Neutral Citation Number: [2023] EWCA Civ 1119

Case No: CA-2022-000158

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (ChD)
David Mohyuddin QC (sitting as a Deputy High Court Judge)
[2022] EWHC 1913 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 6 October 2023

Before :

LORD JUSTICE LEWIS
LORD JUSTICE NUGEE
and
LORD JUSTICE SNOWDEN

- -

Between :

MOHAMMAD RAZI KHAN	**Applicant/ Appellant**
- and -	
(1) ARVINDER SINGH-SALL (Trustee in Bankruptcy of Mohammad Razi Khan)	
(2) HABIB BANK AG ZURICH	**Respondents**

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Chinonso Ijezie, solicitor advocate (instructed by **Sky Solicitors Ltd**) for the **Appellant**
Ian Tucker (instructed by **Vicarage Court Solicitors**) for the **1st Respondent**
Andrew Brown and Daniel Thorpe (instructed by **Harrison Clark Rickerbys Ltd**) for the **2nd Respondent**

Hearing date: 20 July 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on 6 October 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Nugee:

Introduction

1. This second appeal concerns the Court's power to annul a bankruptcy under s. 282(1)(a) Insolvency Act 2016 (**"IA 2016"**). This provides as follows:

> "**282 Court's power to annul bankruptcy order**
>
> (1) The court may annul a bankruptcy order if it at any time appears to the court—
>
> (a) that, on any grounds existing at the time the order was made, the order ought not to have been made…"

2. In the present case the Appellant, Mr Mohammad Khan, was made bankrupt on the petition of the 2nd Respondent, Habib Bank AG Zurich (**"the Bank"**). He applied to annul the bankruptcy. The application was heard by DJ Hart sitting in the County Court at Central London. She dismissed the application. She held that the bankruptcy order ought not to have been made on two grounds, namely that the petition debt was disputed, and that the petition contained a statement that the debt was unsecured which was incorrect as the Bank in fact held security for the debt (albeit not of significant value). But in the exercise of her discretion she declined to annul Mr Khan's bankruptcy, finding, among other things, that he was undoubtedly insolvent.

3. Mr Khan appealed to the High Court. The appeal was heard by Mr David Mohyuddin QC, sitting as a Deputy High Court Judge. He dismissed the appeal on all grounds.

4. Mr Khan now appeals to this Court with the permission of Arnold LJ. The appeal raises two points of potential significance. The first concerns the extent of the discretion conferred on the Court by s. 282(1)(a). DJ Hart treated this as a general discretion to be exercised having regard to all the circumstances of the case and Mr Mohyuddin agreed with her. Mr Khan contends that in a case such as the present the bankruptcy order ought to be set aside as of right, or at any rate unless there are exceptional circumstances.

5. The second concerns the effect of an annulment on the running of time for limitation purposes on debts that were provable in the bankruptcy. DJ Hart did not decide the point but took into account the fact that an annulment might have the effect that time would be treated as running against creditors in the period between bankruptcy order and annulment as if the bankruptcy order had never been made. Mr Mohyuddin went further and decided that this would indeed be the case.

6. The appeal was argued on behalf of Mr Khan by Mr Chinonso Ijezie. But despite his submissions, which he put forward with clarity and forcefulness, I have come to the conclusion that the appeal should be dismissed.

Facts

7. Mr Khan was the sole shareholder and director of a company called Geno Services Ltd. In October 2000 the Bank extended facilities to Geno against a guarantee signed by

Mr Khan. Mr Khan also traded as a sole trader and the Bank extended facilities to him personally as well.

8. On 13 January 2015 Geno was struck off the register for a filing default and was dissolved. On 22 January 2015 the Bank demanded payment from Geno of its indebtedness and on 23 January 2015 from Mr Khan of his personal indebtedness; in October 2015 it further demanded payment by Mr Khan of Geno's indebtedness under his guarantee. On 8 January 2016 the Bank served a statutory demand on Mr Khan based on a debt of £234,459.16 which was the amount then said to be owing under the guarantee. On 9 May 2016 the Bank presented a bankruptcy petition against Mr Khan on the basis of that demand to the County Court at Slough. On 16 January 2018 Mr Khan was made bankrupt on that petition. Mr Khan applied for permission to appeal the bankruptcy order but this was refused both on paper and again after an oral hearing. On 23 April 2018 the 1st Respondent, Ms Arvinder Singh-Sall, was appointed trustee in bankruptcy (**"the Trustee"**).

9. On 9 July 2018 Mr Khan applied to annul his bankruptcy.

Judgment of DJ Hart

10. The application to annul was heard over three days in May 2021 before DJ Hart. She handed down judgment on 26 August 2021 (**"DJ Judgment"**). In this she resolved a large number of matters in exemplary fashion. Her conclusions were, in summary, as follows:

    (1) It was not open to Mr Khan to challenge the refusal of an application which he had made to adjourn the petition, as this point had been raised and rejected in his application for permission to appeal: DJ Judgment at [12]-[15].

    (2) The statutory demand was validly served: DJ Judgment at [16]-[25].

    (3) The Bank failed to disclose the existence of security which it held for the petition debt in either the statutory demand or the petition. That was a breach of the requirement that the petition debt must either be unsecured (s. 267(2)(b) IA 1986), or the creditor must comply with s. 269(1) IA 1986 (either stating that it was willing to give up the security for the benefit of all creditors, or valuing the security and confining the petition debt to the unsecured part). This breach had not been remedied at the date of hearing the petition. Hence at the time the order was made it ought not to have been: DJ Judgment at [26]-[39].

    (4) There was a genuine triable issue as to whether the petition debt was disputed on substantial grounds, Mr Khan's case being that it had been orally agreed between him and the Bank that the guarantee would only cover the initial facility, later extended to a second facility, and that it did not cover the replacement facilities subsequently put in place. DJ Hart had, unusually, heard oral evidence on this, but on the basis that she would go no further than determine whether there was a genuine triable issue. She found Mr Khan to be a poor witness, and significant parts of his case to be unpersuasive, but concluded that "as a whole this is clearly a debt in relation to which there is a genuine triable issue, albeit … Mr Khan would face an *"up-hill task"* at a Part 7 trial": DJ Judgment [40]-[75].

(5) There were therefore two separate grounds on which the bankruptcy order ought not to have been made (the debt being disputed and the Bank having failed to disclose its security): DJ Judgment at [76].

11. She then considered the exercise of the discretion conferred on the Court by s. 282(1)(a) IA 1986 under a number of heads as follows:

(1) The effect of the annulment on Mr Khan: DJ Hart accepted that the fact that the order ought not to have been made on two distinct grounds, and the fact that he was made bankrupt at the first hearing, were significant factors. She further accepted that the financial consequences for Mr Khan of being made bankrupt were considerable, and that his business and professional reputation was also likely to have been significantly damaged: DJ Judgment at [77]-[78].

(2) Mr Khan's conduct: DJ Hart found that there had been a significant lack of co-operation with both the Official Receiver and the Trustee on the part of Mr Khan, including a successful attempt to divert rental income away from the bankruptcy estate. She regarded her findings as significant, as his conduct, which she characterised as sustained and deliberate, had negatively impacted the Trustee's investigations of the assets and liabilities of the estate and disrupted the collection of income. There remained aspects of Mr Khan's affairs in relation to which further investigation might be appropriate: DJ Judgment at [77]-[91].

(3) Solvency: the Bank was by far the largest unsecured creditor, although proofs had also been submitted by other unsecured creditors totalling £51,427 (before statutory interest). Leaving aside the petition debt, which she had found to be disputed, Mr Khan's personal indebtedness to the Bank was £248,414.35 (plus interest of £60,291.58 at the date of the bankruptcy order): DJ Judgment at [93]-[94]. DJ Hart continued:

> "94 …This figure is after crediting the proceeds of sale of Westville. Although in his witness statements Mr. Khan contends that this property was sold at an undervalue, it was not suggested before me that the remainder of the principal debt was thereby not due and owing. Further, although Mr. Khan has previously raised various points as to the interest charged by the Bank (which appear largely to relate to Geno's borrowings) these were also not pursued. Accordingly, I am satisfied that the sum of £308,705.93 was due and owing to the Bank at the date of the bankruptcy order ("the Personal Debt").
>
> 95. Repayment of Mr. Khan's personal borrowings was demanded in January 2015 but remained unpaid some three years later at the time of the bankruptcy order. There is no suggestion that Mr. Khan then had the liquidity to pay that debt and accordingly he was undoubtedly insolvent."

(4) The Bank's position was that if the bankruptcy order were annulled it would immediately present another petition based on Mr Khan's personal

indebtedness. At this point in her judgment DJ Hart raised the question whether that debt would in those circumstances be statute-barred. (That would be the case if the effect of an annulment would be to "wipe away" the bankruptcy as if it had never happened with the result that time ran continuously for limitation purposes from the debt being demanded in January 2015, since any annulment would necessarily be more than 6 years later). She said that it would be inappropriate to decide the point, which was not argued, and that it was not necessary to do so. That was because if the personal indebtedness *were* now statute-barred, it would be unfair to the Bank to deprive them of the benefit of their proof by granting the annulment, as the Bank could have undoubtedly obtained a bankruptcy order in 2018 on the basis of the personal indebtedness. Conversely if the effect of the annulment would be that the debt would *not* be statute-barred, annulment should equally not be granted because it would be followed by a further petition and a subsequent bankruptcy order, Mr Khan not having put forward any evidence to demonstrate that he would have the liquidity to respond to a statutory demand or petition for the personal indebtedness: DJ Judgment at [96]-[97].

(5) She then added:

> "98. Further, the effect of the three and a half years that have passed from the point of view of limitation applies not only to the Bank, but also to other unsecured creditors. Indeed, the point has greater force as they are without fault. The effect of an annulment at this stage might be to leave some of those creditors without an enforceable claim."

12. Having considered the various factors which I have referred to she expressed her conclusions as follows:

> "99. In conclusion, l have considered all the circumstances, and particularly the very significant impact of the bankruptcy order on Mr. Khan and the fact that there are two grounds on which it ought not to have been made. However, when balanced against the impact of Mr. Khan's conduct on the course of the administration and the interests of his creditors, I have concluded that this is a case where the discretion to annul should not be exercised."

She therefore dismissed the application.

Appeal to the High Court

13. Mr Khan appealed to the High Court. The appeal was heard by Mr Mohyuddin in March 2022 and he handed down judgment at [2022] EWHC 1913 (Ch) on 21 July 2022 (**"HC Judgment"**).

14. Mr Khan had six grounds of appeal, which were all dismissed. Four of them have not been further appealed, and so can be shortly stated. These were that DJ Hart had erred (i) in the findings she made about Mr Khan's conduct (Ground 2, considered at HC Judgment [118]-[128]); (ii) in her conclusion that the Trustee might wish to pursue further investigations (Ground 6, considered at [129]-[133]); (iii) in taking account of

delay (Ground 3, considered at [134]-[139]); and (iv) in her conclusions on solvency (Ground 4, considered at [140]-[150]).

15. Ground 1 was that DJ Hart had applied the wrong test. Counsel then appearing for Mr Khan, Professor Mark Watson-Gandy, submitted that where the bankruptcy order ought never to have been made, the Court should only decline to annul the bankruptcy in exceptional circumstances. On this Mr Mohyuddin said:

> "76. In the light of the statutory scheme, it seems to me that where the petition debt is fully disputed such that there is no debt capable of founding the petition and no court could [have] made a bankruptcy order (as in the COMI cases cited to me), there is a powerful argument that the court would have no discretion on an annulment application. However, I consider that I am prevented from reaching that conclusion by the Court of Appeal's decision in [*Owo-Samson v Barclays Bank plc (No. 1)* [2003] EWCA Civ 714]. Even where there was no debt capable of founding the petition, if a bankruptcy order is nonetheless made the court retains a discretion when hearing an annulment application."

(I explain the reference to the COMI cases below.) He then considered a number of authorities on the exercise of the discretion, and concluded as follows:

> "112. In conclusion, as I read these authorities and on the basis that the court has a discretion to exercise when asked to annul a bankruptcy order which should never have been made because the debt stated in the debt was disputed in full, there is no principle that the discretion must be exercised in favour of annulment unless there are exceptional circumstances. Rather, in the exercise of its discretion, the court must consider all the relevant factors. Where there are factors weighing in favour of and against annulment, it must take them into account, giving them appropriate weight. Where there are no factors weighing against annulment, then it might be expected that the court will annul the bankruptcy order."

He therefore concluded that DJ Hart had not misdirected herself as to the test she needed to apply, and dismissed this ground of appeal.

16. Ground 5 concerned the effect of an annulment on the running of time for limitation purposes. The question, and Mr Mohyuddin's answer to it, can be seen from his judgment as follows:

> "168. The question for me, on which I am surprised to see there is no direct authority, is what happens in the event the bankruptcy is annulled. Should time start to run again, having been suspended between the making of the bankruptcy and annulment orders? Or should time be deemed to have run throughout that period, because the effect of the bankruptcy is "wiped away"?
>
> 169. In my judgment, upon the making of an annulment order time should be deemed to have run throughout that period. I reach that

view for the following reasons:

i) The effect of the annulment is to "wipe away" the effect of the bankruptcy: see [*Bailey v Johnson* (1872) LR 7 Ex 263].

ii) There are exceptions to that outcome, but the running of time for limitation purposes was not identified as one of them.

iii) Deeming time to have continued to accrue during the period for which the bankruptcy order was in force puts creditors whose debts were within the bankruptcy in the same position as those whose debts were always outside the bankruptcy.

iv) This is consistent with what Hildyard J said at [82] in [*Mowbray v Sanders* [2015] EWHC 296 (Ch)], considered above.

v) It is also consistent with the approach taken where a company is restored to the register where time runs during the period between dissolution and restoration unless the court orders otherwise, which it could do under section 282(4) of the 1986 Act although it would need to be persuaded that it was proper to do so."

He therefore held that this was a factor which it was proper for DJ Hart to take into account, and dismissed this ground of appeal as well.

Grounds of appeal

17. Three grounds of appeal are relied on by Mr Khan in his appeal to this Court:

(1) Where a bankruptcy order ought not to have been made and was an abuse of the process of the Court, the Court should only decline to annul it in exceptional circumstances.

(2) Where there is no jurisdiction to make an annulment order, the bankruptcy order should be set aside as of right, or at the very least annulment should only be refused in exceptional circumstances.

(3) The effect of an annulment on the limitation period on debts within the bankruptcy is that it is suspended during the bankruptcy and only restarted on annulment, not that time is deemed to run during that period.

18. In support of these grounds Mr Ijezie relied on a skeleton argument that had been prepared by Professor Watson-Gandy, supplemented by oral submissions of his own.

Ground 2 – lack of jurisdiction

19. It is convenient (and logical) to start with Ground 2, as Mr Ijezie did.

20. The foundation of this argument is what Mr Mohyuddin referred to as "the COMI cases". The first of these is a decision of mine (at first instance), *Raiffeisenlandesbank Oberösterreich AG v Meyden* [2016] EWHC 414 (Ch) (***"re Meyden"***). There Mr Meyden had been made bankrupt by the High Court in London in June 2010 on his own petition, on the basis that his centre of main interests (**"COMI"**) was in England and Wales. In August 2014 the applicant, an Austrian bank that had a claim against Mr Meyden on certain guarantees, applied for his bankruptcy to be annulled on the ground that his COMI was not in fact in England and Wales at the time of the petition, but in Germany. Deputy Registrar Lawson, having heard oral evidence, concluded that on that evidence the Court would not have concluded that Mr Meyden's COMI was in England and Wales and that the bankruptcy order ought not to have been made. But in the exercise of his discretion he declined to annul it on the grounds of the bank's delay in bringing the application.

21. On appeal, I held that it was not open to Mr Meyden to challenge the conclusion of the Deputy Registrar that his COMI was not in England (at [12]) and that it followed that the English Court did not have jurisdiction to open insolvency proceedings against him (at [13]). I further held that the position under the general law is that once it becomes apparent to the Court that an order has been made without jurisdiction a party or any person affected by it is entitled to have it set aside as of right (at [17]); and that the fact that s. 282 IA 1986 was expressed to confer a discretion did not displace this general rule (at [36]), with the result that "although in other circumstances s. 282 confers a true discretion, in a case in which the bankruptcy order was made without any jurisdiction at all … the Court has no choice but to set the order aside" (at [37]).

22. That was followed by HHJ Hodge QC in *Deutsche Apotheker- und Ärztebank eG v Leitzbach* [2018] EWHC 1544 (Ch) (***"re Leitzbach"***), a similar case where the debtor had been made bankrupt in England on his own petition, and a creditor applied for an annulment on the ground that his COMI had not been in England at the relevant time at all.

23. Neither advocate before us submitted that the decision in these cases was wrong. I will therefore proceed on the basis that what I said in *re Meyden*, followed by HHJ Hodge QC in *re Leitzbach*, does represent the law.

24. Mr Ijezie submitted that the present case was similar in that on the findings of DJ Hart the Court also lacked jurisdiction to make a bankruptcy order against Mr Khan. He referred to s. 267 IA 1986 which provides, so far as relevant, as follows:

> "**267 Grounds of creditor's petition**
>
> (1) A creditor's petition must be in respect of one or more debts owed by the debtor, and the petitioning creditor or each of the petitioning creditors must be a person to whom the debt or (as the case may be) at least one of the debts is owed.
>
> (2) Subject to the next three sections, a creditor's petition may be presented to the court in respect of a debt or debts only if, at the time the petition is presented—
>
> (a) the amount of the debt, or the aggregate amount of the debts, is

equal to or exceeds the bankruptcy level,

(b) the debt, or each of the debts, is for a liquidated sum payable to the petitioning creditor, or one or more of the petitioning creditors, either immediately or at some certain, future time, and is unsecured,

(c) the debt, or each of the debts, is a debt which the debtor appears either to be unable to pay or to have no reasonable prospect of being able to pay, and

(d) there is no outstanding application to set aside a statutory demand served (under section 268 below) in respect of the debt or any of the debts."

Was there a liquidated sum?

25. Mr Ijezie's first submission was that as the petition debt was, as DJ Hart found, the subject of a genuine dispute on substantial grounds, it was not "for a liquidated sum" as required by s. 267(2)(b). His argument was that a liquidated sum has to be a sum that is certain, and if there is a dispute the claim is uncertain.

26. I do not accept this submission. The argument does not in fact feature in the grounds of appeal or Professor Watson-Gandy's skeleton argument and to that extent is a new point for which Mr Khan does not have permission, but leaving that aside, I think it misunderstands the requirement for a liquidated sum to be certain. The essential distinction between a liquidated sum and an unliquidated sum is that between a debt and a claim for damages, a distinction which has a very long history rooted in the old forms of action at common law. A claim for a debt is a claim for a sum of money that is owed, and that presupposes that at any rate by the time the money falls due for payment it is quantified at a definite sum. It is in this sense that a liquidated sum must be certain.

27. The amount payable may have always been specified from the outset (as where A agrees to pay B £100), or it may initially have been an unascertained amount (as where A agrees to pay B a rent that will be reviewed to open market rent). That does not prevent the obligation being a debt so long as it is capable of being ascertained. This is the principle that that which is capable of being rendered certain is itself certain (traditionally expressed in the Latin phrase *"certum est quod certum reddi potest"*). Thus in *O'Driscoll v Manchester Insurance Committee* [1915] 1 KB 811, the question was whether a sum payable by the insurance committee to a panel doctor was a debt due or accruing due that could be attached, and Rowlatt J held that it was, saying (at 820):

> "I think, therefore, that in respect of 1913 I must come to the conclusion that there is a debt accruing due to Dr. Sweeny and a debt which is certain to the extent of his share of the money in respect of 1913 which they have in their hands, although it is quite impossible for me—and nobody has in fact at present done the sum—to say how much in pounds, shillings, and pence there is. All the elements for ascertaining that sum are there, and on the principle *certum est quod certum reddi potest* I

> think there is a certain sum due and owing from this committee to Dr. Sweeny in respect of 1913."

That was upheld on appeal to this Court: see [1915] 3 KB 499 at 511f per Swinfen Eady LJ, who distinguished the case where an attempt had been made to attach unliquidated damages on the basis that:

> "in such cases there is no debt at all until the verdict of the jury is pronounced assessing the damages and judgment is given."

28. The distinction therefore is between a claim for a debt of a definite amount, which is a liquidated claim, and a claim for damages which is unliquidated. A claim for damages (save for a claim under a liquidated damages clause) is always unliquidated even if the amount claimed is precisely stated and easily quantified: see for example *Hope v Premierpace (Europe) Ltd* [1999] BPIR 695 where Rimer J dismissed a bankruptcy petition based on sums which the debtor was said to have stolen from the petitioning company. He held that the company's claims for damages were not for a liquidated sum and accepted a submission that it was irrelevant that the company claimed to be able "to identify its claim down to the last penny." The damages were still unliquidated. (He also held that the same was true of the company's claims for an account and payment, something which might be thought to be more arguable, but which I do not propose to consider here.)

29. The question whether any particular claim is to be characterised as a claim in debt for a liquidated sum or a claim for unliquidated damages can sometimes be one of some difficulty, particularly in the case of guarantees where a nice distinction is drawn between an obligation on the guarantor to pay the amounts owed by the principal debtor (which creates a debt) and an obligation on the guarantor to see that the principal debtor pays (which creates a liability in damages): see for example *McGuinness v Norwich and Peterborough Building Society* [2011] EWCA Civ 1286. But in the present case the guarantee given by Mr Khan was undoubtedly of the former type as it provided that Mr Khan undertook to make good and pay on demand to the Bank any default in the payment by Geno of its liabilities, and Mr Ijezie rightly accepted that the Bank's claim was a claim in debt not for damages.

30. It follows that the claim was for a liquidated sum. The fact that it was disputed, and, as DJ Hart found, that there was a genuine triable issue as to whether it was due, does not affect this. It does not change the nature of the claim, or convert it from being a liquidated one to an unliquidated one. It no doubt means that the claim is an uncertain one in the sense that until the question has been tried it cannot be known whether it is a good one or not; but that is not the relevant sense in which a liquidated sum must be certain. The relevant sense as I have explained is that the claim must be for a definite amount owed as a debt. The Bank's claim under the guarantee was.

Does a disputed debt deprive the Court of jurisdiction?

31. Mr Ijezie's next submission was that a petition founded on a disputed debt was not a qualifying debt for the purposes of s. 267, and therefore that the Court had no jurisdiction to make a bankruptcy order on it.

32. This is at first sight a more promising submission, but again I do not accept it. It is

undoubtedly the case that as a matter of long-standing practice the Court will not make a bankruptcy order on the basis of a debt that is genuinely disputed on substantial grounds. A debtor who is served with a statutory demand can apply to set aside the demand and the Court may (and in practice normally will) grant the application if, among other things, "the debt is disputed on grounds which appear to the court to be substantial": see r 10.5(5)(b) of the Insolvency (England and Wales) Rules 2016, SI 2016/1024 (replacing r 6.5(4)(b) of the Insolvency Rules 1986, SI 1986/1925, which was in the same terms), and *Practice Note (Bankruptcy: Statutory Demand: Setting Aside) (No. 1/87)* [1987] 1 WLR 119 para 4 ("the court will normally set aside the statutory demand if, in its opinion, on the evidence there is a genuine triable issue").

33. Moreover, even if no application is made to set aside the statutory demand, the Court hearing the petition will in all normal circumstances dismiss it if satisfied that the debt is genuinely disputed on substantial grounds. This is because it will not in practice usually hear evidence on disputed questions of fact and so will not try the issue as to the validity of the debt. The petitioning creditor will therefore not be able to establish that a debt is in fact owed, and hence not be able to establish that it is entitled to present a petition, which by s. 267(1) IA 1986 can only be presented by a creditor to whom a debt is owed. Nor indeed will the Court be able to satisfy itself that the petition debt is unpaid, as required by s. 271(1) IA 1986 which provides as follows:

> "**271 Proceedings on creditor's petition**
>
> (1) The court shall not make a bankruptcy order on a creditor's petition unless it is satisfied that the debt, or one of the debts, in respect of which the petition was presented is either—
>
> (a) a debt which, having been payable at the date of the petition or having since become payable, has been neither paid nor secured or compounded for, or
>
> (b) a debt which the debtor has no reasonable prospect of being able to pay when it falls due."

34. None of this is in dispute, but there remains the question whether this is a matter which goes to the jurisdiction of the Court in the sense in which it is used in the COMI cases.

35. I do not think it does. The position is in my view the same as with company winding-up petitions in what was formerly known as the Companies Court and is now the Insolvency and Companies List of the Chancery Division. The statutory provisions relating to bankruptcy and the winding up of insolvent companies are not identical but there is a close analogy between the practice in bankruptcy and the long-standing practice of the Companies Court in relation to disputed debts. The latter was explained by Buckley LJ in *Stonegate Securities Ltd v Gregory* [1986] Ch 576 at 579G as follows: where a petition to wind up a company is presented by a creditor and the company disputes any liability in respect of the alleged debt in good faith and on substantial grounds, the petition will be dismissed, or if the matter is brought before the Court before the petition is issued, its presentation will normally be restrained. At 580B Buckley LJ adopted the statement of Ungoed-Thomas J in *Mann v Goldstein* [1968] 1 WLR 1091 at 1098f as follows:

> "For my part, I would prefer to rest the jurisdiction directly on the comparatively simple propositions that a creditor's petition can only be presented by a creditor, that the winding up jurisdiction is not for the purpose of deciding a disputed debt (that is, disputed on substantial and not insubstantial grounds), since, until a creditor is established as a creditor he is not entitled to present the petition and has no locus standi in the Companies Court … "

36. But some care is needed with the statement that until a creditor is established as a creditor he has no *locus standi*. That statement also appears to be the basis for Mr Mohyuddin's formulation in [76] of his judgment that a dispute meant that "there is no debt capable of founding the petition". This does not mean that unless a creditor with a disputed debt first establishes his debt in separate proceedings before presenting a petition, the Court cannot as a matter of law entertain it. What it means is that to obtain a winding-up order the creditor has to establish his standing as a creditor, and since the Companies Court will not as a matter of practice decide if there is in fact a debt where it is disputed on substantial grounds, the creditor will in all normal circumstances be unable to do this in the proceedings on the petition. But this is a matter of practice and not a question of the Court's jurisdiction to hear the petition.

37. I do not think Ungoed-Thomas J meant to suggest any different. He cited and relied on the explanation of the practice by Kekewich J (a noted master of Chancery procedure) as long ago as 1894 in *New Travellers Chambers v Cheese and Green* (1894) 70 LT 271 at 272, as follows:

> "Of course the question whether this is a debt or not may possibly be tried by a winding-up petition; but it has been said over and over again, that the presentation of a winding-up petition is not a convenient, and often not a proper method of trying a disputed debt."

That is evidently the source of Ungoed-Thomas J's statement that the winding up jurisdiction "is not for the purpose of deciding a disputed debt", but as can be seen Kekewich J does not dispute that the Court *could* do this, only that it is not usually appropriate for it to do so.

38. That this is the position is confirmed by the decision of this Court in *re Claybridge Shipping Co SA* [1997] 1 BCLC 572, where all three members of the Court said that the practice of the Companies Court was just that, a matter of practice, that could be departed from if the circumstances warranted: see per Lord Denning MR at 575e-h, per Shaw LJ at 576e, and per Oliver LJ at 578b-c, 579a-f. It is not necessary to cite extensively from these judgments but two short passages summarise the position. First, Shaw LJ at 576e:

> "As to the rule of practice, I venture to emphasise that it is a rule of practice and not a rule of law. Accordingly it may be overborne in a particular set of circumstances where its application might result in injustice."

And second, Oliver LJ at 579a:

> "…the refusal of the court to entertain cases where the underlying debt is

> said to be disputed is, in my judgment, a matter of practice only. It is not, in general, convenient that the very status of the petitioner to proceed with his petition should be fought out on a winding-up petition. But the court must, I think, remain flexible in its approach to such cases."

39. A statement to similar effect was made by Lord Hoffmann in giving the opinion of the Privy Council in *Parmalat Capital Finance Ltd v Food Holdings Ltd (in liquidation)* [2008] UKPC 23 at [9] as follows:

> "If a petitioner's debt is bona fide disputed on substantial grounds, the normal practice is for the court to dismiss the petition and leave the creditor first to establish his claim in an action. The main reason for this practice is the danger of abuse of the winding-up procedure. A party to a dispute should not be allowed to use the threat of a winding-up petition as a means of forcing the company to pay a bona fide disputed debt. This is a rule of practice rather than law and there is no doubt that the court retains a discretion to make a winding-up order even though there is a dispute: see, for example, *Brinds Ltd v Offshore Oil NL* (1986) 2 B.C.C. 98,916."

40. In my judgement the same is true in bankruptcy. The normal practice of the Court is to dismiss a creditor's petition if the petitioner's debt is bona fide disputed on substantial grounds. This is why DJ Hart held that the existence of a genuine dispute meant that the bankruptcy order ought not to have been made. But this is a rule of practice rather than law, and the Court had power to entertain the Bank's petition. The dispute therefore on any view did not prevent the Court having jurisdiction to hear the petition.

What is meant by lack of jurisdiction in this context?

41. Quite apart from this, I think one must be careful to identify what is meant by a lack of jurisdiction in this context. "Jurisdiction" is one of those words which mean different things in different contexts. We received very limited submissions on what it means in the present context, although Mr Ijezie did refer us to a statement by Bairamian FJ in the Federal Supreme Court of Nigeria in *Madukolu v Nkemdilim* (1962) 2 SCNLR 341 to the effect that a court is competent if the subject-matter of the case is within its jurisdiction and there is no feature in the case which prevents it exercising its jurisdiction. I have no problem with that as a general statement but find it of little assistance in the present case.

42. I think it helpful to look at what it was about the COMI cases that meant that the Court had, as I put it in *re Meyden* at [37], made the bankruptcy order "without any jurisdiction at all." Jurisdiction in its broadest sense means the authority or power of a court. Without claiming that this is exhaustive, I think that the issue whether a court has jurisdiction usually involves one of two types of inquiry: (i) does the Court have power to entertain and rule on claims of this type? and (ii) does it have authority over this defendant (or respondent)?

43. Sometimes a court may lack jurisdiction because it has no power to hear claims of a particular type. Thus, for example, the County Court is a creature of statute and only has the powers conferred on it by statute. Under s. 1 of the County Courts Act 1984 as

originally enacted these were subject to quite low monetary limits, s. 15(1) providing that "a county court shall have jurisdiction to hear and determine any action founded on contract or tort where the debt, demand or damage claimed does not exceed the county court limit", which was £5,000 until 1991. If a claim over the county court limit was brought, the County Court would have no power to hear it. The High Court, being a court of unlimited jurisdiction, is not generally subject to limitations of this type, although it is always open to Parliament to enact restrictions on its powers, either by conferring a specific power on the Court in limited terms, or by restricting the Court's inherent jurisdiction. Examples of both types can be found in cases I relied on in *re Meyden*, namely *Munks v Munks* [1985] FLR 576 and *Polarpark Enterprises v Allason* [2007] EWHC 1088 (Ch). In the former case ss. 23 and 24 of the Matrimonial Causes Act 1973 conferred on the Court the power to make financial provision orders and property adjustment orders "on granting a decree of divorce … or at any time thereafter", with the result that an order made before decree nisi was held by Ormrod LJ to have been made without jurisdiction. In the latter case the effect of certain provisions in the Protection from Eviction Act 1977 was to require orders for possession of residential premises against former tenants and licensees to be brought in the County Court if the premises were within the County Court limit, with the result that Briggs J (as he then was) accepted that an order that he had made in the High Court permitting the claimant to issue a writ of possession was "unfortunately made without jurisdiction".

44. But in other cases the significant question is not whether the Court has power to hear and determine a claim of a particular type but whether it has jurisdiction over the defendant. It is in this sense for example that the editors of *Dicey, Morris & Collins on the Conflict of Laws* (16th edn, 2022) discuss jurisdiction in international cases. Thus in Chapter 11 they consider the jurisdiction of the English Court in claims *in personam*, summarising the position in their Rule 31 as follows:

> "RULE 31 (1) The court has jurisdiction to entertain a claim *in personam* if, and only if, the defendant is served with process in England or abroad in the circumstances authorised by, and in the manner prescribed by, statute or statutory order."

45. This does not directly apply to bankruptcy, which is not a claim *in personam* within the meaning of this rule, but in the case of bankruptcy the same two questions arise: does the Court have power to hear claims of this type? And does it have power over the respondent? The answer to the first question is Yes: by s. 264(2) IA 1986 the Court is given power to make a bankruptcy order on a creditor's petition. The answer to the second question is found in s. 265 IA 1986.

46. As originally enacted, this provided as follows:

> "**265 Conditions to be satisfied in respect of debtor**
>
> (1) A bankruptcy petition shall not be presented to the court under section 264(1)(a) or (b) unless the debtor—
>
> (a) is domiciled in England and Wales,
>
> (b) is personally present in England and Wales on the day on which

> the petition is presented, or
>
> (c) at any time in the period of 3 years ending with that day—
>
> (i) has been ordinarily resident, or has had a place of residence, in England and Wales, or
>
> (ii) has carried on business in England and Wales.
>
> (2) The reference in subsection (1)(c) to an individual carrying on business includes—
>
> (a) the carrying on of business by a firm or partnership of which the individual is a member, and
>
> (b) the carrying on of business by an agent or manager for the individual or for such a firm or partnership."

47. But with effect from 31 May 2002 this was amended by adding a further sub-section as follows:

> "(3) This section is subject to Article 3 of the EC Regulation."

That is a reference to Council Regulation EC 1346/2000, commonly referred to as the Insolvency Regulation. As I explained in *re Meyden* at [6]-[11] the practical effect of the Insolvency Regulation was that it was only the courts of the Member State in which a debtor had his COMI which had jurisdiction to open main insolvency proceedings in respect of him. This means that if, as in the case of Mr Meyden, his COMI was not in fact in England and Wales but in Germany, the English Court had no power to make a bankruptcy order against him at all.

48. It can be seen therefore that the defect in the bankruptcy order in *re Meyden* had nothing to do with the general power of the Court to make bankruptcy orders (and the statutory requirements as to what needs to be established before the Court will exercise that power), but with the rather different question whether Mr Meyden was within the reach of the English Court. The effect of the Insolvency Regulation (directly binding on the UK while it was a Member State, and given effect to by s. 265(3) IA 1986) was to distribute jurisdiction in insolvency proceedings among the Member States, such that the UK had given up any power to entertain bankruptcy proceedings in relation to those individuals whose COMI was in another Member State.

49. That seemed to me then, and seems to me now, an example of a lack of jurisdiction of a much more fundamental type than a mere failure to comply with one or other of the various statutory requirements that need to be complied with before the Court can properly make a bankruptcy order. In the latter case the result of a failure to comply with the requirements may mean that the Court ought not in the circumstances to exercise the power that it has to make the respondent bankrupt, but in the former case the Court lacks all power to make the respondent bankrupt. I agree therefore with the submission made by Mr Andrew Brown, who appeared with Mr Daniel Thorpe for the Bank, that there is a conceptual difference between a case such as *re Meyden* where (under s. 265 IA 1986) there was no jurisdiction to make Mr Meyden bankrupt at all, and a case such as the present where the Court under s. 271 IA 1986 ought not to have

made Mr Khan bankrupt, but could have done so had the petition, or the evidence, been in different form.

50. For this reason as well therefore I reject Mr Ijezie's submission that the fact that the Bank's claim on the guarantee was disputed meant that the Court had no jurisdiction, and that Mr Khan was entitled as of right to have the bankruptcy order set aside.

Failure of the Bank to disclose its security

51. Mr Ijezie's third submission was that the failure of the Bank to disclose its security was such a fundamental defect in procedure as to rob the Court of jurisdiction.

52. I can take this point quite shortly. It is correct that by s. 267(2)(b) IA 1986 a creditor may *prima facie* only present a petition in respect of a debt that is unsecured. Bankruptcy is a collective process for the purpose of sharing the uncharged assets, if any, of a debtor equally among his *unsecured* creditors. In general therefore secured creditors stand outside the bankruptcy process, the whole purpose of taking security being to enable the creditor to have recourse to specific assets for payment of his debt without having to share them with other creditors. But s. 269(1) IA 1986 provides as follows:

> "**269 Creditor with security**
>
> (1) A debt which is the debt, or one of the debts, in respect of which a creditor's petition is presented need not be unsecured if either—
>
> (a) the petition contains a statement by the person having the right to enforce the security that he is willing, in the event of a bankruptcy order being made, to give up his security for the benefit of all the bankrupt's creditors, or
>
> (b) the petition is expressed not to be made in respect of the secured part of the debt and contains a statement by that person of the estimated value at the date of the petition of the security for the secured part of the debt.
>
> (2) In a case falling within subsection (1)(b) the secured and unsecured parts of the debt are to be treated for the purposes of sections 267 to 270 as separate debts."

This means that a secured creditor can still present a petition by complying with s. 269(1)(a) or (b), and where the security is expected to be of little or no value, so that the creditor is effectively in the same position as unsecured creditors, the creditor may well wish to do one or the other and pursue bankruptcy proceedings.

53. It is also true that the Bank, which claimed to be a creditor under the guarantee and which had security for that claim, did not comply with either s. 269(1)(a) or s. 269(1)(b), although the Bank's evidence was that it had already decided to waive the security in the event of a bankruptcy order being made as it considered that it was unlikely to see any benefit from it.

54. The position therefore, as DJ Hart correctly held, was that since the Bank had not taken

advantage of s. 269(1)(a) or (b), the requirement in s. 267(2)(b) that the debt be unsecured applied. Since that was not complied with, it followed that the bankruptcy order should not have been made. To that extent there was indeed a defect in the proceedings.

55. But for the reasons I have already discussed above, this defect was not in my judgement such as to deprive the Court of jurisdiction. It was a failing by the Bank, but the Bank could have petitioned had it complied with s. 269, and the Court could have made Mr Khan bankrupt on its petition. In terms of the analysis I have adopted above it was a case where the Bank's failure to comply with the statutory requirements meant that the Court ought not to have exercised the power it had to make Mr Khan bankrupt, not a case where the Court lacked power to make a bankruptcy order against Mr Khan at all.

56. This is in line with the decision of Farwell J in *re Small* [1934] Ch 541. That was another case where a bank which in fact held security for a debt presented a petition as if it were an unsecured creditor, and an order was made on the petition in 1927 (in that case for administration of the deceased debtor's estate). In 1934 the bank applied to amend its petition by deleting the statement that it had no security and substituting a statement that it had security which it sought to value. The question in effect was whether the failure to mention the security made the proceedings in the administration incurably bad. Farwell J held that that was not the case and permitted the amendment. That could only have been done if the Court had had jurisdiction to make the order in the first place.

57. To similar effect is the decision of David Richards J in *Barclays Bank plc v Mogg* [2003] EWHC 2645 (Ch), another case where a bank that held security for a debt petitioned on the basis that it was unsecured and without complying with s. 269(1). David Richards J allowed an appeal against a dismissal of the petition and permitted the Bank to amend it, saying that disclosure of security in a bankruptcy petition is an important matter (at [15]), but that the importance of compliance with s. 269 does not lead to the automatic conclusion that a bankruptcy petition which fails to comply with it must be dismissed and cannot be cured by amendment (at [17]).

58. I therefore consider that this ground of appeal should be dismissed. The present case was not one where the Court lacked all jurisdiction to make a bankruptcy order against Mr Khan such that the order fell to be set aside as of right as in the COMI cases. It was, rather, one where the bankruptcy order ought not to have been made, with the result that the Court had a discretion whether to annul the bankruptcy in accordance with s. 282(1)(a) IA 1986, a section which plainly confers a discretion, as stated by this Court in *Owo-Samson v Barclays Bank plc (No. 1)* [2003] EWCA Civ 714 (***"Owo-Samson"***): see per Carnwath LJ at [35].

Ground 1 – is there an exceptional circumstances test?

59. Ground 1 of the appeal is that where a bankruptcy order ought not to have been made and was an abuse of the process of the Court, the Court should only decline to annul it in exceptional circumstances.

60. There is of course nothing in s. 282(1) IA 1986 itself which provides for this. That may be compared with (for example) s. 335A(3) IA 1986 which provides that where an application is made for the sale of land in which the bankrupt had an interest, the Court

shall assume, if a year has elapsed since the interest first vested in a trustee, that the interests of creditors outweigh all other considerations unless the circumstances are exceptional.

61. Mr Ijezie based his argument on two decisions of the High Court. The first was that of Neuberger J (as he then was) in *Guinan III v Caldwell Associates Ltd* [2004] EWHC 3348 (Ch) (***"Guinan"***), the second that of Hildyard J in *Mowbray v Sanders* [2015] EWHC 296 (Ch) (***"Mowbray"***).

62. *Guinan* was another case where annulment was sought on the basis (primarily) that the petition debt was disputed. It was common ground that even if it was established that the debt was disputed the Court still had a discretion whether to annul, something that Neuberger J said was clearly right (at [11]). In the event Neuberger J found that the debt was disputed on sufficiently substantial grounds. He continued:

> "49. As I have mentioned, there is a discretion even if there is an arguable case, but it seems to me that unless there are special circumstances such as other creditors who have undoubted debts, or clear other evidence of insolvency, or facts such as were before the Court of Appeal in *Askew v Peter Dominic Ltd* [1997] BPIR 163, namely that the debt in question was not challenged, then it seems to me, save in exceptional circumstances, that it must be right not to uphold a bankruptcy order. "

63. I do not read Neuberger J in this passage as saying that the discretion not to annul a bankruptcy order should only be exercised in exceptional circumstances. I read it as saying that there must be *something* to set in the scales against annulment, whether that be other creditors with undoubted debts, or other evidence of insolvency, or that the debt was not challenged, or something else; and that in the absence of anything of that nature, one would normally expect the bankruptcy order to be annulled, and the circumstances would have to be unusual not to do so. Read in this way, I do not find it a surprising proposition. That was I think how Mr Mohyuddin read it, as he commented that the headnote (which suggested that one always needed exceptional circumstances) did not accurately reflect what Neuberger J said: HC Judgment at [53].

64. *Mowbray* was another case where annulment was sought on the basis that the petition debt was in fact disputed on substantial grounds. Hildyard J said this:

> "81. In my view, and although the discretion to do so is broadly stated, it is only in exceptional circumstances that it is right to decline to grant an annulment if it is demonstrated that a dispute as to the petition debt was genuine and on substantial grounds, and thus could not properly be the basis of an order of bankruptcy on that petition, so that the bankruptcy order ought not to have been made: and see per Neuberger J in [*Guinan*] at para [49].
>
> 82. However, there is no doubt that even in such circumstances, the court is not only not bound to exercise its discretion by annulling the bankruptcy order, but is always concerned to be satisfied that by making an annulment order it would not be acting to the detriment of other creditors with undoubted debts, or for no good purpose (for

> example, because there is clear other evidence of insolvency). *Askew v Peter Dominic Ltd* [above] provides confirmation of this, and an example; so does *Re Coney (A Bankrupt)* [1998] BPIR 333, ChD.
>
> 83. Thus, the fact that I have reached a different conclusion than did the Deputy District Judge on the principal issues as to whether the conditions of section 282(1)(a) are satisfied, the question which she addressed in her final alternative way of determining the matter and in case she was wrong as to the validity of the petition debt (see paragraphs 48 and 49 of her judgment), is substantially the same: whether the interests of creditors or the entitlement of the First Respondent to payment of his proper costs and expenses outweigh the obvious logic in setting aside an order which should not have been made."

65. Read by itself, [81] does suggest that, at any rate where the ground of annulment is that the petition debt is disputed on substantial grounds, exceptional circumstances are required before an annulment is refused. But this has to be read (i) with the reference to *Guinan*, which does not say this, and (ii) with what Hildyard J says in [82], namely that the Court will be concerned to be satisfied that an annulment order would not be to the detriment of other creditors or where there is clear other evidence of insolvency. Those do not seem to me to be "exceptional" circumstances; there will no doubt often be other creditors or other clear evidence of insolvency where an application is based on s. 282(1)(a) rather than s. 282(1)(b) IA 1986. And it also has to be read with what Hildyard J says in [83] where he refers to the question whether the interests of creditors (or the entitlement of the trustee in that case to payment of his proper costs and expenses) "outweigh the obvious logic in setting aside an order which should not have been made".

66. In those circumstances I do not think Hildyard J was seeking to lay down any different test from that of Neuberger J in *Guinan*. If I can express it in my own words, the Court has a discretion to be exercised having regard to all the circumstances; but where the Court has concluded that the bankruptcy order ought not to have been made, there must usually be something of some weight to put in the scales on the other side before that fact is outweighed and an annulment refused. I do not think it is right to say that that has to be exceptional; but it does have to be something sufficient to lead to the conclusion that annulment should be refused. This was effectively the view taken by Mr Mohyuddin: see HC Judgment at [104].

67. In practice the most significant consideration is likely to be the question of the applicant's solvency. If there are debts which can be pursued against the debtor and which he cannot meet, then there is usually little benefit to anyone in granting an annulment. This is, as Mr Brown said, a consistent theme which runs through the cases: see *re Davenport* [1963] 1 WLR 817 at 819f per Lord Denning MR, *Artman v Artman* [1996] BPIR 511 (***"Artman"***) at 517 per Robert Walker J, *Owo-Samson* at [35] per Carnwath LJ, *Guinan* at [49] per Neuberger J, *JSC Bank of Moscow v Kekhman* [2015] EWHC 396 (Ch), [2015] 1 WLR 3737 at [74] per Morgan J, and *Mowbray* at [82] per Hildyard J.

68. In the present case Mr Khan challenged DJ Hart's conclusions on solvency before Mr

Mohyuddin, but the appeal on that ground was dismissed (paragraph 14 above). Mr Ijezie told us that Mr Khan still wished to challenge this conclusion. But that is not something for which permission has been granted (or even sought) on this appeal, and we cannot go into the question.

69. Mr Brown also submitted that the conduct of the bankrupt and the extent of his co-operation with the trustee was an important factor, relying on *Artman*. In that case Robert Walker J (as he then was) concluded that the question of annulment did not arise, but said that if it had he would have been very strongly disposed against it for three reasons in particular. The first of these was as follows (at 516f):

> "First, there is, even with Mr Artman's invocation of the privilege of self-incrimination, strong prima facie evidence that Mr Artman has concealed assets from his trustee in bankruptcy in circumstances amounting to one or more bankruptcy offences, under Part IX, Chapter VI of the Insolvency Act 1986. It would strongly offend my sense of what is right and proper if the annulment of the bankruptcy were to prevent, or in any way hinder, the investigation and the taking of appropriate action in respect of this serious matter."

70. As can be seen, in that case there was strong evidence of bankruptcy offences having been committed. By s. 350(2) IA 1986 such offences can be committed whether or not the bankruptcy is annulled, but proceedings for such an offence cannot be instituted after the annulment. The point Robert Walker J was making therefore was that if Mr Artman's bankruptcy were annulled he would avoid any investigation or prosecution for what he described as "this serious matter".

71. That does not seem to me to justify the conclusion that the question of the bankrupt's conduct is important in every case. In the present case Mr Ian Tucker, who appeared for the Trustee, confirmed that the case before DJ Hart had not been advanced on the basis that Mr Khan had committed offences, the high point of the submissions having been that his alleged misconduct was towards the more serious end of the scale. I think a note of caution is in order: the question whether a bankrupt has co-operated with a trustee, or has been obstructive or worse, is often a highly contentious one involving a protracted factual inquiry. It seems to me that the Court should be careful not to allow annulment applications to be unduly taken up with or diverted by issues of conduct that may involve extensive oral evidence, especially where such allegations are really being ventilated as a prelude to arguing over who should pay for the trustee's costs and expenses.

72. Be that as it may, the only question that arises on Ground 1 of the appeal is whether it is necessary to show exceptional circumstances before an application for annulment is refused. For the reasons I have given I do not think it is. I agree with Mr Mohyuddin that DJ Hart did not err in her approach to the question, and I would dismiss this ground of appeal.

Ground 3 – Limitation

73. Ground 3 concerns the limitation question, namely whether the effect of an annulment is to put the creditor and debtor in the same position as if the debtor had never been made bankrupt, with the result that time is deemed to have run throughout the period

between the making of the bankruptcy order and the annulment, or whether the effect is that time resumes running from the date of the annulment order. If for example a simple debt accrues in 2010, the debtor is made bankrupt 2 years later in 2012, and his bankruptcy annulled three years after that in 2015, does the creditor have 1 year left to sue, or 4?

74. I do not think we need to decide this. DJ Hart made it clear that she was not doing so, as it made no difference to her analysis. This was that if the effect of an annulment was that the limitation period would be deemed to have run throughout, the Bank would be prejudiced by annulment as its claim on the personal indebtedness would now be statute-barred; whereas if the effect of an annulment was that time did not run between the bankruptcy order and annulment but resumed running on annulment, there would be nothing to be gained from an annulment as the Bank would present another petition and there was no evidence that Mr Khan was in a position to pay (see paragraph 11(4) above). That seems to me a cogent analysis that by itself justified her overall conclusion. Ground 3 of the grounds of appeal criticises her for saying that there might be other unsecured creditors affected by limitation (see paragraph 11(5) above), but this cannot have made all the difference to her decision and I do not see that she was wrong to say it was another possible consequence.

75. Moreover we received quite limited submissions on the point, and by the end of the argument none of the parties before us sought to uphold the decision of Mr Mohyuddin that the effect of the annulment was that time was deemed to have run between the date of the bankruptcy order and annulment.

76. In those circumstances I do not propose to examine the question at any length, but on the limited material we saw I think Mr Mohyuddin's decision is open to doubt. It is true that it has, in other contexts, been said that the general effect of an annulment is to "remit the party whose bankruptcy is set aside to his original situation" (*Bailey v Johnson* (1872) LR 7 Ex 263 at 265 per Cockburn CJ); or that when a bankruptcy order is annulled it is "annulled *ab initio* save for the certain matters which are specifically dealt with in the rules" (*Choudhury v Inland Revenue* [2000] BPIR 246 at 250 per Aldous LJ). But these are statements of general principle, and I do not think can necessarily be applied to the question of the running of time.

77. It is not disputed that once a bankruptcy order is made the creditors in the bankruptcy no longer have a right to bring an action against the debtor. This is the effect of s. 285(3)(b) IA 1986 which provides:

> "(3) After the making of a bankruptcy order no person who is a creditor of the bankrupt in respect of a debt provable in the bankruptcy shall—
>
> …
>
> (b) before the discharge of the bankrupt, commence any action or other legal proceedings against the bankrupt except with the leave of the court and on such terms as the court may impose."

78. The corollary of this is that if a provable debt is not statute-barred at the commencement of the bankruptcy, it does not become barred by lapse of time thereafter, at any rate for

the purposes of proof and distribution in the bankruptcy: see *re Benzon* [1914] 2 Ch 68 at 75 per Channel J giving the judgment of this Court. That is of course consistent with the nature of bankruptcy as a collective process for the benefit of unsecured creditors (or, to be more accurate, those with provable claims). It would be inconsistent with that collective process for individual creditors to be able to take action to enforce their claims; and it seems to me that it would be equally inconsistent with it for them to be required to do so to preserve their claims from becoming statute-barred. It can therefore be seen that this *prima facie* bar on bringing an action for claims within the bankruptcy is a necessary part of the legislative scheme. (That can be contrasted with claims outside the bankruptcy such as claims by secured creditors to enforce their security, where time continues to run normally: *Cotterell v Price* [1960] 1 WLR 1097 at 1105 per Buckley J.)

79. On the face of it therefore it would seem very unfair on a creditor with a provable claim to find that on annulment time had run during the bankruptcy despite the fact that during that period he could not have brought an action to stop time running. It is true that s. 265(3)(b) IA 1986 contemplates that an individual creditor can bring an action with the leave of the Court, but it can scarcely be said to be an attractive idea that unsecured creditors should in every bankruptcy routinely have to apply for such leave, and the Court routinely have to grant it, solely to guard against the possibility that otherwise the bankruptcy might be annulled at some future date when their claims had become statute-barred. That would mean that well-advised creditors would have to incur costs on applying for leave and then initiating proceedings, despite the fact that in the vast majority of cases such proceedings would be entirely futile.

80. Mr Brown at one point suggested that the solution to this problem might lie in the Court that annuls a bankruptcy order making a direction under s. 282(4) IA 1986 that the limitation period should be deemed not to have run in the period between bankruptcy order and annulment. That section provides as follows:

> "(4) Where the court annuls a bankruptcy order (whether under this section or under section 261 in Part VIII)—
>
> …
>
> and the court may include in its order such supplemental provisions as may be authorised by the rules."

But it was not suggested that there was anything in the rules which could be said to authorise any such direction, which would seem to make it difficult to rely on this provision.

81. In those circumstances I think there is much to be said for the submission by Mr Ijezie, not ultimately dissented from by Mr Brown, that the effect of an annulment is that time resumes running on the date of annulment but is treated as not having run during the period between the making of the bankruptcy order and then. As Mr Ijezie pointed out, this was the submission made by counsel in *re Dennis* [1895] 2 QB 630 at 631 ("Directly the receiving order is rescinded the creditor's right of action revives, and the statute begins to run."), although Vaughan Williams J did not have to decide the point.

82. However I am conscious that this is a matter of the law of limitation as much as it is a

matter of the law of bankruptcy. We were not shown any of the jurisprudence on the general principles applicable to limitation, although it appears that there are authorities that might be thought to bear on the point: see for example the cases discussed by Mr John Jarvis QC in *Anglo-Manx Group Ltd v Aitken* [2002] BPIR 215.

83. In those circumstances I do not propose to decide the point and I will leave it to a case where it needs to be decided. I will therefore simply say that I am not satisfied that the conclusion reached by Mr Mohyuddin on this point is correct, and would prefer to leave the matter open.

Conclusion

84. For the reasons I have given, I would conclude that none of the grounds of appeal assists Mr Khan, and I would dismiss the appeal.

Lord Justice Snowden:

85. I agree.

Lord Justice Lewis:

86. I also agree.