Neutral Citation Number: [2022] EWHC 1200 (Ch)

Case Nos: CR-2012-008789
CR-2016-001271

IN THE HIGH COURT OF JUSTICE
INSOLVENCY AND COMPANIES LIST (ChD)

Rolls Building, 7 Rolls Buildings
Fetter Lane, London EC4A 1NL

Date: 20/05/2022

Before :

SIR ANTHONY MANN

- -

IN THE MATTER OF EMERALD MEATS (LONDON) LIMITED
AND IN THE MATTER OF EMERALD PROPERTIES (LONDON) LIMITED
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

Between :

(1) JOHN McCARTHY — **Applicant**

- and -

(1) LOUISE MARY BRITTAIN

(2) STEPHEN PAUL GRANT

(As joint liquidators for Emerald Meats (London) Ltd and Emerald properties (London) Ltd) — **Respondents**

-and-

(3) IVOR DESMOND MARSHALL — **Respondent**

Stuart Adair (instructed by **SBP Law**) for the **Applicant**
John Briggs (instructed by **Boyes Turner**) for the **1st and 2nd Respondents**
Elizabeth Weaver (instructed by **Fladgate LLP**) for the **3rd Respondent**

Hearing dates: 23rd & 24th March 2022

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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.

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SIR ANTHONY MANN

Sir Anthony Mann :

1. This is an application by Mr John McCarthy for a direction that the liquidators of Emerald Meats (London) Ltd ("Meats") and Emerald Properties (London) Ltd ("Properties") assign to him various causes of action for what I can call misfeasance against Mr Marshall, the third respondent to this application. The first and second respondents are the current liquidators who have declined to assign those causes of action without a direction from the court. Properties is a wholly owned subsidiary of Meats, which has been in liquidation since 2013 and Properties since 2014. Both liquidations are solvent and at the moment there is a substantial undistributed surplus held by the liquidators.

2. Mr McCarthy presses for the assignment; Mr Marshall opposes it. The liquidators are neutral. There are three principal issues on this application:

(i) Has the question of the assignment already been determined against Mr McCarthy as a result of previous orders and decisions in litigation concerning these companies.

(ii) If the answer to that is Yes, should those decisions be revisited under Insolvency Rules 12.59(1).

(iii) If the answers to the two previous questions would permit an assignment, should the liquidators nonetheless be directed not to assign on the basis that to do so would be to permit hopeless and/or vexatious litigation.

Issues (ii) and (iii) overlap in that some of the facts are relevant to both.

Background

3. The background to this matter appears from a previous judgment of mine ([2019] EWHC 433 (Ch)) to which reference should be made for general background and any detail that does not appear here.

4. Ignoring for these purposes one share held in the name of Mrs McCarthy (which I shall do hereafter), Mr McCarthy and Mr Marshall were the equal owners of Meats whose trade was, as its name suggests, trading in meat. Properties held (again as its name suggests) properties. Those properties have been sold, and indeed were sold before the winding up of Properties (brought about by the then liquidators of Meats after their appointment). Mr McCarthy resided in Dublin. Mr Marshall resided in England and was left in day-to-day charge of the business. In 2010 Mr McCarthy and Mr Marshall fell out and Meats essentially ceased trading. There is a dispute as to whether there was some residual trade for a while, but in any event at about the same time Mr Marshall started his own meat trade via his own company, Mulberry International Ltd ("Mulberry"), which he has traded since then. Mr McCarthy did not start his own meat trade. In 2013 Meats was wound up on Mr Marshall's petition on the just and equitable ground. Mr McCarthy had commenced his own unfair

prejudice proceedings, and complained of various misfeasances on the part of Mr McCarthy, but Registrar Barber decided that winding up was preferable when it came to investigating those matters, because liquidators would be better placed to investigate (see paragraph 24 of her judgment of 19th July 2013). In due course the liquidators of Meats wound up Properties, and the liquidations have at all material times had the same liquidators.

5. By now the distrust of Mr Marshall by Mr McCarthy was profound. When Mr Marshall lodged a proof of debt Mr McCarthy's accountants produced evidence which forced him to reduce his claim substantially, and eventually he withdrew it completely. Mr McCarthy had other misgivings about the way that Mr Marshall had conducted the affairs of the company, and he also disputed the manner in which the liquidators had conducted their liquidations. On 25th July 2016 certain applications made by Mr McCarthy were heard by Chief Registrar Baister. Mr McCarthy appeared in person on this occasion. There was a challenge to the liquidators' remuneration by Mr McCarthy, an application for inspection of documents by Mr McCarthy and an application for an interim distribution in favour of the shareholders. In the course of the debate about distribution the Registrar indicated that it seemed to him that once HMRC clearance was obtained there could be a distribution:

> "Provided that you [viz Mr McCarthy] haven't got anything else up your sleeve because they don't want to distribute and then find you start suing them over something and they've got no assets to indemnify. So, if you're happy with that you could give me an undertaking that you're not going to bring any further action."

6. Mr McCarthy indicated that he could not do that because he was without representation. He did not know what claims he might have. Chief Registrar Baister indicated that he was looking for a mechanism to flush out claims to see whether it would be possible to close down the liquidation:

> "[Mr McCarthy] can challenge a decision of the liquidator, but that is why I want to see whether I can find a mechanism to say that unless challenge is to the liquidator amounting as to anything else [sic] that is outstanding by a certain date, the liquidator is free to close down."

7. He then attempted a formulation as follows:

> "So, the first order will be Mr McCarthy notifies the liquidators by 4.30 on 25 August of any claims, applications or other objections relating to the conduct of the liquidators. There may be a better way of putting that. I will let everyone go outside and think if they want to as well. Secondly, if none are so notified, the liquidators proceed to close the liquidation as soon as practicable, and then, thirdly, the remuneration application and all applications connected therewith be adjourned until the final fees of the liquidators have been determined by the court and/or by agreement, for which purpose the applications stand adjourned generally, to be listed for further directions."

8. The Registrar then invited the parties to step outside court and produce an agreed wording to deal with what he had decided should happen. The result was an order with the following relevant terms:

> "2. That Mr McCarthy shall notify the Liquidators and Mr Marshall's solicitors by 4:30 pm on 8 September 2016 of all and any claims, applications or objections which he has in relation to the conduct of the liquidation of Meats and/or Properties by the Liquidators (save for the remuneration of the Liquidators and their legal expenses in relation to the liquidations) or claims against Mr Marshall relating to the affairs, dealings or property of Meats or Properties (hereinafter called "the claims").
>
> 3. That Mr McCarthy shall be debarred from making any claims not so notified.
>
> 4. That if no claims are so notified the Liquidators shall proceed to close the liquidation of Meats and liquidation of Properties as soon as practicable.
>
> …
>
> 6. In the event that Mr McCarthy gives notification of any claims the Liquidators shall as soon as practicable apply to the court for further directions."

9. This is the first of the orders in this case which Miss Weaver for Mr Marshall submits to be an answer to Mr McCarthy's current application because she says that the claims which he now wishes to bring were not notified under this order within the specified time (which as a matter of fact is correct).

10. Mr McCarthy's solicitors served a letter on 17th August 2016 giving notice of the claims that he considered he had against the liquidator and against Mr Marshall. They did not include the claims which he now wishes to have assigned. For their part, and pursuant to the liberty to apply, the liquidators issued an application for directions on 19th September 2016. They sought an order that Mr McCarthy issue any applications he intended to issue within 28 days and in default should be debarred from issuing them at all. This application came before Chief Registrar Baister on 8th November 2016. Mr Adair appeared for Mr McCarthy at that hearing and expressed misgivings as to how the debarring order came about at the previous hearing. When he raised them the Chief Registrar made the following remarks, relied on by Mr Adair now:

> "The Registrar: I think that is probably a fair point. I can remember feeling a certain amount of despair as to how we are going to get out of this and move on. I am open to the idea I

> may have been wrong and shot from the hip, but what is the way forward if it is not the one?
>
> Mr Adair: Exactly. My concern was, firstly, that there was no notice and he was a litigant in person. The second concern was that there was actually no evidence before the court of any breach of any order, rule or practice direction or any of these approaches.
>
> The Registrar: Start from the premise that I am prepared to assume I may have shot from the hip and gone too far. That brings us back to what we do and, if it is not what I have suggested, what do we do?"

11. The Chief Registrar did not actually recall any part of his previous order. His order on this later occasion actually provided (so far as material):

> "1. That there be no order on the Liquidators' application for directions save that the Liquidators do issue a further application ("the Assignment Directions Application") by 4 PM on 6 December 2016 for the directions of the Court… as to whether to assign alleged claims of Meats and Properties against the Second Respondent for breach of trust and recovery of trust property in relation to his loan accounts with Meats and Properties and Aston Martin motor vehicle registration number UWM 361 ("the Assignment Claims").
>
> 2. That following the issuing of the Assignment Directions Application a hearing shall be fixed by clerks of Counsel… for the purpose of determining whether the First Respondent [Mr McCarthy] shall be entitled (prior to filing and serving a draft pleading setting out the Assignment Claims for the purposes of the Assignment Directions Application) to inspect such books and papers of Meats and Properties in the possession of the Liquidators and on such terms as the Court thinks just."

12. The liquidators issued an application pursuant to that order on 30th November 2016, seeking directions as to whether they should assign causes of action in relation to Mr Marshall's loan account and the Aston Martin car (which were the claims specifically notified under the first Baister order). On 11th May 2017, within that application, Chief Registrar Baister made an order permitting inspection and copying of company records by Mr McCarthy. Mr McCarthy was to serve fully particularised draft Particulars of Claim "identifying the Assignment Claims (as defined in the order of 8 November 2016) he wishes to be assigned by the Companies …" by 29th September 2017, and if he did not do so the liquidators' application was to be dismissed and the liquidations were to be closed as soon as possible. Directions were made for the listing of the liquidators' application (obviously on the assumption that it survived).

13. That application eventually came on before Deputy ICC Judge Middleton on 28th May 2018. He made an order that the liquidators assign the causes of action specified in the draft Particulars of Claim with the exception of a claim in relation to the salary

of a certain employee (Ms Lorraine Turner). The reason the assignment of that claim was not directed was because to pursue it would be frivolous and vexatious. A claim in relation to the writing off of a loan to that employee was directed to be assigned notwithstanding that it was much smaller than the salary claims.

14. Paragraph 7 of the judgment of the deputy judge deals with two of the three claims which are now the subject of the application before me. It is heavily relied on by Ms Weaver:

> "7. I now turn to one claim which has not been included in the draft particulars of claim namely the alleged misappropriation of the business of Meats and meat quotas by Mr Marshall. This can be found starting at paragraph 27 of Mr Adair's skeleton argument. It is explained at paragraph 33 that at the hearing on 25 July 2016 such a claim had not come to light. I find it difficult to understand how this could be the case given that on his version of events Mr McCarthy had been told that trade had ceased in 2010. However whatever the position the information supporting such a claim is almost totally lacking. Paragraph 27 is little more than a bare assertion and in such circumstances is in my view frivolous or vexatious. I do not direct the assignment of such a claim. I shall now turn to deal with some general points on the subject of assignment."

15. The order of the deputy judge ordered that:

> "1. The Liquidators do procure that Emerald Meats (London) Ltd and Emerald Properties (London) Ltd assign to Mr McCarthy, on terms to be agreed between the Liquidators and Mr McCarthy, the causes of action for fraudulent breach of trust and/or the misappropriation of trust property detailed in the Draft Particulars of Claim annexed to this Order, with the exception of the claim in respect of the salary of £128,611.20 paid to Lorraine Turner, which is pleaded at paragraph 41 and 42 of the Draft Particulars of Claim."

16. That order and decision was then appealed by Mr Marshall and the appeal came before me on 31 January 2019. I dismissed the appeal save that I directed that there be no assignment of the rump of the claim against Ms Turner on the basis that it would be disproportionate to pursue it, and that the maintenance of that claim smacked of the sort of oppression which Mr Marshall fears at the hands of Mr McCarthy. At paragraph 45 of my judgment dated 27th February 2019 I referred to the matter of the alleged misappropriation of the business of Meats and the meat quotas:

> "45. … . The deputy judge removed two claims from the assignment – the Turner salary claim, and a possible claim that Mr McCarthy foreshadowed based on Mr Marshall starting a competing business concurrently with the business of Meats. (I record that Mr McCarthy's position was that if he got a general assignment of the other principal matters he would not be

> concerned to press the latter matter)." (my emphasis for the purposes of this judgment)

17. That is said to be significant because Mr McCarthy now seeks to resurrect the competing business claims, including the meat quota claims.

18. In paragraph 38 I had referred to possible claims outside the scope of those which were the subject of the assignment which was the subject of the application to Deputy ICC Judge Middleton. I said this:

> "38. Mr Steinfeld had a separate point about an assignment of claims to accounts and inquiries. Mr McCarthy had prepared draft Particulars of Claim, which represented the claims that he sought to have assigned and to bring (though it turned out that he needed to expand them somewhat). They included claims to accounts and inquiries, which could be a very broad claim in a case such as the present and disguise other significant but as yet unparticularised claims. It would enable him to open up virtually every claim that the companies might have against Mr Marshall on the basis that they involved an inquiry or would be something that was a matter of accounting (for example, on director's loan account). Mr Steinfeld submitted that that was too broad a matter to be assigned, against a background where (as was the case) Mr McCarthy had been directed to specify what claims he said the companies had against Mr Marshall. I agree with Mr Steinfeld about that, and propose that that should be dealt with as a matter of terms on which any assignment should be allowed. He should be required to identify all claims that he intends to bring after an assignment within 3 months of the date of this judgment, and barred from bringing any others. That removes the real risk of a rolling series of claims as Mr McCarthy delves deeper and deeper into the accounting of the companies, which would be an undesirable manner in which to conduct claims in this particular context. It would be a recipe for vexation, a point to which I now turn."

19. It is therefore apparent that what had been considered was other claims which Mr McCarthy might wish to have brought, or take an assignment of, beyond those which were the subject of the assignment application. Neither I nor counsel seemed to have any recollection as to how that came about, bearing in mind the more limited nature of the appeal, but it would seem likely that it was apparent that Mr McCarthy had not finished considering possible claims against Mr Marshall and, like Chief Registrar Baister, I was looking forward and considering how to bring matters to a head (or an end). I returned to the point in paragraph 47:

> "47. The second further point is the identification of the claims that are to be brought under the assignment. I think it is

> undesirable that Mr McCarthy should be able to take a general assignment of all causes of action (other than those specifically excluded) and then possibly expand his claims very greatly beyond those already foreshadowed. To allow that would be to risk the possible oppression which I have referred to above. I consider that if Mr McCarthy is to have an assignment he must articulate all the claims that he intends to bring no later than 3 months from the date of this judgment, so that that crystallises what Mr Marshall will face. Mr McCarthy has already had the benefit of extensive accountancy inquiries, and since he says (plausibly) that there may be some more investigations to carry out, he should have three months to carry them out and see if he can identify any other matters which may give rise to a claim. After that time he will not be able to expand his claim. Nor will he be able to bring further substantive claims under the guise of accounts and inquiries. Again, achieving this is a matter of drafting."

20. Thus it seems that I was taking the opportunity, notwithstanding the more limited appeal before me, to control future potential disputes in the liquidations. The essence of part of the dispute in the present case is whether Mr McCarthy should have the opportunity of reviving his claim to an assignment of the misfeasance claims which the deputy judge said he could not have, and which he told me he did not want if he got the other principal assignments he was after (see the emphasised words from paragraph 45 of my judgment), pursuant to what I said about the articulation of all claims in my order (dated 27th February 2019) which encapsulated that:

> "1. The Joint Liquidators do procure that the Companies assign to Mr McCarthy the causes of action identified in paragraph 2 below ("the Claims") on terms that Mr McCarthy is entitled only to 50% of any amount awarded by way of judgment in respect of the Claims or otherwise as agreed between Mr McCarthy and Mr Marshall, such assignment to be executed as soon as practicable after the conclusion of the period for inspection and notification of claims provided for in paragraphs 2b and 4 below, and that a copy of the Assignment be provided to Mr Marshall within 7 days of the date of its execution.
>
> 2. The Claims to be assigned are:
>
> a. The causes of action and claims identified in the draft Particulars of Claim annexed to the Middleton Order (including for the avoidance of doubt the claim for interest in paragraph 47 thereof) but excluding the claims in paragraphs 41, 42 and 43 thereof;
>
> b. any other claim of the Companies or either of them against Mr Marshall that is notified in writing by Mr McCarthy to the

> Joint Liquidators and Mr Marshall before 4pm on 28 May 2019 either by the provision of revised draft Particulars of Claim or by notice setting out details of such other claims with reasonable particularity.
>
> 3. The assignment shall not extend to any claim which is not within paragraph 2 of this Order. For the avoidance of doubt, any claim for accounts and inquiries is to be limited to the Claims covered by paragraph 2."

21. Paragraphs 4 and 5 of my order contain elaborate provisions for Mr McCarthy and his accountant to be able to inspect and take copies of all company records, and paragraph 6 dismissed the appeal on the terms set out in paragraphs 1-5 of the order. Other paragraphs deal with an application for an interim distribution which is not relevant to this application, and paragraph 13 gives permission to all parties:

> "to apply for further directions in relation to the assignment, the inspection of Records and the interim distribution provided for by this order."

22. The application now before me is made under that liberty to apply, and it arises under the following circumstances.

23. The period for Mr McCarthy to specify his claims was extended by agreement to 30th September 2019. He used the opportunity to investigate his claims by appointing Grant Thornton to carry out researches on the documentation made available under the order and they provided him with a report (their third in these proceedings, which I will call "GT3"). On the last day of the extended period Mr McCarthy's solicitors (then Pinsent Mason) notified Mr Marshall's solicitors (Fladgate LLP) of the claims he sought to make. The letter attached draft Particulars of Claim which, the letter explained, were not actually required but which were intended to "be constructive to provide further details of his current case as to the causes of action and claims which he wishes to be assigned". The letter described the causes of action of which he sought an assignment as being all causes of action relating to the following matters:

> (i) Misappropriation of moneys and other property of Meats and Properties, including moneys referred to in the Particulars of Claim and six items (or sets of items) of personal property, including the Aston Martin car in relation to which the assignment of the claim was already provided for. There was one further car, six Lambretta scooters, antique chairs and "Avant Garde speakers".
>
> (ii) Mr Marshall's use of the misappropriated moneys and property to finance his personal expenditure.
>
> (iii) The diversion of Meats' business to Mulberry.
>
> (iv) The inflation of stock figures in Meats' accounts.
>
> (v) The sale/transfer of Meats' GATT import rights quota.

(vi) The companies' debt claims against Mr Marshall.

24. The draft Particulars of Claim provided particulars of those claims. The following points should be noted:

(a) As well as pleading out claims against Mr Marshall, the draft Particulars of Claim pleaded out claims against Mulberry and also against two linked companies who were auditors to the companies. As far as I know no suggestion had previously been made of an assignment of claims against those additional persons. In fact in the present application before me no claim was made to an assignment of claims against the auditors. Their inclusion in this letter gives support to the view that, unless controlled, Mr McCarthy will seek to sue everyone he thinks he can for everything he thinks he can, the sort of potentially vexatious behaviour to which the deputy judge had referred and which Mr Marshall says is apparent in the history of this matter. It is true that an assignment of the auditor claims was not pursued before me, but the fact that it was suggested in the first place is significant. An assignment of claims against Mulberry was not proposed or provided for in previous orders either; Ms Weaver adopted a very sensible attitude in relation to that in not opposing it if the claim was inextricably linked to an allowed claim against Mr Marshall (for example, the transfer of business to Mulberry claim).

(b) The claim to an assignment in relation to the personal property referred to in (i) above was not pursued in the application before me, but again the fact that it was originally proposed supports the case that Mr McCarthy is prone to vexatious litigation. Mr Adair said, in terms, that his not pursuing those matters was because litigation about those matters would not be proportionate. I agree with his views on proportionality, but the fact that it was ever proposed shows a lack of a sense of proportion and again is troubling against a background in which vexation and oppression is said to be lurking. It should be noted that the speakers were acquired for a sum of about £150.

(c) The disputed items for the purpose of the present application are the items in (iii), (iv) and (v). Assignments in relation to the other items (apart from the personal property) are not disputed. Items (iii) and (v) are revivals of the two items which Deputy ICC Judge Middleton said he would not allow because of a lack of any particularisation, and which it is said by Mr Marshall should not be revived because of that and previous orders. Item (iv) was not the subject of previous debate; obviously I have to rule on it.

25. After a certain amount of correspondence during which it became apparent that Mr Marshall did not consent to an assignment of the disputed items, and that the liquidators were not themselves going to seek directions as to whether to assign them, Mr McCarthy launched the application before me on 28th July 2021, seeking a direction that the liquidators assign:

> "…[their] causes of action against [Mr Marshall] and/or [Mulberry] in respect of the misappropriation and/or sale at an undervalue and/or fraudulent breach of fiduciary duty of or relating to the following property of [Meats]:

> (1) The business and/or meat trading contracts.
>
> (2) The import quota rights (including GATT and EU quota rights; and
>
> (3) The stock and/or cash."

26. Mr Marshall's response to that is that Mr McCarthy is debarred from seeking an assignment of those claims because of the previous orders and judgments referred to above, that there is no reason to review them, and that in any event to allow Mr McCarthy to pursue the claims would be to allow him to pursue vexatious and frivolous actions, bearing in mind his propensity to do so and the weakness of the claims. Mr McCarthy claims that the orders do not have the effect of debarring him; if they do then they should be reviewed; and that the claims on their face are all claims with at least prima facie if not stronger merits.

27. Accordingly the issues in the application are those referred to in the second paragraph of this judgment.

The nature of the claims of which assignment is sought

28. It will be useful to approach the rest of this judgment with an understanding of the nature of the three claims of which assignment is sought. I outline them here in the order in which they are referred to in the application notice. Further detail appears later in this judgment.

29. First, Mr McCarthy claims that Mr Marshall transferred the existing business of Meats to Mulberry. The business of Meats was the buying and re-sale of wholesale meat. Much of that meat was imported. Mr Marshall is said to have effected this transfer by transferring some contracts and procuring that other contracts were entered into with Mulberry and not Meats, during the period of winding down the business of Meats in 2010 and perhaps 2011. This is said to be a breach of his fiduciary duty. I will refer to this as the "transfer of business" or "business transfer" claim. It is one of the two claims within what I will call the "disavowal" recorded in the emphasised sentence in paragraph 45 of my earlier judgment.

30. Second, Mr McCarthy complains that GATT and other quota rights, of which Meats had the benefit, were sold to a third party (with whom Mr Marshall is said to have some unparticularised connection) at an undervalue so that Meats lost the benefit of them without being properly paid. Indeed, it is said that insofar as there was a sale at an undervalue the proceeds of sale were never received by Meats. I will refer to this as "the quota claim". It is the second of the claims in the disavowal.

31. Third, Mr McCarthy complains of a misappropriation of stock or the proceeds of sale of stock by Mr Marshall, probably in the direction of Mulberry. The accounts for the years ended 2008 and 2009 contain a suspiciously great increase in stock levels (almost tenfold), with no explanation. In later accounts the liquidators wrote off a very large part of that stock when preparing accounts for tax clearance purposes. Mr McCarthy claims (after a fashion) that either that large amount of stock was misappropriated for the benefit of Mulberry, or if it was sold within Meats then the

cash was misappropriated by Mr Marshall. I will refer to this as "the stock/cash claim". It was not the subject of the disavowal; it had not been referred to at the time.

The disavowal at the appeal before me

32. Before going any further it is necessary to develop the disavowal. It has turned out to have a far greater significance to the present hearing than was originally thought, and than the reference to it in my previous judgment suggests it had.

33. The record of the disavowal in my previous judgment suggests it might have been a passing thing. When the hearing of the present application took place in front of me it took place simply on the basis of what my judgment recorded. Ms Weaver relied on it as something that Mr McCarthy should not be allowed to resile from, without presenting any further material in relation to it. However, after the hearing had concluded I was concerned to ascertain how it came about. My own notes, to which I referred, indicated that it had actually come after a break in the proceedings and seemed to be the result of some deliberation by Mr McCarthy and his team. That was capable of changing the complexion of, and significance of, the disavowal. I invited the parties to get a transcript, so that the position was clear. They were told that the recording quality was too poor to allow transcription. I decided to listen to the recording myself (the parties were given an opportunity to listen, which they declined), and the transcribers were right - the quality of the recording was far too poor to allow a full transcription. However, it was possible to make out certain matters which demonstrated the direction and nature of the debate, and with the assistance of a contemporaneous note from Ms Weaver's instructing solicitor, which is a little fuller than my own note, a realistically full picture of the background to, genesis of and content of the disavowal has become apparent. It is indeed very significant - more significant than the single sentence in my previous judgment would suggest. The account that follows is put together from the solicitor's note, what the tape reveals, and my note.

34. The question of the transfer of business and quota claims (during the debate they were both taken together for these purposes) arose in a context which is not wholly clear but which seems to have been a discussion as to their potential to prolong the liquidation, presumably if the liquidators were to investigate or pursue them. Mr Adair said that his client had not decided what to do about those claims yet. I then raised concerns that persisting in these claims might be thought to add "grist to the mill" (my expression) of Mr Marshall's submissions that he was being harassed, and that if that was demonstrated I would not be minded to allow that to happen. I was clearly concerned about the potential for harassment. Mr Adair said he wished to respond to that and asked for an opportunity to speak to his client about it (his client was not present in court). He dangled the prospect of making a significant decision as to the conduct of the proceedings - he might "be making a decision of major importance to your lordship's summary of the position" (words from the recording). I made it clear I was not in any way pressurising Mr McCarthy, which Mr Adair accepted, but he still wished to be able to take instructions on the matter, which clearly concerned the question of vexation and harassment.

35. I then allowed an adjournment so that instructions could be taken, observing that it would be good to "clear away some of the undergrowth" if that were possible. When

Mr Adair returned he said the following, which I have managed to transcribe from the tape despite the huge distortion that appears on the recording:

> **Mr Adair**: "What Mr McCarthy says to me is that if he is unsuccessful in obtaining this assignment on this appeal of Mr Marshall and everything goes back to the liquidators which they get to investigate anyway so all bets are back on and [inaudible] investigate that.
>
> But he is certainly not going to hold up the closure of the liquidation over the claim relating to the business of Meats and he would be happy for me on his behalf to give an undertaking to that court. [Pause]
>
> So in other words he would consider that he is satisfied that he can sue Mr McCarthy [sic] over the matters that were the subject of the deputy judge's decision to assign.
>
> On that basis he can say that the assignment of these causes of action would permit the swift closure of the liquidation on the faith of that undertaking I have just given and this would remove all the obstacles as I see it [inaudible] obstacles to the closure [inaudible]. From the recent report it would seem that all tax questions have been resolved [inaudible] swift closure of the liquidation."

That transcription is consistent with the inevitably shorter note of Ms Weaver's instructing solicitor.

36. In the light of that material there was a difference between the parties as to what Mr McCarthy was in effect doing. Mr Adair submitted that Mr McCarthy's disavowal only went as far as saying that he would not seek to have the liquidators investigate and bring a claim on the transfer of business claims. He was not disclaiming an intention to seek an assignment so he could himself investigate and sue. I disagree for two reasons.

37. First, although the debate seems to have started in the context of not holding up the finalisation of the liquidation, which would have been consistent with the liquidators not being called on to investigate and sue, the more immediate context of the disavowal was my expressed concerns that persisting in those claims might be a demonstration of vexation and/or oppression. In that context Mr McCarthy was given the opportunity to consider a "decision of major importance" to the matter. Mr Adair expressly asked for an opportunity to consider matters with his client, and those matters plainly involved the questions of possible oppression and vexation which were the immediate context of the request for the adjournment. Mr McCarthy's indication of his not pressing his claims, given after consultation with his counsel and (presumably) his solicitor came in order to address that concern. It could only be addressed by abandoning the claim, not merely by abandoning a claim that the liquidators (as opposed to Mr McCarthy) should investigate and sue. Although it is right to say that Mr Adair's statement of his client's position referred to a desire not to hold up the closure of the liquidation, it is quite clear that what he was referring to was an intention (reinforced by a willingness to give an undertaking) not to press the matters at all, including by way of seeking an assignment of claims. It is only that intention that would have the object of removing the risk of oppression and vexation which was clearly the question being addressed. Furthermore, an unstated intention to

seek an assignment of the business claims later would be capable of holding up the closure of the liquidation, because it would be likely to lead to further disputes as to whether such an assignment should take place which would have to be resolved before the liquidation could be closed. It is therefore quite plain that what Mr McCarthy was doing at this point was indicating that he would be satisfied with preserving the assignments which the deputy judge had allowed him (ignoring for these purposes the small loan claim) and if he got that he would not pursue the business claims which were not allowed.

38. Second, Mr Adair's case is not consistent with his client's evidence on the topic. He deals with the "Allegation that I have reneged on the position I adopted before the judge" in 4 short paragraphs in his 6th witness statement. In paragraph 120 he sets out the relevant paragraph in my judgment. In paragraph 121 he says:

> "121. The position I adopted before the Judge was adopted in good faith but was not properly informed. I simply had not appreciated the scale of the fraud carried out by Mr Marshall and the losses caused by his misappropriation of the business of Meats and the very valuable meat import quota rights it owned. I could not make a properly informed decision on these issues until I had sight of the Third GT Report and the evidence on which it is based."

He does not say that he intended merely to rule out asking the liquidators to investigate and sue. Nor does he say that his instructions were to give up the right to press, rather than the right to seek an assignment. He seems to accept that he accepted he would not be concerned to press the business transfer claims generally. In paragraph 122 he claims it is relevant that Mr Marshall sought to conceal his wrongdoing by false accounting and misrepresentation and in paragraph 123 he refers to a particular incident of alleged misrepresentation, which does not actually go directly to the claims under consideration here at all.

39. That factual background becomes of central importance to the questions that arise in this matter, because when the appeal was dismissed Mr McCarthy did indeed achieve the preservation of his right to retain the assignment of the rest of his claims, which was the pre-condition of his concession. I should say that Mr Adair rightly never submitted that my disallowing the small loan claim assignment had any relevance to the concession. Mr McCarthy was obviously not including that minor matter when he said he would abandon the transfer of business (including quota) claims if he got the rest of what he had achieved before the deputy judge. The dismissal of the appeal was the trigger for the operation of the disavowal, on the basis of the events at the hearing.

Do the orders as a matter of construction and effect bar the assignment claim?

40. The argument about the effect of the orders starts with the first of Chief Registrar Baister's orders, which provided for a notification of claims with debarring to follow. At that time Mr McCarthy was saying (inter alia) there were claims against Mr Marshall which should be pursued, and making complaints about the conduct of the liquidations, and it is apparent that the Chief Registrar wanted to flush those out so that the liquidations could be brought to an end. To that end he made his order requiring the notification of claims including the debarring order referred to above.

As Ms Weaver correctly points out, that order was not appealed, and there was no attempt to review it at the time or until the present application. This order is Ms Weaver's starting point. The claims that Mr McCarthy now seeks to have assigned to him were not notified by him under that order. Accordingly, under that order Mr McCarthy is debarred from making further claims to an assignment.

41. Then she seeks reinforcement from the order and decision of Deputy ICC Judge Middleton. He actually refused to order the assignment of two of the three causes of action which are now pursued (the transfer of business claim and the quota claim). True it is that his order does not refer to that refusal, and confines itself to assignments which were to take place, but he proceeded on the footing of a refusal to order an assignment of two of the three current claims (the quota claim and the transfer of business claim). That was not actually appealed by Mr McCarthy. Ms Weaver says that that is an end of those matters, both because the point was decided and on a *Henderson v Henderson* basis so far as necessary. She acknowledges that the stock and cash claim was not referred to by either the deputy judge or by me, but she says that the claim to an assignment of that should fail because it is not adequately particularised in the events following on from my order, and would be vexatious.

42. So far as the apparent permission to seek an assignment of additional claims contained in my order is concerned, she disputes that on its true construction and effect my order, which admittedly provides for additional claims, should be taken to allow the two claims which the deputy judge had disallowed and which were disavowed at the hearing before me. Mr McCarthy should not be entitled to use the door which I opened to admit those two claims, whatever else he might try to walk in with.

43. Mr Adair counters these submissions by starting with the debarring order of Chief Registrar Baister. He says it should never have been made. Mr McCarthy appeared in person at that hearing, and was effectively bounced with an idea (albeit emanating from the Chief Registrar) without the benefit of legal advice and representation. Mr McCarthy himself pointed out his difficult position at the time. The Chief Registrar himself subsequently acknowledged that he had perhaps been too hasty, and he was right in that. There was no appeal from the original order, but that seemed unnecessary in the light of events as they unfolded. Furthermore, that order was overtaken by the order which I made which allowed a further opportunity for Mr McCarthy to notify claims of which he wished to take an assignment, and that is what Mr McCarthy had done. Nothing in my order prevents that and nothing limits the claims so as to prevent the three claims which he now wishes to make.

44. I start my decision on these points with the first order of Chief Registrar Baister. It would seem that the operation of that order by itself would debar Mr McCarthy from making his present claims because they were not notified in time in accordance with its terms. His second order does not mitigate that effect even though the debate with counsel at the hearing would seem to indicate that the Chief Registrar had had second thoughts about it. Although Mr Adair protested at the making of the order, on the footing that Mr McCarthy had been bounced with it at a time when he was not represented, the Chief Registrar did not recall it. Indeed, the second order proceeded along the lines of the first order because it directed the liquidators to seek directions as to whether to assign the claims that were actually notified. Of itself, and on its true

construction, the effect of this order would have debarred all three claims now sought to be raised.

45. It was the "Assignment Claims" that came before the deputy ICC judge. On the way Chief Registrar Baister had made his order (17th May 2017) in which he provided for inspection of documents by Mr McCarthy and also provided for Mr McCarthy to serve draft Particulars of Claim articulating the Assignment Claims as previously defined. Thus the matter arrived before Deputy ICC Judge Middleton, with the debarring element still intact. There is no indication that I have seen that the debarring element of the Chief Registrar's order was considered to be a bar to the raising of the quota claims and the transfer of business claims. The deputy judge ruled them out on other grounds - they were not particularised at all. Nonetheless, the Chief Registrar's debarring order still stood and that would have been an additional ground for not allowing the claims. Until my order there was nothing to detract from the Chief Registrar's debarring order, so that order would still have prevented the bringing of any of the three claims debated before me.

46. The quota claims and the transfer of business claims were considered briefly by Deputy ICC Judge Middleton, and he refused both of them. That is not recorded in his order (one would not necessarily expect it to have been) but he did reach a decision on the point in his judgment. He treated an application about them as being made to him, albeit informally, and Mr McCarthy can hardly complain about that. Then he refused that application. That was a decision on the point. I agree that the rule in *Henderson v Henderson*, if not other forms of estoppel, would normally preclude its being taken again. This is not a question of the construction of his order; it is a matter of legal principle when applied to the facts.

47. In that state, with a dismissed application and no attempt to appeal it, that the matter arrived before me on Mr Marshall's (not Mr McCarthy's) appeal. The two claims refused by Deputy ICC Judge Middleton were not in issue, and the exchange as recorded above demonstrates that despite a brief suggestion they might still be live, I was clearly told that they would not be live if the other main assignment claims survived, which they did. So by the end of the hearing they were still not live, conditionally on Mr McCarthy preserving the rest of his claims. When my judgment dismissed the appeal, that, on the facts of what Mr McCarthy did and said, put the dismissed business/quota transfer claims to rest.

48. It is next necessary to consider the terms and effect of my order, which was, so far as I recall, settled between the parties and approved by me in the usual way (and not settled by me in the first place) in order to reflect my judgment and ancillary matters. On its face it provides for new claims to be notified with a view to their being included in an assignment in due course. To that extent it would seem to override the Chief Registrar's debarring order. That would seem to have been the effect of my intention as to new claims, but it is not clear how that came about and counsel were not able to remind me of anything relevant. However, while I was considering this judgment I was able to draw the attention of counsel to an exchange of emails while the parties were considering my draft judgment on the appeal, in which Ms Weaver questioned whether it was my intention to allow in new claims as opposed to a particularisation of the existing Assignment Claims. Mr Adair made emailed submissions as to why it was just to allow new claims to come in, based on an alleged lack of opportunity to see records. My response (which I can now see is perhaps not

quite as clear as it might have been, but it is clear enough) indicates that he was to be entitled to make new claims provided they were particularised in time. Thus new claims were to be allowed in, and that is what is encapsulated in my order. I obviously thought it fair, in the circumstances, that Mr McCarthy should have one final final opportunity to identify claims, though it is not apparent whether that was by way of review of the Chief Registrar's order or (I suppose) by way of extending his time limit under that order. The technical point was simply not debated, as far as I know, though to be fair to her Ms Weaver did draw attention to the previous orders in her email to me and pointed out an inconsistency with what my (then draft) judgment proposed. However, crucially in my view, nothing in that debate indicated that the two dismissed claims would, or might, come back in; Mr Adair said nothing about resiling from his clear statements at the hearing.

49. In my view, as a matter of pure construction, my order would provide Mr McCarthy with a further opportunity to advance a claim to an assignment of the two dismissed claims. However, it is equally plain that that cannot have been the intention of the parties or the court. By the time of the order, whose terms were sorted out by the parties and agreed by me, the parties had my judgment which revealed that with one minor exception Mr McCarthy had preserved his active claim to an assignment. The exception (the small claim which I disallowed) had no relevance to the remarks made by Mr Adair about not pursuing the two dismissed claims. At that point in time the dismissed claims had been dismissed by the deputy judge, there had been no appeal and the claims had been conditionally disavowed by Mr McCarthy in plain and strong terms, and the condition had been fulfilled (he had preserved the Assignment Claims that he had wanted to make). I have set out above the circumstances in which the disavowal came about. In the light of that, to the extent that the order allowed the two dismissed claims back in it was a mistake, and it would be appropriate to treat it as if amended by expressly excluding them from the new claims, either pursuant to CPR 3.1(7) or the review jurisdiction now invoked by Mr McCarthy (Insolvency Rule 12.59(1)). That is now clear to me, and I shall approach the remainder of this matter as if the order were so amended.

50. The net effect of this chain of events is that on the true construction and effect of the various orders, Mr McCarthy would be barred from seeking an assignment of the transfer of business and quota claims. That means that he is thrown back on the review jurisdiction in respect of those claims.

The review jurisdiction

51. The review jurisdiction on which Mr Adair would need to rely arises out of Insolvency Rule 12.59(1):

> "Every court having jurisdiction for the purposes of Parts 1 to 7 of the Act and the corresponding Part of these Rules, may review, rescind or vary any order made by it in the exercise of that jurisdiction."

52. In order to succeed Mr Adair really has to have three orders reviewed, as appears above. The Chief Registrar's order imposed a time limit which was not complied with, so strictly that is an answer to the matter. That needs a review. Then deputy ICC Judge Middleton considered an application and dismissed it without an appeal.

That would be the end of it even if the Chief Registrar's debarring order were itself varied, so Mr McCarthy needs a review and variation of that. Then there is my order which, as properly read and given effect to (see above), would require a review to read back out the exclusions which I consider should be read into it.

53. A number of courts have emphasised the caution with which this rule (and its statutory equivalent in the bankruptcy jurisdiction - Insolvency Act 1986 section 375) need to be treated. The principles applicable have been summarised in various ways. I am content to adopt the summary of Barling J in Credit Lucky Ltd v National Crime Agency [2014] EWHC 83 (Ch) at paragraph 31:

> "(1) The power to rescind is discretionary and is only to be exercised with caution;
>
> (2) the onus is on the applicant to satisfy the court that it is an appropriate case in which to exercise the discretion;
>
> (3) it will only be an appropriate case where the circumstances are exceptional and those circumstances must involve a material difference from those before the court that made the original order;
>
> (4) there is no limit to the factors that the court can take into account, and they may include changes since the original order was made, and significant facts which, although in existence at the time of the original order, were not brought to the court's attention at that time; but where that evidence could have been made available, any explanation the applicant gives for the failure to produce it then or any lack of such an explanation, are factors to be taken into account; …"

54. I have omitted Barling J's fifth point which has no relevance to this case. Those principles are accepted by the parties in this case.

55. Mr Adair's case as advanced at the hearing can be seen to be based on the following elements:

(a) The Chief Registrar's debarring order ought not to have been made, as the Chief Registrar himself was (it was submitted) minded to accept.

(b) The transfer of business and quota claims are prima facie further examples of dishonest conduct on the part of Mr Marshall, and he should not be able to benefit from such conduct.

(c) The claims are apparently viable claims.

(d) Since they are viable they cannot be, and should not be treated as being, frivolous or vexatious.

(e) The reason that the claims were not notified before the hearing before deputy ICC Judge Middleton, or particularised then, was that Mr McCarthy did not have access to the records of the company to be able to make the claims. It was only

when Grant Thornton had full access to all the records pursuant to my order that they were able to establish the claims. Mr McCarthy did not have real knowledge of them before that time.

(f) What the claims indicate are serious frauds, concealed by Mr Marshall, which Mr Marshall should not be allowed to get away with.

56. Ms Weaver challenges all those matters. She says that the original debarring order of the Chief Registrar was properly and justifiably made; that the two claims can be seen at this stage to have no substance; and they would be vexatious if assigned and brought; and Mr McCarthy has had opportunities before now to identify and particularise the claims. Mr McCarthy has had previous opportunities to bring his claims which he has not taken, and (in essence) effect should be given to the debarring order. So far as necessary, she would say that Mr McCarthy's attempts to resile from his clear statement that he would not seek an assignment of the claims if he got his other main claims amounts to an abuse of process.

The Chief Registrar's debarring order

57. I will start by dealing with Mr Adair's first point, about the debarring order of the Chief Registrar, or at least that part of it arising out of the litigation circumstances in which it was made. I can see no real basis for reviewing the Chief Registrar's debarring order on the basis that it ought never to have been made. The Chief Registrar was concerned to bring an already long-running liquidation to an end, and to flush out what claims Mr McCarthy claimed to exist, and the order he indicated he would make requiring Mr McCarthy to particularise them was entirely sensible. It remained sensible even though Mr McCarthy was not represented at the hearing - a surprising state of affairs bearing in mind the considerable assets that Mr McCarthy had. The debarring element does not seem to have come from the Chief Registrar - it emerged from the discussions after the hearing, though it may have been founded in some of the things passing at the hearing. However, there is no evidence of unfair pressure being put on Mr McCarthy (there was no real debate at the hearing before me as to the discussions outside court) and again the debarring order was sensible in the circumstances.

58. I do not know why the Chief Registrar seems to have thought he might have been over-hasty in making his order, but whatever his reasons were they did not lead him materially to consider the thrust of his order at the November 2016 hearing. If there were a real point which needed pursuing as to the effect of the order and the circumstances of its being made then it could have been pursued subsequently by Mr McCarthy, and he could have applied for appropriate variations. He could, for example, have sought an extension of the time limit if he considered it worked unfairly to his disadvantage. He did none of those things, but instead continued down the path of working out the orders. There is no basis there for reviewing the debarring order arising out of the circumstances of its being made. At this point I am not considering the claims of Mr McCarthy about his ignorance of the claims and whether he could in fact have made them earlier, and his other points in favour of reviewing the order. They are still, in theory at least, factors capable of going to a decision to review the debarring order, and I deal with them below.

The effect of the disavowal

59. I now turn to the factor which I consider to be a plain answer to the whole of the claim to an assignment of the business transfer and quota claims, namely the disavowal.

60. What Mr McCarthy did in the disavowal was in the nature of a concession backed by a form of undertaking; although the latter was not formally recorded it was, at the very least, an indicator of how seriously Mr McCarthy's professed stance was to be taken. I do not propose to embark on a debate as to whether any particular specified form of undertaking should be taken as being given. It is sufficient for present purposes to find, as I do, that Mr McCarthy was seriously committing himself not to pursue the two claims if he retained the assignments provided for by the deputy judge. Obviously he was not bargaining with anyone (either the court or Mr Marshall) but his position was clear, and it was intended to facilitate the progress of the litigation before the court and the liquidations thereafter, against a background of serious disputes, delay and cost. This was a very serious and significant concession/undertaking.

61. Having said that, it is nonetheless the case that neither a concession nor an undertaking is binding in the sense that they can never be resiled from. Concessions can be withdrawn, and undertakings released – see eg *AM (Iran) v Secretary of State for the Home Department* [2018] EWCA Civ 2706 (concessions) and *Placito v Slater* [2003] EWCA Civ 1863 (undertakings). The test is the overriding objective – what the justice of the case requires (*ibid*). But it is clear that a party seeking to do either is likely to have to advance an explanation which is likely to involve having to explain how the concession, and particularly the undertaking, came to be given in the first place, and why it is just to allow the resiling or release as the case may be. The more serious the concession or undertaking, the stronger the case for resiling or release is going to have to be. In addition, departing from it in this case raises issues analogous to those raised in the principle of finality in litigation. Mr McCarthy has to overcome:

> "the court's natural disinclination to permit a party to re-introduce a claim which it had after careful consideration decided to abandon." (per Briggs LJ in *Hague Plant Ltd v Hague* [2014] EWCA Civ 1609 at para 60

62. The disavowal was not a casual concession. It was a serious concession, with a purpose, intended to address some of the concerns of the court (and to that extent to gain an advantage) and made after Mr Adair sought an adjournment specifically so that his client could consider and address the concerns that had been aired. So it was made with the benefit of full legal advice, and presumably consciously. It achieved its objective of taking out of play any possible effect the continued pursuit of the business claims might have had on the vexation (or harassment) question and, presumably in order to demonstrate Mr McCarthy's seriousness, an undertaking was voluntarily proffered. There can be no doubt that Mr McCarthy fully intended to cease his pursuit of those claims (if he preserved his other claims), and the court and Mr Marshall were intended to accept and rely on that. It was relied on in that the matter fell out of play, which was very significant in the context of the conduct of the rest of the appeal.

63. All that means that this particular disavowal (or concession) was a very serious one, which weighs very heavily in the discretion scales. Mr Adair's case requires not merely a review of orders of the court, but a backtracking on his client's own

concession and undertaking designed to get him a benefit in the proceedings in terms of removing questions of oppression and vexation from the fray. The justice of the situation would seem clearly to require that he be held to that. Departure would require an appropriately cogent case, and Mr McCarthy's difficulty in succeeding overall in this matter is not helped by the fact that he is in any event required to make a strong case for the review of any order (as per Barling J, above).

64. There is a particularly striking feature in this particular case. As part of the backtracking of which Mr McCarthy is guilty in advancing the claim at all, and as a precursor to that, he must have given instructions to GT to do the work which he says demonstrates the existence of the claims. So having made the concession and offered the undertaking, he must immediately (on getting access to the documents) have given instructions which he must have known were contrary to his clear statement to the court and which he must have known would not have been in the contemplation of Mr Marshall (and the court). That is a piece of conduct which requires a good explanation; none has been proffered.

65. In order to overcome the effect of the disavowal Mr Adair has the points identified above. First, he says that the disavowal was only a disclaimer of an intention to seek that the liquidators investigate the matters. I have already dealt with this point. That is not the effect of what was said, and even Mr McCarthy does not say that those were his instructions or that was what he intended. Second, Mr Adair says that these are good claims, which have only recently been discovered (as a result of the court's specifically allowing a further investigation), and they demonstrate possible fraud, deliberately concealed by Mr Marshall, which Mr Marshall should not be allowed to get away with. I will consider those elements in the context of each of the two claims to see if they are capable of amounting to a strong enough case to justify allowing Mr McCarthy to depart from the fact and effect of his disavowal and achieve a review of the court's orders.

The transfer of business claim

66. This claim has the following "pleaded" elements.

67. Meats had a substantial business. In its last two years of full trading it had a turnover well in excess of £8m. Its accounts for the financial year ended 30th September 2008 showed net current assets of £1.3m, and a profit of over £100,000, though the draft accounts for the next year (not agreed by Mr McCarthy) showed a loss of £36,000. It is pleaded that notwithstanding what is said to be the significant value of the business, there is no evidence that Mr Marshall ever marketed the business for sale or contracted to sell it. It is alleged that statements made in a skeleton argument later on, in the winding up proceedings, to the effect that the business was sold, were untrue.

68. It is further said that the books of the company show that 3 outstanding contracts between Meats and an Australian supplier (Sanger), which were outstanding at the time the business was agreed to cease, were cancelled and transferred to Mulberry, and the inference is invited that 3 more contracts with Sanger suffered the same fate. It is pleaded that these were long term contracts which were diverted. An email is pleaded as demonstrating that Mr Marshall was telling Sanger that Mulberry was taking the place of Meats. It is further pleaded that from June 2010 to February 2011 suppliers and customers were diverted from Meats to Mulberry without any payment

to Meats, and that was a fraudulent transfer of business. At least one banking document and one insurance document are said to suggest that there was some form of deliberate trading in parallel, and Mr McCarthy had explicitly said that he was not happy about Mr Marshall trading with Mulberry while the business of Meats was still being wound down (which it seems he actually had said in an email). Mr Adair showed me various examples from the books of what were said to be wrongly transferred contracts, and missing contracts which it is suspected and believed that Mr Marshall purloined for his own company.

69. Mr Marshall's answer to this is that there was no transfer of business; there was no meaningful business to transfer. The business was essentially him trading with his own expertise, knowledge and customer contacts which he took with him, legitimately, to Mulberry when Mulberry started trading as the Meats business was wound down by agreement between him and Mr McCarthy from the middle of 2010. There was nothing to transfer. It is correct that certain Meats contracts were cancelled and then assumed by Mulberry, but that is because Meats was not going to be able to fulfil them because the business was ceasing; Meats could not pay sums due on purchases and Mulberry could. The transfers avoided repercussions for Meats arising out of non-fulfilment. He claims this was done by agreement with Mr McCarthy.

70. On the basis of the current material this does not really look like a very worthwhile claim. It is entirely plausible that there was not much of a business to sell, as opposed to a business to wind down. There is no real suggestion that there was any goodwill other than the personal goodwill and experience vested in Mr Marshall which he was entitled to exploit for his own benefit absent a restrictive covenant. The mere assertion that there was no sale and there ought to have been does not really address the question of what should have been sold and its value. The main question-marks as far as I can see are the "transferred" contracts and some sort of case that Mr Marshall ought to have been trading in Meats when he was in fact trading contractual opportunities in Mulberry despite the mutual intention to wind up the affairs of Meats and stop trading If a handful of contracts were "diverted" then I would also question whether that part of the claim has a worthwhile value.

71. So far as the merits of the claim are concerned, it cannot quite be said to be without any merit at this stage, but it looks neither strong nor hugely valuable.

72. I now consider whether it could have been advanced before. At one level the detail that has now been advanced could not have been advanced before because Mr McCarthy did not know it. However, that is not really the point. The more relevant question is whether it could have been investigated and advanced before, as it has been investigated and advanced now (a point which obviously occurred to the deputy ICC Judge). The answer to that seems to me that it could. Mr McCarthy seemed to know that he had a potential claim at the time it was advanced in general terms before the deputy judge, because he was able to have counsel refer to it in his skeleton argument. Whatever he knew then he must have known all along, so if there was something that he wished to have investigated then he could have had it investigated a long time ago. It is no answer that the previous reports of Grant Thornton focused on other things. That is because they were instructed to focus on those things. They could have been asked to investigate the alleged business transfer wrong, but they were not. As Ms Weaver pointed out, there is clear historical evidence that Mr McCarthy has at all times known that Mr Marshall started trading with Mulberry

when the Meats business stopped (there is a dispute as to whether there was actually concurrent trading, but that is irrelevant to this point), and a letter from Boyes Turner (solicitors to the liquidators) to Mr McCarthy's solicitors dated 13th November 2020 refers to the transfer of business (and quota claim) and says:

> ". We should add that this general area was identified as a matter of enquiry by your client in 2014 and our clients' predecessors received an explanation from Fladgate LLP at the time."

73. There therefore appears to be no good reason why this claim could not have been raised earlier and it is not true to say that it is a claim which Mr McCarthy can have known nothing of at the time of the disavowal. Nor does the allegation of concealment add anything to Mr McCarthy's case for present purposes. He knew about a potential claim for quite some time, whether it was concealed or not. When he said he would not pursue it he knew he was electing not to pursue a potentially real claim of some value, and at that stage the concealment was irrelevant. Of course, he did not know its value, but he knew that he did not know its value, and still decided to abandon it. It is not the case that it has transpired, for example, that the claim has a value which is vastly greater than he could reasonably have supposed. That might have been a factor Mr McCarthy could have prayed in aid in being asked to be released from his concession, but it does not exist.

74. The position is therefore that this is not a valuable claim, the nature of which, and existence of which, cannot have been in the contemplation of Mr McCarthy until recently. It does not demonstrate some unanticipated horrendous wrong committed by and hidden by Mr Marshall which is sufficient to justify saying that Mr Marshall should not be allowed to get away with it (if established). Even if that sort of case might have assisted Mr McCarthy, it does not exist here. It is a claim which Mr McCarthy could have got on foot much earlier than he did and which he knew enough about (if it exists) when it was disavowed. None of this justifies going behind the disavowal so as to justify a review of any previous order.

75. I would therefore not direct the assignment of this claim.

The quota claim

76. Meats had the benefit of GATT and other quota claims which, it is said, enabled Meats to import cheaply and then sell on in the EU at a better profit than other non-quota meats. This is said to make the quotas valuable. Mr McCarthy pleads that these quotas were built up over years.

77. The draft Particulars of Claim plead a sale of the quotas by Mr Marshall to a concern called Trans Oceanic Meats for £32,799.55. That is said to be a significant undervalue, but no amount of undervalue is set out. It is also stated that there is no evidence that Meats ever received that sum. Those factors are said to be suspicious factors which justify an inquiry as to how Mulberry acquired its own GATT quota and in particular whether the sale to Trans Oceanic was part of a larger transaction by which that quota was transferred to Mulberry for nominal or no consideration. Those are the elements of the claim which Mr McCarthy seeks to have assigned to him.

78. As they stand and as they are baldly described those factors could give rise to a claim which would prima facie be assignable. However, again Mr Marshall denies the claim and submits that the claim is speculative and not sustainable on the evidence. It is, Ms Weaver submits, another instance of Mr McCarthy taking a disproportionate view of claims and of his willingness to harass Mr Marshall with speculative claims.

79. The evidence which is currently relied on has been put before me. There are invoices showing the sales which are pleaded, and there is no dispute about them. There is an exchange of emails at the time of the sale (late 2011) between Mr Marshall and Mr McCarthy in which the former asks the latter to agree a sale at the sort of prices identified in the invoices. Mr McCarthy says that if those are the best prices that can be obtained then he agreed. Mr Adair accepted that his case must therefore turn on Mr McCarthy being deliberately misled by Mr Marshall as to pricing, though that is not pleaded. Mr Adair points to some flimsy evidence that there may be some sort of unspecified connection between Mr Marshall and Trans Oceanic. He also points to a letter in which the Rural Payments Agency said to Mulberry that it was not in a position to apply for quotas itself and suggested a grant to Meats and an onward assignment to Mulberry. It is not apparent quite how this suggestion, if implemented, fits in with the wrongdoing alleged.

80. So far as evidence of undervalue is concerned, there is none worthy of the name. Mr Adair sought to construct some sort of case by analysing previous sales records to show the great value of the assigned tariffs, but that evidence is vague and speculative. It must be borne in mind that Mr McCarthy has his own significant expertise in the meat trade, and would be expected to have some idea of the value of tariffs, but he does not even hazard his own view as to the true value, and his lack of challenge in the contemporaneous emails when he was asked to consent to the sale does not suggest that there was anything obviously wrong with the prices proposed.

81. So far as the absence of an apparent receipt of the sales proceeds is concerned, it is not clear that any sensible searches have been done to establish the alleged non-receipt. In GT3 Grant Thornton say that the receipt is not reflected in the draft financial statements prepared by the liquidators, though the accountants accept that they are troubled by inaccuracies in the financial statements generally (see paragraphs 5.8 and 5.9).

82. There is therefore only a very shaky evidential foundation for this claim, and no real evidence of undervalue. If there really were something in this claim I would have expected better evidence to have been available, and to have been relied on, by someone proposing a bona fide potential claim. I consider that in this instance Mr McCarthy has not managed to achieve the level of demonstrating a potential claim, so his assignment claim would fail irrespective of the disavowal. I consider that this case is flimsy at best, would be likely to generate a lot of extra work for him, and for Mr Marshall, before it is finally dealt with, with the possibility of continuous inter-partes correspondence about it. I do not consider that the pursuit of this claim is likely to be proportionate, and it provides too much scope for the vexation which is in issue on this application.

83. It is also a claim which could also have been investigated and made a long time ago. Mr McCarthy knew the quotas were to be sold, and the price (see the emails passing at the time). Yet he makes the claim in a thin way and only at the last minute in the

history of this liquidation. No explanation is advanced for that. Again, if there were a claim, he knew enough about it at the time of the disavowal, and the disavowal was made in the light of that knowledge. Nothing new has come to light which would justify release from the disavowal.

84. In the circumstances this claim does not present a viable basis for the strong case in any event. Even if it were to be able to scrape over the hurdle of being a sufficiently arguable case, it is still not the strong and apparently obvious case that Mr McCarthy has to make to overcome the hurdle of the disavowal and the need to establish an exceptional case for the purposes of a review. It does not present a claim which Mr McCarthy can have known nothing about, or which demonstrates to a relevant extent a serious and substantial fraud which Mr Marshall should not be allowed to get away with.

85. I therefore direct that any claim related to this matter be not assigned.

Conclusion on the business transfer and quota claims

86. I therefore direct that there be no assignment of the business transfer and quota claims. I add that I have considered whether the cumulative effect of these claims, taken with the third claim (which, as appears, I will allow) somehow strengthens Mr McCarthy's case, and consider that it does not.

The stock/cash claim

87. This claim is in a different position because it is not one of the claims which were disallowed by the deputy judge or disavowed before me. It is a new claim, and although it was not made within the time specified in the Chief Registrar's order it does, so far as there is a claim, fall within the activity which my order permitted. It is therefore necessary to consider it in the light of that. Mr McCarthy does not require the review of a previous order in order to be able to make this claim.

88. This claim arises out of what is said to be an extraordinarily inflated stock figure in the accounts for the last two full years of trading. In the period leading up to the financial year ended 30th September 2008, signed by Mr McCarthy, the stock figure was on average in the region of £70,000 to £80,000. In the year ended 30th September 2008 the figure was £792, 921. Accounts signed by Mr Marshall (but not by Mr McCarthy) for the year ended 30th September 2009 show a stock figure of £793,176. That amounts to over one month's turnover, which Mr Adair was submitted was unlikely because this would generate undesirable storage charges, based on an email to a supplier which said that 2 month-old meat could not be used.

89. It is also said by Mr Adair to be a suspicious figure in the light of the fact that a sudden increase in stock was (it was submitted) a familiar badge of fraud. If the stock never existed then there was an obvious fraud. If it existed then Grant Thornton were said to be unable to find the proceeds of sale in the records of the company, so either the stock was transferred to Mulberry for no consideration or the proceeds of sale were misappropriated. What is "pleaded" is that the stock figures for 2008 and 2009 were inflated, thereby overstating the net worth of Meats and concealing the wrongdoing of Mr Marshall, which included the transfer of Meats' stock to Mulberry for no consideration. It is also pleaded that the inflation of stock figures "raise[s]

questions regarding the sale of stock belonging to Meats, including, in particular whether it was sold for cash by Mr Marshall and/or transferred to Mulberry."

90. Mr Marshall, in his evidence, says that after all this time he cannot explain the stock figures, though he firmly denies that they reflect or disguise any misappropriation or other wrongdoing by him. Ms Weaver submits that the draft Particulars of Claim do not particularise a claim; they contain merely assertions and suspicions without identifying any misappropriation, and the position is unlikely to get any clearer, particularly bearing in mind (as is the case) that the person who considered these accounts in the context of the liquidation has now left the liquidators' firm. It would be unfair on Mr Marshall to allow these claims to be run now.

91. Although this claim looks like a doubtful claim to me at this stage, it is not quite so doubtful as to make its pursuit frivolous or vexatious, or to present a serious amount of unfairness to Mr Marshall, so as to lead me to refuse to direct an assignment. I acknowledge that in its present state it does not amount to a *prima facie* case of fraud; it is more something which justifies further investigation and which might lead to a fraud case because the figures are relied on as being some sort of potential badge of fraud, or something for which fraud would be an explanation. If the evidence stayed as it is then the claim would fail. Even GT3, which is where this claim comes from, does not actually demonstrate there is missing stock or missing cash (though it does suggest serious problems with the figures). Furthermore, Mr McCarthy signed off on the 2008 accounts which is where the inflated stock figure first came from.

92. However, despite all that what is required at this stage is not strong proof. It is a demonstration of a potentially arguable case which is not apparently frivolous or vexatious. There is sufficient there at present (though perhaps only just) to make this an identifiable area of potential claim despite the fact that there are significant uncertainties about its strength and value. If it is said to be a claim which is bound to fail, that is a point much better dealt with on an application for defendant's summary judgment than on the present application. I shall allow and direct a claim on this point to be assigned, but my order and the assignment must be tightly drawn to make sure that the claim is confined to the period 2008 to 2010, to ensure that it does not become an inquiry stretching back years.

Conclusion

93. I therefore direct that there be an assignment of the stock/cash claim in similar terms as to recovery as apply to the already permitted claims, but that there be no other assignment of any other claims. Under the terms of the orders made, that will mean that there can be no question of an investigation or assignment of other claims, so such claims should not be a bar to bringing the liquidations to an end (though I understand that there are significant disputes about remuneration which might still frustrate that purpose – that is not a matter for me).