CR-2021-001548 and CR-2022-000144

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

INSOLVENCY AND COMPANIES LIST (ChD)

IN THE MATTER OF CORE VCT PLC (IN LIQUIDATION)

IN THE MATTER OF CORE VCT IV PLC (IN LIQUIDATION)

IN THE MATTER OF CORE VCT V PLC (IN LIQUIDATION)

AND IN THE MATTER OF THE INSOLVENCY ACT 1986

B E T W E E N :

1. LAURENCE PAGDEN
(as Liquidator of Core VCT IV plc and Core VCT V plc)
2~~. SIMON JAMES UNDERWOOD~~
~~(as former Liquidator of Core VCT IV plc and Core VCT V plc)~~
3. DAVID ROBERT BAXENDALE
4. STEVEN ANTHONY SHERRY
(as Joint Liquidators of Core VCT plc)

Applicants

- and -

1. MARK ROBERT FRY
2. NEIL JOHN MATHER
(as former Joint Liquidators of Core VCT plc, Core VCT IV plc, and Core VCT V plc)

Respondents

A N D B E T W E E N :

1. CORE VCT PLC (in liquidation)
2. CORE VCT IV PLC (in liquidation)
3. CORE VCT V PLC (in liquidation)

Claimants

- and –

1. SOHO SQUARE CAPITAL LLP
(formerly ESO Capital Advisors LLP and, before that, Core Capital Partners LLP)
2. Mr WALID KHALIL FAKHRY
3. STEPHEN PETER EDWARDS
4. MARK ROBERT FRY
5. NEIL JOHN MATHER
6. BEGBIES TRAYNOR (CENTRAL) LLP
7. BTG ADVISORY LLP (formerly BTG Financial Consulting LLP)
8~~. BEGBIES TRAYNOR GROUP PLC~~
11. RHONDA NICOLL

12. DAVID JOHN ALEXANDER STEEL

Defendants

SKELETON ARGUMENT OF RESPONDENTS AND 4TH TO 7TH DEFENDANTS ("THE BEGBIES DEFENDANTS") FOR APPLICATION FOR PERMISISON TO APPEAL

Empty square brackets are left in as placeholders for references to the appeal bundle. An updated skeleton with those references completed will be filed with the appeal bundle.

1. This is the application of the Begbies Defendants for permission to appeal against the decision of Thompsell J dated 10th September 2025 on a preliminary issue that the limitation of liability provisions of Clause 7 of their letters of engagement dated 5 and 6 March 2015 ("the LoEs") and Clause 13.2.3 of D6's ("Begbies") Standard Terms of Business ("the Limitation Clauses") cannot and do not limit any liability of D4 and D5 ("the Former Liquidators") to the Claimants ("Cs") in respect of their conduct as liquidators, whether to an aggregate sum of £1 million in respect of each C or at all.

2. The decision reflects the Court's finding that the company over which liquidators are appointed ("the Company") cannot as a matter of law limit the liability of those liquidators for the performance of their office. The Court's view was that this was a consequence of the statutory trust arising on liquidation. This is a novel approach and was not one which had been explored in any detail at the hearing.

Background.

3. This was the trial of a preliminary issue ordered by consent by HHJ David-White KC namely

"Whether clause 13.2.3 of the Sixth Defendant's Standard Terms of Business ("the terms") and Clause 7 of their letters of engagement dated 5 and 6 March 2015 ("the letters of engagement") limits the liability of the Fourth to Eighth Defendants ("the Begbies Defendants") and each of them to an aggregate sum of £1 million in respect of the breaches of duty alleged in paragraphs 155-158 of the Particulars of Claim (in their original form or as amended by the Amended Particulars of Claim) or any of them" (the 'Issue').

4. The claim in which the issue arises essentially relates to the alleged sale at an undervalue of the assets of Cs by the Former Liquidators who were its liquidators in a members' voluntary liquidation ("MVL"). The alleged breaches are set out in paragraphs 155 to 158A of the amended Particulars of Claim ("APoC"). [ ]

5. The case has a lengthy and complex procedural history including various stays which lasted until September 2024, followed by a further period during which, in parallel with the preliminary issue, contested applications for extensive amendments to the Particulars of Claim and various strike out/summary judgment applications were made. These were recently determined by Tom Smith KC sitting as a Deputy Judge of the High Court. [ ]. Nothing turns in relation to this application on the amendments and hence for the sake of simplicity this document refers to the APoC dated 20/10/25.

6. It is common ground that

   6.1. Begbies was retained by Cs in relation to placing them into MVL and for the Former Liquidators to act as joint liquidators.

   6.2. Begbies' retainer was subject to the LoEs and the Terms (together "the retainer").

7. Cs acknowledged in their Particulars of Claim the presence of the limitation of liability contained in the Limitation Clauses ("the liability cap") but sought to argue that it did not apply or was ineffective[1] on the basis that

7.1. it applied as a matter of construction only to "the period before the [Former Liquidators] appointment as liquidators and not in relation to their appointment as liquidators";

7.2. It was not possible as a matter of law to limit the Former Liquidators' liability for the performance of their statutory function[2] ("the legal impossibility issue") .

8. The Begbies Defendants sought the determination of the Preliminary Issue in order to resolve these questions. This was agreed and the parties liaised to agree a schedule of assumed facts and matters for the purpose of the determination of the issue [ ].

9. However, it appeared from Cs' skeleton that it wished to raise an additional issue, namely whether any limitation of liability would satisfy the reasonableness test of the Unfair Contract Terms Act 1977 ("UCTA"). This was the first time that issue had been raised, and as a result of the lateness with which that point was raised, it was not addressed in the schedule of assumed facts and matters. Consequently, it could not be dealt with as part of the Preliminary Issue (see Judgment paragraph 11 [S/1/7]).

10. Otherwise, Cs' position was that

---

[1] See APoC para 80 []
[2] Other points are made in para 80 but it does not seem they are pursued by Cs.

(i) In the relevant legislative context, any terms of the LOEs and/or the Terms (howsoever drafted) could not operate to limit or exclude liability for the Former Liquidators' conduct as appointed liquidators of the Companies; and/or

(ii) In any event, as a matter of construction (in the relevant legislative context and/or having regard to their terms) the LoEs and/or the Terms do not purport to limit or exclude liability for the Former Liquidators' conduct as appointed liquidators.

11. The Court determined the legal impossibility issue against the Begbies Defendants i.e. it determined that the Former Liquidators' liability could not as a matter of law be limited. In essence it determined the issues of construction in the Begbies Defendants' favour holding that in principle the services provide under the LoEs extended to the post appointment period and to the acts of the Former Liquidators and principle could extend to vicarious liability, but the precise scope of the determination on construction has not yet been resolved[3].

12. The Begbies Defendants seek permission to appeal against the order of today's date in respect of the legal impossibility issue. Draft grounds of appeal are attached herewith.

The test

13. The test for the granting of permission to appeal is set out in CPR 52.6

"(1) Except where rule 52.7 or rule 52.7A applies, permission to appeal may be given only where—

[3] In view of its decision on the legal impossibility issue the Court declined to determine the points of construction as regards the liability of the Former Liquidators themselves.

(a) the court considers that the appeal would have a real prospect of success; or

(b) there is some other compelling reason for the appeal to be heard."

14. The Begbies Defendants say that

14.1. there is a real prospect of the appellate Court coming to a different view from this Court as to the question of whether the statutory trust precludes the possibility of a liquidator's liability being limited; and

14.2. in any event this is an issue of real and general importance and it is desirable for the issue to be considered by the Court of Appeal.

Real Prospect of Success

15. The central thrust of the Begbies Defendants' case was that there was no rule of law preventing the Company from contracting to limit the liability of a liquidator (certainly in an MVL) for the following reasons.

16. A liquidator is appointed by the Company

16.1. It is the Company which resolves that it be wound up (S.84(1(b) IA86)

16.2. S. 91(1) IA86, "In a members' voluntary winding up, the company in general meeting shall appoint one or more liquidators for the purpose of winding up the company's affairs and distributing its assets.".

16.3. The fact that shareholders vote at a meeting of the Company does not mean that the shareholders themselves are appointing the liquidator any more than they are when they appoint a director.

17. It is accepted that the position of liquidator in MVL is an office created by statute (IA86).

However, the duties of a liquidator with the alleged breach of which this case is concerned arise under the general law and not under statute.

18. It is trite law that s.212 IA86 gives rise to no new cause of action but merely provides a convenient procedure for enforcing a claim which would otherwise be brought by the Company. -see e.g. *Re Eurocircuit Europe Ltd (In Liquidation)* [2007] EWHC 1433 (Ch); [2007] 2 B.C.L.C. 598 at para 24

"In my judgment, Mr Wilson's submissions on this point do not pay sufficient regard to the significance of the fact, made clear by the authorities, that section 212 is procedural in nature. The true significance of that fact is that the section merely provides an alternative means, in terms of procedure, of enabling the company, to which the defaulting director's duty was owed, to obtain recompense from that director for his breach of duty. If the liquidator chooses to name himself as the formal claimant in lieu of the company, his claim is by application, or (as appropriate) originating application, in the liquidation rather than by a claim form under CPR Part 7. ….In each case, however, the claimant is in substance the company; the relief which is granted under section 212(3) is for the repayment, restoration or accounting (to the company) of the money or property of the company or for a contribution to be made "to the company's assets by way of compensation" for the wrong in question. This is so whether the claim is brought by the company or by the liquidator or, for that matter, by a creditor or a contributory."

19. The claims against the Former Liquidators under s.212 are not separately pleaded from those against them under the Part 7 claim. The latter allege against them breach of fiduciary, tortious, and contractual duties and not of any statutory duty .

20. The members of Cs like all shareholders have agreed to participate in the company in question on the basis that its affairs will be managed by its directors. There is therefore no reason why they should not be bound by (in the sense that the return on their

investment will be subject to) decisions of and contracts entered into by the directors.

21. Equally, the duties which Begbies Defendants are alleged to have breached were all owed to Cs:

    21.1. No duty to shareholders as such is alleged to have existed or been broken;

    21.2. Indeed, a liquidator does not generally owe duties to creditors/members but to the Company just as a director owes duties to the members O*ldham & Ors v Kyrris & Anor* [2003] EWCA Civ 1506 especially at paragraph 163

    "163. In my judgment, to the extent that in *A & J Fabrications* Jacob J left open the question whether a liquidator owes a general tortious duty of care to creditors, the decision of this court in Peskin v Anderson (decided after Jacob J's decision) is decisive of that question.";

    21.3. Equally whilst a statutory trust arises in liquidation, the members do not acquire any beneficial interest in the Company's assets .

22. The issue for the Court was not whether it is possible to exclude a statutory liability or to contract out of a statute as such, but whether it is possible for the Liquidators in a MVL to limit liability for (alleged) breaches of duties owed to the Company over which they are appointed arising under the general law in respect of the performance of their office.

23. Given that the Company is the party in whom claims are vested, it is for the Company to decide whether to pursue those claims and whether to compromise them. It should therefore be able equally to limit liability in advance as well as after the event.

24. There does not appear to be any general principle even that duties arising under a statute

cannot be excluded- cf the well-known doctrine that a party cannot exclude liability for his own fraud . In fact, the general rule is that liability for such duties can be excluded by contract- See *Bennion* para 7.6

"Cases where waiver and contracting out allowed: rights and obligations of private parties

As a general rule, a person for whose sole benefit a statutory requirement is imposed may waive that requirement. This is, however, subject to any contrary legislative intention. In determining the legislative intention, public policy considerations and the public interest are likely to be particularly relevant.

In *Kammins v Zenith Investments (Torquay) Ltd* Lord Diplock laid down the following principle:

' . . . where in any Act which merely regulates the rights and obligations of private parties inter se requirements to be complied with by one of those parties are imposed for the sole benefit of the other party it would be inconsistent with their purpose if the party intended to be benefited were not entitled to dispense with the other party's compliance in circumstances where it was in his own interest to do so.

Upon the purposive approach to statutory construction this is the reason why in a statute of this character a procedural requirement imposed for the benefit of protection of one party alone is construed as subject to the implied exception that it can be 'waived' by the party for whose benefit it is imposed even though the statute states the requirement in unqualified and unequivocal words. In this context 'waived' means that the party has chosen not to rely upon the non-compliance of the other party with the requirement, or has disentitled himself from relying upon it either by agreeing with the other party not to do so or because he has so conducted himself that it would not be fair to allow him to rely upon the non-compliance."

24.1. It was for example possible, prior to any legislative intervention, to exclude all statutory implied terms in a contract of sale of goods (se e.g. *L'Estrange v F. Graucob, Limite*d [1934] 2 K.B. 394.

24.2. Specific statutory provisions do of course exist which have the effect of preventing parties from contracting out of particular statutory duties e.g. Ss.6 and 7 of UCTA.

25. Further, the fact that a duty (in the sense of a task) is imposed in respect of a statutory office does not appear in itself to give rise to any reason why liability for breach of duty (such as a duty of care) in the performance of that task cannot be excluded, still less limited in amount. It is noteworthy that that was the case for Company directors and auditors prior to the intervention of Parliament in the Companies Act 1929.

26. Moreover, this was the case notwithstanding that in liquidation the liquidators had a power to issue against directors and auditors a summons for misfeasance i.e. the power which is now set out in s.212 IA1986 -see *Re City Equitable Fire Insurance Company* [1925] Ch 407 see

515 per Pollock MR

"I do not agree with the argument that that article is ultra vires. It does not, in my opinion, offend at all against s. 113 in the sense that it is a contradiction of it. Sect. 113 in laying statutory duties upon the auditors calls on them to exercise those duties, according to the best of their information and the explanations given to them and as shown in the books of the company. Once you have any duty to be performed according to the information given, and explanations offered, you obviously have introduced matters in which discretion is to have play, and it seems to me that the article may quite properly be valid in the sense that it is to discharge the auditor from what may be called technical errors, defaults for which he may be held liable in law, but which he may unconsciously have committed."

525-6 Per Warrington LJ:

” But then it is said that [the article] is contrary to the provisions of s. 113 and s. 215 of the Companies (Consolidation) Act, 1908. With all respect I cannot agree. Sect. 113 does not lay down any rule at all as to the amount of care, or skill, or investigation, or anything of that kind, which is to be brought to bear by the auditors in performing the duties which are imposed upon them. All that the section imposes upon the auditors is the duty of making a report to the shareholders upon the accounts which they examine, ….. and to state in their report ….whether, in their opinion, the balance sheet referred to in the report is properly drawn up so as to exhibit a true and correct view of the state of the company's affairs, according to the best of their information and explanations given to them and as shown by the books of the company. It says nothing as to what they are to do in order to form that opinion, or to ascertain the truth of the facts to which they are to certify. That is left to be determined by the general rules which, in point of law, are held to govern the duties of the auditors, whether those rules are to be derived from the ordinary law, or from the terms under which the auditors are to be employed. Art. 150, therefore, in no way conflicts with s. 113 of the Act.

Then with regard to s. 215, if I am right in what I have already said, it is quite plain that nothing is referred to in that section as a misfeasance, except an act or default which would, having regard to the relations between the auditors and the company, be a misfeasance or a breach of trust, causing a loss to the assets of the company, and if therefore there is some act or omission on the part of the auditors which, having regard to the provisions of art. 150 in the present case, or to a similar article in any other case, does not give rise to any liability to the company, then in my opinion it gives rise to no liability under s. 215….It seems to me, therefore, that art. 150 has such effect as, according to its true construction, it ought to have on the obligations and liabilities of the auditors..”

528 per Sargant LJ

"We have therefore to consider whether if the company here had brought an action against the auditors for neglect or default the defendants would have been entitled to avail themselves of the protection given to them by the article in question. I can see no reason why they should not do so. The article does not limit the nature or extent of the auditor's duties under s. 113. It is in no way contrary to the scheme of the Act, and such cases as *In re Peveril Gold Mines, Ld.* (1) and *Payne v. The Cork Co*. (2) seem to me to have no application whatever to this case. The article merely operates to limit the liability of the

officers of the company by relieving them from the consequences of certain kinds of neglect or default. It might as well be said that a clause of this kind in trust deeds should be inoperative, because it would tend to induce trustees to be negligent of the interests of their cestuis que trust. The truth is that such restrictions on liability may, and I think often do, operate to protect rather than harm beneficiaries, because they prevent honest and responsible persons from being frightened away from accepting an office which might otherwise involve them in various unmerited and unexpected losses notwithstanding perfect honesty on their part."

27. Significantly

27.1. CA 2006 s.232 provides that

> "Any provision that purports to exempt a director of a company (to any extent) from any liability that would otherwise attach to him in connection with any negligence, default, breach of duty or breach of trust in relation to the company is void;

27.2. CA 2006 s. 532 stipulates that any provision

> "(a) For exempting an auditor of a company (to any extent) from any liability that would otherwise attach to him in connection with any negligence, default, breach of duty or breach of trust in relation to the company occurring in the course of the audit of accounts
> … is void, except as permitted by
> …(b) sections 534 to 536 (liability limitation agreements)".

28. Parliament clearly knows well how to legislate to prevent any exclusions or limitations of liability by statutory officeholders but has made no such provision in the case of liquidators.

29. The assertion by Cs that any attempt to limit or exclude liability on the part of the Liquidators would be to oust the jurisdiction of the Court or alter the legislative scheme,

or be contrary to the intention of Parliament is misconceived.

29.1. Parliament has not in fact passed any legislation so as to impose any relevant specific statutory duty (in the sense of legal duty rather than task) on liquidators. If there were any such duty then it would be a matter of statutory interpretation as to whether it could be waived.

29.2. The existence of the s.212 gateway provision is a specific statutory jurisdiction as a conduit for ordinary claims at general law to be brought summarily. There is no ouster of any jurisdiction of the Court.

29.3. As the Court of Appeal held in *Re City Equitable Fire Insurance Company*, the fact that a statute provides that a person is to do something does not mean that the statute has provided that they must be liable for any want of care in doing so.

29.4. If the Court were to hold that liability for breach of duties imposed by the general law were excluded by the Insolvency Act 1986 then this would amount to simply inventing a statutory provision.

30. In summary the Begbies Defendants' case was that

30.1. The liquidator like a director is an agent of the company and owes their duties to the Company;

30.2. to say that the Company cannot limit liability for breach of duty by a liquidator was tantamount to saying that those duties were not owed to the Company;

30.3. there is no general principle that the provisions of a statute or rights granted under a statute cannot be waived or varied, and there is nothing about the provisions of the Insolvency Act 1986 or its predecessor legislation which gives rise to an inference that rights and obligations under or in relation to the statutory trust

created by that legislation may not be limited.

The Decision

31. The Court appeared to think that the answer to this point was that as a result of the statutory trust the duties of a liquidator were in fact not owed to the Company or not only to the Company and therefore those duties could not be modified by the Company, nor could liability for breach of those duties be limited by the Company[4].

32. The Court's reasoning on this point was mainly set out in the following passages in the judgment:

"68. Whilst this case [*Knowles v. Scott* [1891] 1 Ch. 717] remains good authority for the proposition for which Jonathan Parker LJ was relying upon it (that a liquidator is not a trustee for the creditors or contributories of the company in liquidation), it now needs to be read in the context of the statutory trust found in *Ayerst*. I do not think that it remains good authority for the proposition that the liquidator's role is best seen as that of an agent for the company (as would be the case for an administrator): the liquidator now must be seen as being a fiduciary holding assets on a trust to be administered according to statute, and not giving any beneficial ownership right to creditors, to contributories or indeed to the company itself.

69. Mr Deacock ended his survey of these cases with the submission that "To say that the company could not waive a right is tantamount to saying that the duty is not really owed to the company". But that is exactly what *Ayerst* tells us. The duties of a liquidator arising out of the statutory trust are not duties owed to a company. They are the obligations of a fiduciary to carry out the purposes of the statutory trust. They therefore cannot be waived by the company, either acting through its directors or even through its body of shareholders.…

---

[4] This final conclusion is the substantive decision under appeal and is reflected in Ground 1. The remaining grounds essentially break down those parts of the Court's reasoning which led it to that conclusion.

73. Whilst the law has moved on from the proposition that a liquidator in general owes duties to the creditors or members, and City Equitable shows us that there may be a distinction between performing a statutory duty (such as that of auditors) and liability for failing to perform that duty to a particular standard, nevertheless the instinct of Maugham J [In *Re Home & Colonial Insurance Co Ltd [*1930] 1 Ch. 102] was a good one: the statutory duties of liquidators are not owed, or at least not owed purely, to the company in question, and therefore the company cannot modify the liability of liquidators for performing them negligently….

82 As regards the Claimants' point that whether a person can waive performance of a statutory requirement depends on legislative intention, having found that there is an established legislative intention to create a statutory trust, that question does not arise. It is established that that trust is a trust to fulfil the statutory purposes, not a trust of assets on behalf of particular persons. There is, therefore, no person who is able to waive performance of the statutory trust."

33. The Court's reasoning was therefore that in the light of the case of *Ayerst (Inspector of Taxes) v C. & K. (Construction) Ltd* [1976] A.C. 167 ("Ayerst")

33.1. the established authorities that a liquidator is an agent of the Company[5] and owes duties only to the Company[6] are no longer correct;

33.2. the liquidator must be regarded as a trustee or fiduciary holding assets themselves on a statutory trust[7].

33.3. That trust was incapable of being modified nor could

33.3.1. the duties arising as a result of it be modified or

[5] Ground 2.3
[6] Ground 2.1.1
[7] Ground 2.1.2 and 2.3

33.3.2. any liabilities for breach of those duties be excluded or limited[8].

34. The learned Judge was mistaken in his assumption that the statutory trust affirmed by the House of Lords in *Ayerst* require radical rethinking of the existing case law on the duties of Liquidators. The case of *Ayerst* was not considered in detail at the hearing; indeed, it was not even in the extensive authorities bundle. Cs referred to the existence of the statutory trust but merely to bolster their general argument that the liabilities for breach of duties arising out of statutory functions could not be varied. The Begbies Defendants' position was simply that the statutory trust added nothing to the Cs' argument that the duties were statutory in origin and therefore could not be varied: the duties of a liquidator were only owed to the Company, as with those of directors and auditors, and therefore the reasoning in *City Equitable* was equally applicable to a liquidator.

35. The learned Judge appears therefore not have appreciated that *Ayerst* affirmed a line of authority going back a century or so to *In re Oriental Inland Steam Co., Ex parte Scinde Railway Co.* (1874) 9 Ch.App. 557: it did not establish a novel principle and the established caselaw cited to the Court about the duties and status of liquidators was developed in full-knowledge of the statutory trust.

36. The statutory trust was well-known to the Court in *Knowles*; indeed, it was specifically addressed in the Court's reasoning, see in particular the passage at 722 -3

" No doubt in a sense and for certain purposes a liquidator may fairly enough be described as a trustee ; but he is not in my judgment, in the strict sense in which the Plaintiff must use the term to enable him to succeed in this action, a trustee. A director is not a trustee for the shareholders

[8] Ground 2.1.2 and 2.4

of the company, though he is often referred to in various cases as a trustee, and no doubt rightly enough for certain purposes. The cases to which the Plaintiff referred were *In re Oriental Inland Steam Company* (1); *Black & Go.'s Case* (2), and *In re London and Caledonian Marine Insurance Company* (3). In the first case *James,* L.J., used the expression "trust property " ; but that was with reference to the case then before the Court; and in my opinion the Judge who used that phrase was using it in order to point out that the property of the company had ceased to belong beneficially to the company after it had been wound up." (emphasis added)

37. The Court in *Knowles* plainly considered that the statutory trust was consistent with its conclusion that the liquidator was the agent of the company. Indeed its reasoning was that

    37.1. In a liquidation it is the Company which is the trustee not the liquidator;

    37.2. The liquidator was no more a trustee than a director of a (non-liquidating) company is.

38. The learned Judge's view that *Knowles* was not consistent with the statutory trust is a novel one, and is contrary to authority (including *Ayerst* itself[9]).

39. *Ayerst* does not entail that the liquidator should not be seen as agent for the Company once it is recognised that the Company remains the legal owner of the assets: it is the Company which holds the assets and the liquidator is the agent of the Company in the same way that a director is. In *Knowles* the Court's conclusion (having full regard to the statutory trust) at 723 was that

> "In my view a voluntary liquidator is more rightly described as the agent of the company [rather than as a Trustee]—an agent who has, no doubt, cast upon him by statute and otherwise special duties, amongst which may be mentioned the duty

[9] It is also inconsistent with *Oldham*

of applying the company's assets in paying creditors and distributing the surplus among the shareholders. Lord Justice James referred to this as being his true position in the case of *In re Anglo-Moravian Hungarian Junction Railway Company* (2). If this be the true position of a liquidator, and I think at any rate agency more nearly defines his true position than trusteeship, it is clear that he could not as agent be sued by a third party for negligence apart from misfeasance or personal misconduct."

40. In *Ayerst* Lord Diplock referred to *Knowles* with apparent approval (at 180E):

> "[The liquidator's] status, as was held by Romer J. in *Knowles v. Scott* [1891] 1 Ch. 717 differs from that of a trustee " in the strict sense[10]" for the individual creditors and members of the company who are entitled to share in the proceeds of realisation. He does not owe to them all the duties that a trustee in equity owes to his cestui que trust. All that was intended to be conveyed by the use of the expression " trust property " and " trust " in these and subsequent cases (of which the most recent is *Pritchard v. M. H. Builders (Wilmslow) Ltd.* [1969] 1 W.L.R. 409) was that the effect of the statute was to give to the property of a company in liquidation that essential characteristic which distinguished trust property from other property, viz., that it could not be used or disposed of by the legal owner for his own benefit, but must be used or disposed of for the benefit of other persons."

41. Indeed, the point that the liquidator is agent of the Company, like the directors, and that it is the Company not the liquidator which is a trustee has been affirmed since *Ayerst* with specific reference to that case. *In re Southern Pacific Personal Loans Ltd; Oakley Smith and another v Information Commissioner* [2014] CH 426 Richards J held after an extensive review of the authorities that

---

[10] This plainly refers back to the passage *in Knowles* quoted at paragraph 36 above which treats the liquidator as similar to a director.

"31…In taking control of the company's property, just as in dealing with it, the liquidator is not acting as principal but as agent, replacing the control formerly exercised by the board….

It is undoubtedly true that the commencement of a liquidation brings into effect a scheme as regards the company and its property which is fundamentally different from that which existed prior to its liquidation. The beneficial ownership of the assets of the company is suspended pending the implementation of the statutory scheme: see *Ayerst v C&K (Construction) Ltd* [1976] AC167. It does not, however, follow that in exercising his powers and fulfilling his duties in respect of the property of the company, the liquidator is acting as principal. As the authorities establish, he does so as agent for the company, in whose ownership the property remains vested, albeit not for the benefit of the company but in order to give effect to the statutory scheme."(emphasis added)

42. Correctly understood the decision in *Knowles*, affirmed in *Oldham,* is that since it is the Company which is Trustee for the statutory trust, and the liquidator is only agent for the Company (like a director), it follows that (like a director) the liquidator only owes duties to the Company. This is clear from the passages in *Oldham* at paragraphs 141-6 (cited at paragraphs 66 -7 of the present judgment) and paragraph 163[11].

43. The learned Judge's decision is therefore

    43.1. inconsistent with the fact that

        43.1.1. it is the Company not the liquidator who is the trustee holding property on the statutory trusts -see paragraphs 35 and 68 of his judgment[12];

        43.1.2. the liquidator is agent of the Company (see above)[13].

---

[11] Quoted at paragraph 36 of this skeleton.
[12] Ground 2.1.2 and 2.3
[13] Ground 2.3

43.2. Incorrect in its understanding of and therefore contrary to the decision of this Court in *Oldham* as to the above and particularly as to the fact that the liquidator owes duties only to the Company[14], see:

43.2.1. paragraph 68 of the judgment [ ] referring to *Knowles* and its treatment in *Oldham,* wherein the learned judge erroneously considered that *Oldham* was not affirming the position that the liquidator is agent of the Company;

43.2.2. paragraph 69 of the judgment [ ] "But, that is exactly what *Ayerst* tells us. The duties of a liquidator arising out of the statutory trust are not duties owed to a company."

43.2.3. paragraph 73 of the judgment [ ] "the statutory duties of liquidators are not owed, or at least not owed purely, to the Company in question..."

44. The learned Judge was bound by the decision in *Oldham* both as to the agency of the liquidator and the fact that the liquidator owed duties only to the Company and appears incorrectly to regard it as having been somehow invalidated by the (earlier and well-known) decision in *Ayerst*[15] and as having been about something other than the point that the officeholder's duties are only owed to the Company.

45. Further the Court's apparent conclusion that the duties of the liquidator are not owed to the Company is inconsistent with the fact that they are enforceable by the Company (as they are here in the Cs' Part 7 claim.) Although they are also enforceable by the liquidator under s.212 of the Insolvency Act 1986 (as also the case here in the Insolvency

---

[14] Ground 2.1.1. It is accepted that in exceptional circumstances duties may be owed to creditors/members but they do not arise here.

[15] Which, as stated above, actually affirmed that very reasoning.

Application), it is trite law that that section is merely a means of enforcing a claim of the Company and does not give rise to a separate claim. Indeed, the Court appears to have accepted this as the basis for rejecting the Cs' argument that any limitation of liability would amount to an ouster of the jurisdiction of the Court (see paragraphs 75-81 of the present judgment [ ]).

46. If the Company can bring a claim for breach of a liquidator's duties, that can only be because the duties are owed to it. This can easily be squared with the interests of members/creditors by reference to the fact that the Company itself is a trustee for them . The liquidator's role is effectively to manage the Company's assets on its behalf having regard to the statutory trusts on which the Company holds them. Nevertheless, given that the Company in liquidation as trustee can enforce those duties, it can still waive them, just as a trustee could do in relation to an agent employed by the trustee.

47. These points are strengthened rather than weakened by the fact that the creditors do not have a beneficial interest in the liquidating company's assets but an interest akin to beneficiaries under a will pending execution. This emphasises the point that the liquidator only owes duties to the Company; it certainly does not support the inference that the Company has no functions, duties or powers as legal owner of the assets.

48. It will be noted that the Company is not here seeking to vary the statutory trust itself in any way, merely varying the implications which might otherwise arise from or in relation to it. The learned Judge noted at paragraph 60 of his judgment [ ] the distinction drawn in the *City Equitable* case between:

"a) a clause which modifies the duties required by statute (which cannot be modified or attenuated by contract, unless the statute provides that they can be); and
b) a clause which seeks to limit liability for aspects of performance of the role (which may be possible, subject to other considerations such as UCTA)."
The Company and the Former Liquidators here are not seeking to vary the duties arising under statute/ in relation to the statutory trust itself but only limiting liability for aspects of performance of a statutory role. There is therefore no reason (subject to UCTA) why the Company cannot limit the liability of a liquidator in the performance of his duties (irrespective of whether they are characterised as duties arising under the statutory trust).

49. There are some dicta which suggest that the liquidator might owe duties to the body of creditors (or here shareholders) as a whole as well as to the Company. The view is only expressed tentatively and is in any event subject to the qualification that such a right can only be enforced by s.212 Insolvency Act 1986. If so it is difficult to see how the duty really could be owed to the general body of creditors or shareholders as such, given that s.212 is merely procedural, the fact that the same duty is owed to the Company (which is itself a trustee), and that the members/creditors may need to apply to the Court in a case where the officeholder is unwilling to apply. It seems that any recovery under s.212 at the suit of a member/creditor would be subject to the trusts and not directly payable to the members/creditors. On that basis the members/creditors may simply have a right to enforce the statutory trusts without any duty actually being owed to them. In any event this cannot avoid the problem that the Company can enforce, and therefore presumably compromise or waive such a claim; if so, why can it not limit liability in advance?

50. The Court's conclusion, that the existence of the statutory trust meant that the Company could not agree to limit any liability of the Former Liquidators for breach of their duties

in this case, is unjustified[16]:

50.1. The duties alleged to have been breached by the Former Liquidators in this case are not created by the legislation at all, they are rights which arise under the general law as a result of their office and functions;

50.2. the statutory trust is itself not an express creation but may be described as being the effect of the statutory provisions implied by the general law;

50.3. the statutory trust may be part of the context in which those duties arise but it does not follow that a liquidator's duties arise o*ut of* that trust[17];

50.4. those duties are not generally referred to as being duties arising under a statutory trust but simply as duties owed to the Company, nor has the implication (if any) that the statutory trust makes those duties unmodifiable been noted by other Courts or textbooks;

50.5. there is no general principle that the liability of a trustee is not capable of being varied. See *Lewin on Trusts* paragraph 41-131 et seq.

50.6. the fact that a trustee does not hold the beneficial interest in the trust assets does not prevent them from contracting with third parties in a way which affects those assets

50.7. there is nothing in the Insolvency legislation which limits the powers of the Company in MVL subject to the need to carry out the statutory scheme.

51. For these reasons it is submitted that the reasoning of the learned Judge was plainly erroneous and there is (to say the least) a real prospect that the appellate Court will

---

[16] Grounds 1, 2.1.2 and 2.4
[17] Cf paragraph 69 of the judgment

conclude that the statutory trust does not prevent the Company from agreeing with prospective liquidators that their liability will be limited.

Other Compelling Reason

52. This decision is potentially of wide application and has created some attention. This was recognised by the Court itself during the hearing -see Day 2 transcript page 245 line 13[18]. An article in the Times on 8th October 2025 (herewith) asserted that it was "A watershed moment for insolvency practices", and that "The ruling will prompt insolvency practitioners to revisit their engagement terms". The decision has been followed in *Cedar Securities Ltd (In Liquidation) v Phillips* [2025] EWHC 2760 (Ch) by Master Marsh (para 94)[19] and noted in *Pagden v Ridgle*y [2025] EWHC 2674 (Ch) by Foxton J.

53. Given the importance of the case to the insolvency profession, which is entitled to know whether liability may be limited, it is desirable to have the matter considered by the Court of Appeal. Given the imperfect reasoning of the learned Judge as to the implications of the statutory trust without consideration of the authorities in full, there is in addition a real danger of error arising in the lower Courts from the application of the learned Judge's dicta about the status of the liquidator. In any event that relationship between the statutory trust, the liquidator's duties and the Company merit full consideration by the Court of Appeal.

---

[18] "You know, this is going to be an important judgment that's going to be looked at by liquidators, probably auditors and lots of other people as well."
[19] It is unclear why Master Marsh thought that it did not break new ground.

Adam Deacock
Radcliffe Chambers,
Lincoln's Inn.

1st December 2025
adeacock@radcliffechambers.com