A Matter of Forms

The use of applications and claim forms in insolvency proceedings: the case for reform[1]

> "It may…be objected that procedure is not a good theme for academic discussion. Substantive law should come first - adjective law, procedural law, afterwards. The former may perhaps be studied in a university, the latter must be studied in chambers."

The passage cited is the second sentence of the opening paragraph of F W Maitland's *The Forms of Action at Common Law*,[2] a series of lectures he gave as Downing Professor of Law at the University of Cambridge and which were published in 1909, shortly after his death. Some of you will have read them as undergraduates. Maitland wanted to show how the restrictions and complexities of old forms of legal action[3] had to be overcome by the use of legal fictions; but in spite of that, as he put it, the old forms of action continued "to rule us from their grave." The relationship between substantive and procedural law remains fraught with problems, especially in insolvency, where form and substance are inextricably linked. The topic of this short talk is an arcane procedural anomaly that rules us not from the grave but very much in the here and now. It is all to do with when you can use an insolvency application and when you need to use a claim form. It is important for reasons to which I shall come.

Application or claim form: recent case law

The spotlight was turned on the claim form/application question last year in *Re Taunton Logs Ltd (in liquidation)*.[4] The substantive application was brought by office-holders seeking, in essence, money due from the respondents arising out of share acquisitions. The respondents applied to strike it out on the footing that the proceedings had been brought in the wrong form. The question before HHJ Cawson QC, sitting as a High Court judge, was whether, given the nature of the claim (essentially a contractual claim in debt), the office-holders had

[1] I am grateful to Mena Halton, head of legal affairs at Manolete Partner plc, Alison Kirby of Manolete Partners plc and a deputy district judge, Joseph Curl QC, and Chief ICC Judge Briggs for comments and suggestions on drafts of this paper. Responsibility for the final content and views expressed rests with me.
[2] Cambridge, 1909.
[3] Maitland was, I accept, dealing with forms of action in a wide sense, not just forms as documents, although there is and always has been some connection between the nature of a legal action and the form initiating it.
[4] [2020] EWHC 3480 (Ch); [2021] BPIR 427.

been entitled to bring insolvency proceedings or whether they ought to have started their proceedings by CPR Part 7 claim form. The judge found that the office-holders had used the insolvency procedure in circumstances in which they had not been entitled to. He did not strike out the proceedings as he was being asked to do, however, since the defect was curable under CPR Part 3.10 (as opposed to r 12.64 Insolvency (England and Wales) Rules 2016, since the proceedings were not insolvency proceedings to which that rule applied).[5]

A bit of a fuss about nothing you may think, even if we can agree that the judge decided the issue correctly (as I think he did). But the decision had an unfortunate effect as a result of an opportunistic follow up that shone the spotlight even more sharply on the use of an insolvency application rather than a claim form in a case called *Manolete Partners Plc v Hayward and Barrett Holdings Ltd & Ors*[6] which at present represents the definitive word on the manner in which certain insolvency-related proceedings must be started but is, I suggest, something of a procedural set-back for the practice of insolvency litigation.

The facts of the case were simple. The applicant, a litigation funder,[7] as assignee of various claims arising out of the liquidation of a company called Blackwater Plant Ltd, issued proceedings using an insolvency application as provided for by r. 1.35 Insolvency (England and Wales) Rules 2016. The application included claims under various provisions of the Insolvency Act 1986 and claims for relief on the basis of misfeasance.[8] The third and fourth respondents took the point that a claim in misfeasance made by anyone other than an office-holder under s 212 Insolvency Act 1986 had to be brought by claim form and sought an unless order requiring the applicant to pay the additional issue fee that would have been payable had the claim been commenced under CPR Part 7.

A 20 minute slot precludes me from going through all the arguments. Suffice it to say that, unfortunately, Chief ICC Judge Briggs agreed. He held:

[5] Following the approach taken by Henderson J, as he then was, in *Phillips v McGregor-Paterson* [2009] EWHC 2385 (Ch); [2010] 1 BCLC 72; [2010] BPIR 239.
[6] [2021] EWHC 1481 (Ch).
[7] I must declare an interest as a non-executive director of Manolete Partners plc, but that is irrelevant: Manolete just happened to be a party to the case; we did not invite the application that resulted in the decision.
[8] In the context in which I am speaking it has become common to call such a claim a hybrid claim, but that is not to be equated with the use of the term in bankruptcy cases where certain rights vest in the trustee whilst certain rights remain due to the bankrupt.

> "49. As joint liquidators of Blackwater Mr Clark and Mr Renshaw [the office-holders] were able to issue insolvency proceedings using an Insolvency Application against the third and fourth Respondents.
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> 50. As assignee of the transaction avoidance claims the Applicant can bring the proceedings against the third and fourth Respondent by way of an Insolvency Application.
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> 51. Section 212 falls within Part IV of the Act. But for the assignment to the Applicant, the joint liquidators may use the section to bring the Blackwater Claims in their own name making use of the Insolvency Application procedure.
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> 52. The Applicant is not a liquidator, official receiver, contributory or creditor. A distinction is to be drawn between an assignment of claims vested in the joint liquidators and capable of assignment, claims vested in Blackwater and capable of assignment by the joint liquidators and the office of liquidator. The office is not capable of assignment.
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> 53. A Part 7 Claim should have been made to pursue the assigned Blackwater Claims."

Like HHJ Cawson, he decided that the procedural defect could be cured by ordering payment of the court fee for a Part 7 claim within 7 days of his handing down his judgment, which would put the applicant in the same position in which it would have been if it had issued the company's claim using the appropriate (claim form) procedure.

That result was perhaps unsurprising in the light of the decision in *Re Taunton Logs Ltd*, but the Chief ICC judge was himself troubled by it. He said in para 60 of his judgment:

> "I reach these conclusions with regret. The criticisms of the procedure are well made by Mr Curl [counsel for the assignee]. They do not promote a convenient or sensible or economical use of court resource. In modern parlance the result fails to ensure that claims of this nature are dealt with expeditiously, allotting an appropriate share of the court's resources. An office-holder and assignee of claims will be forced to issue claims arising from an insolvency using different procedures, in different lists within the Business and Property Courts, with a risk that without a transfer they will be case managed, at least, by different judges although the claims arise out of the same facts."[9]

In fact, in my view, it was open to the judge to come to a different conclusion. I turn to the matters which I would respectfully challenge in the reasons he gave for deciding the case as he did.

[9] Quite apart from that, the outcome was a Pyrrhic victory for the respondents who argued the point: Manolete had indicated its willingness to pay the court fee at an early stage, as a result of which the respondents were ordered to pay significant costs.

Established practice

My principal criticism is of the judge's rejection of a submission made in opposition to the relief being sought from him that the use of an application where a misfeasance claim was brought with other claims under the provisions of the Insolvency Act was established practice. I know from my own experience as a solicitor that use of an application notice was common (as indeed had been the use of a summons or originating summons before application notices replaced them). It cannot have escaped the judge's own attention during the many years he was in practice as an insolvency specialist at the bar. I shall look at some older authorities shortly, but in the meantime I make my point good by reference to a judgment of HHJ Norris QC, as he then was, and two other random cases decided in recent years.

In *Re Prestige Grindings* Ltd[10] Judge Norris, sitting as a High Court judge, rejected a submission that HMRC could not be joined to proceedings brought by originating application but had to issue a Part 7 claim:

> "I reject those submissions, which I regard as wholly technical and not conducive to attainment of the overriding objective to deal with the case justly, expeditiously and fairly whilst saving expense and allotting to it an appropriate share of the court's resources."

The first of my two random cases is *Global Corporate Ltd v Hale*,[11] a "hybrid claim"[12] decided by HHJ Matthews whose judgment is replete with references to the application (rather than claim form) by which it was commenced. HHJ Matthews was, of course, a Chancery Master, so one may assume, I think, that he would or should have been alive to any procedural irregularity in the case he was hearing; but no point was taken by the parties or indeed by him. More recently, ICC Judge Burton gave judgment in a case called *Bass & Ors v Buchanan*,[13] another hybrid claim, in which she refers to it as having been brought by way of an application.

[10] [2006] 1 BCLC 440.
[11] [2017] EWHC 2277 (Ch).
[12] I use that expression in this context to mean a claim for relief under the Insolvency Act which also includes relief not available under that Act or the parts of it identified by ICC Judge Briggs as being capable of being brought under it by application.
[13] [2021] EWHC 2740 (Ch).

Online commentary bears out my view of the practice. One commentator noted (following ICC Judge Briggs's decision):

> "It has largely been common practice to issue all insolvency claims using the procedure set out in the [Insolvency] Rules (insolvency application) instead of a Part 7 claim under the [CPR]. Many of those claims are 'hybrid' claims, where an office holder (or assignee of those claims) pleads an antecedent transaction claim pursuant to the Insolvency Act 1986 and a breach of duty claim in the alternative under the Companies Act 2006."[14]

There is more in the same or similar vein.

Ignoring history

My second challenge to Chief ICC Judge's decision is that it ignored (or paid inadequate regard to) past case law: the practice of using a summons or application has a pedigree.[15]

In re Shilena Hosiery Co Ltd[16] was a case brought by summons[17] by a liquidator seeking relief including a declaration under s 172 Law of Property Act 1925 as well as a declaration in relation to misfeasance and breach of trust against company officers. A preliminary point was taken against the liquidator that the court could not hear on a summons a claim for relief under s 172 Law of Property Act 1925; such a claim could only be commenced by writ. Brightman J rejected the point on the basis that the "claims arise in consequence of the winding up" (227F). If they did, then they could be commenced by summons in the Companies Court (see the discussion at 226G to 227B).

In re Shilena Hosiery Co Ltd was approved by the Court of Appeal in *Fabric Sales Ltd v Eratex Ltd*,[18] and a similar approach was taken in *Re Clasper Group Services Ltd*[19] in which a liquidator sought relief under ss 239 or 212 Insolvency Act 1986 by an insolvency application. At the hearing, he applied to amend his application to include further relief against the respondent as a constructive trustee, seeking an order to trace the sum claimed

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[14] Rachel Markham, "An Insolvency Claim May be Much More Expensive Following this Recent Decision," *Restructuring Global View*, Squire Patton Boggs, June 10, 2021, online, accessed 19 October 2021.
[15] The analysis of earlier case law that follows is based on an internal paper I wrote after joining Manolete Partners plc in 2017, but I should acknowledge the debt I owe to Boyle and Marshall, *Practice and Procedure of The Companies Court* (1997), sadly now out of print and necessarily out of date, but still of great value; and now to the skilful analysis of that and other case law in the skeleton argument of Joseph Curl QC who appeared for Manolete in the case under discussion and on which I have drawn with his permission.
[16] [1980] Ch 219.
[17] The predecessor of what is now an application.
[18] [1984] 1 WLR 863 (865G *per* Everleigh LJ).
[19] (1988) 4 BCC 673.

into a loan that had been made to a new company. Warner J rejected the respondent's suggestion that he should not entertain the non-Insolvency Act claim:

> "It cannot, in my opinion, be procedurally convenient or sensible or economic that the liquidator here, having quite understandably formed the view, on the evidence initially available to him, that this was a case either of a fraudulent preference or of a misfeasance within sec. 212, should now be told that, in respect of any alternative claims against the respondent, he must proceed by writ – particularly when the sum he claims is only £2,000. I am not saying that liquidators should be encouraged to bring by summons proceedings that ought to be brought by writ, only that one must have regard to the particular circumstances of each case."

While *In re Shilena Hosiery Co Ltd* and *Re Clasper Group Services Ltd* were pre-CPR cases, it would be curious to think that the introduction of the CPR or later insolvency rule changes should result in procedural complexity or a retreat from pragmatic flexibility, in particular having regard to the overriding objective in CPR Part 1, the wording of which is very much in line with the sentiments expressed by Warner J, Norris J and ICC Judge Briggs himself.

A further indication of the established practice of the courts is the fact that a claim under s 423 Insolvency Act 1986 was, it seems, thought to be capable of being brought either by means of an insolvency application (despite not being insolvency proceedings as defined) or by a Part 7 Claim Form. In *TSB Bank Plc v Katz*,[20] Arden J, as she then was, recognised that implicitly, saying:

> "I prefer the view that an application [*sic*] under s. 423 which is not made in existing proceedings in the Companies Court or the Bankruptcy Court, or which is brought otherwise than by virtue of a right to apply to those courts conferred by some other provision of Parts I to XI of the Insolvency Act 1986, may be commenced in any part of the High Court."

<u>An analogy</u>

There is specific, recognised precedent for dispensing with a claim form and using an insolvency vehicle for relief for which it was not primarily designed. Where a winding up order is sought in respect of a company that has been dissolved, it is common to seek in the petition what is often called a "double barrelled order," i.e. an order restoring the company to the register and then an order winding it up. It is mentioned in para 9.7 of the Insolvency Practice Direction.[21] Normally a claim to restore a company has to be brought – by claim

[20] [1997] BPIR 147.
[21] [2020] BCC 690.

form. No one has yet suggested that the Practice Direction lacks force as to the practice of the court. Perhaps someone now will.

A matter of mere form?

Rule 1.35

My third criticism of Judge Briggs's reasoning goes to the weight he attached to the wording of r 1.35 Insolvency (England and Wales) Rules 2016. In paragraph 26 of his judgment he said:

> "The Rule provides that an Insolvency Application must state that it is made under the Act or Rules (as applicable) and state the section of the Act or paragraph of a Schedule to the Act or the number of the rule under which it is made. It follows that if an applicant is not able to state that the application is made under the Act or Rules it is not appropriate to make the claim by way of an Insolvency Application as Rule 1.35 cannot be satisfied.

I am not convinced of the logic of this. Rule 1.35 deals with "Standard contents and authentication of applications to the court under Parts 1 to 11 of the Act." Leaving to one side any question of the weight that can be given to the heading of a legal provision in an Act or Rules, the substance of the rule is about content and form: it does not purport to *define* an insolvency application or limit its use; it simply sets out what it must contain. It is about form rather than procedure, much less substance.

It is a matter of regret that the learned judge chose not to take the pragmatic course I think he could have; but it is understandable too: for I must accept that the recent authorities I have mentioned predate *Taunton Logs*, and the older authorities which I have mentioned deal with situations that were not necessarily representative of the norm but arose out of specific circumstances; I cannot wholly sidestep the reference to Parts 1 to 11 of the Act in r 1.35; the judge was arguably bound by HHJ Cawson's judgment in the *Taunton Logs* case; and now that we have authority on the application/claim form point it will no longer be feasible to rely on the corrective provision in the CPR invoked in *Taunton Logs* that was designed to deal with error as opposed to conscious conduct.[22] In reality, Judge Briggs probably reached the

[22] CPR 3.10 involves the exercise of discretion. One can readily see that it was appropriate to exercise it in *Taunton Logs* in relation to an error; it is less easy to see how it can be in the future in the light of that case and the Briggs judgment,

right conclusion or felt he could not do other than what he did. The result is we are now all stuck with the application + claim form route for "hybrid claims."

Assignment

The ability of certain insolvency office-holder to assign certain claims given by s 246ZD Insolvency Act 1986 is welcome but gives rise to considerations which may have been overlooked when the provision was introduced. As we know,

> "Assignment may be defined as the transfer from one person (the assignor) to another (the assignee) of the whole or part of an existing right or interest in intangible property presently owned by the assignor."[23]

It will in significant respects put the assignee into the shoes of the assignor. But the assignment of a chose in action does not always carry the procedural consequences attendant on assignment itself. In *Investors Compensation Scheme Ltd v West Bromwich Building Society*[24], one of the questions was whether a claim for rescission of a mortgage was itself a chose in action capable of being assigned. The House of Lords held that it was not. Lord Hoffmann said:

> "[A] chose in action is property, something capable of being turned into money […] [W]hat is assignable is the debt or other personal right of property. It is recoverable by action, but what is assigned is the *chose*, the thing, the debt or damages to which the assignor is entitled. The existence of a remedy or remedies is an essential condition for the existence of the chose in action but that does not mean that the remedies are property in themselves, capable of assignment separately from the *chose*."

That may explain why the procedural provision relating to misfeasance (s 212 Insolvency Act 1986) was excluded from s 346ZD. But the consequence is unfortunate.

What is to be done?

For largely pragmatic reasons, no appeal was mounted against the judgment in *Manolete v Hayward*, so we are stuck with it for the moment.

A possible way of overcoming the difficulty addressed in this paper might be for a party in the position of Manolete to take an assignment of an undisputed debt from a creditor in the liquidation, thus making itself a creditor who, alongside the official receiver, liquidator or a contributory, is identified as a party who may apply under s 212 Insolvency Act,[25] but I

[23] *Burton v Camden LBC* [2000] AC 399 at 408.
[24] [1997] UKHL 28; [1998] 1 All ER 98; [1998] 1 WLR 896.
[25] Insolvency Act 1986 s 212(3).

recognise that that is a mischievous suggestion and that the desirability of taking that step would depend on the price of the assignment. It is a bit of a sledgehammer to crack a nut. It would also only address a case where relief was sought using the s 212 route, which in my view is too narrow a solution. The proposition serves, however, to underline the absurdity of the present situation.

I do not suggest some change to the law of assignment or fiddling with primary legislation to deal with a point of procedure. I suggest that the problem I have addressed in this paper could be overcome by a change to the Insolvency (England and Wales) Rules 2016.

The Insolvency Rules 1986 defined insolvency proceedings as "any proceedings under the Act or the Rules."[26] There is no corresponding definition in the Insolvency (England and Wales) Rules 2016, although r 1.1(2) says that "references to insolvency proceedings and requirements relating to such proceedings are, unless the context requires otherwise, limited to proceedings in respect of Parts 1 to 11." Insolvency proceedings are, however, defined in the Insolvency Practice Direction as

> "(a) any proceedings under Parts 1 to 11 of the Act, the Insolvency Rules, the Administration of Insolvent Estates of Deceased Persons Order 1986 (SI 1986/1999), the Insolvent Partnerships Order 1994 (SI 1994/2421) or the Limited Liability Partnerships Regulations 2001; (b) any proceedings under the EU Regulation on Insolvency Proceedings or the Cross-Border Insolvency Regulations 2006 (SI 2006/1030); and (c) in an insolvency context an application made pursuant to s 423 of the Act."[27]

There is, then, no definition in the existing Rules that could be expanded to do what I would like.

A single set of rules now deals with the standard content and authentication of applications under Parts 1-11 Insolvency Act 1986 (except they do not apply to winding up petitions, bankruptcy petitions and certain other applications).[28] The thrust of these would appear to be (unhelpfully) to limit both insolvency proceedings and insolvency applications to use in connection with relief under Parts 1-11 of the Act, which is borne out by the two judgments discussed above.

A way to achieve a more desirable procedural outcome (and the effect plainly thought desirable by Chief ICC Judge Briggs) would be to amend r. 1.35 to provide an additional rule

[26] Insolvency Rules 1986 r 13.7.
[27] Para 1.1(6).
[28] Insolvency (England and Wales) Rules 2016 r 1.35(1). A number of rules deal with petitions. It must also comply with any relevant requirements of r 1.6.

(1.35(4)) to the effect that an application may be used to claim additional defined relief (misfeasance/breach of duty brought other than under s 212 Insolvency Act; or "any other relief arising out of or in connection with the administration or winding up of a company or the bankruptcy of an individual"[29]); or, less ambitiously, something to the effect that such relief may be included in an insolvency application made seeking relief under Parts 1-11 Insolvency Act where it is connected to the other relief sought. Another course might be to remove the reference in r 1.35 to "Parts 1 to 11" of the Act so that the rule would apply simply to "applications under the Act" and, by way of belt and braces, specifically including claims under the Companies Act 2006 arising out of the relevant insolvency. A further alternative would be to (re)define "insolvency proceedings" widely in the Rules and allow any such proceedings to be brought by application notice. Any change may also involve consideration of CPR practice directions relating to the issuing of applications and the allocation of proceedings to the appropriate list, but that should be no obstacle to making an obvious and desirable change.

Reasons to make the change

There are two reasons why I suggest this (or some similar) change should be made.

The first is that use of an insolvency application is cheaper than issuing a claim form. This is an important consideration in insolvency cases where funding is often a problem. That may be said to be at the expense of HMCTS's ability to recover the maximum court fee, but it is worth bearing in mind that since HMRC has become a preferential creditor, the government may well benefit as much as it loses.

More importantly, however, practitioners will benefit from the faster and more streamlined procedure associated with the use of an insolvency application. The claim form procedure is more cumbersome and costly. The need to issue in two forms that carry different procedural consequences which often have to be reconciled is plainly undesirable, yet that is the effect of the *Taunton Logs* and *Blackwater* decisions. So, where an insolvency application is issued before an ICC judge, and a claim form for misfeasance has to be issued as well (often in the mainstream Chancery list), the recent practice of the Chancery masters has been to transfer claim form misfeasance proceedings started before them to the ICC judges, although the

[29] I accept that some restriction might be required. To take an obvious example, it would usually be inappropriate to use the application route to bring professional negligence proceedings against a former office-holder.

practice has not been entirely consistent.[30] The ICC judges then usually direct the claim form proceedings to continue as if they were brought by application. The proposed (or any similar) change would obviate the necessity for those steps and save time and costs as well as bringing uniformity of procedural approach. It would also further the objective set out in CPR 1.1 and reflect the aspiration of Warner J for actions to be "procedurally convenient [and] sensible [and] economic" and HHJ Norris's similar dictum in *Prestige Grindings*.

The Insolvency (England and Wales) Rules 2016 are undergoing their first review. I submit that that review should give consideration to ironing out the problem I have addressed in this short paper and solving it in the way I suggest – or by some better means. I am not alone in that hope. I have heard it expressed by many insolvency professionals, and I note that a recommendation similar to mine has been made by the ICAEW in its response to the Insolvency Service's consultation on the review.[31]

A postscript

Since this paper was presented[32] a further case has been reported where the court had to consider the use of a claim form or an application, this time in a bankruptcy case.

Gostelow & Anor v Hussain & Ors[33] was an appeal from a decision of a deputy district judge sitting in the County Court in Brighton. The judge had dismissed most of the trustees in bankruptcy's application for possession and sale of a property on the basis that the application had been made by application notice when it should have been made by claim form, such that the court had no jurisdiction. Peter Knox QC (sitting as deputy High Court judge), hearing the appeal, was robust in overturning that decision.

The first issue before him was, he said, the question "[D]oes the 1986 Act provide that an 'application' under s. 335A is to be made…under the procedures set out in the 2016 Rules? In my judgment, it plainly does."

He explained why:

[30] Whilst this approach is working reasonably well in the Rolls Building at present, there is plainly scope for much to go wrong in the transfer process, especially if more than one court is involved (e.g. if the claim form has to be issued in the County Court and the application in the High Court).
[31] ICAEW Representation 61/21: *First Review of the Insolvency (England and Wales) Rules 2016: Call for Evidence*, 30 June 2021, paras 39-40.
[32] On 19 November 2021.
[33] [2021] EWHC 3276 (Ch).

> "This is because s. 412 of the 1986 Act provides that the Lord Chancellor, *'may .... in the case of rules that affect procedure, with the concurrence of the Lord Chief Justice, make rules for the purpose of giving effect to Parts 7A to 11 of the 1986 Act'*. S. 335A of the 1986 Act is in Part 9 of the 1986 Act, and therefore the rules made by the Lord Chancellor with the Lord Chief Justice's concurrence are evidently intended to apply to s. 335A. Those rules were initially the Insolvency Rules 1986, and they are now the 2016 Rules, as made clear in their preamble (*'... the Lord Chancellor makes the following rules in exercise of the powers conferred by sections 411 and 412 of the Act ... '*)."

He went on to consider r 1.35, saying:

> "[I]t is plain from all this that (a) the purpose of the 2016 Rules is to *'give effect'* to Parts 7A to 11 of the 1986 Act by providing rules of procedure for those Parts; (b) amongst those rules of procedure is rule 1.35, which explains how to bring an 'application' under those Parts (subject only to the express exceptions mentioned); and therefore (c) rule 1.35 explains how one is to bring an application under s. 335A of the 1986 Act."

Various other points fortified him in his view:

> "(a) This is the natural reading of the material wording itself of s. 335A, i.e. *'Any application ..... shall be made to the court having jurisdiction in relation to the bankruptcy'*. Theoretically, one could read this as saying no more than that if (for example) the bankruptcy has been transferred to Brighton County Court, then the application must be made to that court, albeit by way of claim form under the CPR, but it is difficult to see why the statute should have intended such a curious reading.
> (b) It makes good sense that the court's attention should be drawn at the point of issuing the proceedings under s. 335A to the fact that the application is one against a bankrupt, as provided for by the specific rules in rule 1.35 (see in particular subparagraphs (d) (e) and (f)), so that the court can immediately identify that the claim relates to a bankrupt, and so that it can be added to the court file relating to him to ensure that all questions relating to the bankruptcy are contained and can be found in one court file, rather than in a number of different ones.
> (c) If the judge's conclusion were correct, then it would appear to follow that applications under the analogous provisions in s. 336 and 337 of the 1986 Act (which provide for making orders under s. 33 of the Family Law Act 1996 where non-bankrupt spouses or members of the bankrupt's family are in occupation) should be made not by way of application under the 2016 Rules, but under the procedures appropriate for one under s. 33 of the Family Law Act. However, there is no authority to this effect, and it is difficult to see why this should have been intended.
> (d) Last but not least, both Mr Justice Warren, in *Pickard and another v. Constable* [2018] BPIR 149 (at paragraph 2), and Lord Justice Nugee in *Bell v. Ide* [2021] 1 WLR 1078 (at paragraph 37) appear to have taken it as read that an application under s. 335A is to be made by way of application under the 2016 Rules. It is implausible that two such experienced judges would have done so if there were any doubt as to the correctness of this proposition."

Allowing the appeal, he also referred to *Re Taunton Logs Ltd*, saying that, if he had found the proceedings defective, he would have cured the defect, as HHJ Cawson had in that case.

Curiously there is no reference in his judgment to *Manolete Partners Plc v Hayward and Barrett Holdings Ltd & Or* which appears not to have been cited to him. The decision of Peter Knox QC is welcome in upholding the use of an application rather than a claim form in circumstances that would appear, on one view, to be uncontroversial (but arguably more widely too). A contrary view might be that s 335A Insolvency Act merely provides a trustee with recourse to the Trusts of Land and Appointment of Trustees Act 1996, much as s 212 affords a procedural route to an office-holder, which would mean that the deputy district judge was right. Whatever view one might take, this latest case highlights the confusion that now exists and the need for reform of the kind advocated in this paper.

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