



Batty v Bourse Trust Company Limited
Royal Court
28th March 2017

JUDGMENT
18/2017

Company liquidation – declarations of an unlawful distribution and a transaction at an undervalue and/or a transaction defrauding creditors.

IN THE ROYAL COURT OF GUERNSEY

(ORDINARY DIVISION)

Between:

WILLIAM ANTONY BATTY
(as liquidator of Keane Property (Tolworth) Limited (in liquidation))

Applicant

-and-

(1) BOURSE TRUST COMPANY LIMITED
(as trustee of Thorpe Heritage Investment Limited FURBS)

(2) BOURSE DIRECTORS LIMITED

Respondents

Date of hearing: 22nd December 2016

Decision handed down: 28th March 2017

Before: Richard James McMahon, Esq., Deputy Bailiff

Counsel for the Applicant: Advocate M C Newman

Counsel for the Respondents: Advocate C H Edwards

Cases, Texts & Legislation referred to:

The Insolvency Act 1986

The Insolvency Act 1986 (Guernsey) Order 1989

Slinn and Slinn v Official Receiver and liquidator of Seagull Manufacturing Co. Ltd (1996) 22.GLJ.83

Hughes v Hannover Ruckversicherungs-Aktiengesellschaft [1997] 1 BCLC 497

Re Focus Insurance Co Ltd [1997] 1 BCLC 219

Re Dallhold Estates (UK) Pty Ltd [1992] BCLC 621

Re Bank of Credit and Commerce International SA (No. 9) [1994] 3 All ER 764

In re Med Vineyards Limited (in compulsory liquidation) (unreported, 25 July 1995)

The Companies (Guernsey) Law, 2008
The Companies (Guernsey) Law, 1994
The Companies (Guernsey) Law, 1990
The Companies Consolidation Act 1908
In the matter of X (a bankrupt) (unreported, 4 August 2015)
The Companies Act 2006
Loi ayant rapport aux Débiteurs et à la Renonciation, 1929
In the matter of the Esteem Settlement 2002 JLR 53

Introduction

1. By an order made in the Birmingham District Registry of the High Court of Justice of England and Wales dated 11 December 2014, the Applicant (“Mr Batty”) was appointed as liquidator of Keane Property (Tolworth) Limited (“Keane”) pursuant to the terms of the Insolvency Act 1986. The director of Keane, Barry Lewis, has not been co-operating with Mr Batty’s enquiries. Mr Barry Lewis was declared bankrupt in the Guildford County Court on 18 March 2014. Mr Batty has seen a report prepared by the Official Receiver dated 1 May 2014 which indicates that Mr Lewis told the Official Receiver that he is the beneficiary of a trust. Mr Batty has now ascertained that the trust is known as Thorpe Heritage Investments Limited FURBS (“Thorpe FURBS”) and that the trustee is Bourse Trust Company Limited.
2. Mr Batty applied in the Birmingham District Registry pursuant to section 426 of the 1986 Act for the issuing of a letter of request to this Court. An order was duly made on 8 April 2016. The court was satisfied, having regard to Mr Batty’s Affidavit in support sworn on 2 February 2016, that it was just and convenient and in the best interests of the liquidation to issue the letter of request. That letter, eventually dated 27 April 2016, requested this Court to recognise Mr Batty’s appointment and to hear and determine the application, which had been exhibited in draft to his Affidavit, and generally to provide such other assistance as is appropriate so as to assist and act in aid of and be auxiliary to the High Court. The proceedings instituted by Mr Batty in Birmingham referred to Bourse Trust Company Limited as trustee of Thorpe FURBS and of Blythe Investment Group Limited (“Blythe”).
3. The Applicant’s original application was first before the Court on 1 July 2016, when I dispensed with attendance of Counsel and gave directions on the papers. As a result, the Applicant filed the First Affidavit of Robin Koolhoven sworn on 29 July 2016 and an Affidavit of Julie Coutu sworn on 19 August 2016 was filed in response. A Second Affidavit of Mr Koolhoven sworn on 23 September 2016 was filed in reply. I will not need to make much, if any, further reference to this Affidavit because Mr Koolhoven has not deposed to any additional facts but has descended into legal argument on what Julie Coutu had stated in her Affidavit and, in doing so, recognised that the relief to be sought by the Applicant was evolving. Pursuant to the terms of a Consent Order made on 30 September 2016, an application to amend the Application was made dated 7 October 2016 and supported by a Third Affidavit of Mr Koolhoven sworn the same day, to which I need make no further reference. That application to amend was dealt with by consent on 4 November 2016. As well as expanding the relief sought by the Applicant, the Amended Application made no reference to Bourse Trust Company Limited being the trustee of Blythe Investment Group Limited, but joined as the Second Respondent Bourse Directors Limited. Ms Coutu had identified that Bourse Directors Limited, a subsidiary of Bourse Trust Company Limited, is the corporate director of Blythe, a company incorporated in the British Virgin Islands, and of which Bourse Trust Company Limited held and holds the entire shareholding in its capacity as trustee of Thorpe FURBS. Bourse Directors Limited also provides company administration services to Blythe.

4. During the course of the hearing on 22 December 2016, Advocate Newman, who appears on behalf of the Applicant, sought leave to re-amend the Application so that some of the relief sought more accurately reflected the position shown by the evidence. On behalf of both Respondents, who had indicated they were adopting a neutral stance generally, Advocate Edwards did not oppose the amendments sought, which I duly granted, with the result that the Re-Amended Application is what I now have to determine. Accordingly, as well as seeking recognition of his appointment as liquidator and a declaration that the Court has jurisdiction under the terms of section 426 of the 1986 Act, as extended to Guernsey, the substantive relief set out in para. 3 of the Re-Amended Application comprises:

“Declarations:

- a. *That any dividends declared by the Company in or around December 2013 in favour of Blythe amount to unlawful distributions pursuant to Part 23 of the Companies Act 2006, as amended;*
- b. *That the payments from the Company to Blythe acting by either or both of the First Respondent (as trustee of the Thorpe FURBS) and Second Respondent in or about 31 October 2013 in the sum of £1,000 and on or about 6 December 2013 in the sum of £400,000 (Payments) amount to transactions at undervalue within the meaning of section 238 of the 1986 Act and are void; and*
- c. *That the Payments amount to transactions defrauding creditors within the meaning of section 423 of the 1986 and are void;*

Orders:

- d. *That the First Respondent and/or Second Respondent do procure payment from Blythe to the Applicant such sums as remain in the accounts of Blythe held by the First Respondent (as trustee of the Thorpe FURBS) up to the sum of £501,000 together with interest and/or income earned by the Trustee from those sums and/or an assignment of any assets of the Thorpe FURBS held by the First Respondent as trustee of the Thorpe FURBS and relating to any of the Payments, to the Applicant;*
- e. *That the First Respondent do within 14 days of the date of any order made by the Court, deliver to Ogier, Guernsey advocates to the Applicant, a full statement of account showing all sums passing between the First Respondent (as trustee of the Thorpe FURBS) and Blythe, together with a full statement of account of all sums paid into the Thorpe FURBS and all payments made from the monies held by the Thorpe FURBS, together with details of all recipients of such sums received from the Thorpe FURBS;*
- f. *The First Respondent do within 14 days from the date of this Order, deliver to Ogier a full list of beneficiaries of the Thorpe FURBS together with details of all sums (in any form) received by such beneficiaries;*
- g. *The Respondents shall disclose all records and documents relating to Thorpe FURBS and Blythe, as well as the transaction involving those entities within 28 days of the date of the order;*

- h. The Respondents shall procure the repatriation of the funds held by Blythe to the Company (or such account as the court may designate) within 28 days of the date of the order;*
- i. The Respondents shall procure the repayment of any transactions post 12 June 2015 (such repayment to be paid to the Company or to such account as the court may designate) within 28 days of the date of the order;*
- j. The Second Respondent shall give disclosure in respect of documents and records relating to Blythe in so far as those documents and records directly or indirectly relate to transactions involving Keane Property (Tolworth) Limited and the subsequent flow of those funds.”*

Facts

5. The principal Affidavit evidence (including that of Mr Batty) shows that the events relevant to this Application are as follows.
6. Keane was a special purpose vehicle established for the construction of residential homes in the Tolworth area of south-west London. Its principal development was Rosemead Close. The sole shareholder of Keane is Blythe.
7. A winding-up petition was presented to the Birmingham District Registry on behalf of Peter Burton, who claimed to be owed £100,000, on 4 June 2013. Because a settlement was reached, this petition was then dismissed by District Judge Ingram on 12 November 2013. Proceedings were then issued by Mr Burton in the Northampton (CCMCC) County Court alleging breach of the terms of the settlement agreement dated 8 July 2013. The Particulars of Claim are dated 11 April 2014. Mr Koolhoven was acting against Keane on behalf of Mr Burton. A further petition to wind up Keane was presented to the Birmingham District Registry on 24 June 2014 on behalf of Mr Burton, which related to unpaid costs of the original petition not having been paid in accordance with the terms of the settlement deed. That petition was heard before District Judge Williams on 5 August 2014 and the petition granted. As a result, Mr Batty was appointed liquidator.
8. During the course of 2013, a number of the plots at the Rosemead Close development were completed and sold for various amounts. Mr Batty exhibits ledgers that he obtained from a solicitor at Granditsch and Moore, Sacha Moore, in respect of some of the plots. Most of the ledgers show that monies received from these sales were largely needed to redeem secured liabilities, with balances being used to meet the legal and estate agents’ costs. However, in respect of Plot 6, which Mr Batty has identified as the last of the sales, the ledger entries do not include any such redemption. The completion statement includes an entry under the column of monies paid out of £400,000 to “BOURSE TRUST CO.”, yet the narrative in the ledger simply reads “BALANCE”. Mr Batty also discovered an exchange of e-mails in the file relating to Plot 2 from 30 and 31 October 2013.
9. The first e-mail in time is from Julie Coutu to Sacha Moore. It was an enquiry about around £100,000 being held in the firm’s client account on behalf of Blythe because, if that was correct, she would provide bank details to enable the monies to be remitted to that company. Sacha Moore promptly replied that the source of funds held “*for Barry’s benefit*” was the sale of the property known as 2 Rosemead Close, Tolworth. Julie Coutu replied shortly thereafter that “*Our understanding from Barry Lewis is that the monies you are holding represent a dividend payment due to Blythe Investment Group Ltd as shareholder of the Keane SPV that sold the property*”.

Barry Lewis explained later that day that Sacha Moore was acting for Keane and that he had been dealing with him (Barry Lewis) in his capacity as sole director of that company, adding that Sacha Moore knew Blythe to be “*a/the shareholder*”, but without knowing any further details. Accordingly, Sacha Moore needed to be instructed as to what to do with the funds he was holding. As a result, Julie Coutu provided to Sacha Moore the next morning the bank account of Bourse Trust Company Limited’s client account at Butterfield Bank (Guernsey) Limited, indicating that the reference to provide should be “*Bourse re Blythe Investment Group Limited*”, and asked for some explanation as to the entitlement of Blythe to these monies, together with supporting documentation. A couple of hours later, after Sacha Moore had asked Barry Lewis if he wished him to send funds and if so the amount, Barry Lewis provided Sacha Moore with some payment instructions. Two payments were to go to Checkmate for the different reasons explained. The e-mail then instructs “*Bourse £1,000 into Bourse (test run?)*” and then gave the account details that had been provided by Julie Coutu, adding “*reference Blythe*”. Julie Coutu has clarified that £1,000 was received by Blythe from Granditsch and Moore on 6 November 2013. She understood this was paid in part settlement of fees but has been unable to confirm the position.

10. Julie Coutu has also confirmed that £400,000 was paid to Blythe by Keane’s solicitors (albeit a different firm, Ross Coates) on 6 December 2013. She has exhibited a copy of a minute of a board meeting of Keane held at Vanners Parade in Byfleet on 6 December 2013 and attended by Barry Lewis at which it was resolved that “*an interim dividend of £400000.00 per Ordinary £1 share in respect of the year ended 31st March 2014 be and is hereby declared payable on 12th December 2013 to those shareholders registered at close of business on 6th December 2013*”, along with a tax voucher in favour of the member Blythe. She has also exhibited a source of wealth letter dated 23 December 2013 from a director of Tax Innovations Limited, referring to the way in which Mr and Mrs Lewis operated various companies for residential development projects, which were usually wound up at the end of each project to minimise risk, and which provided income by way of profit distribution from capital or possibly by way of dividend or directors’ fees.
11. Blythe then paid a dividend of £310,025 to the First Respondent in its capacity as trustee of Thorpe FURBS. The minutes of a meeting of Blythe attended by representatives of its corporate director, the Second Respondent, held in Guernsey on 14 January 2014 set out the resolution to make that dividend payment. The balance sheet of Blythe as at 13 January 2014 shows a positive figure of £420,208 of assets less liabilities, with a figure of £383,384 shown as cash at bank and in hand. A loan was then made by the First Respondent as trustee of Thorpe FURBS to Barry Lewis and his wife, Tracey, in January 2014 of £310,000 and a formal written deed entered into in respect of that loan, although the actual date in January 2014 was not entered on to it, but presumably was on or after 14 January 2014. The term of the loan is 17 years.
12. Julie Coutu has also clarified that Blythe currently holds £57,304. This is the amount left from the receipts from Keane of £400,000 after paying the dividend to the First Respondent and paying various fees incurred. There is no cash in the Thorpe FURBS. Apart from its ownership of Blythe, the only other asset within that trust is a small piece of land, which discussions with Barry Lewis have suggested might have a value of approximately £15,000.
13. Solicitors instructed by Mr Batty, KW Law LLP (the firm in which Mr Koolhoven is a member), wrote to the First Respondent on 12 June 2015. The letter requested information pursuant to section 236 of the 1986 Act. It set out that Mr Batty’s investigations to date had led him to believe that the sum of £400,000 paid in respect of the completion monies received by Keane in respect of the sale of Plot 6 was a fraudulent attempt to place company assets beyond the reach of creditors and so fell within section 423 of the 1986 Act.

14. The Managing Director of the First Respondent replied acknowledging receipt of the letter by e-mail the same day. On 15 June 2015, Julie Coutu informed Mr Koolhoven that, as a result of advice received by the First Respondent, the information could not be released unless there was member consent or an order of this Court. Mr Koolhoven replied the same day referring to “*the reciprocal enforcement treaty between Guernsey and England*” and asking for whatever information could be supplied. Julie Coutu responded with confirmation that the First Respondent “*is the corporate Trustee of the Thorpe Heritage Investment Limited FURBS, which in turn, wholly owns Blythe Investment Group Limited*”. She indicated that member consent to release the information requested had been sought and indicated that it would not be prudent for the trustee to allow any transactions to be made by an entity within the trust structure in the circumstances where potential court proceedings had been intimated.
15. KW Law LLP wrote again to the First Respondent on 17 June 2015. This time, Mr Koolhoven enclosed the exchange of e-mails to which reference has been made in respect of Plot 2. He made a similar request for information pursuant to section 236 of the 1986 Act. He then wrote again on 23 June 2015, explaining that he had consulted Counsel with a view to making an application to the court shortly thereafter and setting out the desirability of an undertaking to avoid the added expense of seeking an interim injunction on behalf of Mr Batty. The First Respondent replied the following day confirming that no payments had been made from Thorpe FURBS or Blythe since 12 June 2015 and that no payments would be made until the assets became subject to an order of this Court or the First Respondent informed that the liquidation proceedings against Keane so far as they related to Thorpe FURBS and Blythe had ended.
16. Mr Batty has also explained that his review of Keane’s papers and records has not identified any documentation relating to the payment of dividends to that company’s shareholder, Blythe. Mr Batty caused enquiries to be made of Keane’s accountant, Tax Innovations Limited, and the director, Simon Griffiths, responded on 26 June 2015 that they had given no advice on Keane paying a dividend during the period September to December 2013, noting that some advice had been given to a different company with which Barry Lewis was involved. Mr Batty has also referred to the draft abbreviated accounts for Keane up to 31 March 2013, which were then approved by Barry Lewis on 2 January 2014, showing current assets (stocks, debtors and cash at bank and in hand) of £2,915,934, with creditors (amounts falling due within one year) of £2,867,450, so that the shareholders’ funds were £1 called up share capital and £48,484 on the profit and loss account.
17. Mr Koolhoven has exhibited an annual progress report of Isobel Brett, the trustee in bankruptcy of Barry Lewis, dated 21 August 2015, in which there is reference to a discretionary trust:

“The Debtor and his wife are the beneficiaries of a discretionary trust (“the Trust”). The Trust holds funds paid to it through Blythe Investments Limited, a shareholder of the various property development companies set up by the bankrupt.

The Debtor utilises the funds held in Trust to meet household and other living expenses.

In January 2014 Mr and Mrs Lewis withdrew the sum of £330,000 from the Trust in order to finance the rebuild of their matrimonial home.

I have requested copies of the Trust documentation from both the Trustees and Mr and Mrs Lewis. The Trustees have refused to provide any of the information requested without the consent of Mrs Lewis. She has refused to provide her consent.

The Trust is registered in Guernsey where UK legislation does not apply. This will complicate matters should any legal proceedings need to be instigated.

This matter has been referred to my solicitors to consider whether funds held by the Trust may be claimed as part of the Bankrupt Estate pursuant to Section 306 of the Insolvency Act 1986.”

The reference to “*various property development companies*” arises because there were two other companies that had gone into liquidation associated with Barry Lewis (Keane Property (Vanners) Ltd and Keane Property (Vanners) Uppers Ltd). This report also records that Barry Lewis had stated in his bankruptcy questionnaire on 17 April 2014 *inter alia* that Keane owed him £100,000 in respect of unpaid dividends. It is unclear how Keane can be said to owe a dividend to a person who is not one of its shareholders. It may indicate that Barry Lewis has no real perception that a company is a separate legal person to him. On behalf of Keane, Mr Batty had lodged a proof of debt claim in the sum of £182,943.66. This amount is in respect of an unpaid director’s loan account. Also on the list of creditors of Barry Lewis are Blythe and The Thorpe Heritage Investments Ltd, with submitted claims of £164,680.84 and £331,443.57 respectively. Julie Coutu has explained that separate claims were made because they covered different periods.

18. KW Law LLP wrote to Barry Lewis on 14 July 2016 explaining to him that he was obliged by sections 235 and 236 of the 1986 Act to cooperate with Mr Batty as liquidator of Keane, requesting a date on which he could meet with Mr Lewis, failing which application would be made to the court. Barry Lewis replied on 22 July 2016 directly to the liquidator, indicating first that he did not recognise that KW Law LLP had authority to act and then that he was unavailable to attend any meeting until later in the year, and he pointed out the correspondence might sensibly be sent to his trustee in bankruptcy or the questions the liquidator wished to have answered be put in writing to him. KW Law LLP also wrote to Mrs Tracey Lewis on 14 July 2016, with a similar request pursuant to section 236 of the 1986 Act. Her reply to that firm dated 18 July 2016 queried why she would have any interest in attending a meeting with anyone in relation to Keane when she had never been a director or shareholder and had no information about the company to provide.

Reciprocal relief

19. The Application is brought pursuant to section 426 of the 1986 Act as it has effect through extension to the Bailiwick of Guernsey by the Insolvency Act 1986 (Guernsey) Order 1989 (SI 1989 No. 2409, Ordres en Conseil, Vol. XXXII, p. 1). The subsections as extended, so far as they are material, provide:

“(4) *The courts having jurisdiction in relation to insolvency law in any part of the Bailiwick of Guernsey shall assist the courts having the corresponding jurisdiction in ... any relevant country or territory.*

(5) *For the purposes of subsection (4) a request made to a court in any part of the Bailiwick of Guernsey by a court ... in a relevant country or territory is authority for the court to which the request is made to apply, in relation to any matters specified in the request, the insolvency law which is applicable by either court in relation to comparable matters falling within its jurisdiction.*

In exercising its discretion under this subsection, a court shall have regard in particular to rules of private international law. ...

(10) *In this section “insolvency law” means–*

(a) *in relation to Guernsey:*

- (i) *Titres II to V of the Law entitled “Loi ayant rapport aux Débiteurs et à la Renonciation” of 1929;*
- (ii) *the Ordinance entitled “Ordonnance relative à la Renonciation” of 1929;*
- (iii) *articles LXXI to LXXXI of the Law entitled “Loi relative aux Sociétés Anonymes ou à Responsabilité Limitée” of 1908;*
- (iv) *sections 1, 3(3) and 4(2) of the Law of Property (Miscellaneous Provisions) (Guernsey) Law 1979;*
- (v) *the Preferred Debts (Guernsey) Law 1983;*
- (vi) *sections 12 and 32 to 39 of the Insurance Business (Guernsey) Law 1986;*
- (vii) *the rules of the customary law of Guernsey concerning persons who are unable to pay their judgment debts;*
- (viii) *any enactment for the time being in force in Guernsey which amends, modifies, supplements or replaces any of those rules or provisions; ...*

(d) *in relation to any relevant country or territory, so much of the law of that country or territory as corresponds to provisions falling within any of the foregoing paragraphs;*

and references in this subsection to any enactment include, in relation to any time before the coming into force of that enactment the corresponding enactment in force at that time.

(11) *In this section “relevant country or territory” means the United Kingdom”*

20. The Court of Appeal considered these provisions in *Slinn and Slinn v Official Receiver and liquidator of Seagull Manufacturing Co. Ltd* (1996) 22.GLJ.83, which was decided on 5 August 1991. This was an appeal from a decision of this Court dismissing an appeal from the Court of Alderney. Helpfully, Chadwick JA set out the origins of the provisions:

“The provisions now contained in subsections (4) and (5) of Section 426 of the 1986 Act, replace those which were formerly contained in Section 122 of the United Kingdom Bankruptcy Act, 1914. Those provisions were considered by this court in a judgment delivered on the 6th of February, 1989 In re. Roy Clifford Tucker, a Bankrupt, Civil Rep., No. 23. In giving judgment in that case, this court held that s.122 of the Bankruptcy Act of 1914, was part of the Domestic Law of Guernsey, and imposed on the court, to which a request for aid is made, a duty and not a discretion to act in aid of and be auxiliary to the High Court in England, in the absence of some compelling reason to the contrary.”

The approach to be taken was described as follows:

“... the fact that there is no provision in the [Companies (Amendment) (Alderney) Law, 1962] which is in similar terms to that now contained in s.236, subsection (2) of the Insolvency Act 1986 is immaterial. The language of s.426 subsection (5) of the 1986 Act is such as to confer authority on the court to which the request is made, that is the Court of Alderney, to apply in relation to any matters specified in the request, that is, in relation to the private examination sought by the request, the insolvency law, which is applicable by either court, that is, by either the court in London or the court in Alderney, in relation to comparable matters, that is, matters comparable to those specified in the request, falling within its jurisdiction, that is, falling within the jurisdiction of the relevant court whose insolvency law is made applicable.

The effect is that the Court of Alderney is authorised by s.426, subsection (5) to apply, in relation to the matters specified in the request by the English court, the insolvency law which is applicable by the English court in relation to comparable matters falling within the jurisdiction of the English court.”

21. Advocate Newman has suggested that further guidance as to the discretionary nature of the relief sought can be derived from Hughes v Hannover Ruckversicherungs-Aktiengesellschaft [1997] 1 BCLC 497. In his judgment, Morritt LJ undertook a historical review of the decisions about giving aid to a foreign court under section 426 of the 1986 Act and its predecessors. In doing so, His Lordship referred (at p. 514) to the way Sir Richard Scott V-C put it in Re Focus Insurance Co Ltd [1997] 1 BCLC 219 (at p. 227), comparing what Chadwick J had concluded in Re Dallhold Estates (UK) Pty Ltd [1992] BCLC 621 and Rattee J had said in Re Bank of Credit and Commerce International SA (No. 9) [1994] 3 All ER 764:

“So there I have two very similar approaches: - Chadwick J: Do what you are asked to do unless there is a compelling reason not to do so; Rattee J: Do what you are asked unless there is some good reason for not doing so. I am content to accept that guidance as to the manner in which an application under s 426(4) should be approached by the court.”

The analysis of Morritt LJ continued (at p. 517):

“Consequently the concluding words of sub-s (5) introduce the hypothesis that the matters specified in the request fall within the jurisdiction of the court applying the insolvency law under consideration in so far as ‘comparable matters’ would do so. ... Thus there is available to the court in England when asked for assistance by the court of a relevant country under s 426 (a) its own general jurisdiction and powers and either (b) the insolvency law of England and Wales as provided for in the Insolvency Act 1986, the specified sections of the Company Directors Disqualification Act 1986 and the subordinate legislation made under any of those provisions or (c) so much of the law of the relevant country as corresponds to that comprised in (b). In the case of (b) and (c) but not (a) the court in England is entitled to apply such law on the hypothesis as to jurisdiction concerning the matters specified in the request to which I have referred. ...

The obligation to assist is imposed on a court, not some executive agency. It would in my view require very clear words to justify a conclusion that the court in England was not intended by Parliament to perform its normal function of seeking to do justice in accordance with the law. There is no such indication. Accordingly the function of the court under s 426 must be to consider whether in accordance with the three sources of

law I earlier identified as (a), (b) and (c) the assistance may properly be granted. If it may then it should be, thereby discharging the statutory duty imposed by s 426. But if it may not be properly granted then it should be withheld for it must be implicit in the fact that the duty is cast on a court that the duty is qualified by reference to what the court may properly do as a court. Of course if the court in England cannot do exactly what is sought then it should consider whether it can properly assist in some other way in accordance with any of the other available systems of law. Thus the reasons for withholding assistance either as sought or in any other way are not limited to reasons of public policy. Of course public policy is a reason why assistance may be impossible under (a) or (b). But it is by no means the only reason. Further public policy might prevent assistance being given under (c) if the provision of the insolvency law of the country the court of which requested assistance were contrary to the public policy recognised by the court in England. In my view the court must consider in all cases whether the assistance sought or any other comparable assistance may be properly granted in accordance with the laws the court is authorised to apply on the hypotheses likewise permitted.”

22. In my judgment, I am bound to give effect to the test propounded in the *Seagull Manufacturing* case (*supra*), namely that, in the absence of any compelling reason, there is a duty and not a discretion to act in aid of and be auxiliary to the High Court in England. In deciding whether or not such a compelling reason exists, regard can potentially be had to the matters referred to by Morritt LJ, but the requirement for there to be a compelling reason is, in my view, a high hurdle to surmount before declining to give the assistance requested. The matters referred to be Morritt LJ have to be read so that the sources of law under section 426 of the 1986 Act as extended are (a) this Court’s general jurisdiction and powers, (b) the provisions of Guernsey insolvency law, which would be an updated list of the laws mentioned in section 426(10)(a), as extended and modified, and (c) so much of the law of England and Wales as corresponds to that comprised in (b).

Recognition and jurisdiction

23. I am quite satisfied that it is appropriate to recognise the appointment of Mr Batty as the liquidator of Keane. I have seen the order by which he was appointed to that office and this Court is familiar with applications to wind up Guernsey-registered companies and appointments of liquidators. There is, therefore, no difficulty in recognising the appointment of Mr Batty so that the other relief he seeks can be considered.
24. Similarly, it is apparent from the terms of section 426 of the 1986 Act as extended to Guernsey that this Court has jurisdiction to entertain the Application and indeed has a duty to give aid unless there is a compelling reason not to do so. In accordance with usual comity principles, this Court will give whatever assistance it legitimately can. The key question, therefore, is whether the relief sought by Mr Batty is covered by the approach I have just outlined.
25. Looking at the approach that was taken in *In re Med Vineyards Limited (in compulsory liquidation)* (unreported, 25 July 1995), the inference would be that the wide powers now contained in section 426 of the Companies (Guernsey) Law, 2008 could be prayed in aid. That section provides:

“The liquidator of a company may seek the Court’s directions in relation to any matter arising in relation to the winding up of the company and upon such an application the Court may make such order as it thinks fit.”

That section re-enacts section 110 of the Companies (Guernsey) Law, 1994, which in turn re-cast the provision that had been introduced by section 23(2) of the Companies (Guernsey) Law, 1990. The Court held that its wide supervisory jurisdiction to ensure that the affairs of companies are effectively wound up and that liquidators, as officers of the court, are enabled to do what is required of them was capable of giving jurisdiction to order that a director appear before a Commissioner of the Court for the purpose of answering questions concerning actions taken as such a director. It did not concern the Court that the 1994 Law (or the 1990 Law or even the earlier Law in 1908) did not contain any express provisions along the lines of those existing in England and Wales, eg, section 174 of the Companies Consolidation Act 1908. The principal power to order such an examination is now contained in section 236 of the 1986 Act.

26. These issues were touched upon in passing in *In the matter of X (a bankrupt)* (unreported, 4 August 2015), but the focus of that case was much more personal bankruptcy rather than corporate insolvency, so the conclusions do not directly impact on the approach to be taken to section 426 of the 1986 Act, as extended. However, insofar as the Court on that occasion declined to acknowledge any inherent jurisdiction to make an order for the examination of third parties concerned with the bankrupt's affairs, it is possible to question whether the Court would now follow the *In re Med Vineyards* case. Whilst the ability of a liquidator to seek directions from the Court clearly remains broad jurisdiction, meaning that the outcome might be the same, it is also reasonable to note that the 2008 Law resulted from a comprehensive review of the Companies Act 2006 and, to an extent, the Insolvency Act 1986 and so contains much more detailed provision than previous company legislation. Accordingly, where there are omissions from our statutory regime it starts to look more as if a conscious decision has been reached not to enact equivalent provisions and the option of the Court to fill the gaps might now be regarded as being reduced from how it might have been in the 1990s. (By way of an aside, as a result of the Court's decision, the applicant in that case then obtained the issuing of a letter of request from the High Court of Justice pursuant to section 426 of the 1986 Act, to which effect was given by a further order of this Court.) However, I do not need to decide whether in a domestic case Guernsey law includes the types of relief sought by this Application because section 426 of the 1986 Act as extended enables the Court to apply the insolvency law as it would apply in Birmingham, provided, of course, that there is no compelling reason not to do so.

Unlawful distributions

27. Paragraph 3 of the Re-Amended Application first seeks a series of declarations, starting with the Applicant's contention that any dividend declared by Keane in or around December 2013 was unlawful.
28. Section 830 of the Companies Act 2006 provides:

- “(1) *A company may only make a distribution out of profits available for the purpose.*
- (2) *A company's profits available for distribution are its accumulated, realised profits, so far as not previously utilised by distribution or capitalisation, less its accumulated, realised losses, so far as not previously written off in a reduction or reorganisation of capital duly made.”*

Section 829(1) defines “distribution” as “every description of distribution of a company's assets to its members, whether in cash or otherwise”, subject to the exceptions listed in subsection (2), none of which is relevant in this case.

29. I am satisfied from the evidence of Mr Batty that the papers and records of Keane that he now possesses do not show that any dividend was declared. I am equally satisfied from the evidence of Julie Coutu that the Respondents have been provided with a board minute showing that a dividend was declared. Having regard to the financial position of Keane at around this time, I find it more likely than not that Keane had insufficient profits available for the distribution of a dividend of £400,000 to be made to its member, Blythe. There are provisions on the face of the 2006 Act that spell out the documents to which regard must be had in order to ascertain what amount, if any, is available to distribute. I have seen nothing that suggests that £400,000 was available within Keane's profits for this purpose.
30. The position by reference to Guernsey law produces a similar outcome. Section 304(1) of the 2008 Law provides:

“A company may pay a dividend if –

- (a) the board of directors is satisfied on reasonable grounds that the company will, immediately after payment, satisfy the solvency test, and*
- (b) it satisfies any other requirement in its memorandum and articles.”*

The solvency test is set out in section 527 of the Law:

“(1) For the purposes of this Law a company satisfies the solvency test if –

- (a) the company is able to pay its debts as they become due,*
- (b) the value of the company's assets is greater than the value of its liabilities, and*
- (c) [relates only to supervised companies].*

(2) Without prejudice to sections 303 and 304, in determining whether the value of a company's assets is greater than the value of its liabilities, the directors –

- (a) must have regard to –*
 - (i) the most recent accounts of the company, and*
 - (ii) all other circumstances that the directors know or ought to know affect, or may affect, the value of the company's assets and the value of the company's liabilities, and*
- (b) may rely on valuations of assets or estimates of liabilities that are reasonable in the circumstances.”*

31. It appears to me that Barry Lewis has used Keane as a means to extract monies to be paid away into Blythe, and so potentially available thereafter for the personal benefit of him and his wife, without having regard to the financial consequences to Keane of doing so. Nothing that Mr Batty has produced suggests that during 2013 Keane consistently satisfied the solvency test. Mr Burton's winding-up petition was compromised shortly before the sales at Rosemead Close concluded. It is apparent from the settlement agreement that Barry Lewis was involved. As such, he can be taken to have knowledge of the state of affairs within Keane. Given the secured

liabilities, as each plot sold, until the last one on 13 November 2013, the proceeds were being used to clear Keane's indebtedness. When plot 6 completed, where there was no secured liability to redeem, rather than apply the monies earned being used to reduce the company's other liabilities, I am satisfied that the balance was paid away in the form of the dividend declared. In doing so, I find that Keane was left in a position where it did not satisfy the solvency test. In the absence of any explanation offered by Barry Lewis, I further find that as the sole director of Keane he could not have been satisfied that, immediately after the payment of £400,000, Keane would satisfy the solvency test. As a result, the dividend paid would not have been permitted under section 3-4(1) of the 2008 Law.

32. In those circumstances, whether by reference to English law or Guernsey law, the distribution to Blythe by way of a dividend declared on 6 December 2013 was not permitted. The act of declaring the dividend and paying it away from Keane's funds was *ultra vires* that company. I will turn to the consequences of that in due course. Accordingly, there is no compelling reason why this Court should not grant the relief sought in the Application. By virtue of section 426 of the 1986 Act as extended to Guernsey, I can grant relief that would be capable of being granted by the High Court of Justice and so am able to make a declaration in respect of this dividend.
33. I am limiting the declaration to the single dividend declaration because that is as far as the evidence before me goes. I am not prepared to make a declaration referring to "*any dividends*" in accordance with sub-paragraph (a). However, I consider that such a specific declaration is all that is required by Mr Batty anyway

Transactions at undervalue

34. The second declaration sought by Mr Batty relates to the two payments identified that went to Blythe from Keane. These are the so-called "test run" of £1,000 on or about 31 October 2013 and the dividend payment of £400,000 on or about 6 December 2013. Advocate Newman argues that these could be found to be transactions at an undervalue within the meaning of section 238 of the 1986 Act. This section, which applies *inter alia* where a company goes into liquidation, where references to "*the office-holder*" are references to the liquidator, provides:

"(2) *Where the company has at a relevant time (defined in section 240) entered into a transaction with any person at an undervalue, the office-holder may apply to the court for an order under this section.*

(3) *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.*

(4) *For the purposes of this section and section 241, a company enters into a transaction with a person at an undervalue if—*

(a) *the company makes a gift to that person or otherwise enters into a transaction with that person on terms that provide for the company to receive no consideration, or*

(b) *the company enters into a transaction with that person for a consideration the value of which, in money or money's worth, is significantly less than the value, in money or money's worth, of the consideration provided by the company.*

- (5) *The court shall not make an order under this section in respect of a transaction if it is satisfied—*
- (a) *that the company which entered into the transaction did so in good faith and for the purposes of carrying on its business, and*
 - (b) *that at the time it did so there were reasonable grounds for believing that the transaction would benefit the company.”*

The “*relevant time*” is defined in section 240 as the period of two years ending with the onset of insolvency, which phrase is similarly defined as being the date of the winding up. It is clear that the events in late 2013 in this case fall within that period.

35. Advocate Newman acknowledges that there is no direct statutory equivalent in Guernsey to section 238 of the 1986 Act. It is fair to comment that Guernsey’s laws on insolvency, whether personal or corporate, remain less prescriptive than in other jurisdictions, such as England and Wales. Advocate Newman has drawn attention to the regime created under the *Loi ayant rapport aux Débiteurs et à la Renonciation* of 1929 as offering some support for the general proposition that there is scope to set aside transactions at an undervalue. The strict terms of article IX of that Law might not apply to the present circumstances, but the regime is indicative of an approach that might be taken if this situation arose in a purely domestic context. He might also have referred to the position under section 422 of the 2008 Law, by which it may appear to Mr Batty as the liquidator that Barry Lewis, as an officer of Keane, has misapplied the company’s assets, as a result of which those assets were transferred to Blythe.
36. Advocate Newman also refers to the way a Pauline action might be used domestically, citing the detailed analysis undertaken by the Royal Court of Jersey in *In the matter of the Esteem Settlement* 2002 JLR 53, where (at para. 261) the briefest summary of such an action was “*that a creditor, whose claim predates the disposition in question, may set aside a disposition made by his debtor where the debtor is insolvent at the time of the disposition or becomes insolvent as a consequence of it, provided that the disposition is made with the intention on the part of the debtor to prejudice his creditors and provided that prejudice is indeed caused.*” Mr Batty has the function of seeking to realise Keane’s assets on behalf of all its creditors and so should have the ability to pursue monies that he now identifies should not have left Keane at these times by way of such an action.
37. The principal question for me is whether there is any compelling reason not to apply the insolvency law of England and Wales in relation to comparable matters to the present position. One of the reasons no doubt, why section 426 of the 1986 enables the application of the law of the requesting or requested jurisdiction is to enable some assistance to be given even if the domestic law of the requested court does not provide for the exact relief sought. That is why the provisions of the law of the requesting jurisdiction only have to correspond, or be comparable, to those in Guernsey, rather than needing to be identical. I am satisfied that there is no policy reason why I should decline to consider the position in accordance with section 238 of the 1986 Act. Had the party to which these payments were made been within the jurisdiction of England and Wales there would have been no question of having to rely on an order in aid and the English court seems to me to have the power to determine the matter under section 238. There appear to be a number of options open in Guernsey to seek to obtain similar relief. The overall structure that has been created for the benefit of Barry Lewis has Thorpe FURBS at the top, owning Blythe (the director of which is a Guernsey-registered entity), which in turn owns Keane, each of which is a corporate entity in a different jurisdiction and, in my view, there is no reason, let alone a

compelling one, to refuse to have regard to section 238 in the context of that type of multi-jurisdictional corporate structure.

38. I take the view that I have to look at the two payments made separately. In relation to the purported payment of a dividend to its member, I struggle to regard that as a transaction covered by section 238 at all. The term “*transaction*” is defined in section 436(1) as including “*a gift, agreement or arrangement*”, but even by reference to “*arrangement*” I find it difficult to regard what happened as falling within this term. Advocate Newman has not referred me to any authority that sets out that the wrongful making of a dividend payment is to be treated as a transaction at an undervalue for the purposes of section 238 of the 1986 Act. I would have thought that, if an unlawful distribution were to be so regarded, there would be authority indicating as much. Having regard to subsection (4), I would not treat the making of a dividend payment as a gift. It is a return on a member’s capital investment paid out of a share of the profits and so, in my opinion, cannot be dealt with under the terms of section 238. I have already pointed out that the payment was *ultra vires* the company and this seems to me to be at odds with the wording in section 238, which refers to gifts and transactions in the sense of such actions being in principle permissible. However, because I have already found that Part 23 of the 2006 Act is engaged in relation to the payment to Blythe of £400,000, my conclusion that this payment does not fall within section 238 of the 1986 Act has no real impact on Mr Batty’s position. Further, having already decided to declare that the dividend of £400,000 paid to Blythe was an unlawful distribution, there is no purpose to be served by making a further declaration in relation to it by reference to section 238.
39. The earlier “*test run*” payment of £1,000, however, does fall within section 238. This was a payment of part of the monies held to the order of Keane. The references by Mr Batty, and even from Mr Lewis, about a dividend of £100,000 seem to me to relate to the total amount held, but the evidence does not support a conclusion that this amount was declared as a dividend at all. All but this £1,000 payment from the sum of £100,000 was used in the other ways directed by Barry Lewis. I am satisfied that Barry Lewis gave the instruction to divert £1,000 to Blythe in accordance with the payment instructions received from Julie Coutu as a means of seeing how well that payment routing would work. As it turned out, this was the trial before the declaring of the large dividend of £400,000 later in 2013. Although Julie Coutu refers to the belief that the payment of £1,000 was in part settlement of fees, she was unable to confirm that position. Accordingly, I find that the payment was not made from monies belonging to Keane for any purpose associated with the business of Keane and it was not a transaction that would benefit Keane. No satisfactory explanation has been given as to why Keane would remit £1,000 to Blythe at that time. In those circumstances, it seems to me that the content of the e-mail from Barry Lewis is the best explanation that has been given, namely that this was a trial run before a larger payment was made to Blythe. I suspect that Barry Lewis thereafter simply overlooked the need to document what this payment was for. In the absence of any explanation, the conclusion I reach is that it was a payment for the ultimate personal benefit of Barry Lewis for which Keane received no consideration.
40. Because of the difference between the two payments, the only declaration I feel I can properly make in respect of section 238 of the 1986 Act relates to the payment of £1,000 being a transaction at an undervalue and so void.

Defrauding creditors

41. The final declaration sought by Mr Batty relates to the payments of £1,000 and £400,000 being contrary to section 423 of the 1986 Act. That section provides:

- “(1) This section relates to transactions entered into at an undervalue; and a person enters into such a transaction with another person if–*
- (a) he makes a gift to the other person or he otherwise enters into a transaction with the other on terms that provide for him to receive no consideration;*
 - (b) he enters into a transaction with the other in consideration of marriage or the formation of a civil partnership; or*
 - (c) he enters into a transaction with the other for a consideration the value of which, in money or money’s worth, is significantly less than the value, in money or money’s worth, of the consideration provided by himself.*
- (2) Where a person has entered into such a transaction, the court may, if satisfied under the next subsection, make such order as it thinks fit for–*
- (a) restoring the position to what it would have been if the transaction had not been entered into, and*
 - (b) protecting the interests of persons who are victims of the transaction.*
- (3) In the case of a person entering into such a transaction, an order shall only be made if the court is satisfied that it was entered into by him for the purpose–*
- (a) of putting assets beyond the reach of a person who is making, or may at some time make, a claim against him, or*
 - (b) of otherwise prejudicing the interests of such a person in relation to the claim which he is making or may make.”*

42. There are elements of this provision that are the same as section 238. In the context of the present case, it is rather difficult to distinguish between the effect of the two sections, because each permits the Court to restore the position to which it would have been if the transaction had not been entered into. Section 423(3) limits that relief to a case where the Court is satisfied as to the purpose underlying the transaction being to put assets beyond the reach of a creditor, whereas section 238(5) precludes the granting of relief if the Court is satisfied that the transaction was entered into by the company in good faith and for the purposes of carrying on its business and that there were, at the time, reasonable grounds for believing the transaction would benefit the company. Given the way that Barry Lewis was acting as if Keane were not a separate person to him, it is possible to regard the steps he took to cause these payments to be made to Blythe to have been for the purpose of diverting assets away from being available to settle the other debts of Keane, which cannot be regarded as being of benefit to the company. To that extent, reliance on the sections appears to be almost inter-changeable.

43. Advocate Newman has noted that there is again no direct statutory equivalent in Guernsey to section 423 of the 1986 Act. Accordingly, he suggests that the Pauline action potentially available in these circumstances shows that section 423 can be regarded as comparable for the purposes of section 426 of the 1986 Act as extended. For similar reasoning to that set out above,

I am persuaded that the absence of any direct statutory equivalent does not amount to a compelling reason to decline to consider the position in relation to section 423.

44. I find myself in the same position, though, when construing section 423 as I found in respect of section 238. The payment of £400,000 as a dividend cannot, in my opinion, be regarded as a gift or transaction at an undervalue. I am, though, satisfied that Barry Lewis, as director of Keane and as beneficiary of Thorpe FURBS, took the decision to extract from Keane this large amount which meant that Keane would be unable to settle claims from its creditors, at least those who were owed substantial amounts. I am, therefore, satisfied that if the payment, not being a lawful distribution, but something done *ultra vires* the company, could be regarded as falling within section 423 (and this will apply equally to section 238) as a gift or a transaction at an undervalue, then the type of relief being sought would be available. I do not, though, consider that more is needed above declaring that the dividend payment was an unlawful distribution.
45. The position in relation to the payment of £1,000 is much easier. As previously stated, there has been no adequate explanation advanced as to how this payment to Blythe is said to be justified. In those circumstances, albeit that the primary purpose appears to me to be the “*test run*” to which Barry Lewis referred, another purpose inevitably was to put monies that belonged to Keane into its parent company and so out of the reach of any creditor of Keane. Because the outcome through applying section 423 is the same as through applying section 238, I am persuaded that a single declaration in respect of the £1,000 payment can refer to both provisions.

Other orders sought

46. Having concluded that Mr Batty has succeeded in satisfying me that the payment of £400,000 to Blythe as a dividend was not permitted by section 830 of the 2006 Act (or, for that matter, section 304(1) of the 2008 Law) and that the earlier payment of £1,000 is a transaction at an undervalue and a transaction defrauding creditors, the ancillary questions relate to the forms of relief available. The orders in para. 3(d) to (j) involve a mixture of the Respondents disclosing information, all of which would potentially be obtainable if someone were to be examined before a Commissioner of the Court, and making or procuring payment of the balances of those monies. On the evidence thus far, and as I have already indicated, I am not satisfied that Blythe has received more than the amount of £401,000. I regard the reference to £100,000 being due as a dividend arising from the flawed understanding of Barry Lewis. However, this may become clearer if the orders sought substantively can all be granted and show differently. For the time being, I reject that there is any basis in the orders sought to refer to £501,000.
47. Section 236 of the 1986 Act, again referring to the liquidator as “*office-holder*”, provides:

“(2) *The court may, on the application of the office-holder, summon to appear before it—*

- (a) *any officer of the company,*
- (b) *any person known or suspected to have in his possession any property of the company or supposed to be indebted to the company, or*
- (c) *any person whom the court thinks capable of giving information concerning the promotion, formation, business, dealings, affairs or property of the company.*

- (3) *The court may require any such person as is mentioned in subsection (2)(a) to (c) to submit to the court an account of his dealings with the company or to produce any books, papers or other records in his possession or under his control relating to the company of the matters mentioned in paragraph (c) of the subsection.*
- (3A) *An account submitted to the court under subsection (3) must be contained in–*
 - (a) *a witness statement verified by a statement of truth (in England and Wales), and*
 - (b) *an affidavit (in Scotland).”*

This is one of the sections relied upon by Mr Batty when he was corresponding with Barry and Tracey Lewis.

- 48. As trustee of Thorpe FURBS, the First Respondent falls within section 236(2)(c). I think that the First Respondent has trust documentation that contains information concerning the dealings and affairs of Keane and which may paint a clearer picture for Mr Batty’s benefit about where the property of Keane is now to be found. As the director of Blythe, the Second Respondent is similarly such a person. Blythe itself falls within para. (b) on the basis that Mr Batty has persuaded me that I should know, or at least suspect, that Blythe has in its possession property that belongs to Keane.
- 49. Taking the payment of £400,000 first, the consequences of an unlawful distribution are specified in section 847 of the 2006 Act:
 - “(1) *This section applies where a distribution, or part of one, made by a company to one of its members is made in contravention of this Part.*
 - (2) *If at the time of the distribution the member knows or has reasonable grounds for believing that it is so made, he is liable–*
 - (a) *to repay it (or that part of it, as the case may be) to the company, or*
 - (b) *in the case of a distribution made otherwise than in cash, to pay the company a sum equal to the value of the distribution (or part) at that time.*
 - (3) *This is without prejudice to any obligation imposed apart from this section on a member of a company to repay a distribution unlawfully made to him.”*
- 50. From the evidence, especially that of Julie Coutu, I am unable to find that Blythe, as the recipient of this unlawful distribution, knew or had reasonable grounds for believing that the distribution had been made in contravention of Part 23 of the 2006 Act. It is possible, I suppose, that Mr Batty may be able to advance that argument if he were to see all the documents relating to it but, taking the minute of Keane declaring the dividend dated 6 December 2013 at face value, it appears that those administering Blythe were presented with a document showing that a dividend had been declared and so the effect of section 847 could turn on whether it was incumbent on those responsible for Blythe to enquire as to the financial state of Keane and its ability to declare this dividend. However, as I understand the position, I do not need to make any such findings, at least at present, because the effect of subsection (3) is that there may be some other obligation to repay on which Mr Batty can rely.

51. Advocate Newman has not expanded on this issue as much as he might have done. I understand that there is a line of authority in England and Wales dealing with unlawful distributions that points squarely to the directors involved having the responsibility, in the same way as trustees found liable for a breach of trust, to reimburse the company for the full amount paid out to shareholders. I take the view that this line of authority would potentially be used in Guernsey if there were a finding that section 304(1) of the 2008 Law means that a distribution made by a Guernsey company is unlawful. In this way, Mr Batty can seek redress from Barry Lewis for the whole of the £400,000. Further, on the basis that the payment of £400,000 to Blythe was *ultra vires* Keane, Blythe holds that money as constructive trustee for Keane. Now that Keane is in liquidation, Mr Batty can seek to have returned to Keane the monies held on constructive trust for Keane by Blythe.
52. A further complication in this case is that Blythe is not a party to this Re-Amended Application. Instead, the Second Respondent, as its director and administrator, has been convened. That is why the relief sought is couched in terms of procuring things to be done rather than there being a direct order to do something. This Court clearly has no jurisdiction on this Re-Amended Application to make any order directly against Blythe, so the best it can do is to make an order against the Respondents in terms of them using their respective positions to achieve that outcome.
53. The scheme of the 1986 Act appears to be that there is a first stage of supplying information to the court and a second stage of the court making appropriate orders pursuant to the enforcement powers conferred on it by section 237:
- “(1) *If it appears to the court, on consideration of any evidence obtained under section 236 or this section, that any person has in his possession any property of the company, the court may, on the application of the office-holder, order that person to deliver the whole or any part of the property to the office-holder at such time, in such manner and on such terms as the court thinks fit.*
- (2) *If it appears to the court, on consideration of any evidence so obtained, that any person is indebted to the company, the court may, on the application of the office-holder, order that person to pay to the office-holder, at such time and in such manner as the court may direct, the whole or any part of the amount due, whether in full discharge of the debt or otherwise, as the court thinks fit.*
- (3) *The court may, if it thinks fit, order that any person who if within the jurisdiction of the court would be liable to be summoned or appear before it under section 236 or this section shall be examined in any part of the United Kingdom where he may for the time being be, or in a place outside the United Kingdom.*
- (4) *Any person who appears or is brought before the court under section 236 or this section may be examined on oath, either orally or (except in Scotland) by interrogatories, concerning the company or the matters mentioned in section 236(2)(c).”*
54. To an extent, some of the information that would be provided if someone from the Respondents were to be examined has already been provided in the Affidavit of Julie Coutu. For example, she has explained that Thorpe FURBS has loaned a substantial amount to Barry and Tracey Lewis. Mr Batty can, of course, take whatever steps he considers appropriate directly against those people without needing any assistance from this Court. What Mr Batty effectively seeks is a full account of the dealings that Blythe and Thorpe FURBS has had with property that derives from Keane, although some of the sub-paragraphs are not limited in that way and would operate

generally (eg, sub-paragraphs (e), (f) and (g)). Again, because Blythe is not before the Court, referring to that company really means an account from its director, the Second Respondent, and possibly any steps taken by its member, the First Respondent, although I somehow doubt that there has been any involvement at that level.

55. Looking initially at filling the gaps in Mr Batty's knowledge, which I consider to be the first stage of this process, I take as my starting point that I could order that someone on behalf of both Respondents (or different persons, if that were more appropriate) appear before a Commissioner for the purpose of being examined by someone, probably Advocate Newman, on behalf of Mr Batty. The line of examination would need to be focused on property and information received from or on behalf of Keane, which is the extent of Mr Batty's interest in the affairs of Blythe and Thorpe FURBS. This could, I imagine, also be achieved by way of interrogatories for written answer. Indeed, if the information required can be confined to an account and the production of documentation, this could be achieved by directing the lodging of an affidavit (or affidavits). In the light of the answers given or the affidavit lodged, the Court would then be able to decide whether to make any orders in respect of payment (or, in the case of the Second Respondent, procuring payment) or transfers of property.
56. I have referred to the information being provided to the Court because that is the scheme of section 236 of the 1986 Act. The Re-Amended Application makes no reference to the Court, referring only to delivery to Advocate Newman's firm, Ogier. I take the view that the better approach is to require any written material to be lodged with the Court and also served on Ogier. If it were not served on Ogier, it would be something that could be sought on behalf of Mr Batty anyway. This would reflect what will happen if the examination of one or more persons were to be ordered. It is also a necessary step before the Court can make any further orders arising out of the information to be gleaned through this process.
57. From the information already provided by Julie Coutu, however, I am satisfied that Blythe currently holds £57,304, representing the balance of the payment of £400,000 to it. In their capacities as member and director respectively, as a means of putting those monies into the hands of Mr Batty, I think the Court has the broad jurisdiction to direct both Respondents to procure that money, plus any accrued interest, to be paid to Mr Batty as the liquidator of Keane. The only reason why I might hesitate before making such an order is that I have not been informed about the effect that will have on Blythe and its possible good standing as a matter of the law of the British Virgin Islands. However, this money does not form part of Blythe's own funds, being instead held on trust for Keane, so I do not feel I need to wait for any further information before dealing with that sum in the manner indicated.
58. The evidence from Julie Coutu is that there have been no payments made by Blythe or from Thorpe FURBS since the First Respondent was originally contacted on 12 June 2015. Accordingly, unless further information shows differently, I take the view that paragraph 3(i) of the Re-Amended Application cannot be granted. I regard the relief sought as being conditional on there having been a payment and that there is no justification for that payment when the evidence does not support such findings. It is premature to make any order about events after 12 June 2015. The question can be re-visited if the information to be provided to Mr Batty demonstrates that there is anything he can properly pursue in that regard. If there is not, the making of an order such as that sought in sub-paragraph (i) serves no purpose.
59. I am satisfied, therefore, that the appropriate relief to grant to Mr Batty at this stage is to require the disclosure of information from the Respondents in their capacities as persons falling within section 236(2)(c) of the 1986 Act and also to direct that the Respondents act in such a way as to procure the payment from Blythe to Mr Batty, as Keane's liquidator, of the balance of the

payment of £400,000 still retained by it. It is possible that the information to be supplied will result in further directions to procure payment of monies to Mr Batty, or to transfer other property, but at this stage I consider it premature to make any open-ended orders to that effect. In particular, there is inadequate evidence about whether the parcel of land held by Thorpe FURBS enters into the equation as property in which Mr Batty has any interest and so, until more detail has been provided, I think it would be wrong to make any order dealing with it.

Conclusion

60. For the reasons I have given, I am satisfied that this is an appropriate case in which the powers of this Court under section 426 of the 1986 Act as extended can be exercised to assist Mr Batty in his capacity as liquidator of Keane. Although cases involving section 426 are comparatively rare, I feel that the position could have been more clearly articulated by Advocate Newman than it has been. Indeed, the way that the relief sought has had to be amended as a result initially of information provided on behalf the First Respondent and subsequently at the hearing demonstrates that Mr Batty and his advisers have not analysed the position in terms of stepping back and thinking through what can sensibly be ordered by this Court at this stage. As I have explained, this Court is happy to act in aid of liquidators such as Mr Batty who are faced with an aspect of the liquidation involving Guernsey but, when it is being invited to make orders by reference to English law, it will need clear pathways showing what that assistance really can be and the steps to reaching the outcome the liquidator is really seeking.
61. The declarations sought are really findings needed before engaging the relief jurisdiction on which Mr Batty relies. I am prepared to make two declarations on the basis that they lay the foundation for what it is that Mr Batty really wants. The first of those declarations relates to the £400,000 payment in December 2013, which I am satisfied amounts to an unlawful distribution for the purposes of Part 23 of the Companies Act 2006. The second relates to the payment of £1,000 in October or November 2013, which I am satisfied amounts to a transaction at an undervalue and/or a transaction defrauding creditors for the purposes of sections 238 and 423 respectively of the Insolvency Act 1986.
62. In relation to what follows from those findings (and declarations), I am satisfied that Mr Batty is entitled to further information from the Respondents. However, apart from the amount said by Julie Coutu to be retained by Blythe from the payment to it of £400,000, I consider that further orders about transferring property (or more likely procuring such transfers) will have to await the provision of the information sought. I have an open mind as to the best way to proceed but suspect that the most cost-efficient way is likely to be directing a form of interrogatories and/or provision of an account and documents by way of an Affidavit sworn on behalf of the Respondents.
63. In those circumstances, the Advocates are requested to consider the precise form of relief, in terms of the wording of the declarations, the form of supplying further information and the wording of a direction about the sum held by Blythe of £57,304. That wording can then be put into the Act of Court. If necessary, eg, if there is no consensus as to the wording of the orders, I will hear further submissions (possibly in writing only if that is easiest) in due course.
64. In relation to the costs of these proceedings, I am conscious that Advocate Edwards wishes to make further submissions, so I propose formally to reserve the question of costs.