Neutral Citation Number: [2021] EWCA Civ 1190

Case No: A4/2021/0841

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
(Chancery Division)
Business and Property, Insolvency and Companies List
Mrs Justice Joanna Smith
[2021] EWHC 912 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/07/2021

Before :

LADY JUSTICE ASPLIN
LADY JUSTICE CARR
and
SIR NICHOLAS PATTEN

- -

Between:

Al Jaber and Others	**Appellants**
- and -	
Mitchell and Others	**Respondents**

- -
- -

Ms Clare Stanley QC and **Mr Lemuel Lucan-Wilson** (instructed by **Baker & McKenzie LLP**) for the **Appellants**
Mr Reuben Comiskey (instructed by **Clyde & Co LLP**) for the **Respondents**

Hearing dates: 13th and 14th July 2021

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand down is deemed to be 2.15 p.m. on Friday 30 July 2021.

Lady Justice Asplin:

1. This appeal is concerned with whether the immunity from suit afforded to participants in court proceedings, including to parties and witnesses of fact, applies to statements made under oath and by witness statement by an examinee in the course of a private examination conducted under section 236 of the Insolvency Act 1986 (the "IA 1986").

2. The examinations at issue in this case were carried out by the Respondents (together referred to as the "Liquidators"), who are joint liquidators of a British Virgin Island company called MBI International & Partners Inc (the "Company"). That insolvency procedure has, by order of the High Court, been recognised as a "foreign main proceeding", and the Liquidators have been recognised as "foreign representative", in accordance with the UNCITRAL Model Law on Cross-Border Insolvency set out in Schedule 1 to the Cross-Border Insolvency Regulations 2006 (the "CBIR").

3. Mrs Justice Joanna Smith held that the immunity did not apply to the oral and written statements made by the First Appellant (the "Sheikh") in section 236 examinations. Accordingly, she granted permission to the Liquidators to re-re-amend their Re-Amended Points of Claim to include pleadings averring loss and damage as a result of breaches of fiduciary duty, breach of duty to have regard to the Company's creditors, breaches of trust and/or unlawful means conspiracy arising from some of the Sheikh's statements made in section 236 examinations which are said to be false. She rejected the submissions of the respondents to the application to re-re-amend (together referred to as the "Sheikh Parties") that the immunity from suit meant that the proposed amendments to the pleadings had no real prospect of success. It is that decision which is under challenge in this appeal. Her judgment can be found at [2021] EWHC 912 (Ch).

Background

4. It is necessary to set out the background to this matter in some detail. The Eastern Caribbean Supreme Court ordered that the Company be wound up on 10 October 2011 and, on 11 October 2016, that court granted permission for the Company's former liquidator, a Mrs Caulfield, to seek recognition in the United Kingdom for the purposes of interviewing the Sheikh and his associates. Accordingly, on 9 May 2017 Mrs Caulfield applied to the Companies Court in this jurisdiction for the British Virgin Island liquidation of the Company to be recognised as a "foreign main proceeding", and for herself to be recognised as "foreign representative", in accordance with Schedule 1 to the CBIR. On 9 June 2017, Registrar Derrett made an order to that effect; and on 31 July 2017, Mrs Caulfield applied for "relief pursuant to Article 21, Schedule 1 of the CBIR for the public examination of the Respondent [the Sheikh] and production of books, papers and other records pursuant to section 236 of the Insolvency Act 1986".

5. Article 21 allows foreign representatives to make applications to the High Court for appropriate relief, including, under Article 21(d), "providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities" and, under Article 21(g), "granting any additional relief that may be available to a British insolvency office-holder under the law of Great Britain".

6. In a witness statement dated 28 July 2017, filed with Mrs Caulfield's application (and three parallel applications made in respect of certain of the Sheikh's associates), Mrs Caulfield stated that she was applying for orders that:

> "5.1 the Respondents attend the court to be examined under oath on a date and time to be fixed by the court and that I be at liberty to examine the Respondents on the dealings and affairs of the Company;
>
> 5.2 the Respondents produce all books, papers and records (including those in electronic form) either in their custody or under their control which relate to the dealing and affairs of the Company; and
>
> 5.3 the Respondents pay the costs of this application."

7. In summary, her evidence was that the liquidation of the Company had stalled due to a lack of information and co-operation by the Sheikh and his associates, particularly their failure to attend an interview, and that she was compelled to make the application because "[t]he only way to progress the liquidation is to require the Respondents to attend an examination under oath to answer questions about the dealings and affairs of the Company" (at paragraph 20(iii)).

8. Following that application, it appears the Sheikh agreed to attend a private interview with Mrs Caulfield, and, following a hearing before Registrar Barber attended by counsel for Mrs Caulfield and for the Sheikh Parties, the application was adjourned by order of the Registrar dated 29 August 2017, on the basis that an interview would take place at the offices of Mrs Caulfield's solicitors within eleven weeks. However, the Sheikh failed to attend any interviews within that period, and a further hearing took place before Deputy Registrar Mullen. By order of 13 December 2017, the Deputy Registrar ordered (with the sheikh's consent) that the Sheikh appear before the court by video conferencing for a private examination on oath on 26 April 2018, and to produce to Mrs Caulfield all books, papers and records in his possession or control in respect of the assets of the Company. He also ordered the Sheikh to pay Mrs Caulfield's costs to the date of the order, and to make a payment on account in respect of those costs.

9. In the period leading up to 26 April 2018, solicitors for Mrs Caulfield and the Sheikh engaged in correspondence about the videoconference arrangements. As part of this, on 9 April 2018, Mrs Caulfield's representatives referred their counterparts specifically to CPR Practice Direction 32 on the basis that this sets out the procedure "in respect of giving evidence by videoconference".

10. The first oral examination of the Sheikh took place via videoconference before ICC Judge Barber on 26 April 2018. Both Mrs Caulfield and the Sheikh were represented by counsel. Questions were put to the Sheikh both by Mrs Caulfield's counsel and, on occasion, the ICC judge intervened. In the course of the hearing, ICC Judge Barber invited the Sheikh to give an undertaking to provide Mrs Caulfield's solicitors with a witness statement supported by a statement of truth to address various matters that had arisen during the examination. The Sheikh gave the undertaking, and it was reflected in the Judge's order of the same date: it required him to produce a statement that "sets out the name of the UK entity that now holds the shares in JJW Hotels & Resorts Holdings

Inc" ("JJW") and another statement which "explains the nature of the debt of US$10 million identified in the statement of affairs of the Company dated 31 December 2014". The examination was adjourned. The Sheikh provided three witness statements pursuant to ICC Judge Barber's order, which were dated 4 and 17 May and 1 November 2018 respectively.

11. The examination, which is recorded as being under oath, re-commenced on 1 November 2018 before Deputy ICC Judge Schaffer. By an order of the same date, the application was stated to have been concluded and the Sheikh was ordered to pay all of Mrs Caulfield's costs of the April 2018 examination and 50% of her costs of the November 2018 examination.

12. The current proceedings, in which the Liquidators seek to re-re-amend their pleadings and which is the context for this appeal, were commenced by Mrs Caulfield in 2019, pursuant to an order of ICC Judge Barber dated 10 June 2019 giving the English court's assistance following a letter of request from the Eastern Caribbean Supreme Court. By order of the latter, the Liquidators replaced Mrs Caulfield shortly thereafter, both as liquidator and as foreign representative. They also took over the proceedings from her.

13. The claims concern transactions said to have occurred between 2008 and 2017 and contain allegations of breaches of statutory and fiduciary duty, breach of trust and negligence against the Sheikh and his daughter (the Second Appellant) as directors of the Company, together with other claims for delivery up, knowing receipt and unlawful means conspiracy against the Sheikh and various other parties.

14. The Liquidators' application to re-re-amend their Re-Amended Points of Claim was made during the ten-day trial of the claims. The application arose following the provision by the Sheikh of a "list of corrections" on 9 February 2021, the fourth day of trial, in advance of the Sheikh's examination-in-chief. By the corrections, the Sheikh now avers that certain statements he made in the course of the examinations under section 236 IA 1986, and in three witness statements he had previously served in the proceedings, were incorrect. The false information concerned the ownership and transfer of shares held by the Company in JJW ("the JJW Shares"). He had stated that the JJW Shares had been transferred to JJW Hotels & Resorts UK Holdings Inc (the Third Appellant). It now appears that no shares were transferred, only assets and liabilities.

15. The Liquidators made an application to re-re-amend their Re-Amended Points of Claim to reflect the Sheikh's last minute corrections. The proposed amendments with which we are concerned are set out by the judge at [11]-[14] of her judgment. Reference should be made to those paragraphs for the full details of the amendments. In summary, the Liquidators sought to plead as follows: the Sheikh was under continuing fiduciary duties to the Company, including post-liquidation, to account to the Company acting by its Liquidators for his stewardship of the Company and its assets; the Sheikh gave false information as to the ownership and movement of the JJW Shares during the section 236 examinations held on 26 April 2018 and 1 November 2018, and in his witness statement dated 4 May 2018, in breach of his fiduciary obligations; and those breaches of fiduciary duty caused loss and damage and that damages/equitable compensation is payable. The Liquidators also sought to add a paragraph pleading that the Sheikh had caused damage by failing to disclose information concerning the ownership and movement of the JJW Shares and added a further averment that the

Sheikh's breach of fiduciary duty fell within an unlawful means conspiracy claim already pleaded.

16. As I have already mentioned, the primary objection to these amendments raised by the Sheikh Parties was that they had no real prospect of success because statements made in an examination conducted pursuant to section 236 IA 1986 attract the protection of the immunity from suit afforded to participants in litigation and, in particular, to witnesses and parties in relation to statements made in court.

17. The judge adjourned the trial to give the parties time to consider this point and heard two days of argument on the Liquidators' application to re-re-amend at the end of March 2021. She handed down judgment dismissing the Sheikh Parties' arguments as to immunity, and granting the Liquidators' application, on 21 April 2021. I summarise her reasoning and conclusions below.

18. Before turning to the judgment, I must mention that the Liquidators contend that a number of the proposed amendments are permissible even if the statements made by the Sheikh during the section 236 examinations (and in associated witness statements) are protected by immunity from suit. They contend that paragraphs 55D-55G, 55I-L, 55N and 55Q of the draft Re-Re-Amended Points of Claim, which include descriptions of statements made during the section 236 process, do not themselves assert claims. They also say they are relevant to part of their claim which is not challenged in this appeal, in which it is averred that the Sheikh breached his duty to account by failing to disclose information when he had the opportunity to do so. Therefore, the Liquidators say, these amendments should be permitted irrespective of our conclusion on the question of immunity from suit.

The judgment

19. It is important to set out the judge's reasoning in some detail. The judge described the question at the heart of the amendment application before her, as being "whether an examination conducted pursuant to section 236 in a compulsory liquidation attracts the protection of absolute immunity (whether core immunity because it involves the giving of evidence by a witness in judicial proceedings, or extended immunity because it is a preparatory step)" [50]. She also described her task as determining whether a private examination under section 236 "attracts the protection of the witness immunity rule" [78] and concluded that "no immunity from suit" arises in the circumstances of this case [84].

20. She first considered what she described as the "core immunity" and began by examining the statutory regime itself. In this regard, she concluded that sections 235 – 237 IA1986 provide for an investigative process, designed to assist the liquidator to carry out his or her statutory functions, first by the informal process under section 235 and second by the more formal process provided for under section 236; the language focusses on the giving of information concerning the company and its promotion, formation, business, dealings, affairs or property; and the fact that private examination process involves an examination before a court does not remove it from the investigatory sphere [85].

21. Further, the judge considered that it is inconsistent with the fact that a section 236 examination is designed to enable the liquidator to perform his "primary duty" of

obtaining information, that it should also be characterised as a judicial proceeding involving the giving of evidence by a witness [89].

22. The reference in section 237(1) to "evidence obtained under section 236" did not affect her analysis and in that regard she considered that: "the provision in section 433 IA1986 that a statement made at a section 236 examination may be used in evidence against the examinee makes it entirely unsurprising that in the context of considering enforcement based on the information provided at the s.236 examination, section 237 refers to "evidence obtained"." [89].

23. She was fortified in her conclusions by *Trapp v Mackie* [1979] 1 WLR 377 which she described as providing an insight into the features considered important if proceedings are to be viewed as judicial proceedings or analogous to them [94]. She referred to the four "indicia" which Lord Diplock had identified at 379G-H for determining whether the tribunal in that case was acting in a manner similar to a court for the purposes of immunity. They were: the authority under which the tribunal acts; the nature of the question into which it must inquire; the procedure adopted; and the legal consequences of the tribunal's conclusion.

24. Applying these indicia, as to the first the judge noted that it posed no difficulties: a section 236 examination takes place in the High Court, and therefore clearly proceeds under judicial authority [95]. However, with regard to the second (the nature of the inquiry), she noted that a section 236 examination was not in the nature of a *lis inter partes*, in other words, a dispute between adverse parties of the kind normally decided by a court of justice, and noted the importance attributed to that factor by Lord Diplock and Lord Fraser in the *Trapp* case [96]. Similarly, as to the third indicium, the judge noted that the procedure to be followed was distinct from that of a normal civil trial in several respects: the court can refuse to allow a section 236 examination on the grounds it would be oppressive; the examination takes place in private to protect the confidentiality of the examinee; there is no privilege against self-incrimination (*Bishopsgate Investment Management Ltd v Maxwell* [1993] Ch. 1); it is a free-ranging examination limited only by the court's power to prevent oppressive lines of questioning (and is not structured in terms of examination-in-chief, cross-examination and re-examination); and the examinee is not an ordinary witness giving evidence to the court, but instead is providing information [97].

25. As to the fourth of Lord Diplock's indicia, (the legal consequences of the decision reached by the tribunal), the judge noted that in a section 236 examination, no decision is made by the court before which the examination takes place. She stated:

> "99. . . The court is not determining or establishing the existence of rights; as was common ground between the parties the court merely facilitates the process of putting questions to the examinee and, if a further process is required (such as another examination, as occurred in this case, or the service of a witness statement, or enforcement) the court will make an appropriate order on the application of the liquidator. Whilst there are certainly powers of coercion vested in the court, their purpose is to enforce a pre-existing duty owed by the office holder."

26. She went on to note that although information obtained in an examination could be used against an examinee pursuant to section 433 IA 1986, Lord Diplock's "legal

consequences" referred to the legal consequences of the decision reached by the tribunal as the result of the enquiry. The fact that a tribunal did not reach a binding decision is not always fatal to the issue of witness immunity, if its process is a necessary step towards an ultimate decision; but the court at a section 236 examination "neither makes a decision nor exists as a staging post on the way to an ultimate decision made elsewhere" [100].

27. Moreover, the judge held that the fact the examination takes place in existing insolvency proceedings was not sufficient to satisfy Lord Diplock's test: that "does not seem to me to outweigh the fact that the private examination process is deficient in various of the indicia of judicial proceedings which have been held to be important". She concluded: "I am of the view that there are simply too many important characteristics missing in relation to section 236 examinations to regard them as judicial proceedings at which evidence is given by a witness" [101].

28. At [102] she also rejected an argument that the Sheikh attracted a different form of immunity, namely that of a party and respondent to the section 236 examination, rather than a witness, on the basis that it did not differ in any way from witness immunity and that he did not attract immunity in the context of the section 236 examinations solely because of his status as a party.

29. The judge also considered the case of *Mond v Hyde* [1999] QB 1097 (CA), on which the Sheikh Parties placed considerable reliance. The case concerned various statements made by an official receiver, which the claimant then sought to deploy in a claim against him for negligent misstatement. The Court of Appeal held that immunity attached to the official receiver's statements. However, the judge held that this authority did not assist the Sheikh Parties: it was about the immunity of an officer of the court acting in accordance with his statutory duties, rather than witness immunity [103]-[111].

30. Having determined that a section 236 examination did not fall within the "core immunity", the judge then considered whether the Sheikh's statements nonetheless fell within what she had characterised as the "extended immunity" applicable to certain statements made by witnesses out of court. She held at [114] that they did not.

31. In coming to this conclusion, the judge rejected the analogy drawn by the Sheikh Parties between the Sheikh's statements and out-of-court statements made by police officers in the course of preparing reports for use in evidence, which were held to be covered by the "extended" form of witness immunity by the House of Lords in *Taylor v Director of the Serious Fraud Office* [1999] 2 AC 177. The judge pointed to how that judgment had been interpreted in a House of Lord's later decision in *Darker v Chief Constable of West Midlands* [2001] 1 AC 435 which emphasised the criminal context of *Taylor* and drew a distinction between conduct at the early stage of an investigation which would not attract immunity and statements made in the course of giving or preparing to give evidence which would.

32. Applying *Darker*, she concluded that although she could not rule out the possibility that there may be cases where statements given in a section 236 examination cross the line and benefit from "extended" witness immunity, that was not the case for the Sheikh's statements, on the basis of the facts before her. The original application for the section 236 examination made by the former liquidator, Mrs Caulfield, had simply indicated that the examination was necessary to "facilitate the progress of the liquidation", and

that was insufficient to establish that the statements given by the Sheikh in the examination should benefit from witness immunity [114]-[123].

33. Having determined that the Sheikh's statements did not fall within the established "core" or "extended" categories of witness immunity, the judge turned at [126] to consider whether the doctrine of witness immunity should be extended to cover them. She held that it should not. None of the four justifications for witness immunity articulated by Lloyd-Jones LJ in *Daniels v Chief Constable of South Wales* [2015] EWCA Civ 680 applied to a section 236 examination: an examinee is already under a duty to provide information to the liquidator, and therefore immunity is not required to encourage participants to assist justice; a section 236 examination is not a dispute, and therefore the risk of a multiplicity of actions does not arise; and given the privacy of a section 236 examination and the pre-existing duty of disclosure, the risks of unjustified claims, or the examinee failing to speak freely for fear of such claims, did not justify granting him immunity. The fact that examinees do not enjoy the ordinary privilege against self-incrimination does not itself justify affording them immunity, and the potential availability of other tools to penalise a dishonest or reluctant examinee (such as proceedings for contempt or perjury) is not a reason to cut across a right to a legal remedy against that examinee [126]-[134].

34. Further, the judge accepted the Liquidators' argument that affording immunity to statements made in section 236 examinations would create a perverse incentive, whereby it would be in an individual's interests not to co-operate with an office-holder's enquiries in accordance with his statutory duties and/or pursuant to informal enquiries under section 235 IA 1986 (when no immunity would apply), and instead wait for an order to be made under section 236 in order to benefit from the immunity from civil suit that would apply thereafter. That, the judge held, would not be in the interests of justice, and militated against extending witness immunity to cover statements made in section 236 examinations [124], [136]-[137].

35. Given that conclusion, the judge declined to decide the Liquidators' further argument that even if witness immunity did apply to a section 236 examination, the Sheikh's statements nonetheless fell outside that protection on the basis that the case arose from British Virgin Island insolvency proceedings, with no English insolvency office-holder involved, and therefore there were no judicial proceedings on foot. However, she noted that it was very unlikely that this factor would have made any difference [138]-[140].

Section 236 examinations: the statutory framework

36. The powers of which the Liquidators sought to avail themselves, which are at the heart of this matter, are contained in sections 235-237 of the IA 1986. Those provisions are designed to assist a liquidator, as office-holder, in carrying out his statutory function of discovering the truth about the affairs of the company in order that he or she may trace and then secure the assets of the company for the benefit of the creditors. As the judge observed, in *Re Rolls Razor Ltd* [1968] 3 ALL ER 698, in a passage approved by Mann LJ in the *Bishopsgate Investments Management* case at 60C-H, Buckley J described the powers under section 268 Companies Act 1948, a forerunner of section 236, in the following terms:

> "The powers conferred by section 268 are powers directed to enabling the court to help a liquidator to discover the truth of the circumstances

connected with the affairs of the company, information of trading, dealings and so forth, in order that the liquidator may be able, as effectively as possible and, I think, with as little expense as possible and with as much expedition as possible, to complete his function as liquidator, to put the affairs of the company in order and to carry out the liquidation in all its various aspects, including, of course, the getting in of any assets of the company available in the liquidation".

37. The two procedures that section 235 and 236 IA 1986 provide for were also summarised by Lord Browne-Wilkinson in *Hamilton v Naviede (In re Arrows Ltd (No 4))* [1995] 2 AC 75 at 92-93 as follows:

> "When a company becomes insolvent, the liquidators or administrators need to obtain information as to the company's affairs for the purposes of the winding-up or administration of the company. The Act of 1986 provides two procedures for this purpose, one informal, the other formal.
>
> Section 235 of the Act of 1986 imposes on a wide class (consisting of all those who have been concerned with the running of the company) a duty to give to the liquidators
>
> "(2)(a). . . such information concerning the company and its promotion, formation, business, dealings, affairs or property as the office-holder may at any time after the effective date reasonably require"
>
> Failure to comply with that obligation is punishable by a fine under section 235(5) of the Act of 1986. . .
>
> The second procedure is under section 236 which is the material section in the present case. It is more formal. The court, on the application of the liquidator, can summon to appear before it
>
> (2)(c) "any person whom the court thinks capable of giving information concerning the promotion, formation, business, dealings, affairs or property of the company".
>
> An examination under section 236 takes place before a registrar or judge, both the liquidators and the respondents being entitled to be represented by solicitors and counsel. . . A statement made by the respondent in the course of a section 236 examination may be used as evidence against him in any proceedings whether or not under the Insolvency Act: section 433 of the Act of 1986. . ."

38. Section 235 is headed "Duty to co-operate with office-holder". The section applies, in the circumstances set out in section 234(1) IA 1986, which includes where a company goes into liquidation (section 235(1)). It provides, amongst other things, that "those who are or at any time, have been officers of the company":

> "(2). . . shall –
>
> (a) give to the office-holder such information concerning the company and its promotion, formation, business, dealings, affairs or property as the

office-holder may at any time after the effective date reasonably require, and

(b) attend on the office-holder at such times as the latter may reasonably require."

For these purposes, the effective date is the date on which the company went into liquidation.

39. Section 236, where relevant, provides as follows:

"(1) This section applies as does section 234; and it also applies in the case of a company in respect of which a winding-up order has been made by the court in England and Wales as if references to the office-holder included the official receiver, whether or not he is the liquidator.

(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 or 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),

. . .

(4) The following applies in a case where—

(a) a person without reasonable excuse fails to appear before the court when he is summoned to do so under this section, or

(b) there are reasonable grounds for believing that a person has absconded, or is about to abscond, with a view to avoiding his appearance before the court under this section.

(5) The court may, for the purpose of bringing that person and anything in his possession before the court, cause a warrant to be issued to a constable or prescribed officer of the court—

(a) for the arrest of that person, and

(b) for the seizure of any books, papers, records, money or goods in that person's possession.

(6) The court may authorise a person arrested under such a warrant to be kept in custody, and anything seized under such a warrant to be held, in accordance with the rules, until that person is brought before the court under the warrant or until such other time as the court may order."

40. The enforcement powers associated with section 236 are set out in section 237 IA1986, which provides where relevant that:

"(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.

. . .

(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 to 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)."

41. Section 433 of the IA1986 provides that:

"(1) In any proceedings (whether or not under this Act) …

(b) any other statement made in pursuance of a requirement imposed by or under any such provision or by or under rules made under this Act, may be used in evidence against any person making or concurring in making the statement."

42. It is clear from section 236(2) itself and from Rules 12.17 and 12.18 of the Insolvency (England and Wales) Rules 2016 ("IR2016") that an office-holder who seeks a section 236 examination must make an application to the High Court. As Ms Stanley QC, on behalf of the Sheikh Parties, pointed out, each of sub-rules 12.18(i) – (iv) refer to the

proposed examinee as the "respondent" to such an application. Further, as Ms Stanley submitted, the court has a discretion whether to make an order pursuant to section 236(2).

43. If an order is made, Rule 12.20 IR2016 sets out the procedure which applies to the examination. That rule provides that the office-holder "may attend the examination of the respondent, in person" or be "represented by an appropriately qualified legal representative and may put such questions to the respondent as the court may allow" (Rule12.20(1)). As I have already mentioned, the examination under section 236 takes place in private. However, unless the applicant objects, the persons within the categories specified in Rule 12.20(2)(a) and (b) may attend the examination with the permission of the court and put questions to the respondent, through the applicant.

44. As the judge pointed out, the examinee cannot refuse to answer questions on the basis that he/she will incriminate themselves: *Bishopsgate Investment Management v Maxwell*. However, the respondent may employ a qualified legal representative who may make representations on his behalf and put to the respondent such questions "as the court may allow for the purpose of enabling the respondent to explain or qualify any answers given by the respondent" (Rule 12.20(4)).

45. A written record of the examination must be made (Rule 12.20(5)). That transcript of the oral examination, however, is not kept on the court file (Rule 12.21(1)) and may not be inspected without the permission of the Court, except by the applicant and anyone else who could have applied for such an order (Rule 12.21(2) and (3)). The record "may, in any proceedings (whether under the Act or otherwise), be used as evidence against the respondent of any statement made by the respondent in the course of the respondent's examination" (Rule 12.20(6)).

46. The sanctions for failure to comply with an order for examination or delivery up include arrest (subsections 236(5)-(6)) and if the examinee refuses to answer questions or lies, contempt proceedings may be issued: *Simmonds v Pearce* [2017] EWHC 3126 (Admin).

The doctrine of immunity from suit

47. As Ms Stanley pointed out, the principle of immunity from suit for various participants in legal proceedings has been recognised for centuries. It was referred to in the sixteenth century case of *Cutler v Dixon* 4 Co Rep 14b and was articulated, for example, by Lord Mansfield in the 1772 decision of *The King v Skinner* 98 ER 529 (at 530) in the following terms:

> "neither party, witness, counsel, jury, or Judge, can be put to answer, civilly or criminally, for words spoken in office. If the words spoken are opprobrious or irrelevant to the case, the Court will take notice of them as a contempt, and examine on information. If anything of mala mens is found on such enquiry, it will be punished suitably."

48. In *Lincoln v Daniels* [1962] 1 QB 237, which was concerned with whether immunity attached to letters alleging professional misconduct which led to an inquiry before the Bench of Lincoln's Inn, Sellers LJ stated at 247 that:

> "There is no doubt that in a court of law the observations of the judge, counsel, parties and witnesses are the subject of absolute privilege."

49. More recently, Lord Hobhouse described the principle in *Arthur JS Hall & Co v Simons* [2002] 1 AC 615 at 740 in the following way:

> "A feature of the trial is that in the public interest all those directly taking part are given civil immunity for their participation. . . Thus the court, judge and jury, and the witnesses including expert witnesses are granted civil immunity. This is not just privilege for the purposes of the law of defamation but is a true immunity."

That case was concerned with whether a lawyer can rely upon immunity from suit in relation to the alleged negligent conduct of a case in court.

50. The principle was re-affirmed by the House of Lords in the *Darker* case and by the Supreme Court in *Jones v Kaney* [2011] 2 AC 398, albeit in different contexts. In *Darker*, following a police undercover operation, four of the five claimants were indicted on counts alleging, amongst other things, conspiracy to import cannabis resin. In the course of the trial, the judge ruled that the police had been significantly at fault in respect of disclosure and directed that the charges be permanently stayed on the ground of abuse of process.

51. The claimants brought an action against the defendant Chief Constable claiming damages for conspiracy to injure and misfeasance in public office, alleging amongst other things that the police officers had fabricated evidence against them. The defendant applied for the statement of claim to be struck out, on the basis that the acts were covered by an absolute privilege or immunity. The judge struck out the pleading and the Court of Appeal dismissed the appeal. The House of Lords allowed the appeal on the following bases: public policy required in principle that those who suffered a wrong should have a right to a remedy; the absolute immunity from action given in the interests of the administration of justice to a party or witness in respect of what was said or done in court extended to statements made for the purposes of court proceedings but did not require it to be extended to things done by the police during the investigative process which could not fairly be said to form part of their participation in the judicial process as witnesses.

52. The immunity was described by Lord Hope (with whom Lord Hutton, Lord Mackay, Lord Clyde and Lord Cooke agreed) at 445H – 446B in the following terms:

> "My Lords, when a police officer comes to court to give evidence he has the benefit of an absolute immunity. This immunity, which is regarded as necessary in the interests of the administration of justice and is granted to him as a matter of public policy, is shared by all witnesses in regard to the evidence which they give when they are in the witness box. It extends to anything said or done by them in the ordinary course of any proceeding in a court of justice. The same immunity is given to the parties, their advocates, jurors and the judge. They are all immune from any action that may be brought against them on the ground that things said or done by them in the ordinary course of the proceedings were said or done falsely and maliciously and without reasonable and probable cause: *Dawkins v*

> *Lord Rokeby* (1873) LR 8 QB 2.55, 264, per Kelly CB. The immunity extends also to claims made against witnesses for things said or done by them in the ordinary course of such proceedings on the ground of negligence."

53. Lord Hope also explained that the immunity afforded to the witness in relation to his words in the witness box would easily be outflanked if it did not also attach to words spoken by the witness or prospective witness in giving his proof of evidence before the commencement of a trial (447D-F). He illustrated this by reference to a passage in the judgment of the Earl of Halsbury LC in *Watson v M'Ewan* [1905] QC 480 at 487, as follows:

> "It is very obvious that the public policy which renders the protection of witnesses necessary for the administration of justice must as a necessary consequence involve that which is a step towards and is part of the administration of justice – namely, the preliminary examination of witnesses to find out what they can prove."

54. At 463G – 464B, Lord Hutton also referred to what he described as the "core of the immunity" as the "rule that a party or witness has immunity in respect of what he says and does in court" as having been established for centuries. He went on to explain the reason for the rule at 464C-E in the following terms:

> "The reason for the rule is grounded in public policy: it is to protect a witness who has given evidence in good faith in court from being harassed and vexed by an action for defamation brought against him in respect of the words which he has spoken in the witness box. If this protection were not given persons required to give evidence in other cases might be deterred from doing so by the fear of an action for defamation. And in order to shield honest witnesses from the vexation of having to defend actions against them and to rebut an allegation that they were actuated by malice the courts have decided that it is necessary to grant absolute immunity to witnesses in respect of their words in court even though this means that the shield covers the malicious and dishonest witness as well as the honest one."

55. In *Jones v Kaney*, the Supreme Court was concerned with whether an expert witness enjoyed immunity from suit in relation to a claim in negligence arising from the evidence she had given on the claimant's behalf in previous proceedings. Lords Phillips, Brown, Collins, Kerr and Dyson, (Lord Hope and Baroness Hale dissenting) decided that there was no justification for holding that a party's expert witness could rely upon such an immunity for breach of duty in relation to the evidence which they gave in court or for the views which they expressed in anticipation of court proceedings. In describing the current state of the law and the reasons for immunity, Lord Phillips PSC noted at [15]:

> "The continuous theme that runs through the cases is, in modern parlance, the chilling effect that the risk of claims arising out of conduct in relation to legal proceedings would have. It would make claimants reluctant to resort to litigation. It would make witnesses reluctant to testify. If they did testify, it would make them reluctant to do so freely

> and frankly. The cases emphasise that the object of the immunity is not to protect those whose conduct is open to criticism, but those who would be subject to unjustified and vexatious claims by disgruntled litigants."

56. The Court of Appeal considered the immunity rule and the justification for it, and commented on its limits, most recently in *Daniels v Chief Constable of South Wales*. The claimants were police officers who had been prosecuted for offences connected with a murder investigation, where the convictions of those initially found to have committed the crime were overturned. The prosecution of the officers ended abruptly due to issues over disclosure, which led to the Crown offering no evidence. The officers brought civil proceedings against the Chief Constable, in the course of which they sought to amend their claim to plead misfeasance in public office for the conduct of the criminal proceedings against them (in particular the way the disclosure exercise was performed). The Chief Constable resisted these amendments on the basis that the prosecutor was immune from suit in respect of the conduct of criminal proceedings. The claimants were given permission to amend, the Court of Appeal upholding the lower courts' decision that the Chief Constable had failed to establish that the conduct alleged fell within the scope of the "extended" witness immunity identified in *Darker*. Lloyd Jones LJ (as he then was) stated at [34]:

> "In *Jones v Kaney* … Lord Phillips (at [16]-[17]) summarised the justifications for witness immunity given by the House of Lords in *Darker v Chief Constable of the West Midlands Police* [2001] 1 AC 435 as follows:
>
> > (1) To protect witnesses who have given evidence in good faith from being harassed and vexed by unjustified claims;
> >
> > (2) To encourage honest and well meaning persons to assist justice, in the interest of establishing the truth and to secure that justice may be done;
> >
> > (3) To secure that the witness will speak freely and fearlessly; and
> >
> > (4) To avoid a multiplicity of actions in which the value or truth of the evidence of a witness would be tried all over again.
>
> However, it must be emphasised that the effect of a successful plea of immunity is to deny access to the courts and, in many cases, to leave a wrong without a remedy. As Lord Cooke observed in *Darker* (at p. 453 D-E) absolute immunity is in principle inconsistent with the rule of law but in a few, strictly limited, categories of cases it has to be granted for practical reasons. Accordingly, the immunity must be limited to cases where it is necessary to achieve the objectives identified above."

57. Lloyd-Jones LJ also noted at [39] that the principle of witness immunity had been "extended" beyond evidence given in the witness box, as I have already mentioned:

> "In order to achieve the objective of enabling witnesses to speak freely in judicial proceedings it has been necessary to extend the absolute immunity beyond the giving of evidence by witnesses when they are actually in the

> witness box. Thus it has been extended to statements made by a witness in the course of the preliminary examination of witnesses to find out what they can prove (*Watson v M'Ewan* [1905] AC 48). It has also been extended to statements made out of court which could fairly be said to be part of the process of investigating a crime or possible crime with a view to prosecution."

Commenting on the limits of this "extension", Lloyd-Jones LJ went on to note:

> "40. . . the immunity is essentially a witness immunity concerned with the giving of evidence and the making of statements in judicial proceedings, which has necessarily been extended in the various ways indicated above. Moreover, the inclusion of the words "or done" in the references to "anything said or done" which frequently appear in judgments describing the absolute immunity. . . is not, to my mind, intended to extend the immunity to conduct unconnected with the giving of evidence or the making of statements."

58. The immunity applicable to participants in court proceedings and witnesses, in particular, has been extended to statements made in proceedings which do not take place in court *per se*, but in certain tribunals or other bodies which have been held to have similar functions. Some examples are: a military court of inquiry established under the Queen's Regulations in *Dawkins v Lord Rokeby*; disciplinary proceedings before Benchers of the Inns of Court in *Lincoln v Daniels*; and a local inquiry before a Commissioner appointed by the Secretary of State for Education, convened following the dismissal of a head teacher in *Trapp v Mackie*.

59. The immunity afforded to judges has been extended to those exercising judicial functions in other contexts including those which are closer to the one with which we are concerned. In particular, immunity from suit has been held to apply to reports and statements produced by official receivers pursuant to their statutory duties in insolvency proceedings: see *Bottomley v Brougham* [1908] 1 KB 584, *Burr v Smith* [1909] 2 KB 306 and *Mond v Hyde* (the last of which the judge considered in detail). I will return to these cases below.

The question in broad terms

60. It seems to me, therefore, that what emerges from these authorities is that despite the very broad statement of the principle which have been made and reiterated, the existence of immunity from suit has been approached on a context specific basis. Even in cases in which the immunity is described in broad terms, the court has conducted a close examination of the particular circumstances of the case, bearing in mind the policy considerations, in order to determine whether the immunity applies. That iterative approach is unsurprising given the significant consequences which flow from the application of the principle. As Lord Clyde put it at 456-7 of *Darker*:

> "It is temptingly easy to talk of the application of immunities from civil liability in general terms. But since the immunity may cut across the rights of others to a legal remedy and so runs counter to the policy that no wrong should be without a remedy, it should only be allowed with reluctance, and

should not readily be extended. It should only be allowed where it is necessary to do so".

61. It is essential, therefore, that the precise nature of the immunity and the context in which it is said to arise, are considered in detail. Whether the immunity provides protection in respect of a statement made by a person involved in proceedings may depend, amongst other things, upon: the role or function of the person who made the statement in those proceedings and the relevance of that role; whether the maker of the statement was in that role or exercising that function when the statement was made; the purpose of the statement; the nature of the proceedings in which it was made, or with which it was connected; how "judicial" those proceedings are; and the extent and nature of the connection between the statement itself and the proceedings.

The section 236 examination and the examinee

62. In this case, therefore, it is necessary to consider the nature of the section 236 examination and the Sheikh's position when making statements in the course of the examination, in the light of the authorities. It is common ground that immunity from suit has not previously been considered in relation to section 236. Nor, it appears, has it been considered in relation to an "examinee" in any procedure which might be considered directly analogous to it.

63. It will be clear from the description of the section 236 procedure set out above, that a section 236 examination is quite dissimilar from the archetypal situation in which immunity from suit has been held to apply, namely in relation to statements made by the participants in a civil trial. As the judge pointed out, once the order for the examination has been made, there is no *lis inter partes*: at the end of the examination the judge does not decide any point of law or fact, or determine the outcome of any dispute between the parties (save from possibly making an award as to costs: Rule 12.22(1) IR2016). Furthermore, the judge does not make any decision as to the substantive rights of either the liquidator or the examinee. The judge's role is more limited. It includes, for example: making orders which require the examinee to appear before the Court, submit a witness statement or produce books and records; ensuring the examinee answers questions put to him; preventing oppressive questioning by the liquidator; and ultimately determining that the examination is at an end. Mr Comiskey, on behalf of the Liquidators, described the Court's role as merely supervisory.

64. Nor is it straightforward to fit a section 236 examinee into any of the roles played by participants in the sense of the parties in a civil trial. As Ms Stanley pointed out, the Sheikh was necessarily a respondent to the Mrs Caulfield, the former liquidator's, application for an order for an examination under section 236, but once that order was made and the examination had commenced, neither he nor his counsel put forward a case in the manner of a litigant in a civil trial.

65. It is easier to see that the role of examinee may be analogous in some respects to that of a witness giving evidence in a civil trial. Ms Stanley pressed that point before us, submitting that the Sheikh was a witness in judicial proceedings before the court and therefore was entitled to the same immunity as would be enjoyed by a witness of fact in a civil trial. Mr Comiskey argued to the contrary and sought to make the distinction between information and evidence to which I shall refer below.

66. There are some indicators, both in the statutory regime and in the authorities, which may point towards characterising the Sheikh's statements in the section 236 examination as evidence. For example: section 237(1) makes express reference to "any evidence obtained under section 236. . ." (emphasis added) without making any differentiation between oral statements, witness statements and books, papers and records; and a statement made in a section 236 examination may be used in evidence against any person making or concurring in making the statement (section 433 IA 1986). I agree with the judge, however, that section 433 does not take the matter any further forward. The reference to "evidence" is to the use of statements made in the section 236 examination in other proceedings and not to the way in which they must be characterised in the examination itself.

67. Statements were described as "evidence" in *In re Norwich Equitable Fire Insurance Company* (1884) 27 Ch D 515 at 518 per Bacon V.C., an analysis which was rejected by both Baggallay and Cotton LJJ on appeal at 521 and 522 respectively. That was a case which was concerned with an order under section 115 Companies Act 1862, a forerunner to section 236. Examinees in a section 236 examination were described as "witnesses", however, by Lord Browne-Wilkinson in the *In re Arrows (No.4)* case at 96E and 101G-102A. Moreover, contempt proceedings may be issued if the respondent refuses to answer questions or lies during the examination: *Simmonds v Pearce* and, of course, the Sheikh was asked to (and did) provide witness statements which were verified by a statement of truth in the usual way.

68. However, there are obviously differences between an examinee and an ordinary witness of fact in a civil trial. The purpose of an examination is not to determine a particular issue by the giving and weighing of evidence. The section itself makes clear that the purpose of the examination is for the office-holder to obtain information in order to facilitate the fulfilment of that office-holder's statutory duties: section 236(2)(c) gives the court power to order an examination of "any person whom the court thinks capable of giving information concerning the company" (emphasis added).

69. This focus on information-gathering was recognised in *In re Rolls Razor (No. 2)* and in the *In re Arrows (No. 4)* case. Indeed, in *In re Rolls Razor Ltd (No. 2)* [1970] Ch 576, Megarry J expressly drew a distinction between someone being examined in a private examination under section 268 Companies Act 1948 and the position of a witness, stating at 591G-592B:

> "The process under section 268 is needed because of the difficulty in which the liquidator in an insolvent company is necessarily placed. He usually comes as a stranger to the affairs of a company which has sunk to its financial doom. In that process, it may well be that some of those concerned in the management of the company, and others as well, have been guilty of some misconduct or impropriety which is of relevance to the liquidation. Even those who are wholly innocent of any wrongdoing may have motives for concealing what was done. In any case there are almost certain to be many transactions which are difficult to discover or to understand merely from the books and papers of the company. Accordingly, the legislature has provided this extraordinary process so as to enable the requisite information to be obtained. The examinees are not in any ordinary sense witnesses, and the ordinary standards of procedure do not apply. There is here an extraordinary and secret mode of obtaining

> information necessary for the proper conduct of the winding-up. The process, borrowed from the law of bankruptcy, can only be described as sui generis".

Megarry J's approach was approved in the House of Lords in *Re British & Commonwealth Holdings Plc* [1993] AC 426 at 438H.

70. It seems to me that the nature of the section 236 process is "*sui generis*" as Megarry J described its predecessor and the examinee cannot be equated in every respect with a witness in the ordinary sense. That conclusion reveals the difficulty Ms Stanley faces in arguing that the authorities on witness immunity can be applied directly to the Sheikh's statements. It does not follow, however, that an examinee does not enjoy immunity from suit in relation to statements made in the course of an examination.

Does the fact the examination takes place in court suffice?

71. As I have already mentioned, despite the peculiarities of the section 236 examination, Ms Stanley submits that the application of immunity to statements made by examinees in that context is straightforward. She says the statements were made in a court, and that in itself is sufficient to establish immunity. To the contrary, Mr Comiskey emphasises the unusual nature of section 236 examinations and submits that the fact that they take place before a judge is insufficient to justify the application of immunity to the Sheikh. In particular, he emphasised that the role of the court is merely supervisory and that a private examination under section 236 lacks the majority of the factors identified in *Trapp v Mackie*.

72. In my judgment, Ms Stanley's approach is overly simplistic. It is fair to say that the immunity from suit has been held to apply to statements made by participants in proceedings whether judge, witness or party who are engaged in either a trial or at least a hearing at which issues will be determined, and the procedure leading up to such a hearing or trial. That is the archetype, and the protection of immunity has subsequently been extended (or eroded) to cover equivalent statements, individuals and situations, in the ways I have described above.

73. It is in that context that many of the broad statements of principle in the authorities, which Ms Stanley emphasised, were made. She relied, for example, upon Lord Hutton's statement at 463G of *Darker* that "the rule that a party or witness has immunity in respect what he says and does <u>in court</u> has been established for centuries", and Lord Hope's indication at 446A-B that immunity applied to "anything said or done by [a witness] in the ordinary course of <u>any proceeding in a court of justice</u>" (emphasis added). Similarly, she took us to Sellers LJ's statement in *Lincoln v Daniels* that "that the absolute immunity from liability to an action in respect of statements made in the course of proceedings before a court of justice was applicable to <u>all kinds of courts of justice</u>" (at 248), emphasis added). But as I have already mentioned, statements of this kind cannot simply be viewed in isolation. They must be looked at in the context in which they were made, and in particular in the light of what the cases actually decided. As I have said, *Darker* concerned the application of witness immunity to steps in a criminal investigation, and *Lincoln v Daniels* was about the scope of immunity arising from procedures before Benchers of the Inns of Court. In neither case was the court considering whether immunity would apply to any statement made in any court *per se*.

These statements therefore should not be read as establishing a blanket immunity in relation to everything which takes place before a judge.

74. It may be that *most* statements that are made in court will benefit from immunity. However, it does not follow that *any* statement made in a court, in *any* kind of procedure, by anyone, will automatically benefit.

75. It would be difficult to reconcile such a blanket rule with Lord Clyde's instruction in *Darker* to consider the necessity of the immunity and the corresponding right of redress which is denied. That is particularly so given the unusual nature of the section 236 examination, which although it takes place in a court, is very far removed in nature and in purpose from an ordinary civil trial, and clearly merits its own analysis.

76. It would also be difficult to reconcile such a broad application of the principle with the authorities which have identified certain statements made in court that do not enjoy any immunity. For example, *Jones v Kaney*, in which it was decided that an expert's client may sue the expert for words said in court.

77. That is not to say that the fact the section 236 procedure takes place in a court is irrelevant: on the contrary, it is an important factor which militates in favour of immunity from suit in relation to statements made by a participant in proceedings. But it is not conclusive. To determine the issue, it is necessary to look at the features and context of the section 236 procedure in a more holistic manner.

How should statements made by an examinee in a section 236 examination be viewed?

78. As I have already mentioned, the judge's approach was to examine the features of the section 236 examination against the indicia identified by Lord Diplock in *Trapp v Mackie* as necessary when identifying whether proceedings in a tribunal attracted immunity and to view the matter through the lens of witness immunity. Lord Diplock stated at 379G-H:

> "So, to decide whether a tribunal acts in a manner similar to courts of justice and thus is of such a kind as will attract absolute, as distinct from qualified, privilege for witnesses when they give testimony before it, one must consider first, under what authority the tribunal acts, secondly the nature of the question into which it is its duty to inquire; thirdly the procedure adopted by it in carrying out the inquiry; and fourthly the legal consequences of the conclusion reached by the tribunal as a result of the inquiry."

79. Applying these indicia to the section 236 examination caused the judge to conclude at [101] that the examination was a very different procedure from that which Lord Diplock had in mind in *Trapp v Mackie* and that the fact that it takes place under the umbrella of existing insolvency proceedings was insufficient to overcome its deficiencies in relation to those indicia. I do not disagree that the section 236 examination is a very different creature from an ordinary civil trial: in particular, as I have said, there is no *lis inter partes*, and the judge does not make any decision as to the parties' rights. However, unlike the judge, I do not consider the fact that the section 236 examination *itself* does not bear all of the hallmarks of a civil trial, or meet all of the indicia set out

by Lord Diplock in *Trapp v Mackie*, is particularly helpful in determining the issue in this case.

80. In *Trapp v Mackie*, the House of Lords did not purport to set out a universal test for the application of immunity from suit. It was a very different kind of case from the Sheikh's, and the indicia were developed to help answer the question which arose in that case: do statements made in proceedings before a tribunal which is not a court proceeding overseen by a judge, nonetheless attract immunity? That is not the question we must answer here.

81. With respect, in my judgment, the judge approached the matter too narrowly. The section 236 examination has to be considered not as a standalone procedure, to be examined forensically against the *Trapp v Mackie* indicia, but instead it should be viewed in the context of the wider compulsory winding-up proceedings in which it arises which are commenced by an order of the court and which it is intended to facilitate.

82. Lord Sumption described the nature of such winding-up proceedings in the following way in *Singularis Holdings Ltd v PricewaterhouseCoopers* [2015] AC 1675 (PC) at [11]:

> "Winding up proceedings have at least four distinct legal consequences, to which different considerations may apply. First, the proceedings are a "mechanism of collective execution against the property of the debtor by creditors whose rights are admitted or established"... Inherent in this function of a winding-up is the statutory trust of the company's assets, to which I have already referred, and an automatic stay of other modes of execution. Second, it provides a procedural framework in which to determine what are the provable rights of creditors in cases where they are disputed. Third, it brings into play statutory powers to vary the rights of persons dealing with the company or its assets by impugning certain categories of transaction. …. Fourth, it brings into play procedural powers, generally directed to enabling the liquidator to locate assets of the company or to ascertain its rights and liabilities."

83. A section 236 examination clearly falls within the "procedural powers" directed to enable the liquidator to locate the assets of the company, which forms part of the broader umbrella of the compulsory winding-up proceedings. The information gathered in the examination will help the liquidator fulfil his duties to get in, realise and distribute the assets (section 143(1) IA 1986) and to prepare his final account to be sent to creditors, contributories, the Registrar of Companies and the Court (section 146 IA 1986). The section 236 examination is a tool to that end.

84. Furthermore, in English law at least, the liquidator is acting as the officer of the winding-up court: section 160 IA 1986; Rule 7.76 IR 2016 (and the statutory position in the British Virgin Islands is the same, see section 184 British Virgin Islands Insolvency Act 2003). The application of the immunity to statements made by officers of the court in exercising their statutory duties in insolvency proceedings has been considered in several cases, at least in respect of statements made by the official receiver.

85. *Bottomley v Brougham* concerned an action for libel brought by an individual named as a party to a fraud in a report produced by the official receiver of a company pursuant to his statutory duties under the Companies (Winding-up) Act 1890. Channel J held that statements made by the official receiver in his report were entitled to immunity on two grounds. First, he enjoyed judicial immunity (587-88):

> "I think, in the first place, that the official receiver has a statutory duty to inquire in a judicial way into certain matters by the Act of 1890, and that in performing that duty he is acting in a judicial capacity. It is quite true that the report is made ex parte, but that makes no difference. A judge in hearing an ex parte application is still acting as a judge, and the absolute privilege applies quite as much as when he is hearing a case in which both parties appear. The fact that this was a preliminary inquiry equally does not prevent it being a judicial inquiry."

86. Second, he enjoyed immunity as a party to the proceedings; (588-589):

> "… there is the further ground that the report of the official receiver may be treated, not so much as the judgment in a judicial proceeding, but as the initial stage of proceedings in the winding-up Court, which clearly is a Court. It is the information upon which the proceedings take place, and it is made by the official receiver under a statutory duty...It is perhaps not quite accurate to say the official receiver is in any sense a litigant, but when he comes before the winding-up Court upon the examination no doubt he is, in one sense, a party to the proceedings he is, as it were, appearing for the prosecution. … In presenting this report the official receiver is informing the Court of alleged matters for inquiry, and so initiating a judicial inquiry; and it seems to me to be entirely analogous to what was held to be absolute privilege in *Lilley v. Roney*, and to be a stronger case. It was done in the course of the performance of a duty imposed upon him in his position of officer of the Court. It is much like the report of an official referee, or some one of that sort, to whom matters are referred to report to the Court. I suppose no one would doubt that those reports were privileged."

87. A similar issue arose in *Burr v Smith,* which concerned statements made by official receivers in reports into the company's affairs and reasons for failure which they were under a statutory duty to prepare. The court held these were privileged, as the position of the official receiver was akin to that of a judge. Fletcher Moulton LJ held at 311:

> "Where an officer of the Court is placed, in the performance of his official duty, in the difficult position of having to draw up and circulate such a report as is provided for in s. 3, it appears to me clear that he is entitled to the same amount of protection as is extended to a judge who, after a judicial inquiry, performs his duty by fearlessly pronouncing his judgment as to the matters brought before him, and therefore his report is absolutely privileged. The results would be most unfortunate if the same privilege did not apply to such a report as to all other judicial proceedings, and if the official receiver could only perform his duty under the section at the peril of having an action brought against him."

88. Farwell LJ agreed. He held at 314:

> "The object of the sub-section is that, if there is any ground for suspicion in the case of a company which is being wound up, the receiver, as an officer of the Court, shall make an inquiry and report to the Court whether there has been any fraud. Unless and until the official receiver reports that there has, to the best of his belief, been fraud, the Court cannot proceed to take the further steps contemplated by sub-s. 3. It is a misapprehension to suppose that there is not a judicial duty cast upon the official receiver under sub-s. 2. The moment that, in the exercise of his discretion, after having considered the facts, he has come to the conclusion that they indicate fraud, his discretion is merged in a duty, and it becomes his duty to make a report to that effect."

89. *Burr* was considered by the Court of Appeal in *Mond v Hyde,* a case which the judge considered in some detail. Mr Hyde was an assistant official receiver. In reliance on statements made by Mr Hyde in his capacity as official receiver, Mr Mond, who was the trustee in bankruptcy, defended an action by the bankrupt, which he lost. He therefore sued Mr Hyde in negligent misstatement and the matter came before the court on a strike out application. At first instance, it appears that Mr Hyde's case for immunity was advanced on the basis that his statements were covered by witness immunity. Sir Richard Scott VC held that only two of Mr Hyde's statements enjoyed immunity: one in a letter sent to Mr Mond's solicitors in connection with the latter's defence of the bankrupt's case, and the other in an affidavit produced for those proceedings. The other two were made before the bankrupt's action against Mr Mond was contemplated or begun, and therefore did not enjoy immunity: they could not have been made as a witness or potential witness in the proceedings.

90. In the Court of Appeal, Mr Hyde changed his position, and made what Beldam LJ (with whom Aldous and Ward LJJ agreed) described at 1108C-E as "a wider claim for immunity based upon the public policy that all those who take part in the administration of justice should be immune from suit in respect of their actions and statements in the course of such proceedings or in preparation for them. The wider claim arises from the official receiver's position as the official receiver and the appellant's as trustee in bankruptcy". Thus, Beldam LJ identified the principal issue in the appeal as "whether an official receiver in bankruptcy is, upon grounds of public policy, immune from an action for damages at the suit of the trustee who has suffered financial loss by relying on a negligent statement made to him by the official receiver in the course of the bankruptcy proceedings" at 1101E.

91. At 1108G-1109C Beldam LJ described the role of the official receiver in bankruptcy proceedings, noting that he was a "key figure" in that process, with a "duty to investigate and report on the debtor's conduct, take part in his public examination and, in the case of a fraudulent debtor, to assist in his prosecution… Throughout the proceedings in bankruptcy, therefore, the official receiver as an officer of the court will be required to make reports and statements on which the court, the trustee, committee of inspection, creditors and others will rely". He went on at 1112H:

> "By their nature bankruptcy proceedings tend to be protracted, with substantial parts of the procedure being carried out under the control and direction of the court rather than at a formal hearing or proceeding.

> Moreover, in carrying out his functions as an officer of the court the official receiver will have to embark on many inquiries and make many statements which are not formally part of the proceedings. In *Burr v. Smith* [1909] 2 K.B. 306 the statement made by the official receiver in the report made under the Companies (Winding-up) Act 1890 was clearly a statement made not only in the course of, but for the purpose of, the proceedings. So in bankruptcy proceedings if a statement is made by an official receiver not only in the course of, but for the purpose of, court proceedings it must prima facie come within the absolute protection from action"

92. Beldam LJ noted that the court should be slow to extend immunity to statements given in the course of judicial or quasi-judicial proceedings (1113B), but that, following *Burr v Smith,* it could be justified here:

> "The reasons given in *Burr v. Smith* [1909] 2 K.B. 306 were (1) that the duty exercised by the official receiver necessitated him stating with the greatest frankness all the matters that he may have ascertained referred to in the section; and (2) that he is performing a duty as an officer of the court in connection with an inquiry which might rightly be termed a judicial inquiry.
>
> Having regard to the extensive inquiries which an official receiver would be required to make, for example on reporting to the court under section 26(2) of the Act of 1914 as to the bankrupt's conduct and affairs including his conduct during the proceedings, and having regard to the facts referred to in section 26(3), it seems to me that the need for the official receiver to be able to state with the greatest frankness all the matters he may have ascertained is of itself a sufficient justification for holding that statements made in the course of such a report should be entitled to absolute privilege and the official receiver immune from action in respect of them."

93. On that basis, he found that immunity applied to all four of the official receiver's statements (1115H-1116B):

> "To be afforded immunity from suit in respect of the statement made, the official receiver must be acting in the course of the bankruptcy proceedings and within the scope of his powers and duties. In the preparation of his reports, which are to be accepted as prima facie evidence, statements which he makes are it seems to me as much in need of immunity as statements made by a witness in the preparation of a proof of evidence or in the course of investigating offences of fraud. In the present case the official receiver was acting pursuant to his duty under rule 351(4) of the Rules of 1952 'to give [the trustee in bankruptcy] all such information respecting the bankrupt and his estate and affairs as may be necessary or conducive to the true discharge of the duties of the trustee'.
>
> The getting in of the assets of the bankrupt's estate for the purpose of being distributed to the creditors is part of the bankruptcy proceedings and accordingly I would hold that in making the statements on which reliance is placed by the appellant the official receiver is entitled to immunity from suit."

94. Following *Mond* and *Burr*, it is clear that a statement made by the official receiver acting in the course of insolvency proceedings, and within the scope of his statutory powers and duties, is covered by the principle of immunity from suit. In this case the officer of the court responsible for conducting the section 236 examination was a liquidator in foreign insolvency proceedings, rather than an English official receiver or liquidator. And, of course, we are not concerned with whether the immunity applies to statements made by such an officer. We are concerned with statements made by the person the liquidator was examining: the Sheikh.

95. For the judge, the latter point was sufficient to dispose of *Mond:* she held at [109]-[111] that it did not lead her to the conclusion that statements made by the Sheikh were covered by immunity, because properly understood, the immunity in that case was founded on the fact that the official receiver had been acting as an officer of the court within the scope of his statutory duties. That was a separate category from witness immunity. Therefore, *Mond* could not be authority for the proposition that any immunity covered the words spoken in the course of a private examination under section 236 by someone like the Sheikh, who was not an officer of the court.

96. I do not disagree that *Mond* is authority only for the immunity of the official receiver as an officer of the court in a bankruptcy. However, in my judgment, the Court of Appeal's approach to the statements made in the context of insolvency proceedings is an important factor when considering whether a section 236 examinee's statements also enjoy immunity.

97. In the passages I have set out above, Beldam LJ was at pains to place the statements of the official receiver in the context of his broader role in collecting information and reporting his findings for the purposes of the broader court-managed insolvency procedure. Similarly, in my view, a section 236 examination must not be viewed in isolation, but in the context of the broader court-supervised compulsory winding-up proceedings of which it forms part. Such an approach is consistent with the description of winding-up proceedings provided by Lord Sumption in the *Singularis* case to which I have referred.

98. The section 236 examination is a tool which can be used by the official receiver in his capacity as an officer of the court or by the liquidator in the course of the winding-up proceedings. It is one of the "procedural powers" described by Lord Sumption in *Singularis*. When posing questions under the supervision of a judge, the liquidator is seeking to further the purposes of the court-supervised compulsory winding-up. The liquidator is seeking to fulfil his statutory duty under section 143(1) IA 1986, to get in the company's assets, realise and distribute them, and to place himself in a position to prepare a final account to be sent to the creditors, contributories, the Registrar of Companies and the Court: section 146 IA 1986.

99. That casts the section 236 examination in a different light. It seems to me that once it is viewed in that way, it is clear that it is part of a wider "judicial proceeding". It is part of the compulsory winding-up which commences with an order of the court and is supervised by the court thereafter.

100. It seems to me that it follows that a liquidator posing questions in a section 236 examination in a compulsory winding-up is furthering the insolvency proceedings and by analogy with the official receiver in *Mond* will also have immunity from suit in

respect of the questions he asks, or the statements he puts to the examinee at such an examination. It may be that the liquidator does not enjoy immunity in respect of *all* words spoken in any of the enquiries he makes. That is not a question which we have to decide. However, in my judgment, the immunity would at least encompass statements made in the particular circumstances of a section 236 examination, given it is a formal part of the statutory compulsory winding-up process, which is conducted before a judge in a court.

101. If Mrs Justice Joanna Smith is right that the Sheikh's statements are not covered by immunity from suit, that creates a very curious situation: the judge clearly enjoys immunity from suit in respect of anything he or she says in the course of the section 236 examination; as I have said, the liquidator conducting the examination (or his representative) is protected from suit; and therefore, only the examinee is left exposed. It seems to me that the fact that both the judge and liquidator enjoy immunity, together with the very nature of the section 236 examination which I have already described, points to the section 236 examination, viewed in the context of the winding-up proceedings, as being the kind of judicial proceeding in which all participants are entitled to immunity.

102. In my judgment, these considerations outweigh the factors relied upon by the judge, and which I have mentioned above, which militate against immunity in this context. I do not place much weight on the fact that, in isolation, the section 236 procedure does not resemble the archetypal civil trial and does not reflect some of the *Trapp v Mackie* indicia for determining whether a tribunal or enquiry is a sufficiently "judicial" process by reference to that archetype. Furthermore, in my judgment, it does not matter that the Sheikh's position and the statements made do not fit easily into the category of witness immunity which has previously been recognised in other contexts. Assessed in the context of the broader compulsory liquidation procedure which is supervised by the court and arises from a winding-up order made by the court (in this case, in the British Virgin Islands), and the immunities held to be enjoyed by other participants, it seems to me that the oral and written statements of those examined are, accordingly, immune from suit.

103. To put the matter another way, it seems to me that the section 236 examination, viewed in the context of the court led insolvency proceedings, is a part of a "judicial proceeding" for the purposes of immunity from suit. That, in turn, means that the liquidator and the person examined are entitled to immunity for statements made in the examination whether orally or in writing. Extended immunity may also apply but it is not necessary for us to decide that point.

104. It also follows that I do not consider it necessary to pinpoint whether an examinee is truly a witness or a party to the section 236 examination. However, for the sake of completeness, I should add that I agree with the judge that whether the Sheikh was a "party" to the proceedings adds nothing. In addition, it seems to me that there is little to be gained by debating whether the statements made by an examinee are information or evidence. They can certainly be used as evidence against the person who made them pursuant to section 433 IA 1986. In any event, it seems to me that the it flies in the face of reality to suggest that an examinee is not a witness in the widest sense of the word and it must be the case that a statement which is the subject of a statement of truth has become evidence.

105. I am fortified in my conclusion by two further considerations, which might be termed "public policy" points.

106. First, a section 236 examinee may be required to provide complex, historic information concerning the company and its promotion, formation, business, dealings, affairs or property. The examinee may have advance warning of some likely lines of questioning from previous enquiries, but there remains the possibility that some questions will be put to him "on the spot" as the liquidator's train of enquiry develops in the course of the examination. Even an open and honest examinee acting in good faith may not be able to provide perfect information in that scenario. If he or she faces the prospect of civil claims in respect of mis-statements made during the examination, that may encourage risk-averse responses which may undermine the information-gathering purpose of the section 236 procedure. The risk of a "chilling effect" on the provision of information is particularly pronounced here, given an examinee does not enjoy any privilege against self-incrimination (*Bishopsgate Investment Management v Maxwell*). Thus, affording immunity to statements made by the examinee may encourage him to speak freely and frankly, thereby facilitating the liquidator obtaining the information necessary to progress the winding-up.

107. As Lord Phillips observed in *Jones v Kaney*, the object of the immunity is not to protect those whose conduct is open to criticism, but those who would be subject to unjustified and vexatious claims by disgruntled litigants. It is to protect the honest but mistaken examinee and to facilitate the winding-up and the administration of justice in the widest sense. It seems to me that the justification for the immunity, summarised by Lloyd-Jones LJ (as he then was) in *Daniels,* to which I referred at [56] above, applies equally here.

108. Second, I do not consider that affording immunity to section 236 examinees will materially cut across the principle that those who suffer a wrong should have a right to a remedy. In most cases a liquidator will seek information from an examinee under the informal section 235 procedure prior to seeking an order for a section 236 examination, and if the examinee is an officer of the company, he or she will be under additional statutory or fiduciary duties to provide information. Therefore, even if the examinee enjoys immunity for any statements made in the section 236 process, that will not protect him or her from an action based on non-disclosure in breach of those duties to provide information and the liquidator will be able to rely on statements made in the section 236 examination as a result of section 237(1) and section 433 IA 1986. The liquidator may still obtain a remedy via that route.

109. Third, I disagree both with the judge and Mr Comiskey that there is a strong policy reason against affording immunity to section 236 examinees. Mr Comiskey says that it would undermine the usefulness of the section 235 enquiry process, and push most liquidator enquiries into the formal section 236 process, because those from whom information is sought will stall in responding to enquiries, waiting until a section 236 examination has been ordered so that they may enjoy the accompanying immunity. I find this submission somewhat hypothetical, and insufficient to outweigh the countervailing policy considerations I have outlined above.

110. As I have said, individuals are under an obligation to comply with information requests prior to a section 236 order being made (whether under section 235 or separate statutory or fiduciary duties); affording immunity to examinees in relation to statements made

only in the section 236 process does not diminish those obligations. Moreover, the court may penalise an examinee who "stonewalls" in the face of all pre-236 examination enquiries in order to benefit from immunity by requiring them to pay the costs of the liquidators' application for a section 236 examination and of the examination itself. That provides a further incentive not to delay until the moment of the section 236 examination.

111. Therefore, in my view, the Sheikh's statements, both in the section 236 examination and the witness statements he provided pursuant to the undertaking given therein, enjoy immunity from suit. As I have already mentioned, it is not necessary to determine whether an examinee is truly a witness or a party to the section 236 examination in order to reach that conclusion.

Does it matter that the Liquidators are officers of the British Virgin Islands court?

112. Finally, I should add that I do not consider the fact that the Liquidators are officers of the British Virgin Island court, rather than English court, makes any difference to my analysis. As I have explained, the Liquidators in this case have been recognised as a foreign representative under the CBIR, entitled to apply to the English court for all of the relief that would be available to an English office-holder under the IA1986. As the judge put it at [139] of her judgment, there is no evidence that the situation in the British Virgin Islands is any different from that in the UK: the winding-up is overseen by the court; the liquidator is the court appointed official who implements the winding-up; and the section 236 examination is a part of the court-managed process. Therefore, the judge said, if "the existence of overarching insolvency proceedings is itself sufficient to bring section 236 examinations within the remit of the witness immunity rule, then I think it very unlikely the fact that the overarching proceedings are British Virgin Islands proceedings would have made any difference, notwithstanding that the Liquidators are not officers of the English court" [140. I agree.

Conclusion

113. For all the reasons set out above, I would allow the appeal.

114. One matter remains to be decided: the form of the order, and the extent to which the Liquidators' proposed amendments to their Re-Amended Points of Claim may be allowed, even if the Sheikh's section 236 statements enjoy immunity from suit. As I have already mentioned, the Liquidators can avail themselves of sections 237(1) and 433 IA 1986. They are, in principle, also entitled to plead a claim based upon a failure to disclose. It seems to me that on that basis, the parties should be able to agree those of the amendments which fall outside the immunity.

Lady Justice Carr:

74. I agree.

Sir Nicholas Patten:

115. I also agree.