

Rendle (Trustee in Bankruptcy of Peter Thomas Cartwright) v Panelform Ltd [2020] EWHC 2655 (Ch)

A trustee in bankruptcy sought an order declaring that various transactions transferring the bankrupt's business and its assets to a company owned by the bankrupt's daughter constituted transactions at an undervalue entered into for the purpose of putting those assets beyond the reach of creditors of the business, within the meaning of s423 of the Insolvency Act 1986. The business had been carried on by the bankrupt either as a sole trader, or a partner in a partnership consisting of himself, his wife and their daughters.

The court held, first, that there were 'transactions' as defined in s436, including the sale of machinery, the novation of a hire purchase agreement, and arrangements enabling the company to make use of other assets of the business including its name and goodwill and to collect in the debts of the business. Second, it held that the transactions, whether considered in the aggregate or separately, were at an undervalue, because the consideration provided by the company in each case was significantly less than the value of the assets transferred to it. Third, the court concluded that the bankrupt's motive was, as required by s423(3), to put the assets of the business beyond the reach of its creditors, or to prejudice their interests by making it difficult or impossible for them to recover the assets or the value. The arrangements had been made shortly before the final hearing at which he knew he was likely to be made bankrupt, and his intention was clearly to frustrate the trustee in carrying out his duty to collect and realise the assets, or make it too difficult or expensive for him to do so. There was no evidence to support his claims that the transactions had enabled him to repay creditors, he had admitted that he had not paid his tax liabilities to HMRC, and he had not indicated any intention to pay the costs of his trustee.

The court held that the trustee had standing under s424 to seek an order under s423 regardless of whether the bankrupt had acted as a sole trader or on behalf of a partnership, because he was either the trustee of the debtor under s424(1), or the trustee of a partner who was a victim of the transactions under s424(2) (because they affected his ability to claim in its surplus assets or claim to participate in a distribution of its insolvent estate).

The court exercised its wide discretionary powers under s423 to make orders to restore the position to what it would have been had the transactions not been entered into, or protect the interests of victims of the transaction, such as creditors, by ordering that assets transferred to the company be revested in the partnership or bankruptcy estate, the company must stop carrying on the business and must transfer all its records to the trustee, the trustee had the right to recover sums due in relation to sales made by the business at any date and to dispose of stocks whenever acquired or created, and an account should be taken of any benefit derived by the company from the transactions

***Oberman v Collins and another* [2020] EWHC 3533 (Ch)**

This case involved a dispute between two parties who had a personal relationship and lived together with their children, as to the entitlement to the beneficial ownership of a number of properties. The legal ownership of some was held by both parties jointly, some by a company which they operated jointly, some by the defendant alone, and some by a company operated by him alone.

Of particular interest is the court's judgment that the parties had not been in partnership together. It noted that there was no express agreement for a partnership, there had been no discussion of matters such as the sharing of losses, mutual agency or dissolution, and there was none of the "usual" evidence of a partnership such as accounts, advertisements, agreements and other documents, bills, circulars, meeting and tax returns. The parties had a joint bank account but it was not described as a partnership account and was explicable by the fact that the parties were living together. The Court of Appeal had held in *Greville v Venables* [2007] EWCA Civ 878 that it was possible to imply the existence of a partnership from conduct, but only where the court was "able to conclude with confidence both that the parties intended to create contractual relations and that the agreement was to the effect contended for". It had also cited from *Blackpool and Fylde Aero Club Ltd v Blackpool BC* [1990] 1 WLR 1195 the statement that such agreements were "not to be lightly implied". The court concluded that in the present case the parties had chosen to organise their business relationship through a limited company, and it could not confidently conclude that they intended to create a legally binding contract which went beyond the relationship of shareholders and directors, let alone that they intended to enter into the legal relationship of partnership. (However, the claimant succeeded in proving a beneficial entitlement to a share of the properties on the alternative basis of a constructive trust based on common intention.)

The court also held that that the limited company set up by the parties was a quasi-partnership as defined in *Ebrahimi v Westbourne Galleries* [1973] AC 360: a small private company which additionally exhibited one or more of i) being formed or constituted on the basis of a personal relationship, ii) being based on an understanding of shareholder participation, and iii) restrictions on the transfer of shares so that a shareholder who was removed from management could not simply withdraw his capital and leave. Here, the company was a quasi-partnership, either from the outset because it was "highly likely" that it involved an association formed on the basis of a personal relationship of mutual confidence, or in any event from the time when the claimant became both owner of 49% of the shares, as opposed to her original holding of less than 5%, and a director of the company alongside the defendant because it was from that time clearly continued on that basis. It also involved an understanding that both parties would participate in the conduct of the business; and the defendant had not suggested that the claimant could easily sell her shares or offered to acquire them. The finding of a quasi-partnership allowed the court to impose equitable considerations equivalent to those on partners on the exercise of the rights and powers of shareholders. It held that, on the facts, the claimant had a legitimate expectation that she would be entitled to participate in the company's management and be

consulted on significant decisions; and that she had been excluded from management because the defendant had failed to supply her with information or carry out an audit, taken decisions without her approval, caused the company to incur improper liabilities to a company which he owned and operated, transferred company property without consulting her, and granted leases of company property to himself in breach of fiduciary duty. The court therefore ordered the defendant to purchase the claimant's shares in the company.

Ampalam v Karthiik [2020] EWHC 3407

This case also involved a dispute as to the existence of a partnership. The parties had purchased a supermarket, and the claimant had contributed towards the purchase price and worked in the business, but he was later asked to leave the premises by the defendant. The claimant alleged that there had been an oral agreement to form a partnership to buy and operate a supermarket for six months, and then sell the business and the property and share the net profits of the sale equally. The defendant argued that he had merely been trying to help out an old friend by providing him with a job.

In applying the definition of partnership in s1 of the Partnership Act 1890, of two or more persons carrying on a business in common with a view of profit, the court noted (citing *Lindley & Banks on Partnership*) that although it was able to look at subsequent conduct in order to determine what the parties had agreed, it could not use that conduct to interpret particular provisions of the agreement, since those must be construed objectively. Applying such an objective test, it found that there was an oral agreement to establish a partnership with the aim of running a supermarket together. Even if the defendant had contributed substantially more in terms of money and experience, that did not preclude a partnership agreement arising. The evidence of the parties was entirely contradictory, but on a balance of probabilities the court preferred the claimant's evidence. He had believed, as a result of his discussions with the defendant, that he was entering into a partnership, and it was in reliance on those discussions that he had transferred fund for the purchase of the property. The only realistic reason for him receiving a derisory payment for his work for the supermarket was that he was a partner. The court therefore ordered an account of the proceeds of trade and the later sale of the assets.

Elsbeth Berry
Reader in Law, Nottingham Law School,
Nottingham Trent University
January 2021