Pleading issues: pick your battles

Daniel Lightman KC & Charlotte Beynon recommend a rigorous approach when bringing Insolvency Act claims

IN BRIEF

- Covers *Chandler v Wright* on insolvency claims where there are potential pleading deficiencies.
- Offers insight into the approach taken by the courts to the pleading of Insolvency Act 1986, ss 214 and 212 claims.
- Refers to the ongoing BHS litigation.

A High Court decision in the context of insolvency proceedings in August last year has provided guidance for practitioners as to how best to address potential pleading deficiencies and the ensuing skirmishes.

Mr Justice Edwin Johnson's judgment in *Chandler v Wright* [2022] EWHC 2205 (Ch), [2022] All ER (D) 06 (Sept) has also reaffirmed the essential elements of claims under ss 212 and 214 of the Insolvency Act 1986 (IA 1986) and sent a strong message that judges will expect such claims to be pleaded with the same rigour that is expected in other areas of the Business and Property Courts.

The issue arose in the high-profile BHS litigation, which is currently making its way through the courts.

The BHS case

The joint liquidators of the BHS group of companies brought proceedings against some of the former directors for alleged wrongful trading under s 214, IA 1986. They also alleged that the former directors' decision to continue to trade the companies constituted a breach of their duties, thereby giving rise to parallel claims under s 212, IA 1986.

A successful claim under s 214 for wrongful trading succeeds by reference to a particular date by which the director is found to have known or ought to have known that the company had no reasonable prospect of avoiding an insolvent liquidation.

In their points of claim BHS's liquidators had identified one such 'knowledge date', which constituted their primary case under s 214. However, they had also hinted at a wider case by pleading that s 214 was satisfied 'alternatively by some later date' within a defined period of approximately one year. They had done the same for their breach of duty claims under s 212.

One of the former directors, Mr Chandler, sought to clarify the liquidators' case by a request for further information under CPR 18. In their response, the liquidators (a) identified five alternative, specific dates on which they alleged s 214 was satisfied, but (b) sought to maintain the 'overarching case' that s 214 was in any event satisfied on any date within an identified period (of around a year). They took a similar approach in relation to their alternative s 212 claims.

The liquidators declined to comply with Mr Chandler's request to plead causation or loss in respect of their five alternative s 214 claims or their alternative s 212 claims.

Mr Chandler pointed out the deficiencies in the liquidators' pleaded case, namely that (a) the joint liquidators needed to pin their colours to the mast on specific dates, as it was not fair or appropriate for the 'overarching case' to be run, and (b) causation and loss had to pleaded for the new alternative date claims in any event. He offered the liquidators the opportunity to seek to amend their pleading so as to plead the essential elements of their claims. The liquidators declined that invitation, instead characterising his objections as 'delay tactics'.

Mr Chandler applied to strike out the alternative claims and 'overarching case'. His application was dismissed by deputy Insolvency and Companies Court Judge Schaffer ([2021] EWHC 3501 (Ch); [2022] 2 BCLC 145; [2022] BCC 457), essentially on the basis that in his assessment Mr Chandler knew—or knew sufficiently for present purposes—the case he had to meet.

Edwin Johnson J allowed Mr Chandler's appeal. His judgment provides valuable insight into the court's approach to the pleading of ss 214 and 212 claims, as well as to pleading issues in general.

Pleading the essential elements of ss 212 & 214 claims

Causation & loss

Edwin Johnson J reaffirmed two key points of substantive law in relation to wrongful trading and breach of duty claims.

First, following the judgment of Mr Justice Snowden in *Re Ralls Builders Ltd (in liquidation)* [2016] EWHC 243 (Ch); [2016] Bus LR 555, causation of loss must be demonstrated in a claim under s 214 if it is to succeed. This is so notwithstanding that the statutory language makes no reference to causation or loss.

Second, where a claim is brought alleging 'breach of any fiduciary or other duty' under s 212(1), loss and causation must be demonstrated if the claim is to succeed just as if the claim were a negligence action at common law.

Edwin Johnson J went on to state that causation and quantum are essential elements of claims under both ss 212 and 214 and must be pleaded. Since the joint liquidators had not pleaded causation or loss in relation to any of their alternative claims under ss 212 and 214, those claims should be struck out.

The knowledge/cessation date

In relation to the 'overarching case', the judge considered Mr Chandler's contention that it was unfair and inappropriate to allow the liquidators to run their 'overarching' case—which did not identify any specific dates but effectively asserted that a complete cause of action under ss 214 and 212 arose on each of the days in a year-long period—to trial.

This point had not previously been addressed by a court at the pleading stage of a wrongful trading claim. There were, however, authorities where the court had considered at or around trial whether it would be open to an officeholder to contend for a different 'knowledge date' to that pleaded.

For example, in *Re Sherborne Associates Limited* [1995] BCC 40, after the evidence had been heard the liquidator sought to argue for subsequent 'knowledge dates' if his primary case failed. Judge Jack QC (later Mr Justice Jack) held it would not be fair to the respondents to permit the liquidator to pick a series of subsequent dates, or for the court to do so.

Similarly, in *Re Continental Assurance Co of London plc (in liquidation) (No 4)* [2007] 2 BCLC 287, the court was asked at the start of trial to rule on whether it would consider a later date than the one pleaded in circumstances where the pleaded position suggested a wider case (with reference to the 'knowledge date' it stated 'alternatively at such other date as the court may determine'). Mr Justice Park held that he would not consider any later dates, finding that in a complex case it would be unsatisfactory for the 'knowledge date' to remain at large.

On the separate question of whether the court had jurisdiction to depart from the knowledge date that had been pleaded or relied upon, in *Re Continental* Park J held that it will not matter if the chosen date is 'just a bit too soon' (in that case, a couple of weeks too early); the liquidator could still succeed because the court has jurisdiction to find that s 214 was satisfied on a date other than the pleaded date.

Further, in a number of authorities a s 214 claim had succeeded by reference to a date different to that pleaded or relied upon: *Rubin v Gunner* [2004] EWHC 316 (Ch), [2004] All ER (D) 05 (Mar), *Official Receiver v Doshi* [2001] 2 BCLC 235 (though *Sherborne* had not been cited in either of those cases), *Roberts v Frohlich* [2011] EWHC 257 (Ch) (the court found for a date two weeks later than the one relied on) and *Hooper v Patterson* (unreported, 9/2/2015) (concerning a litigant in person).

Finally, the liquidators pointed to two cases where they contended the 'knowledge date' was entirely 'at large': *Re DKG Contractors Ltd* [1990] BCC 903 and *Re Purpoint Ltd* [1991] BCC 121. However, both (a) were relatively low value, uncomplex cases where no point was taken as to the date for the knowledge requirement and (b) pre-dated *Sherborne*.

Following consideration of the case law, the judge held that (a) there is no absolute rule requiring a specific date or dates to be pleaded, but (b) in a case of the complexity and magnitude of the BHS case, it was unfair and inappropriate for the claims to be pleaded 'at large' in this manner. The 'overarching case' therefore fell to be struck out.

What if the defendants arguably know the case they have to meet?

Chandler v Wright makes clear that it is not good enough to say, in response to a strike-out application, that pleading defects do not matter because it is obvious to the defendant what the case is or because the case can (or may in the future) be identified from some source other than the pleading.

Similarly, Edwin Johnson J rejected the arguments that the true case could be inferred from the statements of case or should be taken as actually having been pleaded in the points of claim as a result of reading disparate parts of that pleading together in a particular way.

Rather, he emphasised that a case should not be a matter of speculation. Claims, including claims under ss 212 and 214 brought in the context of insolvency proceedings, should be spelled out clearly in the points of claim with all of their essential elements present.

The judge observed that the liquidators' CPR 18 response had the effect of adding to their case without clarifying it. It was not satisfactory that the liquidators' pleaded case was not wholly contained in the points of claim but rather was split between that document and the CPR 18 response. The judge made clear that the proper approach, in his view, would have been for the whole case to be contained in the points of claim (ie by way of the liquidators applying to amend their primary statement of case).

Serious claims will be allowed to progress

While Edwin Johnson J acceded to Mr Chandler's strike out application, nevertheless he held that some of the liquidators' claims (those relating to the alternative dates) should be allowed to progress in the event that they were pleaded properly. The judge therefore offered the liquidators an opportunity to apply for permission to amend their pleadings to achieve this. In doing so, he made clear the court will generally wish to give serious claims an opportunity to progress to trial notwithstanding initial pleading defects if it is fair in the circumstances of the case to do so. NLJ

Practical points to take away

1. Ensure that the essential elements of all causes of action are pleaded (and unambiguously so). For claims under ss 212 or 214, IA 1986, causation and loss must be pleaded for each claim. For a s 214 claim, at least in a large and complex case, the specific 'knowledge date' or dates on which your client seeks to rely must be identified in the pleading.
2. Do not assume that any 'pleading point' raised against your client is empty sabre-rattling. If in doubt about the clarity of your client's pleading, consider seeking to amend it—either by consent or application—at an early stage. Digging in risks racking up costs unnecessarily and exposing your client to a costs risk.
3. Do not rely on arguments that the other side understands the case even if it is debatable that all the essential elements of the causes of action are pleaded. Such arguments are likely to fail.
4. Give serious consideration to any CPR 18 request on pleading matters and ensure that your client's response is being used to clarify the claim, not merely add to it.
5. Ideally, avoid pleading the essential elements of claims in an RFI (request for further information) response or reply rather than in the points or particulars of claim.

Daniel Lightman KC and **Charlotte Beynon**, both of Serle Court, represented Mr Chandler in *Chandler v Wright* (*www.serlecourt.co.uk; dlightman@serlecourt.co.uk* and *cbeynon@serlecourt.co.uk*).