Neutral Citation Number: [2022] EWCA Civ 626

Case No: CA-2021-000298

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN MANCHESTER
INSOLVENCY AND COMPANIES LIST (ChD)
His Honour Judge Halliwell (sitting as a Judge of the High Court)
[2021] EWHC 2970 (Ch)

IN THE MATTER OF EDENGATE HOMES (BUTLEY HALL) LIMITED (IN LIQUIDATION)
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Double-click to add Judgment date

Before:

LADY JUSTICE ASPLIN
LORD JUSTICE MALES
and
LORD JUSTICE STUART-SMITH

- -

Between:

ADELE LOCK	**Appellant/ Applicant**
- and -	
1)PAUL STANLEY (in his capacity as liquidator) **2) EDENGATE HOMES (BUTLEY HALL) LIMITED**	**Respondents**

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- -

Matthew Collings QC (instructed by **Simon Burn Solicitors**) for the **Appellant**
Joseph Curl QC (instructed by **Kidd Rapinet LLP**) for the **Respondents**

Hearing date: 28 April 2022

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APPROVED JUDGMENT

This is an Approved Judgment to which CPR Practice Direction 40E applies. The judgment will be handed down electronically, in accordance with the Practice Guidance dated 16 December 2021 on Monday 9 May 2022 at 10.30 a.m.

Lord Justice Males:

1. Mrs Adele Lock is a creditor and former director of Edengate Homes (Butley Hall) Ltd, a company now in liquidation whose only asset was a claim against her and members of her family. She seeks to set aside the liquidator's assignment of that claim to Manolete Partners Plc, a litigation funding company, on the basis that she and her family were not given an opportunity to buy the claim and thereby to bring it to an end. His Honour Judge Halliwell, sitting in the Business and Property Courts in Manchester, dismissed her application under section 168(5) of the Insolvency Act 1986, holding that she did not have standing to make the application and that the liquidator's decision to assign the claim to Manolete could not be regarded as perverse. Mrs Lock appeals on both issues.

The background

2. In March 2012 Mrs Lock and her husband formed Edengate ("the Company") as a special purpose vehicle to acquire and develop Butley Hall, Prestbury, Cheshire. The development involved converting the main building into flats and building three town houses. Mrs Lock's parents, Mr Alan and Mrs Susan Forrest, lent money to the Company to assist with the financing of the project. The Company granted long residential leases of two residential units on the development to Invest in the Best UK Ltd, a company owned by Mr and Mrs Forrest.

3. Ultimately, the Company was unable to raise sufficient funds to meet its liabilities under the project and in addition a dispute arose with the contractor carrying out the development work, Cruden Construction Ltd ("Cruden"). By November 2015, if not earlier, the Company was insolvent. On 26th November 2015 it went into creditors' voluntary liquidation and liquidators were appointed.

4. According to the Company's Estimated Statement of Affairs, signed by Mrs Lock on 26th November 2015, the realisable value of the Company's assets was then only £4,721. However, the Company's indebtedness on directors' loans and loans from connected creditors was estimated in the sum of £2,094,512 and its estimated indebtedness to trade and expense creditors was £408,593. In the schedule of creditors, Mrs Lock was herself listed as a creditor for the full amount owed on directors' loans of £2,094,512, while Cruden was listed as a creditor for £158,814.

5. However, Cruden petitioned for the compulsory winding up of the Company, contending that the true amount of the Company's indebtedness to it was £2,310,228. A winding up order was made on 15th March 2016 and the existing liquidators ceased to hold office.

6. On 18th July 2016, the Secretary of State appointed Mr Paul Stanley as the new liquidator. There is a dispute between the parties about the extent to which Mrs Lock has cooperated with him which it is unnecessary to attempt to resolve.

7. In the course of his investigation of the Company's affairs the liquidator has concluded that he and/or the Company have substantial claims against Mrs Lock, her husband, her parents and her parents' company. In brief outline, those claims allege transactions at an undervalue, preference and misfeasance. It is unnecessary to say

more about them, save that the claims are for about £1.2 million exclusive of interest and that they are strongly disputed by Mrs Lock and her family.

8. The claims first broke the surface in a letter dated 1st February 2018 from solicitors then acting for the liquidator. The letter was sent to, and asserted claims against, Mrs Lock's parents, but not against Mrs Lock herself or other members of her family, for £1,198,222 plus interest. That led to a meeting between Mrs Lock and the liquidator on 8th February 2018. There is a dispute about what was said. It is Mrs Lock's evidence that she raised the possibility of buying the claims, although she does not suggest that any figure was mentioned. However, on the assumption that this possibility was raised, it was not followed up by either party.

9. The Company had no funds to enable the liquidator to pursue the claims and it appears that little or nothing was done to pursue them for some time. The liquidator investigated funding possibilities and ascertained that Cruden was not prepared either to fund litigation or to purchase the claims. He ascertained also that funding the litigation by means of a conditional fee agreement combined with ATE insurance was unlikely to be practicable. The next possibility, and the one which was pursued, was to assign the claims to a litigation funding company. For this purpose the liquidator obtained in April 2019 an offer from Manolete to purchase the claims for an upfront payment of £20,000 together with an equal division of recoveries net of costs and reimbursement of the upfront payment.

10. On 21st May 2019 the liquidator's solicitors wrote again to Mr and Mrs Forrest warning them that he was contemplating selling the claims against them to a specialist insolvency litigation funder and that, in the absence of settlement within a reasonable time, the sale would be completed and the claims would be pursued. It is accepted on behalf of Mrs Lock that this letter was passed to her by her parents. She and her parents were therefore aware that the claims against her parents would be assigned – and that they would be pursued. Litigation funding companies do not purchase claims in order to put them in a drawer. However, no offer was made to settle the claims and nothing was said about a purchase of them either by Mrs Lock or by her parents. For all practical purposes, of course, there is no difference between settlement of the claims and their purchase by Mrs Lock or her parents. In either event, a payment would be made of whatever sum was agreed and that would be the end of the matter.

11. In the event a further four months elapsed before the liquidator entered into the assignment with Manolete on 24th September 2019. During that time he persuaded Manolete to improve its offer. The upfront payment was increased to £30,000. Recoveries net of costs and of the upfront payment were to be shared equally up to £150,000, 60:40 in favour of the liquidator between £150,000 and £300,000, and 70:30 in favour of the liquidator in excess of £300,000. The liquidator's calculation is that if the claims were to succeed in full, the value to the estate would be of the order of £800,000: the precise figure will depend on what irrecoverable costs are incurred in pursuing litigation.

12. Up until this time no claim had been asserted against Mrs Lock or her husband, but the assignment contained a wide definition of the claims assigned, extending beyond the claims against Mr and Mrs Forrest which had been made in correspondence. It was as follows:

> "All and any claims that the Company and/or the Liquidator may have against (1) Alan Forrest and/or (2) Susan Forrest and/or (3) Adele Lock and/or (4) Matthew Lock and/or (5) Michael Kennedy and/or (6) Invest in the Best UK Ltd and/or any companies or individuals associated or connected with the aforementioned individuals or companies and any one or more of them. Such claims to include, but not be limited to, claims for breach of contract, breach of duty at common law, breach of fiduciary or statutory or other legal or equitable duty, any claim in fraud, whether common law or equitable fraud, conspiracy by unlawful means and/or any claim under the Insolvency Act 1986 and/or Companies Act 2006."

13. The assignment was followed on 3rd February 2020 by a letter before action which confirmed the assignment and provided a redacted copy of it. There was further correspondence during 2020 and early 2021 in the course of which Mrs Lock's then solicitors characterised the claims as "an attempt at extracting monies for the benefit of your client (Manolete) rather than … for the benefit of creditors" and as "speculative and opportunistic litigation over 'rights' which have been traded".

14. Eventually, on 19th January 2021, Manolete commenced proceedings against Mrs Lock, her husband, her parents and their company. Disclosure and exchange of witness statements have been completed and the proceedings were due to be tried in December 2021. Mrs Lock and her family have consistently maintained the position adopted in correspondence, that the claims are without merit. However, they have made no application to dispose of the proceedings summarily and, subject to the outcome of this appeal, the case is ready to proceed to trial.

15. Mrs Lock's application to set aside the assignment to Manolete was issued on 18th February 2021. It came on for hearing on 28th October 2021 before Judge Halliwell, who produced his judgment with commendable promptness in order to save the December trial date. In the event, however, this appeal meant that the trial had to be adjourned.

16. Manolete has not been joined as a party to the application to set aside the assignment or to this appeal, but we were told that it has been notified of the proceedings and has been provided with the papers.

Insolvency Act 1986, section 168(5)

17. Section 168(5) of the Insolvency Act 1986 provides:

> "If any person is aggrieved by an act or decision of the liquidator, that person may apply to the court, and the court may confirm, reverse or modify the act or decision complained of, and make such order in the case as it thinks just."

The judgment

18. The judge dealt first with the issue of standing, noting that "any person … aggrieved" in section 168(5) was shorthand for "any creditor, debtor or other person aggrieved".

He referred to the decisions of this court in *Re Edennote Ltd* [1996] 2 BCLC 389, of the Privy Council in *Deloitte & Touche AG v Johnson* [1999] 1 WLR 1605 and of this court in *Brake v Lowes* [2020] EWCA Civ 1491, [2021] PNLR 10, observing that it is not enough to consider whether an applicant is within the category of persons entitled to make the application; it is also necessary to consider whether it has "a legitimate interest in the relief sought". The applicant must not only be a member of the class of persons entitled to make an application (here, a creditor); in addition, its interest must be aligned with the interest of the class as a whole. Applying that test, Mrs Lock's interest was not aligned with the interest of creditors, which was to maximise the recovery to the estate from the claims; rather, it was to protect her family and herself by ensuring that the claims against them would not be pursued. Accordingly, Mrs Lock did not have standing to make the application.

19. Even if she did have standing, the judge noted that the criterion which an applicant would have to satisfy, confirmed in *Re Edennote Ltd*, was that the liquidator's decision to assign the claims was perverse ("so utterly unreasonable and absurd that no reasonable man would so act"). This was a formidable test. Although the judge criticised the liquidator's explanation of his reasons for not offering Mrs Lock the opportunity to buy the claims, he was not satisfied that the test of perversity was satisfied. There was a foundation for the liquidator to conclude that Mrs Lock would not have sufficient funds to purchase or compromise the claims; neither she nor anyone had offered to do so; there was nothing to indicate that the liquidator could have achieved better terms from Mrs Lock than he had obtained from Manolete; the liquidator had explored other options such as a CFA; and the terms negotiated with Manolete provided a reasonable rate of return for creditors, with no specific challenge having been advanced to the terms agreed.

Submissions

20. Mr Matthew Collings QC for Mrs Lock submitted that, as a creditor, Mrs Lock had standing to make an application under section 168(5). He based that submission principally on *Re Edennote*, contending that it decides that (1) although an outsider to the liquidation has no such standing, status as a substantial creditor (as distinct from a creditor who is effectively an outsider because, for example, the debt is minimal), provides the creditor with a legitimate interest in challenging the assignment and is therefore sufficient to confer standing, and (2) the fact that the creditor is also the defendant to the claim is no objection as such a creditor has a "dual capacity". This remains good law.

21. On the issue of perversity, Mr Collings submitted that, as Mrs Lock and her family were the defendants to the claims, she had an obvious interest in acquiring them. The liquidator was under a duty to test the market properly, which included affording the defendants to the claims an opportunity to make an offer to acquire them. In the absence of exceptional circumstances (for example, where there was a risk that a defendant notified of a claim would dissipate assets) failure to do so was perverse. Again, Mr Collings relied on *Re Edennote*. He submitted that Mrs Lock had been deprived of this opportunity, although there was evidence that she and her family would have been prepared to pay a reasonable amount to acquire the claims. That perversity was all the worse in view of the judge's criticisms of the liquidator's reasoning as described in his evidence.

22. Mr Joseph Curl QC for the liquidator supported the judge's reasoning. On the issue of standing, he submitted that it was not enough for an applicant to be a creditor; it had to be acting in that capacity such that its interests were aligned with those of the class of creditors in general. While Mrs Lock was a creditor, she was not acting in the interests of creditors generally: it was fanciful to suppose that she was activated by a desire to maximise the value of the claims for the estate; on the contrary, her interest was to dispose of them as cheaply as possible. Further, the liquidator's decision could not be described as perverse, which the judge was right to describe as a formidable test, even if some aspects of the liquidator's reasoning were open to criticism. In any event the judge had applied the correct test and this court should not interfere with his conclusion, which resulted from an evaluation of all the circumstances, unless he had made a clear error.

Standing

23. In view of Mr Collings' emphasis on the decision in *Re Edennote*, it is necessary to consider the principal authorities.

24. *Re Edennote* itself concerned a dispute between Mr Alan Sugar and Mr Terry Venables arising out of the latter's time as manager of Tottenham Hotspur Football Club. Simplifying the facts slightly, Edennote, a company owned by Mr Venables, brought an action against Tottenham Plc, a company in which Mr Sugar was the majority shareholder. Tottenham Plc and Mr Sugar, unsecured creditors of Edennote, issued a winding up petition and a liquidator of Edennote was appointed. The liquidator decided to assign Edennote's claim against Tottenham Plc to Mr Venables. That assignment was challenged under section 168(5) by Tottenham Plc and Mr Sugar, who contended that they ought to have been given an opportunity to acquire the claim and would have been prepared to make what was likely to be a better offer: whereas Mr Venables had agreed to pay £7,000 together with 10% of the net proceeds of "proceedings which are bound to be costly and protracted" ([1995] 2 BCLC 248, 269g), they would have been prepared to offer £75,000.

25. Lord Justice Nourse (with whom Lord Justice Millett agreed) noted that the term "any person aggrieved" in section 168(5) was shorthand for "any creditor, debtor or other person aggrieved", a term ultimately derived from section 20 of the Bankruptcy Act 1869. He dealt with the issue of standing as follows:

> "It is neither necessary nor desirable to attempt a classification of those who may be persons aggrieved by an act or decision of the liquidator in a compulsory winding up. On the footing that the claims of secured creditors have been or will be satisfied, it is perfectly clear that unless and until there proves to be a surplus available for contributories (a most improbable event), 'persons aggrieved' must include the company's unsecured creditors. If the liquidator disposes of an asset of the company at an undervalue, their interests are prejudiced and each of them can claim to be a person aggrieved by his act. Such was the position of the applicants here. Mr Rayner James [counsel for Mr Venables] submitted that they brought the application not as creditors but as persons who had not been given an opportunity to make an offer for the asset. In the latter capacity alone, like

> any other outsider to the liquidation, they would not have had the *locus standi* to apply under section 168(5). But even if that were wrong, they would still have been able to apply in a dual capacity."

26. The reference to "a dual capacity" needs some explanation. The applicants had two capacities. The first was as defendants to the claim who had not been given an opportunity to make an offer to purchase it. That, however, was irrelevant as, in that capacity, they were outsiders to the liquidation and had no standing to make an application under section 168(5). The second was as creditors of the company. In that capacity, they did have standing. However, it is important to note in understanding this decision that, whatever the applicants' motivation in their dispute with Mr Venables, there was no suggestion that their application was otherwise than in accordance with the interests of creditors generally. Those interests were to maximise the recovery to the estate from the claim. The fact that the applicants were prepared to offer more than Mr Venables had agreed to pay confirmed that their application was to the benefit of the whole class of creditors.

27. Accordingly *Re Edennote* stands as authority for the proposition that an outsider to the liquidation has no standing to make an application under section 168(5) to set aside an assignment by the liquidator of a claim against him. In everyday language, a defendant to a claim may be "aggrieved" that he has not been given an opportunity to acquire the claim, but that is not sufficient to confer standing under section 168(5). However, the case is not authority for the proposition that a creditor has standing under section 168(5) regardless of whether, in seeking to set aside the assignment, he is acting in the interests of the creditors as a class. That point did not arise for decision.

28. *Deloitte & Touche AG v Johnson* was not an application to set aside the assignment of a claim. Rather, it was an application to remove liquidators under the Cayman Islands equivalent of section 108 of the Insolvency Act 1986. The application was made by a defendant to a claim for professional negligence brought by the insolvent company and was made on the ground that the liquidators had a conflict of interest. The applicant was not a creditor of the company. The Privy Council identified two questions which had to be considered when a court is faced with an application in an insolvency case. The first was to "examine the statute to see whether it identifies the category of person who may make the application". This was a question of jurisdiction. If a statute says that an application may be made by a creditor, the court has no jurisdiction to consider an application made by anybody else. The second, which was a question of judicial restraint rather than jurisdiction, was to consider whether an applicant had a sufficient interest to make the application. Although the relevant statutory provision contained no express restriction on the category of person who could make an application to remove a liquidator, so that the court had jurisdiction, a stranger to the liquidation did not have a legitimate interest in the removal of the liquidators and accordingly did not have standing to make the application:

> "The company is insolvent. The liquidation is continuing under the supervision of the court. The only persons who could have any legitimate interest of their own in having the liquidators removed from office as liquidators are the persons entitled to

> participate in the ultimate distribution of the company's assets, that is to say the creditors. The liquidators are willing and able to continue to act, and the creditors have taken no steps to remove them. The plaintiff is not merely a stranger to the liquidation; its interests are adverse to the liquidation and the interests of the creditors. In their Lordships' opinion, it has no legitimate interest in the identity of the liquidators, and is not a proper person to invoke the statutory jurisdiction of the court to remove the incumbent office-holders."

29. The advice of the Privy Council was given by Lord Millett, whose exposition of the two-stage approach to be adopted in such cases was of general application. It follows, in my judgment, that the same approach must be adopted to an application under section 168(5). The first stage is to consider whether the applicant is "a person aggrieved" by an act or decision of the liquidator within the meaning of the section. The second stage is to consider whether the applicant has a legitimate interest in obtaining the relief sought. It will not have such interest if its interests "are adverse to the liquidation and the interests of the creditors". Thus an applicant may qualify as "a person aggrieved" by virtue of being a creditor, but will not have a "legitimate interest" if its interest in obtaining the relief is contrary to the interests of creditors generally. Lord Millett had been a party to the decision in *Re Edennote*, which was cited in argument although not in the judgment. He cannot have thought that there was any conflict between the decision in *Re Edennote* and the two-stage approach which he described.

30. The facts of *Walker Morris v Khalastchi* [2001] 1 BCLC demonstrate starkly that status as a creditor is not sufficient to confer standing on an applicant under section 168(5). The applicant, a firm of solicitors, was a creditor of the insolvent company in the sum of £237. It sought to resist a request by the liquidator to hand over privileged documents relating to the company's tax affairs. It did so with a view to protecting other clients from possible proceedings by the company, financed by the Revenue, for repayment of a dividend paid to those clients. Citing *Deloitte & Touche AG v Johnson* and invoking the principle of judicial restraint, Nicholas Strauss QC (sitting as a Deputy High Court Judge) held that the firm was not a proper person to invoke the jurisdiction of the court to interfere in the administration of an insolvent liquidation:

> "In my view, the situation in this case is in substance the same. It is true that the applicants are creditors, and would have locus standi if acting as such; but this is irrelevant, since they are in fact seeking to advance the interests of possible debtors, which are adverse to those of the creditors."

31. Mr Collings submitted that *Walker Morris* should be explained on the basis that the applicant firm was effectively an outsider to the liquidation because the debt of £237 which it was owed was minimal, but that is clearly not the basis on which the case was decided. Rather, it was decided on the basis that the court had jurisdiction to grant the application, but that the firm did not have a legitimate interest in obtaining the relief sought and therefore failed on the issue of standing at the second stage. That was because it was not acting as a creditor, even though it was one, but was acting adversely to the interests of the creditors. The fact that the debt was for a very modest

sum was irrelevant. *Walker Morris* is not binding on this court but, as the judge pointed out, it was approved by this court in *Brake v Lowes* (to which I shall come) at [101] to [103].

32. Mr Collings relied also on *Ultraframe (UK) Ltd v Rigby* [2005] EWCA Civ 276. The applicant, a creditor of the insolvent company, sought to set aside the assignment of intellectual property rights belonging to the company, contending that the assignment was at an undervalue. The judge found, however, that the applicant's real motivation was not to increase the realisations for the creditors, but as a tactical step in other litigation. He struck out the claim summarily, without giving the applicant an opportunity to adduce evidence. This court allowed an appeal, holding in an *extempore* judgment that the judge had been wrong to do so. Lady Justice Arden (with whom Lord Justice Brooke agreed) held that the applicant had standing as a creditor (indeed, this appears to have been conceded) and that its motivation for challenging the assignment was irrelevant:

> "64. Accordingly, the mere fact that Ultraframe was not only a creditor of QC, but also wished to use the assignment for its own purposes in other litigation – would not preclude it from bringing a claim. Nor, as I see it, is there authority which compels the court to dismiss the claim because it has those two capacities and that primary motivation."

33. This case stands for little more, in my judgment, than that the judge was wrong in the circumstances to have dismissed the application without affording the applicant an opportunity to adduce evidence. To the extent that it goes further, it indicates that a creditor's motivation in challenging an assignment is likely to be irrelevant, but it does not suggest that status as a creditor is sufficient to confer standing on an applicant regardless of whether the applicant is acting in the interests of creditors generally. So far as can be ascertained from the judgment, the applicant was seeking to increase the recoveries available to creditors (hence its claim that the assignment was at an undervalue), even though that was not its primary motivation. Accordingly its interest in making the application, even if not its motivation, was aligned with the interests of creditors generally. The decision does not support the proposition that status as a creditor by itself confers sufficient standing under section 168(5).

34. In *Brake v Lowes* the applicants were unsecured creditors of an insolvent partnership. The facts were complicated but, in essence, they sought a direction that the liquidators should accept their bid for certain property in the sum of £476,000. This was less than the sum of £500,000 for which the liquidators had agreed to sell the property to a third party, Chedington. The applicants' case was that the sale to Chedington was the result of improper collusion between the liquidators and Chedington and should be set aside under section 168(5). In a judgment with which Lord Justice Floyd and Lord Justice Henderson agreed, Lady Justice Asplin held that it was "very doubtful" whether the applicants had a legitimate interest in the relief sought:

> "100. Do the Unsecured Creditors, nevertheless, have a legitimate interest in the relief sought in the Liquidation Application? It seems to me that that is very doubtful. The relief sought is that, amongst other things, the joint liquidators accept the Brakes' bid for the Cottage in the sum of £476,000,

> made in their capacity as trustees of the Settlement. That must be adverse to the interests of the liquidation estate and the unsecured creditors as a whole in just the same way as the position of the creditors in the *Walker Morris* and *Re Fairfield* cases. Furthermore, Mr Sutcliffe [counsel for Chedington] says that even if the Brakes were given an opportunity to bid £570,000 for the Cottage (which is pleaded), it is common ground that the £70,000 in excess of the Chedington bid would be soaked up by expenses.
>
> 101. The position is similar to that in the *Walker Morris* case …
>
> 102. The deputy judge noted that the applicants were creditors of the company, but that it was 'difficult to take seriously' the contention that the applicants were motivated by the possible dilution of their claim for £237. Instead, he found the applicants' only real concern was to frustrate the Inland Revenue's claim for the benefit of their existing clients, rather than to advance any legitimate interest as creditors. See 7F-G. In fact, creditors of the company stood to gain from the Inland Revenue's claim, which could result in a dividend being returned to the company and distributed to its creditors. The deputy judge concluded at 9A that:
>
> > 'It is true that the applicants are creditors, and would have locus standi if acting as such; but this is irrelevant, since they are in fact seeking to advance the interests of possible debtors, which are adverse to those of the creditors'."

35. Thus the bid which the applicants had made (and even the higher bid which they proposed to make) would have resulted in a lesser recovery for the estate than the sum payable by Chedington. Accordingly this court held that the application to challenge the assignment to Chedington was rightly struck out on the issue of standing, without needing to investigate the merits of the challenge.

36. In my judgment these authorities demonstrate that the judge's approach to the issue of standing was correct. It is not sufficient that an applicant for relief under section 168(5) is a creditor of the insolvent company. It must in addition have a legitimate interest in the relief sought. Where the application is to set aside a disposal of property by the liquidator, including the assignment of a claim, an applicant will have a legitimate interest if it is acting in the interests of creditors generally. Typically that will be the case when the effect of the relief sought will be to maximise the assets of the estate. But an applicant will not have standing if the relief sought is contrary to the interests of the creditors as a class, as it will be where that will result in a lesser recovery. This concept can be expressed in a variety of ways. "Where an application may be made as 'a creditor' then it must be made by that creditor in his capacity as such (and not in any other capacity)": *Re Zegna III Holdings Inc* [2009] EWHC 2994 (Ch), [2010] BPIR 277 at [24] per Mr Justice Norris; "whether an application in a liquidation or other insolvency process is really for the benefit of the creditors as a whole": *Nero Holdings Ltd v Young* [2021] EWHC 1453 (Ch), [2021] BPIR 1324 at

[59] per Mr Justice Michael Green; or as the judge put it at [34], the applicant's "interest in the outcome of the application must also be aligned with the interest of the class as a whole and it must not have a collateral interest which transcends the class interest". However it is put, the essential point is clear.

37. In giving permission to appeal to this court, the judge appears to have thought that there was some inconsistency between *Re Edennote* and the later cases. For the reasons I have sought to explain, I do not think that there is. In my judgment the principles are clear and have been consistently applied.

38. Applying these principles to the facts of the present case, it is clear that Mrs Lock's interest is as a defendant in the litigation brought by Manolete. Her position has consistently been that the claims against her and her family are without merit. She acknowledges that they have some nuisance value in view of the stress and inconvenience caused by being a defendant even to an unmeritorious claim, but that is as far as she has been prepared to go. In the circumstances, it is clear in my judgment that Mrs Lock's challenge to the assignment of the claims to Manolete is not made for the benefit of creditors generally and is not aligned with the interest of the class as a whole. On the contrary, the position is neatly summarised in Mr Curl's skeleton argument:

> "79. In short, it is impossible for the Appellant to act simultaneously as both creditor and a defendant. This is because:
>
> (a) the class interest of the creditors is for the claims to be upheld and turned into as much money as possible; but
>
> (b) the class interest of the defendants [i.e. the defendants to Manolete's claims] is to defend the claims and avoid paying as much money as possible."

39. This is not to say that a defendant to a claim by an insolvent company or its liquidator who is also a creditor of the company will never have a legitimate interest in acquiring the claim. There may be circumstances in which it will have such an interest, as in *Re Edennote*. But it was highly material in that case that the section 168(5) applicants were prepared to outbid Mr Venables to acquire the claim against them, thereby increasing the recovery for the benefit of creditors generally.

40. In contrast, there has never been any suggestion in the present case that Mrs Lock would be willing (or would ever have been willing) to match or to beat the offer made by Manolete. The most that she is able to say is that she raised the possibility of buying the claims at her meeting with the liquidator on 8th February 2018, but never sought to follow this up afterwards, even when aware that the liquidator proposed to assign the claims against her parents to a litigation funding company. The suggestion in Mrs Lock's evidence that she (alone or with others) may have been able to raise something of the order of £30,000 shows a lack of understanding of what Manolete had agreed to pay. It falls far short of being satisfactory or realistic evidence that she was or would be in a position to match or beat Manolete's bid.

41. For these reasons the judge was right, in my judgment, to hold that Mrs Lock does not have standing to make her application.

Perversity

42. Sometimes the question of standing will be considered as a preliminary point, as in *Brake v Lowes*. That may enable an application to be disposed of without the court needing to investigate its merits. In the present case, however, the judge dealt with both issues at a final hearing of the application. When that course is taken, there will sometimes be an overlap between the two issues. Thus, if an applicant does not have standing to challenge an assignment because its application is not in the interests of creditors generally, it would seem unlikely that the court would wish to set aside the assignment on its merits. Nevertheless, the two issues are in principle distinct.

43. It is common ground that the test on the merits is one of perversity or, as it was put more fully in *Re Edennote*, affirming previous authority, the correct test (fraud and bad faith apart) is that:

> "the court will only interfere with the act of a liquidator if he has done something so utterly unreasonable and absurd that no reasonable man would have done it."

44. As the judge said, this is a formidable test. Mr Curl pointed out that it leaves a potentially large category of cases where the liquidator's conduct may be open to valid criticism, but where that conduct cannot be so characterised.

45. The judge in this case applied (or purported to apply) the *Edennote* test. That test requires the judge at first instance to evaluate all the circumstances of the case. In my judgment, therefore, this court should only interfere with his decision if he went wrong in principle in his application of that test, or reached a conclusion which was not supported by the evidence or was irrational.

46. Mr Collings submitted that the judge did go wrong in principle in failing to recognise that the liquidator was under a duty to test the market properly. He submitted that defendants to a claim have an obvious interest in acquiring it and therefore comprise an important part of the market, so that the liquidator had a duty to give them an opportunity to make an offer to do so before assigning it to a litigation funding company, at any rate in the absence of exceptional circumstances. He described the liquidator's failure to give Mrs Lock and her family such an opportunity as a failure of process, leading to the conclusion that the assignment to Manolete was necessarily perverse. He submitted that in these respects the present case is indistinguishable from *Re Edennote*.

47. I do not accept these submissions. While it may often be sensible, or good practice, to give a defendant to a claim an opportunity to acquire (or settle) it before assigning it to a litigation funding company, failure to do so is not necessarily perverse. Whether it is or not must depend on careful scrutiny of all the facts of the case. In *Re Edennote* that failure was held to be perverse, but there were two important features of the case which are not present here. The first, which I have already mentioned, is that on the facts the defendants to the claim (the section 168(5) applicants) were prepared to make what was likely to be a better offer than Mr Venables had made. The second is

that the liquidator was proceeding under a belief, wrong in law, that he was not permitted to assign the claim to Tottenham Plc and Mr Sugar. Moreover, he did not take legal advice on the complicated question of how an assignment of the claim would impact on an application for security for costs being made in the litigation between Edennote and Tottenham Plc, which would appreciably affect the value of the claim.

48. Lord Justice Nourse acknowledged that "it is certainly possible for a liquidator to do something so utterly unreasonable and absurd that no reasonable man would have done it, simply by selling an asset of the company without taking into account the possibility that a third party might well have made a better offer than he to whom it was sold". But to say that this is possible does not mean that it is necessarily perverse not to do so. It all depends.

49. In my judgment, therefore, there was no failure by the judge to recognise that the liquidator was under a duty to give Mrs Lock and her family an opportunity to acquire the claims. He was under no such duty. Rather, the question is whether it was perverse of him not to do so.

50. The judge did not accept the explanation given by the liquidator for not approaching Mrs Lock and her family. He described that explanation as "unsatisfactory". Mr Collings submitted that, having rejected the liquidator's explanation, it was not open to the judge to substitute other reasons for those which the liquidator gave, in order to avoid a finding of perversity. I would reject that submission also. Whether a liquidator's act is perverse in the sense described in the authorities is an objective question. The judge was entitled to conclude, if the facts justified it, that the liquidator's decision to assign the claims to Manolete was not perverse even if the reasons which he gave for his decision were unsatisfactory.

51. In my judgment the facts here clearly justified that conclusion. In particular, Mrs Lock never followed up the suggestion made at the meeting on 8th February 2018 that she might be interested in buying the claims; her parents did not respond to the liquidator's solicitors' letter dated 21st May 2019 warning that he was contemplating selling the claims against them to a specialist insolvency litigation funder and that, in the absence of settlement within a reasonable time, the sale would be completed and the claims would be pursued; the liquidator would have been entitled to infer (and would have been correct to do so) that this letter had been passed to Mrs Lock; and Mrs Lock had maintained that the claims against her parents were without merit, worth only nuisance value. It is true (and may be a ground for criticising the liquidator) that there had been no mention of a claim against her personally, but it is hard to think that she would have taken a different view if there had been.

52. Moreover, the liquidator had no reason at all to think that Mrs Lock or her parents would have offered a better deal than the terms on which Manolete was prepared to acquire the claims – and in fact they would not have done. Those terms included not only an upfront sum, but also a share in the proceeds of the claims. In order to match those terms, Mrs Lock or her parents would have had to be prepared to pay considerably more than the £30,000 upfront sum which Manolete had paid. They were not, and still are not, prepared to do so.

53. In my judgment, therefore, the judge was right to say, for the reasons which he gave, that the liquidator's assignment of the claim was not perverse.

Discretion

54. Section 168(5) gives the court a discretion to set aside the assignment of the claims, but does not require it to do so. Neither we nor the judge heard any argument about how this discretion should be exercised on the facts of this case. However, it is apparent that the effect of setting aside the assignment to Manolete would (at the very least) delay further the trial of the claims against Mrs Lock and her family. That appears to be contrary to the interests of the Company's creditors as a class.

55. Accordingly, if I had reached a different view on the issues of standing and perversity, I would have wished to consider carefully what if any order should be made as a result. There would appear to be no point in setting aside the assignment to Manolete in the absence of clear evidence that Mrs Lock or her family are prepared to make a better offer. But in any event, it is always open to them to settle the claims against them if they wish to do so.

Disposal

56. I would dismiss the appeal.

Lord Justice Stuart-Smith:

57. I agree.

Lady Justice Asplin

58. I also agree.