Neutral Citation Number: [2018] EWHC 1405 (Ch)

Case No: CR-2015-009231

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

In the Matter of H S Works Limited

Royal Court of Justice
Rolls Building, Fetter Lane
EC4A 1NL

Date: 8 June 2018

Before :

Deputy Insolvency and Companies Court Judge Prentis

B E T W E E N :

DOMINIC DUMVILLE AND NICHOLAS NICHOLSON
(AS JOINT LIQUIDATORS OF HS WORKS LIMITED)

Applicants

-and-

GERALD IRWIN OF IRWIN & CO
(THE TRADING NAME OF FINANCIAL DYNAMICS CONSULTANTS LIMITED)

Respondent

David Eaton Turner (instructed by BLM) for the **Applicant**
Daniel Lewis (instructed by **Moon Beever**) for the **Respondent**

Hearing dates: 24 April 2018

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.

Deputy Insolvency and Companies Court Judge Prentis

JUDGMENT

This application

1. This is an application by Gerald Irwin, defendant to a misfeasance claim commenced by originating application on 30 November 2015 (the "Claim"), to strike it out "under Rule 3.4 of the *Civil Procedure Rules*; or, alternatively, under the inherent jurisdiction of the Court" (the "Application"). The basis for the Application, as described in the skeleton argument of David Eaton Turner, counsel for Mr Irwin, is that it "was served out of time… [Mr Irwin] relies upon the decision of HH Judge Purle QC (sitting as a High Court Judge) in *Re Baillies Limited* [2012] EWHC 285 (Ch); [2012] BCC 554". The ratio of that decision is identified as being that "the provisions of the CPR that applied to the validity of a claim form under the CPR should be applied by analogy to an ordinary application in insolvency proceedings". Service should therefore have occurred by 30 March 2016; whereas it was actually effected on 26 July 2016. The Application was sealed on 22 February 2018 and comes before me on an accelerated basis, trial being listed to commence on 26 June 2018.

2. The Application is opposed by the claimant liquidators, who are now Nicholas Nicholson and Dominic Dumville, represented by Daniel Lewis. They dispute that CPR Part 7 applies at all; aver that on the wording of rule 7.4(5) *Insolvency Rules 1986* ("IR86") the Claim was served in due time, or that rule 7.55 IR86 should be employed to correct any defect; and say that, anyway, whether under CPR Part 11 or under the common law, there has been a voluntary submission to the Court's jurisdiction.

History

3. H S Works Limited (the "Company") entered creditors' voluntary liquidation on 13 October 2010. From 14 December 2009 it had been in administration; Mr Irwin was the administrator. Creditors' claims in the liquidation total more than £14 million.

4. As early as 26 April 2012 the liquidators were intimating a misfeasance claim against Mr Irwin on the basis that immediately after his appointment he had entered into a "pre-

pack" sale which valued at £1 contracts and work in progress, whereas within eight days of the sale Thames Water paid £2.1 million to the purchaser company in respect of those, and 36 days later a further £860,000. Those payments were made in December 2009 and January 2010.

5. For reasons which are undisclosed, pursuit of the intimated claim was leisurely. A formal letter before claim was sent on 10 February 2015, to which BLM solicitors on behalf of Mr Irwin responded on 11 September 2015. Permission to issue was granted to the liquidators by Registrar Derrett on 27 November 2015.

6. On issue the originating application was given a return date of 11.30am on 22 February 2016.

7. On 17 February 2016 Lucy Tolond, partner at BLM solicitors and deponent to the statement in support of the Application, e-mailed her counterpart Simon Duncan at Moon Beever, referring to a letter of theirs of 22 October 2015 and saying:

"Given that the limitation period has now expired, we assume that you do not have any further instructions to pursue this matter; we would be grateful for confirmation of the same so that we may close our file".

8. At the time she wrote, Ms Tolond knew nothing of the issue of the Claim. Mr Duncan replied on 22 February to inform Ms Tolond of its issue, and said:

"This has not been served because the parties are still engaged in 'pre-action' correspondence. I hope to be able to respond in detail to your letter dated 11 September 2015 by the end of this week".

9. A few minutes later Ms Tolond e-mailed again:

"I was very surprised to receive a letter from the court this morning confirming that there was a hearing listed for this week, in circumstances where we have not heard from you since October 2015".

10. Mr Duncan replied to inform Ms Tolond of the adjourned hearing date, 11.30am on 25 May 2016, and continued:

"The Application had to be issued to stop time from running against our client... The Application relates to the subject matter of the Letter of Claim. I am not instructed to serve it as yet because the 'pre-action' correspondence continues. You would however be able to obtain a copy from the Court file, should you wish to do so".

11. Ms Tolond's response of 24 February was to say, materially:

"I look forward to receiving a response to our letter of 11 September 2015 in early course. My client's position on the application is fully and generally reserved; I note in that regard that no request was made for any form of standstill agreement".

12. Moon Beever sent the anticipated response on 15 March 2016. On 18 May 2016 they wrote again, referring to the "first hearing" of the Claim on 25 May.

"We intend to write to the Court to seek a further adjournment. This is to allow further time for your client to respond to our letter dated 15 March 2016. Please note that we are instructed to serve the proceedings such that the next hearing listed after the 25 May 2016 will be effective".

13. On 26 May 2016 Ms Tolond sought a copy of the originating application "by return". The same morning Mr Duncan confirmed that:

"We are instructed to serve the proceedings to ensure that the hearing on 30 August 2016 is effective. In the meantime, for information purposes only, we can supply a copy of the Application Notice and this is attached. Please advise when we can expect a reply to our letter dated 15 March 2016".

14. Ms Tolond picked up matters in her letter of 25 July 2016, which addressed the continued failure to serve. She chased confirmation that the liquidators were still intending to serve in time for the August hearing; and, if they were, observed that 15 minutes would be "woefully inadequate" given the issues in dispute.

"We therefore invite you by this letter to consent to… an adjournment now and to vacate the hearing on 30 August, with a view to the parties agreeing appropriate directions by consent".

15. Following service of the Claim the next day, that is what happened. On 25 August 2016 Registrar Barber approved a consent order providing for Points of Claim, Defence and Reply; disclosure and inspection; service of witness statements, deponents of which were to attend trial for cross-examination; and for a further directions hearing on 4 April 2017.

16. On 17 November 2016 Moon Beever served notice of funding.

17. On 24 January 2017 Chief Registrar Baister approved a further consent order, rectifying the defect in the originating application, which had named the Company rather than the liquidators as applicant, contrary to paragraph 75 of schedule B1, *Insolvency Act 1986.*

18. On 10 July 2017, having heard counsel, Registrar Derrett approved another consent order which allowed for a stay until 30 September 2017 for settlement discussions; for the liquidators to serve a further witness statement in reply; for Mr Irwin to rely on expert evidence; and fixing a trial date. A trial between 26 and 29 June 2018 was notified on 26 July 2017.

19. A mediation was fixed for 26 September 2017. The day before, Ms Tolond by letter informed Moon Beever that the Claim was time-barred on the authority of *Re Baillies*

Ltd and the application by analogy of CPR rule 7.5. Moon Beever's immediate response, marked "without prejudice", which has been waived before me, was that in the circumstances of the Claim having been defended up to this point, the Court would grant relief under CPR rule 7.6.

20. While the precise details of what has happened since then have been properly shrouded from me, I am aware from Ms Tolond's statement in support of the Application that between the mediation and its issue Mr Irwin was taking continued advice on the limitation point, and the parties were also continuing to comply with the directions to trial. On 26 January 2018 BLM wrote an open letter to Moon Beever wrongly saying that there had been no reply to the letter of 25 September 2017; setting out the limitation point in more detail; and warning that this Application would be issued if need be.

21. Moon Beever replied substantively on 2 February 2018 and the Application was issued on 22 February.

22. Preparations for trial are ongoing. On 6 March 2018 Deputy Insolvency and Companies Court Judge Schaffer approved a consent order allowing for amendment of the Points of Defence; service of an amended Reply; service of further evidence; and varying provisions for expert evidence. I have received no indication that those directions do not continue to be complied with by the parties.

Delay; limitation; merits; and the IR86

23. Before dealing with the rival submissions I can conveniently address four points.

24. First, delay. The reason that the Application was not made earlier was, as explained in Ms Tolond's evidence in support, that:

"...neither Mr Irwin nor those advising him were aware that the CPR provisions concerning period of validity of a claim form ought to be applied by analogy in these proceedings".

25. The reason for the elapse of time between 24 September 2017, when the point was notified, and 22 February 2018 when the Application was issued, I have described in paragraphs 20 and 21.

26. Second, limitation. The liquidators do not accept that the Claim necessarily became statute-barred 6 years after the Thames Water payments in December 2009 and January 2010. In that regard, they point particularly to heads of claim in respect of (i) a deed of novation entered into on 25 February 2010, and (ii) an ongoing alleged failure by Mr Irwin thereafter to investigate potential claims against the purchaser company, including for rescission or rectification.

27. The limitation points have not been argued out in front of me. Instead, Mr Lewis reserved his position as to which parts of the Claim should be struck out if I decided that that was the correct course.

28. It follows that for the determination of the Application only, I will assume that at least parts of the Claim were statute-barred by the time of service in July 2016.

29. Third, merits of the Claim. Neither party sought to argue these, and I was referred only in a cursory manner to the statements of case. For the purpose of this Application I will assume that, whatever the position on limitation, the Claim has merit.

30. Fourth, the IR86. It is now agreed before me that the appropriate version of the IR86 is that which pertained immediately before the amendments effective from 6 April 2010: see paragraph 1(6) of schedule 4 to the *Insolvency (Amendment) Rules 2010*. Thus Mr

Lewis accepts that references in his skeleton to rr.12A.16 and 12A.17 IR86 were misplaced.

Relevant legislation

31. By CPR rule 3.4:

"(1) In this rule... reference to a statement of case includes reference to part of a statement of case.

(2) The court may strike out a statement of case if it appears to the court…

(b) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings; or

(c) that there has been a failure to comply with a rule, practice direction or court order".

32. By CPR rule 7.5, a claim form which is to be served within the jurisdiction must be served in one of the prescribed ways "before 12.00 midnight on the calendar day four months after the date of issue".

33. CPR rule 7.6 permits the claimant to apply for an extension of time for service, which if made after the lapse of that time must comply with the conditions at 7.6(3) including those of taking "all reasonable steps to comply with rule 7.5" and acting promptly in making the extension application.

34. CPR Part 11 provides the procedure for disputing the court's jurisdiction to determine a claim. By rule 11(4) the application must be made within 14 days of filing an acknowledgment of service.

35. By r.7.51(1) IR 86:

"The CPR, the practice and procedure of the High Court… (including any practice direction) apply to insolvency proceedings in the High Court… with any necessary modifications, except so far as inconsistent with the [IR86]".

36. By r.7.4(2) upon issue of an application "the court shall fix a venue for the application to be heard.

37. By r.7.4(3) "Unless the court otherwise directs, the applicant shall serve a sealed copy of the application, endorsed with the venue for the hearing, on the respondent…".

38. Unless the case is urgent, in which event the court may shorten the time period, r.7.4(6), service is to occur "at least 14 days before the date fixed for the hearing": r.7.4(5).

39. By r.12.11, and subject to rr.12.10 and 12.12 "CPR Part 6 (service of documents) applies as regards any matter relating to the service of documents and the giving of notice in insolvency proceedings".

40. By r.7.8(1)(a) "if the applicant intends to rely at the first hearing on affidavit evidence" then that must be served by the same period; and a respondent must file affidavit evidence in answer not less than 7 days before that hearing.

41. By r.7.55 "No insolvency proceedings shall be invalidated by any formal defect or by any irregularity, unless the court before which objection is made considers that substantial injustice has been caused by the defect or irregularity, and that the injustice cannot be remedied by any order of the court".

Re Baillies Ltd

42. *Re Baillies Ltd* is the rock of authority on which Mr Irwin's application is built. It requires careful analysis.

43. Mr Baillie was defendant to a liquidator's claims, brought by way of ordinary application, for "transactions at an undervalue, fraudulent trading and transactions defrauding creditors, the latter being under s.423 [IA86]": [2].

44. Mr Baillie being resident in France, HH Judge Purle QC had on 23 April 2010 given permission to serve out and directions as to service. Mr Baillie was so served.

45. The reported case addresses first Mr Baillie's application seeking to set aside that order and the service under it. Mr Baillie was successful, because the Service Regulation, *Council Regulation (EC) 1393/2007*, had not been complied with.

46. The second part of the decision addresses the consequences. At [16] the Judge said this:

"It follows from this that, despite the order which I made in April 2010, these proceedings have not hitherto been validly served upon Mr Baillie. The liquidator nonetheless says that I should waive any defect… pursuant to r.7.55 [IR86]".

47. The first passage on which Mr Eaton Turner places the weight of the Application is the Judge's discussion at paragraph [18].

"Under the CPR, a claim form for service out of the jurisdiction has to be served within six months; otherwise it expires. There is no such provision in relation to an ordinary application brought during the subsistence of an existing insolvency process. Counsel for Mr Baillie has not challenged the suitability of bringing these proceedings by ordinary, as opposed to originating, application. He does, however, say that the court ought to apply the six-month period of validity, by analogy. Otherwise, as he points out, the office-holder could issue insolvency proceedings on the very last day of the limitation period and sit upon them indefinitely. Counsel for the liquidator says that

that is not so. He points out that the form of application requires a date to be fixed for the first hearing, which will inevitably be far less than six months ahead. That is correct, but the first hearing may not necessarily be effective".

48. The Judge expanded the last remark by reference to the case in front of him: the first hearing had been vacated and a new date fixed to allow for service. He continued, in the second passage emphasised by the applicant, at [20]:

"It is a matter of chance that the Insolvency Rules provide for a different form of process from that prescribed by the CPR for bringing a party before the court. It seems to me that counsel for Mr Baillie is correct that the court should apply the six-month period of validity by analogy. It follows that, were I to waive the defect, I would be depriving Mr Baillie of a potential limitation defence".

49. It is, though, in my judgment critical to read on. The Judge continued the same paragraph:

"I have heard no serious argument justifying an extension of the six-month period of validity…"

by which he was referring to argument on the facts before him. The importance of the particular facts was something he stressed again at [22]:

"…upon the facts of this case, a serious injustice would be done by waiving the defect or by extending the period of validity of the ordinary application in that it would potentially deprive Mr Baillie of a limitation defence. In those circumstances, given that Mr Baillie has not been properly brought before the court, there is no legitimate basis upon which I can now rectify the matter for the liquidator".

50. Then at [23] the Judge said this:

"It is said by the liquidator's counsel that the application challenging service was made unconscionably late. It is not, however, suggested that I should not entertain the application on that ground. In the case of an ordinary claim form, the CPR provide for

any challenge to the jurisdiction to be made within 14 days of an acknowledgment of service. There is no acknowledgment of service in the case of an ordinary application in insolvency, so the CPR do not directly apply. I have no doubt however that delay in making the application is a factor that I can properly take into account. However, delay in making the application has not had a significant impact in this case, as nothing of substance has happened in the proceedings during that period of delay".

51. It is I think fair to observe that in this apparently ex tempore judgment by a highly experienced companies lawyer, HH Judge Purle QC has focussed on the result rather than the reasoning which has led to it. I will investigate in a moment the analogy of the claim form, and the time for service under the IR86. What is apparent, though, is that on this r.7.55 application to validate service the Judge considered that relevant factors would include (i) limitation; (ii) whether there were reasons to extend the period for service; and (iii) delay in making the application; all those points going to whether in the words of r.7.55 "substantial injustice" had been caused to the defendant which could not fairly be remedied by an order of the Court.

Discussion

52. A starting point is this: the period for service of a claim form prescribed under CPR rule 7.5 does not apply to an insolvency application, and nor therefore its companion rule 7.6. Rule 7.51(1) IR86, importing the CPR save insofar as inconsistent with the IR86, does not assist because insolvency process need not be commenced by the claim form with which CPR rule 7.5 is concerned. Rule 12.11 IR86 does import CPR Part 6, but that addresses the mechanics of service rather than prescribing any time for service of the insolvency application, or remedies for a failure to serve.

53. Likewise, we can lay to one side CPR Part 11, as did HH Judge Purle QC, because there is no IR86 equivalent to an acknowledgment of service, and hence no trigger date for an application to contest jurisdiction.

54. For my part I am doubtful that the differences in commencement procedures between the IR86 and the CPR can be described as owing to "chance", although I have received no argument on the point. If it is "chance", it is most unlucky that what Mr Eaton Turner describes as the lacuna, being the failure to prescribe for the lapse of insolvency process unless served within a particular period, has persisted into the latest version of the Act and into the Insolvency Rules 2016. In written submissions delivered at my invitation after the hearing, Mr Eaton Turner set out the genesis of the claim form and its precursor, the writ of summons. Since at least the *Common Law Procedure Act 1852* a writ of summons was subject to a period of validity; and that was precisely to meet the risk of unfairness to a defendant against whom time for limitation purposes had been halted by the issue of the process.

55. As indicated at paragraphs [18]-[19] of *Re Baillies*, the last point is not answered by the provisions of service in the IR86 because an insolvency application does not lapse if it is not served.

56. As to those service provisions, Mr Lewis submitted that when r.7.4(5) requires service "at least 14 days before the date fixed for its hearing", the relevant fixture is the date on which the application is actually heard, being here 30 August 2016. I reject that.

56.1 First, linguistically the words "the date fixed for its hearing" refer back to the obligation on the Court on issue to "fix a venue for the application to be heard": r.7.4(2). The date and venue will be written onto the application itself, and by 7.4(3) the obligation is on the applicant to "serve a sealed copy of the application, endorsed with the venue for the hearing...". Rule 7.4(6)(b) permits the Court to authorise a short period of service where the case "is one of urgency". All those provisions are with reference to the hearing endorsed on the application. So too in my view is r.7.8(1), prescribing time for service of evidence, even though the words used there are "at the first hearing".

56.2 Secondly, the general practice or procedure of the High Court, which is imported by r.7.51(1) IR86 separately from the CPR, is to lay an obligation on a claimant or applicant to serve promptly process which they have chosen to issue. Thus

in *Battersby v Anglo-American Oil Co Ltd* [1945] KB 23, approved by the House of Lords in *Kleinwort Benson Ltd v Barbrak Ltd* [1987] AC 597, Lord Goddard stated that "It is the duty of a plaintiff who issues a writ to serve it promptly…". I note as well that in respect of an application notice the CPR requires service "as soon as practicable after it has been issued": 23APD4.1. That approach accords with the overriding objective (although, of course, there may be exceptional cases on their facts in which a different approach is acceptable, as in *Barbrak*) and removes control of court process from the hands of the person who has issued it. As the Court of Appeal said in *Hoddinott v Persimmon Homes (Wessex) Ltd* [2007] EWCA Civ 1203, [2008] 1 WLR 806 at [54]: "…service of the claim form serves three purposes. The first is to notify the defendant that the claimant has embarked on the formal process of litigation and to inform him of the nature of the claim. The second is to enable the defendant to participate in the process and have some say in the way in which the claim is prosecuted.., The third is to enable the court to control the litigation process". The same is true of service of an insolvency application.

56.3 Thirdly, having an early provision for service fulfils to some extent the public policy in maintaining regard for limitation periods, by avoiding the situation where an application may be issued within time but then unilaterally stayed by the applicant, thereby effectively extending the period of limitation.

57. As I say, that last policy is not one to which the IR86 have given absolute effect in its treatment of originating and ordinary applications because even if not served in accordance with the IR86 such an application does not lapse: it is not time-limited. But it seems to me inconceivable, as it did to HH Judge Purle QC, that the insolvency court is thereby precluded from giving full effect to the policy. On the contrary, it is a policy which it should plainly promote in its role of disposing justly of proceedings. The route to its doing so is either through r.7.55 IR86, which applies the sieve of "substantial injustice" which is not capable of fair remedial order to a technical failing; or through CPR rule 3.4(2)(b) (I exclude CPR rule 3.4(2)(c), striking out where there has been "a failure to comply with a rule, practice direction or court order" because it must be subject to r.7.55 IR86). That said, whichever route is chosen, if one is dealing with a defect in service of an application it is difficult to conceive that the result should be

different depending on the choice of route. If there is no defect or irregularity, then the route must be under CPR rule 3.4(2)(b).

58. On such an application the question is not whether the insolvency application was served outside a four (or if foreign service, six) month period. There is no such applicable period. The question is whether, given when service occurred, there can be said to be an irremediable substantial injustice if that process is continued (if there was a defect), or an abuse of the Court's process or obstruction to the just disposal of the process (whether there was a defect or not). Such an application could be brought however long or short the period of service from the date of issue. However, given that the legislature has applied the periods of four and six months to claim forms, it would be an unusual case in which a Court would find injustice or abuse of process when that period had not passed.

59. In other words, as HH Judge Purle QC said, the time periods applicable to a claim form are no more than an analogy.

60. As must further be apparent, on such an application, whether under CPR rule 3.4(2)(b) or r.7.55 IR86, the Court's powers are discretionary. An applicant is not entitled to relief just because a particular period has elapsed. The same is, indeed, also true of a claim form, in that it may be extended notwithstanding a failure to serve within its currency which has led to the subsequent intervention of a limitation defence: see *Re Barbrak* and, in a CPR context, *Anderton v Clwyd County Council (No.2)* [2002] EWCA Civ 933, [2002] 1 WLR 3174.

61. I should say that I was taken to *Re Hellas Telecommunications (Luxembourg) II SCA v Apax Partners LLP* [2016] EWHC 558 (Ch), [2016] BPIR 903, the one traceable case which has followed *Re Baillies*, for the single-paragraph dictum of Mr Registrar Jones at [96] doing just that and describing an insolvency application as "to be treated as a

claim form [to which] the 6 month requirement for service applies". The point was not apparently argued in front of the Registrar, and is therefore of little assistance to me.

62. I should also add that striking out under the Court's inherent jurisdiction, referred to as a ground in the Application, was not pursued separately before me.

Determination

63. Under the IR86, the liquidators were obliged to serve the Claim 14 days before the return date given on issue of the originating application of 22 February 2016.

64. For no good reason, they did not do that. Instead they took unilateral control of the process by, without consultation with Mr Irwin, writing to the Court to vacate the first hearing date.

65. While the Court's decision to vacate was entirely justified, it was made because it was told that the parties were still engaged in correspondence. That was an ambitious suggestion given that the last letter was about four months before.

66. It is not clear when Moon Beever would have informed Mr Irwin of the issue of the Claim had Ms Tolond not by chance sent her e-mail of 17 February 2016. As it was, she received no response until 22 February. Within the e-mails of that day is Mr Duncan's utterly inappropriate suggestion that if Ms Tolond really wanted a copy of the Claim, she could obtain it from the Court file.

67. Service was not until 26 July 2016. That was more than five months late under the IR86, and very nearly eight months after issue of the originating application. Moon Beever had effected a deliberate policy of non-service, apparently to avoid potential adverse costs consequences once the Claim was served.

68. Of great weight, service was also after expiry of the limitation periods applicable to at least some parts of the Claim: see paragraph 28 above.

69. The response to eventual service was not, though, either an application under r.7.55 because it was defective under the IR86, or an application for striking out relying on the wider issues of statute-barring. The latter, at least, was because until shortly before the point was first raised for Mr Irwin, on 25 September 2017, it had not been thought of by those advising him.

70. Instead the Claim has proceeded by way of four consent orders to the point where, subject to compliance with the last directions, it is ready for trial.

71. In those circumstances, has the defect of IR86 service caused Mr Irwin substantial injustice which cannot fairly be remedied by an order? And, even if not, is it just to continue with the Claim?

72. My answers are, respectively, "no" and "yes".

73. The Application was made not in July or August 2016, shortly after service, but on 22 February 2018. While the liquidators' failures ran from early February 2016 until 26 July 2016 I am not determining the Application as at 26 July 2016 but, with due regard to the period of significant and unexcused behaviour, as at today's date. Such prejudice as Mr Irwin is suffering now through not having available a limitation defence is attributable in my judgment not to the liquidators' failures, but to his own failure to raise the point earlier. Until 25 September 2017 everybody was addressing the Claim as though there were no limitation point deriving from service. It is now virtually ready for trial. If there is "substantial injustice" now, I do not see that that is grounded in the

liquidators' failures. Likewise, it does not seem to me unjust for the Claim to proceed to trial.

74. Mr Lewis took me to some few authorities on common law submission. I do not think that I need to base my decision on the application of that doctrine; but if I do the position would be no different.

75. From what I have been shown, the doctrine has been expressed in two different ways.

76. In *The Burns-Anderson Independent Network plc v Wheeler* [2005] EWHC 575, [2005] I.L.Pr. 38, HH Judge Havelock-Allan QC treated waiver by conduct as a form of estoppel. At [39] he said this:

"Waiver by conduct in this manner is a form of estoppel rather than a form of election. The test in estoppel is an objective test. Regardless of what the defendant knew of his rights to contest the jurisdiction, would a reasonable person in the shoes of the claimant have understood the defendant's conduct as waiving any irregularity as to service?".

77. Applying that first stage to our facts, the answer is affirmative. Going through the ordinary processes of defending a claim, up to the point they had reached in September 2017 is inconsistent with a challenge to jurisdiction.

78. Secondly, HH Judge Havelock-Allan QC took the view that as this was a form of estoppel, reliance and detriment would have to be shown. That is not consistent with the Court of Appeal cases in *Sage v Double A Hydraulics Limited* (26 March 1992), and *Deutsche Bank AG London Branch v Petromena ASA* [2015] EWCA Civ 226, [2015] 1 WLR 4225, as pointed out by George Bompas QC, sitting as a Deputy High Court Judge in *American Leisure Group Ltd v Wright* (unreported, 30 June 2015). In *Petromena* at [32] Floyd LJ said this of *Sage*:

"The *Sage* case was a case of what one might call common law waiver, the doing of an act inconsistent with maintaining a challenge to the jurisdiction. Such a waiver must clearly convey to the claimant and the court that the defendant is unequivocally renouncing his right to challenge the jurisdiction, and the application of a bystander test is plainly apt".

79. The difference in approach does not matter to the result in this case. I must be bound to prefer the *Petromena* disinterested bystander, and for the reasons I have given in paragraph 72 they would conclude that there had been an unequivocal renunciation of the right to challenge. Alternatively, were reliance and detriment on the part of the liquidators required then they can meet that by pointing to their own continued engagement in the Claim both through solicitors and through their own work as liquidators, the latter work not on its face being recoverable under any costs order and, on the evidence, not met from assets in the liquidation. Neither, I add, has any indemnity been offered by Mr Irwin in that regard.

80. The Application is dismissed.

Postscript

81. After settling the above reasons I became aware of the decision of HHJ Walden-Smith in *Re Kelcrown Homes Limited* [2017] EWHC 537 (Ch), covering some of the same ground but without citation of *Re Baillies*. Following circulation of that decision, neither party sought to argue that it altered this; and I agree with them.