Neutral Citation Number [2014] EWHC 1454 (Ch)

IN THE HIGH COURT OF JUSTICE **Case No. 8570 of 2013**
CHANCERY DIVISION
BIRMINGHAM DISTRICT REGISTRY

Birmingham Civil Justice Centre
The Priory Courts
33, Bull Street, Birmingham

BEFORE :

HIS HONOUR JUDGE SIMON BARKER QC
sitting as a Judge of the High Court

IN THE MATTER OF THE INSOLVENCY ACT 1986

AND IN THE MATTER OF MAMA MILLA LIMITED (IN CREDITORS VOLUNTARY LIQUIDATION)

B E T W E E N :

(1) TOP BRANDS LIMITED
(2) LEMIONE SERVICES LIMITED

Applicants

- and -

GAGEN DULARI SHARMA
(as former Liquidator of Mama Milla Limited)

Respondent

Hearing dates 7 and 15 April, and 8 May 2014

Representation :

Mr James Morgan instructed by KW Law LLP for the Applicants

Mr Patrick Lawrence QC and Mr William Hansen instructed by ZAK Solicitors for the Respondent

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JUDGMENT

I direct that pursuant to CPR PD 39A par 6.1 no tape recording shall be made of this judgment and that copies of this version as handed down may be treated as authentic

HHJ Simon Barker QC

HHJ SIMON BARKER QC :

Introduction

1 The interim application the subject of this judgment was made at a very late stage before the substantive hearing of an application pursuant to s.212 of the Insolvency Act 1986 (respectively "the s.212 application", "s.212" and "IA 1986"). The parties to the s.212 application are Top Brands Limited ("TBL") and Lemione Services Limited ("LSL") as the applicants (collectively "As") and Mrs Gagen Sharma, a licensed insolvency practitioner who practises through Sharma Associates trading as Sharma & Co, as the respondent ("R").

2 The circumstances in which a s.212 application may be made include where, in the course of the winding up of a company, it appears that a person who has acted as liquidator of the company has misapplied or become accountable for any of the company's money or has been guilty of any misfeasance or breach of duty in relation to the company. By s.212(3), a creditor, amongst others, may initiate an application by asking the court to examine the liquidator's conduct and to compel the liquidator to (a) repay, restore or account for money or property, or (b) contribute to the company's assets by way of compensation.

Background to these proceedings

3 The present proceedings were issued on 28.10.13 by As as creditors of Mama Milla Limited ("MML"), a company then and now in creditors' voluntary liquidation, against R, then the liquidator of MML, for relief under s.212 and for an order pursuant to s.108(2) IA 1986 that R be removed as liquidator of MML and be replaced by Mr Barry Ward ("Mr Ward"), a licensed insolvency practitioner and principal of Ward Sheldrake Consultancy. The relief sought under s.212 includes an order against R for repayment, restoration, an account or contribution by way of compensation in the sum of £548,074.56 ("the Sum") for the benefit of MML's creditors, or such other sum as the court thinks fit, plus interest.

4 On 20.12.13, the court gave directions in respect of the application under s.108(2) IA 1986 as a result of which a creditors' meeting was held on 17.1.14 at which R was removed from office and replaced by Mr Ward. Accordingly, R was the liquidator of MML from the commencement of the winding up on 21.9.11 to 17.1.14.

5 At an initial short hearing on 26.11.13 and at the hearing on 20.12.13, the court gave directions for the progress of the s.212 application through to a three day trial fixed to commence on 14.4.14.

6 The Sum is said to have been received into MML's account with National Westminster Bank Plc ("NatWest") very shortly before MML entered creditors' voluntary liquidation, to have been transferred by R as liquidator of MML to her business account with Barclays Bank PLC on 8.11.11, and to have been paid away by R by 5.3.12.

7 TBL's and LSL's status as creditors of MML had been in issue during the course of R's tenure of office as liquidator. TBL and LSL first notified R of their respective claims to be creditors of MML by faxes dated and sent to R on 15.11.11. Further communications followed, including from As' then solicitors, S G H Martineau, who submitted undated proofs of debt under cover of letters dated 24.1.12 explaining the basis on which TBL claimed to be a creditor in the sum of £322,666 and LSL claimed to be a creditor in the sum of £189,265. On 3.5.12 R rejected these proofs of debt. In consequence, on 23.5.12, As issued an application, designated case no. 8264 of 2012 ("the first action"), against R pursuant to r.4.83 of the Insolvency Rules 1986 ("IR 1986") for an order reversing R's decision to reject their proofs of debt. On 27.9.12 the parties submitted a consent order ("the Consent Order") to the court, which was entered on the same day, by which R consented to the reversal of her decision and agreed to admit TBL's proof of debt in the sum of £332,666 and LSL's proof of debt in the sum of £189,265.

8 It is common ground that before 27.9.12 R knew that As intended to make an application against her under s.212 and that that would be a likely consequence of accepting their proofs of debt.

The applications issued on 28.3.14

9 On 28.3.14, barely a fortnight before the date fixed for the substantive hearing of the s.212 application, R and As issued interim applications.

10 By their application, As sought permission to amend their Points of Claim to conform to the evidence and an order for specific disclosure. R consented to the application to amend and an order for specific disclosure has also been made.

11 R's application is for an order adjourning the trial so as to allow R to pursue a claim to set aside the Consent Order. By so doing, R seeks to undermine As' status as creditors and, in consequence, thwart their standing to pursue the s.212 application. For the grounds of her application, R refers to a 28 page witness statement dated 28.3.14 to which she exhibits documents collated in 5 lever arch files running to some 1449 pages. Put shortly, R wishes to contend that her consent to the Consent Order was procured by fraudulent misrepresentation and that the transactions relied upon by As to found their proofs of debt were part of a carousel fraud designed to defraud HMRC of very substantial sums of VAT. R also supports her application with draft Particulars of Claim ("draft P/C") in fraud proceedings issued on 14.4.14.

12 Fortunately, because the court had been notified that an application in other proceedings had been compromised, it was possible to list As' and R's applications for hearing on the afternoon of 7.4.14. However, that listing would not have permitted full argument on R's application. By 7.4.14, an eight volume trial bundle had been delivered for the three day trial and there appeared to be a real question as to whether the substantive s.212 application could be heard within the 3 day fixture. By 7.4.14, the court had also been notified of the compromise of a three week trial of yet other proceedings fixed for June. It was therefore possible to allocate sufficient time to hear R's application on 15.4.14 and, without disadvantaging other court users, to reserve time in June for the substantive hearing of As' s.212 application in the event that R's adjournment application fails.

Issues raised by R's application to adjourn the trial

13 Mr Lawrence QC and Mr Morgan make their submissions by reference to four issues which may be expressed as follows :

(1) Does R, being a former liquidator and no longer an office holder, have sufficient standing to bring an action to set aside the Consent Order? ("The Competent Party Issue")

(2) Is R estopped from challenging the Consent Order on the ground that her consent was obtained by fraud? ("The Estoppel Issue")

(3) Would an action by R against As based on such a challenge be an abuse of the court's process? ("The Abuse of Process Issue")

(4) Should the court refuse to further adjourn the trial and refuse to give directions for the concurrent trial of R's challenge to the consent order for procedural reasons? ("The Procedural Issue").

14 On 7.4.14, Mr Lawrence submitted that the Procedural Issue arises for consideration if R establishes that (1) she is a competent party, (2) she is not estopped from challenging the Consent Order, and (3) such challenge is not an abuse of process. For that reason he invited me to hear and rule upon those issues before turning to the Procedural Issue. Mr Morgan submitted that the Procedural Issue is free standing and could equally well be considered first as a determinative point. In order to ensure that argument was completed on 15.4.14, I decided to hear the respective parties' submissions on all four Issues. However, in my judgment the Procedural Issue is, as Mr Morgan submits, free standing and should be viewed in this judgment as being decided alongside rather than after the other three issues, which are sequential.

15 Before turning to the issues, it is necessary to summarise the nature of and the background to R's fraud claim.

R's fraud claim

16 I start by reminding myself that on this application my remit in relation to the fraud claim R now wishes to advance does not include fact finding beyond being satisfied - if such be the case – that the claim would not be not susceptible to adverse summary judgment, in short that it has a real prospect of success. If, on the available material, the claim now sought to be advanced by R can be shown to be fanciful or imaginary, the gateway should be barred as there would be no point in going further.

17 Mr Morgan, on behalf of As, takes this point drawing attention to (1) the lateness of R's challenge, which he submits evidences a lack of genuineness in R's application, coupled with the absence of any new material or startling recent (or post Consent Order) factual discovery, (2) R's own evidence that she does not have the means to restore or repay the Sum, and (3) the lack of substance relating to As in the allegations set out in the draft P/C. Mr Morgan submits that R's application is not made in good faith but is a tactical ploy aimed at derailing or at least delaying an otherwise unanswerable claim under s.212.

18 Mr Morgan refers to R's witness statement in the first action for her own account of what she knew while she was MML's liquidator. After describing what she was told and provided with by MML's director, Faruq Abdullah Tariq ("Mr Tariq"), R

refers to her dealings with As and their then solicitor and to the documentation provided to her for the purpose of considering TBL's and LSL's proofs of debt. She also notes potentially relevant omissions in the records of MML provided by Mr Tariq and the failure, prior to her rejection of their proofs, on the part of As to provide the emails produced and relied upon by them as part of their evidence in the first action.

19 R draws the various strands together and explains the rationale for her decision to reject As' proofs of debt in the following paragraph of her witness statement in the first action :

> "22 Taking all of the above facts, matters and inconsistencies into account, I made a decision based on my knowledge and experience of dealing with insolvency matters to reject the proofs. [As] were not listed as creditors in the statement of affairs supplied to me by [[Mr Tariq]. There was no evidence of any trading activity between [MML] and [As] in [MML]'s books and records, save for the payments to [LSL]. There was no evidence at all that [As] were creditors. There was no evidence of any orders placed for good (*sic*) or of deliveries made to [MML], and no information as to when and how the alleged orders had been placed had been given to me[1]. As I have stated above the first time I was told about or saw the emails Mr Heer[2] has exhibited to his witness statement was when his evidence was sent to me. The alleged trading activity all took place after [MML] had ceased to trade. There was no evidence of any stock delivered to [MML]. The invoices supplied to me appeared to have been altered at some point as the address had changed[3]. The figures supplied by [As] have varied from time to time[4]. To the extent that any goods had been delivered to SERT-MST, there was no evidence that they were goods belonging to [MML][5]. Indeed the director had told me that moneys paid to [MML] by SERT-MST were to be returned to it as [MML] had ceased to trade".

20 What appears from the above is that in May 2012 R was not satisfied that TBL had ever traded with MML or that TBL and LSL, or either of them, were actually creditors of MML as at 21.9.11.

21 The new fact or circumstance, if it be such, is derived from the realisation that MML was involved in VAT fraud. MML's involvement in VAT fraud is addressed in

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[1] A reference to the emails produced for the first time as exhibits to As's evidence in the first action.
[2] Son of Dildar Singh, the owner of As and the manager of As.
[3] Invoices faxed to R by As on 15.11.11 in support of their claim to be creditors note MML's address as 78 York Road, London whereas invoices bearing the same invoice numbers and details as to goods and price accompanying As' proofs of debt sent by As' solicitors under cover of letters dated 24.1.12 note MML's address as 257 Hagley Road, Birmingham.
[4] A reference to TBL abandoning a claim that an invoice for goods supplied at a price of £24,000 was unpaid.
[5] MML was said to be the intermediary in a sale for direct delivery to a third party, SERT-MST.

a first interim report dated 25.3.14 prepared by Mr Ward to assist the court. In this report Mr Ward identifies a pattern of trading by which MML, a UK company registered for VAT as a retailer, purchased or appeared to purchase goods (toiletries including razors and soap) from suppliers outside the UK and therefore not registered for VAT, sold or appeared to sell the goods to UK customers (in fact to trade customers also registered for VAT and not to individual retail customers) and failed to account to HMRC for the VAT on its outputs. Mr Ward refers to this as a 'carousel' fraud and estimates that the undeclared VAT for which MML failed to account is not less than £788,546.

22 In a short second witness statement dated 7.4.14, Mr Ward makes clear that while he is satisfied that MML was involved in such fraud for a considerable period of time, he is still conducting investigations and he is not to be taken, at this stage, as having indicated that TBL, LSL and SERT-MST, or any of them, were involved in a joint enterprise with MML. In other words, on the material currently available to him, Mr Ward is of the view that MML was involved in what is termed 'acquisition' fraud but is not asserting that there was a 'carousel' fraud to which TBL, LSL and/or SERT-MST were parties. Mr Ward also observes that he has reached the conclusions he has set out by reference to material also available to R while she was liquidator of MML.

23 R does wish to allege now that TBL and LSL, and the individuals standing behind them, were involved in a joint enterprise in the nature of a 'carousel' fraud with MML. This appears from the draft P/C at paragraphs 13 – 15. It appears from the supporting particulars of fraud at paragraph 16 of the draft P/C that R also wishes to allege that SERT-MST (or 'Sert' if different) was also involved in the joint enterprise.

24 There are more than 50 particulars which are said to have been drawn from documents available at the time when R rejected As' proofs, from evidence filed in support of the proofs in the first action, and from Mr Ward's first report; there are also interspersed in and as particulars under the draft P/C various comments and argument. The thrust of R's intended case may be summarised as follows :

(1) the purchases from As are high value transactions and honest commercial entities trading at arm's length would be expected to record such arrangements in written contracts, however there are no contracts or documents evidencing usual contractual terms and conditions for trading;

(2) it is improbable that As would have permitted MML, a company with no apparent funds or access to funding, to have dealt with goods worth in excess of £500,000 in the absence of arrangements to secure payment;

(3) there is no evidence available to explain how and when and on what terms the on-sales to SERT-MST were negotiated and concluded;

(4) there is no evidence in MML's books and records of purchases from As or on-sales to SERT-MST;

(5) the net price at which MML purportedly sold to SERT-MST is lower than the price at which As invoiced MML, thus MML's only scope for making a profit was VAT fraud; and,

(6) monies received by MML from SERT-MST were paid out to a variety of companies, some of which were in liquidation or had already been dissolved and one of which (Quetta Developments Ltd ("Quetta")) is owned and controlled by Dildar Singh who also owns and controls As.

25 In addition, Mr Lawrence draws attention to passages in Mr Ward's first report which characterise MML's payment to Quetta and other payments (including £300,000 to Mr Tariq and £100,000 supposedly paid to Neumans LLP, a firm of solicitors in London, but according to Neumans LLP never received into that firm's bank account) as "unusual".

26 As to the on-sales and role of SERT-MST, Mr Lawrence draws attention to the correspondence between R and SERT-MST, some of which letters from SERT-MST to R are said by its finance director to be false documents even though letters from R appear to have been sent to SERT-MST's correct address. Mr Lawrence also refers to R's request for copies of SERT-MST's terms and conditions of trading with MML and details of how the terms were communicated to MML, to which SERT-MST's solicitors replied that there were no terms and conditions of trading, from which it follows that there was nothing to communicate.

27 Mr Morgan draws attention to Mr Ward's second witness statement in which he says that he has seen no evidence that any supplier or customer was involved in the process by which goods were bought at zero VAT rate and sold at a net price loss but with a VAT charge.

28 On the material so far available, there is ample material to allege VAT 'acquisition' fraud on the part of MML, but allegations of 'carousel' fraud involving TBL and LSL

and SERT-MST in a joint enterprise are based on inference and are inevitably more speculative.

29 So, does the case which R intends to bring have a real prospect of success? On the available material I am not able to conclude that the case R wishes to advance is false, fanciful or imaginary. R's intended case and Mr Lawrence's submissions identify puzzling documents and no less puzzling omissions which give rise to nagging doubts, rather than whimsical thoughts, that there was a joint enterprise 'carousel' fraud. Pending further explanation, and the nagging doubts do call for further explanation, this suffices for there to be a real prospect of success and for the gateway to be left open.

The Competent Party Issue

30 Mr Lawrence approaches this and all other issues from the starting point that it is a cardinal principle that fraud unravels all and that the court will not allow its process to be used by a dishonest person to carry out a fraud, United Merchants Ltd v Royal Bank of Canada [1983] 1 AC168 Lord Diplock at p.184A-B.

31 Mr Lawrence submits, first, that R derives her standing from the fact that she was a party to the contract underlying the Consent Order. That may be so, but there is nothing before me to indicate that R dealt with TBL and/or LSL in any capacity other than as liquidator of MML and neither the first action nor the Consent Order itself concerned R personally. Further, in the draft P/C there is no reference to or pleaded reliance on any such contract; the draft P/C refers only to the Consent Order which is alleged to have been procured and obtained by means of dishonest and fraudulent misrepresentations. The fact that R personally may be liable to repay or restore money to MML or to contribute to MML's assets is a consequence of R having acted as liquidator of MML and of the terms and effect of s.212 IA 1986. I attach no weight to this point.

32 Next, Mr Lawrence relies upon a passage from the judgment of the Privy Council in Deloitte & Touche AG v Johnson [1999] 1 WLR 1605 at p.1611 where Lord Millett said :

> "In their Lordships' opinion two different kinds of case must be distinguished when considering the question of a party's standing to make an application to the court. The first occurs when the court is asked to exercise a power conferred on it by statute. In such a case the court must examine the statute to see whether it identifies the category

> of person who may make the application. This goes to the jurisdiction of the court, for the court has no jurisdiction to exercise a statutory power except on the application of a person qualified to make it. The second is more general. Where the court is asked to exercise a statutory power or its inherent jurisdiction, it will act only on the application of a party with a sufficient interest to make it. This is not a matter of jurisdiction. It is a matter of judicial restraint. Orders made by the court are coercive. Every order of the court affects the freedom of action of the party against whom it is made and sometimes (as in the present case) of other parties as well. It is, therefore, incumbent on the court to consider not only whether it has jurisdiction to make the order but whether the applicant is a proper person to invoke the jurisdiction".

33 Mr Lawrence submits that the court is here being asked to exercise its inherent jurisdiction by an applicant with a sufficient interest. He submits that R was a party to the Consent Order and that she is directly and personally affected and - as is common ground - that at the time of the Consent Order R was on notice from As that a s.212 application against her was contemplated; in other words, that although R was necessarily a party to the Consent Order as liquidator of MML, one purpose of the Consent Order was to open a door to potential personal liability on the part of R to As, albeit indirectly because any recovery from R would be paid to MML's liquidator (now Mr Ward) for the benefit of MML's creditors. Mr Lawrence adds that Mr Ward is on notice of the s.212 application and has chosen to place evidence before the court in the s.212 proceedings (some of this evidence is not favourable to R, but that is not a matter for adjudication on this application).

34 In response, Mr Morgan submits that R was a party to the first action and to the Consent Order in her capacity as liquidator of MML; that R so acted in the exercise of her statutory functions under s.165 IA 1986; and, that R was not a party to those proceedings or the Consent Order in a personal capacity.

35 Mr Morgan submits that only the current liquidator, Mr Ward, is in a position to attempt to set aside the Consent Order by reason of privity of interest or, put more directly, because the Consent Order binds the office holder not the person.

36 Mr Morgan draws attention to IR 1986 and, referring to r.4.81 IA 1986, submits that, upon ceasing to be liquidator, R became bound to transmit all proofs she had received together with a list of proofs. I note that r.4.81 also requires the new liquidator to authenticate the list by way of receipt and to return it to the former liquidator; thus, a former liquidator is to have a record of accepted creditors which

is important, not least because a former liquidator may remain vulnerable to complaint or suit under s.212.

37 Mr Morgan also draws attention to r.4.85 IR 1986, which provides :

> (1) The court may expunge a proof or reduce the amount claimed —
> (a) on the liquidator's application, where he thinks that the proof has been improperly admitted, or ought to be reduced; or
> (b) on the application of a creditor, if the liquidator declines to interfere in the matter.
>
> (2) Where application is made to the court under this Rule, the court shall fix a venue for the application to be heard, notice of which shall be sent by the applicant—
> (a) in the case of an application by the liquidator, to the creditor who made the proof, and
> (b) in the case of an application by a creditor, to the liquidator and to the creditor who made the proof (if not himself).

38 Thus, the provisions of r.4.85 include that a liquidator may apply to the court for an order expunging or reducing the amount of a proof on the grounds that it has been improperly admitted. Applying to the court under r.4.85 was a course open to R until 17.1.14.

39 The kernel of these submissions is that R's involvement was only as office-holder and agent of MML, and that she lost the right to challenge As' proofs when she was replaced as liquidator of MML.

40 Mr Morgan submits that Mr Ward, having replaced R as office-holder of MML, is in consequence bound by R's decisions and acts as liquidator of MML, including the Consent Order, unless and until set aside by the court. That could be sought by Mr Ward on any ground that would have been open to R or, for that matter, any ground which may have come, or may yet come, to his attention and was not known or available to R. Mr Ward's powers in relation to R's decisions and acts stem from privity of interest or continuity of office.

41 It may fairly be observed that the tenor of Mr Ward's report and witness statements suggests that, as at 7.4.14, he had no intention of seeking to challenge the Consent Order. However, Mr Ward has said that he is not yet in a position to express a conclusion of his own as to the genuineness or otherwise of MML's dealings with TBL and LSL and/or MST-SERT. From this it follows that he has not yet decided against challenging As' proofs.

42 Mr Morgan submits that the s.212 application and any fraud allegation are quite separate matters. By the s.212 application, As call upon R to account for her conduct in office, including in particular her dealings with the Sum. Although As are private parties, they are invoking a statutory right in the public interest, i.e. for the benefit of MML's creditors as a whole (of whom, on Mr Ward's present evidence, they comprise some 39% and HMRC comprises some 61%), at considerable expense to themselves. By contrast, R's fraud allegations are raised entirely for private purposes : to defeat a claim which is brought to impose personal liability upon her and to advance a new claim as outlined in the draft P/C for personal advantage (the remedies sought include damages). Accordingly, Mr Morgan submits, the s.212 application could and should proceed as it stands and even if R does proceed with her fraud claim that could and should follow on – if it survives any strike out application - because As' status is not in issue in the s.212 application and there is no risk of inconsistent judgments.

43 In reply, Mr Lawrence QC submits that As' pleadings in the s.212 application necessarily assert that As derive their standing as creditors of MML from the Consent Order and that it would be, in Mr Lawrence's words, "topsy turvy" for the s.212 application to precede R's challenge to As' standing as creditors.

44 Mr Lawrence accepts that R has formally admitted in the s.212 application that As are creditors, being constrained so to do by the Consent Order, but draws attention to her denial of the allegation that there was a meeting with a representative of As at which she said that once she had sorted out her fees monies from the Sum could be paid to creditors. As I see it, R does not need to challenge the Consent Order in order to make good her refutation of the alleged meeting and her alleged statement.

45 This is an unusual case. Given that R has identified a viable fraud claim, there are concerns as to R's predicament. However, that cannot affect the question of whether R qualifies under r.4.85 as an applicant entitled to seek to expunge or reduce the proof of a recognised creditor of a company in liquidation. There is no lack of clarity in r.4.85 and a former liquidator is not identified as a person having such a right.

46 I do not accept Mr Lawrence's submission that the Competent Party Issue in this

case falls to be determined as one of the more general kind of cases in which the court's inherent jurisdiction is engaged and the test is whether a sufficient interest has been demonstrated.

47 In my judgment, the route to challenging a proof of debt already accepted by a liquidator is provided for by r.4.85 IR 1986, which authorises a liquidator or a creditor (if a liquidator declines to act) to apply to the court for a proof to be expunged or reduced. This subordinate legislation, embodied in regulations made under IA 1986, clearly identifies the category of person who may make the application. Thus, r.4.85 limits the jurisdiction of the court (the first kind of case identified by the Privy Council in Deloitte & Touche AG). R is neither the liquidator nor, so far as I am aware, a creditor of MML. As the former liquidator of MML, R has no jurisdiction to seek to expunge or reduce the proofs of TBL and LSL, which is the outcome sought by R's intended challenge to the Consent Order.

48 Such a conclusion would be troubling in the light of there being a real prospect that neither TBL nor LSL are creditors but for the facts that (1) the liquidator of MML is progressing investigations and has not reached a conclusion one way or the other in relation to As' proofs, and (2) there was a reasonable window of opportunity after the commencement of the s.212 application and before removal as liquidator of MML for R to seek to challenge the Consent Order. Even if the liquidator of MML was not intending to further investigate MML's trading with As, the court simply does not have jurisdiction to act in disregard of r.4.85. That being said, this judgment should not deter Mr Ward, as MML's liquidator, from investigating the validity of As' proofs or, for that matter, MML's other trading with As and its trading with SERT-MST.

49 As to it being "topsy turvy" for the s.212 application to proceed notwithstanding that there may yet be a challenge by the liquidator, though not by R, to As' proofs and standing as creditors which may follow after the determination of the s.212 application and may be successful, the short answer is that R has only herself to blame. That is because (1) R accepted As' proofs knowing that a s.212 application was likely to follow; (2) when it did follow she did not - as she could have done during the ensuing three months while still liquidator – make an application under r.4.85; (3) moreover, the issue in the s.212 application is whether her conduct in relation to the Sum was misfeasant or in breach of duty, and the present the liquidator, Mr Ward, is of the view that there is a case to

answer; and, (4) if the outcome is adverse to R it does not follow that As or either of them will necessarily benefit, if the court so orders, from the restoration or repayment of the Sum or payment of any compensation by R to MML in liquidation. In these circumstances, I do not accept Mr Lawrence's "topsy turvy" submission.

50 If my conclusion that r.4.85 is relevant, that R does not qualify as an applicant to challenge the validity of As' proofs and, therefore, that the court lacks jurisdiction to entertain a challenge by her to the Consent Order is wrong, I would accept Mr Lawrence's submission as to the more general kind of case referred to in Deloitte & Touche AG and hold that R has demonstrated a sufficient interest to enable the court to exercise its inherent jurisdiction and recognise her as a competent party to challenge the Consent Order. Such interest would be based upon (1) the nature of As' claim against R, there being a real prospect that As' derive their status from a consent order procured and obtained by fraudulent misrepresentation, and (2) the nature of the claim and remedy to be sought by R. However, that is not my decision on the Competent Party Issue.

51 Given my conclusion on the Competent Party Issue, consideration of the Estoppel Issue and the Abuse of Process Issue is unnecessary to my decision. Nevertheless, in case my conclusion on the Competent Party Issue is wrong, I set out my decision on these other issues.

The Estoppel Issue

52 It is common ground that unless and until the Consent Order is set aside its effect is to bar R from challenging As' status as creditors of MML. As further contend that R is also barred or estopped from contending that the Consent Order was obtained by fraud.

53 On this further estoppel, the Estoppel Issue, both Mr Lawrence and Mr Morgan refer to the decision of the Court of Appeal in Zurich Insurance Company PLC v Hayward [2011] EWCA Civ 641 and, in particular, to the judgment of Smith LJ at paragraphs 26-28 :

> "26 It is well established that any judgment, whether resulting from a judge's decision or by consent of the parties is capable of being set aside if one party can show that it was obtained by fraud. However, it is common ground that that principle will not apply in a case in which the first action was itself either based on an allegation of fraud of the

> defendant or was defended on the basis of the fraud of the claimant if, in the second action, the claimant seeks to rely on the self-same fraud. That issue of fraud will have been determined or compromised. It seems to me that it will often be more difficult to ascertain exactly what issues are subject to an estoppel where the first action has been compromised than where it has been decided by a judge. The judgment will or should make the position clear; the same will not always be true in respect of a settlement. In my view, there should only be an estoppel if it is clear that the issue now raised has been decided or compromised in the first action.
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> 27 I do not think that an estoppel will arise merely because there was an allegation of fraud in the first action. I think that, before an estoppel can arise, there must be congruence between the allegation of fraud which was determined or compromised in the first action and the allegation of fraud made in the second action. In other words, the two allegations must be essentially the same. I do not accept Mr Sims' submission that merely putting Mr Hayward's good faith in issue was sufficient to create an estoppel in respect of any subsequent allegations of bad faith or fraud. To create an estoppel there must be a specifically identifiable allegation of fraud and an attempt to repeat that very allegation.
>
> 28 I consider that these two requirements (of clarity as to what was in fact compromised and as to congruity between the first and second allegations) are necessary before there can be an estoppel because an estoppel creates a hard and fast rule that the allegation cannot be made again. If there is an estoppel there is no possibility of allowing the action to proceed on the basis that it is fair and just and because the importance of the purity of justice outweighs the need for finality in litigation. Because the estoppel creates a strict rule, it seems to me right that its application should be strictly confined. This does not mean that the gates will be open to litigants to bring actions which allege almost the same thing as has been alleged before. That can be prevented by the application of the flexible principles set out in *Johnson v Gore Wood*".

54 First, it is necessary to be clear as to what it is that R is said by As to be barred or estopped from doing by reason of the Consent Order. Mr Lawrence submits that the bar contended for by As is that R is prohibited from making any allegation that the Consent Order was procured by fraud. Although not put so starkly by Mr Morgan and although Mr Morgan concedes that R did not at any stage "use the word "fraud" in the first action", Mr Lawrence's submission is a fair summary of Mr Morgan's contention that R's previous assertion that the transactions underlying As' proofs were not genuine is essentially the same as the assertion she now wishes to make.

55 Mr Lawrence submits that R's earlier reason for rejecting TBL's and LSL's proofs was that the combined effect of inconsistencies in As' evidence and absence of

evidence in MML's records, as to which see R's witness statement in the first action at paragraph 22[6], caused her to conclude that As' proofs should be rejected; whereas, R now believes As to have been engaged in a joint enterprise with MML and, probably, SERT-MST to defraud HMRC by means of a VAT carousel fraud based on purported trade in non-existent goods.

56 That R did not turn her mind to the possibility of VAT fraud when considering As' proofs is apparent, by omission, from R's witness statement in the first action and is confirmed from Mr Ward's second witness statement filed in these proceedings, in particular at paragraphs 8-11 thereof.

57 Mr Lawrence also submits that if, contrary to his primary submission, there is clarity and congruity so that the new allegation is essentially the same as that the subject of the Consent Order, fraud is a recognised public policy exception to issue estoppel; for a recent authority Mr Lawrence refers to South Somerset DC v Tonstate (Yeovil Leisure) Ltd [2009] EWHC 3308 (Ch) Roth J at paragraph 46 in addition to Carl Zeiss Stiftung v Rayner & Keeler ltd [1967] 1 AC 853 and Arnold v National Westminster Bank PLC [1991] 2 AC 93.

58 Mr Morgan describes the question of whether or not As' proofs are genuine as "binary" and as necessarily having involved consideration and compromise of any concern that the proofs were fraudulent. On this basis, Mr Morgan seeks to differentiate between the decision of the Court of Appeal in Zurich, both as explained in the judgment of Smith LJ and as differently cast in the judgment of Moore-Bick LJ, in particular at paragraph 60, and the Estoppel Issue for decision on this application.

59 In my judgment, R's compromised grounds for challenging As' proofs and the grounds she now wishes to advance are sufficiently different to demonstrate a lack of congruity. That is not to say that there is not a substantial overlap; of necessity, R wishes to rely now on the same inconsistencies and omissions as were relied on prior to the Consent Order; what is different is the development of the grounds from an unexplained absence of the sort of material that ought to exist where there is arm's length trading at a significant level to a formulated case of dishonest trading to defraud HMRC. Thus, R's grounds now include a rationale

[6] Set out above at paragraph 19

based on analysis and reasoning which, if correct, adds force to the material previously available. To a limited extent there is additional material (the result of Mr Ward's communications with HMRC) albeit that it is not new material in a Ladd v Marshall sense.

60 If that conclusion is wrong, the public policy by which fraud is able to unravel all would, because the allegation has a real prospect of success in this case, operate to save R from being estopped from challenging the Consent Order. I bear in mind that there is a contrary public interest, as an aspect of the proper administration of justice and upholding the rule of law, in preventing repetitious litigation and ensuring finality; but, in the circumstances of this case, and for this purpose adopting as an assumed fact Mr Morgan's submission that the Consent Order should be understood to have compromised any issue that As' proofs were fraudulent, that issue was not the subject of judicial determination and the contrary public policy by which the court will not allow its process to be used as an instrument of fraud should and does prevail.

The Abuse of Process Issue

61 As contend that R could and should have raised the fraud issue as now formulated in the first action.

62 Mr Lawrence frankly concedes that R would face "grave difficulties" in challenging As' contention but for the approach that the court is required to take and the weight to be given to one point when taking that approach.

63 The approach referred to is that identified by Lord Bingham in Johnson v Gore Wood & Co (a firm) [2002] 2 AC1 at p.31C-D :

> "It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before".

64 Mr Lawrence submits that when making a broad, merits-based judgment and taking into account the public and private interests involved in the context of the facts of this case there is one determinative point of public interest. By way of

shorthand description, Mr Lawrence characterises this point of public interest as an attempt by As to "double the money" at double loss to HMRC. The starting point is an assumption for present purposes that R's case that As were conspirators with MML in a fraud on HMRC is well founded. On that basis, As may be taken to have shared in or benefited from that alleged fraud which Mr Ward values at in excess of £¾million. The "doubl[ing] of the money" would occur if As succeed in the s.212 application and then receive from the liquidator 39% of whatever is recovered from R in respect of the Sum or that part of it for which R is held responsible to MML in liquidation (39% of the Sum equates to £213,749) plus attributable interest; moreover, such an outcome for As' benefit would also serve to doubly disadvantage HMRC because HMRC would be deprived of 39% of whatever recovery may be made and would - if As are not creditors - be distributed to HMRC.

65 Mr Lawrence submits that, viewed in this way, there is a decisive public interest against holding R's intended challenge to the Consent Order to be an abuse of the process. Mr Lawrence submits that it would be unpalatable to contemplate that As may have been complicit in a fraud together with MML and SERT-MST and now make good a claim against MML's liquidator. Although Mr Lawrence submits that Mr Ward should not take misfeasance proceedings against R, he notes that Mr Ward is investigating matters which could result in such proceedings and distribution of any recovery to MML's undoubted creditor, HMRC.

66 Mr Morgan submits that when making a broad, merits-based judgment by reference to all the facts and circumstances of the case the following are significant : (a) R's allegations, if not the same, are very similar to those made in the first action; (b) R bases her claim not on fresh evidence but on evidence within her means of knowledge; (c) when entering into the Consent Order R knew that a s.212 application against her was seriously contemplated by As; (d) holding R's attempt to challenge the Consent Order to be an abuse of process would encourage other liquidators to be diligent, and that is an important public interest; (e) the timing of R's application at this very late stage calls into question her good faith and smacks of litigation tactics; (f) R asserts that she is not in a position to pay the Sum and, if permitted to pursue a challenge to the Consent Order, would deplete or exhaust whatever resources she does have in meeting her own litigation costs; (g) finality in litigation is a weighty principle in the public interest; (h) following and relying on such finality, As exercised their rights as creditors to

call for and vote at a meeting held to consider the removal of R and the appointment of Mr Ward as liquidator of MML; (i) when evaluating the public interest in discouraging fraud, the court is entitled to and should bear in mind that R's allegations that the fraud extended beyond MML are, even now, very weak; (j) Mr Ward and not R is the proper person to bring any fraud claim; and (k) taken cumulatively, the "could and should" argument is overwhelming.

67 Mr Morgan emphasises that on behalf of R Mr Lawrence accepts (a)-(c), and Mr Morgan submits that Mr Lawrence has no real answer to (d)-(k) beyond submitting that the public policy in discouraging fraud is a trump card. That submission rather over-simplifies Mr Lawrence's submissions.

68 As to Mr Morgan's other points : (d) while there is, of course, a public interest in encouraging office-holders to be diligent, the court should not be too ready to strike down late or subsequent proceedings based on a genuinely late realisation that action should be taken merely in order to encourage others. I would add here that there is no evidence before me in this case that such general encouragement of liquidators is needed; (e) as to R's good faith, Mr Lawrence refers to the waiver of privilege in advice given by R's former solicitors and counsel and reasonably, in my view, submits that the lateness of the application has a credible explanation which does not point to a lack of good faith or tactical litigation; (f) R's means are unknown and the point is of relatively minor weight in the balancing exercise to be undertaken; (g) finality in litigation is a public interest consideration of significant weight, so too is the principle that fraud unravels all. Where all other circumstances are equal or neutral and these interests are in conflict, I regard the latter as the prevailing interest; (i) I do not understand Lord Bingham to have encouraged judges to attempt to make a considered evaluation of alleged facts, rather Lord Bingham's reference to "merits-based judgment ... taking account of all of the facts ..." is, in my judgment, to the overall merits of the application to strike out as an abuse of process in which the account to be taken of the facts does not generally extend beyond being satisfied that the facts alleged have a real prospect of success. Any attempt to go further is only permissible in an extreme case, where the claim is either cast iron or hopeless and, either way, suitable for summary determination, see Stuart v Goldberg Linde (a Firm) [2008] 1 WLR 823 Lloyd LJ at paragraph 57; (j) for reasons already given, Mr Ward, as the liquidator of MML, and not R is the proper person to challenge As' proofs and status as creditors of MML; and, (k) my evaluation of all the circumstances of this

application is that but for the fact that R is disqualified from challenging the Consent Order, this is a case where the court's process would not be abused by R pursuing a challenge to the Consent Order.

69 Accordingly, were the outcome of this application to turn on the Abuse of Process Issue which, in my judgment, it does not, my decision would be that R's application is not an abuse of the court's process.

The Procedural Issue

70 Mr Lawrence recognises that there is little to be said on R's behalf on this issue. He recognises that there is considerable force in Mr Morgan's submissions which would, but for the fraud point, probably lead to a decision that it is simply too late for R to challenge the Consent Order. Mr Lawrence adds one consideration to the fraud point which is that as it happens an adjournment need not cause undue disruption because, although the trial of all issues together will inevitably cause the s.212 application to be adjourned beyond June 2014, there is currently a sufficient hearing window available in December at or very shortly after the point at which As would be ready for an enlarged trial at which their status as creditors would also be in issue.

71 Mr Morgan starts with the unchallengeable propositions that the adjournment of a trial is an order of last resort, CPR 29PD.7 at paragraph 7.4(6), and that any such application must be considered in the light of the overriding objective which is to enable the court to deal with cases justly and at proportionate cost, CPR 1.1(1). Having regard to CPR 1.1(2), matters engaged here include : expeditious and fair disposition of the case; allotment of appropriate share of the court's resources in the context of the general caseload; enforcing compliance with rules, practice directions and orders; and, albeit of lesser significance in this case, saving expense. Having regard to these matters, the only point in R's favour is that a combined hearing of the s.212 application and the fraud issue - as a challenge to the Consent Order, a challenge to As' status as creditors, and a defence in the s.212 application - is that there would probably be some overall saving of expense and time at trial; however, the savings may well not be material.

72 R has issued her proceedings challenging the Consent Order on the ground of fraudulent misrepresentation. She wishes to, but has not yet, applied to withdraw the admissions in her Points of Defence in the s.212 application nor has she

applied to amend her Points of Defence to plead a positive case in fraudulent misrepresentation against As.

73 In relation to withdrawal of an admission, Mr Morgan refers to procedural rule requiring the court's permission before withdrawal, CPR 14.1(5), to the notes at paragraph 14.1.8 following, and to the practice direction 14PD.7 at paragraph 7.1. Mr Morgan's submissions include that (a) this is not a case where new evidence has come to light which was not available at the time; (b) in terms of conduct, R has only herself to blame if, as a result of the way she conducted MML's liquidation, she failed to appreciate that a VAT fraud had been perpetrated and failed to analyse its scope (which Mr Morgan submits does not involve As), moreover the admission the subject of the Consent Order was made after taking legal advice; (c) if the admission is withdrawn, there will be considerable prejudice to As : they will be put to considerable expense in gathering evidence, their potential recovery will be delayed, and R's means to fund such recovery will be depleted and may be exhausted; (d) there will be no prejudice to R by holding her to the admission because she is only being asked to account for her own misfeasance and the current liquidator, Mr Ward, is being spared the time and expense of making a s.212 application, equally, if Mr Ward is not satisfied that As are creditors he may challenge their proofs; (e) R's application (which is to adjourn the s.212 trial and not yet to withdraw her admission in those proceedings) was made at the last moment before trial, without prior warning, and has caused a delay in the order of six weeks to the trial; (f) if the admission is withdrawn the prospect of the challenge to the Consent Order succeeding is remote because the fraud claim is very weak; and, (g) balancing all of these factors against the public interest derived from the fraud unravels all principle, the administration of justice is best served by holding R to the Consent Order for the purposes of the s.212 application.

74 In relation to possible amendment of R's Points of Defence in the s.212 application, which is also a future application, Mr Morgan refers to Swain-Mason v Mills & Reeve LLP [2011] 1 WLR 2735. R would have to discharge a heavy onus in order to justify a late amendment; this would entail consideration not only of R's own position, it would entail consideration of As' position and of the cases of other litigants. Even at this late stage there is not even a draft application or a draft of an Amended Points of Defence in circulation.

75 Overlaying all of this, Mr Morgan refers to Mitchell v News Group Newspapers Ltd [2013] EWCA Civ 1526 and the subsequent application of the Court of Appeal's judgment, for example by Andrews J in Dany Lions Ltd v Bristol Cars Ltd [7].

76 In Mitchell, the Court of Appeal, at paragraph 36, emphasised that the courts will treat the need for litigation to be conducted efficiently and at proportionate cost and the need for orders, rules and practice directions to be enforced as being of paramount importance to which great weight is to be given. Turning to the circumstances of R's application to adjourn the trial of As' s.212 application, an unheralded very late application of this nature does not fit into the very narrow gap through which trivial non-compliance may be allowed to pass. The only available explanation for the lateness of the application is recent change of legal representation; of itself that is not a sufficient reason. Following Mitchell, the court will subject an application to adjourn a trial to rigorous scrutiny and only grant such an application where the reasons for so doing have been shown to outweigh the disadvantages of so doing, which disadvantages include the imperatives referred to above.

77 In Dany Lions Ltd three factors are identified as material considerations in the abstract of Andrews J's judgment : a very late application to amend, only two days before trial; no good explanation for the lateness of the application; and, the amendment sought was unarguable.

78 Ignoring for the moment my decision on the Competent Party Issue, I attach great weight to R's desire to raise a fraud challenge to the Consent Order, in this context I treat R's challenge as having a real prospect of success and I disregard Mr Morgan's submission that it is very weak; however, I attach even greater weight to the continuation of the s.212 application without further delay because (1) the present liquidator of MML, Mr Ward, endorses the call for R to explain her conduct as liquidator of MML, and (2) Mr Ward, as liquidator of MML, will be duty bound to satisfy himself that As are genuine creditors before making any distribution from MML's assets to its creditors, not least because any distribution to As will adversely affect the distribution to MML's undoubted creditor, HMRC.

79 Accordingly, my decision on the Procedural Issue is adverse to R.

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[7] Cited as an unreported Westlaw case note dated 5.3.14