Case Nos 1 OF 2019 and F72YJ422

IN THE MOLD COUNTY COURT

Law Courts, Bodhyfryd, Wrexham LL12 7BP

Date: 2 July 2020

Before :

HIS HONOUR JUDGE JARMAN QC

IN THE MATTER OF Richard Clive Hallows
IN BANKRUPTCY No 1 of 2019
AND IN THE MATTER of the Insolvency Act 1986

AND IN CASE NO F72YJ442 BETWEEN:

BRIAN GALLAGHER	**Claimant**
- and -	
HALLOWS ASSOCIATES	**Defendant**
(a firm no longer trading)	

Mr Robert Sterling (instructed by **Bond Turner**) for the **claimant**
Mr Benjamin Phelps (instructed by **RPC**) for the **defendant**

Hearing dates: 23 June 2020

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email and released to BAILII. The date and time for hand-down is deemed to be 10.30am on the 1 July 2020

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HIS HONOUR JUDGE JARMAN QC

HH JUDGE JARMAN QC :

1. Brian Gallagher claims to have suffered psychiatric injury in the workplace in July 2010 when he was a serving prison warden in Liverpool, which injury he says was caused by his employers, HMP. In June 2013, some 6 weeks before the expiry of the limitation period under the Limitation Act 1980 (the 1980 Act) for bringing a claim against HMP, he entered into a conditional fee agreement with Richard Hallows, then a solicitor and sole trader trading as Hallows Associates (the firm) to bring such a claim. However, the deadline to do so was missed and Mr Gallagher in 2017 instructed his present solicitors to bring proceedings against Mr Hallows' firm for negligence.

2. There was correspondence with the firm's solicitors and with its professional indemnity insurers, Endurance Worldwide Insurance Ltd (Endurance). In August 2018, these solicitors were asked by Mr Gallagher's solicitors whether the latter had instructions to accept service of proceedings. Without having had a reply, a claim form (the claim form) was issued on his behalf on 4 June 2019. The limitation period under the 1980 Act for bringing that claim expired the following month. The claim was then sent to the firm's solicitors on 19 September 2019, about two weeks prior to the date when the four-month period for service of the claim form expired. On 7 October 2019, after the expiry of that period, the firm's solicitors wrote to Mr Gallagher's solicitors saying they had no such instructions, and on the same day the latter found out that Mr Hallows had been made bankrupt on 30 June 2018, on a petition bought by HMRC (the bankruptcy proceedings).

3. This state of affairs has given rise to three applications, all of which were heard by me in the same hearing remotely, when Mr Gallagher was represented by Mr Sterling, and the firm was represented by Mr Phelps. The first application in time is dated 24 October 2019 and made on behalf of the firm to contest the jurisdiction of the court in respect of the claim on the grounds that there has been no valid service under the Civil Procedure Rules 1998 (CPR). Two applications, each dated 22 November 2019 are made on behalf of Mr Gallagher. One is made in the bankruptcy proceedings and seeks permission to continue the claim against Mr Hallows as a bankrupt pursuant to section 285 of the Insolvency Act 1986 (section 285). The second is to join or substitute Mr Hallows and Endurance in the claim as defendants.

4. These applications demonstrate that those now representing Mr Gallagher and the firm respectively approach this procedural conundrum from opposite starting points. Mr Sterling submits that the focus should be upon section 285 and to the statutory regime applicable to the bankruptcy proceedings. As a claim cannot be commenced against a bankrupt without permission of the court under section 285, then unless and until such permission is granted the claim could not be served. Moreover the future conduct of the claim, including any issues of service should be a matter of directions given in the bankruptcy proceedings as the purpose of section 285 is to give control of claims against bankrupts to the court dealing with the bankruptcy proceedings.

5. Mr Phelps, however, focuses on the CPR. As no indication had been given that service of the claim could be effected upon the firm's solicitors under rule 6.7(1), the claim should have been served at the usual or last known residence of Mr Hallows or his principal or last known place of business, pursuant to rule 6.9(2). This was not done within the four-month period, or at all, and no extension for service has been

applied for or obtained. Accordingly, the claim may not now be served, and the court cannot entertain the same. It would be otiose therefore to give permission under section 285 of the 1986 Act.

6. It became clear during the hearing that there is no material factual dispute between the parties. Moreover, it is common ground that the grant of permission under section 285 can be given retrospectively and that once such permission is given, steps already taken in the claim are validated, without the need to start all over again.

7. Section 285 (3) of the Insolvency Act 1986 provides as follows:

> "After the making of a bankruptcy order no person who is creditor of the bankrupt in respect of a debt provable in the bankruptcy shall -
>
> (a) have any remedy against the property or person of the bankrupt in respect of that debt, or
>
> (b) before the discharge of the bankrupt, commence any action or other legal proceedings against the bankrupt except with the leave of the court and on such terms as the court may impose."

8. David Richards J, as he then was, in *Bank of Ireland v Colliers International UK Plc* [2012] EWHC 2942 (Ch), concluded that proceedings commenced without such permission were not a nullity and could be cured with a retrospective grant of permission. He reviewed the authorities on this point, and in particular a decision of Lindsay J in *Re Saunders* [1997] Ch 60 and a Court of Appeal decision in *Adorian v Commissioner of Police of the Metropolis* [2009] EWCA Civ 18.

9. It was common ground before me that that principle is applicable to the present claim. However, the point as to whether retrospective permission would allow directions to be given as to service of the claim, as Mr Sterling submits, or whether such permission is otiose as the claim cannot now be served, as Mr Phelps submits, is not a point that is expressly dealt with in these or other authorities, so far as counsels' researches revealed. Both counsel relied upon passages in the authorities, and in particular from the judgment of Lindsay J in *Saunders*, to show that their approach respectively should be preferred as a matter of principle.

10. In the absence of authority directly on point, that is a helpful approach. Lindsay J carried out an extensive review of authorities going back over 100 years in England and Wales, and in Commonwealth countries. The Latin phrase used in some of the cases for permission that is retrospective is nunc pro tunc, the literal English translation of which is "now for then." This emphasises that the effect of giving permission retrospectively for an act is that the act has effect as at an earlier date.

11. This is strikingly indicated by the facts in *Saunders*, where Lindsay J granted such permission for the plaintiffs to commence proceedings even though the limitation period for doing so had subsequently expired. At page 65 E he said this:

> "It is [the defendants'] case that section 285(3) requires that the leave of the court to the commencement of proceedings can be

> given only before they commence; that in point of jurisdiction retrospective consent is not a possibility and that so-called proceedings begun without leave are a nullity which no late giving of leave can thereafter validate. On many facts such a submission would involve, if successful, only the making of a fresh start by way of the plaintiff seeking leave, obtaining it and then recommencing proceedings. Time and money would there have been wasted but nothing else. But in the cases before me there can be no effective fresh start as, if fresh proceedings were to be launched, they would assuredly be met with limitation defences to which, I think I may take it, the plaintiffs have as yet found no answer. Matters have thus been argued on the basis that, if the plaintiffs' existing proceedings cannot be retrospectively validated by being given leave even at this stage, then they will all necessarily fail"

12. That passage also emphasises that the act for which permission is required under section 285(3) is the commencement of proceedings. CPR Part 7 deals with how proceedings are started. Rule 7.2 provides that (1) proceedings are started when the court issues the claim form at the request of the claimant and (2) a claim form is issued on the date entered on the form by the court. The date in the present case was the 4 June 2019.

13. Rule 7.5(1) provides:

> "Where the claim form is served within the jurisdiction, the claimant must complete the step required by the following table in relation to the particular method of service chosen, before 12.00 midnight on the calendar day four months after the date of issue of the claim form."

14. That time can be extended by order under rule 7.6, but subparagraph (3) provides:

> "(3) If the claimant applies for an order to extend the time for compliance after the end of the period specified by rule 7.5 or by an order made under this rule, the court may make such an order only if –
>
> (a) the court has failed to serve the claim form; or
>
> (b) the claimant has taken all reasonable steps to comply with rule 7.5 but has been unable to do so; and
>
> (c) in either case, the claimant has acted promptly in making the application."

15. The Supreme Court considered this power in *Barton v Wright Hassall LLP* [2018] UKSC 12, in which Lord Sumption at paragraph 21 said:

> "The problem was that Mr Barton made no attempt to serve in accordance with the rules. All that he did was employ a mode

> of service which he should have appreciated was not in accordance with the rules. I note in passing that if Mr Barton had made no attempt whatever to serve the claim form, but simply allowed it to expire, an application to extend its life under CPR rule 7.6(3) would have failed because it could not have been said that he had "taken all reasonable steps to comply with rule 7.5 but has been unable to do so." It is not easy to see why the result should be any different when he made no attempt to serve it by any method permitted by the rules."

16. The manner of service is dealt with in CPR Part 6. Rule 6.7 provides for service on a solicitor within the United Kingdom as follows:

> "(1) Solicitor within the jurisdiction: Subject to rule 6.5(1), where—
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> (a) the defendant has given in writing the business address within the jurisdiction of a solicitor as an address at which the defendant may be served with the claim form; or
>
> (b) a solicitor acting for the defendant has notified the claimant in writing that the solicitor is instructed by the defendant to accept service of the claim form on behalf of the defendant at a business address within the jurisdiction,
>
> the claim form must be served at the business address of that solicitor."

17. Where no notice has been given in writing by either the defendant or the solicitor acting for the defendant, service under rule 6.7 is not engaged. Instead service must be affected in accordance with rule 6.9(2), which provides that the claim form must be served on the defendant at the place shown in the table therein set out, which on the facts of the present case means the usual or last known residence of Mr Hallows, or the principal or last known place of business.

18. It is clear, and the contrary was not argued by Mr Sterling, that the claim form as issued in the present case (leaving aside for one moment the fact that Mr Hallows was at that time an undischarged bankrupt) was not served in accordance with the above rules. Moreover, no application for an extension under rule 7.6 has been made. In my judgment given that there was no attempt to serve within time by any method permitted by the rules, it is, to use Lord Sumption's phrase, difficult to see how it could be said that the requirements of rule 7.6(3) could be made out.

19. Had it not been for Mr Hallows' bankruptcy therefore, it seems likely that once the time limit for serving the claim form expired on 4 October 2019 without valid service, that would have been the end of the claim. The question at the heart of these applications is what difference if any does the fact of his bankruptcy make, or ought to make.

20. The effect of retrospective permission under section 285 was examined in *Saunders,* from which it is clear that once such permission is given retrospectively, steps taken

between issue of the claim form and the retrospective permission do not need to be retaken. Several examples were given by Lindsay J.

21. One such example is that pleadings do not have to be refiled (at page 72F, referring to *Thomson v. Mulgoa Irrigation Co. Ltd.* (1894) 4 B.C.(N.S.W.). Another is illustrated by another case from New South Wales, In *Howe v. R.M. MacDougall Pty. Ltd.* (1939) 13 W.C.R.(N.S.W.) 180, where proceedings had run their course right down to an award to the plaintiff on a default judgment where the defendant had by mistake not attended. At page 73A after referring to that case, Lindsay J said:

> " The Chief Judge in Equity, having observed, at p. 181, that "in an ordinary case, I should have no hesitation in granting leave nunc pro tunc, and moulding the order in such a way as to see that no injustice was suffered," arranged that on the default judgment being set aside, which itself would suggest it was no nullity, he would grant leave nunc pro tunc "so as to avoid the costs of instituting proceedings de novo.""

22. At page 77H, yet another example given by Lindsay J was the grant of urgent ex parte orders, in respect of which he said:

> "Where, asks [counsel for the claimants], would be the justice of a court, such as some county courts, not having a jurisdiction in bankruptcy finding itself very willing to grant urgent relief but unable to do so because it could not grant the necessary leave to commence proceedings? It is not as if the granting of leave puts further conduct outside the court's control. What are in issue here are proceedings, matters inherently within the control of the courts in which they are pursued. It is not possible to detect any weakening in the court's control if, in cases where it would have granted leave had it been asked in time, it elects later to grant it."

23. Lindsay J concluded by referring to the form of permission in the following terms:

> "As to the form of leave, as leave to continue proceedings … is not possible because section 285(3) relates only to the *commencement* of the proceedings, there is not open to me that benign sophistry whereby courts have sometimes given leave to continue proceedings in cases where leave to commence had not been given and have thereby disguised the nature of the problem. The jurisdiction in bankruptcy, if I am right and if leave is to be given here, can only be leave nunc pro tunc to commence the proceedings. Presumably, although this would no doubt be exceptional, there would still be a jurisdiction in an appropriate case thereafter to stay their continuation under section 285(1) or (2). So much for the jurisdiction.
>
> As for the discretion, I have earlier mentioned that the trustees in bankruptcy do not oppose the granting of leave and that it has been conceded that if the jurisdiction exists the facts are

> such as to justify a grant of leave nunc pro tunc in exercise of the discretion. I am satisfied that that is so and grant such leave."

24. In the present case, Mr Hallows' trustee in bankruptcy takes a neutral stance as to whether or not permission should be given.

25. The approach in *Saunders* was held to be correct in *Adorian* and *Bank of Ireland.* In the latter case, David Richards J had regard at paragraph 32 to the purpose of section 285 in the following terms:

> "In addition to the consequences of holding that proceedings are a nullity, it is clearly relevant to have regard to the purpose of the provisions in the context of insolvency. It is important to note that the requirement for permission for the commencement of proceedings applies to insolvency proceedings under the control of the court: bankruptcy, winding-up by the court and administration. It does not apply to a company in creditors' voluntary winding-up. This suggests that the real purpose of these provisions is not so much the protection of creditors as the purpose identified by Black LJ in *Boyd v Lee Guinness Limited*:
>
> "This section is one of a series of provisions designed to ensure that when a winding-up order has been made by the court the whole of the task of supervising the collection and distribution of the company's assets should be committed to the winding-up court and, accordingly, that all proceedings having any bearing upon the winding-up of the company should remain under the supervision and control of that court."
>
> Given that purpose, it is hard to see why the court should not be permitted to grant retrospective permission if in the circumstances it is appropriate to do so."

26. The factors to be so taken into account have been referred to in a number of authorities and were conveniently summarised by David Young QC sitting as a judge of the High Court in *Bristol & West Building Society v Trustee of the property of Back and another (bankrupts)* (1998) 1 BCLC 485. Whilst emphasising that the list is not all embracing the judge indicated that the following were helpful, as set out in the headnote:

> (1) the claim should not be clearly unsustainable but the court would not investigate the merits of the claim;
>
> (2) there should be no prejudice to the creditors or to the orderly administration of the bankruptcy if the action were to proceed;

> (3) the claim should be of a type which should proceed by action rather than through the proofing procedure in bankruptcy;
>
> (4) leave was more likely to be granted where there was an insurance company standing behind the respondent to pay any judgment debt the plaintiff might obtain since, if successful, such an action was unlikely to prejudice the creditors of the respondent;
>
> (5) a condition was often imposed that the plaintiff would not enforce any judgment against the respondent without the leave of the court to ensure that the bankruptcy court retained ultimate control;
>
> (6) mere delay itself in applying for leave would not prevent leave being granted. Leave was not to be withheld simply and solely as a punishment; and
>
> (7) leave might be granted after the expiry of the relevant period of limitation to continue an action commenced within the limitation period without the leave of the court.

27. In the present case, it was not submitted that the claim is clearly unstainable or would prejudice creditors or orderly administration or should have been proved in the bankruptcy. Moreover, Endurance provided professional indemnity insurance to the firm in respect of the claim, and Mr Hallows is now discharged from bankruptcy.

28. In my judgement it is clear that as applied to the facts of this case, any permission under section 285 could only relate to the commencement of proceedings. Although the court can impose conditions under that section, in my judgment having regard to the purpose of it as explained by David Richards J in *Bank of Ireland* and to the principles summarised in *Bristol & West,* it would be inappropriate to do so in a way that retrospectively validates invalid service. Given the insurance position, such a term does not promote the collection or distribution of Mr Hallows' bankruptcy or the orderly administration of it.

29. I do not accept Mr Sterling's submission that in the present case the claim form could not have been served without permission. That is not the reason why there was no valid service. The reason was that Mr Gallagher's solicitors, unaware of the bankruptcy, attempted service by a method which was not permitted by the rules, namely service on the firm's solicitors, without having had confirmation that the latter had instructions to accept such service. Although the issue of service is not expressly dealt with in the authorities such as *Saunders,* it is implicit from some of the above examples that re-service was not required. The claim form could and should have been served in a manner permitted by the rules, in which event service would be validated by retrospective permission to commence the claim.

30. However, had it not been for the application by the firm for an order under CPR 11, I should have been inclined to grant the permission sought by on behalf of Mr Gallagher for retrospective permission.

31. Rule 11 provides:

> "(1) A defendant who wishes to-
>
> (a) dispute the court's jurisdiction to try the claim; or
>
> (b) argue that the court should not exercise its jurisdiction,
>
> may apply to the court for an order declaring that it has no such jurisdiction or should not exercise any jurisdiction which it may have."

32. The meaning of the word "jurisdiction" within that rule was explained by Dyson LJ giving the judgment of the Court of Appeal in *Hoddinott v Persimmon Homes (Wessex) Ltd* [2017] EWCA Civ 1203 at [23] as follows:

> "But in CPR 11(1) the word does not denote territorial jurisdiction. Here it is a reference to the court's power or authority to try a claim. There may be a number of reasons why it is said that a court has no jurisdiction to try a claim (CPR 11(1)(a)) or that the court should not exercise its jurisdiction to try a claim (CPR 11(1)(b)). Even if … the court *has* jurisdiction to try a claim where the claim form has not been served in time, it is undoubtedly open to a defendant to argue that the court *should not exercise* its jurisdiction to do so in such circumstances. In our judgment, CPR 11(1)(b) is engaged in such a case. It is no answer to say that service of a claim form out of time does not of itself deprive the court of its jurisdiction, and that it is no more than a breach of a rule of procedure, namely CPR 7.5(2). It is the breach of this rule which provides the basis for the argument by the defendant that the court should not exercise its jurisdiction to try the claim."

33. Whilst the court should not investigate the merits of the claim for the purpose of considering section 285, where as in the present case, the claim form has not been validly served in time, and no extension for time has been or could reasonably be made, in my judgment there is force in Mr Phelps' argument as to jurisdiction, Even if the court has jurisdiction in respect of that claim, in my judgment the court should not exercise it, and in my judgment an order should be made to that effect.

34. Accordingly in my judgement the proper disposal of the applications is that retrospective permission should be given in the bankruptcy proceedings to commence the claim, but that an order should be made in that claim that the court should not exercise jurisdiction in respect of it. The application to join parties and to amend therefore falls away.

35. I am grateful to both counsel for their assistance. This judgment will be handed down remotely. Counsel helpfully indicated that any consequential matters not agreed can be dealt with on the basis of written submissions. Any such submissions and/or a draft order agreed if possible, should be filed within 14 days of hand down.