Neutral Citation Number [2020] EWHC 3888 (QB)

Case No: QB-2012-6883

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/05/2020

Before :

MASTER COOK

- -

Between :

Siamak Feridoni Balengani	**Claimant**
- and -	
Mostafa Sharifpoor	**Defendant**
-and-	
(1) Framjee Properties Ltd (In Liquidation)	**Third Parties**
(2) Mackrell Solicitors	**to the Application**

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- -

Ryan James Turner (instructed by **Berkeley Rowe International Lawyers**) for the **Claimant**
Philip Young (Solicitor with **Cooke Young & Keidan LLP**) for the **Defendant**
Mr Spencer (Solicitor with **Mackrell**) for the **Third Parties**

Hearing date: 14 April 2020

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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.

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MASTER COOK

MASTER COOK:

1. This is the adjourned hearing of an application by the Defendant, who is the judgment creditor, for a Third Party Debt Order [TPDO] which has been held by video link due to the current Covid 19 crisis. I would like to thank the advocates for accommodating the connection difficulties experienced in the course of the hearing and for their helpful written submissions.

2. The hearing of the application originally came before me on 1st April 2020 when Mr Turner, who had very recently been instructed on behalf of the Claimant judgment debtor, indicated that he had instructions to oppose the making of the TPDO and outlined his arguments.

3. It was immediately obvious to me the issues outlined by Mr Turner required proper consideration and came as some surprise to Mr Young. I therefore granted a short adjournment and made directions for the filing of skeleton arguments. On that occasion neither party sought permission to file further evidence beyond the bundle of documents which had been submitted for the hearing.

4. At the start of the hearing I was informed that three further witness statements had been served following the service of the Judgment Debtor's skeleton argument. First, a witness statement from Mr Young, exhibiting correspondence between his firm and Berkeley Rowe International Lawyers instructed by the Judgment Debtor following the previous hearing. Second, a witness statement from Jerry Samuel, a partner in the BVI law firm Conyers Dill & Pearman, giving his response to matters of BVI law which had been raised by Mr Turner at the previous hearing and in particular as to the effect of Framjee entering liquidation in the BVI. Thirdly, a further witness statement from Mr Young concerning matters said to have been raised for the first time in Mr Turner's skeleton argument, exhibiting Framjee's Memorandum and Articles of Association, describing the circumstances in which the form N349 had been modified by him and exhibiting an undertaking to be given by the Defendant to the effect that if required he would apply to the BVI Courts for permission to continue the TPDO proceedings in England.

5. I indicated that I would admit the statements of Mr Young but as there had been no application for expert evidence I would not admit the statement of Mr Samuel. It was however common ground between Mr Turner and Mr Young that the provisions which provide for an automatic stay of proceedings against a company in liquidation in the BVI are similar to those applying in this jurisdiction.

6. Neither party requested a further adjournment to adduce evidence of foreign law. In the circumstances the usual presumption or evidential assumption that English law will apply to the case arises, see Rule 25(2) in *Dicey, Morris & Collins, "The Conflict of Laws"* (15th Ed)

7. The Interim Third Party Debt Order [ITPDO] was made by me without a hearing on the 11 February 2020 and in accordance with CPR 72.4 (1).

8. The order giving rise to the judgment debt was made by HHJ Simpkiss (sitting as a judge of the High Court) in claim HQ2X05579 on 30 June 2014 which required the

Claimant to pay the Defendant the sum of £172,762.40 plus interest at the rate of 8% together with costs which were summarily assessed in the sum of £71,801.26.

9. CPR r 72.3 (2) requires the application notice for a TPDO to contain the information set out in PD 72, paragraph 1.2 of which provides that the notice of application must contain the following information:

> "(1) the name and address of the judgment debtor;
>
> (2) details of the judgment or order sought to be enforced;
>
> (3) the amount of money remaining due under the judgment or order;
>
> (4) if the judgment debt is payable by instalments, the amount of any instalments which have fallen due and remain unpaid;
>
> (5) the name and address of the third party;
>
> (6) if the third party is a bank or building society—
>
> (a) its name and the address of the branch at which the judgment debtor's account is believed to be held; and
>
> (b) the account number; or, if the judgment creditor does not know all or part of this information, that fact;
>
> (7) confirmation that to the best of the judgment creditor's knowledge or belief the third party—
>
> (a) is within the jurisdiction; and
>
> (b) owes money to or holds money to the credit of the judgment debtor;
>
> (8) if the judgment creditor knows or believes that any person other than the judgment debtor has any claim to the money owed by the third party—
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> (a) his name and (if known) his address; and
>
> (b) such information as is known to the judgment creditor about his claim;
>
> (9) details of any other applications for third party debt orders issued by the judgment creditor in respect of the same judgment debt; and
>
> (10) the sources or grounds of the judgment creditor's knowledge or belief of the matters referred to in (7), (8) and (9)."

10. Paragraph 3 of the application for a TPDO described the Third Parties as follows:

> "The First Third Party ("**Framjee**") is a company incorporated in the BVI that is in liquidation. The Judgment Creditor is a 50% shareholder in it and the Judgment Debtor is the other 50% shareholder. The company was originally set up by the Judgment Creditor and the Judgment Debtor to invest in and develop property. It formerly owned a property at 13 The Avenue London NW6 7NR (the **"Property**"). Disputes emerged between the Judgment Creditor and the Judgment Debtor that led to litigation in claim No HQ2X05579 that in turn, led to an oral judgment given by His Honour Judge Simpkiss that in turn resulted in the Order.
>
> In an attempt to collect the judgment debt the Judgment Creditor caused Framjee to be put into liquidation. Framjee has since been pursuing litigation in the Chancery Division in England under claim number HC-2016-003343 against Abholghassem Jamshid Jamshab, the brother-in-law of the Judgment Debtor (the "**Sale of Property Litigation"**). In the Sale of Property Litigation Framjee has been represented by Mackrell, solicitors, The Second Third Party. Pursuant to paragraph 2 of an Order of Master Teverson dated 19 May 2017 (the **"2017 Order"**) (**attached**), directions were given for the Property to be sold and for a sum of money to be retained in Mackrell's client bank account pending written agreement or further order. Mackrell have confirmed that they have instructions on behalf of Framjee to accept service of this application.
>
> The Second Third Party ("**Mackrell**") is an English law firm instructed by Framjee. Its address in England and Wales is Mackrell Solicitors, Savoy Hill House, Savoy Hill, London, WC2R 0UB. Mackrell holds money in its client bank account pursuant to paragraph 2 (3) of the 2017 Order and owes that money to (or holds money to the account of) Framjee who in turn, owes some of that money to the Judgment Debtor, as is more particularly explained below."

11. Paragraph 5 of the application for a TPDO set out the Judgment Creditor's sources and ground of information as follows:

> "The Judgment Creditor knows or believes that the information in sections 3 and 4 is correct for the following reasons.
>
> The information is within the Judgment Creditors own knowledge, information and belief.
>
> Pursuant to paragraph 2(3) of the 2017 Order the amount of **£830,296.18** is currently held in the client bank account of Mackrell. Mackrell confirmed this by way of e-mail dated 4

> February 2020 to Cooke Young & Keidan LLP ("**CYK**"), solicitors for the Defendant (**attached)**.
>
> The Sale of Property Litigation was scheduled to go to trial on and/or from Tuesday 4 February 2020. However it settled shortly before trial. A Tomlin Order reflecting the terms of settlement is understood (from Mackrell's e-mail attached) to have been prepared and negotiated with Attwaters (solicitors for Mr. Jamshab). Based on discussions between the Judgment Creditor and Mackrell, it is understood that the Tomlin Order was agreed and presented to the Court for sealing. Mackrell have informed the Judgment Creditor that the Sale of Property Litigation was settled, materially for present purposes, by agreement to pay the sum of £75,000 to Mr. Abholghassem Jamshid Jamshab. That Tomlin Order is understood from Mackrell to make provision for that payment, thus satisfying the "pending written agreement or further order" provision in the 2017 Order.
>
> Once the Tomlin Order is sealed by the Court and returned to Mackrell, they will be instructed by Framjee to pay the £75,000 out to Mr. Jamshab. That will leave **£755,296.18** in their client bank account.
>
> Mackrell have told the Judgment Creditor and CYK that they will then receive instructions from Framjee to pay 50% of that sum (namely **£377,648.09**) out of their client bank account for the ultimate account of the Judgment Debtor (as 50% shareholder) (the "**Debt owed to the Judgment Debtor"** with the remaining 50% being paid out for the ultimate account of the Judgment Creditor (as the other 50% shareholder). Mackrell have not asserted any interest of their own in the £755,296.18 and the Judgment Creditor does not understand Framjee to have any interest in it beyond remitting that equity to its shareholders and then concluding its winding up. The Judgment Creditor is not aware of any party other than the Judgment Debtor having an interest in the Debt owed to the Judgment Debtor.
>
> The object of the present application is to apply for a third party debt order to enforce the Order over the Debt owed to the Judgment Debtor. The Judgment Creditor understands from discussions with Mackrell that both Framjee and Mackrell will abide by any order that the Court makes on this application."

12. On behalf of the Judgment Debtor Mr Turner makes five core submissions:

    i) Firstly, there is no "*debt due or accruing due*" to Mr Balengani from Mackrell, who is a stranger to Mr Balengani and against whom Mr Balengani has no known rights of any kind, or Framjee. As such, there is no debt to which a TPDO might attach and no evidence before this Court on which it can find that there is such a debt.

ii) Secondly (and without prejudice to the contention that there is no debt), the situs of the "*debt*" that *may*, at some future time, be owed by Framjee to Mr Balengani if a distribution to its shareholders is to be made in its winding up can only be the Territory of the Virgin Islands ("BVI") and not England & Wales. As such and in accordance with well-established comity-enhancing principles that prevent the Court granting a TPDO in respect of a foreign debt, the Court has no power to make a TPDO against Framjee.

iii) Thirdly, the Court has no power to make a TPDO against Framjee because it is not present "*within the jurisdiction*". It is (so far as the evidence before the Court indicates) present only in the BVI and has (insofar as it is relevant) not submitted to the jurisdiction.

iv) Fourthly, contrary to CPR r 72.3(2), the Application does not confirm, and verify by a statement of truth, that each of the Third Parties "*is within the jurisdiction*" and "*owes money to or holds money to the credit of*" Mr Balengani (as required by para 1.2(7) of Practice Direction 72). The standard form of the application notice (Form N349) includes the statement "*The third party is within England and Wales and owes money to (or holds money to the credit of) the judgment debtor*", but that statement has been removed, inexplicably, from the Application Notice in this case.

v) Fifthly, even if the Court had power to make a TPDO (which, for the above reasons, it does not), this Court should decline to exercise its discretion to make the Order. In particular, this Court should decline to do so because (among other reasons), the Applicant failed to discharge his duty to provide "*accurate evidence*" and make fair disclosure in the Application Notice in respect of the debt that it seeks to attach, the relationship between the Third Parties and Mr Balengani, and the insurmountable impediments to the grant of a TPDO.

13. Mr Turner's first point concerning Mackrell can be disposed of quickly. Mr Young informed me at the start of the hearing that the application was no longer maintained against Mackrell.

Debt due or accruing

14. CPR r. 72.2(1)(a) requires that a debt to be attached by way of TPDO must be due or accruing due. This requirement must be met at the time the application for ITPDO is made see, *Heppenstall v Jackson* [1939] 1KB at 591 to 592.

15. In *Hardy Exploration & Production (India) Inc v Government of India* EWHC [2019] QB 544 Peter MacDonald QC sitting as a Deputy High Court Judge having reviewed the relevant authorities said:

> "120 Accordingly, it follows that the court may make a third party debt order in respect of a debt which is payable by reason of an existing obligation at the date of the making or service of the Interim Order, whether payment is required instantly or in the future. An existing obligation is one which is a cause of action which may be the subject of an immediate suit before the

> court. For this purpose, it does not matter if the amount to be paid is not yet quantifiable, provided that there is an existing obligation in respect of the debt. If, however, there is no existing obligation, for example because a contingency or condition precedent has not yet been satisfied at the relevant date, that will not be a debt which is amenable to a third party debt order."

16. Mr Young accepted that there was no debt instantly due but argued there was an existing obligation to pay a sum of money not yet quantifiable arising from clause 6.1(c) of Framjee's Memorandum of Association which provides;

> "*Each Share in the Company confers upon the Shareholder … the right to an equal share in the distribution of the surplus assets of the Company on its liquidation.*"

17. Mr Turner accepted that a contractual obligation may arise from Framjee's Memorandum of Association but submitted that, until the liquidator has resolved to make or declared a distribution in favour of its shareholders, there is no "*debt due or accruing due*" and that all that the Judgment Creditor has is a right vis-à-vis Framjee that is contingent upon there being assets available for distribution. In the circumstances he submitted that it was incumbent upon the Judgment Creditor to have adduced evidence that the liquidator of Framjee had resolved to make a distribution and that there were sufficient assets to make a distribution to the Judgment Debtor.

18. The evidence contained in the application for the ITPDO and amplified in paragraphs 5 and 6 of Mr Young's second witness statement is:

> "5. As I understand it from JDSkel, whether or not Framjee had surplus assets as on 7 February 2020 is now being challenged by JD. As to this, over the Easter holiday, on Monday 13 April 2020, I spoke to Mr. Spencer of Mackrell, who had had an opportunity to take instructions from the Liquidator. He told me that the real property that was owned by Framjee and was its only asset of substance was sold in or around May 2019 for about £2.3m. In accordance with the Order of Master Teverson dated 19 May 2017, 1/3rd of the net sale proceeds plus £80k was retained in England in the client bank account of Mackrell and the balance of the net sale proceeds were remitted to the BVI at a later date. On 4 February 2020 Mr. Spencer of Mackrell emailed JC with a copy to the Liquidator saying that the exact amount in Mackrell's client bank account as of that date was £830,296.18, from which £75,000 to JD's brother-in-law was to be deducted, leaving a net amount of £755,296.18 in Mackrell's client bank account (this email was in the bundle for the previous hearing but for completeness I exhibit it at **page 1 of PJY2**).
>
> 6. I understand from speaking to Mr. Spencer that the £75,000 was indeed paid to JD's brother-in-law and so logically there is a minimum of £755,296.18 in Mackrell's client bank account.

> As regards the sums in the BVI, on or by 7 February there was about £800k and I understand from Mr. Spencer that the current amount remaining is about £760k. The reason this is a lower figure than the original 2/3rds of net sale proceeds less £80k (which would have been roughly £1.453m) is that liabilities have been settled from those net sale proceeds originally remitted to the BVI including but not limited to the Liquidator's fees, solicitors' fees and estate agency fees. I understand that the Liquidator will still need to pay statutory interest and meet tax liabilities and he intends to do so from the sums held in the BVI and the quantum of these liabilities are still to be ascertained (and I understand the Liquidator has been and is working towards finally ascertaining them), however, the Liquidator reasonably believes that the quantum of these are such that there will be more than sufficient money left over for Framjee to pay JD an amount (from, for example, the sums held in Mackrell's client bank account) that would be greater than the amount of the sums owed by JD to JC under the Judgment Order."

19. I also have regard to the fact that this account was not contradicted by the representative of Framjee, instructed by the liquidator, at the hearing. The position is therefore that the liquidator will instruct Mackrell to pay one half of the money currently in its client account to the Judgment Debtor by reason of his 50% shareholding in Framjee. In the circumstances I accept Mr Young's submission that as at the date of the application for the TPDO there was an enforceable contractual right arising from Framjee's Memorandum of Association notwithstanding its liquidation on 7 February 2020 because, as confirmed by the liquidator, there is a surplus of assets capable of meeting the judgment debt and which absent this order would be paid to the Judgment Debtor.

The situs of the debt

20. In *Taurus Petroleum Ltd v State Oil Marketing Co of the Ministry of Oil Iraq* [2018] UKSC AC 690 Lord Clark said at 64:

> "It is common ground that all property, whether tangible or intangible, has a situs for legal purposes. It is further common ground that … a third party debt order is a proprietary remedy, which, when complied with, operates to discharge the debt and to release the debtor from his obligation. Since it involves dealing with property, the English courts do not have jurisdiction to make such an order in respect of debts situated outside the jurisdiction, unless by the law applicable in that place an English order would be recognised as discharging the liability of the third party to the judgment debtor."

21. Mr Turner placed particular reliance on the observation of Lord Millett in *Societe Eram Shipping Co Ltd v Cie Internationale de Navigation* [2004] 1 AC 260 at [112] to the effect that:

> "if the court cannot discharge the debt by force of its own order, it cannot make the order. If the debt is situate abroad, the court should not seek to evaluate the risk of the third party being compelled to pay twice. The only relevant question is whether the foreign court would regard the debt as automatically discharged by the order of the English court. Since this would be most unusual, it would be for the judgment creditor to establish."

22. In my judgment the situs of the debt is clearly the British Virgin Islands therefore the relevant question is whether the Judgment Creditor can establish that the BVI courts would regard the debt as automatically discharged by the order of the English Court.

23. While I have not admitted specific evidence of BVI law, on the facts of this case, I am of the view I can be satisfied that the BVI courts would recognise the debt as discharged by order of the English Court. In my view the evidential presumption applies and there can be no doubt that English law would recognise the debt as discharged. In any event I accept Mr Young's submission that the BVI is a dependant territory of the United Kingdom with a legal system closely modelled on our own and as such the principle of res judicata would apply. It is also not without relevance that Framjee's only activity would seem to be in the United Kingdom where it's principal asset was situated and that the BVI liquidator has instructed solicitors to appear before this court and maintain a position of neutrality rather than oppose the application

Present within the jurisdiction

24. CPR r. 72.1 (1) requires the Third Party to be within the jurisdiction. I do not accept Mr Turner's submission that Framjee can only have been carrying on business in the BVI. As I have already observed it's only or principal asset was the property at 13 The Avenue London NW6 which it purchased in order to renovate. The proceeds of sale are retained in the jurisdiction. Moreover in my judgment the case of *SCF Finance Co ltd v Masri (no.3)* [1987] QB 1028 is binding on me. At page 1041 of the judgement Ralph Gibson LJ said at G:

> "In the end, we do not find it necessary to decide either of the two last mentioned questions relating to the meaning of the phrase "other person within the jurisdiction," since, whatever the answers to them may be, we are of the clear opinion that a person must be "within the jurisdiction" for the purpose of Ord. 49, r. 1(1) if, before the order nisi is made, he or she has agreed to submit to the jurisdiction of the English court for the purpose of the relevant garnishee proceedings."

25. In this case Framjee confirmed via its English Solicitors Mackrell that it would accept service before the ITPDO was applied for. Framjee has as I have already observed appeared before the court and has indicated that it will remain neutral and be bound by the decision of the court. In my judgment this is sufficient for me to reject Mr Turner's submission. It is right that I point out that Mr Turner wishes to reserve the right to argue in a higher court that the case of *SCF Finance* was wrongly decided.

The form of the application

26. The requirements of CPR r 72.3 (2) are set out at paragraph 9 above. These requirements are in turn repeated in Form N349 which is verified by a statement of truth. Mr Turner submits that the failure to include the specific words required by sub paragraph 7 of the Practice Direction are both unexplained and a serious breach of the duty to provide accurate evidence and of disclosure such that the court should refuse to exercise its discretion to make a TPDO. Mr Turner conceded that in an appropriate case the failure to follow requirements of the Practice Direction would be an error of procedure and subject to the general power of the Court to remedy the error under CPR r.3.10.

27. Compliance with the requirements of the Practice Direction is important especially in view of the fact that the application is initially considered on the papers. As I pointed out in the case of *State Bank of India v Mallya* [2019] EWHC 995 (QB) having reviewed the cases of *Merchant International Company v Natsionalna Aktsionerna Naftogaz Ukrainy* [2014] EWHC 391 (Comm) and *BCS Corporate Acceptances Ltd v Terry* [2018] EWHC 2349 (QB):

> "there is a duty on the applicant for a TPDO to provide accurate evidence and there is a duty of disclosure. The scope of duty of disclosure will depend upon the circumstances of the application with greater disclosure being required where the grounds for making an order are debatable or the consequences of making an order may be severe."

28. At paragraph 5 of his second witness statement Mr Young set out the reason why the standard wording of form N349 was varied:

> "As to the alteration of the standard form application notice, I am afraid that this is my unintentional mistake, it is not JC's mistake, I am very embarrassed and I offer my unreserved apology to the Court for it. Without any waiver of privilege, the process of JC engaging my firm and my firm taking instructions and preparing and issuing the application for the ITPDO was all done in a bit of a rush over a few days in February as there was a perception (rightly or wrongly) that JD might seek to take steps to put the money he is owed by Framjee beyond reach of JC once Framjee's proceedings against his brother-in-law were concluded. So far as I can remember (and, at the time I make this witness statement, I have not had the chance to go back over my files – unfortunately at present I do not have access to my office), my paralegal Eleni brought to me a draft completed application notice and, unfortunately and in hindsight very unintelligently, I impulsively amended it. ln fact, I have the mortifying recollection that I may have told her that the original language was inelegant. Rather than improving it, I evidently did harm to the document by removing language that is important and certainly not inelegant. At the time I did this I was not aware that the relevant language was mandatory by the Practice

> Direction. I certainly had no intention of misleading the Court either at the time or subsequently and, as I say, I apologise unreservedly and I am very embarrassed."

29. Mr Turner did not seek to go behind this explanation. As to the requirement under paragraph 1.2 (7)(a) of the Practice Direction to verify that the Third Party is present in the jurisdiction, I note that the application notice confirmed that Framjee was a BVI registered company and that it's solicitor "*Mackrell have confirmed that they have instructions on behalf of Framjee to accept service of this application.*" As to the requirement under paragraph 1.2 (7)(b) of the Practice Direction to verify that the Third Party owes money or holds money to the credit of the Judgement debtor, I note that the application confirmed, "*Mackrell holds money in its client bank account pursuant to paragraph 2 (3) of the 2017 Order and owes that money to (or holds money to the account of Framjee who in turn, owes some of that money to the Judgment Debtor, as is more particularly explained below.*" Thus it seems to me the factual basis for the requirements of the Practice Direction was clearly set out in the notice of application and was accurate and as such there was no material breach in the Judgment Creditor's duty of fair presentation to the Court . In the circumstances I conclude that the Court can and should remedy the error of procedure.

Comity and Discretion

30. Mr Turner argued that the Court should not exercise its discretion to make an order as to do so would run counter to well-established principles of public international law and judicial comity, see *Eram* at [26] and [80]. In particular he submitted that if this Court were to make a TPDO it would interfere with the performance of the functions of an officer of a foreign court (i.e. the liquidator) who is required to comply with distributional priorities set out in legislation. He also pointed out that the permission of the Eastern Caribbean Supreme Court would be required to make an equivalent application in that Court due to the statutory moratorium that applies to the commencement of actions against it by virtue of s 175(1)(c) of the BVI Insolvency Act of 2003. He submitted that the Judgment Creditor should not be permitted to circumvent that statutory regime by making the Application in this Court and that in the circumstances it cannot be consistent with comity for this Court to make a TPDO against Framjee.

31. In my judgment this objection is overcome by the undertaking offered to the Court on behalf of the Judgment Creditor at paragraph 12 of Mr Young's second witness statement, see paragraph 4 above. Such an undertaking would in my judgment put to rest any lingering doubt concerning the position of Framjee's liquidator. In the circumstances and in the absence of any suggestion from Mr Turner that I do not have the power, I will direct that the ITPDO will remain in place until the Judgment Creditor has obtained the permission of the BVI Court to continue these proceedings and that on obtaining an order for the continuation of these proceedings the ITPDO will be made final.

Events since the hearing.

32. I circulated a draft of this judgment to the advocates on 29 April 2020. On 30 April I received an e-mail from Mr Turner which invited me to reconsider my judgment on

the basis that there were relevant authorities, of which he was previously unaware, which ought to be bought to the Court's attention he did so in the following terms;

> "As you will recall, it was Mr Balengani's position that the prospect of a distribution in the winding up of Framjee did not give rise to a debt due or accruing due to Mr Balengani. The submission was not supported by reference to specific authority on a member or creditor's entitlements in a winding up. However, there is a line of authority in relation to garnishee orders in respect of the surplus assets of a liquidation process, of which I was not aware, that ought to have been drawn to the Court's attention by the parties as it calls into question the TPDO that the Court proposes to grant.
>
> The rule is summarised in *Halsbury's* at [1406] nn 4 in the following terms:
>
> "A third party debt order cannot therefore be made in respect of dividends payable to the judgment debtor by a trustee in bankruptcy … or by the liquidator of a company …." (citations omitted)
>
> The authorities cited in support of that proposition are
>
> (1) *Spence v Coleman* [1901] 2 KB 199, in which the Court of Appeal held that a garnishee order could not be made in respect of surplus assets that were distributable to a shareholder by the liquidator because it did not give rise to the relationship of debtor-creditor (see p. 204-5).[1]
>
> (2) *Mack v Ward* [1884] Bitt Rep in Ch 23, in which Mathew J held that a garnishee order could not be made in respect of surplus assets that were distributable to a shareholder, observing that "*[the liquidator] is bound to realise the assets of the company and to distribute them among the shareholders. But he is not bound to a particular shareholder; and I fail to see what cause of action any shareholder would have who did not receive his share*" (the point is made in *Tolley* that the appropriate course for a dissatisfied shareholder or creditor is to apply to the Court for a direction that the liquidator perform his duties as such).
>
> I do apologise for not having drawn this line of authority to the attention of the Court. It is not that my client is seeking to have another bite of the cherry (so to speak), but as I am instructed to apply for permission to appeal in due course, we consider it appropriate to place this material in the Court's hands so that the Court may have an opportunity to decide on the appropriate course of action."

33. Mr Turner also indicated that he had instructions from his client to make an application for permission to appeal.

34. On 1st May Mr Young responded in the following terms:

> "The new point is a bad one. The authorities in question (*Spence v Coleman* and *Mack v. Ward*, attached to Mr. Turner's email) are authority for the proposition that a judgment creditor cannot apply for a garnishee order against an officeholder. The reasoning is that an officeholder does not owe any debt to a shareholder. We do not quarrel with that proposition and it misses the point. They do not say that a judgment creditor cannot apply against the insolvent company.
>
> Briefly, the facts of *Spence* (a Court of Appeal case) are that the liquidator of a company called Bluebell Proprietary Company Ltd (in voluntary liquidation) was unable to locate a shareholder (Coleman) and so could not distribute Bluebell's surplus assets to that shareholder. The liquidator therefore paid the proceeds into the "Companies Liquidation Account" held at the Bank of England. This was apparently a general mixed fund into which the unclaimed surplus assets of every company in liquidation could be paid. Under the law then pertaining, this payment gave the liquidator an effectual discharge in respect of that sum. The entity in control of the Companies Liquidation Account was the Board of Trade. The applicant Spence (who was owed a judgment debt by the missing shareholder Coleman) then applied against the Inspector General in Companies Liquidation (a public official) for a garnishee order. Unsurprisingly, the Inspector General successfully resisted this on the basis that he owed no debt to Coleman and, furthermore, that he could not pay out money from the "Companies Liquidation Account" unless and until ordered by the Board of Trade to do so, that there was a prescribed procedure for doing so and that it had not been followed. It also appears to have been common ground that because the liquidator had been discharged by paying the money into the Companies Liquidation Account, it could not be said that he owed any debt to Coleman either. Collins LJ observes (apparently as *obiter*) in the passage highlighted at the top of p205 that no garnishee order could be made against an officeholder. Nowhere in his judgment does he hold that a garnishee order cannot be made against an insolvent company.
>
> It is also worthwhile considering the assenting judgment of Stirling LJ. Halfway down p207 he makes some observations on *Ex parte Turner 2 D. F. & J. 354*. Based on Stirling LJ's judgment, *Ex parte Turner* appears to have involved a

> garnishee application against the insolvent company, and not against the officeholder, and there a garnishee order was made by the High Court. Stirling LJ does not criticise that but rather distinguishes that scenario from the one being considered by the Court of Appeal in *Spence*."

35. The position that has arisen is most unsatisfactory. In the case of *Gosvenor London Ltd v Aygun Aluminium UK Limited* [2018] EWHC 227 (TCC) Mr Justice Fraser reviewed the principles that apply in such a situation at [46 to [49 of his judgment:

> "46. … It is within the powers of the judge to alter his or her judgment at any time before it is entered and perfected (*per* the Court of Appeal in ***Re Barrell Enterprises*** [1973] 1 WLR 19; ***Robinson v Fernsby*** [2003] EWCA Civ 1820). Given a judgment is simply in draft form until it is handed down, there is no doubt therefore that the jurisdiction exists.
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> 47. In ***Egan v Motor Services (Bath) Ltd*** [2007] EWCA Civ 1002, [2008] 1 All ER 1156, the Court of Appeal noted and deprecated the growing practice of counsel writing to the judge upon receipt of draft judgment, asking for reconsideration of the conclusions contained within it. It is my experience that this occurs far more frequently than ought to be expected; it could be described as now being almost routine. Of course, there are very occasionally particular circumstances that warrant it. As a single example, in ***Energysolutions EU Ltd v Nuclear Development Authority (No.2)(Liability)*** [2016] EWHC 1988 (TCC), very shortly before the formal handing down of a very lengthy judgment concerned with public procurement, the NDA discovered that every single witness of fact called by the claimant had a contractual agreement in place with the claimant for payment of a cash bonus in the event of success in the litigation. This had only just come to the notice of the solicitors acting for the claimant, who acted very promptly and properly and disclosed this fact, and the agreements. This led to further hearings, cross-examination both of solicitors themselves (not previously called as witnesses) and of the factual witnesses themselves, and reconsideration of all the findings in that judgment.
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> 48. In ***Egan v Motor Services (Bath) Ltd*** the Court of Appeal made it clear that circulation of a draft is not intended to provide counsel with an opportunity to re-argue the issues in the case, and also it was only in the most exceptional circumstances that it was appropriate to ask the judge to reconsider a point of substance. Examples given were where counsel feels that the judge (i) had not given adequate reasons for some aspect of his decision, or (ii) had decided the case on a point which was not properly argued or has relied on an authority which was not considered. However, in the case of ***In re L (Children) (Preliminary Finding: Power to Reverse)***

> [2013] UKSC 8; [2013] 1 WLR 634 the Supreme Court held that a judge's power to recall and reconsider his or her judgment is not restricted to *"exceptional circumstances"*. Whether a judge should exercise the discretion to recall a judgment will depend upon all the circumstances of the case. That is the approach that I adopted here.
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> 49. In ***Space Airconditioning Plc v Guy*** [2012] EWCA Civ 1664; [2013] 1 WLR 1293, the Court of Appeal stated that: (1) a judgment should be an accurate record of the judge's findings and of the reasons for the decision; (2) if a judgment contains what the judge acknowledges is an error when it is pointed out, the judgment should be corrected, unless there is some very good reason for not doing so; (3) it should not normally be necessary for a party to bring an appeal to correct an error, if it turns out that the parties and the judge agree that there is an error and that a correction should be made. In that case, the court directed a re-trial on the basis that the erroneous finding in the judgment could properly be described as an "irregularity in the proceedings" which made the decision an "unjust" one within the meaning of the old RSC r.52.11(3) – now CPR Part 52.21(3)(b).”

36. Mr Justice Fraser went on to say at [52]:

> “In my judgment, all these statements point in the same direction. Very careful consideration must be given to such applications, and litigants should not be given the ability to have a second bite at the cherry. The distribution of a draft judgment under CPR Part 40 should not be seen (as it seems to be, by many legal advisers currently) simply as an open invitation to embark upon an additional round of the litigation, remedying lacunae in their own evidence and raising further arguments. If a matter could have been raised at the first hearing, then it should be. If time is needed to deal with something, then the court must be asked for time – this will not always be given, but the matter must be dealt with then.”

37. Ultimately it seems to me these new authorities go to an issue I have already decided. The question is whether on the basis of the evidence before the court there is a debt due and owing from Framjee to the Judgment Creditor? Mr Turner submits at this stage and without reference to modern insolvency law that there cannot be a debt due and owing from Framjee as the Judgment Creditor’s entitlement to any surplus assets can only be realised by an action against the liquidator and not Framjee. He now relies upon two old authorities which do not appear to me to be precisely on point. I can see no reason why these issues were not ventilated during the hearing before me other than Mr Turner’s candid admission that he was unaware of them.

38. I have invited written representations from Mr Turner and Mr Young. There must come a point where the line must be drawn. I have considered whether to seek further submissions on modern insolvency law but have concluded that would be step too far.

The parties must accept the consequences of the way in which the case as been argued. I accept Mr Young's submission that the new authorities are not relevant to current situation for the reasons he puts forward in his written submission. Indeed, the case of *Ex parte Turner* seems to support the proposition that a garnishee order could be made against an insolvent company. In the circumstances I decline Mr Turner's invitation to change my decision.

39. Finally, I note that the undisputed amount of the judgment debt on 14 April 2020 is as set out at paragraph 57 of Mr Young's skeleton argument, namely £357,770.07. I would ask that the parties' representatives draw up an appropriate form of order.