Neutral Citation Number: [2023] EWHC 1101 (Ch)

Case No. CR-2019-LDS-000129

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

Leeds Combined Court Centre
The Courthouse, 1 Oxford Row, Leeds LS1 3BG

Date: 9 May 2023

Before :

DISTRICT JUDGE BOND

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Between :

James Court Limited (in liquidation)

Applicant

– and –

Hindsight Contractors Limited

Respondent

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- -

Miss Jessica Powers instructed by Weightmans LLP for the Applicant
Mr Nicholas Towers instructed by Axiom DWFM for the Respondent

Hearing date: 6 December 2022

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- -

Approved Judgment

I direct that pursuant to CPR rule 39.9(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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DISTRICT JUDGE BOND

District Judge Bond:

Introduction

1. By this application James Court Limited ('JCL'), acting by its liquidator, Mr Kevin Roy Mawer, seeks a declaration that two payments totalling £37,000 made by JCL to Hindsight Contractors Limited ('HCL') are void pursuant to section 127 of the Insolvency Act 1986 and an order for payment accordingly.

2. Section 127(1) provides:

> *"In a winding up by the court, any disposition of the company's property […] made after the commencement of the winding up is, unless the court otherwise orders, void."*

3. By section 129(2) the commencement of the winding up is deemed to be the time of the presentation of the winding-up petition.

Background

4. At all material times Mr Paul Fava was the sole director and shareholder of JCL and HCL. JCL was a property investment company. HCL is an accountancy practice.

5. HCL subcontracts payroll services for its clients to Proactive Payroll Services ('PPL'). The sole director and shareholder of PPL is Ms Nicola Lawson, a long-standing business associate of Mr Fava's.

6. On 21 December 2018 Think Accounting Limited (in liquidation) ('TAL') acting by its liquidator, who is also Mr Mawer, served a statutory demand on JCL. On 8 January 2019 Mr Mawer wrote to Mr Fava, as the sole director of JCL, to reconfirm that a statutory demand had been served on JCL and to draw attention to its expiry on 14 January 2019. Mr Fava was aware of the statutory demand at this time.

7. On 30 January 2019 TAL presented a creditor's petition for the winding-up of JCL. On 11 February 2019 the petition was served on JCL.

8. On 12 and 13 February 2019 JCL paid £23,000 and £14,000 respectively to HCL. Mr Fava was aware that JCL had been served with a winding-up petition at the time he caused JCL to make the payments but states that he did not understand the significance of the petition or how it would affect the payments.

9. Mr Fava's account of the circumstances surrounding the payments is essentially this:

   (a) over the years there have been several inter-company loans between JCL, PPL and HCL;

   (b) as at 1 February 2019 JCL owed PPL £30,766 and JCL owed HCL £8,000;

(c) HCL had been the victim of a banking scam resulting in £120,000 being stolen from its bank account (most of which has now been recovered save for £38,000);

(d) at the start of 2019 HCL was suffering cash flow difficulties as a result;

(e) Mr Fava proposed that JCL should lend £30,000 to HCL to assist it through its difficulties;

(f) Mr Fava agreed with Ms Lawson that:

"a. PPL could agree to a reduction in any debt owed by JCL;

b. JCL could agree to a reduction in any debt owed by HCL;

c. This could put into effect by HCL accepting repayment of the debt due to PPL by reducing the net amounts paid to HCL by PPL."

(see the first witness statement of Paul Fava dated 16 July 2021, paragraph 15);

(g) this arrangement was documented in counter-signed a letter dated 28 January 2019;

(h) on 1 February 2019 HCL and JCL entered into a loan agreement;

(i) the first of the payments made to HCL on 12 February 2019 of £23,000 comprised (i) repayment of the £8,000 owed by JCL to HCL and (ii) a draw down under the loan agreement of £15,000;

(j) the second payment to HCL of £14,000 on 13 February 2019 was a further draw down under the loan agreement;

(k) as at that date HCL owed £29,000 to JCL and JCL owed £30,766 to PPL.

(HCL now accepts, by reference to evidence given by Ms Lawson in these proceedings, that the debt due from JCL to PPL at that time was in fact £26,500.)

10. On 25 February 2019 the winding-up petition was gazetted.

11. On 9 April 2019 a winding-up order was made against JCL on that petition. It is common ground that upon the making of the winding-up order the payments made by JCL to HCL were made void by section 127.

12. On 9 May 2019 Mr Mawer was appointed liquidator of JCL.

13. On 13 September 2019 JCL, acting by its liquidator Mr Mawer, presented a bankruptcy petition against Mr Fava. On 17 March 2020 Mr Fava was declared bankrupt on that petition. On 29 April 2020 Mr Mawer was appointed as his trustee in bankruptcy.

14. Shortly prior to the bankruptcy order being made, on 14 March 2020 Mr Fava resigned as a director of HCL. The current directors of HCL are Mr Fava's father, Anthony Fava, who has been a director since incorporation, and Ian Shepherd, who was appointed on 15 June 2020.

15. In the meantime, on 30 September 2019, 31 December 2019 and 30 March 2020, Ms Lawson, who had access to HCL's bank account, caused HCL to pay £30,000 in three

instalments of £10,000 to PPL, which was set off against JCL's indebtedness of £26,500 to PPL and discharged HCL's indebtedness to JCL.

16. On 19 July 2021 HCL made an application for a validation order in respect of the payments made by JCL to HCL on 12 and 13 February 2019 totalling £37,000. That application came before HHJ Kelly sitting as a judge of the High Court. On 27 August 2021 HHJ Kelly dismissed the application.

17. On 27 June 2022 JCL issued its application seeking restitution. HCL relies on the equitable defence of change of position in response. Since it is common ground that the payments were made and that they are void, JCL has established a right to restitution subject to HCL's change of position defence.

The issues

18. In the context of a claim for restitution of payments made void by section 127, the circumstances in which a change of position defence can succeed are constrained in the same way as the exercise of the court's discretion to validate the payments. I will come to the authorities which establish that shortly.

19. HCL accepts that of the £37,000 received from JCL, £10,500 is repayable. This comprises the £8,000 paid by JCL to HCL in discharge of the existing indebtedness and £2,500, being that part of the remaining £29,000 which exceeds the £26,500 indebtedness from JCL to PPL that was discharged under the tripartite arrangement relied upon. I have already ordered that sum to be repaid. The remaining dispute is over the balance of £26,500.

20. In those circumstances the following issues arise:

    (a) Is HCL estopped by the decision of HHJ Kelly from contending that the payments are capable of validation?

    (b) Is it an abuse of process for HCL to contend that the payments are capable of validation?

    (c) If HCL is entitled to contend that the payments are capable of validation has it established its defence of change of position on the facts?

The law on void dispositions under section 127

21. The nature of the claim made by JCL against HCL is restitutionary: *Hollicourt (Contracts) Ltd v Bank of Ireland* [2001] Ch. 555 at [22]; *Ahmed v Ingram* [2018] EWCA Civ 519, [2018] B.P.I.R. 535 at [33]. In a case involving the payment of money the particular form of claim is in unjust enrichment, being the modern equivalent (for these purposes) of the old form of action for money had and received: *Officeserve Technologies Ltd v Annabel's (Berkeley Square) Ltd* [2018] EWHC 2168 (Ch), [2019] Ch. 103 at [32].

22. The defence of change of position is in principle available to the respondent to such a claim. Although it has not been without controversy, that is the established position: *Rose v AIB*

Group (UK) plc [2003] EWHC 1737 (Ch), [2003] 1 W.L.R. 2791 at [41]-[42]; *Clark v Meerson* [2018] EWHC 142 (Ch), [2018] B.P.I.R. 661 at [47]; *Re D'Eye* [2016] B.P.I.R. 883 at [55]; *Officeserve* (supra) at [41]; *Re MKG Convenience Ltd* [2019] EWHC 1383 (Ch), [2019] B.P.I.R. 1063 at [62]-[69]; *Re Changtel Solutions UK Limited* [2022] EWHC 694 (Ch), [2022] B.P.I.R. 926 at [106]-[154].

23. In *MKG Convenience* at [69] HHJ Cooke considered the rationale for the defence and its particular applicability in the insolvency context:

> *"67. In my view, the resolution is to be found by stepping back and considering the reason why change of position is recognised as a defence to restitutionary claims at all, which is that in the circumstances in which the defence is held to be made out, the court necessarily finds that it would be inequitable to allow the claim to restitution to proceed (see per Lord Goff in Lipkin Gorman v Karpnale [1991]2 AC 548 at 577-80, including the following: "... why do we feel that it would be unjust to allow restitution in cases such as these? The answer must be that, where an innocent defendant's position is so changed that he will suffer an injustice if called upon to repay or to repay in full, the injustice of requiring him so to repay outweighs the injustice of denying the plaintiff restitution").*
>
> *"68. In other words, the strength of the equitable claim of the person seeking restitution is not such as to make it unconscionable for the defendant to retain the benefit he has received. A balance is being struck between the equities in favour of the claimant and those in favour of the defendant. In striking that balance, the court is bound to have regard to the nature of the equitable claim being asserted, and in the context of a claim being made to give effect to the legislative policy to preserve and where necessary return assets for the benefit of creditors in insolvency that requires the court to recognise the strength imparted by that policy to the claim. If it is to be denied, it must be because the circumstances of the defendant are such as to outweigh the policy imperative and show that that enforcement of the policy would be unjust on the particular facts.*
>
> *"69. Looked at in this way, the result would be that although the defence is in principle as a matter of jurisprudence available, the circumstances in which it can succeed are constrained in the same way and for the same reasons as the exercise of the court's discretion to validate. That seems to me a more satisfactory approach than to hold that a form of defence is available against some claimants but not others. It is not easy to think of circumstances in which the court would decline to make a validation order, but nevertheless find it inequitable to order repayment of a benefit received, particularly when one takes account of the availability of "exceptional circumstances" as justification for a validation order."*

24. In *Changtel* at [154], after a full review of the authorities, ICC Judge Barber concluded, following *MKG Convenience*, that:

> *"the circumstances in which a change of position defence can succeed are constrained in the same way and for the same reasons as the exercise of the court's discretion to validate. The principles governing the circumstances in which validation should be ordered are those set out in Express Electrical."*

25. *Express Electrical Distributors Ltd v Beavis* [2016] EWCA Civ 765, [2016] 1 W.L.R. 4783 continues to be the leading case on the circumstances in which a validation order will be made under section 127. The principle summarised at [56] is that:

> *"save in exceptional circumstances, a validation order should only be made in relation to dispositions occurring after presentation of winding up petition if there is some special circumstance which shows that the disposition in question will be (in a prospective application case) or has been (in a retrospective application case) for the benefit of the general body of unsecured creditors, such that it is appropriate to disapply the usual pari passu principle."*

The law on re-litigating decided issues

26. The starting point, reflected in common law and in article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, is that everyone has the right to a fair hearing to determine their civil rights: *Tinkler v Ferguson* [2021] EWCA Civ 18, [2021] 4 W.L.R. 27 at [26].

27. That right is necessarily subject to limitations that are to be found in rules of substantive law concerning *res judicata*, including cause of action estoppel and issue estoppel, and procedural powers (now found in CPR rule 3.4) to prevent abuse of process. These substantive and procedural limitations have the common purpose of limiting abusive and duplicative litigation: *Tinkler* at [27]; *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2014] A.C. 160 at [25]. Cause of action estoppel and issue estoppel are thus rules of substantive law. Abuse of process is part of procedural law.

Cause of action estoppel

28. It is not necessary to say very much about cause of action estoppel because both parties agree that it does not apply in this case. It is relevant only insofar as it is necessary to distinguish it and its effects from issue estoppel.

29. The rule applies where a cause of action has been found to exist or not exist in earlier proceedings. The parties to those proceedings and their privies are estopped from challenging the existence or non-existence of that cause of action in subsequent proceedings. Cause of action estoppel therefore applies where the cause of action in both sets of proceedings is identical and where the proceedings are between the same parties or their privies and involve the same subject matter.

30. Cause of action estoppel is absolute in relation to all points which had to be and were decided except where the judgment was obtained by fraud or collusion. In relation to points which were not decided, and which are essential to the existence or non-existence of the cause of action, the bar applies unless the point could not with reasonable diligence have been raised in the earlier proceedings. See *Virgin Atlantic* at [17], [20], [22].

Issue estoppel

31. The classic formulation of issue estoppel is found in the opinion of Lord Diplock given in *Mills v Cooper* [1967] Q.B. 459 at 468F-469A:

> *"a party to civil proceedings is not entitled to make, as against the other party, an assertion, whether of fact or of the legal consequences of facts, the correctness of which is an essential element in his cause of action or defence, if the same assertion was an essential element in his previous cause of action or defence in previous civil proceedings between the same parties or their predecessors in title and was found by a court of competent jurisdiction in such previous civil proceedings to be incorrect, unless further material which is relevant to the correctness or incorrectness of the assertion and could not by reasonable diligence have been adduced by that party in the previous proceedings has since become available to him."*

32. Issue estoppel arises in relation to a particular issue where the cause of action in the later proceedings is different to that in the earlier proceedings but the same issue is a necessary ingredient of both causes of action: see *Arnold v National Westminster Bank plc* [1991] 2 A.C. 93 at 105D-E, cited as authoritative in *Virgin Atlantic* at [20]:

> *"Issue estoppel may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant one of the parties seeks to reopen that issue."*

33. In *Carl Zeiss Stiftung v Rayner & Keeler Ltd* [1967] 1 A.C. 853 at 917 the House of Lords was concerned with whether an issue estoppel arose out of a foreign judgment. Lord Reid alighted upon the practical reasons why the limits of issue estoppel necessarily require more consideration than those of cause of action estoppel at 917:

> *"The difficulty which I see about issue estoppel is a practical one. Suppose the first case is one of trifling importance but it involves for one party proof of facts which would be expensive and troublesome; and that party can see the possibility that the same point may arise if his opponent later raises a much more important claim. What is he to do? The second case may never be brought. Must he go to great trouble and expense to forestall a possible plea of issue estoppel if the second case is brought? This does not arise in cause of action estoppel: if the cause of action is important, he will incur the expense: if it is not, he will take the chance of winning on some other point. It seems to me that*

> *there is room for a good deal more thought before we settle the limits of issue estoppel. But I have no doubt that issue estoppel does exist in the law of England. And, if it does, it would apply in the present case, if the earlier judgment had been a final judgment of an English court."*

34. Lord Upjohn similarly held at 947:

> *"As my noble and learned friend, Lord Reid, has already pointed out there may be many reasons why a litigant in the earlier litigation has not pressed or may even for good reason have abandoned a particular issue. It may be most unjust to hold him precluded from raising that issue in subsequent litigation and see Lord Maugham's observations in the* New Brunswick *case. All estoppels are not odious but must be applied so as to work justice and not injustice and I think the principle of issue estoppel must be applied to the circumstances of the subsequent case with this overriding consideration in mind."*

35. For these and other reasons the effect of issue estoppel is recognised as being less strict than in the case of cause of action estoppel. It was summarised by Lord Sumption in *Virgin Atlantic* at [22]:

> *"Except in special circumstances where this would cause injustice, issue estoppel bars the raising in subsequent proceedings of points which (i) were not raised in the earlier proceedings or (ii) were raised but unsuccessfully. If the relevant point was not raised, the bar will usually be absolute if it could with reasonable diligence and should in all the circumstances have been raised."*

36. In *Musst Holdings Limited v Astra Asset Management UK Limited* [2023] EWHC 432 (Ch) at [30] it was held that this statement of general principle, so far as it applies to issues which were raised unsuccessfully in the earlier proceedings, is subject to a qualification discussed earlier by Lord Sumption in *Virgin Atlantic* at [21] when considering the opinion of Lord Keith in *Arnold* on the difference between cause of action estoppel and issue estoppel:

> *"The relevant difference between the two was that in the case of cause of action estoppel it was in principle possible to challenge the previous decision as to the existence or non-existence of the cause of action by taking a new point which could not reasonably have been taken on the earlier occasion; whereas in the case of issue estoppel it was in principle possible to challenge the previous decision on the relevant issue not just by taking a new point which could not reasonably have been taken on the earlier occasion but to reargue in materially altered circumstances an old point which had previously been rejected. He formulated the latter exception at p 109 as follows:*
>
> > *"In my opinion your Lordships should affirm it to be the law that there may be an exception to issue estoppel in the special circumstance that there has become available to a party further material relevant to the correct determination of a point involved*

> *in the earlier proceedings, whether or not that point was specifically raised and decided, being material which could not by reasonable diligence have been adduced in those proceedings. One of the purposes of estoppel being to work justice between the parties, it is open to courts to recognise that in special circumstances inflexible application of it may have the opposite result.""*

37. The position in relation to issue estoppel therefore appears to be that:

    (1) issue estoppel bars the raising in subsequent proceedings of points which (i) were not raised in the earlier proceedings or (ii) were raised but unsuccessfully;

    (2) the bar will not apply if there are special circumstances which mean that it would cause injustice; and

    (3) special circumstances include, but are not limited to, there becoming available further material relevant to the correct determination of the point which could not with reasonable diligence have been adduced in the earlier proceedings, whether or not the point was raised and decided in the earlier proceedings.

38. The "could and should have" exception is sometimes known as the rule in *Phosphate Sewage* after *Phosphate Sewage Co Ltd v Molleson* 4 App Cas 801 where Lord Cains LC held:

> *"As I understand the law with regard to res judicata, it is not the case, and it would be intolerable if it were the case, that a party who has been unsuccessful in a litigation can be allowed to re-open that litigation merely by saying, that since the former litigation there is another fact going exactly in the same direction with the facts stated before, leading up to the same relief which I asked for before, but it being in addition to the facts which I have mentioned, it ought now to be allowed to be the foundation of a new litigation, and I should be allowed to commence a new litigation merely upon the allegation of this additional fact. My Lords, the only way in which that could possibly be admitted would be if the litigant were prepared to say, I will shew you that this is a fact which entirely changes the aspect of the case, and I will shew you further that it was not, and could not by reasonable diligence have been, ascertained by me before."*

39. The *Phosphate Sewage* test is that the party seeking to relitigate a previously decided issue, or an issue that could and should have been raised in earlier litigation, must show that new facts have come to light which fundamentally change the complexion of the case which were not and could not by reasonable diligence have been ascertained before.

Abuse of process

40. I take the following summary of the applicable principles on the law concerning abuse of process from *Tinkler* at [28]-[35], so far as they apply to this case:

(a) The court has the inherent power to prevent misuse of its procedure where the process would be manifestly unfair to a party to litigation before it or would otherwise bring the administration of justice into disrepute among right-thinking people. See also *Hunter v Chief Constable of West Midlands Police* [1982] A.C. 529 at 536; *Kamoka v Security Service* [2017] EWCA Civ 1665 at [75].

(b) In cases where there is no *res judicata* or issue estoppel the power to strike out a claim for abuse of process is founded on two interests: the private interest of a party not to be vexed twice for the same reason and the public interest of the state in not having issues repeatedly litigated. These interests reflect unfairness to a party on the one hand and the risk of the administration of public justice being brought into disrepute on the other. Both or either interest may be engaged.

(c) An abuse may occur where it is sought to bring new proceedings in relation to issues that have been decided in prior proceedings. However, there is no prima facie assumption that such proceedings amount to an abuse and the court's power is only used where justice and public policy demand it.

(d) To determine whether proceedings are abusive the court must engage in a close merits-based analysis of the facts. This will take into account the private and public interests involved and will focus on the crucial question: whether in all the circumstances a party is abusing or misusing the court's process.

(e) The circumstances in which abuse of process can arise are very varied and are not limited to fixed categories. Examples can be found in: vexatious proceedings amounting to harassment; attempts to re-litigate issues that were raised in previous proceedings; attempts to litigate issues that should have been raised in previous proceedings (*Henderson v Henderson* (1843) 3 Hare 100); collateral attacks upon earlier decisions (attacks made in new proceedings rather than by way of appeal in the earlier proceedings); pointless and wasteful litigation.

(f) There is no hard and fast rule to determine whether abuse is found or not; the process is not dogmatic, formulaic or mechanical, but requires the court to weigh the overall balance of justice. The overriding objective of the procedural rules is to enable the court to deal with cases justly, including when it exercises the power under CPR rule 3.4. Where there is abuse the court has a duty, not a discretion, to prevent it.

41. In her written submissions Miss Powers, counsel for JCL, directed me to the authorities on the particular species of abuse by way of a collateral attack on an earlier decision. However, Miss Powers accepts that a collateral challenge, properly so-called, applies only where the parties to the later proceedings were not parties to the earlier proceedings: see *Allsop v Banner Jones Ltd* at [2021] EWCA Civ 7, [2022] Ch. 55 at [27]:

> *"For the purposes of this judgment, a collateral challenge is one where—no matter how similar the issue in question—the parties to the later dispute are different from the parties to the earlier dispute that is the subject of the collateral challenge"*

42. In this case the parties in these proceedings are the same as in the validation order proceedings and as such there is no collateral attack here.

43. In *Allsop* the court was concerned with a collateral attack on a decision made in matrimonial proceedings in later proceedings for professional negligence against the claimant's legal representatives in the earlier proceedings. The particular issue was whether the *Phosphate Sewage* test applies to a party attempting to mount a collateral attack. The issues are not of direct relevance in this case but Mr Towers, counsel for HCL, relies on the statement of general principle at paragraph 44(iii)(c):

> *"Thirdly, and relatedly, it is necessary to be very clear what is meant by "relitigation". In my judgment, relitigation means arguing the same issue, that has already been determined in earlier proceedings, all over again in later proceedings. In civil proceedings, generally speaking, for an issue to be the same, it will arise as between the same parties (or their privies) That is why, in such cases, the doctrine of res judicata estoppel comes into play. The role of the doctrine of abuse of process is, correspondingly, much more limited. The abuse doctrine will only arise where one of the parties to the earlier litigation sues a stranger to that litigation. In such a case, the claim will typically be permissible and not abusive, and that will generally be because the case is not one of relitigation at all. Rather, the stranger to the earlier litigation will be the subject of the later claim because that person has done or failed to do something which (had that person behaved as he or she should) affected the terms or nature of the anterior decision. Why or how that earlier decision was affected will depend on the individual circumstances. It may be that the later claimant's former legal advisers failed properly to prepare the case (see the example in Laing at para 27 (Buxton LJ at para 41 above) and para 36 (Moses LJ at para 42 above)) or failed, in an appeal, to deploy or consider a potentially winning point (Walpole at para 38 above). In all of these cases, what is being focused on is "the impugned conduct of the lawyer [which is] independent of the … conclusions of the court" in the anterior decision (Laing at para 37 (Moses LJ at para 42 above)). None of these cases involves the adduction of new evidence within the meaning of Phosphate Sewage 4 App Cas 801 and it is quite clear that these later so-called "collateral" challenges are regarded as permissible even though there was no new evidence which would meet the stringent test in Phosphate Sewage."*

JCL's submissions

44. In this case it is common ground that neither cause of action estoppel nor issue estoppel apply to prevent HCL from raising a change of position defence in these proceedings.

45. However, JCL contends, in reliance on *MKG Convenience* and *Changtel*, that it is an essential element of the change of position defence that the payments ought to be, or are, capable of validation. That issue was determined against HCL by HHJ Kelly on the validation order application. Whilst issue estoppel does not bar HCL from raising a change of position defence, it does bar HCL from re-litigating the validation issue. Since that issue

is an essential element of the change of position defence, that defence must necessarily fail. Insofar as HCL seeks to rely upon new evidence it does not meet the *Phosphate Sewage* test.

46. Further, given that it is not possible to put forward a defence of change of position without re-opening the validation issue, it is an abuse of process for HCL to advance a change of position defence in these proceedings. Miss Powers describes HCL's attempt to do so as a "collateral attack" but I do not understand her to mean this in its technical sense (because she accepts that collateral attack only applies where the parties to the litigation are different). I think that what she means is that it is an abusive attempt to re-litigate the same issue twice. It is abusive, she says, because:

    (a) It would be manifestly unfair to JCL that the issue should be relitigated. JCL refrained from issuing this application to allow time for HCL to apply for a validation order. JCL incurred time and costs in successfully opposing that application. JCL has now been put to the time and expense of addressing exactly the same issue on this application.

    (b) To permit such relitigation would bring the administration of justice into disrepute. Court time and costs have been wasted and it gives rise to a clear risk of inconsistent findings.

47. If HCL is permitted to run its change of position defence that defence should fail, either by reason of the advertisement of the petition, or by reason of Mr Fava's knowledge of the petition being imputed to HCL. HCL was aware of the petition and the winding-up order at the time it made the payments to PPL in discharge of its indebtedness to JCL. HCL should be taken to have known that the loan draw down payments it had received from JCL were void: *Rose* at [45]. HCL's change of position took place as a result of its own act by making payment to PPL and it cannot rely on the belief that a restitutionary claim would not be enforced: *Rose* at [55]-[56]. In paying PPL HCL took a risk that JCL would not pursue a restitutionary claim and must bear the consequences of that risk: *Rose* at [59].

HCL's submissions

48. Mr Towers first says that there is no issue estoppel at all because HHJ Kelly made no finding that the facts, or legal consequences of facts, relied upon by HCL were incorrect. The validation order was refused because HCL had adduced insufficient evidence of the loan and set off agreement; the court did not go on to consider whether, had it been satisfied of their existence, this was an appropriate case to validate the payments.

49. Second, he says that there is a difference between litigating the same application twice and dealing with two applications that happen to have the same essential requirements. By way of example he cites the instance of a company successfully resisting a winding-up petition by raising a genuine dispute and argues that the company could not mount an issue estoppel on that determination in order to defeat a summary judgment application made against it in subsequent Part 7 proceedings.

50. Third, if issue estoppel would otherwise apply, there are special circumstances. The fact that *MKG* has narrowed the scope of the change of position defence in corporate insolvency cases

to circumstances in which a court might exercise its discretion to make a validation order is an unusual and perhaps even unique set of circumstances.

51. Fourth, whether the payments should be validated under a statutory discretion is qualitatively different to the equitable question of whether HCL should be ordered to repay them.

52. Fifth, JCL did not apply for restitution at the time of the validation order application and HCL should not be punished for not pre-emptively opposing a claim for restitution which had not yet been made.

53. Turning to abuse of process, Mr Towers relies in particular on *Allsop* and the passage at paragraph 44(iii)(c) to contend that there is no scope for a finding of abuse of process by relitigation in this case because it involves the same parties. He says that unless there is a cause of action estoppel or issue estoppel there is no bar to HCL seeking to relitigate the issue of whether the payments are capable of being validated.

54. Mr Towers contends that HCL's change of position defence is not manifestly unfair to JCL and does not bring the administration of justice into disrepute. JCL could have but chose not to make an application for restitution at the time of the validation order application. JCL will obtain a procedural windfall if it can prevent HCL from raising a change of position defence in these proceedings when that defence was never considered in the validation order proceedings.

55. Further, there is no collateral challenge to the decision of HHJ Kelly to refuse a validation order on 27 August 2021 because this court is being asked to decide, on new and different evidence, that a validation order would be capable of being made today. HHJ Kelly determined the validation order application on the basis that HCL did not come up to proof. HHJ Kelly made no positive decision that restitution would or would not be equitable if HCL had come up to proof. The hearing before HHJ Kelly was not a trial. The evidence of the witnesses was not tested then, nor has it been tested in these proceedings. HCL's evidence in these proceedings is substantially more expansive than in the proceedings before HHJ Kelly and shows that a validation order could have been made.

56. The exceptional circumstances relied upon by HCL are that:

    (a) HCL has changed its position by allowing PPL to pay to itself monies that HCL would have otherwise been entitled to retain;

    (b) those monies would not have been paid but for the void loan draw down payments made by JCL to HCL;

    (c) although JCL's assets were reduced by the loans to HCL, they were correspondingly increased by its debt to PPL being discharged;

    (d) repayment of the monies to JCL would put JCL in a better position than it would have been in if the payments had never been made: its debt to PPL of £26,500 will be discharged and it will receive £26,500 from HCL, a net enrichment of £26,500;

    (e) conversely, if HCL is ordered to make restitution to JCL it will have received a loan of £26,500 and have paid it back twice, once to PPL and once to JCL;

(f) any monies paid in restitution to JCL will go to meet the costs of the insolvency;

(g) HCL's finances have suffered as a result of COVID-19 and it cannot afford to repay.

Issue estoppel: conclusions

57. For the defence of change of position to be made out in this context HCL must show that:

(a) it has changed its position in good faith consequent on or in a way that is referable to the void payments;

(b) it will suffer an injustice if called upon to repay the payments;

(c) a validation order would be made in the circumstances;

(d) the injustice to HCL outweighs the injustice of denying JCL restitution.

58. This is not a case where HCL contends that the payments were for the benefit of the general body of creditors. It is said to be a case of exceptional circumstances.

59. Before HHJ Kelly on the validation order application Mr Fava gave two witness statements. His second witness statement corrected, clarified and amplified matters in the first witness statement. The documents exhibited to Mr Fava's witness statements comprised: (1) the letter dated 28 January 2019; (2) the loan agreement; (3) an extract from a spreadsheet kept by Mr Fava said to show the amounts paid by HCL to PPL and set off against JCL's indebtedness to PPL; (4) HCL's management accounts for the year ended 31 March 2021; and (5) HCL's abbreviated accounts for the year ended 31 March 2020.

60. HCL's cause of action in the validation order proceedings and its defence in these proceedings both depend on establishing the same essential requirement: that there are exceptional circumstances justifying the exercise of the discretion of the court to make a validation order.

61. I do not agree that HHJ Kelly made no relevant finding on the correctness of the facts contended for by HCL. At paragraph 15 of her judgment she said this:

> *"In those circumstances and on the evidence, considering that on the balance of probability, I am not satisfied that Mr Fava and HCL had established that there was in fact a loan agreement in the first place, nor (even if there were such an agreement) that HCL has in fact paid the monies owed to PPL by paying JCL."*

62. This was a finding that, on the evidence, HCL's contention that there was a loan agreement and that payments made to JCL were referable to it, was not established applying the civil standard of proof to the evidence before the court. The court can only determine a case by reference to the evidence before it. Either a fact contended for is established by the evidence or it is not. Whether the court simply determines that the party has not come up to proof, or goes further and positively rejects the evidence of that fact as being, for example, unreliable or dishonest, is a distinction without a difference for these purposes. The facts contended for were not found to be correct.

63. It also matters not that HHJ Kelly did not consider whether, had those facts been established, they would have amounted to exceptional circumstances. HCL failed at the first hurdle. That HHJ Kelly did not go on to indulge in the hypothetical does not lead to the conclusion that the issue was not decided. It was.

64. In my judgement there is prima facie an issue estoppel arising out of the determination of HHJ Kelly on this issue. The question is whether there are special circumstances why the bar should not apply.

65. It is irrelevant that the application before HHJ Kelly was different to the application that is before me. That is to be expected in cases of issue estoppel where the cause of action is always different.

66. I do not find the winding-up example posited by Mr Towers to be of very much assistance. For these purposes I am prepared to accept that the genuine dispute test on a winding-up petition is broadly equivalent to the summary judgment test, although I am aware that there has been resistance to definitively equating the two tests in the Companies Court notwithstanding the recognition that the difference between them is somewhat elusory.

67. Putting that to one side, and assuming Mr Towers to be correct about the equivalence of the two tests, I see no reason in principle why, if precisely the same issue were before the Companies Court in the winding-up proceedings as is before the court on a summary judgment application in subsequent Part 7 proceedings, the company ought not be able to rely upon the earlier determination as raising an issue estoppel subject to any arguments about special circumstances.

68. Having said that, it is easy to see that in that kind of case there may be difficulties in identifying issues which can be said to have been determined due to the nature of winding-up proceedings and the absence of statements of case. As Lord Hodson pointed out in *Carl Zeiss* at 926, "*There may be difficulties in applying the principle through the necessity of following the course of procedure when pleadings and evidence have to be examined to ascertain what issues have been determined.*" This is not an argument for saying that the principle should not apply if the same issue between the same parties can be ascertained in both sets of proceedings and the same standard of proof is applied. It is a matter in each case whether the same issue can be sufficiently identified.

69. It is also very easy to see why in that sort of case special circumstances may be found to exist but, again, that is not the same thing as saying that the principle simply is not capable of application in the first place.

70. I am likewise unable to agree that the effect of *MKG* is such as to give rise to special circumstances. Mr Towers might well be right that, so far as the change of position defence goes, its application in section 127 cases is uniquely different to its application in other types of case. All that this is really saying is that the legal test for change of position is different in these kinds of cases. I cannot regard that as a special circumstance. It might be different had *MKG* been decided after the validation order application was heard in this case; but it

was not. Indeed, Mr Towers cited *MKG* in his skeleton argument for HCL on the validation order application.

71. It is right that there is a qualitative difference between validating payments under section 127 and balancing the equities under a change of position defence. I do not accept that this amounts to special circumstances. Issue estoppel is, by its very nature, concerned with specific overlapping issues; it is likely if not inevitable in most cases that the nature of the case before the court in the earlier proceedings will be fundamentally different from that in the later proceedings because the causes of action are different.

72. Although HHJ Kelly did not go on to consider whether she would have validated the payments had HCL come up to proof, the absence of a determination on that point is not in my judgement a special circumstance permitting HCL to re-open the factual determination that HHJ Kelly did make, which necessarily precluded any validation order being made.

73. That JCL did not pursue a claim in restitution at the same time as the validation order proceedings is not a factor capable of giving rise to special circumstances for a number of reasons:

    (a) First, having read the correspondence between the parties dated 6 May 2021, 26 May 2021, 4 June 2021, 10 June 2021, 23 June 2021, 24 June 2021, 7 July 2021 and 8 July 2021 it is clear that JCL expressly forbore from issuing a claim for restitution to give HCL the opportunity to apply for a validation order. At no stage did HCL put JCL or the court on notice that it considered that proceedings for restitution should be conducted at the same time.

    (b) Second, whilst it is often the case that a claim for restitution is met with a counter-application for a validation order, the converse is not true. Obtaining a validation order in response to a claim for restitution amounts to a complete defence to the claim. However, commencing a claim for restitution in the face of an outstanding application for a validation order would not have the same effect. The claim could not be disposed of until the validation order application had been determined. If the validation order were granted the claim for restitution would inevitably fail.

    (c) Third, it is difficult to see how HCL has been deprived of any benefit, or is being punished, by reason of its change of position defence not being considered at the same time as the validation order application. In order for HCL to succeed in its change of position defence it was always going to be necessary to prove that the payments would be validated if an application for a validation order were made. Having actually made a validation order application, it should have been obvious to HCL that that was the time to produce its best evidence.

    (d) Fourth, in the skeleton argument filed in support of the application for a validation order HCL's case on exceptional circumstances was that HCL has a defence of change of position and that that was sufficient to meet the exceptionality threshold. HCL therefore comprehensively argued its case on change of position in the validation order proceedings in support of its case on exceptional circumstances.

74. With regard to the new and additional evidence upon which HCL now seeks to rely, nowhere is it suggested that that evidence could not with reasonable diligence have been adduced in the validation order proceedings. In any event, for reasons which I will come on to, it does not fundamentally change the complexion of the case. The existence of that evidence does not constitute a special circumstance.

75. In my judgement no special circumstances have been established. I find that HCL is estopped from contending that the payments are capable of being validated.

76. In those circumstances HCL's change of position defence must fail. There are no countervailing considerations, and none have been suggested, that could lead me to conclude that this is an exceptional case where the change of position defence can succeed in the face of a failed validation order application.

77. Since the matter has been fully argued before me I will deal briefly with the remaining issues in the event that I am wrong in this conclusion.

Abuse of process: conclusions

78. It being conceded that there is no cause of action estoppel, if the case had not come within the confines of issue estoppel I agree with Mr Towers that the court should be cautious in finding that there is an abuse of process in relitigating the same issue in proceedings between the same parties.

79. Having concluded that issue estoppel does apply, it is difficult to express a concluded view on abuse of process. It is only having identified the reasons why cause of action and issue estoppel do not apply that it is then possible to evaluate whether it is a case of abuse.

80. With that point firmly in mind, I will limit my observations to these. It does seem to me that it would be manifestly unfair to JCL to be vexed twice with the validation issue. It is precisely the same issue in both sets of proceedings. HCL is seeking to have a second bite at the cherry by adducing fresh evidence in these proceedings that it could and should have adduced in the earlier proceedings. It also goes further than the narrow validation point. HCL's change of position defence requires consideration of all of its factors. By running that defence in circumstances where an essential element has already been determined against it, HCL is putting JCL to the trouble of dealing with all matters raised by that defence in circumstances where it is bound to fail if the validation element cannot be satisfied.

81. I am also satisfied that it would bring the administration of justice into disrepute. Claims to restitution and validation order applications, if they are made, are inextricably linked due to the special context in which they arise under section 127. As night follows day, if a validation order is refused a liquidator will seek to recover the void payments; they are duty-bound to do so. In that context litigants who do not adduce all of their evidence on an issue in earlier validation order proceedings, and obtain an undesirable outcome, should not be seen to be able to relitigate precisely the same issue against the same party in a claim to restitution, with new evidence, in the hope of achieving a different result. HCL's attempt to do that in this case is, in reality, an attack on the decision of HHJ Kelly. It is mere window

dressing to say that the issue in these proceedings is whether the payments are capable of being validated today, as opposed to whether they ought to have been validated on 27 August 2021. That it is an attack based on new evidence does not alter its essential character as a challenge to the earlier decision which was final on the issue of validation.

82. Subject to the point I have already made about the need to consider the reasons why the matter does not come within cause of action or issue estoppel, my preliminary view is that this would be a case of abuse of process if issue estoppel did not apply.

The change of position defence on its merits: conclusions

83. Miss Powers made a number of significant and important criticisms of the evidence given by HCL's witnesses, Mr Fava and Ms Lawson. However, JCL did not seek to cross-examine them. Whilst the rule in *Browne v Dunn* is not an inflexible one, usually fairness requires that when the court is asked to disbelieve the evidence of a witness on a specific factual matter, that witness should be challenged on it so as to have the opportunity to respond to that challenge: see generally *Edwards Lifesciences LLC v Boston Scientific Scimed Inc* [2018] EWCA Civ 673; [2018] F.S.R. 29 at [62]-[69] *per* Floyd LJ. I expressed concern to Miss Powers during the course of submissions about this. Her response was to say that the court was not being invited to make findings of fact but could comment on the evidence, in particular where the witness statements are internally contradictory, and where they are directly contradicted by documents.

84. In my judgement JCL's position is an uneasy one. It is undoubtedly the case that HCL was on notice that JCL was going to call into question the credibility of its witnesses. However, it was not until the second witness statement of Kevin Roy Mawer dated 24 August 2022, produced after the statements of Mr Fava and Ms Lawson, that the nature of the challenges to their evidence was made clear. The witnesses had no opportunity to respond in writing and they are entitled to an opportunity to explain themselves under cross examination before the court can be invited to disbelieve them. There is an exception if their evidence is so incredible on its face, or so inconsistent with contemporaneous documents, that it defies belief; but that is not this case.

85. In those circumstances it seems to me that this is not a case where I could be asked to disbelieve Mr Fava or Ms Lawson. Miss Powers did not go so far as to say that I was. JCL's case must be limited to the contention that HCL has not made out its case even if its witnesses are believed.

86. Proceeding on that basis, and having considered the evidence in the round, in my judgement JCL is right that none of the requirements of the change of position defence are made out on HCL's own evidence.

87. It will be recalled that HCL contends that of the £37,000 paid to it by JCL, £8,000 was in repayment of existing indebtedness and £29,000 was a draw down under the 1 February 2019 loan agreement. It is said that there was a tripartite agreement between JCL, HCL and PPL that would enable payments made by HCL to PPL to be set off against sums owed by JCL to PPL thus discharging HCL's debt of £29,000 under the loan agreement to JCL. It is Ms

Lawson's evidence that JCL's debt to PPL was only £26,500. In those circumstances HCL accepted that it had no defence to the difference between £29,000 and £26,500, namely £2,500, or to the £8,000 paid by JCL to HCL in discharge of pre-existing indebtedness. At the conclusion of the hearing on 6 December 2022 I therefore ordered HCL to repay £10,500. It is the balance of £26,500 that remains in issue.

88. The change of position relied upon by HCL is thus in making payments to PPL pursuant to this tripartite agreement on 30 September 2019, 31 December 2019 and 30 March 2020, which are said to have discharged JCL's debt to PPL and HCL's debt to JCL. Mr Fava's evidence is that these payments comprised two payments of £10,000 and one payment of £9,000. However, in a witness statement given by Ms Lawson, backed by bank statements, it appears that three payments of £10,000 were made. In the event, nothing turns on this inconsistency.

89. The winding-up order had been made against JCL on 9 April 2019. Of this Mr Fava was well aware. As the sole director of HCL his knowledge of that fact is undoubtedly imputed to HCL. At the time that HCL made the payments to PPL it cannot have been acting in good faith bearing in mind its knowledge of JCL's liquidation. The effect of the payments was to prefer PPL by ensuring that the debt due to it from JCL was paid in full rather than PPL having to prove for its debt in the liquidation alongside the general body of creditors. Had HCL wished to simply repay its indebtedness to JCL it could have done so directly to JCL through its liquidator, Mr Mawer.

90. Whether or not HCL was aware of the effects of section 127 is in my judgement irrelevant in these circumstances. Whilst Mr Towers is strictly correct in saying that HCL paid to PPL monies that it was otherwise entitled to retain, that assertion belies the reality of the situation. On HCL's own case HCL received the monies as a loan, which it knew it always had to repay. It did not receive those monies in the expectation that it was absolutely entitled to retain their value; it was always going to have to return monies of equivalent value. HCL made a conscious choice to obtain discharge for its debt by payment to a third party, PPL, rather than directly to JCL and did so in full knowledge that JCL was in insolvent liquidation.

91. It makes no difference to the analysis that the person who actually effected the payments was Ms Lawson. The state of her knowledge is irrelevant. In any event, Ms Lawson was herself aware of JCL's liquidation, as shown by the email correspondence with the liquidator's firm in July and August 2019.

92. Having made that conscious decision I see nothing unjust or unconscionable in requiring HCL to repay the loan monies of £29,000 to JCL. HCL may have a right to recover that sum from PPL for failure of basis or for some other reason but even if it does not HCL is the author of its own misfortune.

93. So far as it is contended that the effect of the COVID-19 pandemic on HCL's finances is a material factor there is simply no evidence (other than a bare assertion by Mr Fava) that COVID-19 has had such an effect. Even if there were, it is very difficult to understand how this could have any significant impact on the matter. It has nothing to do with HCL's change of position; it is an external factor.

94. If I am wrong, and there has been a change of position in good faith, I am required to weigh the injustice to HCL against the injustice of denying JCL restitution. Mr Towers says that far from JCL suffering an injustice, JCL is in a financially neutral position. It was owed £29,000 by HCL and has received the benefit of £26,500 in the discharge of its debt due to PPL (the difference of £2,500 now admittedly being repayable and having been ordered to be repaid). Against that JCL relies upon the pari passu principle and, in my judgement, correctly. From the time that the winding-up petition was presented JCL's interests were in its creditors being paid rateably according to their rank. The preferential treatment of PPL by payment in full of its debt is contrary to the statutory regime. JCL lost the benefit of the debt of £29,000 due from HCL and paid £26,500 to PPL in full, which it would never have done had the statutory scheme been applied. On a balance sheet basis it might be said that, but for the £2,500, the arrangement was financially neutral, but having regard to the statutory scheme governing JCL's affairs, the arrangement was far from neutral. It is irrelevant that these monies may in fact go to payment of the costs and expenses of the winding-up, which are themselves part of the statutory scheme: see *Dean v Stout* [2004] EWHC 3315 (Ch); [2005] B.P.I.R. 1113. In the circumstances that I have described, HCL being required to pay out twice does not seem to me to be a significant injustice. The balance of injustice weighs in favour of restitution.

95. It will be apparent from the foregoing that I do not consider that the circumstances of this case are exceptional. Accordingly, even on the basis of all of the evidence put before me, and even assuming the essential thrust of HCL's evidential case to be correct (ignoring the various inconsistencies), this is not a case where I would exercise my discretion to validate the payments today were a validation order application before me.

96. For all of these reasons I reject the change of position defence so far as it relates to the remaining £26,500 and will enter judgment for JCL.

Order Accordingly.