Neutral Citation Number: [2021] EWHC 1740 (Ch)

Appeal Reference: CH-2021-000044
Claim No: BR-2018-001805

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY APPEALS (ChD)
ON APPEAL FROM DEPUTY ICC JUDGE BARNETT 8TH FEBRUARY 2021

Royal Courts of Justice
The Rolls Building
7 Rolls Buildings
London EC4A 1NL

Date: Wednesday, 26th May 2021

Before:

MR. JUSTICE MILES

- -

Between:

STATE BANK OF INDIA & OTHERS

Petitioners/ Respondents

- and -

DR. VIJAY MALLYA

Respondent/ Appellant

- -
- -

MR. PHILIP MARSHALL QC and MR. JAMES MATHER (instructed by **RPC**) for the **Appellant**
MR. TONY BESWETHERICK (instructed by **TLT LLP**) for the **Respondent**

- -

APPROVED JUDGMENT

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MR. JUSTICE MILES:

Introduction

1. This is an appeal against parts of an order of Deputy ICC Judge Barnett ("the judge") dated 8 February 2021. The Judge granted the appellant's application made by an application notice dated 27 November 2020 to release some of the money beneficially owned by the appellant and held in the Court Funds Office to meet his living expenses and the costs of English solicitors and counsel in the defence of the bankruptcy proceedings against him. However, the judge refused to grant validation relief in respect of the other costs and expenses sought by the appellant, including the appellant's costs of litigation in India.

2. The principal issue of this appeal concerns the costs of the Indian proceedings. The appellant contends that the Indian litigation is closely connected with the bankruptcy proceedings and that the court ought therefore to have validated the payments to his Indian lawyers. The judge refused to do that on two grounds: first, that the court's jurisdiction under section 284 of the Insolvency Act 1986 was narrowly circumscribed and did not extend to costs of the kind being sought and, second, that the appellant had failed to provide an adequate evidential justification for the order.

3. The appellant also appeals against the costs order of the judge. He ordered that the appellant should pay 50% of the banks' costs with the remainder of the costs to be costs in the case. The appellant also appeals against the judge's decision not to rescind an earlier order of ICC Judge Prentis of 11 January 2021 ordering the appellant to pay the costs of an interim application heard on that date.

Background

4. The respondent banks are judgment creditors of the appellant under a judgment of the Debt Recovery Tribunal of Karnataka, Bangalore ("the DRT") in a rupee amount equivalent to some £1.05bn including interest. That judgment is based on a personal guarantee given by the appellant in respect of the liabilities of Kingfisher Airlines. The borrowings of Kingfisher were also guaranteed by another company owned and controlled by the appellant called United Breweries Holdings Ltd ("UBHL").

5. The banks commenced proceedings against the appellant in India in 2013 under the personal guarantee. The banks obtained the DRT judgment against the appellant on 19 January 2017. That judgment was registered in England on 24 November 2017. An application to set aside the decision to register the judgment was dismissed. The petition is therefore based on a judgment debt that has been registered in this country.

6. The bankruptcy petition was issued here on 11 September 2018. The petition failed to refer to the appellant giving security to the banks. On 9 April 2020, Chief ICC Judge Briggs ("Judge Briggs") held that the petition infringed the provisions of section 269 of the Insolvency Act 1986 by failing to disclose the security. He nonetheless refused to dismiss the petition and held that the

petitioner should be permitted to amend. Judge Briggs further held that there was a realistic prospect of a petition debt being compromised by virtue of a petition presented by the appellant to the Supreme Court of India seeking a compulsory compromise of the claims against the appellant. There was evidence before Judge Briggs from a retired Justice of the Supreme Court of India, Justice Verma, that the Supreme Court of India has power to impose a compromise of that kind on the parties and that there was a reasonable prospect of success.

7. Judge Briggs also explained that there had been various attachments of assets under the orders of various courts and tribunals in India, including attachments arising as a result of the action of the Enforcement Directorate, a prosecution agency of the Indian government. The attachments applied to assets of both the appellant and UBHL.

8. There are several outstanding proceedings in India which include the following.

9. First, the Indian Settlement Petition before the Supreme Court, as just mentioned. As Judge Briggs explained in his judgment of 9 April 2020, if the petition is granted it will have the effect of discharging the underlying debt on which the petition is based. The appellant also contends that the existence of a petition means that the debt, the subject of the petition, is disputed and this should itself lead to a dismissal of the bankruptcy petition.

10. Second, there is a challenge to the interest element of the DRT judgment. Interest is being charged on the judgment at the compound rate of 11.5% and accounts for something approaching half of the total debt. The appellant complains that for much of the time since the judgment was given the attachment orders obtained by the Enforcement Directorate have prevented the appellant from discharging the debt. The appellant has commenced proceedings in the Karnataka High Court in relation to those attachments. He contends that the attachments were obtained on the basis of criminal complaints filed by the banks. Justice Verma has given evidence that these proceedings have a reasonable prospect of success. The appellant's evidence is that the proceedings would reduce the debt to the petitioners by approximately half, about £1.06bn to £569m.

11. Third, as already explained, some assets of the appellant's and UBHL in India have been attached. In addition, the authorities are pursuing proceedings against the appellant in respect of the debt owed to the banks under the legislation relating to Fugitive Economic Offenders. The appellant is challenging those proceedings, disputing both the applicability and constitutionality of the relevant legislation.

Procedural background

12. The bankruptcy petition was issued on 11 September 2018.

13. On 12 July 2019 ICC Judge Burton made a validation order permitting a number of categories of payments, including the appellant's living expenses and "reasonable prospective fees and disbursements to be incurred after 10 July 2019 in opposing the petition".

14. On 11 September 2020 the appellant and the banks entered into a consent order whereby the net proceeds of sale of some property in France (of about €3.266m) ultimately owned by the appellant were paid into the English court to be held pending further order and permitting either party to apply in respect of the sum so held ("the deposited funds").

15. On 27 November 2020 the appellant issued an application seeking orders for the release of sums from the deposited funds to enable certain payments to be made. These included payments of incurred living expenses and legal fees and disbursements of defending the bankruptcy petition, and future legal fees and disbursements. The appellant contended that these had already been validated by the order of Judge Burton and that he now sought payment from the deposited funds. The application also sought validation and the release of further sums from the deposited funds in connection with the legal fees of the Indian litigation, both incurred and future, and the legal fees incurred in other separate pieces of litigation.

16. The application notice contained a schedule setting out the sums for which the appellant sought validation orders. As regards the Indian proceedings it listed "outstanding litigation" of £291,659 for Bachubhai Munim & Co ("BM") and £262,904 for Mr. Desai, the appellant's senior counsel in India. Together they total over £550,000. The schedule then listed "anticipated litigation costs" of £101,600 for BM and £101,600 for Mr. Desai.

17. The application notice did not provide any breakdown of the outstanding costs or anticipated costs as between the three sets of proceedings. The evidence in support of the application referred to a number of steps that had been taken to date in various proceedings but did not seek to apportion the outstanding costs to those steps. It did not break down the outstanding costs as between the three sets of proceedings. It did not explain how the anticipated costs would be divided between the three sets of proceedings or what steps the costs were anticipated to cover. Indeed, no details were given of the anticipated steps or when any such steps might be taken. The appellant did not provide any invoices, draft bills of costs, or other information which might have enabled the banks or the court to assess the reasonableness of the outstanding or anticipated costs of the Indian proceedings.

18. On receipt of the application the banks' solicitors immediately invited the petitioner to provide further information which might enable the banks and the court to assess the reasonableness of what was being sought. The solicitors for the appellant refused to provide that information. They contended that the banks being parties to the Indian proceedings could themselves assess the reasonableness of the amounts being sought.

19. The banks' solicitors then submitted a witness statement explaining that the banks required further information. The banks said that they wished to see

invoices or other evidence about the outstanding costs. The bank then submitted another witness statement again raising the need for further information and complaining about the lack of any breakdown of the costs in the Indian proceedings as between the various sets of proceedings or by reference to the particular steps said to have been taken to date or anticipated for the future.

20. The appellant provided a further witness statement shortly before the hearing before the judge but provided no further breakdown or allocation of the costs to date and provided no details in relation to the anticipated costs or the steps that were intended to be taken.

21. The appellant provided a yet further witness statement the day before the hearing but again did not provide any of the further information sought by the banks. After the hearing but before judgment the appellant provided a further witness statement which again did not provide the information sought.

22. The application was listed twice in the interim applications list of the ICC. On 11 December 2020 Deputy ICC Judge Schaffer ordered the release of the sum equivalent to £240,000 from the deposited funds to the appellant's English solicitors in respect of their costs. On 11 January 2021, ICC Judge Prentis ("Judge Prentis") ordered that the payment of the appellant's reasonable legal costs of preparing for and attending a forthcoming permission to appeal hearing in respect of the earlier decisions of Judge Briggs should be validated. Judge Prentis did not consider that further relief was appropriate and adjourned the balance of the application to be heard at a hearing fixed before an ICC Judge on 22 January 2021. Judge Prentis ordered the appellant to pay the banks' costs of the hearing, such costs to be assessed summarily at the 22 January 2021 hearing.

23. The application then came on before the judge, and it is his decision on the application which is now appealed from.

The judgment below

24. The judge addressed the costs of the Indian proceedings from [36] of his judgment. He was taken to certain authorities in relation to the court's discretion to validate the payment of legal fees by a debtor facing a bankruptcy petition. He concluded that the court had a narrow power to validate expenditure on legal costs other than those referable to the bankruptcy proceedings themselves and it would be wrong in principle to extend this to other costs such as the costs of the Indian litigation. He decided, secondly, that if he had a discretion, he would not in any event exercise it so as to make a validation order, for two reasons: the appellant had failed to provide sufficient evidence to enable the court to assess the reasonableness of the incurred or anticipated expenditure and, second, the appellant had failed to provide any appropriate safeguards against unreasonable expenditure of the kind found in the case law and embodied in the original validation orders of Judge Burton. The judge also made decisions about costs, which I shall come back to separately.

Legal framework

25. Section 284 of the Insolvency Act 1986 provides (materially) 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.
>
> (4) The preceding provisions of this section do not give a remedy against any person –
>
> (a) in respect of any property or payment which he received before the commencement of the bankruptcy in good faith, for value and without notice that the bankruptcy application had been made or (as the case may be) that the bankruptcy petition had been presented, or
>
> (b) in respect of any interest in property which derives from an interest in respect of which there is, by virtue of this subsection, no remedy."

26. There are some obvious analogies between this provision and section 127 of the Insolvency Act 1986, which provides (materially) as follows:

> "(1) In a winding up by the court, any disposition of the company's property, and any transfer of shares, or alteration in the status of the company's members, made after the commencement of the winding up is, unless the court otherwise orders, void."

27. The commencement of the winding up includes the case where there has been a presentation of a winding up petition so the section applies during the period between the presentation of the petition and an order winding up the company.

28. There are differences between the two sets of provisions. For example, section 127 does not include the protection of creditors acting in good faith without notice found in section 284. There may also be differences arising from the

position of a company on the one hand and an individual on the other hand. But the underlying statutory purpose of the two provisions is to promote the *pari passu* principle of distribution of insolvent estates to creditors.

29. The Court of Appeal explained this in the case of *Express Electrical Distributors Ltd v Beavis* [2016] EWCA Civ 765, a case about section 127. Sales LJ, who gave the lead judgment, said,

> "19. The principles governing the exercise of the court's discretion in deciding whether to make a validation order were examined in the judgment of Buckley LJ in *In re Gray's Inn Construction Co. Ltd* [1980] 1 WLR 711, CA. The case concerned section 227 of the Companies Act 1948, which was the predecessor of section 127 of the 1986 Act and is in identical terms. ….
>
> 20. Buckley LJ explained the principles to be applied in deciding whether a validation order should be made at pp. 717D-719E. As he emphasised, 'It is a basic concept of our law governing liquidation of insolvent estates [of individuals and companies] that the free assets of the insolvent at the commencement of the liquidation shall be distributed rateably amongst the insolvent's unsecured creditors as at that date' (717D, this is the *pari passu* principle); 'It may sometimes be beneficial to the company and its creditors that the company should be enabled to complete a particular contract or project, or to continue to carry on its business generally in its ordinary course with a view to the sale of the business as a going concern', in which case a validation order may be sought (717G); 'In considering whether to make a validating order the court must always …. do its best to ensure that the interests of the unsecured creditors will not be prejudiced' (717G); and 'Since the policy of the law is to procure so far as practicable rateable payments of the unsecured creditors' claims, it is …. clear that the court should not validate any transaction or series of transactions which might result in one or more pre-liquidation creditors being paid in full at the expense of other creditors, who will only receive a dividend, in the absence of special circumstances making such a course desirable in the interests of the unsecured creditors as a body' (718A-B; and see also p. 720E). Thus the policy of the law in favour of distribution of the assets of an insolvent company in the course of the liquidation process on a *pari passu* basis between its unsecured creditors is a strong one, and it needs to be shown that special circumstances exist which makes a particular transaction one in the interests of the creditors as a whole before a validation order will be made to override the usual application of the pari passu principle.
>
> 21. Sometimes the court may be justified in making a validation order where the making of a payment or the supply

> of assets by the company is a way of, say, fulfilling its obligations under a particularly profitable contract where the eventual profits will exceed the consumption of the company's assets and will enure to the overall advantage of the general body of creditors. There is no suggestion of that in this case. Sometimes the court may be justified in making a validation order simply to allow the company to carry on its business in the usual way; but, as Buckley LJ pointed out, it will be more speculative whether this is really desirable in the interests of the general body of creditors and this 'will be likely to depend on whether a sale of the business as a going concern will probably be more beneficial than a break-up realisation of the company's assets.' (717H)."

30. On the facts of that case, the Court of Appeal decided that there was no justification for a validation order. At [27] Sales LJ said,

> "The goods to which the £30,000 payment related had all been supplied by the appellant on credit prior to the making of that payment and were already available for use in Edge's business whether that payment was made or not. Therefore, absent some special circumstance, it was not in the interests of the general body of creditors that the appellant should receive that £30,000 in payment for those already delivered goods, in breach of the *pari passu* principle."

31. Sales LJ noted at [47] that the statement of principles to be derived from the case law was in accordance with the Practice Direction for Insolvency Proceedings and he quoted paragraph 11.8, which deals with validation orders in respect of companies.

32. At [56] Sales LJ said,

> "… The true position is that, save in exceptional circumstances, a validation order should only be made in relation to dispositions occurring after presentation of winding up petition if there is some special circumstance which shows that the disposition in question will be (in a prospective application case) or has been (in a retrospective application case) for the benefit of the general body of unsecured creditors, such that it is appropriate to disapply the usual *pari passu* principle."

33. Counsel for the appellant submitted that significant differences between section 284 and section 127 mean that the *Beavis* case is of little assistance. I do not agree with this as a general proposition. As Sales LJ explained in [20], the same basic concept of rateable distribution, that is the *pari passu* rule, applies to personal bankruptcy as it does to corporate insolvency. That said, there may be special considerations concerning individuals as opposed to companies which merit the court's discretion being exercised in their favour so that, for example, it may well be that the living expenses of a debtor could not be justified on the basis of the *pari passu* principle. It is also difficult to

see that the costs of defending the bankruptcy petition itself can be justified on the basis of the *pari passu* principle, yet the authorities show that the courts sometimes validate the payment of such costs. I shall turn in a moment to the question of whether costs of that kind may be the subject properly of an application under section 284 and, if so, on what basis.

34. I have noted that in *Beavis* Sales LJ referred with approval to the terms of the Practice Direction. In relation to bankruptcy petitions validation orders are dealt with at paragraph 12.8 of the Practice Direction. Paragraph 12.8.4 sets out the requirements for the evidence in support of the application. These include details of the dispositions or payments in respect of which an order is sought and the reasons relied on in support of the need for such dispositions or payments to be made. Paragraph 12.8.4 is stated to be the minimum information which is sought on such an application. So full information is expected on applications of this kind and the evidence served in support should provide the court with adequate details to enable the court to exercise its discretion properly.

35. Paragraph 12.8.8 says the Court will need to be satisfied by credible evidence that the debtor is solvent and able to pay their debts as they fall due or that a particular transaction or series of transactions in respect of which the order is sought will be beneficial to or will not prejudice the interests of all the unsecured creditors as a class.

36. There have been a number of cases specifically concerning the payment of the costs of debtors of defending bankruptcy proceedings.

37. Most of these were concerned with earlier legislation, culminating in the Bankruptcy Act 1914. Under that legislation the bankruptcy of a debtor was deemed to relate back and to commence at the time of the act of bankruptcy on the basis of which the receiving order was made: see section 37 of the 1914 Act. This meant that the assets of the bankrupt were deemed to vest in the trustee in bankruptcy from the date of the act of bankruptcy and that the trustee could therefore reclaim property disposed of by the bankrupt after the act of bankruptcy. However, bona fide payments, conveyances, or other transactions with any person without notice of the act of bankruptcy were protected: see section 45 of the Bankruptcy Act 1914.

38. On their face these provisions would have made it impossible for a debtor to engage and pay solicitors to defend bankruptcy proceedings against him. The lawyers would have been on notice of the alleged act of bankruptcy so would not have been able to rely on the protections contained in section 45 of the Bankruptcy Act 1914. The courts nonetheless developed a practice under which the costs of a debtor expended in the bona fide defence of bankruptcy proceedings would not be reclaimed by the trustee of a debtor whose defence failed.

39. The first reported case recognising this practice appears to be *re Sinclair* [1885] 15 QBD 616, a decision of Cave J. He did not explain the statutory basis for this practice but put it on a broad foundation of the requirements of justice.

40. In *re Pollit* [1893] 1 QB 455, the Court of Appeal refused to extend the practice to costs incurred by a solicitor in assisting a debtor with a proposed arrangement but which were not expended in the defence of the bankruptcy proceedings themselves. The Court of Appeal commented on *re Sinclair*. Lord Esher MR described the practice as being due to the court's consideration for the dictates of humanity.

41. In *re A Debtor* [1937] Ch 92 the court refused to extend the practice to the costs of an appeal from the receiving order. Clauson J said that it was not easy on the statute as it stood to appreciate the basis of the practice but in any event said he did not see his way to extend that practice.

42. These cases were all under the pre-1986 legislation.

43. Section 284 of the 1986 Act gives the court an express power to consent to payments after the presentation of a bankruptcy petition, so there is no longer any puzzle about the court's jurisdiction to validate the costs of the bankruptcy proceedings.

44. In *Rio Properties v Al-Midani* [2003] BPIR 128 HHJ Maddocks, sitting as a judge of the High Court, considered an application for a validation order under section 284 in respect of the costs of the defence of the bankruptcy proceedings before him. He considered the earlier authorities, including *Sinclair*, and *re A Debtor*, and concluded that they remain relevant to the exercise of the court's powers under section 284. He rejected an argument, based on the *Gray's Inn Construction* case and other authorities concerning section 127, that it would not be open to the court to permit the payment of costs of this kind as that would be contrary to the *pari passu* principle. He concluded that the court retained a discretion to validate the payment of costs of defending bankruptcy proceedings in a proper case. However, having considered the inadequate evidence about the financial position of the debtor, he refused on the facts to grant relief under section 284.

45. I should also refer to the case of *National Westminster Bank v Lucas* [2013] EWHC 770 (Ch). That concerned the administration of the estate of Jimmy Savile. As Sales J explained, issues had arisen as to whether a validation order should be made under section 284 of the Insolvency Act as it applies in relation to the estates of deceased persons by virtue of the Administration of Insolvent Estates of Deceased Persons Order 1986. The expenses in question included legal fees, funeral expenses, and tax payments. Sales LJ distinguished two periods. The first was before a television programme making allegations of serious sexual and child abuse against Jimmy Savile had been broadcast. The second was the period after that programme. In the first period the executors could reasonably suppose that the estate was solvent; in the second there was good reason to suppose that there would be very substantial claims and that the estate might well be insolvent.

46. He allowed the funeral expenses, all of which had been incurred during the first period. He said that the court might have taken a less generous view of such expenses had it already been apparent that the estate might be insolvent. As to the legal costs, he said, at paragraphs 21-22:

> "21. It was common ground between counsel that it is open to the court, in making an order under section 284(1), to limit the extent to which the validation is given, so as to ensure that the validation operates without prejudice to the usual ability of persons claiming in respect of an estate to seek to challenge items of account in relation to expenses incurred by administrators or an executor at some later point in time, when an account of the administration of the estate is presented. …
>
> 22. … In relation to [the legal expenses] I consider that the just and appropriate way forward is to make the limited validation order under section 284(1) which I have indicated, so as to ensure that it operates without prejudice to the ability of persons claiming in relation to the estate to raise points at some later point in time in relation to the legal expenses so far incurred."

47. A similar mechanism was incorporated into the original validation order made in this case in respect of costs of the appellant's English solicitors. The effect of an order of this kind is that it remains and will remain open to any later trustee in bankruptcy to challenge the reasonableness of the expenses incurred by the debtor in defending the proceedings; and if it is later determined that any amounts which have been received by the solicitors are unreasonable, the court will be able to require repayment by the solicitor to the trustee in bankruptcy. The solicitor in the present case is a well-known and large firm of city solicitors so there can be no question about the ability of the trustee in bankruptcy to recover any amounts later found to have been unreasonably paid.

48. Counsel for the appellant contends that the approach of Sales J in that case to funeral expenses casts helpful light on the scope of the court to exercise its discretion in favour of validation. I do not find that part of the judgment of any real assistance here. As Sales J explained the question concerned both the administration of an estate and the effect of section 284 of the Insolvency Act which was applied by virtue of the Administration of Insolvent Estates of Deceased Persons Order 1986. That was not a case where a bankruptcy petition has been presented and I do not think that the analogy with the funeral expenses is a particularly helpful one for the court considering the present matter.

Submissions of the parties

49. The appellant submits in outline as follows. First, the Judge made an error of principle. He concluded that the court lacked the power to validate payments of these legal expenses and that the court's power was restricted in this regard to the costs of defending the bankruptcy proceedings themselves. The right question, the appellant submits, is to ask whether the expenses are "reasonably necessary".

50. Second, the Judge should have validated the costs of the Indian proceedings. They are closely connected to the English bankruptcy proceedings. If the appellant were to succeed in the Indian proceedings, he would potentially have defences to the bankruptcy proceedings. As to the amount of the costs of the Indian proceedings, the banks are involved in those proceedings and are therefore in a position to say whether the costs are or are not reasonable. The banks have not provided proper grounds for contesting the reasonableness of the costs claimed.

51. Third, and to the extent necessary, the appellant relies on a letter signed by a partner in BM, on 26 February 2021, addressed to the appellant's English solicitors. That was, of course, provided after the hearing, so the appellant needs the permission of the court to rely on the letter. I shall return to that aspect of the submissions below.

52. The banks submit in outline as follows. First, the discretion under 284 of the Insolvency Act should be exercised having regard to the purposes of the section, namely, the protection and promotion of the pari passu principle. The test is not one of "reasonable necessity". It is whether the court should allow the payment and must in doing so weigh the interests of the debtor and the interests of the general body of creditors while giving due weight to the *pari passu* principle.

53. Second, there may be cases where validating the payment sought is justified even though it does not protect or even enhance the position of creditors as a class, including the payment of the costs of defending the bankruptcy petition in an appropriate case.

54. Third, where the court is being asked to make an order which does not accord with the *pari passu* principle, it should approach the matter cautiously and require a full justification. Fourth, the evidence before the Judge did not justify any validation order. Fifth, the court should not admit the letter of 26 February 2021.

Analysis and decision

55. I start with the legal principles to be applied. I agree with the submission of counsel for the banks that when considering an application under section 284 the court should bear in mind and give weight to the underlying *pari passu* principle. Generally, the court should ensure that the proposed expenditure or transaction is for the benefit of the creditors as a whole. This is reflected in the practice direction as endorsed by Sales LJ in the *Express Electrical Distributors* case.

56. I also agree with the banks that there may be some exceptions (which may include the costs of defending the bankruptcy proceedings) and that in such exceptional cases the court should proceed cautiously and require a full and proper evidential basis for the validation relief being sought.

57. I reject the appellant's submission that the court should apply a test of reasonable necessity. That is not found in the statute and the limits or bounds

of such a test are potentially too broad and uncertain. It is also not clear from whose point of view the test of reasonable necessity would be applied. The necessities of the debtor may be very different from those of the creditors.

58. I do not on the other hand consider that it is helpful to seek to specify in advance that certain categories of payment could never be validated. For this reason, I think the judge was wrong to hold that the court lacked the power to validate the costs of the Indian proceedings as a matter of principle. It seems to me that the court has to approach the validation exercise before it on the particular facts and in the light of the evidence adduced, without ruling out *a priori* specific categories of expenditure. For that reason I think that the way the judge expressed himself in relation to the scope of the court's power was wrong.

59. I am, however, in no doubt that the judge was justified in refusing the application as the exercise of his discretion on the evidence before him.

60. As I have already said, there was no breakdown of the incurred costs as between the various sets of proceedings, there was no attempt to justify the incurred costs by reference to steps already taken, no invoices, bills of costs, descriptive schedules, or other evidence was provided in support of the amount of costs being sought. The amount being sought was substantial, being over £550,000 in respect of incurred costs (and well over £200,000 in respect of the future).

61. The banks had repeatedly asked for further information about the costs and the appellant had a number of chances to provide it. I do not think it is any answer to say that the banks were themselves parties to the proceedings. There are various contexts in civil litigation where a breakdown of costs is routinely provided: e.g. on the assessment of costs or where a party seeks security for costs, or in costs budgeting. It is never an answer to say that the other party is involved in the litigation. Far more detailed information was needed than was provided here. As already explained the costs were not even broken down as between the three sets of proceedings.

62. The appellant submitted that at least some part of the costs must have been reasonable and that the court should have ordered at least something by way of payment. The problem with that argument is that the appellant's evidence before the Judge was that the Indian lawyers would not carry out any further work until their outstanding bills had been paid. There was nothing to suggest that a payment of only a proportion of their costs would have satisfied them and led them to resume their work. The result of a payment of that kind would therefore have been to prefer the lawyers as creditors in the event of the appellant's bankruptcy for no obvious benefit, whether to the bankrupt or anyone else. The lawyers were prepared to do the work they have without the benefit of a validation order and it seems to me that there is no reason why it would have been appropriate to pay them part of their costs on the basis suggested by the appellant's counsel.

63. As to the anticipated costs, again there was no breakdown as between the three sets of proceedings. There was no attempt to tie the amounts claimed to any

expected or intended steps in the proceedings and, again, it is commonplace in litigation for this kind of process of estimation to take place. Again, it happens in costs budgeting and applications for security for costs. In addition to the points already recorded about the lack of information to enable the reasonableness of the costs to be assessed, there was no evidence about what steps were to be taken or when they were anticipated to occur. The basis of the application was that the incurred and future costs needed to be paid in order to persuade the Indian lawyers to resume work and advance the existing Indian proceedings. At the moment, those Indian proceedings appear to be stagnant. Without having some idea as to what further steps need to be taken, and are anticipated, it is impossible for the court to assess whether they would have any real impact in the foreseeable future on the English bankruptcy proceedings.

64. Counsel for the appellant submitted that unless the costs were paid and the Indian lawyers are able to resume their work, the proceedings would remain moribund and they will only come back to life if prompted by action from the appellant. That may be so, but without knowing even in the broadest terms what further steps are anticipated, and when, the court is not in a position to reach a reasonable view as to the impact any steps anticipated to be taken in those proceedings might have on the English bankruptcy petition.

65. The judge also concluded separately there was no mechanism as found in the *National Westminster Bank v Lucas* case for the ascertainment of reasonable costs and repayment of any sums that may later be found to have been unreasonably incurred. That was a separate basis on which the judge exercised his discretion against validation. The only answer to this is the new material (see below). But absent that, I am clearly of the view that the judge was entitled on this basis too to exercise his discretion against the validation of the payments.

66. I turn then to the appellant's application to rely on new material not available to the judge, namely, the letter from BM dated 26 February 2021. In that letter, BM proposes a mechanism for the determination of the reasonableness of its and Mr. Desai's fees. BM is to provide redacted copies of its bills of costs to the banks' legal representatives. The banks will then have 28 days to raise objections and BM a further 14 days to reply. In the event of a dispute a former judge of the Supreme Court of India or the Bombay High Court ("the Indian expert") "applying the same test of reasonableness as that to be adopted in connection with the fees of English legal advisers," should be appointed. The Indian expert is to report within 28 days of appointment. The letter states: "This proposal is made on the basis that once legal fees and disbursements are paid under the above procedure, there will be no further recourse to this firm."

67. The appellant submits that this new material was not available at the date of the hearing before the judge, is important, and constitutes a change in circumstances of a kind that undermines the discretionary exercise in fact taken by the judge. The appellant submits that the process proposed in the letter is a reasonable and workable one which would enable the reasonableness of the fees to be determined and that this court should therefore re-exercise its discretion and validate the payments to the Indian lawyers on this basis.

68. The banks submit that this is no more than an attempt to rectify the obvious evidential defects in the application as presented to the judge at the hearing. They say it is not a proper application to adduce new evidence under the requirements of CPR 51.21(2). The banks refer to the well-known principles in *Ladd v Marshall*. They accept that those principles do not occupy the entire field under CPR 51.21(2) but are relevant to the exercise of the court's discretion whether to admit new evidence on an appeal. They say that there has been no relevant change of circumstances justifying any interference with the judge's order.

69. I have concluded that this is an unjustified attempt to introduce material to bolster an application which lacked proper evidential basis when made. It cannot be regarded as entirely fresh evidence in the sense of material that only came to light later: it has been brought about by the appellant and his lawyers in order to seek to plug a hole in the evidence. The banks have repeatedly explained to the appellant the deficiencies in the evidence supporting the reasonableness of the fees. The response of the appellant was to rebuff those requests for information. The appellant has not explained why some form of mechanism of this kind was not discussed and provided before the hearing. The appellant knew that some sort of mechanism of this kind would be required because such a mechanism derived from the *Lucas* case was included in the original validation orders.

70. I do not consider it to be appropriate to allow the appellant effectively to have another go on this point when the very poor state of its evidence at the time of the hearing was obvious and was highlighted to it by the banks well in advance of the hearing. The appellant had every opportunity of providing further information. It seems to me that to allow this material to come in now would be to undermine the finality of litigation, a principle that underlies the *Ladd v Marshall* guidelines.

71. For completeness, I would not even with this new material have concluded that the court should exercise its discretion in the appellant's favour. In this regard I return to the point that the appellant has not provided any details of the steps that might be taken in the Indian proceedings in the foreseeable future which might have any bearing on the English bankruptcy petition. In this regard I note that on 18 May 2021 Judge Briggs made an order that any arguments that the appellant might wish to run that the existence of the compromised proceedings in the Indian Supreme Court means that the debt was disputed will be determined at a forthcoming hearing of the bankruptcy petition now fixed for the end of July 2021. At that hearing the merits of the bankruptcy petition are to be considered and, if appropriate, determined. There is no evidence before the court to suggest that, even with the prompting of the appellant's Indian lawyers, there would be any substantive steps taken in the Indian courts before the end of July 2021. And as the appellant's counsel explained, the effects of the Covid-19 pandemic in India have had a serious impact on the progress of cases in the courts there. There is, therefore, no material which would enable the court hearing this application to conclude that any steps that might be taken in the Indian proceedings between now and

the hearing of the bankruptcy petition at the end of July 2021 would have any material bearing on the petition.

72. I also consider it to be highly material that most of the amounts for which validation is sought are historical sums already incurred (more than £550,000). Those sums were all incurred at a time when the lawyers were not protected by a validation order. What is being sought is a payment of those sums in order effectively to persuade the lawyers in India now to take up their tools and pursue the Indian proceedings. It seems to me that the appellant could only begin to justify a validation order if there were steps imminently to be taken in the Indian proceedings that could have an effect on the hearing in July 2021. I am not satisfied that is the case.

73. I also agree with the submissions of the banks that the procedure suggested in the letter of 26 February 2021 is not satisfactory in any event. Those steps would involve putting questions about the reasonableness of the costs into the hands of an expert in India over whom the English court would have no control. The court which is supervising the bankruptcy proceedings here would have no control over the expert's decisions.

74. As counsel for the banks submitted the effect of the letter is that there would be no further room for a challenge by a trustee in bankruptcy in the event that the appellant is made bankrupt. In that regard, the protection would be less than that which the court has ordered in respect of the costs of the English proceedings. It is at least arguable that a trustee in bankruptcy would be able to see any legal advice that has been given to the appellant in relation to the proceedings and that might have a bearing on the reasonableness of any costs incurred.

75. I do not think it is an answer to that to say that Judge Verma has given his views about the reasonable prospects of success in the Indian proceedings. That general view that he has expressed does not begin to deal with the question whether the amount of costs incurred by the lawyers acting in India are reasonable and proper.

76. It follows for these various reasons that even had I considered it was appropriate to admit the February 2021 letter on this appeal (which I do not) I would have declined to validate the payment sought.

77. For all of these reasons the principal appeal is dismissed.

The costs appeal

78. The judge ordered the appellant to pay 50% of the banks' costs on the application, with the remaining costs being in the case.

79. The effect of the judgment was that over £1.1m (in addition to £240,000 that had already been ordered to pay out of the funds on the earlier interim hearing) should be validated and paid from the deposited funds. On the other hand, the judge refused to release some £1.5m in respect of payments which he did not validate.

80. The appellant says that the judge was wrong in principle in his approach to the question of costs. The starting point for his order was that the banks were to be regarded as the successful party for the purposes of CPR rule 44.2(2)(a). The appellant says that he started in the wrong place. The appellant had to make the application in order to obtain the release of anything from the deposited funds. The banks refused their consent across the board. In effect, the appellant says that he was successful as he received a substantial payment from the deposited funds and it was only through bringing the application that he received anything. The appellant relies on *Day v Day* [2006] EWCA Civ 415, and *Global Energy Horizons Corp v Gray* [2021] EWCA Civ 123. The appellant submits that those cases show that a claimant who received less than the full amount of its claim is still to be regarded as the successful party for the purposes of rule 44.2.

81. The appellant submits that there was, in any event, no basis for treating the banks as the successful party. He also submits that the judge took no or inadequate account in making his costs order of the bank's conduct in arguing at an earlier stage that the original validation orders had ceased to have effect in relation to the living expenses and costs of the English solicitors. The appellant points out that the banks only conceded this point at the hearing before the judge and that this conduct should have been reflected in the costs order.

82. The banks submit in outline that the judge's decision was well within the proper bounds of his broad discretion in relation to costs. They say that the hearing did not concern a claim for the payment of money such as *Day v Day* or the *Global Energy* case. It concerned the court's control over bankruptcy proceedings and the protection of creditors as a class. Validation orders must be applied for by debtors who are subject to a bankruptcy petition and it is indeed not uncommon for petitioners to receive their costs even where validation orders are ultimately made. To the extent that the relative success of the parties was significant, the effect of the decision was some £1.5m was preserved for creditors. The banks' position was that this was an identified and identifiable fund which would be available for a trustee in bankruptcy to fund the investigation of possible bankruptcy related claims.

83. I have concluded that this is not a situation in which it is straightforward to regard one party or the other as the successful party. I do not think the present case is closely analogous to cases like *Day v Day* or other cases in which some financial relief is being sought and one can simply ask who ends up writing the cheque. That is not the sort of question that was before the court. It was concerned with a preservation of identified funds and the question was whether there should be validation of payments from those funds and an order for payment out of court. It seems to me that the exercise for the court was a supervisory one in relation to the bankruptcy proceedings and the court was bound to take into account the interests of creditors as a whole, as well as the position of the bankrupt. I also think that there is some force in the submission of the banks that it was not for them simply to consent to the payments as it was necessary for the court under the practice direction to satisfy itself as to the appropriateness of a validation order. On the other hand, the banks did

choose to oppose the application and their opposition undoubtedly increased the costs, including in relation to those matters in respect of which the appellant was successful. Moreover, looking at the result the appellant did succeed in obtaining substantial payments of well over £1m while on the other hand the banks succeeded in persuading the court that some payments should not be validated and those sums should remain in the Court Funds Office.

84. I also think there is some force in the appellant's complaint that it was only at the hearing that the banks conceded that the earlier validation orders applied to the living expenses and English lawyers' costs. But the importance of the point should not be overstated since the banks also contended, in any event, that the money should not be paid out of the Court Funds Office even if it was within the scope of the earlier validation order. That was a respectable argument, albeit one which was ultimately rejected by the Judge. It is also relevant to bear in mind that, by numbers of contested points, the banks were overall somewhat more successful than the appellant.

85. I have come to the conclusion that the judge's starting point (concluding that the banks were the overall successful parties and then making deductions from that) was wrong and, therefore, I should exercise my own discretion. I have come to the conclusion that the right order is that the costs for the hearing before the judge should be costs in the case, essentially for the reasons which I already have given. I do not believe that one party or the other was overall the winner. Each party won on some of the points, and each party may properly consider that the outcome was helpful to its position.

86. I turn finally to the challenge to the judge's decision about how to deal with the application to rescind the order of ICC Judge Prentis. The judge decided to refer that matter back to Judge Prentis.

87. I have already referred to the terms of the order of Judge Prentis. Procedurally the matter came about in this way. On the Friday evening before the judge was due to give judgment on the following Monday, the appellant issued an unheralded application under section 375 of the Insolvency Act to rescind the order of Judge Prentis on the basis that Judge Prentis had made a decision effectively on the false basis that the banks were properly contending that some of the payments sought were not covered by the original validation order. The appellant in that application said that the banks had acted oppressively. At the hearing where the judge gave his judgment on the main issues, the banks sought time to put in evidence in answer to the application and to explain their position, including why they had not acted oppressively or in any other way improperly in taking the stance they had in relation to the living expenses and the English legal fees.

88. The judge decided in the exercise of his case management powers that it was preferable for that matter to be dealt with by Judge Prentis. His order preserved the ability of Judge Prentis to rescind the earlier order of 11 January 2021. He then gave directions for the service of evidence.

89. The hearing was then fixed in Judge Prentis's list for 29 March 2021. The appellant, however, discontinued the application on 18 February 2021 and agreed to pay the banks' costs of the application of £2,000.

90. The appellant has nonetheless sought to appeal the case management decision of the judge to adjourn the matter to Judge Prentis.

91. The appellant submits that the judge erred in making that decision. The appellant says that the judge was in a better position to consider the impact of the concession of the point concerning the earlier validation orders as he was dealing with all questions of costs in the round and he should therefore at the same time have entertained the application to rescind the earlier order. The banks say that the decision was a case management decision and therefore this court should only interfere with it if persuaded it was clearly wrong. The banks say that the decision was in fact clearly right. They were served with an application which they wished to respond to. The application accused them of oppression. There were in fact, they say, good reasons for the stance they had taken previously and for the decision made by Judge Prentis in January 2021. They say that the real reason for the order he made on that occasion was that the matter had come before the court in the ICC Interim Applications List and there was no proper urgency. The banks also say that in the light of the appellant's subsequent withdrawal of the application that the appellant is playing procedural games.

92. I prefer the submissions of the banks. To my mind, this was clearly a case management decision whether to adjourn and refer the application to the judge who had made the order, or to determine it at the February hearing. A reasonable case could no doubt have been made for either course but neither course was irrational or plainly wrong. The judge decided it one way. His order preserved all of the appellant's rights. The appellant was given the opportunity to seek to rescind the order of Judge Prentis but instead of pursuing that course withdrew the application. It seems to me that there is absolutely no merit in this part of the appeal. It was a simple case management decision and there is no basis for interfering with it. I agree on this point that the appellant's approach amounts to procedural game playing.

Result

93. The principal appeal concerning the appellant's Indian legal fees is dismissed. The costs appeal is allowed and I have made my own decision. The appeal concerning the treatment of the earlier order of Judge Prentis is dismissed.

This judgment has been approved by Miles J.