Neutral Citation Number: [2020] EWHC 3480 (Ch)

IN THE HIGH COURT OF JUSTICE Case No. 2552 of 2018
BUSINESS AND PROPERTY COURTS IN MANCHESTER
INSOLVENCY AND COMPANIES LIST (ChD)

IN THE MATTER OF TAUNTON LOGS LIMITED (IN ADMINISTRATION)
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

Manchester Civil Justice Centre
1 Bridge Street West,
Manchester M60 9DJ
Date: Thursday 17 December 2020

Before :

His Honour Judge Cawson QC
Sitting as a Judge of the High Court

- -

Between :

(1) KEVIN LUCAS AND ELIZABETH MANLEY
(AS JOINT LIQUIDATORS OF TAUNTON LOGS LIMITED (IN LIQUIDATION))
(2) TAUNTON LOGS LIMITED (IN LIQUIDATION)

Applicants

-and-

(1) MALCOLM CRUICKSHANKS
(2) LIV LOGE
(3) DAVID ARDLEY
(4) VEENAY CHHEDA
(5) CHRISTOPHER CLAYHILLS-HENDERON
(6) MARK FROGGATT
(7) ANDREW HOLLINS
(8) MARTYN INWOOD
(9) GARETH JONES
(10) CHRISTOPHER JORDINSON
(11) RISHI MEHROTRA
(12) EDWARD MILLS
(13) THIRZAH SILVEIRA PAIXAO
(14) DOMONIQUE PIPER
(15) ALBERT PLATTNER

Respondents

James McWilliams (instructed by **Charles Russell Speechlys LLP**) for the **First Respondent**
Timothy Sherwin (instructed by **Irwin Mitchell LLP**) for the **Second to Fifteenth Respondents**
Eleanor Temple (instructed by **Freeths LLP**) for the **Applicants**

Hearing date: Tuesday 1 December 2020

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.

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and uploading it to the CEFile.

The date and time for hand-down is deemed to be 10.30 a.m. on Thursday 17 December 2020

.....

HIS HONOUR JUDGE CAWSON QC

His Honour Judge Cawson QC

Introduction

1. Taunton Logs Ltd ("**the Company**") entered into administration on 14 June 2018 when Kevin Lucas and Elizabeth Manley ("**the Joint Administrators**") were appointed as joint full administrators of the Company.

2. By an Insolvency Act Application Notice ("**the Substantive Application**") dated 2 March 2020, the Joint Administrators and the Company, as Applicants, sought against each of the above named Respondents the following relief, namely:

    2.1. Declarations that:

        2.1.1. Pursuant to s. 33 of the Companies Act 2006 ("**CA 2006**") and the Company's Articles of Association, the Respondents, in acquiring their respective shareholdings in the Company were obliged to pay to the Company the full value of the corresponding shareholding;

        2.1.2. Further or in the alternative, pursuant to paragraph 19 of Schedule 1 and paragraph 60(1) of Schedule B1 to the Insolvency Act 1986 ("**IA 1986**") the Applicants have called up and/or called upon the Respondents to pay all unpaid share capital due from each of them to the Company;

        2.1.3. The Respondents have not paid to the Company the sum equivalent to 70% of the share capital due from them upon the acquisition of their respective shareholdings in the Company, and each of the Respondents are accordingly indebted to the Company in the same amount (or such other amount as the Court shall determine); and

        2.1.4. Further or in the alternative, Company monies have been used to repay sums due from each of the Respondents to Lendtech Ltd in connection with the acquisition by the Respondents of their respective shareholdings in the Company; and

    2.2. An Order that in consequence of the above directions or otherwise, the Respondents shall each pay to the Applicants the sum equivalent to 70% of the share capital due from them to the Company upon the acquisition of their respective shareholdings in the Company, or such other sum as the Court thinks fit, within 14 days of an order of the Court, together with interest and costs.

3. The Company has subsequently moved from administration to creditors' voluntary liquidation ("**CVL**") upon the service of the requisite notice pursuant to paragraph 83(3) of Schedule B1 to the 1986 Act on 11 June 2020, whereupon the Joint Administrators became the Joint Liquidators of the Company. By way of a Block Transfer Order made on 4 November 2020, Elizabeth Manley was removed as a Joint Liquidator of the Company, leaving Kevin Lucas as sole liquidator ("**the Liquidator**").

4. I have before me for determination the following applications, namely:

4.1. An application dated 30 July 2020 brought by the 1st Respondent to strike out the Substantive Application;

4.2. An application dated 30 July 2020 brought by the 2nd to 15th Respondents to strike out the Substantive Application;

("together "**the Strike Out Applications**")

4.3. An application dated 19 August 2020 brought by the then Joint Liquidators of the Company, and now pursued by the Liquidator for:

4.3.1. Permission to amend the Substantive Application to reflect the change in status of the Joint Administrators following the conversion of the administration into a CVL pursuant to CPR 17.1(2)(b), 17.3 and 17.4; and

4.3.2. For a declaration that the correct procedure has been used to bring the Substantive Application before the Court, alternatively for relief rectifying any error of procedure pursuant to Rule 12.64 of the Insolvency Rules 2016 ("**IR 2016**"), alternatively CPR 3.10;

4.3.3. A declaration that the 5th Respondent was validly served with the Substantive Application on 17 July 2020; alternatively, for relief from sanction pursuant to CPR 3.9 for any failure to comply with CPR 6.32, 6.34 and or the Practice Direction thereto, and/or, for relief rectifying any error of procedure as to such service pursuant to Rule 12.64 of the Rules, alternatively CPR 3.10; and

("**the Liquidators' Application**")

4.4. An application dated 27 November 2020 seeking the removal of Elizabeth Manley as an Applicant in consequence of the making of the Block Transfer Order referred to in paragraph 3 above.

("**the Removal Application**")

5. Although it was at one point suggested on behalf of the Respondents that I ought to deal with the Strike Out Applications before dealing with the Liquidators' Application, ultimately it was common ground that it was appropriate for me to deal with all of the applications together given the potential interplay between them, whilst recognising that the Liquidators' Application might become academic if I were to accept the Respondents' submission that the proceedings as commenced were a nullity.

6. James McWilliams of Counsel appeared on behalf of the 1st Respondent, Timothy Sherwin of Counsel appeared on behalf of the 2nd to 15th Respondents, and Eleanor Temple of Counsel appeared on behalf of the Liquidator. I am grateful to them for their helpful Skeleton Arguments and oral submissions.

Background

7. The background to the matter can be summarised as follows.

8. The Company was incorporated on 4 February 2013. As shown by a return of allotments received at Companies House on 7 April 2014, between 27 March 2014 and 31 March 2014, 4,806,666 A Ordinary Shares with a nominal value of £1 each were allotted in the share capital of the Company, the relevant return of allotments showing the shares to have been paid for in full. These 4,806,666 shares were allotted to the 1st to 15th Respondents. It is unnecessary, for present purposes, to be any more specific than that as to how the shares were allotted as between the respective Respondents.

9. As I have already mentioned, the Company entered into administration on 14 June 2018. The net deficiency for creditors was then considered to be £1,480,636.10.

10. It is common ground that the 1st to 15th Respondents only personally paid 30% of the nominal value of the shares allotted to them. The case advanced, now by the Liquidator, by way of the Substantive Application is that there is no evidence that the balance of 70% of the nominal value of the shares was ever paid. Alternatively, the case is advanced that if this balance of 70% was ever paid, then it was paid using monies borrowed by the 1st to 15th Respondents from a third party, and that that borrowing was subsequently repaid by the Company so as to give the Company a subrogated right against each of the 1st to 15th Respondents in respect of the loans so repaid.

11. Letters of Claim were sent to each of the Respondents on 3 December 2019 seeking payment of an amount representing 70% of the nominal value of the shares allotted in March 2014. These Letters of Claim referred to the number of A Ordinary Shares allotted to the respective Respondent, referred to s. 33 CA 2006 as providing that money payable by a member to a company under its constitution is a debt due from him to the company, referred to paragraph 19 of Schedule 1 to IA 1986 as empowering the Joint Administrators to call up any uncalled capital of the Company, and stated that the Company's records indicated that whilst 30% of the *"called up"* value had been paid to a third party and then accounted for to the Company, the remaining 70% remained unpaid, and had not been received by the Company, thus making the relevant Respondent indebted to the Company for the unpaid element.

12. It was in default of payment following the sending of these Letters of Claim that the Substantive Application was issued on 2 March 2020 by way of an Insolvency Act Application Notice brought within the existing administration insolvency proceedings.

13. The Substantive Application relies upon the following, namely:

    13.1. Article 21 of the Company's Articles of Association as adopted by special resolution passed on 26 March 2014, that provides that:

    > *"No share is to be issued for less than the aggregate of its nominal value and any premium to be paid to the company in consideration for the same".*

    13.2. S. 33(2) CA 2006, that provides that:

"(2) Money payable by a member to the company under its constitution is a debt due from him to the company. In England and Wales and Northern Ireland it is of the nature of an ordinary contract debt."

13.3. Paragraph 19 of Schedule 1 to IA 1986, which provides that the powers of an administrator include a power to *"call up any uncalled capital of the company"*.

14. The amendments sought to be made to the Substantive Application by the Liquidator's Application seek to:

14.1. Alter the status of the Applicants from that of Joint Administrators to Joint Liquidators in consequence of the entry by the Company into CVL;

14.2. In addition to simply seeking declarations in relation to the matters referred to in paragraph 2.1 above, seek *"and/or"* thereto *"determinations by the Court pursuant to Section 112 of the Insolvency Act 1986"*; and

14.3. Rely upon s.74 IA 1986 in addition to the reliance in the Substantive Application upon paragraph 19 of Schedule 1 thereto.

15. As to these further provisions sought to be relied upon:

15.1. S. 74 IA 1986 provides, so far as is relevant, as follows:

"(1) [Liability to contribute] When a company is wound up, every present and past member is liable to contribute to its assets to any amount sufficient for payment of its debts and liabilities, and the expenses of the winding up, and for the adjustment of the rights of the contributors among themselves.

(2) [Qualifications to liability] This is subject as follows-

....(d) in the case of a company limited by shares, no contribution is required from any member exceeding the amount (if any) unpaid on the shares in respect of which he is liable as a present or past member"

15.2. S 112 IA 1986 provides, so far as is relevant, as follows:

"(1) [Application to court] the Liquidator or any contributory or creditor may apply to the court to determine any question arising in the winding up of the company, or to exercise, as respects the enforcing of calls or any other matter, all or any of the powers which the court might exercise if the company were being wound up by the court."

16. The Substantive Application is disputed by the Respondents on its merits. In essence, it is the Respondents' case that:

16.1. The evidence in fact establishes that the Company received and accepted money from the relevant third party lender equivalent to 70% of the subscription price for their shares;

16.2. The Company provided share certificates to the Respondents in which it was represented that the shares that were issued fully paid up, and so an estoppel by share certificate arises barring the Company or its officeholders from alleging that the shares were not fully paid-up; and

16.3. The Joint Administrators/Joint Liquidators have provided no evidence that the Company ever paid back the sums due to the third party lender, and so no question of subrogation can in fact arise.

17. However, the Respondents say that before one gets to the merits of the Substantive Application, the procedure adopted by the Joint Administrators/Joint Liquidators, namely the use of an Insolvency Act Application Notice issued within existing administration proceedings, was fatally flawed, and impermissible under the IR 2016, and that the proceedings ought to have been brought by way of an ordinary claim by way of Part 7 claim form under the Civil Procedure Rules ("**CPR**"). It is therefore said that as no proper originating process was used, the existing proceedings are to be treated as a nullity. They further maintain that the Joint Administrators'/Joint Liquidators' conduct has amounted to an abuse of process in any event, and that for all these reasons the Substantive Application ought to be struck out.

18. It is common ground between the parties that the relevant cause of action to recover any monies unpaid on the allotment of shares accrued as at the date of the allotment of the shares as there was then an immediate obligation to pay for the same. A debt arising under a company's articles of association between the company and a member is no longer a specialty debt, and it is common ground that a limitation period of six years applies thereto. Consequently, it is common ground between the parties that any cause of action to recover any monies unpaid on the allotment of shares will have expired six years after the dates of allotment between 27 and 31 March 2014, i.e. shortly after the issue of the present proceedings.

19. There was initially an issue as to whether the proceedings had been properly served upon the 5th Respondent in Scotland, and this prompted the application for the relief referred to in paragraph 4.3.3 above by the Joint Liquidators' Application. However, that issue has now been resolved by way of the provision of a valid Form N510. I am therefore not concerned with it, save that it may be necessary to return to the issue on the question of costs.

The Basis of the Strike Out Applications

20. The basis upon which it is said by the Respondents that the present proceedings are fatally flawed, and ought therefore to be struck out, is, in short terms, as follows:

20.1. The true nature of the claim against the Respondents is a simple debt claim on the basis that Article 21 of the Company's Articles of Association provided for payment in full for the shares on allotment, and the effect of s 33(2) CA 2006 is to constitute the sum payable as a simple contractual debt – see Palmer's Company Law, Volume 2, para 6.203. This is to be contrasted with a liability in respect of shares that might

be the subject matter of a call in the strict sense, where there is no immediate requirement or expectation that the shareholder will pay the unpaid element for the shares, but circumstances might subsequently arise, e.g. on liquidation, when a call might be made for payment.

20.2. Whilst paragraph 19 of Schedule 1 to IA 1986 confers power on an administrator to call up any uncalled capital of the company, we are not presently concerned with such a situation because we are not concerned with uncalled capital, and the making of a call for monies unpaid in respect of shares, but rather a simple debt claim. Consequently, paragraph 19 is not, in the present circumstances, engaged.

20.3. "Insolvency proceedings", which may be brought by way of Insolvency Act Application Notices as provided for by r. 1.35 IR 2016, are confined to applications made specifically under IA 1986 or IR 2016, and in particular Parts 1 to 11 thereof – see r. 1.1(2) and, e.g., *Jyske Bank (Gibraltar) Ltd v Spjeldnaes* [2000] BCC 16 holding that proceedings under s.423 (Part XVI) IA 1986 were not insolvency proceedings. Further, reliance is placed on the fact that r. 1.35(2)(a) and (b) require the insolvency application to state that it is made under IA 1986 or IR 2016 (as applicable), and the section of IA 1986 or the paragraph of a Schedule thereto, or the number of the rule under which it is made.

20.4. There is long-standing authority to the effect that the summary procedure provided for by the insolvency legislation is inapplicable and inappropriate for the bringing of simple debt claims to recover monies due and owing – see *In re Etic, Limited* [1928] Ch 861 at 873 per Maugham J, holding that misfeasance proceedings were an inappropriate way to pursue a debt claim against a director. See also *In re Brampton and Longtown Railway Company* (1875) LR 20 Eq 620.

20.5. On this basis, whilst the Substantive Application purports to be an Insolvency Act Application Notice, it is not, but is a nullity and a mere piece of paper having no legal effect because it is not made under IA 1986 or IR 2016, in particular Parts 1 to 11 thereof, but merely to pursue what is, in substance, a debt claim.

20.6. The proceedings being a nullity, they cannot be saved by way of the amendments proposed by the Liquidators' Application. Even if the amendments as proposed by the Liquidators' Application would now provide a proper procedure and basis for claiming the monies alleged to be unpaid in respect of the shares, given the limitation defence that I have referred to, the amendment sought ought not now to be permitted as this would involve reliance on new facts – see CPR 17.4.

20.7. However, in any event, the claims as pursued by the Liquidator, as liquidator, face the same difficulty as faced the Joint Administrators in that the claim remains a simple debt claim that is not pursued pursuant to any relevant provision within IA 1986 or IR 2016, and the jurisdiction in respect of calls in liquidation, and requiring contributories to contribute towards the deficiency under ss. 74, 148, 150, and, as applied in the case of a CVL by s.165(4) IA 1986, are simply not engaged, and even

if they were, the proper procedure relating thereto involving, at least, the preparation of a list of contributors by the Liquidator, has not been followed.

20.8. Given that the proceedings cannot properly be described as insolvency proceedings, the jurisdiction to remedy defects provided for by r. 12.64 cannot be relied upon by the Liquidator as that provision can only apply to what are properly described as insolvency proceedings.

20.9. Further, the Respondents maintain that it is not open to the Liquidator to rely upon CPR 3.10 in order to cure any error in procedure because:

20.9.1. The Liquidator has not sought to invoke a procedure provided for by the CPR, but rather has brought proceedings that purport to be insolvency proceedings, but which, on proper analysis, are not. As the CPR will only apply to insolvency proceedings so far as consistent with IR 2016 (see IR 12.1(1)), CPR 3.10 cannot be deployed in order to save insolvency proceedings that do not comply with the IR 2016.

20.9.2. It is that the circumstances are analogies to the bringing of proceedings in the name of a dead person, which will give rise to a nullity, see *Millburn-Snell v Evans* [2012] 1 WLR 41 referred to in the White Book 2020 at 10.4.1 (third cumulative supplement), commenting on the application of CPR 10.4.

20.9.3. Further, it is said by the Respondents that CPR 3.10 cannot be invoked to rescue proceedings where statute or rules with the force of statute provide for a particular form of procedure to be followed, which is not followed. Particular reliance was placed upon *Re Osea Road Camp Sites* [2005] 1 WLR 760. This case concerned unfair prejudice proceedings under what is now s. 994 CA 2006 brought otherwise than by way of petition. Pumfrey J held that as the statute specifically provided for such proceedings to be brought by way of petition, CPR 3.10 could not be relied upon to cure the defect.

20.10. It is further contended that even if there is jurisdiction to cure any defect, the court should not, in the exercise of its discretion in respect of that jurisdiction, do so in favour of the Liquidator given what the Respondents maintain was the Joint Administrators'/Joint Liquidators' abusive conduct. As to this:

20.10.1. It is suggested that the use of insolvency proceedings was a ploy to avoid paying the £10,000 issue fee that would have been payable on the issue of a Part 7 claim form;

20.10.2. It is said that the Joint Administrators/Joint Liquidators have used a wholly inappropriate and flawed procedure, and ought not to be relieved from their own folly;

20.10.3. It is said that to grant relief curing the defect would cause them prejudice and would involve depriving the Respondents of an accrued limitation defence given that no properly constituted proceedings were commenced within the relevant limitation period.

The Liquidator's Response to the Strike Out Applications

21. The gist of the Liquidator's response to the Strike Out Applications is as follows:

21.1. The proceedings as commenced by the Joint Administrators by way of the Substantive Application were properly constituted as insolvency proceedings, and the Substantive Application did comply with r. 1.35(2)(a) and (b) by referring to paragraph 19 of Schedule 1 to IA 1986.

21.2. The Respondents have taken an unrealistically narrow view of the scope of paragraph 19, it being the Liquidator's case that the reference to calling up uncalled capital of the company in paragraph 19 is wide enough to extend to a claim to recover allegedly unpaid amounts in respect of shares such as those in the present case, and the power under paragraph 19 must extend not merely to demanding payment, but to seeking to recover payment, and as that power is provided for by IA 1986, the present proceedings are properly to be regarded as being made under the IA 1986 Act, and in particular Part II thereof, s. 8 within Part II incorporating Schedule B1 to IA 1986, and paragraph 60 of Schedule B1 specifically conferring on administrators the powers set out in Schedule 1, including that under paragraph 19.

21.3. Further, and in any event, following the entry into CVL, the Liquidators were, and the Liquidator is now able to invoke remedies and procedures that would not have been available to them as Joint Administrators. As I have referred to, the amendments sought to be made by the Liquidators' Application refer to s. 74 IA 1986, and therefore seek to introduce the machinery for requiring members to contribute towards the deficiency on winding up through the mechanism of the settlement of a list of contributories and the making of calls, enforceable in the case of a CVL through the operation of ss. 165(4) and 112 IA1986. However, in her Skeleton Argument, and in the course of submissions, Ms Temple also made reference to s. 149 IA 1986 as providing for a summary procedure for the recovery of debts due from contributories, apart from money payable by virtue of any call.

21.4. Ms Temple recognised, as I understood her, that if the proceedings as issued are properly to be regarded as a nullity, then, not least given the limitation issue, they could not be saved by the amendments proposed by the Liquidators' Application. However, it was her submission that even if the Respondents are correct that paragraph 19 of Schedule 1 is incapable of applying to the claim to recover the contractual debt due in respect of the amounts alleged to have been left unpaid on the allotment of shares, and even if as a result the proceedings were incapable of being brought by way of insolvency proceedings, it is open to the court to rectify the defect either under 12.64 IR 2016, or under CPR 3.10.

21.5. The Liquidator places particular reliance on *Phillips v McGregor-Paterson* [2010] 1 BCLC 72. In that case liquidators commenced misfeasance proceedings by way of CPR Part 7 claim form. Of course, the liquidators themselves had no personal cause of action against the relevant defendant director, but could, through the procedural gateway provided for by s. 212 IA 1986, bring insolvency proceedings for misfeasance in their own name. It was argued by the Defendant that as the liquidators had used a form of originating process that fell entirely outside the scope of the then Insolvency Rules, there were no "insolvency proceedings" before the court which could be validated by the application of r. 7.55 of the Insolvency Rules 1986 ("**IR 1986**"). Henderson J held that, given the nature of the relief being claimed, the proceedings were "plainly insolvency proceedings", and that, therefore, r. 7.55 could be invoked to cure the "formal defect" – see paragraphs [21] to [25] of Henderson J's judgment. The Liquidator argues that, on the basis of the above hypothesis, the present case involves a mirror situation to that in *Phillips v McGregor-Paterson*, and just as r. 7.55 IR 1986 was applied to cure the defect in the proceedings brought by way of CPR Part 7 claim form that ought to have been brought by way of insolvency proceedings, so it is open to the Court in the present proceedings to cure the defect in proceedings brought by way of insolvency proceedings that ought to have been brought by way of Part 7 claim form by the application of CPR 3.10 , if necessary to do so, contrary to Ms Temple's primary submission that the proceedings are properly constituted in any event.

21.6. As to the question of discretion in respect of the jurisdiction to cure any procedural defect, it is submitted on behalf of the Liquidator that:

21.6.1. The procedure adopted, namely an Insolvency Act Application Notice, was not adopted because it was intended to avoid paying a large issue fee, but because that was considered to be the appropriate procedure to adopt, and the relevant proceedings were drafted by solicitors and reviewed by Counsel (other than Ms Temple). Even if the wrong procedure was adopted, there is nothing abusive in what was done.

21.6.2. Proceedings of some kind were issued within the relevant limitation period, and there is no question of the Respondents having been prejudiced by the use of the wrong procedure.

21.6.3. The Respondents can point to no further significant prejudice.

Issues

22. As I see it, four broad questions arise for consideration:

22.1. What is the true nature of the claims that the Joint Administrators sought to bring by the Substantive Application, and that the Liquidator seeks to continue;

22.2. Were the Joint Administrators, given the true nature of those claims, entitled to bring insolvency proceedings, or were they required to bring ordinary proceedings by way of CPR Part 7 claim form;

22.3. If the wrong form of procedure was adopted, what is the effect thereof, and in particular:

22.3.1. Are the proceedings as bought by the Substantive Application a nullity, and a mere piece of paper, or a formal defect, irregularity or procedural error that does not nullify or invalidate the proceedings, and which can, as much of jurisdiction, be cured;

22.3.2. If capable of cure, ought the Court to exercise its discretion in favour of the Liquidator and, if so, how;

22.4. Having regard to the procedural history, and the Court's determination of the above issues, what claims, if any, can the Liquidator now pursue, as liquidator, in respect of the monies alleged to have been unpaid on the allotment of the shares?

23. I propose to consider these issues in turn.

True nature of the claims made by the Substantive Application

24. The Respondents in their submissions sought to identify two distinct types of "call" properly so called, namely:

24.1. Calls permitted by articles of association where there is no immediate obligation on the shareholder to make a payment, with the obligation to make payment only arising upon the company or its directors making a call upon the shareholder to do so; and

24.2. Calls that might, in the context of a winding up or CVL, be made by the Court or a liquidator on a contributory appearing on a list of contributories to contribute to making up a deficiency for creditors.

The former might potentially be relevant in the context of an administration, but the latter plainly could not be.

25. The Respondents also, correctly in my judgment, point out that the present Articles of Association say nothing about calls, and confer no power on the Company or its directors to make calls on shareholders in respect of partially paid shares. Indeed, Article 21 specifically provides that shares should be paid for in full on issue, and therefore no share should, in accordance with the Company's constitution, be issued only part paid. I am therefore satisfied that, properly analysed, if the Respondents did not pay in full on allotment for their shares, then, subject to the defences that they raise, the claims against them had nothing to do with making calls, or uncalled share capital, and amount to a simple debt claims, treated as a simple contractual debt claims enforceable by the Company pursuant to s. 33(2) CA 2006.

26. Although the initial claim letters dated 19 September 2019 and the Letters of Claim dated 3 December 2019 refer to paragraph 19 Schedule 1 to IA1986, they do not purport to make a call for uncalled share capital, whether pursuant to any provision in the Company's Articles of Association or otherwise, but amount, as I see it, to no more than a request or

demand for payment, in default of which matters would be passed to solicitors *"to commence appropriate recovery action"*.

27. The power given to administrators by paragraph 19 of Schedule 1 is to "call up any uncalled capital of the company*".* Whilst the Respondents were obliged to, but on the Liquidator's case failed to pay 70% of the nominal value of their shares on allotment, I agree with the Respondents that, for the reasons considered above, it is hardly apposite to describe the process of recovering the relevant monies from the Respondents as having anything to do with calling up uncalled capital in the ordinary sense. Consequently, unless some extended meaning can be given to the reference to calling up uncalled capital of the company in paragraph 19, then paragraph 19 is not, in my judgment, engaged in the circumstances of the present case.

28. I am not persuaded that any extended meaning should be given to the references to calling up uncalled capital of the company in paragraph 19 of Schedule 1. This would involve a departure from the natural meaning of the words used, and I can see no case for any such departure. As Palmer (supra) points out at paragraph 6.203, the present Article 21 reflects the modern practice of requiring payment in full for shares at the outset, the more traditional situation being that the liability of the shareholders is contingent upon a call being made as, for example, provided for by Reg 12 of Table A contained within the Companies (Tables A to F) Regulations 1985, which conferred a power on directors to make calls in respect of unpaid share capital. One can see why it might have been considered appropriate to confer the specific power upon an administrator to exercise such a right to make a call in the context of an administration. However, the same reasoning does not extend to a claim to recover what is, properly analysed, simply a contractual debt claim.

29. In short, therefore, I am satisfied that paragraph 19 of Schedule 1 was not engaged in respect of the present claims, and that it was not open to the Joint Administrators to rely upon the same in respect of the present claims.

Was the correct procedure used to bring the claims?

30. The only basis upon which it was suggested by the Liquidator that the present proceedings were properly to be regarded as having been brought under Parts 1 to 11 of IA1986 or the IR 2016 was because the circumstances had involved the exercise by the Joint Administrators of their powers under paragraph 19 of Schedule 1 to IA 1986. It is unnecessary for me to decide for present purposes whether if, contrary to my above finding, the Joint Administrators were properly to be considered to have been excising their powers under paragraph 19, proceedings then brought to obtain payment of the uncalled capital called up by the Joint Administrators could have been brought by way of insolvency proceedings using an Insolvency Act Application Notice. However, given my finding that the paragraph 19 was never engaged, it seems to me clear that the basis relied upon by the Liquidator as permitting the use of insolvency proceedings rather than ordinary proceedings is not made out.

31. It must therefore follow that by using the procedure that they did, the Joint Administrators used the insolvency proceedings procedure in circumstances in which it was not open to

them, in accordance with IR 2016, to do so. I am supported in this conclusion by the authorities cited by the Respondents referred to in paragraph 20.4 above, to the effect that in the context of an insolvency, ordinary contractual debt claims ought to be pursued by way of ordinary action, rather than by way of insolvency proceedings, subject to any specific provision to the contrary.

The effect of the use of an incorrect procedure

Nullity or worthless piece of paper?

32. I accept the Respondents' submission that it is not open to the Liquidator to rely upon r.12.64 IR 2016, which provides that no insolvency proceedings will be invalidated by any formal defect or any irregularity unless the Court is satisfied of various specified matters. If proceedings have been brought that cannot properly be brought as insolvency proceedings because they seek relief that is not available in such proceedings, then I do not consider that they can be regarded as insolvency proceedings. That being the case, as r. 12.64 IR 2016 only applies to insolvency proceedings, I do not consider that it can apply in the circumstances of the present case.

33. This leaves CPR 3.10, which provides as follows:

> *"Where there has been an error of procedure such as a failure to comply with a rule or practice direction –*
>
> *(a) the error does not invalidate any step taken in the proceedings unless the court so orders; and*
>
> *(b) the court may make an order to remedy the error."*

34. I am persuaded that CPR 3.10 is capable of application in the circumstances of the present case, and the fact that the proceedings as issued were formulated and issued as insolvency proceedings, albeit impermissibly so, does not prevent this. I consider that a clear analogy can be drawn with *Phillips v McGregor-Paterson* (supra). It will be recalled that in this case, the liquidator's brought misfeasance proceedings by way of Part 7 claim form when they had no locus standi to bring proceedings in their own names as officeholders save through the gateway of insolvency proceedings under s. 212 IA 1986. It was argued on behalf of the defendant director that the proceedings were fatally and irredeemably flawed because the liquidators "failed to use the form of application prescribed by Parliament for insolvency proceedings" – see paragraph [22] of Henderson J's judgment. It was further argued that the liquidators had used a form of originating process that fell entirely outside the scope of IR 1986, with the consequence that there were no "insolvency proceedings" before the Court which could be validated pursuant to r.7.55 IR 1986.

35. In dealing with these submissions at paragraph 25 of his judgment, Henderson J said this:

> *"I was for a time attracted by this submission, but on reflection I am unable to accept it. I agree with the submission …. for the liquidators that the present proceedings are plainly insolvency proceedings, a term which is nowhere defined in the Insolvency Rules, by virtue of the fact that they are brought under various provisions of the*

Insolvency Act 1986. Accordingly, they are proceedings to which Part 7 of the Insolvency Rules applies, and the use of the wrong form of application is in my judgment a "formal defect" which is capable of being cured under r. 7.55. If that is right, the effect of r.7.55 is that the present proceedings are not to be invalidated by the formal defect unless the court considers that substantial injustice has been caused, and that the injustice cannot be remedied by an order of the court."

36. As the present proceedings could not properly be brought as "insolvency proceedings", then as the Respondents themselves submit, they ought to have been brought by way of Part 7 claim, or possibly Part 8 claim under the CPR, being the default method of commencing proceedings absent some specific provision providing for some alternative originating process.

37. However, the fact is that proceedings were issued, albeit using the wrong form in procedure, but correctly joining the Company as an Applicant, joining the Respondents as Respondents, and including within the Substantive Application a claim for payment of the sums alleged to be payable in respect of the 70% that it is alleged was left unpaid on the allotment of the Respondents' shares. There were, therefore, issued and commenced, albeit using the incorrect procedure, proceedings of some kind joining the correct parties, and claiming relief that could, and should have been, the proper subject matter of an ordinary Part 7 claim commenced by claim form. In the circumstances, just as proceedings incorrectly issued by Part 7 claim form were treated in *Phillips v McGregor-Paterson* (supra) as being insolvency proceedings falling within the scope of the IR 1986, so ought, in my judgment, the present proceedings incorrectly commenced as insolvency proceedings, to be treated as ordinary proceedings that ought to have been commenced by Part 7 or Part 8 claim form falling within the scope of the CPR.

38. I reject the Respondents' contention that the circumstances are analogous to a claim brought in the name of a dead person, which will be treated as a nullity – see paragraph 20.9.2 above. In that situation there is no effective party bringing the claim. In the present case there are effective parties to the proceedings as issued, it is simply that the wrong procedure has been used. This is, to my mind, very different, and readily distinguishable.

39. Thus, subject to the further points that I consider, I see no reason in principle why the present proceedings should be treated as a nullity, and why CPR 3.10 should not be capable of being prayed in aid in the same way that r. 7.55 IR 1986 was prayed in aid in *Phillips v McGregor-Paterson* (supra) to save proceedings commenced as ordinary proceedings by Part 7 claim form.

40. The further points that require to be considered are whether:

    40.1. Unlike *Phillips v McGregor-Paterson* (supra), but like *Re Osea Road Camp Sites Ltd* [2005] 1 WLR 760, the required method of proceeding in the present case is, as suggested by the Respondents, to be properly regarded as prescribed by statute or the equivalent thereof such that CPR 3.10 is inapplicable thereto; and

40.2. It matters that the Insolvency Act Application Notice was issued within existing insolvency proceedings, in distinction to the situation in *Phillips v McGregor-Paterson* (supra) where the Part 7 claim form used was an originating process.

41. As to the first point, the requirement to commence ordinary proceedings that do not fall within the scope of some special jurisdiction by way of Part 7 Claim Form is provided for by CPR 7.2(1). CPR 8.1 then sets out the circumstances in which, as an alternative, a party might use the CPR Part 8 procedure. Whilst the provisions of the CPR do, in a sense, have the force of statute, CPR 3.10 is an integral part thereof and so if the error in procedure arises under the CPR, then there is no reason why CPR 3.10 should not be applied thereto. This is in distinction to the position in *Re Osea Road Camp Sites Ltd* (supra), where the requirement to commence unfair prejudice proceedings under what is now s. 994 CA 2006 was expressly provided for by s. 459 of the Companies Act 1985 itself. The Respondents were unable to point to any other statutory provision expressly providing for how the present proceedings should have been commenced.

42. As to the second point, *Re Continental Assurance Co of London plc (in liquidation) (No 2)* [1998] 1 BCLC 583, referred to by Henderson J in paragraph [24] of his judgment in *Phillips v McGregor-Paterson* (supra), provides authority for the proposition that, certainly in the context of the regime under IR 1986, the use of an ordinary application instead of an originating application was not fatal, and was a matter that could be cured pursuant to r.7.55 IR 1986. Further, it is perhaps not insignificant that:

42.1. The new form of Insolvency Act Application Notice provided for by r. 1.35 IR 2016 does not distinguish between ordinary applications and originating applications, although the application is required to state: "where the court has previously allocated a number to the insolvency proceedings within which the application is made, that number" – r. 1.35(2)(f) IA 2016; and

42.2. Even if purporting to be brought within existing insolvency proceedings, it is perfectly permissible for an Insolvency Act Application Notice to join respondents to pursue new claims against them, such as claims brought within misfeasance proceedings.

43. Against this background, I consider that it can properly be said that what has occurred in the present case by the use of the wrong form to initiate the present proceedings against the Respondent's does amount to an "error of procedure" in respect of the procedure established by the CPR so as to fall within the scope of CPR 3.10. On this basis, I do not consider that the step taken in the present proceedings acting on the basis of such error of procedure, namely the issue proceedings using the incorrect form, is such as to invalidate the present proceedings, and render them a nullity (CPR 3.10(a)), and I consider that it is open to the Court, in the exercise of its discretion, to make an order remedying the error (CPR 3.10(b)).

Should the procedural error be cured?

44. Further, I am satisfied that the Court should, in the exercise of its discretion, cure the error, although how it should do so must, in my view, await my consideration below of the effect of the entry of the Company into liquidation and the remedies that might be open to the Liquidator thereupon.

45. The reasons why the Court should exercise its discretion in favour of the Liquidator are, in my judgment, in essence as follows:

    45.1. I do not consider that I can properly go behind the Liquidator's evidence in paragraphs 18 and 19 of his witness statement dated 19 August 2020 that the use of the incorrect form was down to an error rather than a deliberate attempt to avoid paying the significantly larger issue fee that would have been involved in issuing proceedings using a Part 7 Claim Form, and it is not seriously suggested that I should do so. I note that Solicitors drafted the Substantive Application, and therefore that the Joint Administrators relied upon legal advice. In the circumstances, I do not consider there to have been any abuse of process.

    45.2. Whilst it is true that the Respondents might be prejudiced in one sense if I do not strike out the present proceedings given that it is not open to them to raise a limitation point within the present proceedings if they are not struck out, bearing in mind that the present proceedings were commenced before the expiry of the relevant limitation period, the Respondents have not, as I see it, been prejudiced in any significant way by the use of the wrong form of originating process, or the error in procedure that has occurred itself. It is by reference to these matters that the question of prejudice is, in my view, to be considered. If matters had been dealt with correctly, then the Respondents would have the same difficulty in raising any limitation defence. The Substantive Application sufficiently identifies the claim against the Respondents, it was duly served upon them in good time, subject to the point with regard to service in Scotland on the 5th Respondent, and apart from some procedural delays they are in much the same position as they would have been in had the proceedings been commenced in the correct manner.

    45.3. It would, in my judgment, be grossly disproportionate to strike out the present significant claims against the Respondents totalling some £3.3 million having regard to the nature, extent and effect of the error in procedure made, and taking into account the other factors required to be taken into account pursuant to CPR 1.1(2) for the purposes of applying the overriding objective.

    45.4. It has not been suggested that the Liquidator is required to seek relief from sanction pursuant to CPR 3.9, but even if this were a requirement upon him, I would exercise my discretion in his favour having regard to the seriousness and significance of the procedural error, why the error occurred, and all the circumstances of the case, including those specified in CPR 3.9(1)(a) and (b).

46. I will return to the question as to how the procedural error might be cured after my consideration of the effect on the present proceedings of the entry of the Company into liquidation.

The effect on the proceedings of the entry of the Company into liquidation

47. For reasons that I have already touched upon and, as I understand it, as is accepted by Ms Temple on behalf of the Liquidator, if the Substantive Application is, contrary to my finding, properly to be regarded as a nullity incapable of cure, then the fact that the Liquidator might, as a matter of procedure, be able to use summary insolvency proceedings to recover the relevant monies claimed from the Respondents, would not provide a proper basis for allowing amendment of the Substantive Application as proposed by the Liquidators' Application because this would involve the Liquidator relying on facts other than the same facts, or substantially the same facts, upon which the claims were already based – see CPR 17.4(2).

48. Further, I consider that it must be right as a matter of principle, and again as I believe to be accepted by Ms Temple, that if the limitation period for the recovery of any monies unpaid on allotment in 2014 had expired by the commencement of the liquidation, then unless the same could be brought within the present proceedings, it would not be open to the Liquidator to seek to invoke s. 74 IA 1986 in respect of the liability of contributories to contribute in that the obligation of a member in respect of a limited company to contribute is limited to "… the amount (if any) unpaid on the shares in respect of which he is liable as a present or past member" [emphasis added] – see s. 74(2)(d) IA 1986. A member cannot, as I see it, be "liable" for these purposes in respect of a statute barred debt.

49. However, if, as I have found to be the case, the procedural error in the present proceedings did not lead to the latter being treated as invalid or a nullity in circumstances in which the defect ought, as a matter of discretion, to be cured, then I can see scope for argument for saying that if the relevant claims could, as a matter of procedure, be dealt with on a summary basis by way of insolvency proceedings within the liquidation, then the defect could and should be cured by permitting the amendments along the lines sought, and allowing the Substantive Application to continue as an insolvency proceeding. This would be in the alternative to ordering that the defect be cured by directing that the Substantive Application proceed as if commenced by CPR Part 7 claim form.

50. So far as potential summary remedies in the liquidation are concerned, subject to the limitation issue considered above, I consider that such remedies might well be available to the Liquidator. As a matter of principle, I see no reason why, if the conditions of s. 74(2)(d) IA 1986 were satisfied and monies were unpaid on shares, calls could not be made on the Respondents in respect thereof, or, alternatively, if that is not correct, why a summary remedy under s.149 as applied by s 112 IA 1986 could not be pursued. However, my concern is that each of these steps requires to be carried out by reference to "a list of contributories". Although it is open to the Liquidator pursuant to s. 164(4)(a) to settle such a list, and in all probability to do so without reference to the Respondents or other shareholders, there is no evidence that he has, in fact, done so. The process of settling a list of contributories as envisaged by s.165(4)(a) does, in my view, require a deliberative process. Thus, even if some sort of list of shareholders does exist, of which there is no evidence, I do not consider that it is open to the Liquidator to simply rely upon such a list

unless deliberated upon for the purposes of the liquidation, and not simply handed on from the administration.

51. In the circumstances, and as matters stand, I do not consider that it is open to me properly to order that the proceedings continue as insolvency proceedings based upon some potential procedural route available to the Liquidator pursuant to ss.148-150 IA 1986, as applied in the case of the present CVL by s. 112 IA 1986. Consequently, I consider that if the procedural error is to be cured, the proper way of curing it is to direct that the proceedings constituted by the Substantive Application should continue as if commenced by CPR Part 7 claim form.

Conclusion

52. It follows from the above that I do not consider that I should strike out the Substantive Proceedings as sought by the Strike Out Applications. Whilst the present proceedings have been issued using an incorrect originating process that it was not open to the Joint Administrators to use having regard to the subject matter of the present claims against the Respondents, this amounted, in my judgment, to a procedural error that does not invalidate the proceedings, and is capable of cure pursuant to CPR 3.10.

53. For the reasons set out above, I propose to exercise my discretion to cure the procedural error by directing that the Substantive Application should continue as if commenced by CPR Part 7 claim form, with the Substantive Application standing as a CPR Part 7 claim form for this purpose.

54. However, bearing in mind that the issue fee in respect of a CPR Part 7 claim has not been paid, I consider that any order curing the procedural error in this way should be conditional upon the Applicants paying the difference between the issue fee payable in respect of a claim under CPR Part 7 and the actual issue fee paid in the circumstances of the present case. I would be minded to order that the Substantive Application should be struck out if relevant amount is not paid within a specified period of time, such as 14 days.

55. Irrespective of the way in which the procedural defect might been cured, I would have been minded to direct the service of Statements of Case in order that the issues arising in the present case might be properly pleaded out. I therefore propose to direct that Particulars of Claim, a Defence and a Reply be served, and that a Costs and Case Management Conference be listed to be heard after the close of pleadings. Hopefully the appropriate time periods for service of these Statements of Case can be agreed between the parties, but if not I will determine the matter on paper, or at a hearing if there are other matters that require to be determined in consequence of this judgment.

56. I consider that it follows from my findings above that paragraph 2 of the Substantive Application should be struck out, but that otherwise, subject to the point referred to in paragraph 54 above, the Strike Out Applications should be dismissed.

57. As to the Liquidators' Application, I consider that some amendment is required to refer to the liquidation of the Company, and the change in status of the Administrators, but that otherwise the application to amend should be dismissed given that the amendments

proposed would only be appropriate if the proceedings were continuing as insolvency proceedings.

58. As to the Removal Application, it is, in my judgment, plainly right that Elizabeth Manley should be removed as an Applicant given that she is no longer an office holder. I did not understand it to be suggested otherwise.