Neutral Citation Number: [2021] EWHC 191 (Ch)

Case Number BR-2018-001805

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY LIST (Ch D)

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

Date: 8 February 2021

Before :

DEPUTY ICC JUDGE BARNETT

- -

Between :

STATE BANK OF INDIA AND OTHERS

- **and –**

DR VIJAY MALLYA

- -

PHILIP MARSHALL QC AND JAMES MATHER (instructed by Reynolds Porter Chamberlain LLP) for the Applicant/Debtor

TONY BESWETHERICK (instructed by TLT LLP) for the Respondent/Petitioners

Hearing date: 22 January 2021

- -

JUDGMENT

DEPUTY ICC JUDGE BARNETT

1. Dr Mallya is the subject of a bankruptcy petition presented against him by 13 Indian banks. The bankruptcy proceedings are hotly contested. Both sides are represented by leading and junior counsel and large law firms specialising in the field of insolvency.

2. An application dated 27 November 2020 has been issued by Dr Mallya seeking orders that:

   (1) Funds held in the Court Funds Office originally in the sum of €3,266,107.41 (the "CFO Monies") be used to discharge payment of legal fees and other necessary costs; and

   (2) Relief be granted, to the extent necessary, pursuant to section 284 of the Insolvency Act 1986 in connection with such payments.

   The payments sought are substantial amounting to £2.7m or approximately €3m. They cover both historic and future litigation costs in respect of the bankruptcy proceedings and other litigation both in England and India.

Background

3. I deal with the background briefly.

   India

   On 19 January 2017 a Judgment was given in favour of the Petitioners in respect of a monetary claim pursued before the Debt Recovery Tribunal of Karnataka, Bangalore for a sum of INR 62,033,503,879 (approximately £688 million) (the "DRT Judgment"). The debt is said to be due in respect of a personal guarantee provided by Dr Mallya in respect of certain company loans made by the Petitioners to Kingfisher Airlines Ltd. The DRT Judgment carries interest at 11.5% per annum with annual rests. In addition to Dr Mallya's personal guarantee the Petitioners also hold a guarantee from another company owned and controlled by Dr Mallya namely United Breweries (Holdings) Ltd ("UBHL").

   Steps have been taken by the Petitioners in India to enforce the security held by them and to attach the assets of Dr Mallya and UBHL.

4. Proceedings have also been instituted by the Indian government to declare Dr Mallya a fugitive economic offender under the Fugitive Economic Offenders Act so as to entitle the Indian government to seize Dr Mallya's assets (the "FEO proceedings").

5. Pertinent to the present application are three ongoing proceedings in India initiated by Dr Mallya.

   First, Dr Mallya has, by way of a petition to the Supreme Court of India, made a settlement proposal which Dr Mallya maintains it is open to the Indian Court to impose on the Petitioners as a collective procedure for the discharge of Dr Mallya's obligations (the "Settlement Proceedings");

   Secondly, Dr Mallya has sought to challenge the interest rate in respect of the DRT Judgment. He also contends that he has been precluded from satisfying

the judgment debt by virtue of the attachments obtained by the Petitioners over his assets and the assets of UBHL (the "Interest Rate Challenge");

Thirdly, Dr Mallya seeks to challenge the attachment orders obtained by the Indian government under the Fugitive Economic Offenders Act, seeking to contend that the attached assets should be realised for the benefit of the Petitioners and reducing Dr Mallya's liabilities to them. In that context Dr Mallya seeks to challenge the constitutionality of the Act (the "FEO dispute").

England

6. Following registration of the DRT Judgment as a Judgment of the High Court under the Foreign Judgments (Reciprocal Enforcement) Act 1933, the Petitioners obtained a worldwide freezing order in respect of Dr Mallya's assets (the "WFO"). The WFO restrains Dr Mallya from removing or otherwise dealing with his assets up to the value of £1,145,000,000.

7. On 14 January 2019 the Petitioners obtained an interim third party debt order in relation to monies totalling £258,599.79 held by Dr Mallya in his sole bank account with ICICI Bank.

8. The Indian government initiated extradition proceedings against Dr Mallya. An order for extradition was made by Senior District Judge Arbuthnot on 10 December 2018. The order was upheld by the Divisional Court on 20 April 2020.

9. On 18 September 2018 the Petitioners presented the extant bankruptcy petition against Dr Mallya in respect of the English Judgment.

<u>The Bankruptcy Proceedings</u>

10. At the first hearing of the petition on 10 December 2019 Dr Mallya was successful before Chief ICC Judge Briggs in arguing that the Petitioners had failed to comply with section 269 of the Insolvency Act 1986 in that they had failed to disclose on the face of the petition that they held security in India. He was also successful in persuading the Judge to adjourn the proceedings to enable the Indian proceedings to be determined. Dr Mallya was not successful in persuading the Judge to dismiss the petition, the Judge concluding that it was appropriate to give the Petitioners an opportunity to amend the petition.

11. A further hearing was held on 7 July 2020 at which Dr Mallya sought to persuade the Court that, rather than adjourn the petition, the Court should have taken into account the Petitioners alleged security over assets of UBHL and should have dismissed the petition. In a Judgment dated 22 July 2020 the Court rejected that submission.

Dr Mallya unsuccessfully applied for permission to appeal before Birss J on 13 January 2020.

I am told that the Petitioners have also sought to appeal certain aspects of the Judgment of 9 April 2020. Their application for permission to appeal was refused on paper but a further oral application for permission is due to be heard in March 2021.

12. The Petitioners amendment to the petition has spawned a further dispute. The Petitioners amended their petition to confirm that they would release their security if a bankruptcy order was made. However, Dr Mallya argues that, as a matter of Indian law, it is not open to the Petitioners to give up the Indian security held by them. A hearing of that issue took place on 18 December 2020 before Chief ICC Judge Briggs. Both parties rely on expert evidence of Indian law in the form of reports produced by retired justices of the Indian Supreme Court. Whilst the hearing of the expert evidence was completed, the one day time estimate proved insufficient. A further hearing has been listed to take place in April 2021.

    What is clear from the above thumbnail sketch is that the bankruptcy proceedings are complex and unlikely to be resolved conclusively for some months.

The First Validation Order

13. In June 2019 Dr Mallya sought orders pursuant to section 284 of the Insolvency At 1986 seeking, amongst other things, retrospective and prospective validation of legal fees and disbursements payable to his legal advisers, payment of living expenses and payment of a costs order due to the Crown Prosecution Service in respect of the extradition proceedings.

    On 12 July 2019 ICC Judge Burton granted a validation order (the "First Validation Order") in respect of:

    (i) legal fees and disbursements incurred in opposing the petition by, Dr Mallya's then legal advisers, DWF Law LLP and counsel in a sum of approximately £464,000
    (ii) reasonable prospective fees and disbursements to be incurred in opposing the petition (then presently estimated at £65,000)
    (iii) living expenses in the sum of £22,500 per month
    (iv) £83,802 to the Crown Prosecution Service in respect of a costs order in their favour.

    ICC Judge Burton refused to make an order validating legal expenses in respect of certain linked proceedings.

    The First Validation Order was amended by ICC Judge Prentis on 25 March 2020 to reflect that Dr Mallya's legal team had changed to Reynolds Porter Chamberlain.

The present application in summary

14. Dr Mallya seeks the release of certain funds currently held with the Court Funds Office:

    (1) To meet reasonable incurred and future legal fees and disbursements in the defence of the bankruptcy petition. Mr Marshall submits that these payments have already been validated by the First Validation Order as varied by ICC Judge Prentis and that all that is required is an order permitting payment from the CFO Monies.
    (2) To meet Dr Mallya's ongoing living expenses. Again, Mr Marshall submits that these payments have already been validated by the First Validation Order and that all that is required is an order permitting payment from the CFO Monies.
    (3) To meet Dr Mallya's reasonable legal fees and disbursements in pursuing closely related litigation.

15. Mr Marshall accepts that a validation order is required in respect of the third aspect together with an order for payment out from the Court Funds Office. Whilst a validation order had been refused in respect of a similar species of linked claim in the first validation proceedings, he submits that the circumstances have changed. In particular, he relies on the express recognition of Chief ICC Judge Briggs, in respect of the hearings before him, that the fate of the petition is bound up with the related Indian litigation.

16. This application first came before Deputy ICC Judge Schaffer on 11 December 2020 on an urgent basis. He ordered the release of £240,000 plus applicable VAT from the CFO Monies and adjourned the balance of the application. Subsequently a similar application issued on 7 January 2021 came before ICC Judge Prentis on 11 January 2021, again on an urgent basis, when further limited relief was granted, the balance of the application being adjourned to be heard by me.

<u>The relevant legal principles</u>

17. Section 284 of the Insolvency Act 1986 provides: –

    "(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."

18. Paragraph 12.8 of the Practice Direction-Insolvency Proceedings recognises that the Court has the power in certain circumstances to validate dispositions

which would otherwise be void in the event of a bankruptcy order being made. However, as a broad rule, the Court will need to be satisfied either that the debtor is solvent or that the transactions contemplated will either be beneficial to or will not otherwise prejudice the interests of creditors – see paragraph 12.8.8: –

"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"

19. The one exception to this broad rule is the provision of funding for legal representation to oppose the bankruptcy petition. The exception was recognised in the case of *In Re Sinclair (1885) 15 QBD 616* where Cave J observed:

"it is right that a man should have legal advice and assistance against a bankruptcy petition, but if a solicitor has to refund money paid to him for such a purpose a man would be left defenceless because nobody would act for him. It seems to me impossible to hold that, whenever a solicitor has received instructions to oppose proceedings in bankruptcy, does his work and is paid for his services, if the petition is ultimately successful, the money that has been paid to him by the bankrupt may be recovered from him by the trustee in the bankruptcy."

20. This exception to the broad rule that has been justified on the grounds of "humanity" but it is a narrow exception – see Clauson J in *In re A Debtor [1937] Ch 92*:

"With regard to the defence of the debtor against bankruptcy proceedings, it has long been settled practice of the Court to approve of the trustee permitting the solicitors to whom the debtor has paid a sum as against their charges in the proceedings to retain so much of that sum as has been properly disbursed or allocated for the purpose for which it was paid. It is not easy, on the Act as it stands, to appreciate the justification for the practice; but the practice is well settled and it has been accounted for by Lord Esher MR when presiding in the Court of Appeal in the case of in re Pollitt as being due to the Court's consideration for the dictates of humanity. The question I have to determine is whether this practice (which I do not for one moment suggest should be departed from) is to be extended so as to apply to the costs of supporting an appeal which ex hypothesi is unsuccessful. I do not see my way to extend the practice."

Albeit the exception predates the Insolvency Act 1986, it is still given effect – see *Rio Properties v Al Midani [2003] BPIR 128*.

21. When considering whether to make a validation order in respect of defence legal costs it is not appropriate to undertake any form of assessment or taxation of the costs to be incurred or to review the reasonableness of the proposed expenses. This was considered in *National Westminster Bank plc v Lucas [2013] EWHC 770 (Ch*):

"20. As matters were presented to me, on one approach it seems that this Court was being invited, in effect, to conduct some form of taxation or review of the reasonableness of the executor in incurring legal expenses in issue and/or of the extent of the legal fees charged by the executor's lawyers, Osborne Clarke, to the executor, going through detailed items of account in Court. This is not an appropriate or sensible use of the Court's time at this hearing. In my view, the more appropriate way forward in relation to these matters is that a more limited form of validation order should be made in respect of them, to save these items of expenditure from being automatically rendered void under section 284 (1) of the 1986 Act, whilst also preserving the opportunity of the opposing parties to challenge the expenditure by the executor and the appropriateness of the fees charged by Osborne Clarke at some later point in time and in a more appropriate forum."

I should note that the First Validation Order contained such a *Lucas* provision reserving to any subsequently appointed trustee in bankruptcy the ability to scrutinise the validated legal cost expenditure.

<u>The claim in respect of living expenses and past and future petition litigation costs</u>

22. Dr Mallya seeks a sum of £121,729.95 in respect of living expenses being £9,229.95 for March 2021 and £22,500 per month for the following five months. In respect of litigation costs, Dr Mallya seeks £786,024.08 for incurred costs and future legal costs of £288,000 being £40,000 plus VAT for a period of six months.

23. The logical starting point is to determine whether a validation order is required or whether the expenditure remains within the ambit of the First Validation Order. In the prior hearings before Deputy ICC Judge Schaffer and ICC Judge Prentis there had been a suggestion that the First Validation Order did not apply as it had been premised on an assumption that the costs would be funded from income from a consultancy which has since terminated.

24. Mr Marshall submitted that the First Validation Order did not permit that interpretation and that the First Validation Order continued to apply. He referred me to the case of *Masri v Consolidated Contractors (Oil and Gas) Company SAL [2009] EWCA Civ 36* where the Court faced with a dispute as to the interpretation of an order observed:

"17. In my Judgment the Order must speak for itself, and references to extrinsic material, such as earlier drafts prepared by the parties for the assistance of the

Court, are not admissible as an aid to its proper construction. The Order must, on its face, make it clear to third parties, who may know little or nothing of the background to the making of the order, what it is that they must not do in order to avoid being in contempt of Court. ……."

Mr Marshall submitted that this was the correct approach particularly in the case of class proceedings. Third parties should be able to understand the terms of the order on its face. Nothing on the face of the First Validation Order indicated any limitation or that payment was restricted to payment from a particular source.

25. Seemingly in contrast to the position taken before Deputy ICC Judge Schaffer and ICC Judge Prentis, Mr Beswetherick accepted that the First Validation Order continued to apply in respect of living expenses and petition defence costs. However, he sought to draw a distinction between the validation of such expenditure and whether I should make an order for payment from a specific source, namely the CFO Monies.

It is clear to me from the face of the First Validation Order that it does continue to apply to both living expenses and past and future petition defence costs. Mr Beswetherick was right to concede the point. Accordingly, I propose to proceed on the basis that a validation order is not required in respect of this aspect of the application.

<u>The scope of the Court's discretion with regard to the CFO Monies.</u>

26. It is convenient to examine first how the CFO Monies came to arise. Through a corporate structure, Dr Mallya was the ultimate beneficial owner of a substantial property in Cannes, France. It appears that as part of a restructuring plan approved by the Commercial Court of Cannes the property was sold and Dr Mallya was entitled to the net proceeds being, ultimately, €3.288 million. A consent order negotiated between the Petitioner's solicitors and Dr Mallya's solicitors and approved by me on 6 October 2020 provided:

"2. The net proceeds are hereby authorised to be paid into Court (in the foreign currency of EUR) to be held pending further order of the Court.

3. Either party may apply on notice to the Court in respect of the net proceeds."

The order is silent on its face as to the purpose why the monies were paid into Court. In his sixth witness statement Mr Gair offers his explanation as to the genesis of the order:

"17…… In the correspondence between my firm and the debtor's solicitors, RPC, the Petitioners had two main concerns in light of the WFO and the petition. First, to establish that the sale was a bona fide one at arms length and for the best price reasonably obtainable. Secondly to ensure that any net

proceeds of sale (the funds) were appropriately ring fenced pending the determination of the petition in order to protect one of the few significant assets the debtor has accepted that he owns."

Mr Gair goes on to explain in his witness statement that the original draft of the order provided by RPC had read that the net proceeds were

"to be held pending the determination of the petition or further order of the Court "

He explains that his firm suggested that the deletion of the words "pending the determination of the petition" because the Petitioners wanted to leave open the possibility that if the petition was dismissed the Petitioners would want to obtain direct payment of the funds as part of the enforcement of their Judgment. He says:

"21. At no point during this correspondence was there any suggestion on the part of the debtor that he might seek to make use of the funds prior to the petition being determined."

In answer, Mr Marshall submits that the subjective intention of a party is irrelevant. The order must be reviewed objectively. He further submits that it is clear from the face of the order that the monies are not impressed with a charge or any other restriction preventing their use.

27. In my opinion, Mr Marshall is correct. There is nothing on the face of the order that restricts the use of the CFO Monies for appropriate purposes. The private motivations of the Petitioners and the correspondence leading to the negotiation of the order are irrelevant.

28. As to whether the Court should order payment from the CFO Monies, Mr Beswetherick makes the following submissions:

(1) As regards living expenses, notwithstanding the First Validation Order, it was nonetheless open to me to review the proposed expenditure given Dr Mallya's changed circumstances. He submitted that, as Dr Mallya no longer had substantial consultancy income, he should "cut his cloth" according to his means.

(2) The Court should not authorise unreasonable expenditure. The sums being claimed are "eye watering ". No breakdowns or other materials have been provided to justify the claim. Whilst accepting that it is a difficult exercise, the Court should nevertheless require the applicant to produce information justifying his claims. He stressed that the First Validation Order only extended to reasonable costs whereas the draft order submitted with the present application sought the payment of costs without any further scrutiny. The effect of the order as drafted, he submitted, would be to validate and order payment of costs even if incurred unreasonably.

(3) Dr Mallya has not been forthcoming as to his assets and income and whether there are other sources from which he could fund the payments.
(4) On the evidence, there is no justification for depleting assets in the Court's control.

29. In answer, Mr Marshall submits:

(1) Absent an application to vary the First Validation Order, Dr Mallya is entitled to payment of his living expenses as authorized by the First Validation Order.
(2) As to litigation costs, the suggestion that the Court should form a view as to the quantum of the costs or the reasonableness of the defences put forward is misconceived. The First Validation Order only validates reasonable costs. The *Lucas* provision provides an appropriate safeguard. He accepts that any order made in respect of this application should contain a *Lucas* provision so as to preserve rights of scrutiny to a subsequently appointed trustee in bankruptcy.
(3) One cannot say that Dr Mallya's proposed defence is improper or fanciful given the success of the argument before Chief ICC Judge Briggs in December 2019 and having regard to the fact that the case is supported in the evidence by a former Judge of the Supreme Court of India.
(4) The WFO restricts the ability of Dr Mallya to deal with any of his assets. The only liquid assets are the CFO Monies. He submits that the only other bank account is an account with ICICI bank which is subject to the third party debt order in favour of the Petitioners. All assets in India are subject to enforcement action. The trusts are not in a position to repay Dr Mallya's loans and, in any event, any amount receivable in India would be subject to Indian exchange control and thus not easily exportable.

30. In my view, the starting point is that the payments being contemplated are the subject of the First Validation Order. In the absence of an application to vary that order I should give effect to it. That being so, I do not accept that it is appropriate for me, in the context of this application, to review Dr Mallya's living expenses. That exercise was undertaken by ICC Judge Burton in the first validation proceedings. If the Petitioners wish to revisit the order they should make an application to vary it.

31. As to litigation costs, both past and present, the First Validation Order contains appropriate safeguards to prevent unreasonable expenditure being incurred. I do not accept that it is appropriate for this Court to undertake a detailed assessment of the type proposed by Mr Beswetherick. Provided that any order made by me retains a *Lucas* type safeguard, the rights of any subsequently appointed trustee in bankruptcy to review the costs will be retained.

The only question for me is whether it is appropriate to permit payment out of the CFO Monies. As I have noted above the CFO Monies are not subject to a trust or any other sort of restriction. They are liquid and readily available.

32. Mr Beswetherick submits that I should not make an order which would deplete funds within the Court's control. He argues that there are other assets which Dr Mallya could seek to realise – not least of which are loans made to various family trusts. I am told that there are also two boats and two cars currently in storage which could be sold. Mr Beswetherick is also deeply critical of the level of transparency given by Dr Mallya with regard to his financial affairs. In particular, the Petitioner's solicitors have produced a schedule which seeks to cross refer Dr Mallya's income and expenditure and speculates that there is £356, 082 unaccounted for.

33. In answer, Mr Marshall submits that the CFO Monies are the only liquid assets. Realisation of any other assets would require a variation of the WFO. Moreover, a sale of luxury items such as boats are unlikely to be realised efficiently in the middle of a pandemic. As to the loans to family trusts, I was provided with a note and further witness statement subsequent to the hearing which suggest that the trusts are not in a position to repay the loans as their underlying assets are subject to attachments in India.

34. I note that Dr Mallya produced a schedule of assets prior to the approval of the First Validation Order which does not appear to have been challenged at that time. He has said in his more recent evidence that there has not been a significant change (other than the loss of his consultancy income). I am reluctant to place great weight on the schedule produced by the Petitioner's solicitors. It was only produced on the eve of the hearing and it is, in part, speculation. As the Petitioner's solicitors acknowledge some or all of the discrepancy may relate to tax.

35. I am satisfied that the CFO Monies are the most appropriate source for payment of the transactions that have already been validated and I propose to order accordingly.

<u>The claim in respect of the Indian proceedings</u>

36. Dr Mallya seeks validation in respect of outstanding litigation costs due to two Indian law firms and a senior member of the Indian bar in a total sum of £555,680.60. He also seeks future litigation costs in relation to one of the law firms and in respect of senior counsel totalling £203,200.

    I do not have the material to enable me to understand how those costs break down between the three proceedings identified by Dr Mallya or what work has been, or will be, undertaken.

37. Mr Marshall submits that the Indian proceedings are inextricably linked with the defence of the bankruptcy petition. In particular, he refers me to the comments of Chief ICC Judge Briggs in his Judgment of 9 April 2020:

    "55. This bankruptcy petition is by any measure extraordinary. The Banks are pressing for a bankruptcy order at a time when there is extant proceedings in

India such as a challenge to the PG, a challenge to the high rate of interest accruing on the debts, and the Karnataka High Court is seized of compromise proposals presented by UBHL. In addition, a petition has been presented to the Supreme Court to sanction a binding compromise. There is no obvious advantage to the Banks to pursue this class-action at this point in time. First, a bankruptcy order may put at risk a compromise that may see the Banks paid in full from the assets of UBHL and assets made available from outside the liquidation estate (I accept that is disputed). Secondly assets with a current market value of approximately 14,875 crores (£1 .6 billion) "have been attached [secured] and/or seized under the orders of various Courts, the tribunal's authorities, including the Petitioners and the ED….."

56. In my Judgment the following factors weigh heavily in favour of an adjournment for a period of time sufficient to permit the petitions to the Supreme Court, and the settlement proposal before the Karnataka High Court to be determined. First, apart from the high rate of interest, Dr Mallya is not contesting that UBHL owes substantial money to the banks. He does contest the validity of the PG. The PG contest is yet to be finally determined. Secondly, although the petition to the Supreme Court and proposal before the Karnataka High Court are not guaranteed to succeed, they are genuine. The evidence supports the view that the petitions stand a reasonable prospect of success. Thirdly, if Dr Mallya is right in his contention that the proposal before the Karnataka High Court, if sanctioned, is likely to see the UBHL debt paid in full, there will be no liability under the PG. Fourthly, if the Supreme Court were to accede to the compromise petition, the Banks will be bound….."

Mr Marshall further submits:

(1) The finding of Chief ICC Judge Briggs with regard to the Indian Settlement Proceedings is such that to deny Dr Mallya the costs of pursuing those proceedings would be tantamount to denying him the costs of a defence to the petition.
(2) Similarly, with regard to the Interest Rate challenge, success in those proceedings would reduce the liability to the Petitioners by half and may make the difference between dismissal or refusal to dismiss the petition so that the denial of costs would be to deny him a defence to the petition.
(3) With regard to the challenge to the FEO action and related attachment orders success would, again, make a fundamental change to the net position of whether the attached assets in India of Dr Mallya and UBHL are to be applied to the liability under the DRT Judgment.

38. In answer, Mr Beswetherick reminds me that the *Sinclair* exception is narrow in scope. He points out that when faced with a similar application in the first validation application, ICC Judge Burton rejected the attempt to extend the validation order to linked proceedings. She concluded:

"31. I consider myself bound by authority to consider only those costs incurred in directly opposing the petition for the purposes of validation. In Re debtor (490 of 1935) [1937] Ch 92 it was made clear that there is very narrow scope for the Court's discretion when exercising this exceptional jurisdiction, particularly exceptional in this case where Dr Mallya is cash flow insolvent."

39. I respectfully agree with ICC Judge Burton. It is clear that the *Sinclair* exception is a limited exception only applying in respect of costs directly referable to the bankruptcy proceedings and not collateral litigation notwithstanding that such litigation might have a bearing on the bankruptcy proceedings. Applying the *Sinclair* exception to validate funding in respect of such litigation would be an impermissible extension of the principle.

    If I am wrong as to the principle and I have a discretion, I would not, in any event, exercise it so as to make a validation order. I have insufficient evidence to enable me to assess the reasonableness of the incurred, and to be incurred, expenditure. Moreover, with regard to future expenditure, it is clear that a *Lucas* type provision would not be an appropriate safeguard against unreasonable expenditure given that the payees are outside the jurisdiction of this Court.

40. Accordingly, Dr Mallya's claim for a validation order in respect of the costs of the Indian proceedings is refused.

Costs in connection with the WFO proceedings

41. Dr Mallya seeks outstanding litigation costs of £21,292.20 and future costs of £36,000 being calculated as £5,000 plus VAT per month for six months.

42. Mr Marshall submits that it is exceptional and inappropriate as a matter of principle for the WFO to co-exist with a bankruptcy petition over such an extended period. He submits that where the freezing order and the petition co-exist it would be appropriate for Dr Mallya to be permitted to fund advice and representation in connection with matters arising under the WFO.

43. However, the WFO proceedings have concluded. Mr Marshall was unable to identify any particular work streams that needed to be undertaken over the next six months but, in answer, he suggested that a validation order could be subject to a *Lucas* type provision so as to ensure that only reasonable costs were incurred.

44. In my view, the costs, whether past or future, cannot be said to fall within the ambit of the *Sinclair* exception. That being so, payment would simply serve to prefer one creditor over the general body of creditors in the event that a bankruptcy order is made in respect of Dr Mallya. Dr Mallya's claim for a validation order in respect of the costs of the WFO proceedings is refused.

Costs in connection with the extradition proceedings

45. Dr Mallya claims £127,818.87 in respect of incurred costs in connection with his unsuccessful opposition to extradition proceedings.

    Mr Marshall submits that the proceedings touched on Dr Mallya's fundamental rights and liberties and, as such, he was entitled to legal representation. He points out that a costs order in favour of the Crown Prosecution Service was validated by ICC Judge Burton as non-payment rendered Dr Mallya at risk of imprisonment. He submits that the costs should fall within what is to be permitted by the dictates of humanity.

46. In answer, Mr Beswetherick emphasises that the application is only in respect of historic costs, that there is a lack of detail as to how those costs are made up and that a validation order would simply serve to prefer one creditor over the general body of creditors.

47. I have some sympathy with the proposition that costs of defending extradition proceedings should fall within the "humanity" exception. However, in exercising my discretion, I do have in mind that I have little information regarding those costs. Moreover, they are historic costs in respect of a failed defence and, as Mr Beswetherick submits, a validation order would simply prefer one creditor over the general body of creditors in the event Dr Mallya is made bankrupt. It seems to me that Dr Mallya's legal advisers in respect of the extradition proceedings must, or should, have appreciated that they were at risk of not being paid.

48. I refuse Dr Mallya's application for a validation order in respect of these costs.

Costs in respect of the Diageo litigation

49. Dr Mallya seeks a validation order in respect of outstanding legal costs due to Joseph Hage Aaronson, his solicitors ("JHA") in the sum of £286,447.30 and a further £282,707.80 in respect of an adverse costs order in favour of Diageo entities in respect of which an unless order was obtained against the defendants.

50. The proceedings concern claims brought by Diageo entities against four defendants, Dr Mallya, his son, Watson Ltd and Continental Administration Services Ltd. Dr Mallya explains in his ninth witness statement that he is the ultimate beneficial owner of Watson and, thus, it is in the interests of him and his creditors for Watson to be able to continue their defence of the Diageo claim. Moreover, he says that, if successful in respect of his counterclaim, he would expect to receive the sum of US $35million personally which would be in the interests of his creditors. All four defendants are represented by JHA.

51. The evidence of Dr Mallya was that JHA had "downed tools" due to non-payment. Following enquiries by the Petitioner's solicitors, it came to light that, if JHA had downed tools, the position had changed and that they were continuing to act.

Before me, Mr Marshall has sought an adjournment of the application insofar as it relates to the Diageo claim. He says that Dr Mallya wishes to consult with JHA and to obtain further and better evidence to support the application. Mr Beswetherick on behalf of the Petitioners resists that application for an adjournment.

52. I am not prepared to adjourn that aspect of the application. The application was made on an urgent basis. Court time has been made available and considerable evidence has been served by both sides. The application should be assessed on the basis of the evidence that is available.

53. As to the evidence, Mr Beswetherick criticises the lack of detail provided by Dr Mallya. He points out that Dr Mallya's interest in the litigation appears to be indirect and there is no evidence before the Court as to whether any of the other three defendants are able to fund either the litigation or the costs order. More significantly, in a post hearing submission, Mr Beswetherick provided to me a copy of an order dated 20 January 2021 made by Calver J in the Diageo litigation. It recites the failure of Dr Mallya or any other party to pay the outstanding costs and that, consequentially, the third and fourth defendants defences were struck out and judgment was entered for the second claimant. The order provides that, by consent, Watson Ltd shall pay Diageo Holdings Netherlands BV the sum of US$6,696,595.90 and that the fourth defendant Continental Administration Services Ltd shall pay Diageo Holdings Netherlands BV the sum of US$1,580,038.34.

54. Whilst, of course, a party can apply for relief from sanctions, in the light of that information coupled with the lack of any material supporting the proposition that the pursuit of the litigation would be in the best interests of Dr Mallya's creditors, I refuse the application for a validation order in respect of the Diageo related costs.

DEPUTY ICC JUDGE BARNETT