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BR-2014-003039

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

INSOLVENCY AND COMPANIES LIST (ChD)

IN THE MATTER OF RICHARD RAYMOND RUFUS

AND IN THE MATTER OF THE INSOLVENCY ACT 1986

Remote Hearing
Date: 30/07/2021

Before :
INSOLVENCY AND COMPANIES COURT JUDGE JONES

- -

Between :
MARK ROBIN SANDS

(as Joint Trustee in Bankruptcy of Richard Raymond Rufus)

Applicant

and

(1) BRUCE ANTONIO DYER

(2) JANINE DYER

(3) MARVIN MARCELL RUFUS

(9) LAKHBIR DOSANJH

(10) KAMALIJT DOSANJH

Respondents

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Ms Faith Julian (instructed by **Wedlake Bell LLP**) for the **Applicants**
Mr Jamie Holmes (instructed by Gateley Legal) for the **Third Respondent**

Hearing dates: 24 May 2021 with further written submissions

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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.

.....CHJ 30/7/21.....

INSOLVENCY AND COMPANIESCOURT JUDGE JONES

I.C.C. Judge Jones:

A) The Applications

1. On 21 October 2019 an insolvency application ("the Substantive Application") was filed on behalf of the joint trustees in bankruptcy ("the Trustees") of Mr Richard Rufus. It seeks relief pursuant to ***sections 339 and/or 423 of the Insolvency Act 1986*** ("IA") (transactions at an undervalue and debt avoidance provisions). The Substantive Application was listed for its first hearing on 11 March 2020. ***Rule 12.9 of the Insolvency Rules 2016*** ("***Rule 12.9***" and "***IR 2016***" respectively) concerning its service provides as follows (my underlining):

> *"**12.9.**—(1) The applicant must serve a sealed copy of the application, endorsed with the venue for the hearing, on the respondent named in the application unless the court directs or these Rules provide otherwise.*
>
> *...*
>
> *(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—*
>
> *(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."*

2. In this case the Substantive Application was not served before the 11 March 2020 hearing. This breach of ***Rule 12.9*** was raised by counsel on behalf of the Trustees at that hearing within the context of their application to adjourn, issued on 9 March 2020 ("the 9 March Application"). That application includes an alternative request for an extension of time or other order as may be appropriate (although in parenthesis). My recollection, albeit without the assistance of a transcript, is that there was full and fair disclosure of the facts and of the applicable law concerning the breach. An arguable case having been identified during those submissions for the proceedings to continue, I adjourned the application to a date to be fixed for a between-parties hearing. It was listed for 18 May 2020 and heard by I.C.C. Judge Mullen. There is no transcript of that hearing.

3. On 24 May 2021 I heard the Third Respondent's application for an order striking out the claim against him ("**the Strike Out Application**") made on the following bases:

    3.1 The Trustees failed to serve the Substantive Application in accordance with the IR 2016 and the limitation period has since expired.

    3.2 There are no exceptional circumstances to justify an extension of time for service.

    3.3 There is no power to grant a retrospective extension of time in which to serve in any event.

    3.4 The Trustees breached the duty of full and frank disclosure at the hearing on 11 March 2020 of the 9 March Application – although this is no longer pursued.

3.5 The order of 11 March 2020 failed to include a statement of the Respondents' right to make an application to set aside or vary the order, in contravention of ***r.23.9(3) of the Civil Procedure Rules 1998*** ("***the CPR***").

4. The Strike Out Application was not issued until 23 November 2020, the day before the Substantive Application's CCMC. By that time a number of matters had occurred:

4.1 At the 18 May 2020 hearing, at which the Third Respondent was represented: Directions were given for pleadings: amended Points of Claim were due by 1 June 2020, Points of Defence by 25 September 2020, and any Points of Reply by 30 October 2020. A CCMC was listed for 24 November 2020, and costs budgets were ordered to be filed 21 days in advance. No point appears to have been taken concerning service.

4.2 The Third Respondent subsequently requested an extension of time in which to file Points of Defence. That was agreed.

4.3 The Third Respondent's Points of Defence were served shortly after the agreed deadline, and were deemed filed and served on Monday 12 October 2020. They do not include a limitation period defence.

4.4 The Trustees filed Points of Reply on 16 November 2020, a mutual extension of 14 days having been agreed between the parties. The Points of Reply were on time if the 14 days ran from Monday 12 October 2020, but late if time ran from Friday 9 October 2020. No specific point turns on that.

4.5 On 2 November 2020, the Applicant and the Third Respondent filed costs budgets.

4.6 The further case and costs management was listed for 24 November 2020.

5. At the CCMC hearing on 24 November 2020, directions were given for a contested hearing of the Strike Out Application, issued the day before, and the Substantive Application was otherwise stayed. On 11 January 2021 (and in accordance with the terms of the November Order), the Trustees cross-applied ("the Cross Application") for an order waiving any defect as regards service and/or extending time for service, insofar as either order is necessary.

6. On 24 May 2021, the time allocated proving deficient, the hearing was adjourned to today and I asked counsel for further written submissions. These were received by the end of June in accordance with the time limits directed.

B) Summary of the Submissions

7. It is not in dispute that the 6 year limitation period for both statutory causes of action pursuant to ***section 9 of the Limitation Act 1980*** expired on or before 25 February 2020 and, therefore, before the first hearing on 11 March 2020. Mr Holmes submits

on behalf of the Third Respondent that the Substantive Application should be struck out because: (i) the Applicant having failed to serve the Application in time under ***Rule 12.9*** must obtain an extension of time if the proceedings are to continue and to do so must show "*exceptional circumstances*" under ***Rule 12.9.(3)***, which cannot be done; alternatively (ii) there has been a formal defect or irregularity which has caused irremediable, substantial injustice and the court should invalidate the proceedings applying ***r.12.64 IR 2016***; alternatively (iii) the court's power to strike out a statement of case under ***CPR 3.4(2)(b)*** for failure to comply with a rule should be exercised.

8. Both counsel have referred me in support of their submissions to the Court of Appeal's decision in ***Bell and another v Ide and another*** [2020] EWCA Civ 1469, [2021] 1 W.L.R. 1076. Ms Julian submits on behalf of the Trustees that it was far too late by 23 November 2020 for the Third Respondent to be able to issue the Strike Out Application. From 18 May 2020 significant steps were taken in the proceedings and by 23 November 2020 he had through his conduct submitted to the jurisdiction of the court, a term which is not limited to territorial jurisdiction (see ***Hoddinott v Persimmon Homes (Wessex) Ltd*** [2007] EWCA Civ 1203, [2008] 1 WLR 806). She submits that the fact that an application notice is not served in accordance with ***Rule 12.9*** does not render it a nullity (applying ***Aktas v Adepta*** [2010] EWCA Civ 1170, [2011] QB 894 at [18], ***Jerrard v Blyth*** [2014] EWHC 647 (QB) at [9] with support from ***r.12.64 IR 2016***). Therefore, the common law principles of submission to the jurisdiction apply, as expressed by Robert Goff LJ in ***Astro Exito Navegacion SA v Hsu*** [1984] 1 Lloyds Rep 266 at p. 270:

> *'Now a person voluntarily submits to the jurisdiction of the court if he voluntarily recognises, or has voluntarily recognised, that the court has jurisdiction to hear and determine the claim which is the subject matter of the relevant proceedings. In particular, he makes a voluntary submission to the jurisdiction if he takes a step in proceedings which in all the circumstances amounts to a recognition of the court's jurisdiction in respect of the claim which is the subject matter of those proceedings.* ***The effect of a party's submission to the jurisdiction is that he is precluded thereafter from objecting to the court exercising its jurisdiction in respect of such claim.****' [Emphasis added by counsel.]*

9. Ms Julian's alternative submission is that the Strike Out Application ought to be considered in accordance with ***r.12.64 IR 2016*** because service has been effected, albeit, defectively. This is not an abuse case. Accordingly, the issue is whether there would be irremediable substantial injustice if the Substantive Application continues. The question of injustice must be assessed at today's date and cannot arise because of the submission to the jurisdiction. There can be no injustice when the Third Respondent has not previously objected to the breach of ***Rule 12.9.*** In the further alternative, if an extension of time is required notwithstanding the steps taken in the proceedings, she submits that the actions resulting in submission to the jurisdiction are exceptional circumstances justifying an extension of time.

10. Mr Holmes's submissions on behalf of the Third Respondent include the proposition that whilst the application is not a nullity, it remained incumbent upon the Trustees to apply for an extension of time for service and, this being a case where the limitation period has expired, to establish exceptional circumstances for that purpose. That being so whether that application is made by their own volition or as a result of an Application to Strike Out. Upon hearing such an application the primary question is

whether the claim should be allowed to proceed when the limitation period expired after the Substantive Application was issued and before it was served. It should not, he submits, because an extension of time would deprive the Third Respondent of a limitation defence. The fact that the Third Respondent has taken steps in the proceedings is only one factor to weigh in the balance. It is not decisive, not a "knock-out" blow as Ms Julian's primary submission advocates. It is outweighed by the failure to obtain an extension and by the fact that exceptional circumstances cannot be established by the Trustees to justify such relief. That being so, her alternative submission must fail too.

11. His submissions rely in particular upon the following paragraphs from the judgment of Nugee LJ (adopting Mr Holmes's underlining of emphasis):

> [61] "*I therefore do not accept the premise of Mr Fennell's argument that there is a difference in substance between the position of a claim form not served in accordance with CPR r 7.5 and that of an application notice not served in accordance with rule 12.9. In each case an extension of time for service is needed from the Court if the proceedings are to continue. In each case if the proceedings were brought within the limitation period but the limitation period has (or even arguably has) expired by the time the claimant or applicant applies for an extension, the effect of granting one would be to deprive (or arguably deprive) the defendant or respondent of a limitation defence. In my judgment the same principles ought to be applicable. That was the view adopted by HHJ Walden-Smith in Kelcrown, in my view rightly.*"
>
> [62] "*[following consideration of the findings to the contrary of the Judge below, HHJ Matthews] … But in this Court, as I have said, [counsel for the party in the position of the Applicant] accepted that if an application notice is not served in time, and the Court refuses an extension of time, then it cannot be proceeded with. That seems to me to rob the suggested distinction between an unserved claim form and an unserved application notice of any substance. In each case an extension of time is needed, and if limitation is engaged I can see no principled reason why it should be the "primary question" for the Court under the CPR but of no relevance at all under the 2016 rules.*"

C) The Law – The Overview

12. This case really only requires the court to consider whether a defence of equitable waiver can be established on the facts and be relied upon by the Trustees because it is equitable in all the circumstances to decide that the Third Respondent can no longer rely upon the breach of ***Rule 12.9*** having by conduct submitted by waiver to the court's jurisdiction.

13. However, diverging submissions presenting different analyses of the law mean this needs to be explained in far more detail. I have decided to do that first by explaining the law within an overview which will not become tied up with those diverging submissions. Second by setting out the detailed reasons behind that explanation, which will enable me to address the submissions, insofar as it is necessary to do so.

14. The starting point for the overview is the statutory scheme. It can be summarised as follows to set the context for the decision of the Court of Appeal in ***Bell v Ide*** (above):

    a) ***Section 376 IA*** confers unfettered power upon the court to extend time prospectively or retrospectively and upon any terms it thinks fit.

b) That provision was reflected in ***r.12.9(2) of the Insolvency Rules 1986*** and then within ***r.12A.55(2) of the 1986 Rules*** as amended by the ***Insolvency Amendment Rules 2010 (SI 2010/686)***. Those ***Rules*** are not repeated in the ***IR 2016***. Instead ***r.1.3 and paragraph 3 of Schedule 5 to the IR 2016*** together provide that the general powers of case management conferred upon the court by ***CPR r.3.1(2)(a)*** apply *"so as to enable the court to extend or shorten the time for compliance with anything required or authorised to be done"* by the ***IR 2016*** except where the ***IR 2016*** makes express provision for the exercise of such a power.

c) There is express provision within ***Rule 12.9***. ***Sub-paragraph (3)(c)*** confers power upon the court to extend or abridge the 14 day time limit for service/notice of the application prescribed by ***r.12.9(3) IR 2016*** as set out under paragraph 1 above. The relief may be granted prospectively or retrospectively.

d) ***R.12.4 IR 2016*** provides that *"No insolvency proceedings will be invalidated by any formal defect or irregularity unless the court before which objection is made considers that substantial injustice has been caused by the defect or the irregularity and that the injustice cannot be remedied by order of the court".* There is a similarly worded provision in ***CPR r.3.10***.

e) ***R.12.1 IR 2016*** provides that the ***CPR*** and its practice directions will apply with any necessary modifications except to the extent that they are disapplied by or are inconsistent with the ***IR 2016***.

f) ***CPR 3.4(2)(b)*** and the court's inherent jurisdiction confers power on the court to strike out a statement of case under for failure to comply with a rule.

g) ***CPR r.7.5*** provides that a claim form must be served within 4 months of issue (subject to extension). ***CPR r.7.6*** confers power upon the court to extend that time. ***CPR r.7.6(3)*** also prescribes specific requirements ("***CPR 7.6(3) Requirements***") (without reference to limitation periods under ***the Limitation Act 1980***) which must be satisfied for the court to have the power to extend time if the application is made after expiry of the ***CPR r.7.5*** time limit for service of the claim form. The court may make such an order only if: it has failed to serve the claim form; or the claimant has taken all reasonable steps to comply with rule 7.5 but has been unable to do so; and in either case, the claimant has acted promptly in making the application.

15. Next, is the key ratio of the decision of the Court of Appeal in ***Bell v Ide*** (above): That the approach to be taken when judicially exercising the unfettered discretion to extend time under ***Rule 12.9(3)(c)*** is the same as the approach required for an application to extend the 4 month period for the service of a claim form under ***CPR r.7.5***. This includes the principles established by case law to be applied under ***CPR r.7.5 and r.7.6*** where the limitation period has expired between the date of issue and the application to extend time.

16. The third holding in the report of ***Bell v Ide*** (above) contains that ratio. Taken from the judgment of Lord Justice Nugee, it includes his conclusion that this means that if the limitation period has so expired an extension will only be granted in *"exceptional circumstances"*. That phrase is used to describe the consequence of the application of those principles (considered below) not to formulate a test to be applied, as submitted. The third holding reads as follows (underlining for emphasis):

> *"That there was no difference in substance between the position of an insolvency application not served in accordance with rule 12.9 of the 2016 Rules and that of a claim form not served in accordance with CPR r 7.5, since in each case an extension of time for service was needed from the court if the proceedings were to continue and, if the proceedings had been brought within the limitation period but that limitation period had expired by the time the claimant or applicant applied for an extension, the effect of granting one would be to deprive the defendant or respondent of a limitation defence; that, therefore, the principles applicable under the CPR to an application to extend the time for service of a claim form where the limitation period had already expired should also be applied to an extension of time for service of an application brought under the 2016 Rules; that it followed that, when an application notice led under the 2016 Rules had not been served within the time prescribed by rule 12.9(3), an extension of time for service should not, save in exceptional circumstances, be granted since that would be to deprive the respondent of a limitation defence; and that, accordingly, the trustees' originating application should be struck out (post, paras 55—56, 60—61, 64, 68, 74)."*

17. Whilst ***Rule 12.9(3)(c)*** does not include any prerequisites such as the ***CPR 7.6(3) Requirements***, it follows from the Court of Appeal's decision that such requirements will also be relevant when applying the principles established under ***CPR r.7.6*** if the application to extend time is not made before the expiry of ***Rule 12.9***'s 14 day period for service of an application notice.

18. The third matter for the overview is that the Court of Appeal's decision does not concern, and did not need to address, a case where the applicant contends that the respondent can no longer rely upon the breach. Obviously, if there has been an agreement or a legal estoppel, the respondent will not be able to raise any further objection to the ***Rule 12.9*** breach. Equally, a respondent may waive the right to do so by conduct, for example by taking steps in the proceedings. If so, the defence of equitable waiver can be relied upon as a submission to the jurisdiction.

19. For the purposes of such a defence the court considers whether the respondent's conduct establishes a waiver making it equitable in all the circumstances to preclude the respondent from relying upon the breach, in this case, of ***Rule 12.9*** (see the principles identified in ***Roebuck v Mungovin*** [1994] 2 A.C. 224, H.L.). If so, the respondent will have submitted to the jurisdiction and *"will be precluded from objecting to the court exercising its jurisdiction in respect of the claim"* (to use the words of Robert Goff LJ in ***Astro Exito Navegacion SA v Hsu*** (above)).

20. Therefore, it is not really an issue of whether waiver is a "knock-out" blow as described in submissions (see paragraph 10 above). This particular dispute of the submissions arises in the context of the concern that the Third Respondent should not be prevented through the conduct summarised at paragraph 4 above from raising the facts and matters that he relies upon to support the Strike Out Application and, to the extent necessary, oppose an application to extend time. However, the point is that equitable waiver requires the court to decide what is equitable in all the circumstances when addressing the conduct relied upon. The weight of the facts and matters the

Third Respondent wishes to raise will of course depend upon all the other circumstances including his conduct but they will be part of those circumstances. This also means there is no need to try to resort to **r.12.64** ***IR 2016*** even assuming it is not superseded by ***Rule 12.9(3)***, which it is. An equitable decision cannot give rise to substantial injustice.

It is this analysis which leads to the "real" issue identified in paragraph 12 above. However, it should be apparent from a comparison with the brief summary of the submissions above that this overview of the law does not accord with them. Although there will inevitably be some repetition, this judgment needs to explain the reasons why that is the case. I will address the reasons now and they will be followed by my decision applying this overview.

D) The Law - Reasons

D1) *Rule 12.9* Principles

21. Applying ***Bell v Ide*** (above) within the statutory scheme identified above (paragraph 13), the following principles apply:

a) ***Rule 12.9*** requires an applicant to serve an application notice in the time prescribed unless the court directs or the ***IR 2016*** otherwise provide. The Court of Appeal in ***Bell v Ide*** (above) (agreeing with the approach of Deputy ICC Judge Prentis in his earlier decision of **Re** ***HS Works*** [2018] EWHC 1405 (Ch)) decided that the prescribed 14 days before the date fixed for the application's hearing refers to the date originally fixed for hearing and endorsed by the court on the application notice, rather than the date ultimately fixed for hearing.

b) The requirement for an extension of time will normally arise at the first hearing of the ***IA*** application or at the subsequent hearing when the respondent has been served. It may be raised by the parties or the Court under its case management powers. There is nothing to prevent the parties in accordance with general litigation, adversarial principles agreeing or otherwise accepting that the breach will not be relied upon and that the proceedings will continue.

c) ***Rule 12.9*** is to be construed from the basis that *"once the applicant has issued an application, [they] should notify the respondent of that sooner rather than later .... an extension of time for service is needed from the Court if the proceedings are to continue"* (see ***Bell v Ide*** (above), Nugee LJ at [51 and 61-62]). It is not for the claimant/applicant to decide unilaterally to postpone service (see ***Cecil and others v Byatt and others*** [2011] EWCA Civ 135 at [47], [2011] 1 W.L.R. 3086).

d) That does not mean that an application for which an extension of time is needed is invalid. It is not (see ***Bell v Ide*** (above), Nugee LJ at [60]). Whether non-compliance with a statutory provision or rule results in invalidity depends upon Parliament's intentions. This is to be decided by identifying first the purpose of the requirement breached and second the consequences of non-

compliance (see ***Re Ceart Risk Services Ltd*** [2012] EWHC 1178 (Ch), [2012] B.C.C. 592). In this case Parliament provides that non-compliance can be cured by an application to extend time, which can be made retrospectively. That speaks for itself. It also follows from the last sentence of sub-paragraph (b) above.

e) The power to extend time within ***Rule 12.9(3)(c) IR 2016*** is to be read with the general power of the Insolvency Court to extend time limits under ***s.376 IA***. Together with the Insolvency Court's exceptional inherent jurisdiction to control insolvencies, they confer an unfettered power which can be exercised retrospectively. Absent a limitation period issue, the court is likely to extend time (see ***Bell v Ide*** (above), Nugee L.J. at [63]).

f) If the limitation period has expired after the application was issued, to apply that discretionary power judicially, the application should be treated as analogous to a request to extend time for the validity of a claim form under ***CPR r7.5***. As a result the principles established by case law within applications made under ***CPR 7.6*** are to be applied (see ***Bell v Ide*** (above) – noting the modification required as observed by Arnold LJ concerning the difference arising between a claim form and application notice because the date provided by the court will not be fixed by reference to a 4 month period for service prescribed by the CPR).

g) Whilst the ***CPR 7.6(3) Requirements*** are not included within ***Rule 12.9(3)***, it follows from the Court of Appeal's decision that they too should be addressed when exercising the discretionary power to extend time and will normally be required to be satisfied. Their significance is apparent from the fact that under the ***CPR*** there is no power to extend time if the ***CPR 7.6(3) Requirements*** are not met (see the review of authorities by O'Farrell J. in ***Boxwood Leisure Limited v Gleeson Construction Services Limited and Anor.*** [2021] EWHC 947 (TCC) at paragraphs [33-45] and the principles identified at sub-paragraph [46(i)] and [(v)] of the judgment).

h) ***CPR r.7.5 and r.7.6*** do not include an exceptional circumstances test. The reference to *"exceptional circumstances"* by Lord Justice Nugee (see paragraph 11 above) is not intended to be a statement of the test to be applied but a conclusion ("*it followed*") of the likely result of the application of the principles applicable under ***CPR r.7.5 and r.7.6*** if the limitation period has expired before the application to extend time is heard.

i) The *"principles applicable under the CPR to an application to extend the time for service of a claim form where the limitation period had already expired"* to which Nugee L.J. refers (see paragraph 15 above) are not set out in the **CPR**. However, as Lord Justice Nugee explained, many decisions have emphasised the importance of service within the context not only of notice, the opportunity to participate and the ability of the court to control proceedings but also because of the limitation period. The point that has been made is that it would be wrong to allow a party to decide that an application once issued need not be served even if a limitation period is due to expire. A failure to serve in those circumstances would in practice effect an extension of the limitation period. It would thwart the limitation period's objective of finality. It would leave

potential respondents uncertain whether they could still face proceedings because there would always be the possibility, unknown to them, that the Applicant was "sitting on" the issued application notice (**Bell v Ide** (above), Nugee LJ at [48-49 and 61-64] and Arnold L.J. at [71]**.**

j) Therefore, whilst neither **CPR r.7.5 or r.7.6** refer to the limitation period, as a matter of practice it is extremely important to consider whether an extension of time will deprive a defendant of a limitation defence (see ***Bell v Ide*** (above), Nugee LJ at [57] referring to the judgment of Stanley Burnton LJ in ***Cecil and others v Byatt and others*** (above)). The same approach must be applied to ***Rule 12.9*** (see ***Bell v Ide*** (above), Nugee LJ at [61-64] and Arnold L.J. at [71]).

D2) *Rule 12.9* and Waiver

22. The fact that the proceedings remain valid (paragraph 21(d) above) means that a claimant/applicant can rely upon an agreement to extend time (it not being excluded by ***CPR Rules 2.11 and 7.5***, as applied in ***Thomas v Home Office*** *[2006] EWCA Civ 1355; [2007] 1 W.L.R. 230, CA*), legal estoppel, waiver, acquiescence or equitable estoppel, if appropriate on the facts. Therefore, as is not in dispute, a party who ignores irregular service (which service in breach of ***Rule 12.9*** will be) and allows the proceedings to continue risks the conclusion that, for example, waiver has occurred (applying the general principles identified in ***Roebuck v Mungovin*** above and considered below).

23. This leads to the dispute between the competing submissions as to whether the Trustees are able to argue waiver/submission to the jurisdiction as a ground on its own for dismissing the application to strike out or whether it must be argued as one of the discretionary factors to be taken into consideration upon the Strike Out Application and, if made, the application to extend time. For reasons above and which will become further apparent, I do not consider it matters in practice because the court when addressing equitable waiver considers what is equitable in all the circumstances. However. I need to address the issue as presented in submissions.

24. I shall start with the decision of the House of Lords in ***Roebuck v Mungovin*** (above). It concerned the court's discretionary power to strike out a claim for want of prosecution in circumstances of inordinate and inexcusable delay either giving rise to a substantial risk that a fair trial would not be possible or otherwise causing or being likely to cause serious prejudice. The specific issue was whether the defendant's conduct, which had induced the plaintiff to incur further expense in the proceedings, was an absolute bar to the application to strike out by reason of equitable estoppel, as the Court of Appeal had decided based on precedent. The question arose, as here, as to whether defences of equitable estoppel, waiver or acquiescence should be treated, if established, as an absolute bar to the discretion to strike out being exercised. As in this case, there were no legal rights, for example created by agreement or by legal estoppel. Instead there were representations as to future conduct. Namely that the defendant will be proceeding to trial.

25. The speech of Lord Browne-Wilkinson (with whom the others agreed) concluded that because the decision whether to dismiss for want of prosecution involved a discretion, there was no need for the concepts of equitable estoppel, waiver or acquiescence when they also require a substantially similar discretion to be exercised. As he said at 236A: *"Such a discretion is not materially different from that which the court would be exercising if it had an unfettered discretion whether or not to strike out a claim. Therefore the introduction into the law of striking out of concepts of waiver, acquiescence or estoppel is merely confusing."*

26. Whilst that conclusion is obviously specific to want of prosecution, his analysis of the application of equitable remedies is not. It can be isolated for the purposes of its application to this case. That analysis stemmed from the original concerns of Salmon L.J. in ***McAlpine's case*** [1968] 2 Q.B. 229 at 272 over the application of the principles of waiver or acquiescence in the context of delay. Lord Browne-Wilkinson's analysis draws the distinction between legal and equitable rights and explains that, as with equitable estoppel, waiver (waiver of contractual rights not being referred to) and acquiescence require the court to decide what is equitable in all the circumstances. They cannot operate as automatic bars without the exercise of that discretion. In exercising that discretion the court will consider, for example, the balance between the harm done to the defendant and the expense or other detriment incurred by the facts and matters giving rise to the equitable relief.

27. Although without reference to that decision, Mr Holmes's submissions advocate the same conclusion for an application to strike out for failure to comply with ***Rule 12.9***. He does not accept the issue is procedural and submits with reference to paragraph [63] of the judgment of Nugee LJ in ***Bell v Ide*** (above) that it is a matter of substantive law determining whether a party is deprived of a limitation defence. He submits that any facts or matters relied upon to oppose the application to strike out should be advanced and applied only within the context of the discretionary decision whether to extend time. In his submission the decisions of Norris J. in ***Re Anderson Owen*** [2009] EWHC 2837 (Ch), [2010] B.P.I.R. 37, of HHJ Purle Q.C. in ***Re Baillies*** [2012] EWHC 285 (Ch), [2012] B.C.C. 554 and of Deputy I.C.C. Judge Prentis in **Re *HS Works*** [2018] EWHC 1405 (Ch) apply that approach and should be followed. Namely, as he submits, that there can be no "knock-out blow" relying upon the conduct of the Third Respondent alone.

28. I do not entirely agree with that analysis, although no doubt it is open to a higher court to decide that the concept of "waiver" is inappropriate and should be replaced by a general discretion to be exercised within the court's procedural rules. However, I agree with the outcome, namely that the court will exercise a discretion to do what is equitable in all the circumstances when deciding whether there is waiver.

29. That may arise within the context of an application to extend time. However, the equity can also be raised purely in response to the application to strike out. Indeed, it may have to be. For example, there can be no application to extend time if the ***CPR 7.6(3) Requirements*** apply (whether directly or by analogy) and are not met. Alternatively if an applicant in breach of ***Rule 12.9*** decides that an application to extend time in itself has little prospect of success. In those circumstances the claims of equitable estoppel, waiver or acquiescence (as appropriate) will stand on their own as defences to the application to strike out. To that extent they are "knock-out blows" but it matters not (other than procedurally) because the equitable discretion must still

be exercised taking into consideration all the circumstances as explained by Lord Browne-Wilkinson.

30. In reaching that conclusion I have not addressed the submission to the jurisdiction (rather than waiver), "knock-out blow" approach of Ms Julian relying upon the decision of the Court of Appeal in ***Hoddinott v Persimmon Homes (Wessex) Ltd*** (above) and the common law principles of submission to the jurisdiction explained by Robert Goff LJ (see paragraph 8 above). That first mentioned decision of the Court of Appeal is that a defendant who files an acknowledgment of service is to be treated as having accepted the court's jurisdiction (as expressly provided in ***CPR r. 11(5)***) unless an application to dispute jurisdiction or to argue that it should not be exercised has been made within 14 days of filing in accordance with ***CPR Part 11***. That decision was reached because the reference to "jurisdiction" in ***CPR r.11(1)*** is not limited to territorial jurisdiction but refers generally to the court's power or authority to hear the proceedings. Therefore, such a defendant cannot rely upon late service to challenge an order or the continuing progress of the proceedings.

31. As Ms Julian appreciates, the obvious point that flows for the purposes of this case is that ***CPR Part 11*** does not and cannot apply to IA applications. There is no acknowledgment of service and no express rule requiring an application within 14 days of acknowledgment. Of course, the court should bear in mind the importance of taking the point early but there is no requirement within ***IR 2016*** for a respondent to make an application. Indeed, as emphasised in ***Bell v Ide*** (above), the applicant should obtain an extension of time (see paragraph 17(f) above). Whilst that too may be subject to issues of agreement, estoppel, waiver and acquiescence (as appropriate on the facts), there would be a dichotomy between that emphasis and a conclusion that the point must be taken by the respondent (for example) before or at the first, between-parties hearing.

32. That, however, is not the basis for Ms Julian's submission. She relies upon ***Hoddinott v Persimmon Homes (Wessex) Ltd*** (above) to invoke the common law principle that voluntary recognition of the court's jurisdiction (in its widest sense) whether by taking a step in the proceedings or otherwise will preclude objection to the court exercising that jurisdiction. In assessing whether a defendant has submitted to the jurisdiction, the court will apply the objective, disinterested bystander test (***SMAY Investments Ltd v Sachdev*** [2003] 1 WLR 1973 at p.1976). If that is established, she submits, the Third Respondent will not be able to rely upon the breach of ***Rule 12.9*** or upon the failure to obtain an extension of time.

33. Plainly that is correct as a description of the common law principle. It follows the explanation of Sir Andrew Morritt C. in ***Global Multimedia International Ltd*** [2006] EWHC 3612 at [26-27] within the context of considering the power of the court to extend time for a challenge under ***CPR Part 11***. However, the common law principle of submission to the jurisdiction in this context results from the court considering whether there is submission to the jurisdiction by conduct, namely whether there is equitable waiver. Submission is the consequence of waiver and will arise as a result of the court having exercised its equitable discretion. The two concepts are effectively tautologous in this context. If there is any doubt over that, it is apparent from the judgment of Colman J., as he then was, in ***Spargos Mining NL v Atlantic Capital Corporation*** (above), quoted in full by Patten J., as he then was, in ***SMAY Investments Ltd. v Sachdev*** [2003] 1WLR 1973 at p.1976 at paragraph 41, as quoted

by Sir Andrew Morritt C.. Having referred to the passage from the judgment of Goff L.J. relied upon by Ms Julian, he continued (my underlining for emphasis, although the whole passage is important for the test it identifies):

> *"In **Sage v. Double A Hydraulics Ltd**, [1992] Times Law Reports, 165, Lord Justice Farquharson said (and this is a report of the judgment which is not reported in oratio recta): 'A useful test was whether a disinterested bystander with knowledge of the case would have regarded the acts of the Defendant, or his solicitors, as inconsistent with the making and maintaining of his challenge.' In arriving at the view to be imputed to the disinterested bystander, it seems to me that one has to bear in mind that there will be an effective waiver, or a submission to the jurisdiction, only where the step relied upon as a waiver, or a submission to the jurisdiction, cannot be explained, except on the assumption that the party in question accepts that the court should be given jurisdiction. If the step relied upon, although consistent with the acceptance of jurisdiction, is a step which can be explained also because it was necessary or useful for some purpose other than acceptance of the jurisdiction, there will, on the authorities, be no submission.*
>
> *If the well−informed bystander had been left in doubt because what the defendants had done was equivocal, in the sense that it was explicable on other grounds in addition to agreement to accept the jurisdiction of the court, then the conclusion must be, on the authorities, that there would have been no submission to the jurisdiction. The representation derived from the conduct of the party said to have submitted must be capable of only one meaning."*

34. The position, therefore, is that should waiver be established and be accepted by the court for the purposes of the equitable relief sought by the party raising this defence having considered all the circumstances of the case (see ***Roebuck v Mungovin*** (above)), there will be a submission to the jurisdiction. That will mean that the party concerned can no longer raise objection to the court's jurisdiction (in the widest sense), for example, as here, in reliance upon a breach of ***Rule 12.9***.

D3) ***R.12.64***

35. The application to strike out also relies upon ***r.12.64 IR 2016***, which has two purposes. First to establish that no insolvency proceedings will be invalidated by any formal defect or irregularity unless the court otherwise orders in accordance with the power provided. Second to empower the court to make such an order if it considers that irremediable, substantial injustice has been caused.

36. The first purpose is consistent with and supports the conclusion that Parliament did not intend breach of ***Rule 12.9*** to invalidate the proceedings. As to the second purpose, **r.12.64 IR 2016** being a general rule is to be read subject to any provision within a specific rule (see the reasoning of the Court of Appeal in ***Vinos v Marks & Spencer Plc*** [2001] 3 All ER 784 when addressing ***CPR***, ***r.3.10***, its equivalent). In the case of ***Rule 12.9***, any question of irrevocable, material injustice will be subsumed within the discretionary exercise which will arise when deciding whether there is waiver. ***R.12.64 IR 2016*** will not, as such, be needed or apply.

E) Decision

37. The starting point is that the Trustees not only breached ***Rule 12.9*** but they have also failed to establish and do not try to establish: (i) that they took all reasonable steps to comply with its service provision but were unable to do so; and (ii) any good reason for not having served in accordance with ***Rule 12.9***. conduct. The Trustees by their evidence refer to the Substantive Application having been issued as a protective measure, to the hampering of their investigations and to delays obtaining after the event insurance. However, they also expressly state that they do not present a detailed explanation for the failure to comply with ***Rule 12.9***.

38. Their only ground for opposing the Strike Out Application and/or for the granting of an extension of the time (whether under the 9 March Application or the Cross-Application) is the fact, as asserted, of the Third Respondent's submission to the jurisdiction by engagement with the proceedings. No binding agreement or representation of fact is relied upon. The Trustees rely upon the Third Respondent's representations by conduct through his participation in the proceedings to establish a representation concerning the future. Namely that he will proceed to trial.

39. This moves to the second point. The hearing on 11 March 2020 adjourned the Substantive Application thereby granting the primary relief sought in the 9 March Application, albeit subject to the order being set aside at a between-parties hearing. The 11 March hearing did not determine the alternative request for an extension of time and that part of the application remained unresolved and available to be placed before the court depending upon whether the Trustees needed and wished to ask for that relief. It was not sought at the between-parties hearing on 18 May 2020 but nor was objection taken by the Third Respondent to service and directions for the further progress of the Application were given.

40. A result from those facts, however, is that an application to extend time was made two days before the first hearing of the Substantive Application on 11 March 2020. To the extent that the application is to be treated as having been abandoned, and it does not appear to be specifically relied upon before me by the Trustees, that will have resulted from the fact that the proceedings continued without objection having been made. It would be a consequence of the waiver if waiver/submission to the jurisdiction is established.

41. That leads to the third point, the Third Respondent has had the opportunity to object to service since the attended hearing on 18 May 2020. Until the Strike Out Application was issued on 23 November 2020 he conducted himself on the basis that no objection was being made to the fact that the Substantive Application was served after the first hearing. In that context it is to be noted that he has been represented by solicitors from at least 15 May 2020. He did not raise any point on service until 23 November 2020, only one day before the CCMC. None of the steps taken in the proceedings were equivocal.

42. The fact that this occurred for a period of some 6 months means it is not relevant to consider whether 18 May 2020 was too early to be bound by waiver. It also means it is unnecessary to delve into what precisely occurred at that hearing. Neither side seeks to do so. It is not suggested that there is any reason why the Third Respondent could not have raised objection whether at the hearing on 18 May 2020 or at any time before

23 November 2020. By that date the proceedings had progressed to the stage of statements of case having closed, costs budgets having been exchanged and the Trustees having prepared for the further case and costs management listed for 24 November 2020.

43. Taking those matters into consideration, including all the matters set out under paragraph 4 above, the facts plainly establish waiver. The Third Respondent has no real answer to this. Instead, emphasis is placed upon the Trustees' obligation to obtain an extension of time as prescribed by the Court of Appeal in ***Bell v Ide*** (above), their failure to justify or explain their breach of ***Rule 12.9,*** the fact that the Trustees have already had advantage of the limitation periods, the importance of ensuring proceedings are pursued with diligence in those circumstances and the problems for a fair trial of events having occurred between 2005 and 2011 in particular when the outcome will turn on oral evidence.

44. However, the reason why the Third Respondent is being deprived of a limitation period defence is not because of the late service of the Substantive Application or the current absence of an extension of time but because of the fact that he decided to waive the breach and proceeded instead to take an active part in the proceedings. It is plainly equitable to give effect to the waiver. There is no injustice in that result. The fact that this trial may be difficult because of the time elapsed and the need for recollection arises because the Third Respondent chose to submit to the jurisdiction (in its widest sense) and for some six months participated in the proceedings and waived the right to object to the court exercising its jurisdiction in respect of this claim.

45. Notwithstanding all the legal arguments and law addressed, this is a simple case of waiver resulting in submission to the jurisdiction. That submission means that the Strike Out Application must be dismissed and that no order need be made in respect of either the 9 March Application to extend time or the Cross-Application.

46. The only matters that remain are: (i) The omission of a CPR r.23.9(3) statement but that is a technical failing and rightly has not been pursued to sustain the Strike Out Application; (ii) The observation that an application notice having been used for a ***s.423 IA*** claim it will be necessary for the Trustees to address the decision of ***Manolete Partners Plc v Hayward and Barrett Holdings Limited*** [2021] EWHC 1481 (Ch) when judgment is handed down; and (iii) The further directions required for trial.

Order Accordingly