Neutral Citation Number: [2024] EWHC 1215 (Ch)

Case No: BR-2018-001381

**IN THE HIGH COURT OF JUSTICE**
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**
**INSOLVENCY AND COMPANIES LIST (ChD)**

**IN BANKRUPTCY**
**IN THE MATTER OF JOSEPH ACKERMAN**
**AND IN THE MATTER OF THE INSOLVENCY ACT 1986**

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

Date: 22/05/2024

**Before** :

**DEPUTY ICC JUDGE PASSFIELD KC**

- - - - - - - - - - - - - - - - - - - - -

**Between :**

**JOSEPH ACKERMAN**

**Applicant**

**- and -**

**(1) MICHAEL THOMAS LEEDS**
**(2) KEVIN JOHN HELLARD**
**(as Former Joint Trustees in Bankruptcy of Joseph Ackerman)**
**(3) NAOMI ACKERMAN**
**(4) BARRY ACKERMAN**
**(5) BANA ONE LIMITED**

**Respondents**

- - - - - - - - - - - - - - - - - - - - -
- - - - - - - - - - - - - - - - - - - - -

**David Eaton Turner and James Davies** (instructed by Ackroyd Legal (London) LLP) for the **Applicant**
**Katie Longstaff** (instructed by Pinsent Masons LLP) for the **First and Second Respondents**
**Marcia Shekerdemian KC and Andrew Mold KC** (instructed by Bryan Cave Leighton Paisner LLP) for the **Third to Fifth Respondents**

Hearing date: 9 May 2024

- - - - - - - - - - - - - - - - - - - - -

# APPROVED JUDGMENT

This judgment was handed down remotely at 10.30am on 22 May 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

**Deputy ICC Judge Passfield KC:**

1. For more than a decade, Joseph Ackerman ("**Joseph**") has been embroiled in litigation with his sister-in-law, Naomi Ackerman ("**Naomi**") and her son, Barry Ackerman ("**Barry**") arising out of the demerger of a group of companies known as the Ackerman Group ("**the Group**"). In 2011, Vos J (as he then was) dismissed Joseph's claim to challenge the demerger ("**the 2011 Claim**") and in 2017, Snowden J (as he then was) struck out Joseph's claim to set aside that order ("**the 2015 Claim**"). In the meantime, Joseph was made bankrupt (on 1 September 2016) and Michael Leeds and Kevin Hellard ("**the Trustees**") were appointed as his joint trustees in bankruptcy (on 19 October 2016).

2. On 27 February 2017, the Trustees *inter alia*: (i) assigned the 2015 Claim to Naomi, Barry and their company, Bana One Limited (together, "**the Ackerman Respondents**"); and (ii) waived, released and settled their right to appeal against the striking out of that claim ("**the Settlement**").

3. On 11 September 2018, Joseph issued an application ("**the s.303 Application**") against the Trustees and the Ackerman Respondents pursuant to s.303(1) of the Insolvency Act 1986 ("**IA 1986**") by which he seeks to set aside the Settlement. For reasons which I will explain in more detail below, the s.303 Application has effectively been in abeyance since that time, since when the Trustees have vacated office and had their release under s.299 IA 1986.

4. The present hearing was listed to determine:

   i) Joseph's application dated 28 June 2023 to "restore" the s.303 Application ("**the Restoration Application**"); and

ii) the Trustees' and the Ackerman Respondents' applications dated 6 October 2023 and 15 March 2024 respectively to strike out the s.303 Application and/or for reverse summary judgment ("**the Respondents' Applications**").

5. Given that the s.303 Application has never been formally stayed, it does not appear to me to be necessary to make an order restoring that application. In the circumstances, I consider that the proper approach for me to take at the present hearing is to: (i) hear the Respondents' Applications and determine whether it is appropriate to summarily dismiss the s.303 Application; and, if I conclude that it is not: (ii) give appropriate case management directions for the final disposal of the s.303 Application.

**Issues arising on the Respondents' Applications**

6. The following issues arise for determination in relation to the question of whether I should summarily dismiss the s.303 Application:

i) Does Joseph have standing to make the s.303 Application?

ii) Can Joseph pursue the s.303 Application in light of the Trustees' release?

iii) Does the s.303 Application disclose a reasonable cause of action and/or have a realistic prospect of success?

## Background

7. Joseph and his brother, Jack, arrived in the UK as Jewish refugees from Czechoslovakia. In the early 1960s, they established the Group, which came to consist of: a large number of SPV companies; some individual properties; a sub-group of companies known as the Superetto group; a Gibraltarian trust; and a company called Loch Tummel Limited. They also incepted and incorporated a charitable company (Delapage Limited) and its two non-charitable subsidiaries (Haysport Limited ("**Haysport**") and Twinsectra Limited ("**Twinsectra**")) ("**the Charity Group**"). Joseph and Jack each owned 50% of the various parts of the Ackerman Group and were trustees and directors of the Charity Group.

8. Following Jack's death in 1989, Naomi (who was Jack's wife) inherited his share of the Group. In 2001, Barry (who is Naomi's son) started to work part-time in the Group.

9. In 2004, the relationship between Joseph (on the one hand) and Naomi and Barry (on the other) deteriorated. This culminated in a joint decision in 2006 that there should be a demerger of the Group.

10. In September 2008, the parties appointed Andrew Thornhill KC ("**Mr Thornhill KC**") to act as an expert to determine the basis for the demerger of the Group. It was agreed that Mr Thornhill KC should undertake a lottery to decide how the Group should be split between Joseph and Naomi, and that he would have exclusive authority from both to determine the form of the demerger. It was also agreed that after the lottery Mr Thornhill KC would have authority to determine adjustments to be made in respect of a variety of matters

including any money and assets taken out of the Group for private purposes and in respect of inter-company indebtedness.

11. On 5 January 2011, Mr Thornhill KC published a provisional adjustment report ("**the Provisional Report**") setting out the result of the lottery and the adjustments he had decided to make, together with what he had done to give effect to those matters. Mr Thornhill KC determined that Joseph had removed a substantial quantity and value of assets from the Group, and that consequently: (i) the entirety of the Group and jointly owned properties should be transferred to Naomi; (ii) Naomi had a further claim of £20.33m against Joseph; and (iii) Haysport and Twinsectra had claims for £9m against Joseph.

*2011 Claim*

12. On 20 April 2011, Joseph commenced the 2011 Claim against Mr Thornhill KC and the Ackerman Respondents by which he challenged the Provisional Report on the grounds that Mr Thornhill KC had allegedly acted unfairly and with bias and partiality.

13. On 12 August 2011, disclosure took place. The Ackerman Respondents' disclosure included three documents relating to two transactions from 2008 and 2009 concerning Mr Thornhill KC, Naomi and Barry ("**the Three Documents**") which Joseph claims demonstrate that: (i) Mr Thornhill KC was in a place of conflict of interest and duty which prevented him from acting fairly, impartially and in an unbiased manner; and (ii) Naomi and Barry dishonestly caused a bribe

or secret commission to be paid to Mr Thornhill KC to induce him to favour Naomi in the demerger process.

14. On 19 October 2011, Joseph amended his particulars of claim to include additional allegations. However, the amended claim did not make any reference to the Three Documents.

15. On 21 December 2011, following a 9-day trial, Vos J (as he then was) handed down judgment on the 2011 Claim, which is reported at [2011] EWHC 3428 (Ch) ("**the Vos Judgment**").

16. In paragraph [6], Vos J summarised Joseph's allegations as follows:

> *"In these proceedings, Joseph alleges that Mr Thornhill was guilty of actual bias, collusion and partiality in favour of Naomi and her side of the family, that he acted unfairly and deceitfully, and that he materially departed from his instructions contained within the Agreement. As a result, Joseph contends that the Report and the steps taken in pursuance of it are invalid and of no effect, and that the breaches are so serious as to amount to a repudiation of the Agreement which is said to have been accepted and therefore to be at an end."*

17. In paragraph [152], Vos J identified the issues for determination as including whether Mr Thornhill KC was guilty of actual bias and/or collusion.

18. In paragraph [275], Vos J indicated that the allegation of bias was one of actual bias as opposed to the appearance of bias. In paragraph [276], he supported that point with citation of a passage from the judgment of Robert Walker J in *Macro v Thompson (No 3)* [1997] 2 BCLC 36 at 65 that referred to older cases which equated actual bias with *"fraud or collusion"* or *"gross fraud or partiality"*.

19. In paragraphs [338]-[340], Vos J rejected the allegations of actual bias and collusion against Mr Thornhill KC.

20. In consequence, Vos J dismissed the 2011 Claim and ordered Joseph to pay the Ackerman Respondents' costs and to make payments on account in the sum of approximately £1.4m (subject to a stay if permission to appeal was sought and granted by the Court of Appeal) ("**the Vos Order**").

21. On 13 June 2012, the Court of Appeal granted Joseph limited permission to appeal solely in relation to Vos J's findings that Mr. Thornhill KC had not materially departed from his instructions.

22. On 20 July 2012, before Joseph's appeal was heard, the parties signed a consent order by which they agreed that Joseph's appeal be dismissed on the terms of a settlement agreement contained in the schedule to the order ("**the Consent Order**"). Those terms included an agreement by the Ackerman Respondents not further to enforce the costs orders which had been made, and set out a revised timetable for completion by Mr Thornhill KC of a "Further Provisional Adjustment Report" and then a "Final Adjustment Report".

*2015 Claim, Haysport/Twinsectra Claim and Contribution Claim*

23. On 11 February 2013, Mr Thornhill KC announced his final adjustment report ("**the Final Report**") in which he declared that Joseph and Naomi had removed assets of £65.43m and £4.2m respectively from the Group and, in consequence, a balancing sum of £61.23m was due from Joseph to Naomi. Mr Thornhill KC also declared that Joseph had removed £6.7m from Haysport and Twinsectra.

24. Joseph asserts that within days of the publication of the Final Report, an unknown person delivered to his house an envelope containing the Three Documents. He further asserts that this was the first time that those documents had been brought to his attention.

25. On 30 June 2014, Haysport and Twinsectra issued a claim against Joseph for breach of fiduciary duty ("**the Haysport/Twinsectra Claim**").

26. On 24 June 2015, Joseph commenced the 2015 Claim against Mr Thornhill KC and the Ackerman Respondents claiming fraudulent or negligent misrepresentation, collusion and conspiracy. As originally drafted, the 2015 Claim did not seek to set aside the Vos Judgment.

27. On 12 October 2015, Mr Thornhill KC and the Ackerman Respondents applied to strike out the 2015 Claim ("**the 2015 Claim Strike Out Applications**") on the grounds that: (i) the 2015 Claim raised issues that were either decided against Joseph in 2011 or which could and should have been raised by him in those proceedings and was therefore barred by the principles of *res judicata*; and (ii) the alleged non-disclosure would not have been of sufficient importance that it could conceivably have caused Vos J entirely to change the way he approached the evidence at the trial or the way in which he came to the Vos Judgment.

28. On 2 March 2016, Peter Smith J entered judgment against Joseph on the Haysport/Twinsectra Claim in the sum of £9m (plus interest and costs). His judgment is reported at [2016] EWHC 393 (Ch). In paragraph [48], Peter Smith J observed that if Naomi had become aware of Joseph's breaches of duty, she

would also be liable to Haysport and Twinsectra for participating in that breach of duty, meaning that Joseph could potentially seek a contribution from her.

29. On 21 March 2016, Joseph applied to amend the 2015 Claim to include claims to set aside the Vos Order and the Consent Order. That claim was preceded by an application issued by Joseph on 10 March 2016 to set aside the Vos Order and the Consent Order on the grounds that they were obtained by fraud and/or collusion. I understand that that application was not ultimately pursued on the basis that it was procedurally misconceived.

30. By his draft Amended Particulars of Claim, Joseph alleged that: (i) Mr Thornhill KC dishonestly breached his contractual and fiduciary duties to Joseph and entered into an unlawful means conspiracy with the Ackerman Respondents with the intention that Mr Thornhill KC should injure Joesph by providing a more advantageous outcome for the Ackerman Respondents than would otherwise have been the case; and (ii) Mr Thornhill KC and the Ackerman Respondents deliberately and dishonestly concealed their dealings from Vos J.

31. On 6-8 April 2016, Snowden J (as he then was) heard the 2015 Claim Strike Out Applications and reserved judgment.

32. In June 2016, Joseph issued proceedings seeking a contribution from Naomi and Barry in respect of his liability as determined in the Haysport/Twinsectra Claim ("**the Contribution Claim**").

*Joseph's Bankruptcy and initial negotiations*

33. On 1 September 2016, Joseph was made bankrupt on the petition of Haysport and Twinsectra presented on 4 May 2016. The Trustees were appointed as Joseph's joint trustees in bankruptcy by the Secretary of State with effect from 19 October 2016. It is common ground that Joseph's right to pursue the 2015 Claim and the Contribution Claim formed part of his bankruptcy estate which vested in the Trustees immediately on their appointment taking effect pursuant to s.306 IA 1986.

34. On 10 January 2017, Joseph offered to purchase seven causes of action from the Trustees (including the 2015 Claim and the Contribution Claim) for the total sum of £100,000.

35. On 25 January 2017, Mr Leeds (one of the Trustees) met with Joseph's solicitor, Benjamin Posener (then of FPG) ("**Mr Posener**") to discuss Joseph's offer. Mr Leeds' unchallenged evidence is that during those discussions, Mr Posener indicated that Joseph only wished to purchase the 2015 Claim.

*Snowden Judgment*

36. On 27 January 2017, Snowden J handed down his judgment on the 2015 Claim Strike Out Applications, which is reported at [2017] EWHC 99 (Ch) ("**the Snowden Judgment**").

37. In paragraph [3], Snowden J indicated that he would consider whether the claim sought to be made in the final version of the draft Amended Particulars of Claim ought to be struck out, rather than consider that question on the basis of the existing pleadings.

38. In paragraphs [82]-[92], after a careful consideration of the Vos Judgment, the draft Amended Particulars of Claim and the relevant principles on *res judicata* (as set out in *Arnold v National Westminster Bank plc* [1991] 2 AC 93 and *Virgin Atlantic Airways v Zodiac Seats UK* [2014] AC 160), Snowden J held that: (i) the 2015 Claim raised the same issues of actual bias involving fraud and collusion that Vos J considered and decided in 2011 or was so closely connected with those issues that unless the material upon which the allegations were based was not available to Joseph, or could not with reasonable diligence have been obtained by him at the time, they could and should have been raised in the 2011 Claim; and, accordingly (ii) unless Joseph could show that he had a realistic prospect of showing that the Vos Judgment should be set aside on the grounds that it was obtained by fraud, the 2015 Claim was barred by the doctrines of issue estoppel and *Henderson v Henderson* abuse of process.

39. In paragraph [93], Snowden J held that in order to succeed in setting aside the Vos Judgment, Joseph would have to show that: (i) there was some fresh evidence that was not available, or which could not with reasonable diligence have been obtained, at the time of the Vos Judgment; (ii) there was *"conscious and deliberate dishonesty"* in relation to the concealment of that evidence; and (iii) the fresh evidence was material, in the sense that it was an operative cause of Vos J's decision to give the Vos Judgment in the way that he did.

40. The first of the three requirements identified by Snowden J (i.e. the need to demonstrate that there was some fresh evidence that was not available, or which could not with reasonable diligence have been obtained, at the time of the Vos Judgment) was derived from the decision of the House of Lords in *Hunter v*

*Chief Constable of West Midlands* [1982] AC 529 (as to which, see paras [65]-[80] of the Snowden Judgment). As I explain in paragraph 62 below, the Supreme Court has subsequently confirmed that that decision does not apply to applications to set aside a civil judgment (in *Takhar v Gracefield Developments Ltd* [2019] UKSC 13 ("***Takhar***")).

41. The second and third requirements identified by Snowden J were derived from the decision of the Court of Appeal in *Royal Bank of Scotland plc v Highland Financial Partners LP* [2013] EWCA Civ 328 ("***Highland Financial***") (which remains good law).

42. In paragraphs [94]-[99] of his judgment, Snowden J held that Joseph could not satisfy the first requirement because the Three Documents were all disclosed to him by the Ackerman Respondents in the course of the 2011 Claim.

43. In paragraph [100] of his judgment, Snowden J went on to say that he could not see how the second requirement (i.e. that there be *"conscious and deliberate dishonesty"* in the concealment of the Three Documents by Mr Thornhill KC and the Ackerman Respondents) could possibly be made out in circumstances in which the Ackerman Respondents actually disclosed the documents, and Mr Thornhill KC's unchallenged evidence was that his legal team were aware of the documents throughout and continued to act for him.

44. In the circumstances, Snowden J concluded that Joseph had no prospect of succeeding in his allegation that the Vos Judgment was obtained by fraud, with the consequence that the 2015 Claim was barred by *res judicata* (see paragraphs [110]-[111] of the Snowden Judgment). Accordingly, he struck out the 2015 Claim ("**the Snowden Order**").

*Further negotiations*

45. On 1 February 2017, one of the Trustees' administrators emailed Mr Posener asking for an update on when Joseph would be in a position to make a revised offer to purchase the causes of action vested in the Trustees (if he intended to do so) and indicating that the deadline for applying for permission to appeal the Snowden Order was 9 February 2017 (although it appears that this was an error and the deadline was in fact 2 March 2017). In the absence of a response, a chasing email was sent on 3 February 2017.

46. On 8 February 2017, Mr Leeds spoke with Mr Posener. During that conversation, Mr Posener advised Mr Leeds that he (Mr Posener) considered that the merits of successfully appealing the Snowden Order were 30%.

47. On 9 February 2017, Mr Leeds emailed Mr Posener asking how Joseph proposed to fund the 2015 Claim going forward (assuming that an appeal against the Snowden Order was successful) and whether Joseph had sought Counsel's opinion on the merits.

48. On 13 February 2017, Mr Posener replied stating that any litigation would be funded by either a litigation funder or Joseph's *"longstanding friends"* and that Counsel (Philip Coppel KC) had given the following assessment of the prospects of successfully appealing the Snowden Order:

> *"Putting to one side the merits of any appeal against the Snowden judgment, as a statistical fact more applications for permission to appeal to the CA from the HC fail than succeed; and of those that have been given permission to appeal, on the substantive hearing more fail than succeed. The latter is easily checked by looking at CA judgments on bailii. Overall then, there is a statistically slim chance of successfully appealing to the CA against a judgment in the HC. That is the reality of the situation.*

> *While I do think that there are good grounds to appeal against the judgment of Snowden, it takes some time and careful analysis for them to become apparent. In other words, there is nothing that leaps off the Snowden judgment that tells a judge unfamiliar with the detail to say "this can't be right". This makes getting permission more difficult than in a case of obvious mistake. When combined with the above reality, my overall assessment is that [Joseph] has a 1-in-4 chance of both getting permission to appeal and then winning the appeal."*

49. Mr Posener stated:

> *"I hope this assists and puts in perspective that prospects of success are therefore not good and why a back end (on success) only payment is more appropriate for the rights of assignment of this claim."*

50. On the same day, Mr Posener confirmed that he was instructed to make an offer to purchase the 2015 Claim only, on terms that there would be no upfront payment but Joseph would pay *"a percentage of the back end payment on success"*.

51. On 16 February 2017, Mr Leeds advised Mr Posener that the Trustees were also exploring whether Mr Thornhill KC and the Ackerman Respondents wished to make an offer to settle or acquire any claims, including the 2015 Claim and stated:

> *"As we may be in a competitive bid situation and given the urgency in [the 2015 Claim], I am asking all parties interested in that claim to make their best and final bids in writing by midday on Tuesday 21 February 2017, to include a commitment to conclude a transaction by close of business on Friday 24 February 2017. This timescale is designed to ensure fairness and give your client enough time to seek permission to appeal."*

52. On 17 February 2017, Mr Leeds advised Mr Posener that the deadline for making offers had been extended to 22 February 2017.

53. On 20 February 2017, the Trustees sought advice from Counsel as to the merits of the 2015 Claim.

54. On 21 February 2017, Joseph made two offers to the Trustees, namely: (i) an offer to *"put forward a cash sum of £75,000"* to *"be utilized by the Trustee (sic) in pursuing the appeal before the Court of Appeal"*; and (ii) an offer to purchase the 2015 Claim (including the right to appeal the Snowden Order) for £75,000 plus *"50% of the net proceeds of any successful realization (sic) of funds following the conclusion of the claim limited to the amount required to discharge all creditors and fees in the bankruptcy"*.

55. On the same day, Mr Leeds consulted the directors of Haysport and Twinsectra about Joseph's offers and obtained further legal advice.

56. On 23 February 2017, Joseph repeated his offer to purchase the right to appeal for £75,000 plus 50% of the net proceeds of any realisations. On the same day, the Ackerman Respondents offered to pay £300,000 to the Trustees to purchase the 2015 Claim and the Contribution Claim.

57. In the event, the Trustees decided to reject Joseph's offer and accept the Ackerman Respondents' offer. This decision was communicated to Joseph on 27 February 2017.

58. On the same day, the Trustees entered into the Settlement by which they: (i) assigned and transferred the 2015 Claim and Contribution Claim to the Ackerman Respondents; and (ii) waived, released and settled the right to appeal against the Snowden Judgment.

*s.303 Application*

59. On 11 September 2018, Joseph issued the s.303 Application by which he seeks: (i) a declaration that in assigning the 2015 Claim and right to appeal against the Snowden Order to Naomi, Barry and Bana, the Trustees *"failed to properly instruct and direct themselves and, on account of the same, made a decision that no trustee properly advised or instructing himself would have made"*; (ii) an order that the assignment of the 2015 Claim (but not the Contribution Claim) be set aside; and (iii) an order that the 2015 Claim be assigned to Joseph without further order.

60. The s.303 Application was supported by a witness statement from Joseph's then solicitor, Anjana Mepani of FPG Solicitors dated 10 September 2018 ("**Mepani 1**"). In that statement, Ms Mepani stated that if the s.303 Application was granted, Joseph proposed to: (i) seek permission from the Court of Appeal to appeal against the Snowden Judgment out of time and an expedited determination of the appeal; and (ii) seek permission from the Supreme Court to appeal against the Court of Appeal's decision and have it heard at the same time as the appeal in *Takhar* (which was due to be heard on 10 October 2018).

61. Joseph applied for the s. 303 Application to be heard on an expedited basis ("**the Expedition Application**"). On 13 September 2018, Arnold J dismissed the Expedition Application and ordered Joseph to pay the Trustees' and the Ackerman Respondents' costs, summarily assessed in the sums of £8,106 and £15,000 respectively. Although not expressly recorded in Arnold J's Order, it appears to have been agreed by the parties that the s.303 Application would be

held in abeyance (but not formally stayed) pending the Supreme Court's decision in *Takhar.*

*Takhar*

62. On 20 March 2019, the Supreme Court handed down their judgment in *Takhar*, in which they held that a party who seeks to set aside a judgment on the basis that it was obtained by fraud does not have to demonstrate that he could not have discovered the fraud by the exercise of reasonable diligence.

63. It is Joseph's case that this decision confirms that the Snowden Judgment was based on an error of law and that Snowden J should therefore have dismissed the 2015 Claim Strike Out Applications, ordered the Ackerman Respondents to pay his costs of those applications and allowed the 2015 Claim to continue.

64. However, as the Respondents point out, the decision in *Takhar* does not affect the test in *Highland Financial*, or Snowden J's finding that Joseph had no prospect of demonstrating that there had been conscious and deliberate dishonesty in the concealment of the Three Documents by Mr Thornhill KC and the Ackerman Respondents (see paragraph [100] of the Snowden Judgment).

*Joseph's second bankruptcy*

65. On 15 May 2019, Joseph was made bankrupt for a second time on the petition of the Ackerman Respondents in consequence of his failure to pay their costs of the Expedition Application ("**the Second Bankruptcy**").

66. On 11 January 2022, Mr Leeds was removed as Joseph's joint trustee in bankruptcy by a block transfer order pursuant to s.298(1) IA 1986. The Order

provided that Mr Leeds did not need to apply to the Secretary of State for his release under s.299(3)(b) IA 1986 but, rather, had his release 21 days after notice of the Order was published in the London Gazette, unless a creditor applied to set aside the Order within that time. No such application was made and, accordingly, Mr Leeds had his release on 20 April 2022.

67. On 21 April 2022, Mr Hellard gave creditors notice that it appeared to him that the administration of Joseph's estate was for practical purposes complete and issued his final report pursuant to s.331(2) and (2A) IA 1986.

68. On 30 June 2022, Mr Hellard delivered notice of the final report to the court and thereby vacated office under s.298(8) IA 1986 and was released under s.299(3)(d)(ii) IA 1986.

69. On 13 October 2022, the Second Bankruptcy was annulled.

*Restoration Application*

70. On 4 November 2022, Joseph's solicitors (Ackroyd Legal (London) LLP) wrote to the court requesting that the s.303 Application be "restored" and listed for a 3-day hearing, with consequential directions for the filing and service of responsive and reply evidence. The request was supported by a witness statement from Mr Posener dated 1 November 2022 ("**Posener 1**"). The court does not appear to have responded to that request.

71. On 10 January 2023, the Ackerman Respondents' solicitors (Bryan Case Leighton Paisner LLP) sent a letter to the court opposing the restoration of the s.303 Application on the basis that: (i) there was no extant application to restore;

and (ii) seeking to restore the application after more than 4 years would amount to an abuse of process.

72. On 15 June 2023, Joseph's solicitors sent a further letter for the direct attention of Chief ICC Judge Briggs.

73. On 16 June 2023, Chief ICC Judge Briggs gave the following direction:

> *"I am not convinced this request can be dealt with in box work. The application is to restore a historic action following the bankruptcy of a potential claimant. An application should be made and the other side put on notice. One question that arises is in whom is the cause of action vested."*

74. On 28 June 2023, Joseph issued the Restoration Application, which was supported by Mr Posener's second witness statement of the same date ("**Posener 2**").

75. On 6 October 2023, the Trustees applied to strike out the s.303 Application and/or for reverse summary judgment ("**the Trustees' Application**"). The Trustees' Application was supported by Mr Hellard's witness statement of the same date ("**Hellard 1**"), which was also made in opposition to the Restoration Application.

76. On the same day, the Ackerman Respondents filed Barry's first witness statement ("**Ackerman 1**") in opposition to the Restoration Application.

77. On 20 November 2023, Joseph filed Mr Posener's third witness statement ("**Posener 3**") in response to Ackerman 1 and, on 11 December 2023, Joseph filed Mr Posener's fifth witness statement ("**Posener 5**") in response to Hellard 1.

78. On 15 March 2024, the Ackerman Respondents issued their own application to strike out the s.303 Application and/or for reverse summary judgment ("**the Ackerman Respondents' Application**"). The Ackerman Respondents' Application was supported by the second witness statement of Andrew Tuson ("**Tuson 2**"). On the same day, the Ackerman Respondents filed the third witness statement of Andrew Tuson ("**Tuson 3**") which sets out concerns about Joseph's capacity.

79. On 22 April 2024, Joseph filed Mr Posener's sixth witness statement ("**Posener 6**")

80. On 2 May 2024, the Trustees filed the first witness statement of Michael Leeds ("**Leeds 1**").

**Standing**

81. Section 303(1) IA 1986 provides:

> *"If a bankrupt or any of his creditors or any other person is dissatisfied by any act, omission or decision of a trustee of the bankrupt's estate, he may apply to the court; and on such an application the court may confirm, reverse or modify any act or decision of the trustee, may give him directions or may make such other order as it thinks fit."*

82. In *Brake v The Chedington Court Estate Ltd* [2023] UKSC 29; [2023] 1 WLR 3035 ("***Brake***") at [8]-[9], Lord Richards JSC noted that: (i) s.303(1) IA is not intended to provide a means of redress to a party with no connection to the bankruptcy; and (ii) the following limitations apply to bankrupts, creditors and others who are connected with the bankruptcy:

> *"First, subject to very limited exceptions discussed below, a bankrupt must show that there is or is likely to be a surplus of assets once all liabilities to creditors, and the costs and expenses of the bankruptcy, have been paid…Second, a creditor will not have standing, except as regards a matter which affects the creditor in its capacity as such. As a matter of principle, this limitation applies also to bankrupts, even when they can demonstrate a surplus. Third, there are other, very limited, circumstances which will provide standing to an applicant, whether or not the applicant is the bankrupt [or] a creditor…So far as the authorities go, those circumstances are confined to cases where the challenge concerns a matter which could only arise in a bankruptcy…and in which the applicant has a direct and legitimate interest."*

83. In *Engel v Peri* [2002] EWHC 799 (Ch); [2002] BPIR 961, Ferris J held that a bankrupt had standing to challenge his trustee's remuneration and expenses under s.303(1) IA 1986 notwithstanding that there was no likelihood of a surplus where that application was made together with an application for an annulment under s.282(1)(b) IA 1986, as the bankrupt had a clear interest in obtaining the annulment as cheaply as possible.

84. On behalf of the Trustees, Ms Longstaff submits (by reference to *Brake*) that Joseph does not have standing to make the s.303 Application because: (i) he cannot show that there is or is likely to be a surplus in his bankruptcy; and (ii) his challenge to the Trustees' decision to enter into Settlement does not concern a matter which could only arise in a bankruptcy and in which Joseph has a direct and legitimate interest (and therefore does not fall within the limited category of exceptional cases identified by Lord Richards in *Brake*). Ms Shekerdemian KC and Mr Mold KC adopted and endorsed those submissions on behalf of the Ackerman Respondents.

85. So far as surplus is concerned, Ms Longstaff notes that the Trustees' final report records that Joseph has unpaid creditors in the total sum of £125,035,080 and

the Trustees have outstanding costs and expenses in the total sum of £364,280. In the circumstances, it is clear that there is presently no surplus in Joseph's bankruptcy.

86. In response, Mr Eaton Turner and Mr Davies (who appeared on behalf of Joseph) assert that if: (i) the Settlement is set aside; (ii) the 2015 Claim (including the right to appeal the Snowden Order) is assigned to Joseph; (iii) Joseph obtains permission to appeal against, and then subsequently successfully appeals, the Snowden Order; and (iv) Joseph then successfully pursues the 2015 Claim (thereby obtaining the setting aside of the Vos Judgment) and the 2011 Claim (thereby procuring the unwinding of the demerger) then: (i) the Ackerman Respondents' claims will no longer exist; and (ii) he will be in a position to discharge all his other debts in full by virtue of his resulting 50% shareholding in the Group.

87. However, as Ms Longstaff points out:

i) Joseph owes the total sum of £6,797,987.52 to Haysport and Twinsectra which would be unaffected by the setting aside of the Snowden Order and the Vos Order; and

ii) in Ackerman 1, Barry asserts that: (i) the Group is heavily indebted; and (ii) the Group's shareholders are forbidden from removing monies until the liabilities which it owes to a charity have been repaid, which is likely to take *"many years"*. Joseph has not filed any evidence to contradict these assertions.

88. In the premises, I cannot be satisfied that there is likely to be a surplus in Joseph's bankruptcy even if he could somehow succeed in setting aside both the Snowden Order and the Vos Order.

89. For the same reason, I cannot be satisfied that there is any prospect that Joseph would be in a position to obtain an annulment of his bankruptcy pursuant to s.282(1)(b) IA 1986, such that he would have a legitimate interest in seeking to set aside the Snowden Order and the Vos Order in order to reduce the amount of his liabilities.

90. Joseph further argues that he has a substantial interest in making the s.303 Application even if it will not result in a surplus because he has *"lost the right to continue with his action against those who he alleges defrauded him"*. However, this was a consequence of his bankruptcy, and the consequential vesting of the 2015 Claim (including the right to appeal against the Snowden Order) in the Trustees pursuant to s.306 IA 1986, rather than the subsequent entry into the Settlement.

91. In the circumstances, I am satisfied that Joseph's concerns about the Trustees' decision to assign the 2015 Claim to the Ackerman Respondents and waive, release and settle their right to appeal the Snowden Order are wholly unconnected to his position as a bankrupt (Joseph having been divested of all his rights in relation to that claim on being made bankrupt) but, rather, relate solely to his personal interest in wishing to see vindicated the very serious allegations of dishonesty which he has made against Naomi, Barry and Mr Thornhill KC (which were emphatically rejected by both Vos J and Snowden J).

92. In the premises, I do not consider that Joseph has standing to make the s.303 Application. For that reason, I am satisfied that it is appropriate to grant the Respondents' Applications and strike out the s.303 Application.

93. In light of this conclusion, it is not strictly necessary for me to go on to consider: (i) whether Joseph would otherwise have been prevented from pursuing the s.303 Application as a result of the Trustees' release; and (ii) whether the s.303 Application discloses reasonable grounds for challenging the Trustees' decision to enter into the Settlement and/or has a real prospect of success. I will however do so on the basis that I heard full argument on these issues and in case this matter goes further.

**Effect of the Trustees' release**

94. Section 299(5) IA 1986 provides:

> *"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."*

95. The Respondents assert that this provision operates to prevent a person from pursuing an application under s.303 IA 1986 in respect of an act, omission or decision of a trustee after that trustee has had his release, even if that act, omission or decision occurs very shortly before the trustee vacates office. That assertion is supported by *Muir Hunter on Personal Insolvency*, which states (at 3-865):

> *"Notwithstanding that the trustee has obtained his "release," he remains indefinitely subject to a potential liability to be proceeded against under s.304(1) in relation to the bankrupt's estate on grounds of alleged misconduct or breach of duty, at the instance of the Official Receiver, the Secretary of State, a creditor, or the bankrupt, subject to the conditions imposed by that section. But the terms of this subsection, confining its application to s.304, must be read as excluding its application to s.303, which is dealing with and must be taken as applying only to a trustee still in office."*

96. Joseph disputes that s.299(5) IA 1986 has this effect. In this regard, he relies on the statutory definition of *"liability"* in s.382(4) IA 1986, which provides:

> *"In this Group of Parts, except in so far as the context otherwise requires, "liability" means (subject to subsection (3) above) a liability to pay money or money's worth, including any liability under an enactment, any liability for breach of trust, any liability in contract, tort or bailment and any liability arising out of an obligation to make restitution."*

97. Alternatively, Joseph asserts that if s.299(5) IA 1986 does prevent him from making the s.303 Application, the court should adjourn the Respondents' Applications to give him an opportunity to apply to set aside the Trustees' release.

98. It appears to be common ground that if the statutory definition of *"liability"* as *"a liability to pay money or money's worth"* is applied to s.299(5) IA 1986, the *"discharge from all liability"* provided for thereby would not operate to prevent a person from seeking an order under s.303(1) IA 1986 (which empowers the court to confirm, reverse or modify any act or decision of a trustee, give him directions or make such other order as it thinks fit, but does not enable the court to order any monetary relief against the trustee).

99. However, the Respondents contend that the context of s.299(5) IA 1986 requires the court to adopt a wider definition of *"liability"* which includes a finding that the trustee has *"done something wrong which needs to be put right"*. In this regard, the Respondents submit that because the threshold test for successfully challenging a trustee's decision under s.303 IA 1986 is a very high one (see paragraph 108 below), a finding that a trustee's decision should be set aside, varied or revoked would have considerable adverse consequences for that trustee (including the potential for regulatory proceedings against them), and the trustee would therefore be compelled to defend any allegations made against them (and incur costs and expense in this regard), notwithstanding that no monetary relief was sought against them. They therefore contend that there are good policy reasons why a trustee's release should operate to prevent challenges to that trustee's decisions under s.303 IA 1986.

100. Whilst acknowledging that there is no authority directly on point, the Respondents seek to derive support for their submissions from dicta in the following cases:

i) In *Re Borodzicz* [2016] BPIR 24, a bankrupt applied for leave to pursue an application against his trustee under s.304(1) IA 1986 after the trustee had had his release under s.299 IA 1986. Chief Registrar Baister noted that in *Re Munro, ex parte Singer* [1981] 1 WLR 1358 at 1362G, Walton J had said that the intention of s.93(3) of the Bankruptcy Act 1914 (which is in materially similar terms to s.299(5) IA 1986) was "*to wipe the slate completely clean so far as the trustee is concerned, so that they*

*may thereafter pay no thought to the previous course of his actions as trustee"* and said (at [55]):

> *"Whilst Walton J was concerned with a different section of a different Act, his judgment is nonetheless a clear expression of the purpose of release that must be as good today and in the present context as it was when he made it in the context of the Bankruptcy Act. The proviso contained in the last sentence of s 299(5) militates against the absolute terms in which Walton J spoke, but, as is apparent from what I have said so far, my view is that nothing put forward with which I have so far dealt would justify a departure from the effect of his dictum."*

ii) In *Oraki v Bramston* [2015] EWHC 2046 (Ch); [2015] BPIR 1238, following the annulment of their bankruptcies, the claimants issued various claim against their former trustees in negligence and under s.304 IA 1986. The trustees argued that as they had had their release, they had been discharged from liability for the negligence claims (but not the s.304 claims) under s.299(5) IA 1986. The bankrupts argued that because s.304(1) IA 1986 was expressly *"without prejudice to any liability arising apart from this section"*, the negligence claims were not discharged by s.299(5) IA 1986. Proudman J rejected that argument stating at [162]:

> *"As a matter of statutory construction and logic…the trustee must be released from everything except the matters specifically provided for in s 304. Thus anything arising 'apart from' s 304 must be excluded. It follows that only matters for the benefit of the bankrupt's estate can properly be the subject of any action so that mental distress, loss of income, loss of legal costs, payment out in repairs are in any event excluded."*

On appeal, having held that Proudman J was right to conclude that the negligence claims were discharged by s.299(5) IA 1986, David Richards

LJ (as he then was) went on to say that he was *"unable to endorse her conclusion that therefore no other claim arising out of the trustee's conduct as trustee can be brought"* noting that it *"gives rise to some difficult and as yet untested questions"* but he did not consider it appropriate to express obiter views in this regard (*Oraki v Bramston* [2017] EWCA Civ 403; [2018] Ch 469 at [220]).

iii) In *Birdi v Price* [2018] EWHC 2934 (Ch); [2019] Bus LR 489, a trustee seized and sold certain items of equipment belonging to the bankrupt. The bankrupt alleged that the equipment did not form part of his bankruptcy estate as it fell within the exemption in s.283(2)(a) IA 1986 and issued a claim against the trustee for damages for conversion after the trustee had had his release. The trustee argued that the claim was precluded by operation of s.299(5) IA 1986. The bankrupt contended 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 in s.304(3) IA 1986 *"there is a liability notwithstanding the trustee's release and notwithstanding the terms of s.299(5)"*. HHJ Eyre QC (as he then was) held (at [98]-[99]) that this involved *"a highly artificial reading of s.299(5) and s.304(3)"* which was *"required neither by principle nor authority nor by the background to the legislation"*. He went on to observe (at [102]):

> *"There are…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."*

101. In my view, these authorities are of limited assistance because they all involved attempts by a bankrupt to pursue a claim against his/her trustee for monetary relief and therefore the references therein to s.299(5) IA 1986 *"wip[ing] the slate completely clean"*, releasing the trustee from "*everything except the matters specifically provided for in s 304"* and *"drawing a line in respect of claims"* must be read in that particular context.

102. Having regard to the principles of statutory interpretation summarised by the Supreme Court in *R (O) v Secretary of State for the Home Department* [2022] UKSC 3; [2023] AC 255 at [29]-[31] and [58]-[63], I am not persuaded that the context of s.299(5) IA 1986 requires the court to apply a wider definition of *"liability"* than the statutory definition in s.382(4) IA 1986.

103. In this regard, I can see no obvious reason why Parliament would have intended that a person who has a legitimate interest in seeking to reverse or modify a perverse or absurd act, omission or decision of a trustee should be prevented from doing so because the trustee has had their release, particularly where that release occurs very shortly after the act, omission or decision in question.

104. Ms Shekerdemian KC suggested that the Respondents' interpretation of s.299(5) IA 1986 makes logical sense because it *"marks the conclusion of the administration and the end of the trustee's functions and duties in respect of it"* at which point *"the trustee essentially locks up and walks away"*. However, this overlooks the fact that the outgoing trustee may vacate office whilst the administration of the bankruptcy is ongoing and there is a joint trustee who remains in office and/or the departing trustee is replaced by another insolvency practitioner (potentially from the same firm) to whom they *"hand the keys"*.

105. I am fortified in my view by the fact that the discharge from liability under s.299(5) IA 1986 is not unqualified and expressly does not prevent a claim pursuant to s.304 IA 1986 from being brought (with the permission of the court) against a trustee who has had their release, notwithstanding that such claim could potentially have the same adverse consequences for that trustee that I described in paragraph 99 above.

106. Ms Longstaff relied on the express exclusion of s.304 claims from the ambit of the discharge in s.299(5) IA 1986 as supporting the Respondents' case, arguing that Parliament could have been expected to include a similar express carve out for claims under s.303 IA 1986 if it had intended that they should survive the trustee's release. However, this would only have been necessary if Parliament had intended that the word *"liability"* should have the wider definition contended for by the Respondents. For the reasons set out above, I do not consider that Parliament can have so intended.

107. Ms Longstaff and Ms Shekerdemian KC also argued that if the discharge from liability under s.299(5) IA 1986 does not apply to claims under s.303 IA 1986, the provision would be rendered *"nugatory"* or *"toothless"*. However, the decisions in *Oraki* and *Birdi* (in which the court held that tortious claims against trustees were barred by s.299(5) IA 1986) demonstrate that this is not the case.

108. In the premises, if Joseph had had standing to make the s.303 Application, I do not consider that he would have been prevented from pursuing it by the Trustee's release (although I consider that the Official Receiver, who became Joseph's trustee pursuant to s.300(2) IA 1986 on Mr Hellard vacating office,

would have needed to be substituted for the Trustees as the proper respondent to that application).

## Merits

109. It is well-established that the court will only interfere with the decision of a trustee under s.303 IA 1986 if it can be shown that he has acted in bad faith or so perversely that no trustee properly advised or properly instructing himself could so have acted, alternatively if he has acted fraudulently or in a manner so unreasonable and absurd that no reasonable person would have acted in that way (*Osborne v Cole* [1999] BPIR 251 at 255, cited with approval in *Bramston v Haut* [2012] EWCA Civ 1637; [2013] 1 WLR 1720 at [69]).

110. The Respondents submit that the s.303 Application discloses no reasonable grounds for asserting that this very high test is met in relation to the Trustees' decision to enter into the Settlement and, in any event, has no real prospect of success in circumstances where: (i) Joseph's own legal team had concluded that the merits of successfully appealing the Snowden Order were *"not good"*; and (ii) before entering into the Settlement, the Trustees (who were operating under considerable time pressures, given the deadline for applying for permission to appeal the Snowden Order) invited offers from all relevant parties, took independent legal advice and consulted Joseph's creditors.

111. The various witness statements filed by Ms Mepani and Mr Posener on Joseph's behalf are not wholly clear as to the precise basis on which it is contended that the Trustee's decision is susceptible to challenge pursuant to s.303 IA 1986. In his oral submissions, Mr Eaton Turner put his case in two ways. First, he argued that it was unfair for the Trustees to enter into the Settlement because it

prevented Joseph from being able to vindicate the very serious allegations of dishonesty which he has made against Naomi, Barry and Mr Thornhill KC and therefore by deciding to enter into the settlement the Trustees acted in breach of the principle in *ex parte James* (1874) LR 9 Ch App 609. Second, he argued that there was no real commercial difference between the Ackerman Respondents' and Joseph's respective offers and therefore no reasonable trustee would have preferred the former to the latter, given its effect on Joseph's ability to vindicate those allegations.

112. In effect, Mr Eaton Turner's first argument amounts to a submission that, as a matter of principle, a trustee can never assign a claim which involves allegations of dishonesty to the defendant, even if it is in the commercial interests of the creditors to do so and irrespective of the merits of the claim. Unsurprisingly, Mr Eaton Turner was unable to find any authority for that proposition, which I do not regard as a realistic one.

113. As for Mr Eaton Turner's second argument, I do not consider that it is realistic for Joseph to contend that there was no real commercial difference between his offer (to purchase the 2015 Claim for £75,000 and then pay 50% of any net realisations) and the Ackerman Respondents' offer (to pay £300,000 to purchase the 2015 Claim and the Contribution Claim), given that the former was largely contingent on Joseph: (i) successfully appealing the Snowden Order (which his own legal team assessed as having a 25% prospect of success); (ii) successfully pursuing both the 2015 Claim (to set aside the Vos Order and the Consent Order on the grounds that they were obtained by fraud and/or collusion) and the 2011 Claim (to set aside the demerger); and then (iii) somehow obtaining some

monetary relief. Accordingly, I do not consider that there is any real prospect of the court concluding that the Trustees' decision to enter into the settlement was an unreasonable one, let alone one that was so unreasonable and absurd that no reasonable trustee could have taken it.

114. In the circumstances, I am satisfied that the s.303 Application discloses no reasonable grounds for challenging the Trustee's decision to enter into the Settlement and has no real prospects of success. Accordingly, if I had been satisfied that Joseph had standing to make the s.303 Application, I would nevertheless have struck out that application and/or granted reverse summary judgment on it.

**Disposal**

115. For the reasons set out above, I will grant the Respondents' Applications and strike out the s.303 Application.