Neutral Citation Number: [2022] EWHC 1913 (Ch)

Appeal Ref: CH-2021-000208

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY APPEALS (ChD)

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

Date: 21 July 2022

Before :

David Mohyuddin QC sitting as a Deputy Judge of the High Court

- -

Between :

MR MOHAMMAD RAZI KHAN	**Appellant**
- and –	
(1) MS ARVINDER SINGH-SALL (the Trustee in Bankruptcy of Mr Mohammad Razi Khan)	
(2) HABIB BANK AG ZURICH	**Respondents**

- -
- -

Professor Mark Watson-Gandy (instructed by **Sky Solicitors**) for the **Appellant**
Mr Andrew Brown (instructed by **Harrison Clark Rickerbys**) for the **Second Respondent**
The **First Respondent** was not represented

Hearing dates: 29 and 30 March 2022
Written submissions: 5 April 2022

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

DAVID MOHYUDDIN QC :

Introduction

1. Mr Mohammad Razi Khan, the Appellant ('**Mr Khan**') was the sole shareholder and director of Geno Services Limited ('**Geno**'). He also traded on his own account as Afreen Properties ('**Afreen**').

2. Habib Bank AG Zurich, the Second Respondent ('**Habib**') extended credit to both Mr Khan personally ('**Personal Debt**') and Geno. On 2 October 2000, Mr Khan signed a personal guarantee ('**Guarantee**') in favour of the bank in respect of Geno's indebtedness ('**Guarantee Debt**'). Further credit was extended to Geno in 2005.

3. The Bank obtained security in respect of the Guarantee Debt in the form of second charges over Mr Kahn's properties at 16 Summerville Avenue, Manchester ('**Summerville**') and Flat 1, 7 Westville, Brixham ('**Westville**'). The Bank separately had a charge over Westville in respect of the Personal Debt.

4. On 13 January 2015, Geno was struck off the Register of Companies for a filing default and dissolved. Shortly after that, on 22 January 2015, Habib demanded repayment under the Guarantee of £223,539 and of Mr Khan's personal indebtedness of £558,888.52.

5. Habib says that it served a statutory demand for the Guarantee Debt of £234,459.16 on 10 February 2016. The statutory demand did, however, found a bankruptcy petition presented to the County Court at Slough by Habib on 9 May 2016. The petition was deemed served in accordance with an order for substituted service dated 16 August 2017.

6. In August 2016, Mr Khan moved to take up employment in Pakistan.

7. Habib's petition came on for hearing on 16 January 2018 before District Judge Parker. Mr Khan applied for an adjournment but it was refused. He was adjudged bankrupt.

8. Mr Khan sought to appeal against the bankruptcy order, but permission to do so was refused by Rose J on paper on 20 March 2018.

9. Ms Arvinder Singh-Sall, the First Respondent ('**Trustee**') was appointed as his trustee in bankruptcy on 23 April 2018.

10. Mr Khan's application for permission to appeal was renewed orally on 3 May 2018 and refused, again by Rose J.

11. Then, on 9 July 2018, Mr Khan applied to annul his bankruptcy ('**Annulment Application**'). Pending the outcome of that application, the sale of two of his properties (Summerville and 8 Staveley Road, London ('**Staveley**')) was stayed by Order made by District Judge Lambert on 26 March 2019 who also gave directions by Order made on 9 April 2019 including listing the Annulment Application for hearing on 3 February 2020 and ordering witnesses to attend for cross-examination. Mr Khan applied for that hearing to be adjourned "on health grounds" and it was relisted for 29 April 2020. He

asked for a further adjournment on the grounds of ill-health which District Judge Mauger granted by Order dated 17 April 2020.

12. Mr Khan's Annulment Application came before District Judge Hart sitting at the County Court at Central London on 5 May 2021. It seems that, initially, he made his application pursuant to section 282(1)(a) and (b) of the Insolvency Act 1986 ('**1986 Act**') but shortly before his application was heard he abandoned the part of the Annulment Application that was made pursuant to section 282(1)(b).

13. Section 282(1)(a) of the 1986 Act confers a discretion on the Court and is in these terms:

> "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…"

14. Mr Khan was cross-examined, as were two witnesses called by the Bank, Mr Sayed and Mr Abbas. The Trustee was neutral. The hearing lasted three days.

15. There were four grounds upon which Mr Khan sought to have his bankruptcy annulled:

    i) the application to adjourn the hearing of the Bank's petition for his bankruptcy should have been granted;

    ii) the statutory demand which founded the bankruptcy petition had not been validly served in accordance with rule 6.3(2) of the Insolvency Rules 1986 ('**1986 Rules**'), which were the rules then in force;

    iii) neither the statutory demand nor the bankruptcy petition provided details of the security held by the Bank over Mr Khan's property, in breach of rules 6.5(1) and 6.8(1) of the 1986 Rules and sections 267 and 269 of the 1986 Act; and

    iv) the debt stated in the Bank's petition was disputed on substantial grounds.

16. In a 99 paragraph written judgment dated 26 August 2021, the very experienced District Judge set out her reasons for dismissing the annulment application. She made introductory comments in paragraphs 1-4, setting out the principles governing what points it was open to Mr Khan to take. There is no suggestion that she misdirected herself in that regard. In paragraphs 5-8 she set out the background and identified the four grounds upon which the annulment application was pursued. She identified the evidence before her in paragraphs 9-11.

17. In paragraphs 12-15, she concluded that the question whether the hearing of the bankruptcy petition should have been adjourned had already been considered and had been dealt with in an appeal process (permission to appeal having been refused as I have already said) and therefore it was not open to her to reconsider it. There is no attempt to appeal that conclusion.

18. In paragraphs 16-25, she concluded that the statutory demand had been validly served. There is no appeal against that conclusion.

19. In paragraphs 26-39, she dealt with Mr Khan's point that Habib had failed to disclose the fact that it held security over Summerville and Westville. Rather, the bankruptcy petition stated in terms: "6. We do not, nor does any person on our behalf, hold any security on the debtor's estate, or any part thereof, for the payment of the above-mentioned sum."

20. The District Judge concluded that, if the annulment application were to succeed and the petition were to be re-listed, Habib could apply to amend the petition and would be likely to succeed in obtaining permission to do so. However, she observed that until the petition was amended (which itself depended on the petition being re-listed rather than dismissed subsequent to a successful annulment), the mandatory requirements of IA86, ss 267 and 269 had not been met. Therefore, she said, at the time the bankruptcy order was made it ought not to have been.

21. In paragraphs 40-75, the District Judge dealt with the fourth of Mr Khan's grounds in support of his annulment application, that the petition debt was disputed on substantial grounds. She directed herself, correctly, that the test which Mr Khan had to meet was a low one. She concluded that, although he might face an up-hill task, there was a genuine triable issue and that, therefore, the petition debt was disputed on substantial grounds. It followed, as she set out in paragraph 76, that the bankruptcy order ought not to have been made also because the debt was disputed.

22. The District Judge then turned in paragraph 76 to consider how to exercise her discretion under section 282(1)(a) of the 1986 Act, her discretion having been triggered by the conclusion that, on two separate grounds, the bankruptcy order should not have been made. She said that she was given no guidance on how to exercise her discretion by IA86, s 282(1) itself. She identified relevant factors as including but not being limited to:

    i) the effect of the bankruptcy both on Mr Khan and his creditors;

    ii) any element of abuse of process in obtaining or making the bankruptcy order;

    iii) Mr Khan's conduct in the bankruptcy;

    iv) whether Mr Khan was or remained hopelessly insolvent;

    v) the amount of time that had passed since the making of the bankruptcy order.

23. In paragraphs 77-78, she noted the significance of the effect of the bankruptcy on Mr Khan. In particular in paragraph 77 she said:

> "[Counsel for Mr Khan] submits that the court should give substantial weight to the fact that this was a bankruptcy order that ought not to have been made on two distinct grounds. It is submitted that the court should bear in mind the cumulative effect of these faults in addition to the harshness of the fact that Mr. Khan was made bankrupt at the first hearing, which it is submitted would have been avoided had he received

> the petition in time to arrange for legal representation. It is submitted that it would be exceptional not to annul in such circumstances. I accept that these are significant factors."

24. In paragraphs 79-91 she found that there had been a significant lack of co-operation on Mr Khan's part which was not excused by the fact that she had concluded that the bankruptcy order against him should not have been made. In particular, she criticised his attempt to divert rental income away from the bankruptcy estate, his delay in attending for, and then signing the record of his interview with the Official Receiver and the piecemeal way he had answered the Trustee's enquiries, insofar as they had been answered. The District Judge rejected the Trustee's criticism in respect of the valuation evidence obtained by Mr Khan and the criticism that he sought a stay pending the determination of the annulment application, the delay caused by his own ill-health and the COVID pandemic not being his fault. As for any increase in costs occasioned by his obstruction, she noted that she could require Mr Khan to pay an appropriate proportion of the Trustee's costs as a condition of annulment.

25. Having dealt with the various complaints made against him, the District Judge concluded that his conduct had "negatively impacted the Trustee's investigations of his assets and liabilities" and had "disrupted the collection of income for the benefit of creditors pari passu". She said that the conduct was "sustained and deliberate." She said that "there remain aspects of Mr Khan's affairs in relation to which further investigations by the Trustee may be appropriate." She gave the example of a first charge which had been granted to an associate of Mr Khan's over Summerville. She concluded that there was a "realistic possibility that the Trustee is still not fully apprised of all the liabilities and assets of the estate (including those out of the jurisdiction). This is an administration where it can legitimately be said that it is appropriate for the Trustee to remain in office in order to conclude her investigations."

26. Then, in paragraphs 92-98, the District Judge dealt with Mr Khan's solvency and the potential for claims to be statute-barred and therefore unable to found a further petition. She concluded that Mr Khan was insolvent when the bankruptcy order was made and that the position as to solvency would be worsened by Mr Khan being ordered by reason of his conduct to pay "a significant contribution to the Trustee's costs and expenses" if the bankruptcy was annulled; that he would be the subject of a fresh petition by Habib for the Personal Debt if it was not statute-barred and, if it was, that would militate against annulment because it would be unfair to deprive Habib of the ability to present a petition based on the Personal Debt (even though Habib was not contending that that would be effect of annulment); other third party unsecured creditors likewise should not be left with an unenforceable claim by reason of the passage of time.

27. Finally, in paragraph 99, the District Judge said that she had considered all the circumstances, including particularly the significant impact of the bankruptcy order on Mr Khan and the fact that there were two grounds on which it should not have been made. She said, however, that, when balanced against the impact of his conduct on the administration of his estate and the interests of his creditors, she had concluded that "this is a case where the discretion to annul should not be exercised" and dismissed the application.

28. Consequently upon her judgment, she made an order on 26 August 2021:

i) refusing and dismissing the Annulment Application;

ii) ordering Mr Khan to pay 50% of Habib's costs and all of the Trustee's costs;

iii) ordering Mr Khan to pay £20,000 to each of Habib and the Trustee on account of those costs;

iv) discharging the stay on the sales of Summerville and Staveley; and

v) refusing permission to appeal.

29. By Order made on 5 October 2021, Fancourt J stayed those paragraphs of the District Judge's Order which required Mr Khan to pay £20,000 on account of the order that he pay 50% of the Bank's costs and which lifted the stay on the sale of Summerville and Staveley.

30. By the same Order, Fancourt J refused Mr Khan's application for a transcript of the hearing before and judgment of the District Judge to be provided at public expense.

31. Permission for Mr Khan's appeal was granted by Fancourt J by Order made on 2 November 2021 which also granted Mr Khan's application to adduce further evidence, limited to evidence:

i) that proves payments made to secured or unsecured creditors of Mr Khan by his wife since 28 May 2019 and

ii) of up to date desktop valuations of his two remaining properties.

32. The appeal came on for hearing before me on 29 and 30 March 2022. Mr Khan was represented by Professor Mark Watson-Gandy of Counsel and the Bank by Mr Andrew Brown of Counsel. The Trustee had been neutral on Mr Khan's annulment application and was not represented before me.

33. At the conclusion of the hearing I asked for written submissions to be provided to me on a point which had arisen during the hearing.

34. In the course of preparing this judgment, I have also dealt with a further request for a transcript of the evidence heard by the District Judge, which I refused for the reasons I then gave.

35. I am grateful to Professor Watson-Gandy and to Mr Brown for their helpful oral and written submissions and to the parties for bearing with me whilst I prepared this judgment.

Grounds of Appeal

36. Mr Khan relies on six grounds of appeal. He said that the District Judge erred in law and on the facts when:

i) she failed to appreciate that where the bankruptcy order ought not to have been made and/or had been made in an abuse of the process of the Court an annulment

should only be refused in exceptional circumstances because the whole foundation of the bankruptcy had gone;

ii) she found that Mr Khan's conduct had been oppressive and failed to give sufficient weight to his co-operation;

iii) she found that there had been delay when there was no limitation period for his application and when there had in fact been no delay;

iv) she found that he did not have sufficient liquidity immediately to meet a fresh petition presented by the Bank when in fact he could;

v) she inferred that some of his creditors might be prejudiced by the annulment because some of them might have debts that had become time barred since the making of the bankruptcy order when she should have recognised that the limitation period on a bankruptcy debt is suspended during the period of the bankruptcy and only restarted on annulment;

vi) she found that refusing the annulment would assist the Trustee in continuing her investigations when Mr Khan when, indicating that there was no intention to continue to investigate, he had been discharged from bankruptcy in January 2020 and further examination of him had been dispensed with by the Trustee.

37. These Grounds of Appeal all seek to undermine the District Judge's exercise of the discretion conferred by section 282(1)(a) of the 1986 Act and some ask me to conclude that she reached a conclusion on the facts to which she was not entitled on the basis of the evidence put before her.

38. When considering an appeal against a lower court's exercise of discretion, the following principles are to be borne in mind:

i) Every appeal will be limited to a review of the decision of the lower court unless (a) a practice direction makes different provision for a particular category of appeal or (b) the court considers that in the circumstances of an individual appeal it would be in the interests of justice to hold a re-hearing. See CPR 51.21(1).

ii) The general rule is that appeals at all levels will be by way of review. See *Audergon v La Baguette Ltd* [2002] EWCA Civ 10 at [83.1] *per* Jonathan Parker LJ with whom the other members of the court agreed.

iii) The appeal court will allow an appeal where the decision of the lower court was (a) wrong or (b) unjust because of a serious procedural or other irregularity in the proceedings in the lower court. See CPR 52.21(3).

iv) As was set out by Brooke LJ in *Tanfern Ltd v Cameron-Macdonald and another: Practice Note* [2000] 1 WLR 1311 at [32] in respect of what used to be called "interlocutory appeals":

> "If the appeal is against the exercise of a discretion by the lower court, the decision of the House of Lords in *G v G (Minors:*

Custody Appeal) [1985] 1 WLR 647 warrants attention. In that case Lord Fraser of Tullybelton said, at p.652:

> 'Certainly it would not be useful to inquire whether different shades of meaning are intended to be conveyed by words such as 'blatant error' used by the President in the present case, and words such as 'clearly wrong,' 'plainly wrong,' or simply 'wrong' used by other judges in other cases. All these various expressions were used in order to emphasise the point that the appellate court should only interfere when they consider that the judge of first instance has not merely preferred an imperfect solution which is different from another imperfect solution which the Court of Appeal might or would have adopted, but has exceeded the generous ambit within which a reasonable disagreement is possible.'"

v) As set out by Saini J in *Azam v University Hospital Birmingham NHS Foundation Trust* [2020] EWHC 3384 (QB) (an appeal from a decision of a circuit judge) at [50]-[52]:

> 50. An appellate court will only interfere with a discretionary evaluation where an appellant can identify one or more of the follows errors:
>
> (i) a misdirection in law;
>
> (ii) some procedural unfairness or irregularity;
>
> (iii) that the Judge took into account irrelevant matters;
>
> (iv) that the Judge failed to take account of relevant matters; or
>
> (v) that the Judge made a decision which was "plainly wrong".
>
> 51. Error type (v) requires some elaboration. This means a decision which has exceeded the generous ambit within which reasonable disagreement is possible.
>
> 52. So, even if the appeal court would have preferred a different answer, unless the judge's decision was plainly wrong, it will be left undisturbed. Using terms such as "perversity" or "irrationality" are merely likely to cause confusion. What is clear is that the hurdle for an appellant is a high one whenever a challenge is made to the

> outcome of a discretionary balancing exercise. The appellate court's role is to police a very wide perimeter and it will be rare that a judge who has exercised a discretion having regard to relevant considerations will have come to a conclusion outside that perimeter. I would add that an appellate court is unlikely to be assisted in such challenges by a simple re-argument of the points made to the judge below. It needs to be underlined that an appellate court in an appeal such as the present is exercising a CPR 52.21(1) "review" power. It is also well-established that the weight to be given to specific factors is a matter for the trial judge and absent some wholly unjustifiable attribution of weight, an appellate court must defer to the trial judge.

39. In the present case:

    i) there has been no suggestion that I should depart from the normal approach of conducting a review of the decision of the lower court;

    ii) even though Mr Khan asserts that his appeal should be allowed because the decision below was wrong and unjust because of a serious procedural irregularity, he did not identify that alleged irregularity. His case before me was that the decision of the Learned District Judge was wrong;

    iii) it was accepted by Professor Watson-Gandy on behalf of Mr Khan that a discretion existed; the appeal was against the District Judge's approach to how to exercise it.

Respondent's Notice

40. By a Respondent's Notice dated 2 December 2021, Habib contends that there are the following additional or alternative grounds for upholding District Judge Hart's decision:

    i) if an annulment should be refused only if there are exceptional grounds, such grounds exist in the present case;

    ii) the effect of the extended period of the bankruptcy is such as potentially to prejudice the Bank and other unsecured creditors of Mr Khan because their claims will have become time-barred under the Limitation Act 1980;

    iii) if the Bank's claim was not time-barred, there would be no point in the annulment because Mr Khan would be unable to avoid a subsequent bankruptcy petition presented by the Bank.

Ground 1: wrong test

41. The first ground of appeal was that the District Judge had applied the wrong test. I heard submissions on that ground separately to the others because it seemed to me that if it was made out that would be sufficient for the appeal to succeed.

Parties' submissions

42. In paragraph 26 of his skeleton argument, on behalf of Mr Khan, Professor Watson-Gandy said:

> "Where the underlying bankruptcy order ought never have been made or was an abuse of process, the court should only decline to annul it in exceptional circumstances; the principle being that where the whole foundation of the bankruptcy has gone it should not, save in exceptional circumstances, stand…"

43. He relied upon the following authorities:

    i) *Re Davenport* [1963] 2 All ER 850, [1963] 1 WLR 817;

    ii) *Re Noble (a bankrupt)* [1965] Ch 129 at 145-146;

    iii) *Mowbray v Sanders* [2015] EWHC 296 (Ch);

    iv) *Raiffeisenlandesbank Oberösterrich AG v Meyden* [2016] BPIR 697;

    v) *Deutsche Apotheker-Und Artzebank EG v Leitzbach & The Official Receiver* [2018] EWHC 1544 (Ch);

    vi) *Artman v Artman* [1996] BPIR 511 (first instance) and [1997] Lexis Citation 2709 (permission to appeal).

44. Professor Watson-Gandy said that the District Judge had made no finding of any exceptional circumstances and when weighing factors in the exercise of her discretion gave no "special weight" to their absence. She did not include it in the list of factors that she said had to be taken into account (paragraph 76), she had conflated the consideration with the financial effect on the bankrupt (paragraphs 77-78) and, whilst she noted that exceptional circumstances were needed, she made no ruling on whether she would adopt or apply that test (paragraph 77).

45. Mr Brown submitted that it was incorrect to say that a discretion to dismiss the annulment application should be exercised only in exceptional circumstances. He said that no exceptional circumstances test arose from the wording of section 282(1)(a) of the 1986 Act and that Mr Khan was seeking to interpolate words into the statutory provision when there was no foundation to do so. He sought to contrast other provisions of the 1986 Act where there was an express exceptional circumstances test or where other words justified reading in such a test. He said that the discretion to annul a bankruptcy has existed since the Bankruptcy Act 1869 but there is no line of authority suggesting that there is a presumption in favour of annulment except in exceptional circumstances; the high point was in *Guinan III v Caldwell Associates Limited* [2004] EWHC 3348 (Ch) but even that did not suggest that there was an exceptional circumstances test in the sense for which Mr Khan contended. He also relied on the decisions in:

    i) *Owo-Samson v Barclays Bank plc (No. 1)* [2003] EWCA Civ 714 at [35];

    ii) *JSC Bank of Moscow v Kekhman* [2015] EWHC 396 (Ch) at [74].

46. He said that the authorities relied on by Mr Khan did not support the contention that there was an exceptional circumstances test and that Mr Khan appeared to have misread a number of them. He said that whilst permission to appeal had been granted in *Artman v Artman*, the appeal did not proceed and the decision at first instance had not been overturned. He submitted that there is not and never has been an exceptional circumstances test. He said that the proper approach for the court to take was to consider all of the circumstances when applying its discretion, including:

    i) the conduct of the bankrupt (*Artman v Artman*);

    ii) whether insolvency is inevitable (*Lambert v Forest of Dean DC* [2019] EWHC 1763 (Ch); *Omokwe v HFC Bank Ltd* [2007] BPIR 1157; *Owo-Samson*, above);

    iii) delay in making the application to annul (*Gill v Quinn* [2004] EWHC 883 (Ch));

    iv) whether a petition debt is not disputed otherwise than on a mere technicality or an error on the face of the petition (*Askew v Peter Dominic Ltd* [1997] BPIR 163).

47. Professor Watson-Gandy and Mr Brown made oral submissions consistent with their skeleton arguments.

Does the court have a discretion on an application to annul a bankruptcy order that should never have been made?

48. The starting point is the words of section 282(1)(a) of the 1986 Act: "The court **may** annul a bankruptcy order…" (emphasis added). As was accepted by Professor Watson-Gandy, the court accordingly has a discretion. As explained in *Owo-Samson*, a decision of the Court of Appeal which binds me, at [35]:

> "[T]he word 'may' in [IA 1986 s.282] makes clear that the court's power to annul, even if the grounds are made out, is discretionary. The court is not bound to set aside the petition, particularly if … the creditor is found to have acted reasonably and the debtor has failed to raise defences which were open to him at an earlier stage. In such a case, a critical factor in exercising the discretion … must be the prospects, if the order is annulled, of the debtor being able to satisfy the petitioner and meet his other liabilities."

49. The next authority to consider is *Guinan III*. In that case, Mr Edward Joseph Guinan III was adjudicated bankrupt on the petition of Caldwell Associates Limited. His application to annul his bankruptcy was refused by a district judge. Mr Guinan appealed. The two arguments that had been before the district judge were, first, that Mr Guinan had not been served, properly or at all, with the statutory demand or the bankruptcy petition and, second, that, in any event, there was a genuine dispute as to whether there was a debt at all. There was no appeal on the question whether Mr Guinan was properly served with the statutory demand or the bankruptcy petition. The question on the appeal was whether the debt was genuinely disputed and, if it was, whether the bankruptcy should be annulled.

50. In his Judgment, Neuberger J recorded this at [11]:

> "It is common ground that even if it is established that there was no valid service and/or that the debt is disputed, the court still has a discretion whether or not to annul. That concession seems to be clearly right in light of the wording and in particular the word 'may' in s 282(1) of the Insolvency Act 1986, and any doubt on the point must be put to rest, as [Counsel for Caldwell] rightly says, by the decision of the Court of Appeal, albeit on an application for permission to appeal, in Askew v Peter Dominic Ltd [1997] BPIR 160. Indeed, in that case the statutory demand and bankruptcy petition had been described by His Honour Judge Roger Cook as 'sheer nonsense' – see at 164E – a view which does not seem to have been dissented from by Millet LJ, and yet because the bankrupt 'did not dispute the debt' – see at 164H – His Honour Judge Cook did not set aside the bankruptcy order. The fact that the Court of Appeal thought this was right is shown by the fact that they refused permission to appeal – see at 164H-165A."

51. At [16], the Judge turned to the question whether there was a genuine dispute about the debt. He observed:

> "However, as I mentioned, that is not the end of the matter in this case, because, even if there is a genuine triable issue, that does not automatically mean that I should annul the bankruptcy; I still have a discretion."

52. Having considered the facts, the Judge reached the conclusion that there was a genuine dispute. He ultimately allowed Mr Guinan's appeal and annulled the bankruptcy. At [49] he said:

> "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 a 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."

53. It seems to me that the fourth holding recited in the headnote of the report of the decision in *Guinan* in the BPIR does not quite accurately reflect what the Judge said at [49].

54. Next comes the decision of Morgan J in *JSC Bank of Moscow v Kekhman and others* [2015] EWHC 396 (Ch). According to the report in the Weekly Law Reports, the decision in *Guinan* was not drawn to the Court's attention in *Kekhman*.

55. The facts of *Kekhman* are these. A bankruptcy order had been made on Mr Kekhman's own petition. The JSC Bank, claiming to be one of his creditors, applied to annul his

bankruptcy on the basis that he had failed to show a sufficiently close connection with England and Wales and so the bankruptcy order ought not to have been made, i.e. under section 282(1)(a) of the 1986 Act. The Chief Registrar refused the bank's application. The bank appealed on the basis that he had applied the wrong test and thus erred in law.

56. In a section of his judgment starting at [65], Morgan J considered the court's power to annul a bankruptcy order. At [74] he said:

> "The power to annul under section 282 is discretionary ("the court may annul"). Thus, even if the court is satisfied that on the grounds existing at the date of the bankruptcy order, the order ought not to have been made, the court can still decide not to annul the order. An obvious example would be where the annulment would be pointless, for example, where the circumstances were such that a new bankruptcy order would certainly be made. Another example would be where circumstances had changed following the bankruptcy order making it inappropriate to annul the order. It follows that when considering whether to exercise its discretion to annul an order which it has found ought not to have been made the court will take into account all relevant matters, including matters which have come about after the bankruptcy order was made."

57. At [75], Morgan J went on to refer to *Owo-Samson* as showing the discretionary nature of the jurisdiction to annul.

58. I should also refer to the decision in *Askew v Peter Dominic* [1997] PBIR 163 because, although it is a decision on an application for permission to appeal, it is referred to in *Guinan* and *Mowbray*. Millett LJ, having set out the words of section 282(1) of the 1986 Act, then said at page 164:

> "It will be observed that the first ground (that the order ought not to have been made) permits the court, but does not compel it, to annul the bankruptcy order. The court has a discretion to refuse to annul the order even in a case where it is satisfied that the bankruptcy order ought not to have been made."

59. That observation accords with the later decision in *Owo-Samson*.

60. Were the arguments before me to have rested there, it would be clear that even where a court concludes that a bankruptcy order should not have been made (such that section 282(1)(a) of the 1986 Act is satisfied), it nonetheless has a discretion which it must then exercise.

<u>COMI cases</u>

61. However, Professor Watson-Gandy's citation of the decisions in *Meyden and Leitzbach* gave rise to a debate before me as to how to reconcile those decisions with the other authorities and, in particular, the Court of Appeal's decision in *Owo-Samson*. Because

the point arose during oral submissions, I asked for and received written submissions on the point after the hearing.

62. Those two decisions have in common the fact that the debtor's centre of main interests ('**COMI**') was not in England and Wales. At the time, if the debtor's COMI was not in England and Wales no bankruptcy order could be made for want of jurisdiction.

63. The first is *Raiffeisenlandesbank Oberösterreich AG v Meyden* [2016] EWHC 413 (Ch), [2016] EWHC 414 (Ch). In that case, a bankruptcy order was made against Mr Meyden on his own petition. The Bank applied for an annulment. The Deputy Registrar found that, had the evidence put before him been before the court which heard the petition, it was unlikely that that court would have concluded that Mr Meyden's COMI was in England and Wales. He went on to reject the Bank's argument that, because Mr Meyden's COMI was not in England and Wales, the court lacked jurisdiction to make the bankruptcy order and so he had no discretion whether to annul it but rather that order should be set aside as of right. He said that it would be unusual to refuse to annul in the circumstances before him but he had to take other factors into account in deciding whether the circumstances were exceptional and justified the refusal of an annulment. He found the length of delay to be exceptional and dismissed the Bank's application but granted it permission to appeal.

64. On the appeal, Nugee J accepted as a proposition of the general law that where the court makes an order without jurisdiction any person who might be affected by it is entitled to have that order set aside as of right. He also had cited to him four decisions on annulment applications where the argument was that the debtor's COMI was not in England and Wales and so the court had lacked jurisdiction to make the bankruptcy orders. In each of those cases, the court had proceeded on the basis that it had a discretion under section 282. Nugee J said that in none of those cases had the position under the general law been pointed out. He noted that the Deputy Registrar had proceeded on the basis that Article 4 of Council Regulation (EC) 1346/2000 ('**Insolvency Regulation**') imported both English procedural rules (and so the general rule that where the court makes an order without jurisdiction any person who might be affected by it is entitled to have that order set aside as of right) and section 282 of the Insolvency Act 1986. Thus the question became: does section 282 (and in particular the use of the word "may") displace that general rule? Nugee J said that it did not and so (see at [37]):

> "…the position in relation to the setting aside or annulment of bankruptcy petitions is the same as it would be in any other case in which an order was made without jurisdiction."

65. Thus the bankruptcy order had to be annulled.

66. The other COMI case cited to me was *Deutsche Apothetker-Und Arztebank EG v Leitzbach* [2018] EWHC 1544 (Ch). Dr Leitzbach presented a petition for his own bankruptcy to the court in Manchester on 12 November 2012. It was dismissed following a hearing on 29 January 2013 on the basis that his COMI was not in England and Wales. He presented a further petition for his own bankruptcy, again to the court in Manchester, on 9 January 2014. A bankruptcy order was made on that petition on 17 March 2014. An application to annul was made 10 January 2018 by the Bank and came

before HHJ Hodge QC sitting as a Judge of the High Court. On behalf of Dr Leitzbach, it was submitted that the court had a discretion under section 282 even where it finds that the bankruptcy order ought not to have been made. For the Bank, it was submitted that where the there was no jurisdiction to make the bankruptcy order, the court had no discretion and the order ought to be set aside as of right.

67. HHJ Hodge QC held that he should follow the approach of Nugee J in the *Meyden* case. and said at [45]:

> "if a bankruptcy order is made without jurisdiction, then it should be set aside, without consideration of discretionary matters."

68. He went on to hold, if he was wrong about that and there was a discretion for the court to exercise, the fact that the bankruptcy order was made without jurisdiction would be a very powerful factor to weigh in the balance when deciding whether to set it aside, particularly if the debtor had in any way contributed to the making of a bankruptcy order without the necessary jurisdiction in the court to do so; if the matter was one of discretion the court would almost invariably exercise the discretion in favour of annulment.

69. Both *Meyden* and *Leitzbach* are authority for the proposition that, where the court had no jurisdiction to make the bankruptcy order in the first place, where someone with sufficient interest in the outcome applies for an annulment there is no discretion to be exercised. Rather, the order will be set aside as of right. There is a distinction between cases where the court had jurisdiction to make the original bankruptcy order and those where it did not. Where an annulment application is made, in the former there is a discretion whether to annul; in the latter there is not.

70. Thus a question arose as to whether the fact that the District Judge had found the debt to be disputed meant that the bankruptcy order made against Mr Khan had been made without jurisdiction. In other words, where the debt is disputed, if it is asked to do so, does the court have a discretion whether or not to annul?

71. Initially Professor Watson-Gandy cited these two decisions in support of his argument that, where it finds that a bankruptcy order ought never to have been made, the court, in the exercise of its discretion, should refuse to annul only in exceptional circumstances. In his written submissions provided following the hearing at my request, his argument had been refined so that he submitted:

    i) where the petition debt is fully disputed the petitioner has no standing to present the petition (at least until the debt is established in other proceedings); there is no debt which can found the petition;

    ii) it is fundamental to the making of a bankruptcy order that the court must be satisfied that there is a debt in respect of which the petition was presented which was payable at the date of the petition or has become payable since, and which has neither been paid nor secured or compounded for (or is a future debt which the debtor has not reasonable prospect of being able to pay when it falls due);

iii) where there is no such debt, the court simply cannot make a bankruptcy order: the requirements of the statutory scheme (in particular section 276(1)) are simply not met;

iv) thus when considering an annulment application where the debt which founded the petition upon which the bankruptcy order was made was fully disputed, the court should annul the bankruptcy unless exceptional circumstances were shown.

72. This last step is difficult to reconcile with the ratio of *Meyden* and *Leitzbach*, which is that the court has no discretion if the bankruptcy order was made without jurisdiction. On Professor Watson-Gandy's formulation, it must follow from the absence of a debt capable of founding the petition that the court has no jurisdiction to make a bankruptcy order and, had the dispute been demonstrated when the court heard the petition, it would have been bound to dismiss it. It is difficult to then reach the conclusion (as forms the final step in Professor Watson-Gandy's argument) that the court nonetheless retains a discretion which should be exercised in favour of annulment save where the circumstances are exceptional.

73. In his written submissions provided at my request after the hearing, Mr Brown said that even where the court was faced with a petition where the founding debt was fully disputed it retained a discretion whether to annul. He said that section 271(1) of the 1986 Act was a gateway which, once (and even if) satisfied, conferred on the court a discretion whether to make a bankruptcy order: see the wording of section 264(2) of the 1986 Act. This accords, he said, with the fact that bankruptcy is a class remedy; the possibilities that a petition might be founded on multiple debts owed to various creditors; and the potential expressly recognised by rule 10.27 of the Insolvency Rules 1986 that a different creditor might be substituted for the original petitioner.

74. The difficulty with this argument is that it is predicated upon the petitioner successfully navigating the section 271(1) gateway. If there is no debt upon which the petition could be founded, then how can the creditor pass through the gateway? It does not seem to me that rule 10.27 comes to that petitioner's aid: the very problem which has arisen in this case is that a bankruptcy order was made on a petition founded on a fully disputed debt. There had been no substitution.

75. Mr Brown expressly recognised in his written submissions that the COMI cases had developed such that the court has no discretion where the debtor's COMI was not in England and Wales which is in "stark contrast" to the other authorities such as *Owo-Samson, Guinan* and *Kekhman*. Mr Brown said that the reason why the COMI cases are an exception to that approach taken in those authorities is because no court of England and Wales could make any bankruptcy order at all, regardless of the strength, size or number of petition debts relied upon by creditors even if those debts were not challenged by the debtor. But that still leaves open the question whether the court faced with a petition founded on a fully disputed debt nonetheless has the jurisdiction to make a bankruptcy order on that petition.

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 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*. 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.

Exceptional circumstances test?

77. I turn then to the particular cases on which Professor Watson-Gandy relied as supporting the principle for which he contended in paragraph 26 of his skeleton argument, namely that the court should decline to annul a bankruptcy order which ought never to have been made or where the petition was an abuse of process only in exceptional circumstances.

78. The effect of his concession (which I consider to have been rightly made in the light of the Court of Appeal's decision in *Owo-Samson*) that section 282 confers on the court a discretion has the consequence that his argument is really directed to the way that discretion ought to be exercised or whether there are any fetters on its apparent breadth (which arises from the words of section 282). The thrust of his argument was that these cases demonstrated that where its foundation had gone, a bankruptcy order had to be annulled save in exceptional circumstances.

79. The first of those decisions is *Re Davenport* [1963] 1 WLR 817. In that case, an 18-year old (who was, as the law stood at that time, still an infant) gave a guarantee of certain liabilities of a company of which she was a director. In ignorance of her infancy, judgment was entered against her for her guarantee liabilities and a receiving order was made against her shortly afterwards. Shortly after her 21st birthday (when she had ceased to be an infant), she applied for the receiving order to be rescinded on the basis that the guarantee liability was a debt unenforceable against an infant. Her application was refused and she was adjudicated bankrupt. She appealed.

80. The only judgment in the Court of Appeal was given by Denning LJ with whom the other members of the court agreed. He said at 819-820:

> "It is clear that the debt was unenforceable. It was not for the infant's benefit at all. It was void and could not be ratified.
>
> We have had a discussion as to what is the position when an infant in made bankrupt in such a way. It is quite clear that if there are legally enforceable debts against an infant, then the infant can be made bankrupt… But where the debt on which the petition is founded it an unenforceable debt, then it is equally clear that the order of adjudication can be set aside. It can be set aside under section 29 of the Bankruptcy Act, 1914, which says:
>
> > 'Where in the opinion of the court a debtor ought not to have been adjudged bankrupt … the court may, on the application of any person interested, by order annul the adjudication.'
>
> It seems to me that that gives a discretion to the court. It does not mean that where the petitioner's debt is an unenforceable debt the adjudication is a nullity ab initio. It only means that the court may in its discretion

> annul the bankruptcy. I can well se if there were other legally enforceable debts the court might say: The bankruptcy is not to be set aside. But in the present case it appears that there are no other legally enforceable debts. It is case where the judgment and the bankruptcy have proceeded on a debt which was unenforceable. In those circumstances, under the power given in section 29 of the Act, the bankruptcy ought to be annulled and all the proceedings anterior to it."

81. The appeal was from the order dismissing the application to rescind the receiving order and from the order of adjudication in bankruptcy. The Court of Appeal allowed the appeal on the basis, as can be seen from the passage I have quoted, that "under the power given in section 29 of the Act, the bankruptcy ought to be annulled".

82. Section 29(1) of the Bankruptcy Act 1914 was helpfully set out in the report of the decision in *Davenport*. It reads:

> "Where in the opinion of the court a debtor ought not to have been adjudged bankrupt, or where it is proved to the satisfaction of the court that the debts of the bankrupt are paid in full, the court may, on the application of any person interested, by order annul the adjudication."

83. Although it is not entirely clear from the report in the Weekly Law Reports, it seems that the Court of Appeal exercised the court's discretion under section 29 of the Bankruptcy Act 1914 as if it was a court of first instance. There is no suggestion that any application had been made under section 29 to the Registrar from whose order the appeal proceeded. Rather, as can I think be seen from the quotation from its judgment which I have set out above, the Court of Appeal decided that "under the power given in section 29 of the [Bankruptcy] Act [1914], the bankruptcy [i.e. the adjudication] ought to be annulled and all the proceedings anterior to it [i.e. the receiving order]."

84. Next is the decision in *Re Noble (a bankrupt)* [1965] Ch 129, another decision of the Court of Appeal, in which the facts are somewhat more convoluted. In February 1962, a Mr Vaidya obtained judgment against Mr Noble; a bankruptcy notice was issued on 5 October 1962 and was served on 10 October 1962; Mr Noble did not comply with it by 18 October 1962 and so on that date there was an available act of bankruptcy committed by him.

85. At about the same time, the petitioning creditor sued Mr Noble for £700 alleging that his payment of that sum as consideration for the purchase of some shares had entirely failed. The petitioning creditor obtained judgment in default on 2 November 1962 and on the same day presented a bankruptcy petition, alleging the act of bankruptcy of 18 October 1962 and the debt for £700. On 26 November 1962, the petitioner entered a further default judgment, this time for £1,000 in respect of a dishonoured cheque.

86. The petition was first heard on 6 December 1962 when it was adjourned until 17 January 1963. In the meantime, Mr Noble had applied to set aside the judgment for £700; his application was dismissed by the Master on 13 December 1962 and an appeal from the Master was dismissed by the Judge in chambers on 21 December 1962.

87. At its second hearing, the petition was adjourned again, this time until 14 February 1963. In the meantime, on 8 February 1963, Mr Noble entered a notice of appeal against the decision of the Judge in chambers, permission to appeal out of time having been given by the Court of Appeal. It was expected that the appeal would be heard on 18 February 1963.

88. On the third hearing of the petition on 14 February 1963, a receiving order was made but all proceedings under it were stayed pending the hearing of the appeal.

89. On 18 February 1963, the appeal was allowed on the ground that the petitioning creditor had no liquidated debt for £700 and only an unliquidated claim for damages in respect of his purchase of shares from Mr Noble. By that time (18 February 1963), more than three months had elapsed since the act of bankruptcy (18 October 1962).

90. On 20 February 1963, Mr Noble applied to the registrar to rescind the receiving order. That application was not heard until 8 May 1963 when it was dismissed. On the same day, a second petition was adjourned to await the outcome of the first petition (i.e. that which relied on the judgment for £700).

91. On 11 June 1963, a meeting of creditors passed a resolution to make Mr Noble bankrupt. On 12 June 1963, the second petition was dismissed.

92. On 3 July 1963, Mr Noble was adjudicated bankrupt. On 24 July 1963 he appealed against the adjudication. On 13 August 1963, Mr Noble filed a statement of affairs showing a deficiency of more than £14,000. The ground of appeal, for which Mr Noble asked the Court of Appeal to give him permission out of time, was that there was no debt capable of supporting the petition and that therefore the receiving order should never have been made.

93. Harman LJ took the view that Mr Noble should have appealed against the receiving order rather than applying to rescind it, but considered that to be a technical mistake which could be remedied if the Court of Appeal decided to give Mr Noble permission to appeal out of time. He said that on 14 February 1963 the Registrar should have adjourned the hearing of the petition to await the outcome of the appeal on 18 February 1963; to have proceeded was a wrong exercise of discretion. Given the outcome of the appeal, no receiving order could have been made; there could be no substitution of the debt relied on in the petition. Accordingly, an appeal against the receiving order would have succeeded. However, Mr Noble required permission out of time to appeal. Harman LJ refused to do so because Mr Noble was hopelessly insolvent and because it would not be just to his creditors to allow his affairs to go unregulated. He took into account Mr Noble's conduct and the fact that there was another judgment in favour of the petitioning creditor and a second petition.

94. Russell LJ also gave a judgment. He explained the technical requirements for a petition to proceed and why the other judgment obtained by the petitioning creditor for £1,000 could not be relied upon. He said that had Mr Noble appealed the receiving order on 20 February 1963, the Court of Appeal would have been bound to allow the appeal; once the receiving order had been set aside, the adjudication would fall with it. He went on to say at page 146 of the report:

> "…if, at the time when the appeal is heard, it is demonstrated that the petition is not founded on any valid debt, I think the receiving order must be discharged. Moreover, on an appeal from a receiving order under section 108(2), I consider that quite different considerations apply from those applicable to cases of review under section 108(1) or appeals from a refusal to review. Similarly, on an appeal from an adjudication, if it is shown that the adjudication was wrongly made it must be annulled: on the other hand, if the application for annulment be under section 29, not by way of appeal, but by way of review by the court of original jurisdiction, there is room for the exercise of discretion. In summary, section 29 is an application to adjudications of the general power of review conferred on the court of original jurisdiction by section 108(1). Neither is an appellate provision. Under both there is a discretion. Section 108(2) confers appellate jurisdiction, and no question of discretion is involved if it appears that (for example) the receiving order or adjudication appeared from was wrongly made. In that connection I refer to the case in this court of In re Davenport. That was an actual appeal, and the references to section 29 must, I think, be taken to be per incuriam: so also must be the implication that where the petitioning creditor's debt turns out to be invalid there is a discretion in the appellate court to decline to set aside the receiving order and adjudication if there are other debts. The questions now under consideration were not really debated in that case.
>
> In my judgment, if on appeal from a receiving order it emerges that there was no valid debt sufficient to support the petition, the debtor is entitled to an order setting it aside, and with it the adjudication founded thereon, unless (as is not the case here) the defect can be amended by substitution of another and valid available debt. Consideration of the state of affairs of the debtor, and of his creditors, is not relevant, though they would be were it a review by the original court, or an appeal from a refusal by the original court to review."

95. Davies LJ agreed with both judgments.

96. I am unconvinced, given the view I have formed above as to the jurisdiction which the Court of Appeal in fact exercised, that the references to section 29 of the Bankruptcy Act 1914 were actually per incuriam but I doubt that matters for the disposal of the present appeal.

97. The next authority relied upon by Professor Watson-Gandy was *Mowbray v Sanders* [2015] EWHC 296 (Ch). *Mowbray* is a decision on appeal from the refusal by a deputy district judge to annul a bankruptcy. Two grounds were relied upon in support of the application to annul, one of which was that the debt relied upon was statute-barred. That ground was advanced by the debtor, Ms Mowbray but the petitioner obtained by a default judgment and a bankruptcy order without putting forward any cogent answer to that limitation defence. The first time the petitioner did so was on the annulment application.

98. This meant that, when the annulment application came before the deputy district judge, Ms Mowbray had to show either that the circumstances were exceptional such that the court should allow her to re-litigate grounds that were the subject (at least it seemed at first sight) to adjudication when the bankruptcy order was made or that there was sufficiently new and different material such that an appeal against the bankruptcy order ought to be allowed. Having summarised the facts and the deputy district judge's reasons for refusing the annulment, at [40]-[47], Hildyard J considered the nature of the power to annul. In [42]-[43], [47] he said:

> "[42] By its nature, therefore, an annulment application should not be used to re-litigate grounds which were the subject of adjudication when the bankruptcy order was made: see *Crammer v West Bromwich Building Society and Others* [2012] EWCA Civ 517; [2012] BPIR 963, CA, where the Court of Appeal confirmed (citing *Turner v Royal Bank of Scotland* [2000] BPIR 683, CA) and re-emphasised that the court would allow such points to be re-litigation on an application under s 282(1) 'only in exceptional circumstances' (see especially para [5] in the judgment of Patten LJ).
>
> [43] As to what might constitute 'exceptional circumstances', helpful guidance is provided in the judgment of Patten J (as he then was) in *Ahmed v Mogul Easter Foods and Another* [above] and in the judgment of Millet J (as he then was) in *Re A Debtor (No 32/SD/1991)* [1993] 1 WLR 314, [1993] 2 All ER, ChD which (though in fact a decision on s 375 of the Insolvency Act 1986) Patten J cited and adopted…
>
> [47] … not only is it in the discretion of the court to determine whether an application under s 282(1)(a) is a permissible process (rather than an appeal), but it is also in the discretion of the court whether, pursuant to that process, to grant or refuse an annulment, even in a case where it is satisfied that the bankruptcy order ought not to have been made: see *Askew v Peter Dominic Ltd* [1997] BPIR 163, CA."

99. Having then considered whether there were such exceptional circumstances warranting the review of the validity of the debt relied upon by the petitioner and having concluded that there were, at [78] Hildyard J turned to the question whether an annulment should be granted, "remembering that the relief is ultimately discretionary".

100. When he came to deal with the discretion that arises upon an annulment application where there was and is a genuine dispute about the validity or enforceability of the petition debt, he said:

> "[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 III v Caldwell Associates Ltd* [above] 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 s 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 … is substantially the same: whether the interests of creditors or the entitlement of the [trustee in bankruptcy] to payment of his proper costs and expenses outweigh the obvious logic in setting aside an order which should not have been made."

101. It was this passage upon which Professor Watson-Gandy relied in support of his argument that where the debt was disputed (as it is in this case) it could not found the basis for making bankruptcy order and therefore, absent exceptional circumstances, the order must be annulled.

102. Mr Brown relied on the passage at paragraphs [40]-[47] in support of his argument that Mr Khan had misunderstood the decision in *Mowbray* which was authority for the proposition that it would only be in exceptional circumstances that a point that was in issue on a bankruptcy petition could be re-litigated on an annulment application.

103. I agree with Mr Brown that that is what paragraphs [40]-[47] of *Mowbray* say. But there are also the comments at paragraphs [81]-[83]. As to those, I agree with Professor Watson-Gandy that in paragraph [81] Hildyard J states in terms: "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". However, he went on in [82] to say: "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".

104. In my judgment, the proper way in which to understand Hildyard J's decision – not least given his reference to *Guinan III* – is not simply that there is an exceptional circumstances test per se but rather that the test requires the court to identify other factors which would suggest that the annulment should be refused; only in their absence

would it be exceptional not to grant an annulment. This is another way of saying that all the relevant circumstances have to be taken into account and is also consistent with the Court of Appeal's decision in *Owo-Samson* which I have already considered.

105. I turn then finally to the case of *Artman v Artman*. The District Judge identified as a factor relevant to her exercise of discretion whether there was "any element of abuse of process in obtaining/making the bankruptcy order" (Judgment para 76(b)) and identified the first instance decision of Robert Walker J in *Artman* as authority for that proposition. Professor Watson-Gandy said that she was wrong to do so because the Court of Appeal granted permission to appeal the first instance decision in *Artman* although he properly also observed that the appeal was never in fact heard. Mr Brown said that, because the appeal was never heard, the first instance decision in *Artman* remained good law; the District Judge had both directed herself properly as to the law and properly applied it to the facts.

106. *Artman* is a decision on an application to annul made by a bankrupt's former wife which was resisted by him. The facts are these. There were divorce proceedings between Mr and Mrs Artman. There were inconclusive applications for ancillary relief; Mrs Artman said that Mr Artman had engineered, or at least submitted to, his bankruptcy in order to frustrate her wish to become the sole owner of their former matrimonial home.

107. The bankruptcy order against Mr Artman had been made on a petition presented by the Commissioners of Customs and Excise. The debt was one owed by Mr Artman and his partner in an accountancy practice, a Mr Beaver. Mr Beaver reached an arrangement with Customs and Excise and, by the time the annulment application was heard, the sum due to them had been paid.

108. On the application to annul, it was submitted on Mrs Artman's behalf (in support of the application) that the arrangement with Mr Beaver meant that the debt had been compounded for at the date of the hearing of the bankruptcy petition such that it was an abuse of process for Customs and Excise to pursue the petition. That argument was rejected and the Judge concluded that, at the time when the petition was heard, Mr Artman had a present liability to Customs and Excise; that was sufficient to dispose of annulment application.

109. However, the Judge went on to say that even if he had been persuaded that the bankruptcy order ought not to have been made because of Mr Beaver's arrangement with Customs and Excise, he (the Judge): "would have been very strongly disposed against annulling the bankruptcy for three reasons in particular." Those reasons were:

i) there was strong prima facie evidence that Mr Artman had concealed assets from his trustee in bankruptcy and thereby committed one or more bankruptcy offences; an annulment could not be allowed to prevent or in any way hinder the investigation and taking of appropriate action in respect of that matter;

ii) even if the bankruptcy was annulled, Mr Artman would likely soon be made bankrupt again because he appeared to be "hopelessly insolvent" and

iii) annulment would likely not do Mrs Artman any good at all because there was no realistic prospect of her obtaining a property adjustment order in the matrimonial proceedings before Mr Artman's insolvency again supervened.

110. In granting permission to appeal on Mrs Artman's renewed application, Nourse LJ said:

> "Having rejected [Mrs Artman]'s case on the first question, the judge said that, even if it had gone the other way, he would have been very strongly disposed against annulling the bankruptcy. He gave three particular reasons for that view. Lord Justice Millett [who dealt on paper with that part of the application for permission to appeal] treated that part of the judgment as an exercise of the judge's discretion with which this court could not interfere. He therefore refused leave to appeal.
>
> On this renewed application, [Counsel for Mrs Artman], while accepting that there is some discretion in the matter, has submitted that, where a bankruptcy order is made in contravention of s 271(1)(a), the court should only decline to annul it in exceptional circumstances, the principle being, he says, that where the whole foundation of the bankruptcy has gone it should not, save in exceptional circumstances, stand. In support of that submission he has briefly referred us to authorities under the old law: first, Re Davenport … and, secondly, observations of Russell LJ in Re Nobel (a Bankrupt) … That question, being one concerned with the principles upon which a discretion ought to be exercised, appears to be a further question of law and one which in my view is also arguable.
>
> [Counsel for Mrs Artman] has further submitted that none of the judge's three reasons involved exceptional circumstances and, further, I think he would say, that, even if the discretion is wide, those reasons were incapable of justifying the judge's decision in the particular circumstances of this case…"

111. Mr Brown is strictly correct, that the first instance decision in *Artman* stands. As I understand that decision, it was to the effect that, even if the bankruptcy order against Mr Artman ought not to have been made because the arrangement with Mr Beaver meant that it had been compounded for, on hearing the annulment application the court had a discretion which would have been exercised against annulment. That there was a discretion was, in principle, accepted by Counsel for Mrs Artman on the application for permission to appeal. The point that was held to be arguable (or, expressed in the language of the CPR, which had a real prospect of success) was whether where the whole foundation of the petition had gone (because the debt relied upon had been compounded for) it should be annulled save where there were exceptional circumstances. That question was never resolved by the Court of Appeal and is the same question that arises for determination in the present case. The decision goes no further than that.

Conclusion on Ground 1

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.

113. The District Judge did not misdirect herself as to test she needed to apply. The non-exhaustive list of relevant factors that she set out in paragraph 76 of her judgment is entirely proper. It follows after this extensive review of the authorities that Ground 1 is dismissed.

Grounds 2 and 6: conduct and further investigations

114. Both these Grounds invite me to consider Mr Khan's conduct and the extent to which he disclosed his assets to the Trustee. They also involve challenges to the factual conclusions the District Judge reached on the evidence put before her. As I see them, they can be conveniently dealt with together.

Judgment below

115. At paragraph 76(c) of her judgment, the District Judge correctly identified that Mr Khan's conduct was a relevant factor to take into account, as Professor Watson-Gandy accepted in his skeleton argument by reference to the decision in *Artman* (and as I have explained above the first instance decision in *Artman* has not been overturned).

116. The District Judge went on in paragraphs 79 to 89 to identify Mr Khan's obligation under sections 291, 312 and 333 of the 1986 Act and his failures to discharge those obligations. She set out the conduct for which he was to be criticised and explained its impact on the administration of his bankrupt estate.

117. At paragraphs 90 and 91, the District Judge recorded that there remained aspects of Mr Khan's affairs in relation to which further investigation by the Trustee may be appropriate. By way of example, she identified the loan secured by the first charge over Summerville in favour of an associate of Mr Khan who had not responded to enquiries and where full security documentation had not been provided. Mr Khan's own evidence was inconsistent, he having said that £25,000 was owing but also that £50,000 was owing. She concluded that it was a realistic possibility that the Trustee was not fully apprised of all the liabilities and assets of the estate including those out of the jurisdiction. Therefore, she said, it was appropriate for the Trustee to remain in office to conclude her investigations.

Parties' submissions on Ground 2

118. On behalf of Mr Khan, Professor Watson-Gandy said that:

i) The District Judge applied too low a test when considering Mr Khan's conduct; the true test required the District Judge to find "exceptional circumstances which outweighed the strong presumption in favour of annulment".

ii) The District Judge came to the wrong factual conclusion; rather than having failed to co-operate with the Official Receiver or Trustee, she should have concluded that the opposite was true.

119. As to the first, I have already found that there is no "exceptional circumstances" test. There was no "strong presumption in favour of annulment" which needed to be outweighed. Whilst Mr Artman's conduct might well have been egregious, *Artman* does not set down a principle as to the nature of the bankrupt's conduct which is relevant on an application to annul. Rather, consistent with the court's obligation to consider all relevant factors, it must look at the bankrupt's conduct in the context of the case in question. That is what the District Judge did in this case.

120. As to the second, as Professor Watson-Gandy rightly accepted, an appellate court will be reluctant to interfere with a trial judge's findings of fact. What Mr Khan has to demonstrate, as Professor Watson-Gandy accepted in his skeleton argument, is that the District Judge's findings exceeded the generous ambit within which reasonable disagreement about the conclusion to be drawn from the evidence is possible.

121. The District Judge found that:

i) notwithstanding Mr Khan's concerns about the Trustee's appointment and conduct and in particular the price at which Westville was sold and the impact of difficulties of travelling between the UK and Pakistan and his ill-health, there had been a significant lack of co-operation on his part, particularly in the first year of his bankruptcy (paragraphs 80, 81);

ii) that failure to co-operate included the diversion of rental income away from the bankruptcy estate (paragraph 81);

iii) there had been intimidation of tenants as part of Mr Khan's efforts to actively collect rent which should have been paid to the bankruptcy estate (paragraph 82);

iv) an agency agreement whereby Mr Khan's wife received rental income and made mortgage and other payments was disclosed in December 2018 (which, I observe, was some eleven months after he was made bankrupt), that arrangement having continued in effect since he was made bankrupt (paragraph 83);

v) there were examples of undue delay (paragraphs 84 and 85);

vi) Mr Khan's obstruction has increased the costs of the Trustee and her legal team but that could be met by a cost order against Mr Khan (paragraph 88);

vii) Mr Khan's conduct was sustained and deliberate and has negatively impacted the Trustee's investigations of the assets and liabilities of his estate and has disrupted the collection of income for the benefit of creditors (paragraph 89).

122. Professor Watson-Gandy said that these findings went beyond the generous scope afforded to the District Judge. He said that:

i) Mr Khan did not conceal information; rather it was provided on three separate occasions;

ii) Mr Khan's co-operation had been impacted by his ill-health, the fact that he is overseas in Pakistan and the COVID-19 pandemic;

iii) he attended public examination hearings notwithstanding his ill-health, having travelled to the UK to do so on one abortive occasion and the Official Receiver had decided in December 2018 that there was no reason to go ahead with the public examination;

iv) the agency agreement was not an attempt to divert income because it pre-dated Mr Khan's bankruptcy, was entered into when he went to work in Pakistan, the Official Receiver was aware of it, an account had been provided and overpayment had been made by Mr Khan's wife in an attempt to part-discharge his indebtedness.

123. Mr Brown said that:

i) tellingly, Mr Khan had ignored (and, it follows, not challenged) the District Judge's finding that he had positively interfered with the collection of rent including using intimidating behaviour;

ii) the evidence relied upon as evidence of co-operation in fact demonstrates a failure to co-operate; the failure to provide information was consistently raised by the Trustee in her reports to the court;

iii) the collection of rent by Mr Khan's wife deprived his estate of rental income that could otherwise have been used for the purposes of the administration of the estate, for example paying insurance premiums;

iv) the District Judge's findings were within the generous ambit afforded to her.

Conclusions on Ground 2

124. I agree with Mr Brown. The District Judge's findings were well within the generous ambit within which reasonable disagreement is possible.

125. As for the new evidence that Mr Khan has adduced showing payments made to his secured or unsecured creditors by his wife since 28 May 2019, his witness statement dated 15 September 2021 goes beyond that for which he was given permission by the order of 2 November 2021, namely evidence limited to evidence:

i) that proves payments made to secured or unsecured creditors of Mr Khan by his wife since 28 May 2019 and

ii) of up to date desk top valuations of his two remaining properties.

126. There are three paragraphs in his statement which might be said to be aimed at proving payments to secured or unsecured creditors by Mr Khan's wife since 28 May 2019. They are paragraphs 4.4, 4.5 and 4.6. They in turn refer to bank statements which are exhibited.

127. It is notable that Mr Khan (in paragraph 4.6) asserts that: "Certain creditors are still being paid to date…". That suggests that creditors were being selected for payment which in turn carries the implication that some creditors were not paid. That is borne out by the bank statements which show payments to RBS, BM Samuels (both secured creditors) and John Lewis Partnership Card (an unsecured creditor). No other creditors

are mentioned in the bank statements despite the Trustee's report dated 30 April 2019 referring to seven unsecured creditors (see paragraph 5.72) and the estimate of the sums required to pay creditors and expenses drawn to 29 April 2021 referring to other unsecured creditors.

128. In my judgment, this evidence is insufficient to persuade me that I should interfere with the District Judge's factual conclusions. If anything, it states in terms that £38,784.70 was received by Mr Khan and his wife "as an income from the estate". I understand that quoted phrase to be an acceptance that at least some of the £38,784.70 should have been paid to the Trustee, being a continuation of the diversion of monies away from Mr Khan's estate.

Parties' submissions on Ground 6

129. As for investigations, Professor Watson-Gandy said in his skeleton argument that there was no basis for the District Judge's inference that the trustee had any real intention to pursue any further investigations and that the evidence pointed to the contrary. He relied in particular on the Trustee's Second Supplementary Report dated 20 April 2021. In that report, she said that Mr Khan had not provided information relating to the purchase of his property in Pakistan or the expenditure incurred in relation to his properties in the UK (paragraph 11). She said that she had not taken steps to obtain that information during the period covered by the report because of Mr Khan's personal circumstances and the cost to the bankruptcy estate of (I infer) her taking those steps (paragraph 12). Other than that information, she said there were no further matters which required further investigation at that stage (paragraph 13). She went on to say that Mr Khan had never provided her with details of any creditors in Pakistan (paragraph 36), that payments to unsecured creditors may have altered the amount of their claims but she did not have any "substantive evidence" of the payments made (paragraph 37).

130. Professor Watson-Gandy also submitted that Mr Khan had been discharged from his bankruptcy since 23 January 2022 and that further examination of him had been dispensed with by the Trustee; he referred to an email sent on behalf of the Trustee dated 22 January 2020.

131. Mr Brown submitted that rather than pointing to compliance and a decision not to investigate further, the evidence showed that there had been a failure to provide information (see in particular paragraph 13 of the Trustee's report from April 2021). As for the email of 22 January 2020, it referred to Mr Khan having provided the majority of information requested; the need for continued co-operation should the requirement for Mr Khan to attend for public examination be lifted (which it ultimately was) and the threat that the Trustee would apply to court to obtain his co-operation if need be.

Conclusions on Ground 6

132. Again, I agree with Mr Brown. The evidence to which I was referred does not support the contention that the Trustee was content with the information Mr Khan had provided and would not investigate further. She required compliance, Mr Khan's discharge from bankruptcy not absolving him of his obligation to co-operate with the Trustee.

133. Accordingly, grounds 2 and 6 are dismissed.

Ground 3: delay

134. On behalf of Mr Khan, Professor Watson-Gandy submitted that the District Judge applied the wrong test when she observed at paragraph 76(e) of her Judgment that one of the relevant factors for her to consider when deciding whether to annul Mr Khan's bankruptcy was:

> "The time that has passed since the making of the bankruptcy order."

135. He says that there is no prescribed period within which an application for annulment must be made. Although he accepts that a long lapse of time between the making of a bankruptcy order and the making of an application to annul might be taken into account, there is no such lapse of time in the present case. He further says that the District Judge's conclusion that there had been delay was at odds with her earlier observations that Mr Khan could not be criticised for delays through ill-health or the disruption caused by the COVID-19 pandemic. He pointed out that Mr Khan had attempted to expedite the hearing of his annulment application by having his case transferred to the County Court at Central London due to the long waiting times at the County Court at Slough.

136. On behalf of Habib, Mr Brown submitted that this ground of appeal was based on a misreading of the judgment; the District Judge had never made a finding or observation that there had been delay between the making of the bankruptcy order and the application to annul. Rather, he said, her comments were about the potential impact of the effluxion of time on creditors and were made with regard to potential limitation issues; that was plain from paragraphs 96-98 of the judgment.

137. I have already quoted above the relevant part of the District Judge's Judgment. Whilst I can see that it could be said that she was taking into account the entirety of the time that had passed between Mr Khan being made bankrupt and the hearing of his annulment application, I disagree that she was doing so. That is because, in paragraph 87 of her Judgment, she said in terms that Mr Khan could not be criticised for seeking a stay of his bankruptcy pending the determination of his annulment application and was not to be blamed for any delay attributable to his own ill-health or the effect of the COVID-19 pandemic. The District Judge made no finding that there had been any undue lapse of time between the making of the bankruptcy order and the making of the annulment application.

138. As for paragraphs 96-98 of her Judgment, it is clear from their express terms that the District Judge was considering the impact of the effluxion of time on creditors were she to grant the annulment which Mr Khan sought. That can be seen from:

    i) the use in paragraphs 96 and 97 of the words: "statute barred" and

    ii) the reference to "limitation" in paragraph 98.

139. I agree with Mr Brown that there has been a misreading of the District Judge's Judgment and that she did not fall into error as alleged in Ground 3, which I dismiss.

Ground 4: solvency

140. At paragraph 76(d) of the Judgment, the District Judge directed herself that one of the relevant factors for her to consider was whether Mr Khan was or remained hopelessly insolvent. In such circumstances, she said, an annulment would only serve to increase costs and add delay if a fresh petition is likely to be presented. She cited ICC Judge Mullen's decision in *Lambert v Forest of Dean District Council* [2019] EWHC 1763 (Ch) as authority for the proposition that she should consider Mr Khan's solvency.

141. Professor Watson-Gandy accepted in his skeleton argument that the District Judge was correct to identify solvency as a relevant factor. However, he said, she erred on the facts when she concluded that Mr Khan would not be able to resist a petition presented by Habib in respect of the Personal Debt. He said that:

    i) both the Guarantee Debt and the Personal Debt "were either disputed or disputable";

    ii) The Trustee's second report disclosed assets with a total value of just over £750,000; there are two remaining unsold properties with such that the assets available total over £1 million (once the valuations had been updated as set out in the new evidence for which permission had been given). In terms, he submitted that there was sufficient "liquidity" in Summerville and Staveley together with cash held by the Trustee. Professor Watson-Gandy handed up a calculation which he said demonstrated that, taking together the sum held by the Trustee and the equity in the Mr Khan's two remaining properties, there was sufficient available to discharge Mr Khan's creditors. As I understand it, the calculation does not take account of any of the Trustee's remuneration or expenses which Mr Khan might, upon annulment, be required to pay.

142. Mr Brown submitted that:

    i) it had never been said to the District Judge that the Personal Debt was disputed; this was a new point not taken before and which should not be allowed to be taken now; in any event the highest Mr Khan's case got was a bare assertion in his witness statement of 15 September 2021 that the Petition Debt is disputed;

    ii) the term "disputable" was not used in the 1986 Act;

    iii) the District Judge could not be criticised for having concluded that the Personal Debt was not disputed when it had never been suggested to her that it was;

    iv) in bankruptcy, solvency is tested on a cashflow basis not a balance sheet basis; on any view there is insufficient liquidity for Mr Khan to discharge the Personal Debt in the event that the bankruptcy order was annulled and Habib served a statutory demand for it.

143. In reply, Professor Watson-Gandy said that on Mr Khan's figures there was sufficient equity even if the Personal Debt were undisputed. If the bankruptcy order was annulled, he said, Mr Khan would have (and should be given) the opportunity to raise sufficient funds to pay Habib. He said that there was a dual approach for solvency: both cashflow and balance sheet bases could be used to demonstrate solvency.

144. As for whether the Personal Debt was said to be disputed at the hearing before the District Judge, the highest this gets is the assertion in paragraph 46.2 of Mr Khan's witness statement of 6 July 2018 (made in support of the annulment application) where he refers to Habib claiming the shortfall following the sale of the Westville property of £240,693.69 plus interest. He says that, and two other sums, "are disputed". On his case, that can only be because he asserted that Westville had been sold at an undervalue. However, as recorded by the District Judge in her judgment at paragraph 94 (against which there is no appeal), the figure stated by Habib for Mr Khan's personal indebtedness was £248,414.35 plus interest of £60,291.58. She concluded that £308,705.93 was due and owing to Habib at the date of the bankruptcy order; this is the Personal Debt.

145. In my judgment, the creditors which Mr Khan has to demonstrate he can pay include Habib in respect of the Personal Debt. Although Mr Khan asserted that it was disputed, there is no sufficient evidence to enable him to demonstrate that a dispute exists, even noting the low threshold that he would have to meet in order to do so. What I have seen is:

    i) paragraph 4.8 of his witness statement of 15 September 2021 which refers to his personal bank statements with Habib showing a nil balance, the absence of a demand for the same after January 2015 and

    ii) paragraph 7.1 of the same witness statement in which he refers to offers made for Westville, one of which he says valued the seven flats comprising Westville at £105,000 each whereas the Trustee sold them as a whole for a total of £375,000 which equates to £53,571 each.

146. As for the bank statements, which I have looked at even though Mr Khan did not have permission to adduce evidence before me about the dispute concerning the Personal Debt, it remains unclear to me what they are meant to show and I cannot rely on them as showing that Habib might have accepted that nothing is owing in respect of the Personal Debt.

147. As for the offer to purchase two of the Westville flats for £210,000, there is no evidence to support the assertion nor any valuation evidence in respect of Westville. In my judgment, what Mr Khan says is no more than assertion. Again, I have considered what he says despite the absence of permission to adduce evidence before me concerning the Personal Debt.

148. In my view, on the evidence put before the District Judge, she was correct to conclude that the Personal Debt was undisputed. It was for Mr Khan to demonstrate otherwise. The material now available to me does not alter my view. Whilst the Personal Debt might be "disputable" in the sense that it could be disputed, there is insufficient evidence for Mr Khan to do so.

149. I agree with Mr Brown that the relevant test for bankruptcy is a cashflow test: see section 271 of the 1986 Act. Thus the question is whether Mr Khan has the liquidity to pay his creditors. The evidence before me does not suggest that he does; rather it is addressed to his assets and liabilities and seeks to balance the one against the other and to demonstrate that he has "net assets" sufficient to discharge his creditors; this is what us shown by the calculation handed up to me. I also note that his witness statement

dated 6 July 2018 at paragraph 39 asserts that his bankruptcy debts and expenses can be paid from third party funds and that he can provide security over his properties for the Habib claim (I assume this is a reference to the Personal Debt). The District Judge recorded in paragraph 97 of her Judgment that Mr Khan had put forward no evidence to demonstrate that he would have the liquidity to respond to a statutory demand or petition for the Personal Debt. It is not suggested to me that she was wrong to reach that conclusion about the evidence put forward by Mr Khan.

150. As such, I consider that the District Judge's conclusion is not now open to criticism and I dismiss Ground 4.

Ground 5: time bar

Judgment below

151. At paragraph 76(e) of her judgment, the District Judge identified as a relevant factor in the exercise of her discretion:

> "The time that has passed since the making of the bankruptcy order."

152. She went on at paragraph 96:

> "The Bank submitted that were the bankruptcy order to be annulled, it would immediately present a petition for the Personal Debt. The letter of demand is now more than six years old, which raises the question whether the Personal Debt is now statute barred. This is not the Bank's position and, since it is not an issue that was addressed in any detail in the evidence or submissions, it would be inappropriate to make any finding. I do not consider that to be necessary in any event, because if the Personal Debt is now statute barred, it would be unfair to deprive the Bank of the benefit of their proof by granting the annulment. This is because the Bank could undoubtedly have obtained a bankruptcy order in 2018 in respect of the Personal Debt, even though they were not entitled to the one that was then obtained in respect of the Guarantee."

153. And then at paragraph 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."

Parties' submissions

154. In his skeleton argument, Professor Watson-Gandy criticised the District Judge and submitted that:

i) she had erred in law because the limitation period on bankruptcy debts is suspended during the period of the bankruptcy and only restarted on annulment. He relied on a passage in *Halsbury's Laws of England*, Volume 68 (2021)/1 (3) (iii) paragraph 1038 which reads:

> "Proceedings in bankruptcy or for the winding up of a company are for the benefit of all creditors, and prevent time from running in respect of provable debts in favour of the person or company indebted. In the case of a disputed bankruptcy debt, time begins to run for the purposes of the Limitation Act 1980 from the date of annulment; and time ceases to run for limitation purposes on the making of a bankruptcy order, but only in respect of debts provable in the bankruptcy, and not in respect of the creditor's right to pursue other remedies."

ii) therefore, no creditor would or could have been prejudiced by an annulment because their debts would not have become time barred;

iii) in any event, there was no evidence that any creditor had been prejudiced in that way;

iv) accordingly, the passage of time since the making of the bankruptcy order was not a proper consideration in the exercise of her discretion.

155. Then, in oral submissions, Professor Watson-Gandy referred me to the decision of Mr John Jarvis QC sitting as a Deputy Judge of the High Court in *Anglo Manx Group Ltd v Aitken* [2002] BPIR 215. The relevant passage is [66] which reads:

> "It seems to me that the judgment of the Court of Appeal in *In re Benzon* is binding authority on me and that there is nothing to indicate that it was based on any false premise. The result of that Court of Appeal decision is that the Statute of Limitations, having begun to run against the claimant before the commencement of the bankruptcy, continue to run, notwithstanding the bankruptcy, in respect of a claim in relation to a fund pursued outside of the bankruptcy."

156. Mr Brown started by referring me to the decision of the Court of Exchequer Chamber in *Bailey v Johnson* [1871-1872] LR 7 Ex 263. Cockburn CJ, who was the only one of the judges to express a view one way or another, said this on the question of the effect of annulment. The Lord Chief Justice said:

> "The effect of s. 81 [of the Bankruptcy Act 1869] is, subject to any bonâ fide disposition lawfully made by the trustee prior to the annulling of the bankruptcy, and subject to any condition which the Court annulling the bankruptcy may by its order impose, to remit the party whose

> bankruptcy is set aside to his original situation. Here the Court of Bankruptcy has imposed no condition; the general provision of the section has therefore its full legal effect, and that effect is to remit the bankrupt, at the moment the decree annulling his bankruptcy is pronounced, to his original powers and rights in respect of his property."

157. Mr Brown said that there were exceptions to that "wiping away" provision. He said that time does not run in respect of debts "in the bankruptcy" once the bankruptcy order has been made because they are dealt with by the trustee in bankruptcy. However, time does continue to run in respect of debts "outside the bankruptcy". Examples are fraud or personal injury claims. The same goes for secured creditors, against whom time continues to accrue against their right to enforce their security.

158. He went on to say that commentary in two textbooks supports the proposition that, because the effect of annulment order is to return the bankrupt to their original position (see *Bailey v Johnson*, above), time is taken to have run for limitation purposes during the period of the (annulled) bankruptcy. He referred to:

    i) *Limitation Periods*, 8th ed. at paragraph 17.053 which reads:

    > "Where a bankruptcy has been annulled under s.282 of the Insolvency Act 1986, it is as if there never had been a bankruptcy and time runs throughout the period between the bankruptcy order and the annulment, notwithstanding that no action could have been brough during that period."

    The commentators identify two authorities in support. The first is *More v More* [1962] Ch 424, which was not cited to me; I have however looked at it and concluded that it does not assist me in dealing with this appeal. The second is *Re Dennis* [1895] 2 QB 630 which I deal with below.

    ii) *Insolvency Litigation: A Practice Guide*, 3rd ed. at paragraph 9-020 which reads:

    > "The making of a bankruptcy order does not suspend the running of time in relation to claims which may have to be made outside the bankruptcy such [as] a secured creditor's claim to enforce his security or a claim which is not discharged by bankruptcy and may (subject to limitation issues) be brought after the bankruptcy is discharged, such as one for fraud or personal injury.
    >
    > Since the suspension of rights only occurs within the bankruptcy, problems may arise if it is brought to an end. For example, where a bankruptcy is annulled under s.282 of the IA 1986, it seems that time may be deemed to have run throughout the bankruptcy although it may be that the Court could impose terms or provisions to deal with any injustice under [s.282(4)]."

    The authority cited for the proposition that time may be deemed to have run throughout the bankruptcy is *Re Dennis*, already mentioned.

159. As for the commentary in *Halsbury's Laws of England*, Mr Brown said that Professor Watson-Gandy had incorrectly summarised it and ignored the exceptions set out. He said that what *Halsbury's* actually stated was that time in respect of *disputed* debts begins to run from the date of annulment – and even then no authority is cited.

160. Then Mr Brown applied the principles to the facts of this case and submitted that the District Judge was correct to consider whether annulment would affect creditors' causes of action.

161. In his oral submissions, Mr Brown said that the decision in *Anglo Manx v Aitken* was consistent with the earlier decision in *Cotterell v Price* [1960] 1 WLR 1097 (which he had cited in his skeleton argument). The general principle was that for so long as the bankruptcy exists, time does not run in respect of debts within the bankruptcy. He referred me to section 1032(1) of the Companies Act 2006 which provides for the general effect of an order by the court for restoring a company to the register. Such a company is deemed to have continued in existence as if it had not been dissolved or struck off the register. Section 1032(3) enables the court to make provision to avoid prejudice by placing the company and all other persons in the same position (as nearly as may be) as if the company had been dissolved or struck off. Mr Brown said that section 282(4) of the 1986 Act was the equivalent provision in bankruptcy.

162. As for the decision in *Re Dennis*, in his oral submissions Professor Watson-Gandy sought to distinguish it on the basis that it was a decision about what happens when there has been payment into court for creditors; it does not concern annulment at all and therefore does not support the premise for which Mr Brown cited it.

Authorities

163. The starting point is the decision in *Bailey v Johnson*: the effect of the annulment is the "wiping away" of the bankruptcy, with some limited and specific exceptions.

164. The next step is the decision in *Re Dennis*. In that case, a receiving order was made against the debtor after which he paid all his creditors in full except two who could not be found but whose debts were included in his statement of affairs. The Court then rescinded the receiving order, the debtor having paid into court the total amount needed to pay those two creditors. Neither of them proved for their debt nor made any claim to the money in court. More than six years later, the debtor applied for an order that the money in court be paid out to him. Vaughan Williams J declined to make such an order. He said:

> "It is suggested that the present case is within the Statute of Limitations, and that as these creditors have not applied for the amount which was paid into court to cover their claims, that the debtor is entitled to have the money back. I cannot assent to that. If I were dealing with the annulment of an adjudication under these sections, it clearly could not be argued, What s.36 [of the Bankruptcy Act 1833] provides for is, first in respect of disputed debts. There, a bond is sufficient; and in that case is may very well be that the effect of annulling the adjudication, or annulling the receiving order, is to make the Statute of Limitations apply; and I know of nothing which would prevent the statute applying, because in such a case there is no trust in favour of the creditor, and there

> is nothing that amounts to a payment to take the case out of the statute. But the section makes a difference in the case of debts which are not disputed. There, it does not provide for the giving of a bond, but that the money shall be paid into court. In my opinion it is not paid into court as security at all. It is paid into court for the creditor whenever he likes to come for it. Therefore that contention has entirely failed."

165. He went on, however, to make an order authorising the Official Receiver to pay out the money in court if the debtor gave a bond or other security to replace the money if the creditors came asking for it.

166. Then, there is the decision of Buckley J in *Cotterell v Price* [1960] 1 WLR 1097. In that case, a second mortgagee or particular property claimed to be entitled to redeem the first mortgage. A receiving order had been made against the mortgagor. The mortgagee made their claim more than twelve years later. Buckley J held the mortgagee's right against the mortgagor to have become statute barred with the consequence that the mortgagee lost all estate and interest in the mortgaged property. He said that:

> "Although the bankruptcy takes away the rights of ordinary creditors to sue for their dues and regulates their right of proof in the bankruptcy, the rights of secured creditors are unaffected under that section, and there is no reason, in my judgment, why time should not continue to run under the Limitation Act as regards those rights and remedies which the secured creditors have outside the bankruptcy."

167. It is quite clear from these authorities that for debts outside the bankruptcy, time continues to run for limitation purposes. It is also quite clear that for debts within the bankruptcy, time ceases to run upon the making of the bankruptcy order because those debts fall to be dealt with by the trustee.

Annulment and the running of time

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*.

    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*, 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.

170. As such, this was a factor which it was proper for the District Judge to take into account.

171. Professor Watson-Gandy also took the point that there was no evidence before the District Judge that any creditor would be adversely affected by the passage of time. However, insofar as Habib was a secured creditor for the Personal Debt, time continued to run against it. As for creditors within the bankruptcy, if it was for anyone to show that they would not be adversely affected, it was for Mr Khan to do so; he bore the burden on the annulment application.

172. Accordingly, I dismiss Ground 5.

Outcome of the appeal

173. In these circumstances, where none of the Grounds of Appeal have been made out, the appeal is dismissed. There is no need for me to address the points taken in the Respondent's Notice.