Neutral Citation Number: [2020] EWHC 96 (Ch)

Case No: BR-2018-001805

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

The Rolls Building
7 Fetter Lane
London
EC4A 1NL

Date: 09/04/2020

Before:

CHIEF INSOLVENCY AND COMPANIES COURT JUDGE BRIGGS

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Between:

(1) STATE BANK OF INDIA **(2) BANK OF BARODA** **(3) CORPORATION BANK** **(4) THE FEDERAL BANK LIMITED** **(5) IDBI BANK LIMITED** **(6) INDIAN OVERSEAS BANK** **(7) JAMMU & KASHMIR BANK LIMITED** **(8) PUNJAB & SIND BANK** **(9) PUNJAB NATIONAL BANK** **(10) STATE BANK OF MYSORE** **(11) UCO BANK** **(12) UNITED BANK OF INDIA** **(13) JM FINANCIAL ASSET RECONSTRUCTION CO.PVT.LTD**	**Petitioners**
- and -	
DR VIJAY MALLYA	**Respondent**

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MARCIA SHEKERDEMIAN QC (instructed by **TLT LLP**) for the **PETITIONERS**
PHILIP MARSHALL QC AND JAMES MATHER (instructed by **DWF LAW LLP**) for the **RESPONDENT**

Hearing dates: 10 December 2019

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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CHIEF INSOLVENCY AND COMPANIES COURT JUDGE BRIGGS

Chief Insolvency and Companies Court Judge Briggs:

Introduction

1. Dr Mallya is a well-known Indian businessman and former member of the Parliament of India, now living in the UK pursuant to an indefinite leave to remain certificate. He has possessed the certificate since 1992. The petitioners seek to make Dr Mallya bankrupt. This is the first hearing of a bankruptcy petition.

2. The petition is based on a foreign judgment debt, registered in England under the Foreign Judgments (Reciprocal Enforcement) Act 1933. The registration of the judgment is not subject to an appeal. The judgment debt is £720,740,180.57. Due to interest accruing at a rate of 11.5% with yearly rests, the debt has increased to approximately £1.05 billion. This figure takes account of recoveries already made.

3. The first twelve petitioners are state-owned Indian banks. The thirteenth is an asset restructuring company that purchased debt owed to other Indian banks. I shall describe them collectively as the "Banks".

4. The judgment debt and subsequent order were made by the Debt Recovery Tribunal, Karnataka, Bangalore, India. The Debt Recovery Tribunal has been referred to through-out the hearing as the "DRT" as the judgment the "DRT judgment".

5. Dr Mallya resists the making of a bankruptcy order. Two principal grounds for resistance are advanced: (i) the petitioners are secured creditors and there is a failure to state the security on the face of the petition (ii) there is a reasonable prospect that the DRT judgment will be compromised within a reasonable period of time.

The background in brief

6. I deal with the background in brief as it has been dealt with in part in another judgment ([2018] EWHC 1084) where Dr Mallya and several companies he controls asked the court to (i) set aside the registration of the DRT judgment (see below) and (ii) set aside a freezing order. The overall context is that the petition debt is based on an unsatisfied demand made pursuant to a personal guarantee (the "PG") provided by Dr Mallya in respect of certain company loans. The companies were or are associated with Dr Mallya and detailed in a Master Debt Recast Agreement ("MDRA") dated 21 December 2010. The MDRA consolidated existing liabilities of Kingfisher Airlines Limited ("Kingfisher") which had suffered financially due to the 2008 credit crunch. In addition to the PG provided by Dr Mallya, the Banks held a guarantee from another company owned and controlled by Dr Mallya namely, United Breweries (Holdings) Limited ("UBHL").

7. In his first witness statement Dr Mallya explains that in March 2013 he challenged the validity of the PG. Less than a month later, on 2 April 2013, the Banks accelerated their loan facilities. They subsequently, on 19 January 2017, obtained judgment for the sums lent and not repaid by Kingfisher and UBHL. In addition judgment was entered against Dr Mallya on the PG. After the loans were accelerated and demands made, the Banks released a press report stating that: "[t]here was no fraud involved in the non-payment of loans and that it was simply a case of business failure". His view is that "the Government of India is under pressure to take action in respect of loans

owed to state owned banks. On 6 May 2016, India's Ministry of Finance (IMF) sent a letter to the Petitioners directing them to meet with the head of the Central Bureau of Investigation (the "CBI") and the head of the Enforcement Directorate in Mumbai (the "ED"). The ED is a law enforcement agency that forms part of the Department of Revenue of IMF. Whilst the CBIs role is to investigate independently from political influence, I consider that there is a lack of independence of the CBI from government ministries and departments."

8. That Dr Mallya perceives political interference is clear, but that is not a matter for this court. His perception is partly based on what he claims to be inconsistent dealings he has experienced with the authorities. His position is that the CBI pressurised the Banks to make a complaint about him, Kingfisher and UBHL. The complaint made by the Banks appears to have been that Dr Mallya had "caus[ed] loss of Rs 6,027 crore to [the Banks] by not keeping repayment commitments of his loan taken during 2005-10". The complaint is seemingly with a letter from the First Petitioner to the Reserve Bank of India dated 31 January 2012 in which it was stated that Kingfisher had "been making every effort to achieve satisfactory performance of its operations through infusion of substantial funds and keep the airline as a going concern, despite facing severe constraints…" (*sic*).

9. On 26 June 2013 the Banks began proceedings in the DRT to enforce the covenants in the MDRA. A jurisdictional challenge was mounted and dismissed. An appeal was made against the dismissal but later withdrawn due to a change in the law. On 19 January 2017 the DRT gave judgment for the Banks which was followed by attachment orders in respect of shares in UBHL, said to be worth £385.9 million. There have been a number of appeals made by Dr Mallya, UBHL or Kingfisher but they have generally been thwarted by a failure to comply with procedure, namely appeals being made out of time or failing to comply with a condition. There have been appeals to the DRT appeal court and Karnataka High Court which have all been dismissed. A hearing in the Bombay High Court is pending which will determine a question of jurisdiction. There are other proceedings that are yet to be determined such as a challenge to the rate of interest, a settlement sanction petition in respect of UBHL and a special leave petition filed with the Supreme Court.

10. On 24 November 2017 the DRT judgment was registered in England and Wales.

The attachment orders

11. In 2016 and 2017 the ED obtained attachment orders over assets of UBHL and personal assets of Dr Mallya. I turn to the DRT judgment. The presiding officer of the DRT was Shri. K. Srinvasan. Unless it is clearly stated or the context suggests otherwise, the passages I quote below are from his judgment. It should be noted that the judgment contains some linguistic imperfections.

12. The claim made by the Banks was that Kingfisher approached them for working capital and a term loan facility in 2005. A demand for repayment followed default that led to restructuring negotiations, the MDRA, the PG and a guarantee provided by UBHL "for repayment of the outstanding loans by [Kingfisher] to applicant banks…pursuant to the terms of the MDRA…a security Trustee Agreement dated 21.12.2010 was also entered into among the Applicants and Defendants No 1 and 5,

by which Defendant 5 was appointed as security trustee for the benefit of the Applicant-Banks and, inter alia, to hold the security documents created by Defendant no 1 in favour of Defendant No 5 for the benefit of the applicant-banks." Defendant No.1 is Kingfisher and Defendant No 5 is SBICAP Trustee Company Ltd. Kingfisher and UBHL also provided a pledge "pledging thereby certain shares owned by the Pledgors…" It is common ground that the pledged shares have been realised for the benefit of the Banks. The sixth defendant in the DRT was the Commissioner of Service Tax. Having dismissed many challenges made by the defendant to the DRT action Shri. K. Srinvasan considered an issue of security: "whether the sixth defendant has got first charge over the movable and immovable properties of defendants 1 to 3?" The answer is set out at page 92 of the judgment:

> "The said claim of the sixth defendant cannot be accepted in view of section 31(b) of the RDDB & FI Act according to which the rights of secured creditors to realise secured debts due and payable to them by sale of assets over which security interest is created shall have priority and shall be paid in priority over all debts and government dues including revenues, taxes, cesses and rates due by them to the Central and State Government of any local authority. Further, even according to the 6th defendant, u/s 88 of Finance Act 1994, the claim of the sixth defendant will be subject to the banks claim. Hence, the claim of the sixth defendant for first charge over the charged assets of the defendants 1 to 3 is rejected and it is held that claim of the sixth defendant will be considered for distribution only as a second charge subject to the first charge of applicant banks being fully satisfied…"

13. The PG provided by Dr Mallya obliges him to produce a statement of personal assets and liabilities on an annual basis and restricts dealings with his personal assets so that "transactions contemplated by, the Personal Guarantee do not and will not conflict: (i) with any Applicable Law; (ii) with the constitutional documents of the Personal Guarantor; or (iii) with any document which is binding upon the Personal Guarantor or on any of his assets; and (iv) will not result in the existence of, nor oblige to create, any encumbrance over all or any of his present or future revenues or assets." The PG contains a clause stating that it will not result in the existence of an encumbrance over Dr Mallya's "present or future revenues or assets" but also precludes him from dealing with his property. It obliges him not to "convey, sell, lease, let or otherwise dispose (or agree to do any of the foregoing at any future time) all or any part of his property or assets without the prior written approval of the Lenders' Agent and the Lenders." The orders made by the DRT are set out at the end of the judgment. These include the following:

> "In the event of failure of defendants to pay the said OA amount, the applicant bank is at liberty to sell the hypothecated/mortgaged movables/immovables properties described in schedules to the main petition according to law…the Applicant Banks are also at liberty to proceed against the person and properties of the defendants 1 to 4 in execution proceedings."

14. Chapter VI, section 31B of the Recovery of Debts Due and Financial Institutions Act 1993 cited as authority for the proposition that the Banks have a first charge over the assets of Dr Mallya in the DRT judgment provides:

> "Notwithstanding anything contained in any other law for the time being in force, the rights of secured creditors to realise secured debts due and payable to them by sale of assets over which security interest is created, shall have priority and shall be paid in priority over all other debts and Government dues including revenues, taxes…due to the Central Government, State Government or local authority".

15. A secured creditor shall have the meaning assigned to it in section 2(1)(zf) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act 2002. By section 2(1b) a security interest means "a mortgage, charge, assignment or any other right, title or interest of any kind whatsoever upon property, created in favour of any bank or financial institution". The definition states that secured creditor means "any bank or financial institution or any consortium or group of banks or financial institutions holding any right, title or interest upon any tangible asset or intangible asset as specified…in whose favour security interest is created by any borrower for due repayment of any financial assistance". The term 'pledge' is also defined as a security interest. It is not a far reach to conclude that having cited section 31B of "the RDDB & FI Act" Shri. K. Srinvasan would have (i) known the meaning of security (ii) known how security operates and (iii) applied section 31B to the facts of the case. There has been no appeal against this part of the decision by the Banks. In my judgment it is highly likely that Shri. K. Srinvasan was finding not only that the debt was due but that the Banks were secured and as a first charge have priority over other charges.

16. As a result of the Banks reporting a potential fraud provisional attachment orders were made pursuant to the Prevention of Money Laundering Act 2002 on an application of the Deputy Director of ED. The attachment orders are said to be "in respect of movable properties and immovable properties as detailed below". The 'detail below' is contained in a schedule and provides a list of moveable and immovable properties which includes the pledge on shares and other assets of Dr Mallya, Kingfisher and UBHL. The initial adjudication was on 1 December 2016 and confirmation of the attachment orders was made on 22 February 2017. The Banks subsequently challenged the attachment orders and filed three applications for condonation of delay. I am informed by counsel for Dr Mallya that the challenge application made by the Banks stated at paragraph 17 that they have "an interest in all the assets of Dr Vijay Mallya" by reason of the PG and the DRT judgment; and at paragraph 19 "the Applicants have an interest in the assets of Dr. Vijay Mallya by virtue of the Personal Guarantee dated 21.12.2010, on which basis recoveries had already been made against certain of his assets". This is strong evidence that the Banks knew or should have known that they held security.

17. On 10 October 2018 Justice Manmohan Singh as chairman of the Prevention of Money Laundering Appellate Tribunal, Delhi ("PMLA"), gave judgment in relation to the challenge application.

18. In his judgment Justice Singh set out the argument of the Banks that they have prior rights over the moveable and immovable properties in respect of Dr Mallya, UBHL and Kingfisher pursuant to the contractual provisions in the PG, a corporate guarantee and by a final order dated 19 January 2017 (the DRT judgment). The first respondent to the applications was the Deputy Director of the ED, the second to fifth respondents

were Kingfisher, Dr Mallya, UBHL and Kingfisher Finvest India Ltd. The application for condonation of delay related to a delay of 562 days and the judgment of Justice Singh sets out the relevant part of the application:

> "4. It is further submitted the Impugned Order was passed by the Adjudicating Authority inter alia confirming the Provisional Attachment Order dated 03.09.2016 passed by the Respondent No.1 in the criminal case bearing ECIR No. ECIR/07/MBZO/2016 inter alia attaching movable and immovable properties of the Respondent Nos. 2 to 5 are bad in law as the Appellants have prior right over the moveable and immovable properties of the Respondent Nos. 2 to 5 pursuant to the Personal Guarantee dated 21.12.2010, the Corporate Guarantee dated 21.12.2010 and the Final Order passed by the DRT on 19.01.2017 in O.A. No 766/2013 inter alia holding that the Respondent Nos 2 to 5 are jointly and severally liable to pay the OA amount and consequently by the Recovery Certificate in favour of the Appellants."

19. At paragraph 10 of the Judgment:

> "I have gone through the application filed by the appellants for condonation of delay. This Tribunal is of the considered opinion that as a matter of fact, ED has failed to perform his duty not to implead the appellants (lenders) banks despite having full knowledge that *the loan amounts have to be returned by Vijay Mallya and his associate company to the banks who are the mortgagees of the attached properties.* One is failed to understand why have not done so when they were full aware. Thus, the prayer made in the application for condonation of delay is liable to be allowed as the sufficient cause has been shown…" (emphasis supplied)

20. Having dealt with the condonation application Justice Singh explained (paragraphs 20 and 21):

> "Earlier, the State Bank of India and other banks have appreciated the investigation of the ED and were also satisfied with the Provisional Attachment Order passed by the ED and the confirmation order. Once the State Bank of India and other banks have come to the notice that the ED may not agree to dispose of the properties by the banks (in view of the decree passed) till the completion of trial under Section 5(5) of the Act, the banks have decided to challenge the impugned order before this Tribunal…Therefore, it appears that in the present appeal, the banks are seeking the interim order. Admittedly, the trial may take a number of years in view of the nature of the case and bulky records. *The banks are the secured creditors against the unpaid loans by the Vijay Mallya and his associate companies*." (emphasis supplied).

21. This is further evidence to support the view that the Banks knew or should have known of the security.

22. Justice Singh recited section 31B of the Recovery Debts Due to Banks and Financial Institutions Act 1993 noting that it came into effect on 1 September 2016, and commented (paragraph 24) that the Banks "are admittedly secured creditors who have

obtained decree against the borrowers who have provided security" and explained the effect of the section (paragraph 25) in the following way:

> "The amendment prima facie gives the Secured Creditor, a priority over the rights of Central or State Government or any other Local Authority. It is evident that the amendment has been introduced to facilitate the rights of the Secured Creditors which are being hampered by way of attachments of properties belonging to the Financial Institutions/Secured Creditors, done by/in favour of the Government institutions."

23. The Tribunal cited *The Assistant Commissioner (CT), Anna Salai- III Assessment Circle vs. The Indian Overseas Bank and Ors* MANU/TN/3743/2016 for the proposition that section 31B of the Recovery of Debts Due and Financial Institutions Act 1993 had the effect of giving priority to the Banks' security over Government dues and "the law having now come into force, naturally it would govern the rights of the parties in respect of even a *lis pending*."

24. The Tribunal found that "in view of settled law on the subject, I am of the opinion the appellant Bank is the rightful claimant who have already obtained decree against the borrower from DRT" and (at paragraph 34):

> "The Respondent No 1 is not having any lien over the said properties as the Appellant banks are now the Legal Transferee of said properties".

25. The Justice explained that the ED did not have title over the identified property, that the Banks are entitled to dispose of the properties if they chose and "have priority rights on assets of the secured creditors to recover the loan amount/debts by sale of assets over which security interest in created." And at paragraph 38 of the judgment the Justice said:

> "In view of facts and nature of the present case, I am of the opinion that once the banks are secured creditors and have obtained the final decree from the court which has attained finality, the banks are bound to receive the default loan amount from Vijay Mallya and his companies. He was/is active person of the companies. The loans amount has to be paid by the borrowers. It is a banks money. It must come to the banks..."

26. The result of the challenge application in the High Court of Karnataka is that the Banks succeeded in demonstrating that the contractual nature of the PG made them secured creditors over certain assets of Dr Mallya, and the security had priority over any security obtained by the ED by reason of the attachment orders and interim orders were made. The terminology used suggests that the Justice was making interim findings but there can be little doubt that the Banks were asserting rights over property as secured creditors.

27. Two issues arise. First, can an English court take account of the Indian security said to exist over the Indian assets of Dr Mallya? This leads to the issue of security for the purpose of section 269 of the Insolvency Act 1986 ("IA 1986"). Secondly, if there is security for the purpose of section 269 IA 1986, should discretion be exercised to permit an amendment or dismiss the petition?

Security for the purpose of section 269 Insolvency Act 1986

28. A creditor may hold security but for the purpose of a creditor's petition, the petition must contain a statement that the creditor is willing in the event of a bankruptcy order to give up the security or that the petition is not made in respect of any secured part of the debt.

29. In correspondence solicitors acting for Dr Mallya wrote seeking agreement that expert evidence be adduced in respect of the Indian Court System, the matters adjudicated upon in the Indian Courts and settlement offers made. Solicitors acting for the Banks responded that these matters were not suitable for expert evidence. Accordingly, no expert evidence was adduced in respect of the judgments provided by the Indian Courts and in particular whether the decision that the Banks held security in the DRT is security for the purpose of section 269 of the Insolvency Act 1986. The present state of affairs is that this court has the benefit of the DRT judgment registered in England and Wales, under the Foreign Judgments (Reciprocal Enforcement) Act 1933 (the "1933 Act").

30. It is not contested that section 2 of the 1933 Act provides that "a registered judgment shall, for the purposes of execution, be of the same force and effect…as if the judgment had been a judgment originally given in the registering court and entered on the date of registration".

31. I agree with Mr Marshall that, the DRT judgment is of a competent court that found the PG gave rise to the "consequences prescribed by Indian statute under section 31B of the Recovery of Debts Due to Banks and Financial Institutions Act 1993 (as inserted by the Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions Act 2016) ("Section 31B"), namely that the rights of secured creditors to 'realise secured debts due and payable to them by sale of assets over which security interest is created' take priority over all other debts and government dues and that this is 'notwithstanding anything contained in any other law'." The fact of security is reinforced by the findings in the PMLA. Ms Shekerdemian argues that as the DRT judgment is against other parties as well as Dr Mallya "this is not security". She argues that the judgment merely gives rise to a right to enforce.

32. In my judgment the analysis given by the DRT and Justice Singh goes further than that contended by Ms Shekerdemian. This is not just a question of enforcement. The Banks are entitled to enforce the order made by the DRT over Dr Mallya's property rights.

33. In my judgment the term "security" is used by the Indian Courts in a particular manner. It gives rise to a specific form of encumbrance over the property rights of Dr Mallya. It is specific as it gives the Banks priority in the business of collecting-in proceeds from the sale (enforcement) of specified property owned by Dr Mallya. The ability to make a claim on the proceeds enables the Banks to receive payment ahead of Dr Mallya and all other creditors. Another way of putting it is that the security interest found to exist, provides the creditor Banks with a right to secure payment of the sums said to be due. The rights also secure Dr Mallya's contractual obligations under the PG. The security interest does not purport to transfer outright any interest in

Dr Mallya's property (which is not necessary for security) but restricts his right to dispose of specific assets free from the security interest. The security provisions are defined by Indian statute and the term "security" in English law is "no wider than the ordinary meaning of the word": *Bristol Airport Plc v Powdrill* [1990] 1 Ch 744, 760. In that case Sir Nicolas Browne-Wilkinson V-C accepted a submission from Mr Crystal (at page 760) that security is created where in addition to a personal promise from the debtor a creditor obtains "rights exercisable against some property in which the debtor has an interest in order to enforce the discharge of the debtor's obligation to the creditor." The submission of Mr Crystal accepted by Sir Nicolas Browne-Wilkinson, is not challenged in this court. It follows that it matters not that the Banks have security rights over property belonging to other parties. The issue is whether the Banks hold security over (some or all of the) property rights of Dr Mallya.

34. The conclusiveness of a foreign judgment is dealt with in Rule 48 of *Dicey, Morris & Collins on the Conflict of Laws* (15th Ed) at 14R-118 which provides:

> "A foreign judgment which is final and conclusive on the merits and not impeachable under any of Rules 49 to 52 is conclusive as to any matter thereby adjudicated upon, and cannot be impeached for any error either of fact or law."

35. The authors of Dicey state that Rule 48 has never been questioned and that the Rule is consistent with the maxims *interest reipublicae ut sit finis litium* and *nemo debet bis vexari pro eadem causa*. They explain that Rule 48 "holds good whether the judgment is relied upon by the claimant or defendant" whether *in rem* or *in personam*. Of consequence Rule 48 "precludes a party from denying any matter of fact or law necessarily decided in the earlier judgment". In my judgment the DRT judgment (i) is a final judgment on the merits (it is not argued otherwise) (ii) is a judgment of a foreign court of competent jurisdiction (it is not argued otherwise) (iii) where the parties are clearly identified and (iv) is a judgment that concerns the subject matter or issues (namely security) that are argued before the court at this bankruptcy hearing. Accordingly Rule 48 applies: *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No. 2)* [1967] 1 A.C. 853; *The Sennar (No 2)* [1985] 1 WLR 490.

36. It follows, in my judgment, that the Banks are in breach of section 269 of the Insolvency Act 1986 (the "IA 1986") and Rule 10.9 of the Insolvency Rules 1986 (the "Rules") as they have failed to disclose their security over the assets of Dr Mallya.

37. It is argued that the failure should lead to dismissal. Cited in support of the argument is *Barclays Bank Plc v Mogg* [2004] BPIR 259 where David Richard J (as he was) considered the consequences of a failure by a secured creditor to comply with the requirements of section 269 of the Insolvency Act 1986. He found [17]:

> "The importance of compliance with s269 of the 1986 Act does not, however, lead to the automatic conclusion that a bankruptcy petition which fails to comply must be dismissed and cannot be cured by amendment. Neither the language of the section nor the underlying principles compel that result."

38. The judge considered the equivalent provision in the Bankruptcy Act 1914 and agreed with the approach suggested by the authors of *Muir Hunter on Personal Insolvency (Sweet & Maxwell)*, para 3-337. In appropriate cases the court should allow an

amendment rather than dismiss the petition. The editors of *Insolvency Legislation Annotations and Commentary (LexisNexis)*, (8th Ed) comment:

> "[I]n *Wave Lending Ltd v Parmar* [2017] EWHC 681, [2019] BPIR 451, where Mr Martin Griffiths (sitting as a deputy High Court judge) allowed appeals from bankruptcy orders where the petitions had failed to comply with either of the limbs in s 269(1). It is submitted that the difference in outcome may be accounted for by the fact that the petitioner in *Mogg* appears to have included the correct gross figure for the debt but omitted to mention the security, whereas in *Parmar* the petition included only an estimated net balance, accompanied by a statement that no security was held, without reference either to the gross figure or the security, or any acknowledgment that the figure was a net figure."

39. In fact the deputy High Court Judge in *Parmar* did not dismiss the petition but concluded with the observation that the parties had agreed "the existing bankruptcy orders should be discharged and the petitions should be remitted to the County Court so that any applications to amend may be determined". In my judgment neither *Mogg* nor *Parmar* is authority for the proposition that a petition should be dismissed if it fails to comply with the provisions of the IA 1986. It may be otherwise if the petition cannot be cured by amendment.

40. In my judgment where there is a breach of section 269 of the IA the court should take account of at least the following factors when exercising its discretion: (i) the consequence of the breach (ii) the conduct of the parties and (iii) all the circumstances of the case. It may be argued that the identified breach is deliberate, and the petition should be dismissed. In this case the Banks know they have security over the specified assets of Dr Mallya.

41. The submissions of Ms Shekedemian lead me to conclude that although the Banks knew or should have known of their status as secured creditors due to (i) their participation in the Indian proceedings (ii) specifically by reason of the arguments they advanced in those proceedings, their legal advisers had doubt that the security said to exist by the foreign court is security for the purpose of section 269 of the IA 1986. Taking account of the contentious background to this matter and the Indian proceedings, a cautious approach would have been to make a statement in accordance with section 269(1)(a) or section 269(1)(b) of the IA 1986.

42. In my judgment a bankruptcy order should not ordinarily be made where the petition is defective as a result of such a breach.

43. It is accepted that the security obtained by the Banks over the assets of Dr Mallya, does not secure the entire judgment debt. It may be argued that the security provided is over the entirety of his assets, but recent evidence undermines the argument as Dr Mallya has assets in the UK that are not subject to security held by the Banks.

44. In my judgment the following factors weigh in favour of adjourning the petition rather than dismissal. First, the assets secured are not, or at the very least based on recent evidence, are unlikely to represent the entirety of Dr Mallya's assets. Secondly the security over the assets of Dr Mallya have a value which is significantly less or at least less than the judgment debt. Thirdly although there is good evidence to support

an inference of abuse (deliberately failing to disclose the security) there is also good reason to reach the opposite conclusion. The petition could have proceeded due to the size of the judgment debt measured against the value of security held. Fourthly, the petition is capable of cure. Lastly any prejudice suffered as a result of a failure to state the security in accordance with section 269 IA 1986 is limited. There are no opposing creditors. The judgment creditors are not claiming to have suffered prejudice as a result of the breach. Any prejudice suffered by Dr Mallya may be compensated by an appropriate cost order and an adjournment.

Settlement offers

45. Dr Mallya has petitioned the Supreme Court of India seeking a court sanctioned settlement with creditors of UBHL. If the Supreme Court were to accede to the petition two consequences flow. First, he would be under no personal liability as the DRT judgment debt would be compromised. Secondly, the settlement would be supervised by the Indian courts as a collective procedure.

46. In respect of the first petition there has been a delay due to a procedural failure. The second petition is the subject of expert evidence given by Justice Verma in a report dated 4 December 2019. Justice Verma is a retired Judge of the Indian Supreme Court. In his opinion the Supreme Court should determine the petition within four months. He explains the procedure and the effect of a court sanctioned settlement. In particular there is no requirement for the creditors of UBHL or Dr Mallya to consent to the settlement terms. If the Supreme Court sanctions the settlement agreement it will bind the creditors regardless of consent. Although the process will be more straightforward and quicker if the Banks were to agree.

47. In his evidence Dr Mallya states that some of the debts from supporting creditors are disputed. He claims, although I have not seen the evidence to support the claim, that there are sufficient assets to meet the DRT judgment. The Banks say otherwise.

48. Justice Verma can "see no legal infirmity with Dr Mallya's offer". The fact of the attachment orders does not undermine the settlement proposals. He explains that the powers of the Supreme Court are wide as the Constitution of India provides it with a power "to pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it, and any decree so passed or order so made shall be enforceable throughout the territory of India…". As regards the liability under the PG, Justice Verma concludes that there "is a reasonable prospect of the Supreme Court of India passing an appropriate order in respect of the release sought".

49. The evidence of Justice Verma leads me to conclude that the prospect of a court sanctioned compromise is more than just fanciful. It would be highly unusual in this jurisdiction for a company in liquidation to be able to conduct negotiations to settle its debts. It has not been argued that it is equally unusual in India. Yet Karnataka High Court has made an order, in April 2017, staying the winding up of UBHL for the purpose of allowing settlement negotiations and proceedings to continue and be conducted by its management officers. Dr Mallya explains in his written evidence that the settlement offer provides that the assets of UBHL be sold and proceeds deposited with the High Court. His evidence is that in addition to assets of UBHL other

companies owned and controlled by family members will also be sold and made available to the Banks.

50. I agree with the submission of Dr Mallya, that when the settlement proposals are analysed, as long as they have substance, it is difficult to see what reasonable basis the Banks may have for rejecting the offers. In the teeth of this evidence the Banks argue that (i) some of the assets are secured or pledged to third parties, and (ii) there can be no certainty that they will have their debts settled within a reasonable period of time. The pledge of assets to third parties was not advanced with any vigour at this hearing. Dr Mallya has explained that the purported pledge is challenged. In my judgment a reasonable period of time is dependent upon the context. I turn to the applicable principles.

Adjournment- applicable principles

51. There is agreement that the court has a discretion to exercise at the hearing of a bankruptcy petition. The discretion is provided by section 266(3) of the Insolvency Act 1986 which provides:

> "The Court has a general power, if it appears to it appropriate to do so on the grounds that there has been a contravention of the rules or for any other reason, to dismiss a bankruptcy petition or to stay proceedings on such a petition; and where it stays proceedings on a petition, it may do so on such terms and conditions as it thinks fit."

52. The discretion has long been available. The first statute that formalised the discretion was the Bankruptcy Act 1914. Section 5(3) of the 1914 Act gave discretion to dismiss a petition where the Court was not satisfied that there had been an act of bankruptcy or not satisfied as to proper service. Judicial consideration of the discretion introduced by section 5(3) of the 1914 Act shows that there were few limits other than it had to be exercised judicially. In *Re A Debtor* [1920] KB 432 McCardie J (sitting as part of a two-man Court) said that a judge appears to "possess the widest discretion in respect of granting adjournments" and that the limits imposed on the judge are that he "should exercise a judicial discretion". Mr. Justice Peter Smith said that the discretion remained "quite unfettered": *Re Micklethwait* [2003] BPIR 101, 102. There is some doubt whether it is completely unfettered but Mr. Justice Peter Smith was merely explaining that the discretion was wide. In *Re A Debtor* [1920] KB 432 the Court identified at least three circumstances where an adjournment may be sought. First to remedy technicalities; secondly "to enable the evidence on either side to be fully heard and thirdly to enable the debtor in the event of his being able to do so, to satisfy [the Court] of his power to pay his or her debts in full."

53. The Court's discretion provided by section 266(3) of the Insolvency Act 1986 is supplemented by the Insolvency Rules 2016. Rule 10.24 provides that the Court "may make a bankruptcy order if satisfied that the statements in the petition are true and that the debt on which it is founded has not been paid, or secured or compounded for". Whether or not the petition debt could be paid within a reasonable time was the subject of an appeal to Henderson J (as he was) in *Ross & Holmes v HMRC* [2010] BPIR 652:

> "[72] I come finally to the question of discretion, and whether the Chief Registrar should have granted a further adjournment. There is no doubt that the Court retains a

discretion not to make a bankruptcy order, even where the petition debt has been clearly established and any grounds of opposition have been dismissed. However, the authorities establish that in such circumstances the discretion to adjourn should only be exercised if there is a reasonable prospect of the petition debt being paid in full within a reasonable period: see *Harrison v Seggar* [2005] EWHC 411 (Ch), [2005] BPIR 583, at para [7] per Blackburne J, and *Re Gilmartin (A Bankrupt)* [1989] 1 WLR 513, at 516F–G, per Harman J. Furthermore, as Blackburne J said, "[t]here must be credible evidence to support such a prospect if the Court is to grant an adjournment for payment".

[73] Accordingly, the first question is whether there was credible evidence before the Chief Registrar on 20 July to establish a reasonable prospect that the petition debts would be paid in full within a reasonable time. In my judgment there was not. In the context of the long-drawn out history of the petitions, and the adjournments which had already been granted, it seems to me that a reasonable time for payment in full of the petition debts could have been no more than a further 2 or 3 months at the most. There was no credible prospect of payment being received within such a timescale, because the offer of security contemplated that nothing would probably happen for at least 6 months, and the terminal loss claims were still inchoate and unsupported by any draft accounts. In view of the past history of delay and broken promises, it was in my judgment appropriate to take a fairly hard line and to accord priority to HMRC's undoubted prima facie right to obtain bankruptcy orders over protestations that a further adjournment might finally yield the payment in full which had so signally failed to materialise in the past. Furthermore, the Court would in my opinion have been justified in harbouring a suspicion that the predominant purpose of the adjournment, from the debtors' point of view, was to enable them to realise their assets at a time of their choosing in a difficult property market."

54. It is notable that the Judge was not taken to *Re A Debtor* (*supra*), but the judgment can be easily distinguished from the present situation. There was a "long-drawn out history of the petitions, and the adjournments" but even so a further 2 to 3 months would have been appropriate but for the fact that "There was no credible prospect of payment being received within such a timescale."

Application of principle

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, tribunals or 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 Mallay 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 Bank will be bound. Lastly, if the Banks decide to continue with the petition they are required to amend.

57. Finally, I record that although an argument of abuse, in the sense that the bankruptcy proceedings are prosecuted for a collateral purpose, was raised in written submissions, Dr Mallya preferred to preserve the argument for another occasion. I make no decision on the issue.

Conclusions

58. In my judgment the Banks are secured, at least in part. The petition fails to comply with section 269 of the IA 1986. A bankruptcy order should not ordinarily be made where the petition is defective as a result of such a breach. The breach is capable of cure by amendment. The hearing of the petition should be adjourned for the purpose of amendment and for time to pay the debts in full.

59. Having regard to the factual background, a reasonable period of time is at least six months.

60. I will hear counsel on the precise period for an adjournment when this judgment is handed down.

Postscript

61. This judgment was produced in December 2019 and circulated in January 2020. Handing-down was adjourned for further argument, at the request of the parties. The parties agreed to a hearing after 1 June 2020. The outbreak of Covid-19 has made fixing a date uncertain. In my judgment it is in the interests of the administration of justice and in the public interest that this judgment be handed down now. In any event the agreed adjournment is not inconsistent with the judgment. Two matters arise. First, I shall order that the decision hearing for the purpose of CPR 52.3(2) is to be adjourned to a date to be fixed, and I shall extend time for filing an appellant's notice to 21 days after the decision hearing, subject to permission. Secondly, no decision has been made in respect of the further argument referred to above, namely that as a matter of fact the whole of the debt owed by the Respondent to the Petitioners is secured. Consequently, it is argued, the court should not adjourn the hearing of the petition but exercise its discretion to dismiss the petition. Further evidence may be served in respect of this argument at the adjourned hearing.