



**IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS  
FROM THE GRAND COURT, FINANCIAL SERVICES DIVISION**

**CICA (Civil) Appeal 005 of 2023  
(FSD 88 of 2019 (RPJ))**

- (1) RITCHIE CAPITAL MANAGEMENT L.L.C.**
- (2) RITCHIE CAPITAL MANAGEMENT SEZC, LTD.**
- (3) RITCHIE RML TRADING, LTD.**
- (4) RITCHIE SPECIAL CREDIT INVESTMENTS, LTD.**
- (5) RHONE HOLDINGS I. LTD**
- (6) RITCHIE STRUCTURED MULTI-MANAGER, LTD.**
- (7) YORKVILLE INVESTMENTS I, L.L.C.**

**Appellants**

**AND**

- (1) LANCELOT INVESTORS FUND, LTD. (IN OFFICIAL LIQUIDATION)**

**Respondent**

**Before:** The Hon Justice John Martin KC, Justice of Appeal  
The Rt Hon Sir Richard Field, Justice of Appeal  
The Rt Hon Sir Alan Moses, Justice of Appeal

**Appearances:** Mr Tom Lowe KC instructed by Mr Peter Sherwood and Ms Jasmin Davies  
of Carey Olsen for Appellants  
Mr Adrian Beltrami KC instructed by Mr Guy Manning of Campbells for  
the Respondent

**Heard:** 2 November 2023

**Draft circulated:** 14 August 2024

**Judgment delivered:** 2 September 2024

## JUDGMENT

### **MARTIN JA:**

1. There is an established principle of insolvency law, derived from *Re General Rolling Stock Ltd* (1872) LR 7 Ch App 179 (“General Rolling Stock”), that the passage of time does not prevent claims which were not statute-barred at the date of insolvency from being proved in the insolvency at any time thereafter, even though the limitation period has in the meantime expired. This application for leave to appeal raises the question whether that principle applies not merely to proofs but also to ordinary proceedings against a company in liquidation, such that the running of the time allowed by the Limitation Act for the bringing of proceedings in tort against a company is suspended (or tolled, in the expression used by the parties) upon the making of a winding-up order in respect of the company.
2. This question was answered in the negative by Parker J, who in consequence by order dated 4 April 2023 struck out proceedings brought by the applicants (whom I shall call collectively “Ritchie”) against Lancelot Investors Fund Ltd (in Official Liquidation) (“Lancelot”) on the ground that they were statute-barred. The judge refused leave to appeal; but by order of the President dated 5 June 2023 the application was directed to be heard by the full court, the hearing of the appeal to follow immediately if leave were granted. At the outset of the hearing we indicated that, since determination of the limitation question would decide both the application for leave and the appeal itself, we would hear them together.

### *Background*

3. Lancelot is a Cayman company which operated as a feeder fund for investment into companies run by Thomas Petters. It transpired that the Petters companies were run fraudulently; that the inventory which was supposed to provide security for the investments did not exist; and that Mr Petters had been operating a US\$3.65 billion Ponzi scheme. When this was discovered, the Petters companies and affiliates were placed into bankruptcy under Chapter 11 of the United States Bankruptcy Code in Minnesota in October 2008; Lancelot (and two other related funds) filed for bankruptcy in Illinois under Chapter 7 of the Code on 20 October 2008; and on 10 December 2008 Lancelot went into official liquidation in the Cayman Islands.
4. Ritchie is a group of funds and investment managers which lost a great deal of money – said to be in excess of US\$200 million – in the Petters Ponzi scheme. It instituted a large number of

proceedings in the United States, most of which were stayed or dismissed because of the bankruptcy of the Petters companies.

5. On 21 May 2019, Ritchie commenced these proceedings in the Cayman Islands (with leave of the Grand Court so far as Lancelot was concerned, as described below). There were originally two defendants: Lancelot, and General Electric Company (“GEC”). Ritchie claimed against both defendants in deceit and unlawful means conspiracy. In relation to Lancelot, Ritchie claimed in deceit on the basis of what it said were fraudulent misrepresentations as to the existence of arrangements securing all investments made by Ritchie through Lancelot, and fraudulent misrepresentations that Lancelot was monitoring Mr Petters’s delivery and payment obligations; and it claimed in conspiracy on the basis that Lancelot conspired with others, including Mr Petters and his companies, to use unlawful means to obtain funds from investors. In relation to GEC, which had at one time advanced (through a subsidiary) revolving credit facilities to two of the Petters companies, Ritchie’s claim in deceit related to a “reference” made in a letter dated 4 January 2000 addressed to Mr Petters, on which Ritchie said it had relied and which was said to amount to a fraudulent misrepresentation; and its claim in conspiracy asserted that GEC had conspired with Mr Petters and/or one of his companies to perpetuate the Ponzi scheme by unlawful means (consisting of the alleged deceit, and dishonest concealment of the fraud).
6. By summons dated 13 December 2019, GEC applied for an order setting aside the ex parte order previously made giving leave to serve the proceedings on it out of the jurisdiction. This application was granted by Parker J by order dated 21 December 2020 (“the GEC Order”) made consequent on a judgment handed down by the judge on 15 December 2020 (“the GEC Judgment”). In the GEC Judgment, the judge found in favour of GEC on four grounds: (a) Ritchie’s claims against both Lancelot and GEC were out of time and statute barred, the primary limitation period having expired in 2014; (b) the dismissal of equivalent proceedings brought by Ritchie against GEC in New York gave rise to an issue estoppel; (c) the Cayman Islands were not the appropriate forum; and (d) Ritchie had not made full and frank disclosure in its application for leave to serve out of the jurisdiction.
7. Leave to appeal against the GEC Order was refused by Parker J. Ritchie applied to this court for leave to appeal, and the application was heard by the full court in September 2021 and dismissed in July 2022. The grounds on which the application was dismissed were that there was no adequate ground of challenge to the judge’s conclusions in relation to appropriate forum and the failure to make full and frank disclosure. The court did not address the other two bases of the judge’s decision, limitation and issue estoppel, Moses JA (with whose judgment Morrison JA and Goldring P agreed) saying this:

“That I have not dealt with the other arguments advanced in relation to other grounds is not to be taken as an expression of any view as to their merit. I have not done so because no appeal is possible unless, as I have said, Ritchie could establish that each and every basis on which the judge set aside his order is arguably wrong. In my judgment, it cannot do so”.

8. On 1 November 2022, Lancelot – by that stage the only defendant, following the removal of GEC from the proceedings – applied to strike out and dismiss Ritchie’s claims against it on the basis that those claims were statute barred. By order dated 4 April 2023 Parker J acceded to that application by reference to the reasons previously given in the GEC Judgment, and refused leave to appeal. As I have said, Ritchie’s application to this court for leave to appeal was referred by the President for decision by the full court.
  
9. In the GEC Judgment, the judge dealt with the limitation question in the following way. He recorded Ritchie’s argument that the consequence of Lancelot’s liquidation on 10 December 2008 was that time ceased to run on all existing liabilities, so that Ritchie’s claims were not time barred against Lancelot. The judge described this as a “rather startling proposition”, leading to “a most surprising outcome”, and rejected it on three grounds:
  - (1) Section 4 of the Limitation Act prescribed a six-year limitation period for actions – defined by section 3(1) of the Act as meaning “any proceedings in a court of law” – in tort. Ritchie’s claims in deceit and unlawful means conspiracy were clearly actions in tort. Nothing in the Limitation Act or the Companies Act or any other Cayman statute provided for the suspension of the running of time for such actions upon the entry of a defendant company into liquidation. The statutory time limit therefore applied.
  
  - (2) The authorities, beginning with *General Rolling Stock*, did not support the proposition that the provisions of the Limitation Act should be disregarded in this situation. *General Rolling Stock* was dealing specifically with the proof of debt process, and the effect of the case was that the Statute of Limitations “had nothing to do with when the proof of debt needed to be submitted in the liquidation process which had its own regime”. The case was dealing with a different regime to the Limitation Act as regards the bringing of causes of action, and was not authority for the proposition that the effect of Lancelot’s insolvency was to suspend time for the

commencement of legal proceedings pursuant to the underlying cause of action, which was governed by the Limitation Act. The subsequent English Court of Appeal decision in *The Financial Compensation Scheme Ltd v Larnell* ([2006] QB 808: “Larnell”) did not extend the principle to ordinary actions, but confirmed that the proposition to be derived from *General Rolling Stock* was limited to the position of proofs in a liquidation process.

(3) It made no sense for the Limitation Act not to apply to actions brought by way of court proceedings simply because a defendant company had been wound up. To disapply it would be contrary to the policy behind the Limitation Act requiring actions to be commenced within a reasonable time period for there to be certainty and finality.

10. Before considering the merits of the application for leave, it is necessary to describe the circumstances in which Ritchie was permitted to institute proceedings against Lancelot. Section 97(1) of the Companies Act provides that:

“When a winding up order is made or a provisional liquidator is appointed, no suit, action or other proceedings, other than criminal proceedings, shall be proceeded with or commenced against the company except with the leave of the Court and subject to such terms as the Court may impose”.

11. On 30 August 2017, Ritchie applied to the Grand Court for leave to bring proceedings against Lancelot. The application was heard on 16 and 17 April 2018, but was compromised before judgment was given. The compromise was embodied in a Deed of Settlement (“the Deed of Settlement”) dated 21 October 2018 and sanctioned by the Grand Court on 5 November 2018, made between Lancelot, the Official Liquidator (“the OL”) and Ritchie. By it, the parties agreed to compromise Ritchie’s application for leave to issue proceedings against Lancelot and an application by the OL for directions consequent on the determination of Ritchie’s application. The Deed of Settlement provided so far as relevant that the OL consented on terms to Ritchie being granted leave to bring proceedings against Lancelot (clause 2.1); that upon the Grand Court giving leave to bring proceedings Ritchie should “not file any proofs of debt or assert any claims, actions or proceedings of any nature whatsoever against Lancelot in the Winding Up Proceedings, the Grand Court, the Bankruptcy Proceedings, the Bankruptcy Court or any other court or tribunal in any jurisdiction (save for bringing the Action in the Grand Court and any appeals in respect thereof)” (clause 2.2 (a)); that “any amounts which Lancelot is ordered to pay to any of the

Ritchie Claimants in respect of the claims... shall be subordinated behind the claims of Lancelot's unsubordinated creditors, and shall rank *pari passu* with the claims of shareholders in Lancelot" (clause 2.6); and that pending the settlement or determination of Ritchie's proceedings the OL should retain 17.5% of any further interim distribution as a reserve against Ritchie's claims and the costs of them (clause 2.7).

12. By a consent order dated 8 January 2019, Kawaley J gave Ritchie leave pursuant to section 97(1) to commence proceedings against Lancelot in the form of a supplied draft amended Statement of Claim, subject to provisos that no causes of action beyond those contained in the draft should be asserted against Lancelot, and the overall level of damages claimed should not be increased beyond those claimed in the draft. As I have said, the proceedings were commenced on 21 May 2019 and struck out as against Lancelot by Parker J's order of 4 April 2023.

#### *General Rolling Stock and Larnell*

13. Two cases are central to the arguments on the application: General Rolling Stock itself, and Larnell. It is desirable to deal with them in general terms at this stage: their application to the present case will be considered further below.
14. General Rolling Stock. General Rolling Stock Company Limited ("the company") was wound up in February 1865; debts and claims were certified in December 1870; and in January 1871 the liquidator paid a dividend to the admitted creditors. In March 1871, the liquidators of the Joint Stock Discount Company claimed in respect of bills of exchange which had been accepted by the company and had become payable in February and March 1865, and were given leave to prove their debt, not disturbing any previous dividends. The liquidator of the company set up the statute of limitations in opposition to the proof, and the Master of the Rolls held that the statute was a bar to proof of the debt. The Court of Appeal in Chancery allowed an appeal. James LJ said this:

"The statute which governs the present case is clear. [Section 98 of the Companies Act 1862] enacts that, "As soon as may be after making an order for winding up the company, the Court shall settle a list of contributories, with power to rectify the register of members in all cases where such rectification is required in pursuance of this Act, and shall cause the assets of the company to be collected, and applied in discharge of its liabilities". A duty and a trust are thus imposed upon the Court, to take care that the assets of the company shall be applied in discharge of its liabilities.

What liabilities? All the liabilities of the company existing at the time when the winding-up order was made which gives the right. It appears to me that it would be most unjust if any other construction were put upon the section. After a winding-up order has been made, no action is to be brought by a creditor except by the special leave of the Court, and it cannot have been the intention of the Legislature that special leave to bring an action should be given merely in order to get rid of the Statute of Limitations. It must have been intended that such leave should be given only in cases where the Court thought that an action was the most proper means of determining the question as to the liability of the company. In the present case it is not disputed that at the time of the winding-up order the company was liable to the holders of these bills, and the winding-up order enures to the benefit of the holders. No possible mischief or inconvenience can arise from this, for a day is fixed for creditors to come in and prove, and the Act expressly provides that any creditor who does not come in within the time named shall lose the benefit of any dividend that has been paid in the meantime. No mischief therefore can be done to the other creditors by reason of the delay or laches of any creditor, since if he delays beyond the proper time he must take his chance of what assets he can find for payment of his debt, not disturbing any former dividend”.

Mellish LJ said this:

“It appears to me to be the clear meaning of [section 98], that the assets should be applied in satisfaction of all the liabilities which existed at the time of the winding-up order. That being so, I think we must consider that the Legislature intended us to follow the analogy of other cases where the assets of a debtor are to be divided amongst his creditors, whether in bankruptcy or insolvency or under a trust for creditors or under a decree of the Court of Chancery, in an administration suit. In these cases the rule is that everybody who had a subsisting claim at the time of the adjudication, the insolvency, the creation of the trust for creditors or the administration decree, as the case may be, is entitled to participate in the assets, and that the Statute of Limitations does not run against this claim, but, as long as assets remain unadministered he is at liberty to come in and prove his claim, not disturbing any former dividend”.

15. Larnell concerned a claim of negligent financial advice brought against a company in liquidation. The company was insured against liabilities to third parties. On the winding up of the company, its rights under the insurance policy were transferred to the recipients of the advice under section 1(1) of the Third Parties (Rights against Insurers) Act 1930. The recipients assigned their rights of action to the claimant, the Financial Services Compensation Scheme (“the FSCS”). The FSCS brought a claim in negligence by writ against the company, with a view to establishing the company’s liability as a preliminary to claiming against the insurers. The company applied to strike out the claim on the ground that it was statute-barred, and succeeded at first instance. The English Court of Appeal allowed an appeal. It is necessary to quote extensively from the judgments.
16. The substantive judgments were given by Lloyd and Moore-Bick LJJ, with both of whom Sir Peter Gibson agreed. At paragraph [5] Lloyd LJ identified the first question argued as “Does the special statutory regime for the administration of a company’s assets in liquidation, which prevents time running under the Limitation Act 1980 after the winding up resolution, apply to the present claim... as a matter of general principle?”. At paragraph [11] he stated that it was clear and settled that the third party had to establish that the insured was liable to him before he could take advantage of the rights afforded to him under the 1930 Act, such liability being capable of being established by action, by arbitration or by agreement between the insured and the third party, nothing turning on the particular procedure adopted. At paragraphs [13] and [14] Lloyd LJ said this:

“In a voluntary winding up, the liquidator’s duty is to apply the company’s property “in satisfaction of the company’s liabilities *pari passu*”: see section 107 of the Insolvency Act 1986. Similar provisions apply in a compulsory winding up and in bankruptcy. An obligation which, at the relevant date is barred by limitation, so that no action can be brought to enforce it, is not a “liability” for the purposes of the insolvency legislation: see *In Re Art Reproduction Co Ltd* [1952] Ch 89. In that case Wynn-Parry J relied on the decision of the Court of Appeal in Chancery in [General Rolling Stock]. The court held that a claim which was still in time at the date when the winding up commenced but which was not asserted by way of proof until after the normal period of limitation had expired was to be admitted to proof, because it was in respect of something which had been a liability at the commencement of the winding up. *In effect, so far as the operation of the winding up is concerned, limitation periods cease to run at that date, so long as they have not already expired.* That case has been followed ever since, whatever the type of insolvency and whether the claim is disputed or not...” (emphasis added).

Lloyd LJ then considered citations from the reasoning of Judge Paul Baker QC in *In re Cases of Taffs Well Limited* [1992] Ch179 and of Lord Hoffmann in the Privy Council in *Wight v Eckhardt Marine GmbH* [2004] 1 AC 147, and said this (at paragraph [18]):

“It seems to me that Lord Hoffmann’s analysis is correct and that Judge Paul Baker QC was wrong to describe a creditor’s rights under a contract (or in tort) as being converted into a trust. In so far as it is necessary to ascertain what the creditor’s rights are, they have to be established in contract, tort, or otherwise as the case may be. The creditor’s cause of action remains as it was before, so that, for example, the claimant correctly sues in tort in the present case. It is only as regards giving effect to those rights in the insolvency that the rights are subjected to the statutory trust resulting from the duty of distribution imposed on the liquidator or trustee in bankruptcy. Correspondingly, it is as regards giving effect to those rights in that way that, by virtue of the principle established in [General Rolling Stock], the period of limitation ceases to run when the liquidation or bankruptcy commences”.

Lloyd LJ then considered cases demonstrating the limits to the application of General Rolling Stock, which (as he said at paragraph 19) were bankruptcy cases. These cases, which he discussed in paragraphs 20 to 28, included *In re Benzon* [1914] 2 CH 68, a decision of the English Court of Appeal, which included the statement “that in the bankruptcy a debt does not become barred by lapse of time if it was not so barred at the commencement of the bankruptcy, and of this there can be no doubt, but this is only *in the bankruptcy*” (original emphasis). In paragraph 32, he said this: “Given that the claimant made no bones about its purpose being to get at the proceeds of the indemnity policy, that there is thought to be nothing worthwhile in the liquidation itself, and that those proceeds are, by virtue of the 1930 Act, taken out of the funds distributable to general creditors, it is easy to see the force of the analogy with *In Re Benzon* on the facts of this case”. Lloyd LJ then said this, at paragraphs 33-34:

“The rights under the policy are to an indemnity against claims by third parties established against the insured. Ignoring agreement or arbitration, such claims have to be established by a judicial determination. As indicated above at para 11, there are several ways of achieving such a determination and it does not matter which is used. A claim such as the present is a normal method. Such a claim is and can only be brought against the insured. If successful, it will establish the liability of the insured to the third party, both for the purposes of triggering the right to indemnity under the policy and for the purposes of any claim in the liquidation. Though it may well be

common, as in the present liquidation, for there to be no assets in the liquidation which are worth pursuing, given that the proceeds of the policy are taken out by the 1930 Act, that is by no means necessarily the case. There may be assets available to general creditors as well as the policy available to the third party. As in the present case, the policy may not be sufficient for the third party's claim, if made out in full, by reason of a cap or a deductible, or there may be defences to the insurer. Thus it does not follow that the third party will be satisfied in full, or at all under the policy. In that case, the third party would need to rely on its right to prove in the liquidation as well, if there are any assets available to creditors. The right to do so would be settled by success in the claim. Thus pursuit of a claim such as the present may serve two purposes: both as against the insurer and as against the funds in the liquidation. [34] Plainly, so far as the third party's claim to share in the funds available to creditors generally is concerned, the General Rolling Stock principle applies. If the claim is not barred by limitation when the winding up resolution is passed, it does not become so barred by the passage of further time. How, then, can it be said that the third party's claim, which is not barred as against the defendant for the purposes of claiming in the liquidation, is barred insofar as it may be used to found a claim under the 1930 Act against the insurer?"

Finally, at paragraph 37, he said this:

"Given that the first stage for a third party such as the claimant is to establish the liability to it of the insured, which is necessarily being administered in insolvency, it seems to me that the third party's claim against the insured is one to which the normal principles apply, namely that, if it is not time-barred at the commencement of the bankruptcy or winding up, it does not become time-barred by the passage of further time thereafter".

17. Moore-Bick LJ agreed with Lloyd LJ, but stated certain propositions in his own words. At paragraph 57, he said this:

"That decision [i.e. General Rolling Stock]... establishes that the rights of a person who seeks to enforce a claim against the assets of the company in the liquidation are to be ascertained as at the date of the commencement of the liquidation. It is to the satisfaction of *all* such liabilities that the company's property must be applied and therefore... provided his claim is not time-barred at

the date of the winding up, the right to prove in the liquidation is not thereafter lost by reason of the operation of the Limitation Act” (original emphasis).

Having considered the bankruptcy cases, including *In re Benzon*, he said this (in paragraphs 60-61):

“They support the conclusion that a distinction is to be drawn between rights to obtain satisfaction of claims from the property of the company through the process of the liquidation, which are determined as at the date of the commencement of the winding up, and rights that may be enforceable outside the liquidation, for example by recourse to security. In the case of the former time does not run after the date of the winding up so that a proof may be submitted at any time, although without disturbing any previous distributions. In the case of the latter time runs in the ordinary way. This makes it necessary to consider whether the claims brought against the company in the present case are claims within or outside the liquidation”.

His conclusion on that matter was expressed in paragraphs 63-64 in the following terms:

“In the present case... the claimant’s rights against the company could be established by proceedings in the ordinary way (this being a voluntary liquidation) or by an appeal against the refusal of the liquidator to admit its proof, but in either case if it were successful it would establish its right to prove in the liquidation. By so doing it would also complete its cause of action against the insurers under the policy, but that does not mean that the claim is one that is made outside the liquidation or that the present proceedings are proceedings to enforce rights against property outside the liquidation. They cannot be, since no such rights exist until the company’s liability has been established. [Counsel for the company] submitted that since the purpose of the proceedings is to enable the claimant to enforce rights against the insurers, the claim should be held to be time-barred for those purposes even if it cannot be held to be time-barred for the purposes of establishing its right to prove in the liquidation. However, I find it impossible to accept that the same claim can be time-barred for one purpose but not for another. Either the claim can be brought or it cannot”.

#### *Draft grounds of appeal and arguments*

18. The draft grounds of appeal assert that the judge was wrong to determine the limitation issue against Ritchie in reliance on the GEC judgment; that in the GEC judgment the judge had

incorrectly held that Lancelot could avail itself of a limitation defence, “notwithstanding the fact that once a company is placed into liquidation... unexpired limitation periods ceased to apply by virtue of the principle in [General Rolling Stock]. In particular, the judge incorrectly held that this principle had no application to disputed claims against companies in the liquidation which are the subject of adjudication in ordinary proceedings rather than by a liquidator’s adjudication on a proof of debt”; and that the judge should have followed the decision in Larnell.

19. As argued in writing and orally, Ritchie’s case was that the rationale for the General Rolling Stock principle was that from the moment of liquidation a company’s estate crystallised and the assets of the company became distributable in satisfaction of all liabilities existing at the date of commencement of liquidation under a form of statutory trust. A claimant who commenced ordinary proceedings against the company in liquidation did not escape the consequences of insolvency, being entitled only to share *pari passu* in the company’s assets even if his action succeeded in full. The suspension of limitation periods was a logical corollary of the fact that no judgment was capable of being enforced against the company outside the liquidation. Accordingly, a judgment obtained by regular action established little more than the right to a dividend in the liquidation and the quantum of the proof; and there was no reason why the General Rolling Stock principle should not in such circumstances apply as much to a liability established through ordinary action as one established by proof of debt. That this was the position was confirmed by Larnell. The judge’s decision was accordingly wrong.
  
20. Lancelot’s case was that section 4(1) of the Limitation Act was clear, inclusive and mandatory, and Ritchie’s action fell squarely within it. In order to avoid that result, Ritchie had to show the existence of a mechanism by which the operation of the Limitation Act was (contrary to its terms) arrested upon a company’s liquidation. Any such mechanism would have to be the result of a process of statutory interpretation; but there was no express disapplication of the limitation period on a company entering into liquidation, and no scope for an implied disapplication – which would not satisfy the test of necessity and would contradict the express terms of the section. It was not within the power of the court to disapply the section by judicial legislation. The General Rolling Stock principle was confined to the submission of a proof of debt, and said nothing about limitation of any action. A proof was not subject to the Limitation Act, and was not an action founded on tort. The right to prove was a “new right coming into existence for the first time after liquidation”: *Re Paul & Gray* (1932) 32 NSWSR 184, 188, and the existence of that new, statutory process of enforcement meant that there was no scope or mechanism for achieving a cessation of the limitation periods applicable to actions on the underlying claims. Larnell did no more than follow General Rolling Stock. Because in that case a proof of debt had also been

lodged, no distinction could sensibly be drawn between the action and the process of proof: it did not matter that the action was statute barred provided the claimant could achieve the same outcome by proof. But Ritchie could not lodge a proof because of the terms of the Deed of Settlement. The issue in Larnell was whether the General Rolling Stock principle applied at all where the purpose of the proceedings was said to be to establish a third party claim. There were English cases where actions were brought against a company in liquidation, or against a bankrupt, without the necessary prior leave and where the limitation period had expired before leave could be obtained. In such cases the courts had either disapplied limitation periods pursuant to an express statutory power to do so in personal injury cases, or granted leave on a retrospective basis, the implicit acceptance being that time continued to run despite the insolvency - contrary to Ritchie's assertion as to the application of the General Rolling Stock principle.

### *Discussion*

21. The rationale of General Rolling Stock is that upon winding up a statutory trust arises under which the assets of the company are to be applied in satisfaction of all liabilities existing at the inception of the liquidation. The position is the same in the Cayman Islands by virtue of section 140(1) of the Companies Act. As Moore-Bick LJ emphasised in Larnell, this means *all* liabilities: the whole point of the statutory scheme in liquidation is that it is a collective exercise by which all available assets are to be allocated rateably in discharge of all liabilities. Although the rationale was expressed in General Rolling Stock in the context of its effect on proofs in the liquidation, its focus is on the existence of the liabilities, not on the means by which they are established. Looked at from the perspective of the statutory scheme, there is no reason why the method of establishment of the liabilities should be relevant: it is the liabilities themselves which are important. There is no difference in this respect between a proof and an ordinary action: each of them is competent to establish the existence of the liability. As James LJ pointed out in General Rolling Stock, an action will often be the most proper means of determining the question of liability.
22. That there is no difference for the purpose of the application of the General Rolling Stock principle between proof and suit in respect of the same liability is what Larnell decides. That case is not binding on us; but its careful analysis is highly persuasive, and in my judgment we should follow it. It is entirely consistent with the existence of the statutory trust arising on insolvency. Although some of the statements (particularly by Moore-Bick LJ) are couched in terms of proving in the liquidation, what is inescapable is that the decision was that the FSCS's action was not statute-barred. Lloyd LJ's identification in paragraph 5 of Larnell of the issue as being the

application of General Rolling Stock “to the present claim ... as a matter of principle” shows that the outcome was not merely fact based (although the facts would not have dictated a different result) but a decision on principle. The reasoning in the judgments must be read in the light of that outcome; and because of that outcome it is not possible to treat Larnell, as the judge did, as doing no more than confirming General Rolling Stock in its application to proofs.

23. It seems to me immaterial that the FSCS had in fact also lodged a proof in the liquidation: as the Court of Appeal pointed out, a decision by the court admitting the proof would have been sufficient to establish the case for the purposes of the 1930 Act, but the decision nevertheless concerned the validity of the writ action designed to do the same thing. Nor is there any relevance in the fact that the primary object of the action was to establish liability for the purposes of a claim against the insurers, giving rise to a consequent issue as to whether the claim was a claim “in the bankruptcy”: it was still necessary to establish the liability against the company, and the questions of limitation and the application of the General Rolling Stock principle were decided in that context. Thus I regard as a clear statement of principle of general application the statement of Lloyd LJ (at paragraph 14) that “in effect, so far as the operation of the winding up is concerned, limitation periods cease to run at that date [ie the commencement of the winding up], so long as they have not already expired”. To similar effect is his statement in paragraph 37 that: “the third party’s claim against the insured is one to which the normal principles apply, namely that, if it is not time-barred at the commencement of the bankruptcy or winding up, it does not become time-barred by the passage of further time thereafter”.
24. The judge at paragraph 65 of his judgment placed emphasis on the words “so far as the operation of the winding up is concerned” in paragraph 14 of Larnell, treating them as confirmation that the General Rolling Stock principle was limited to the position of proofs in a liquidation process, and stated that Larnell did not extend the principle to ordinary actions. But the outcome in Larnell is explicable only on the basis that the principle applies to ordinary actions, and the reference to the operation of the winding up is explained by the fact that the principle does not apply to liabilities which are not “in the bankruptcy”.
25. Support for the proposition that Larnell decides that the running of time ceases for all purposes on winding up may be derived from *Wagstaff v Commissioners for Revenue and Customs* [2022] UKUT 00327 (TCC), a decision of the English Upper Tribunal (Tax and Chancery Chamber). The issue in that case was the validity of personal liability notices (PLNs) issued by HMRC against a director of a company (WHL) in respect of National Insurance Contributions (NICs)

payable by WHL. WHL had gone into creditors' voluntary liquidation (CVL) leaving the NICs unpaid. The Upper Tribunal (Michael Green J and Judge Brannan) said this:

“[27]. When a company, such as WHL, enters into CVL it is well-established that the liabilities of the company are determined at the date of the commencement of the CVL. It is equally well-established that limitation periods in respect of those liabilities, to the extent that they have not already elapsed, cease to run from the date of the commencement of the CVL.”

After considering General Rolling Stock, the Tribunal continued:

[30] “Mr Brodsky [Counsel for Mr Wagstaff] sought to argue that General Rolling Stock was confined to debts and liabilities provable in the liquidation and that it provides no answer to whether WHL was “liable to pay” the NICs on the date the PLN was issued”.

The Tribunal said that that argument failed to take account of Larnell, which it then discussed; and then continued as follows:

“[35] We see no basis for distinguishing Larnell and it is fatal to Mr Brodsky's argument. As [Counsel for HMRC] put it, the issue can be tested by reference to the situation if HMRC brought a claim for the NICs against WHL after the expiry of the limitation period. HMRC could in theory do that because WHL is in CVL not compulsory liquidation. It is clear that WHL would have no limitation defence to such a claim because of the General Rolling Stock principle”.

26. How then may the application of the General Rolling Stock principle to actions be reconciled with the terms of the Limitation Act, which provides that an action in tort shall not be brought after the expiration of six years from the date of accrual of the cause of action? This point was not in terms addressed in Larnell, despite the UK legislation being in substantially the same terms (section 2 of the Limitation Act 1980); but it nevertheless seems to me that the answer is again largely provided by that case. At first instance, David Steel J had described the General Rolling Stock doctrine as a “technical exception introduced... more as a matter of convenience than as a matter of principle” (see paragraph 30 of the Court of Appeal judgment); but that statement was disapproved by the Court of Appeal, Lloyd LJ saying (at paragraph 39):

“With all respect to the judge, I do not agree with his comment... that it is a matter of administrative convenience rather than of principle. It is a point of statutory policy, on which the words of the relevant legislation have stood consistently for many years”.

On that basis, the policy of the Limitation Act and the policy of the insolvency legislation are in conflict; and in my view it is plain that that conflict is to be resolved in favour of the insolvency legislation. This is not judicial law-making: it is the recognition that there are two contradictory legislative policies, one of which must prevail. There are three reasons why I consider it is the policy of the insolvency legislation which must prevail. First, all that the relevant provisions of the Limitation Act do is impose a procedural bar on the promotion of proceedings, without affecting the underlying cause of action (unlike, for example, in the case of actions to recover land, where after the expiration of the limitation period title to the land is expressly extinguished: section 23 of the Act): the words “an action shall not be brought” do not prevent commencement of an action but provide a ground of defence if a defendant chooses to take the point. By contrast, the insolvency acts impose a system of rateable distribution which has a practical (although not legal) effect on the substance of the underlying claim through limiting recovery. Secondly, the policy of the insolvency legislation (that all liabilities should be brought into account) already prevails over the policy of the Limitation Act (that there should be certainty and finality of claims) in relation to proofs of debt, that being the undoubted effect of the General Rolling Stock principle; and it is a small step to say that it should prevail also in relation to actions. (In this connection, it is worth pointing out that the effect of allowing a proof after the expiration of a limitation period is no more or less inconsistent with the policy of the Limitation Act than would be the effect of applying the principle in the case of conventional causes of action, so that the judge’s comments (paragraph 51) that applying the principle to actions would produce a “most surprising outcome” are nothing to the point.) Thirdly, insofar as the test for resolution of the conflict is necessity, it is necessary for the proper operation of the statutory trust resulting from the insolvency legislation that liabilities existing at the relevant date should be included in the statutory scheme whatever the method used to establish them.

27. The General Rolling Stock principle applies only to “rights to obtain satisfaction of claims from the property of the company through the process of the liquidation” (Moore-Bick LJ at paragraph 60 of Larnell). This means that an established liability must be capable of being brought within the liquidation process, with the result that even in the case of a claim pursued by way of action it

will ultimately be necessary to lodge a proof in order to recover any sum awarded (or a dividend on it). That is because section 97(2) of the Companies Act provides that “When a winding up order has been made, any attachment, distress or execution put in force against the estate or effects of the company after the commencement of the winding up is void”. Unlike in the case of section 97(1), there is no ability in the court to permit execution of a judgment outside of the scheme of the liquidation, so that any recovery must be pursued through the mechanism of proving in the liquidation. Because of that, the restriction in clause 2.2(a) of the Deed of Settlement on proving in the liquidation must be construed as applying only to the submission of proofs during the currency of the proceedings: to construe it as preventing the lodgement of a proof for the purpose of satisfying a judgment, that being the only method of doing so, would render nugatory the acceptance in the same agreement that the proceedings could be commenced, and the express provision in clauses 2.6 and 2.7 for subordination of any claim established in the litigation and retention of a reserve against any judgment.

28. In *Larnell*, Lloyd LJ said that the effect of a winding-up is not to replace a creditor’s existing cause of action with an interest under a trust; as he said (paragraph 18):

“The creditor’s cause of action remains as it was before, so that, for example, the claimant correctly sues in tort in the present case. It is only as regards giving effect to those rights in the insolvency that the rights are subjected to the statutory trust resulting from the duty of distribution imposed on the liquidator or trustee in bankruptcy”.

I agree; and it follows that I do not accept Lancelot’s submission, quoting *Re Paul & Gray*, that the right to prove constitutes a “new right coming into existence for the first time after liquidation”. That quotation is taken out of context. The case concerned a statutory provision which provided that “no action, suit or proceeding shall be commenced, nor shall any action or proceeding already commenced be continued for breach of any covenant, agreement or condition express or implied in any mortgage of real property”. Harvey CJ said this (at 188):

“In my opinion, a claim to prove as a creditor in the liquidation of the company is not covered by that provision, as it is not a proceeding for “breach” of a covenant, agreement or condition. It is a statutory right given by s. 157 of the Companies Act, 1899, to all persons who have a claim against the company which can be measured in money, whether the claim is presently payable or not; it is not based on a breach of any agreement or condition, but on the fact that the claimant has a right, sooner or

later, to call on the company to pay him the sum of money. In virtue of this right the Statute establishes on his behalf a trust affecting all the property of the company at the date of liquidation for the benefit of himself and all other persons having similar rights for proportionate distribution between them. These claims of persons entitled to prove are limited by the date of the liquidation, and there is no proof allowed for interest subsequent to liquidation. That this is a new right coming into existence for the first time after liquidation is clear from the fact that no Statute of Limitation begins or continues to run against the claimant after liquidation: *In re General Rolling Stock Company* (LR 7 CH 646).”

That statement is in substance the same as the suggestion made by Judge Paul Baker QC in *In re Cases of Taffs Well Limited* (quoted at paragraph 15 of Larnell) that:

“The true question... is whether the original contracts of the creditors were discharged by operation of law and replaced by other rights before time had run out by which actions would have had to be brought to enforce them. It is not simply that time has stopped running against the creditor; the cause of action itself is destroyed and replaced by other rights.... One may conclude that the effect of an order to wind up is to convert the contractual rights of the creditors into proprietary rights under a trust”.

That suggestion was explicitly rejected in paragraph 18 of Larnell, on the grounds that it was inconsistent with the analysis propounded by Lord Hoffmann in *Wight v Eckhardt Marine GmbH* [2004] 1 AC 147 (quoted at paragraph 17 of Larnell). *Wight* is a decision of the Privy Council on appeal from this court, and we are bound by it. Thus although the mechanism of proof may be a creature of the insolvency legislation, it has no effect on the existence of the underlying cause of action; and it is that cause of action which is pursued by proof or conventional action. For present purposes, there is no distinction between them.

29. I deal finally with Lancelot’s point that the limited application of the General Rolling Stock principle is demonstrated by insolvency cases involving the extension of the limitation period or the giving of leave to commence proceedings after expiry of that period, which were said to proceed on the basis that the limitation period would have expired despite the onset of insolvency. The following cases were cited: (1) *Wilson v Banner Scaffolding Ltd* [1982] Lexis Citation 1290. This was a personal injury case against an employer company which had gone into liquidation. The action had been started without the leave which was necessary in view of the moratorium on

actions against companies in compulsory liquidation. Milmo J held that the absence of leave rendered the issue of the writ a nullity, but extended the applicable limitation period under a statutory provision available in personal injury cases, so as to allow the action to proceed. The General Rolling Stock principle was not mentioned. (2) *Rose v Express Welding Ltd* [1986] Lexis Citation 1161, a decision of the English Court of Appeal, which was a case whose facts and outcome were in substance the same as in *Wilson v Banner*. (3) *In re Saunders* [1997] CH 60. In this case, professional negligence proceedings were brought against solicitors who had been made bankrupt before the issue of the writ. Leave to commence proceedings had not been obtained. Lindsay J held that the absence of leave did not render the proceedings a nullity, and gave retrospective leave. Again, the General Rolling Stock principle was not discussed. (4) *Re Linkrealm Ltd* [1998] BCC 478 was a case where retrospective leave was given to bring proceedings against a company in compulsory liquidation, Sir John Vinelott following *Saunders*, once again without reference to General Rolling Stock.

30. In my view, these cases do not carry the matter further. *Saunders* and *Linkrealm* were cases in which valid proceedings had been started during the currency of the limitation period, and all that was necessary was retrospective leave to validate them. The General Rolling Stock principle is only relevant where a limitation period has expired. The principle would or might have provided an easy answer in the first two cases, which proceeded on the footing that the limitation period had expired when the proceedings started; but the failure of the courts to recognise that possibility is too slender a foundation for the proposition that the General Rolling Stock principle cannot apply to conventional actions or is of less than universal application.

#### *Disposition*

31. For these reasons, I would allow the application for leave to appeal, and would allow the appeal itself. My provisional view is that the costs of the application and appeal should be borne by Lancelot; but if either side wishes to propose a different order it may do so within ten working days of the distribution in draft of this judgment, and the matter will then be dealt with on the papers.

#### **MOSES JA:**

32. I agree.

**FIELD JA:**

33. I also agree.