

The case held that a judge was right to strike out a claim brought by a liquidator under sections 238 and 241 of the Insolvency Act 1986, as the transactions alleged to have been made at an undervalue were not transactions entered into by the company.

Comment

An essential ingredient of any claim under section 238 is that the company itself entered into a transaction. There has to be a transaction and the transaction had to be something which the company itself had entered into. The expression “entered into” means the taking of some step or act of participation by the company.

This case is useful authority when considering the level of involvement that an insolvent company has to have in a transaction to be potentially party to a transaction at an undervalue claim under section 238 of the IA 1986.

The Facts

Mr Hosking was appointed as liquidator over two connected companies, CSM Group Limited and CSM Sheet Fed Limited (the “CSM Companies”), which owed another company, Ovenden Colbert Printers Ltd (“Ovenden”) over £1,300,000. Ovenden entered into a fee agreement with its accountant, Mr Temple, in 2003, authorising him to receive and hold any distributions from the liquidations of the CSM Companies in a client account to the order of Ovenden and to pay his fees out of such account. This arrangement was further varied in 2005.

Mr Temple made a series of payments out of the client account totalling £570,292. Mr Temple in turn made payments totalling £224,951.11 to Mr Hosking and others. Mr Hosking claimed that sums were paid to him to discharge a loan of £154,000 that he had made to Mr Temple in or around 1998/1999. However, there was no copy of the loan agreement available.

Ovenden went into administration in 2006, appointing Mr Hosking as administrator. Mr Hunt was subsequently appointed as liquidator of Ovenden. Mr Hunt contended that Mr Temple provided no consideration for the fee agreement, he was not entitled to any fees and further, payments he made to Mr Hosking constituted transactions at an undervalue.

Held

An essential part of a claim under section 238 is that the company had itself entered into the transaction. The withdrawing by Mr Temple of the funds he held in a client account did not constitute a dealing between him and Ovenden. Mr Temple was not acting as Ovenden’s agent in making such payments and although he was a trustee of the funds, a trustee in English law is not an agent for his beneficiary.

When Mr Temple paid the funds to Mr Hosking it required no further act or step by Ovenden beyond the 2003 agreement or the 2005 variation. Neither of these were said to constitute or form part of the relevant transaction and neither agreements were being challenged. It was held that payment of funds out of the client account were not transactions entered into by Ovenden and therefore could not be challenged under section 238.