Neutral Citation Number: [2021] EWHC 2647 (QB)

Case Nos: QA-2020-000162 and QA-2020-000227

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/10/2021

Before :

MR JUSTICE LANE

- -

Between :

Thomas Banks Hamilton	**Applicant**
- and –	
(1) Secretary of State for Business, Energy and Industrial Strategy	**First Respondent**
(2) Christopher Lucas-Jones	**Second Respondent**

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- -

The applicant appeared in person
Mr Simon Hunter (instructed by **Shepherd & Wedderburn LLP**) for the **first respondent**
Mr Chris Royle (instructed by **Feltons Law**) for the **second respondent**

Hearing date: 22 July 2021

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APPROVED JUDGMENT

Mr Justice Lane :

1. At the heart of this case is the vessel *MV Samara*, currently moored in St Katherine Dock, London. The second respondent is a High Court Enforcement Agent, authorised by Clare Sandbrook, a High Court Enforcement Officer, to proceed to sell the *MV Samara*, so that the first respondent may receive the relevant proceeds of sale in order to satisfy a debt owed to him by the applicant, Mr Hamilton.

THE LITIGATION

2. The first respondent obtained a directors' disqualification order against Mr Hamilton in Scotland on 24 April 2015. The first respondent was awarded two decrees of costs, amounting to a total of £20,356.04. Mr Hamilton sought to challenge the decrees of costs, but this challenge was refused by the Court of Session. Mr Hamilton's application for permission to appeal to the Supreme Court was refused on 21 April 2017.

3. The respondent then sought to enforce the decrees of costs. In February 2019, the decrees were registered in England and Wales. The first respondent then instructed the High Court Enforcement Officer to obtain and enforce two writs of control, covering the total amount of the debt.

4. Taking control of the *MV Samara* was considered necessary because Mr Hamilton was regarded as having ownership of the vessel, with the result that its sale would enable the first respondent to obtain from Mr Hamilton all or part of the sum owed by him to the first respondent as a result of the decrees of costs.

5. In 2019, a Mr Newett gave notice under CPR 85.4 that the *MV Samara* was his and not Mr Hamilton's. On 22 May 2020, Master Cook dismissed the application, following a remote hearing at which Mr Newett appeared in person. Master Cook found that, at the time of what was said to be a loan agreement between Mr Hamilton and Mr Newett, with the *MV Samara* standing as security, it was more likely than not that Mr Hamilton did not have any interest in the vessel which could be granted as security for a loan. Master Cook further held that, if that were not right, then the agreement did not have the effect of conferring any interest in the vessel on Mr Newett.

6. In his order, sealed on 26 May 2020, Master Cook, besides dismissing Mr Newett's application, ordered him to pay the cost of the application in the sum of £12,106.89.

7. Paragraph 2 of Master Cook's order reads:-

> "2. The High Court Enforcement Officer do sell MV Samara, pursuant to paragraph 60 of Schedule 12 [to the Tribunals], Courts and Enforcement Act 2007."

8. On 31 May 2020, Mr Hamilton applied to have the order of Master Cook set aside. The application contended that Mr Hamilton had unsuccessfully applied for an adjournment of the hearing on 22 May, which was refused on the basis that his position was not relevant to the question of whether Mr Newett had an interest in the *MV Samara*. Mr Hamilton's application alleged that he had in fact had no knowledge of the hearing. He submitted that the Scottish judgments, leading to the enforcement proceedings in England, had been obtained fraudulently; that there was "subsidiary ownership of

Jacqueline Hamilton to MV Samara"; and there was "supporting evidence" regarding the loan agreement with Mr Newett and a loan agreement relating to Mr Newett.

9. On 2 June 2020, Master Cook dismissed Mr Hamilton's application "as being totally without merit". Master Cook pointed out that the judgment debtor, Mr Hamilton, was not a party to Mr Newett's application under CPR 85.4 and that Mr Newett's previous applications for a stay of enforcement had been refused. The court had made previous directions in relation to the evidence to be filed by Mr Newett, as a result of which all evidence to be relied on at the hearing should have been served by 20 December 2019. Mr Newett had submitted evidence to the court and attended the hearing on 22 May 2020, when he made submissions to the Master. Mr Newett had not requested an adjournment or sought to put in further evidence. Mr Hamilton had been informed that he could attend the video hearing of Mr Newett's application but did not do so.

10. The application to set aside bears the reference QA-2020-000162.

11. Mr Hamilton applied for permission to appeal against the order of Master Cook of 22 May 2020. He also applied for permission to appeal against the order of Master Cook of 2 June 2020, in which Master Cook refused to set aside his order and judgment of 22 May 2020.

12. On 22 January 2021, Stewart J struck out Mr Hamilton's appeal against the order of Master Cook of 22 May 2020 (QA-2020-000227). On 26 March 2021, Stewart J reinstated Mr Hamilton's appeal in QA-2020-000162, which had earlier been struck out for failure to comply with an order of 13 November 2020. As for appeal QA-2020-000227, Stewart J ordered that, if Mr Hamilton was applying for a set aside the strike out in that appeal, he was required to file an application notice, providing reasons in support. If Mr Hamilton did so, then the combined matters would be listed for hearing before a judge on the first available date after 23 April 2021, with an estimated time of two hours.

13. Following receipt of Stewart J's order of 26 March 2021, Mr Hamilton filed an application notice in respect of QA-2020-000227. Unfortunately, however, some of the parties misunderstood the effect of Stewart J's order, a matter that was aggravated by the hearing being listed only for 30 minutes, rather than the two hours envisaged by Stewart J.

14. Following that hearing, which came before me on 16 June 2021, I ordered that there should be a hearing on 22 July 2021, at which the court:-

    (a) Would consider Mr Hamilton's application to set aside the strike out order of Stewart J of 22 January 2021 in QA-2020-000227;

    (b) If that application to set aside was granted, would consider Mr Hamilton's application for permission to appeal the order and judgment of Master Cook in QA-2020-000227; and

    (c) Would consider Mr Hamilton's application for permission to appeal the order of Master Cook of 2 June 2020 dismissing (as totally without merit) Mr Hamilton's application to have Master Cook's order and judgment of 22 May 2020 set aside (QA-2020-000162).

15. Directions were made for the filing and service of written submissions and other materials on which the parties respectively intended to rely at the hearing. To that end, the solicitors for the first respondent helpfully collated relevant materials in three bundles.

THE CENTRAL ISSUE IDENTIFIED

16. Mr Royle produced written submissions on behalf of the second respondent, followed by a supplementary skeleton argument of 20 July 2021. In accordance with his overriding duty to the court, Mr Royle, in those documents, raised for the first time a matter of such significance that the majority of the hearing on 22 July was devoted to it; and which requires to be addressed at this point of the judgment. The court is extremely grateful to Mr Royle for the thoroughness and clarity of his submissions on this issue.

17. The short point is that, on the face of the relevant legislation, the second respondent is not empowered to sell the *MV Samara.* The vessel has been statutorily abandoned, such that the enforcement powers conferred by the Tribunals, Courts and Enforcement Act 2007 have ceased to be exercisable. Mr Royle submits that such a result is, in effect, so problematic (indeed, absurd) that this court should construe the relevant legislation in such a way as to avoid it. Any such construction would, however, in practice involve the judicial insertion of provisions into the legislation.

LEGISLATIVE FRAMEWORK

(a) The Tribunals, Courts and Enforcement Act 2007

18. Section 62(1) of the 2007 Act provides that Schedule 12 to the Act applies where an enactment, writ or warrant confers power to use the procedure in that Schedule; that is to say, taking control of goods and selling them to recover a sum of money. The power conferred by a writ or warrant of control is, by section 62(2), exercisable only by using the Schedule 12 procedure. What were writs of *fieri facias* (except for an ecclesiastical form, not here relevant) were, by section 62(4), renamed writs of control. The same subsection re-named warrants of execution as warrants of control. Section 63 makes provision for enforcement agents.

19. Paragraph 1 of Schedule 12 provides that using the procedure in that Schedule to recover a sum "means taking control of goods and selling them to recover that sum in accordance with this schedule and regulations under it". The power to use the procedure to recover a particular sum is called an "enforcement power". By paragraph 2, only an enforcement agent may take control of goods and sell them under an enforcement power.

20. Paragraph 3 of Schedule 12 contains a number of definitions. Amongst these are "goods", which means "property of any description, other than land"; "interest", which means "a beneficial interest"; and "premises" which means any place, including a vessel.

21. Paragraph 8 of Schedule 12 provides that an enforcement agent may not take control of goods after the prescribed period, which may be prescribed by reference to the date of

notice of enforcement or of any writ or warrant conferring the enforcement power or any other date.

22. Paragraph 10 of Schedule 12 provides that an enforcement agent may take control of goods only if they are goods of the debtor.

23. Paragraph 13 of Schedule 12 explains what constitutes taking control of goods. In order to take control, an enforcement agent must do one of four things, of which the fourth is to "enter into a controlled goods agreement with the debtor" (paragraph 13(1)(d)). Paragraph 13(4) provides that a controlled goods agreement is an agreement under which the debtor is permitted to retain custody of the goods, acknowledges that the enforcement agent is taking control of them, and agrees not to remove or dispose of them nor to permit anyone else to, before the debt is paid.

24. Paragraph 40 of Schedule 12 concerns the notice of sale. It provides as follows:-

> "40(1) Before the sale, the enforcement agent must give notice of the date, time and place of the sale to the debtor and any co-owner.
>
> (2) Regulations must state –
>
> (a) the minimum period of notice;
>
> (b) the form of the notice;
>
> (c) what it must contain (besides the date, time and place of sale);
>
> (d) how it must be given.
>
> (3) The enforcement agent may replace a notice with a new notice, subject to any restriction in regulations.
>
> (4) Any notice must be given within the permitted period.
>
> (5) Unless extended the permitted period is 12 months beginning with the day on which the enforcement agent takes control of the goods.
>
> (6) Any extension must be by agreement in writing between the creditor and debtor before the end of the period.
>
> (7) They may extend the period more than once."

25. Paragraph 53 of Schedule 12 provides that controlled goods are abandoned "if the enforcement agent does not give the debtor or any co-owner notice under paragraph 40 (notice of sale) within the permitted period".

26. Paragraph 54 of Schedule 12 provides that if controlled goods are abandoned, then the enforcement power ceases to be exercisable; and as soon as reasonably practicable, the enforcement agent must make the goods available for collection by the debtor, if he removed them from where he found them.

27. Paragraph 60 of Schedule 12 concerns third party claims, such as that raised by Mr Newett in the present case. The paragraph applies where a person makes an application to the court claiming that goods taken control of were his and not the debtor's. After

receiving notice of such an application, the enforcement agent must not sell the goods, or dispose of them, unless directed by the court under paragraph 60. Paragraph 60(3) provides that the court may direct the enforcement agent to sell or dispose of the goods if the third party applicant fails to make, or continues to make, the required payments into court. Those payments are specified in paragraph 60(4). They are the payment of an amount equal to the value of the goods, or to a proportion of it directed by the court; and payment of amounts prescribed in respect of the enforcement agent's costs of retaining the goods.

28. Paragraph 60(6) provides as follows:-

> "(6) If sub-paragraph (3) does not apply the court may still direct the enforcement agent to sell or dispose of the goods before the court determines the applicant's claim, if it considers it appropriate."

29. Paragraph 60(7) provides that, if the court makes a direction under sub-paragraph (3) or (6), then paragraphs 38 to 49, and regulations under them, "apply subject to any modification directed by the court". Paragraph 60(7)(b) provides that the enforcement agent must pay the proceeds of sale of disposal into court.

(b) The Taking Control of Goods Regulations 2013

30. The Taking Control of Goods Regulations 2013 (SI 2013/1894) apply in relation to the taking control of goods and selling them in the exercise of the power to use the procedure in Schedule 12 to the 2007 Act. The Regulations apply to all such cases except to the extent that they provide otherwise (regulation 3).

31. Regulation 2 contains provisions of general interpretation. Amongst these is the definition of "clear days", which means that in computing the number of days, the day on which the period begins and, if the end of the period is defined by reference to an event, the day on which that event occurs, are not included in the computation.

32. On 24 June 2020, the Taking Control of Goods and Certification of Enforcement Agents (Amendment) (No. 2) (Coronavirus) Regulations 2020 added the definition of "emergency period", which "means the period beginning with 26 March 2020 and ending on 23 August 2020".

33. Regulation 7 prescribes the form and contents of a notice of enforcement. Regulation 8 prescribes the method of giving notice and who must give it. Regulation 8(1) provides that a notice of enforcement must be given by post at the place or one of the places where the debtor usually lives or carries on a trade or business; or by other specified means including "by fax or other means of electronic communication" (regulation 8(1)(b)).

34. Regulation 9 needs to be set out in full:-

> "**9. Time limit for taking control of goods**
>
> (1) Subject to paragraphs (2), (3) and (5), the enforcement agent may not take control of goods of the debtor after the expiry of a period of 12 months beginning with the date of notice of enforcement.

(2) Where -

(a) after giving notice of enforcement the enforcement agent enters into an arrangement with the debtor for the repayment, by the debtor, of the sum outstanding by instalments (a repayment arrangement); and

(b) the debtor breaches the terms of the repayment arrangement,

the period in paragraph (1) begins with the date of the debtor's breach of the repayment arrangement.

(3) The court may order that the period in paragraph (1) be extended by 12 months.

(4) The court may make an order under paragraph (3) only -

(a) on application by the enforcement agent or the creditor;

(b) on one occasion; and

(c) if the court is satisfied that the applicant has reasonable grounds for not taking control of goods of the debtor during the period referred to under paragraph (1).

(5) Where the relevant day falls—

(a) during the emergency period; or

(b) on or after 26th February 2020 but before the beginning of the emergency period,

the period referred to in paragraph (1) begins on the day that is one month after the relevant day.

(6) For the purposes of paragraph (5) the relevant day is the day one month before the expiry of either -

(a) the period referred to in paragraph (1); or

(b) the period referred to in paragraph (1) as extended in accordance with paragraph (3)."

35. Regulations 37 to 43 concern notices of sale. Regulation 37(2) provides that a sale may take place on the day after removing controlled goods for sale, where goods would otherwise become unsaleable. Otherwise, the main requirement is for a minimum period of seven clear days between removing controlled goods for sale and their sale (regulation 37(1)).

36. Regulation 39 prescribes the form of contents of the notice of sale, including the date, time and place of the sale. Regulation 39(1)(f) provides that the sale of controlled goods is conditional on an offer to purchase the goods being made; and the reserved price, if any, on the controlled goods being met. Regulation 39(1)(g) provides that if the conditions in paragraph (f) are not met, then the date, time and place of sale will be set out in a further notice.

37. Regulation 39(3) provides that the enforcement agent may replace a notice of sale with a new notice, in accordance with paragraph 40(3) of Schedule 12 to the 2007 Act, only where the date, time or location of the sale has had to be rearranged. In this regard, it will be noted that paragraph 40(4) of Schedule 12 requires "Any notice" (my emphasis) to be given within the permitted period defined by paragraph 40(5).

(c) The Control of Goods (Fees) Regulations 2014

38. The final legislative instrument made under the 2007 Act which it is necessary to mention is the Control of Goods (Fees) Regulations 2014 (SI 2014/1). Regulation 10 (exceptional disbursements) provides that upon application by the enforcement agent with the consent of the creditor in accordance with rules of court, the court may order that the enforcement agent may recover from the debtor exceptional disbursements associated with the use of the Schedule 12 procedure which are not otherwise recoverable under the Regulations. The court may not make such an order unless satisfied that the disbursements to which it relates are necessary for effective enforcement of the sum to be recovered, having regard to all the circumstances.

39. The second respondent has made a regulation 10 application. He did so because, he contends it was necessary to apply to the court on 4 December 2020 so that the *MV Samara* could be sold. This was in the light of the suggestion that Mr Hamilton's daughter, Jacqueline Hamilton, might be asserting a claim to the *MV Samara*. The second respondent sought an order, amongst other things, to ensure that he retained the relevant protection from claims afforded by Schedule 12 as to sale and disbursement of proceeds. On 18 December 2020, Bourne J joined the second respondent to the appeals of Mr Hamilton and made directions in consequence.

DEADLINE FOR GIVING NOTICE OF SALE

40. It is now necessary to see how these statutory provisions relate to the circumstances of the present case.

41. The writs were issued on 10 April 2019. On 9 April, two purported notices of enforcement were sent by post and email to Mr Hamilton at the *MV Samara*. The email was sent to Mr Hamilton's address. Email receipts have been produced.

42. Mr Royle candidly submits that a notice of enforcement emailed before the issue of the writ is highly unlikely to be valid. The required contents of the notice are such that the legislature must have intended a valid notice to be one which post-dates the issue of the writ; especially given the mention in the notice of enforcement fees, which do not accrue until there is a writ.

43. I agree. Indeed, I am in no doubt that these purported notices are invalid.

44. It is less clear whether the notice that was posted to Mr Hamilton on 9 April 2019 was valid. This is because, pursuant to section 7 of the Interpretation Act 1978, a document which is authorised to be served by post is deemed to have been served at the time when

the letter containing it would be delivered in the ordinary course of post. Practice Direction (Q.B.D. – postal service) [1985] 1 WLR 489 provides that, in the case of first class mail, delivery in the ordinary course of post is deemed to be effected on the second working day after posting; and in the case of second class mail, on the fourth working day thereafter. In either event, the service in the present case would have post-dated the issue of the writs. It is however unnecessary to reach a concluded view on this because on 18 April 2019, notices of enforcement were emailed to Mr Hamilton. These notices were valid, on their face. Since they undoubtedly post-date the issue of the writs, there is no issue in that regard concerning their validity.

45. I accordingly find that from 18 April 2019, the second respondent had twelve months to take control of the goods. As we have seen, paragraph 8 of Schedule 12 provides that an enforcement agent "may not take control of goods after the prescribed period". By reason of regulation 9(1), this period is the period of twelve months, beginning with the notice of enforcement.

46. Leaving aside the effect of the amendments made by the Coronavirus Regulations to regulation 9 of the Control of Goods Regulations 2013, the second respondent therefore had until 18 April 2020 to take control of the *MV Samara*. The court's power to extend that period by twelve months is not relevant to the present case (regulation 9 (3) and (4)).

47. On 30 April 2019, the second respondent attended at the *MV Samara* and two controlled goods agreements were signed by Mr Hamilton, one in respect of each writ. By reason of paragraph 13 of Schedule 12, entering into these agreements constituted the taking of control of the *MV Samara* by the second respondent.

48. The next stage, therefore, is the giving of notice of sale. We have seen that paragraph 40 of Schedule 12 provides that any notice of sale must be given within the permitted period, defined by paragraph 40(5) as the period of twelve months beginning with the day on which the enforcement agent takes control of the goods. The only way in which the twelve month period can be extended is by agreement in writing between the creditor and debtor before the end of the twelve month period; and any such extension can happen only once.

49. Accordingly, leaving aside the amendments to regulation 9 occasioned by the Coronavirus pandemic, any notice of sale had to be given by 30 April 2020. It is common ground that no notice of sale was given by that deadline. A purported notice of sale was eventually given on 8 December 2020, but the sale never took place. By that time, there was a suggestion that Jacqueline Hamilton might have a claim to the *MV Samara* and there were, in any event, extant applications for permission to appeal, which Mr Royle submits had the potential to mean the vessel could not be sold because it might have belonged to Mr Newett.

50. The question arises whether the amendments made to regulation 9 by the Coronavirus Regulations have the effect of displacing the deadline of 30 April 2020 and substituting something else. As Mr Royle accepted in oral submissions, it is difficult to see how regulation 9(5) or (6) can affect the position where, as here, control had been taken before the beginning of the emergency period (26 March 2020 – 23 August 2020). Regulation 9 deals only with the period within which the enforcement agent may take control of goods, following a notice of enforcement. The only way in which one could infer a contrary conclusion is by reading amended regulation 9 in such a way that there was

deemed to be a re-taking of control as at (in our case) 18 March 2020, that being the end of the twelve month period in regulation 9(1) less a month, as provided in regulation 9(6). But, as Mr Royle points out, such an interpretation is profoundly unattractive. Drawing on the principles of statutory interpretation, which I mention later in this judgment, the proposition requires me to find, first, that the legislature made a mistake in not catering for an extension of the period in paragraph 40 of Schedule 12 for giving notice of sale; and second, to interpret regulation 9 in a highly convoluted way. It is difficult to see why an enforcement agent who has taken control of goods should be regarded as not having taken control of them, solely for the purpose of extending the time for giving notice of sale.

51. The alternative, not proposed by Mr Royle, would be to interpret the Coronavirus Regulations as amending paragraph 40 of Schedule 12 when they did no such thing. On the application of the principles of interpretation (which I set out later), very strong reasons indeed would be required to reach either of these two results. I do not consider that such reasons have been shown to exist. One can see why the legislature, during the height of the pandemic, might be concerned about people carrying out activities likely to involve direct interaction with others, such as those involved in taking control of goods in the ways described in paragraph 13(1)(a) to (c) of Schedule 12 (securing goods on the premises where they are found; securing goods on the highway; and removing goods from where they are to somewhere else). To have expressed the same concerns about controlled goods being sold during the height of the pandemic would, however, have raised difficult issues, given that goods were, of course, generally still being bought and sold during that time. One can therefore see a reason for the legislature not to have had the same concerns regarding the sale of goods which had, necessarily, already been taken under control by the enforcement agent, compared with, say, going onto a third party's premises in order to take control of goods for enforcement purposes. In short, there is no need and, hence, justification for applying such strained constructions to the legislation.

52. I accordingly find that, in the present case, the deadline for giving notice of sale was 30 April 2020.

HAS THE MV SAMARA BEEN ABANDONED?

53. The consequence of this finding is profound. Paragraph 53(1) provides that controlled goods are abandoned if the enforcement agent does not give the debtor or any co-owner notice of sale under paragraph 40 within the permitted period. Thus, on 30 April 2020, the *MV Samara* ceased to be property that the enforcement agent could sell, in order to apply the proceeds for the benefit of the first respondent, in satisfaction of the debt owed by Mr Hamilton. Since section 62(2) of the 2007 Act provides that the power conferred by the writs is exercisable only by using the Schedule 12 procedure, at this point the writs lost all efficacy.

54. Part 85 of the CPR deals with claims to controlled goods and executed goods. CPR 83.4(7) provides that if, during the validity of a relevant writ, a person makes an application under Part 85 "the validity of the writ or warrant will be extended until the expiry of 12 months from the conclusion of the proceedings under Part 85". As Mr Royle observes, however, all that CPR 85.4(7) does is extend the validity of the writ. That is quite different from extending time for taking control under the 2013 Regulations or for

giving notice of sale under paragraph 40 of Schedule 12. The CPR cannot change the substantive law: Dunhill v Burgin (Nos. 1 & 2) [2014] 1 WLR 933.

55. Accordingly, unbeknown to all those concerned, Master Cook in fact had no power to order on 22 May 2020 that the second respondent "do sell MV Samara, pursuant to paragraph 60 of Schedule 12" of the 2007 Act, irrespective of whether Mr Newett had any claim to the vessel. Because the *MV Samara* had been abandoned, so far as the 2007 Act was concerned any claim to its ownership no longer had anything to do with the first or second respondents but only with Mr Hamilton. Since Master Cook had determined Mr Newett's claim, it does not appear that Master Cook's order to sell was intended to be made pursuant to paragraph 60(6) of Schedule 12. In any event, however, paragraph 60 had ceased to have any application.

56. Mr Royle queries whether the High Court has any inherent power of sale, in circumstances with which we are concerned. I am in no doubt that it does not. To conclude otherwise would be to ride roughshod over the statutory scheme in the 2007 Act.

57. Accordingly, on the face of the relevant legislation, and notwithstanding whether there was ever any merit in Mr Newett's application under paragraph 60 (or, for that matter, any merit in the suggestion that Jacqueline Hamilton had an interest in the vessel), paragraph 2 of Master Cook's order of 22 May 2020 cannot stand, unless I am persuaded by the second respondent to interpret the legislation in a way that finds no expression in the actual words of the legislature. In his skeleton argument, which he developed orally at the hearing, Mr Royle submits that I should do so.

58. Mr Royle identifies two *lacunae* in the legislation. Paragraph 60(2) of Schedule 12 imposes a prohibition of the sale of goods, once a third party application has been received "unless directed by the court under this paragraph". There are only two mechanisms by which the court can order a sale under paragraph 60. As we have seen, paragraph 60(3) provides that if an applicant fails to make or continue to make certain required payments into court, an order for sale can be made. There is no suggestion that this power was exercisable in the present case. Secondly, paragraph 60(6) provides that the court may, in any event, make an order for sale before the determination of the third party's claim, if it appears appropriate to do so. As I have already explained, that could not have been the provision under which Master Cook purported to act, since the proceedings in respect of Mr Newett's claim had been concluded.

59. Mr Royle submits that there is, thus, a "glaring omission" in paragraph 60, in that there is no evident power to direct a sale if, as was the case here, the claim by the third party fails. It cannot have been the legislature's intention that the sale or disposal would continue to be prohibited even if a third party's claim failed.

60. I am not persuaded that there is any *lacuna* in paragraph 60 of the kind just described. The powers of direction to sell in paragraph 60(3) and (6) are needed because of the prohibition on sale imposed by paragraph 60(2), following receipt of notice of the third party application. It is, in my view, manifest that the legislature saw no need to make specific provision for the power of sale, after the conclusion of the paragraph 60 proceedings, because the conclusion of those proceedings lifts the prohibition on sale imposed by paragraph 60(2). This is made evident by the words "before the court determines the applicant's claim" in paragraph 60(6). After the court has determined the

third party's claim, and found against that party, the position is the same as if no paragraph 60 application had ever been made.

61. This leads to consideration of the second suggested *lacuna*. The time limit for giving notice of sale under paragraph 40 remains unchanged if a third party application is made under paragraph 60. As the earlier legislative analysis makes plain, the "clock" which is set in motion by taking control of the goods, and which governs the enforcement agent's ability to give notice of sale, is unaffected by paragraph 60.

62. Mr Royle submits that this permits a debtor to "run out the clock … if someone can be persuaded to bring a third party claim and that claim takes some time to resolve". Whether or not that accurately describes the relationship between Mr Hamilton and Mr Newett, in the present case the clock ran out before the court could determine Mr Newett's claim.

63. Mr Royle submits that to allow this result would be absurd. He contends that one can infer provisions in the legislation dealing with the time limit for sale where there has been a third party claim; and that it is, in fact, necessary to do so for the purpose of effective enforcement, which is the whole point of Chapter 1 of Part 3 of the 2007 Act. This is so, even though such an interpretation may interfere with the rights of the owner of the *MV Samara*. Paragraph 60 cannot, in Mr Royle's graphic phrase, have been intended as a "tripwire" for the enforcement agent, preventing him or her from selling the goods for the benefit of the creditor after a third party claim fails, because the notice of sale time limit has by then expired. Since third party claims may take an inordinate period to be disposed of, retaining the twelve month time limit from the taking of control may well work an injustice to the enforcement agent and the creditor. Accordingly, Mr Royle submits that an appropriate time limit would be "a refreshed 12 month period under Schedule 12, paragraph 40 from the point of dismissal of the claim".

64. Apparently accepting the point that once the court has determined the applicant's claim, the prohibition on sale in paragraph 60 ceases, Mr Royle nevertheless submits that, where there is an actual or potential appeal against the court's determination, an enforcement agent would be "highly unwise to sell the goods in control". It was, Mr Royle says, precisely for that reason that the second respondent made the application of 4 December 2020, in that there was a suggestion that Jacqueline Hamilton owned the vessel; and Mr Hamilton had embarked upon various applications, including for permission to appeal against the decisions of Master Cook. An enforcement agent would be likely to lose his protection under paragraphs 63 and 64 of Schedule 12, were he or she to sell in such circumstances.

65. I have to say that I do not accept that last concern. Paragraphs 63 and 64 of Schedule 12 confine an enforcement agent's liability to two situations. The first is where the enforcement agent "had notice that the goods were not the debtor's, or not his alone". The mere suggestion that Jacqueline Hamilton might own the goods does not come close to constituting such notice. The second situation is where before sale the "lawful claimant had made an application to the court claiming an interest in the goods". That, too, is not relevant. Mr Newett's application had been unsuccessful. Even if the position on appeal turned out to be otherwise, I do not consider that that would give rise to liability on the part of the enforcement agent.

66. These observations do not, however, materially blunt the thrust of Mr Royle's submission. For whatever reason or reasons, the proceedings in the High Court, in the present case, ran beyond the expiry of the time limit for giving notice of sale. The argument based on the alleged arbitrary criterion of the duration of those proceedings therefore remains.

INTERPRETING THE LEGISLATION

67. The second respondent, accordingly, submits that I should interpret Schedule 12, so that the following sub-paragraph (or something like it) is to be assumed to exist in paragraph 60:-

> "(7A) The time for giving notice of sale under paragraph 40 begins again at the conclusion of any proceedings under this paragraph, as if the time of that conclusion were the time of taking control under paragraph 40(5), providing that immediately following such conclusion the goods taken into control remain goods of the debtor. The same shall apply *mutatis mutandis* to any appellate proceedings, including any application for permission to appeal."

68. In support of this submission, Mr Royle relied upon a number of propositions in *Bennion, Baily and Norbury on Statutory Interpretation* (Eighth Edition).

69. At section 10.5 the authors state that one can find dicta in the decided cases to the effect that the grammatical meaning of legislation must be followed, irrespective of the consequences and even in cases of absurdity, and that the court has no power to read words into a statute. Those dicta reflect the so-called literal rule of statutory interpretation. There are, however, the authors state, very many cases where the courts have attached meanings to enactments which by no stretch of the imagination could be called meanings the words are grammatically capable of bearing. The truth, therefore, is that there are sometimes circumstances whereby arguments against a grammatical construction are so compelling that even though the legislative words are not, within the rules of language, capable of another meaning, they must be given one. Mr Royle submits that in the 2007 Act, the omission of a power of sale, following third party proceedings, is one such circumstance.

70. At section 10.8, the authors state that the duty of an interpreter is to arrive at the legal meaning of the enactment; and that this is the meaning that conveys the legislative intention. That intention is the objective intention to be imputed to the legislature by reference to the meaning of the words used and the context in which they are used.

71. In chapter 11 (Interpretation: Key Principles) the authors say that the primary indicator of legislative intention is the text, read in context and having regard to its purpose (section 11.1). Parliament is assumed to be a rational, reasonable and informed legislature pursuing a clear purpose in a coherent and principled manner. The text of the statute has to be read in context, which includes the act as a whole, its legal, social and historical context: (11.2). Mr Royle submits that, in the present instance, the context is providing an effective means of enforcement against goods for debts which have gone unpaid.

72. At section 11.3, the authors opine that the presumption is that the Act has been competently drafted. Mr Royle, however, remarks that "this one may not have been".

At section 11.5, the authors deal with the matter of implications. The meaning to be attributed to an enactment consists not just of what is expressed, but also what may properly be implied. Implications may arise either because they are directly suggested by the words of the enactment, or are indirectly suggested by rules or principles not disapplied by the words of the enactment. In order to produce reasonable concise, readable text that is capable of being applied in a wide variety of situations, drafters are forced to leave much of what they intend to implication. Judging when this can safely be done, and when on the other hand express provision is necessary, is one of the trickiest drafting decisions.

73. The finding of proper implications within the expressed words of an enactment is said to be a legitimate, indeed necessary, function of the interpreter. When an implied meaning is suggested by an advocate, it is not, the authors say, reliable to reject the implication on the basis that if the legislature had intended such a qualification of the express words it could easily have said so. This is because, for example, the drafter may think that the qualification goes without saying, or it may not be possible to be comprehensive.

74. At page 404, the authors suggest that the question of whether an implication should be found within the express words of an enactment depends on whether it is proper, having regard to the accepted guides to legislative intention, to find the implication; and not on whether the implication is "necessary" or "obvious". In this regard, they cite with approval the judgment of Lord Carnwath in R (on the application of New London College Limited) v Secretary of State for the Home Department [2013[UKSC 51, where he stated that the Secretary of State's powers of immigration control, whilst confined to those conferred expressly or impliedly by the Immigration Act 1971, may include both powers expressly conferred and powers reasonably incidental to them.

75. At page 406, the authors consider that the consequence of the fact that the express words of an enactment fall to be treated as enlarged by all proper implications is that, so far as relevant, the court may treat the enactment as if it were worded accordingly. Whilst, however, it may be helpful to treat words as incorporated, it is not essential. What is implied is the meaning, and not necessarily a particular verbal formula.

76. At section 11.6, it is stated when considering which of the opposing constructions of an enactment corresponds to its legal meaning, the court should assess the likely consequences of adopting each construction, both to the parties in the case and (where similar facts arise in future cases) for the law generally. If on balance the consequences of a particular construction are more likely to be adverse than beneficent, then this is a factor telling against that construction. The consequences of a construction are to be taken into account, as part of the process of interpretation. At section 11.7, it is suggested that, when considering which of the opposing constructions of an enactment would give effect to the legislative intention, the court should presume that the legislature intended common sense to be used in construing the enactment. The authors observe, however, that it is "perfectly possible for the legislature to enact a law that might be regarded as containing rules that do not accord with common sense". The example cited is Re Ronald Johnson [2020] EWHC 207. Section 2(3) of the Presumption of Death Act 2013 provides that where the court (a) is satisfied that the missing person has died but (b) is uncertain at which moment during a period the missing person died, the finding must be that the missing person is presumed to have died at the end of that period. The court found that although it was likely the missing person died in the early part of the period, there was insufficient evidence to establish a particular moment of death; and so the provision

applied, with the result that the person was presumed to have died at the time the court made its finding. The court did not consider that this accorded with common sense but "it at least accords with what the law requires …" (paragraph 13).

77. Mr Royle also relies on section 11.8, where the authors submit that an enactment must be construed so as to implement, rather than defeat, a legislative purpose. An Act must be construed so that its provisions are given force and effect rather than being rendered nugatory. The example cited is Livewest Homes Ltd v Bamber [2019] EWCA Civ 1174. The question in that case was whether section 21(1B) of the Housing Act 1988 prevented a landlord from terminating a residential tenancy by giving two months' notice under a break clause. Patten LJ held:-

> 43. Mr Grundy accepted that on Dingmans J's construction of s.21(1A) the provisions of s.21(1B) could never apply, but he sought to rely on this as indicating that ss.21(1A)-(1B) are, in the form enacted, inoperable and of no effect. It was not, he said, possible to overcome these difficulties by some form of purposive construction unless it was clear what the statutory purpose was and how it was intended to be achieved.
>
> 44. I am not attracted to this approach. It is certainly true that the format adopted by the legislation does give rise to some difficulties. If s.21(1B) is intended to be engaged only when the fixed term has expired by effluxion of time there is nothing express in the provisions which limits the obligation to serve the notice to such circumstances. Mr Grundy criticised the appellant's construction of these provisions under which the requirements of s.21(1B) apply in every case so that the six months' notice must have been served on Ms Bamber as a pre-condition to the making of a possession order, even though her tenancy did not expire by effluxion of time and the contents of the notice would have no application to the circumstances of her case. But, in my view, these difficulties can be overcome without giving s.21(1B) a strained meaning and without rendering the provisions as a whole inoperable."

78. The principle outlined in section 11.8 "requires inconsistencies within an Act to be reconciled … The principle means that, if the obvious intention of the enactment gives rise to difficulties in interpretation, the court must do its best to find ways of resolving these".

79. Although not mentioned by Mr Royle, section 11.9 (Plain meaning rule) of *Bennion* requires mention. This provides that where an enactment is grammatically capable of only one meaning (whether generally or in relation to the facts of the instant case) and, on an informed interpretation, the interpretative criteria do not raise any real doubt as to that meaning, the enactment is to be given its grammatical meaning. In most cases, enactments are said to have a straightforward and clear meaning with no counter-indications. However, the words "on an informed interpretation" are important. The authors contend that the question is not whether the enactment, read literally, contains a plain meaning but, rather, whether it carries such a meaning in the light of an informed interpretation of it. Thus, for the purposes of the plain meaning rule, the meaning is "plain" only where no relevant interpretative criterion points away from that meaning: the plain meaning must be given "but only where there is nothing to modify, alter or qualify" (pages 418, 419).

80. Mr Royle lays emphasis on the purpose behind the enforcement provisions of the 2007 Act. He accordingly draws support from section 12.1 of *Bennion* (Purpose, mischief and

evasion), whereby an Act or other legislative instrument "is passed or made for a reason". In interpreting the legislation, the courts, accordingly, seek to identify and give effect to its purpose. This leads to section 12.2, which provides that in construing an enactment the court should aim to give effect to the legislative purpose. The purposive construction is one that interprets the enactment's language, as far as possible, in a way that best gives effect to the enactment's purpose. The purpose of construction may ether accord with the grammatical construction "or may require a strained construction". At section 12.3, the authors suggest that where the court is unable to find out the purpose of an enactment, or is doubtful as to its purpose, the court may be reluctant to depart from the grammatical meaning.

81. Mr Royle also lays emphasis on section 13.1, concerning the presumption that an "absurd" result is not intended. It is helpful to set out section 13.1 in full:-

> "13.1 Presumption that 'absurd' result not intended
>
> (1) The court seeks to avoid a construction that produces an absurd result, since this is unlikely to have been intended by the legislature. Here, the courts give a very wide meaning to the concept of 'absurdity', using it to include virtually any result which is impossible, unworkable or impracticable, inconvenient, anomalous or illogical, futile or pointless, artificial, or productive of a disproportionate counter-mischief.
>
> (2) The strength of the presumption against absurdity depends on the degree to which a particular construction produces an unreasonable result.
>
> (3) The presumption may of course be displaced, as the ultimate objective is to ascertain the legislative intention."

82. The presumption against absurdity is frequently relied on by the court. In <u>Project Blue Ltd v HMRC</u> [2018] UKSC 30, Lord Hodge described it as "without question a legitimate method of purposive statutory construction that one should seek to avoid absurd or unlikely results" (paragraph 31). In <u>Oldham Metropolitan BC v Tanna</u> [2017] EWCA Civ 50, Lewison LJ said that it "is a fundamental principle of the interpretation of statutes that Parliament does not intend an absurd or futile result" (paragraph 31).

83. The authors describe the presumption against absurdity as one manifestation of the principle that an interpreter is to have regard to the consequences of differing constructions when interpreting a provision. It is one aspect of the presumption that the legislature intends to act reasonably. It is, however, perfectly possible for the legislature to decide to pass an Act that, on one view at least, produces an absurd result, as a presumption against absurdity is "simply a presumption" (page 476).

84. Mr Royle relies particularly on the authors' view that the strength of the presumption "depends on the degree to which a particular construction produces an unreasonable result. The more unreasonable the result, the less likely it is that the legislature intended it, and accordingly the clearer the wording needed to produce that result".

85. At page 477, the authors consider that one result of the presumption being simply a guide to legislative intention is that the presumption is most likely to be successfully relied on "where the alleged absurdity is not a necessary consequence of an otherwise cogent statutory scheme and cannot be justified on other grounds". In this regard, a mere assertion that a particular construction will produce an absurd result will not necessarily

carry much weight. This is particularly so where the legislation "creates what appears to be a coherent statutory scheme and there is no obvious way of construing the legislation so as to correct the alleged absurdity".

86. An example given for this proposition is Secretary of State for Culture, Media and Sport v BT Pension Scheme Trustees Ltd [2014] EWCA Civ 958. The Court of Appeal was concerned with the interpretation of an enactment that guaranteed certain liabilities. The question was whether the guarantee covered liabilities relating to new members of a pension scheme. Rimer LJ said:-

> "82. Mr Eadie says, however, that that interpretation results in an absurdity, in that it attributes to Parliament an intention to extend the Crown guarantee not just to members as at the date of vesting, but also to post-transfer members. I accept that that is a result that Lord Mackay and his advisers did not intend, and I expect the legislature would probably regard such an interpretation of the legislation as resulting in an absurdity. But how does the claimed absurdity arise? The legislation proceeded, according to what we were told, on the basis of a statement made by Lord Mackay to the House of Lords that (a) related to the irrelevant section 68, and (b) was apparently made in ignorance of the terms of what became section 60. A consideration of what became section 60 would or should have told Parliament that the legislation, according to the ordinary interpretation of its language, failed to confine the Crown guarantee as Lord Mackay had explained. Moreover, if Lord Mackay, his advisers and Parliament had given any thought to how the Scheme worked, they would have seen that even the guarantee Parliament intended to give would not, upon the termination of the Scheme, have accrued exclusively to the benefit of the pre-transfer members. That is because the Scheme was not sectionalised as between pre- and post-transfer members, so that any guarantee payments made on a termination shortfall would simply serve to increase the available fund applicable for the benefit of both pre- *and* post-transfer members. If Parliament had given proper consideration to what the Crown guarantee was intended to achieve, it would have required the Corporation to close the Scheme to new members, and BT to open a new scheme for such members. The guarantee could then have been given in respect of the closed fund.
>
> 83. The problem the Secretary of State faces is, therefore, the fruit of shortcomings on the part of the Government in relation to the legislation intended to effect the offered guarantee. The outcome was legislation that, upon its ordinary construction, results in the guarantee taking effect as a guarantee of any outstanding liability of BT that vested in it under section 60. I can identify no proper basis upon which the court can interpret the legislation so as to provide the Crown with an escape from the guarantee to which our legislators voted to subject it. That would not be to interpret section 60, it would be to re-write it."

87. In the same vein is R (on the application of AA (Sudan)) v Secretary of State for the Home Department [2016] EWHC 1453. Here, the High Court was concerned with a provision which limited the powers of immigration officers to detain children, defined as persons under 18. The issue was whether the age limit applied where the person was in fact under 18, or whether the immigration officer's reasonable belief as to a person's age was what mattered. The Secretary of State submitted that to require the issue to be determined as a matter of fact would lead to an absurd and anomalous outcome because it was unrealistic within the statutory time limits to obtain evidence of the child's actual age. The court held that the Secretary of State's submission fell to be rejected. The provision could have effect if construed in accordance with its grammatical meaning.

Although such a construction might cause some operational issues, the Secretary of State must have been aware of the alleged absurdities when the legislation was being drafted and enacted.

88. Mr Royle relies on section 13.5, where the authors state that the courts will generally avoid adopting a construction that creates an anomaly or otherwise produces an irrational or illogical result.

89. The final part of *Bennion* to which Mr Royle makes reference is chapter 15. This deals with mistakes in legislation. Section 15.1 states that there is a presumption that the legislature intends the court to apply a construction which rectifies any error in the drafting of the enactment, where required in order to give effect to the legislative intention. The authors observe that drafting errors occur "and often escape everyone's eyes until spotted by some alert observer". However, before construing an Act so as to correct a drafting error, the court must be "abundantly sure" of the intended purpose of the provision; that the drafter and the legislature inadvertently failed to give effect to that purpose; and of the substance of the provision the legislature would have made, had the error in the Bill been noticed, albeit not necessarily the precise words the legislature would have used. This "basic test" was articulated by Lord Nicholls in Inco Europe Ltd v First Choice Distribution [2000] UKHL 15. Lord Nicholls said:-

> "I am left in no doubt that, for once, the draftsman slipped up. The sole object of paragraph 37(2) in Schedule 3 was to amend section 18(1)(g) by substituting a new paragraph (g) that would serve the same purpose regarding the Act of 1996 as the original paragraph (g) had served regarding the Act of 1979. The language used was not apt to achieve this result. Given that the intended object of paragraph 37(2) is so plain, the paragraph should be read in a manner which gives effect to the parliamentary intention. Thus the new section 18(1)(g), substituted by paragraph 37(2), should be read as confined to decisions of the High Court under sections of Part I which make provision regarding an appeal from such decisions. In other words, 'from any decision of the High Court under that Part' is to be read as meaning 'from any decision of the High Court under a section in that Part which provides for an appeal from such decision'.
>
> I freely acknowledge that this interpretation of section 18(1)(g) involves reading words into the paragraph. It has long been established that the role of the courts in construing legislation is not confined to resolving ambiguities in statutory language. The court must be able to correct obvious drafting errors. In suitable cases, in discharging its interpretative function the court will add words, or omit words or substitute words. Some notable instances are given in Professor Sir Rupert Cross' admirable opuscule, *Statutory Interpretation*, 3rd ed., pp. 93-105. He comments, at page 103:
>
>> 'In omitting or inserting words the judge is not really engaged in a hypothetical reconstruction of the intentions of the drafter or the legislature, but is simply making as much sense as he can of the text of the statutory provision read in its appropriate context and within the limits of the judicial role.'
>
> This power is confined to plain cases of drafting mistakes. The courts are ever mindful that their constitutional role in this field is interpretative. They must abstain from any course which might have the appearance of judicial legislation. A statute is expressed in language approved and enacted by the legislature. So the courts exercise considerable caution before adding or omitting or substituting words. Before interpreting a statute in this way the court must be abundantly sure of three matters: (1) the intended purpose of the statute or provision in question; (2) that by inadvertence the draftsman and Parliament

failed to give effect to that purpose in the provision in question; and (3) the substance of the provision Parliament would have made, although not necessarily the precise words Parliament would have used, had the error in the Bill been noticed. The third of these conditions is of crucial importance. Otherwise any attempt to determine the meaning of the enactment would cross the boundary between construction and legislation: see Lord Diplock in *Jones v. Wrotham Park Settled Estates* [1980] A.C. 74, 105. In the present case these three conditions are fulfilled.

Sometimes, even when these conditions are met, the court may find itself inhibited from interpreting the statutory provision in accordance with what it is satisfied was the underlying intention of Parliament. The alteration in language may be too far-reaching. In *Western Bank Ltd. v. Schindler* [1977] Ch 1, 18, Scarman L.J. observed that the insertion must not be too big, or too much at variance with the language used by the legislature. Or the subject matter may call for a strict interpretation of the statutory language, as in penal legislation. None of these considerations apply in the present case. Here, the court is able to give effect to a construction of the statute which accords with the intention of the legislature."

90. Amongst the examples given at page 521 are Inco itself, which involved a mistake in a consequential amendment, whereby the intention was to give the provision as amended by the consequential amendment the same effect as the provision had had previously. Other examples are where statutory instruments regarding tolls had failed to set a charge for a "large bus"; and where repeals of certain existing offences came into force on Royal Assent, which was before the coming into force of the new offences which were intended to replace the existing ones.

91. I have touched on aspects of Mr Royle's submissions on the interpretation issue in the course of setting out (at considerable length) the relevant passages from *Bennion*. It is, however, necessary to record his detailed submissions in support of the proposition that this court should infer the intention of the legislature was such as to require paragraph 60 of Schedule 12 to be interpreted in such a way as to give effect to the meaning of the form of words set out by Mr Royle at paragraph 60(7A).

92. Mr Royle says that, if it were the intention of the legislature that there would be no sale of controlled goods in the circumstances that have arisen in the present case, that would be an absurd result, bearing in mind that, for this purpose, absurdity is wider than impossibility, and can cover results that are impracticable and/or inconvenient. The necessary interpretation is, accordingly, one which, so far as possible, "will be consistent with the smooth working of the system which the statute purports to be regulating" (Shannon Realities Ltd v Vill de St Michel [1924] AC 185, 192). Mr Royle submits that it would be bizarre if the legislature had intended goods to be capable of sale if any third party proceedings were completed in time for a notice of sale to be given within the time limit set by paragraph 40; but that if those proceedings "dragged on then the goods would be abandoned". The availability of sale should, accordingly, arise however long the third party proceedings take. This would promote consistency and protect the interests of creditors, who generally will have little control over the progress of the third party proceedings. The proposed result would, thus, avoid a situation in which the power of sale effectively turns on an immaterial distinction. If Schedule 60 were interpreted as meaning that no sale could take place, irrespective of the final outcome of the third party claim, then that would be, according to Mr Royle, a futile or pointless result, which would defeat the purpose of Schedule 12, if the third party claim failed. Paragraph 60 is, therefore, plainly incomplete, on its face. The absence of a provision as to sale, following

the outcome of a third party claim, may be because the drafter of the legislation thought that it went without saying; or that it was a matter of common sense.

93. Not to construe the legislation as contended for by the second respondent would, according to Mr Royle, defeat the principle in section 12.2 of *Bennion*, whereby a construction which advances the legislature's aim of providing a remedy for the mischief against which the enactment is directed is to be preferred to a construction which attempts to find some way of circumventing it. This so-called presumption against evasion, is, Mr Royle says, applicable because it would be absurd if a debtor or anyone else, could "run out the clock" simply by pursuing legal proceedings in respect of the goods in question, thereby leading to ineffective enforcement against the debtor. The whole point of Schedule 12 is to enable taking control and sale of a debtor's goods in order to pay the latter's debts; not to facilitate the opposite. It is, accordingly, proper to imply the provisions dealing with sale following the outcome of a third party claim, as it would defect the legislature's obvious intention if such provisions were not implied. What is "proper" is said by *Bennion* to be a matter for the court, based on principles of law, rules of language and where necessary a weighing and balancing of factors.

94. It is, furthermore, a requirement on the court to apply a construction which rectifies any error in the drafting of the enactment. In this regard, Mr Royle relies upon the so-called Inco test. Applying this, the intended purpose of paragraph 60 is to allow a third party to claim that the goods are his or hers to the exclusion of the debtor. Concerning the second consideration in Inco, Mr Royle submits that the legislature inadvertently failed to give effect to the purpose of the statutory scheme and that there is a "clear omission" from the legislation, to allow for the sale of goods where a third party claim fails. As for the third consideration, it can been seen that, at the very least, the legislature would have included a provision lifting the prohibition on sale where a third party claim fails; and that the original twelve month time limit can work as an injustice to the enforcement agent and the creditor. An appropriate time limit would, therefore, be "a refreshed twelve month period under" paragraph 40 of Schedule 12 "from the point of dismissal of the claim".

95. Mr Royle submits that even onerous enactments can be the subject of a construction of the kind for which the second respondent contends. Although a person should not be subject to doubtful penalisation, the overarching requirement is to give effect to the legislative intention.

96. Very properly, given that Mr Hamilton is unrepresented, Mr Royle seeks to identify arguments against these submissions on behalf of the second respondent. In this regard, Mr Royle notes the statement at page 492 of *Bennion* that "complex statutory schemes may result in anomalies, especially when first introduced". The courts may accept such anomalies, "particularly where they are not readily capable of being cured by interpretative means". Mr Royle draws attention to Project Blue Ltd v HMRC Commissioners [2018] UKSC 30. In that case, the Supreme Court considered certain provisions of the Finance Act 2003, which introduced a new tax called stamp duty land tax. The Court of Appeal had concluded that section 71A(2) of the 2003 Act could not have intended to leave transactions that involved a sub-sale financed by an arrangement that fell both within section 45(3) and section 71A free of charge for over one year, before it introduced an anti-avoidance provision in the form of section 75A. Whilst seeing the force of the Court of Appeal's point, that it was without question a legitimate method of purposive statutory construction to seek to avoid absurd or unlikely results, Lord Hodge

held that stamp duty land tax "was a new tax created by the FA 2003 and, as I have said, required repeated amendments to make it effective. It is not surprising that lacunas may have existed in the early years of a new tax" (paragraph 31).

97. At page 493, the authors state that, in view of the weight to be given to the grammatical meaning of legislation, where the meaning of a provision is otherwise clear, then the existence of anomalies may not be sufficient to displace that meaning. The position is, however, different where the anomalies amount to an absurdity that the legislature cannot have intended. In this regard, Mr Royle submits that Mr Hamilton would be likely to state that paragraph 60 of Schedule 12 appears to have a clear grammatical meaning and that the legislature may, therefore, be taken to have chosen not to make the provision which the second respondent seeks this court to read into the legislation.

98. Mr Royle also notes that, where an enactment interferes with a person's property rights, albeit in the context of enforcement of a debt against that person, that enactment ought to be construed strictly or narrowly.

99. Finally, as *Bennion* notes at 15.1, citing The Joint Administrators of Lehman Brothers Ltd v Lehman Brothers International (Europe) (In Administration) [2017] UKSC 38, if the court is unable to remedy the error by interpretation, then any remedy has to be left to the legislature.

Notwithstanding these counter-arguments, Mr Royle concludes by submitting that not to act in the way sought by the second respondent would leave an unworkable situation, which should be rejected.

DISCUSSION

(a) Interpretation

100. I turn to a consideration of these submissions. As I have already held, I do not find that there is any *lacuna* in paragraph 60, so far as concerns the absence of a power for the court to direct the sale of the goods, once it has determined the third party applicant's claim under that paragraph. The mischief (if such it be) lies, as I have said, in the operation of the time limit for giving notice of sale, where there have been proceedings under paragraph 60 to determine a third party's claim.

101. The grammatical meaning of the legislation is, I find, entirely plain. Paragraph 40(4) provides that any notice of sale must be given within the permitted period. The use of "any" puts beyond doubt that paragraph 40(4) applies both to an initial notice of sale and any new notice, as mentioned in paragraph 40(3). The "permitted period" is unambiguously defined in paragraph 40(5) as the period of twelve months beginning with the day on which the enforcement agent takes control of the goods. Any extension of that period is governed by paragraph 40(6), whereby such an extension must be by agreement in writing between the creditor and the debtor before the end of the twelve month period. Paragraph 40(7) provides that those individuals may extend the period more than once.

102. The question, therefore, is whether the position I have just described, which leads to the conclusion that the second respondent cannot now sell the *MV Samara*, is one that the legislature did not intend. Whilst one must avoid easy reliance on presumptions or burdens in conducting the interpretative exercise, the fact that the grammatical meaning is against the second respondent means in practice that Mr Royle must show the legislature meant something significantly (and, in our case, elaborately) different to what it has actually said. Since our legislature is assumed to be "rational, sensible and informed" (paragraph 70 above), Mr Royle's task is no easy one.

103. Although the "Inco test" is a useful device, the present case is not one of obvious error on the part of the drafter of the legislation. The real issue is whether to interpret the legislation in accordance with its grammatical meaning would be "absurd", giving that expression its extended meaning which can cover results that are impracticable and/or inconvenient (see paragraph 81). In using this general principle to search for the legislature's intent, it is necessary to have regard to the legislative purpose of the provisions regarding enforcement and the presumption that the legislature does not intend its laws to be evaded or result in pointless outcomes. In reaching its conclusion, the court must pay due regard to what the outcome will be in the case before it, if the legislation is not given a reading that does not accord with its grammatical sense.

104. The 2007 Act and its related subordinate legislation constitute a wholesale modernisation of the law of enforcement. As far as I am aware, there has been no previous relevant judicial doubt cast upon the coherence of that scheme. It has been in operation now for a number of years.

105. It is, in my view, manifest that the legislative scheme comprising the 2007 Act and the instruments made under it give effect to Parliament's intention to produce a system of enforcement that strikes a fair balance between the interests of creditors, debtors and third parties. It also provides a clear, if sometimes challenging, framework within which enforcement agents operate.

106. The time limits for taking control of and selling goods make it clear that the legislature intends that enforcement action is undertaken with due expedition. There is nothing inherently problematic in that intention. Expedition is plainly in the interest of the creditor, who wishes to secure prompt reimbursement through the sale of the controlled goods. Expedition is also, in my view, likely to be in the interest of the debtor, who will normally be keen to see an end to the enforcement proceedings sooner rather than later. Expedition is also likely in many cases to be in the interests of a third party, who claims an interest in goods which are the subject of enforcement. Finally, as a general matter, uncertainty as to the fate of goods is inherently undesirable.

107. Overall, therefore, there is a coherent reason for the time limits contained in Schedule 12. It is against this background that I must consider whether the effect of the interaction of paragraphs 40, 54 and 60 is such that I must infer some form of modification of those limits. In doing so I must, however, be mindful of the obvious and important realities that, once expedition is identified as a feature of the enforcement world, time limits are going to be necessary; and that any system of time limits is in the nature of a blunt instrument, which may, in certain circumstances, produce consequences that could rightly be described as harsh.

108. With these observations in mind, I turn to the provisions of paragraph 60 of Schedule 12. As we have seen, paragraph 60 contains two express powers, whereby the court may, during the currency of the proceedings initiated by a third party's application, direct the enforcement agent to sell or dispose of the goods concerned. The first power is where the third party applicant fails to make, or to continue to make, the required payments into court. Those payments are defined by paragraph 60(4) as an amount equal to the value of the goods, or to a proportion of it directed by the court; as well as payment at prescribed times of any amounts prescribed in respect of the enforcement agent's cost of retaining the goods.

109. The second power, contained in paragraph 60(6), is a general power to direct the enforcement agent to sell or dispose of the goods "before the court determines the applicant's claim, if it considers it appropriate". If the court makes a direction under either sub-paragraph, the enforcement agent must pay the proceeds of sale or disposal into court (paragraph 60(7)(b)).

110. It is necessary at this point to examine the relationship between paragraph 60 and CPR 85.4. As Mr Royle acknowledged, it is noteworthy that CPR 85.4(1) provides a short time limit of seven days within which a person making a claim under paragraph 60(1) must give written notice of their claim to the enforcement agent who has taken control of the goods. That then triggers a requirement on the creditor, within seven days of receiving notice of the claim, to give written notice to the enforcement agent informing them whether the claim to the controlled goods is admitted or disputed in whole or part (CPR 85.4(3)). There then follow provisions which explain what happens where a third party claim is admitted.

111. CPR 85.5 contains provisions where the claim is disputed. The claimant must make an application, supported by a witness statement and copies of any supporting documents that will assist the court to determine the claim. CPR 85.5(6) requires the claimant to make the required payments described in paragraph 60(4) of Schedule 12, unless the claimant seeks a direction that he or she pay only a proportion of the value of the goods.

112. CPR 85.5(7) provides that the application will then be referred to a Master (if in the High Court). The Master may, by CPR 85.5(8), give directions and list the hearing of the application, as well as other incidental matters.

113. As Mr Royle accepts, the seven day limit in CPR 85.4(1) and the other equally short or shorter time limits in the rest of that rule, are indicative of the fact that the "clock" governing the party giving notice of the sale continues to run during the procedure created by paragraph 60. So too is the fact that such claims proceed as Part 23 applications rather than fully case-managed Part 7 claims.

114. CPR 85.4 is not without its own difficulties. In Celador Radio Ltd v Rancho Steak House Ltd and Others [2018] EWHC 219 (QB), Master McCloud identified that the CPR do not deal with the situation where a third party has given notice that they believe they are entitled to goods, under CPR 85.4(1), and where counter-notices are given by the creditor under CPR 85.4(3), but the third party then fails to commence the application to the court, which is required under CPR 85.5. There is no provision in those circumstances for what steps must be taken by the person holding the goods. Furthermore, CPR 85.5 imposes no time limit by which the application under that rule must be made by the creditor or other party claiming an interest. There is, accordingly, no clear point at which the rule

has been breached and no provision within the rule for what should happen when no application is made.

115. Master McCloud considered that, for these reasons, the CPR "must be said to be deficient". She observed that the High Court Enforcement Officer (or, here, the enforcement agent) "cannot release the goods or dispose of them but may well be storing them at cost. The purpose of swift enforcement is thereby frustrated, and costs and expense wasted" (paragraph 10). I note, in particular, her reference to swift enforcement.

116. Master McCloud relied on the law of interpleader to fashion orders, to the effect that unless by a stated date the third party files and serves evidence setting out the basis for its claim to title, the third party would be debarred from relying on evidence of title to contradict that put forward by the HCEO. In the event that the third party is so debarred, then without further hearing the HCEO would be entitled to a declaration that the judgment debtor was at the material time the person with title to the seized goods; and, consequent upon that declaration, the HCEO would be entitled to dispose of them in execution, as well as being entitled to their reasonable costs. In the event that the third party served and filed evidence and was not debarred, the HCEO would be directed to apply to the High Court for directions, including for the application to proceed thereafter in accordance with CPR 85.

117. The "Celador order", as it has come to be known, was colloquially, but nevertheless accurately, described by Mr Royle as a "put up or shut up" order. Together with the time limits in CPR 85.4, Master McCloud's invention of the Celador order is demonstrative of the fact that the judicial machinery which accompanies paragraph 60 of Schedule 12 has been engineered with the aim of achieving the rapid resolution of third party claims, compared at least some other types of claim.

118. Mr Royle points to the present proceedings as an example of where, notwithstanding this machinery, paragraph 60 proceedings may take so long that the prescribed period for giving notice of sale expires, abandonment occurs and the whole process is rendered nugatory, at least from the point of view of the enforcement agent and the creditor. That is certainly the result that will obtain in the present case, if I am against the second respondent on this issue. As I have already indicated, this is a matter to which I must have regard in deciding on the correct interpretation of the legislation.

119. Nevertheless, in deciding whether the intention of the legislature can be discerned only by inferring something along the lines of proposed paragraph 60(7A), these judicial procedures must be given weight. In my view, they serve significantly to diminish the second respondent's case, whether based on absurdity in its extended sense or upon any other interpretative principle relied upon by Mr Royle. They operate by reference to the legislative scheme, which lays significant store on bringing enforcement proceedings to a speedy conclusion. The fact that legal consequences flow from the time limits set by the scheme, and that such limits can, in a particular case, be adverse to one at least of the parties to a dispute, is, I consider, part of the rationale for these procedures.

120. The second respondent's interpretative case accordingly faces serious problems, even before I return to paragraph 60(6) of Schedule 12. In the course of oral argument, I asked Mr Royle why, if the deadline for giving notice of sale was fast approaching, an application could not be made to the court pursuant to paragraph 60(6) for a direction to sell or dispose of the goods before the court determines the applicant's claim. Mr Royle

responded that there would still be no provision for the court to direct a sale, if the claim were dismissed. As I have said, however, I do not regard the absence of such a provision as a problem. So far as the time limit issue is concerned, it seems to me that paragraph 60(6) represents the legislature's acceptance that the prohibition on sale contained by paragraph 60(2) requires tempering. The court's power to act "if it considers it appropriate" is obviously broad in nature. It would clearly encompass the situation where, unless the court orders a sale, it is certain or likely that the proceedings would become a dead letter, as a result of the operation of paragraph 40(4).

121. Although I accept Mr Royle's point that an enforcement agent is not able to engage in the CPR 85.4 process as easily as the creditor, the present case is an example of how the agent can become a party and thereby make the court aware of any relevant issues, such as the effect of the end of the period for giving notice of sale.

122. It is also important to recognise that the paragraph 60 process is intended to be the sole means by which third party claims to controlled goods are determined; and that the process is an arduous one for the claimant. He or she must pay into court a sum equivalent to the value of the goods, unless the court directs payment of some proportion thereof (paragraph 27 above). In the case of goods of large value, such as the *MV Samara,* that is itself likely to deter spurious claims, before one comes to the matter of costs. In the present case, I was told by Mr Royle that it was not known whether Mr Newett had complied with paragraph 60(4). If he had not, that matter ought to have been pursued by the first respondent and the second respondent. But even if Mr Newett had paid the requisite sum, the present paragraph 60 proceedings have not been shown to be so typical of their kind as to enable the second respondent to extrapolate from them the need for proposed paragraph 60(7A).

123. Despite the present power of the court to order sale it can, of course, still be argued that it would be better if the matter were addressed legislatively on an "automatic" basis, such as by extending the time limit in the way proposed by the second respondent. But, at this point, we are far removed from arguments based on absurdity, particularly where, as here, the grammatical meaning of the words is clear and there is a rationale for the legislation's emphasis on expedition. Although I accept Mr Royle's submission that absurdity can sometimes cover results that are "inconvenient", I do not accept that a single instance of inconvenience to a particular party in a particular case necessarily entitles the court to fashion a bespoke time limit in order to eliminate that inconvenience. It is not for this court to finesse Parliament's work by concocting provisions that it considers might be merely better than those Parliament has seen fit to enact.

124. In any event, I unpersuaded that the second respondent's proposed words do not themselves have the potential to work unfairly in a particular case. For instance, the proposed automatic extension of the time limit might be viewed as unfair to the debtor, if the third party proceedings become protracted because of the actions or inaction of the creditor. As I have said, whatever might be Mr Hamilton's position, many third parties and debtors are likely to be keen to see the enforcement process over and done with as soon as possible.

125. In all the circumstances, I have therefore concluded that, despite Mr Royle's most able submissions, the enforcement provisions of the 2007 Act and their related subordinate instruments represent Parliament's intention in enacting or otherwise approving the

same; and that there is no justification for interpreting them in such a way as to include a provision bearing the meaning of proposed paragraph 60(7A).

126. It follows that, whatever the merits or otherwise of Mr Hamilton's applications, paragraph 2 of Master Cook's order of 22 May 2020 cannot stand. The second respondent cannot sell the *MV Samara*.

(b) Permission and relief

127. In the circumstances, I consider that the appropriate course is for me to set aside the order of Stewart J of 22 January 2021, in which he struck out Mr Hamilton's appeal against the order of Master Cook in QA-2020-000227. This means that I shall consider the substance of Mr Hamilton's application for permission to appeal against Master Cook's order in that appeal, and also Mr Hamilton's application for permission to appeal the order of Master Cook dismissing Mr Hamilton's application to have Master Cook's order and judgment set aside: QA-2020-000162. In that regard, I heard oral submissions from Mr Hamilton, Mr Hunter and Mr Royle, as well as considering the parties' respective written submissions.

128. In his oral submissions, Mr Hamilton appeared to question the validity of the controlled goods agreements, which he signed. As far as I am aware, the validity of these agreements has not, hitherto, been sought to be directly questioned before the court. Insofar as Mr Hamilton contends Mr Newett owned the *MV Samara* at the time of the agreements, that matter is irrelevant. Paragraph 13(4) of Schedule 12 makes it plain that a controlled goods agreement does not involve the debtor accepting or denying ownership of the goods. Paragraph 60 makes it equally plain that a third party can claim an interest in goods which have been taken into control by, inter alia, a controlled goods agreement. In any event, it is inappropriate for Mr Hamilton to raise the issue at this stage. It is also, of course, contrary to his interest to do so because it was the making of the controlled goods agreements that started the twelve month period within which a notice of sale had to be given.

129. Finally, for the reasons I will give, there is no arguable merit in the challenge to the decision of Master Cook, as regards the position of Mr Newett in respect of the *MV Samara*.

130. Mr Hamilton's grounds of appeal contain various assertions regarding the proceedings in Scotland. They are not relevant to the present proceedings. Mr Hamilton has unarguably exhausted his appeals as regards the decrees being enforced.

131. Mr Hamilton contends that the *MV Samara* has, at all relevant times, been owned by Jacqueline Hamilton. Apart from the effect that this assertion has on Mr Hamilton's attempt to impugn the judgment of Master Cook in respect of the alleged ownership of the vessel by Mr Newett, it is entirely inappropriate to raise Jacqueline Hamilton's alleged ownership in this manner. As we have already seen, CPR 85.4 provides the mechanism for third parties to make claims in respect of controlled goods. Ms Hamilton has not, as far as I am aware, made any such application, which would in any event now be hopelessly out of time. The only issue before Master Cook was whether Mr Newett owned the *MV Samara* to the exclusion of Mr Hamilton; nothing more.

132. On that issue, Mr Hamilton has not arguably shown that Master Cook erred. Before me, Mr Hamilton's attempt to contend, on the one hand, that Jacqueline Hamilton owned the *MV Samara* and, on the other hand, that Master Cook was wrong in concluding that Mr Newett had not shown any relevant interest in the vessel, were incoherent. In so finding, I have had regard to the documentation to which Mr Hamilton referred me. This is best described as intensely problematic. Matters were not helped by Mr Hamilton telling me that Jacqueline Hamilton was not, in fact, involved in the arrangement between Mr Hamilton and Mr Newett; and that Jacqueline Hamilton would transfer her shares in the vessel to Mr Newett if so required.

133. It is also, of course, noteworthy that Mr Newett, who was the applicant in the paragraph 60 proceedings, has not seen fit to challenge Master Cook's judgment.

134. For these reasons, there is no arguable merit in the grounds of challenge advanced by Mr Hamilton to the decisions of Master Cook. For the reasons I have given, however, even if there had been any such merit in the grounds, the *MV Samara* was abandoned, prior to Master Cook's order. Accordingly, any issues as to whether Mr Newett, Ms Hamilton, or, indeed, anyone else has an interest in the *MV Samara* are irrelevant to the present proceedings and no purpose can be achieved by keeping them in being.

135. Although Mr Hamilton's applications are, on their own terms, unarguable, in view of my conclusion at paragraph 126, I formally grant permission and allow the appeal against paragraph 2 of Master Cook's order, replacing it with a declaration that the *MV Samara* became abandoned on 30 April 2020.

(c) Costs and next steps

136. In view of my findings, subject to any submissions I do not presently consider there is any scope for me to make a cost order pursuant to regulation 10 of the Control of Goods (Fees) Regulations 2014. Mr Hunter told me that, if I were to conclude that the *MV Samara* was abandoned, the first respondent would wish to have his costs paid by the second respondent. That is, clearly, a particular matter of costs, upon which I shall need to hear further from the first respondent and the second respondent, in the absence of any agreement on costs. I apprehend that, in any event, I may need to hear from the parties generally regarding costs.

137. I invite counsel to draft the necessary order.

138. I wish to end this judgment by acknowledging the exemplary role played by Mr Royle, on behalf of the second respondent.