Neutral Citation Number: [2020] EWHC 230 (Ch)

Case No: No 43 of 2019

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BRISTOL
INSOLVENCY AND COMPANIES LIST (ChD)

Bristol Civil Justice Centre
2 Redcliff Street, Bristol, BS1 6GR

Date: 12 February 2020

Before :

HHJ PAUL MATTHEWS
(sitting as a Judge of the High Court)

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Between :

(1) SARAH HELEN BELL **(2) PAUL WILLIAMS** **(as Joint Trustees in Bankruptcy of NICOLA JANE IDE)**	**Applicants**
- and -	
(1) NICOLA JANE IDE **(2) NICHOLAS DEREK IDE** **(3) ALEXANDER JOHN BURNETT** **(4) HH ALUMINIUM & BUILDING PRODUCTS LIMITED** **(5) PETER ROBERT HOUSE** **(6) GEORGE WEBB**	**Respondents**

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Steven Fennell (instructed by **Hewlett Swanson**) for the **Applicants**
Jessica Powers (instructed by **Isadore Goldman**) for the **Fourth and Fifth Respondents**
The other Respondents did not appear and were not represented

Hearing date: 4 February 2020

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Approved Judgment

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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HHJ Paul Matthews :

Introduction

1. This is my judgment on three applications made within an originating application in insolvency proceedings. The originating application, by the joint trustees in bankruptcy of the first respondent, Nicola Jane Ide, was issued on 30 January 2019 in the County Court at Southampton, where the administration of the bankruptcy was being carried on. The originating application sought orders under sections 339, 340 and/or 423 of the Insolvency Act 1986 against various of the respondents, in respect of payments which had been made by or to them. If a six-year limitation period under the Limitation Act 1980, section 9 (discussed further below), applies to this originating application, and if it commenced on the day on which the trustees in bankruptcy were first appointed, then it is common ground that the application was issued on the last day of that period.

2. The County Court at Southampton sought further information from the applicants before transferring the proceedings to the County Court at Bristol on 28 March 2019, pursuant to para 3.6 of the Insolvency Practice Direction of 4 July 2018. The County Court at Bristol referred the matter to a district judge and the application notice was endorsed with a hearing date of 9 July 2019 on or about 29 April 2019 and sent back to the applicant's solicitors in May. On 7 June 2019 the applicants made an ordinary application to the court, which amongst other things sought permission to serve the third respondent out of the jurisdiction and (because of that application) sought to vacate the hearing fixed for 9 July 2019.

3. On 27 June 2019 Deputy District Judge Hebblethwaite considered the matter on the papers, and made an order giving permission to serve out, and to vacate the hearing of 9 July 2019, as well as giving the applicants permission to amend their draft points of claim. Because the order had been made without reference to the respondents, it provided that any of the respondents might apply to set it aside or vary it within seven days of its being served on him or her: see CPR rules 23.9 and 23.10.

4. The County Court fixed a further hearing for 15 October 2019. Notice of this hearing was sent out to the respondents, and the originating application, as endorsed by the court, was served upon them in September 2019. Although a letter before claim had been sent previously to the fourth respondent (not the fifth), this was the first indication that they had had of the issue of the originating application. At the hearing on 15 October 2019 the district judge gave directions. These were however mainly directions in relation to another ordinary application, issued by the fourth and fifth respondents on 14 October 2019.

5. This latter was an application essentially for an order to set aside the order made on the papers by DDJ Hebblethwaite, and to strike out the originating application as not having been served in compliance with rule 12.9 of the Insolvency (England and Wales) Rules 2016 (hereafter the "Insolvency Rules"). In addition the application notice sought alternative relief, namely striking out or summary judgment in favour of the fourth respondent so far as relates to the claim in respect of an unlawful preference under section 340, and in favour of the fifth respondent completely.

6. On 13 November 2019 the applicants issued two further ordinary applications. One was an application for an order declaring that the order of DDJ Hebblethwaite dated 27 June 2019 extended the time for service on the respondents of the originating application or alternatively an order retrospectively extending the time for service on the respondents of that application. The other was an application for an order that the fourth and fifth respondents' application of 14 October 2019 be heard by a judge authorised under section 9 of the Senior Courts Act 1981. It was common ground at the hearing before me that this application was to be understood as an application to transfer the fourth and fifth respondents' application to the High Court from the County Court.

7. At the hearing on 4 February 2020, sitting as a judge of the County Court, I first heard and determined the applicants' ordinary application to transfer the fourth and fifth respondents' application to the High Court. For the reasons given orally at the time, I allowed that application. Sitting then as a judge of the High Court, I then proceeded to hear the fourth and fifth respondents' application, which, as I have explained, is really two separate applications in the alternative. The application is primarily to strike out the originating application, but if that fails then for summary judgment in respect of substantial parts of it. There was no need for additional argument in relation to the applicants' second ordinary application (to extend time for service of the originating application) because that was really the obverse of the arguments already being made. The oral arguments were complete that afternoon. However, I wished to review the papers and look at the authorities before giving my decision, which accordingly I reserved.

Underlying facts

8. It is not necessary to deal in any great detail with the underlying facts of the insolvency. Briefly, the first respondent and the second respondent are married. The second respondent was a director of a company called Express Glass and Glazing (New Build) Ltd from 2001 until he resigned on 27 April 2009, the date on which a bankruptcy order was made against him on his own petition. The first respondent was a director of the company from 1 January 2009 until the company was dissolved on 12 July 2013. She had personally guaranteed the company's liabilities to its invoice discounter, a subsidiary of Lloyds TSB Bank. The bank appointed administrators over the company and on 13 April 2012 obtained a freezing order against the first respondent. A bankruptcy order was made against her on her own petition on 6 December 2012.

9. The applicants' claim against the other respondents is that they received money directly or indirectly from the first respondent's bank account on 11 April 2012, and that those payments amounted to transactions at an undervalue, preferences or transactions defrauding creditors. As against the fourth respondent, the applicants say that the first respondent paid the sum of £485,000 out of her bank account to the fourth respondent on 11 April 2012. The fourth respondent has admitted receipt of this sum, although giving certain explanations which have led to possible alternative cases being made by the applicants. One of these concerns a payment alleged to have been made by the fourth respondent to the fifth respondent in the sum of £72,068.89. I will come back to this.

The application to strike out the claim

10. The primary case put forward by the fourth and fifth respondents (to whom, for convenience, I will refer to hereafter simply as "the respondents") in their application is that there was a failure by the applicants to serve the issued originating application on them in compliance with rule 12.9 of the 2016 Rules. That rule reads as follows:

> "(1) The applicant must serve a sealed copy of the application, endorsed with the venue for the hearing, on the respondents named in the application unless the court directs or these Rules provide otherwise.
>
> (2) The court may also give one or more of the following directions –
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> > (a) that the application be served upon persons other than those specified by the relevant provision of the Act or these Rules;
> >
> > (b) that service upon, or the delivery of a notice to any person may be dispensed with;
> >
> > (c) that such persons be notified of the application and venue in such other a way as the court specifies; or
> >
> > (d) such other directions as the court thinks fit.
>
> (3) A sealed copy of the application must be served, or notice of the application and venue must be delivered, at least 14 days before the date fixed for its hearing unless –
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> > (a) the provision of the Act or these Rules under which the application is made makes different provision;
> >
> > (b) the case is urgent and the court acts under rule 12.10; or
> >
> > (c) the court extends or abridges the time limit."

11. On the facts of the present case, it is common ground that (i) the applicants did *not* serve a sealed copy of the application or a notice of the application and venue upon the respondents at least 14 days before the date *originally* fixed for the first hearing of this matter, namely 9 July 2019, but that (ii) they *did* so serve a sealed copy of the application at least 14 days before the date *subsequently* fixed for the first hearing of this matter, after the order made by DDJ Hebblethwaite giving permission to serve out, vacating the hearing of 9 July and directing that it be relisted in October.

The construction of "the date fixed for its hearing"

12. Accordingly, the respondents argue that the reference in rule 12.9(3) to "the date fixed for its hearing" is a reference back to the requirement under rule 12.8 that the court fix a venue for the application to be heard. That rule provides that:

> "When an application is filed the court must fix a venue for it to be heard unless –
>
> > (a) it considers it is not appropriate to do so;
> >
> > (b) the rule under which the application is brought provides otherwise; or

(c) the case is one to which rule 12.12 applies."

13. On the other hand, the applicants submit that that the reference in rule 12.9(3) to "the date fixed for its hearing" is a reference to the date actually fixed for the first effective hearing. They say that the words "date fixed" are ambiguous, and could refer either to the date endorsed on the application notice by the court originally or to the date which is fixed for the actual effective hearing. They say that authority shows that the provision in 12.9(3) is *procedural* rather than substantive.

14. In *Re Kelcrown Homes Ltd* [2017] EWHC 537 (Ch), [4], Warren J, giving permission to appeal from the decision of Registrar Derrett, said:

> "IR 7.4(5) [the predecessor of rule 12.9(3) in the 2016 Rules] is a purely procedural requirement. Late service does not make the application a nullity."

This important distinction between insolvency and ordinary private law litigation was acknowledged in the same case (at [25]) by HHJ Walden-Smith in dealing with the substantive appeal. And it is accepted by the respondents in their skeleton argument (at [34]), so that, whereas a failure to serve a claim form within the time for service renders it a nullity, a failure to serve an application within the time stipulated by rule 12.9(3) does not.

15. The only authority which appears to deal with the point squarely is the decision of Deputy ICC Judge Prentis (as he then was) in *Re HS Works Ltd* [2018] EWHC 1405 (Ch). There he said this (referring to the predecessor rule 7.4(5)):

> "56. As to those service provisions, Mr Lewis submitted that when r.7.4(5) requires service 'at least 14 days before the date fixed for its hearing', the relevant fixture is the date on which the application is actually heard, being here 30 August 2016. I reject that.
>
> 56.1 First, linguistically the words 'the date fixed for its hearing' refer back to the obligation on the Court on issue to 'fix a venue for the application to be heard': r.7.4(2). The date and venue will be written onto the application itself, and by 7.4(3) the obligation is on the applicant to 'serve a sealed copy of the application, endorsed with the venue for the hearing…'. Rule 7.4(6)(b) permits the Court to authorise a short period of service where the case 'is one of urgency'. All those provisions are with reference to the hearing endorsed on the application. So too in my view is r.7.8(l), prescribing time for service of evidence, even though the words used there are 'at the first hearing'.
>
> 56.2 Secondly, the general practice or procedure of the High Court, which is imported by r.7.51(l) IR86 separately from the CPR, is to lay an obligation on a claimant or applicant to serve promptly process which they have chosen to issue. Thus in *Battersby v Anglo-American Oil Co Ltd* [1945] KB 23, approved by the House of Lords in *Kleinwort Benson Ltd v Barbrak Ltd* [1987] AC 597, Lord Goddard stated that 'It is the duty of a plaintiff who issues a writ to serve it promptly…'. I note as well that in respect of an application notice the CPR requires service 'as soon as practicable after it has been issued': 23APD4.1. That approach accords with the overriding objective (although, of course, there may be exceptional cases on their facts in which a different

> approach is acceptable, as in *Barbrak*) and removes control of court process from the hands of the person who has issued it. As the Court of Appeal said in *Hoddinott v Persimmon Homes (Wessex) Ltd* [2007] EWCA Civ 1203, [2008] 1 WLR 806 at [54]: '…service of the claim form serves three purposes. The first is to notify the defendant that the claimant has embarked on the formal process of litigation, and to inform him of the nature of the claim. The second is to enable the defendant to participate in the process and have some say in the way in which the claim is prosecuted… The third is to enable the court to control the litigation process'. The same is true of service of an insolvency application.
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> 56.3 Thirdly, having an early provision for service fulfils to some extent the public policy in maintaining regard for limitation periods, by avoiding the situation where an application may be issued within time but then unilaterally stayed by the applicant, thereby effectively extending the period of limitation."

16. I regret to say that I do not accept these reasons. First, I do not agree that "linguistically the words 'the date fixed for its hearing' refer back to the obligation on the Court on issue to 'fix a venue for the application to be heard'." The earlier rule does not in fact refer to fixing *a time* at all. But, more importantly, the words could equally refer to the date fixed for the first *actual* hearing, whenever that was. After all, that is what the respondent really needs to know about. And the judge's final reference to rule 7.8(1) goes the other way, because, as he says, "the words used there are 'at the first hearing'."

17. Nor do I agree that the undoubted obligation of a claimant issuing a claim under the CPR to serve process promptly adds anything in this insolvency context. Unlike the position under the CPR, the issuing applicant has to wait to get back the sealed application from the court, *endorsed with a hearing date*, before serving it. The rule then requires it to be served at least 14 days before the hearing, obviously to give sufficient time to the respondent to prepare for it. The combination of the provisions of the rules and the control by the court mean that there is no need for an implied obligation to serve process promptly.

18. Finally, in the insolvency context there is no need for specific provisions on early service for the purpose of "maintaining regard for limitation periods". Limitation, to the extent that it applies, is dealt with by issuing in time. What happens afterwards in relation to service is, as I have said, the product of the court's control and the procedural requirement to give sufficient notice to the respondents of the forthcoming hearing. There is no need to give the serving party a period of time within which to effect service.

19. Accordingly, I am satisfied that, on the true construction of rule 12.9(3), the 14 day period referred to is to be calculated by reference to the hearing that actually goes ahead, rather than to the date endorsed on the application notice (if that is different). In other words, I am clear in my mind that the view taken by the judge in *HS Works* is wrong, and that therefore I am not obliged by comity or convention to follow it. Since, as is common ground, the application notice in the present case was served more than 14 days before the hearing on 15 October 2019, there has been no failure to comply with the rules.

The effect of a failure to serve in time

20. However, in case this matter goes further, and it is *I* that am wrong, and the view of Deputy ICC Judge Prentis is correct, I will consider what flows from that. The respondents say that the effect of adjourning and relisting the first effective hearing of the application was to extend time for service, because it delayed the time at which the application needed to be served. It was therefore incumbent on the deputy district judge deciding to adjourn and relist to take into account (amongst other things) the effects of that on the respondents. This, the respondents say, included depriving them of a limitation defence: see *eg Re Baillies Ltd* [2012] BCC 554, [20]. If the deputy district judge had refused an adjournment, any fresh originating application would have been time-barred. The respondents rely on the decision of HHJ Walden-Smith in *Re Kelcrown Homes Ltd* [2017] EWHC 537 (Ch), on appeal from Registrar Derrett.

Limitation and insolvency claims

21. Before dealing with that submission and the decision in *Re Kelcrown Homes Ltd* in detail, I should say something about limitation in relation to insolvency proceedings. Limitation of actions is entirely a creature of statute in English law. Initially, it was confined to claims to recover land. From 1623 it extended to other claims, *eg* including what we would now call tort and contract. But it did not extend to claims on specialties (deeds) or debts under statute until 1833. The modern law of limitation dates from 1939, and is now largely contained in the Limitation Act 1980, as amended. This legislation does not refer in terms to insolvency proceedings.

22. Although debts themselves were subject to limitation from 1623 (and once time-barred could not found insolvency proceedings), there appears to have been no suggestion in the caselaw that insolvency proceedings were subject to limitation periods until at least *Re Farmizer Products Ltd* [1997] 1 BCLC 589, CA. Indeed, as late as *Law Society v Southall* [2002] BPIR 336, the Court of Appeal proceeded on the assumption, without argument, that *no* limitation period was applicable to a claim under s 423 of the Insolvency Act 1986.

23. Then, in *Re Priory Garage (Walthamstow) Ltd* [2001] BPIR 144, proceedings under ss 238-241 of the 1986 Act to set aside transactions as preferences or alternatively transactions at an undervalue were held to be actions on a specialty within s 8 of the Limitation Act 1980, or (in some cases) to recover a sum under statute within s 9 of that Act. And subsequently, in *Hill v Spread Trustee Co Ltd* [2007] 1 WLR 2404, CA, after full argument, claims to set aside transactions under s 423 of the 1986 Act *were* held to be within either s 8 or s 9 of the Limitation Act, depending on the facts (see also *Burndon Holdings (UK) Ltd v Fielding* [2020] BPIR 1, [509]-[512]).

24. In private law litigation, it is well settled that a claim will be brought within the limitation period if the claim form is issued on or before the last day of that period. The CPR then provide that the claim form so issued remains valid if served on the defendant within four months after issue (if served within the jurisdiction) or six months after issue (if served out of the jurisdiction): see CPR rule 7.5. Over and above that, the court may extend time in certain circumstances: see CPR rule 7.6.

25. If the claim form is not served on the defendant within the relevant time period, whether original or as extended, *it ceases to be valid*. If the relevant limitation period has by then expired, any fresh claim issued thereafter is liable to be defeated by a limitation defence. It is also to be noted that service of the claim form under the CPR

is merely the beginning of a period of pleading and counter-pleading so that the issues become clear, and that the first hearing before the court may yet be some months off.

26. The scheme of insolvency proceedings is quite different. An originating application filed at court on or before the last day of any applicable limitation period will be in time. But there is nothing in the Insolvency Rules equivalent to rule 7.5 of the CPR, because there does not need to be. As I have already said, rule 12.9 requires only that the application be served on the respondent at least 14 days before the hearing which is fixed by the court, which is either the hearing endorsed at the bottom of the application before being returned to the applicant for service on the respondent, or the first effective hearing of the application. At the hearing the court will give directions for the future conduct of the proceedings.

27. As I have already pointed out, the requirement for service is purely procedural, and if it is not complied with it does not make the application a nullity. Instead, as Warren J said in giving permission in *Re Kelcrown Homes Ltd*,

> "it may be more proportionate to deal with late service by an adjournment rather than by dismissal of the application."

28. In this connection, I mention rule 12.64 of the Insolvency Rules, which was briefly referred to at the hearing. It provides:

> "No insolvency proceedings will be invalidated by any formal defect or any irregularity unless the court before which objection is made considers that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by any order of the court."

Accordingly, failure to comply with the service provision does *not* mean that the application fails, and, in principle at least, even if the limitation period has by then expired, it is hard to see how the respondent is deprived of a limitation defence, because the applicant does not have to resort to issuing a fresh application, and so the question of limitation simply never arises.

Re Kelcrown Homes Ltd

29. Nevertheless, the respondents rely on the decision of HHJ Walden-Smith in *Re Kelcrown Homes Ltd* [2017] EWHC 537 (Ch). In that case the liquidators of the company made an originating application for relief under the 1986 Act in respect of payments alleged to have amounted to transactions at an undervalue or preferences. The application was lodged on 29 June 2015, just within the six year limitation period, which expired on 3 July 2015. The application was listed by the court for hearing on 19 October 2015. On 2 October 2015 the liquidators applied without notice to adjourn the hearing fixed for 19 October 2015 and for an order for alternative service against one respondent.

30. On 8 October 2015 an order was made on this application, adjourning the hearing of 19 October 2015 and relisting it for 3 December 2015. The order expressly purported to extend time for service of the originating application, and it was served on the respondents on 19 November 2015 (in fact, this was only 13 clear days before 3 December 2015). The respondents applied to set aside the order of 8 October 2015, on

the basis that it should not have been made, thereby extending the time for service of the application and causing the respondents to lose the benefit of a limitation defence.

31. At first instance, Registrar Derrett dismissed the application. She held that the originating application was not to be treated as if it were a claim under CPR Part 7, and did not have a "shelf life" of four months which needed to be extended. Instead, it simply had to be served 14 days before the hearing date fixed by the court. Therefore the criteria applicable to extensions under CPR rule 7.6 did not apply. She held that the originating application had been issued within the limitation period, and that all the liquidators had to do was to serve it 14 days before the hearing that was listed, so that no limitation point arose and the respondents had not been deprived of a limitation defence.

32. On appeal, HHJ Walden-Smith held that the registrar's decision was wrong. She said:

> "31. In my judgment, the impact of that extension of time for the service of the application did have the effect of withdrawing from the Appellants a potential limitation argument. Such an argument is not as straightforward or clear cut as the argument that a potential defendant can raise if there is a failure to serve a claim form within 4 months of issue. A failure to comply with the service provisions in CPR 7.5 means that the claim form is a nullity. As a consequence, if an extension of time is not given under CPR 7.6, the claim is at an end. Plainly, if it is possible to do so (without an abuse or issue estoppel argument being raised) and the claim is still within the Limitation Act, the claimant can start again. That is not the case if limitation has already expired.
>
> 32. As is accepted by all parties, CPR 7.5 does not apply to the service of an application under the IR 1986. However, by adjourning the date for the hearing, and therefore extending the time for the service of the application, the Appellants have potentially lost a limitation defence. At the very least, they are being required to deal with matters more than 6 years after the date of the event now being complained about. While the application was issued before 3 July 2015, and therefore a few days before limitation expired, and the failure to serve does not make it a nullity (unlike the effect of the CPR) an extension of the time to serve does have a potentially adverse impact on the respondent to the application (the Appellants). A further delay is being introduced which has the potential of severely impacting upon the ability of the respondents to the application defending the claim being brought against them and over which the respondent to the application (the Appellants) has no control.
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> 33. It does seem to me, from a reading of paragraph 17 of the judgment of Registrar Derrett, that she may have been under the impression that the Appellants were seeking to suggest that CPR 7.6 applied 'The CPR regime under Part 7 (on the basis of which the Applications are made) is different and in my judgment has no application here.' That impression may have been gained from the fact that the Deputy Registrar's order to extend time to serve the application notice had purportedly been made *'pursuant to* CPR 7.6(4)'. That was wrong.
>
> 34. The Appellants had contended that even though the date for service of the substantive application is set by a formula (14 days before the hearing) rather

> than within a fixed period after issue (as is the case with the CPR) any order extending time for service has the same impact and the same principles should apply.
>
> 35. The Registrar properly set out that in deciding whether to allow an adjournment for the first hearing of the application *'the court must act judicially'*. In acting judicially, the court ought, in these circumstances, to apply the principles enunciated in *Cecil v Bayat* and the line of cases dealing with an application to extend time for the service of a claim form. The distinction drawn between the cases under the CPR, where there is a fixed period to serve after issue, and the situation under the IR 1986, where there has to be service 14 days before the date of the hearing, does not, in my judgment, make a fundamental difference to the principles that need to be applied in exercising the discretion of whether to adjourn."

33. In seeking to make good her point in the last sentence of paragraph 35, the judge referred to the decision of the Court of Appeal in *Haskew v Pannone LLP* [2013] EWCA Civ 350. In that case the court held that the principles applicable under CPR rule 7.6 to extensions of time for service of a claim form applied also to extensions of time for service of a CPR Part 20 claim, although there the court usually sets a time for service by formula rather than by reference to a fixed period.

34. HHJ Walden-Smith said of this case,

> "the Court of Appeal concluded that while different CPR provisions apply depending upon whether dealing with a part 7 claim or a part 20 claim, in both cases one of the important considerations is whether an extension of time deprives the defendant of a limitation defence and that the correct approach for the court to take is dependent upon whether either the limitation period has clearly not expired or there is doubt as to whether it has."

35. But in this respect it is to be borne in mind that the effect of service of a Part 20 claim on a person who is not already a party to the proceedings is to make that person a party to *those* proceedings. In other words, the end result is that there is only *one* set of proceedings, which were originally commenced by claim form served within the period of validity provided for by CPR rule 7.5. It is not *separate* proceedings being commenced in a different way, but a reflection of the fact that others are joining the proceedings later. It is also to be noted that the Court of Appeal in *Haskew* preferred to apply authorities under CPR Part 7 in preference to authorities cited to them which had been decided under section 33 of the Limitation Act 1980. So the court was making a deliberate choice for Part 7 claims.

36. The present case, however, does not involve a claim form proceeding under the CPR at all. It involves a different kind of claim in relation to which there is no period of validity during which the originating process has to be served by the claimant on the defendant. Instead, the court controls the service process, in two ways. First of all, it sets a hearing date and endorses it before the originating application is returned to the applicant for service. Secondly, the rules provide that, subject to any other order and to certain other exceptions, the application must be served on the respondent at least 14 days before the hearing. A failure so to serve is not fatal, and, as Warren J

observed, the usual consequence (if there were any at all) would be an adjournment of the hearing to enable the respondent to prepare properly.

37. HHJ Walden-Smith said (at [37]) that it would have been open to the liquidators to bring a claim under the CPR against the respondents, and that it was difficult to find a justification for having a different exercise of discretion depending upon the course taken by the liquidators. But my respectful answer to this is that, in a claim made under the CPR, the claimant is given a discretion as to when within the validity period the claim is served, whereas in a claim made under the Insolvency Rules the applicant has no discretion, because the rules require service on the respondent at least 14 days before the date fixed by the court for the hearing. So it is obvious that, in considering the possible extension of the period for service of the claim form under the CPR, the court must take into account the additional effect of the claimant's exercise of discretion on the limitation position, whereas in the case of the insolvency claim there is no discretion given to the applicant, as the court controls the whole process.

38. In my judgment, the fact that a CPR claim form not served within the relevant service period becomes a nullity, requiring the issue of a fresh claim, *creates* the problem of the potential loss of a limitation defence for the defendant, requiring that such considerations be taken into account by the court in exercising its discretion to extend the service period: see *eg Cecil v Bayat* [2011] EWCA Civ 135. But, because an insolvency application does not become a nullity if not served in accordance with rule 12.9, the problem of the potential loss of the limitation defence for the respondent does not arise. There is therefore no need for the *Cecil v Bayat* considerations that apply in the case of the extension of a claim form under the CPR to apply in the case of the adjournment of the hearing of an insolvency application.

39. For these reasons I am respectfully unable to agree with the reasoning or the decision of the judge in *Re Kelcrown Homes Ltd*. Although the convention is that courts of coordinate jurisdiction at first instance, such as the High Court is, will follow its earlier judgments unless convinced that they are wrong (see *Huddersfield Police Authority v Watson* [1947] 1 KB 842, 848), in the present case I regret to say that I *am* so convinced. Therefore, I am not bound to follow the decision in *Re Kelcrown Homes Ltd*, and I will not do so in this case.

This case

40. In my judgment, the deputy district judge in the present case had to deal judicially with the application to adjourn the first hearing of the originating application, which meant deciding whether there was a good procedural or substantive reason for not holding to the original date and adjourning it to a later one. The deputy district judge appears to have found this in the application to serve the third respondent out of the jurisdiction and the application for permission to amend the draft points of claim.

41. The respondents criticise the applicants for failing to serve the originating application 14 days before the original hearing date on the grounds (as stated in the applicants' evidence) that (i) it was necessary to ensure that insurance and funding were in place before service and (ii) the applicants wished the originating application to be subject to the same case management timetable for all the respondents. There is some force in the criticism of the first ground, but to my mind there is good sense in the second ground, and I think the criticism of it is misplaced. The respondents also criticise the

applicants for failing to serve the originating application on them at the same time as making their application for an adjournment. Certainly this has not been sufficiently explained.

42. But the deputy district judge had the filed evidence at the time of considering the papers. This, among other things, showed that the applicants knew by January 2018 that the third respondent was resident out of the jurisdiction. Nonetheless, the deputy district judge was satisfied that it was appropriate to adjourn the first hearing to a later date. I do not think that that can be stigmatised as outside the reasonable range of possible decisions that could be made in the circumstances. Accordingly I would not set aside the decision of the deputy district judge. It appears to be common ground that the effect of that decision was to extend time for service of the originating application, and there is therefore no need to make an express order to that effect.

Striking out or summary judgment

Fourth respondent

43. I therefore turn to the question of the applications made by the respondents for striking out or summary judgment on other bases. I understood it to be accepted on behalf of the applicants that the claim against the fourth respondent, insofar as it depends on the payment in question being treated as a preference, must fail on the applicants' pleaded case. The pleaded case is that the first respondent "was under no obligation to pay the sum of £94,976.45, or any sum at all, to" the fourth respondent. This is a positive averment that the fourth respondent was *not* a creditor of the first respondent. Yet, unless the fourth respondent *was* a creditor of the first respondent, the payment in question cannot be a 'preference' as a matter of law. Accordingly, those parts of the amended draft points of claim making a preference claim against the fourth respondent should be struck out on the basis that they disclose no reasonable grounds for bringing the claim.

Fifth respondent

44. The fifth respondent seeks summary judgment on the claim against him on the basis that the applicants have no real prospect of succeeding on that issue and there is no other compelling reason why the issue should be disposed of at trial. As I said earlier, the claim against the fifth respondent concerns a payment alleged to have been made by the fourth respondent out of funds received from the first respondent to the fifth respondent in the sum of £72,068.89. The applicants rely on an extract from an affidavit sworn by the first respondent on 26 April 2012, with the assistance of solicitors, and in response to a freezing injunction. This contains a table of monies said to have been paid out of the original sum paid by the first respondent and admitted to be received by the fourth respondent. One of the entries reads:

> "11-4-12 Payment to Peter House £72,068.89."

The applicants say that these matters lie outside their knowledge, but they rely on this entry in any event.

45. The fifth respondent's case is that he never received any monies from the first respondent, either directly or through the fourth respondent, and that the sum of

£72,064.89 was retained by the fourth respondent. The fifth respondent exhibits and relies on (i) a payment schedule prepared by the fifth respondent, (ii) copies of the fourth respondent's bank statements for its trading account for the relevant period, (iii) a transaction summary for the fourth respondent's trading account for the relevant period, (iv) a copy of the fourth respondent's bank statement for its reserve account for the relevant period, (v) a transaction summary for the fourth respondent's reserve account for the relevant period, (vi) payment instructions for onward payments made by the fourth respondent from the monies received from the first respondent, (vii) invoices raised and delivered by the fourth respondent to Express Glass and Glazing (New Build) Ltd, (viii) the fourth respondent's Sage ledger for its transactions with that company, (ix) a screenshot of the fourth respondent's Sage system showing the application of the sum of £72,064.89 to the invoices raised and delivered by the fourth respondent to Express Glass and Glazing (New Build) Ltd and (x) a letter from the fourth respondent's accountants. All of these purport to show that there was no payment on or about 11 April 2012 by the fourth respondent to the fifth respondent and no receipt by the fifth respondent of this sum.

46. The fifth respondent says that (reverse) summary judgment may be granted if the factual basis for the claim is fanciful because it is entirely without substance. He relies on a passage in the speech of Lord Hope in *Three Rivers District Council v Governor and Company of the Bank of England (No 3)* [2003] 2 AC 1:

> "95. … The method by which issues of fact are tried in our courts is well settled. After the normal processes of discovery and interrogatories have been completed, the parties are allowed to lead their evidence so that the trial judge can determine where the truth lies in the light of that evidence. To that rule there are some well-recognised exceptions. For example, it may be clear as a matter of law at the outset that even if a party were to succeed in proving all the facts that he offers to prove he will not be entitled to the remedy that he seeks. In that event a trial of the facts would be a waste of time and money, and it is proper that the action should be taken out of court as soon as possible. *In other cases it may be possible to say with confidence before trial that the factual basis for the claim is fanciful because it is entirely without substance. It may be clear beyond question that the statement of facts is contradicted by all the documents or other material on which it is based.* The simpler the case the easier it is likely to be take that view and resort to what is properly called summary judgment. But more complex cases are unlikely to be capable of being resolved in that way without conducting a mini-trial on the documents without discovery and without oral evidence. As Lord Woolf said in *Swain v Hillman,* at p 95, that is not the object of the rule. It is designed to deal with cases that are not fit for trial at all."
>
> (Emphasis supplied, in order to show the words which are particularly relied on by the fifth respondent.)

47. On the other side, the applicants rely on the well-known statement by Potter LJ in *E D & F Man Liquid Products Ltd v Patel* [2003] EWCA Civ 472 that:

> "10. … where there are significant differences between the parties so far as factual issues are concerned, the court is in no position to conduct a mini-trial: see per Lord Woolf MR in *Swain v Hillman* [2001] 1 All ER 91 at 95 in relation to CPR 24. However, that does not mean that the court has to accept without

> analysis everything said by a party in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporary documents. If so, issues which are dependent upon those factual assertions may be susceptible of disposal at an early stage so as to save the cost and delay of trying an issue the outcome of which is inevitable …"

48. There is no difference in substance between the tests put forward in these two extracts. Indeed, they both refer to the dictum of Lord Woolf in *Swain v Hillman*, and, in the second one, Potter LJ goes on immediately to refer to the earlier statement by Lord Hope in the *Three Rivers* case. The difficulty, if there is one, lies only in applying the test to the facts of the case. I accept that the documents produced by the fifth respondent go all one way. Yet the applicants, as officers of the court, have put forward a case based on affidavit evidence (prepared with legal assistance) from another person concerned in the same transactions. They themselves have no personal knowledge. As the applicants say, there is a clear conflict of evidence which cannot be dealt with summarily. In my judgment, whilst at this stage this does not look to be a particularly strong case, nevertheless it is not a case which can be dismissed straightaway. There will need to be disclosure before trial, and cross-examination at trial, in order to resolve the matter. Accordingly, I decline to give summary judgment to the fifth respondent.

Disposition

49. For the reasons given above, I dismiss the respondents' applications, except for that to strike out the preference claim against the fourth respondent, which succeeds. I would not wish to leave this case without recording that I am extremely grateful to both counsel, for the clarity, acuity and economy of their respective submissions, which greatly assisted me.