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Case No: BR-2019-000627

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

ON APPEAL FROM AN ORDER OF DEPUTY JUDGE JONES DATED 28 FEBRUARY 2020

IN THE MATTER OF DEREK THOMAS HOOD (A DEBTOR)
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 27/11/2020

Before :

THE HONOURABLE MR JUSTICE MICHAEL GREEN

- -

Between :

DEREK THOMAS HOOD	**Appellant**
- and -	
JD CLASSICS LIMITED (IN ADMINISTRATION)	**Respondent**

- -
- -

Peter Shaw QC (instructed by **Tees Law**) for the **Appellant**
Felicity Toube QC and Adam Al-Attar (instructed by **Quinn Emanuel Urquhart and Sullivan UK LLP**) for the **Respondent**

Hearing dates: 11 November 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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THE HONOURABLE MR JUSTICE MICHAEL GREEN

Mr Justice Michael Green:

Introduction

1. This is an appeal from the order of Deputy Insolvency and Companies Court Judge Jones (the **Judge**) made on 28 February 2020 whereby the Judge granted change of carriage of the bankruptcy petition brought by HMRC against the Appellant, Mr Derek Hood, to the Respondent, JD Classics Limited (in administration) and made a bankruptcy order against the Appellant. The appeal rests largely on a short point of insolvency law, namely whether a payment by a third party to the petitioning creditor that purports to discharge the petition debt so as to lead to the dismissal of the petition but where the debtor has agreed to repay or reimburse that third party is a void disposition or payment pursuant to s.284 of the Insolvency Act 1986 (the **Act**). The Judge held that such a payment was void under s.284 and therefore did not discharge the petition debt. Accordingly, the Judge allowed the Respondent to take over carriage of the petition pursuant to Rule 10.29 of the Insolvency (England and Wales) Rules 2016 (the **Rules**) and the Court was not precluded by s.271(1) of the Act from making a bankruptcy order.

2. The Appellant says that the Judge came to the wrong conclusion on the law and she should have held that: (i) the payment of monies by the third party to the petitioner was an application of the third party's own monies, not the debtor's; (ii) that the making of a loan by the third party to the debtor did not amount to and was not the equivalent of a disposition or payment of the debtor's own funds within s.284; and (iii) the petition debt was thereby discharged by the third party's payment and the Court was unable to make a bankruptcy order because of the operation of s.271(1) of the Act.

3. The Respondent says that the Judge came to the right conclusion because this is, at its heart, about the fact that a bankruptcy petition is a class remedy and the overarching objective in this situation should be to ensure that the bankrupt's estate is preserved intact from the time of the presentation of the petition and that the *pari passu* principle is respected.

4. As Ms Felicity Toube QC, appearing with Mr Adam Al-Attar on behalf of the Respondent, neatly summarised the two positions of the parties: the Appellant relies on the issue of whether the Appellant disposed of any property that was part of his estate; whereas the Respondent relies on an alleged breach of the *pari passu* principle if the petition has to be dismissed in these circumstances. In my view however, it comes down to the meaning of the relevant statutory provisions and how they work together in this situation.

The facts

5. Oddly for such an application, there was actually a trial with cross examination of witnesses before the Judge. Although there were some disputed facts below, largely because the Appellant's story as to the bases upon which the third party payment was made seemed to change over time, both parties are now content to rely on the facts as found by the Judge.

6. On 15 May 2019, HMRC presented a bankruptcy petition against the Appellant. After certain credits were applied to the petition debt, the amount outstanding to HMRC was £993,182.30.

7. On 24 June 2019, the Respondent gave notice of its intention to appear on the petition as a supporting creditor. At the first hearing of the petition on 26 June 2019, ICC Judge Prentis adjourned it to allow the Appellant to make an application for a validation order, so as to be able to pay the petition debt. The Appellant issued his application under s.284 of the Act for a validation order but this was dismissed by ICC Judge Clive Jones on the basis that the Appellant was insolvent, even ignoring the petition debt (this judgment was handed down on 22 August 2019 and is reported at *Hood v HMRC* [2019] EWHC 2236 (Ch)).

8. On 10 September 2019, the Appellant arranged for the petition debt to be paid off by two third parties: one payment was from his ex-wife, Mrs Hood, who paid HMRC directly, from her solicitor's client account, the sum of £470,000; the other payment in the sum of £530,000 was paid by a business associate of the Appellant, Mr Colin Hill directly from his bank account to HMRC. The latter payment is the crucial one for the purposes of this appeal. HMRC had confirmed to the Appellant that upon receipt of the £1 million, they would instruct their solicitors to request that the petition be dismissed.

9. On 19 September 2019, the Respondent issued an application in the bankruptcy proceedings under rule 10.29 of the Rules for an order granting it change of carriage of the petition. On 20 September 2019, ICC Judge Mullen directed a trial in relation to the change of carriage application.

10. The application was heard by the Judge on 16 and 17 December 2019. Mr Hood and Mrs Hood were cross examined. Even though Mr Hill had put in a witness statement dealing with the circumstances around his payment of £530,000 to HMRC, he did not attend the trial for cross examination. Judgment was handed down on 28 February 2020.

11. In the judgment the principal relevant findings of fact made by the Judge were as follows:

    (1) The payment of £470,000 by Mrs Hood was a gift by her for the benefit of her ex-husband "*and, as third party funds, is not liable to be voided under s284*" [65];

    (2) The payment of £530,000 by Mr Hill was from his own funds and the Appellant had no interest in such funds. The payment was made unconditionally by Mr Hill, in the sense that it was not conditional on the petition being dismissed. Mr Hill did not assert that there was any trust of the monies and it was simply a transfer of funds by him;

    (3) The payment by Mr Hill was however to be treated as a loan by him to the Appellant "*to be repaid or reimbursed*" [73].

12. Accordingly, the Judge held that the payment by Mrs Hood was not caught by s.284 of the Act, but the payment by Mr Hill, as a loan to Mr Hood, was so caught and there

was therefore jurisdiction under rule 10.29(3) of the Rules to make a change of carriage order. Furthermore, as Mr Hill's payment was void under s.284, the petition debt was not discharged and there was no bar under s.271(1)(a) to the making of a bankruptcy order.

13. The Appellant says that, even if the payment by Mr Hill is characterised as a loan from Mr Hill to Mr Hood, there was no disposition of the Appellant's property within s.284 because the monies never came into his possession and were at no time his "*property*".

Relevant Statutory provisions

14. It is necessary to look at the above-mentioned statutory provisions and rules in a little more detail. As a result of the Court of Appeal decision in *Smith v Ian Simpson & Co* [2001] Ch 239 (***Smith v Simpson***), the following provisions should be considered in the round so that they all work coherently together.

15. The first is s.271(1) of the Act. This provides as follows (emphasis added):

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

16. Therefore the court is precluded from making a bankruptcy order if the debtor can prove that the debt has been "*paid*". As will be seen, the Court of Appeal, by a majority, in *Smith v Simpson* held that because of the effect of rule 10.29 (or its then equivalent), the debtor had to prove that the petition debt had been paid by a third party, not him or herself. The Respondent goes even further in this case to submit that not only must it have been paid by a third party, but also that such payment must have been by way of gift to the debtor with no corresponding obligation on the debtor to reimburse the third party. I will have to decide if that is correct.

17. The court also has a discretion to dismiss the petition in the circumstances set out in s.271(3) of the Act:

> "(3) The court may dismiss the petition if it is satisfied that the debtor is able to pay all his debts or is satisfied –
>
> (a) that the debtor has made an offer to secure or compound for a debt in respect of which the petition is presented,
>
> (b) that the acceptance of that offer would have required the dismissal of the petition, and

> (c) that the offer has been unreasonably refused;
>
> and, in determining for the purposes of this subsection whether the debtor is able to pay all his debts, the court shall take into account his contingent and prospective liabilities."

18. This seems to me to contemplate an offer being made by the debtor. Curiously subsection (3)(a) does not refer to an offer to "*pay*" the debt, only to "*secure or compound*" it, but it surely must encompass an offer to pay the debt. Such an accepted offer would only require the dismissal of the petition under subsection (3)(b) if it was within s.271(1)(a). While I can see that it may well be reasonable of the petitioner to refuse such an offer if they considered that the debtor was hopelessly insolvent and further that the court could refuse to dismiss the petition if it thought that such a payment would be void under s.284 or as breaching the *pari passu* principle, I find it difficult to read into the words a requirement that the offer from the debtor must impliedly be for the petition debt to be paid off by a gift from a third party. Yet that is how I understand the Respondent says it should be read. There is no reference to a third party or a gift in s.271.

19. Section 284 of the Act invalidates dispositions of property by the debtor between the time the petition was presented and the making of the bankruptcy order. It is similar to, but also materially different from, the equivalent provision in relation to company winding up petitions – s.127 of the Act. It is common ground that the purpose of s.284 is to define the assets in a bankrupt's estate from the date of the presentation of the petition so as to ensure a fair and equal distribution of the estate to the unsecured creditors, that is, a *pari passu* distribution of those assets. Section 284 (and s.283) come within Chapter 2 of Part IX of the Act which is entitled "*Protection of Bankrupt's Estate and Investigation of his Affairs*". The Court of Appeal in *Express Electrical Distributors Ltd v Beavis* [2016] EWCA 765 which contained a review of the principles applicable to the making of validation orders, endorsed the statement of Oliver J (as he then was) in *In Re J. Leslie Engineers Co. Ltd* [1976] 1 WLR 292, 304 ([28] in the judgment of Sales LJ, as he then was):

> "I think that in exercising discretion the court must keep in view the evident purpose of the section which, as Chitty J said in *In re Civil Service and General Store Ltd*, 58 L.T. 220, 221, is to ensure that the creditors are paid pari passu."

20. Section 283 provides a definition of the bankrupt's estate:

> "(1) Subject as follows, a bankrupt's estate for the purposes of any of this Group of Parts comprises –
>
> (a) all property belonging to or vested in the bankrupt at the commencement of the bankruptcy, and
>
> (b) any property which by virtue of any of the following provisions of this Part is comprised in that estate or is treated as falling within the preceding paragraph.
>
> …

(3) Subsection (1) does not apply to -

(a) property held by the bankrupt on trust for any other person…".

21. The commencement of the bankruptcy is the date the bankruptcy order is made (s.278(a)). "*Property*" is defined in s.436 of the Act as including:

> "money, goods, things in action, land and every description of property wherever situated and also obligations and every description of interest, whether present or future or vested or contingent, arising out of, or incidental to, property".

22. The material parts of s.284 of the Act are as follows:

> "(1) Where a person is made bankrupt, any disposition of property made by that person in the period to which this section applies is void except to the extent that it is or was made with the consent of the court, or is or was subsequently ratified by the court.
>
> (2) Subsection (1) applies to a payment (whether in cash or otherwise) as it applies to a disposition of property and, accordingly, where any payment is void by virtue of that subsection, the person paid shall hold the sum paid for the bankrupt as part of his estate.
>
> (3) This section applies to the period beginning with the day of the making of the bankruptcy application or (as the case may be) the presentation of the bankruptcy petition and ending with the vesting, under Chapter IV of this Part, of the bankrupt's estate in a trustee.
>
> …
>
> (6) A disposition of property is void under this section notwithstanding that the property is not or, as the case may be, would not be comprised in the bankrupt's estate; but nothing in this section affects any disposition made by a person or property held by him on trust for any other person."

23. Unlike under s.127 of the Act in respect of winding up, there is no statutory relation back for the purposes of defining the bankrupt's estate, as there had been under the previous Bankruptcy Acts (in those, relation back was to the relevant act of bankruptcy). Nevertheless, s.284 is to the same effect by rendering void dispositions of property from the date of the bankruptcy petition. As was made clear by Gloster LJ in *Ahmed and ors v Ingram and anor* [2018] BPIR 535, (with whose judgment Patten and David Richards LJJ agreed) s.284 operates so that the recipient of the bankrupt's property holds it upon receipt contingently for the bankrupt in the event that a bankruptcy order is made. Gloster LJ said as follows:

> "**[44]** In *Re Palmer (Deceased) (A Debtor)* [1994] Ch 316 (reversed on appeal, but not on this point) Vinelott J concluded that s 284 had a similar effect to the application of the old doctrine of relation back:
>
> > 'section 284 has a dual effect. First it supplements the relation back of the trustee's title by avoiding dispositions after the date of presentation of the petition. Secondly, it protects dispositions after the

> presentation of the petition and before the appointment of the trustee which fall within subsections (4) and (5); to that extent it reflects (though it is not coterminous with) section 45 of the Bankruptcy Act 1914' (at 334C-D).

> **[45]** In my judgment, the effect of ss 278, 283, 284 and 306 of the Insolvency Act 1986 was that, in the present case, as from the transfer date, the first appellant held the legal title to the shares on the following trusts:
>
> (i) contingently for the bankrupt in the event that a bankruptcy order was indeed made against him; and
>
> (ii) subject thereto (ie in the event that no such order was made), for himself as absolute owner of both the legal and beneficial title."

24. The other difference between s.284 and s.127 is subsection (2) that makes separate provision for payments. Ms Toube QC relied on subsection (2) to submit that "*payments*" that are not dispositions of a bankrupt's property within subsection (1) are void. She relied on the decision of HH Judge Norris QC (as he then was) in *Pettit v Novakovic* [2007] BPIR 1643 in which the learned Judge attempted an explanation as to what subsection (2) might be intended to cover. That case concerned a payment that was made by the debtor's solicitor out of the debtor's own funds to his accountant which were then acknowledged by the accountant that he was holding on trust for the debtor. Hence there had been no transfer or "*disposition*" of the beneficial interest in the funds by the payment to the accountant. The learned Judge said as follows:

> "**[10]** …Plainly a 'payment' could also be 'a disposition of property' falling within s 284(1), since by virtue of s 436 of the 1986 Act the expression 'property' includes money. But the question is: must it be so? The language of the subsection certainly appears to proceed on the basis that a 'payment' may be something different from a 'disposition', for the purpose of subs (2) is to say that subs (1) applies to a 'payment' as it applies to a 'disposition'…
>
> **[12]** …in order to give content to the subsection I consider one must simply focus upon its very words: s 284(2) relates to 'payments' properly so described. I attempt no complete definition of that term. But in general 'payment' is the process by which money (or some acceptable substitute) passes from one to another and a 'payment' is the money or value that is the subject of that process. Since the subsection does not qualify the term 'payment' in anyway it relates to 'payments' whether or not they involve a disposition of property (in the sense that that has been treated on this appeal viz the transfer of beneficial title). The accountant received a 'payment' properly so described (a cheque drawn in his favour that was met on presentation) and the statutory consequence is that he is to be treated as holding it for the bankrupt as part of his estate. That statutory assumption replaces the express bare trust which the accountant says arose, and the money he received must be dealt with according to the regime imposed by the Insolvency Act 1986 consequent upon such payment and not the law of private trusts."

25. I do not understand why it was necessary to find that the payment to the accountant was within s.284(2) rather than the money being held for the bankrupt. In both cases, they formed part of his estate. Any of that money paid away by the accountant to third parties, including himself, would be void under s.284(1). In any event, the important point for this case is that the money was beneficially owned by the bankrupt, whereas the money paid by Mr Hill was never beneficially owned by the Appellant. It is odd that subsection (2), unlike subsection (1), does not expressly refer to a payment made by the bankrupt but that cannot mean that any payment is within the subsection. I agree with HH Judge Norris QC that it is apt to cover a situation where the payment is physically made by another person, in that case, by the solicitor to the accountant, but that the money being paid must be otherwise part of the bankrupt's estate.

26. The other relevant provision central to this appeal is rule 10.29 as to when the court can order a change of carriage of the petition. There is no similar process in winding up, probably because a creditor's bankruptcy petition is dependent on either the service of a statutory demand or unsatisfied execution of a judgment debt in favour of the petitioner whereas a winding up petition can be based purely on an outstanding debt. In winding up, a supporting creditor can be substituted for the petitioner if the petitioner has been paid off or is otherwise unwilling to proceed with the petition. In bankruptcy, there is also the possibility of a supporting creditor being substituted for the petitioner but this can only happen under rule 10.27 of the Rules if the supporting creditor would have been able to present their own bankruptcy petition, ie they have already served a statutory demand or have an unsatisfied judgment debt.

27. That is why in this case the Respondent had to rely on the change of carriage rule. This provides as follows (emphasis added):

> "(1) On the hearing of the petition, a person who has delivered notice under rule 10.19 of intention to appear at the hearing, may apply to the court for an order giving that person carriage of the petition in place of the petitioner, but without requiring any amendment of the petition.
>
> (2) The court may, on such terms as it thinks just, make a change of carriage order if satisfied that—
>
> > (a) the applicant is an unpaid and unsecured creditor of the debtor or a member State liquidator appointed in main proceedings in relation to the debtor; and
> >
> > (b) the petitioner either—
> >
> > > (i) intends by any means to secure the postponement, adjournment, dismissal or withdrawal of the petition, or
> > >
> > > (ii) does not intend to prosecute the petition, either diligently or at all.
>
> (3) The court must not make such an order if satisfied that the petitioner's debt has been paid, secured or compounded by means of—
>
> > (a) a disposition of property made by some person other than the debtor; or

> (b) a disposition of the debtor's own property made with the approval of, or ratified by, the court."

28. It is common ground that the Respondent fulfilled all the conditions in rule 10.29(1) and (2). The effect of a change of carriage order is that the supporting creditor steps into the shoes of the petitioner and the basis of the original petition remains. The supporting creditor's debt is not substituted for the petition debt and the issues on the hearing of the petition will still be around the petition debt. It remains open to the debtor to prove that the petition debt has been paid off so as to bring it within s.271(1)(a) of the Act and the consequent dismissal of the petition.

29. The policy behind the change of carriage rules, which were only brought in by the Insolvency Act 1986, is the class remedy nature of a bankruptcy petition. It ensures that the original petition, and more particularly the date that it was presented, remains in existence so as to fix that date for the purposes of defining the bankrupt's estate for the benefit of all his or her unsecured creditors. As Ms Toube QC rightly pointed out, that is not only so that transactions after that date are rendered void by s.284 but also for the purposes of the relevant time period before that date in order to found claw-back actions by the trustee to gather in more assets to the estate. It prevents a debtor picking off petitioning creditors one by one, and in the process moving the relevant date for defining the estate, when he or she is clearly insolvent and ought to be made bankrupt so as to ensure a *pari passu* distribution of the whole estate.

30. However, by rule 10.29(3), a distinction is made between the petition debt being paid off by a third party and it being paid off by the debtor without a validation order under s.284. To get a validation order, the debtor would have to show either that he or she is solvent or that it would be in the best interests of the unsecured creditors as a class for the payment to be made. In this case, the Appellant failed in his attempt to get a validation order because he was found to be insolvent.

31. Ms Toube QC says that to come within rule 10.29(3)(a), the "*disposition of property*" by the third party must be by way of gift with no concomitant obligations on the debtor to reimburse the third party. (It should perhaps be noted in passing that rule 10.29(3)(a) does not separately refer to a "*payment*", so it does not directly mirror s.284(2) insofar as such payments are not also dispositions of property.) Mr Peter Shaw QC for the Appellant, says that the rule is clearly looking to the owner of the property disposed of and where the money does not go via the debtor and instead goes direct from the third party to the petitioner, that is within the rule and no change of carriage can be ordered. Both parties are agreed that if the payment is routed through the debtor's bank account and then the petitioner is paid from funds within that bank account, then that is a disposition of property by the debtor and outside of rule 10.29(3).

32. Ms Toube QC says it should make no difference how the money finds its way to the petitioner and the crucial question is whether the policy and purpose of the Act and Rules is breached by the debtor becoming obliged to repay the loan to the third party. Mr Shaw QC says that it makes all the difference because the crucial question is whether this was "*property*" of the Appellant when it was paid to the petitioner.

***Smith v Simpson* (supra)**

33. The way the above provisions fit together was explored by the Court of Appeal in *Smith v Simpson*. The Court of Appeal unanimously agreed that the appeal should be dismissed but it was divided on the reasons why it should be dismissed. Jonathan Parker J gave the lead judgment for the majority (Laws LJ agreed with his judgment). Evans LJ effectively gave a dissenting judgment, even though he agreed that the appeal should be dismissed.

34. The case concerned a debtor who, immediately prior to the hearing of a bankruptcy petition, tendered a banker's draft for the full amount of the petition debt on condition that the petition was dismissed. There were supporting creditors and the petitioner refused to accept the payment on the basis that if there was a change of carriage order made the payment would be rendered void under s.284 of the Act. The district judge made the bankruptcy order and the debtor appealed to a deputy High Court Judge on the basis that the payment if accepted would have required the dismissal of the petition under s.271(1)(a). That appeal was dismissed as was the debtor's further appeal to the Court of Appeal. Even though the case was really about whether the petitioner acted reasonably under s.271(3) of the Act in refusing to accept the offer of payment, the Court of Appeal held that, because a payment out of the debtor's own funds would be void under s.284 in the event of a bankruptcy order being made, such a payment was not within s.271(1)(a) and the court was not precluded from making a bankruptcy order. As Mr Shaw QC rightly points out, Jonathan Parker J clearly distinguished between a payment out of the debtor's own funds (as the tendered banker's draft was accepted to be) and a payment by a third party. (The current rule 10.29 was, at the time of the judgment, rule 6.31 of the Insolvency Rules 1986, but it was in the materially same form.)

35. The first point to note is that the debtor conceded that the banker's draft that she tendered should be considered as her own funds. At p.252C, Jonathan Parker J said:

> "I am content to proceed on the basis (a) that the tender of the banker's draft was equivalent to a tender of cash, and (b) that in the circumstances, as accepted by Mr Whitaker, the cash is to be treated as belonging to the debtor."

That concession was also recorded in Evans LJ's judgment at p.255B.

36. At pp. 252D-253F are Jonathan Parker J's conclusions on the true meaning of s.271(1)(a) (with underlining added):

> "For the sake of simplicity references hereafter to payment by the debtor mean payment by the debtor out of his own property, and include a securing of, or compounding for, the petition debt which involves a disposition of the debtor's own property. Similarly, references hereafter to payment by a third party mean payment otherwise than out of the debtor's own property, and include a securing of, or compounding for, the petition debt which does not involve a disposition of the debtor's own property…
>
> On the debtor's construction section 271(1) is inconsistent with the Rules in that whereas section 271(1) makes no express distinction between payment by the debtor and payment by a third party, rules 6.31 and 6.32 do make such a

> distinction. In particular rule 6.31(3) provides expressly that the court shall not make a change of carriage order if it is satisfied that the petition debt has been paid by a third party. It is clearly implicit in this provision that the court *may* make a change of carriage order where there has been payment *by the debtor*. If the debtor's construction of section 271(1) is right, therefore, rule 6.31(3) is to that extent ultra vires and of no effect…
>
> In my judgment, to construe section 271(1) in the manner contended for by the debtor would result in section 271(1) being inconsistent not only with rules 6.31 and 6.32 but also with section 284(1). Further, such a construction would run counter to the scheme and policy of the Act to which I have referred. Section 284(1) renders "*any*" disposition of the debtor's property made after the date of presentation of the petition voidable, in the sense that it will be avoided on the making of a bankruptcy order unless validated by the court. It is, in my judgment, inconsistent with that provision, as with the scheme and policy of the Act, that the debtor should be in a position to bring the petition to an end by paying the petition debt, in the face of supporting creditors desirous of seeking a bankruptcy order. To use Farwell LJ's expression in *Brook v Emerson*, 95 LT 821, 823, that would, in my judgment, be contrary to the spirit of the Act.
>
> Nor, in my judgment, does the express wording of section 271(1) compel the construction contended for by the debtor. The subsection provides that the court shall not make a bankruptcy order unless it is satisfied that the debt "has been neither paid nor secured or compounded for". In my judgment, what the subsection is referring to, when read in context, is a payment which is unconditional in the sense that it is not liable to be avoided in the event that a bankruptcy order is made: that is to say a payment which is not vulnerable to the operation of section 284(1). If section 271(1) is construed in that way, it is consistent with section 284(1), with the Rules and with the scheme and policy of the Act. By contrast, if the debtor's construction is correct section 271(1) would have the, to my mind, surprising effect that the jurisdiction of the court to make a bankruptcy order is removed by a disposition which would be liable to be avoided under section 284(1) had a bankruptcy order been made on the petition."

37. It seems to me implicit in Jonathan Parker J's judgment that while a post-petition payment out of the debtor's own property was potentially void under s.284, a payment out of a third party's property was not. That was recognised in the wording of what is now rule 10.29(3) which clearly distinguishes between dispositions of a third party's property and dispositions of the debtor's property. There is no mention in the judgment that such a disposition of a third party's property would have to be by way of gift to the debtor so as to come outside of s.284, or to come within the definition of "*paid*" in s.271(1)(a) or within a "*disposition of property*" within what is now rule 10.29(3)(a).

38. Evans LJ disagreed with the majority's conclusion and he would have held that the literal interpretation of s.271(1)(a) does not limit it to the situation where the debt has been "*paid*" by a third party. However, he agreed that the appeal should be dismissed because he considered that the tender of a banker's draft did not engage s.271 at all. Evans LJ also made the further observation at p.255B-D, which has been relied upon by both parties for different reasons:

> "I am not at all clear why payment by means of a banker's draft, which constitutes the bank's personal undertaking to pay the debt from its own resources, counts as a disposition of property made by the debtor out of his own funds, although any disposition made by him to the bank would clearly be avoided under section 284(1) if it took place during the relevant period. However I respect the judgment of the Divisional Court in *In Re Salaman (A Bankrupt)* (1983) 127 SJ 763, and Mr Whitaker accepted that the draft should be regarded as the debtor's own funds."

39. Evans LJ seems to be disagreeing with the concession made on behalf of the debtor that the banker's draft would be regarded as the debtor's own funds; he considered it to be the bank's funds. The reference to *Re Salaman* is a little confusing as that was a case of a cheque paid by a third party, but I will come on to deal with that later in this judgment. I should say that Ms Toube QC relied on the reference to *Re Salaman* in Evans LJ's judgment as some sort of endorsement of the decision by the Court of Appeal, but I think that that reads far too much into Evans LJ's words. (Jonathan Parker J did not refer to it in his judgment.)

The Judgment below

40. The Judge relied on *Smith v Simpson* and *Re Salaman* and summarised her conclusions on the relevant legal principles to be applied as follows:

> "42. What I draw from the above is that where a third party makes a payment from his own funds but the debtor has agreed to repay or reimburse the third party, it is equivalent to a payment from the debtor's own funds because, absent a trust, it is merely substituting one debt for another one, leaving the debtor in the same position. A true third party payment, it seems to me, is one which leaves the debtor in a better financial position as there are more potential assets in the pot to pay any other creditors. An arrangement which leaves the debtor in the same position, but would result in the dismissal of a petition, breaches the *pari passu* principle by preferring an existing creditor above others in breach of the essential intention of the Act.
>
> 43 It is asserted that because the payments made by Mr Hill and Mrs Hood were made directly to the creditor from their own money, it cannot be a disposition of property or a payment of the debtor's own property such as to trigger s284. That cannot be correct in the light of *In re Salaman* or generally. Merely because something does not come into the hands of an individual does not mean that it does not belong to them or does not amount to their property. Legal ownership or possession by one person does not preclude equitable ownership by another. Indeed, this principle is specifically recognised in s284(6) which excludes payments made from property held on trust by the debtor."

41. Mr Shaw QC identified four propositions from this passage, all of which he says are wrong:

    (i) substituting one debt for another leaves the debtor in the same position;

    (ii) a true third party payment should leave the debtor in a better position;

    (iii) an arrangement whereby the debtor was left in the same position but resulted in the dismissal of the petition would breach the *pari passu* principle;

    (iv) the fact that there was a direct payment by Mr Hill to HMRC does not mean that the property from which the payment was made does not belong to the Appellant.

42. Ms Toube QC did not seek to support proposition (ii) that a true third party payment to come within the various provisions has to result in the debtor being in a better position. But it does seem to me implicit in her argument that a third party payment must be a gift for it to come within s.271(1)(a) (and outside of s.284) and that that would result in the debtor, or more particularly, the debtor's creditors, being in a better position than they would otherwise be.

43. In relation to the banker's draft in *Smith v Simpson*, the Judge said at [40]:

> "There was no doubt in the minds of the court that a banker's draft was to be treated as the debtor's own property, although the funds were drawn directly from the issuing bank rather than made from the debtor's own bank account."

I am not entirely clear what the Judge meant by that and Jonathan Parker J stated expressly that it was being treated as the debtor's own funds because she had conceded that. Furthermore, Evans LJ did not think that a banker's draft should be regarded as the debtor's own property.

The grounds of appeal

44. Mr Shaw QC's arguments on this appeal focused on whether the loan from Mr Hill to the Appellant, which the Judge found to be the proper analysis of the arrangements between them, could be considered to be the Appellant's property that was disposed of by Mr Hill's payment to HMRC. The net result of the payment was that the debt owed to HMRC had been substituted for the debt owed to Mr Hill and the transaction is entirely neutral so far as the Appellant's creditors are concerned and there has been no breach of the *pari passu* principle. Accordingly, says Mr Shaw QC, the payment by Mr Hill direct to HMRC was not within s.284 of the Act and would not have been rendered void if a bankruptcy order was made. On the same basis, and applying *Smith v Simpson*, the payment required the petition to be dismissed under s.271(1) of the Act and the Court was not able to grant the Respondent change of carriage of the petition because of Rule 10.29(3).

45. In response, Ms Toube QC says that such a characterisation of the loan is contrary to the policy behind Rule 10.29 (and s.271 and 284) as it would constitute a breach of

the *pari passu* principle which is what that Rule and those sections seek to protect. She also says that it is quite wrong of the Appellant to pretend that the arrangement was any sort of refinancing as he remained after, as before, insolvent. Ms Toube QC submitted that it should not matter if the money was paid via the debtor or went directly from the third party to the petitioner and she explained her position by positing three possible third party payments:

(1) A payment by way of gift;

(2) A loan from the third party where the debtor is not returned to solvency;

(3) A proper refinancing where the debtor is returned to solvency.

46. Ms Toube QC said that in all three scenarios, there should be the same result whether the money is paid directly by the third party or it is paid to the debtor and then the debtor pays the petitioner. So in the gift scenario, she submitted that whether or not the gift was paid via the debtor, it would not be void under s.284. That would also be the case in a refinancing, which she said would be likely to attract a validation order if it would result in the debtor returning to solvency. However, in scenario (2), the loan would be void under s.284, whether or not it was paid via the debtor.

47. Mr Shaw QC disagreed fundamentally with that proposition as it does not fit with the words of the statute. He says that if a gift is paid to the debtor and then the debtor uses that money to pay the petitioner that is clearly within s.284 as it is the debtor's own property when it is gifted to him. Similarly, in relation to the loan, if the loan is paid to the debtor and then used by him to pay the petitioner, that is clearly within s.284 and void. But if it is not paid first to him, it never becomes his property and the direct payment by the third party does not fall foul of s.284. There is much force in that.

Is the loan from Mr Hill the Appellant's "*property*"?

48. In order to determine the answer to this question, it is necessary to explore whether an outstanding loan repayment obligation can sensibly be considered to be "*property*" within s.284.

49. I do not think it was seriously disputed that an obligation to repay a loan is not "*property*" within the meaning of s.436 of the Act. Even though s.436 refers to an "*obligation*", as Arnold J (as he then was) pointed out in *Shlosberg v Avonwick Holdings Ltd* [2017] Ch 210 at [135] – [140] that can only mean an "*obligation*" owed to, not by, the debtor. This was also made clear by Lightman J in *Coutts v Stock* [2000] 1 WLR 906 in which he set out certain "*principles*" as to the operation of s.127 of the Act including in relation to an increase in a company's bank overdraft: "*the loan by the bank to the company is not a disposition of the company's money (it is a disposition of the bank's money to the company) and is therefore outside section 127*" (p.910G).

50. Even though Ms Toube QC accepted that the obligation to repay a loan or overdraft is not "*property*" within the meaning of s.284 and s.436, she did not accept that it was necessary to show that the money used to pay the petitioner came into the debtor's

beneficial ownership. She argued that one should look at the substance of the transaction which shows that the loan monies that went direct from the third party to the petitioning creditor were in reality and effectively a disposition of the debtor's own property within s.284. There are no authorities dealing with the position under the Act, including the operation of the change of carriage rules. But Ms Toube QC particularly relied on *Re Salaman* and I was also referred to a number of earlier authorities, all of which were based on the original Bankruptcy Acts.

51. *In Re Snyder* (1891) BR 127 concerned a third party company, albeit associated with the debtor, lending money to the debtor to pay his petitioning creditor so as to have the petition adjourned. Amongst the security taken by the company was a charge over the debtor's assets. It is clear from the facts as recited in the submissions of counsel that the money from the company was paid to the debtor's solicitors and they then paid a cheque, drawn on the firm's account, to the petitioner. After the debtor had subsequently been made bankrupt, Cave J held that the monies paid to the petitioner were the property of the bankrupt and therefore had to be repaid. In his short judgment he said as follows:

> "It is clear to me that this was the money of the bankrupt, and that it was paid by the solicitor as his money for the purpose of obtaining a delay of the bankruptcy proceedings…They [the lending company] never meant to lend without looking to somebody to repay them. The money was lent to Snyder and was not lent to the five gentlemen, and the consequence of that is that the trustee is entitled to succeed in this application".

52. I do not see that this case assists, for a number of reasons. Cave J clearly found the money to have gone to the debtor's solicitors. It was at that stage the debtor's property as recorded in the judgment. The granting of the charge would also itself be a disposition of the debtor's property. It is not akin to the Appellant's position of a third party payment direct to the petitioner without security for the loan.

53. *In Re Rogers* (1891) BR 243 concerned a debtor who borrowed from a moneylender in order to pay a number of creditors after an act of bankruptcy had been committed. The money was paid into the debtor's bank account, then to his solicitors' bank account and from there the solicitors paid the creditors. After the debtor was made bankrupt, his trustee sought to recover the payment to one of the creditors. Cave J, following his decision in *Re Snyder,* held that this was a payment of the debtor's money and so recoverable. However, the Court of Appeal allowed the appeal on the basis that the money never became the debtor's property. Lindley LJ said:

> "In my opinion the true result of the evidence is not that the money paid to Bromley [the creditor] was the bankrupt's money, but that the bankrupt through his solicitors paid his debt with money lent him for the purpose by Mozley [the moneylender]…The payment cannot be impeached by the trustee if the above conclusion is correct in fact. The trustee is endeavouring to affirm the transaction in part and to repudiate it in part. He wants to claim the money as the bankrupt's because it came to his hands and at the same time to reject the terms and conditions on which alone the bankrupt procured it. This is manifestly unjust and contrary to principle…I entertain no doubt that Mozley could have obtained an injunction to restrain the bankrupt from using that money for any purpose except that of paying his pressing creditors. If this be so, the money never was the

> bankrupt's in any proper sense so as to vest in his trustee as part of his general assets."

54. The other two members of the Court of Appeal, Bowen and Kay LJJ, also considered that the payments from the moneylender were impressed with a trust and could not be used by the debtor for any other purpose than to pay the creditors. *In Re Rogers* was one of the cases relied upon by Lord Wilberforce in establishing the concept of the *Quistclose* trust for a purpose – *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567. Ms Toube QC says that *In Re Rogers* and the next case in the series, *In Re Drucker (No. 1)* [1902] 2 KB 55, need to be re-analysed in the light of *Quistclose* and *Twinsectra Ltd v Yardley and ors* [2002] 2 WLR 802, but I am not so sure that they do in this context.

55. In *In Re Drucker* the debtor's own solicitors agreed to lend him money so that he could pay off the petitioning creditor. The solicitors paid the petitioning creditor directly. The debtor was later adjudicated bankrupt and the trustee sought to recover the money as property of the bankrupt. At first instance Wright J held as follows:

> "All that I have to consider is, whether this money, which was paid to the bank, was the money of the debtor or not…if the 300l. ever became the debtor's money, it is plain that he had the right to spend it, or to speculate with it, or do whatever he pleased with it. But what I find is, that it never came into debtor's hands at all; and I am of opinion that it never was intended to come into his hands. It is quite clear that [the solicitors] would never have consented to that money going out of their hands into the debtor's hands, or being applied for any purpose whatever other than the dismissal of the petition by the bank… I cannot help thinking that this money was never free, and never became part of the general assets of the debtor at all. He never had any right to receive it, or use it, or apply it to any purpose except this one particular purpose. Under these circumstances it seems to me it was impressed with a trust – not in the strict sense of the word – but in substance with a quasi-trust that it should be applied by [the solicitors] out of their own money for the discharge pro tanto of the claim of the bank."

The Court of Appeal – [1902] 2 KB 237 – dismissed the trustee's appeal. Romer LJ said:

> "In my view there never was a moment of time at which this money could have been used for any other purpose than that of paying the bank."

56. It seems fairly clear that the Court of Appeal in both *In Re Rogers* and *In Re Drucker* held that money would only be regarded as part of the bankrupt's estate if it was beneficially owned at a relevant point of time by the bankrupt. This is confirmed by s.283(3)(a) of the Act which excludes from the bankrupt's estate any property held on trust for another person. The corollary must be that the bankrupt's estate is confined to assets which are beneficially owned by the bankrupt or in which the bankrupt has a beneficial interest.

57. As I said above, Ms Toube QC sought to distinguish these cases on the basis that they needed to be reinterpreted in the light of the modern juridical basis for *Quistclose* trust cases, as explained by Lord Millett in *Twinsectra* (supra) (see particularly [68], [69], [79]-[81] and [100]). That explanation is, however, that at no point does the borrower

have a beneficial interest in the monies advanced; the beneficial interest remains with the lender (the borrower holding on resulting trust for the lender) until those monies are applied in accordance with the agreed purpose. When they are so applied, there remains the simple debtor/creditor relationship between the lender and borrower. In her oral submissions, Ms Toube QC said that at the moment that the purpose was about to be fulfilled, the beneficial interest became vested in the borrower (for a "*scintilla temporis*") but I do not understand Lord Millett to have been saying that in *Twinsectra*. Rather, in accordance with *In Re Rogers* and *In Re Drucker*, the beneficial interest never became vested in the borrower/debtor, as it either remained with the lender or transferred to the payee/creditor.

58. In this case, one of the issues that the Judge had to consider was whether the monies paid by Mr Hill were subject to a *Quistclose* type trust, such as in *In Re Rogers*, and she decided that there was no such trust. Even though this was a point of defence raised by the Appellant, I do not see why the question of a trust ever arose because the money never in any sense, legal or beneficial, came into the Appellant's hands. It was perhaps because of the case of *Re Salaman (A bankrupt)* that this became a live issue and I now turn to that case.

59. *Re Salaman (a bankrupt)* is unreported but I have seen a Lexis transcript of the *ex tempore* judgment at [1983] Lexis Citation 814. It was also reported in The Times on 20 October 1983. This was a decision of the Divisional Court in Bankruptcy, Walton and Nicholls JJ (as Lord Nicholls then was) hearing an appeal from HH Judge Bloomfield sitting in the Newbury County Court. The Divisional Court was a court of coordinate jurisdiction to my hearing this appeal. It was a decision under the Bankruptcy Act 1914 in which the doctrine of relation back to the bankrupt's estate as at the date of the relevant act of bankruptcy applied. The Divisional Court upheld HH Judge Bloomfield's declaration that a payment by cheque of a third party to the petitioner was void as against the trustee in bankruptcy under s.37 of the Bankruptcy Act 1914.

60. Nicholls J gave the main judgment, first setting out the facts and then saying:

> "To my mind the resolution of the issue raised by this appeal turns on a consideration of the relevant evidence that was put before the court. On this appeal the court is concerned to ascertain what were the precise terms of the arrangement made between the debtor and Mr Collis (the third party who provided the £5,000 in question). Those are the terms which are of crucial importance in determining whether that sum was an asset of the debtor."

No evidence was given by the third party or the debtor and the court only had three letters from the third party on which to base its factual findings. Nicholls J set out those letters and then concluded simply as follows:

> "…I think that on the evidence before him the learned Judge came to the right conclusion and that that evidence does not entitle, or enable, this court to reach the conclusion either that the transaction was not one of loan, or that being one of loan the sum loaned was impressed with a trust."

Walton J agreed with Nicholls J. He also referred to *In Re Rogers* saying that it may need reconsideration.

61. It is unclear whether *In Re Drucker* was cited to the Divisional Court. That would be closer on the facts to *Re Salaman* as the cheque from the third party went straight to the petitioner, whereas in *In Re Rogers* the money was first transferred into the debtor's bank account. There is no analysis as to how, even if the payment was treated as a loan to the debtor, the money could be said to have become the property of the debtor. The appeal seems to have only been concerned with the facts as to whether it had properly been characterised by the judge as a loan or whether it should have been a loan impressed with a trust. But whichever way round, I find it difficult to see that the money ever became beneficially owned by the debtor. I am afraid that I also do not understand Evans LJ's reference to *Re Salaman* in *Smith v Simpson*, save insofar as it is limited to whether a cheque is to be regarded as a payment of the payor's own money.

62. While the Judge understandably relied on *Re Salaman* I do not find it of persuasive authority. It is a decision under the Bankruptcy Act 1914, under which there were no change of carriage rules, and contains no analysis of the legal status of loaned monies nor why the payment by a third party direct to the petitioning creditor should be treated as the "*property*" of the bankrupt and as having come within his estate.

63. In my judgment therefore, the monies paid by Mr Hill direct to HMRC, together with the Appellant's obligation to repay Mr Hill the same amount, never became the "*property*" of the Appellant such as to engage s.284 of the Act. It follows that I reject Ms Toube QC's contention that the notion of third party payments within s.271(1)(a) and rule 10.29(3) following *Smith v Simpson* is confined to gifts from third parties and does not extend to loans from them. There is nothing within those sections, or rule 10.29, that indicate that Parliament intended so to confine their operation to pure gifts; nor is there anything within the judgments of the Court of Appeal in *Smith v Simpson* that indicate that it considered the sections and rule to be limited to gifts from a third party.

Does the *pari passu* principle govern the operation of the sections?

64. Ms Toube QC submitted that the overarching principle and policy governing the operation of s.284 of the Act, and working together with s.271 and rule 10.29, is to preserve the bankrupt's estate so as to ensure a *pari passu* distribution of it to the bankrupt's creditors. Therefore one has to read the sections and rule purposively and broadly so as to fulfil that policy and, she submitted, that any transaction should be tested by reference to whether it causes prejudice to the bankrupt's creditors because it disrupts a *pari passu* distribution.

65. The first thing to say about this submission is that such a test does not appear from the words of the relevant sections or the rule. Rule 10.29(3) bases its operation on the concept of the "*debtor's own property*" and, by contrast, a "*disposition of property made by some person other than the debtor*". And s.284 refers to a "*disposition of property made by that person*" (ie the bankrupt). It does go on to refer in s.284(2) to "*a payment*" but as I have explained above, that must necessarily have a very limited application to where the legal and beneficial interest in money is separated.

66. I think Ms Toube QC's main point was that it should make no difference whether the loan monies were paid direct to HMRC or first to the borrower, the Appellant, who then paid them to HMRC. In both situations, the effect on the unsecured creditors is exactly the same: one debt is substituted for another. If the sections and rule operate to invalidate the payment that came via the Appellant, then it shows that this was thought to contravene the *pari passu* principle. If the effect on creditors is the same when the payment is made direct to HMRC, then surely the sections and rule should operate similarly to invalidate that payment.

67. Ms Toube QC illustrated her point with an example that mirrored this case and showed that if the petition had been dismissed as a result of the payment, the unsecured creditors would have been worse off than if the order had been made. However, the crucial element of the example is that the debtor actually goes on to pay off the third party after the petition has been dismissed, despite remaining hopelessly insolvent and so unable to pay his other creditors. Clearly in that situation, the creditors are prejudiced but as Ms Toube QC accepted, there would probably be a good case for a preference claim under s.340 of the Act for any subsequently appointed trustee. Ms Toube QC also accepted that if, in the example, one stops short of the final step of repaying the third party, so that one debt has simply been replaced by another, there is no breach of the *pari passu* principle. She says that one should not stop there because that was the whole point of getting the petition dismissed.

68. Mr Shaw QC countered the example by saying that it obscures the fundamental distinction between the incurring of a debt and its repayment. The only detriment that creditors might suffer would be when the debt was repaid thereby depleting the bankrupt's estate that should be available in full to the unsecured creditors. The incurring of the debt was neutral so far as the creditors were concerned and left the estate intact and with the same value of creditors.

69. In relation to the preference point, Ms Toube QC submitted that the trouble with it is that if the current petition is dismissed the relevant time for clawback actions such as preference claims would continually be pushed forward. If a debtor is allowed to pick off petition debts in this way, the preservation of the estate for the benefit of creditors as a class is undermined. While I can see that that might be the effect of requiring a petition to be dismissed in the circumstances of this case, I do not see that it can influence the interpretation of the statutory words.

70. Both sides prayed in aid the decision of Lightman J in *Coutts v Stock* (supra). Mr Shaw QC relied on it for the proposition that an increase in a company's (or debtor's) overdraft is not a disposition of the company's property (see [49] above). Ms Toube QC relied on it for the proposition that when a bank honours its customer's cheque it is acting as agent for the customer in the disposition of the customer's money to a creditor. It is perhaps unfortunate that the issue came before Lightman J on an unmeritorious application by a director of the company who had guaranteed the company's overdraft and was seeking to argue that the increase in the overdraft was void under s.127 of the Act. In rejecting that application, Lightman J set out six principles as to the operation of s.127 of the Act, all of which are predicated on the *pari passu* distribution principle being the basis for the invalidation of dispositions of a company's assets after the presentation of a winding up petition. Principle 6 was as follows (p.910G-H):

> "(6) On principle however the acts of the bank in honouring cheques drawn on a company's overdrawn account constitute (i) loans of the sums in question by the bank to the company and (ii) payment by the bank as agent of the company of the sums loaned as moneys of the company to the party in whose favour the cheques are drawn. On this analysis, the loan by the bank to the company is not a disposition of the company's money (it is a disposition of the bank's money to the company) and is therefore outside section 127; but the payment by the bank as agent for the company's money does constitute a disposition to the payee by the company within section 127 and is recoverable by the liquidator from the payee."

71. Ms Toube QC submitted that the banker/customer agency relationship in relation to the payment of cheques can be transposed to the relationship between Mr Hill and the Appellant, such that the monies paid by Mr Hill to HMRC should be treated as the Appellant's monies being disposed of at his direction. Mr Shaw QC submitted that the agency relationship is confined to the specific honouring of cheques as between banker and customer and cannot be applied outside banking to the Appellant's case. I agree with Mr Shaw QC that there is no evidential basis for the suggestion that Mr Hill was acting as the Appellant's agent.

72. But the wider point at the heart of this dispute is more difficult to reconcile. On the one hand, there is substance to Ms Toube QC's point that, if there is no difference in relation to the *pari passu* principle whether the money was paid direct to HMRC or first paid to the Appellant and then to HMRC, there should be no difference in the operation of ss. 271 and 284 of the Act and rule 10.29. On the other hand, there is also force in Mr Shaw QC's point that the payment was neutral so far as the unsecured creditors were concerned, and so there was no breach of the *pari passu* principle.

73. In my judgment, it is necessary to revert to the statutory words and they clearly cover only dispositions of a debtor's property, meaning property which the debtor owns beneficially or in which he or she has a beneficial interest. I do not see that one can read into those words an overarching requirement that the debtor must show that either he or she is not insolvent or that the transaction did not infringe the *pari passu* principle. While that may be necessary for the debtor to show if he or she is seeking a validation order (which would be an exercise of the court's discretion) I do not see that it is required in relation to testing whether there has actually been a disposition of the debtor's property.

74. Even though such an approach may result in a disposition being within s.284 despite it not infringing the *pari passu* principle, I do not think that Parliament intended to invalidate or prevent third parties from making payments direct to creditors even where those third parties are contractually or otherwise entitled to be repaid by the debtor. In fact, I think that the wording of rule 10.29 indicates that such payments were being encouraged and I do not believe that this was considered only to enable those payments to be by way of gifts.

75. Nor do I consider that the allowance of direct payments by third parties to the petitioning creditor itself contravenes the policy behind this Part of the Act or the *pari passu* principle. A distinction is made in the scheme of the Act and the Rules between substitution and change of carriage. Under Rule 10.27 of the Rules, if a supporting creditor would have been able to present a petition at the date the original petition was presented, then it may be substituted as the petitioner if the original petitioner was

willing to allow the petition to be dismissed. The petition would then be amended to show the new petitioner's debt and if a bankruptcy order was eventually made, the relevant date for establishing the bankrupt's estate would be the date the original petition was presented. There is no bar to making a substitution order if the original petition debt has been paid off by a third party. So a creditor who would have been able to present a petition is able to take advantage, for the ultimate benefit of the class of unsecured creditors, of the earlier date even if the petition debt has been paid off by a third party.

76. This needs to be contrasted with the change of carriage rules. A supporting creditor who is unable to be substituted because it would not have been able to present its own petition has to rely on the more restrictive change of carriage rules. Under those rules it is only where the debtor has used his or her own property to pay off the petition debt that such a supporting creditor is able to take advantage of the original petition date. That is because the petition debt has not really been paid off – see *Smith v Simpson*. Where however the debt has been paid off by a third party and there has been no disposition of the debtor's own property, there is no reason to allow the supporting creditor to take advantage of the original petition date, because, as of that date, the supporting creditor had no right to present its own petition.

77. Whether rightly or wrongly, the Rules contemplate a different approach depending on whether the creditor was in a position to present its own petition on the original petition date or not. (I should add that this does not arise in relation to companies winding up as any creditor has a right to petition and so will always be able to ask to be substituted.) That distinction has been brought into sharp focus in this case and I do not think that it undermines, as Ms Toube QC said it would, the nature of a bankruptcy petition as a class remedy. Even though it means that a debtor is able to pick off successive petitioners by third party direct payments, that is a consequence of the preferential treatment afforded to supporting creditors who have got themselves into a position to present their own petitions.

78. In my view, ss.271 and 284 of the Act with rule 10.29 of the Rules can work coherently together first in the way envisaged and interpreted in *Smith v Simpson* and second by respecting the distinction drawn in the Rules between dispositions of a third party's property and dispositions of the debtor's own property. In the circumstances of this case, the payment by Mr Hill direct to HMRC did not amount to a disposition of the Appellant's own property; it was a disposition of Mr Hill's property which brought it within rule 10.29(3)(a) and meant change of carriage to the Respondent could not be ordered.

Conclusion

79. For the reasons set out above, the Judge erred in law in concluding that she was able to grant to the Respondent carriage of the petition and to make a bankruptcy order. The Judge should have held that rule 10.29(3) prevented the making of a change of carriage order and that the court could not make a bankruptcy order under s.271(1)(a) because the petition debt had been paid off by two third parties: Mr Hill and Mrs Hood.

80. Accordingly, I will allow the appeal. It seemed to me to follow that I should set aside the Judge's order and dismiss both the change of carriage order and the bankruptcy petition. However, after circulation of a draft of this judgment, the Respondent's solicitors quite properly wrote to suggest that the Respondent and the Appellant's trustees in bankruptcy, together with possibly other supporting creditors, would want to have the opportunity to argue either that such orders should not be made or, if they are to be made, that they should be stayed pending appeal, or at least permission to appeal. It will not be possible to hear those applications at the time this judgment is handed down and, so that they should have the opportunity to make those applications, I do not make those orders at the time this judgment is handed down. I will adjourn consideration of the appropriate orders to make in the light of my judgment, and any other consequential matters, to a hearing to be arranged as soon as possible for that purpose. I will extend time for filing an appellant's notice for a period to be considered at the further hearing. I hope that a suitable order to deal with this and any further directions to be made in relation to the further hearing can be agreed between the parties.

81. I am grateful to all counsel for their helpful submissions, both oral and written.