Claims against Third Parties in Insolvency: Is there any room for the Part 20 Claim?

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Introduction

1. Where a company sues a former director, for example, or its auditors for negligence, that defendant is entitled if it so wishes to join in a third party for the purpose of claiming a contribution or an indemnity. If the same company is in liquidation, the liquidator brings such claims on the company's behalf by way of section 212 of the Insolvency Act 1986 ("the 86 Act"). Claims under section 212 are brought in the Companies Court using the summary procedure in which third party proceedings are not available. The purpose of this article is to identify the origin of this rule and consider whether it still remains applicable.

Section 212: A Summary Remedy

2. The case law concerning the rule arises almost exclusively in the context of misfeasance proceedings. Section 212, although slightly altered, is a modern version of the historical misfeasance provisions of previous Companies Acts which afforded a summary remedy in liquidation. Section 212 provides:

> *" Summary remedy against delinquent directors, liquidators, etc.*
>
> *(1) This section applies if in the course of the winding up of a company it appears that a person who—*
>
> *(a) is or has been an officer of the company,*
>
> *(b) has acted as liquidator or administrative receiver of the company, or*
>
> *(c) not being a person falling within paragraph (a) or (b), is or has been concerned, or has taken part, in the promotion, formation or management of the company,*

has misapplied or retained, or become accountable for, any money or other property of the company, or been guilty of any misfeasance or breach of any fiduciary or other duty in relation to the company.

(2) The reference in subsection (1) to any misfeasance or breach of any fiduciary or other duty in relation to the company includes, in the case of a person who has acted as liquidator of the company, any misfeasance or breach of any fiduciary or other duty in connection with the carrying out of his functions as liquidator of the company.

(3) The court may, on the application of the official receiver or the liquidator, or of any creditor or contributory, examine into the conduct of the person falling within subsection (1) and compel him—

(a) to repay, restore or account for the money or property or any part of it, with interest at such rate as the court thinks just, or

(b) to contribute such sum to the company's assets by way of compensation in respect of the misfeasance or breach of fiduciary or other duty as the court thinks just.

(4) The power to make an application under subsection (3) in relation to a person who has acted as liquidator of the company is not exercisable, except with the leave of the court, after has had his release.

(5) The power of a contributory to make an application under subsection (3) is not exercisable except with the leave of the court, but is exercisable notwithstanding that he will not benefit from any order the court may make on the application.

3. The section does not create new liabilities, but is intended to provide a more simplified procedure by which actions for recovery on behalf of the company may be brought, by way of "summary" procedure commenced in the name of the insolvency office-holder. The summary procedure is used to mean just that and it is not considered the correct route by which to litigate matters outside the winding up. The practice of the Companies Court was, where appropriate, to consider applications summarily: on paper, without oral evidence and occasionally without hearing.

4. Practices have changed. These days, in the majority of larger more complex cases, on the first return date the court will give directions as if it were an ordinary claim so that the parties are required to provide detailed statements of case, disclosure, witness statements, expert evidence, culminating in a trial with cross examination of the witnesses. This procedural move away from a summary approach would seem practically to weigh against the need for the rule against third party claims.

Nature of Third Party Actions

5. There are plainly circumstances in which a respondent may wish to bring a third party claim in the context of a section 212 application. It has been suggested that these fall under three broad headings: where a respondent seeks:

    i. To claim as against a person not a party to the action a contribution or indemnity; or

    ii. To claim any relief or remedy relating to or connected with the original subject matter of the application and substantially the same relief or remedy is claimed by the applicant; or

    iii. Any question or issue relating to or connected with the original subject matter of the application should be determined not only as between the applicant and the respondent but also as between either or both of them and a person not already a party to the action[1].

6. The case law shows that, to date, respondents to summary applications within the winding up have been required to resolve third party claims by way of separate litigation. Should the rule, then, remain or is a new approach to the question required?

Authorities & the Underlying Principles

(1) In re Land Securities

7. The line of authorities regarding a third party claim within insolvency proceedings originated with the case of *In re Land Securities*[2] which concerned a misfeasance summons[3] to recover monies from defendant directors who were said to be liable for

[1] The Practice & Procedure of the Companies Court by Boyle & Marshall, para 10-17.
[2] (1895) 2 Mans. 127.
[3] Pursuant to the Winding Up Act 1890.

repayment of dividends made from capital. The directors in turn sought to issue third party notices against the shareholders for a contribution.

8. On behalf of the directors, it was argued that: (i) whilst the relevant statute made no express provision for a third party notice to be served, such claims could be served and (ii) it must be taken to have been the intention of the statute that justice be done without repetition of proceedings between the parties. In response, it was argued that this was an entirely novel procedure and that the court had no jurisdiction to entertain such an application; but that even if it did have such jurisdiction, it ought not to exercise it.

9. The judgment is short and makes the following salient points:

    i. The directors cannot recover a contribution against the shareholders in the winding up proceedings and therefore the court has no jurisdiction to make such an order.

    ii. Even assuming the jurisdiction existed, service of a third party notice requires leave of the court and is therefore an exercise of discretion. The court would have refused to exercise its discretion at the early stage of proceedings in any event.

    It is clear that the court firmly rejected the application on the grounds of lack of jurisdiction. The basis for that assertion was not, however, elaborated upon.

(2) In re A. Singer & Co

10. The issue of a third party claim does not appear in another reported case for a further 48 years until *In re A. Singer & Co (Hat Manufacturers) Ltd*[4], in which the Court of Appeal again considered whether or not the third party procedure was appropriate in winding up proceedings.

11. The liquidator of a company had issued a summons against Lloyds bank seeking a declaration that payment of sums by the company in reduction of its overdraft was an undue or fraudulent preference and invalid, as against the bank[5]. The bank applied

[4] [1943] 1 Ch. 121.

[5] The headnote states that the liquidator sought declarations against AS as guarantor & surety and against SS as surety, but they were not joined as parties to the liquidator's application.

for leave to issue a third party notice against the sureties, who had in turn been discharged of their liabilities in that regard by the payment in issue. The registrar made no order at first instance and the bank appealed. Simonds J found against the bank on appeal and also in relation to a further point raised during the course of that hearing that the liquidator might be directed to discontinue proceedings by summons and to commence proceedings by writ, in order to allow the bank to join the third party claims as an alternative.

12. The Court of Appeal agreed with the judge at first instance that the third party procedure was not applicable to such a case as this and that no attempt had been made to introduce third parties into the summary procedure before the Companies Court since the unsuccessful application made in the case of *In Re Land Securities*. Lord Greene MR observed that:

> *"When the basis of the jurisdiction in the winding up of companies is examined, it appears to be quite plain that the third-party procedure is not applicable to winding -up."*

13. In support of this position, Lord Greene then analysed the route by which the statutory enactments provided that any such application in chambers, just as that then before the court, was to be made by summons and that *"Accordingly, we have here an application under the summary jurisdiction created by those rules."* The liquidator's application was made to the court seized of jurisdiction in the winding up. By contrast, the bank's application for leave to serve the third party notice did not involve deciding matters within the winding up jurisdiction and the distinct nature of the claim as arose between the liquidator and the bank was distinguished from the separate issue of what, if any, rights the bank had as against a third party.

14. It was central to the court's reasoning that the statutes[6] which give rise to the court's jurisdiction to consider matters within the winding up were limited solely to the winding up of companies. In other words, the court analysed the application as one made specifically under the summary jurisdiction created by the Companies (Winding Up) Rules 1929 and the judges hearing the application were those nominated pursuant to the Companies Act 1929. The third party application was deemed to fall outside the

[6] The application was made by summons pursuant to the Companies (Winding Up) Rules 1929, which were enacted by way of section 305 of the Companies Act 1929.

scope of the jurisdiction under which the judges were appointed and the corresponding statutory scheme for the winding up of companies.

15. *In re A Singer*, as *In re Land Securities*, took a narrow view of the claims which were deemed properly to fall within the jurisdiction of the winding up. It should be noted that the statutes upon which the court found it lacked jurisdiction have long since been repealed and the primary source of the Companies Court jurisdiction as regards winding up now originates in the Insolvency Act 1986 ("the 86 Act").

Was There Jurisdiction?

16. It is clear that the fundamental basis of the decision in *In re Land Securities* and followed in analysis by the Court of Appeal *In re A Singer*, was that the court did not possess the jurisdiction to join third party claims to applications within the winding up process on a summary basis. However, it is by no means clear that this was correct.

17. The Supreme Court of Judicature Act 1873 ("the 1873 Act"), along with the subsequent Supreme Court of Judicature Act 1875 ("the 1875 Act"), created one system to form the Supreme Court of Judicature to cover both common law and equity[7]. Section 24(3) of the 1873 Act provided:

> *"The said Courts respectively, and every Judge thereof, shall also have power to grant to any defendant … all such relief relating to or connected with the original subject matter, and in like manner claimed against any other person, whether already a party to the same cause or matter or not…"*

18. Jurisdiction regarding counterclaims against plaintiffs was clarified and enshrined in the 1875 Act by way of Order XIX, Rule 3 and as against third parties, by way of Order XXII, Rule 5:

> *"Where a defendant by his defence sets up any counterclaim, which raises questions between himself and the plaintiff along with any other person , or persons , he shall add to the title of his defence a further title similar to the title in a statement of complaint, setting forth the names of all the persons who, if*

[7] Each division of the High Court thereafter exercised both legal and equitable jurisdiction so that in theory any claim could be heard in any division, but, for the sake of administrative convenience, cases were allocated according to their subject matter. The court "is now not a Court of Law or a Court of Equity, it is a Court of complete jurisdiction." (*Pugh v Heath* (1882) 7 App Cas 235, 51 LJQB 367, 30 WR 553, 46 LT 321, Lord Cairns).

such counterclaim were to be enforced by cross action, would be defendants to such cross action, and shall deliver his defence to such of them as are parties to the action within the period within which he is required to deliver it to the plaintiff."

The court also had a discretion to award the defendant any relief as it thought fit[8].

19. It would appear, then, that Vaughan Williams J's statement that the court did not possess jurisdiction in winding up on an application to join a third party claim was not in fact an accurate statement of the court's powers. Whilst Lord Greene MR in *In re A Singer* attempted to undertake an analysis of the statutory means by which the court was seized of winding up cases, he also appears to have overlooked the inherent jurisdiction of the High Court, of which the Companies Court forms a part, to deal with all such matters before it.

20. The Companies Court appears to have conflated the concepts of jurisdiction and settled practice. It is quite clear from these older judgments that the summary procedure was not commonly used to deal with complex or complicated litigation including third party claims, although whether this analysis of the system remains sound must be questioned.

Jurisdiction Considered

21. In considering the differing concepts of jurisdiction and settled court custom, it has been observed:

"'The first and, in my opinion, the only really correct sense of the expression that the court has no jurisdiction is that it has no power to deal with and decide the dispute as to the subject-matter before it, no matter in what form or by whom it is raised. But there is another sense in which it is often used, ie, that, although the court has power to decide the question it will not according to its settled practice do so except in a certain way and under certain circumstances."[9]

[8] Order XXII, Rule 10.

[9] Pickford LJ in *Guaranty Trust Co of New York v Hannay & Co* [1915] 2 KB 536, 563, 84 LJKB 1465, 21 Com Cas 67.

22. This point was more recently considered by the Supreme Court in *Fourie v Le Roux*[10]; the case concerned an application for the grant of a *Mareva* injunction before proceedings were issued and absent an undertaking so to issue. On appeal, Lord Scott observed:

> *"The issue is, in my opinion, not whether Park J had jurisdiction, in the strict sense, to make the freezing order but whether it was proper, in the circumstances as they stood at the time he made the order, for him to make it. This question does not in the least involve a review of the area of discretion available to any judge who is asked to grant injunctive relief. It involves an examination of the restrictions and limitations which have been placed by a combination of judicial precedent and rules of court on the circumstances in which the injunctive relief in question can properly be granted. The various matters taken into account by the deputy judge and Sir Andrew Morritt V-C respectively in holding that Park J had no jurisdiction to make the freezing order were really, in my respectful opinion, their reasons for concluding that, in the circumstances as they stood when the matter was before him, it had not been proper for Park J to have made the order. That, in my opinion, is the real issue."*

23. This reasoning applies equally to the position of the judges of the Companies Court in *In re Land Securities* and *In re A. Singer*. Those cases should not be interpreted as meaning that the court lacked jurisdiction "in the strict sense". Rather, it was contrary to settled practice to allow third party procedures to intervene. Approached in the language of "settle practice", it is easier to see that the modern litigation conditions might justify departure from the reasoning in the older authorities. Before turning to the modern era under the Civil Procedure Rules, it is necessary to mention several further authorities that touch upon the issue.

A Developing View of the Companies Court Jurisdiction?

24. The scope of the jurisdiction of the Companies Court was considered in *In re Shilena Hosiery Co Ltd*[11] in which the liquidator of the company brought proceedings by way

[10] [2007] UKHL 1, [2007] 1 WLR 320; [2007] 1 All ER 1087.
[11] [1980] 1 Ch 219.

of summons pursuant to section 172 of the Law of Property Act 1925 against an associated company for the return of sums paid to it by the company and to avoid a contract for sale of the company's premises to a third party. The respondents objected on the grounds that the Companies Court had no jurisdiction to grant relief under section 172 on a summons and alternatively, even if such jurisdiction existed, the correct procedure was to commence such a claim by way of a writ.

25. The Court was quite clear that it possessed the necessary jurisdiction to hear the claim. Brightman J noted:

> *"The Companies Court is not a court separate and distinct from the High Court with its own peculiar jurisdiction. The jurisdiction to wind up a company is conferred on the High Court, not the Companies Court (see s 218(1) of the Companies Act 1948); nor is the Companies judge invested with a special jurisdiction not possessed by a High Court judge sitting elsewhere. The Companies Court is a way of describing the High Court when dealing with matters originating in the chambers of the bankruptcy registrar dealing with company matters, and the Companies judge is a way of describing a High Court judge when trying such matters."*

26. As to whether the court should decide matters between the company and a stranger in the liquidation on a summons, he stated:

> *"if there is a claim against a stranger which needs to be decided in order to complete the collection and distribution of the assets of the company, I find no warrant for the suggestion that it can only be litigated by summons in the Companies Court if it is based on a section of the 1948 Act. It would, I think, be particularly arbitrary if a claim arising out of an attempt to defraud creditors by preferring one of their number can properly be litigated in the Companies Court, but an alternative claim to set aside the same transaction under s 172 of the 1925 Act cannot be. I reach the conclusion that the opposition to the motions, so far as based on lack of jurisdiction, fails"*

The question of jurisdiction did not depend on the summary nature of the application; it was simply a matter of whether the court possessed the power to grant the relief sought. The court made clear that whether or not the application could be heard by way of a summons, or a writ, was a procedural matter only.

27. The court then turned to consider the question of procedure, which it held was a matter of discretion. It noted that, unlike the Companies Act 1948 or the Companies (Winding -Up) Rules 1949, the Bankruptcy Act 1914 conferred on every court having jurisdiction in bankruptcy the power to *"decide all questions whatsoever which arise in the bankruptcy."* However, that did not answer the question as to what form any such application must take in any given court.

28. The court cited *In re F&E Stanton Ltd*[12] in which the Divisional Court was asked to consider whether the county court had jurisdiction to hear an application by a liquidator for declarations regarding debentures and fraudulent preferences brought by motion. It held that the county court enjoyed the same powers as the High Court and these were powers *"to decide matters of administration and disputes arising in and in consequence of the winding up and must be decided before the winding up is completed."* Brightman J concluded that in the county court, any such application in the winding up must be by way of a motion; by parity of reasoning, the same application should be heard in the High Court by way of summons.

29. The court did refer to the case of *In re A Singer,* and noted that the specific issue then before it did not involve third party proceedings and if it had, there may be grounds for arguing that any such proceedings ought to be begun by writ. Thus, whilst the question of the nature of the Companies Court jurisdiction was clarified, the position as regards third party claims was not.

Counterclaims: Other Types of Part 20 Claim

30. As regards counterclaims, the court has been prepared to accede to such applications; the factors which have historically operated to disallow third party claims do not prevent a party to a summons claiming an indemnity from other parties to the claim. In *Re Morecombe Bowling Limited*[13] following voluntary liquidation, the liquidator issued misfeasance summons against three directors. Two of the directors issued separate summons to claim an indemnity from the third, as being primarily liable for the monies. Of the view that they could not start separate proceedings against him in the context of the misfeasance claim, they issued a summons seeking a stay and to force the

[12] [1928] 1 KB 464.
[13] [1969] 1 All ER 753.

liquidator to bring proceedings by writ in the course of which they could then make their claims[14].

31. The court held that the Rules of the Supreme Court empowered the court to give such directions as to the procedure on summons as it thinks fit and that power must include the giving of a direction that one respondent may serve upon another respondent a notice claiming an indemnity, such as corresponds to the rule allowing one defendant to claim from another defendant. Pennycuick J went on to observe:

> *"It would be altogether extraordinary if that were not the position. It would mean that where a liquidator makes a claim against two officers of the company arising out of the same series of transactions, and where one of those officers claims that he is entitled to be indemnified by the other, the whole matter would have to be litigated as against the officers severally on the liquidator's claim. Then, if the liquidator succeeded against both of them, the matter would have to be re-litigated in different proceedings as between the officers themselves. That would be an entirely absurd and unjust result."*[15]

32. The liquidator relied upon *In re A. Singer* to justify not allowing the directors to seek the indemnity. Pennycuick J noted that an indemnity was different from a third party claim. He emphasised that both respondents were already subject to the jurisdiction of the Companies Court and it did not involve settling a dispute between persons where one is outside the winding up.

33. A number of important considerations arise out of the *Morecombe Bowling* case: first, the applicable winding up rules[16] allowed the court to issue such directions as to the procedure on the summons as it thought fit and secondly, that avoidance of multiplicity of actions was held to be paramount. Both these factors remain live in any such application under the current procedural rules of court.

34. Whilst this was a decision in relation to a claim for an indemnity rather than a third party claim, it remains the case that the factors which weighed upon Pennycuick J as set out in the preceding paragraph would also be issues which might weigh in favour

[14] The Rules of the Supreme Court stipulated that a defendant to an action could not issue a third party notice without leave of the court unless the matter had been begun by writ.
[15] At p 756E.
[16] Companies (Winding Up) Rules 1949.

of allowing a third party claim on an insolvency application. Yet again, the court reiterated the reasoning in the *Singer* case that it is the bringing in of a third party unconnected to the winding up which is not permitted (although this appears to be a repetition of the *ratio* of that case without any reasoned decision on the matter).

Avoidance of Multiplicity of Actions

35. Avoiding unnecessary litigation has long been a central consideration of the courts when deciding procedural issues in claims which may involve counterclaims or third party claims. This clearly has the potential to create conflicts of principle in the Companies Court if such claims involve third parties who may be treated as falling outside the winding up process. There are clearly cases where the exercise of the court's discretion will involve a consideration as to the efficient administration of justice and avoidance of multiplicity of actions[17].

36. This point was forcefully made in *In re Therm-A-Stor Limited*[18]. The case concerned the scope of the court's powers on a summons to order payment of administrative receivers' costs by indemnity insurers[19]. The insurers argued that this was not a proper construction of the statutory power as any obligation to indemnify was a matter of contract between the parties, a private law matter outside the court's powers and not within the receivership. If the receivers wished to enforce the indemnity they ought to commence proceedings by writ, setting the claim out fully.

37. The court noted that as an alternative to the issuing of a writ in place of the summons, the receivers could issue a writ simultaneously and ask for consolidation of proceedings followed by summary judgment. Nothing would be achieved by this course other than duplication of effort (and cost). The court observed that the indemnifiers' complaint was one of form rather than substance and that the cases cited generally showed:

> *"…a reluctance on the part of the courts to allow objections as to form to interfere with the efficient administration of justice.*
>
> *The formalities imposed on different types of proceedings under the Rules of the Supreme Court are, by and large, designed to ensure that litigation is*

[17] See *In re Shilena* and *Morecombe Bowling*.
[18] [1996] 1 WLR 1338.
[19] Pursuant to section 35(1) of the Insolvency Act 1986.

conducted speedily and fairly. A framework of predefined procedures and directions helps the parties to progress litigation in an orderly manner.

…

But the formalities prescribed by the rules should not readily be allowed to undermine their proper function by becoming a hindrance to the efficient administration of justice.

…

Furthermore, the courts are obliged to take into consideration the matters referred to in section 49(2) of the Supreme Court Act 1981, namely:

> *"Every … court … shall so exercise its jurisdiction in every cause or matter before it as to secure that, as far as possible, all matters in dispute between the parties are completely and finally determined, and all multiplicity of legal proceedings with respect to any of those matters is avoided."*

38. The court then went on to consider that where an action might require - in strict form – an issue of a writ on the one hand and a summons on the other, an objection to both matters being dealt with in the same application appeared to be without purpose. Thus, it is clear that where appropriate, in accordance with the court's overriding considerations regarding administration of justice and in light of the mandatory wording of section 49(2) of the Supreme Court Act 1981, the court will look to exercise its jurisdiction in a wide and progressive manner so as to avoid such unnecessary duplication of claims.

The Australian View

39. The Australian courts have followed a similar approach in applying the rule against third party claims. In the case of *Re John Bruce Home World Pty (In Liquidation)*[20], the court was required to consider an application under section 367B of the Companies Act 1961, which then constituted the Australian statutory equivalent of section 212 of 86 Act.

[20] [1982] Vic Rp 51; [1982] VR 510 (23 February 1982).

40. The court noted at the outset that (as with section 212), the provisions did not create new causes of action, but provided a summary, and what was intended to be a prompt, means of recovering money that might otherwise be recovered by action in the ordinary way by writ. In light of the complexity of the case, counsel for the liquidator recognised the need for points of claim and discovery but submitted that this could be done speedily, to enable the matter to be disposed of quickly within the summary procedure.

41. On the other hand, counsel for the respondent directors argued that the complexity of the facts and the likelihood that the respondents would wish to bring third party proceedings in the claim (which could not be brought under section 367), meant that these summary proceedings should be stayed and a fresh action begun joining the directors as defendants and allowing all claims to be determined together.

42. The court rejected this approach and emphasised that it was for the liquidator, in his special statutory position, to decide what in form of proceedings he wished to effect recovery. It is clear that it is not the court's function to direct the liquidator as to which particular type of proceedings to be used in the recovery of assets.

43. The then court set out the purpose of the summary procedure:

> *"The purpose of s367B is, as already mentioned, to assist a liquidator in the prompt winding up of an insolvent company, and the method provided is a summary method without the usual trappings of a full scale action. Any complication of the simple procedure which may delay the determination of the issues raised and of the winding up of the company is to be avoided if possible, and the prospect of contingent liabilities of other persons as third parties is not the liquidator's concern."*

44. It is of interest that the court also went on to consider that whilst it had the power to direct that summary proceedings should be stayed in favour of allowing proceedings by writ to proceed, it ruled that the onus of establishing such a course was firmly on the respondent and that before such discretion should be exercised it was necessary for that party to show that substantial benefits would accrue[21].

[21] Citing with approval the earlier case of *Re Reid Murray Holdings Ltd (In Liquidation),* [1969] Vic Rp 39; [1969] VR 315, per Adam J.

45. It would seem that historically the Australian courts, like the English courts, gave particular emphasis to the summary nature of misfeasance proceedings in winding up. Yet, as noted above already, this emphasis may in truth be one of form over substance, in that many summary applications proceed in the same manner and with the same directions as ordinary applications. On that basis, it must now be time to revise precisely what is meant by the "summary" procedure and whether or not there is a place for third party claims within it.

Effect of the Civil Procedure Rules 1999 on Proceedings in the Companies Court

46. The CPR apply to insolvency proceedings except insofar as they are not inconsistent with the Insolvency Rules 1986 ("the 86 Rules")[22]. As already noted, whilst the 86 Act does not make any express provision for third party claims, the CPR do and there is no legislative conflict in this regard.

47. As a matter of jurisdiction and procedural powers, it seems likely that a court should in principle be minded to allow a third party claim to proceed in the form of a Part 20 Claim in accordance with the provisions of the CPR. This can be considered as an important difference in any procedural approach to be considered by the Companies Court which would not have formed part of the court's discretionary powers in the (pre-CPR) earlier cases.

48. The most recent reported decision to address the question of third party proceedings in the insolvency context is *Re International Championship Management Ltd*[23] in which claims for wrongful trading and misfeasance were brought against the former directors of the company. The directors in turn issued Part 20 proceedings against the joint liquidators' firm alleging that it had advised them negligently. The sole relief sought by the directors was that pursuant to the Civil Liability Contribution Act 1978. The firm applied to strike out the Part 20 claim on the grounds that the main claims were brought by the liquidator on the company's behalf and there was no 'common liability' for the purpose of the 1978 Act[24].

[22] This is currently r.7.51 of the 86 Rules but as of 6 April 2017, it will be found at r.12.1 of the Insolvency (England & Wales) Rules 2016 ("the 2016 Rules").
[23] [2007] 2 BCLC 274.
[24] See paragraph 29 of the judgment.

49. The court acceded to the firm's claim and granted – in the main - summary judgment on its application to strike out the Part 20 claim for want of common liability. The case is interesting because at no point does it appear to have been argued that the court was bound to dismiss the claim as a third party claim in accordance with the prevailing case law and the court ultimately allowed a much reduced Part 20 claim to proceed with permission to amend the pleadings.

Conclusion

50. The original basis for refusing to allow a third party claim to be brought within the liquidation was that the court lacked jurisdiction. On the authorities, this should be interpreted as meaning "against the settled practice of the Companies Court".

51. The question whether to allow a third party claim in winding up proceedings has not been directly addressed by the Companies Court in a reported judgment since *In re A. Singer*, but it is clear that the question of jurisdiction upon which the original decisions were based must now be revisited and reassessed, not least in light of the fundamental statutory changes which have been introduced in that time. As noted, after *In re A Singer*, the court has subsequently affirmed its jurisdiction, but nevertheless continued to follow the rule by exercising its discretion against allowing third party claims in winding up proceedings. It is time for the rule to be revisited.

52. The court will need to consider a wide range of issues beyond an assertion of settled practice, including: the connection between the third party claim and the liquidation, the power as derived from the 86 Act, a reluctance to allow an over emphasis on form[25] to interfere with the effective administration of justice and the practicalities of dealing with cases fairly including avoiding multiplicity of claims. It must be considered undesirable to have a party to insolvency proceedings either issue a claim in the High Court or otherwise as a separate application within the insolvency unless both matters are to be case managed and tried together. If that is correct, why not allow all relevant parties to be joined to the one set of proceedings, avoiding unnecessary additional cost and delay?

53. In addition to the 86 Act, it also likely that the considerations which are brought into play by the application of the CPR, such as the procedural power to allow such claims, the requirement to apply the overriding objective of dealing with a case justly and at

[25] That is, should the matter be commenced by way of an application or a claim form [summons or writ].

proportionate cost and the consequential matters referred to at r.1.1 of the CPR, ought to support the conclusion that unless such a claim is inappropriate for practical reasons, a third party claim in the form of a Part 20 Claim should be permitted. When the older cases were decided the modern rules against multiplicity of proceedings were less well developed and the modern approach to pro-active case management remained unborn.

54. There are almost certainly circumstances whereby the introduction of a third party claim will be rejected by the Companies Court: if, in what otherwise might be considered a straightforward s.212 application for a contribution to the winding up, the addition of third party proceedings would vastly increase resources required to determine the matter and the costs incurred by the liquidator in seeking so to do, then these might well be good reasons to disallow third party proceedings.

55. Overall, once it is recognised that there is no jurisdictional bar to third party proceedings under section 212 of the 86 Act and that the CPR has introduced the necessary procedural framework and form-busting culture, the Companies Court must look afresh at this rule. It is now required to apply the considerations of the overriding objective and the modern approach of the courts is to seek to achieve finality in litigation, where appropriate. Given that the majority of section 212 applications will in reality require detailed directions to trial as if they were ordinary actions, the real question to be addressed is whether permitting the third party claim will allow for determination of all the relevant issues arising out of the winding up and to deal with the case justly and at proportionate cost as between the parties. In my view, although each case is of course fact-sensitive, the overriding objective is likely to weigh in favour of allowing a third party claim.

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