Neutral Citation Number: [2021] EWHC 1481 (Ch)

Case No: CR-2020-004267

IN THE BUSINESS AND PROPERTY OF COURTS ENGLAND AND WALES
HIGH COURT OF JUSTICE
CHANCERY DIVISION
COMPANIES COURT

Rolls Building
London
EC4A 1NL

Date: 02/06/2021

Before:

CHIEF INSOLVENCY AND COMPANIES COURT JUDGE BRIGGS

- -

Between:

MANOLETE PARTNERS PLC	**Applicant**
- and -	
(1) HAYWARD AND BARRETT HOLDINGS LIMITED	**Respondents**
(2) NAIO ENVIROMENTAL LTD	
(3) DANIEL HAYWARD FROST	
(4) STEVEN BARRETT FROST	

- -
- -

JOSEPH CURL QC (instructed by **EMW LAW LLP**) for the **Applicant**
HUGO GROVES (instructed by **KARAM, MISSICK & TRAUBE LLP**) for the **Respondents**

Hearing dates: 21 May 2021I

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Approved Judgment

COVID-19: This judgment was handed down remotely by circulation to the parties' representatives by email. It will also be released for publication on BAILII and other websites. The date and time for hand-down is deemed to be 09:00 hrs on 2 June 2021

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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CHIEF INSOLVENCY AND COMPANIES COURT JUDGE BRIGGS

CHIEF ICC JUDGE BRIGGS:

Introduction

1. There are three applications before the court. The first is made by the Applicant. It is to extend time to admit a witness statement. The purpose of the witness statement is to exhibit a document to bolster resistance to the second application. The second application is made by the fourth Respondent. He seeks to strike out (or give summary judgment on) a pleaded allegation that he acted as a *de facto* director of Blackwater Plant Limited.

2. I gave an extempore judgment on 21 May 2021 dismissing the second application. I found that there were reasonable grounds for bringing the claim. Taking account of the evidence before the court, and evidence that may reasonably be expected to be available at trial a fuller investigation as to the fourth Respondent's role is required. The question of *de facto* directorship is one of fact. A trial where the evidence may be tested may affect the outcome. Accordingly, there was no need to consider the first application.

3. It became apparent, during submissions made by Mr Groves, that the third application has implications beyond this case. The third and fourth Respondents seek an unless order requiring the Applicant to pay the issue fee that would have been payable had the claim been commenced by way of a Part 7 claim form. This is the reserved judgment on the third application.

Liquidation

4. Blackwater Plant Limited ("Blackwater") entered a creditors' voluntary liquidation on 17 August 2018. A connected company known as Hayward & Barrett Ltd ("H&B") entered a creditors' voluntary liquidation on the same day. H&B was the main customer of Blackwater. The third and fourth Respondents were de jure directors of H&B. It is alleged that they were directors of Blackwater: the third Respondent a *de jure* director, and the fourth a *de facto* director. For completeness, the third and fourth Respondents are *de jure* directors of Hayward & Barrett Holdings Ltd ("Holdings"). Mr Clark was appointed liquidator of Blackwater at the creditors' meeting convened to wind it up. Mr Renshaw was appointed joint liquidator shortly after. Mr Clark is the liquidator of H&B.

Insolvency process and available causes of action

5. An insolvency process may start in court or out of court. Many insolvency procedures are available. As an example, creditors may resolve to wind up a company or the court may make an order for compulsory winding up. Likewise, a company or its directors may make an out of court appointment of administrators or the court may order that it enter administration. When a company is placed into a formal insolvency process an insolvency practitioner (an "office-holder") is appointed and the interests of creditors intervene between the company's shareholders and its assets.

6. In most insolvency processes an office-holder will be concerned to act in the interests of creditors, to get in and distribute the assets of the debtor company. There are exceptions. Insolvent schemes of arrangement and restructuring plans do not involve the appointment of an office-holder. A supervisor controls and monitors a creditors' voluntary arrangement where creditors agree a compromise of their debts.

7. The Insolvency Act 1986 (the "Act") provides an office-holder with a menu of actions, peculiar to her position, designed to recover assets. Such provisions have formed a part of the debt enforcement and insolvency laws of England and Wales since 1376: Transaction Avoidance in Insolvencies by Parry and others (Oxford). The transaction avoidance provisions enable office-holders to bring specific claims provided by statute: the Act.

   7.1. Section 213 (fraudulent trading);

   7.2. Section 214 (wrongful trading);

   7.3. Section 238 (transactions at an undervalue);

   7.4. Section 239 (preferences); and

   7.5. Section 244 (extortionate credit transactions).

8. I shall refer to these causes of action as the "transaction avoidance" provisions. It could be argued that section 245 of the Act is a transaction avoidance provision. No action however, need be brought. The provision automatically renders void any floating charge that is created within a specified period of the onset of insolvency where the security secures existing debt.

9. Prior to the introduction of the Small Business, Enterprise and Employment Act 2015 (the "2015 Act") (inserting section 246ZD into the Act), it was thought that although office-holders could assign rights of action which vested in and formed part of the assets of the company (such as misfeasance claims or breach of duty) at the time the company enters liquidation, an office-holder could not assign "property" within the meaning of paragraph 6 of Schedule 4 of the Act if it arose after the commencement of liquidation: *Re Oasis Merchandising Services Ltd* [1998] Ch 170.

10. The explanatory notes to the 2015 Act in relation to section 246ZD read as follows:

> "Section 118: Power for liquidator or administrator to assign causes of action
>
> 712. This section amends the Insolvency Act 1986 to allow a liquidator or administrator ("the officer-holder") to assign causes of action that arise on a company going into liquidation or administration.
>
> 713. The causes of action to which the section relates are actions which already exist within insolvency law … whereby liquidators and administrators can take action on behalf of the body of creditors to recover monies or reverse certain transactions where the directors and others have acted in a way that has caused harm to creditors.
>
> 714. The section allows the office-holder to assign not only the right to bring the action itself but also the proceeds of such an action."

11. As Snowden J recently observed in *Cage Consultants Limited* [2020] EWHC 2917 the policy behind the introduction of section 246ZD is to permit claims arising on insolvency and vested in liquidators or administrators to be sold or assigned thereby providing a return to the insolvent estate, to benefit society by increasing the likelihood that miscreant directors will be held to account and to create a new market for such actions [13]:

> "The legislative policy behind s. 246ZD is also clear from the Economic Impact Assessment (IA No. BIS INSS007) produced by the Insolvency Service on behalf of the Department for Business Innovation and Skills on 16 April 2014, which accompanied the proposals for what became s. 118 of the 2015 Act"

12. There is a notable exception to the transaction avoidance provisions capable of assignment pursuant to section 246ZD. Section 423 of the Act bears more than a passing

resemblance to section 238 of the Act but requires an extra element. The transaction must have been entered into for the purpose of prejudicing the interests of creditors. It therefore has legitimate reasons to consider itself part of the transaction avoidance family. It provides:

> "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."

13. Like section 212 of the Act, the identity of a person able to avail herself of section 423 is prescribed by section 424 of the Act:

> "An application for an order under section 423 shall not be made in relation to a transaction except—

> (a) in a case where the debtor has been made bankrupt or is a body corporate which is being wound up or is in administration, by the official receiver, by the trustee of the bankrupt's estate or the liquidator or administrator of the body corporate or (with the leave of the court) by a victim of the transaction;
>
> (b) in a case where a victim of the transaction is bound by a voluntary arrangement approved under Part I or Part VIII of this Act, by the supervisor of the voluntary arrangement or by any person who (whether or not so bound) is such a victim; or
>
> (c) in any other case, by a victim of the transaction."

14. The origin of the provision extends back to the reign of Edward III and its direct predecessor is section 172 of the Law of Property Act 1925. It is commonly referred to as by its title: "transactions defrauding creditors". A company may apply for a remedy under this section if it is a "victim" of an undervalue transaction where the purpose in subsection 3 is satisfied.

15. A claim made pursuant to section 212 is not a transaction avoidance provision. It is often used to bring claims vested in a company in liquidation for the purpose of restoring assets. Once restored the liquidator may realise the assets and make a distribution to creditors.

Assignment

16. By an agreement dated 3 September 2019 the joint liquidators assigned the transaction avoidance causes of action provided to them by the Act.

17. By the same agreement, acting as agents of Blackwater, the joint liquidators assigned "all and any claims that [Blackwater] may have…such claims to include…breach of duty at common law, breach of fiduciary duty or statutory duty or other legal or equitable duty, any claim in fraud, whether common law or equitable fraud, conspiracy by unlawful means and/or any claim under the…Companies Act 2006." I shall refer to these as the "Blackwater Claims".

18. The Blackwater Claims are made against the third and fourth Respondents for breaches of duty in their capacity as directors.

The disputed claim

19. As assignee of the Blackwater Claims and the transaction avoidance provisions, the Applicant issued an application that included transaction avoidance claims against the first and second Respondents. The Applicant chose to add the third and fourth Respondents who are subject to the Blackwater Claims.

20. The application is made by form IAA and Rule 1.35 of the Insolvency Rules 2016 (the "Rules"). I shall refer to applications brought under Rule 1.35 as an "Insolvency Application".

21. There is no issue concerning the claims made in the Insolvency Application that concern the transaction avoidance provisions.

22. The issue relates to the Blackwater Claims. The Applicant claims that the third and fourth Respondents breached their duties to Blackwater by allowing or causing the preference payments to H&B, the second Respondent and Holdings, and they breached their duties when allowing Blackwater to provide an unsecured credit to H&B. The credit advanced results in what is said to be an "irrecoverable debt" of £680,000. The Applicant also seeks a declaration and account in respect of: "large plant valued at £535,500 and motor cars valued at £74,835.35 … purported surrendered by [Blackwater] to Holdings." It is said that the large plant "remained at all relevant times beneficially owned by [Blackwater]." Further the Applicant seeks a declaration against the Second Respondent concerning a sum received from Blackwater.

Commencement of proceedings arising from an insolvency

23. Where a company is the claimant and the claim will involve questions of fact, the appropriate originating process is a claim form N1 under Part 7 of the CPR ("Part 7 Claim").

24. To commence insolvency proceedings regard should be had to the Act, the Insolvency Rules 2016 and the Business and Property Courts Practice Direction: see paragraph 4 of the Insolvency Practice Direction (July 2018).

25. Rule 1.35 of the Rules applies to applications made under "Parts I to XI" of the Act, with certain specified exceptions. These proceedings may be referred to as "insolvency

proceedings". This is necessarily the case because the rule-making powers in sections 411 and 412 of the Act only confer rule-making power in relation to Parts I to XI.

26. The Rule provides that an Insolvency Application must state that it is made under the Act or Rules (as applicable) and state the section of the Act or paragraph of a Schedule to the Act or the number of the rule under which it is made. It follows that if an applicant is not able to state that the application is made under the Act or Rules it is not appropriate to make the claim by way of an Insolvency Application as Rule 1.35 cannot be satisfied.

27. The claims against the first and second Respondents made pursuant to section 239 of the Act fall within Part VI. Accordingly, they are insolvency proceedings. A claim seeking a remedy pursuant to section 423 of the Act is not an insolvency proceeding. The section is found in Part XVI. It follows that a liquidator may bring an action pursuant to section 239 by way of an Insolvency Application because it is an insolvency proceeding but not a claim made pursuant to section 423 as the Rules do not permit such a claim. An assignee is in no better position as he stands in the shoes of the assignor, although, as I shall come to, not for all purposes.

28. A party seeking a remedy pursuant to section 212 of the Act may make an Insolvency Application as the section falls within Part I to XI of the Act.

The arguments

29. Mr Groves argues that the Applicant has no authority or power to make a claim pursuant to section 212 of the Act. It is said that the Applicant does not fall within any of the categories of person able to make such an application as section 212(3) provides:

> "The court may, on the application of the official receiver or the liquidator, or of any creditor or contributory, examine into the conduct of the person falling within subsection (1) and compel him—
>
> "(a)to repay, restore or account for the money or property or any part of it, with interest at such rate as the court thinks just, or
>
> (b)to contribute such sum to the company's assets by way of compensation in respect of the misfeasance or breach of fiduciary or other duty as the court thinks just."

30. A distinction is drawn between assets of a company (which may be sold) and the rights conferred by statute upon a liquidator in relation to the conduct of the liquidation: *Re Ayala Holdings Ltd (No 2)* [1996] 1 BCLC 467, 480. The Applicant cannot take an assignment of the office. The Applicant is not a creditor or contributory.

31. There is no argument that section 212 of the Act provides a procedural route to bring a claim that is not an office-holder claim: *Re Eurocruit Europe Limited* [2007] EWHC 1433 (Ch), [2007] 2 B.C.L.C. 598, Times, July 16, 2007.

32. Taking a pragmatic approach, Mr Groves says that a cure is available. The Applicant may ask the court to treat the application as mistakenly including claims made under section 212, and upon payment of the appropriate fee, should be permitted to continue. He argues that there is authority for such a course: *Re Taunton Logs Ltd (in liquidation)* [2021] BPIR 427.

33. *Taunton Logs* was heard in the Business and Property Courts in Manchester by HHJ Cawson QC sitting as a Judge of the High Court. The company entered administration before moving to liquidation. The administrators made an Insolvency Application that the shareholders, who had paid 30% of the nominal value of the shares, pay to the company a sum equivalent to 70% of the share capital allotted to them. It goes without saying that the cause of action was vested in the company.

34. The administrators relied on the company's articles of association, which provided that no share was to be issued for less than the aggregate of its nominal value; the Companies Act 2006 Pt 3 s.33(2), which provided that money payable by a member to the company under its constitution was a debt due to the company; and Sch.1 para.19 of the Act, which provides that the powers of an administrator includes a power to call up any uncalled capital of the company. The respondents argued that the wrong procedure had been used as the true nature of the claim was a simple debt claim, not a call on unpaid capital, and therefore the proceedings were a nullity. The Judge reasoned [27]: "it is hardly apposite to describe the process of recovering the relevant monies from the Respondents as having anything to do with calling up uncalled capital in the ordinary sense. Consequently, unless some extended meaning can be given to the reference to calling up uncalled capital of the company in para 19, then para 19 is not, in my judgment, engaged…". He concluded [31] that the:

> "Joint Administrators used the insolvency proceedings procedure in circumstances in which it was not open to them, in accordance with IR 2016, to do so."

35. Given that the proceedings before him could not be described as insolvency proceedings, the jurisdiction to remedy defects using Rule 12.64 was not available. He turned to CPR Rule 3.10 which provides that if there has been an error of procedure such a failure to comply with a rule or practice direction does not invalidate the proceedings unless the court orders otherwise and that the court has a discretion to make "an order to remedy the error" the Judge said [34]:

> "I am persuaded that CPR 3.10 is capable of application in the circumstances of the present case, and the fact that the proceedings as issued were formulated and issued as insolvency proceedings, albeit impermissibly so, does not prevent this. I consider that a clear analogy can be drawn with Phillips v McGregor-Paterson (supra). It will be recalled that in this case, the liquidator's brought misfeasance proceedings by way of Pt 7 claim form when they had no locus standi to bring proceedings in their own names as office-holders save through the gateway of insolvency proceedings under s 212 IA 1986."

36. After concluding that the failure to use the right originating process was an "error of procedure" [43] and not an abuse of process [45.1] he explained: "any order curing the procedural error in this way should be conditional upon the Applicants paying the difference between the issue fee payable in respect of a claim under CPR Pt 7 and the actual issue fee paid in the circumstances of the present case".

37. Mr Curl QC makes a forceful response. Although distinguishing *Taunton Logs* on the facts (it did not include any transaction avoidance provisions vested in the office-holder) he says the approach taken by HHJ Cawson QC was contrary to established practice:

    37.1. All claims touching or concerning an insolvency are capable or should be capable of being brought before one court, in one list and before the same Judge. CPR 7.3 expressly supports this proposition.

    37.2. The Chancery Guide explains that it is for the Claimant to consider whether "there are aspects requiring expertise of a specialist judge and if so must select the court, list or sub-list in which the relevant specialist judges sit. Only one court, list or sub-list may be chosen".

37.3. It follows that the creation of the Business and Property Court Lists is intended to provide user autonomy. Any procedure that prevents such autonomy, forcing a claimant to choose a list which does not have a relevant specialist judge when such expertise is required is inconsistent with that aim.

37.4. CPR Part 49 governs procedure under the CA 2006 and other legislation relating to companies and limited liability partnerships.

37.5. CPR Part 49, Practice Direction 49A (5) provides that "Proceedings to which this practice direction applies must be started by a Part 8 claim form-(a) unless a provision of this or another practice direction provides otherwise, but (b) Subject to any modification of that procedure by this or any other practice direction".

37.6. Part 7 Claims may only be brought for limited proceedings such as section 370 (unauthorised donations), section 955 (takeovers), 968 (takeovers- effect on contractual restrictions) and derivative claims.

37.7. The Business list permits the issue of a Part 7 claim for misfeasance/breach of duty claims.

37.8. A liquidator or assignee would be forced to issue a Part 7 claim in the Business list and not before a specialist judge in the Companies Court. Furthermore, as the Chancery Guide provides that only one list is to be chosen an Insolvency Application would have to be issued in the Business list which is clearly inappropriate.

37.9. On one scenario there would be two sets of proceedings. They would seek relief (perhaps very similar relief) arising from exactly the same facts and matters but would appear in different lists and come before different judges for case management;

37.10. It is "illogical" to have two sets of proceedings. Such an outcome would lead to a "waste of time and court resource" which is contrary to the principles in CPR 1.1.

37.11. For these reasons there is an "established practice" that all claims concerning insolvency are issued by way of an Insolvency Application regardless of whether they are transaction avoidance, company or other claims.

38. Mr Curl says that case law reflects "established practice":

38.1. Although a claim made pursuant to section 423 of the Act does not fall within Rule 1.35 of the Rules it is habitually included in an Insolvency Application as if it were an insolvency proceeding: *TSB Bank Plc v Katz* [1997] BPIR 147.

38.2. In *TSB*, Arden J (as she was) inferred that an application under section 423 could be made together with insolvency proceedings commenced in the Companies Court or the Bankruptcy Court. She explained [149]:

> "…I prefer the view that an application under s.423 which is not made in existing proceedings in the Companies Court or the Bankruptcy Court, or which is brought otherwise than by virtue of a right to apply to those courts conferred by some other provision of Parts I to XI of the Insolvency Act 1986, may be commenced in any part of the High Court."

38.3. A preliminary point was taken against the liquidator *In re Shilena Hosiery Co Ltd* [1980] Ch 219, that the Companies Court has no jurisdiction to hear on a summons a claim for relief under s.172 of the LPA 25, and if it does have jurisdiction, it should exercise its discretion not to hear it. Brightman J dismissed the motion that the Companies Court did not have jurisdiction. In respect of the discretion motion, he said [227F]:

> "So far as the exercise of my discretion is concerned my decision is based solely on the fact that the section 172 claims arise in consequence of the winding up. The decision will not, therefore, affect any existing practice of the Companies Court in relation to a claim against a stranger of which it cannot be said that it arises in consequence of the winding up."

38.4. The Court of Appeal agreed that the Companies Court is a mere description of the High Court. It had jurisdiction to hear a claim on a summons as opposed to some other form of procedure: *Fabric Sales Ltd v Eratex Ltd* [1984] 1 WLR 863

38.5. The same approach was adopted by Warner J in *Re Clasper Group Services Ltd* (1988) 4 BCC 673 to an application made under the Act. The matter concerned a summons by the liquidator of Clasper Group Services Ltd to recover the sum of £2,000 paid out of that company one month before it went into creditors' voluntary liquidation. The claim was put in the alternative: a transaction avoidance claim, pursuant to section 239 of the Act, and a claim made on behalf of the insolvent company under the equivalent to section 212 of the Act or that the respondent was liable as constructive trustee. The Judge found that the respondent was not within the framework of section 212 and therefore it did not apply. There was no issue that the section could not be used by the liquidator if appropriate. The question was about whether the court should "entertain, on this summons, claims by the liquidator invoking the court's extra-statutory jurisdiction to make either an order charging the respondent as a constructive trustee of the sum of £2,000 or a tracing order against him".

38.6. Using the phrase "procedural convenience" Warner J thought: "it cannot, in my opinion, be procedurally convenient or sensible or economical that the liquidator here, having quite understandably formed the view on the evidence…that this was a case either of fraudulent preference or of a misfeasance within section 212 should be now told that in respect of the alternative claims...he must proceed by writ." He was careful to say that the case was fact specific and that liquidators should not be encouraged to bring claims by writ.

Hybrid claims

39. Where a mixture of transaction avoidance and company claims and/or a claim made pursuant to section 423 are made, it is convenient to refer to them as "hybrid claims". I agree with Mr Curl that the Insolvency and Companies Court has seen hybrid claims made by way of an Insolvency Application. Without statistical data it is not possible to know if there has been an increase in hybrid claims since 9 March 2015. That was the date when the Civil Proceedings and Family Proceedings Fees (Amendment) Order 2015 (SI 2015/576 (L.7) was introduced increasing the issue fee for a Part 7 claim. By that statutory instrument, if relief of £150,000 or more is sought the issue fee is £10,000. On 8 March 2015 the issue fee for a Part 7 claim seeking recovery of £150,000 was £1,115 representing a 673% increase. Practice Direction 7A paragraph 2.1 provides that a claim

can be issued in the High Court only if the damages claimed is £100,000 or more. Thus, most Part 7 Claims in the High Court will attract a high issue fee.

40. Whatever the reason the fact that Insolvency Applications include hybrid claims and have progressed through the court does not mean that such claims should continue to be made by way of an Insolvency Application if the rules are not permissive.

41. In my judgment the following principles can be teased out of the cases referred to above:

    41.1. The Companies Court is part of the High Court. The name does not endow it with a special jurisdiction. Today it describes the work done by High Court Judges and the specialist Insolvency and Companies Court Judges: *In re Shilena Hosiery Co Ltd*;

    41.2. Where a claim should have proceeded by way of a Part 7 Claim form, and is included in an Insolvency Application, the court has a discretion to permit the claim to continue where the claim is made as a consequence of the liquidation: *In re Shilena Hosiery Co Ltd, Fabric Sales Ltd v Eratex Ltd*;

    41.3. The reason for permitting a Part 7 Claim to continue as an insolvency proceeding is because "it is procedurally convenient or sensible or economical" to do so: *Re Clasper Group Services Ltd*. Today the court is given wide case management powers by CPR 3 that should be exercised in accordance with the principles in CPR 1.1;

    41.4. A claim made pursuant to section 423 of the Act may be brought in any part of the High Court. Today this includes any list within the Business and Property Courts England and Wales: *TSB Bank Plc v Katz;*

    41.5. In appropriate circumstances, the court may exercise its discretion and order that claim that is not an insolvency proceeding but made by an Insolvency Application should not proceed: CPR Rule 3.10;

    41.6. One such occasion where a court is likely to exercise its discretion against continuance is if there is evidence of an abuse of process: *Taunton Logs*;

41.7. In other circumstances the court may impose conditions to permit a claim that should have started as a Part 7 Claim to proceed as an Insolvency Application;

41.8. One condition likely to be imposed is the payment of the appropriate fee in accordance with the Civil Proceedings and Family Proceedings Fees (Amendment) Order 2015 (SI 2015/576 (L.7): *Taunton Logs*.

42. Save for *Taunton Logs* all cases referred to pre-date the introduction of the CPR. In my judgment these cases do not establish a practice that all claims arising from an insolvency may be made within an Insolvency Application. These cases do demonstrate that the issue before the court now is not new. The courts: (i) determine that the High Court has jurisdiction to hear company law matters and (ii) is prepared to remedy failures to use the right procedure.

43. Turning specifically to applications made using the procedural gateway provided by section 212 of the Act, I prefer the submissions made by Mr Groves. A distinction should be drawn between the assets of a company that may be sold and the rights conferred by statute on a liquidator. Section 246ZD of the Act does not include claims vested in the insolvent company.

44. In my judgment the issue is about standing. There is authority for the proposition that an assignee of a creditor has standing to make an application using the gateway: *Mullarkey v Broad* [2007] EWHC 3400 (Ch) [15, 32]. The rationale is in my view plain. If a debt is assigned, the assignee becomes a creditor, and a creditor has standing to make an application.

45. Similarly, if shares are sold the purchaser becomes a contributory and, a contributory has standing to use the procedural gateway.

46. The office of liquidator and that of the official receiver cannot be assigned or sold. The two categories I speak of above are the only categories where an assignee can take the benefit of the summary procedure.

47. The Blackwater Claims are property of Blackwater; they are company claims. The assignee, depending on the terms of the assignment, will take the beneficial interest in the

causes of action and may take the legal title to bring the claims in the name of the company.

48. The Applicant will be entitled to bring those claims in its own name or in the name of the Blackwater. As a matter of standing, section 212 does not permit an application to be made by the Applicant or Blackwater. The Applicant is not a creditor or contributory.

Conclusions

49. As joint liquidators of Blackwater Mr Clark and Mr Renshaw were able to issue insolvency proceedings using an Insolvency Application against the third and fourth Respondents.

50. As assignee of the transaction avoidance claims the Applicant can bring the proceedings against the third and fourth Respondent by way of an Insolvency Application.

51. Section 212 falls within Part IV of the Act. But for the assignment to the Applicant, the joint liquidators may use the section to bring the Blackwater Claims in their own name making use of the Insolvency Application procedure.

52. The Applicant is not a liquidator, official receiver, contributory or creditor. A distinction is to be drawn between an assignment of claims vested in the joint liquidators and capable of assignment, claims vested in Blackwater and capable of assignment by the joint liquidators and the office of liquidator. The office is not capable of assignment.

53. A Part 7 Claim should have been made to pursue the assigned Blackwater Claims.

54. A claim made pursuant to section 423 of the Act made by a liquidator or assignee is not an insolvency proceeding. A Part 7 Claim form is required to bring a claim under the section.

55. I reject the submission that the Insolvency and Companies Court has an established practice that overrides the Rules. If I am wrong as to that, such a practice cannot prevail in the teeth of the statutory framework.

56. Unless the court orders otherwise, a claim made by way of an Insolvency Application that should have been made under Part 7 of the CPR does not invalidate the proceeding. The

court may make such order as it thinks fit when exercising its discretion under the procedural rules.

57. The court is unlikely to regularise such proceedings where there is an abuse of process. The court will not assume abuse.

58. The court should encourage proceedings to be issued using the appropriate procedure. The court may exercise its discretion to promote the use of the correct procedure for the right claim: CPR 3.10

59. In the circumstances of this case an appropriate condition is to order payment of the prevailing court fee for issuing a Part 7 Claim within 7 days of the handing down of this judgment. The condition will put the Applicant in the same position as it would have been if it had issued the Blackwater Claims using the appropriate procedure.

60. I reach these conclusions with regret. The criticisms of the procedure are well made by Mr Curl. They do not promote a convenient or sensible or economical use of court resource. In modern parlance the result fails to ensure that claims of this nature are dealt with expeditiously, allotting an appropriate share of the court's resources. An office-holder and assignee of claims will be forced to issue claims arising from an insolvency using different procedures, in different lists within the Business and Property Courts, with a risk that without a transfer they will be case managed, at least, by different judges although the claims arise out of the same facts.

61. I invite the parties to agree an order.