Milne (Liquidator of Premier Housewares) Scotland) LLP) v Rashid **[2018] CSOH 23**

In the event of an insolvency, the LLP Regulations 2001 create an additional sanction for LLP members which is not applicable to companies, the so-called 'clawback' under s214A IA 1986. This provides that in a winding up of an LLP the court can order an LLP member to make a contribution to the LLP's assets if, within two years before the commencement of the winding up, that member withdrew LLP property (described in *Milne* as 'limb 1'), and it is proved to the court's satisfaction that he knew or had reasonable grounds for believing that the LLP was at the time of the withdrawal unable to pay its debts within the meaning of s123 IA 1986 or would become so unable after that withdrawal ('limb 2'). Section 214A further provides that the court may not make an order unless the member knew or ought to have concluded that after the withdrawal there was no reasonable prospect of the LLP avoiding insolvent liquidation, taking into account his actual knowledge, skill and experience and that reasonably to be expected of a person carrying out the same functions as him ('limb 3').

In *Milne*, the court was concerned with the Scottish version of s214A but the minor differences between that version and the English version were not at issue.

It was undisputed that limb 1 of the test was met, and the court also held that limb 2 was met. Section 123 deemed an LLP to be unable to pay its debts in certain circumstances, including it being unable to pay its debts as they fell due (s123(1)(e)) and its assets being less than its prospective and contingent liabilities (s123(2)). The Supreme Court in *BNY Corporate Trustee Services Ltd v Eurosail-UK 2007-3BL Plc* [2013] UKSC 28, [2013] 1 WLR 1408, had held s123(1)(e) did not mean that a business which was currently paying its debts as they fell due could not be deemed to be unable to pay its debts; that subsection was concerned not only with debts presently due, but also those due from time to time in the reasonably near future. It had also held that for the purposes of s123(2) it was not conclusive that the liabilities exceeded assets at a particular point in time; the question was whether the LLP could reasonably be expected to meet its prospective and contingent liabilities. On the basis of this interpretation, the court in *Milne* held that the respondent LLP member did not know, nor ought he to have concluded, that the LLP was unable to pay its debts as they fell due for the purposes of s123(e), but that he knew or ought to have concluded that the LLP could not reasonably be expected to meet its liabilities and therefore had reasonable grounds to believe that the LLP was unable to pay its debts for the purposes of s123(2). However, the fact that limb 2 was met did not did not mean that limb 3 was also met, and the court concluded that it was not. There was a reasonable prospect of the LLP avoiding insolvent liquidation and so the respondent could not have known, nor ought he to have concluded, that there was no such prospect. A contribution order should therefore not be made against him.

Carlton, Hartley and others v Commissions for Revenue and Customs **[2018] EWHC 130 (Admin)**

The claimants were members of several LLPs and one limited partnership which invested in commercial property in order to take advantage of business premises renovation allowances (BPRA) under the Finance Act 2005. HMRC opened enquiries into some of the partnership tax returns and then issuesd Partner Payment Notices (PPNs) to the claimants under the Accelerated Payments Notices (APN) legislation contained in the Finance Act 2014, requiring the claimants to pay the disputed tax. One of the partnerships appealed to the First Tier Tribunal (FTT) claiming that certain heads of

expenditure which had been disallowed by HMRC were in fact qualifying expenditure for the purposes of BPRA. The claimants brought judicial review proceedings to challenge the PPNs, but a decision on the four of their grounds which were common to those raised in *R (Rowe and Others) v HMRC* [2015] EWHC 2293 (Admin) was stayed pending the appeal in *Rowe*.

As to the other grounds, the High Court rejected the claimants' arguments that since the partnerships were commercial in nature and did not constitute tax avoidance the decision to use the APN legislation was unreasonable and/or an abuse of power, and that HMRC's decision to issue the PPNs was ultra vires because the statutory conditions had not been met. The court held that the statutory conditions to issue PPNs had been fulfilled. First, there was a tax enquiry in progress into the partnership return. Second, the claimants had obtained a particular tax advantage from the chosen arrangements since the partnerships' tax statements were substantially reduced by the qualifying expenditure and this resulted in a tax advantage, namely loss relief, for the partners. The court note that the legislation did not require an examination of the taxpayer's purpose. Third, for the purpose of the APN regime, those arrangements were DOTAS arrangements (meaning that the promoter was required to provide certain information about them to HMRC) because the legislation posed an objective test, of benefit and not purpose, and did not refer to tax avoidance but to whether the main benefit of the arrangements was the provision of losses to participating individuals and whether it was expected that they would use those losses to reduce their tax liability. There was no other reason to impugn the issue of the PPNs. HMRC's decision to reduce the amount claimed in the PPNs after discussing the matter with the claimants was not unreasonable but a pragmatic compromise, and the fact that HMRC accepted that the arrangement was a commercial one did not make it unreasonable for it to issue PPNs, not least because PPNs could only ever be issued in relation to part of the tax advantage gained. Finally, the claimants' argument that the capital accounts arrangements were genuine, and did not create a circular funding arrangement as HMRC alleged, would be dealt with by the FTT.

Wilsons Solicitors LLP and others v Roberts
Earlier proceedings in the Employment Appeal Tribunal were reported in A Propos Partnership Issue 45 – December 2016.

The claimant was a member of the defendant LLP until his expulsion in April 2015. He claimed compensation for detriments suffered by him as a worker as a result of making protected disclosures under the Employment Rights Act.

The Court of Appeal held that the Employment Tribunal (ET) had been wrong to strike out the claimant's claim for post-termination losses. It had correctly appreciated that the disputed facts had to be assumed to be true in his favour, and that the post-termination losses could therefore be traced back to the pre-termination detriments which he claimed to have suffered. In those circumstances his claim should not have been struck out, and the Employment Appeal Tribunal (EAT) had therefore been correct to allow the appeal from the ET. The Court of Appeal also held that the EAT had been correct to rule that the claimant was not prevented from seeking to claim post-termination losses on the ground that they were attributable to the allegedly unlawful pre-termination detriments. The lawful termination of the LLP agreement by the other members after the alleged detriments took place did not break the chain of causation. Finally, the Court of Appeal rejected the LLP's argument that held that the decision of the EAT was inconsistent with the decision of the Court in *Western Excavating v Sharp*, holding that this was an incorrect reading of the EAT's judgment.

***Vaines v Commissioners for HMRC* [2018] EWCA Civ 45**
Earlier proceedings in the Upper Tribunal were reported in A Propos Partnership Issue 44 – July 2016.

Vaines was a partner in an LLP. He had previously worked for a partnership which had ceased to trade owing considerable sums to a bank, and he agreed to pay the bank a sum to release him from all claims. He then sought to deduct that sum for tax purposes. HMRC rejected his claim, and although the First Tier Tax Tribunal upheld it, the Upper Tax Tribunal allowed HMRC's appeal and disallowed the claim.

The Court of Appeal dismissed Vaines' appeal. It agreed with the Upper Tribunal that although the trade of the LLP was, by virtue of s863 of the Income Tax (Trading and Other Income) Act 2005 (ITTOIA), to be treated as though it were carried on by the LLP members, the payment was not incurred wholly and exclusively for the purposes of the LLP's business, and s34 of ITTOIA provided that no deduction could therefore be made. Although Vaines had made the payment to preserve his professional career or trade, this did not make it expenditure which has been wholly and exclusively incurred for the purposes of the LLP's trade.

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March 2018