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Case No: BM80183CH

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BIRMINGHAM
INSOLVENCY AND COMPANIES LIST (ChD)

ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BIRMINGHAM
INSOLVENCY AND COMPANIES LIST (ChD)

Insolvency case No 8232 of 2018

IN THE MATTER OF JONATHAN DIGBY-ROGERS
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

date: Double-click to add Judgment date

Before : Mark Anderson QC

- -

Between :

Jonathan Digby-Rogers	**Appellant**
- and -	
Speechly Bircham LLP	**Respondent**

- -
- -

Laurie Scher (instructed by **Drukker Solicitors**) for the **Appellant**
Nicholas Cobill (instructed by **Charles Russell Speechlys**) for the **Respondent**

Hearing date: 16 May 2019

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JUDGMENT

Mark Anderson QC :

1. This is an appeal against a bankruptcy order made on 18 September 2018 by District Judge Rouine. The debtor, Mr Digby-Rogers, contends that the judge should not have made the order but should have adjourned the petition.

2. In May 2015 the petitioning creditor ("Speechly") obtained judgment for £178,199 against Mr Digby-Rogers. Part of the debt was paid but in December 2016 Speechly served a statutory demand for the balance, and issued this petition in Telford County Court in early 2017.

3. The petition came on for hearing before District Judge Etherington on 8 March 2017. The judgment debt, which Mr Digby-Rogers cannot and does not dispute, stood at £167,266. The list of creditors showed total debts of £1,255,591, so Speechly's debt represented about 13 per cent of the total.

4. Mr Digby-Rogers asked the judge to adjourn the petition to give him time to receive an anticipated project fee which would be large enough to satisfy all his creditors. He said that he had no other assets, and that a bankruptcy order would yield nothing. The project fee, he said, was his creditors' only hope.

5. The anticipated fee is US$ 2.5m. It relates to a mining project in Mongolia. Mr Digby-Rogers' case was, and still is, that he introduced an investment manager to a Mongolian entity which holds a mining licence. A Russian company is to invest and Mr Digby-Rogers' role is to help to devise the financial structure. His fee will be payable when the documentation has been signed, provided he has not been made bankrupt before then. He says that if he is made bankrupt his credibility will be lost, he will not be allowed to continue in his role and will have no prospect of receiving any part of the fee.

6. So stated, Mr Digby-Rogers' case does not appear to provide a promising basis for resisting a bankruptcy order. Moreover he has all along advanced this case without exhibiting any project documents or communications showing how much, or when, he would be paid. However the surprising and unusual feature of the petition is that it is opposed by all the other creditors. These are eight in number. Speechly has not challenged their status as creditors nor their motives in opposing the petition. They include a Mr Paul Leatherdale, owed around £600,000, two firms of solicitors, owed about £146,000 between them, and a well known insolvency practice which is owed £21,000. Those creditors have had the opportunity to investigate the Mongolian project for themselves, and take the prospect of payment seriously. The chief creditor by amount, Mr Leatherdale, has expertise in international financial projects and, having made

inquiries of the Russian investor, has given evidence that he is confident that the fee will be paid.

7. At the first hearing (at which Mr Digby-Rogers appeared without representation) District Judge Etherington was persuaded to grant an adjournment. He did so in the interests of the broad range of creditors, adding that it was unlikely that a further adjournment would be allowed without evidence that payment from the project was imminent.

8. The matter came back before the same judge in August 2017, when Mr Digby-Rogers was represented by counsel. The judge was told that the payment of the fee was anticipated the following month and asked for an adjournment until then. Though opposed by Speechly, a further adjournment was granted.

9. The petition was not relisted until January 2018. Mr Digby-Rogers represented himself, and again asked for more time. This time he was accompanied by Mr Leatherdale, who told the judge that he had made contact with the Russian investors and was confident that the fee was going to be paid. The judge granted the requested adjournment.

10. However when the matter was re-listed in February 2018 Mr Digby-Rogers, again acting in person, and asked for another adjournment, which District Judge Etherington granted.

11. The petition was not then relisted until June 2018. At this (fifth) hearing, Mr Digby-Rogers again persuaded District Judge Etherington to adjourn. By this stage it is clear that the judge was very close to finding that the balance had tipped in favour of the petitioning creditor and made comments to the effect that a bankruptcy order would be very likely on the next occasion if payment had not been made. He had in mind a timescale of one month.

12. However someone realised that the case could no longer proceed in the County Court and it was transferred to the High Court, resulting in a delay of some three months.

13. It was in those circumstances that the petition was listed for 1.5 hours before District Judge Rouine on 18 September 2018. I do not know how much time was allowed for pre-reading.

14. In the days before the hearing Mr Digby-Rogers filed eight witness statements: one from himself, six from creditors supporting his request for an adjournment and one from a Mr Rainer Schobries. Even though the case had been transferred to a new judge, these statements did not contain any introduction to the issues. They assumed prior knowledge, and provided an update. Thus Mr Schobries'

statement was his fifth, and its narrative begins with the words "Since my previous statement…" It did not explain who he was or his role in the project. Mr Digby-Rogers was to tell the judge during the hearing that Mr Schobries was the investment manager.

15. Speechly filed no evidence, and so did not prepare a hearing bundle. The judge was provided with no reading list and no case summary. He only had the court file, which in the usual way is unbound, unindexed and forbiddingly large. It would have been impossible, in the time usually allowed for pre-reading, for the judge to locate the statements filed for the earlier hearings and to discern which of them to read. Speechly's counsel, Mr Cobill, provided a skeleton argument which mentioned the Mongolian project as the reason for previous adjournments but did not mention, for example, that 87 per cent of the creditors (by value) opposed the petition.

16. The judge was not asked, and did not announce, what materials he had read. However he took a lot of trouble during exchanges with Mr Digby-Rogers to draw out his case about the Mongolian project, and gave Mr Digby-Rogers the opportunity to refer him to the evidence that the prospect of payment was real. Mr Digby-Rogers was able to tell the judge some of the details of the project and its financial structure, that it was nearing completion and that he would be paid. The judge ascertained that there was nothing in writing to that effect, except for the witness statements themselves. He also ascertained that no one had set a deadline for payment. Mr Digby-Rogers told him that he anticipated payment by the end of 2018, and the reasons for that anticipation. Whether or not the judge had pre-read the witness statements, all this information was derived from them.

17. However Mr Digby-Rogers was not successful in persuading the judge to consider an argument based on the support of the other creditors. His sixth witness statement made reference to *Glenn Maud v Aabar Block* [2016] EWHC 2175 (Ch), in which Snowden J analysed the collective nature of bankruptcy proceedings as a class remedy. Mr Digby-Rogers' statement asserted that the other creditors' views should receive separate and distinct consideration, to be weighed in the scales against the preference of the petitioning creditor. As will be seen, that was Mr Digby-Rogers' best point. However Mr Digby-Rogers' statement went on to develop it into a spurious submission that the petition was an abuse of the process of the court, culminating in paragraph 39 with an assertion that the petition should be struck out. Mr Scher accepted before me there was no basis for such a contention.

18. The judge began the hearing by asking Mr Digby-Rogers, "So, you want to apply for dismissal of the petition?" Mr Digby-Rogers confirmed that he did. After a brief exchange, the judge gave a ruling in which he refused to hear that application. The judge then asked Mr Digby-Rogers if he wanted to appeal that case management ruling, and Mr Digby-Rogers said that he did. It was in that context that he began to deploy the argument about the collective rights of creditors as a class. The exchange went as follows:

D-R: A bankruptcy is a class action.

DJ: No, it is not, Mr Digby-Rogers.

D-R: A collective -

DJ: No, it is not, Mr Digby-Rogers. You are an individual debtor. There is a petition creditor. There are a number of other creditors. But, at the moment, carriage of the petition is with Speechly Bircham solicitors. It is not a class action. There is one target; that is you.

…

D-R: I understand that, but my understanding, albeit an amateur one - and I hope you will indulge me there - is that the petition is being brought on behalf of a group of people.

DJ: That has got nothing to do with it.

D-R Fine

DJ: It is being brought by a commercial entity. What are the grounds of your application for permission to appeal?

D-R: That all, except for the petitioner, object to the petition … Because the result of the petition, if granted, will be that all creditors will effectively receive nothing. And if the petition is dismissed - not made - then there is every chance everybody will be paid in full.

19. The judge refused permission to appeal and the hearing proceeded to Mr Digby-Rogers' application for an adjournment. However Mr Digby-Rogers' argument based on the collective interests of creditors as a class was not mentioned again. There was no reference to *Glenn Maud v Aabar Block* [2016] EWHC 2175 (Ch) by either side. Given the firm view that the judge had expressed in the exchange quoted above, it is unsurprising that Mr Digby-Rogers did not attempt to renew the argument.

20. The result was that the rights of the other creditors received scant attention for the rest of the hearing. Their witness statements were not referred to and it is unclear whether the judge had read them. Although Mr Leatherdale appeared on the list of creditors who opposed the petition, he was not invited to speak.

The only allusion to the interests of the other creditors was an observation by the judge in the course of Mr Cobill's submissions:

> *DJ: And all this is in the context of this petition creditor being fully aware of what Mr Digby-Rogers is describing, to use my own word, as an Armageddon scenario. If you put me under, colloquially, I won't get paid out of the Mongolian project. I've not got anything else, so absolutely everybody who is a creditor of mine gets hung out to dry?*
>
> *NC: Yes that's correct. That situation is known to the petition creditor, and the opposing creditors also know that that's the position the petitioning creditor's taken, and that's the position that has maintained in all of the hearings in this matter.*
>
> *DJ: And the fact that there are multiple opposing creditors would not prevent me from making a bankruptcy order?*
>
> *NC: That's correct.*

21. Mr Cobill's submissions did not deal with the rights and preferences of the other creditors. He dealt only with the separate question whether the judge should allow an adjournment in exercise of the discretion described by Lewison LJ in *Sekhon v Edginton* [2015] 1 WLR 4435 at [18-19]:

> *Against this background, the practice has evolved in relation to the grant of adjournments of bankruptcy petitions where the debtor asks for time to pay. The starting point is that, if the petitioning creditor establishes that the statutory conditions are fulfilled, he is prima facie entitled to a bankruptcy order: see In re A Debtor (No 452 of 1948); Ex p The Debtor v Le Mee-Power [1949] 1 All ER 652 and the In re A Debtor (No 72 of 1982) case, both referred to in Judd v Williams.*
>
> *The court, of course, has the power to adjourn the petition, but the practice is to do so only if there is credible evidence that there is a reasonable prospect that the petition debt will be paid within a reasonable time.*

22. Similarly, in his ruling (dismissing the application for an adjournment) the judge dealt only with this issue. Having cited *Sekhon v Edginton* and other cases to the same effect, he said

> *The thread which runs through these authorities ... is that an adjournment of a hearing of a bankruptcy petition may only be ordered where there is credible evidence of a reasonable prospect of a petition debt being paid within a reasonable time. I am satisfied that this is the test I must apply in respect of Mr Digby-Rogers's application to adjourn.*

23. The judge went on to find that there was no credible evidence of any such reasonable prospect and refused the application for an adjournment. He did not mention that the other creditors had supported the application.

24. Mr Digby-Rogers now appeals (with the financial support of the other creditors) on grounds which have been helpfully distilled by counsel into six issues as follows:

    1) Did the judge proceed on a manifest error of law?
    2) Did the judge take into account the interests of the class of creditors, and properly weigh the views of the creditors who supported and opposed the making of the bankruptcy order?
    3) Was not hearing from Paul Leatherdale a serious procedural irregularity rendering the decision of the lower court unjust?
    4) What consideration was given to the witness statements and other evidence filed by the Appellant? Did that level of consideration amount to a serious procedural irregularity rendering the decision of the lower court unjust?
    5) What allowance was given to the appellant's status as a litigant in person? Was that a serious procedural irregularity rendering the decision of the lower court unjust?
    6) Did the judge give appropriate weight to the evidence showing a reasonable prospect of the petition debt being paid within a reasonable time?

25. Permission was granted by His Honour Judge Cooke sitting as a judge of the High Court on 24 October. Judge Cooke's reason for giving permission was based solely on the omission to give Mr Leatherdale the opportunity to address the court (issue 3), but Judge Cooke did not dismiss the other grounds of appeal and Mr Cobill realistically accepted that permission had been granted in respect of all of them.

The parties' submissions

26. Counsel helpfully agreed the following proposition of law:

> *Glenn Maud v Aabar Block [2016] EWHC 2175 (Ch) is binding authority that the Court hearing a bankruptcy petition opposed by other creditors should, as a distinct exercise of its discretion, consider whether to grant or refuse a bankruptcy order in the*

> *interests of the class of creditors having evaluated the weight to be attached to the views of all of the various creditors in the class.*

27. On issues (1) to (3) Mr Laurie Scher submitted for the appellant that the judge made a manifest error of law in ruling (i) that bankruptcy proceedings are not a class action, and (ii) that the fact that the petition is brought on behalf of a group of creditors "has got nothing to do with it". He says that this manifest error led the judge to overlook the exercise identified in para. 26 above, and that his decision was therefore wrong. He did not evaluate the interests of the other creditors and balance them against the interest of Speechly. He took no account of the fact that the other creditors accounted for 87 per cent of Mr Digby-Rogers' debts, that they included professionals and a project finance expert, that they had expressed in witness statements cogent reasons for opposing the petition; and, by contrast, that Speechly had provided no good reason for wanting a bankruptcy order. He submitted also that there had been a serious procedural irregularity in not giving Mr Leatherdale an opportunity to address the court.

28. On issues (4) to (6), Mr Scher submitted that the judge's approach at the hearing suggested that he had not read the relevant evidence. Mr Scher also criticised his omission to say what materials he had read, as well as his frequent interruptions of Mr Digby-Rogers' submissions. The result, says Mr Scher, was that the judge's decision that there was no credible evidence of a reasonable prospect of receiving the project fee in a reasonable time was wrong. In particular the judge concluded that the prospect of payment appeared to have taken a "backward step", a conclusion for which there was no evidential basis.

29. Mr Cobill for the respondent reminded me that this had been the sixth hearing of the petition, and that at all stages the opposition of the other creditors had featured at the forefront of the reasons for the adjournments. He submitted that the remarks quoted in paragraph 18 above were made in the context of an application to dismiss the petition, to which the other creditors were not parties. So the judge had been right that they had no part to play. He pointed out that Mr Digby-Rogers had clearly informed the judge that the other creditors supported his position, and submitted that the judge must have had that fact in mind throughout. He supported that by reference to the passage quoted in paragraph 20 above. He said that the omission to ask Mr Leatherdale if he wished to speak was of no consequence because Mr Leatherdale had spoken at an earlier hearing and therefore knew of his right to address the court. Anyway the judge had no way of knowing that he wanted to speak because no one told him so. Mr Cobill went on to submit that even if the judge had not exercised his discretion properly, it would have made no difference because it was clear from the

hearings before District Judge Etherington that the fifth adjournment had been intended as the debtor's last chance and he had been unable to take it.

Decision

30. I will deal first with issues (4) and (6). The judge was presented with 8 witness statements running to some 40 pages, with no guide to pre-reading and no hearing bundle. None of the witness statements included a summary of the project but assumed that the judge would already know all about the background and just needed to be brought up to date. The principal witness statements appeared to assume that all the earlier witness statements would all have been read as well. This evidence was not accompanied by a case summary to explain what it was all about.

31. The judge was therefore faced with formidable difficulties, and in my judgment there can be no complaint about how he overcame them. The judge correctly appreciated the need to examine the evidence as to if and when Mr Digby-Rogers would be paid $2.5m, given that he had told the court at five earlier hearings that payment was expected in the near future and it had not yet happened. He was entitled to ask Mr Digby-Rogers to take him to the relevant evidence, and did so. Mr Digby-Rogers' response was correctly understood by the judge as being that the time for payment was open-ended. When Mr Digby-Rogers contradicted that, it was only on the basis that payment depended on the actions of others. When pressed he said that he expected payment by the end of the year. Later, the judge asked to see contractual documentation to evidence that the debtor could expect to be paid $2.5m and was told that there was none because it was the execution of the documentation that would give rise to the payment.

32. These exchanges, and the transcript as a whole, demonstrate that the judge gave Mr Digby-Rogers the opportunity to bring out his best factual case; that the judge understood the evidence presented to him and had distilled out of it the essential issues. In giving his ruling, the judge displayed a clear understanding of Mr Digby-Rogers' case, summarising it accurately and then giving clear and cogent reasons for concluding that Mr Digby-Rogers had not presented credible evidence of a reasonable prospect of being paid $2.5m within a reasonable time. I do not think that the witness statements, including those of the creditors who opposed the making of a bankruptcy order, contained evidence which demanded a finding that the project fee would be paid within a reasonable time. The evidence was only of confidence in it being paid at some indefinite time in the future.

33. I agree with Mr Scher that the judge's observation that the prospect of payment appeared to have receded ("significant step back") may have gone too far, but that does not undermine the judge's clear finding, which he was entitled to make, that the prospect of being paid was not strong enough to warrant an adjournment.

34. In my judgment the judge undertook a proper exercise of the discretion whether to adjourn the petition in accordance with the principles discussed in *Sekhon v Edginton* [2015] 1 WLR 4435, especially in view of the very difficult circumstances which I have identified. There is no merit in the grounds of appeal summarised as issues (4) to (6).

35. However before coming to the decision whether to adjourn in the debtor's favour, the judge was required to consider and evaluate the views of the other creditors. That was not part of the same exercise as considering whether the debtor had demonstrated credible evidence of a reasonable prospect of payment within a reasonable time. It was a separate and prior question which involved different considerations.

36. This is apparent from *Glenn Maud v Aabar Block* [2016] EWHC 2175 (Ch). That case, like this, involved a majority of creditors who did not want a bankruptcy order to be made. The registrar made a bankruptcy order on the basis that there was no reasonable prospect of payment being made within a reasonable time. On appeal, Snowden J analysed the collective nature of bankruptcy proceedings as a class remedy. He quoted from *Re Crigglestone Coal Company Limited* [1906] 2 Ch 327 (Buckley J), *Re P & J Macrae Limited* [1961] 1 WLR 229 (Wilmer and Upjohn LJJ), and quoted the summary of the relevant principles by Mr Richard Sykes QC in *Re Leigh Estates (UK) Limited* [1994] BCC 292 at [81]:

> *The following matters are clear: Although a petitioning creditor may, as between himself and the company, be entitled to a winding-up order ex debito justitiae, his remedy is a 'class right', so that, where creditors oppose the making of an order, the court must come to a conclusion in its discretion after considering the arguments of the creditors in support of and opposing the petition: see Re Crigglestone Coal Company Ltd [1906] 2 Ch 327, in particular the statements of principle of Buckley J at first instance, and s. 195 of the Insolvency Act 1986… It is plain from the well-known authorities on the subject that, where there are some creditors supporting and others opposing a winding-up petition it is for the court to decide as a matter of judicial discretion, what weight to attribute to the voices on each side of the contest…"*

37. At [99] Snowden J went on to discuss the discretion to adjourn a petition on the basis that there are reasonable prospects of payment of the petition debt within a reasonable period. At [102] he said:

> *It is therefore readily apparent that this type of discretionary decision is not a substitute for the consideration by the court of the separate question of the views of the members of the class in a case in which the petition is opposed by other creditors. In such a situation, as Buckley J indicated in Crigglestone Coal, the majority of creditors may consider that their prospects of getting paid are better if no bankruptcy order is made at all. That decision is theirs to make, and is not circumscribed by considerations as to whether payment will be made "within a reasonable time" – whatever that might be taken to mean in the particular circumstances of the case. It is also a question in which "the debtor has no voice".*

38. At [119] Snowden J said

> *For the reasons that I have given, in my view the registrar should have evaluated the views of the members of the class of creditors and their reasons for seeking or opposing an order, taking into account, for example, the various objectives of the petitioning creditors and the nature and interests of the opposing creditors.*

39. At [124] Snowden J concluded that

> *the registrar was led into omitting the critical stage in the exercise of his discretion of addressing the interests of the class and weighing the views of the creditors who supported and opposed the making of the bankruptcy order. Instead, he simply proceeded to the question of whether Mr. Maud had demonstrated that he had a reasonable prospect of paying the petitioning creditors within a reasonable time. That error in approach to the exercise of his discretion means that the registrar's decision to make a bankruptcy order was flawed and cannot stand.*

40. The judge was not provided with a copy of that authority, and it was not cited at the hearing, although it had been mentioned in Mr Digby-Rogers' sixth witness statement. As I have already described, Mr Digby-Rogers did try to make a submission based upon it in support of his application for permission to appeal against the dismissal of his application to dismiss the petition, but the judge cut him off, and Mr Digby-Rogers did not attempt to renew the submission in the context of his subsequent application to adjourn. Mr Cobill did not submit that Mr Digby-Rogers is therefore precluded from taking this point on appeal against refusal of an adjournment, and I think that that is a proper concession. The judge's observations which I have quoted in paragraph 18 above were firm and would have deterred anyone in Mr Digby-Rogers' position from attempting to renew the submission based on *Aabar*.

41. Having heard no submissions based on *Aabar* it is clear from his ruling that the judge overlooked what Snowden J described in that case as a critical stage in the exercise of his discretion. He considered only the discretion to adjourn on the ground that there was credible evidence of a reasonable prospect of payment within a reasonable time. He made no mention of the interests of creditors as a class, nor the weight to be accorded to their views. I must therefore respectfully conclude that he misdirected himself in law.

42. The approach which the judge should have taken was as explained by Upjohn LJ in *In re P & J Macrae Ltd* [1961] 1 WLR 229, 238—239:

> *Although the statute provides that it is the wishes of the creditors to which the court may have regard, it is quite clear that, as the statute gives a complete discretion, the weight to be given to those wishes in determining whether a winding up order ought to be made varies according to the number and value of the creditors expressing wishes, and the nature and quality of their debts. I certainly do not accept for one moment the proposition that it is merely a matter of counting heads and that a majority of 51% opposing a petition will outweigh the views of the 49% who support the petition. In such a case where the wishes of the creditors are so evenly balanced (and there is no reason to distinguish between creditors as mentioned below) the weight to be given to the majority view is obviously negligible. No judge, in my judgment, could possibly be criticised if, in the absence of other relevant circumstances, he chooses to exercise his discretion by giving effect to the prima facie right of the petitioning creditor to a winding up order. At the other end of the scale there is the case where an overwhelming proportion of the creditors in number and value oppose the petitioner who is virtually alone. In that case clearly the weight to be given to those creditors, unless there is some reason for disregarding them, must be very great, and in the ordinary case in the absence of special circumstances will be decisive.*

…

> *Then there may be divergencies in the quality of the creditors. The circumstances may be such that the court is rightly suspicious of the opposing creditors and of the motives which are actuating them. In such a case the court may desire to have evidence before it of their reasons for opposing. It must be a question of discretion in each case whether creditors should be asked to file evidence to support the views they have expressed or not. I do not think it is possible to lay down any prima facie rule one way or the other.*

43. A proper consideration of the interests of the opposing creditors in this case would obviously have included that they constituted the majority by value of 87 per cent of the outstanding debts. It is possible that that consideration would have been decisive. In any event it was necessary to examine their views with some care. Two of the creditors were firms of solicitors, another was an

insolvency practitioner. These professional qualifications might have added weight to their views, but were not considered by the judge. Mr Leatherdale has expertise in international finance which made his view potentially very important. He attended the hearing, and had provided a witness statement, but no one asked him to speak. In his ruling, the judge did not mention his evidence at all. Neither did he mention that 87 per cent of the creditors by value opposed the making of a bankruptcy order.

44. It was also relevant, but the judge did not take into account, that the petitioning creditor was not pressing any evidence to contradict the debtor's assertion that he had no assets, nor to suggest lines of inquiry into concealed or dissipated assets. There was no evidence from the petitioning creditor as to what a bankruptcy order was likely to achieve. That would not have mattered if the only considerations had been those discussed in *Sekhon v Edginton* [2015] 1 WLR 4435, because in the absence of opposition from other creditors, the petitioning creditor is entitled as of right to a bankruptcy order. But that was not the position. It was necessary to balance the petitioning creditor's reasons for wanting a bankruptcy order against the other creditors' preference against it.

45. It is clear, as Mr Cobill submitted, that the judge did have in mind some of the relevant considerations. He did, for example, understand that a bankruptcy order was thought likely to deprive the debtor of any chance of recovering the fee of $2.5m which would enable him to pay his creditors, and that the result of a bankruptcy order would be that no one would get anything. But the fact that the judge took into account some relevant matters does not compensate for the fact that he did not take into account others.

46. I have sympathy with Mr Cobill's submission that the position of the other creditors had received more than enough consideration in the first five hearings; that District Judge Etherington had effectively ruled that Mr Digby-Rogers and his supporting creditors should only have one last chance of a short adjournment; and that since payment had still not been made three months later, there was no need to start from scratch to consider their interests. However Mr Digby-Rogers had filed 8 new witness statements which District Judge Etherington had never seen, and I think that it was incumbent on District Judge Rouine to consider that evidence and to reconsider the position of the opposing creditors in light of it.

47. I would add that the faith placed in the debtor's prospect of recovering the project fee by his other creditors does appear surprising. I also bear in mind the number of hearings which had already taken place and the number of times that payment of the $2.5m fee had been postponed just as it was expected to arrive.

Moreover the evidence supplied to the judge was very unsatisfactory, in particular for not exhibiting a single contractual document, nor any communication between Mr Digby-Rogers and anyone involved in the project. Although he provided a statement from Mr Schobries, that statement did not exhibit any documents either.

48. However I cannot discount the possibility that a proper exercise of discretion would have come down in favour of another adjournment. I have considered whether it would be possible for me to exercise the discretion afresh, taking proper account of the interests of and evidence from the opposing creditors. One practical difficulty with that is that Mr Leatherdale was unable to remain for the duration of the appeal and so was not available to contribute in the way I think he should have been asked to contribute in the court below. Anyway neither party was expecting a rehearing of the petition before me, and both approached the appeal on the basis that if the grounds of appeal were made out, the petition would be relisted before a district judge in due course with the opportunity for both parties to adduce updating evidence.

49. I would therefore allow the appeal on the grounds identified in issues (1) and (2). I also think that issue (3) is made out. The judge should have told Mr Leatherdale that he was entitled to speak and should have taken into account anything he chose to say. There was some debate before me about whether Mr Leatherdale needed to deliver a notice of intention to appear at the hearing of 18 September, but I do not think there is anything in that point. The judge was given a "List of Creditors Intending to Appear" which included Mr Leatherdale's name and stated, correctly, that he opposed the petition. Since he had made a witness statement and since he was the chief creditor by a considerable margin, I think that the judge should have given him an opportunity to be heard. Indeed his interests were more important than those of the debtor. It is no answer that Mr Leatherdale could have spoken up if he had wanted to be heard. The judge made clear at the outset of the hearing that he was facing a busy morning and had expressed the firm view, which both the debtor and Mr Leatherdale were bound to accept, that this was not a class action in any sense.

50. Issue (5) adds nothing to the grounds which have already succeeded.