Neutral Citation Number: [2021] EWCA Civ 505

No: A4/2020/0820

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)
HHJ Pelling QC sitting as a Judge of the High Court
[2020] EWHC 1249 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16 April 2021

Before :

LORD JUSTICE DAVID RICHARDS
LADY JUSTICE SIMLER DBE
and
LORD JUSTICE NUGEE

- -

Between :

MICHAEL WILSON & PARTNERS LTD	**Claimant and Appellant**
- and –	
(1) THOMAS IAN SINCLAIR **(2) SOKOL HOLDINGS INC.** **(3) EAGLE POINT INVESTMENTS LTD** **(4) THE BUTTERFIELD BANK (BAHAMAS) LTD**	**Defendants and Respondents**
- and –	
JOHN FORSTER EMMOTT	**Third Party and Respondent**

- -
- -

Brian Doctor QC (instructed directly) for **Michael Wilson & Partners Ltd**
Mr Emmott in person

Hearing date: 30 March 2021

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be at 10:30am on 16 April 2021

Lord Justice Nugee:

Introduction

1. The Appellant, Michael Wilson & Partners Ltd, (**"MWP"**) is a judgment creditor with the benefit of a number of judgments against the 1st and 2nd Defendants, Mr Sinclair and Sokol Holdings Inc (**"Sokol"**). MWP sought to enforce those judgments by way of a third party debt order (**"TPDO"**) against the Third Party, Mr Emmott, on the basis that he owed monies to Mr Sinclair and/or Sokol. MWP obtained an interim TPDO, but both Master Kay QC and, on appeal, HHJ Pelling QC dismissed MWP's application to make it final on the grounds that the terms on which monies were lent to Mr Emmott were that he would repay Mr Sinclair 30 days after demand, and, there having been no such demand, there was no "debt due or accruing due" from him that could form the subject matter of a TPDO.

2. Permission for a second appeal was granted by Popplewell LJ on the basis that the argument that both lower courts were wrong not only had a real prospect of success but also raised an important point of principle. I respectfully agree with him on both points.

3. But shortly before the hearing of the appeal Mr Sinclair was made bankrupt, on a petition presented by MWP itself. In those circumstances we asked Mr Brian Doctor QC, who appeared for MWP, to explain how MWP could pursue its appeal, given the terms of s. 285(3)(a) and s. 346(1) of the Insolvency Act 1986 (**"IA 1986"**). I give the text of these provisions below but s. 285(3)(a) provides that after the making of a bankruptcy order no creditor of the bankrupt shall have any remedy against the property of the bankrupt in respect of a provable debt; and s. 346(1) that a creditor cannot retain the benefit of an attachment as against the official receiver or trustee unless the attachment was completed before the commencement of the bankruptcy.

4. Having heard argument from Mr Doctor, we decided (i) that the effect of these provisions made it impossible for MWP to pursue its appeal unless it could establish that it had a reasonable prospect of obtaining an order under s. 346(6) IA 1986 (which enables the Court to disapply the general rule under s. 346(1)); and (ii) that in the circumstances of this case MWP had no reasonable prospect of obtaining such an order. We therefore concluded that even if MWP were right on the point of law raised by the appeal it would not assist it, and that the appeal had become academic.

5. Mr Doctor asked us to hear the appeal in any event as it potentially affected the question of costs. We have a discretion whether to permit an appeal to proceed that has become academic save as to costs. We decided in the exercise of that discretion that this was not an appropriate case to hear the appeal solely on the question of costs.

6. In those circumstances we did not proceed to hear the substantive appeal. In this judgment I give my reasons for agreeing to that decision.

Background

7. The present application forms a very small part of what has been a vast campaign of litigation between Mr Wilson (the individual behind MWP) and Mr Emmott, into

which Mr Sinclair and his company Sokol have been drawn. It is unnecessary for the purposes of this appeal to give any detailed account of the litigation – for which reference can be made if necessary to the numerous other judgments, including several of this Court, that are publicly available – so I will simply record that after a lengthy arbitration between MWP and Mr Emmott the arbitrators found overall in favour of Mr Emmott, and as long ago as 2014 issued an award (**"the Award"**) under which MWP is liable to pay Mr Emmott £3,209,613 and $841,213. To that has to be added a further sum for costs which Mr Emmott told us would be in excess of £2.5m (and which Master Kay accepted would be likely to amount to at least £2m and might exceed £3m). In 2015 Burton J gave leave to enforce the Award as a judgment of the Court. All attempts to appeal that have failed. MWP has not however paid the Award, despite apparently being in a position to do so. Its application for a TPDO was sought as a means to reduce its liability to Mr Emmott under the Award by offsetting any sums ordered to be paid to it by Mr Emmott. I should add that in submissions received after our draft judgments were circulated (see below) MWP asserted that it had in fact paid some of the Award but it is not suggested that it has paid it all, and whether this is so or not makes no difference to the analysis.

8. MWP has the benefit of numerous judgments against Mr Sinclair and Sokol, many, if not all, for costs awarded against them of various proceedings not only in England but in other jurisdictions. There was no dispute that this is so and the precise sums do not matter: when MWP obtained the interim TPDO, it was based on there being a total due to it of £1,077,511 and $729,349.

9. Mr Emmott had borrowed various sums of money from Mr Sinclair to fund the arbitration. There was a dispute between MWP and Mr Emmott as to precisely how much was outstanding, but again this does not matter for present purposes. What is significant however, as will appear, is that in the present application MWP expressly accepted that these advances were governed by the terms of a deed between Mr Sinclair and Mr Emmott. Only an unsigned copy was available but Master Kay accepted that it was entered into on or about 21 May 2007. This deed (**"the 2007 Deed"**) provided that Mr Sinclair might by 30 days' written notice require Mr Emmott to repay him sums advanced with interest.

10. That formed the background to MWP's application for a TPDO.

The TPDO proceedings

11. By application dated 17 April 2017 and amended on 18 May 2017 MWP applied for a TPDO against Mr Emmott, supported by a witness statement from Mr Wilson. The procedure for obtaining a TPDO is governed by CPR Part 72, and in accordance with CPR r 72.4 the application was initially dealt with on paper as an application for an interim TPDO. We have not seen the application, or Mr Wilson's witness statement in support, but on the basis of them Master Kay made an interim TPDO on 23 May 2017, fixing a hearing for 18 July 2017, and providing that Mr Emmott must not make any payment reducing the amount claimed by MWP below $729,349 and £1,077,511 plus fixed costs in accordance with CPR r 72.4(2) and (3). It is apparent from the terms of his Order that the application was presented to Master Kay as if the relevant judgment debtors were both Mr Sinclair and Sokol, and by paragraph 4 of the Order it was provided that they must not destroy or remove information necessary to disclose to MWP the extent and basis of Mr Emmott's liability to them.

12. It appears that the application to make the TPDO final was adjourned a number of times and finally came before Master Kay for hearing on 8 February and 21 and 22 May 2018. There were by then a number of applications before the Court, including not only MWP's application to make the TPDO final but also an application by Mr Emmott for its discharge on the basis either that there was no power to make a TPDO, or that the Court should decline to make the TPDO final in the exercise of its discretion.

13. Master Kay handed down a reserved judgment ([2018] EWHC 1496 (Comm)) on 14 June 2018. Having referred at [9] to the 2007 Deed, he recorded at [14] that:

> "It is accepted for the purposes of the application that advances to Mr Emmott were governed by the Deed."

He then considered, and accepted, the submission for Mr Emmott that under the terms of the 2007 Deed there was no repayment due until Mr Sinclair demanded payment and then only in such sum as Mr Sinclair might require; and that that meant (in the absence of any relevant demand) that there was no debt "due or accruing due" from Mr Emmott to Mr Sinclair as required by CPR r 72.2(1) (at [17]).

14. That was sufficient to justify discharging the TPDO, but in case he was wrong he went on to consider whether the Court should in the exercise of its discretion allow the TPDO to be made final (at [19]). He held that it should not, having regard to (a) non-disclosure of various matters, including the Award, the order of Burton J giving leave to enforce it, and the exhaustion of any appeals against it; (b) the lack of any explanation as to why the Award had not been paid, and his conclusion that MWP's failure to comply with decisions of the Court was "contumelious, inexcusable and probably amounts to a contempt of court"; (c) the fact that there appeared to have been a breach of a freezing order made against MWP; and (d) the fact that on the evidence the sums owed by MWP to Mr Emmott significantly exceeded the amount that might become due to Mr Sinclair and/or Sokol from Mr Emmott. He considered that each of these would be sufficient for the Court to conclude that it would be inappropriate to continue the TPDO, and that taking those matters as a whole obviously strengthened that conclusion (at [29]).

15. He therefore made an Order dated 14 June 2018 discharging the interim TPDO. By a further Order dated 20 July 2018 he refused permission to appeal and ordered MWP to pay Mr Emmott's costs, to be the subject of detailed assessment on the indemnity basis, with an interim payment of £35,000 and a further £2,000 in respect of the expenses and losses incurred by Mr Emmott as a result of the TPDO.

16. MWP was granted permission to appeal by Males J (as he then was) on 23 August 2018. By his Order he also stayed the Orders of Master Kay pending the final outcome of the appeal, with the effect that the interim TPDO remained in place.

17. The appeal was heard by HHJ Pelling sitting as a Judge of the High Court on 12 May 2020. He handed down a reserved judgment ([2020] EWHC 1249 (Comm)) on 22 May 2020.

18. In his judgment he said at [9]:

> "It is important to note that [Master Kay] was satisfied that [the 2007 Deed] had been

> signed and was operative, that there was no appeal from that conclusion and that it was not suggested by Mr Holland QC appearing on behalf of MWP at the hearing of the appeal that this document was not authentic or did not govern the transaction between Mr Sinclair and Mr Emmott."

At [15] he recorded that it was common ground that the primary issue on the appeal was whether any sum due under the 2007 Deed was a debt due or accruing due to the judgment debtor (Mr Sinclair) from the third party (Mr Emmott). At [18] he gave his conclusion on the primary issue, namely that Master Kay had been correct and that the appeal must therefore be dismissed. He then gave his reasons for that conclusion at [19]-[33]. On the discretion issue (which had also been appealed, as MWP needed to succeed on both points) he simply said at [34] that it was not necessary or desirable to consider what he might have concluded had there been a debt due or accruing due.

19. By his Order dated 22 May 2020 he therefore dismissed the appeal. He did however continue the stay granted by Males J until 1 June 2020 to enable MWP to apply to this Court for a continuation of it. He also ordered MWP to pay Mr Emmott's costs, this time to be the subject of detailed assessment on the standard basis, with an interim payment on account of £16,000.

20. On 3 July 2020 Popplewell LJ granted a further stay, and reimposed the interim TPDO, pending the final outcome and determination of the application for permission to appeal, and, if granted, the appeal. On 17 November 2020 he granted permission to appeal.

The bankruptcy proceedings

21. On 9 March 2021 Mr Sinclair was made bankrupt by an Order of ICCJ Prentis. We have not seen very much in relation to the bankruptcy proceedings; we do not have before us the petition, or any of the evidence. But we have seen an *ex tempore* judgment of ICCJ Prentis ([2020] EWHC 3603 (Ch)) given on 13 November 2020 in which he considered the petition. From this it is apparent that MWP was itself the petitioning creditor, that the petition was presented as long ago as 11 December 2018, initially based on two default costs certificates in the sum of £260,192 odd, and that it had subsequently been amended to add in further liabilities under other orders for costs.

22. Apart from various technical points which ICCJ Prentis was unimpressed by, Mr Sinclair's answer to the petition was that he was not subject to the bankruptcy jurisdiction of the English courts. ICCJ Prentis however held that he was carrying on business in England (the business being that of making loans to Mr Emmott) and that there was therefore jurisdiction (at [78]). At [86] he concluded that it was open to him to make a bankruptcy order there and then, but at [87] he said that he was not going to make an immediate bankruptcy order as there was a real prospect of the petition being settled within a relatively short term; if it was not then Mr Sinclair must expect a bankruptcy order to be made at the next hearing. By his Order dated 13 November 2020 he adjourned the petition to be heard by himself on 9 March 2021, and, as already referred to, on that occasion Mr Sinclair was duly made bankrupt.

s. 285 and s. 346 IA 1986

23. These respectively provide, so far as material, as follows:

> **285 Restriction on proceedings and remedies**
>
> (1) At any time when proceedings on a bankruptcy application are ongoing or proceedings on a bankruptcy petition are pending or an individual has been made bankrupt the court may stay any action, execution or other legal process against the property or person of the debtor or, as the case may be, of the bankrupt.
>
> (2) Any court in which proceedings are pending against any individual may, on proof that a bankruptcy application has been made or a bankruptcy petition has been presented in respect of that individual or that he is an undischarged bankrupt, either stay the proceedings or allow them to continue on such terms as it thinks fit.
>
> (3) After the making of a bankruptcy order no person who is a creditor of the bankrupt in respect of a debt provable in the bankruptcy shall—
>
> (a) have any remedy against the property or person of the bankrupt in respect of that debt, or
>
> (b) before the discharge of the bankrupt, commence any action or other legal proceedings against the bankrupt except with the leave of the court and on such terms as the court may impose.
>
> This is subject to section 346 (enforcement procedures) and 347 (limited right to distress).
>
> (4) Subject as follows, subsection (3) does not affect the right of a secured creditor of the bankrupt to enforce his security.
>
> …
>
> (6) References in this section to the property or goods of the bankrupt are to any of his property or goods, whether or not comprised in his estate.
>
> **346 Enforcement procedures**
>
> (1) Subject to section 285 in Chapter II (restrictions on proceedings and remedies) and to the following provisions of this section, where the creditor of any person who is made bankrupt has, before the commencement of the bankruptcy—
>
> (a) issued execution against the goods or land of that person, or
>
> (b) attached a debt due to that person from another person,
>
> that creditor is not entitled, as against the official receiver or trustee of the bankrupt's estate, to retain the benefit of the execution or attachment, or any sums paid to avoid it, unless the execution or attachment was completed, or the sums were paid, before the commencement of the bankruptcy.
>
> …

> (5) For the purposes of this section—
>
> (a) an execution against goods is completed by seizure and sale or by the making of a charging order under section 1 of the Charging Orders Act 1979;
>
> (b) an execution against land is completed by seizure, by the appointment of a receiver or by the making of a charging order under that section;
>
> (c) an attachment of a debt is completed by the receipt of the debt.
>
> (6) The rights conferred by subsections (1) to (3) on the official receiver or the trustee may, to such extent and on such terms as it thinks fit, be set aside by the court in favour of the creditor who has issued the execution or attached the debt.

Application to present case

24. The effect of these provisions in the present case seems to me straightforward. Unlike s. 285(1) and s. 285(2) which confer on the Court (that is the insolvency court, and the court in which proceedings are pending, respectively) a discretionary power to stay proceedings, s. 285(3)(a) is in mandatory terms and prevents a creditor of the bankrupt having any remedy against the property of the bankrupt in respect of a provable debt. A bankruptcy order has been made in relation to Mr Sinclair. MWP is a creditor of Mr Sinclair, and there is no reason to think that the judgment debts that it has obtained against Mr Sinclair are not provable in the bankruptcy – indeed they or some of them may have been debts on which the petition was founded. Mr Sinclair has a claim for repayment of monies against Mr Emmott. That is a chose in action, and therefore property of Mr Sinclair.

25. The only remaining question under s. 285(3)(a) therefore is whether obtaining a final TPDO against Mr Emmott would be a "remedy against" that property. It seems to me undeniable that it would be. The effect of a TPDO was considered in detail by the House of Lords in *Société Eram Shipping Co Ltd v Cie Internationale de Navigation* [2003] UKHL 30 (***"Société Eram"***). At [10]-[12] Lord Bingham traced the history of what were formerly called garnishee proceedings from the Common Law Procedure Act 1854 to the current provisions in CPR Part 72. At [13] he referred to the fact that the procedure had always made provision for a two-stage process, first an order nisi or interim order, and then an order absolute or final order. At [14] he explained the effect of an interim order by reference to decided cases as "attaching" the debt owing from the third party to the judgment debtor, or as "binding" the debt in his hands, or as creating an equitable charge on it. At [15] he explained the effect of a final order, again by reference to authority, as binding the debt attached, and giving the judgment creditor a right to receive payment of it, referring to the description by Lindley MR in *Pritchett v English and Colonial Syndicate* [1899] 2 QB 428 at 433 as follows:

> "the order is, in substance, not an order to pay a debt, but an order on the garnishees, a syndicate, to hand over something in their hands belonging to [the judgment debtor] to [the judgment creditor]."

26. Lord Millett also explained the nature of the order. At [87] he said:

> "A third party debt order "attaches", that is to say appropriates, the debt owing to the

> judgment debtor to answer the judgment debt. This is the classic method of creating an equitable charge over a debt or fund. It creates a proprietary interest by way of security in the debt or fund and gives priority to the claim of the judgment creditor to have his debt paid out of the fund before all other claims against it including that of the judgment debtor himself."

At [88] he said that two things followed:

> "First, a third party debt order is not an in personam order against the third party; it has proprietary consequences and takes effect as an order in rem against the debt owed by the third party to the judgment debtor. Secondly, the discharge of the debt is an integral part of the scheme of the order, which first creates and then realises a proprietary interest in the debt and makes the proceeds available to the judgment creditor."

27. In the light of this authoritative explanation of the nature of a TPDO, there seems to me no doubt that a creditor who obtains a final TPDO obtains a remedy against the property of his debtor in the shape of a charge on the debt. He is therefore prevented from doing so after a bankruptcy order has been made in respect of his debtor by s. 285(3)(a) IA 1986.

28. By s. 285(3) this is subject to the effect of s. 346 IA 1986, but this also does not seem to me to give rise to any difficulties on the facts of this case. It follows from the analysis in *Société Eram* that MWP, by obtaining an interim TPDO, had attached the debt due from Mr Emmott to Mr Sinclair. It was therefore a creditor of a person who is made bankrupt (Mr Sinclair) who had, before the commencement of the bankruptcy, attached a debt due to Mr Sinclair from Mr Emmott. MWP was therefore squarely within s. 346(1). That means that it is not entitled to retain the benefit of the attachment as against the official receiver or trustee of Mr Sinclair's estate, unless the attachment was completed before the commencement of the bankruptcy. By s. 346(5)(c), an attachment of a debt is not completed until the debt has been received. On 9 March 2021 when Mr Sinclair was made bankrupt, MWP had not received the debt. It follows, subject to the power of the Court in s. 346(6) to set aside the effect of s. 346(1) in favour of the creditor who has issued the attachment, that MWP cannot keep the benefit of the interim TPDO, or obtain an order making the TPDO final.

29. It was for those reasons that we concluded that it was impossible for MWP to pursue its appeal unless it could establish that it had a reasonable prospect of obtaining an order under s. 346(6) IA 1986.

Arguments for MWP

30. Mr Doctor advanced a number of reasons in writing, some of them repeated orally, why this conclusion did not follow. I can deal with these quite shortly as none of them to my mind is an answer to the above analysis.

31. First, Mr Doctor submitted that the interim TPDO was made in respect of both Mr Sinclair and Sokol; Sokol is a Delaware company and unaffected by Mr Sinclair's bankruptcy; and Sokol is jointly liable to MWP with Mr Sinclair for the judgment debts. The TPDO can therefore be upheld on the basis of Sokol's position rather than Mr Sinclair's.

32. This submission might well have been valid if the evidence established that Mr Emmott was liable to repay the advances he received to Sokol, either instead of Mr Sinclair or together with him. But whatever Mr Wilson's evidence in support of the application (which we have not seen), before Master Kay it was accepted for the purposes of the application that the advances to Mr Emmott were governed by the 2007 Deed: see paragraph 13 above. We have not seen a copy of the 2007 Deed, but its terms are set out, so far as material, in HHJ Pelling's judgment at [10]. The most relevant points for present purposes are these: (i) the parties to the Deed are Mr Sinclair and Mr Emmott alone; (ii) at recital E it recites that Mr Sinclair agreed to fund Mr Emmott; (iii) cl 2.1 contains an agreement that Mr Sinclair fund Mr Emmott's Defence Costs; and (iv) at cl 5.1 it provides that Mr Sinclair may demand repayment from Mr Emmott. Sokol is not a party and there is no reference to Sokol in the parts HHJ Pelling sets out. Moreover, the 2007 Deed contained an entire agreement clause, something relied on by Mr Doctor himself before Master Kay, and it could not therefore be said that there was some oral arrangement outside the 2007 Deed. On the basis that the 2007 Deed governed the advances to Mr Emmott, I think there is no doubt that Mr Emmott's liability to repay was owed to Mr Sinclair alone and not to Sokol.

33. When MWP appealed Master Kay's decision to the judge, one of its Grounds of Appeal was that although the loan agreement entered into with Mr Emmott was made only between Mr Sinclair and Mr Emmott, there was evidence that showed that the monies advanced were paid by Sokol to Mr Emmott or his legal representatives and Master Kay therefore ought to have held that the loans were actually made by Sokol, or at least by Mr Sinclair and Sokol. But this ground was not pursued in Mr Doctor's skeleton argument in support of the appeal, nor in a supplementary skeleton argument prepared by Mr Holland, and before HHJ Pelling Mr Holland again accepted that the 2007 Deed governed the transaction between Mr Sinclair and Mr Emmott: see paragraph 18 above. HHJ Pelling's judgment therefore proceeds on the basis that Mr Emmott's liability to repay was governed by the 2007 Deed. On further appeal to us, the question of Mr Emmott's suggested liability to Sokol was not even raised in the Grounds of Appeal.

34. In those circumstances I do not think it is open to MWP now to suggest that Mr Emmott was liable to repay Sokol as well as, or in place of, Mr Sinclair. Having conducted the hearing before Master Kay on the basis that the 2007 Deed governed the transaction, and not having pursued a challenge to that before HHJ Pelling, it is too late for it now to suggest that Mr Emmott's liability to repay was not so governed. I therefore reject this argument.

35. The next point taken by Mr Doctor was that the overall objective of s. 285 IA 1986 is to ensure the orderly administration of the bankrupt's estate by the official receiver or an appointed trustee, and to protect unsecured creditors: *Harlow DC v Hall* [2006] EWCA 156 at [17], citing *Smith v Braintree DC* [1990] 2 AC 215 at 230 per Lord Jauncey. I agree, but I do not see how this assists MWP.

36. Mr Doctor next submitted that s. 285(3)(a) did not apply to the present proceedings as s. 285(1) applied instead, the words of s. 285(1) ("or other legal process") being wide enough to include the process of seeking a TPDO. I agree that these words are wide enough. This means that "the court" (which means the insolvency court: see s. 385(1)) can stay proceedings, including an application for a TPDO, taking place in

other courts. But I do not think it follows that because s. 285(1) applies, s. 285(3)(a) does not also apply.

37. Mr Doctor submitted that a TPDO was not a remedy against the property of the debtor. I have explained why in my view it is. I do not see any sustainable argument to the contrary. Mr Doctor referred to *re Taylor* [2006] EWHC 3029 (Ch) at [54] where HHJ Kershaw QC, sitting as a Judge of the High Court, referred to s. 285(3)(a) as affecting any remedy which a creditor could pursue without recourse to litigation or arbitration. It is not clear to me that HHJ Kershaw intended by that to hold that "remedy" in s. 285(3)(a) was *limited* to out of court remedies, or only whether it *included* them; but if he meant the former I cannot agree.

38. Mr Doctor submitted that s. 285(3)(a) did not prevent proceedings being continued up to the entry of a judgment, but only barred the enforcement of a judgment. The Court could therefore decide whether the TPDO should be made final and at that stage stay its enforcement.

39. There are indeed authorities which establish that s. 285(3)(a) does not prevent the Court proceeding to judgment on a money claim, but only bars its enforcement: *Heating Electrical Lighting & Piping Ltd v Ross* [2012] EWHC 3764 (Ch) at [38] to [40] per HHJ Langan QC, followed in *Hellard v Chadwick* [2014] BPIR 163 at [34]-[41] by Registrar Barber. But that is because of the nature of a money claim. If there is a dispute whether A has a claim against B (a bankrupt) or as to the quantum of such a claim, the alternative to allowing A to proceed to judgment in an ordinary action is to leave A to prove in the bankruptcy. In either case the question of liability and quantum will have to be resolved, if not by trial, then by proceedings in the bankruptcy. All that obtaining a money judgment does is establish and quantify A's claim, and convert the disputed claim into a judgment debt. It has no effect by itself on the property in the estate.

40. A TPDO seems to me entirely different. As explained in *Société Eram* it creates an equitable charge on the debt. That is a proprietary remedy against the property of the bankrupt. Once the TPDO has been made, the debt is not available to the general body of creditors but is payable in priority to the judgment creditor. I do not see it as analogous to a money judgment: the question is whether s. 285(3)(a) permits a TPDO to be made final at all, not merely whether the TPDO should be enforced.

41. Mr Doctor submitted that the words "except with the leave of the court" which appear at the end of s. 285(3)(b) should be read as applying to s. 285(3)(a) as well. An argument to that effect might well have been made on the wording of the predecessor provisions, namely s. 9 of the Bankruptcy Act 1883 and s. 52 of the Bankruptcy Act 1914. But the layout of the current section seems clear. And there is ample authority that the IA 1986 should be construed as a piece of new legislation and without regard to the predecessor provisions: see for example *Smith v Braintree DC* [1990] 2 AC 215 at 238B per Lord Jauncey where he said this about s. 285 itself.

42. Mr Doctor's final written submission was based on the decision of this Court of *Nationwide BS v Wright* [2009] EWCA Civ 811. He suggested that the Court had approved a practice of adjourning the question whether an interim charging order or interim TPDO should be made final until after the hearing of the bankruptcy petition, and that this showed that bankruptcy, while highly material, does not by itself put an

end to proceedings.

43. I do not think this case assists him. The ratio of the decision is that where a charging order has been made final between petition and bankruptcy and *without the Court being aware of the pending petition*, the creditor can keep the benefit of the charging order as (i) unlike under the Bankruptcy Act 1914 (and the position with company winding up) the commencement of the bankruptcy does not date back to a date before the making of the bankruptcy order and (ii) the policy of the Act, as provided by s. 346, is that a creditor with the benefit of a final charging order who has completed execution before the bankruptcy order is entitled to keep it: see at [18] per Sir John Chadwick. He also says that if the Court *is* aware of a pending petition at a time when it is asked to make a charging order final, it makes sense to adjourn the application to make the charging order final until after the hearing of the petition: see at [26]-[27]. This is no doubt because if the petition is dismissed there is usually no reason not to make the charging order final, whereas if the bankruptcy order is made, the application will ordinarily be dismissed precisely because execution is not complete before the commencement of the bankruptcy.

44. But the present case is not like that. We are not being asked to consider whether to make the TPDO final at a stage between presentation and bankruptcy, when it might well make sense to adjourn the hearing until after the hearing of the petition. We are being asked to make the TPDO final at a stage when it is known that a bankruptcy order has been made.

45. In oral argument Mr Doctor made the point that Mr Sinclair, who had sought to appeal every order made against him in the litigation, was likely to seek to appeal the bankruptcy order, the day of the hearing before us being his last day for doing so; and indeed during the course of the hearing it was confirmed that Mr Sinclair had applied for permission to appeal. But Mr Doctor did not ask for an adjournment, and indeed shortly before the hearing MWP opposed the suggestion that the appeal should be adjourned in the light of Mr Sinclair's bankruptcy. In those circumstances we can only deal with the case on the basis of the current facts, which are that a bankruptcy order has been made.

46. Mr Doctor added some other points orally. He said that there was no evidence that Mr Sinclair had any other creditors who would be prejudiced by the TPDO. But equally there is no evidence that there are no other creditors, and we have to assume that there may be. Mr Doctor said that we could continue the interim TPDO until after a trustee was appointed, which would simply preserve the position. But unless there is a real prospect of the TPDO being made final, I do not see that there is any basis for continuing the interim TPDO; and in order to satisfy us of that, for the reasons I have given, it is necessary for MWP to satisfy us that it has a reasonable prospect of making a successful application under s. 346(6) IA 1986. Mr Doctor said that continuing the interim TPDO would have the benefit of continuing the provision obliging Mr Sinclair and Sokol to preserve information. But if it is not otherwise appropriate to continue the interim TPDO, I do not think it can be a good reason to do so that it would continue a provision which is clearly only ancillary.

47. None of these submissions therefore affects the conclusion I have already expressed at paragraph 29 above that unless MWP can establish that it has a reasonable prospect of obtaining an order under s. 346(6) IA 1986, the appeal cannot be pursued.

Does MWP have a reasonable prospect of obtaining an order under s. 346(6)?

48. The fundamental principle of bankruptcy is that it enables a *pari passu* distribution of the bankrupt's assets among his creditors. Creditors who are already secured before the bankruptcy commences are entitled to keep the benefit of their security; but creditors who are not secured are only entitled to a *pari passu* distribution. For these purposes a creditor who has obtained an order nisi or interim order is regarded as only having a provisional (or "revocable" or "defeasible") interest, and hence when a creditor had obtained a charging order nisi over assets of a company, the House of Lords held that the intervening liquidation of the company was a good reason not to make the charging order final: *Roberts Petroleum Ltd v Bernard Kenny Ltd* [1983] 2 AC 192. The same policy is of course reflected in s. 346(1) IA 1986 which prevents a creditor from retaining the benefit of an attachment unless it has been completed before the commencement of the bankruptcy.

49. In these circumstances to allow one creditor to obtain priority over others by completing an attachment after the bankruptcy order has been made is a significant inroad into the *pari passu* principle. It is not surprising therefore that it has been held that it requires something exceptional before this should be permitted.

50. The relevant principles for the exercise of the Court's discretion under s. 346(6) were conveniently summarised by Mann J in *Tagore Investments SA v Official Receiver* [2008] EWHC 3495 (Ch) (***"Tagore"***) at [44]-[48]. It is not necessary to set them all out, but he refers to the jurisdiction being exercised with great caution, and only in an exceptional case; to the normal primacy of the *pari passu* rule, which should not be lightly displaced; and to the heavy burden on the applicant to establish that the events which have happened have generated sufficient unfairness to justify an exception in his favour.

51. In the present case Mr Doctor relied on the following matters. First, he relied on the substantial sums that are due. But this does not seem to me to affect the question of fairness one way or the other.

52. Second, he said that on a previous occasion or occasions Mr Emmott had assigned to Mr Sinclair, by way of partial repayment of what he owed him, a part of his rights under the Award. That had enabled Mr Sinclair to discharge a corresponding liability to MWP and in effect it had reduced the amount payable by MWP under the Award. That was convenient to all parties, and Mr Sinclair was still willing to do something similar. Such a solution made sense and might, he said, indeed prove attractive to the trustee once appointed. But it seems to me that the willingness of Mr Sinclair to see this happen is no longer here or there. On his bankruptcy it is no longer a matter for him how his liabilities are met. It is a matter for the trustee in bankruptcy. If there are any other creditors, the trustee would *prima facie* have no reason to see one creditor preferred, necessarily at the expense of others.

53. Mr Doctor said that there might turn out not to be any other creditors; but I have already said that we have no evidence that there are none, and in any event if there are no other creditors, one would have thought there would be no reason for MWP to apply under s. 346(6) as, subject to the costs of the bankruptcy, all Mr Sinclair's assets will be distributable to it as sole creditor anyway.

54. Mr Doctor said that if he was right on the substance of the appeal, MWP should have had a final TPDO already long before the bankruptcy. I can see that in some cases that might be a consideration. If for example some other creditor had made Mr Sinclair bankrupt before MWP's appeal could be heard, or if (as happened in *Tagore*) Mr Sinclair had petitioned for his own bankruptcy, it might be relevant that the intervening bankruptcy had deprived MWP of the benefit of a final order that it should, on this view, have obtained before Master Kay in 2018. But in the present case it was MWP's own acts which led to Mr Sinclair being made bankrupt, and I do not think it can then complain that it is unfair that his bankruptcy intervened before the TPDO was made final.

55. Mr Doctor accepted that MWP's petition, presented in December 2018, was presented at a stage when MWP had already lost before Master Kay and was appealing his Order to the Judge. He said that there was nothing wrong or improper in MWP pursuing both procedures in parallel to seek to recover what it was owed by Mr Sinclair. I agree that that was not necessarily improper, but there was always a risk when it presented its petition that the petition would be heard, and Mr Sinclair bankrupted, before the appeal against the TPDO could be heard. MWP could have asked for a stay on the petition until after the appeal was heard. By 9 March 2021 when it came to be finally heard, the petition had admittedly been on foot for an unusually long time, but if ICCJ Prentis had been asked for a further short adjournment to await the outcome of this appeal, he might have been persuaded to grant it. But MWP did not do this, and allowed Mr Sinclair to be made bankrupt. In my judgment it can scarcely complain that the intervening insolvency before its TPDO can be made final has caused it unfairness when the insolvency was brought about by its own act. There may be nothing improper in MWP pursuing two parallel sets of proceedings against Mr Sinclair at the same time, but once one of those proceedings has resulted, at MWP's request, in his bankruptcy, it is difficult to see that it can complain of the impact of that on its other proceedings.

56. Finally Mr Doctor said that Mr Sinclair's bankruptcy had been something of a last-minute development that had happened suddenly, and it was possible that if he had more time, other matters might become apparent that could be relied on. But however much the bankruptcy came as a surprise to Mr Doctor himself, it can scarcely have done so to MWP; and it seems odd to describe Mr Sinclair's bankruptcy in March 2021 on a petition presented in December 2018 as having happened suddenly. I do not think there is any reason to give MWP any further opportunity to make out its case.

57. In those circumstances none of the matters relied on by Mr Doctor seems to me to give rise to any realistic prospect that MWP would be able successfully to invoke s. 346(6) IA 1986. It follows, for the reasons I have already given, that there is no prospect of MWP being able to keep the benefit of the TPDO, and hence no substantive purpose would be achieved by our hearing the appeal.

Hearing the appeal for the purpose of costs

58. Mr Doctor submitted that we should proceed to hear the appeal anyway as it potentially affected the costs which MWP had been ordered to pay in the two lower Courts (and/or the costs of the appeal itself).

59. The practice of this Court in relation to appeals that have become academic save as to costs was considered by Gross LJ in *Hamnett v Essex CC* [2017] EWCA Civ 6 at [35]-[37]. He summarised the position at [37] as follows:

> "37. Pulling the threads together, I do not, respectfully, read these authorities as suggesting any inflexible rule as regards proceeding with an appeal which has become academic between the parties. Instead, in such a case, they point to the court having a narrow discretion to proceed, to be exercised with caution – even when a point of public law of some general importance is involved. If the only extant issue goes to costs, the Court is likely to be still more cautious before deciding to hear the appeal."

60. We therefore have a discretion to allow the appeal to be argued solely for the purpose of costs. We decided not to exercise it. The factors which I took into account in agreeing to this decision were as follows. First, the legal point raised by the appeal, namely whether a loan repayable 30 days after demand is a "debt due or accruing due" within the meaning of CPR r 72.2(1)(a), is admittedly a relatively short point of law of some general importance, and I have already said that I agree with Popplewell LJ that it has a real prospect of success; but it would be necessary for us not only to hear this point, but also the question whether there was any sufficient basis for disturbing Master Kay's exercise of his discretion. That turns very much on the facts of this particular case and raises points of detail that are of less general interest and likely to give rise to longer argument. When granting permission to appeal to the Judge, Males J said that the appeal on that ground was "just" sufficiently arguable to raise a prospect of success; and we do not have the benefit of HHJ Pelling's views on the question as he did not consider it.

61. Second, the costs concerned, although not minimal, are not very high, and compared with the much larger sums owed by MWP to Mr Emmott under the Award are not of great significance to the parties.

62. Third, and to my mind decisively, the current situation is one of MWP's own making as I have already explained. MWP chose to present and pursue the petition against Mr Sinclair to the point where it succeeded in having him made bankrupt. The consequences for the present TPDO proceedings were consequences that it brought on itself. Given the general principle that the Court will be cautious about permitting an appeal to be continued solely for the sake of costs, that seems to me to point firmly to not exercising the discretion in MWP's favour.

63. These were the reasons why I concurred in the decision not to hear the appeal.

Postscript

64. We circulated our draft judgments in the above form in the usual way on 7 April 2021. On 14 April we received submissions from MWP inviting us not to hand down our judgments in final form but to reconvene the hearing of the appeal, or at least continue the interim TPDO for the time being. We have decided not to do so, and I explain here why.

65. The jurisdiction of this Court to withdraw its draft judgments and proceed to hear further argument in an appeal is undoubted. But it is not a procedure to be encouraged. It is at the hearing of the appeal that a party is expected to deploy all its

arguments. It is not in accordance with the overriding objective for a party to wait until it has seen from the Court's draft judgment(s) why it is about to lose an appeal and then seek to advance further arguments. The hearing of an appeal is not, and should not be allowed to become, an iterative process.

66. These are points of general application. In the case of the sprawling litigation with which this appeal is concerned, they are given particular force by the comments of Peter Jackson LJ in one of the other appeals to have reached this Court, *Emmott v Michael Wilson & Partners Ltd* [2019] EWCA Civ 219 at [70]:

> "Any court in this jurisdiction that has to consider this dispute in future would do well to remember that the overriding objective in civil proceedings includes a duty on the court to save expense, deal with the case expeditiously and fairly, and allot to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases; further, that the parties have a duty to help the court to achieve this. This pathological litigation has already consumed far too great a share of the court's resources and if it continues judges will doubtless be astute to allow the parties only an appropriate allotment of court time."

67. Nevertheless, I accept that we should not reject MWP's new material out of hand but should consider it to see whether it gives any reason to think that we would, or might, have reached a different decision had this material been before us. But having considered it, I see no reason to think that we would have done. In short it changes nothing.

68. There are two relevant documents before us. One is a 23-page witness statement of Mr Wilson (supported by 395 pages of exhibits) intended to show why an application by MWP in Mr Sinclair's bankruptcy under s. 346(6) IA 1986 would be successful. The other is a 24-page submission by MWP (not signed but I assume also written by Mr Wilson). Mr Wilson's documents amply bear out the criticism made of him by HHJ Pelling who referred in his judgment to "the invariably prolix manner in which Mr Wilson of MWP chooses to present each application" (at [5]). But for all their length the points they make can be summarised quite shortly:

(1) MWP says that it was unfair to MWP for the Court to ask Mr Doctor to address the question whether MWP would have any reasonable prospect of success on an application under s. 346(6) IA 1986 without any prior warning.

There is nothing in this point. It was MWP who had Mr Sinclair made bankrupt on 9 March 2021. Even without any prompting from the Court, that should have caused MWP and its legal advisers (including Mr Wilson who is an English solicitor) to have given thought to whether it could pursue its appeal. Then on 25 March 2021 the Official Receiver e-mailed the Court (copying in Mr Wilson) drawing attention to s. 285(3)(a) IA 1986. The Court had in fact already itself researched the point and formed a provisional view that s. 285(3)(a) deprived it of jurisdiction to make a TPDO, and, again on 25 March 2021, e-mailed Mr Doctor to alert him to this and ask for his submissions why that was incorrect. The Court was of course under no obligation to give MWP any advance warning of its concerns, but did so in order to make the hearing more efficient. Mr Doctor's submissions raised a number of points (see above) but among other things he relied on the possibility of an application under s. 346(6). It was for MWP, if it was going

to rely on s. 346(6) as an answer to the s. 285(3)(a) point, to explain how it proposed to make out a case under s. 346(6), and there was nothing unfair in expecting Mr Doctor to address this in his submissions.

(2) MWP says that the relevant history of the litigation shows that both Mr Sinclair and Mr Emmott have behaved very badly, and that overall MWP is owed more than it owes under the Award.

This is set out in elaborate detail, both in MWP's submissions and in Mr Wilson's witness statement. Mr Wilson says that he has many judgments in MWP's favour that demonstrate the abusive litigation behaviour of Mr Sinclair and Mr Emmott. I will assume this is so. I do not see the relevance of it to an application under s. 346(6). The question on such an application is whether the *pari passu* principle should be displaced. That is not an issue that turns on the behaviour of the bankrupt (Mr Sinclair) let alone that of the third party debtor (Mr Emmott) but on whether there is anything exceptional which justifies promoting the interests of one creditor (MWP) above the others. Nor does the overall state of account as between MWP and Mr Emmott affect the application under s. 346(6).

(3) MWP says that information about the assets and liabilities of Mr Sinclair shows he has few other creditors or easily realisable liabilities.

The information in fact shows that Mr Sinclair does indeed have other liabilities than to MWP. Although some of them are disputed, it includes £37,000 owed on credit cards which it is not suggested is disputed. Mr Wilson says that MWP is by far the largest creditor. That does not mean that it is the only creditor, and no reason has been given why the other creditors should have their rights to a *pari passu* distribution disturbed.

Mr Wilson says that none of Mr Sinclair's assets (other than his claim against Mr Emmott) are readily available. That seems to me a reason why all his creditors should share in the realisation of that asset, not a reason why MWP alone should.

Mr Wilson says that the best way for Mr Sinclair's claim against Mr Emmott to be realised is for it to be assigned to MWP so that it can be set off against the amounts remaining payable under the Award, and a trustee in bankruptcy might well conclude that that was so, and agree to a s. 346(6) application. I can see that a trustee might agree that the best way to realise the claim was to assign it to MWP, but I do not see why a trustee would agree to MWP having the sole benefit of such a claim to the exclusion of other creditors which is what a s. 346(6) application would mean. It is far more likely that a trustee would only agree to such an assignment on terms that an appropriate part of the value was made available to the other creditors. That does not need the trustee to consent to an application under s. 346(6), and indeed would be inconsistent with him doing so.

69. In short, no good reason is advanced why it is unfair to MWP to allow the ordinary *pari passu* distribution to apply in Mr Sinclair's bankruptcy. It was MWP itself which chose to invoke that principle by making him bankrupt, and for reasons given

above that seems to me to point firmly to any application under s. 346(6) having no real prospect of success. The new material adds nothing on this point. Mr Wilson says that he hoped that the pressure of bankruptcy would have induced Mr Sinclair and Mr Emmott to settle, but it did not, and instead Mr Sinclair was made bankrupt, which is what MWP itself had petitioned the Court to do. As I have already said, MWP cannot in my judgment then complain of the effect that the bankruptcy had on its application for a TPDO, or that the *pari passu* principle which it had invoked was unfair.

Lady Justice Simler:

70. I agree.

Lord Justice David Richards:

71. I also agree.