Neutral Citation Number: [2021] EWHC 2475 (Ch)

Claim No: BL-2020-001040

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND & WALES
BUSINESS LIST (ChD)
IN THE MATTER OF DISCOVERY YACHTS LIMITED (04520591)
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

The Rolls Building
7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Date: Wednesday, 8 September 2021

Before:

ROBIN VOS
(SITTING AS A DEPUTY JUDGE OF THE HIGH COURT)

- -

Between:

PSV 1982 LIMITED

Claimant

- and -
SEAN ANTHONY EDWARD LANGDON

Defendant

- -
- -

Andrew Grantham QC (instructed by **MFB Solicitors**) appeared for the **Claimant**
Adam Chichester-Clark (instructed by **Clarke Willmott LLP**) appeared for the **Defendant**

Hearing date: 20-21 July 2021

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APPROVED JUDGMENT

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

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be Wednesday, 8 September at 10:30am.

DEPUTY JUDGE ROBIN VOS:

Introduction

1. The Defendant, Mr Langdon was a shareholder and director of Discovery Yachts Group Limited (DYGL), a company now in liquidation. The Claimant, PSV 1982 Limited (PSV), is the assignee of amounts awarded to a Mr Andrew France and his company, Elusive Yachting Limited, against DYGL by way of damages for breach of contract, interest and costs in a claim made against DYGL and an associated company, Discovery Yachts Sales Limited (DYSL), in the Commercial Court under reference number CL-2018-000288 (the Commercial Court proceedings).

2. PSV seeks to recover this sum from Mr Langdon on the basis that, as a result of Sections 216 and 217 Insolvency Act 1986, he is personally responsible for the debts and liabilities of DYGL. The total amount claimed is £1,125,824.67.

3. Subject to certain exceptions (which are not relevant in this case), section 216 Insolvency Act 1986 prohibits a person who has been a director of a company which has gone into insolvent liquidation from being involved in the management of a company with a similar name. A breach of Section 216 Insolvency Act 1986 is a criminal offence. It also results in the individual being personally responsible under Section 217 Insolvency Act 1986 for any debts and liabilities of the new company which are incurred during the period of the breach.

4. The current proceedings were commenced on 31 March 2020. On 30 March 2021, Deputy Master Bowles ordered that a number of issues be tried as preliminary issues based on an agreed statement of facts.

Background facts

5. As the preliminary issues are to be determined based on an agreed statement of facts, I do not make any findings of fact. Where relevant, I will refer to the assumed facts. However, before considering the issues which I need to determine, it is helpful to say a little bit more about the background.

6. Mr France entered into a contract with DYSL in October 2015 for the purchase of a yacht to be known as Elusive. At the time, DYSL was owned by a Mr John Charnley.

He also owned Discovery Yachts Limited (DYL). DYL built the yachts and supplied them to DYSL for onward sale to DYSL's customers. Mr Langdon was a director of DYL between August 2016 and April 2017.

7. Elusive was delivered in January 2017. Following delivery, Mr France complained about a number of alleged defects.

8. In early April 2017, DYGL (then known as Tradewinds Marine Limited) purchased the shares in DYSL, two other companies owned by Mr Charnley and the business of (but not the shares in) DYL. At the time, Mr Langdon owned 40,000 shares in DYGL out of a total issued share capital of 46,000 shares.

9. The change of name from Tradewinds Marine Limited to Discovery Yachts Group Limited took place on 21 April 2017.

10. By September 2017, Mr Langdon was one of three directors of DYGL, describing himself as managing director. A fourth director was appointed in November 2017.

11. DYL was placed into insolvent liquidation on 12 October 2017 with the result that Mr Langdon was then in breach of Section 216 Insolvency Act 1986. He was not however aware that one consequence of this was that he would be personally responsible for the debts and liabilities of the Discovery Yacht Group companies.

12. The Commercial Court proceedings were commenced by Mr France and Elusive Yachting in April 2018.

13. In May or June 2018, a German company, Binti Holding GmbH (Binti) acquired shares in DYGL. Binti was owned and controlled by a Mr Werner Schnaeble. By August 2018, Binti was DYGL's largest shareholder, owning approximately 34% of the shares. Mr Langdon then held approximately 21% of the shares. At this point, DYGL had six directors including Mr Schnaeble and Mr Langdon.

14. By August 2019, Mr Langdon only held about 5% of the shares in DYGL. Binti had increased its shareholding to approximately 57%. Mr Langdon and Mr Schnaeble remained directors along with three other individuals.

15. In October 2019, the solicitors acting in the Commercial Court proceedings for DYGL and DYSL came off the record as DYGL and DYSL were unable to pay their fees. From that point on, DYGL and DYSL were unrepresented.

16. The hearing of the Commercial Court proceedings was listed before Teare J on 11 December 2019. On 5 December 2019, the board of DYGL (chaired by Mr Langdon) resolved to place DYGL into administration. Mr Schnaeble had decided that Binti would not provide any further funding to DYGL. Notice of intention to appoint an administrator was filed with the Court on 6 December 2019. The administrator, Mr Christopher Moore, was appointed as administrator on 19 December 2019. Mr Moore's solicitors indicated on 10 December 2019 that he would respect the Court's decision at the trial of the Commercial Court proceedings.

17. On 11 December 2019 (the first day of the trial), Teare J lifted the stay of the claim imposed by the statutory moratorium triggered by the notice of intention to appoint an administrator and adjourned the trial to the following day to allow DYGL's and DYSL's witnesses to attend. However, DYGL and DYSL decided not to defend the claim at trial and that neither they nor their witnesses therefore needed to attend Court. As a result of this, Teare J struck out the defence. However, he did not enter judgment in default but proceeded with the trial, hearing witness evidence on behalf of the Claimants and reviewing the relevant documentary evidence.

18. Judgment was handed down on 19 December 2019 which concluded that DYGL had, in September 2017, agreed to assume liability for ensuring that various repairs to Elusive would be completed and that DYGL had breached that agreement in January 2018. An order made by Teare J on the same date contained the following provisions:-

    18.1 Judgment was entered against DYGL in the sum of £262,957 together with interest up to 2 January 2020 of £22,867.67 and interest thereafter at 8% per annum.

    18.2 DYGL was required to indemnify Mr France in respect of the reasonable costs of certain further repairs.

18.3 DYGL and DYSL were ordered to pay the claimants' costs, to be assessed on the indemnity basis if not agreed with a payment on account of £283,000.

19. DYGL has not appealed against the order.

20. At the request of DYGL's administrator, Mr Langdon, in his capacity as a director of DYGL, signed a statement of affairs showing a liability to Mr France and Elusive Yachting Limited of £568,824. This comprised the damages of £262,957, interest of £22,867.67 and the payment on account of costs of £283,000.

21. The claims of Mr France and Elusive Yachting Limited were assigned to PSV on 18 March 2020.

22. By a consent ordered dated 26 June 2020, DYGL and DYSL (by then, both in liquidation) agreed to pay a total of £575,000 in relation to the claimants' costs of the Commercial Court proceedings (which included the £283,000 which they had already been ordered to pay on account of costs by Teare J on 19 December 2019).

23. The sum of £1,125,824.67, which PSV now claims, comprises the judgment debt of £262,957, interest of £22,867.67, estimated costs of further repairs of £240,000 and costs which, at the time the claim was issued, were estimated to be £600,000.

The Preliminary issues

24. The first issue is whether the liabilities of DYGL for which Mr Langdon is now said to be liable have, for the purposes of Section 217 Insolvency Act 1986, been established by the Commercial Court proceedings (despite the fact that Mr Langdon was not a party to those proceedings) either on the basis that the judgment and the consequential orders made in those proceedings are, in themselves, sufficient to establish the liabilities or that Mr Langdon is a privy of DYGL and is therefore bound by the judgment and the consequential orders or that he is otherwise estopped or precluded from denying that they establish the liabilities in question. There is a separate reference in the order made by Deputy Master Bowles as to whether the liabilities may be established by reference to a statement of affairs signed by Mr Langdon as a director of DYGL when the company was placed into administration. However, it was accepted by Mr Grantham during the course of the hearing that this

was, in reality, a fact to be taken into account in determining whether Mr Langdon was a privy of DYGL rather than a separate basis on which the existence of the liabilities could be established.

25. The second preliminary issue is whether, if the judgment and the consequential orders in the Commercial Court proceedings do not establish the relevant liabilities, they are nonetheless admissible in evidence in the current proceedings. It is however accepted by PSV that, in these circumstances, the judgment and the consequential orders would not be admissible and so this point falls away.

26. The third preliminary issue is whether Mr Langdon is not in fact responsible for the relevant liabilities given that they derive from a contract which, based on the findings in the Commercial Court proceedings, was made at a time when Mr Langdon was not in breach of Section 216 Insolvency Act 1986 even though the relevant breach of the contract took place at a time when Mr Langdon was in breach of Section 216. This point arises on the basis that the relevant contract was entered into by DYGL in September 2017 and the breach of that contract was in January 2018. However, the company of which Mr Langdon was previously a director (DYL) only entered into insolvent liquidation (thus triggering the breach of Section 216 Insolvency Act 1986) in October 2017.

27. The final preliminary issue is whether, if Mr Langdon is not bound by the Commercial Court judgment, PSV is bound by the terms of that judgment. Again, it is no longer necessary to determine this issue as Mr Langdon accepts that if, in these proceedings, he is not bound by the Commercial Court judgment, PSV is not bound by it either.

28. There is a separate application by PSV for an extension of time for producing amended Particulars of Claim. However, as the amendments are, for the most part, only relevant should I decide the first preliminary issue in favour of Mr Langdon, it was agreed that this would, if necessary, be dealt with as part of any consequential hearing following my judgment in respect of the preliminary issues.

Sections 216 and 217 Insolvency Act 1986

29. Sections 216 and 217 Insolvency Act 1986 are contained in Chapter X of Part IV under the heading "Penalisation of directors and officers".

30. Section 216 applies to a person who has been a director of a company at any time in the 12 months prior to the company going into insolvent liquidation. Such a person is prohibited for five years from being a director of, or involved in the management of, a company with the same or a similar name. Breach of this prohibition is a criminal offence.

31. The prohibition does not apply if the Court gives permission, if the new company acquires the business of the insolvent company from a liquidator/administrator and notice is given to all the creditors of the insolvent company or if the new company has been actively carrying on business for 12 months before the insolvency of the old company (see Section 216(3) Insolvency Act 1986 and Rule 22 of the Insolvency (England and Wales) Rules 2016).

32. Mr Langdon accepts that he was in breach of Section 216 Insolvency Act 2016 with effect from 12 October 2017 as a result of the following:

    32.1 He was a director of DYL until 18 April 2017.

    32.2 DYL entered into insolvent liquidation on 12 October 2017.

    32.3 At that time, he was a director of DYGL.

    32.4 "Discovery Yachts" was a prohibited name within the meaning of Section 216(2) Insolvency Act 2016.

    32.5 He did not obtain permission from the Court to act as a director of DYGL following the entry into liquidation of DYL and none of the exceptions in Rule 22 of the Insolvency Rules 2016 apply.

33. Section 217 Insolvency Act 1986 makes a person who is in breach of Section 216 personally responsible for the debts and liabilities of the new company. The relevant provisions are as follows:-

> "**217 Personal liability for debts, following contravention of s. 216.**
>
> (1) A person is personally responsible for all the relevant debts of a company if at any time—
>
> (a) in contravention of section 216, he is involved in the management of the company, or
>
> (b)...
>
> (2) Where a person is personally responsible under this section for the relevant debts of a company, he is jointly and severally liable in respect of those debts with the company and any other person who, whether under this section or otherwise, is so liable.
>
> (3) For the purposes of this section the relevant debts of a company are—
>
> (a) in relation to a person who is personally responsible under paragraph (a) of subsection (1), such debts and other liabilities of the company as are incurred at a time when that person was involved in the management of the company,…"

34. It is worth noting at this stage that both parties accepted that the debts and liabilities of a company for which a person who is in breach of Section 216 is personally responsible are only those debts and liabilities which are incurred whilst there is a contravention of Section 216 Insolvency Act 1986. This follows from the judgement of Arden LJ in *ESS Production Limited v Sully* [2005] EWCA Civ 554 where she concluded [at 75] that:-

> "It is unlikely that Parliament intended liability under Section 217(1)(a) and (3)(a) to extend to debts incurred when there was no contravention and accordingly in my judgment Section 217(3)(a) must be read as restricted to the time during which there is a contravention of Section 216."

35. This analysis was subsequently accepted by Lord Glennie in the Outer House of the Court of Session in *Glasgow City Council v Craig* [2008] CSOH 171 [at 21-22]. This is the reason for the need to determine whether the liabilities in question were incurred when the contract was made in September 2017 or, as PSV contends, when that contract was breached in January 2018.

36. In deciding both of the preliminary issues, it will be necessary to determine the correct interpretation of Section 217 Insolvency Act 1986. In this context, it will be important to bear in mind the purpose of Sections 216 and 217.

37. It is well recognised that the provisions are aimed at what are often referred to as "phoenix" companies where one company goes into insolvent liquidation, only for those responsible to set up a new company with a similar name to carry on the same business (see for example Arden LJ in *ESS Production* [at 3]).

38. As Arden LJ goes on to point out however [at 4], if the conditions in Section 216 are satisfied, the provisions apply even if there is no attempt to exploit the assets or goodwill of the insolvent company or to mislead the public. As Lewison J said in *First Independent Factors & Finance Limited v Mountfor*d [2008] EWHC 835 (Ch) [at 17]:

> "Although the "phoenix syndrome" is the principal target of the Sections, the words of the Sections encompass factual situations that cannot be described in those terms. The Court should not adopt a strained interpretation of the words of the statute simply in order to confine its operation to true cases of phoenix syndrome: *Ricketts v Ad Valorem Factors Limited* [2003] EWCA Civ 1706; [2004] B.C.C. 164. As Mummery LJ made clear in that case (at [18]), *Ad Valorem Factors Limited v Ricketts* itself was not a phoenix case, yet the director was liable. Moreover, it is difficult to distinguish between good and bad phoenix situations and between honest and unscrupulous traders; and the Sections do not attempt to do so; *Thorne v Silverleaf* [1994] B.C.C. 109; *ESS Production Limited (in admin.) v Sully* [2005] EWCA Civ 554; [2005] B.C.C. 435. However, neither Section should be construed to include transactions which are not within those Sections on their fair interpretation."

39. This last observation is no doubt a reference to the principle (referred to by Arden LJ [at 71] in *ESS Production*) that a person should not be penalised except under clear law. Simon Brown LJ noted in *Ad Valorem Factors Limited v Ricketts* [at 30] that:-

> "In construing this provision it is important to bear in mind the draconian consequences, both criminal and civil, which can all too easily flow from finding a company's name to be a prohibited name. As stated in Section 271 of *Bennion on Statutory Interpretation* (4th edn) p 705, the Court should strive to avoid adopting a construction which penalises someone where the legislator's intention to do so is doubtful, or penalising him in a way which is not made clear."

40. With this background in mind, I turn now to consider the preliminary issues.

The effect of the judgment and orders

41. It is well established that a judgment is conclusive evidence of its legal effect – in this case, that DYGL has been found liable to pay certain sums to Mr France and Elusive Yachting – but that it is not evidence of the accuracy of the decision rendered (see *Phipson on Evidence* (19th Ed) at [43.02]). The first question is whether the judgment and the consequential orders in the Commercial Court proceedings are nonetheless, of themselves, sufficient to establish the existence of the liabilities for the purposes of Section 217 Insolvency Act 1986 as a result of the terms of that statutory provision.

42. Mr Grantham, on behalf of PSV, submits that the effect of the reference in Section 217(1) to "the relevant debts of a company" is that, once a debt or liability is established as against the company, it follows automatically that a director who is in breach of Section 216 is personally responsible for the relevant debt or liability and that there is no need for the creditor to prove the liability in separate proceedings against the director. He argues that it would frustrate the purpose of the legislation if the creditor were required to incur the expense of proving the liability a second time bearing in mind that the mischief at which the legislation is aimed is based on the need to protect creditors in situations involving phoenix trading. This interpretation is, he says, also supported by the fact that the relevant part of the Insolvency Act is clearly intended to penalise defaulting directors.

43. Mr Chichester-Clark, representing Mr Langdon, on the other hand relies on the well-established principle that a judgment is only binding as between the parties to the proceedings (or their privies) and submits that the judgment in the Commercial Court proceedings cannot therefore be relied on in these proceedings against Mr Langdon (who was not a party to the Commercial Court proceedings) to establish the existence of any liability of DYGL.

44. Against this background, Mr Chichester-Clark submits that clear wording would be needed in Section 217 in order to override this principle given the underlying reason for the rule which is that it would be unjust for a person to be affected, let alone bound, by a judgment in proceedings in which he had not been heard. As James LJ said in *ex parte Young, in re Kitchin* [1881] 17 Ch.D. 668 [at 672] (an action against a

surety where the amount due from the principal debtor had been determined in earlier arbitration proceedings):-

> "The principal debtor might entirely neglect to defend the surety properly in the arbitration; he might make admissions of various things which would be binding as against him, but which would not, in the absence of agreement, be binding as against the surety. It would be monstrous that a man who is not bound by any admission of the principal debtor, should be bound by an agreement between the creditor and the principal debtor as to the mode in which the liability should be ascertained."

45. Mr Chichester-Clark accepts that the purpose of the provisions is to protect people dealing with the company but argues that it does not follow from this that a director should be denied the ability to defend themself. He points out that it would of course have been possible for Mr France and Elusive Yachting to have made Mr Langdon a defendant in the Commercial Court proceedings in order to avoid having to prove their case again in separate proceedings against Mr Langdon.

46. In my judgment, the effect of Section 217 Insolvency Act 1986 is that, as Mr Grantham suggests, once a liability is established in proceedings against the company, the defaulting director automatically becomes responsible for that liability. It is not necessary for the liability to be established in separate proceedings against the director.

47. The authors of *Bennion on Statutory Interpretation* (8th edition) refer [at 11.4] to the comment of Lord Nicholls in *R v Secretary of State for the Environment, Transport and the Regions, ex parte Spath Holme Limited* [2001] 2 AC 349 [at 397] that, in interpreting legislation:-

> "… an appropriate starting point is that language is to be taken to bear its ordinary meaning in the general context of the statute."

48. Giving the phrase "the relevant debts of a company" its ordinary meaning, it is difficult to see why that would not encompass a liability which had been established by proceedings against the company.

49. This conclusion is, in my view, supported by the context of Sections 216 and 217. Both parties agree that the purpose of the legislation is to protect creditors of the new company and, to that end, to penalise defaulting directors. Mr Grantham referred to

the comment of HHJ Purle QC in HMRC v Yousef [2008] EWHC 423 (Ch) [at 33] that:

> "This section is concerned solely with protecting creditors and widening the range of people from whom recovery can be sought."

50. Whilst this comment was made in context of a discussion about the nature of the joint and several liability of the company and the defaulting director and, in particular, whether one person who was liable could claim a contribution from any other person who was liable, it is in my view an accurate statement. In that context it would be surprising if Parliament had intended that a creditor who had established a liability in proceedings against a company should have to prove that liability all over again in order to recover the liability from the defaulting director.

51. As Mr Grantham has pointed out, the costs in this case in establishing the liability against DYGL amount to almost £600,000. Whilst the costs of establishing DYGL's liability in these proceedings against Mr Langdon would no doubt be less than this given the work already undertaken in relation to the previous proceedings, they would no doubt still be substantial. It is difficult to accept that Parliament intended that creditors should be put to this expense and risk. Whilst PSV would no doubt hope to recover its costs if it is successful, given that the context for these sorts of proceedings (as in this case) is that the company in question is insolvent, it is of course likely to be far from certain that full recovery against a defaulting director would be possible.

52. As I have mentioned, Mr Chichester-Clark suggests that it is always open to a creditor to join the defaulting director as a party to any proceedings against the company in order to avoid duplicating costs. However, the flaw with this is that the creditor may of course be unaware at the time proceedings are taken against the company that there has been a breach of Section 216 so that, as a result of Section 217, the director is jointly and severally liable. Indeed, as noted by Arden LJ in *ESS* [at 3], one of the key problems with phoenix trading is that "the management conceal their previous failure from the public".

53. There is no suggestion of any concealment in this particular case. However, the legislation must be interpreted in the context of the mischief at which it was aimed rather than based on the facts of one specific case.

54. Turning this point around, it would not only be possible for a creditor to join the defaulting director as a party, it would equally be possible for a director to apply to be joined as a party if the possibility of personal liability under Section 217 Insolvency Act 1986 existed. The one person who is clearly in a position to know whether the provisions of Section 217 might be relevant is a director themself. It is also relevant that Parliament has provided mechanisms by which a director may protect themselves from liability by applying to the court for permission to be involved with the new company or by falling within one of the exceptions. In my view, both of these considerations support the case for interpreting Section 217 as imposing an automatic liability on the defaulting director if the liability has been established in proceedings against the company.

55. This however leads to the important question raised by Mr Chichester-Clark which relates to the potential injustice for a director to be fixed with a liability as a result of proceedings to which that person was not a party.

56. One of the leading cases on the question of whether one person is the privy of another (which I shall come on to) is *Gleeson v J. Wippel & Co* [1977] WLR 510. In his judgment, the Vice-Chancellor, Megarry V.-C. warned that:

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

57. The question of course in relation to this particular issue is whether Parliament intended by Section 217 to remove the ability of the director to contest the liability in circumstances where it has been established against the company in separate proceedings. As Mr Chichester-Clark submits, the potential injustice to a director in being fixed with a liability established in proceedings to which they were not a party is an important factor to take into account in determining the true meaning of the legislation. It also ties in with the principle (which I have already mentioned) against what Arden LJ referred to in *ESS Production* [at 78] as "doubtful penalisation".

58. As far as injustice is concerned, Mr Grantham points out that a director of the company is in a very different position to a third party. It is not suggested that the effect of Section 217 is that the establishment of a liability in proceedings against the company binds the whole world (like a judgment in rem); it is only that it should be conclusive as against a director of the company who has committed a criminal offence under Section 216 Insolvency Act 1986 at the time the liability is incurred. Looked at in this way, neither the possibility of injustice nor the fact that Section 217 is, in effect, imposing a penalty on the defaulting director is sufficient in my view to override what, as I have said above, is the ordinary and natural meaning of the words used.

59. The fact is that the defaulting director will, by definition, have (or have had) a close connection with the company. They are therefore likely to be aware of any proceedings against the company and will be able to apply to be joined as a party to those proceedings if it is appropriate for them to do so and to put their case.

60. Essentially, what this issue boils down to is a question of how Parliament intended to allocate any risk of an injustice. On the one hand, a creditor who has obtained a judgment against the company could be forced to incur potentially significant expense and risk in establishing their claim a second time in separate proceedings against the defaulting director; on the other hand, the defaulting director may be fixed with a liability as a result of the proceedings against the company to which they were not a party and where (as in this case) the liability was not defended as effectively as might have been the case if the director were a party.

61. Given the wording of the section, the underlying purpose of the legislation, the fact that a director will have a close connection with the company and that they will only be liable if they have committed a criminal offence by acting in breach of the prohibition in Section 216 (which can be avoided by asking the court for permission to be involved with the new company), I have no hesitation in concluding that Parliament intended any risk to lie with the director rather than the creditor and that there is no reason to import a requirement that the creditor must establish the company's liability against the director when they have already established that liability as against the company.

62. This does not, in my judgment, offend the principle against doubtful penalisation. It is quite clear that Section 217 makes a defaulting director personally responsible for the debts of the company and so there is no doubt about the penalty which is being imposed. It does not therefore follow that the reference in Section 217 to the debts of a company should be limited to those debts which have been established in proceedings against to defaulting director.

63. In a completely different context, Lord Briggs JSC, in *Project Blue Limited v HMRC* [2018] 1 WLR 3169, made the following comments [at 110]:

> "I must now address some of the contrary arguments. The first is that a statutory requirement to have regard to the context does not permit regard to be had to the consequences. I respectfully disagree. A hallmark of the modern contextual approach to the construction of a contract is that a choice which produces a result which the parties cannot have intended is to be rejected if there is a less unsatisfactory alternative. I can see no reason why the same approach is inapplicable for the construction of a statute. On the contrary it is frequently used: see *Bennion on Statutory Interpretation*, 7th ed (2017), section 9.6"

64. I do not go so far as to say that in this case the interpretation which Mr Chichester-Clark contends for is one which Parliament cannot have intended. However, whilst both possible interpretations have their drawbacks, the approach adopted by Mr Grantham is less unsatisfactory and is, in my judgment, much more closely aligned with the purpose of the legislation.

65. Although I do not place any weight on the point in reaching the conclusion which I have, I do also note that, if for some reason the director is not aware of the proceedings against the company, CPR Rule 40.9 does permit a person who is not a party but who is directly affected by a judgment or order to apply to have the judgment or order set aside or varied.

Privity/estoppel

66. Having reached the conclusion which I have in relation to the interpretation of Section 217 Insolvency Act 1986, it is not strictly necessary for me to decide whether, if the judgment and the consequential orders in the Commercial Court proceedings were not sufficient to establish the liability of DYGL for the purposes of Section 217, Mr Langdon is nonetheless estopped from disputing the judgment and orders or

whether it would be an abuse of process for Mr Langdon to effectively require PSV to relitigate the issues relating to the liability of DYGL. However, as these points were argued before me, I will deal with them briefly.

67. The question as to whether there is a cause of action estoppel or issue estoppel depends on whether Mr Langdon is a privy of DYGL. There is a separate question as to whether Mr Langdon is estopped by his conduct from requiring PSV to establish the liabilities of DYGL or whether it would be an abuse of process for him to do so.

Privity of interest

68. In determining whether DYGL and Mr Langdon are privies the parties were agreed that the Court should follow the approach advocated by Floyd LJ in *Resolution Chemicals Limited v H Lundbeck A/S* [2013] EWC Civ 924 where he summarised the authorities [at 32] as follows:-

> "Drawing this together, in my judgment, a Court which has the task of assessing whether there is privity of interest between a new party and a party to previous proceedings needs to examine (a) the extent to which the new party had an interest in the subject matter of the previous action; (b) the extent to which the new party can be said to be, in reality, the party to the original proceedings by reason of his relationship with that party, and (c) against this background to ask whether it is just that the new party should be bound by the outcome of the previous litigation."

69. In support of his submission that Mr Langdon was in privity of interest with DYGL, Mr Grantham referred to the following matters:-

69.1 Although he was not aware of his potential liability under Section 217 Insolvency Act 1986, on an objective basis, Mr Langdon had the same interest as DYGL in defending the claims made by Mr France and Elusive Yachting.

69.2 Mr Langdon was the managing director of DYGL throughout the relevant period and, at the time DYGL entered into the contract in September 2017 and breached the contract in January 2018, he was the majority shareholder of DYGL.

69.3 Mr Langdon chaired the meeting at which it was resolved to place DYGL into administration shortly before the trial in the Commercial Court proceedings.

69.4 Mr Langdon was given the opportunity to participate in the trial of the Commercial Court proceedings but failed to do so. He could also have been joined to the Commercial Court proceedings as a co-defendant. He signed the original defence in those proceedings as well as providing a witness statement.

69.5 A mediation appointment was cancelled as Mr Langdon was ill and there was no alternative senior decision maker who could replace him at the mediation.

69.6 Mr Langdon, in his capacity as a director of DYGL, signed a statement of affairs acknowledging the liabilities to Mr France and Elusive resulting from the Commercial Court judgment and the consequential orders.

70. Based on this, Mr Grantham submits that Mr Langdon was clearly the driving force behind the company. In particular, he says that Mr Langdon clearly had control of DYGL even though, at some point in 2018, he ceased to be the majority shareholder. Based on these factors, he concludes that Mr Langdon had privity of interest with DYGL.

71. On behalf of Mr Langdon, Mr Chichester-Clark made the following points:-

71.1 Given his lack of knowledge of a potential liability under Section 217 Insolvency Act 1986, Mr Langdon's only interest in the subject matter of the Commercial Court proceedings was an indirect interest as a shareholder of DYGL. By 2018, this was a minority interest and, at the time of the trial, he only had a 5% interest.

71.2 Even if, on an objective basis, his potential liability under Section 217 should be taken into account, the interests of DYGL and Mr Langdon diverged when DYGL was put into administration. DYGL then had to act in the best interests of its creditors, which was to abandon the defence of the proceedings. Mr Langdon's personal interest would however still have been to defend the proceedings.

71.3 There were at all relevant times between 3-6 members of the board of directors of DYGL, including, from 2018 onwards Mr Schnaeble who

controlled DYGL's largest shareholder and who, in October-December 2019, declined to provide any further funding to DYGL.

71.4 The actions taken by Mr Langdon which have been identified by Mr Grantham were taken by him in his capacity as a director of DYGL in accordance with his fiduciary duties to the company and not in his personal capacity.

71.5 Mr Langdon did not fund DYGL's defence or cause it to continue to defend the claim against it for his own benefit.

72. As Megarry V.-C. observed in *Gleeson* [at 515A]:-

> "The doctrine of privity for these purposes is somewhat narrow".

73. No doubt the reason for this is the injustice which may be caused if a person is not able, as Megarry V.-C. put it in *Gleeson* [at 516]:-

> "to put his own defence in his own way, and to call his own evidence."

74. As far as the interest in the subject matter of the proceedings is concerned, Mr Chichester-Clark argued forcefully that Mr Langdon's potential liability under Section 217 Insolvency Act 1986 should not be taken into account given that he was unaware of the potential liability. I would agree with this. Mr Grantham did not refer to any authority which supports the proposition that this aspect should be considered on an objective basis. Indeed, it would in my view be wrong in principle to find that a person is in privity of interest with a party to previous proceedings as a result of having an interest in the subject matter of the proceedings in circumstances where that person was unaware of the interest in question.

75. However, even if the test is an objective one, I accept Mr Chichester-Clark's submission that, as a result of DYGL resolving to go into administration prior to the trial of the Commercial Court proceedings, the interests of DYGL and Mr Langdon at that point diverged with DYGL no longer having the same commercial interest in defending the proceedings as Mr Langdon.

76. Turning to the identity of the parties, I do not accept that there is a sufficient identity between Mr Langdon and DYGL for Mr Langdon to be treated as DYGL's privy. The question posed by Floyd LJ in *Resolution* is whether "the new party can be said

to be, in reality, the party to the original proceedings by reason of his relationship with that party". It cannot be the case that a director of a company acting in their capacity as such for that reason alone falls within that category even if they are controlling the proceedings on behalf of the company.

77. I accept that, in circumstances where a person is a sole director and also the main shareholder of a company, that may, depending on the circumstances be sufficient to mean that the individual and the company are privies (as was conceded by the plaintiff in *Johnson v Gore Wood & Co* [2002] 2 AC 1 [at 60D] and was found to be the case in *Secretary of State for Business, Innovation and Skills v Potiwal* [2012] EWHC 3723 (Ch)).

78. Mr Chichester-Clark notes that, in *Virgin Atlantic Airways Limited v Zodiac Seats UK Limited* [2013] UKSC 46, Lord Sumption JSC doubted [at 25] the correctness of the concession made by the plaintiff in *Johnson v Gore Wood*. However, in any event, the position here is very different. Mr Langdon was one of a number of directors. Whilst he was the majority shareholder at the time the contract was entered into and at the time it was breached, he ceased to be the majority shareholder soon after the Commercial Court proceedings were launched and, by the time of the trial, was only a small minority shareholder. The assumed facts confirm that Mr Langdon had no authorisation to conduct the defence or attend the trial on behalf of the Defendant companies.

79. For these reasons, I am entirely satisfied that there is insufficient identity of interest between Mr Langdon and DYGL for Mr Langdon and DYGL to be treated as privies. It is not therefore necessary to consider any further the question of issue estoppel or cause of action estoppel.

Estoppel by conduct/abuse of process

80. Mr Grantham referred to the decision of Mr Justice Jay in *Collett v Deighton* [2016] EWHC 3842 (QB) which highlights a distinction between privity and estoppel by conduct. This concept was referred to by Lord Denning giving the decision of the Privy Council in *Nana Ofori Atta v Nana Abu Bonsra* [1957] AC 95 who stated the position [at 101] as follows:-

> "The general rule of law undoubtedly is that no person is to be adversely affected by a judgment in an action to which he was not a party, because of the injustice of deciding an issue against him in his absence. But this general rule admits of two exceptions: one is that a person who is in privity with the parties, a "privy" as he is called is bound equally with the parties, in which case he is estopped by res judicata: the other is that a person may have so acted as to preclude himself from challenging the judgment, in which case he is estopped by his conduct."

81. Whilst Lord Denning observed that estoppel by conduct would normally only arise where there has been some active participation in the proceedings or the person has taken some benefit from the proceedings, he noted the principle stated by Lord Penzance in *Wytcherley v Andrews* [1871] L.R. 2 P. & M. 327, 328 that:-

> "If a person, knowing what was passing, was content to stand by and see his battle fought by somebody else in the same interest, he should be bound by the result, and not allowed to reopen the case."

82. Lord Denning observed that, under English law, the principle in *Wytcherley* was confined to wills and representative actions. However, in *House of Spring Gardens Limited v Waite* [1991] QB 241, Stuart-Smith LJ considered [at 253E] that the principle should apply more widely. In that case, a joint tortfeasor had, in full knowledge of the circumstances, declined to participate in an unsuccessful action by his co-tortfeasor to set aside (on the grounds of fraud) a judgment against them all. Stuart-Smith LJ concluded [at 254A-B] that the defendant in question:

> "was content to sit back and leave others to fight his battle, at no expense to himself. In my judgment that is sufficient to make him privy to the estoppel".

83. Although Stuart-Smith LJ treated this principle as an aspect of privity, it seems to me that Mr Justice Jay (in *Collett v Deighton)* was right that it is in fact, as Lord Denning clearly treated it in *Nana*, a separate principle. I would also suggest that, in terms of the approach the court should adopt, the principle perhaps has more in common with the question as to whether it would be an abuse of process to allow a defence to be raised in later proceedings which should have been raised in earlier proceedings.

84. In this context, Lord Bingham in *Johnson v Gore Wood* warned [at 31 C-E] that:-

> "It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the

> raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all of the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the Court by seeking to raise before it the issue which could have been raised before."

85. Mr Langdon did not participate in the previous proceedings and did not therefore put forward any defence to the claims made by Mr France and Elusive Yachting as he was unaware that he could be personally responsible for any liabilities of DYGL. Mr France and Elusive were well aware of the history of the companies and could have joined Mr Langdon as a defendant, had they wished to do so.

86. Whilst the fact that the person seeking to raise the defence was not a party to the original proceedings does not preclude the possibility of an abuse of process, Thomas LJ noted in *Aldi Stores Limited v WSP Group Plc* [2007] EWCA Civ 1260 [at 10] that:-

> "The fact that the defendants to the original action and to this action are different is a powerful factor in the application of the broad merits-based judgment".

87. As I have already noted, Mr Langdon was not in control of the conduct of the litigation by DYGL. He was one of a number of directors and the board together took the decision not to defend the Commercial Court proceedings when it came to the trial.

88. Taking all of this into account, it would not in my view be an abuse of process for Mr Langdon to defend these proceedings on the basis that DYGL was not in fact liable in respect of the underlying claims made by Mr France and Elusive Yachting.

89. For the same reasons, I do not consider that Mr Langdon is estopped by his conduct from raising these points. This was not a case where (in the words of Lord Penzance in *Wytcherley*) "a person, knowing what was passing, was content to stand by and see his battle fought by somebody else". The fact is that Mr Langdon did not realise that the battle was not only one for DYGL but was also relevant to him personally.

90. Although I accept that there is of course a risk of inconsistent findings if, contrary to my conclusion that the judgment establishes the debt for the purposes of section 217, PSV were required to establish the underlying claims against DYGL in these proceedings this would not, in my view, in the particular circumstances of this case which I have just outlined, bring the administration of justice into disrepute and, for that reason, constitute an abuse of process.

When was the liability incurred?

91. Under s.217 Insolvency Act 1986, a defaulting director is personally responsible for all the "relevant debts" of a company. Section 217(3)(a) provides that a relevant debt is a debt or liability which is "incurred" at a time when the person was involved in the management of the company.

92. As have already mentioned, it was common ground between the parties that the effect of the decision in *ESS Production* is that a debt or liability will only be a relevant debt if it is incurred not only at a time when the person was involved in the management of the company but also at a time when the individual is in breach of the prohibition in s.216.

93. In *ESS Production* the specific question related to the extent to which the new company was using a prohibited name. In this case the issue is slightly different as there is no argument as to whether DYGL was using a prohibited name. Instead, the point is that the contract which was the subject of the Commercial Court proceedings was entered into in September 2017 but there was only a breach of s.216 when DYL was put into insolvent liquidation on 12 October 2017.

94. I agree however that the reasoning of the Court of Appeal in *ESS Production* leads to the same result in this situation as, under s.216(2), it is clear that a name can only be a prohibited name once the previous company has gone into insolvent liquidation. I do also note that, although Arden LJ was dealing with the question as to whether the company in that case was known by a prohibited name in relation to the whole of its business she concluded more generally [at 75] that "s.217(3)(a) must be read as restricted to the time during which there is a contravention of s.216".

95. As mentioned above, the agreement which Teare J found to have been made by DYGL was entered into in September 2017. DYL entered into liquidation on 12 October 2017 which triggered the breach of s.216 by Mr Langdon. Teare J found that the agreement was breached in January 2018.

96. Mr Chichester-Clark submits that the liability in this case was incurred when the contract was entered into in September 2017. He notes that, in his judgment, Teare J described DYGL [at 42] as having assumed "a liability for the repairs".

97. When pressed, Mr Chichester-Clark accepted however that the obligation to ensure that the repairs were carried out was not a "liability" within s.217 (which is confined to payments of a sum of money – see Rule 14.1(6) Insolvency (England and Wales) Rules 2016) but argued that the liability to pay damages as a result of the breach of the agreement was a secondary obligation arising under the agreement and was therefore "incurred" at the time the agreement was entered into.

98. In essence, what Mr Chichester-Clark suggests is that any liability arising in relation to the contract is incurred when the contract is entered into even if the liability only crystallises at a later date. Mr Chichester-Clark submits that this is in accordance with the purpose of the legislation which is only to penalise a director when there is a breach of s.216. There is, he says, no mischief in the company entering into a contract at a time when there is no breach of s.216. Any liabilities arising as a result of the contract should not therefore be within the scope of s.217.

99. Mr Grantham's response to this is that the legislation is intended to protect people dealing with the new company and is aimed at anybody involved in the management of that company. Protection, he says, includes not only entering into a contract with the company but also ensuring that the company honours the contract and is not managed in such a way that there is, ultimately, a breach of the contract. The legislation should therefore be interpreted as including liabilities which arise as a result of a breach of a contract where that breach takes place at a time when there is a contravention of s.216 even if the contract was originally entered into prior to any such breach.

100. Mr Grantham also submits that, once it is accepted that a "liability" within s.217 is a liability to pay a sum of money (as opposed to, for example, to an obligation to carry

out repairs), on a natural meaning of the words of the legislation, that liability is only incurred once there is a cause of action which can be enforced in a court. In this case, the cause of action only arose as a result of the breach of the contract in January 2018 and this is therefore the point at which the liability was incurred.

101. I have no hesitation in accepting Mr Grantham's submissions in relation to this point. The liability in this case is a liability to pay damages as a result of a breach of contract. The liability would not arise if there were no breach of the contract. It makes no sense to describe this as a secondary liability under the contract itself. It is a completely separate liability which arises as a result of the breach. The liability is incurred when the breach takes place giving rise to a cause of action for breach of contract.

102. I agree with Mr Grantham that this is more consistent with the purpose of the legislation. One of the risks with Phoenix companies is that the new company will be managed in a way which results in it failing to honour its obligations under a contract. It must therefore have been the intention of Parliament to provide recompense to a person where there is a breach of contract at a time when there is a contravention of s.216 even if there was no contravention at the time the contract was entered into.

103. I accept that this could give rise to something of an anomaly in the reverse situation. If a contract is entered into at a time when there is a contravention of s.216 but there is a breach of the contract (and therefore a liability is incurred) at a time when there is no longer any contravention of s.216 (for example because the company has changed its name to one which is not prohibited or the director is no longer involved with the company) the person dealing with the company would have no recourse against the director. It could be said with some justification that, in these circumstances, the director should be liable. This demonstrates that neither of the answers to this issue is completely satisfactory. However, in my view, it cannot be said that the interpretation proposed by Mr Chichester-Clark is less unsatisfactory than that proposed by Mr Grantham. It should not therefore override the natural and ordinary meaning of the words used by the statute.

Conclusion in relation to the preliminary issues

104. In relation to the first preliminary issue:

104.1 The Judgment and the consequential orders in the Commercial Court proceedings are sufficient to establish the relevant liabilities of DYGL for the purposes of s.217 Insolvency Act 1986.

104.2 Mr Langdon is not a privy of DYGL and is not therefore bound by the Judgment and consequential orders in relation to the Commercial Court proceedings as a matter of cause of action or issue estoppel. He is also not precluded from denying that the Judgment and the consequential orders in relation to the Commercial Court proceedings established the debt for any reason other than that mentioned at [104.1] above, including estoppel by conduct and abuse of process.

104.3 The fact that Mr Langdon signed the statement of affairs in relation to DYGL does not establish the liabilities for the purposes of s.217 Insolvency Act 1986.

105. In relation to the third preliminary issue, the liabilities in question were incurred when the contract was breached in January 2018 and are therefore within the scope of s.217 Insolvency Act 1986. The liabilities were not incurred when the agreement was entered into by DYGL in September 2017.

106. I would invite the parties to agree an appropriate order to reflect this Judgment and also to reflect the agreed position in relation to the remaining two preliminary issues as well as any order in relation to costs.

107. It is not clear to me whether, in the light of my conclusions, any order is needed in relation to the Claimant's proposed amended particulars of claim. If so, the parties should seek to agree the terms of any proposed order; otherwise I will deal with this aspect when this judgment is handed down.