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Re Peter Herbert Fowlds (a bankrupt); Bucknall and another (as joint trustees in bankruptcy of Peter Herbert Fowlds) v Wilson

[2021] EWHC 2149 (Ch), [2021] All ER (D) 19 (Aug)

Insolvency – Preferences. The appellant trustees in bankruptcy appealed a decision refusing to grant relief requiring the respondent to repay a preferential payment under s 340 of the Insolvency Act 1986 on the basis that the respondent had established a change of position so as to refuse relief. The Chancery Division, dismissing the appeal, held that the judge had erred in finding that a change of position of the transferee amounted to a defence under s 340, but that the judge had been correct to find that there were factors that had justified refusing the trustee's claim in the instant case.

Catchwords

Insolvency – Preferences – Bankruptcy

Background

The appellants were trustees in bankruptcy. The respondent (W) was the stepdaughter and was a creditor of the bankrupt. Within two years preceding the bankruptcy order, the bankrupt made a part-payment to W against a debt that he had owed in respect of professional accountancy services. The trustees sought repayment of the sum paid to W pursuant to [s 340](#) of the Insolvency Act 1986 ([IA 1986](#)) on the grounds that it was a preferential payment. The judge held that all the elements of a preference claim had been satisfied but that there were significant factors to refuse relief. In particular, the judge held that W had received the sums on a commercial basis, that she had acted in good faith, that she no longer had the proceeds and had changed her position so that it would be inequitable to require restitution. The trustees appealed. They submitted, among other things, that the judge had been wrong to conclude that a change of position was a relevant consideration when deciding what, if any, relief was to be granted in a preference claim or, if it was, that the judge had erred in describing it as a strong factor, and that the overall considerations that the judge had taken into account had not justified refusal of relief.

Issues and decisions

Whether the judge had erred in refusing to grant relief.

A change of position did not operate as a defence under [IA 1986 ss 339\(2\)](#), [340\(2\)](#) nor 342. There were exceptional circumstances in which the facts that would establish a change of position would

weigh in the balance when the court was determining how to exercise its discretion as to the order it thought fit for restoring the position to what it would have been if the transaction had not been entered into or the preference had not been given. In any event, change of position was not a strong factor that the judge had considered it to be. To have characterised it in that way was to give insufficient weight to the underlying policy considerations and the difficulty of balancing the interests of a class against the interests of the innocent transferee. However, there were a number of factors which, taken together, meant that a refusal of the application for relief in the instant case was the right order to make. First, it was a striking feature that the only reason W was vulnerable to the claim was because she happened to be an associate of the bankrupt and was therefore vulnerable to the two-year claw back period. However, the preference was not given to W because she was an associate. Second, W's claim was akin to one made by an ordinary commercial creditor acting in good faith without knowledge that the payment was a preference. Third, W no longer had the money that she had received. Overall, the judge had been entitled to reach the conclusion that he had and find that, in the circumstances of the instant case, there was no other appropriate remedy short of refusing relief altogether (see [94], [130], [131], [133]-[135], [139] of the judgment).

Decision of ICC Judge Jones [\[2020\] EWHC 1200 \(Ch\)](#) Affirmed.

Judgment Date

30 July 2021

Judge

Trower J

Representation

James Morgan QC and Andrew Brown (instructed by Coffin Mew LLP) for the claimant. The respondent acting in person

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