

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Case No: PHW-SC-2019-000409

[2023] EWHC 1332 (KB)

Royal Courts of Justice,
Strand
London
WC2A 2LL

Thursday, 30th March 2023
And 2nd October 2023

Before:
MASTER DAGNALL

B E T W E E N:

MARCUS HERRING

and

- (1) CLAIRE SANDBROOK
- (2) CHRISTOPHER LUCAS-JONES
- (3) CHRISTOPHER MARK HERRING

MR N BURROUGHS & MR R RIPLEY (Solicitor) appeared on behalf of the Applicant
MR R TRIVEDI and MR P FELTON (Solicitor) appeared on behalf of the First and Second Respondents
MR A HOLT (Solicitor) appeared on behalf of the Third Respondent

APPROVED JUDGMENT
(Approved by the Judge)

This Transcript is Crown Copyright. It may not be reproduced in whole or in part, other than in accordance with relevant licence or with the express consent of the Authority. All rights are reserved.

WARNING: reporting restrictions may apply to the contents transcribed in this document, particularly if the case concerned a sexual offence or involved a child. Reporting restrictions prohibit the publication of the applicable information to the public or any section of the public, in writing, in a broadcast or by means of the internet, including social media. Anyone who receives a copy of this transcript is responsible in law for making sure that applicable restrictions are not breached. A person who breaches a reporting restriction is

liable to a fine and/or imprisonment. For guidance on whether reporting restrictions apply, and to what information, ask at the court office or take legal advice.

MASTER DAGNALL:

Introduction

1. This is my judgment in this matter in relation to the applications of Claire Louise Sandbrook, the relevant High Court Enforcement Officer, and Christopher Lucas-Jones, the relevant High Court Enforcement Agent. They appeared before me by Mr Royle of counsel at the substantive hearing, but now appear before me by Mr Trivedi of Counsel in relation to this judgment. Their applications are for the court to strike out the application dated 25 March 2022 made by Marcus Herring whom I will describe as “Marcus” and who appears by Mr Burroughs of counsel. The third respondent, Christopher Mark Herring who I will call “Mark”, appears by Mr Holt, solicitor. However, he is essentially neutral with regard to this matter except with regard to seeking provision for his costs.
2. Essentially, the High Court enforcement officer and High Court enforcement agent say:
 - (a) Firstly that Marcus has used the wrong procedure to bring his claims.
 - (b) Secondly that in fact, only Marcus and Mark acting together can bring a claim and which they have not done.
 - (c) Thirdly, that, in any event, either the claim that Marcus seeks to bring is misconceived or Marcus has disintitiled himself by his conduct from being able to bring it.
3. I heard oral submissions on 14 November 2022 and then 20 December 2022. The matter did not then conclude but I directed and received written submissions from counsel thereafter. I have taken into account all the material before me and the various submissions, oral and written received from each side. If I have omitted specific reference to any particular point, it is for reasons of time and space; and, if appropriate, any such point can be flushed out if so desired by a request made at the time of seeking any transcript of the second part of this judgment.
4. I previously gave a lengthy judgment in relation to this matter, including elements of its history on 25 January 2022, neutral citation number [2022] EWHC 2092 which I will call “the January judgment” and which reads for itself.

History, Section 23 and the January Judgment

5. In terms of the history, Mark and Marcus were in partnership together under a deed dated 5 February 2009 in relation to a farming business and activity. The partnership was dissolved but the nature and elements of the dissolution were and have been contested, and certain of which resulted in an arbitration which gave rise to a judgment in costs in favour of Mark against Marcus. In relation to that judgment and its enforcement, Mark had obtained a writ of control in February 2021, directed to Ms Sandbrook, the High Court enforcement officer who nominated Mr Lucas-Jones as a High Court enforcement agent to execute the writ. The High Court enforcement agent seized goods and machinery purportedly in accordance with the writ, some of which goods and all of which machinery Marcus asserts was property of the partnership, and the High Court enforcement agent then had them sold by auction.
6. Before me it appeared that the High Court enforcement officer, but it may also or indeed actually be the High Court enforcement agent, says that they are entitled to levy and take out certain fees and costs from the proceeds of sale. In any event, the High Court enforcement officer took the amount of the arbitration debt from the proceeds and paid that amount over to Mark and then divided the balance between Mark and Marcus. In these

proceedings, Marcus asserts and has asserted that the levying of execution over partnership property was rendered unlawful by section 23 of the Partnership Act 1890 and which I set out and referred to in paragraph 39 of the January judgment as follows:

“Section 23 of the Partnership Act:

“Procedure against partnership property for a partner’s separate judgment debt.

(1) A writ of execution shall not issue against any partnership property except on a judgment against the firm.

(2) The High Court, or a judge thereof, . . . may, on the application by summons of any judgment creditor of a partner, make an order charging that partner’s interest in the partnership property and profits with payment of the amount of the judgment debt and interest thereon, and may by the same or a subsequent order appoint a receiver of that partner’s share of profits (whether already declared or accruing), and of any other money which may be coming to him in respect of the partnership, and direct all accounts and inquiries, and give all other orders and directions which might have been directed or given if the charge had been made in favour of the judgment creditor by the partner, or which the circumstances of the case may require.

(3) The other partner or partners shall be at liberty at any time to redeem the interest charged, or in case of a sale being directed, to purchase the same”.

I bear in mind particularly at this point that section 23(1) in prohibiting the issue of the writ of execution against partnership property is doing so by use of a simple bald and unequivocal statement (with, of course, the exception of a judgment against the firm but which is of course not this situation). Section 23(2), of course, provides for an alternative method of enforcement in relation to, as opposed to against, partnership property where it is sought to enforce a debt of the individual partner alone; namely the procedure set out there for the making of a charging order and then potential methods of enforcement of the charging order such as by way of sale or the appointment of a receiver.”

7. In paragraph 87 of the January judgment, I held that insofar as the writ of control extended to what was partnership property, its issue would have contravened section 23 of the 1890 Act.
8. In paragraphs 88-96 of the January judgment, I held that it was no defence to the High Court enforcement officer or High Court enforcement agent for them to say that what they did was authorised by the writ of control for one or more of the reasons that:
 - (a) Firstly, the writ could not override the section 23 prohibition.
 - (b) Secondly, the writ should not be construed as extending to partnership property.
 - (c) Thirdly that the provisions of paragraph four of Schedule 12 to the Tribunals Courts and Enforcement Act 2007 did not allow the High Court enforcement agent to use the Section 12 procedure where what was being done involved the seizure and sale of partnership property: and which would give rise to (i) either a trespass or a breach of a provision of Schedule 12 within the meaning of paragraph 66(1) (a) of Schedule 1, or (ii) of the writ being “defective” within the meaning of paragraph (66)(1)(b) in Schedule 12.
9. In paragraph 97 of the January judgment, I said that I was not then deciding which of those various analyses was correct, but that I was deciding that, for the reason of one or more of

them, the issue and existence of the writ itself was no answer to Marcus's claim that the seizure and sale was improper. However, I added that the question of what was the appropriate route procedurally for Marcus to claim any relief said to result from that situation was for another day, and which question was not then for me to decide.

10. In paragraph 98 of the January judgment, I dealt with an argument from Mr Royle of counsel, then appearing for the High Court enforcement officer alone (the High Court enforcement agent not then being a party to these proceedings) that Marcus should, if he wished to seek to claim any remedy, use the procedure set out in paragraph 66 of Schedule 12. It is, in fact, now both the High Court enforcement officer's position and that of the High Court enforcement agent as advanced by Mr Royle at the substantive hearing before me, that paragraph 66 is not an available procedure for Marcus to use. In paragraph 98 of the January judgment, I repeated that I was not deciding at that point what would be if any, the appropriate procedural route for Marcus to use to bring any claim.
11. In paragraph 99 of the January judgment, I noted that Marcus might be arguing that the contravention of section 23 would prevent the High Court enforcement officer or High Court enforcement agent from claiming against the proceeds of sale of, at least the goods and machinery which were partnership assets, any fees, charges or disbursements.
12. In the consequential order which I made following the January judgment of 2 February 2022, I provided that Marcus must issue any originating process seeking to challenge the enforcement pursuant to the writ of control by 25 March 2022.

Marcus' Application

13. Marcus issued an application notice on 25 March 2022 which claimed against both the High Court enforcement officer and the High Court enforcement agent:
 - (a) Firstly damages for the High Court enforcement agent's (1) breach of a provision of Schedule 12 to the 2007 Act and/or (2) actions under an enforcement power under a writ which is defective pursuant to paragraph 66 of Schedule 12 to the Act.
 - (b) Secondly, a declaration that the respondents, that is both the High Court enforcement officer, and the High Court enforcement agent, are not entitled to any fees or disbursements, pursuant to paragraph 62 of Schedule 12 to the Act and the Taking Control of Goods (Fees) Regulations 2014 ("the 2014 Regulation") other than in respect of grain belonging to the applicant. I note that paragraph 62 is the paragraph of Schedule 12 which authorises the creation of the 2014 Regulations.
 - (c) Thirdly, an order for costs.
14. The application notice went on to state the various grounds on which relief was sought:
 - (a) Firstly, that the writ of control for February 2020 did not extend to that which was partnership property.
 - (b) Secondly, if the writ did extend to partnership property then it was defective under paragraph 66(1)(b).
 - (c) Thirdly, that paragraph 11 of Schedule 12 to the Act excluded the partnership property from the property over which control might be taken of the goods on the basis that they were protected under section 23 of the 1890 Act. It seems for me for reasons which I will

come that the reference to paragraph 11 of Schedule 12 is also a reference to paragraph four of Schedule 12.

- (d) Fourthly, that the High Court enforcement officer was the officer who took control and sold the partnership property in breach of a provision of Schedule 12 and/or acting under a writ which was defective. “Without any reasonable belief that he was not breaching a provision of Schedule 12 to the Act and/or acting an enforcement power under a writ which was defective”.
 - (e) Fifthly, that the first respondent, that is to say the High Court enforcement officer, was a related party to the High Court enforcement agent who “is the person on whom the enforcement power is conferred”.
 - (f) Sixthly, that at the time of sale and payment of the proceeds, the High Court enforcement officer and the High Court enforcement agent had notice that the partnership property was not “the applicant’s”, that is to say Marcus’s.
15. It was then said, “no orders or other relief sought against the third respondent [that is to say Mark] who is a respondent to this application because he is the judgment creditor and the partner of the applicant in the farming partnership which owned the partnership property”.
16. The application notice was supported by a lengthy witness statement from Marcus in accordance with my order of 25 March 2022. I thereafter provided that that witness statement should stand as a statement of case and directed that the respondents produce a responsive statement of case for a costs case management conference to take place on 16 November 2022. The costs case management conference itself, was effectively overtaken by and used for the hearing of the application to strike out Marcus’s application which the High Court enforcement officer and the High Court enforcement agent then made by application notice of 16 September 2022.
17. That application notice, asked for an order:
- a. firstly “striking out that part of Mr Marcus Herrings’ application dated 25 March 2022 which was brought under paragraph 66 of Schedule 12 to the Tribunal Courts and Enforcement Act 2007 because it is an abuse of the Court process”.
 - b. secondly “striking out that part of Mr Marcus Herrings’ application dated 25 March 2022, which seeks declaratory relief: (1) as it is an abuse of process because it is pointless and wasteful litigation and (2) because it cannot succeed in light of the enforcement agent’s immunity from liability under Schedule 12, paragraphs 63 and 64”
 - c. for costs.
18. In consequence of that application I have had to consider and hear from counsel at the two hearings, as to what procedure if any Marcus can use to challenge what occurred under the writ and the fees and charges and disbursements incurred as a result, in circumstances where I have held that section 23 of the 1890 Act provided that the issue of the writ did not justify the seizure and sale of partnership property. This is in circumstances where the January judgment recorded that the High Court enforcement officer’s then argument through counsel was that Marcus had to make a paragraph 66 application, but which is not now their position or that of the High Court enforcement agent.
19. I bear in mind generally that what is set out in the witness statement in support of Marcus’s application of 25 March 2022, is a case that the goods and machinery were sold following

their being seized, and all purportedly in pursuance of the writ, for a lesser value and price than could have been obtained in the ordinary course of the dissolution of the partnership. Marcus claims to be entitled to compensation as a result, albeit that his primary claim, to which I will revert, is that the partnership should be compensated by a financial order, and which would then result in a sum of money, which would go into the partnership dissolution to be dealt with under that process. The second element of Marcus's claim is to the effect that the fees, charges and disbursements cannot be levied on or in relationship to the partnership property, which would also in itself, release a greater amount than would otherwise be the case for the purposes of the dissolution.

20. I have been concerned as to the fact that the High Court enforcement officer, although also the High Court enforcement agent, appear to be arguing that Marcus should if at all, have to make a different type of application than that which Marcus has actually made relying on paragraph 66, Schedule 12; this argument being advanced in circumstances where the High Court enforcement officer had submitted in the previous element of the proceedings that a paragraph 66 application was the appropriate course. However, it seems to me that I should, nonetheless, do have to deal with the strike-out application as made for a number of reasons:

- (i) Firstly, because this is all at least arguably jurisdictional in terms of what the Court has power to or not to do; and the Court is always concerned as to whether or not it actually has a particular jurisdiction which is sought to be invoked.
- (ii) Secondly, Mr Royle advanced additional or supplemental points to his initial contention that paragraph 66 was not an available route for Marcus to advance his claim. These points were as follows, and said also to justify the Court striking out Marcus' application or granting reverse summary judgment against it:
 - (a) Marcus could not bring the claim when he was only one partner of the partnership and the claim, if it was to be brought forward, needed to be brought by both partners, that is to say both Marcus and Mark, and it was not sufficient for Marcus to bring the claim and only join Mark as a respondent and not as a co-applicant
 - (b) Marcus was barred from bringing his application because he had assented to the various sales
 - (c) there was barely any financial loss or worthwhile financial loss justifying the bringing of a claim.

Schedule 12

21. In order to consider the contentions of the parties, I have needed to remind myself of the structure of Schedule 12 to the 2007 Act, which sets out the procedures which are to be used following the issue of a writ of control, and which include provisions as to how various types of challenge to what is or has been done are to be dealt with. Those various elements of the structure are summarised in paragraphs 11-24 of my January judgment, although I note that in the last sentence of paragraph 24, there is use of the word "instruct" when the word should be "obstruct" and the January judgment should be treated as being corrected accordingly.

22. The relevant paragraphs in Schedule 12 of the 2007 Act state as follows:

“The procedure

1. (1) Using the procedure in this 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.
- (2) In this Schedule, a power to use the procedure to recover a particular sum is called an “enforcement power”.
- (3) The following apply in relation to an enforcement power.
- (4) “Debt” means the sum recoverable.
- (5) “Debtor” means the person liable to pay the debt or, if two or more persons are jointly or jointly and severally liable, any one or more of them.
- (6) “Creditor” means the person for whom the debt is recoverable.

Enforcement Agents

2. (1) In this Schedule, “enforcement agent” means an individual authorised by section 63(2) to act as an enforcement agent.
- (2) Only an enforcement agent may take control of goods and sell them under an enforcement power.
- (3) An enforcement agent, if he is not the person on whom an enforcement power is conferred, may act under the power only if he is authorised by that person.
- (4) In relation to goods taken control of by an enforcement agent under an enforcement power, references to the enforcement agent are references to any person for the time being acting as an enforcement agent under the power.

General Interpretation

3. (1) In this Schedule –
 - “amount outstanding” is defined in paragraph 50(3).
 - “control” (except in paragraph 5(4)(a)) means control under an enforcement power.
 - “controlled goods” means goods taken control of that (a) have not been sold or abandoned, (b) if they have been removed, have not been returned to the debtor (unless subject to a controlled goods agreement, and (c) if they are goods of another person, have not been returned to that person.
 - “controlled goods agreement” has the meaning given by paragraph 13(4).
 - “co-owner” in relation to goods of the debtor, means a person other than the debtor who has an interest in the goods, but only if the enforcement agent (a) knows that the person has an interest in the particular goods, or (b) would know if he made reasonable enquiries;
 - “The Court” unless otherwise stated and subject to rules of Court, means (a) the High Court in relation to an enforcement power under a

writ of the High Court, (b) The County Court” in relation to an enforcement power under a warrant issued by the County Court. (c) In any other case, a Magistrates’ Court.

“Disposal” and related expressions in relation to securities, are to be read in accordance with paragraph 48(2).

“Exempt goods” means goods that regulations exempt by description or circumstances or both.

“goods” means property of any description, other than land.

“interest” means a beneficial interest.

“money” means money in Sterling or in another currency.

“premises” means any place, and in particular includes (a) a vehicle, vessel, aircraft or hovercraft or (b) a tent or moveable structure.

“securities” includes bills of exchange, promissory notes, bonds, specialities and securities for money.

- (2) In this schedule, (a) references to goods of the debtor or another person are references to goods in which the debtor or that person has an interest, but (b) references to goods of the debtor do not include references to trust property in which either the debtor or a co-owner has an interest not vested in possession.
11. (1) Subject to paragraphs 9 and 10 and to any other enactment under which goods are protected, an enforcement agent (a) may take control of goods anywhere in England and Wales. (b) may take control of any goods that are not exempt.
 - (2) Regulations may authorise him to take control of exempt goods in prescribed circumstances if he provides the debtor with replacements in accordance with the regulations.

Best Price

37. (1) An enforcement agent must sell or dispose of controlled goods for the best price that can reasonably be obtained in accordance with the Schedule.
 - (2) That does not apply to money that can be used for paying any of the outstanding amount, unless the best price is more than its value if used in that way.
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 the 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.

Application of Proceeds

50. (1) Proceeds from the exercise of an enforcement power must be used to pay the amount outstanding.

(2) Proceeds are any of these (a) proceeds of sale or disposal of controlled goods; (b) Money taken in exercise of the power if paragraph 37(1) does not apply to it.

(3) The amount outstanding is the sum of these: (a) the amount of the debt which remains unpaid (or an amount that the creditor agrees to accept in full satisfaction of the debt); (b) any amounts recoverable out of proceeds in accordance with regulations under paragraph 62 (costs).

(4) If the proceeds are less than the amount outstanding, which amounts in (3)(a) and (b) must be paid, and how much of any amount is to be determined in accordance with regulations.

(5) If the proceeds are more than the amount outstanding, the surplus must be paid to the debtor.

(6) If there is a co-owner of any of the goods, the enforcement agent must (a) first pay the co-owner a share of the proceeds of those goods, proportionate to his interest; (b) then deal with the rest of the proceeds under subparagraphs (1)-(5).

(7) Regulations may make provision for resolving disputes about what share is due under 6(a).

Third-party claiming goods

60. (1) This paragraph applies where a person makes an application to the court claiming that goods taken control of are his and not the debtor's.

(2) After receiving notice of the application the enforcement agent must not sell the goods or dispose of them (in case of securities), unless directed by the Court under this paragraph.

(3) The Court may direct the enforcement agent to sell or dispose of the goods if the applicant fails to make, or to continue to make, the required payments to Court.

(4) The required payments are (a) payment on making the application (subject to paragraph 60(5) of an amount equal to the value of the goods or to a proportion of it directed by the Court; (b) payment, at prescribed times (on making the application or later), of any amounts prescribed in respect of the enforcement agent's costs of retaining the goods.

(5) If the applicant makes a payment under paragraph 60(4) but the enforcement agent disputes the value of the goods, any underpayment is to be (a) determined by reference to an independent valuation carried out in accordance with regulations, and (b) paid at the prescribed time.

(6) If paragraph 60(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.

(7) If the court makes a direction under paragraph 60(3) or paragraph 60(6), (a) paragraphs 38-49 and regulations under them apply, subject to any modification directed by the Court; (b) the enforcement agent must pay the proceeds of sale or disposal into Court.

(8) In this paragraph, "the Court" subject to rules of Court, means (a) the High Court in relation to an enforcement power under a writ of the High Court; (b) the County Court in relation to an enforcement power under a warrant issued by the County Court; (c) In any other case, the High Court.

Limitation of liability for sale or payment of proceeds

63. (1) Any liability of an enforcement agent or related party to a lawful claimant for the sale of controlled goods is excluded except in two cases:
- (2) The first exception is where at the time of the sale the enforcement agent had notice that the goods were not the debtor's, or not his alone.
- (3) The second exception is where before the sale the lawful claimant had made an application to the Court claiming an interest in the goods.
- (4) A lawful claimant in relation to goods is a person who has an interest in them at the time of sale, other than an interest that was assigned or transferred to him, while the property in the goods was bound for the purposes of the enforcement power.
65. (1) Paragraphs 63 and 64 (a) do not affect the liability of a person other than the enforcement agent or a related party; (b) do not apply to the creditor if he is the enforcement agent.
- (2) The following apply for the purposes of those paragraphs.
- (3) The enforcement agent or a related party has notice of something if he would have found it out if he had made reasonable enquiries.
- (4) A related party is any person who acts in exercise of an enforcement power, other than the creditor or enforcement agent.
- (5) "The court" has the same meaning as in paragraph 60.

Remedies available to the debtor

66. (1) This paragraph applies where an enforcement agent (a) breaches a provision of this Schedule, or (b) acts under an enforcement power under a writ, warrant, liability order or other instrument that is defective.
- (2) The breach or defect does not make the enforcement agent, or a person he is acting for, a trespasser.
- (3) However, the debtor may bring proceedings under this paragraph.
- (4) Subject to rules of court, the proceedings may be brought (a) in the High Court, in relation to an enforcement power under a writ of the High Court; (b) in County Court, in relation to an enforcement power under a warrant issued by the County Court; (c) in any other case, in the High Court or the County Court.
- (5) In the proceedings the court may (a) order goods to be returned to the debtor; (b) order the enforcement agent or a related party to pay damages in respect of loss suffered by the debtor as a result of the breach or of anything done under the defective instrument.
- (6) A related party is either of the following (if different from the enforcement agent) (a) the person on whom the enforcement power is conferred, (b) the creditor.
- (7) Sub-paragraph (5) is without prejudice to any other powers of the court.
- (8) Sub-paragraph (5)(b) does not apply where the enforcement agent acted in the reasonable belief (a) that he was not breaching a provision of this Schedule, or (b) (as the case may be) that the instrument was not defective.
- (9) This paragraph is subject to paragraph 59 in the case of a breach of paragraph 58(3)."

Contentions as to the Statutory Scheme of Schedule 12

23. Mr Royle advanced the High Court enforcement officer and High Court enforcement agent's case as being that these paragraphs and associated civil procedure rules created a statutory scheme which works as follows:

- (a) Firstly, the writ of control is obtained by the judgment creditor.
- (b) Secondly, the writ of control is directed to the High Court enforcement officer.
- (c) Thirdly, the High Court enforcement officer appoints the High Court enforcement agent to enforce the writ, as only the High Court enforcement agent is authorised to do so, see in particular paragraphs 2 (and especially 2(3)) of Schedule 12.
- (d) Fourthly, once the High Court enforcement agent obtains possession of the goods, in principle they must sell them (this case as public auction) as provided by paragraphs 37 onwards of Schedule 12; albeit that they must give notice of the intended sale to the judgment debtor and any known co-owner, and sell within 12 months of having taken control.

24. Mr Royle accepted that here might be certain types of challenge to the enforcement process where someone else, other than the judgment debtor, claims the goods. Mr Royle set out his contentions as to what would (and should) occur in various circumstances as follows.
25. Firstly, there may be a challenge from somebody who claims they are the sole owner. In which case, such a challenge is governed by paragraph 60 of Schedule 12, where paragraph 60(1) provides according to Mr Royle, that the sole owner must apply to the Court. In those circumstances, paragraph 60 provides that the matter will be dealt with by rules of Court and the relevant rules for these purposes are the Civil Procedure Rules, paragraph 85.4 and 85.5 which state:

“85.4 (1) Any person making a claim under paragraph 60(1) of Schedule 12 must, as soon as practicable but in any event within 7 days of the goods being removed under the exercise of an enforcement power, give notice in writing of their claim to the enforcement agent who has taken control of the goods ('the notice of claim to controlled goods') and must include in such notice (a) their full name and address, and confirmation that such address is their address for service(b) a list of all those goods in respect of which they make such a claim; and(c) the grounds of their claim in respect of each item.

(2) On receipt of a notice of claim to controlled goods which complies with paragraph (1) the enforcement agent must within 3 days give notice of such claim to (a) the creditor; and (b) any other person making a claim to the controlled goods under paragraph (1) ('any other claimant to the controlled goods').

(3) The creditor, and any other claimant to the controlled goods, must, within 7 days after receiving the notice of claim to controlled goods, give notice in writing to the enforcement agent informing them whether the claim to controlled goods is admitted or disputed in whole or in part.

(4) The enforcement agent must notify the claimant to the controlled goods in writing within 3 days of receiving the notice in paragraph (3) whether the claim to controlled goods is admitted or disputed in whole or in part.

(5) A creditor who gives notice in accordance with paragraph (3) admitting a claim to controlled goods is not liable to the enforcement agent for any fees and expenses incurred by the enforcement agent after receipt of that notice by the enforcement agent.

(6) If an enforcement agent receives a notice from a creditor under paragraph (3) admitting a claim to controlled goods the following applies (a) the enforcement power ceases to be exercisable in respect of such controlled goods; and (b) as soon as

reasonably practicable the enforcement agent must make the goods available for collection by the claimant to controlled goods if they have been removed from where they were found.

(7) Where the creditor, or any other claimant to controlled goods to whom a notice of claim to controlled goods was given, fails, within the period mentioned in paragraph (3), to give the required notice, the enforcement agent may seek (a) the directions of the court by way of an application; and (b) an order preventing the bringing of any claim against them for, or in respect of, their having taken control of any of the goods or having failed so to do.

85.5 (1) Where a creditor, or any other claimant to controlled goods to whom a notice of claim to controlled goods was given, gives notice under rule 85.4(3) that the claim to controlled goods, or any part of it, is disputed, and wishes to maintain their claim to the controlled goods, the following procedure will apply.

(2) The claimant to controlled goods must make an application which must be supported by (a) a witness statement (i) specifying any money; (ii) describing any goods claimed; and iii) setting out the grounds upon which their claim to the controlled goods is based; and (b) copies of any supporting documents that will assist the court to determine the claim

(3) In the High Court, the claimant to controlled goods must serve the application notice and supporting witness statements and exhibits on (a) the creditor; (b) any other claimant to controlled goods of whom the claimant to controlled goods is aware; and (c) the enforcement agent.

(4) In the County Court when the application is made the claimant to controlled goods must provide to the court the addresses for service of (a) the creditor; (b) any other claimant to controlled goods of whom the claimant to controlled goods is aware; and (c) the enforcement agent, ('the respondents'), and the court will serve the application notice and any supporting witness statement and exhibits on the respondents.

(5) An application under paragraph (2) must be made to the court which issued the writ or warrant conferring power to take control of the controlled goods, or, if the power was conferred under an enactment, to the debtor's home court.

(6) The claimant to controlled goods must make the required payments on issue of the application in accordance with paragraph 60(4)(a) of Schedule 12, unless such claimant seeks a direction from the court that the required payment be a proportion of the value of the goods, in which case they must seek such a direction immediately after issue of the application, on notice to the creditor and to the enforcement agent.

(7) The application notice will be referred to a Master or District Judge.

(8) On receipt of an application for a claim to controlled goods, the Master or District Judge may (a) give directions for further evidence from any party; (b) list a hearing to give directions; (c) list a hearing of the application; (d) determine the amount of the required payments, make directions or list a hearing to determine any issue relating to the amount of the required payments or the value of the controlled goods; (e) stay, or dismiss, the application if the required payments have not been made; (f) make directions for the retention, sale or disposal of the controlled goods; (g) give directions for determination of any issue raised by a claim to controlled goods".

26. I note that a somewhat similar procedure applies under CPR85.6 and CPR85.7 to what are called "executed goods" which are goods over which an execution takes place but which are not subject to a writ of control (see CPR85.2(1)(j) and the proviso to CPR85.2(1)(s)).

27. Mr Royle submits that this procedure requires, as set out in paragraph CPR85.4(1), the relevant third-party claimant to give written notice to the High Court enforcement officer as soon as reasonably practicable and in any event within seven days of their claim, such notice to identify the relevant goods and their grounds for the claim. The High Court enforcement agent then ascertains whether or not the judgment creditor disputes the third-party claim. If the judgment creditor does so dispute, then the third-party claimant must apply to the Court under CPR 85.5.
28. In relation to CPR85.5, as is noted in the *White Book* notes at 85.5.1 there is no time limit provided for in the Civil Procedure Rules for that application to be made. However, the notes point out that the Court may direct a time limit within which the application must be issued, and such an order may include a provision that the third party will be debarred from pursuing their claim if they do not comply with such an order, and make reference to that course being adopted in *Celador Radio Ltd v Rancho Steak House Ltd & Ors* [2018] EWHC 219 (QB). I do note, as has been stated above, that CPR 85.5 only applies to claims being made under paragraph 60 of Schedule 12.
29. Mr Royle further drew my attention to the fact that paragraph 60(2) of Schedule 12 prevents, in circumstances where the third-party claimant has made an application to the Court, a sale taking place pending the outcome of such an application, although subparagraphs 60(3)-(6) enables the Court to direct that a sale should take place either if “required payments” are not made or if the Court so decides, even if such payments are made.
30. Mr Royle submits that therefore the statutory scheme is that the third-party claimant must make those “required payments” as a price of not having the goods sold. He further submits that the third-party claimant must do so in certain circumstances as a price of bringing their application at all. With regards to those points, it does not seem to me that it is necessary for me, in the context of this case, to decide whether or not Mr Royle is right, but I do have doubts about his contentions. I do not see the wording as clearly stating that the making of the “required payments” is a mandatory matter so that a sale must take place unless they are made and that the court cannot direct otherwise. Further, in construing the paragraphs of the statute, it seems to me at first sight it would be necessary to bear in mind what may be substantial Human Rights’ arguments (e.g. in relation to non-interference with peaceful enjoyment of possessions). The question might well be asked as to why someone should be forced to make payments to defend their property when their case is that there was never any right for it to be taken in the first place (including that, as the judgment debtor has no interest in them, they were never “goods of the debtor” as defined by the Schedule; and, at first sight, it is difficult to see how either the Writ or Schedule 12 could justify their being seized, let alone sold); and may also be that the High Court enforcement agent was simply on what might be described as an unjustified frolic of their own. Those are all matters which it seems to me that a Court considering that specific scenario would have to bear in mind. However, it does not seem to me that it is necessary for me to decide any such point in this case, at least at this point.
31. Mr Royle also appeared to suggest in his submissions, although I am unclear as to how far he went on this, that reading together paragraph 60 of Schedule 12 and CPR 83.4 leads to a construction that the third-party claimant has a maximum seven-day period to make their claim (which must include specific details) in writing, and that, if they do not do so, they will then at least have their goods sold, and may lose them altogether with the goods being sold and having the proceeds paid over to the judgment creditor. I will return to this aspect in due course. However, at this point I do note that CPR 85.4 requires the third-party claimant to make their claim within an extremely short time period.

32. Following on from the above, I note that Schedule 12 does not provide for any compensation remedy for the third-party true sole owner claimant (unlike for the judgment debtor in paragraph 66 circumstances), notwithstanding that, at first sight, their property has been interfered with (seized and sold) without any justification. It is clear (and see the case-law to which I refer below) that the High Court enforcement officer, and others, have protections under paragraphs 63 and 64, and it seems to me that the solution, and which is suggested by some of the case-law, is that a claim exists in common-law trespass (or statutory wrongful interference with goods under the Torts (Interference with Goods) Act 1977, which concepts I treat together in this judgment as “trespass”) but subject to at least the provisions of paragraphs 63 and 64 (and, if Mr Royle is right with regard to his preceding contentions, and where the case-law may support him at least in part, with regard to those points).
33. Mr Royle’s second class of potential objector to what is happening in terms of execution under the writ of control, is that of a third-party claimant who does not say that they own the goods absolutely, but merely that they have an interest in the goods, that is to say that they are a co-owner. I do note that under paragraph three of Schedule 12 a “co-owner” is defined as somebody who is someone other than the judgment debtor and of whose interest the High Court enforcement agent knows or should have known.
34. As far as co-owners are concerned, Mr Royle draws my attention to paragraph 50 of Schedule 12. He contended that there is no rule within either Schedule 12 or the CPR, which allowed a co-owner to make any application to prevent a sale taking place. He submitted the situation is simply that, in circumstances where there has been enforcement against goods in which the judgment debtor has an interest but also a co-owner has an interest, there simply will take place a sale; and the High Court enforcement agent will then, out of the proceeds whatever they may be, pay the co-owner a share representing their proportionate interest, and pay over the rest to the judgment debtor.
35. Again, it does not seem to me that it is necessary for me to decide whether Mr Royle is right in all circumstances. I do note that, if he is right, this would give rise to a situation that, just because an item of property was beneficially owned in part, and which may be a very small part, by a judgment debtor, the majority co-owner will find themselves in a situation where their goods have been sold by force and rightfully; and albeit that what takes place might well be described as a forced open-market sale, possibly realising a substantially lower value than the price which might have been obtained had a full marketing taken place on the basis that the sale was not forced and that the owners could decide not to proceed with the highest bid if they regarded it as being inadequate. I do have concerns as to whether it is the correct construction of the Act that what might be a valuable item of very considerable personal and distinct significance to the co-owner might be forcibly sold in those circumstances and in that way. However, it does not seem to me that it is necessary, for the purposes of this judgment, for me to conclude as to whether the co-owner has no option but simply to stand back and watch or as to whether they can make some appropriate application to the Court.
36. The third possible objector is the judgment debtor themselves, in particular if they wish to assert that the procedure is being used improperly. For example, they wish to raise some claim as to the validity of the writ or as in this case, that enforcement against the relevant goods is in fact prohibited. I note that enforcement against particular goods may be prohibited for various different reasons. Now one possibility is that the goods are made exempt by regulations under Schedule 12 itself, such as for example personal papers. However, another possibility is that there is some other statute which prohibits enforcement and within which category falls as I have already held, section 23 of the 1890 Act. I note

that if the goods are “exempt goods” within Schedule 12, then in those circumstances the Civil Procedure Rules in CPR 85.8 and CPR 85.9 provide for a procedure whereby the judgment debtor can apply to claim the exempt goods should they be seized. However, the CPR reference to “exempt goods” is defined by reference to the same definition in paragraph 3(1) of Schedule 12, see CPR 85.2(1)(k)(a), and so does not extend to partnership property or other goods protected by statutes other than the 2007 Act.

37. The judgment debtor is however, given some sort of right to claim under paragraph 66 of Schedule 12. I remind myself that Schedule 12, paragraph 66(1) provides for two circumstances in which the paragraph applies. Namely where the High Court enforcement agent either (a) breaches a provision in the schedule or (b) acts under an enforcement power under a writ that is defective.
38. As stated in my January judgment, questions exist as to how wide these provisions are and whether they extend for example, to such situations as where the writ did not apply to permit seizure of the relevant property at all; for example, because on its true construction, it applies to property of the judgment debtor located at address A, but where execution has taken place over property at address B, thus giving rise to questions as to whether in that situation a judgment debtor cannot claim under paragraph 66 but might have some simple claim that the enforcement agent has committed a trespass to goods at common law. I give that as an example, although it may be it can be applied by analogy to the section 23 situation and to which I will revert in due course.
39. I note that under paragraph 66(3) it is specifically provided that the debtor may bring proceedings under the paragraph. Mr Royle submits that it is only the debtor who can do so and not a full owner of those goods, who would have to apply under paragraph 60 or a co-owner who would have to be content with whatever share they received out of eventual proceeds of sale (see Mr Royle’s assertions which I have set out above). Mr Royle has also drawn my attention to the Court’s powers under paragraph 66(5) which include ordering the return of goods to the debtor and paying damages to the debtor, albeit that, as provided by paragraph 66(7), the Court is not limited where it has other powers. Mr Royle has also drawn my attention to the limits which exist on claims against the enforcement agent under paragraph 66(8), namely that the agent has a defence if they acted in the reasonable belief that they were not breaching a provision of the schedule or that the writ was not defective as the case may be.
40. Paragraph 66 simply provides that “proceedings may be brought” and makes no reference to rules of court (unlike various other provisions within Schedule 12) but I note¹ that CPR84.13 provides:

“Application by the debtor for a remedy in relation to goods taken into control

84.13

(1) This rule applies where the debtor wishes to bring proceedings under paragraph 66 of Schedule 12⁵for—

- (a) breach of a provision of Schedule 12; or
 - (b) enforcement action taken under a defective instrument.
- (2) The debtor may bring proceedings by way of an application.
- (3) The application must be accompanied by evidence of how—
- (a) the provisions of Schedule 12 are alleged to have been breached; or
 - (b) the instrument is alleged to be defective.”

¹ This was not, I think, drawn to my attention in submissions; but it has now come to my attention and, as I have only so far delivered a “part judgment”, I have revised this “part” accordingly.

41. In terms of protection of the High Court enforcement agent, and also of any related party who may, and to which I will again revert, include the High Court enforcement officer and potentially the judgment creditor, Mr Royle submitted that protections appeared in various provisions. I have referred to paragraph 66(8) in relation to paragraph 66 proceedings. Mr Royle also referred me to paragraph 63, dealing with when goods have been taken into control before sale, and also paragraph 64, dealing with when goods have been sold and their proceeds have been distributed. Both provide that any liability of the enforcement agent or a related party, albeit that I note that “related party” is not defined in those paragraphs, are excluded except where either the enforcement agent had notice that the goods were not those of the judgment debtor or the judgment debtor alone or which is not the case here, an application had already been made to the Court. I am somewhat unclear as to whether or not Mr Royle submitted that the judgment creditor, that is to say Mark, could be a “lawful claimant” for the purposes of paragraph 63 and paragraph 64, although, in the light of the remainder of the judgment, it does not seem to me that that makes very much difference.
42. In any event, paragraph 66 envisages that the judgment debtor can bring proceedings under it, and it contains provision which protect the High Court enforcement agent if that agent has a reasonable belief that there is no breach of any provision of the schedule or that the writ is not defective as the case may be.
43. I note that firstly, there is no apparent decision on the question as to whether anyone other than the judgment debtor can bring proceedings under paragraph 66. Secondly, that the interaction between paragraph 66 and partnership law are somewhat complex to which I will return. Thirdly, that there is a potential issue as to whether paragraph 66 is subject to paragraph 63 and 64. This is because the High Court enforcement officer and the judgment creditor can be sued as each being a “related party” under paragraph 66, but they have no direct protection under paragraph 66(6) because that only relates to a High Court enforcement agent. The question may arise as to whether, in those circumstances, they can rely on paragraph 63 to say they have no notice of the claim and there is no application to the Court. Something of a reverse question exists also here, being as to whether the High Court enforcement agent can rely on paragraph 66(8) and say that they have a reasonable belief that there is no breach of any provision of the schedule notwithstanding that they have notice that a claim is being made by someone who says they are a lawful claimant; that is to say a situation where they may well not be able to rely on the paragraph 63 protection, but which protection is framed in different terms than that in paragraph 66(8).

Authorities regarding Schedule 12

44. Both Mr Royle and Mr Burroughs for Marcus took me to various authorities in the area. The first is the decision of *Hamilton v Secretary of State for Business, Energy and Industrial Strategy* [2021] EWHC 2647. In that case, the third-party claimant had given notice that the goods belonged to the third-party claimant and not the judgment debtor. The third-party claimant then applied to the Court under paragraph 60, but the application was dismissed on the basis that they were not the owner. Paragraph 40 of Schedule 12 provides that the sale following seizure must be within 12 months of the seizure; and, as a result of what had happened in relation to the third party claimant’s application, the sale did not occur within the 12 months, and therefore, under paragraph 53 of Schedule 12, the goods then became deemed abandoned. Not knowing of this or of the relevant consequential problems, a Master then ordered a sale which gave rise to an appeal and challenges.
45. The matter came before Lane J who at paragraph 63-65 of the judgment considered whether the High Court enforcement agent might have lost what would otherwise be their

immunities under paragraph 63 of Schedule 12, to a possible alternative co-owner where there was a suggestion being made, that that possible co-owner might have an interest. Lane J held that more than a mere suggestion was required to amount to notice, which would remove the immunity under paragraph 63(2), saying:

“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 one 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.”

46. Lane J then went on to construe Schedule 12 as to both its express and any implied meanings. The judge cited from and considered material passages from *Bennion, Baily and Norbury on Statutory Interpretation* at paragraph 68-91 of the judgment. I note from that the following:
- (i) Firstly that there is a general principle in terms of construction of statutes of considering the objective meaning of the words used and their particular context, see paragraph 70.

- (ii) Secondly, that meanings may be implied into the statutory wording, see paragraphs 71-76.
- (iii) Thirdly, that construction of the statute involves giving proper weight to the legislative purpose and to internal consistency, see paragraphs 77-80 which may justify a strained construction of the words used.
- (iv) Fourthly, the Court will lean away from a construction which produces an absurdity or to a lesser extent, an unreasonable result, see paragraphs 81-84. However, the Court will still look to the words in the statutory scheme, and the fact that such a result is possible in some circumstances may not prevent it from adopting a particular construction, see paragraphs 85-88.
- (v) Fifthly, the Court can deal as a matter of construction with an obvious error in the statute, see paragraphs 89-90.

47. Those principles are not that different from the ordinary documentary construction principles of considering the words in their known factual context and in conjunction with the underlying purposes of and the scheme underlying the document. Again, there the task is an iterative one considering all the suggested meanings and the Court asking itself as to which of those meanings is the most likely, rather than rejecting meanings one by one leaving the last considered meaning to be the determined right one. Nonetheless, I do note that, with regards to a statute, the Court is more ready to make implications as the statute may require some fleshing out. Further, the need in relation to an implication for it to be either obvious or to be acquired from business efficacy is somewhat watered down in the statutory context. However, as in contractual construction, the Court cannot use an implication to contradict or to rewrite express words. I note that in paragraphs 98-99 Lane J stated:

“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.

48. It seems to be that Lane J also accepted: firstly, that clear words are to be given their full force, even if they may lead to anomalies; and, secondly, that the Court should adopt a construction approach of something of a narrow nature where as here, statute involves an interference with the property rights.
49. Lane J went on to apply those principles to construe paragraph 60 of Schedule 12, where the third-party claim had failed and that had taken the full prescribed 12 months allowed for the period within which a sale might take place.
50. In doing so, it seems to me that the judge, firstly, recognised that the co-owner only had seven days to give notice of their interest under CPR 85.4(1), although the judge did not say in terms if there was a sanction imposed as a result, see paragraphs 110 and 113. What the judge did seem to be at least leaning towards, was a statement that in those circumstances, a

sale might go ahead rather than the judge actually saying that in those circumstances, the co-owner would lose their rights altogether. I note the judge did not deal with the situation as to what would happen if notice was given late but before a sale had taken place.

51. In this context, I note that CPR 3.1(2)(a) allows the Court to extend any time limit under the rules, although often there are sanctions implied into the rules where time limits are given and not complied with. In those circumstances a person seeking an extension of time must satisfy the terms of CPR 3.9 or, at least, the Court will apply an equivalent to the *Denton v TH White Ltd* [2014] EWCA Civ 906 approach, to which I will revert in due course, and with a substantial burden resting on the person seeking an extension of time to justify it being granted. I do note that in various cases with regard to CPR time limits, either no sanction is implied or only a limited one, giving rise to a potential for it being said that, in this context, any sanction might be limited to an inability of the claimant to complain if a sale had have taken place before notice was given.
52. However, *Hamilton v Secretary of State for Business, Energy and Industrial Strategy* itself is an example of when and why the Court might regard it as appropriate for there to be imposed and maintained a sanction, being in view of the problems which arise under Schedule 12 if a sale is delayed and which was precisely the sort of problem which actually occurred in *Hamilton v Secretary of State for Business, Energy and Industrial Strategy* itself. I do note that in paragraph 131 of the judgment, the judgment said that any application made at point in time of the hearing before Lane J, might be “hopelessly out of time”.
53. Secondly, the judge recognised that CPR 85.4 did not deal with the situation where the third-party claimant failed to apply to Court after they had advanced their claim and the High Court enforcement officer or judgment creditor had given a counternotice disputing the claim. However, I note that at paragraphs 114-117 the judge seemed to approve the *Celador Radio Ltd v Rancho Steak House Ltd and Others* approach of the Court making an order that unless the third-party claimant made their application within a specific time limit, they would be debarred from being able to assert their claim to title.
54. Thirdly I note that the judge seemed to accept the submission that paragraph 60 was the only way by which a third-party sole owner claimant could claim the goods; and appeared to proceed on the basis that the third-party would or at least might have to make the “required payments”. That was all stated in paragraphs 121-122 of the judgment although it seems to me that it is at least arguable that those paragraphs were technically obiter, not being required for the actual decision itself. For the reasons which I have already given that construction of paragraph 60 may be open to contrary argument in various circumstances. Nevertheless, the judgment itself, being at High Court judgment level, is at least highly persuasive as far as I am concerned.
55. I do also note that the judge’s conclusion with regard to the questions of statutory construction before her was that she was not prepared to come to a strained construction of the statute so as to remove the apparent problem which existed with regards to sale in that case. That was a conclusion to which she came, at least in part, due to the fact that the solution which was proposed by counsel for the High Court enforcement agent in that case could be unfair to others including the judgment debtor, see paragraphs 123-125 of the judgment.
56. The second authority was *Alenezey v Shergroup* [2022] EWHC 777 (QB), where a writ of control had been issued directed towards goods of the judgment debtor which resulted in the

High Court enforcement agent seizing a car owned solely by the claimant. The claimant contended that the car was his, and the High Court enforcement agent said that their position was that either payments had to be made under paragraph 60 or there would be a sale. The claimant obtained an interim injunction restraining the sale, and it was then accepted that the car belonged to the claimant. The actual dispute was over who if anyone, should pay costs; and the High Court enforcement agent contended that paragraph 60 both prescribed the procedure for the claimant to assert ownership, and which procedure had not been formally used by the claimant, and also forced the claimant to make the required payments. The claimant said that the paragraph 60 procedure did not apply if the goods had been taken unlawfully, and that that was the case there because they were simply not goods of the judgment debtor. Mr Simon Tinkler, QC, sitting as a section 9 Deputy High Court Judge held as follows:

57. Firstly at paragraphs 29-32 of the judgment, that paragraph 60 was not limited to goods taken lawfully and applied to any goods taken or purportedly taken under an enforcement power.
58. Secondly in paragraphs 30-31, paragraph 60 of Schedule 12 provided for various safeguards to the effect that the third-party claimant could prevent a sale by applying to Court and then making required payments, or, potentially, by making an application and simply persuading the Court not to order a sale. It seems to me that that latter point as to whether the Court could simply direct that a sale should not take place but without the “required payments” being made might not be in accordance with the views of Lane J.
59. Thirdly in paragraphs 33-37, the judge dealt with the question of whether paragraph 60 was confined to where goods were jointly owned by the judgment debtor and the third party, that is to say to a co-owner situation. He held that paragraph 60 did apply where the goods were entirely the property of the third party and including where, as a result, they had not been lawfully taken (because the judgment debtor had no interest in them and so that the writ did not extend to them). Mr Royle drew my attention to the fact that the first instance judge in *Hamilton v Secretary of State for Business, Energy and Industrial Strategy* had taken something of a different view, but he also he informed me that, on appeal in *Hamilton v Secretary of State for Business, Energy and Industrial Strategy*, it was held that paragraph 60 only applied in circumstances where the goods were entirely owned by the third party and so the third party was not a co-owner. Even though I was not taken to the judgment itself, it seems to me that that was common ground, and, in any event, it is the natural reading of paragraph 60 itself.
60. I note that in paragraph 35 of *Alenezey v Shergroup*, it was held that the paragraph 60 procedure would apply, even if a claim might technically exist under The Torts (Interference with Goods) Act 1977. In addition I note that at the end of paragraph 37 of the judgment, the judge effectively put a limit on paragraph 60 in a situation where the person who had purportedly acted under the writ of control was not themselves a High Court enforcement agent. However, that point was not developed and does not seem to be applicable to the case before me.
61. I note that in paragraph 38, the judge held that, on the particular facts, the High Court enforcement agent had full notice of the claim of the third party and had no reasonable belief to the effect that the goods were not solely owned by the third party. The judge also appeared to hold that paragraphs 63, 64 and 66 only contained protections for the High Court enforcement agent in relation to: firstly, sale of goods and distribution of the proceeds, and, secondly, claims “by the debtor”. I assume what was meant by claims of the debtor, was a reference to paragraph 66.

62. The judge then dealt with an assertion that the claimant could not seek costs against the High Court enforcement agent because the claimant had not used the CPR 85.4 procedure. It was argued by the High Court enforcement agent that, as a result, the claimant's claim was in itself an abuse of process, and the claimant should not be entitled to any costs of it. In paragraph 41, the judge held that CPR 85.4 applied to all paragraph 60 claims, and therefore that procedure must be used in relation to such claims. In paragraph 45, the judge noted that the claimant had given a clear notice of claim through solicitors. In paragraphs 44-59, it seems to me that the judge held, firstly, that the reality was that the substance of CPR 85.4 had been satisfied in terms of notice being given and proceedings brought in the Court. Secondly, the judge held that the Court would in the circumstances of that case, ignore any noncompliance, see paragraph 45 in which the learned judge stated:

“45. The rules for applying for an order in relation to controlled goods are set out in part 85.4. The claimant gave very clear written notice to the defendants on 23 February, through their solicitors, as to (a) the goods in question (b) to whom they belonged and (c) the grounds of dispute. The only part of part 85.4 that could be said not to have been complied with was the giving of a formal address for service. As the defendants had a letter from the solicitors stating they were acting for the claimant, the lack of a formal confirmation that this was the address for service cannot be said to be material. Or put another way, in these circumstances I do not see that the court would have refused the claimant permission to seek the relief they sought for that reason alone”.

63. It does seem to me that, although the judge did not identify any relevant CPR rule, that by relying on a general power to remedy defects in procedure the judge was effectively evoking CPR 3.10 which states:

“Where there has been an error of procedure, such as a failure to comply with a rule or practice direction (a) the error does not invalidate any step taken in the proceedings, unless the Court so orders and (b) the Court may make an order to remedy the error”.

64. Thirdly, the judge held that an interim applications judge would have granted an injunction in any event on the facts of that case, even if they had had drawn to their attention the CPR 85.4 point; and also that in doing so, they would have rectified any defect. It seems to me that, as far as Simon Tinkler QC was concerned, the matters being advanced by the High Court enforcement agent were simply points of arid technicality, where both the real issue of ownership and the fact that the claimant was correct were absolutely obvious. I note that at paragraphs 60-74 of the judgment, the judge was distinctly critical of both the High Court enforcement officer and the High Court enforcement agent. The High Court enforcement officer in that case is effectively the same overall entity as in this case, although the High Court enforcement agent is different. However and it seems to me that this is of some importance, the underlying issue in that case, being as to who was the true owner, was clear cut, while the existence and effect of the little-known statutory provision, section 23 of the Partnership Act 1890, in this case, is much less so.

65. The third case was *Bone v Williamson* [2022] EWHC 3158 (KB), Mr Burroughs for Marcus says any relevant point arising from that case has been raised far too late. I, however, do not see that as being the case; the relevant matter before me is one of law, and it seems to me to be right that the Court should be able to see all the relevant law, and especially in circumstances where the parties have been enabled to make submissions on it.

66. In that case, there was judgment debt and writ of control. The Master granted a stay of the writ, but the writ was executed nonetheless by the High Court enforcement agent on the instructions of the High Court enforcement officer. The Master granted a further stay after that enforcement; and the judgment debtor brought an application seeking to contest the fees of the High Court enforcement officer and to seek damages against the High Court enforcement agent. The damages claim was dismissed, but the Master held that the dispute about fees should not have been brought against the High Court enforcement officer and that decision was made the subject matter of an appeal. I note in relation to fees that paragraph 62 of Schedule 12 enables regulations and civil procedure rules to be made with regards to procedure in relation to claims for fees and charges being made by the High Court enforcement agent.

67. Lambert J stated in *Bone v Williamson*:

“20. The regulations referred to in section 62 are the TCG (Fees) Regulations 2014.

21. Paragraph four provides in respect of “recovery of fees for enforcement-related services from the debtor: (1) The enforcement agent may recover from the debtor the fees indicated in the Schedule in accordance with this regulation and regulations 11, 12, 13, 15 and 17 by reference to the stage or stages, of enforcement for which enforcement-related services have been supplied. (2) The fees referred to in paragraph (1) may be recovered out of proceeds. (3) The enforcement agent may recover under this regulation, the whole fee provided in the Schedule for a stage where the amount outstanding is paid after the commencement, but before the completion of that stage”.

22. In connection with disputes about the amount of fees and disbursements recoverable under the regulations, paragraph 16 provides that: "Upon application in accordance with the rules of court, any dispute regarding the amount recoverable under these Regulations is to be determined by the Court." Such applications are made under CPR 84.16 which provides that where "a party" wishes the court to assess the amounts recoverable under regulation 16, that party may make an application to the court to assess the amount”.

68. I also note under CPR 84.16, relating to disputes about the amount of fees or disbursements recoverable under the 2014 Regulations, states:

“(1) This rule applies where: (a) there is a dispute about the amount of fees or disbursements other than exceptional disbursements recoverable under the Fees Regulations and (b) a party wishes the Court to assess the amounts recoverable under regulation 16 of the Fees Regulations. (2) A party may make an application to the Court to assess the amounts. (3) The application must be accompanied by: (a) evidence of the amount of fees or disbursements in dispute. (b) evidence that the fees or disbursements in dispute were not applicable as the debt had been settled before the stage where it would have been necessary to incur those fees or expenses. (c) evidence that because the enforcement agent was instructed to use the TCG procedure in relation to the same debtor, but in respect of more than one enforcement power where the enforcement powers could reasonably be exercised at the same time, Regulation 11 of the Fees Regulations should have been applied. (d) evidence that the fee due and any disbursements for the enforcement stage, first enforcement stage, or first and second enforcement stage, as appropriate, are not recoverable under regulation 12 of the Fees Regulations, or (e) where the dispute concerns the amount of the percentage fee, calculated in accordance with Regulation 7 of the Fees Regulations, evidence of the amount of the sum to be recovered”.

69. Under both that rule and under those regulations, an application may be made to Court in relation to “dispute about the amount”. I do bear in mind that the inclusionary words of those provisions appear at first sight, to assume that the dispute is likely to be one of various types of dispute, none of which are the type of dispute in this claim. However, I also bear in mind that those words are merely inclusionary and do not at first sight, seem to limit what might be the subject matter of the relevant application regarding fees or disbursements.
70. In *Bone v Williamson Lambert J* went on to state:

“25. I accept the submission (of both parties) that the HCEO and enforcement agent are distinct entities. The power to enforce the debt vests in the HCEO but, unless he or she has "dual qualification," the HCEO must instruct/authorise an enforcement agent to carry out the enforcement steps by taking control of the good and selling them under the enforcement power.

26. The TCG (Fees) Regulations 2014 were made under the powers conferred by paragraph 62 Schedule 12 of TCEA 2007. Those regulations refer throughout to the enforcement agent, as opposed to the enforcement officer, as the person entitled to recover fees for enforcement related services from the debtor. The enforcement agent is defined as "an individual entitled to act as an enforcement agent by virtue of section 63(2) of TCEA 2007" (that is, someone who has been certificated or who is exempt). The definition does not cover the HCEO. Further, paragraph 16 of the TCG (Fees) Regulations 2014 states that any dispute regarding the amount recoverable "under these Regulations" is to be determined by the Court (my emphasis). The regulations provide a self-contained scheme for the charging of fees, the levels of fees and mechanism for dealing with disputes as to those fees. It seems to me therefore that on an application under paragraph 16 (and CPR 84.16) the enforcement agent is the correct respondent and not the HCEO.

27. Mr Kessler floats the submission that by enforcing the writ and by charging the fees referred to, the enforcement agent is acting as an agent for a principal, the enforcement officer. The proposition remained largely undeveloped both in written and oral submissions. However, there is a fundamental difficulty with this argument. For the reasons set out above, when the enforcement agent takes the practical steps to enforce the writ and then charging the fees for doing so, he or she is performing a function which the enforcement officer could not perform under the regulations. In these circumstances, I find it difficult to see how Mr Brown in this instance could have been acting as agent for Mr Williamson. Further, the fees charged by Mr Brown are for work undertaken by him personally in enforcing the writ. The bill for those fees is sent by him (or his employer DCBL) to Mr Bone. There is no evidence that Mr Williamson, as enforcement officer, is entitled to receive any share of those fees. Indeed the evidence before the Master was to the contrary: Mr Williamson's statement referred to him not having any right to any part of the fees incurred by Mr Brown. Even if, in some respects therefore, there exists a relationship of principal and agent between the enforcement officer and enforcement agent, the fees claimed by Mr Brown were in respect of work undertaken personally by him.

28. Mr Kessler submits that Schedule 12, paragraph 66 assists his argument. This paragraph sets out that, where an enforcement agent breaches a provision of the Schedule, then the court may order the enforcement agent or a related party to pay damages. A related party includes "the person on whom the enforcement power is conferred" that is, an enforcement officer. This provision makes sense as one imposing upon the enforcement officer a potential liability for any acts or omissions

by the enforcement agent which constitute a breach of Schedule 12. It is consistent with the requirement that the HCEO should carry insurance cover including professional indemnity insurance and public liability insurance. However, submitting a bill for fees which is incorrect is not a breach of Schedule 12 nor a breach which would render the enforcement agent or officer liable to pay damages. I do not therefore conclude that it is a provision which advances the appellant's case”.

71. I note that in paragraph 25, Lambert J accepted that the High Court enforcement officer and the High Court enforcement agent were different entities and stated that the writ was directed to the High Court enforcement officer who instructs the High Court enforcement agent. Additionally in paragraph 26, Lambert J held that any dispute about fees is with the High Court enforcement agent who is the proper defendant. I note that in paragraph 28, Lambert J considered paragraph 66 and said that if there was a breach of Schedule 12, then the Court could order either the High Court enforcement agent or a “related party” to pay damages and that “related party” included the High Court enforcement officer.

Factual History

72. In addition to the law, I also need to consider various elements of the factual history. In my January judgment, I referred to the fact that the partnership between Marcus and Mark was throughout in dissolution and that still seems to be the case. In paragraphs 58-62 and paragraphs 75-79 and 83, I held that all partnership property is held by the partners, whether or not it is legally in the names of one or both, on trust to pay the partnership debts and then to be applied in accordance with section 39 of the 1890 Act. Therefore it is, or at least arguably held on a trust where the partners have between them the beneficial interest, but where it is held in undefined shares rather than defined or undivided shares.
73. The writ of control was issued on 4 February 2020, addressed to the High Court enforcement officer. On 10 February 2020, Shergroup Ltd which is effectively an emanation of Ms Sandbrook, the High Court enforcement officer, sent a notice of enforcement to Marcus. Enforcement took place on 21 February 2020 by the High Court enforcement agent, acting at the direction of the High Court enforcement officer. I have before me a visit report of the High Court enforcement agent, which records that Marcus told the High Court enforcement agent that much of the goods and the machinery was partnership property. The High Court enforcement agent returned to collect more goods on 3 March 2020, where again I have before me the visit report. That records that, amongst other things, Marcus discussed with the High Court enforcement agent, how to get the best value for the grain which was part of the goods. The process of sale was however then delayed, owing to the impact of Covid-19 and Government Regulations made to deal with the pandemic.
74. On 17 June 2020, Marcus sent an email to the High Court enforcement officer, referring to the partnership and attaching a copy of the partnership agreement. On the same day, the High Court enforcement officer sent an email to Marcus with a copy to the High Court enforcement agent referring to that, and stating that the relevant items were co-owned by Mark and referring to how, when a sale took place, proceeds would be split accordingly. On 25 June 2020, Marcus replied to the High Court enforcement officer and High Court enforcement agent stating that the assets were partnership assets, and, therefore, they were not co-owned, but were owned entirely by the partnership; and stating that that would have various VAT consequences on a sale.
75. On 30 June 2020, the solicitor for the High Court enforcement officer emailed back to Marcus, stating: that duties were owed by the High Court enforcement officer to the Court

- and to Mark as judgment creditor; and, expressly, that the goods were partnership assets, and that the proceeds of sale would have to be divided accordingly.
76. The sale eventually did take place, with the proceeds being used to pay the judgment debt and then being divided between the partners, Mark and Marcus, but with a dispute as to whether or not there should be a deduction for the fees, charges and disbursements claimed by the High Court enforcement agent.
77. The situation is thus that, while Marcus had notified the High Court enforcement agent, at least to some extent, the fact that the goods were partnership property within seven days of the seizure, Marcus did not give notice in writing to that effect within the seven days provided by CPR 85.4, provision which is in point if paragraph 60(1) had applied to the situation. Marcus did thereafter i.e. after the seven days CPR85.4 period had expired, give that notice in writing; and the High Court enforcement officer via their solicitor did accept, or at least indicated, that the goods were all, or if not all then included, partnership goods. It seems to me that Marcus had at least arguably written by that point in time in terms such as indicated his desire to resist a sale taking place because the goods were partnership goods. However, Marcus did not at this point make any application either under paragraph 60(3) or paragraph 66 or otherwise seeking to prevent a sale. Further, at least to some extent, Marcus cooperated with the sale process, at least with regards to the sale of some of the grain.

Procedural History

78. What happened following the sale, is that the High Court enforcement officer issued an application seeking to have a determination as to what fees, charges and disbursements could be levied from the proceeds of the sale of the goods. Marcus sought to contest both individual items and the matter generally relying on section 23 of 1890 Act, to say that that simply prohibited enforcement against the partnership goods altogether. In the hearings leading up to the January judgment, I decided to confine what was being dealt with at that point to the questions as to whether particular items of expenditure would be justifiable as charges, assuming that there was a general right to levy charges out of the proceeds of sale, and to deal with the question as to whether the fact of the issue and existence writ prevented Marcus from bringing his claims entirely. In particular I dealt with an arguments from the High Court enforcement officer that section 23 merely forbade the issue of a “writ of execution” and that: either the writ of control was not a “writ of execution”; or that, if was, once it had been issued, the only course which Marcus could have taken would have been in some way or other to have sought to have the writ set aside, and which would have been done at an earlier stage but which was not done. I effectively rejected both of those arguments in the January judgment.
79. The order which I made was designed to limit what had happened to effectively those aspects. I directed, firstly, that disbursements were properly claimed “by the applicant” being the High Court enforcement officer, but that that was subject to the points which existed under section 23 and its consequences and which I had not yet determined. I note that that order was in favour of that applicant, being the High Court enforcement officer, albeit that in the *Bone v Williamson* decision, which was decided subsequently, it was held that claims of fees and disbursements are to be made by, and to be disputed against, the High Court enforcement agent not the High Court enforcement officer.
80. Secondly, I directed that the High Court enforcement officer’s application for a fees assessment was adjourned until the conclusion of Marcus’s challenges to enforcement under the writ with permission to apply for the assessment to be restored by letter. There has been no letter applying for restoration, but there has been Marcus’s application notice of 25 March 2022 which effectively seeks a declaration in this area.

81. Thirdly, I provided for Marcus to issue his originating process, seeking to challenge the enforcement, by 25 March 2022. That originating process was to include any remedies being sought against the High Court enforcement agent. It seems to me that I used the words “originating process” as I was not then sure as to what would be the correct process to adopt. I had recorded in the January judgment that Mr Royle for the High Court enforcement officer was then saying that Marcus should use the paragraph 66 procedure; albeit that I also recorded that I was not sure whether that was actually the correct course.
82. It was following that order that Marcus issued the application notice on 25 March 2022, which was against both the High Court enforcement officer and the High Court enforcement agent, with, as I have set out above: paragraph one setting out the damages claim being said to be brought under paragraph 66; and paragraph two seeking a declaration with regards to fees and disbursements but making no mention of CPR 84.16, that, as I have stated above, being the CPR provision relating to determination of disputes with regards to amount of fees or disbursements; and which application notice accepted that some of the grain which was sold was actually Marcus’s own property exclusively, but asserted that the remainder of the grain and the machinery were partnership property.
83. Marcus’s witness statement in support of his application dated 25 March 2022, essentially set out the history, but expressly said that the enforcement was improper, insofar as it had been against partnership property, due to section 23 of the Partnership Act 1890. Marcus added that he said that both the High Court enforcement officer and the High Court enforcement agent had known that the goods were partnership property and therefore should be liable.
84. In Paragraph 33 of the witness statement Marcus said:
“I, therefore, seek damages against the 1st and 2nd Respondents pursuant to paragraph 66. Those damages should not be the sums achieved by the sale of the partnership property but the current value of those assets as those damages represent partnership property. The damages should be paid to the partnership. Alternatively, if they are paid to me I will hold them on behalf of the partnership. It is not my intention to benefit from this application at the expense of the partnership.”
85. In earlier paragraphs, Marcus had asserted that the result of the forced sale as part of the process of enforcement, had caused substantial reductions to what would have been obtained for the goods and machinery on the open market with full notice and on the basis of a free rather than a forced sale. He asserted that there had been a diminution of tens of thousands of pounds, between the prices which were actually obtained and the open market values. I note Marcus asserts that he would hold any damages recovered for the partnership.
86. I did also note during the hearing that Mr Burroughs at one point seemed to imply that, if a damages remedy was obtained, that would not involve Marcus giving credit for the monies which were actually obtained on the sale of the goods and machinery and which had paid out to Marcus and Mark. I raised with Mr Burroughs, as was also advanced by Mr Royle for his client, the question as to whether any monies recovered in this litigation would or could be said to be derived from partnership property, such that they would be held by the recipients on trust for the partnership and so they would be brought into account on a final accounting of the partnership. Mr Burroughs reserved his position with regards to that, but it seems to me that he will have to grapple with that point in due course, although I do not presently seek to decide it, assuming that he otherwise succeeds in this litigation.
87. Marcus also said in the witness statement that if the enforcement was held to be contrary to section 23, then no fees or charges could be levied, except by reference to the grain which belonged entirely and absolutely to Marcus. Mr Royle asserted that Marcus had

misunderstood what could be charged in those circumstances; although Mr Royle accepted that at least some of the charges, which were sought to be levied, could not be levied if Marcus was right on the section 23 point, even if Mr Royle was correct with regards to how charges in relation to Marcus's own grain would be calculated. It does not seem to be that I should determine any of the relevant underlying arguments. However, it is important to one aspect of what is before me that at least some real amount of money would depend on that particular issue.

88. Following the issue of the application, I directed a case management conference which actually took place on 21 June 2022 where I heard counsel for Marcus and counsel for the High Court enforcement officer and High Court enforcement agent. As a consequence, I directed further witness statements and the case management conference in November. This led to the High Court enforcement officer, Ms Sandbrook responding to Marcus's claim by a witness statement of 23 July 2022. In it, she:
- a. disputed whether Marcus was able to bring a claim which she asserted is a claim which if at all, belongs to the partnership
 - b. asserted that the writ was not defective, and, even if it was, the High Court enforcement officer and High Court enforcement agent had a reasonable belief that it was not defective
 - c. asserted that the relevant person for claims to be brought against was the High Court enforcement agent and not herself, the High Court enforcement officer
 - d. asserted that Marcus did have a beneficial interest in the seized assets. It seems to me that it was necessary for her to say that, because otherwise they would not be "goods of the debtor" within the definitions in paragraph 3(2) of Schedule 12 against which enforcement could take place at all within Schedule 12
 - e. went on to submit that she had reasonably believed that there was no breach of any provision of the schedule and no non-compliance of the schedule for the purposes of paragraph 66; notwithstanding that she believed, as was the case, that Marcus had an interest in their goods due to them being partnership property, and
 - f. asserted that both Marcus and Mark had consented to the sales of the grain and of the machinery.
89. There is also before me a witness statement of the High Court enforcement agent on 22 July 2022, in which he asserted that Marcus knew at all material times that both the wheat and the machinery could be sold. It also includes at paragraph 15 what seems to me to be an acceptance, or at least very arguably an acceptance, on his part that he knew that a substantial amount of the grain and also the machinery were partnership property.
90. There is also before me a witness statement of Mark on 1 August 2022, and he refers, in its paragraph 7, to the fact that a settlement agreement was made between him and Marcus on 2 August 2021. whereby they agreed, as between themselves, not to pursue each other for any relief or remedy. In these matters before me, Marcus asserts that he is not seeking any relief or remedy against Mark but has simply joined Mark to his application for procedural reasons. In paragraphs 10 and 11, Mark asserted that he is not concerned with the dispute which is actually between Marcus and the High Court enforcement officer and High Court enforcement agent; but he is concerned as to his being a named respondent and incurring costs. He confirmed that he had not authorised Marcus's application and also stated that he accepted that the partnership is not yet fully wound up. He stated that his position is that all of this is a matter between others than him, and that he simply wished, as a party, to have provision and protection for his own costs.
91. The application to strike out Marcus's application was issued by the High Court enforcement officer and High Court enforcement agent on 16 September 2022. I listed it

for hearing on 14 November 2022 and heard submissions. The time was inadequate, so I allowed for a further hearing on 20 December 2022 to be and which was used for more submissions. I provided for further written submissions thereafter; all of that leading to this oral judgment. I have considered all the evidence and submissions before me.

92. It does seem to me that to an extent, the application of the High Court enforcement officer and High Court enforcement agent has gone through some iterations from the form in which it was originally issued on 16 September 2022, through the way in which Mr Royle's various submissions developed. I do not think that any such iterations have prejudiced Mr Burroughs in terms of his being able to make submissions with regards to them and I do not think that I should refuse to deal with any or all of them.

The Main Issues

93. It does seem to me, and as a matter of general analysis, the main issues are as follows:

- (a) Firstly, whether Marcus can bring this claim, which on his case, has to be regarding partnership property, in his own name with Mark as a defendant.
- (b) Secondly, whether Marcus can bring a claim under Paragraph 66 either for the partnership's alleged loss or his own alleged loss, or must use some other statutory or common-law means and basis.
- (c) Thirdly, if Marcus has to use either (a) paragraph 60 of Schedule 12 or (b) some other means than his application notice purportedly relying on Paragraph 66, what that means is and whether he should be permitted to use it
- (d) Fourthly, possibly depending on my conclusions with regards to the earlier matters, whether both or either of the High Court enforcement officer or High Court enforcement agent, have a clear defence to Marcus's claims: firstly, on the grounds that it is the other who should be sued alone; or, secondly, on the grounds that they or a relevant person, had a reasonable belief that what they did by way of seizing the goods, holding them and then selling them was lawful.

Although that last question of "reasonable belief" is to some extent a question of fact, that would not necessarily prevent me deciding it either under or by analogy with the reverse summary judgment process contained in Part 24 of the Civil Procedure Rules on a summary basis should that be appropriate. I bear in mind in relation to such questions of fact that it is clear that the Court should not at a hearing of this nature, be conducting a mini trial. In fact, in his final submissions in reply, Mr Royle said that this point "was not pressed" by the High Court enforcement officer or High Court enforcement agent. I think that that was a realistic course for Mr Royle to take, as their evidence is that they knew the goods were, or at least that there was a real potential for them being said to be, partnership property. In fact, their general case justifying the enforcement is that the goods were partnership property, and the documents at least potentially, show that Marcus was raising objections to enforcement on the basis that the goods and machinery were partnership property. It seems to me at least reasonably arguable that the issue had been clearly raised, and that Marcus would have a real prospect of success on the questions of the

holding of “reasonable belief”. It therefore seems to me, that I should only deal with a limited extent further, with the question as to whether either the High Court enforcement officer or High Court enforcement agent, either had a relevant belief or whether it was reasonable.

(e) Fifthly, whether Marcus can complain about losses having occurred on the sales, where he is said to have cooperated in the process. Again this involves questions of fact and the point was not pressed by Mr Royle in his final submission. Again I think that Mr Royle was right not to do so as Marcus’ co-operation, such as it was, appears, at least very arguably, to have been in circumstances where (i) he had made his stance that this was illegitimate execution against partnership property clear and (ii) he was having to do his best in the face of a seizure of the goods and machinery and a firm stance being taken by, at least, the High Court enforcement agent. However, I set out the parties’ competing submissions as to this aspect below

(f) Sixthly, whether the High Court enforcement officer is clearly not a proper respondent to the declarations sought regarding fees etc. Linked to that is the question of what, if one exists, is the correct procedural method for Marcus to challenge the claims to fees and, in consequence, whether his challenge to them based on section 23 should remain part of this application.

94. Although that is the convenient order for that analysis, it seems to me that I cannot fully keep to it in the light in the way in which the submissions were presented, but I have borne it in mind in terms of considering the parties’ submissions, to which I now come.

Submissions regarding whether a claim relating to partnership property (1) can be brought by only one Partner; and (2) can exist under Paragraph 66

95. The first question is as to whether Marcus can bring the claim in his own name with Mark as a respondent, where the claim relates to partnership property but the other partner, that is to say Mark, does not consent although he does not also oppose. Mark does not join in the claim and the claim is not being made in the name of the partnership as such. It seems to me to give rise to two types of sub issue:

- (a) The first question is whether Marcus can bring a claim for what is essentially a claim of the partnership.
- (b) The second question is whether Marcus, in the alternative, can claim for his own loss, that is to say diminution in the value of his rights as partner, extending to at least partnership share, assuming the partnership to be solvent.

96. Those questions interact with the second and third general questions of whether a claim can only be brought under Paragraph 60 (and not Paragraph 66) in partnership circumstances, using the CPR Part 85.4 and 85.5 procedure. In consequence, I now turn to recite counsel’s submissions on the various points altogether rather than dealing with each of the main issues in turn.

97. Mr Royle has submitted that he would accept that Marcus as a judgment debtor can bring a claim under paragraph 66 if the relevant conditions were satisfied and that it might follow that Marcus as a judgment debtor could bring a common-law claim if they were not. However he submits that:

- a. Marcus cannot bring a claim because it would have to be brought under paragraph 60 if at all
 - b. Marcus has not actually brought any claim for his own loss. Even if Marcus did seek to bring such a claim it would fail as:
 - i. he cannot bring such a claim because the only claim would be a claim which would have to be made by the partnership, but, if that was wrong
 - ii. Marcus should not be permitted to either amend to bring a claim for his own loss, or to bring any other claim than that which he has already brought, because my order of 2 February 2022 required Marcus to issue his originating process within two months, and Marcus has chosen only to issue a purported application under Part 66 in relation to the partnership's loss.
98. Mr Royle otherwise reiterated in his submissions that:
- a. the only claim which could be brought would be a claim by the partnership
 - b. that would have to be a claim brought by both Marcus and Mark together, and
 - c. it would have to be a claim under paragraph 60 and:
 - i. such a claim was not being made at all
 - ii. it would have to be brought within the procedure and time limits laid down by CPR 85.4 and 85.5
 - iii. it would have had to have been brought within the two months limited by my order of 2 February 2022.
99. Mr Burroughs submitted as follows. Firstly that the claim is actually vested in the partnership and brought properly by Marcus using his own name, and even though Mark did not consent. He submitted that it was sufficient to have Mark as a respondent to the application. Mr Burroughs relied on, firstly, CPR 19.3(1) which states "all persons jointly entitled to the remedy claimed must be parties unless the Court orders otherwise" Mr Burroughs submitted that it was sufficient in circumstances of a joint right, which he submitted was the case here, for the claim simply to be brought by one of those entitled to enforce the joint right, namely Marcus and with the other being a respondent, namely Mark.
100. Secondly, he relied on *Lindley and Banks : Partnership : 21st Edition*, paragraph 14-42 which states:

"14-42

The [Civil Procedure Rules](#) provide that:

"Where a claimant claims a remedy to which some other person is jointly entitled with him, all persons jointly entitled to the remedy must be parties unless the court orders otherwise."¹⁶¹

It follows that, whilst additional parties can be added at a later stage,¹⁶² it would normally be inappropriate for proceedings on behalf of a firm to be commenced by some only of the partners, unless the others are joined as defendants.¹⁶³ Equally, since proceedings on behalf of a firm can normally be issued in the firm name,¹⁶⁴ this rule should have little impact in practice.¹⁶⁵"

Footnote 163 reads:

"This principle was clearly affirmed in [HLB Kidsons v Lloyd's Underwriters \[2009\] 1 All E.R. \(Comm\) 760](#) at [19]. Note also Lord Lindley's observations on the consequences of the misjoinder/non-joinder of parties: "... mistakes create delay and expense ... and if all the members of a firm sue when one only ought to do so, or one only sues when all ought to do

so, and the defendant can show that he is thereby prejudiced, he can apply to have the improper parties struck out or the proper parties joined, as the case may be.” The position is, if anything, a fortiori, under the [CPR](#).”

101. That footnote refers to the decision of *HLB Kidsons (A Firm) v Lloyds Underwriters & Ors* [2009] 1 AER (Comm) 760, and draws particular attention to paragraph 19. In fact, the parties included in the bundle for the hearing, a different judgment in the *HLB Kidsons (A Firm) v Lloyds Underwriters & Ors* litigation. Nevertheless, I have obtained the relevant judgment being that of HHJ Mackie QC, sitting as the judge of the High Court. Although I did not hear specific submissions on that judgment, it seems to me that it actually says no more than what is set out at footnote 163, albeit that the somewhat fuller citation of the judgment is helpful.
102. The situation in that case was that the accountant’s firm of HLB Kidsons had merged with the firm of Baker Tilly and thereafter, various Kidsons’ partners who are called in the judgment, the “KFP partners” had retired while others who were called in the judgment “the Kidsons’ partners” had continued. The managing partner had then brought proceedings against the firm’s insurers on behalf of all the partners, both the Kidsons’ partners and the KFP partners which at that point of the litigation those proceedings had failed, with a very substantial cost order having been made against the firm. The Kidsons’ partners in the proceedings before HHJ Mackie QC had contended that that claim was properly brought by them, on behalf of the firm, that is to say all the partners including the KFP partners, as a consequence of a technical dissolution of the firm on the occasion of the merger requiring a winding up. The Kidsons’ partners contended that that winding up justified, as a necessary consequence of it, the managing partner being able to bring a claim against the insurers on behalf of all the partners.
103. The KFP partners contended that there had been no such general dissolution and therefore, there was no such justification or authorisation for the managing partner to act on their behalves. They also submitted that, even if there was such a justification or authorisation, any such proceedings could not be properly brought without their assent and without them being made co-claimants.
104. HHJ Mackie QC first considered the concession that there had been a general dissolution and he held that there had merely been a retirement which resulted in the KFP partners simply ceasing to be part of the partnership altogether; and in consequence that the managing partner could not act on their behalf. However, HHJ Mackie QC went on to consider as to whether if there had been a general dissolution, it would have been necessary for the claim against the insurers to have been brought in the name of all the partners rather than just in the name of the Kidsons’ partners without the KFP partners being made co-claimants.
105. In paragraph 18, he said as follows:

“18. Kidsons”, that is to say the Kidsons’ partners, “say that the answer is “yes” because third-party claims which are plainly arguable as the history of the litigation has shown, had to be pursued. KFP say “no” because the bringing of these claims in not “winding up” within section 38. A process which would bring the trading activities of the dissolved firm to an end. Furthermore, the action could have been commenced by Kidsons with KFP being joined as defendants under CPR 19.3”.
106. The final sentence of paragraph 18 thus deals with the raising of the contention that any such claim where there was a general dissolution could have been brought against a third

party by simply by one set of partners and with the remaining partners being made defendants even though they had not authorised the bringing of the claim.

107. The judge responded to this contention in paragraph 19 which reads as follows:

“19. The answer as I see it is “no”, Kidsons were free to proceed as they did without the consent of KFP and to bring KFP in as defendants under CPR 19.3. This provides where a claimant claims a remedy to which some other person is jointly entitled, that person must be a party. If any person does not agree to be a claimant, he must generally be made a defendant. While some may agree with Kidsons that it is unattractive for KFP to take the position, they will be content to benefit from the fruits of the action but decline to take the financial risks. That is, as Mr Lazarus points out, an aspect of the broader law of joint claims”.

108. It is that paragraph which is cited in *Lindley and Banks*, but the judge returned to the matter in paragraph 28 being his conclusion, which reads as follows:

“28. It follows that in substance, KFP succeed. Kidsons claim that it is morally wrong that KFP should be able to stand on the side lines reaping any benefit of the insurance litigation while avoiding the risks and burden of costs. KFP say that their position is no different from that of any other joint Claimant who, as a matter of established law, can decline to take part in proceedings but still benefit from the outcome. I reach my decision without regard to either moral consideration. It may be said that KFP's position is unattractive. Against that the retired partners have played no part in the decisions to bring this case and it is quite common for continuing partners to take steps which may benefit retired partners without seeking to place the risk and costs on those who may be less able to meet them from income. I recognise however that in this case a number of the retired partners left to work in other fields.”

109. Mr Burroughs, therefore, submits that Marcus has properly brought the claim on behalf of the partnership. Mr Royle submitted that was wrong, and that *HLB Kidsons v Lloyds Underwriters & Ors* was only relevant to a situation of former partners. Mr Royle also relied on paragraph 7 of Practice Direction 7A to the Civil Procedure Rules which reads as follows:

“Claims by and against partnerships within the jurisdiction

7.1 Paragraphs 7 and 8 apply to claims that are brought by or against two or more persons who—

(1) were business partners; and

(2) carried on that partnership business within the jurisdiction, at the time when the cause of action accrued.

7.2 For the purposes of this paragraph, “partners” includes persons claiming to be entitled as partners and persons alleged to be partners.

7.3 Where that partnership has a name, unless it is inappropriate to do so, claims must be brought in or against the name under which that partnership carried on business at the time the cause of action accrued.”

110. Mr Royle relies in particular on paragraph 7.3. I also note that it requires proceedings to be brought in the name of a partnership, even a dissolved partnership, unless it is inappropriate to do so.

111. Mr Burroughs submitted, secondly, that Marcus can and should be allowed to bring a paragraph 66 application for the partnership's, or alternatively his own, loss for various reasons, being:
- a. Marcus is the judgment debtor and paragraph 66(3) simply provides that a judgment debtor can bring proceedings
 - b. Marcus could sue either in his own right as judgment debtor or, as he is the judgment debtor, as trustee of the partnership
 - c. paragraph 66(3) is not, he contended, confined to the debtor, he submitted that it was only permissive.
112. Mr Royle disputes this, he submits that any claim is the claim of the partnership and paragraph 66 does not apply for a number of reasons:
- (a) Firstly, he submits that that partnership is not "the judgment debtor" in these circumstances, and is not equivalent to "the judgment debtor" and that Marcus cannot get around it by saying that in some way, he as judgment debtor, is claiming as trustee for the partnership.
 - (b) Secondly though, Mr Royle submits that paragraph 66 is not in point at all. He submits firstly, that the writ is not defective, there is nothing wrong with it. Secondly, that there has not been any breach of any provision of Schedule 12. He submits that even if my January judgment is correct, the situation is rather that the writ simply did not extend to partnership property and that that situation does not come within paragraph 66.
 - (c) Thirdly, he submits that even if Marcus could use paragraph 66, it would only be for loss which was suffered by him personally, that is to say as judgment debtor. He submits that Marcus has not applied on the basis that he is claiming such a loss and that if Marcus was to seek to amend to claim that, either as his primary claim or in the alternative, he should not be permitted to do so.
 - (d) Fourthly, Mr Royle submits that what is being brought is effectively a paragraph 60 application because it is an application being made effectively by the partnership, contending that the goods are theirs and not the judgment debtor's, that is to say the partnership's goods and not Marcus's. Mr Royle submits that if this was not the case, then a partnership can never bring a claim at all. He submits that both *Hamilton v Secretary of State for Business, Energy and Industrial Strategy* and *Alenezey v Shergroup* make clear that a claimant can only use a right to bring proceedings if the right itself appears in Schedule 12. If Schedule 12 does not contain a right to bring a claim and a procedure with which to do so, Mr Royle submits that there can be no remedy. Mr Royle further submits that this is consistent with paragraph 63 which excludes the liability of a High Court enforcement agent if no application is being made under paragraph 60 by a sole owner, albeit that is only so long as the High Court enforcement agent has no notice that the goods are not those of the judgment debtor or (here) of the judgment debtor alone and which notice the High Court enforcement officer did, at least very arguably, have
 - (e) I further believe that Mr Royle was also seeking to say that there is effectively a limitation period imposed on paragraph 60 claims by

CPR 85.4, on the basis that CPR85.4 requires, in the case of a paragraph 60 challenge, a written notice to have been given within seven days and no written notice was given within that time here. Rather, at most there was given, within the 7 days' period, an oral notice that the goods were partnership goods; and which oral notice Mr Royle submits was in any event is too vague, relying on the passage I cited from paragraph 65 of the *Hamilton v Secretary of State for Business, Energy and Industrial Strategy* judgment. In addition Mr Royle would rely on paragraph 131 of the *Hamilton v Secretary of State for Business, Energy and Industrial Strategy* judgment to say that what he says would have been the requisite application under CPR 85.5 would now be hopelessly out of time and should not be capable of being made. Mr Royle thus submits that the only claim which could have been made would have been under paragraph 60, using the CPR85.4/5 procedure, and that it would now be too late.

113. In relation to various of these submissions, Mr Burroughs responds to say that this is not a paragraph 60 application situation. He says that such an application would require there to be a third party claimant who was someone other than the debtor, and which person was the only person who owned the goods, and would only be the case where the judgment debtor has no interest in the goods at all. Mr Burroughs submits that, on any basis, this judgment debtor had an interest in the goods.
114. Mr Burroughs further submits that this matter is simply governed by paragraph 66 which deals with claims of the judgment debtor, and that it is paragraph 66 which relates to claims of the judgment debtor. Mr Burroughs further submits that if Mr Royle's analysis is correct then section 23 would be deprived of much of its effect.
115. Mr Burroughs would go on to submit that if he is forced to use paragraph 60, then CPR 85.4 and its seven days' provision should not be used to bar a claim against a High Court enforcement agent who is said, in these circumstances, not to be entitled to the protection afforded by paragraph 63 because of the agent's knowledge of the claim, now accepted by the agent, that at least some of the goods were partnership goods.
116. Mr Royle further submits, in the alternative, that this is a co-ownership situation, as both Marcus and Mark have interests in the goods. He therefore submits that the seizure was proper because the goods were within the statutory language of paragraph 3 "goods of the debtor" as they were goods in which Marcus had an interest. He repeats his submission that the only right and remedy which exists in a co-ownership situation is for a co-owner to receive a share of the proceeds of sale under paragraph 50 and therefore that no other claim can be made arising from the fact of a seizure and sale.
117. Mr Burroughs submits, firstly, that this ignores Marcus's rights under paragraph 66; and, secondly, if Mr Royle was correct, it would deprive section 23 of the Partnership Act 1890 of much of its value and force where there was a contravention of it, as is the case here.
118. Mr Royle also submits that it was too late for there to be any amendments or changes in procedure, bearing in mind the terms of my order of 2 February 2022. Mr Burroughs says that it would be quite unfair for him not to be able to add amendments or alterations to the application, especially in circumstances where, at the

time of the January judgment, Mr Royle appeared to contend that the correct procedure was paragraph 66; and, in any event, the situation has considerably developed but the claim is still at an early case management stage.

119. I do note that Mr Royle accepted that these goods are not “exempt goods” within the wording of Schedule 12. It seems to me that he was clearly right to do so, because paragraph 3 of Schedule 12 requires for goods to be “exempt goods” that they must be exempted by “regulations” i.e. a statutory instrument made under the 2007 Act. However, these are partnership goods which are excluded from any writ of execution procedure by statute.

120. I do also note that the expression “writ of execution” in the 1890 Act is different from the expression “writ of execution” in the CPR, where the definitions in CPR 83.1(2)(l) and in CPR85.2(1)(s) excludes a writ of control.

The parties’ further submissions

121. Mr Royle further in relation to paragraph 66(7), contends that a paragraph 66 claim can only be made against a High Court enforcement agent and not against a High Court enforcement officer. In relation to paragraph 66(6), which provides that the claim can be made against “a related party” and defines “related party” to include a person with an enforcement power, Mr Royle submitted that paragraph 1(3) of Schedule 12 still operated to confine “related party” to a High Court enforcement agent as the enforcement power was never conferred, at least within the provisions of paragraph 2 of Schedule 12, on the High Court enforcement officer. Mr Royle submitted that the decision in *Bone v Williamson* was wrong at paragraph 28 to say that the words “related party” in paragraph 66 extended to the High Court enforcement officer. Mr Burroughs submitted that *Bone v Williamson* was entirely right on the point and also binding on me.

122. Mr Royle further submitted that Marcus had no claim in any event for a number of reasons: Firstly that there was insufficient evidence that any particular goods were partnership goods. Secondly following on from that, that the High Court enforcement officer and High Court enforcement agent, according to his submission, had contested that there was such evidence. Thirdly, that Marcus had encouraged the sale, at least of the grain and therefore, was barred from claiming in respect of it. On these points, Mr Burroughs submitted that the case was properly pleaded as to the goods being partnership assets and the machinery being partnership assets and Ms Sandbrook’s witness statement seemed to accept that. Mr Burroughs further submitted in relation to the question of Marcus having acceded to the sale, that Marcus had at all points made the case that there were partnership goods clear; and that all that Marcus had sought to do was to mitigate a situation which had been forced upon him by the High Court enforcement officer and High Court enforcement agent insisting that proper enforcement was taking place. Mr Burroughs further submitted that on any basis Marcus had not done such sufficient to prevent him now bringing this claim or as to estop him from making it.

123. With regard to the declaration sought with regard to fees, Mr Royle submitted that the *Bone v Williamson* case made clear that a fees’ point could only be taken against the High Court enforcement agent and not against the High Court enforcement officer. He reiterated his point that Marcus had approached the question of calculation of fees incorrectly and that: the fees which were leviable were to be calculated by reference to the amount of the debt, not the value of the goods against which enforcement had taken place; and, therefore, that such amounts were payable in any event, out of the proceeds of the grain owned solely by Marcus; and that would take

up the entirety of those financial claims being made by the High Court enforcement agent except for a figure which might be only as much, at most, as £14,000, a sum which Mr Royle asserted was so low as to render the carrying on of this litigation as being disproportionate. However, in his final written submissions, he accepted that that issue would probably be for another day. In any event, Mr Royle submitted that it was too late for Marcus to raise these points, but also, in any event, it was wrong for Marcus to seek a declaration with regards to those matters. Mr Royle submitted that what Marcus should be doing was to bring an application with regard to what were or were not the correct amounts under CPR 84.16. Mr Burroughs responded to say that this was a real issue which was being properly litigated and which was being properly raised by Marcus's application.

Discussion

124. I found aspects of this difficult especially as:

- a. Schedule 12 does not expressly contemplate the situation of section 23 of the Partnership Act 1890 preventing a writ of execution being issued in respect of partnership goods. On the other hand, it does envisage goods being protected by an enactment, see paragraphs 4(1) and 11 of the Schedule.
- b. There is some difficulty in ascertaining as to which parts of Schedule 12 deal with the situation of property, which is protected by a Statute, here section 23, being vested in joint owners, one of whom is the debtor and one of whom is not
- c. The cited case-law does not seem really to deal with damages claims being made in relation to what is protected property or as to how such are brought. It also seems to me that the caselaw is of limited assistance with regards to a damages claim being brought by a co-owner or even a full owner in circumstances where the provisions of paragraphs 63 and 64 do not protect the High Court enforcement agent (or some other respondent), owing to the circumstances of their knowledge. In particular, there seems to be an absence of caselaw cited which deals with the circumstances as to what then happens where a sale has taken place, as in this case.

125. However, while those difficulties exist and subject to some points which will require a limited further consideration, I do not think that I should accede to any of Mr Royle's various arguments to in effect, stop these claims at this point. My main reasons are as follows, although I have taken into account all of the parties' submissions:

The Statutory Scheme

126. It seems to me to be important, as was done in *Hamilton v Secretary of State for Business, Energy and Industrial Strategy*, to identify the statutory scheme and that is an essential element in construing the words used in Schedule 12, and I have applied the *Hamilton* approach throughout this judgment.

127. It is necessary to identify upon whom the enforcement power is conferred. That is effectively required by paragraph 1 of Schedule 12. I need to identify whether it is directly conferred on the High Court enforcement agent or whether it was conferred on the High Court enforcement officer who then authorised the High Court enforcement agent to use the power as contemplated by paragraph 2 of Schedule 12. I do accept that only the High Court enforcement agent is the "enforcement agent" as that expression is used within Schedule 12. It seems to me that both Schedule 12 and the judgment in *Bone v Williamson* made that clear. However, I do not accept Mr Royle's submission that here the enforcement power was not conferred on the High Court enforcement officer; rather in my judgment it was so conferred on the High Court enforcement officer and who then authorised the High Court enforcement agent to use it. It seems to me that paragraphs 25 and 28 of *Bone v Williamson* make it entirely clear that that was the situation: The enforcement power was

conferred on the High Court enforcement officer by the writ and the High Court enforcement officer then authorised the High Court enforcement agent to actually use and carry into effect the enforcement power. It seems to me that that represents the reality of what happened and the reality of the statutory scheme. Furthermore, it also seems to me that the statements in *Bone v Williamson*, even if they are technically obiter, are both highly persuasive and are entirely correct as to that.

What Claims can Marcus bring as a matter of general procedural and partnership law (a) on behalf of the partnership for its loss and (b) for his own loss; and whether Marcus can do so under (i) paragraph 66 or (ii) otherwise?

128. I need to ask myself by whom this claim is being brought and for whose right and loss? Mr Burroughs says that Marcus is bringing both the partnership's claim and, in the alternative, his own claim. I deal first with the partnership claim; and it seems to me to be common ground, and rightly, that Marcus is at least purporting to bring what is a claim of the partnership. Mr Royle however submits that Marcus cannot do that, he submits that only both partners can bring that claim acting together and that Marcus needs to have authority from the partnership to do that in circumstances where it is clear here that Mark does not consent, although he also does not object.
129. However, it seems to me that, in these circumstances, Marcus is properly bringing the partnership's claim with Mark as a respondent. It seems to me that this situation just simply falls within the provisions of CPR 19.3 and the general law as interpreted in *HLB Kidsons (A Firm) v Lloyds Underwriters & Ors*. In fact it seems to me that it is exactly the situation contemplated by what HHJ Mackie QC set out as being the second issue in *HLB Kidsons (A Firm) v Lloyds Underwriters & Ors*.
130. There, the judge held that someone to whom is owed an obligation jointly with another person, can sue if he joins that other person as the defendant; and that this is the case even if the consequence may be that the other person may not be liable for costs if the claim fails, but may be entitled to take the benefit or some of the benefit if the claim succeeds (although the recovered property may be subject to a lien for the costs incurred in taking the claim to success). It seems to me that the *HLB Kidsons (A Firm) v Lloyds Underwriters & Ors* decision holds both that that principle exists and that it applies to partners. It is technically speaking obiter, in the light of the judge's decision on the first issue, and therefore only of persuasive effect, but the authors of *Lindley and Banks* regard it as being correct. It is true that that was the situation where ex-partners had simply left a partnership where others were continuing the business; but the question of the effect of that being the case formed the subject matter of the first issue before HHJ Mackie QC and which had led the judge to consider that there was no general dissolution at all. The second issue as formulated by the judge, was on the assumption that the judge was wrong on the question as to whether there had been a mere retirement, and was on the hypothesis that, as in this case, there was a full dissolution. The judge was actually considering what would have been the situation had there been a general dissolution, and there the judge held that one partner can sue if that partner joins the others as defendant.
131. It is correct that paragraph 7.3 of Practice Direction 7A requires the claim to be brought in the name of the partnership; but, firstly, that is only "unless it is inappropriate to do so", which seems to me to be clearly the case where not only there was a dissolution but also, only one of the two partners wanted the claim to be brought; and, secondly, it only applies where the claim is being brought by "two or more persons who were business partners" and here is it only being "brought" by one such person. Thirdly, paragraph 7.3 is merely a paragraph of a Practice Direction, and it does not seem to me that it should be construed so

as to give rise to the substantive effect of a practical defence as far as a defendant is concerned, and especially so as to (i) alter the effect of CPR19.3 which permits one joint obligee to bring a claim with their other joint obligee(s) as defendant(s), or (ii) so as to give rise to a requirement of law that the partner bringing the claim requires the authority of other partners when, as set out in *HLB Kidsons (A Firm) v Lloyds Underwriters & Ors*, that is not part of the general law. It seems to me that the Practice Direction could have such a substantive effect or even it could, which at first sight being merely a Practice Direction it could not in some way or other, cut down the effect of CPR 19.3. It seems to me that the paragraph is merely for the purposes of convenience and no more, and in no way cuts down on what was held and decided in *HLB Kidsons (A Firm) v Lloyds Underwriters & Ors*.

132. It seems to me that authority clearly favours Mr Burroughs' submission that it is sufficient for one partner to sue. It seems to me that not only authority favours that, but also does principle. There is no disadvantage to the person who is subject to the obligation or right; because as long as the other partner is joined, there is no risk that they will pay out one partner and then find themselves sued by another.
133. Further, if it was necessary to have all the partners as claimants, that would have the effect that somebody who had committed a wrong might be able to escape liability simply because there were differences between the partners as to whether or not a claim should be brought. It seems to me that the policies of CPR 19.3 and the law of joint obligations, requiring only all those who enjoy the right to be before the Court, is entirely inconsistent with such an advantage being conferred on the potential wrongdoer.
134. It further seems to me that it would be unsatisfactory in this case if all the partners had to be claimants. Marcus would be forced to engage in partnership proceedings, and potentially seek the appointment of a receiver which would involve a considerable waste of cost and money. I note that enabling just one partner to bring the claim, could involve a potential abuse if the partners could arrange between themselves for an insolvent rather than a solvent partner to bring the claim, with consequent risk that any costs award would not be satisfied but as to that:
 - (a) Firstly, there is no suggest that that is the case here.
 - (b) Secondly, HHJ Mackie QC regarded that as simply being a possible consequence of the law being as he held it to be.
 - (c) Thirdly, that the Court could control any abuse and
 - (d) Fourthly, that there might be potential for some application for security for costs in those circumstances.
135. Mr Burroughs did make an alternative submission that Marcus should be treated as claiming not only as a trustee but also as a beneficiary and relied on various elements of the law of trusts to the effect that a beneficiary may be able to bring a claim in exceptional circumstances where a trustee or co-trustee is refusing to join in proceedings, and thereby potentially prejudicing the trust's assets. Mr Royle submitted that, whatever the situation was in general Trust Law, this should not apply in the circumstances of a partnership claim. I see some force in what Mr Burroughs says but it does not seem to me that it is a necessary element of my decision. It simply seems to me that it is in accordance with both authority and principle that one partner should be able to bring a claim on behalf of the partnership as long as they join the other partner or partners, and which is exactly what Marcus has done in this case.
136. I should however, in case I am wrong about that, consider Mr Burroughs' alternative submission that Marcus should be able to bring his own claim for his own loss. Mr Royle

points out that it is not pleaded that way and says that Marcus would need to amend and submits that he should be allowed to do so, particularly bearing in mind the terms of my order of February 2022. There is an issue which I will come on to as to what are the appropriate claims which can be brought in these particular circumstances, especially where Marcus is the judgment debtor. However, I am against Mr Royle's submission as to its being procedurally impossible for Marcus to bring a claim for his own loss, and, if Marcus wishes to do so, I regard it as appropriate for him to be able procedurally to assert an alternative claim with regards to his own loss. I have come to that conclusion for the following reasons:

137. Firstly, in my judgment, Marcus has already done that and, if that is wrong, that he is at least in a position where he can do so. It does not seem to me that Marcus's application notice and witness statement limit the claim to whatever claim the partnership may have. They simply set out Marcus's version of the facts, saying that some of the goods and the machinery were partnership property which have been improperly executed against and improperly sold, and claim loss. They do say in the witness statement that the damages will represent partnership property, and Marcus will account for them, and that he is not seeking to make a profit simply for himself as against the partnership. Be that as it may, even though I have made the witness's statement a statement of case, I do not see that the relevant paragraphs limit the claim. It does not seem to me that Marcus ever says that the only claim he is bringing is a partnership claim, or, more importantly, that he foregoes any claim which he has in his own right. Rather, it does seem to me that the application makes clear that it is a paragraph 66 application; and it seems to me at first sight, that, as is set out by paragraph 66(3), it is clearly being brought by "the judgment debtor", that is to say Marcus. Of course, Marcus, in order to bring the claim, has to say that the relevant assets were partnership property, because otherwise there would not be a breach of section 23 of the 1890 Act in the first place. In order to bring a claim, all that is usually required is to plead the facts that are relied on. That Marcus has done, and he has done it in a way which is sufficient for him to say, as an alternative to seeking the loss allegedly suffered by the partnership, that as a matter of law he has a claim in his own right. It does not seem to me that he is now under an obligation to plead additional facts about that. It further seems to me that, in the circumstances, that Marcus can simply just respond to what is asserted now by the respondents when they say that the partnership does not have a claim and in particular a claim under paragraph 66 by himself contending that if that is correct (which he disputes) then he has his own claim for his own loss. He may be right or wrong with regards to that, but it still seems to me that he has pleaded the relevant facts on which he relies.
138. Secondly, if I am wrong about Marcus having already advanced the alternative claim or, at least being able to advance it without more, in my judgment Marcus should be allowed to amend. I will assume for these purposes against Marcus, even though I have considerable doubts as to whether it was my intention, and my order certainly does not say that it was, that my order of 2 February 2020 contains some implied sanction to the effect that Marcus cannot bring any particular claim unless it is contained within the originating process which he has issued by 25 March 2022.
139. In those circumstances rule 3.9 of the Civil Procedure Rules is in point, and it states:

“(1) On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order, the court will consider all the circumstances of the case, so as to enable it to deal justly with the application, including the need –

- (a) for litigation to be conducted efficiently and at proportionate cost; and
 - (b) to enforce compliance with rules, practice directions and orders.
- (2) An application for relief must be supported by evidence”.

140. In applying CPR3.9 the Court must carry out the three-stage analysis set out in *Denton v TH White Ltd 2014 EWCA Civ 906*, and must give full weight to the factors identified in CPR 3.9(a) and (b) and where there would be a substantial burden on Marcus to justify it being just in all the circumstances of the case for relief from sanctions to be granted. I am therefore engaging in the relevant three-stage analysis:

- (a) The first stage is whether or not there has been a serious or substantial breach of an order. It seems to me that if an application to amend is required, and on the assumption that there is an operative sanction, that there has been a serious and substantial breach, because of the amount of time which has passed since March 2022. This is notwithstanding that Marcus can well say that the application notice before me took the form that it did because Mr Royle had said that a paragraph 66 application was required.
- (b) The second stage is as to whether or not there is a good reason for the breach. It seems to me that Marcus can well argue that there is some reason for the breach in light of the complexity of the regulations and the stance previously taken by Mr Royle. However, I will assume that there is no good reason in the light of the fact that Marcus could have carried out his own legal analysis and come to what was assumed for the purpose of this element of my judgment to be the correct one.
- (c) The third stage is whether or not it is just in all the circumstances for relief to be granted, notwithstanding the first two stages being determined against Marcus. It seems to me that on any basis it would be just as:
 - (i) Firstly, Marcus has already pleaded all the facts that he relies upon
 - (ii) Secondly, Marcus’s application to amend is effectively responsive to an attempt to strike out the application Marcus has made on the basis that Marcus used the wrong procedure to seek to bring the partnership’s claim under paragraph 66; but where Marcus is able to point to what was said in *Lindley and Banks* and *HLB Kidsons (A Firm) v Lloyds Underwriters & Ors* which indicated that Marcus could bring a claim of the partnership as long as he joined Mark as a defendant or in this case, respondent. It seems to me that even if I am wrong in following what HHJ Mackie QC said in *HLB Kidsons (A Firm) v Lloyds Underwriters & Ors*, Marcus was acting properly in relying on what was said in *HLB Kidsons (A Firm) v Lloyds Underwriters & Ors* as quoted in *Lindley and Banks*
 - (iii) Marcus has, so far, simply made the application which Mr Royle had effectively invited in his submissions, which led up to the January judgment and as recorded in the January judgment

(iv) there is no real prejudice to the High Court enforcement officer or agent. All they would be doing would be losing the benefit of an implied and to my mind, unintended section. Even if there has been some delay it has been limited and these proceedings are at a very early stage, in terms of Marcus's claim, and, further, there are no relevant issues it seems to me, with regards to limitation. Even if Mr Royle is right to assert there would be some quasi-limitation point under CPR 85.4 and 85.5 in relation to the partnership's claims (which I doubt), there is none in relation to whatever claim Marcus has if he has one. There is no limitation period in relation to a pure paragraph 66 claim

(v) I have borne in mind CPR3.9(a) and (b) but it does not seem to me that there is any particular disruption to this litigation, by allowing Marcus to amend at this point where these hearings have been required in any event.

141. While I would grant any necessary relief from sanctions and permission to amend simply because of the above reasons, I do note that this is a case where at an early initial stage that the High Court enforcement officer and High Court enforcement agent have seemingly decided to run an argument that the partnership's claim cannot be brought under paragraph 66, notwithstanding their previous stance that it could so be brought. It further does not seem to me that any noncompliance of this nature with my order of 2 February 2022, whether or not it was technically a substantial breach of it, would be a matter of any particular great importance when Marcus has set out all the relevant facts. Rather, it seems to me that this is simply a procedural dispute which may be of great interest to lawyers, but which is not of any particular assistance in achieving the overriding objective, at least in general terms of dealing with the case justly, although I bear in mind that the overriding objective does include the importance of compliance with rules, Practice Directions and orders. This is simply a situation where Marcus has brought a claim, which the other side had previously said was the right one; but where they have decided to bring a strike-out application based on a procedural point based on their saying it is not in fact the right one; and Marcus, relying on exactly the same facts as he had already set out, says, "well if that is right, I have my own claim as an alternative fallback". It seems to me entirely just to allow Marcus to bring that claim as an alternative, and that it would be entirely wrong and contrary to the overriding objective in these circumstances to deprive someone of a legal right owing to a mere technical procedural point which gives rise to no real advantage to the Court or anyone in terms of its consequences and where there is no question of amendment being used to circumvent a statutory limitation defence. It seems to me that this is simply a situation of an amendment being made early in litigation, where if any compensation were required to the other side, that could be dealt with simply in terms of costs.
142. Therefore, insofar as Marcus wishes to bring, as an alternative claim, a claim for his own loss distinct from a claim for loss suffered by the partnership, I would hold that Marcus has effectively brought that claim already, and also that, insofar as he requires permission to amend, that he should be granted that permission. That does leave the substantive question as to whether Marcus could actually have a claim of his own if the partnership has one and cannot bring it, and I will revert to that in due course.

What relevant Claims exist as a matter of substantive law and Schedule 12 under Paragraph 66 or otherwise

143. It seems to me I next need to analyse whether the partnership does have a claim or could have a claim, and if so, how that claim should be brought. Mr Burroughs submits that the partnership does have a claim, and that Marcus as judgment debtor and partner can bring it under paragraph 66. Mr Royle submits that any claim made by the partnership must be brought under paragraph 60 using the provisions of CPR Part 85, although his primary position is that the partnership is a co-owner and Schedule 12 does not allow a co-owner to bring any claim at all but only to accept a share by way of division of the eventual proceeds of sale.
144. The first question, it seems to me, is whether the partnership's claims can fall within paragraph 66 and that does come back to a question I left open in paragraphs 97 and 98 of the January judgment as to what is the correct procedure to complain about a breach of section 23. I had, as I set out in the January judgment, hoped to leave it and related questions to the end of the litigation to avoid the risk of interim appeals and disruption to the process claim, but it seems to me that I now have to decide them.
145. As far as paragraph 66 is concerned, Mr Royle submits that this is not a situation of the writ of control itself being deficient within paragraph 66(1)(b), but also there has not been any breach of any provision of Schedule 12 sufficient to bring the matter within paragraph 66(1)(a). I have concluded, notwithstanding the doubts I expressed in paragraphs 93-94 of the January judgment, that the situation, which exists in this case, of a contravention of section 23 of the Partnership Act 1890 falls within paragraph 66(1)(a) of Schedule 12. I have further concluded that, assuming the rest of Marcus's case to be made out, there has been a breach of at least one provision of Schedule 12, that breach being a breach of a combination of paragraphs 4 and 11. Paragraph 11 provides that subject "to any other enactment under which goods are protected", a High Court enforcement agent can take control of the goods and also that the goods are bound by the enforcement power and the writ. It seems to me that partnership property is in principle, "protected" by section 23 of the Partnership Act 1890. I construe Schedule 12 to have that result as firstly, I have already effectively held that the partnership property is goods protected by an enactment in my January Judgment, and, secondly, that I consider that construction to be correct as:
- a. Firstly, section 23 does precisely that. It provides that partnership property cannot be made the subject of a writ of execution (which in a section 23 context I have held extends to a writ of control) and thus protects it from a writ of control
 - b. Secondly, it seems to me to fit the statutory scheme of Schedule 12 that, where some other statute says that enforcement should not take place against particular goods, those goods become protected goods, and that enforcement should not take place against those goods. In a somewhat analogous way Schedule 12 also provides that enforcement should not take place against exempt goods. My preferred construction of Schedule 12 enables it to operate in a consistent manner.
146. Next, it seems to me that paragraph 11 of Schedule 12 must at least impliedly protect control being taken of protected goods and by extension prohibit them being sold. It seems to me that that implied prohibition has been breached in these circumstances, where the partnership goods have nonetheless been seized and sold.
147. I have applied the *Hamilton v Secretary of State for Business, Energy and Industrial Strategy* approach to construction. It seems to me clear that the statutory purpose of the 2007 Act is not to override the 1890 Act. Moreover, as I have already said the Schedule should only permit the High Court enforcement officer to enforce against unprotected goods as otherwise they will not be "protected". It seems to me that, notwithstanding that in one

- sense there is no express prohibition against enforcement against protected goods, it is implicit from paragraph 11 that there is an implied prohibition.
148. I note that as far as exempt goods are concerned, paragraph 11(2) says that control cannot be taken of them, except subject to conditions. It seems to me that for control to be taken of exempt goods without the conditions being complied with, would amount to a breach of paragraph 11(2). It seems to me that in the same way, to take control of protected goods would amount to a breach of an implied prohibition contained within paragraph 11(1) which applies to protected goods but without any provision for enforcement against them at all whether or not subject to conditions. Although the word “breaches” which is used in paragraph 66(1)(a) might usually be taken to relate to either a failure to do something which the schedule requires or the doing of something which a schedule expressly prohibits, it does not seem to me that that should prevent it extending to a breach of what I regard as being a clearly implied prohibition.
149. While I am adopting a purposive construction of paragraph 66(1)(a), I think it is perfectly consistent with the statutory purpose and is in no way contrary to the actual wording used, to say that there has been a breach here. It seems to me that that analysis is supported by the following further reasons:
- (a) Firstly it would mean that the schedule is consistent in both conferring a power which can be used in proper circumstances, but a remedy where it is used improperly.
- (b) Secondly, it will mean that paragraph 66 is itself consistent; it prevents the High Court enforcement agent becoming a trespasser where the debtor, here Marcus, has a beneficial interest in the goods which are protected whilst providing for compensation and other remedies. That though, does itself give rise to certain difficulties as to what the position is with regard to a claim being brought by another partner. However, it seems to me that that can be dealt with by giving a somewhat limited meaning to the word “trespasser” in paragraph 66(2) being “trespasser in relation to the judgment debtor” and which I will come back to in due course.
150. I have considered whether various other constructions of paragraph 66, including giving a narrower meaning to the word “breaches” are more appropriate, but I consider that doing so would result in an inappropriate hole being left in the Schedule and the statutory scheme. It would mean that the scheme would be incomplete because there would be nothing within the Schedule which dealt with the situation of where the enforcement power had been used against protected goods. It would also leave nothing in the Schedule to give the judgment debtor a remedy in such circumstances, notwithstanding the provisions of paragraphs 4 and 11 of the Schedule which seem to me to clearly contemplate that the enforcement power should not be used in relation to protected goods. It further seems to me that the statutory scheme is to afford the High Court enforcement agent and indeed related parties, protections; but here there is a protection set out in paragraph 66(8)(a) as well as the protections set out in paragraphs 63 and 64.
151. Standing back and looking at the matter holistically, it seems to me that the proper construction of Schedule 12 is to hold that it is implied within paragraphs 4 and 11 that the enforcement power must not be used to take control of and then to sell etc. goods protected by another enactment such as section 23; and that it amounts to a breach of the Schedule within the meaning of Paragraph 66(1)(a) for that to have occurred.
152. I therefore decide that this case is a paragraph 66(1)(a) situation. If I had reached a contrary conclusion and concluded that it was not a paragraph 66(1)(a) situation, I would have decided that it did not fall within paragraph 66(1)(b). Having considered the January judgment and the parties’ submissions further, I have concluded it cannot be said that the writ of control is “defective” in these circumstances. What instead would follow, is that I

would have to hold that the situation was simply outside Schedule 12 generally, that it was a situation where the enforcement was simply prohibited by section 23 and would leave the High Court enforcement agent (at least) a trespasser and liable at common-law. That, it seems to me, would be somewhat unsatisfactory since it would mean that there was a general hole in the statutory scheme. It seems to me that it is much better to construe paragraph 66 in ways which means that there is no hole in the scheme as I have done with paragraph 66(1)(a).

153. However, it simply does not seem to me that the words which are used of the writ being “defective” can be applicable in these circumstances. This is notwithstanding that I had wondered at one point as to whether it might be possible to say that the writ was defective because it did not contain an expressed exclusion for partnership property.
154. However, it does seem to me that the effect of section 23 must be that if paragraph 66(1)(a) does not apply then the solution (but perhaps subject to paragraphs 63 and 64 – see *Hamilton* and *Alenzy*) is that there is a simple contravention of a combination of section 23 which should be actionable in its own right (because Schedule 12 does not empower the High Court enforcement officer to enforce against protected goods) and/or that the writ should be construed to provide that it should only operate in a lawful (i.e. not contravening section 23) manner by impliedly excluding partnership property from what may be seized according to its terms (a conclusion towards which I was somewhat leaning in paragraphs 90-95 of my January judgment but where I have now, after having heard further argument, concluded that paragraphs 4 and 11 give rise to an implied prohibition which has been breached so that paragraph 66(1)(a) applies); although if that was right any claim might have to be brought using a CPR Part 7 Claim Form albeit for similar reasons to those given above I would regard it as clearly and obviously just to grant any requisite permission and/or relief from sanctions and/or CPR3.10 waiver to enable such to occur. However, I do not have to consider that further because, in my judgment, the situation is within paragraph 66(1)(a). This is simply a situation of an implied prohibition having been breached.
155. Flowing on from that conclusion that 66(1)(a) is in point, there is then the question as to whether either the partnership or Marcus can bring a claim under paragraph 66. Although I have recited their submissions already at greater lengths, effectively Mr Royle says “no” because he says it is really a partnership claim and, in addition, either the partnership is not Marcus, who is the only person he would say who can claim under paragraph 66 and so that the claim must be made under paragraph 60, or that this is a co-ownership situation and a co-owner cannot claim under paragraph 66.
156. Mr Burroughs says that:
 - a. Marcus is a judgment debtor and therefore he can claim under paragraph 66, alternatively
 - b. the partnership can claim as co-owner. The partnership might be met by defences under paragraph 63 and 64 but which defences Mr Burroughs says can be overcome,
 - c. alternatively, if the partnership has to claim as third-party claimant, Mr Burroughs says that paragraph 60 is not obstacle and that he can deal again with paragraphs 63 and 64 defences.
157. Mr Royle again says that Marcus is in some way limited by the procedural manner in which the claim has been raised and that Marcus is limited to paragraph 66 which either is or is not available to Marcus. Mr Royle says that paragraph 66 is not available to Marcus and that Marcus, having chosen to invoke paragraph 66, should not be allowed to expand his procedural mechanism to include whatever else might be available to him.
158. It seems to me that this divides into two (or three) types of procedural question:

- (a) Firstly, whether Marcus has used the correct procedure
- (b) Secondly, as to whether Marcus in claiming for (I) his own loss or (II) the partnership's loss, is (i) prevented from doing so by Schedule 12 and/or the CPR and/or partnership law, and (ii) able to invoke paragraph 66 (or has to use some other route to claim and, if so, whether it is available for him to use in the present circumstances of this case).

159. The first question is what I would describe as a pure procedural point and the second questions as more of procedural substantive points. In relation to the first question, I have now had my attention drawn to CPR84.13 which requires the use of a Part 23 Application Notice when bringing a paragraph 66 claim; and that Marcus has done.
160. The next question though is what I term the procedural substantive one as to whether Marcus can bring a claim in relation to either the partnership's loss or his own loss under paragraph 66. I note that paragraph 66(3) simply says that the judgment debtor can bring proceedings, Mr Royle says that this is not in fact the judgment debtor's proceedings but the partnership's proceedings.
161. Mr Burroughs' primary submission is that Marcus can bring the partnership's claim and that, being the judgment debtor, he can rely on paragraph 66. and therefore can bring the partnership's claim for the partnership's loss under paragraph 66 as he seeks to do.
162. As to this, which is again a question of statutory construction, Mr Royle contends that:
- a. the partnership should be seen as distinct from Marcus himself, but, in any event
 - b. the partnership is a co-owner; and accordingly is simply confined to a right to share in the eventual proceeds of sale and cannot complain about the enforcement process and sale at all, but, if that is wrong
 - c. the partnership is the third-party claimant within paragraph 60; and cannot claim because it did not give the written notice prescribed by CPR 85.4 within the time limited seven days and has never brought an application to prevent the sale.

I am not prepared to accede to Mr Royle's contentions for various reasons, although it seems to me that the analysis is somewhat protracted.

163. Firstly, I consider Marcus's own claim which I will permit to be advanced for the reasons which I have given above. That is in relation to Marcus's own loss whatever it might be, although his loss is to be seen and assessed within the context of the partnership, what he has lost is the value of his own partnership rights. It seems to me at first sight, that that claim comes within the precise words of paragraph 66 which provides that the judgment debtor may bring proceedings and, additionally, paragraph 66(5)(b) provides for the Court to be able to award compensation for the judgment debtor's own loss. It seems to me, at first sight, that Marcus can simply bring that claim.
164. I have considered three possible sets of objections to Marcus being able to bring a claim for his own loss. Firstly Mr Royle submits the statutory scheme is against that, he says that where the judgment debtor, Marcus, has a beneficial interest but so also does someone else, here Mark, that the judgment debtor cannot bring his own claim. That submission results in my needing to carry out a *Hamilton v Secretary of State for Business, Energy and Industrial Strategy* analysis of the statutory wording scheme and construction and I have done that; and, in particular, in relation to Mr Royle's argument that the statutory scheme requires such a judgment debtor to go down the route of bringing a paragraph 60 claim (i.e. advancing the claim of a third party sole owner), or alternatively, the co-ownership route (i.e. not having or raising any claim at all but just accepting a division of the eventual sale proceeds). I do not accept Mr Royle's construction and I do not think that Marcus cannot

- use the paragraph 66 route for claiming for his own loss, even if it is his own loss suffered in the context of his being a partner. This is essentially for the following main reasons:
165. Firstly the wording of paragraph 66 is absolutely clear, the judgment debtor can bring proceedings for the judgment debtor's loss; and that is what Marcus would be doing were he to claim for his loss in terms of diminished value in and return from the partnership.
 166. Secondly, Marcus has potentially suffered his own loss, where the goods have been seized and sold on a forced sale basis, so as to realise less than they would have been generated (or, potentially, would have to be replaced at a higher open market cost). Marcus has suffered potential damage in terms of diminution of the value of his share in the partnership, assuming that the partnership is solvent. If the partnership is not solvent, then Marcus has potentially suffered loss in terms of increasing the amount for which the partners may be personally liable to third parties for debts of the partnership, since, on that hypothesis, those debts will not have been discharged or will only have been discharged to a lesser extent than would have occurred if the seizure and forced sale had not taken place. That does not, of course, mean that Marcus has actually suffered any damage; that issue will involve questions of quantification and causation, including as to what would have happened if the seizure had not taken place, and which are not questions that I can determine at this hearing. It is true that to determine those questions would involve the Court eventually having to investigate as to what would have happened within the partnership dissolution had the seizure and sale not take place. However, it seems to me that, firstly, that is simply part of an exercise of quantification and, secondly, it is a matter which will quite often happen in co-ownership situations where enforcement has taken place against protected or exempt goods. It seems to me that Paragraph 66 simply provides that the judgment debtor can bring a claim and it seems to me that all that would be involved would simply be a quantification exercise, and notwithstanding that it might involve the Court having to determine questions of the extent and consequences of co-ownership or, here, partnership as part of that exercise.
 167. Thirdly, it does not seem to me that it is right that either Marcus should be forced to make a paragraph 60 application or that the partnership should be treated as a full owner with Marcus having no beneficial interest. In one sense, it is true that Marcus has interests of an unusual nature because the goods are partnership goods, but, firstly, Marcus still has a beneficial interest in them. Indeed as Mr Royle pointed out, Schedule 12 only allows an enforcement procedure against goods at all in circumstances where the goods are "goods of the debtor" within paragraph two of Schedule 12 and which envisages a judgment debtor having a beneficial interest in them, and it is Mr Royle's case that that provision is satisfied in partnership circumstances. I regard that as clearly the case under partnership law, where, although the interest of Marcus as a partner is undefined, it is still a very real and proprietary interest. However, it seems to me that paragraph 60 is dealing with a situation where a judgment debtor simply has no interest at all i.e. that of a true third party sole owner claimant. Secondly, it does not seem to me that paragraph 60 is about execution against protected goods in which the judgment debtor has an interest. Paragraph 60 is about the real owner making a claim to the effect that the judgment debtor has no interest in the goods. However, the structure of the schedule, combined with section 23 of the 1890 Act seems to me, to be to the effect that this is a situation (i) where the judgment debtor has an interest, but (ii) there has been a contravention (i.e. a breach of the provisions) of the Schedule and so (iii) the judgment debtor is to have a potential remedy which is contained in paragraph 66 which both identifies it and provides a mechanism for it to be carried into effect. In general terms, I simply do not see paragraph 60 as being relevant to Marcus's own claim because, firstly,, it is dealing with a claim from the real owner who is not the

judgment debtor, and, secondly, it is not dealing with a claim arising from the prohibited seizure of protected goods in which the judgment debtor has an interest and where the resulted claim of the judgment debtor is governed by paragraph 66. Thirdly, I do not see it as right to see the partnership as an entity separate from Marcus. A partnership has no legal identity of its own. It is simply a situation of persons who are in partnership and hold property which is of and subject to the partnership. I do not see this as a separate “true sole owner” situation at all.

168. Fourthly, I do not see Mr Royle’s contentions with regard to Schedule 12 containing a scheme that allows seizure and sale of goods which are co-owned by another as well as being by this judgment debtor as being in point here. It does not seem to me that this claim of Marcus’s is based on co-ownership of another but rather on the goods being partnership property. As to this: firstly, it is Marcus’s claim for Marcus’s loss and not for the loss of the co-owner. Secondly, while Mr Royle may or may not be right to say that a co-owner cannot sue for damages, notwithstanding that the High Court enforcement officer or High Court enforcement agent knows of the co-ownership when seizing and selling goods, this is a claim based not on co-ownership but on the fact of seizure and sale of protected goods, an infringement of section 23 of the 1890 Act. It seems to me that that gives rise to its own remedies, whether this is a situation of co-ownership or not. Thirdly, I cannot see why a judgment debtor’s claim for breach of provisions of the Schedule, which is permitted by paragraph 66, should be prevented by the fact of co-ownership. Paragraph 66 simply says that it gives a remedy to the judgment debtor in paragraph 66(1)(a) circumstances, which I hold exist here, subject to the paragraph 66(8) protections. I have considered the wording of paragraph 66 and the statutory scheme, and applied the *Hamilton v Secretary of State for Business, Energy and Industrial Strategy* principles of analysis, and considered the submissions of counsel and their respective constructions. I see no reason to cut down the natural meaning of paragraph 66; and it seems to me that Marcus can bring a claim, at least for his own loss.
169. The second question then would be as to whether Partnership Law allows Marcus to bring a claim for his own loss, or whether the only claim that can exist is that of the partnership. It seems to me that there is some force in argument to the effect that in ordinary Partnership Law it is for the partners to bring claims for a loss suffered by the partnership; and they do not bring claims for their own loss. The ownership of the property is vested in the partnership and, therefore, a Court ordinarily asks as to what is the overall loss caused by the relevant loss, and not what is the loss suffered by the individual partner. A submission to the effect that that applies here is potentially reinforced by consideration of the fact that section 23 of the 1890 Act, at first reading, exists to protect the partnership’s assets rather than the individual rights of each partner in or respecting the assets.
170. However, in my judgment, that is overridden by paragraph 66 itself, which provides for and permits the judgment debtor, that is Marcus, to bring a claim. Paragraph 66 provides for the Court to allow the Court to award damages for the judgment debtor’s, that is Marcus’s, own loss. It seems to me that if I apply a *Hamilton v Secretary of State for Business, Energy and Industrial Strategy* principled analysis to paragraph 66, it simply allows Marcus to bring a claim for whatever is his own loss. I note, in case I am wrong about that, that a prohibition on Marcus bringing a claim for his own individual loss would give all the more reason as to why the statutory scheme should allow a claim to be brought by Marcus for the partnership’s loss.
171. I therefore conclude at this point to hold that:

- (a) Firstly, Marcus is bringing in these proceedings a claim for his own loss and, if he is not, he should be allowed to do so.
 - (b) Secondly, that Marcus can properly bring a claim for his own loss under paragraph 66(1)(a) and notwithstanding general Partnership Law
 - (c) Third, that for all those reasons I should not strike out the claim which is being brought in any event.
172. The next question to which I come, is as to whether Marcus can bring a claim under paragraph 66 in relation to the partnership's loss suffered by reason of the seizure and forced sale. That is relevant in two ways:
- (a) Firstly, if I am wrong as to whether Marcus can bring a claim for his own loss, the question would arise as to whether Marcus can bring any claim at all.
 - (b) Secondly, it is highly relevant as to the extent of the claim, whether Marcus's claim can only be for the loss himself has suffered or whether it can extend to the overall loss which the partnership has suffered, assuming that there is a loss in the first place.
173. I consider first the situation if I am wrong as to whether Marcus can bring a claim for his own loss; and whether, if that is the law, Marcus bring a claim for the partnership's loss. I consider first whether such a claim can be brought by Marcus under paragraph 66. My conclusion is that, whether or not the partnership can bring a claim other than under paragraph 66, Marcus can still bring a claim under paragraph 66 for the partnership's loss. I have again applied the *Hamilton v Secretary of State for Business, Energy and Industrial Strategy* approach. I have so concluded as: firstly, the words of paragraph 66 say the judgment debtor can bring a claim. Secondly, the statutory scheme is that the judgment debtor can bring a claim where paragraph 66(1) circumstances exist, albeit subject to the 66(8) protections. Thirdly, even if the partnership can claim outside paragraph 66 (which I think that it can and to which I will come to below), although Marcus's argument is even stronger if it cannot (because then there would be no apparent remedy for any partner for a breach of section 23), I still do not see that that should lead to the wording and effect of paragraph 66 being cut down or limited. Paragraph 66 states that the judgment debtor has a claim in these circumstances where there has been a breach of the provisions of the Schedule, and which I have held above to have been the case, and if it does not entitle Marcus to bring a claim for his own loss then it seems to me that he must be able to bring a claim for the partnership's loss, or else paragraph 66 would be negated.
174. However, I also have to consider the situation of where I am right to conclude that Marcus can bring a paragraph 66 claim for his own loss, and whether Marcus can nonetheless sue not merely for his own loss, but also for the partnership's loss. Again, I have applied a *Hamilton v Secretary of State for Business, Energy and Industrial Strategy* analysis. I remind myself that paragraph 66(3) contemplates proceedings being brought by the judgment debtor, and also that under paragraph 66(5)(b) that claim would at first sight be for the judgment debtor's own loss. There is, therefore, some force in the contention that, in those circumstances, if Marcus can bring a claim for his own specific loss under paragraph 66, he should not be able to bring a claim for a loss which extends to loss of others (here his co-partner Mark) simply because under general Partnership Law and the CPR, as interpreted in the *HLB Kidsons (A Firm) v Lloyds Underwriters & Ors* judgment, one partner can bring a claim in relation to what is a joint right for the entirety of the partnership's alleged loss.

175. Nevertheless, looking at the words in the statutory scheme as contained in both paragraph 66 and section 23, and bearing in mind that the paragraph 66(8) protections exist, it seems to me that paragraph 66 should still give a judgment debtor a full remedy in relation to any type of loss for which they would ordinarily be entitled to sue, and so that Marcus should be able to claim the full partnership remedy for the entire loss allegedly suffered by the partnership. In coming to that conclusion, I have considered two scenarios:
176. Firstly, that the partners themselves or the partners apart from the judgment debtor, cannot bring any claim outside paragraph 66. I think that that is probably not the case (i.e. the other partners can sue) for reasons to which I will come, but, in such circumstances, I think it must then be possible for Marcus as judgment debtor to claim for the partnership's loss as, otherwise, there would simply be no, or no sufficient, remedy available for a breach of section 23 of the 1890 Act. Paragraph 66 says that a claim can be brought if there is a breach of a provision of Schedule 12 (which I have held has occurred), and if the partnership's loss cannot be claimed otherwise than by a judgment debtor's claim under paragraph 66 it seems to me that it must be possible for the judgment debtor claim (as they are entitled to do under general Partnership Law and the CPR – see the *HD Kidsons* decision) for the partnership's loss.
177. The second scenario is that it is possible in law for partners to bring a claim outside paragraph 66, and which I think that they probably can for reasons to which I will come. However, even if a partnership can in theory bring a claim outside paragraph 66, that still leaves the question of whether partners who include the judgment debtor can bring it. There is a general difficulty here because paragraph 66(2) says that a breach of a provision of Schedule 12, and which wording I have held extends to a breach with regards to protected goods, creates a situation where the High Court enforcement agent is not a trespasser. Even if I read that, as I am minded to do, to mean that the High Court enforcement agent is not a trespasser as against the judgment debtor but may still be a trespasser against somebody else, there would then arise the difficulty of Marcus, the judgment debtor, being unable to sue in trespass (as paragraph 66(2) says he cannot) even though the other partners could do so. In all this, and which I have considered carefully, it does not seem to me that the statutory scheme should result in either the judgment debtor, Marcus, or any other person who is able to enforce what is a joint right with the judgment debtor, losing their common-law/statutory right to sue for the entire loss caused by a seizure of their joint-owned property contrary to section 23 of the 1890 Act, and notwithstanding that this would give right to potential oddities including that one claim could be brought by the judgment debtor under paragraph 66 (and subject to the paragraph 66(8) defence) and another by co-partners (subject to the paragraphs 63 and 64 defences, and possibly to needs for there to have been a paragraph 60 or equivalent application and compliance with CPR 85.4&5 – see *Hamilton* and *Alenzy* although the dicta in them are obiter and may not apply to a partnership situation). I also note that any claim brought for the partnership's loss (as opposed to the individual loss of a partner) would have to involve the other partners being made either co-claimants or respondents/defendants, and so that all could be bound by the one end result.
178. However, and notwithstanding those difficulties, and having sought to apply the principled approach to statutory construction set out in *Hamilton*, in my judgment, in this scenario too, Marcus, who as judgment debtor has to sue under paragraph 66, because that is the remedy which is afforded to the judgment debtor, can sue for the entire losses which the partnership has itself suffered. It seems to me that that is entirely in accordance with paragraph 66. Firstly, because it seems to me that the partnership must have a claim because its rights have been infringed and it, therefore, should have a remedy to enable it to recover its loss.

Secondly, because paragraph 66 states that it does provide its own remedy to the judgment debtor where the Schedule has been breached, and which I have held to be the case here where enforcement has taken place against protected goods. Thirdly, because it seems to me that *HLB Kidsons (A Firm) v Lloyds Underwriters & Ors* simply confirms that one partner can bring a claim for the entire loss suffered by the partnership; and that is therefore the relevant loss which has been suffered by the judgment debtor (even though Marcus is likely to be under duties to account for part of it to Mark). Further, it is logical that the partner can claim for the entire loss; in particular as that avoids any need for the court conducting an internal accounting of the partnership and also reflects the fact that section 23 simply prohibits enforcement by means of Writ against the partnership's property. Fourthly, although there would be incongruities between the Schedule 12 procedures and protections regarding claims being brought by the judgment debtor partner and by the other partners, the paragraphs 63/64 and 66(8) protections are aligned albeit they are not identical.

179. I therefore do conclude that Marcus can claim under paragraph 66 not only for his own individual loss but for that of the partnership.
180. If I was wrong about that, the question would arise as to whether the situation would be that Marcus could claim outside paragraph 66 for the partnership's loss, as long as the partnership could have and bring a claim outside paragraph 66, and which I think it could be reasons to which I will come. It seems to me to be likely that he could do so on the basis that in those circumstances paragraph 66(2) should be given a limited meaning to the effect that a breach of a provision of the Schedule should only not make the High Court enforcement agent a trespasser as against the judgment debtor suing in his own right alone, and so should not apply to circumstances where Marcus was bringing his claim, not simply as judgment debtor, but in right of the partnership. Marcus would therefore be able to bring a claim in trespass (albeit subject to paragraphs 63 and 64 (and not paragraph 66(8) and, if valid, Mr Royle's points under paragraph 60 and CPR85.4&5). It seems to me that those readings are possible on the words, would fit the statutory scheme including that of section 23 of the 1890 Act, and would still leave in place the statutory protections which exist for the High Court enforcement agent. It seems to me that such a conclusion should be compelled by the fact that one partner should be able to claim for the entire loss suffered by the partnership (see *HL Kidsons*); and that Schedule 12 should not be read to simply impliedly prevent there ever being a claim for that loss in circumstances where section 23 has been contravened. I would add that if that was the situation then, in view of this being at an early stage in the proceedings, Mr Royle having encouraged the bringing of the paragraph 66 application in the hearings leading up to the January judgment, and the absence in my mind of any intention to make an "unless" order, if CPR3.9 or *Denton v White* principles were in any way relevant, I would regard it as clearly and obviously just to allow such a claim to be brought now (and would waive any procedural error under CPR3.10) notwithstanding the terms of my previous orders and any failure to bring such a claim previously. However, in the light of my primary views and determinations, this possible course does not arise.
181. I therefore conclude that Marcus can bring his claim under paragraph 66 in relation to the partnership's losses as well as in relation to his own losses and if that is wrong, can in principle bring a claim outside paragraph 66 for the partnership's losses.

Claims other than by Marcus under Paragraph 66

182. In coming to these conclusions, I have also considered as to whether or not the partnership can have a claim outside paragraph 66. That raises various of the same points I have already dealt with, although it seems to me it is of limited importance in the analysis because the only person who is bringing the claim is Marcus himself, the judgment debtor.

183. Mr Royle submits that the partnership (even if Marcus can bring a claim in right and for the losses of the partnership), and also the co-partner, Mark, could have no claim because the partnership, and Mark, is a co-owner, and a co-owner cannot complain about seizure and sale but is confined to a proportionate share of the eventual proceeds. I have had to apply the *Hamilton v Secretary of State for Business, Energy and Industrial Strategy* principle analysis again, but I would not accede to Mr Royle's various submissions.
184. There is a preliminary question, as I have already mentioned, as to whether in these circumstances the wording of paragraph 66(2) would block any claim of the partnership or of a co-partner because it deems that a breach of any provision of Schedule 12 (which I have held is the case) does not render the High Court enforcement agent to be a trespasser. However, it seems to me that the words of paragraph 66(2) should be limited to mean that the High Court enforcement agent is not a trespasser as against the judgment debtor, as opposed to as against anyone else, and for them to be given the wider meaning is unnecessary when one looks at the words and would be inconsistent with the statutory scheme. There should not be any ability of the High Court enforcement agent to seize and sell what are protected goods where section 23 prohibits enforcement by means of a Writ against them. I also take into account both the human rights considerations (that persons should ordinarily only have their rights to goods infringed in accordance with law) and the general principle that where a statutory provision, here section 23 of the Partnership Act 1890, designed to protect persons, is infringed, those persons should have a remedy for the resultant loss suffered by them. It does not seem to me that, bearing in mind all those matters and the statutory scheme generally, I should construe paragraph 66(2) to prevent the partnership as having a remedy in these circumstances, even if the claim is brought by someone who is not the judgment debtor.
185. As far as Mr Royle's contentions as regards to co-ownership is concerned, again I have had to apply *Hamilton v Secretary of State for Business, Energy and Industrial Strategy* in considering the statutory wording and scheme. It seems to me that I am again left with a situation that there has been a contravention of section 23. There is nothing express in the wording of Schedule 12 which says that a co-owner, assuming that the partnership is to be treated as co-owner, should not have a remedy. Even if I assume that, ordinarily, the statutory scheme is such that a co-owner can only take a share in the eventual proceeds of sale and cannot complain as to what has happened, it seems to me that the situation is different here where section 23 has been contravened. In principle, again, the situation is that the co-owner has had their rights invaded, a matter which is at first sight a tort or statutory wrong, and, at first sight, there should be a remedy for loss suffered as a result. It does not seem to me that I should construe Schedule 12, applying the *Hamilton v Secretary of State for Business, Energy and Industrial Strategy* approach, as excluding what would be the ordinary right and consequential remedy. I do not consider that there is anything in Schedule 12 or the CPR which excludes this. Rather, it can be said that, when paragraphs 63 and 64 provide their general protections for the High Court enforcement agent, they imply that a financial remedy will exist against the High Court enforcement agents and relevant others unless those protections do exist. I accept that, on the other hand, the references to "a lawful claimant" in paragraph 63 and 64 can be said more naturally to apply to somebody who is a true sole owner rather than a mere co-owner. However, it seems to me that, looking at the matter of construction generally, there is insufficient in the schedule to deprive a co-owner whose rights have been infringed in contravention of section 23 of the 1890 Act from having a claim in respect of such an infringement. It therefore seems to me that the co-ownership analysis is no answer to the claim; and also that, if Marcus has to be treated as a co-owner outside paragraph 66 in order for him to

- bring a claim for the partnership's loss, this analysis supports my conclusion that he would have a claim in those circumstances.
186. It seems to me, provisionally, that a claim as co-owner (not under Paragraph 66) would have to be brought under Part 7, but again, applying a CPR3.9 and *Denton v White* analysis, I would regard it as clearly and obviously just in these circumstances (especially in view of this being at an early stage in the proceedings, Mr Royle having encouraged the bringing of the paragraph 66 application in the hearings leading up to the January judgment, and the absence in my mind of any intention to make an "unless" order) to grant to Marcus any requisite relief from sanctions or permission or CPR3.10 waiver.
187. The above analysis would seem to tend to lead to the conclusion that Mark could, if he so wished, himself bring a claim as co-owner either for his own or for the partnership's loss. Such a claim would, at least if for the partnership's loss, require Marcus to be either a co-claimant or a defendant/respondent (see CPR19.3 and *HL Kidsons*). Apart from one point, that results in a coherent scheme where either or both partners can claim for either their own or the partnership's loss arising from a breach of section 23, and which is entirely consistent with the conclusion in *HL Kidsons* that one partner can sue in relation to a joint right of the partnership. The one point of incoherence is that in Mark's case, the protections in paragraphs 63 and 64 would be available, where in Marcus's case it would be the protections in paragraph 66(8) and where there is also a specific statutory right in Marcus to pursue "related parties" (while for Mark that would be left up to the general law). However, there is some equivalence between the provisions, and I do not see the fact that paragraph 66 deals with the specific position of the judgment debtor as being sufficient to lead me away from this overall analysis.
188. In all this I have considered whether the partnership could have a claim as being the true sole owner i.e. as third party claimant, as opposed to as being a co-owner so that paragraph 60 and CPR85.4&5 could apply. However, for the reasons given above, I do not think that "the partnership" should be treated as being a separate entity from the individual partners for these purposes. Marcus, a partner and the judgment debtor, did have a beneficial interest in the goods, and paragraph 60 applies only where the judgment debtor has no interest at all in the goods (cf. *Alenzy* on appeal and the wording of paragraph 3(2) of the Schedule).
189. If the partnership was to be treated as the sole owner, I do not think that any non-compliance with CPR85.4 and its seven days for written notice requirement would bar the partnership's right to sue for its loss. I accept that some of the judgment in *Hamilton* may suggest that, notwithstanding no *Celador* "unless order" has been made, it can become too late for a true owner to make a claim and that such a "lateness" (assuming that there is no relevant Limitation Act 1980 period which has expired and none was identified as relevant in *Hamilton*) can only refer to CPR85.4 (although perhaps there could be an estoppel in certain circumstances of "standing-by"). However, I do not think that CPR85.4 should be read as creating some implied limitation period which can be used to defeat the true owner's property rights, and especially as: (1) what is said in *Hamilton* is at most obiter and somewhat of a throwaway comment (2) paragraph 60 does not seem to confer a power on the Civil Procedure Rules Committee to make a rule to deprive a true owner of a property right, and for that to occur would involve considers of its legitimacy under human rights law (protection of possessions) (3) the statutory scheme does give the High Court enforcement agent etc. protections under paragraphs 63 and 64 (and they can always apply for a *Celador* order) which would seem to be the chosen and proportionate balance imposed by Parliament and the CPRC (4) it would seem surprising if that a true owner could lose their rights even in the case of an egregious taking of what was known to be their property just

because they failed to comply with a seven days notification requirement (and where, here, Marcus gave an oral notification, and a written one prior to sale). I do not see the ordinary CPR3.1(2)(a) power to apply for an extension of time as being the requisite solution, that would require an application and I do not see why CPR85.4 should be construed to have such a dramatic effect in the first place. However, even if I am wrong as to that as a matter of general law, I do not see how CPR85.4 can or should be able to take away the true owner's right to complain about, and have a remedy, for a breach of section 23. Section 23 is primary legislation and is not overruled by CPR85.4 (or Schedule 12 which does not purport to repeal it).

190. However, even if I was wrong about all of such matters, I do not consider that any failure (by either Marcus or Mark) to comply with the strict CPR85.4&5 notification requirements, or any failure by Marcus to bring such a claim in such terms notwithstanding my earlier order, should prevent such a claim being brought. Even applying a CPR3.9 and *Denton v White* analysis, I would regard it as clearly and obviously just in these circumstances (especially in view of the initial oral and then written notifications, this being at an early stage in the proceedings, Mr Royle having encouraged the bringing of the paragraph 66 application in the hearings leading up to the January judgment, and the absence in my mind of any intention to make an "unless" order) to grant to Marcus any requisite relief from sanctions or permission or CPR3.10 waiver or extensions of time.

191. I have further considered the position in case I am wrong about what has happened amounting to a breach of the provisions of the Schedule so as to fall within paragraph 66(1) (a) and so that paragraph 66 would not apply (since I hold in any event that this is not a paragraph 66(1)(b) "defective writ" situation). On that hypothesis, paragraph 66(2) would not apply, and, for essentially like reasons to those given above, I would conclude that the contravention of section 23 would render the High Court enforcement agent to be a trespasser and the High Court enforcement officer who appears to have both authorised and instructed him to act to be a wrongdoer. Marcus would then be able to claim not only for his own but also for the partnership's loss under *HL Kidsons* principles. Notwithstanding that at first sight such a claim would have to be brought under Part 7 and any failure by Marcus to bring such a claim in such terms notwithstanding my earlier order, applying a CPR3.9 and *Denton v White* analysis, I would regard it as clearly and obviously just in these circumstances (especially in view of the initial oral and then writing notifications, this being at an early stage in the proceedings, Mr Royle having encouraged the bringing of the paragraph 66 application in the hearings leading up to the January judgment, and the absence in my mind of any intention to make an "unless" order) to grant to Marcus any requisite relief from sanctions or permission or CPR3.10 waiver or extensions of time.

Conclusion in relation to the loss claims

192. For all those reasons, I conclude that:

- a. Marcus can bring the partnership's claims with Mark as a respondent
- b. The breach of section 23 resulted in a breach of the provisions of Schedule 12 within the meaning of paragraph 66(1)(a)
- c. Marcus can bring and has properly brought claims under paragraph 66 for both his own loss and for the partnership's losses; but (and which is only relevant if I am wrong as to the aforesaid) if, or to the extent that:
 - i. He has not done so; he should be granted any requisite permission or relief so that he can do so; and
 - ii. He cannot do so under paragraph 66; he can do so outside paragraph 66, and he should be granted any requisite permission or relief so that he can bring such a claim.

The Defences advanced to the loss claims

193. Mr Royle advanced as part of his application to strike-out or for reverse summary judgment various defences to Marcus's claims. He did not press them in submissions as he accepted that they involved questions of fact which it would not be appropriate for me to determine on a summary basis. I consider that he was right to take that approach. In the circumstances, I deal with them briefly, having adopted the summary determination approach of whether Marcus has real prospects of success in resisting them in accordance with the manner that that test is formulated in the case-law as set out in the White Book notes at 24.2.2.
194. Mr Royle contends that the High Court Enforcement Agent will have a defence under Paragraph 66(8) of Schedule on the basis that he had a reasonable belief that there was no breach of any provision of the Schedule. Here, as set out in the Visit Reports, it was known that Marcus was throughout stating that the seized goods and machinery were, or included, partnership assets; and it seems to me that it is at least highly arguable that the High Court Enforcement Agent proceeded to seize, retain and sell on the known basis that that was the case, especially as the proceeds of sale were then distributed on that assumption. It would then follow, in my judgment (see above), that these were protected goods and that the Schedule had been breached. It may be that the High Court Enforcement Agent can say that they had a reasonable belief that that was not the case in law. However, that would involve questions of fact as to such matters as (i) what was actually in the High Court Enforcement Agent's mind (ii) what investigations they actually made or could have made as to the law, and with what outcomes (or possible outcomes). It would also involve questions of law as to what extent they would be deemed to know the law where they knew (or should have known) the underlying facts. I regard Marcus as having real prospects of success in defeating this defence.
195. Mr Royle further contends that the High Court Enforcement Agent will have a defence under Paragraphs 63 and 64 of the Schedule on the basis that they did not have notice that the goods were not those of Marcus alone. I regard there as being a real question of law as to whether those Paragraphs apply to a Paragraph 66 claim. However, even if they do, I consider that Marcus has real prospects of success in establishing the relevant notice. Mr Royle refers to the *Hamilton* decision where a mere suggestion of a right was not sufficient to amount to notice of it. However, here the contents of the Visit Reports and the various communications are very different from the *Hamilton* situation, and can be said even to amount to a recognition that the goods and machinery did include much which was partnership property.
196. Mr Royle further contends that Marcus joined in with the sale process such that he is estopped or similar from complaining that it occurred and seeking compensation for its having occurred. It seems to me that that type of argument is wholly fact dependent and that Marcus has real prospects of success. Marcus can say that he throughout made clear that the goods and machinery included partnership property and should not have been subject to the seizure and sale, and that he was merely co-operating without prejudice to his primary position and under force or even duress; and where the High Court Enforcement Agent (and the High Court Enforcement Officer) would have pressed ahead in any event. I do not think that I can summarily determine them against Marcus.
197. Mr Royle also disputed that these claims could be brought against the High Court Enforcement Officer. Mr Burroughs relies on Paragraph 66(6) and says that they are a "related party" (which here is defined as a person "on whom the enforcement power is

conferred”) to the High Court Enforcement Agent. Mr Royle submits that the High Court Enforcement Agent is acting under their own powers conferred by the Schedule and not under any power conferred by the High Court Enforcement Officer acting under the Writ. Mr Royle has to accept that his contention is contrary to the *Bone* decision which he says was wrong on this point but is binding upon me. Even if it was only highly persuasive, at first sight it is consistent with both the words of Paragraph 66(6) (as the Writ does confer an authority, and, at first sight, the enforcement power upon the High Court Enforcement Officer) and the scheme, and the reality, of the Writ is one of its being directed to (and at first sight conferring a power upon) the High Court Enforcement Officer, and the High Court Enforcement Officer then selecting and authorising the High Court Enforcement Agent; and I see Mr Royle’s construction as being somewhat convoluted and potentially not reflecting reality. I will not strike out or grant reverse summary judgment on that basis.

198. Even if the claims were brought outside Paragraph 66, I would come to the same conclusion in relation to Paragraphs 63 and 65 and the restricted defences contained in them. The Paragraph 63 defence only applies to a “related party” which has a specific definition (“person who acts in exercise of an enforcement power”) in Paragraph 65(4) which is less apposite to be applied to the High Court Enforcement Officer than the different definition of “related party” in Paragraph 66(6). Thus, it is well arguable that Paragraph 63 is of no avail to the High Court Enforcement Officer, and who, it seems to me, can arguably potentially be sued as principal of the High Court Enforcement Agent (who was potentially acting under their direction) under ordinary principles of a principal being liable for the actions of their agent although this may depend on both question of law and of fact (e.g. as to the extent to which the High Court Enforcement Officer directed or authorised the steps taken by the High Court Enforcement Agent). Further, the Paragraph 63 defence is no more than arguable (in the circumstances of this case) in favour of anyone who can rely upon it for the reasons which I have given above. In all the circumstances, I see Marcus, should he have to bring his claims outside Paragraph 66 (which I do not think that he has to do) would have real prospects of success against both the High Court Enforcement Agent and the High Court Enforcement Officer.

Claim for Declaration regarding Fees and Charges asserted by the High Court Enforcement Agent

199. I now turn to the application to strike out the declaration sought with regards to the High Court Enforcement Officer and High Court Enforcement Agent allegedly not being able to levy any fees or charges in relation to the circumstances of this case. Mr Royle made various objections to this proceeding although I am not sure as to how much they were pressed, but I have considered them fully.
200. First, Mr Royle submits that the *Bone* decision makes clear that points with regards to fees and charges can only be taken against the High Court Enforcement Agent and not against the High Court Enforcement Officer. In principle I think Mr Royle is right to say that questions regarding fees and costs are between the High Court Enforcement Agent and the judgement debtor as that is what was concluded in paragraph 25 to 28 of the *Bone* judgement. I am, however, not sure as to what consequences that has here in practice where all that is sought here is the Declaration, and there is not sought any repayment order or provision that money should be paid over. All that is sought by way of financial remedy are damages or compensation under Paragraph 66 (and which I have held above might be extended perhaps to other technical courses of action for the same loss).
201. It does seem to me that the High Court Enforcement Officer is potentially affected by the claim for the declaration as that may impact on the quantum of the damages claim. However, in the event that the High Court Enforcement Officer does not wish to oppose the

granting of the declaration, there is no requirement on them to do so and they can maintain a neutral stance. If, however, the grant of the declaration would not be irrelevant to the High Court enforcement officer and they wish to take an active role, I consider that they should be able to do so as a potentially affected party. Therefore, while I may be prepared to remove the High Court enforcement officer from the claim for the declaration that would only be on the basis of the High Court enforcement officer would be bound by its outcome.

202. I am unclear as to whether the declaration, if granted, would be said by Marcus to be the gateway to a financial claim. If that is Marcus' position, at first sight such a claim would need to be advanced in a proper way.

203. I would add that I do not know as to what has happened to the money which has been purportedly taken by the High Court Enforcement Agent in respect of fees and charges I do note that the invoices for fees are in the name of "Shergroup" which may be a reference to the High Court Enforcement Officer rather than the High Court Enforcement Agent. If relevant monies have been used to discharge asserted liabilities owed to or by or asserted entitlements of the High Court Enforcement Officer or the High Court Enforcement Agent, or have simply been transmitted between them, then there may be a claim against both or either of them. However, if such a claim is to be brought then it should be done in an appropriate manner. At present such a claim does not appear to be made in those circumstances, and it is for Marcus to decide as to what claim he wishes to bring at first sight and what is the appropriate procedural process (and whether or not a Part 23 Application is sufficient).

204. Second, Mr Royle submits that there should be a Part 23 application but advanced under CPR 84.16:

"84.16

(1) This rule applies where—

(a) there is a dispute about the amount of fees or disbursements, other than exceptional disbursements, recoverable under the Fees Regulations; and

(b) a party wishes the court to assess the amounts recoverable under regulation 16 of the Fees Regulations.

(2) A party may make an application to the court to assess the amounts.

(3) The application must be accompanied by—

(a) evidence of the amount of fees or disbursements in dispute;

(b) evidence that the fees or disbursements in dispute were not applicable, as the debt had been settled before the stage where it would have been necessary to incur those fees or expenses;

(c) evidence that, because the enforcement agent was instructed to use the TCG procedure in relation to the same debtor but in respect of more than one enforcement power where the enforcement powers could reasonably be exercised at the same time, regulation 11 of the Fees Regulations should have been applied;

(d) evidence that the fee due and any disbursements for the enforcement stage, first enforcement stage, or first and second enforcement stage, as appropriate, are not recoverable under regulation 12 of the Fees Regulations; or

(e) where the dispute concerns the amount of the percentage fee, calculated in accordance with regulation 7 of the Fees Regulations, evidence of the amount of the sum to be recovered."

205. That rule is derived from Regulation 16 of the Taking Control of Goods (Fees) Regulations 2014:

"16. Upon application in accordance with rules of court, any dispute regarding the amount recoverable under these Regulations is to be determined by the court."

206. I have some difficulty with the application of these provisions to this case as, as appears from the wording of CPR 84.16(3), CPR84.16 appears to be directed to other matters than the question of whether any fees can be charged at all; and, at first sight, does not seem apposite to deal with the consequences of a contravention of section 23 of the Partnership Act 1890. However, I do see this as at least in part falling within regulation 16, and thus CPR 84.16. The wording of regulation 16 is a wide one and appears to extend to any dispute about amount which would seem potentially to include an assertion that the amount should be nil, a contention which is in dispute between the parties before me. In order to invoke regulation 16 an application is required in which case it would be properly made by a Part 23 Notice of Application.
207. My provisional view is that it would not seem to be in accordance with the overriding objective in the circumstances of this case to require there to be a new and separate Notice of Application (or even a claim form). I also provisionally do not see any reason as to why I should not permit the existing Part 23 Notice of Application to be amended to say expressly that it is also brought under the provisions of CPR 84.16; as all that would do would be to give a heading of a relevant rule for an application which is already being made.
208. Third, Mr Royle submitted that it is too late for Marcus to raise this assertion or make such an application. He submitted that Marcus should have brought a CPR 84.16 application at an earlier point when I dealt with the High Court Enforcement Officer's (it should have been the High Court Enforcement Agent in accordance with the *Bone* decision but which judgement had not then been delivered) application to determine what were potentially recoverable disbursements (and where I adjourned questions of what were recoverable fees).
209. I note that CPR84.16 and Regulation 16 do not provide for any time limit with regards to the making of an application under them. However, I think that Mr Royle may have been seeking to say that what Marcus is seeking to do is an abuse of process and that it was contrary to the *Henderson v Henderson* principle which requires parties to bring all relevant matters before the court at once, for this point to be raised and advanced by Marcus only after my earlier determination of the High Court Enforcement Officer's application with regards to determination of quantum of particular disbursements.
210. I disagree with Mr Royle, and do not see this as being in any way and abuse, for the following reasons. Firstly, I proceeded in relation to my previous determination on the basis that Marcus was raising these points but that, as they were logically distinct from the mere quantification points that the High Court Enforcement Officer was then raising, it was convenient for them to be dealt with separately as it seemed then, and still seems to me, that these points belonged more to the section 23 aspects. I determined on the previous occasion that I would only deal with the section 23 aspect on a limited basis, and would deal with it more fully at this stage. I do not see any abuse in Marcus having acted in accordance with that procedural approach.
211. Secondly, the previous application was brought by the High Court Enforcement Officer and not the High Court Enforcement Agent. That was a wrong course for them to take, although no one then appreciated the point which was yet to be decided in the *Bone* judgment. However, I do not see the fact that the High Court Enforcement Officer wrongly brought an application which the court determined on something of a mistaken basis should mean that it is an abuse of process for Marcus now to proceed seeking this declaration which is primarily directed against the High Court Enforcement Agent.
212. Thirdly, the High Court Enforcement Agent made their own application for the assessment of their fees which I adjourned as set out in paragraph 3 of my order of the 2nd

of February 2022 and which granted a permission to restore that application. I do not see as to how it can be in abuse for Marcus to effectively seek to restore it now (albeit by Notice of Application rather than by letter) on the basis of seeking a declaration that no fees are chargeable at all.

213. Fourthly, it seems to me that this is already part and parcel of the section 23 aspect of the matter and that the underlying aim of my order of the 2nd of February 2022 was to leave all such matters over to further determination through the process which is now actually before me. The seeking of the declaration is simply part of the section 23 aspect and in those circumstances I do not see there as being any abuse at all.
214. Even if there was an abuse I would not regard the appropriate response as being strike out the application for a declaration. As I have already said, it seems to me that this is a distinct point which arises from the section 23 aspect; and is one of the questions as to what consequences should flow from the fact that section 23 has effectively been contravened. It is those matters with which the court is now dealing and it seems to me that they should extend the fees and charges aspect as well as the other compensatory remedies which Marcus seeks. I do not see there as being any prejudice to it being caused to any party or to the court, or any false apprehension to have been raised let alone one which has had any detrimental consequence to the process of this litigation.
215. Third, Mr Royle says that in any event the application is misconceived with regards to what fees can be charged and taken from the proceeds of the grain which was solely owned by Marcus and was not partnership property. However, he seemed to accept even on his own case some £14,000 may remain in issue. I am not clear as to that figure as Mr Burroughs advanced an alternative lesser figure of £7000. Mr Royle did not in fact press the point on me but asserted that this was a situation in the light of the overall costs where “the game was not worth the candle” on what are called *Jameel v Dow Jones 2005 EWCA 75* grounds. Again I disagree. I have no material for me to properly analyse whether the relevant claim is limited to £14,000 or £7000; but, even if that is not the case, I do not think that this is a “game not worth the candle” scenario. *Jameel* was a special case where the relief sought was of a particular nature which the judge regarded as being effectively worthless in any commercial sense. I do not regard either £14,000 or £7000 as being commercially worthless. Very much smaller sums such as £25 or £5 have been said not to be worthless or not so worthless that a claim for them should not be allowed to proceed; see *Sullivan v Bristol 2012 EWCA 570* and *Alsafi v Trinity 2018 EWHC 1954*.
216. Therefore, with regards to the other grounds advanced for seeking to strike out the claim, I am going to hold that I should not accede to them. However, Marcus needs to clarify whether any relief other than a declaration is sought with regard to fees, disbursements and charges against the High Court Enforcement Officer, and if not, and the High Court Enforcement Officer wishes not to be part of the declaration aspect, that aspect should only proceed as between Marcus and the High Court Enforcement Agent. In order for Marcus to state his position it may be necessary to first clarify whether the High Court Enforcement Officer has taken or received any of the proceeds of sale.

Conclusion

217. For all those reasons, I am not going to strike-out or grant reverse summary judgment in relation to the applications brought by Marcus subject to the clarifications and possible consequences mentioned above.

Consequential Matters

218. I am going to hand-down this complete judgment at 2pm on 2nd October 2023. I have previously adjourned the hearing delivering judgment and all questions of time to appeal and permission for appealing and extended time for filing any appeal notice

generally and continue such adjournments and directions so that all such matters can be considered on 2nd October 2023. My eventual order should recite that this judgment has concluded and determined that (1) the seizure and sale has involved breaches of provisions of Schedule 12 within the meaning of Paragraph 66(1)(a), and (2) Marcus can and has properly brought a claim for the loss (if any) suffered not only by him personally but also by the Partnership by reason of those breaches and the seizure and sale (but that the Court has not made any decisions regarding whether all or any of the Respondents are liable under the provisions of Paragraph 66 or have defences under the provisions of Paragraph 66 or otherwise).

Approved : 
2.10.2023

Transcript in part from a recording by Ubiquis
291-299 Borough High Street, London SE1 1JG
Tel: 020 7269 0370
legal@ubiquis.com

Ubiquis hereby certify that the above is an accurate and complete record of the proceedings
or part thereof