

Position of liquidators strengthened (Re MKG Convenience Ltd (in liquidation) Abdulali and others v NISA Retail Ltd))

21/06/2019

Restructuring & Insolvency analysis: A recent decision further strengthens liquidators' ability to recover payments made after presentation of a winding up petition. Reuben Comiskey, barrister at Radcliffe Chambers, discusses the case and its ramifications.

Re MKG Convenience Ltd (in liquidation) Abdulali and others v NISA Retail Ltd [\[2019\] EWHC 1383 \(Ch\)](#), [\[2019\] All ER \(D\) 55 \(Jun\)](#)

What are the practical implications of this case?

Prior to *Express Electrical Distributors Ltd v Beavis and others* [\[2016\] EWCA Civ 765](#), [\[2016\] All ER \(D\) 118 \(Jul\)](#), the test which was commonly applied to determine whether or not to make a validation order under [section 127](#) of the Insolvency Act 1986 ([IA 1986](#)) was whether the payments in question had been made in good faith, in the ordinary course of business, and at a time when the parties were unaware of the presentation of the petition. In *Express Electrical*, the Court of Appeal held that this was wrong and that—save in exceptional circumstances—a validation order ought to be made only where it can be shown by the party seeking it that the transactions were for the benefit of the company's creditors.

On the authorities, there was a second line of defence available to the recipient of a void payment faced with a claim made under [IA 1986, s 127](#) for repayment by a liquidator, namely the change of position defence generally available to restitutionary claims. Here, however, it was held that this defence is constrained in the same way as the court's discretion to validate a transaction. If a defendant could not obtain a validation order, it will not be entitled to rely on a change of position defence.

In this way, the position of liquidators has been further strengthened, effectively removing any defence to a claim for repayment in circumstances where the court will not validate a transaction under [IA 1986, s 127](#).

What was the background?

MKG Convenience ran several convenience stores as part of the Nisa chain. In March 2015, a winding up petition was presented against it. However, Nisa continued to deliver goods to the stores and continued to take payment of invoices by direct debit. Payments totalling in excess of £160,000 were made to Nisa following the presentation of the petition, of which more than £27,000 was paid after the winding up order was made.

At some point after presentation of the petition, MKG's major shareholder had transferred MKG's account with Nisa to a new company controlled by him. This new company traded from the same premises as MKG had, and Nisa continued to supply this new company for approximately a year. On liquidation, therefore, the liquidators had been unable to identify any stock which belonged to MKG.

MKG's liquidators applied for an order that Nisa repay the sums received by it after presentation of the petition. Nisa cross-applied for an order pursuant to [IA 1986, s 127](#) validating those payments. It also defended the application on the basis that even if the payments were not validated, it should not have to make restitution because it had changed its position on the strength of the payments by continuing to make supplies to the company.

What did the court decide?

The court dismissed Nisa's cross application for a validation order. Applying *Express Electrical*, it held that Nisa had failed to demonstrate that the continued supplies—and therefore the payments—were of any benefit to MKG's creditors. It was not appropriate simply to assume that MKG's continued trading was profitable, and there was no evidence to show that the proceeds from continuing trade had been paid into MKG's accounts. In particular, the court

was concerned the continued supplies may well have been made for the benefit of the new company set up by MKG's majority shareholder, and not for the benefit of MKG at all.

The court also held that the change of position defence contended for by Nisa was constrained, so that it was available only where and to the extent that the court would make a validation order.

On this second limb of Nisa's defence, the court considered the decisions of Nicholas Warren QC in *Rose v AIB Group (UK) Plc* [\[2003\] EWHC 1737 \(Ch\)](#), [\[2003\] All ER \(D\) 91 \(Jun\)](#) and of HHJ Paul Matthews in *Officeserve Technologies Ltd v Annabel's (Berkeley Square) Ltd* [\[2018\] EWHC 2168 \(Ch\)](#), [\[2018\] All ER \(D\) 96 \(Aug\)](#), which had held that a general defence of change of position was available. It determined that the policy behind [IA 1986, s 127](#) (as identified by *Express Electrical*), namely the preservation and return of assets for the benefit of the creditors as a whole, was such that it would not be inequitable for the payments to be recovered in full unless the conditions for making a validation order had been satisfied. The defence therefore failed.

The court also observed that, if it had concluded that a wider change of position defence was available as a matter of principle, it would not have succeeded in this case anyway. In particular, the court noted (following the decision in *Rose* for these purposes) that the defence would not have been available in relation to any supplies made after advertisement of the petition, and that Nisa had advanced insufficient evidence to establish the value of the supplies made after presentation but before advertisement.

Reuben Comiskey is a commercial chancery junior, with a focus on fraud and insolvency. Comiskey frequently acts for insolvency practitioners both in asset recovery actions and in disputes involving technical aspects of insolvency practice and procedure. Comiskey acted for the successful liquidators in Re MKG.

Interviewed by Kate Beaumont.

The views expressed by our Legal Analysis interviewees are not necessarily those of the proprietor.

FREE TRIAL