2) exception as being where "property is excluded by virtue of section 283 (2) (tools of trade, household effects, etc) from the bankrupt's estate". The passage in parenthesis is clearly only a short form description of the exception provided for in section 283 (2)(a) and (b) and the use of that short form description can carry little weight. Nonetheless it is of note that Parliament adopted a short form description which describes the exception in narrower rather than wider terms.

57. In interpreting and applying the exception Mr. Macpherson urged me to be mindful of its purpose; to avoid equating "personally" with "exclusively"; and to give the exception a wide scope. Miss. Kyriakides reminded me that the Claimant bore the burden of establishing that particular items fell within the exception and that the issue was to be determined by reference to the state of affairs as at the commencement of the bankruptcy (here 21st March 2012).

58. Against that background I have concluded that the approach to be applied is as follows.

    i) The burden of establishing that a particular chattel falls within the exception lies on the bankrupt.

    ii) The relevant questions are to be determined in the light of the factual situation existing at the date of the commencement of the bankruptcy.

    iii) The Court should not seek to define the operative words of the sub-section. They are to be regarded as non-technical terms and as setting out in ordinary language a test which is to be applied to the facts of the particular case.

    iv) The application of that test will be highly fact-sensitive and close regard must be had to the circumstances of the particular bankrupt and of the particular chattels. Chattels which are necessary to one bankrupt for use in that bankrupt's employment, business, or vocation might not be necessary to another even though the chattels appear to be of the same kind and the employment, business, or vocation are also apparently similar.

v) In applying the language of the sub-section to the particular case regard must be had to the purpose of the exception which is to enable a debtor to achieve rehabilitation as a useful and productive member of society. That purpose must, however, be seen in the light of the overall purposes and policies of the bankruptcy code and, in particular, the policy of enabling a debtor to draw a line under his or her debts and liabilities but at the price of ensuring all current assets are made available in satisfaction of the claims of his or her creditors.

vi) Regard must be had to the particular chattel and the use made of it. The fact that a bankrupt could in the future obtain a substitute tool, book, vehicle, or item of equipment to do the work of the particular chattel and thereby earn a living does not take the particular chattel outside the exception provided that the chattel is necessary to the bankrupt for use in his employment, business, or vocation. However, in that regard it is important to note that the test is one of necessity. Care will be needed in particular cases in determining whether a particular chattel is necessary to the bankrupt. The fact that a particular tool used by a bankrupt is owned by him does not automatically or of itself make it necessary to him for use in his employment, business, or vocation. All will depend on the particular circumstances having regard to the chattel; the bankrupt; and the employment, business, or vocation. It will not be a good answer to a claim invoking the exception to say that the bankrupt could purchase a replacement chattel for himself. However, in a particular case it may be a good answer to say that such chattels are normally provided by others to those engaged in the particular employment, business, or vocation so that continued possession of the chattel in question is not necessary to the bankrupt.

vii) Regard must be had to each element in the sub-section and the bankrupt must establish each element. Thus the bankrupt must show that the tools, books, vehicles, or other items of equipment are (a) necessary to him (b) for use personally by him (c) in his employment business or vocation.

viii) "Necessary" is a normal English word and no gloss of it is required but the court must keep in mind that the test is one of necessity and not, for example, one of convenience or desirability.

ix) The sub-section requires that the use be "personally" by the bankrupt. The word "personally" must be regarded as adding something to the words "by him". It is for this reason that I am unable to accept as correct the view expressed by HH Judge Saffman in the second paragraph of the passage I have quoted at [50] above from *Wood v Lowe & others*. I cannot envisage circumstances in which a person could be said to be personally using a tool, book, vehicle, or item of equipment if he or she was not him or herself physically using that chattel. I do not believe that a bankrupt whose employees are using certain chattels in that bankrupt's business with no physical use of those chattels by the bankrupt can him or herself be said to be using the chattels personally. Such use may well be "use by" the bankrupt but it

cannot be "personal use by" him. In my judgement this conclusion follows from the wording of the sub-section particularly the qualification of "use" by the adverb "personally" but I am confirmed in that view when regard is had to the context and purpose of the section 283 (2)(a) exception. The exception is intended, in the words of the Cork Report, to enable a bankrupt to "achieve his rehabilitation as a useful and productive member of society" but it must be seen in the context of the operation of bankruptcy as a means whereby a debtor is freed from his debts but at the price of the gathering in and realisation of all his existing assets. The exception must not be artificially constrained but care must be taken not to interpret it excessively widely. An interpretation which would enable a bankrupt not just to earn a living by himself working with particular equipment but also to keep all the equipment of his business out of the bankruptcy estate and so prevent it being available for the creditors would be excessively wide. Such an interpretation is not necessary to achieve the purpose of the exception and would run counter to the overall purposes of the bankruptcy.

x) It is possible that the relevant use does not have to be exclusive in order to be personal and in particular cases a shared use might still be a personal use for these purposes. However, the approach taken in *Toseland Building Supplies Ltd v Bishop* (a decision which was not cited to HH Judge Saffman) strongly suggests that use which is not exclusive is unlikely to be within the subsection at least where the shared use is by an employee of the bankrupt. I remind myself that it would be unwise to attempt to define the words of the subsection and that regard must be had to the facts of each particular case. Nonetheless, in the light of *Toseland Building Supplies Ltd v Bishop* considerable caution must be exercised before the court can conclude that equipment which is not used exclusively by a bankrupt is necessary for use personally by him.

59. The Defendants had pleaded that the Claimant was estopped from asserting that any part of the Equipment fell within the section 283 (2)(a) exception. However, the evidence did not provide any basis for such an estoppel and Miss. Kryiakides sensibly accepted that this line of defence could not be maintained.

60. The relevant date for determining whether the Equipment was within the exception is 21st March 2012 being the date when the bankruptcy order was made. Miss. Kyriakides argued that at that time the Equipment was being used not by the Claimant but by Precision. She pointed out that the business was the business of Precision, a separate legal entity from the Claimant, and that it cannot be said that the Claimant was using the Equipment if it was being used by Precision to generate funds for that company. There is considerable force in this argument but it is not conclusive of itself. The relevant test for the purposes of the exception is not whether the bankrupt was actually using a particular chattel at the time of the bankruptcy but whether at that time it was necessary to the bankrupt for use personally in his employment, business, or

vocation. The fact that a particular item is not actually being used at the relevant time is a powerful indication that its use is not necessary to the bankrupt but the issues of actual use and necessity are logically distinct. Similarly, the fact that the Claimant has apparently continued to work without the Equipment in the period since July 2013 is a potent indication that it is not necessary for his employment, business, or vocation but is not conclusive of that question. In that regard I must consider the matters set out at [58 vi] above.

61. The **Tools.** This is a reference to the toolbox which was item 27 on the Scott Schedule. Although I have referred to it as a toolbox it was a bulky item. It is described in the Scott Schedule as being a "mobile tool chest" and as having an "8-drawer chest over a 6-drawer side unit". In his oral evidence the Claimant said that it was about the size of the desk at which he was sitting to give evidence and that it contained specialist hand tools for use on Italian supercars which he had accumulated over his career. It was in the Premises when those were being used for the Precision operation. The First Defendant accepted that it contained handtools of a kind which a Ferrari technician would need to do his work but expressed his belief that this was equipment of a kind which would be supplied by an employer. In that regard the Claimant's assertion in his witness statement that "perhaps less than 10% of mechanics in the UK would have this tool box and even fewer with the tools I had in it" cuts both ways. It provides support for the Claimant's contention that this was specialist equipment which he used as a specialist technician but it suggests that it is possible to work as such a technician without ownership of that equipment.

62. Statements from Byron Blake and from Amire Adeile were adduced in evidence on behalf of the Claimant. Those gentlemen live overseas and their statements were admitted under the Civil Evidence Act 1995. It follows that those witnesses were not cross-examined and I have to exercise care not to place undue weight on their accounts which are in any event expressed in somewhat general terms. However, the overall thrust of their evidence is not particularly controversial and accords with the picture given by the balance of the evidence. I accept that both these gentlemen engaged the Claimant to provide specialist technician services in relation to their supercars; that the Claimant travelled to them to provide those services; and that when he did so he took some equipment with him. The statements did not identify the equipment which the Claimant took other than to describe it as "mechanical and diagnostic equipment" and in particular they do not provide any material assistance in identifying which, if any, parts of the Equipment had been taken by the Claimant on those visits.

63. I have reflected on the very considerable reservations which I have as to the reliability of the Claimant's evidence and I have reminded myself that the burden of establishing that particular chattels fell within the exception lies on the Claimant. However, in relation to the toolbox I note that the Claimant was able to give persuasive detailed evidence and that his position accords with intrinsic likelihood. It also accords with the picture which emerges from the evidence of Messrs Blake and Adeile. Moreover, the First Defendant's belief

that one would expect an employer to provide such equipment was not supported by any expert evidence nor by evidence of the actual practice of employers or technicians in this field. In my judgement it is of note that the First Defendant accepted that there were a number of other toolboxes which had been on the Premises in July 2013 and which were seized but then returned to individual technicians who convinced the First Defendant that those toolboxes belonged to them. Indeed at one point in his evidence the First Defendant appeared to indicate that if this toolbox had contained the Claimant's name or had been marked as belonging to him then the First Defendant would have been open to the suggestion that it fell within the exception. I have concluded that on the balance of probabilities the toolbox is properly to be seen as a larger version of the toolboxes which the First Defendant released to other technicians. I find that it contained the Claimant's personal tools; that it was for his personal use; that such use as there was of its contents by others was only with the permission of the Claimant; and that it was necessary for his personal use in his business or vocation as a specialist technician. Accordingly, it was covered by the exception and did not form part of the bankruptcy estate

64. The **Diagnostic equipment** consisted of items 8 - 15, 17 – 21, and 23 on the Scott Schedule. The Claimant said that each of these items was a piece of specialist personal equipment which he did not allow others to use and which was necessary for his work as a specialist technician. However, in my judgement there are significant differences between the items in this category. The inventory compiled at the time of the seizure shows differences as to the location and nature of these items. Thus items 8,13, and 14 were found in the office which I find to have been the Claimant's office and which contained other items personal to him. Those three items were not only in the office but were found with carrying cases which were said to look like large briefcases. Items 9, 10, 11, and 12 were also in the office but not with or in carrying cases. The last of those items was attached to a trolley. Items 15, 17 -21, and 23 were found in one of the workshops forming part of the Premises.

65. I have already set out my reservations as to the reliability of the Claimant's evidence. Nonetheless I found credible his account in respect of the items of equipment which were in carrying cases and again this account accords with the evidence of Messrs Blake and Adeile. In respect of those items I find on the balance of probabilities that they were items of equipment which were used personally by the Claimant and which were necessary for him to work as a specialist technician. I find that this was not the position in relation to the items which were found in the workshop. These appear to have been less readily portable and appear to have been in use generally in the business of Precision. I am not satisfied that these were in personal use by the Claimant nor that they were necessary for such use in his employment, business, or vocation. That leaves the items which were in the office but which were not in carrying cases. I have found the analysis of these items more difficult but I have concluded that they are properly to be seen as akin to the items in carrying cases and as being within the exception.

66. It follows that items 8 – 14 are within the exception and did not form part of the bankruptcy estate but that items 15, 17 – 21, and 23 were not in the exception and were part of the bankruptcy estate. The Diagnostic Equipment category is to be divided accordingly and hereafter I will refer to the former items as the Excepted Diagnostic Equipment.

67. I turn to the **MOT testing station.** This was items 5 and 7 on the Scott Schedule (and it is to be noted that some of the items in the next category were also used in the course of performing MOT tests). I find that this was not within the exception and that it did form part of the bankruptcy estate. The effect of the evidence was that although the Claimant appears, at one time, to have been an authorised examiner for the purposes of MOT testing by early 2012 which is the time with which I am concerned the actual testing was being done by Paul Hilton assisted on occasion by another employee. The Claimant accepted that at this time Mr. Hilton was the only person certified to carry out MOT testing. This equipment was not being used personally by the Claimant at the time of his bankruptcy nor was personal use of it necessary for his employment, business, or vocation. The Claimant did not suggest that this was an item which had been kept separate from the Precision operation in the way in which he had said that the Tools and the Diagnostic Equipment had been. Instead this was part and parcel of the operation being conducted by Precision and in which a number of persons were employed. This equipment was clearly necessary for a business which provided MOT testing services but it was not necessary for use personally by the Claimant. It would only fall within the exception if the wider approach suggested by HH Judge Saffman were applicable and for the reasons set out above I have concluded that I should not apply approach in the circumstances of this case

68. The balance of the **Equipment** consists of sundry items of fixed and heavy machinery such as vehicle lifts or presses together with some smaller ancillary items such as jacks and compressors. This category covers items 1- 6, 16, 22, 24 -26, 28 – 29, 31 -36, 39 -44, 46 –51, 53- 54, 56 -58, 61, 70 – 78, and 105 on the Scott Schedule (the balance of the Schedule being the items in respect of which the Claimant accepts that a claim cannot be pursued) The conclusions which I have reached in relation to the MOT testing station also apply here. These were items of plant and machinery which were being used by the various employees working in the Precision operation. Again the Claimant did not suggest that this equipment had been kept separate from Precision's operation rather his case was that he had authorised Precision's use of the equipment (he said by way of a non-exclusive licence). Any personal use of these by the Claimant was incidental and in reality they were being used by Precision. These were items of a kind which were necessary for the operation of garage business (albeit one of a specialist nature) but they were not necessary for use personally by the Claimant.

<u>Does Section 304 (3) of the Act provide a Defence to the First Defendant?</u>

69. In the light of my findings this potential line of defence is only relevant to the Tools and to the Excepted Diagnostic Equipment. However, it will come into play in respect of the other items if, contrary to my finding, they fall within the

section 283 (2)(a) exception and I will consider its application to all of the Equipment.

70. The First Defendant explained that he had formed the view that the Claimant was a shadow director of Precision and that the Claimant was running the business which was being operated from the Premises rather than himself working physically in the mechanical or technical aspects of the business. The First Defendant came to that conclusion based on the discrepancies in the information which the Claimant had given at different times and on the information which he, the First Defendant, had been given by Mr. Khot. The First Defendant said that he believed that the copy contract which had been provided by Mr. Khot had to be viewed with circumspection given the delay which there had been in producing it and the difference between its contents and the account which had been given to the Official Receiver. The First Defendant also pointed out as relevant his recollection that when the Premises were entered on 9th July 2013 he did not believe that the Claimant was present at the outset but that there had been about five other persons present who had been engaged in work at the Premises.

71. The First Defendant said that he did not regard it as his duty actively to seek out claims against the bankruptcy estate or to seek out arguments that particular assets did not form part of that estate. He said that it was his task to assess the material provided to him by the Official Receiver and that which had resulted from his own investigations with a view to identifying, gathering in, and realizing the bankruptcy estate. If an issue was raised as to a particular item it would then be necessary to consider whether it was or was not part of the bankruptcy estate.

72. It was the First Defendant's position that the information which he had in the period before 9th July 2013 indicated that the Equipment was part of the bankruptcy estate and that nothing came to light between then and the sale of the Equipment to suggest a different assessment.

73. Although he did not concede the point Mr. Macpherson did not contend strenuously that the First Defendant did not have reasonable grounds for believing that the Equipment formed part of the bankruptcy estate as at the time of seizure. That was a sensible approach. The information which the First Defendant had as at 9th July 2013 provided reasonable grounds for the belief that all of the Equipment at the Premises formed part of the bankruptcy estate and there is no suggestion that the First Defendant did not genuinely have such a belief.

74. Mr. Macpherson focused his challenge to the section 304 (3) defence (a defence of course which the First Defendant had to establish rather than the Claimant refute) on the period after that seizure and in particular on the time of the disposal of the Equipment. His contention was that by the time the Equipment was sold the First Defendant no longer had reasonable grounds for believing that it formed part of the bankruptcy estate and/or that there had been negligence on the First Defendant's part in failing to appreciate that the Equipment or some of it fell within the section 283 (2)(a) exception. Mr.

Macpherson mounted this argument in relation to all the Equipment but made particular reference to the Tools and the Diagnostic Equipment.

75. It is the Claimant's case that the First Defendant should have undertaken an analysis of the Equipment and/or obtained specialist assistance in doing so. The Claimant contends that the First Defendant should have consulted with him and should have informed him of the section 283 (2)(a) exception saying that if the First Defendant had done this the Claimant would have explained the true position and would have set out his claim to the Equipment or to parts of it. In addition Mr. Macpherson says that the First Defendant failed to keep adequate records of the reasons for his actions. Mr. Macpherson says that this was a breach of the First Defendant's record-keeping duty under Regulation 13 of the Insolvency Practitioners Regulations 2005 and of his obligations (especially with regard to transparency) under Part D of the Code of Ethics for Insolvency Practitioners. Mr. Macpherson says that these alleged breaches should cause me to conclude that the First Defendant has not substantiated the reasons for his actions and should cause me to regard the alleged justification with extreme caution. In those circumstances he invites me to conclude either that the First Defendant did not have reasonable grounds for his belief or that he acted negligently.

76. Section 304 (3) provides that where the requisite belief is held on reasonable grounds there will be only liability for such "loss or damage as is caused by the negligence of the trustee". Miss. Kyriakides relied on those words to argue that such liability only came into being where the trustee was found to have a duty of care to the owner of the chattel in question and to have breached that duty of care. I reject that contention. It amounts to saying that a trustee in bankruptcy who seizes assets which are not part of a bankruptcy estate and acts carelessly in relation to them can only be liable if he or she had a pre-existing duty of care to the owner of the chattels or if the seizure is found to give rise to such a duty. That is an approach which is not required by the language of section 304 (3) and is contrary to the apparent intention of that provision. In my judgement the sub-section gives a defence to a trustee who has acted on the basis of a belief held genuinely and formed on reasonable grounds provided that the trustee does not then act carelessly when judged by reference to the standard of a competent trustee. It does not limit the potential liability for a wrongful seizure of goods to cases where a freestanding duty of care exists as between the trustee and the owner of the chattels.

77. It follows that I must consider whether as at the time the Equipment was sold in September 2013 the First Defendant still had reasonable grounds for believing that it all formed part of the bankruptcy estate and whether his conclusions or approach were marred by any carelessness on his part. I have concluded that the First Defendant did have such grounds and that there was no negligence on his part. The First Defendant's general approach to his duties was correct. He was to consider the material before him and come to a view as to the extent of the bankruptcy estate. However, in doing so he had no obligation to seek out claims against the estate. The First Defendant was not obliged to inform the Claimant of the section 283 (2)(a) exception nor to invite him to make a claim asserting that particular assets were covered by that

exception. In that regard it is relevant that the First Defendant was appointed four months after the making of the bankruptcy order in circumstances where there had been dealings between the Claimant and the Official Receiver in the interim. Moreover, the Claimant had been accompanied by a solicitor to the initial meeting with the First Defendant on 29th November 2012. In those circumstances there is simply no basis for saying that the First Defendant should have sought out a claim from the Claimant or should have engaged in giving the Claimant advice about the operation of the Act. If the Claimant had made a claim invoking the exception the First Defendant would have had to consider it. The First Defendant would have been entitled to regard such a claim with scepticism and to test it against the material which had caused him to conclude that the Claimant was running the business of Precision rather than himself working on the vehicles. There was, in any event, no such claim. Out of completeness I make it clear that I find no basis for criticism in respect of the record keeping on the part of the First Defendant. He was obliged to keep a record of his actions and dealings and of the information which he had obtained but that did not, in my judgement, require him to record the reasoning which had led him to take each action. Mr. Macpherson's argument was in effect that the First Defendant should have made a file note setting out the process of reasoning leading to each step he took in carrying out his duties as trustee in bankruptcy. Such a requirement would be unrealistic and is not required by the obligation to keep proper records. In that regard the First Defendant was correct to say that his obligation was to keep records which were such that his actions could be justified by reference to them but that he was not required to set out the chain of reasoning which caused him to take a particular action.

78. It follows that the First Defendant is protected from liability by the operation of section 304 (3).

Has the Claimant a Cause of Action against the Defendants?

79. The Defendants argued that on the footing the Claimant had leased the Equipment to Precision he had at the relevant time no current right to possession of it and accordingly was not entitled to bring a claim in conversion regardless of whether or not the Equipment formed part of the bankruptcy estate. At the start of the trial the Claimant sought permission to amend the Particulars of Claim to bring an alternative claim for damage to his reversionary interest if it were to be found that Precision held the Equipment pursuant to a lease. The proposed amendment had been intimated for the first time on the morning of the first day of the trial. That was far too late in circumstances where such a line of claim could and should have been made earlier. Accordingly, and for the reasons which I set out more fully in an extempore judgment at the time I refused permission for the proposed amendment.

80. The Claimant's position was that Precision had a non-exclusive licence in respect of the larger items of Equipment but that he had retained control of the Tools and the Diagnostic Equipment.

81. I have set out at [24] above my conclusions that there was no actual lease nor any formal licence agreement. I have also set out at [37] my conclusions as to the use and control of the particular items of the Equipment.

82. I have concluded that the Claimant retained control of the Tools and the Excepted Diagnostic Equipment. In relation to those items the Claimant kept personal control and would, but for the defence under section 304 (3), have been entitled to bring a conversion claim against the First Defendant.

83. What would be the position in respect of the other items of Equipment if I were to be wrong in my conclusion that they had formed part of the bankruptcy estate? There was no lease nor any formal licence agreement. However, Precision was a separate legal entity from the Claimant. The Claimant had caused that company to be formed and had caused the business to be operated through it in circumstances where Precision was being held out as entitled to use the Premises and to use the heavy items of the Equipment. In those circumstances it would not have been open to the Claimant as against Precision to say that the latter had no right to use the Equipment. The best analysis of the dealings is that there was an implied licence from the Claimant to Precision terminable only on reasonable notice. There is no evidence that there was a termination of such a licence. It follows that at the time of the First Defendant's seizure of the Equipment and at the time of the subsequent sale the Claimant did not have an immediate right to possession other than in respect of the Tools and the Excepted Diagnostic Equipment and so would not have been entitled to bring a claim in conversion in relation to the larger items of equipment even if the same had not formed part of the bankruptcy estate.

The Effect of Section 299 (5) of the Act.

84. Section 299 (5) of the Act provides that:

> " **299.— Release of trustee.**
> **…**
> (5) Where the official receiver or the trustee has his release under this section, he shall, with effect from the time specified in the preceding provisions of this section, be discharged from all liability both in respect of acts or omissions of his in the administration of the estate and otherwise in relation to his conduct as trustee.
>
> But nothing in this section prevents the exercise, in relation to a person who has had his release under this section, of the court's powers under section 304."

85. In turn section 304 of the Act provides:

> **"304.— Liability of trustee.**
> (1) Where on an application under this section the court is satisfied—
> (a) that the trustee of a bankrupt's estate has misapplied or retained, or become accountable for, any money or other property comprised in the bankrupt's estate, or
> (b) that a bankrupt's estate has suffered any loss in consequence of any misfeasance or breach of fiduciary or other duty by a trustee of the estate in the carrying out of his functions, the court may order the trustee, for the benefit of

> the estate, to repay, restore or account for money or other property (together with interest at such rate as the court thinks just) or, as
> the case may require, to pay such sum by way of compensation in respect of the misfeasance or breach of fiduciary or other duty as the court thinks just.
> This is without prejudice to any liability arising apart from this section.
>
> (2) An application under this section may be made by the official receiver, the Secretary of State, a creditor of the bankrupt or (whether or not there is, or is likely to be, a surplus for the purposes of section 330(5) (final distribution)) the bankrupt himself.
> But the leave of the court is required for the making of an application if it is to be made by the bankrupt or if it is to be made after the trustee has had his release under section 299.
>
> (3) Where—
> (a) the trustee seizes or disposes of any property which is not comprised in the bankrupt's estate, and
> (b) at the time of the seizure or disposal the trustee believes, and has reasonable grounds for believing, that he is entitled (whether in pursuance of an order of the court or otherwise) to seize or dispose of that property,
> the trustee is not liable to any person (whether under this section or otherwise) in respect of any loss or damage resulting from the seizure or disposal except in so far as that loss or damage is caused by the negligence of the trustee; and he has a lien on the property, or the proceeds of its sale, for such of the expenses of the bankruptcy as were incurred in
> connection with the seizure or disposal."

86. The court's order of 28th May 2014 provided for Mr. Price's release to take effect from that date. The Defence say that the First Defendant's actions in relation to the Equipment were clearly part of his conduct as the Claimant's trustee in bankruptcy. Accordingly, they say that section 299 (5) operated to discharge the First Defendant from all liability in relation to that conduct and to provide a complete defence to the claim. The First Defendant says that the defence given by section 299 (5) is absolute unless a matter falls within the scope of section 304 (1). That provision cannot apply here, the Defendants say, because it is limited to circumstances where there has been an impact on the bankrupt's estate whereas the Claimant's case relates to assets which he says were within the section 283 (2)(a) exception and so never formed part of the bankruptcy estate.

87. Miss. Kyriakides says that this conclusion follows as a matter of simple construction of the wording of section 299 (5). She says that the language of the subsection is clear and does not admit of any ambiguity. Miss. Kyriakides says that this result is consistent with the approach of the courts and the regard which is to be had to the position of trustees in bankruptcy who are office holders dealing with many cases and not retaining possession of the relevant paperwork once their term of office has ended. In that regard Miss. Kyriakides drew my attention to the decision of Walton J in *Re Munro* [1981] 1 WLR 1358. Walton J set aside the release which had been obtained by trustee in bankruptcy in that case under section 93 (3) of the Bankruptcy Act 1914 having concluded that the release had been obtained on the basis of incorrect evidence. Miss. Kyriakides prayed in aid the following passage at 1362 G – H

where Walton J set out his assessment of the effect of a release under section 93 (3) and of the rationale behind it saying:

> "What is in my judgment crystal clear is that upon a true construction of section 93 (3), which interestingly does not ever appear to have been previously construed, although the proviso thereto was construed in *In re Harris, Ex parte Hasluck* [1899] 2 Q.B. 97, it appears to me that the intention of that subsection, and it is a very right, proper and wholesome intention, is to wipe the slate completely clean so far as the trustee is concerned, so that he may thereafter pay no thought to the previous course of his actions as the trustee in bankruptcy. Of course, that means that if the release is now allowed to stand, the applicant would be deprived completely of any redress whatsoever against the trustee in bankruptcy in respect of the whole of the conduct of the trustee in bankruptcy in relation to the applicant's own proofs of debt."

88. In *Re Borodzicz* [2016] BPIR 24 Chief Registrar Baister was considering whether to grant permission under section 304 (2) for a claim under section 304 (1) to be brought after the release of the trustee in bankruptcy. For present purposes it is relevant to note that at [43] the Chief Registrar cited the passage I have just quoted from *Re Munro.* He said that the "thrust and effect" of section 93 (3) of the Bankruptcy Act and of section 299 (5) of the Act were the same and that the passage demonstrated the "far reaching" consequences of a release as provided for in section 299 (5).

89. Mr. Macpherson said that matters are not as simple as the Defendants contend. He said that regard was to be had to the combination of the closing words of section 299 (5) retaining the scope for the exercise of "the court's powers under section 304" and the terms of section 304 (3) and in particular the reference there to a liability "whether under this section or otherwise". Mr. Macpherson contends that section 304 (3) is to be seen as giving rise to a potential liability which is preserved even after discharge by section 299 (5). He says that the effect of this is that where a trustee has seized property which was not part of the bankrupt's estate and then fails to establish the grounds of defence provided by section 304 (3) there is a liability notwithstanding the trustee's release and notwithstanding the terms of section 299 (5). Such liability is, he says, subject only to a potential defence under the Limitation Act 1980.

90. Mr. Macpherson accepted that this is neither a straightforward nor a literal reading of the provisions. However, he says that it is warranted by reference to principle; to the purpose and intention of the Act; and to authority.

91. As for principle Mr. Macpherson makes the point that if discharge of the trustee in bankruptcy operates as an absolute bar save for claims falling in the scope of section 304 (1) and (2) then an innocent third party wholly unconnected to the bankruptcy whose property has been wrongfully seized by a trustee would have no redress at all after the latter's release. Such a third party would be in a worse position than a creditor who can seek leave to make a claim in relation to the diminution in value of the bankruptcy estate after discharge of the trustee. Mr. Macpherson also says that it would be unjust for a bankrupt to be deprived of redress if assets of his which did not form part of the bankruptcy estate had been wrongfully seized.

92. Mr. Macpherson referred to the position before the coming into force of the Act. He pointed out that release under Bankruptcy Act 1914 was not an automatic or straightforward matter. Release was dependent upon consideration by the Secretary of State of a report on the trustee's accounts in circumstances where notice of the trustee's intention to seek release had been given to the creditors and the general public (by way of notice in the Gazette). Even then, Mr. Macpherson says, release did not prevent personal rights of action in respect of the actions of a trustee. For the latter proposition Mr. Macpherson referred me to the decision of the Court of Appeal in *Ex parte Carter, re Ware* (1878) 8 Ch D 731. That decision was cited as authority for that proposition in the 1915 edition of Baldwin on The Law of Bankruptcy and Bills of Sale. Although the members of the Court do appear to have assumed that the potential personal liability survived the release of the trustee their actual decision was much more narrowly focused. The decision was to the effect that such claim as there was or might be against the trustee was a personal one. As such it fell outside the jurisdiction of the Bankruptcy Court because the trustee had been released and once released he was no longer subject to the control of that court. The effect of release as freeing an office holder from the supervision of the court having oversight of the relevant insolvency process remains the position under the Act. This is demonstrated by the approach of Millett LJ, as he then was, in *Barclays Mercantile Business Finance Ltd v Sibec Developments Ltd* [1992] 1 WLR 1253 at 1259 E – G where a reason for declining to release the administrators was the effect this would have of freeing them from the court's oversight. The conclusion that the Court of Bankruptcy lacked jurisdiction over the former trustee sufficed to determine the appeal in *Ex parte Carter, re Ware* and so the decision is of very limited assistance in setting out the law as it formerly was. It must also be read in the light of the decision of Walton J in *Re Munro* to which I have referred above and in which Walton J expressly considered the effect of a release under section 93 (3) of the 1914 Act and concluded that it gave a complete discharge of liability.

93. Mr. Macpherson is right to say that it is markedly easier for a trustee to obtain his or her release under the Act than it was under the former legislation. He couples reference to this point with reference to the approach taken in the Cork Report in respect of the duties imposed on trustees in bankruptcy and the redress for breach of those duties. The Committee recommended the imposition of a duty of care on a trustee: see *Oraki & another v Bramston & another* [2017] EWCA Civ 403, [2018] 3 WLR 569 per David Richards LJ at [212] et seq. In those circumstances Mr. Macpherson argues that it would be inconsistent with the recommendations of the Cork Committee and the policy of the Act for section 299 (5) to be read in the way contended for by the Defendants. If that reading is adopted not only would it be easier for a trustee to obtain release than before but that release would, Mr. Macpherson says, give greater protection against claims than had been the case previously and he contends that cannot have been the intention of Parliament. In that regard Mr. Macpherson points to the abolition in the Act of the former doctrine of reputed ownership an abolition which increased the scope for claims against a trustee and which is also, Mr. Macpherson says, inconsistent with giving section 299 (5) a wide effect.

94. Mr. Macpherson says that the description in *Re Munro* of the effect of a release under section 93 (3) of the Bankruptcy Act 1914 as drawing a line under claims against a trustee was overstated (he goes so far as to say it was "misconceived") and would not apply under the Act. This is because under the Bankruptcy Act a trustee was at risk of an application to revoke the release and in the current law there remains scope after release for an application under section 304 (2). It follows that a trustee could not safely regard release as an absolute end to all matters arising out of a particular bankruptcy. I accept that Mr. Macpherson is right to say that release cannot be seen as giving an absolute protection to a trustee but this does not detract from Walton J's approval of the policy of minimising the scope for claims against a former trustee.

95. Mr. Macpherson placed considerable weight on the dicta of David Richards LJ in *Oraki & another v Bramston & another* at [214] – [221] where his lordship addressed the scope of the duties under section 304 and the effect of section 299 (5) in these terms:

> "214 Section 304 in terms provides a framework for claims for the benefit of the bankruptcy estate. It is concerned with, and confined to, acts or omissions on the part of the trustee that have caused loss or damage to the estate. An application under the section may be brought by any creditor, who will clearly have an interest in the proper administration of the estate. The bankrupt may only apply under the section with the leave of the court. This is a requirement designed to provide protection to trustees, although it is to be noted that the bankrupt may be given leave even though there is not, or is not likely to be, a surplus available for him.
>
> 215 The judge held [2016] 3 WLR 1231:
>
> "33. I observe that it would be inconsistent with the requirement that the permission of the court must be given if the bankrupt had an unfettered right to take proceedings against his trustee. In any event there is no need for the bankrupt to have a general right of action based on a common law duty which would conflict with the statutory regime of rights, for example, sections 303, 304, 325(2), 326(3) and 363 of the 1986 Act.
>
> 34. I do not therefore consider that there is a common law duty in negligence apart from the statute"
>
> 216 It is perfectly understandable that the bankrupt should need leave before he can apply under the section for the benefit of the estate. That does not, however, explain why in no circumstances can a trustee owe an enforceable duty to the bankrupt in respect of loss or damage caused not to the estate but to the bankrupt personally. Nor, importantly, does it explain why section 304(1) provides that the subsection is "without prejudice to any liability arising apart from this section". Those words are apt to extend to any claim for any common law or other duty not falling within the express terms of section 304. They wisely accommodate future legal developments, including developments in the common law, as well as providing for liabilities that could in 1986 have arisen.
>
> 217 In my judgment, section 304 cannot be read as excluding any liability on the part of a trustee to a bankrupt, save as expressly provided by the section, and I

> therefore respectfully disagree with the judge on this point. However, for the reasons given above, this is not the case to decide the circumstances in which a duty in respect of loss caused to the bankrupt personally may arise or the nature of that duty. I say only that section 304 does not exclude the possibility of such a duty.
>
> 218 Turning to the effect of section 299 of the Act, it provides, so far as relevant, that a person who has ceased to be a trustee "shall have his release" as from dates to be determined in accordance with the section. ...
> Section 299(5) provides that:
> "Where the official receiver or the trustee has his release under this section, he shall, with effect from the time specified in the preceding provisions of this section, be discharged from all liability both in respect of acts or omissions of his in the administration of the estate and otherwise in relation to his conduct as trustee.
> But nothing in this section prevents the exercise, in relation to a person who has had his release under this section, of the court's powers under section 304."
>
> 219 The former trustees submitted, and the judge held, that the effect of section 299(5) was that the claimants could not maintain their personal claims against the former trustees. All the claims were "in respect of acts or omissions of his in the administration of the estate and otherwise in relation to his conduct as trustee". She held that the saving for claims under section 304 did not assist the claimants because, apart from one or two claims for which they had permission, none of their claims involved the exercise of the court's powers under section 304.
>
> 220 I agree with the judge as regards the inapplicability of the saving for claims under section 304 for the reason she gave, but I am unable to endorse her conclusion that therefore no other claim arising out of the trustee's conduct as trustee can be brought. It gives rise to some difficult and as yet untested questions. Suppose that in the course of realising an asset a trustee makes a negligent or even fraudulent misstatement, is the third party who relied on it deprived of any remedy against the trustee? Mr Briggs submitted that he was. Mr Briggs further submitted that because Mr Defty had his release from 17 October 2014, the claimants' personal claims could no longer been maintained against him, even though the action had been commenced some 20 months earlier. This seems a surprising result.
>
> 221 Again, I do not consider it valuable to express obiter views on what seem to me to be difficult questions on the effect of section 299 on claims such as these in this case but should await a case in which the answer will have an effect on the outcome."

96. Mr. Macpherson accepted that David Richards LJ's consideration of those matters had been obiter in circumstances where the Court of Appeal had upheld Proudman J's findings that there had been no breach of any potential duty and that in any event the impugned acts and omissions had not caused loss. Nonetheless, Mr. Macpherson invited me to regard those passages as support for a wide view being taken of the duty owed by a trustee in bankruptcy and for a narrow view being taken of the effect of release and discharge.

97. Miss. Kyriakides pointed out that adoption of the Claimant's interpretation of section 299 (5) would mean that a trustee in bankruptcy could be liable after his or her release in a way which would not apply to a liquidator or administrator. Sub-sections 234 (3) and (4) of the Act provide to liquidators and administrators a similar protection in respect of the incorrect seizure of property to that given to trustees in bankruptcy by section 304 (3). However, sections 173 (4) and 174 (6) which provide for the discharge of a liquidator's liabilities upon release make reference not to section 234 but to the scope for exercise of the court's power under section 212 of the Act. The latter section relates to misfeasance or breach of duty in relation to a company and cannot relate to the wrongful seizure of a third party's property. Similarly, an administrator's discharge upon release is provided for in paragraph 98 of Schedule B1 which, at 98 (4), makes reference to paragraph 75 which similarly relates to claims in respect of misfeasance. This means that the interpretation which Mr. Macpherson seeks to place on section 299 (5) when read in conjunction with section 304 could not be applied to the provisions governing the discharge of liquidators and administrators. This would have the effect, if Mr. Macpherson is correct, that trustees who had seized the property of third parties would continue to be liable when a released liquidator or administrator would not be.

98. At its best Mr. Macpherson's approach involves a highly artificial reading of sections 299 (5) and 304 (3). The latter subsection does not purport to create a liability. On a natural reading it is giving a defence to a liability which might arise otherwise. It is true that the passage which refers to a liability "whether under this section or otherwise" is infelicitously phrased. This infelicity can be seen when it is noted that any liability under section 304 (1) and (2) has to be in respect of harm to the bankrupt's estate while section 304 (3) relates to the seizure of property which does not form part of the bankrupt's estate. It follows that there could be no liability under section 304 (1) or (2) in the circumstances which section 304 (3) is addressing. Thus section 304 (3) cannot be relevant as providing a defence to a liability under the earlier subsections and nor can those subsections be relevant as giving rise to a liability in respect of which the section 304 (3) defence might be needed. However, that infelicity does not require section 304 (3) to be read as giving rise to a liability. Such a reading would be contrary to the whole tenor and thrust of that subsection which are of a provision giving a defence to a liability which might arise apart from the subsection. Moreover, the reference in section 299 (5) to "the court's powers under section 304" can perfectly sensibly be read as being a reference to section 304 (1) and (2) which are provisions expressly giving powers to the court rather than to section 304 (3) which makes no reference to the court and which does not on its face provide a power to the court.

99. In my judgement the artificial reading for which the Claimant contends is required neither by principle nor authority nor by the background to the legislation.

100. As to the last of those elements I have already explained the limited weight which can be placed on *Ex parte Carter, re Ware* as authority for the

proposition that under the previous law a trustee's liability for actions which were wrongful in respect of third parties survived the release of the trustee. It is correct that a trustee in bankruptcy can now obtain his or her release much more readily than had been the case previously. It is also correct that the Cork Committee recommended the expansion of the duties owed by trustees in bankruptcy. However, it is important to note that although the Cork Report formed the basis for the Act not all of the Cork Committee's recommendations were incorporated in the Act and that there was modification of its proposals. In this regard it is relevant to note the Committee's recommendation for the imposition of a statutory duty of care was not adopted and that section 304 (1) and (2) are to be regarded as containing the duty which was imposed: see *Oraki & another v Bramston & another* per David Richards LJ at [212] – [214]. It is apparent that the Act contained both provisions which imposed new (or redefined) obligations on trustees in bankruptcy and also other provisions which reduced the burdens on such trustees. The assessment of where Parliament placed the balance in any particular respect is to be made by reference to the language of the Act. The facts that a particular provision gave greater protection to a trustee than had been available previously or that it might be thought to be contrary to the thrust of a recommendation of the Cork Committee can be given only limited weight when interpreting the Act. Those are factors which may well be relevant in instances where the language of the Act lacks clarity but they cannot justify an unnatural reading of clear language.

101. Mr. Macpherson relied on the dictum of David Richards LJ at [220] in *Oraki & another v Bramston & another* saying that it would be a "surprising result" if section 299 (5) meant that a trustee's release operated to deprive a third party of redress against the trustee for wrongs committed against that third party. It is important to note that David Richards LJ made it clear that he was not setting out concluded views on this question. Moreover, the result which he said seemed surprising was that of a release operating to preclude redress in circumstances where the third party had actually commenced proceedings 20 months before the release. It may well be that very different considerations apply in such a case from those in a case such as this where the proceedings were not commenced until 2½ years after the trustee's release and were first intimated only about 8 months before that commencement. Finally, with regard to *Oraki & another v Bramston & another* it is important to note that, at [225], the Master of the Rolls explained that he was expressing no views on this question.

102. The obiter expression of surprise on the part of David Richards LJ related to the impact on a potential third party. Regard is, however, to be had to Walton J's expression of the view in *Re Munro* that it is a "very right, proper, and wholesome intention" for a trustee in bankruptcy to have the slate wiped "completely clean" following release. There are strong policy considerations in favour of giving redress to those whose property is wrongfully seized by trustees in bankruptcy. There are also strong policy considerations in favour of drawing a line in respect of claims against office holders and in favour of enabling those office holders to proceed on the footing that no claim will be made following a release. The question as to where the balance lies between

those competing considerations is a matter for Parliament and it is to be taken as having set out the concluded position in the Act. The considerations in favour of giving redress to an injured third party (or indeed to an injured bankrupt) are not so manifestly compelling as to outweigh the competing considerations still less to warrant an artificial reading of the Act.

103. There is considerable force in the point made by Miss. Kyriakides that to adopt Mr. Macpherson's interpretation of the provisions would mean that a different approach was being taken to a trustee in bankruptcy from that applicable to a liquidator or an administrator. There are differences between the provisions relating to different office holders and their circumstances are not to be regarded as identical. Nonetheless an interpretation which would create a marked difference between the office holders as to the existence or otherwise of a post-release liability for similar actions is undesirable and is to be avoided unless it is compelled by the language of the Act which it is not in this instance.

104. It follows that I reject the interpretation of sections 299 (5) and 304 (3) for which the Claimant contended and find that even if the First Defendant had not been able to avail himself of the section 304 (3) defence the claim against him would have been precluded by his release and discharge.

The Position against the Second Defendant.

105. The principle set out in *Ex parte James* is that where an officer of the court, such as a trustee in bankruptcy, holds money "which in equity belongs to someone else" (per James LJ at 614) the court will require that officer to pay the money to the person "really entitled to it". This is on the footing that this would be the honourable or honest thing to do and that "the Court of Bankruptcy ought to be as honest as other people." The Claimant says that the principle applies here and that the court should apply the principle by making an order pursuant to section 303 of the Act ordering the Second Defendant to account to the Claimant for such funds as he received as represented the proceeds of the sale of the Equipment.

106. In the light of the findings which I have made such a direction would only be even potentially appropriate in the case of the proceeds of the sale of the Tools and the Excepted Diagnostic Equipment. The fact that the First Defendant is protected against a claim by reason of his discharge would not be a ground for declining to make such an order if it was otherwise appropriate. If a successor trustee in bankruptcy holds funds which in equity are to be regarded as belonging to another the fact that his predecessor as trustee is protected against claims would not make it appropriate for the successor trustee to retain the funds.

107. The proper approach is for me to consider matters in the round. Is the Second Defendant in possession of funds which should in equity be regarded as belonging to the Claimant and which a private person acting honourably would return to the Claimant rather than relying on any technical legal defence? There are a number of matters which are to be taken into account in assessing the position here. The fact that the First Defendant has a defence

under section 304 (3) is not determinative of the position against the Second Defendant because it is possible that an *Ex parte James* argument might have been mounted against the First Defendant if he had still been trustee. Nonetheless, it is a very powerful consideration. A claim against the First Defendant would not have succeeded if he had happened still to be trustee. The fact that he has retired and been succeeded by the Second Defendant is irrelevant as between the trustees and the Claimant and it would be a curious result if the Claimant were to obtain payment from the Second Defendant of funds which would not have been recoverable if the First Defendant had still been trustee. In that regard it is relevant to note that the defence given by section 304 (3) is not one of legal technicality but is one of substance provided to protect trustees who have acted on reasonable grounds and without negligence. A trustee who invokes that defence would not be acting dishonourably. Account has also to be taken of the Claimant's actions and the passage of time. The Claimant's attempts to put assets out of reach of his bankruptcy and his varying and untrue assertions and explanations about the Equipment and the rights to it formed the background to the seizure and sale of the Equipment. It was the Claimant who was principally responsible for bringing about the state of affairs in which the First Defendant had reasonable grounds for believing that the Equipment formed part of the bankruptcy estate. The Claimant's delay in asserting his claim to the Equipment is also highly material. The Claimant made no attempt to invoke the section 283 (2)(a) exception between the seizure of the Equipment in July 2013 and its sale in September 2013. He did not intimate the current assertions until March 2016 and did not commence proceedings until November 2016. Looking at those matters in the round there is simply no basis for saying that the Second Defendant is relying on legal technicalities to escape a liability to the Claimant nor that the Second Defendant is retaining funds which an honest or honourable person would regard as properly belonging to the Claimant and which should be given to the Claimant. It follows that the attempt to invoke the principle in *Ex parte James* against the Second Defendant fails.

108. In those circumstances the claim against each Defendant is to be dismissed.