RE PRIORY GARAGE (WALTHAMSTOW) LIMITED

Chancery Division

John Randall QC
(Sitting as a Deputy Judge of the High Court)

23 May 2000

Transaction at an undervalue – Preferences – Period of limitation – Whether 6 years or 12 – Limitation Act 1980, ss 8(1), 9(1) – Insolvency Act 1986, ss 238–241

On 24 March 1993 a compulsory winding-up order was made against PGW Ltd upon a petition presented on 24 January 1993. On 15 July 1999, the liquidator, A, issued proceedings pursuant to the Insolvency Act 1986, ss 238 to 241 against a former director, G, seeking to set aside as transactions at an undervalue or alternatively as unlawful preferences certain transfers on 21 December 1991 by PGW Ltd to G of leases of two flats. A's claim was also made under the same provisions for monetary relief. The proceedings having been issued more than 6 years after the accrual of the causes of action on the making of the winding up order, G wished to raise limitation defences. The registrar directed that the issue whether the claims were statute-barred or an abuse of process should be determined as preliminary issues.

Held – answering the issues in terms that the proceedings were not statute-barred nor an abuse of process –

(1) Applications to set aside transactions under ss 238–241 are generally actions on a specialty within the meaning of the Limitation Act 1980, s 8(1) and subject to a 12-year limitation period accordingly.
(2) However, where, in certain applications under ss 238–241, the substance of the claim is not to set aside a transaction but 'to recover a sum recoverable by virtue of" ss 238–241, such applications will be governed by the Limitation Act 1980, s 9(1) and subject to a 6-year limitation period accordingly.
(3) The first and primary head of relief sought was the setting aside of the two transactions and the monetary claims were ancillary thereto with the result that a 12-year limitation period was applicable to the whole claim.

Re Farmizer Products [1997] 1 BCLC 589, CA distinguished; dictum of Jules Sher QC in *Hamblin v Field* [2000] BPIR 270 not followed.

Per curiam – Where there is doubt as to whether a claim is subject to a 12-year or a 6-year limitation period, the court should look at the substance or essential nature of the relief truly sought. Given the possibility that a 6-year period might be applicable in any given case, those who allow that period to pass before issuing proceedings do so at their own risk.

Statutory provisions considered
Bankruptcy Act 1914, s 44
Local Government Act 1933, s 151
Limitation Act 1939, s 2(1)(d), 21(d)
Companies Act 1948, ss 320, 323
Leasehold Reform Act 1967
Coal Industry Act 1975, s 2(4)
Limitation Act 1980, ss 8(1), (2), 9(1), 21, 23(1)(b), (3)
Insolvency Act 1986, ss 129(2), 212, 213(3)(b), 214(2), 215(2), 240(1)(a), (3)(b), 238(1)(a), (3), 239(1), (3), 241(1), (2), (4), 247(2), 339, 342

Cases referred to in judgment

Aiken v Stewart Wrightson Members Agency Ltd [1995] 1 WLR 1281; [1995] 3 All ER 449; [1995] 2 Lloyd's Rep 618, QBD
Aylott v West Ham Corporation [1927] 1 Ch 30, CA
Birkett v James [1978] AC 297; [1977] 3 WLR 38; [1977] 2 All ER 801, HL
British Coal Corporation v Ellis Town Pipes [1994] RVR 81, CA
Central Electricity Board v Halifax Corporation [1963] AC 785; [1962] 3 WLR 1313; [1962] 3 All ER 915, HL
Collin v Duke of Westminster [1985] 1 QB 581; [1985] 2 WLR 553; [1985] 1 All ER 463, CA
Cork & Bandon Railway Co v Goode [1853] 13 CB 826
Cornwall Minerals Railway Co, In re [1897] 2 Ch 74, ChD
Farmizer Products, Re [1995] 2 BCLC 462, ChD; [1997] 1 BCLC 589, CA
Field (A Bankrupt), Re; sub nom *Hamblin v Field* [2000] BPIR 270
Gutsell v Reeve [1936] 1 KB 272, CA
Lievers v Barton Walker & Co [1943] 1 KB 385
Pratt v Cook, Son & Co (St Paul's) Ltd [1940] AC 437
Rowan Companies v Lambert Eggink Offshore Transport Consultants VOF (The Gilbert Rowe) (No 2) [1999] 2 Lloyd's Rep 443
Shepherd v Hills (1855) 11 Exch. 55
West Riding County Council v Huddersfield Corporation [1957] 1 QB 540; [1957] 2 WLR 219; [1957] 1 All ER 669

Sally Barber for the applicant.
Katherine Howells for the respondent

THE DEPUTY JUDGE: This matter raises an important, but apparently undecided, point of law: what is the limitation period which governs an application to the court made by a liquidator pursuant to ss 238 to 241 of the Insolvency Act 1986 (hereafter 'IA86')?

The point arises as follows. On or about 23 December 1991 Priory Garage (Walthamstow) Limited (hereafter 'the Company') transferred 125-year leases of two flats at 25 Recreation Ground, Stansted, Essex (hereafter 'the properties') to one of its directors, Mr Giblett, who is the respondent to these proceedings. That information appears from the answers to an insolvency questionnaire signed by the respondent himself on 20 October 1993 (see the bundle at pp 24 et seq, especially at 61).

In the questionnaire the respondents gave their approximate value as £90,000. They have since been valued for the liquidator at £104,000 (bundle, p 109). The transfers were only registered at HM Land Registry some time later, the relevant entries on the respective proprietorship registers both being dated 23 October 1992 (bundle, pp 104 and 107). In the event, nothing turns on that delay, at least for the purposes of the present application.

On 24 January 1993 a petition to wind up the company was presented to the court by Honda (UK) Limited (bundle, pp 2–4). A compulsory winding-up order was made on that petition on 24 March 1993 (bundle, p 5). Hence, for the purposes of IA86, s 240(1)(a) the onset of insolvency was 24 January 1993 (see IA86, s 240(3)(b) and s 129(2)). However, both parties are agreed that, by virtue of ss 238(1)(a), 239(1) and 247(2), the date on which it is first possible to commence such proceedings is when the company 'goes into liquidation', and that this is the date of the winding-up order (s 129(2) is directed to a different phrase, namely, 'the commencement of the winding-up').

It follows that, on the respondent's own dates, the transfers of the properties occurred well within the period of 2 years before the onset of insolvency, which period is 'the relevant time' for the purposes of a case such as this under IA86, s 240(1)(a).

The applicant, Mr Anwar, was appointed liquidator of the company by the Secretary of State with effect from 9 August 1994 (bundle, p 6). Cautions were registered against both properties by or on behalf of the liquidator on 9 December 1994 (bundle, pp 104 and 107).

Much time then elapsed before the commencement of the proceedings. However, as no point is taken in respect of abuse of process separate from the limitation point to which I must come, I need not go into the reasons for that. Presumably, it was during that long period of time that the respondent moved to British Columbia. On a 'without notice' application lodged in late May of last year, the applicant was granted leave to issue the substantive application herein for service on the respondent out of the jurisdiction by order of Mr Registrar Rawson dated 1 June 1999 (p 7 of the bundle).

The proceedings, which invoke ss 238 and 239 in the alternative, were then issued on 15 July 1999 (pp 8 and 9), supported by the second affidavit of the applicant sworn on 7 July 1999. All this was, of course, over 6 years since the making of the winding-up order on 24 March 1993.

In due course, the present proceedings came before Mr Registrar Buckley for directions on 22 October 1999. The respondent wished to take the limitation point and the registrar accordingly ordered that the issue of whether this claim is statute-barred or is an abuse of process be tried as a preliminary issue and gave ancillary directions to that end. It is the trial of that issue which is now before me. It has been conducted on the basis of a paginated bundle containing 110 pages. The only witness evidence in it is the applicant's second affidavit and the respondent has not required him to be cross-examined on it at this stage, instead simply and economically confining himself to making the point that passages within it are contentious.

It is against that somewhat bald background that the point of law I identified at the outset of this judgment arises for decision. That was: what is the limitation period which governs an application to the court made by a liquidator pursuant to ss 238 to 241 of the Insolvency Act 1986?

Somewhat surprisingly it appears, as I have been told by both counsel, not to have been the subject of any previous judicial decision. The predecessor to s 239 of IA86 under the regime of the 1948 Companies Act was s 320 of that Act which in turn brought in the provisions of s 44 of the Bankruptcy Act 1914. Consistently with s 44, s 320 simply invalidated a disposition of a company's property which was a fraudulent preference of its creditors in the event of the company being wound up within the then relevant period thereafter. There was, on the other hand, no direct equivalent of IA86, s 238 in the earlier legislation. The equivalent of IA86, ss 238 to 241 with respect to bankruptcy or personal insolvency, are IA86, ss 339 to 342. There is a brief obiter dictum in one unreported case at first instance with regard to the likely limitation position under s 339 to which I shall refer later in this judgment.

I have received skeleton arguments and oral submissions from both parties. Ultimately, it appears that the crux of the respondent's case may be found in para 6.(ii) of his skeleton argument where it is asserted that:

A 'In reality, the applicant's claim is for the payment of a sum of money.'

I shall revert to that once I have reviewed the various authorities which have been cited to me. First, however, there are a number of statutory provisions of relevance to which I must refer.

From the Insolvency Act 1986 the following, in particular, should be noted. Section 238(3) [court order]:

B

'Subject as follows, the court shall, on such an application, make such order as it thinks fit for restoring the position to what it would have been if the company had not entered into that transaction.'

Section 239(3) [court order]:

C

'Subject as follows, the court shall, on such an application, make such order as it thinks fit for restoring the position to what it would have been if the company had not given that preference.'

Section 241(1) [extent of orders]:

D 'Without prejudice to the generality of sections 238(3) and 239(3), an order under either of those sections with respect to a transaction or preference entered into or given by a company may (subject to the next subsection)—

(a) require any property transferred as part of the transaction, or in connection with the giving of the preference, to be vested in the
E company,
(b) require any property to be so vested if it represents in any person's hands the application either of the proceeds of sale of property so transferred or of money so transferred,
(c) release or discharge (in whole or in part) any security given by the company,
(d) require any person to pay, in respect of benefits received by him
F from the company, such sums to the office-holder as the court may direct,
(e) provide for any surety or guarantor whose obligations to any person were released or discharged (in whole or in part) under the transaction, or by the giving of the preference, to be under such new or revived obligations to that person as the court thinks
G appropriate,
(f) provide for security to be provided for the discharge of any obligation imposed by or arising under the order, for such an obligation to be charged on any property and for the security or charge to have the same priority as a security or charge released or discharged (in whole or in part) under the transaction or by the giving of the preference, and
H (g) provide for the extent to which any person whose property is vested by the order in the company, or on whom obligations are imposed by the order, is to be able to prove in the winding up of the company for debts or other liabilities which arose from, or

were released or discharged (in whole or in part) under or by, the transaction or the giving of the preference.' A

Section 241(2) [restriction on orders]:

'An order under section 238 or 239 may affect the property of, or impose any obligation on, any person whether or not he is the person with whom the company in question entered into the transaction or (as the case may be) the person to whom the preference was given; but such an order— B

(a) shall not prejudice any interest in property which was acquired from a person other than the company and was acquired in good faith and for value, or prejudice any interest deriving from such an interest, and
(b) shall not require a person who received a benefit from the transaction or preference in good faith and for value to pay a sum to the office-holder, except where that person was party to the transaction or the payment is to be in respect of a preference given to that person at a time when he was a creditor of the company.' C

D

Section 241(4) [application of ss 238–241]:

'The provisions of sections 238 to 241 apply without prejudice to the availability of any other remedy, even in relation to a transaction or preference which the company had no power to enter into or give.'

By contrast to the wording of those sections, and in the light of an important authority which I will have to consider in a moment, it may be helpful also to refer to the wording of s 214(1) [declaration by court, on application] where it is provided: E

'Subject to subsection (3) below, if in the course of the winding up of a company it appears that subsection (2) of this section applies in relation to a person who is or has been a director of the company, the court, on the application of the liquidator, may declare that that person is to be liable to make such contribution (if any) to the company's assets as the court thinks proper.' F

Turning to the provisions of the Limitation Act 1980, by virtue of s 8 of that Act: G

'(1) An action upon a specialty shall not be brought after the expiration of twelve years from the date on which the cause of action accrued.

'(2) Subsection (1) above shall not affect any action for which a shorter period of limitation is prescribed by any other provision of this Act.'

H

Section 9(1) of the Act provides:

A 'An action to recover any sum recoverable by virtue of any enactment shall not be brought after the expiration of six years from the date on which the cause of action accrued.'

Section 23 of the same Act provides:

B 'An action for an account shall not be brought after the expiration of any time limit under this Act which is applicable to the claim which is the basis of the duty to account.'

In addition, it may be of some relevance to note that under s 21 the general position provided for in subs (3) is qualified, relevantly for these purposes, by subs (1)(b) as follows. Section 21(1) provides:

C 'No period of limitation prescribed by this Act shall apply to an action by a beneficiary under a trust, being an action—

(a) in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy; or

(b) to recover from the trustee trust property or the proceeds of trust

D property in the possession of the trustee, or previously received by the trustee and converted to his use.'

Section 21(3) itself provides:

'Subject to the preceding provisions of this section, an action by a beneficiary to recover trust property or in respect of any breach of trust,

E not being an action for which a period of limitation is prescribed by any other provision of this Act, shall not be brought after the expiration of six years from the date on which the right of action accrued.

For the purposes of this subsection, the right of action shall not be treated as having accrued to any beneficiary entitled to a future interest in the trust property until the interest fell into possession.'

F It is common ground between the parties that a 'specialty' includes an Act of Parliament and that prima facie a statutory cause of action created by the Insolvency Act 1986 will be a speciality within the meaning of ss 8 and 9 of the Limitation Act. Authority for that, if needed, may be found in *Collin v Duke of Westminster* [1985] 1 QB 581 CA at 601–603 and in *Re Farmizer Products* [1997] 1 BCLC 589 CA at 594C–D, supplemented by a passage

G from the judgment of Blackburne J at first instance, [1995] 2 BCLC 462 at 472B–C.

Taking the other case law in order of time, first comes *West Riding County Council v Huddersfield Corporation* [1957] 1 QB 540. In this case a council brought claims for two financial adjustments in what, in 1953, were the very substantial sums of £214,516 and £44,273 under s 151 of the Local Government Act 1933. At that time the 1939 Limitation Act was in force,

H and s 21(d) of that Act provided:

'The following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say,

(d) actions to recover any sum recoverable by virtue of any enactment other than a penalty or forfeiture or sum by way of penalty or forfeiture.' A

The trial judge, Lord Goddard CJ, held that such claims were statute-barred under that provision. The headnote states the decision succinctly:

'... although s 151 of the Act of 1933 made provision for adjustments of other than a financial nature, the claims made in the present case were for specified sums of money and as such were within the ambit of s 2(1)(d) of the Limitation Act, 1939, and thereby statute barred.' B

In the course of his judgment, the Lord Chief Justice, having read s 151 of the Act said this (picking up on p 544):

'There follow several provisions for the payment of moneys found due by the arbitrator. I have no doubt that there are matters which may not involve the payment of money. It may be that some functions can be transferred without having to make financial provision with regard to them; but it is quite obvious to me from the whole of the section, including the following subsections, that the statute clearly is contemplating that in most cases at any rate there will be payments of money. C D

What has happened in this case is simply this. On 29 January 1953, the treasurer of the West Riding County Council wrote to the town clerk of the Huddersfield Borough Council as follows: "I enclose the claim, with supporting financial tables, of the county council against the corporation of the city ... in respect of the areas added ... on 1 April 1937, under the provisions of the above-named Review Order. The claim is marked 'without prejudice and subject to revision', and if any of the items are not quite clear to you, I shall be pleased to explain them if we can arrange an appointment. The question of orders for continuing county expenditure remains to be considered." That was sending in a money claim – there is no question about that – for £214,516, and it was followed by another letter submitting a claim for £44,273. These letters were accompanied by most elaborate and lengthy accounts and figures showing how these amounts were made up. It seems to me that one would be shutting one's eyes to the truth of the matter if one did not regard this as being simply a claim by the West Riding County Council on the Huddersfield Borough County Council for roughly £260,000: and that is what it was, taking the two claims together.' E F

At p 546 at the end of his judgment, the Lord Chief Justice concluded thus: G

'In my opinion this is really, when the realities of the transaction are looked at and documents to which I have been referred are considered, simply an action to recover a sum of money by virtue of the provisions of s 151 of the Local Government Act, 1933. Therefore, in my judgment the answer to the arbitrator's question is that the claim is barred by statute, and I so declare.' H

A This is the source of what I shall call the 'look and see' approach which has subsequently been approved and applied by the Court of Appeal in the *Farmizer* case to which I must revert shortly.

In *Collin v Duke of Westminster* [1985] 1 QB 581, the case concerned leasehold enfranchisement under the Leasehold Reform Act 1967. The enfranchising tenant was guilty of substantial delay and in due course it was argued, unsuccessfully in the event, that he had lost his right to B enfranchisement by abandonment. An argument was also advanced that the tenant's claim to enfranchisement under the 1967 Act was statute-barred. Oliver LJ, who in effect gave the judgment of the court, said this at 601H to 602F:

> 'The obvious and most common case of an action upon a specialty is an C action based on a contract under seal, but it is clear that "specialty" was not originally confined to such contracts but extended also to obligations imposed by statute. Under the Statute of Limitations of 1623 (21 Jac 1, c 16) no limit was prescribed for actions on a specialty and it was not until the Civil Procedure Act of 1833 (3 & 4 Will 4, c 42) that a time-limit of 20 years was introduced for actions of debt "upon any bond or other specialty": section 3. There was no statutory definition of a specialty but it D was established in *Cork & Bandon Railway Co v Goode* (1853) 13 CB 826 that (to adopt the words of Lord Hanworth MR in *Aylott v West Ham Corporation* [1927] 1 Ch 30, 50):
>
> > "where a plaintiff relies and has to rely upon the terms of a statute so that his claim is under the statute the nature of the claim is one of specialty and the 20 years applies."
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> E *Goode*'s case, 13 CB 826 was an action for calls and a similar principle was applied to an action for interest on debenture stock (*In re Cornwall Minerals Railway Co* [1897] 2 Ch 74) and to an action for recovery of rates and duties imposed by statute: *Shepherd v Hills* (1855) 11 Exch 55. A distinction, however, was drawn between the case where all that the statute did was to make binding a contract which otherwise would not be F binding or to vary one term of a contract (see *Aylott*'s case [1927] 1 Ch 30 and *Gutsell v Reeve* [1936] 1 KB 272) and the case where the action rested on the statute and only on the statute: see, for instance, *Pratt v Cook, Son & Co (St. Paul's) Ltd.* [1940] AC 437. Broadly the test is whether any cause of action exists apart from the statute: per Lord Atkin at p 446.
>
> G It seems to me to be quite clear that in the instant case any cause of action which the applicant has derived from the statute and from the statute alone. Apart from the statutory provisions he could have no claim and it is only by virtue of the statute and the regulations made thereunder that there can be ascertained the amount of the price to be paid under the statutory contract the terms of which can be gathered only from the sections of the Act and the Schedules. Subject, therefore, to one question, H namely whether the word "specialty" as used in the Limitation Act 1939 and the Act of 1980 has assumed a more limited meaning than it originally bore,
>
> I have no doubt at all that the applicant's claim is a claim on a specialty.'

Thirdly, during the course of argument reference via a text book was made to the decision of the Court of Appeal in *British Coal Corporation v Ellis Town Pipes* [1994] *Rating & Valuation Reporter* 81. The case has helpfully been brought to court and I have been briefly addressed on it. The source of the reference was a passage in *McGee on Limitation Periods* 1998 Edition, appearing at pp 180–182 of that work, and in particular paras 11.003(f) and 11.005, the second paragraph within that number. The case is a complex one but for our purposes there is but one point in it which is worthy of note. At p 84 in the judgment of Ralph Gibson LJ, which again is the judgment of the court in that case, the terms of s 2(4) of the Coal Industry Act 1975 are set out. It provides:

> '(4) Subject to the provisions of Schedule 1 to this Act, where damage to any land arises from the exercise of the right to withdraw support conferred on the Board by this section, the Board shall either—
>
> (a) pay proper compensation for the damage, or
> (b) with the consent (which shall not be unreasonably withheld of the person who would otherwise be entitled to the payment of compensation for the damage, make good the damage to the reasonable satisfaction of that person and without expense to him;
>
> and the obligation imposed on the Board by this subsection shall extend to damage to buildings and works on that land, whenever constructed.'

At p 90 at the foot of the left-hand column, having considered arguments as to the applicability of either a 6 or 12-year limitation period to causes of action relating, on the one hand, to a claim for compensation under s 24(a), and on the other hand to a claim for property to be made good under s 24(b) of the same Act, the learned Lord Justice said this:

> 'For my part, I am reluctant to attribute to parliament the intention to create in one section of the 1975 Act obligations upon BCC in respect of which two limitation periods are applicable.
>
> 'I would hold that s 2(4) of the 1975 Act creates one obligation, namely, to pay proper compensation for damage to land with the right in BCC at its election to make good the damage. That alternative is available only with the consent of the person entitled to payment of the compensation and no question of making good with such consent arises unless BCC asks for that consent. In this case the tribunal made no finding of fact with reference to election by BCC or the asking or giving of consent. The claimant sought no such findings and did not seek an order for remission of the case for amendment with reference thereto ... The period of limitation applicable to the claimant's claim was, in my judgment, six years preceding the making of the 1986 reference.'

I should add, without the need to cite passages from the judgment, that having found for the shorter limitation period, the Court of Appeal then held that the relevant claim was nevertheless not statute-barred.

The case on which argument has primarily turned is that of *Re Farmizer (Products) Ltd, Moore and Another v Gadd and Another*, the citations for which both at first instance and in the Court of Appeal, I have already given.

A The case arose by way of a claim pursuant to s 214 of the Insolvency Act which was initially commenced about four and a half years after the commencement of the creditors' voluntary winding-up. However, there was inordinate and inexcusable delay in its prosecution. The defendants applied to dismiss for want of prosecution and thus, in order to apply the well-known principles in *Birkett v James* [1978] AC 297 the judge had to consider whether, by the time of the hearing before him, the limitation period for the B commencement of fresh proceedings had expired. By then more than 6, but less than 12 years, had expired.

At p 470I through to p 471A, Blackburne J records the three submissions made to him on the liquidators' behalf in the following terms:

> 'Mr de Lacy for the liquidators submitted that no limitation period is C applicable to claims under s 214, alternatively that a claim under s 214 is an action on a speciality to which s 8(1) of the 1980 Act applies, which provides for a 12-year limitation period which, on any view, has not yet expired, and, in the further alternative that, if s 9(1) of the 1980 Act is the applicable provision, the six year period prescribed by that section only began to run when these very proceedings were commenced, ie 13 April 1992, with the consequence that the 6-year period still has just under D 3 years to run.'

In the event, all three submissions failed. In the course of rejecting the first and second of them, Blackburne J said this at 471F–G:

> 'I am quite unable to agree with Mr de Lacey's submissions on this point. E In my view, it is clear that the facts that a liquidator must prove to establish a claim for wrongful trading are those set out in subsection (2) of s 214 and no others. The statutory cause of action created by the section accrues on the occurrence of the latest of the matters to which the subsection referred. That is self-evidently when the company in question goes into insolvent liquidation.'

F In the Court of Appeal the judgment of Blackburne J. on the limitation issues and indeed generally was upheld. The judgment of Peter Gibson LJ was in effect the judgment of the court. It contains extensive citations from the judgment of Blackburne J. In addition, Peter Gibson LJ said this, firstly from 596I–597A:

> 'In the light of these considerations, I reach the clear conclusion that the G judge was right to reject the liquidators' contention that the 1980 Act did not apply. The words "in the course of the winding up of the company" make clear that the court's jurisdiction to make an order under the section is limited to the period whilst the company is being wound up. I would give them no more significance than that.
>
> Before I leave this point I must deal with an alternative argument of H Mr Oliver, that the cause of action under s 214 was not properly constituted unless and until it appears that subsection 2 of this section applies.'

Further down that page at 597F through to 598D, the judge said:

'Mr Davis submitted that the whole substance of a claim under s 214 is to recover money and that this was supported by the language of s 214 and its ancillary provisions in s 215. He further submitted that in any event the claim made by the liquidator against Mr and Mrs Gadd was to recover money, namely, at least £1.25 million. Accordingly, s 9 was, he contended, satisfied.

On this point I start with the question what is recoverable under s 214. The word 'contribution' if taken in isolation could be either monetary or in kind, particularly when conjoined with "to the company's assets" which themselves may or may not be monetary. It is common ground that "contribution" in s 214 must have the same meaning as in s 213. One notes that in s 213(3)(b) "contribute" is used together with "such sum", but that is in contrast with subs (3)(a) where the words "repay, restore or account for the money or property" are to be found. However, as Mr Davis pointed out, the verb "contribute" has in and since the 1862 Act always been used in s 212 and its predecessors only in relation to money. The basis of the claim under s 214 is that it is to compensate for loss caused to the creditors of the company through wrongful trading and one notes that this is expressly recognised in s 214(2) in the reference to 'the potential loss to the company's creditors'. Further in s 215(2) of the 1986 Act it is provided that where under either s 213 or s 214 the court makes a declaration it may give further directions as it thinks proper for giving effect to the declaration, and in particular it may "provide for the liability of any person under the declaration to be a charge on any debt or obligation due from the company to him". That provision plainly contemplates that the liability under the declaration is a liability that can be made the subject of a charge on a debt or obligation, and that can only be a liability to pay a monetary sum. Mr Oliver sought to find in s 215(4) of the 1986 Act an indication that what could be recovered under s 213 or s 214 need not be a sum of money. Subsection (4) provides:

> "Where the court makes a declaration under either section in relation to a person who is a creditor of the company, it may direct that the whole or any part of any debt owed by the company to that person and any interest thereon shall rank in priority after all other debts owed by the company ..."

But that power is only exercisable when the court makes a declaration as to liability to make a contribution. I do not accept Mr Oliver's suggestion that it contemplates the court first making a declaration that the delinquent is to be liable to make no contribution so that the substantive relief is that subordination which subsection (4) allows. I conclude from this examination of the statutory provisions that the liability to make a contribution under s 213 or s 214 is in respect of a sum of money.'

At p 599 between letters A and G, the judge stated:

'I therefore conclude that s 214 (no less than s 213) proceedings are for the recovery of a sum of money which the court declares the delinquent respondent liable to contribute to the assets of the company. This does not of course preclude the liquidator accepting property other than money to satisfy that liability.

A Does the fact that the court has a discretion whether to make a declaration at all, even if it appears to the court that s 214(2) applies, and as to the amount of the contribution, if any, cause the claim made not to be an action to recover any sum recoverable by virtue of any enactment? I do not think so. If one asks, 'By virtue of what is the sum of £1.25m recoverable?', the answer would surely be: 'By virtue of s 214'. It is of course only capable of being recovered if the court chooses to make the B declaration after the statutory conditions are shown to be satisfied, but I have no difficulty in holding that s 9 of the 1980 Act applies to such a case. Mr Oliver accepted that the recoverable sum under the section could be damages. That the court with jurisdiction to award the recoverable sum has a discretion was not a matter which deterred Lord Goddard CJ in *West Riding County Council v Huddersfield Corporation* [1957] 1 All ER 669, C [1957] 1 QB 540, when he held that for the purposes of the predecessor to s 9(1), proceedings for an order for financial adjustment under s 151 of the Local Government Act 1933 were an action for the recovery of any sum recoverable by virtue of any enactment.

I therefore agree with the judge's conclusion that s 9(1) is the applicable provision of the 1980 Act.

For the sake of completeness I add that I also accept Mr Davis's D alternative submission that even if the contribution, liability for which the court can declare under s 214, could be other than in a sum of money, nevertheless the claim made by the liquidators against Mr and Mrs Gadd comes within s 9(1). The decision in the *West Riding* case supports the view that when the statutory provision relied on for the recovery of a sum enables the court to make an order either to give monetary relief or relief in some other non-monetary form, one should look to what was actually E being claimed in the proceedings. An argument that the section would not be satisfied if the relief given need not sound in money was not accepted, Lord Goddard CJ looking to what had actually been sought. In the present case, although the summons by which the s 214 claim was made did not specify a sum for the claimed contribution, it is clear from the liquidator's affidavit in support of the summons that they were seeking to recover a F sum of money. Accordingly s 9(1) is satisfied on this basis too.'

It is quite clear, in my judgment, that the decisions both of Blackburne J and of the Court of Appeal were closely dependent on the words of s 214 which are materially different from those of ss 238-241.

In *Rowan Companies v Lambert Eggink Offshore Transport Consultants VOF (The Gilbert Rowe) (No 2)* [1999] 2 Lloyd's Rep 443, David Steel J G had before him a contested application for leave to join certain parties to the action which had been remitted to the Admiralty judge at a previous hearing before the Court of Appeal. A summary of the position may be found in the judgment of David Steel J at 446 in the right hand column to 447 in the left hand column. The application was made more than 6 years after the accrual of the relevant cause of action. At p 447, in the right hand column, H immediately after having set out the words of ss 8 and 9(1) of the Limitation Act, the judge said this:

'It was common ground that the claim was 'upon a speciality' in the sense it was under a statute: *Collin v Duke of Westminster* [1985] 1 QB 581.

Thus, it was the case for Rowan that the applicable period was 12 years under s 8(1). The partners' submission was the applicable period was 6 years under s 9(1), the action being within the exception furnished by s 8(2). The resolution of this dispute accordingly centred on the meaning of the word "sum" in s 9(1). Rowan contended that this word was not apt to encompass a claim for unliquidated damages. I am unable to accept that submission.

As a matter of first impression: (1) The word "sum" in its ordinary and natural meaning means any sum of money; (2) there is no express restriction of the scope of the section to claims for liquidated sums of money, ie debts; (3) the relevant distinction would seem to be between claims under an enactment for non-monetary relief and those claims under an enactment for monetary relief whether in a form of debt, damages, compensation or otherwise.

This first impression is fortified, in my judgment, by the authorities. (1) It is clear that actions on a speciality are not confined to claims for liquidated sums: *Pratt v Cook, Son & Co* [1940] AC 437 (quantum meruit), *Lievers v Barton Walker & Co* [1943] 1 KB 385 (workmen's compensation), *Aiken v Stewart Wrightson Members Agency Ltd* [1995] 2 Lloyd's Rep 618; [1995] 1 WLR 1281 (damages). (2) The scheme of the Act is to impose a 6-year limitation period on claims for money under an enactment thus constituting an exception to the general rule as regards specialities: *West Riding County Council v Huddersfield Corporation* [1957] 1 QB 540, *Central Electricity Board v Halifax Corporation* [1963] AC 785, *Re Farmizer (Products) Ltd*, [1997] BCC 655.

I conclude that the claim against the partners is now time-barred by virtue of s 9.'

The applicant seeks particularly to rely on the third enumerated 'matter of first impression' set out in that passage of the judgment.

In *Re Field (A Bankrupt)* decided in July 1999 by Mr Jules Sher QC sitting as a deputy judge of the High Court (reported sub nom *Hamblin v Field* [2000] BPIR 270), the case was again an application for dismissal for want of prosecution in which the question of limitation arose in the context of the principles in *Birkett v James*. The substantive claim was brought under IA86, s 399. Mr Sher QC upheld the decision of District Judge Marsh in the Birmingham County Court, albeit on rather different grounds.

Having cited the dates concerned, on the first page of the transcript at lines 15–18 he said:

'By any standards we are dealing with a pretty stale claim.'

This was a matter relied on in submissions on behalf of the respondent. At p 5, having identified the relevant principle in *Birkett v James* between lines 16 and 24, the learned deputy judge said this:

'There is no authority whether the Limitation Act 1980 applies to claims under s 339 of the Insolvency Act 1986. If it does, the period is much more likely to be the 6-year period under s 9(1) of the Limitation Act 1980 than the 12-year period under s 8(1) of that Act. See *Re Farmizer Products Ltd* [1997] BCC 655. Whether it does or not may depend upon

A the precise nature of the relief sought. See Muir Hunter, *Personal Insolvency*, at 3.296. On any view, it seems if the application was struck out, the trustee could start again unless the period of limitation was 6 years and ran from the date of the impugned transaction rather than, as appears to me to be the case, from the date of the bankruptcy.'

B I note that in the event the learned deputy judge's observations were limited as to the *likelihood* of which of the two limitation periods would apply to s 339 as, for the reasons that appear in the remainder of the judgment immediately after the passage I have cited, he concluded that the action could properly be struck out without coming to a firm view one way or the other on the limitation point.

I have also been referred on behalf of the respondent to a short extract C from the report of Sir Kenneth Cork's Review Committee on Insolvency Law and Practice of June 1982, in particular the section from paras 1278 to 1282. Within para 1282 the report states this, and this is to be read in the context of voidable preference claims:

> 'Under the law as it stands at present, once the bankruptcy or winding up has commenced, there is no time-limit within which proceedings must be D brought. While this is appropriate where the transaction is challenged as a fraudulent conveyance, we regard it as unjust in the other cases. Accordingly, we recommend that in future no proceedings to set aside a gift or other voluntary disposition, or a voidable preference other than as a fraudulent conveyance, should be brought more than three years before the making of the Protection Order, appointment of the liquidator, receiver or E administrator or execution of the arrangement (as the case may be), with power for the court to extend the time in any particular case for just cause shown.'

Given that parliament did not see fit to enact the recommendation for an express 3-year limitation period, I do not see how the presence of that passage within the report can assist the respondent's position in the present F case. However, given the underlying legal point I do have to determine, it is perhaps worth noting why the report would have asserted that there was at that time (1982) no limitation period applicable to proceedings to set aside a voidable preference.

The relevant statutory provision is s 44 of the Bankruptcy Act 1914 imported into company law by s 323 of the Companies Act 1948. Counsel G have kindly obtained for me a copy of the last edition of *Williams & Muir Hunter on Bankruptcy* and the notes to s 44 do not indicate any authority under the 1914 Act whereby a limitation period, in the proper sense of those words, applied to that section.

The reasoning for what the Cork Committee observed would appear to me to be this. Both the Bankruptcy Act and the Company Act sections simply provided that a transaction which was a voidable preference was void or H invalid rather than conferring a power on the court to set them aside. Hence if the transaction was simply void by statute, no question would arise of there being a limitation period in respect of a particular cause of action to have them set aside.

The matter has been closely and carefully argued before me by both counsel. I shall not endeavour to rehearse all of the submissions which I have heard, but I note in particular the following. A

Neither counsel has gone so far as to submit that the result as to whether it is a 6- or 12-year limitation period will always be the same in cases under IA86, ss 238 and 239. For the applicant it was submitted that the primary purpose of ss 238 and 239 as reflected by subs (3) in each case, is restorative, not compensatory, in contrast to the provisions of s 214. The B applicant's primary position was that the 12-year limitation period applies to both heads of claim under the originating application. Ultimately, in reply, the applicant's secondary and tertiary positions were as follows. Secondarily, that if the time-limit for head one was 12 years, but nevertheless for head two I should not be persuaded that the 12-year period also followed, then in that situation, a 6-year period for head two would be contended for. The tertiary C position was to put down a marker that should it appear from my reasoned judgment that the presence of head two of the claim for relief imperilled the survival of the entire action, an application to withdraw head two would be made.

On behalf of the respondent, Miss Howells submitted first that monetary relief is claimed in this action (see head two of the prayer for relief), heads one and two all derive from one cause of action, that the two heads are not D severable, and that it would be too late to abandon one of them once I have delivered a reasoned judgment. Secondly, alternatively, and at the least, head two of the claim should be struck out in its entirety because the account claimed would catch at least some money more than 6 years before the claim was brought. Thirdly, and with considerable emphasis, the substance of the whole claim in this case is a monetary claim. That links to para 6(ii) of the E skeleton argument for the respondent which is ultimately the crux of the argument as I have already indicated.

My attention was drawn to the suggested form for an originating application under s 238 appearing in what I take it is the current edition of Atkins *Court Forms* in the *Companies, Winding Up* volume, where words much more closely tying in to those of s 238(3) appear as the draft form of relief following a formal declaration. F

It was submitted on the respondent's behalf that ss 238(3) and 239(3) are not limited to setting aside and that it is important for the court always to look behind the substance of the pleading. It was further submitted that on an application under these sections a simple revesting order would seldom be sufficient to restore the position to that which it had been. All such claims, it was submitted, are in substance about money. The judge will inevitably have G to conduct a balancing exercise, by which I think counsel meant a valuation exercise making a series of balancing adjustments in either direction. That, she submitted, is the scheme of the Act. That is the position here, and it is reinforced by public policy arguments in favour of (a) judgments being monetary (assisting with finality in disputes) and (b) keeping the limitation period as short as possible for the reasons rehearsed by Peter Gibson LJ at p 595C–E in the Court of Appeal's consideration of the *Farmizer* case. H

The respondent directed me to the evidence at pp 89 and 101 of the bundle which, in the form of notes to accounts of the company, seemed to suggest that, at least prior to transfer to the respondent, these properties were likely to have been charged to the company's bankers in support of what, on 30

A April 1991, was its not inconsiderable short and long term borrowing from the bank. Hints were dropped that the respondent considered himself to be in a position of disadvantage as to having evidence available to put in, by reason that all the documents were with the liquidator. It is my experience and view that such complaints are easily and too frequently made in proceedings of this nature, and for that reason I invited Miss Howells to indicate first what particular documents her client felt embarrassed for not B having available to put in evidence and, second, to indicate whether or not they had been requested in writing. Having taken instructions, answers to neither of those questions were proffered but instead it was made clear that it was the documents at pp 89 and 101 which were the sole documentary references on which the respondent would wish to rely.

The applicant's counsel submitted in reply that there was no firm C evidential basis here for my inferring that the inevitable result of this case going to trial and the applicant succeeding on head one was that the trial judge would have to conduct a delicate evaluation and balancing exercise of the nature asserted on the respondent's behalf. She pointed out that the evidence of the existence of a charge was less than conclusive, and that the submissions for the respondent assumed that a substantial amount was still owing to the bank and the company, and hence still secured by the charge D mentioned in the note by the date of the transfer. However, if one turns to the affidavit evidence at p 13 of the bundle, para 9 of Mr Anwar's affidavit, it is clear that there had been a huge reduction in the liabilities to the bank, the long term liabilities having been extinguished and the overdraft reduced to a figure of only about £10,000 by 30 April 1992, only 4 months or so after the transfers, and indeed that the personal guarantees of the respondent and his E wife had been discharged by January 1993. It was further pointed out, and accepted by both counsel, that the insolvency questionnaire indicates that by the time of winding up, Midland Bank was not an unpaid creditor at all.

Counsel for the applicant further submitted that there was no evidence that the respondent's director, as opposed to the company itself, had been responsible for paying off this bank borrowing. The terms of the affidavit at pp 12 to 13 indicate that it is somewhat improbable that at about December F 1991 the respondent had discharged £190,000 worth of the company's bank borrowing himself.

In relation to the *British Coal Corporation* case, counsel for the applicant submitted, first, that the present case was not a case which came within category F of the formulation in McGee's book. Her second submission was that the limitation defence having failed, the relevant passages in the *British Coal Corporation* case were strictly obiter. I agree with that submission. G Thirdly, as no findings were made as to election or consent by the tribunal, nor made by the Court of Appeal (as appeared from the passage that I cited), again matters were strictly obiter. I agree with that submission too. Fourthly, and finally, she relied on the same passage as counsel for the respondent as to the judge's reluctance to find two different limitation periods within one section of an Act of Parliament, but relied on it for the opposite result, that H is, periods of 12 years in the case of each head of relief as opposed to the respondent's submission that it pointed towards periods of 6 years in each case.

In the light of the foregoing, the legal position is, in my judgment, as follows:

(1) An application to the court under IA86, s 238 to 241 to set aside one or more transactions is an action on a speciality within Limitation Act 1980, s 8(1) and hence prima facie subject to a 12-year limitation period. The case of *Re Farmizer Products* is clearly distinguishable because the words of s 214 are different and because the claim there was a claim for monetary compensation, not a claim to set aside a transaction. To that extent, I must respectfully differ from the dictum of Mr Scher QC where he expressed a view as to what the more likely limitation period (6 years or 12 years) was in the case of the equivalent personal insolvency section (399). I accept the submission of counsel for the applicant that the case cited by him at the end of that sentence (*Re Farmizer* in the Court of Appeal) does not on analysis offer any support for his proposition that the 6-year period under s 9(1) of the Limitation Act 1980 is more likely to be that applicable. Particularly given the great experience of the learned deputy judge, I do wonder whether the overall result of the *Farmizer* case – as opposed to a full analysis of the terms of the judgment – is all that had been laid before him. It seems also that the text of Muir Hunter on *Personal Insolvency*, para 3.296 which was placed before him must have been more similar to the September 1999 edition which I have seen, than the 1996 editions which are the only others which I have seen. That sentence, which runs from lines 19 to 21 of the penultimate page of the transcript of Mr Sher QC's judgment, is a further example of what I have called the 'look and see' approach, as to which there is no difficulty in reconciling the judgment in the *Farmizer* case and that which I am now giving.

(2) There may however be examples of applications under ss 238 to 241 which are taken outside the scope of s 8(1) of the Limitation Act by the combined operation of ss 9(1) and 8(2) of that Act with the effect that the limitation period is reduced from 12 years to 6.

(3) An application under ss 238 to 241 will come into the latter category if it can fairly be said that the substance or the essential nature of the application is 'to recover a sum recoverable by virtue of' those sections. The applicant accepts that some cases under ss 238 and 239 will be caught by s 9(1). Which category will prove to be the more frequent has been the subject of extended debate, and I do not propose to offer any prediction of my own. One example of a case caught by ss 9(1) and 8(2) might be where the transaction to be set aside is a simple payment of a sum of money. Another might be where the only substantive relief available to the applicant is an order for the payment of money, such as where s 241(2) precludes the setting aside of the transaction.

(4) Where there is doubt as to whether a claim falls into the first (that is, 12 year) category, or the second (that is, 6 year) category, the 'look and see' approach adopted by Lord Goddard CJ in the *West Riding* case and approved by Peter Gibson LJ in the *Farmizer Products* case at 599F should be applied, and the court should look to see what the substance or essential nature of the relief truly sought by the applicant in the particular case before it is. The court is not limited just to the words of the pleading. The court may look at the substance behind the pleading. However, provided the pleaded claim to set aside is a bona

A fide claim, which is neither a sham nor bound to fail, the applicant is entitled to pursue it, and it cannot be without significance that the first example of the types of relief which may be granted to implement ss 238(3) and 239(3) given in s 241(1), which is ultimately a list of examples, is that set out at subs (a), which I have already quoted earlier in this judgment.

(5) Given the possibility that a 6-year, rather than a 12-year, limitation B period may apply in any particular case, liquidators – and for that matter, other office holders within the meaning of these sections – would be well advised to ensure that any such proceedings are commenced within this shorter 6-year period. Those who allow such a claim to drift past the first 6 years after accrual of the cause of action before commencing proceedings, as appears to have occurred here, do C so at the risk of finding either all, or possibly part, of their claim lost.

Applying those general propositions to the present case, my conclusions are as follows. The first and primary head of relief sought is for the setting aside of the two transfers (as provided for by IA86, ss 238(3), 239(3) and 241(1)(a)). If one looks into the factual background to check whether that reflects the substance of the position, there is every indication that it does. D Both properties have registered titles which are still vested in the respondent. The liquidator's interest has been protected by cautions since December 1994. In neither case is there any mortgage or other financial charge registered against the titles. They therefore appear to be valuable assets which the applicant would have every reason to wish to have restored to the company of which he is liquidator. I cannot accept the assertion in para 6(ii) of the respondent's skeleton argument, notwithstanding that the vigour and E persistence with which it was advanced to me. I accept the applicant's submissions as to the true nature of the evidence before me, and its significance as to the type of relief which may result in this case. If this claim goes to trial, I see no reason to believe either that this primary head of relief will not be pursued or that there is no realistic prospect that a judge may grant it. At most, in this case, all the respondent's assertion can mean is that F the applicant hopes ultimately to obtain a sum of money. As a liquidator, presumably he does so hope, whether by means of selling the properties if and when they are re-vested in the company, or by means of reaching a commercial settlement of the litigation before trial. However, neither of these possibilities can bring the case within s 9(1) of the Limitation Act and thus take it outside s 8(1) of the same Act.

For the foregoing reasons, I conclude that the claim in para 1 of the G originating application is not statute-barred, from which (by concession) it follows that the proceedings as a whole are not an abuse of the process of the court.

Turning to head two, initially both parties pressed me to decide the position on this head separately even if I were to find for the applicant on head one. Later on in the hearing, the respondent's position as to that H changed, possibly in response to picking up some straws in the forensic wind, and the respondent would now be content for me to leave over to trial the question of whether head two is also statute barred. Miss Howells points out in particular that there are a number of permutations as to how this case may be resolved both before me and indeed at trial. That would have been

my inclination had I been of the mind that there was real doubt as to the limitation position with regard to head two. However, in the course of argument I have been persuaded that the position here is clear. Accordingly, I ought to and shall determine it now. It also appears to be necessary to determine this point in order to deal with one of the ways in which Miss Howells puts her substantive submissions, which is that the very presence of head two is fatal to the whole claim.

Paragraph two is put by the applicant as an ancillary claim to the setting aside and revesting orders which are primarily sought. The obvious logic of this claim is this. If the property is to be revested in the company in order to restore the position in accordance with the statutory sanctions I have now cited several times, the revesting alone would not restore the position because in the meantime 9 or 10 years' income from the property will have been lost to the company. The claim is therefore, in my judgment, genuinely ancillary and not simply ancillary in the form of drafting.

Both counsel agree that s 23 applies to it but each says that that means that their answer, rather than the other party's answer, to head one should also be the answer in the case of head two. It was rightly pointed out that although two separate heads of relief are formulated, the cause of action is one and the same. I would respectfully share the reluctance of Ralph Gibson LJ, expressed in another statutory context, to attribute to parliament the intention to create within one section two possible limitation periods for a particular case. The claim is (a) clearly ancillary, (b) governed by s 23 and (c) dependent on one and the same cause of action as claim one. For these reasons, I conclude that the 12-year period applicable to the primary claim is therefore also applicable to the claim under head two of the prayer for relief.

I therefore propose to answer the issue posed for the court by Mr Registrar Buckley in these terms: that this claim is neither statute-barred nor an abuse of the process of the court.

Solicitors: *Moon Beever* for the applicant
Pilgrims Solicitors for the respondent