No: 4893 of 2012

IN THE HIGH COURT OF JUSTICE
IN BANKRUPTCY

IN THE MATTER OF VLADIMIR ABRAMOVICH KEKHMAN
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

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

Date: 9 April 2014

Before:

Mr Registrar Baister

- -

Between:

(1) JSC BANK OF MOSCOW	**Applicants**
(2) ZAO SBERBANK LEASING	
- and -	
(1) VLADIMIR ABRAMOVICH KEKHMAN	**Respondents**
(2) HEATH SINCLAIR (as joint trustee in the bankruptcy of Vladimir Abramovich Kekhman)	
(3) TIM HEWSON (as joint trustee in the bankruptcy of Vladimir Abramovich Kekhman)	

Mr Alan Gourgey QC and **Ms Marcia Shekerdemian** (instructed by **PCB Litigation LLP**) for the **First Applicant**
Ms Felicity Toube QC and **Mr William Willson** (instructed by **Clifford Chance LLP**) for the **Second Applicant**
Mr Michael Swainston QC, **Ms Blair Leahy** and **Mr Jonathan O'Mahony** (instructed by **Rubinstein Phillips Lewis LLP**) for the **First Respondent**
The Second Respondent appeared in person

Hearing dates: 4-7 March 2014

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Approved Judgment

I direct pursuant to CPR PD 39A para 6.1 that 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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Mr Registrar Baister:

The petition

1. On 25 September 2012, a date on which he was personally present in this country, Vladimir Abramovich Kekhman presented a petition to this court on which a bankruptcy order was made on 5 October 2012. His statement of affairs shows creditors in excess of £300 million. He was automatically discharged on 5 October 2013.

Dramatis personae

2. Mr Kekhman was at the time, and remains, a Russian citizen, domiciled and resident in the Russian Federation.

3. Mr Kekhman went into the fruit business in 1994. It expanded rapidly from modest beginnings. In 1997 he formed the JFC Group, the ultimate holding company of which is JFC (BVI) Limited, which operates through companies in Russia, the British Virgin Islands, Costa Rica, Cyprus, Ecuador, Luxembourg and Panama. It is described by Mr Kekhman's solicitor, Mr Lewis, in a witness statement of 3 October 2012 (which appears in bundle A behind tab 7) as "a complex tax driven cross border group…created on the advice of international accountants and advisers and including many subsidiaries in two continents". A Dutch Antilles entity set up in February 2008, the VK Family Private Foundation, holds 70% of the shares in JFC (BVI) Limited and 90% of the shares in the LQ Group which holds property in Russia.

4. Mr Kekhman's businesses were funded by loans from a number of banks and financial institutions, many of which were backed by personal guarantees.

5. In 2011 the businesses got into financial difficulties. Negotiations and restructuring attempts failed, and a number of lending banks took steps to enforce their securities and called in their guarantees. On 20 February 2012 insolvency proceedings were initiated by JFC Russia. A Russian supervisor was appointed over a number of Russian companies in the JFC Group. On 11 September 2012 JSC Bank of Moscow obtained a worldwide freezing order against the BVI companies in the group. A receiver in Curaçao was appointed over the VK Family Private Foundation in late 2012/early 2013.

6. At the date of presentation of his petition Mr Kekhman said that he was the general director of an entity described as ZAO JFC Finance Group and the general director of the St Petersburg Theatre of Opera and Ballet, commonly known as the Mikhailovsky Theatre, a position he took up in May 2007. At about the same time he became a member of the Consultative Council of the Russian Federation Cultural Ministry. Mr Lewis describes how his client was able to do this only after he achieved financial security (as he then thought) through his considerable business success. After those

appointments Mr Kekhman relinquished day-to-day control of the JFC Group and put its management and control in the hands of others.

7. JSC Bank of Moscow ("Bank of Moscow") is a Russian Bank which claims to be a creditor of Mr Kekhman in a sum in excess of $150 million in respect of damages for conspiracy to defraud. Its status as a creditor is in issue: Mr Kekhman denies the bank's allegations and says that he has a counterclaim. In the course of the opening submissions Mr Swainston conceded for present purposes that Bank of Moscow had standing on the basis of its expressed commitment to bring its claim, which it has now belatedly issued.

8. ZAO Sberbank Leasing ("Leasing") is also a Russian bank. It claims to be a creditor in the sum of approximately £3 million said to be due under guarantees given by Mr Kekhman.

9. The Second and Third Respondents are Mr Kekhman's trustees in bankruptcy, having been appointed at a meeting of creditors on 21 December 2012. Mr Sinclair appears to be taking the lead in this case, so where I refer to the trustee in the singular I mean him. His stance on these applications is neutral, and his role has been confined to preparing a number of reports and attending as a witness.

10. On 28 February 2013 a creditors' committee was formed consisting of representatives of OJSC Promsvyazbank, Raiffeisen Bank International AG and OJSC Uralsib.

The bankruptcy

11. Mr Kekhman's petition first came on for hearing before Mr Registrar Jones on 26 September 2012. It showed:

> (a) Mr Kekhman's address as Apartment 1, Arts Square, 1 St Petersburg, Russian Federation;
>
> (b) his occupation as theatre director and company director;
>
> (c) his centre of main interests was not in a member state within the meaning of the EC Regulation on Insolvency Proceedings;
>
> (d) he was not resident in England and Wales;
>
> (e) he was unable to pay his debts.

Jurisdiction was claimed on the basis that Mr Kekhman was personally present in the country on the day of presentation of his petition. His position is set out more fully in the petition as follows:

> "I have been present in the United Kingdom since 12.10 pm on 24th September 2012 when I arrived at Gatwick Airport and whilst in London I reside at the Corinthia hotel in Whitehall Place, London SW1A 2BD and presently intend to leave on Thursday 27th September 2012 and when I travel to St Petersburg, Russia. I am therefore present in the United Kingdom for some 2 clear days and the Court has jurisdiction

> under section 264(1)(b) and section 265(1)(b) of the Insolvency Act 1986 and I am advised that the Court has jurisdiction to make a bankruptcy order. I wish to submit to the jurisdiction of the Courts of England and Wales with regard to bankruptcy, as I am advised that there is no personal bankruptcy law in the Russian Federation and as I am connected with international business matters and the English jurisdiction as a sophisticated jurisdiction in these matters appears appropriate to help resolve my affairs in an orderly manner that will be recognised internationally. I wish to add that under 3 personal guarantees and indemnit[ies] subject to English law which I have given to 6 international banks particularised in my Statement of affairs and dated 15th March 2011, a total sum of £86,201,784 has been demanded of me on 6th April 2012."

12. The accompanying statement of affairs showed:

> (a) Mr Kekhman was subject to ten sets of legal proceedings, nine in the Russian Federation and one in the Commercial Court in this country;
>
> (b) his assets consisted of cash in hand of £200,000, land in St Petersburg valued at £4.3 million, a Mercedes-Benz in Russia and a Bentley in France;
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> (c) he had not been visited by an enforcement officer or bailiff in the last 6 months;
>
> (d) he had 19 unsecured creditors totalling £316,136,088, all located in the Russian Federation;
>
> (e) details of 23 bank accounts, three of which were "arrested";
>
> (f) Mr Kekhman's monthly household income amounted to £7,912 but he had monthly expenditure of £49,000 odd;
>
> (g) he had a wife, daughter and two sons, all described as dependents.

He attributed his insolvency to

> "The overwhelming demands made on me personally under the guarantees […] that I gave to support bank facilities granted to JFC Group and in which group I have a substantial indirect interest. That group defaulted on those facilities and hence the numerous calls under the personal guarantees I refer to."

13. Mr O'Mahony appeared for Mr Kekhman. The transcript of the hearing shows that a number of issues were canvassed. Mr Registrar Jones wanted to know whether there were assets in the jurisdiction and whether the £200,000 was to be brought in (contrary to what was said in the course of this hearing, Mr Registrar Jones at no stage

directed the money to be brought in); he was concerned that an English bankruptcy would not benefit creditors; he expressed doubt as to whether an English order would be recognised in Russia; he considered whether notice should be given to creditors. He was plainly approaching the petition on the basis that, whilst there was jurisdiction to make a bankruptcy order, there were a number of factors which needed to be clarified to enable the court to consider whether to exercise its discretion to make the order. The upshot was that the petition was adjourned so that those factors could be further considered by Mr Kekhman and his advisers.

14. The second hearing of the petition took place on 5 October 2012 before me. I had the benefit of the witness statement of 2 October 2012 from Mr Lewis, which exhibited a report from Mr Kekhman's Russian lawyer, Mr Torkanovskiy of Ivanyan & Partners (bundle F/tab 42), and documentation to do with the JFC Group borrowings and Mr Kekhman's guarantees. I also had a very full skeleton argument backed by authorities from Mr O'Mahony who again appeared for Mr Kekhman. Mr O'Mahony submitted that there were a number of points favouring the making of a bankruptcy order in this jurisdiction, principally:

> (a) the absence of a personal bankruptcy regime in the Russian Federation;
>
> (b) the availability of assets in the jurisdiction (the £200,000 which was to be made available to the official receiver);
>
> (c) connection to the jurisdiction in the form of contractual English law/jurisdiction provisions;
>
> (c) the opinion of a Russian lawyer, Mr Torkanovskiy of Ivanyan & Partners, that the courts of the Russian Federation would recognise the bankruptcy;
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> (d) the fact that an English bankruptcy would allow for the investigation of Mr Kekhman's affairs and an orderly realisation of Mr Kekhman's assets for the benefit of his creditors as opposed to realisation on a first come first served basis;
>
> (e) the promise that Mr Kekhman would cooperate with the official receiver and any trustee appointed;
>
> (f) the prospect of Mr Kekhman's financial rehabilitation.

15. Mr Torkanovskiy (who I think was present at the hearing) confirmed in his report that Russian law made no provision for the bankruptcy of an individual in Mr Kekhman's position: "only individual entrepreneurs benefit from a bankruptcy procedure in Russia (and Mr Kekhman is not an individual entrepreneur)" (see paragraph 26 of his report) and expressed the opinion that any bankruptcy order made could be recognised and enforced in Russia (see, for example, paragraphs 3 and 27). Mr Lewis seemed less certain: dealing with the potential benefits of an English bankruptcy he said in paragraph 13 of his witness statement that there could be benefit even in the absence of recognition in Russia, a possibility he must have contemplated.

16. A number of other issues were explored. I was concerned that Mr Kekhman's beneficial interest in stocks and shares held by him through the VK Family Private Foundation should be regarded as an asset in the bankruptcy (they were not described as available assets in the statement of affairs which answered "No" to the question about stocks and shares) and that Mr Kekhman should not be under the misapprehension that an English trustee would allow him to spend almost £50,000 a month on school fees and support for his wife and children. The first point was disposed of by Mr O'Mahony agreeing to record in the bankruptcy order that the VK Family Private Foundation shares should be regarded as an asset (see the order at A/12). I was told that the expenditure figure simply reflected financial obligations to which Mr Kekhman was currently subject: he had no expectation of being able to continue to make payments on the scale he had thitherto. I was told (and accepted) that this was not a bankruptcy tourism case of the kind that had recently been considered by the courts in relation to, primarily, German and Irish debtors who were shifting their centres of main interest here opportunistically to avoid their domestic bankruptcy regimes. Like Mr Registrar Jones, I raised the question of whether notice should be given to creditors but was persuaded that that would not be necessary.

17. It will be apparent from the above that the second hearing also proceeded on the basis that there was jurisdiction to make a bankruptcy order and that the exercise of the discretion was the only relevant consideration. Although I was at first reluctant to make the order there and then, I was persuaded that I should do so and did so.

18. With the benefit of hindsight it seems to me that (a) I ought to have given a reasoned judgment (although it would have consisted largely of a recital of the issues raised in Mr O'Mahony's skeleton argument and in the course of the hearing, so may not have added much to the material available) and (b) I should arguably have adjourned for notice to be given to the creditors (as I recognised should probably be considered in *Re Eichler (No 2)* [2011] BPIR 1293), although the arguments that would have been heard on the petition would, I imagine, have been substantially the same as the arguments heard on these applications. I make no criticism of Mr O'Mahony for those failings which were mine rather than his, much less Mr Kekhman's. I was, however, right when I predicted that the making of the bankruptcy order would not be the end of the matter.

19. According to the official receiver's report to creditors of 4 December 2012 (A/13) Mr Kekhman had assets consisting of cash, freehold property, motor vehicles, stocks and shares and jewellery to a total value of £4,895,533 and total liabilities of £316,136,088, giving an estimated deficiency of £311,240,555.

20. The trustee has made three reports. In a report to this court dated 3 May 2013 (H/55) he reported that one vehicle (the Mercedes in Moscow) had been seized ("arrested") on behalf of OAO Sberbank; he was experiencing difficulty in recovering the other (located in Cannes) as it was registered to a Mrs Singermann. Property in St Petersburg consisting of two flats and a commercial property had also been seized to satisfy claims of OAO Sberbank and Raiffeisenbank. There was a question mark over the value of the shares. However, a collection of watches had been received and was to be sold in Geneva. A further report dated 28 August 2013 (H/56) disclosed that a collection of icons was a potential asset in the estate as were claims in respect of antecedent transactions relating to a property in Cannes and a gift to Mr Kekhman's son.

21. The trustee said that he had not sought recognition of the bankruptcy in Russia since he understood that the proceeds of sale of the arrested assets located in Russia would be distributed to the Russian creditors.

22. In his latest report dated 28 February 2014 (H/57) the trustee says he has managed to secure the vehicle in France for sale, has realised £224,000 from the sale of the watches and has arranged a sale of the icons. The position as regards the Foundation and the shares it holds remained up in the air. The trustee continues to investigate the property and gift transactions described above as well as the status of donations made by Mr Kekhman to the Mikhailovsky Theatre.

The applications

23. On 31 January 2013 Bank of Moscow issued an application to annul or rescind the bankruptcy order and for other relief. On 27 March 2013 Leasing issued its own application seeking annulment and/or rescission.

24. Although it is not party to these applications, OAO Sberbank indicated through Ms Toube on the last day of the hearing that it too was in favour of annulment. It represents 34.25% in value of Mr Kekhman's creditors.

25. Part of the relief sought by Bank of Moscow in its application was an order under section 285(3)(b) Insolvency Act 1986 permitting it to commence proceedings against Mr Kekhman in the Commercial Court for damages for conspiracy to defraud. The application was resisted by Mr Kekhman at least up to a point, in that directions were given but he never served evidence formally opposing it yet declined to consent to it either. In the end the application became otiose as Mr Kekhman was automatically discharged on the first anniversary of the bankruptcy order. Although the need to get on with the fraud action was said to be a reason to expedite the hearing of this application, which I declined to do, the claim form was neither issued nor served until after the commencement of the final hearing of these applications. As I have mentioned, Mr Kekhman contends that he has a counterclaim (albeit one that is now vested in his trustees) and that the Bank of Moscow and/or its agent, a Mr Afanasiev, have in fact misappropriated assets of his companies. Although Mr Gourgey and Mr Swainston sought to persuade me that their clients' respective claims were plainly good and that a cursory glance at some of the documentation demonstrated that, matters turned out to be more complicated as a result of which I said that I could not possibly form even the most provisional view about either side's case. That remains the case.

26. There have already been proceedings in the Commercial Court involving Mr Kekhman and companies said to be connected to him. Bank of Moscow applied in 2012 to commit Mr Kekhman on the basis that he was the *de facto* director of companies which had failed to comply with a disclosure order made in aid of the world wide freezing order I have already mentioned. The facts are set out in a judgment of Hamblen J of 21 January 2014 (H/66). The application was ultimately compromised so I need say no more about it.

27. Neither Bank of Moscow nor Leasing dispute that the court had jurisdiction to make the bankruptcy order (see paragraph 6 of Mr Gourgey and Ms Shekerdemian's

skeleton argument; Ms Toube and Mr Willson[1] are less explicit in their skeleton argument, but the relevant paragraphs (28 ff.) focus on discretion and do not suggest that there was no jurisdiction to make the order). Bank of Moscow's case is neatly summarised in paragraphs 6-7 of Mr Gourgey's skeleton argument:

> "6. [Bank of Moscow]'s application under section 282(1)(a) is made on two bases: first, that having regard to the facts as they existed at the date of the bankruptcy order (including matters not disclosed to the Court by [Mr Kekhman]), the order should not have been made; secondly, that the bankruptcy order should be annulled on the grounds of breach of [Mr Kekhman's] duty to make full and frank disclosure when applying for the bankruptcy order. The bases are not in the alternative.
>
> 7. [Bank of Moscow] does not dispute that the Court had jurisdiction to make [the] order. It submits however that the discretion to make a bankruptcy order should only be exercised where the debtor has established a real connection with this jurisdiction and that there is a reasonable probability that there is utility to the bankruptcy and benefit to creditors as a whole. This falls to be viewed as at the date of the bankruptcy order. Submissions on the law in this regard are set out in paragraphs 68 to 81 below."

28. Leasing contends:

> "7. In essence…that [Mr Kekhman] is, despite his protestations to the contrary, a *'bankruptcy tourist*' who is *'forum shopping'* and trying to evade Russian law (which does not permit him to bankrupt himself) by coming on a fleeting visit to England, a place to which he has no real connection. What [Mr Kekhman] says that he seeks from his [bankruptcy order] is an orderly realisation and distribution of his assets. This has not occurred, mainly because the [bankruptcy order] has not been (and cannot be, in [Leasing]'s submission) recognised and/or enforced in Russia. Despite his assertions to the contrary, what [Mr Kekhman] in fact seeks is his discharge in one year from his English debts (which totalled £316 million, and a substantial amount of which arose pursuant to English law guarantees). In return for this benefit, [Mr Kekhman] has offered this jurisdiction non-disclosure, misrepresentations, and failure to co-operate.
>
> 8. [Mr Kekhman] seeks to persuade this Court now (as he did when his [bankruptcy order] was made) that his English bankruptcy would be recognised in Russia, despite no case having ever recognised a foreign bankruptcy in that manner.

[1] I shall henceforth refer to the skeletons as being those of leading counsel only, so reference to Mr Swainston's includes reference to its co-authors, Ms Leahy and Mr O'Mahony. I do this for the sake of brevity and not because I discount the no doubt considerable contributions of junior counsel instructed.

> Not only does he assert that his bankruptcy would be recognised, but that it would be enforced. Indeed, in the Joint Memorandum of the experts, [Mr Kekhman]'s expert asserts, without support from any legislation or case-law, that [Mr Kekhman's] bankruptcy would be enforced as if it were a Russian receivership. Neither of these assertions is correct. Russia will not recognise or enforce this bankruptcy order, leaving Leasing and other English creditors bound while other of Mr Kekhman]'s creditors are free to collect in his substantial Russian assets. There is no benefit to [Leasing] in keeping themselves bound into this bankruptcy."

29. Mr Swainston contends that the discretion was properly exercised when the bankruptcy order was made and that there is utility in the bankruptcy, so the applications should be dismissed.

The evidence

30. The applications are supported by substantial written evidence (B/27 ff.). I do not think I need to review it here in detail since much of it was not referred to or referred to only in part. I mention briefly, however, a complaint made by Mr Swainston about the Applicants' attempts to extend the scope of the applications beyond what is set out in the supporting witness statements, Mr Riem's witness statement of 27 January 2013 (B/27/paragraph 7), his second of 12 February 2013 (B/30/paragraph 7) and Mr Hunter's of the same date (B/31/paragraphs 11-12). As far as most of the matters relied on by the Applicants are concerned the battle lines are clear and well understood, as is plain from the skeleton arguments. I will, however, return to this question when it comes to the non-disclosure points relied on, which are, I think, Mr Swainston's main concern.

31. I heard the oral evidence of three experts on the law of the Russian Federation and of Mr Kekhman (all assisted by interpreters) and Mr Sinclair, one of the trustees. I deal with the expert evidence below. Mr Sinclair's oral evidence (he was cross-examined on his written reports to the court and to creditors) was helpful. It was given with the proper neutrality to be expected of an officer of the court.

32. Mr Kekhman's oral evidence was less satisfactory in that there was a great deal he appeared not to know or to have forgotten. I do not, however, think that that means he was being untruthful. Rather, it seemed to me, he had taken his eye off the ball as far as his business interests were concerned after he was appointed to his theatrical post. I give just one example to illustrate the point. When Mr Gourgey was asking him about the plantations operated by the JFC Group I intervened at one point to ask what JFC was doing in 2011. Mr Kekhman replied,

> "Well, if we are talking about JFC Group in 2011 it carried on the business that it had been carrying on for the past I would say maybe 11 or 12 years. It was trading in bananas, it produced bananas, it used gas to process bananas and it transported bananas."

Asked for more detail by Mr Gourgey, however, he said,

> "I'm not sure I can tell you what happened as of 30 June 2011, whether or not there was plantations held by Varsovia or not because I was simply not dealing with this. In general I do not know what they did but as of 30 June 2011 I don't know exactly what was going on. Whether or not these companies held those plantations is not something that I can offer any comment on because I'm just not aware of this."

Later he said,

> "I personally do not recollect exactly which companies I personally owned. It seems to me I don't think I owned anything personally. I stress personally."

He agreed that he had beneficial interests in companies "held via VK" but said, "I don't recall the exact structure"; and "the thing is that everything pertaining to western companies unfortunately from a specific point in time was not controlled by me at all." As I have already indicated, I understood his evidence to mean that he had put the management of his companies in the hands of others and lost the thread of what had happened to them.

The law

33. I shall deal with the law next, since it is the law and my application of it when I made the bankruptcy order rather than the facts that are in issue.

Jurisdiction

34. Personal presence in the country has been sufficient to found jurisdiction in bankruptcy for at least a century. Section 1(2) of the Bankruptcy Act 1914 (which reproduced section 8 of a 1913 Act) provided:

> "In this Act, the expression 'a debtor,' unless the context otherwise implies, includes any person, whether a British subject or not, who at the time when any act of bankruptcy was done or suffered by him-
>
> (a) was personally present in England; or
> (b) ordinarily resided or had a place of residence in England; or
> (c) was carrying on business in England, personally or by means of a manager; or
> (d) was a member of a firm or partnership which carried on business in England."

35. Acts of bankruptcy were defined by section 1(1) and included departing out of England or being and remaining out of England with intent to defeat or delay creditors (section 1(1)(d)) or presenting a bankruptcy petition against oneself (section 1(1)(f) and section 6).

36. Section 265 Insolvency Act 1986 now provides:

> "Conditions to be satisfied in respect of debtor
>
> (1) A bankruptcy petition shall not be presented to the court under section 264(1)(a) or (b) unless the debtor –
> (a) is domiciled in England and Wales,
> (b) is personally present in England and Wales on the day on which the petition is presented, or
> (c) at any time in the period of 3 years ending with that day –
> (i) has been ordinarily resident, or has had a place of residence, in England and Wales; or
> (ii) has carried on business in England and Wales."

37. Once jurisdiction has been established, the court has an unfettered discretion to make a bankruptcy order or to refuse to make a bankruptcy order. That proposition can be made good by reference to the Insolvency Act and to authority.

38. Section 264(1) of the Act lists the persons who may present a bankruptcy petition, including the debtor himself (section 264(1)(b)). Section 264(2) goes on to say, "Subject to those provisions, the court may make a bankruptcy order on any such petition".

39. Section 266(3) 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…"

In a footnote to paragraph 67 of his skeleton argument Mr Gourgey notes the provenance of that discretion: its predecessor was section 5(3) Bankruptcy Act 1914; there was no equivalent in the 1869 Act, but in *Ex parte McCulloch* (1880) 14 Ch D 716, James LJ held (at 723) that notwithstanding the mandatory language of section 8 of the 1869 Act,

> "the Court retains its old jurisdiction to refuse to make a man bankrupt for an improper purpose, and to annul an adjudication when the justice and the convenience of the case require it."

40. Although it arguably adds nothing to the foregoing provisions on which counsel for the parties rely, I should mention, if only for completeness and because it underlines the discretion to make an order or refuse to make an order, rule 6.25(1) Insolvency Rules 1986 which provides, in relation to a creditor's petition only:

> "On the hearing of the petition, 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."

41. The authority to which I referred above, and which is relied on by Mr Swainston, is *Re Micklethwaite* [2003] BPIR 101 in which Peter Smith J refers to the power set out in section 266(3) as being "quite unfettered".

42. What, then, have the courts said about how the discretion is to be exercised both generally and in a case such as this where, as Mr Gourgey puts it, jurisdiction is established by what he describes as mere transitory presence? I have been taken to a number of authorities on the point under the pre- and post-1986 law, many dealing with factors operating against the exercise of the discretion to make an order, others pointing in a different direction.

43. *Ex parte Robinson* (1883) 22 Ch. D 816 was an appeal against an adjudication of bankruptcy made in circumstances in which the debtor was already subject to a Scottish sequestration from which he had not been discharged. Lord Jessel MR gave a pithy judgment:

> "About the jurisdiction to make an adjudication I have no doubt […] Of course there must be some reason for exercising it, and the mere existence of a bankruptcy in Scotland or in Ireland would, prima facie, be a reason for not exercising it. Here the Scotch sequestration is not closed: it does not appear that there are any subsequent debts or any assets in England, and there is no reason for exercising the jurisdiction. An adjudication would be altogether a vain thing. It might embarrass the proceedings in Scotland and could be of no use to anyone. I am of opinion, therefore, that there ought to be no adjudication."

Baggallay LJ expressed himself in similar terms, noting, however, that the court would make an adjudication if there were assets in England.

44. *Re Betts* [1897] 1 QB 50 is a case where the debtor had already been bankrupt and received his discharge. There would be no assets in the subsequent bankruptcy, so making a receiving order would have been a waste of money. Lord Esher MR put the matter thus (page 52):

> "If the Court is clearly convinced, not merely by the statement of the debtor, but from all the circumstances of the case, that there cannot be any assets or any prospect of any coming into existence, and that, if a receiving order is made, the only effect will be a mere waste of money in costs, then in such a case the Court has a discretion in the matter, and will be justified in exercising that discretion by refusing to make the order."

And (at 53):

> "It is said that there is a possibility of assets. But I think that a Court of justice ought not to take into consideration a possibility of which there is no probability. There does not appear to me to be in this case any possibility of assets in a business sense. There being no probability or even possibility in a business sense of the existence of assets which would pay off the debts under the first bankruptcy, and so become available for the purposes of the second, it appears to me that the result of making a receiving order would only be to cause a waste of money in costs which would be incurred uselessly."

And (*per* Lopes LJ at 52):

> "I entirely agree with the law laid down by the Master of the Rolls, to the effect that, where from all the circumstances of the case it is perfectly clear that there is no asset and no reasonable probability of any asset coming into existence in the future, and that the only effect of making a receiving order would be a useless heaping up of costs, the right course is to refuse to make an order."

45. The absence (or presence) of assets and debts in the jurisdiction was considered in the context of discretion in *In re a Debtor (No 199 of 1922)* [1922] 2 Ch 470. The case concerned very similar facts to *Ex parte Robinson*, but Lord Sterndale MR made clear that the circumstances were different, for "in that case there were no assets in England, and here there are". The appeal against the receiving order was therefore dismissed.

46. *In re a Debtor (No 737 of 1928)* [1929] Ch 362 again concerned a receiving order, this time made against a Swiss national employed in England. The holding demonstrates that the dispute in that case was peculiar to its facts. However, the point also arose that there were already pending bankruptcy proceedings in Switzerland. Notwithstanding that fact, Lord Hanworth MR (at 370) rejected the submission that the discretion was wrongly exercised when a receiving order was made:

> "It appears to me that inasmuch as there are debts over here, the debtor is over here and the jurisdiction is not disputed, the Registrar was acting well within his discretion in making the order. […] If difficulties arise hereafter in the carrying out of the bankruptcy proceedings in this country as well as in Switzerland, they will be matters to be dealt with in the course of the bankruptcy proceedings."

47. The absence of any reasonable prospect or probability of assets becoming available for distribution in the bankruptcy was also a factor in *In re Field* [1978] 1 Ch 371, although I think it is important to note that the issue under consideration was whether the debtor's assertion of that fact was sufficient. Megarry V-C, dealing with a submission that where it was established that the debtor had no assets and no prospect of acquiring any the court should dismiss the petition, said (at 375):

> "Now it is plain that there is considerable support for some doctrine of this sort; but it is equally plain that the doctrine is hedged about by important precautions. After all, if it were open to a debtor to avoid having a receiving order made against him simply by alleging utter destitution, both present and future, such pleas of destitution might become popular; and prospective bankrupts might hasten to rid themselves of any assets or prospects which might hamper them in making such a plea. A man may indeed be too poor to be made bankrupt; but the burden of proof is heavy."

A little further on, however, (page 376) he cited Lord Esher in *Re Betts* to the effect that when a receiving order is made the court does not know the true asset position: "During the process of bankruptcy much that was unknown earlier becomes revealed"; also Vaughan Williams J in *In re Jubb* [1897] 1 QB 641: even where it appeared that the assets would probably be less than the costs it was "quite possible that the assets available for distribution would be found to be larger than they presently appeared to be"; and *In re Leonard* [1896] 1 QB 473 as "mak[ing] it clear that the apparent non-existence of assets is no ground for refusing to make a receiving order".

48. The only recent (post-1986) authority on this area appears to be *In re Thulin* [1995] 1 WLR 165, a decision of Mr Jules Sher QC sitting as a deputy High Court judge. The case was an appeal against a bankruptcy order made by Mr Registrar Pimm on the ground that the order was wrongly made in circumstances where the debtor was already subject to bankruptcy proceedings in Sweden and had no assets in the jurisdiction. The debtor relied on section 266(3). The learned deputy judge was taken to many of the authorities considered above but noted that they dealt with "a purely domestic situation" rather than "people [who] wheeled and dealed on an international scale". He said that the "no assets" plea had some credibility: "What is suggested," the deputy judge noted, "is that nothing would come of such a bankruptcy order and it would be a waste of money to make it because the debtor has already been bankrupted in Sweden and has no assets in England." However, he also noted that,

> "[T]he English bankruptcy may yield benefits by way of reaching assets in a foreign country through recognition of the English bankruptcy by, and assistance of, the courts of that foreign country. Such assets may not be capable of being recovered by the Swedish trustee in bankruptcy in the same way, or at all. Given the international connections of the debtor and the improvement since the days of *Ex parte Robinson* in international communications, and the capacity to move funds and assets across international boundaries and across the seas at the press of a button, I do not see why the petitioning creditor should be deprived of what would otherwise be its right to a bankruptcy order simply because there are, at the present time, no assets physically located in England, and I have seen nothing in the authorities cited to me to show that in such a case the court's discretion should be exercised by dismissing the petition."

He discussed the state of the debtor's evidence as to his assets, then went on:

> "However, even had I been satisfied that there were no assets in England, I would not have been satisfied on the evidence that there could be no point in a bankruptcy order, and I would have been disposed, in the absence of further evidence, to let the petitioning creditor have its order for what it was worth."

The debtor's appeal against the bankruptcy order was accordingly dismissed.

49. I conclude my review of the personal insolvency case law by turning back the clock and saying something about another early bankruptcy authority, *Ex parte Painter* (1895) 1 QB 85 to which Ms Toube drew my attention in her opening submissions because it is, as she described it, the only no assets bankruptcy case. It is also a case where the debtor presented his own petition. He did so in order to avoid a judgment summons and to preserve pension rights he had. He was adjudicated bankrupt but the creditor applied for annulment. The judge annulled the order. The debtor appealed.

50. Vaughan Williams J began his judgment by noting that the case was of great importance then; and it seems to me that it still is, so I set out the judgment at some length. At page 88 Vaughan Williams J looked at the background to the introduction of debtors' petitions and the policy informing their introduction:

> "By s. 8, sub-s. 1, of the Act of 1883 a debtor is entitled to present his own petition, and 'the Court shall thereupon make a receiving order.' The course of legislation on this subject has from time to time varied a good deal. Under the earlier bankruptcy Acts no petition could be presented by the debtor himself. If the debtor desired to be relieved from the pressure of his debts, he must take proceedings under another series of Acts - those for the relief of insolvent debtors. But from an early period the legislature recognised the interest that the State had in a debtor being relieved from the overwhelming pressure of his debts, and that it was undesirable that a citizen should be so weighed down by his debts as to be incapacitated from performing the ordinary duties of citizenship. Gradually the law was modified, and by the Act of 1849 a debtor was enabled to present his own petition on certain conditions, the main feature of which was that his estate should be able to pay a certain proportion in the pound. Then came the Act of 1861, which for the first time applied the bankruptcy law to insolvent debtors, and which by s. 86 gave a perfectly general power to any debtor to petition for adjudication of bankruptcy against himself. Next came the Act of 1869, in which the legislature did not continue this provision, probably because provision was made for liquidation by arrangement, which it was thought would enable the debtor to arrange his affairs without having recourse to a petition for his own adjudication. In 1883 the legislature reverted to the terms of the Act of 1861. Are there any limitations to the words used? It does not seem to me that there are: 'A debtor's petition shall allege that a debtor is unable to pay his debts … and the Court shall thereupon make a receiving order.'"

The learned judge went on to consider the inherent power of the court to prevent abuse and expressed the view that "shall" did not detract from that power. He continued:

> "It is, however, important to remember that some such provisions were introduced in the Act of 1849. The object of the limitation in that Act on the power of debtors to present

their own petitions was to prevent debtors, who had no assets which could be distributed among their creditors, from becoming bankrupts on their own petition, and solely for their own benefit. Such provisions, therefore, have appeared in legislation on the subject, and they appear no longer. That is a very material circumstance, because it shews that the legislature have deliberately chosen not to introduce any such limitation of the power of debtors to present their own petitions. Mr. Muir Mackenzie was pressed with that circumstance himself, and he declined to say that in no case in which the debtor had no assets ought an adjudication to be granted on the debtor's own petition. He would not put his case as high as that; but he contended that in this case the adjudication ought not to be granted because this was a debtor in receipt of an inalienable pension, who was seeking to be made a bankrupt in order to get the undisturbed enjoyment of his pension without being liable to the pressure of a judge's order for the payment of the debt by instalments. But the same difficulty really presents itself there. We are invited to introduce into the granting of adjudications on a debtor's petition a condition which the legislature has not thought fit to insert, for to decide in that way would in fact be to say that no adjudication ought to be granted where the debtor who presents the petition is in receipt of an inalienable pension. It would have been perfectly easy for the legislature to have said so if they wished; but they have not done so, and we have no power to insert such a condition. I am strengthened in the view which I take (I admit, with reluctance) by the fact that such great judges as Knight Bruce, L.J., and Turner, L.J. [in *Ex parte Hewitt, In re Drinkwater* (31 L. J. (Bank.) 83)] feeling the same reluctance that I do to applying the section to a case, where the petition was presented by the debtor without any view of benefiting his creditors, but solely for his own benefit, could not bring themselves to say that such was the law. Carefully looked at, the words of both the Lords Justices shew that if the question had been specifically raised - which it was not, the appeal being against an order of discharge - they both would have felt great difficulty, in view of the express words of s. 86 of the Bankruptcy Act of 1861, in saying that the adjudication ought not to have been made in such a case. Under these circumstances I have come to the conclusion that we are not entitled to annul an adjudication made on a debtor's own petition merely because the debtor has no assets, nor because he is possessed of an inalienable pension, nor because, having no assets and being in possession of such a pension, he has presented his petition for the express purpose of preventing the application of the Debtors Act to compel him to pay this debt out of his pension. I am materially assisted in coming to this conclusion by the consideration of the severe provisions with regard to bankrupts which are found for the first time in the Act

> of 1883, especially with regard to the powers of the Court to refuse a discharge.
>
> It seems to me that if it cannot rightly be said that the receiving order ought not to have been made because it was on a petition presented for a purpose foreign to the bankruptcy laws, we cannot, nor could the county court judge, annul it. For the reasons I have given I am unable to say that the petition was presented for a purpose foreign to the bankruptcy laws, and therefore I am unable to agree with the county court judge, and I think that this appeal must be allowed."

The bankruptcy adjudication was reinstated.

51. Mr Swainston relies on *Ex parte Painter* as authority for the proposition that the court should not introduce conditions for making a bankruptcy order which the legislature has not provided for.

52. Mr Gourgey also draws on text book commentary, relying on Dicey & Morris, *The Conflict of Laws* (15th edition):

> "…**Personal Presence**
>
> **31-007**
>
> If the debtor is personally present in England on the day on which the petition is presented, the court may hear the petition and, if appropriate, make an order. This ground can, of course, apply to a petition by the debtor himself. The court, however, may and no doubt would decline to exercise the jurisdiction wherever it would work injustice: and the absence of all local connection with England on the part of a petitioning debtor would be a strong reason for the court's refusing, on grounds of equity and fairness, to make him bankrupt...
>
> **Discretionary Nature of the Jurisdiction**
>
> **31-011**
>
> The exercise of the court's jurisdiction has been regarded as discretionary. The existence of this discretion is enshrined in s. 266(3) of the Insolvency Act 1986 which gives the court a general power to dismiss a bankruptcy petition or to stay proceedings thereon. As yet there is little authority identifying factors which may be relevant to the exercise of this discretion. However, in relation to an analogous discretion which was found to exist under the Bankruptcy Act 1914, it was held that the court could refuse to exercise a jurisdiction which it undoubtedly possessed if the debtor possessed no assets in England or had been made bankrupt in a foreign country. But such circumstances will not inevitably lead to the conclusion

> that jurisdiction should not be exercised in cases falling within the 1986 Act...
>
> **31-012**
>
> More generally, however, a refusal to exercise such jurisdiction might be found to be justified on the basis of the existence of "any of those equitable considerations which have induced the court … to say that although the legal requisites to an adjudication were in all respects perfect, it was not equitable that the bankruptcy should proceed" [*Ex parte McCulloch* (1880) 14 Ch D 716 at 719 (Bacon CJ at first instance) and at 723, *per* James LJ]. These factors seem likely to influence the court in its approach to s. 266(3) of the 1986 Act. It is also possible that factors which are relevant in the general inquiry into forum non conveniens may be found to be relevant in appropriate cases."

53. He also notes the following observation in Sheldon and others, *Cross Border Insolvency* (3rd Edition):

> "8.121 [T]he English court will be vigilant to ensure that, in the case of a petition presented by the debtor himself, he is not 'abusing the system' by either limiting assets which would fall into a foreign bankruptcy or obtaining discharge from his debts by having recourse to the more lenient English bankruptcy regime."

54. Turning to the corporate cases, the most convenient starting point is probably *Banque des Marchands de Moscou (Koupetschesky) v Kindersley* [1951] 1 Ch 112, an apposite case since it is one where the English court wound up a Russian bank that had been dissolved by the Soviet government in 1918 where the bank had assets in the jurisdiction and there was no Soviet law remedy available. The question arose whether it was necessary, before a winding up order could be made, to establish that the company had a place or places where it carried on business within the jurisdiction. Lord Evershed MR, agreeing with Harman J in the court below, held that it was not (125). On the question of jurisdiction generally he said (125-126):

> "As a matter of general principle, our courts would not assume, and Parliament should not be taken to have intended to confer, jurisdiction over matters which naturally and properly lie within the competence of the courts of other countries. There must be assets here to administer and persons subject, or at least submitting, to the jurisdiction who are concerned or interested in the proper distribution of the assets. And when these conditions are present the exercise of the jurisdiction remains discretionary. Prima facie if the local law of the dissolved foreign corporation provided for the due administration of all the property and assets of the corporation wherever situate among the persons properly entitled to participate therein, the case would not be one for interference

> by the machinery of the English courts. In the present case there are substantial assets standing in the name of the bank or its liquidator, and there are persons within the jurisdiction having claims to participate in the distribution of those assets. At the same time, by reason of the total extinction in Russia of the bank and the absence of any machinery under Russian law for the due distribution of the assets among the persons regarded as properly having claims upon them, there would be, unless the machinery of winding up under the Companies Act is available, no means of any kind existing for the administration of the English assets.
>
> The existence of assets here, the presence here of persons claiming as creditors of the bank or said to be indebted to them, seem to constitute at least the indicia of a business in some sense formerly conducted here. Where, therefore, the circumstances exist which, upon the general principle above referred to would make the case appropriate for the exercise by our court of its winding up jurisdiction, it would appear that the question whether the foreign corporation carried on business in this country would generally be academic, unless it is also necessary to show that that business was carried on directly and from some established or specified place or places in this country."

55. Later (at 131) Evershed MR noted, however, that the provisions under consideration were not to be construed as subject to limiting conditions beyond "reference to the fact that some commercial subject-matter on which a winding-up order can operate is a natural and necessary requisite for the exercise of winding-up jurisdiction".

56. I was briefly taken to *Re a Company* [1983] BCLC 492 in support of the proposition that, whilst it was improper for a creditor to present a winding-up petition for a private purpose, if it benefitted the class, malice or improper motive did not render the petition itself demurrable (*per* Harman J at 495 g-i), but I do not think I should make too much of that as the case concerned an application to restrain advertisement of a petition on the basis that it was an abuse, so the judgment needs to be read in that narrow context: for "Words in a judgment must be construed in relation to the subject matter of the case in question, and not as if they were Acts of Parliament".

57. That dictum of Megarry J was cited by Peter Gibson J in *International Westminster Bank plc v Okeanos Maritime Corp* [1987] BCLC 450 in which *Banque des Marchands de Moscou (Koupetschesky) v Kindersley* was considered. The court held that the presence of assets in the country was not an essential condition to confer jurisdiction to wind up a foreign company: the court could wind up where there was a sufficient connection with England and a reasonable possibility of benefit to the creditors:

> "In the circumstances, I am prepared consistently with the *Eloc* case [[1982] Ch. 43] to hold that the presence of assets in this country is not an essential condition for the court to have jurisdiction in relation to the winding up of a foreign company.

> In my judgment, provided a sufficient connection with the jurisdiction is shown, and there is a reasonable possibility of benefit for the creditors from the winding up, the court has jurisdiction to wind up the foreign company."

Peter Gibson J continued:

> "I turn then to the question whether there is a sufficient connection with the jurisdiction. The following matters seem to me to provide such a connection. First, the company incurred the debt on which the petitioner, an English company, relies under an English loan agreement negotiated and executed here, and requiring performance here. Second, there is clear evidence that the company has carried on business in England. All the directors and officers of the company were resident in England at least until August 1986. All the negotiations for the loan from the petitioner were carried on in London, all the loan documents were executed in London, and the only bank accounts of the company that are known were in London. Even as late as 18 November 1986 the company, when in breach of its contractual obligation decided that the Daiichi freight should not be paid into the NatWest account, directed payment to an account with another London bank. Charterparties were negotiated and agreed here. In relation to the Daiichi charterparty, the petitioner's evidence, which is accepted by Dimitri Samonas, is that all the arrangements were made in London and the decisions were taken here by J.S.S. for the company after reference to the Samonases. That shows that even in November management decisions on the company's business were being taken in London. At least two business letters were written directly in the name of the company from J.S.S.'s offices and those offices were the address given to NatWest as the address of the directors of the company. Miss Heilbron submitted that it was not sufficient for a company to trade here through agents but I do not follow this. If what was done was done in the name of and for the company I fail to see why that is not the company carrying on business here through its agents."

Finally I should set out this passage:

> "I turn next to the question whether there is a reasonable possibility of benefit accruing to creditors from the making of a winding up order. That such is the appropriate test appears from the *Merabello* case [1973] Ch. 75 and the *Eloc* case [1982] Ch. 43. Similarly in *In re Allobrogia Steamship Corporation* [1978] 3 All E.R. 423 the company there had a claim of the same type as in the *Merabello* case and that was the asset which founded jurisdiction for the court. Slade J. held that it was not necessary to show that the claim was one which

> was certain to succeed. It was sufficient to show that the claim had a reasonable possibility of success."

After hearing submissions the judge concluded that there was a reasonable possibility of benefit accruing to the creditors and went on to appoint a provisional liquidator over the Liberian company.

58. In *Stocznia Gdanska SA v Latreefers Inc (No 2)* [2001] 2 BCLC 116 the Court of Appeal held that there must be a sufficient connection with England and Wales (which may, but does not have to, take the form of assets in the jurisdiction), a reasonable possibility of benefit to those applying for a winding up order if an order is made, and one or more persons interested in the distribution of assets of the company must be persons over whom the court can exercise jurisdiction (*per* Morritt LJ, citing Lloyd J in the court below). In the first instance decision under appeal Lloyd J had expressed the view that the law had moved on since the decision in *Banque des Marchands de Moscou (Koupetschesky) v Kindersley*, holding that "The formulation of these principles has changed over time, and in particular the presence of assets in the jurisdiction is no longer regarded as essential" ([1999] 1 BCLC 271 at 277). He reviewed the relevant authorities and then cited three principles which he derived from a decision of Knox J in *Re Real Estate Development Co* [1991] BCLC 210 at 217 (there had to be a sufficient connection with England and Wales but this did not necessarily have to take the form of assets in the jurisdiction; there had to be a reasonable possibility that the winding-up order would benefit those applying for it; and the court had to be able to exercise jurisdiction over one or more persons interested in the distribution of the company's assets).

59. Morritt LJ confirmed the correctness of this approach:

> "**[30]** There was some debate before us whether the three core requirements were pre-conditions for the existence of the statutory jurisdiction or principles to be observed in considering its exercise. Sir Richard Scott's reference to jurisdiction 'in the broad sense' suggests that he did not draw any such distinction. Nor do we for there seems to be no reason so to do. It is common ground that if a winding-up order is to be made then, at least, the three core requirements must be satisfied. The issue is whether, in addition, the petitioner must demonstrate that the company has sufficient assets within the jurisdiction to provide a reasonable possibility of benefit to either the petitioner or the general body of creditors.
>
> **[31]** Having considered the previously decided cases on the subject at some length we reject the submission for Latreefers that the presence of assets is essential. First, the issue before the Court of Appeal in *Banque des Marchands de Moscou* (*Koupetschesky*) *v Kindersley* was whether it was necessary to demonstrate that the company had had a place of business in England or had previously carried on business in England, not whether the presence of assets was a necessary condition. Any opinion of Sir Raymond Evershed MR deserves the greatest respect but we cannot regard his statement as a decision laying

> down what is necessary in all cases rather than what was sufficient in that case. As Megarry, Nourse and Peter Gibson JJ have all observed the court must have good reason to make the winding-up order and that the existence of assets here will constitute good reason in the normal case. But, like them, we do not regard what is sufficient to provide good reason in the normal case as necessary in all cases.
>
> **[32]** Second, we can see no reason why, in addition to the three core requirements referred to by Knox J, the presence of assets should advance the presumed intention of Parliament. As counsel for the Yard observed liquid assets may be moved from one jurisdiction to another at the entry of a computer command anywhere in the world. An additional requirement for the presence of an asset would introduce an arbitrary element which Parliament cannot have intended. Moreover if the core requirements are satisfied there is no need for the addition of a fourth to ensure that this exorbitant jurisdiction is only exercised for good reason.
>
> **[33]** Thirdly, though the precise point was not argued in *Banco Nacional de Cuba v Cosmos Trading* so that we may not, strictly, be bound by the decision of this court in that case we consider that we should follow the dictum of Sir Richard Scott unless good reason to the contrary is shown. The statement of Sir Raymond Evershed MR in *Banque des Marchands de Moscou* (*Koupetschesky*) *v Kindersley* is not such a reason.
>
> **[34]** Accordingly we consider that we can and should apply only the three core requirements to which we have referred in determining whether Lloyd J was right to order the winding up of Latreefers."

60. It was inevitable that consideration of what Morritt LJ described as the exorbitant jurisdiction to wind up a foreign company (or bankrupt a foreign debtor) would lead to consideration of the recent law regarding schemes of arrangement as it has been applied to foreign corporations with often tenuous connections to this jurisdiction. Mr Swainston relies on two scheme cases.

61. The first is a decision of the Court of Appeal in *SEA Assets Limited v Perusahaan Perseroan (Persero) PT Perusahaan Penerbangan Garuda Indonesia* [2001] EWCA Civ 1696. Peter Gibson LJ, after briefly introducing the appeal, set out the purpose or utility of schemes of arrangement under what was then Part XIII Companies Act 1985 as follows:

> "2. It has been the legislative policy for well over a century to encourage compromises and arrangements between a company and its creditors or members. That has been achieved by the enactment of a statutory mechanism to enable the absence of consent of minority creditors or members to be overcome, provided that a sufficient number of the relevant

> creditors or members agree with the proposed compromise or arrangement and the court gives its approval. If that occurs, then the dissentient minority will be bound by that compromise or arrangement. That of course in the case of a creditor is an encroachment on his right to be paid what he is owed in accordance with the contractual terms. But the utility of the statutory mechanism is particularly obvious in a case where a company is in financial difficulties but can persuade most, but not all, of the relevant creditors that the company's debts should be restructured rather than that those creditors should exercise their rights, including the right to put the company into liquidation."

He explained that Garuda, the Indonesian airline, had become insolvent; that Indonesian company law had no equivalent of our scheme of arrangement but that Singapore did (paragraphs 6 and 7). Accordingly, a scheme was proposed under English and Singaporean law. SEA Assets Limited appealed against the order of Lloyd J sanctioning the scheme. Two grounds of appeal are arguably relevant to this case. They are set out in paragraphs 58 and 59 of the judgment and disposed of at paragraphs 62 and 63:

> "58. First, Mr Cohen took the point that it was wrong for Garuda, an Indonesian company, to put forward schemes in England and Singapore with which it had no obvious connection when such a scheme was not permissible in Indonesia. He said that it was objectionable for Garuda to forum shop. But the reasons why Garuda chose not to seek a composition in Indonesia are fully explained in the Explanatory Statement, as I have already mentioned, and in Mr Satar's third witness statement he rejects the suggestion that there is no sufficient connection with Singapore and England. In my judgment there is nothing in this point.
>
> 59. Second, it is said that the effect of the Scheme is uncertain because it is not binding in Indonesia. I have already referred to the way the judge dealt with that point, which in my view cannot be criticised.
>
> […]
>
> 62. The Scheme Creditors voted overwhelmingly in favour of the Scheme, notwithstanding that by the date of the meeting the events of September 11th were known to them, and questions were raised about the impact of those events at that meeting. The vast majority of the Scheme Creditors were content with the proposal in the Explanatory Statement that the directors should be left to certify before the Scheme came into effect that there had been no material adverse change. In my judgment the court should be very slow to say that that was so unsatisfactory as to withhold its sanction.

> 63. For these reasons, I am wholly unable to accept that the judge has been shown to be plainly wrong in the way in which he exercised his discretion. On the contrary, he seems to me to have been plainly right".

62. That judgment was given on an application for permission to appeal. Nonetheless, it demonstrates reluctance to interfere with the discretion to entertain a scheme in this jurisdiction in order to plug a gap in the law of the country of the foreign company's incorporation, albeit in circumstances in which there was positive support from the Indonesian state and state-controlled entities (see paragraph 9 of the judgment).

63. *In re Rodenstock GmbH* [2011] EWHC 1104 (Ch) was a case in which Briggs J, as he then was, sanctioned a scheme in circumstances in which

> "i) the applicant Rodenstock GmbH ('the Company') is incorporated in Germany and has its Centre of Main Interest ('COMI') there;
>
> ii) the Company has no establishment in the UK, nor any assets here likely to be affected by the Scheme;
>
> iii) there exists no comparable jurisdiction under German law to sanction schemes of arrangement concerning solvent companies ('solvent schemes');
>
> iv) a recent decision of a German court has declined to recognise an English judgment sanctioning a solvent scheme in comparable, but not identical, circumstances, pursuant to Chapter III of the Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ('the Judgments Regulation'), upon the ground that an order for sanction by the English court is not a judgment within the meaning of Articles 32 and 33 of the Judgments Regulation;
>
> v) the small minority of the Company's creditors who voted against the Scheme have, through solicitors, asserted that the court has no jurisdiction to entertain the application or, in the alternative, that the court should not do so as a matter of discretion".

64. Rodenstock GmbH was part of a group of companies with its headquarters in Munich and production facilities in Europe and Thailand. Its products were distributed internationally through subsidiaries. It had significant dealings with customers in England. The company had outstanding senior debt which had been advanced under a facilities agreement governed by English law and which contained a jurisdiction clause giving the courts of England exclusive jurisdiction in respect of any dispute arising out of or in connection with the agreement. Some 56% in value of the senior lenders with whose rights the scheme was concerned were situated in England; the remainder were in Europe. The company had experienced financial difficulties as a result of which it was in breach of its financial covenants. It proposed a scheme of

arrangement with a view to enabling it to restructure itself in a way that would avoid going into a German insolvency process. The questions for consideration at the sanction stage were whether the court had jurisdiction and, if it did, whether it should exercise its discretion to sanction the scheme. The court did so on the basis that the company was "liable to be wound up"; the connection with the UK resulting from the choice of English law and exclusive English jurisdiction was sufficient for the court to exercise jurisdiction in relation to the company; furthermore, a decision to sanction the scheme would be legally effective in Germany.

65. I should, however, note one part of the judgment on which the Applicants rely (paragraph 66):

> "It would not in my view be right to treat the Senior Lenders' choice of English jurisdiction for the purposes of resolving disputes under or in connection with Existing Senior Facilities Agreement as involving a deliberate decision voluntarily to subject themselves to the English court's scheme jurisdiction."

Equally, though, Briggs J qualified that statement in paragraph 67:

> "Nonetheless the Senior Lenders' choice of English law clearly did have the consequence that their rights as lenders were liable to be altered by any scheme sanctioned by a court (whether or not the English court) to the extent that English law recognises the jurisdiction of that court to do so. The alteration of the English law contractual rights of the dissentient majority achieved by a scheme of arrangement…occurs because Parliament has legislated precisely to that effect by conferring upon the English court jurisdiction to do so."

66. The Applicants rely on a contrasting *dictum* in *Re Drax Holdings Ltd* [2004] 1 BCLC 1 in which Lawrence Collins J observed that "The English Court will not wind up a foreign company where it has no legitimate interest to do so, for that would be to exercise an exorbitant jurisdiction on international comity" (paragraph 24). He went on, however, to conclude that it was "not necessary for the purposes of section 425 [Companies Act 1985] that the grounds for winding up in section 221(5) [Insolvency Act 1986] exist" (paragraph 26) and to say that he was satisfied that the court had jurisdiction to order meetings to be convened because there was a sufficient connection with England (paragraph 36).

67. In *Re Magyar Telecom BV* [2013] EWHC 3800 (Ch) David Richards J built on *Drax* as follows:

> "14. The fact that a foreign company would not be wound up by the English court in the circumstances prevailing at the time of the scheme is not a bar to the court sanctioning the scheme, provided that there is a sufficient connection with this jurisdiction. In *Re Drax Holdings Ltd*, Lawrence Collins J said at [29]:

> 'That the companies fall within the definition of companies for the purpose of section 425 [Companies Act 1985, now section 899 Companies Act 2006] does not, of course, mean that there are no limitations to the exercise of jurisdiction under section 425. The court should not, and will not, exercise its jurisdiction unless a sufficient connection with England is shown.'

In that case, Lawrence Collins J found that there were many factors which pointed to the exercise of the jurisdiction being both legitimate and appropriate. Foremost among them was that the claims of creditors falling within the relevant class were governed by English law and were subject to a non-exclusive submission to the jurisdiction of the English court, as were the associated security documents, and that the security included very substantial assets within England.

15. In a number of recent cases, a sufficient connection has been found solely or principally in the fact that the rights of the relevant creditors were governed by English law and that the English Courts have an exclusive or non-exclusive jurisdiction in respect of disputes: see, among others, *Re Rodenstock GmbH*, *Re Primacom Holdings GmbH (No.1)* and *(No.2)* [2011] EWHC 3746 (Ch) and [2012] EWHC 164 (Ch), [2013] BCC 201, and *Re Vietnam Shipbuilding Industry Group* [2013] EWHC 2476 (Ch). Under generally accepted principles of private international law, a variation or discharge of contractual rights in accordance with the governing law of the contract will usually be given effect in other countries. This is also the effect of the Rome Convention, and of Council Regulation (EC) 593/2008 (the Rome I Regulation) which applies to contracts concluded as from 17 December 2009, the day after the date of the indenture in this case.

16. In this case, however, not only is the company registered in the Netherlands but the Notes are governed not by English law but by New York law. The purpose of this scheme is to affect the rights enjoyed by the Note Creditors under New York law by exchanging the existing notes for new notes and equity. The court will not generally make any order which has no substantial effect and, before the court will sanction a scheme, it will need to be satisfied that the scheme will achieve its purpose: *Sompo Japan Insurance Inc v Transfercom Ltd* [2007] EWHC 146 (Ch), *Re Rodenstock GmbH* at [73]-[77].

17. The case made by the company on the present application is that the requirements for a sufficient connection with the jurisdiction and for the scheme achieving its purpose can be satisfied."

I was also taken to the following passage:

"21. I am inclined to the view that the requirement to show a connection with England and the need to show that the scheme, if approved, will have a substantial effect are not wholly separate questions but, if not aspects of the same question, at least closely related. In applying the requirement for a sufficient connection with England to the exercise of the court's jurisdiction to sanction a scheme, Lawrence Collins J in *Re Drax Holdings Ltd* was applying the requirement that, before the court would make a winding up order, there must be a sufficient connection with England. This may, but does not necessarily have to, consist of assets within the jurisdiction. The reason for such connection in the context of winding up is not the product of abstract theory but the need for the winding up order to have a practical effect: see, for example, *Re Compania Merabello San Nicholas SA* [1973] Ch 75 at 86 G-H per Megarry J. Although in theory a winding up order against a foreign company has as a matter of English law worldwide effect, the courts have always recognised that in practice its effect will be confined to the United Kingdom. (I leave aside here the effect of the Insolvency Regulation and the UNCITRAL Model Law.) The presence of assets within the jurisdiction is but the most obvious example of a connection which will give practical effect to a winding up order.

22. Likewise, the presence in England of substantial assets belonging to a company proposing a scheme with its creditors could in an appropriate case provide the requisite connection, because the scheme if sanctioned would have the practical affect of preventing execution by the relevant creditors against those assets, save in accordance with the terms of the scheme. The presence of a sufficient number of creditors in England subject to the personal jurisdiction of the court might also supply the necessary connection, as those creditors would be bound to act in accordance with the scheme, both within and outside the jurisdiction. The importance of the connection provided in cases where the rights of creditors are governed by English law lies in the effect which foreign courts may be expected to give to an alteration of those rights in accordance with English law.

23. In the present case, the significance of moving the COMI of the company to England again lies not so much in the establishment in the abstract of a connection between the company and England but, on the basis that any insolvency process for the company would be undertaken under English law in England, providing a solid basis and background for a scheme under English law which altered contractual rights governed by a foreign law.

24. […]

> 25. On any footing, the circumstances of this case and the evidence filed in support of the application establish that there exists a sufficient connection with England and that the scheme will substantially achieve its purpose."

I note again, however, that recognition and enforcement were not going to be a problem (paragraph 30).

Annulment

68. Section 282(1)(a) Insolvency Act 1986 deals with annulment:

"(1) The court may annul a bankruptcy order if it at any time appears to the court –

(a) that, on any grounds existing at the time the order was made, the order ought not to have been made;
(b) […]

(2) […]
(3) The court may annul a bankruptcy order whether or not the bankrupt has been discharged from bankruptcy.
[…]".

69. There is substantial agreement as to the law so I can deal with it briefly. The following propositions are set out in Ms Toube's skeleton argument (paragraph 36):

(a) The court does not define or restrict the persons who may apply for annulment. All the applicant has to do is satisfy the court that he has some kind of legitimate interest (*Muir Hunter on Personal Insolvency* paragraph 3-580).

(b) A court can at a later stage reconsider the bankruptcy on grounds that were not then known to the court but existed at the time (*Hunt v Fylde BC* [2008] BPIR 1368, [14]) and facts that existed at the time, but were uncertain (such uncertainty being resolved after the date of the bankruptcy order) (*Watts v Newham LBC* [2009] BPIR 718, [76-77]). The words "any grounds existing at the time the order was made" in section 282 (1)(a) should be construed extensively, and so as to comprehend the facts which then existed but which were not then known to the court (*Muir Hunter on Personal Insolvency* paragraph 3-583).

(c) The question of annulment is discretionary (*Skarzysnki v Chalford Property Co Ltd* [2001] BPIR 673). In particular, the court will not annul a bankruptcy on a technicality if there is no point in so doing because the debtor still owes the debt

and cannot pay it, as in those circumstances the creditor can simply present a new petition (*Skarzysnki v Chalford Property Co Ltd* [2001] BPIR 673 at para 24; *Omokwe v HFC Bank* [2007] BPIR 1157 at para 39).

Mr Gourgey makes much the same points in his skeleton argument.

70. Mr Swainston (in paragraph 23 of his skeleton argument) contends that the court took into account proper and relevant factors when making the bankruptcy order so that "it is […] hopeless, with respect, for the Applicants to contend that no reasonable registrar could have made the bankruptcy order, which would be the relevant test:

> 'Thus, I cannot interfere with the bankruptcy registrar's decision unless I am satisfied of a number of possible matters.
>
> 1. Did the court below take into account material which it ought not to have taken into account?
>
> 2. Did the court below fail to take into account material which it ought to have taken into account? And,
>
> 3. If neither of those apply, was the exercise of discretion under section 282(2) such that no reasonable judge could have exercised it in the way in which the bankruptcy registrar exercised that discretion below, sometimes referred to as 'Wednesbury unreasonableness'?
>
> The fact that, had I been the judge below, I might have exercised the discretion in a different way would not be sufficient. It is quite plain that in regard to the exercise of discretion, there is a generous band throughout which a trial judge cannot be criticised on appeal for the way he has exercised it. The Appeal Court has to be satisfied that that generous band of permissible methods of exercising discretion has been exceeded on the facts of the particular case'.

(*Owo-Sampson v Barclays Bank Plc* [2004] BPIR 303 *per* Judge Haworth at [25])".

71. Ms Toube submits that *Owo-Sampson* is irrelevant since the judge was dealing with an appeal rather than annulment or rescission. Her position is that if the order ought not to have been made the court ought to annul unless there are good reasons for not doing so. I shall return to this point later and simply note at this stage that *Owo-Sampson* was about an appeal as opposed to an annulment.

Review and rescission

72. Section 375(1) Insolvency Act 86 provides :

> "Every court having jurisdiction for the purposes of the Parts in this Group may review, rescind or vary any order made by it in the exercise of that jurisdiction."

73. Again, the law in relation to the jurisdiction is well-established. The classic formulation of the applicable legal test is in *Papanicola v Humphreys* [2005] 2 All ER 418 (at [25]) in which Laddie J set out the following principles:

(a) The section gives the court a wide jurisdiction to review, vary or rescind any order made in the exercise of the bankruptcy jurisdiction.

(b) The onus is on the applicant to demonstrate the existence of circumstances which justify the exercise of the jurisdiction in his favour.

(c) Those circumstances must be exceptional.

(d) The circumstances relied upon must involve a material difference to what was before the court when it made the original order. In other words there must be something new to justify the overturning of the original order.

(e) There is no limit to the factors which may be taken into account. They can include, for example, changes which have occurred since the making of the original order and significant facts which, although in existence at the time of the original order, were not brought to the court's attention at the time.

(f) Where the new circumstances relied upon consist of or include new evidence which could have been made available at the original hearing, any explanation by the applicant given for the failure to produce it or lack of such explanation are factors which can be taken into account in the exercise of the discretion.

74. Later authorities have amplified these principles:

(a) The discretion of the court is a wide one, and on review the court should consider new material that has come to light since the order (*Ross v HMRC* [2012] BPIR 843 at [29]).

(b) Review of a bankruptcy order will be limited to cases where there is new material and/or has been a material change of circumstances (*Crammer v West Bromwich Building Society* [2012] BPIR 963 at [7])

(see paragraphs 49-50 of Ms Toube's skeleton argument and paragraph 14 of Mr Gourgey's).

Misleading information

75. The law on misleading information in relation to petitions can also be dealt with shortly. In *Official Receiver v Mitterfellner* [2009] BPIR 1075 I suggested that giving misleading information in a debtor's petition might warrant annulling the bankruptcy order. The suggestion has gained traction as a result of *dicta* in *Re Hagermeister* [2010] BPIR 1093, where incomplete information was held to justify setting aside the bankruptcy order, and, importantly, in *Die Sparkasse Bremen AG v Armutcu* [2012] EWHC 4026 (Ch) in which Proudman J said:

> "As the petition was an ex parte matter great importance should in my judgment be attached to full and frank disclosure. A finding of material non-disclosure is sufficient by itself to afford discretion to annul a bankruptcy".

For the sake of completeness I also mention *Re OJSC ANK Yugraneft* [2009] 1 BCLC 298, *Re Eichler (No 2)* [[2011] BPIR 1293 and *Irish Bank Resolution Corporation Ltd v Quinn* [2012] NICh 1 where the same or a similar point is made.

Utility

76. I shall deal with the principles which in my view emerge from the foregoing case law later. It is, however, common ground, I think, that the court should only make a bankruptcy order or grant similar relief in respect of a foreign individual or an overseas corporation if there is utility or some benefit in doing so (see paragraph 73 of Mr Gourgey's skeleton argument, paragraph 40 of Ms Toube's and part II(1) of Mr Swainston's). The Applicants say that the discretion to make a bankruptcy order should be exercised only in cases where (a) the debtor has established a real connection with this jurisdiction and (b) there is a reasonable probability that there is utility to the bankruptcy and benefit to creditors as a whole. They recognise that in *Re Thulin* utility to creditors was rightly taken into account but contend that different considerations apply to a debtor's petition "which is of its nature self-serving and where the debtor's argument that a bankruptcy order would bring benefit to creditors should be viewed with greater caution and where issues of improper forum shopping may arise" (Mr Gourgey at paragraph 74 of his skeleton; Ms Toube made similar points in her closing submissions). That is the more so, they say, where the regime for insolvent debtors in their home jurisdiction is more stringent than in this country and goes as far as to exclude bankruptcy or any possibility of discharge from indebtedness of any kind as it does in this case. I deal with other points they make below.

77. Mr Swainston puts the matter this way

> "In practice, a very important and arguably over-arching factor is whether there is a need for a due and proper administration of the debtor's affairs and whether an English bankruptcy can contribute to that objective."

He identifies a number of factors in support of there being utility or benefit in Mr Kekhman's bankruptcy in this country.

78. The first is the absence of an alternative bankruptcy regime in Russia, which he describes as "relative utility": the utility of an English bankruptcy may flow from or be strengthened by the absence of an alternative elsewhere. In support of that he draws again on *Re Thulin, Banque des Marchands de Moscou v Kindersley* ("Prima facie if the local law of the dissolved foreign corporation provided for the due administration of all the property and assets of the corporation wherever situate among the persons properly entitled to participate therein, the case would not be one for interference by the machinery of the English courts"), *Re a Company* and a case I have not so far mentioned, *Shepherd v Legal Services Commission* [2003] BCC 728, in which Mr Gabriel Moss QC, sitting as a deputy judge of the High Court, considered the question whether it was just and equitable to make a bankruptcy order where the petitioner accepted that the debtor had no assets but the debtor claimed he had in the form of an action against the petitioner. The learned deputy judge said this about purpose (or utility):

> "It seems to me that that purpose, which appears to be the purpose for which the Legal Services Commission has brought these bankruptcy proceedings, is a proper purpose because it seeks 'the proper administration' of the debtor's assets within the meaning of that phrase as used by Harman J in the *Re a Company No. 001573 of 1983* case I have referred to above. It also seems to me that a bankruptcy order is justifiable on the grounds that there is a proper reason other than simply the realisation and distribution of assets, namely an investigation by the trustee of the affairs of the debtor and in particular [the debtor's] very serious allegations against the conduct of the Legal Services Commission. That would be a proper purpose for insolvency proceedings in terms of the approach of Chadwick J in the *Bell Group* case" [*Bell Group (UK) Holdings Ltd* [1996] BCC 505].
>
> […]
>
> "I am…satisfied…that there is no case to be made out of an attempt to stifle any future proceedings but merely an understandable attempt to ensure that they are considered by an independent and objective officer of the court" (734 A-C).

79. That leads neatly to Mr Swainston's second claim for utility, the need for investigation. He relies on the *dicta* of Gabriel Moss QC above, on a passage from the judgment of Chadwick J in the *Bell Group* case and on the judgment of the Court of Appeal in *Stocznia Gdanska v Latreefers*:

> "In my view the question which the court has to ask in each case in which there are no assets is whether it is indeed just and equitable to make a winding-up order? It may well be just and equitable to make such an order in order to enable an investigation to take place. In circumstances in which I find

> that assets having a book value of some £353m have a nil realisable value, it seems to me that an investigation is undoubtedly called for (*Bell* page 514).
>
> [T]he provisional liquidators have…expressed the view that Latreefers has a potential claim for wrongful and perhaps fraudulent trading which require[s] further investigation.
>
> In summary we consider that the potential claims for misfeasance and wrongful and fraudulent trading do provide a reasonable possibility of benefit to [Stocznia Gdanska] and other creditors of Latreefers so as to comply with the second core requirement" (paragraphs 39 and 40).

80. In part III of his skeleton argument he relies on two other matters which I understand to go to utility: the possibility of an orderly arrangement of Mr Kekhman's affairs as opposed to a disorderly asset grab and the economic rehabilitation of Mr Kekhman himself.

81. The Applicants take issue with the proposition that this bankruptcy has utility. Their primary position is that Mr Kekhman, as a Russian citizen, is bound by the law of his country, which is the proper forum for dealing with his interests and those of his creditors. They say openly that they favour the Russian regime which allows creditors to pursue their debtors even to the crack of doom and make the point that that is the regime they envisaged when they advanced money to his companies and took guarantees from him. The English court should not assist Mr Kekhman by enabling him to avoid the regime to which he is subject as a Russian citizen.

82. Mr Swainston deals with the question of assets in the jurisdiction in this way (which I take directly from his skeleton argument):

> "17. As appears from the leading and most recent authority, above at (1) [*Re Thulin*], the presence of assets within this jurisdiction is not dispositive as to the utility or otherwise of an English bankruptcy. However, it is a positive factor if assets exist within the jurisdiction, even if they have been brought here for the purpose of the bankruptcy, or if the trustees in bankruptcy are envisaged to be able to take control of international assets.
>
> 18. Conversely, where a party (whether the debtor or a creditor) wishes to argue that there are no assets in the jurisdiction, the burden of proving no assets is a heavy one, as appears from analogous cases under section 5(3) of the Bankruptcy Act 1914 (power to dismiss a petition '*for other sufficient cause*'). As to the burden of proof, note *Re Field* [1978] 1 Ch. 371 *per* Megarry VC at pp 375-7 ('*clearly convinced that there are no assets and will be none*') and also noting that such a plea is rarely successful. See also *Re Betts* [1897] 1 Q.B. 50, at p.52 and *Ex Parte Painter* [1895] 1 QB 85 *per* Vaughan-Williams J at pp 88-91. Historically, a plea of no

> assets could be overcome by the existence of a prospect of assets being recovered, even if dependent on the assistance of a foreign court: see e.g. *Ex p. McCulloch* (1880) 14 Ch.D. 716 ."

83. He also relies on the English law connection of which much was made at the hearing of the petition. (Mr Kekhman, it will be recalled, had provided a personal guarantee to a syndicate of European banks which was governed by English law; it also included an LCIA arbitration provision and permitted the security agent to refer a dispute to the English courts rather than arbitration. Mr. Kekhman's liability under the guarantee was estimated to be in excess of $80 million and thus the largest single obligation of all of Mr Kekhman's potential guarantee obligations (see again the statement of affairs at A/4)). Mr Swainston points out that it was a connection of exactly this kind that weighed with the court in *Re Magyar Telecom BV*. We have also seen that it was a factor in *Re Rodenstock*.

84. The Applicants say that the only asset in the jurisdiction was the £200,000 Mr Kekhman brought into the country and that he should not have brought it in as it was subject to the arrest order. Given the size of the bankruptcy, that sum was in any event *de minimis* and was always going to be consumed by the trustees' fees and expenses, which is precisely what has happened; so no benefit to creditors from that. The majority of Mr Kekhman's remaining assets were always located in Russia and were, like the £200,000, subject to arrest, so they could never have been realised in the bankruptcy, leaving to one side for the moment the problem of recognition. Assets held in South America and elsewhere will almost certainly not be easily realised as a result of the bankruptcy order. In any event they are not assets of Mr Kekhman whose interest in them is indirect through his shareholding. They contend in any event that those assets have no real value so there will be no return via the shares in the VK Family Private Foundation either since it too is subject to a charge in favour of OJSC Bank St Petersburg and is insolvent. They also point to what they describe as the opaque structures through which Mr Kekhman conducted his corporate dealings and the likely difficulty of getting to the bottom of them in the absence of the ability of a trustee to compel the provision of information from persons in Russia and other countries whose assistance will almost certainly be needed but which may well not be forthcoming.

85. As for connection, they dispute the adequacy of the English law and English jurisdiction clauses as having relevance to the bankruptcy (*Re Rodenstock*). They make the same point about the adequacy of the committal proceedings in the Commercial Court for the purpose of establishing a connection.

86. Putting things perhaps rather kindly, Mr Swainston contends that many of the factors on which he relies "resonate" with those I took into account when making the bankruptcy order. He lists them as being:

> "(1) the English law provisions in the personal guarantee by Mr. Kekhman of a substantial loan to JFC Russia from a Syndicate of European banks is '*a point of considerable strength*' and '*is a good reason for coming here for the bankruptcy*' (A/9/7A);

> (2) when someone is insolvent there needs to be an orderly administration of the insolvent estate (A/9/8-9);
>
> (3) a debtor on the face of it is entitled to the protection of bankruptcy if he is insolvent in a way that a creditor is not necessarily entitled to a bankruptcy order and this right 'would outweigh any opportunistic representations made by creditors' (A/9/7H & 9C-D);
>
> (4) in Russia there is no personal bankruptcy jurisdiction so that Mr. Kekhman has '*no incentive to pick himself up*' (by obtaining a discharge) (A/9B);
>
> (5) this was not a typical 'COMI' (i.e. forum shopping case) where the debtor was seeking to avail himself of a more favourable insolvency regime (A/9D);
>
> (6) if Mr. Kekhman's beneficial interest in the VK Foundation was available to be realized as an asset in his bankruptcy, there is '*potentially a huge benefit*' (A/10A). (In a footnote he reminds us that the Curacao receiver of the VK Foundation has recognized the primacy of the English bankruptcy to which he defers: see para 13 of Mr. Lewis's third statement [B/34/4]).''

Russian law

87. This is a convenient point at which to turn to some important questions of Russian law. Two arise: first, recognition/enforceability of the bankruptcy order in the Russian Federation, which goes to utility, and second, the effect of the arrests, which goes to utility and non-disclosure.

88. A major plank of the Applicants' case is that, contrary to what the court was told when the bankruptcy order was made but as Mr Registrar Jones correctly foreshadowed, there was always going to be a problem with the recognition and enforcement of an English bankruptcy order; indeed the Applicants contend that there is not and never was any prospect whatsoever of recognition in the Russian Federation. Thus, they say, a major use of the bankruptcy falls away.

89. I have had the privilege of reading and hearing expert testimony from three prominent Russian academic lawyers, Professor Dmitry V Dozhdev (for Bank of Moscow), Professor Vladimir Vladimirovich Yarkov (for Leasing) and Professor Alexander Petrovich Sergeev (for Mr Kekhman). (Permission to adduce expert evidence from academic lawyers as opposed to practising lawyers was given, I should mention, because I was told that academic legal opinion carries more weight in Russia than that of a practising lawyer.) I am grateful to all three experts for their careful written reports and the extensive accompanying materials (sufficient, I suspect, to form the basis of a university dissertation), the clarity with which they dealt with the questions put to them and the patience with which they explained the relevant Russian law to the court and to the parties' advocates. I have no doubt whatsoever about the *bona fides* of the opinions they have expressed. Reluctance or refusal on my part to accept

any of the propositions put forward by them is the product of the uncomfortable necessity of deciding between competing propositions rather than a sign of disrespect.

90. The first question I have to answer by reference to their evidence is whether the courts of the Russian Federation will recognise and/or enforce in that country an English bankruptcy order made against a Russian citizen.

91. Before dealing with what the experts say about that I should remind myself what Mr Torkanovskiy said in his report of 3 October 2012 (F/42). In paragraph 3 he said:

> "I have been asked by Mr Kekhman to opine…as to whether the Order [a bankruptcy order] can be recognised and enforced in the Russian Federation. I believe that the Order can be recognised and enforced as explained below."

In a 27 paragraph report covering six pages he explained his reasoning in a manner which appears to be well thought out and to take into account all the matters one would expect it to. He also, incidentally, explains that notice need not be given to creditors "because the Order is not to be enforced 'against' creditors" (paragraph 24).

92. Turning to the experts themselves, I think it is convenient to begin by noting some points on which they all agree. These are set out in a joint memorandum (H/53). The following propositions are common ground ((a) from the generality of the expert evidence; (b)- (e) summarise the material at page 2 of the joint memorandum):

> (a) Russia has a bankruptcy law, the Russian Federation Federal Law on Insolvency (Bankruptcy), 2002/127-FZ of 26 October 2002 (G1/48/27).
>
> (b) However, that legislation does not currently provide for a Russian citizen who is not a sole trader [*individualniy predprinimatel*][2] to be declared bankrupt because the relevant provisions have not come into force.
>
> (c) If such a law were in effect, the arbitrazh courts would be the competent courts to hear insolvency (bankruptcy) cases.
>
> (d) Cases concerning the recognition and enforcement of the judgments of foreign courts in business disputes are within the competence of the arbitrazh courts.
>
> (e) There have been no instances in the Russian Federation in which a bankruptcy judgment from a foreign court against a Russian citizen who was not a sole trader has been recognised.

93. The points of disagreement follow. Professor Dozhdev says that the bankruptcy order cannot be recognised and enforced in the Russian Federation for the following reasons:

[2] We used the shorthand term "entrepreneur" at the hearing.

"1) There is no international treaty that, according to Russian procedural law, would be stand-alone grounds for the recognition and enforcement of the judgment of a foreign court in Russia – the principle of conventional exequatur (para. 10; 21; 26[3]).

2) The Russian courts interpret the principle of reciprocity very narrowly, as a negative test (para. 20; 21); in this case there can be no reciprocity because, in Russia, a citizen who is not a sole trader cannot be declared bankrupt (para. 20; 21.1; 23.3). The fact that there is no regime governing the bankruptcy of Russian citizens is an intentional expression of the will of the Russian legislator to preclude such an event (para. 8; 22.4; 23.5).

3) A system of transnational bankruptcy cannot be constructed upon the principle of reciprocity (para. 20) and that principle cannot serve as an alternative to an international treaty (para. 10; 21; 23.2; 26).

4) The Russian courts proceed on the basis of the principle of territoriality with regard to bankruptcy, which is enshrined in statute (para. 21.1; 24.1; 24.2; 30); only a Russian court can commence bankruptcy procedures in Russia (para. 18; 19).

5) Russian law does not envisage a procedure for co-operation with a foreign court in a bankruptcy case and there is no relevant court practice; a bankruptcy order issued in England against a Russian natural person cannot be directly enforced on Russian territory and therefore must fail (para. 14; 16; 17; 21.2; 23.1; 23.2; 27).

6) The powers of a trustee in bankruptcy appointed by an English court cannot be recognised because the Russian courts proceed on the basis that only a Russian judge can be appointed administrator (para. 18;19; 25; 26). The trustee's in bankruptcy rights to property that requires registration in Russia cannot, under Russian legislation, be founded upon a bankruptcy order adopted by a foreign court because such powers are part of the exclusive competence of the Russian courts (para. 22.2; 26).

7) A Russian court might have doubts as to the final nature of the Bankruptcy Order issued by the English court (para. 13, 28, 29).

8) The Russian court might point out that the Russian creditors have not been duly and promptly notified of the hearing in the English court (para. 22.1)".

[3] The references are to the underlying written reports.

94. Professor Yarkov says that neither the order nor the powers of the trustee in bankruptcy can be recognised for the following reasons:

> "1) The institution of justiciability and the institution of exclusive competence are part of a single general institution within procedural legislation – the "Competence of the Courts" (Chapter 4 RF APC). An arbitrazh court will refuse to recognise and enforce the judgment of a foreign court entirely or in part if, according to an international treaty of the RF or federal law, the case is within the exclusive competence of the court in the RF or federal law, the case is within the exclusive competence of a court in the RF (reproduction of wording of Art. 244(1)(3) RF APC). A bankruptcy case is within the exclusive competence of the RF arbitrazh courts because (1) the arbitrazh courts may hear bankruptcy cases regardless of whether the parties to them are legal entities, citizens with the status of individual entrepreneur or citizens without such status ("Arbitrazh courts' special jurisdiction" – Art. 33(2) RF APC); (2) bankruptcy cases may not be referred to arbitral tribunals (Art. 33(3) of the Federal Law "On Insolvency (Bankruptcy)" – Jurisdiction and justiciability of bankruptcy cases"); and (3) applications to have a debtor declared bankrupt are submitted to the arbitrazh court in the locality of the debtor (citizen's place of residence in Russia) and the debtor may not change that rule (Art. 38(4) RF APC – "Exclusive jurisdiction"). Article 248 of the RF APC and Art. 403 of the RF CPC are dedicated to the exclusive competence of the arbitrazh courts in the Russian Federation as concerns cases to which foreign persons are party and therefore they can have no bearing upon the question of the bankruptcy of Mr Kekhman, who is not a foreign citizen (paras. 3.16-3.23,340);
>
> 2) The fact that there is no regime governing the bankruptcy of RF citizens is a deliberate expression of the will of the Russian legislator to preclude such a possibility (para. 3.38);
>
> 3) [T]he differences in the legal doctrines of Russia and the United Kingdom concerning the regime for personal bankruptcy preclude the application of the principle of reciprocity (para. 3.38.2);
>
> 4) Russian procedural legislation prohibits the referral of a bankruptcy case against a Russian citizen to a court outside the place in the Russian Federation in which the citizen resides. For this reason, the application to the English court is a breach of the imperative norms relating to competence for such disputes (para. 3.38.3);
>
> 5) The principle of reciprocity only allows foreign court judgments to be recognised in the Russian Federation if they concern foreign persons, not Russian citizens (para. 3.39);

> 6) Mr Kekhman's lex personalis is Russian law because he is an RF citizen (Art. 1195 of the RF Civil Code. Mr Kekhman's legal capacity [*grazhdanskaya pravosposobnost]* and capacity to contract [*deesposobnost*] are determined by Russian law (Art. 1196 and 1197 of the RF Civil Code) (para. 3.40.3);
>
> 7) The norms concerning competence are governed by law that is by its nature public-procedural and they are imperative. The Civil Code governs property relations and does not apply to judicial proceedings (Art. 2 and 3 of the RF CC). Judicial proceedings are governed by procedural statute which is, by its nature, imperative (Art. 3 of the RF APC and Art. 1 of the RF Civil Procedure Code ("RF CPC")) (para. 3.8 and 3.9).
>
> 8) The Bankruptcy Order issued against Mr Kekhman cannot be recognised and enforced in the Russian Federation (paras. 3.16- 3.23, 3.38, 3.39, 3.40)".

95. Professor Sergeev approaches the question from a different angle. He says that there are no legal obstacles to the bankruptcy order being recognised and enforced in Russia because:

- "Art. 248 of the RF APC and Art. 403 of the RF CPC give an exhaustive list of categories of cases that are within the exclusive competence of the Russian courts. Bankruptcy cases are not on the list (question not considered).
- The institution of justiciability and the institution of exclusive competence are different institutions within procedural legislation (question not considered).
- The English court's Bankruptcy Order against Mr Kekhman must be treated as a final court judgment for the purposes of its recognition and enforcement in Russia.
- The fact that the creditors were not notified when the English court heard the bankruptcy case against Mr Kekhman cannot be grounds for refusing to recognise and enforce the Bankruptcy Order (question not considered).
- The fact that a natural person who is not a sole trader cannot currently be declared bankrupt in Russia does not attest that the Russian legislator deliberately precluded such bankruptcy; on the contrary, Russian legislation does contain the relevant rules but they have not been put into force owing to opposition from the banks (para. 38, 41, 42).

> - [A] comparative analysis of the English and Russian rules for the bankruptcy of natural persons shows that there are no fundamental differences between them (para. 25).
>
> - [T]he application to the English court does not breach the imperative norms of Russian law concerning competence for such disputes because bankruptcy cases are not within the exclusive competence of the Russian courts (question not considered).
>
> - The English court's Bankruptcy Order against Mr Kekhman can be recognised and enforced in the Russian Federation on the basis of the principle of reciprocity because there are no grounds for denial on the basis that natural persons cannot currently go bankrupt in Russia or for a narrow interpretation of the principle as intended only to apply when foreign citizens are being declared bankrupt in Russia (question not considered)".

96. The second question is whether Mr Kekhman was entitled to bring the sum of £200,000 into this jurisdiction in the face of a Russian court order.

97. On 16 April 2012, on the application of OJSC Sberbank, the Kuybyshev District Court of St Petersburg granted interim relief in the form of what the court's ruling described as "a set of steps guaranteeing, if the claims are not satisfied, that the decision of the court would be enforceable" (see E/40/97). There is a recital to the effect that failure to impose interim relief could render the court decision unenforceable. What I take to be the dispositive parts of the order read:

> "To satisfy the claim of OJSC Sberbank of Russia, freeze the assets of Vladimir Abramovich Kekhman, regardless of their form or location, up to the amount of the claim – not to exceed RUB 1,410,275,018.96 [approximately £23 million], pending resolution of the case…on its merits.
>
> The ruling is subject to immediate execution but is subject to appeal before the St Petersburg City Court within 15 days […]
>
> This ruling may be reversed by the Kuybyshev District Court of St Petersburg pursuant to an application of the parties".

98. ZAO Raiffeisenbank and JSC Sberbank also arrested four freehold properties in St Petersburg in May and October 2012 respectively (I do not think I have those orders but they are mentioned by the trustee in his report of 3 May 2013, (H/55/4 paragraph 2.7)).

99. There is disagreement about the effect of those orders (or at least the first). The Applicants contend that the effect of the interim order was to freeze Mr Kekhman's assets in the jurisdiction. Their experts say the order had immediate effect. Professor

Yarkov was quite clear about this. Relying on the words "a set of steps," Mr Swainston contends that a Russian freezing order differs from an order made in this jurisdiction in that a Russian order is not effective when made but only when certain other steps have been taken: the court order is the first step, the next is for the bailiffs to recognise the order (they make their own order); further steps by the bailiffs may include investigation to identify and earmark the assets necessary to secure the order. Only when the bailiff notifies the debtor of the assets that are frozen does the order take full effect.

Conclusions

100. I shall begin with the matter of jurisdiction, since, although it is common ground that there was jurisdiction to make the bankruptcy order, the Applicants suggest that jurisdiction in this case is in some way circumscribed by reason of what they see as its tenuous or transitory basis.

101. I agree with Mr Swainston's submission that jurisdiction founded on personal presence in England and Wales on the day of presentation of the petition should not be circumscribed by any condition that the legislature has not seen fit to impose (see his submissions on *Re Painter* in paragraph 51 above).

102. I reject the submission advanced by Ms Toube that jurisdiction founded on personal presence in England and Wales on the day of presentation of the petition is a less secure jurisdictional foundation than any of the alternatives set out in section 265(1)(a)-(c). There is no hierarchy in the provisions. Domicile can be a very slender link to this country, one capable of surviving decades of absence, resting on birth, choice and such compelling indicators as the location of a grave plot. Residence need not be prolonged. I briefly mention two cases not referred to in order to illustrate the point. The first is well known. *Re Hecquard* (1890) 24 QBD 71, 6 Morr 282 concerned a Frenchman who came to England to conduct an action which he had commenced in the English courts. He took furnished rooms in a house in London which he occupied for just three months with his wife and servants (a period we would regard as suspiciously short if relied on by a debtor in support of a shift of his centre of main interests to this country from another EU member state). During that three month period he made frequent visits to France, and at the end of the three months returned there. Later in the same year a bankruptcy petition was presented against him. The court held that there was jurisdiction since he had had a dwelling-house in England within a year before the date of the presentation of the petition, within the meaning of section 6(1)(d) Bankruptcy Act 1883 such that the petition had been properly presented against him. M. Hecquard's short residence could also be said to have been fleeting. Last year in *Re Aydin* [2013] BPIR 539 I explained the reasons why I was persuaded that a very short time of ordinary residence within the three year period mentioned in section 265(1) could be sufficient for the purpose of founding jurisdiction under section 265(1)(c)(i).

103. Similarly, I do not consider that the fact that this petition is a debtor's petition as opposed to a creditor's petition in some way weakens its jurisdictional basis. That too could have been legislated for if it had been the intention of Parliament.

104. The authorities, and in particular the corporate ones, demonstrate that the courts here are prepared to countenance what is in reality forum shopping, albeit of a positive, by

which I mean a legitimate, kind (*Banque des Marchands de Moscou v Kindersley*, the *Garuda* case and *Re Rodenstock* are examples). The Court of Appeal has recognised that there can be good and bad individual forum shopping. In *Shierson v Vlieland-Boddy* it said (*per* Chadwick LJ at paragraph 56):

> "It is a necessary incident of the debtor's freedom to choose where he carries on those activities which fall within the concept of 'administration of his interests', that he may choose to do so for a self-serving purpose. In particular, he may choose to do so at time when insolvency threatens. In circumstances where there are grounds for suspicion that a debtor has sought, deliberately, to change his centre of main interests at a time when he is insolvent, or threatened with insolvency, in order to alter the insolvency rules which will apply to him in respect of existing debts, the court will need to scrutinise the facts which are said to give rise to a change in the centre of main interests with that in mind. The court will need to be satisfied that the change in the place where the activities which fall within the concept of 'administration of his interests' are carried on which is said to have occurred is a change based on substance and not an illusion; and that that change has the necessary element of permanence."

Ms Toube says that the case is of limited or no relevance because it is about centres of main interest, which is a fair point, but if a certain degree of freedom can be accorded to a debtor in the restricted jurisdictional scope envisaged by the EC Regulation, I do not see why a debtor whose petition is not governed by that restrictive jurisdictional regime should not also be able to invoke an available jurisdiction for a self-serving purpose, provided of course, that he does so properly and there are no countervailing factors to which equivalent or greater weight should be given. That is, as we have seen, precisely what many companies are doing on an increasing scale.

105. A number of principles emerge from the case law. They seem to be:

> (a) the courts in England and Wales will act to fill lacunae in foreign jurisdictions when it is proper to do so (*SEA Assets Ltd v Garuda* and *Re Rodenstock* etc.);
>
> (b) the existence of insolvency proceedings in another jurisdiction is a relevant consideration but not a bar to making an order (*In re a Debtor (No 737 of 1928)*; *Re Thulin*);
>
> (c) the presence of assets in the jurisdiction may once have been an important factor (Lord Jessell MR and Baggallay LJ in *Ex parte Robinson*) as may be the fact that there is a prospect of there being assets in the jurisdiction (*Re Betts*, *Ex parte Painter* and *Re Thulin*); however, the absence of assets never has been an absolute bar to making an order (*In re Field*; *Re Thulin*, where the judge talked of letting the petitioner have its order for what it is worth); it is plainly not now essential that there be

assets (*International Westminster Bank plc v Okeanos Maritime Corp* and *Stocznia Gdanska SA v Latreefers Inc*);

(d) a claim may be an asset (*International Westminster Bank plc v Okeanos Corp*; *Shepherd v Legal Services Commission*);

(e) even when it was thought there had to be assets or someone submitting to the jurisdiction the real test was the existence of "some commercial subject-matter on which the winding-up order can operate" (*Banque des Marchands de Moscou v Kindersley*);

(f) however, there is a need to show some benefit (*Stocznia Gdanska SA v Latreefers SA*; *Re Magyar Telecom BV*); the court will not make an order where there is no purpose or it would be a waste of costs (*Ex parte Robinson*; *Re Betts*);

(g) the presence of debts and debtor here may be a consideration (*In re a Debtor (No 737 of 1928*) ;

(h) a sufficient connection may be found in commercial dealings (*International Westminster Bank plc v Okeanos Maritime Corp*);

(i) submission to the jurisdiction appears to be relevant (*Banque des Marchands de Moscou v Kindersley*);

(j) the need for investigation is a relevant factor in considering whether or not to make an order (*In re Field, Re Betts, Re Thulin*; *Shepherd v Legal Services Commission*);

(k) there must be a benefit to someone from making the order (*Stocznia Gdanska SA v Latreefers Inc et passim*);

(l) the rehabilitation of the debtor or preservation of something for his benefit may be taken into account *(Ex parte Painter*).

Not all will be relevant in every case; some are not directly relevant to this case.

106. It is perhaps unsurprising that the cases take such varying approaches and throw up apparently contradictory (or perhaps complementary) propositions, since connection and utility can take many forms. In his closing submissions Mr Gourgey recognised that it was difficult to identify a "formulaic approach to discretion". I think he is right. As Lloyd J said at first instance in *Stocznia Gdanska SA v Latreefers Inc*, the principles change over time. I note here too Morritt LJ's reference in paragraph 31 of his judgment in *Stocznia Gdanska v Latreefers* to the way the judgment in the *Banque des Marchands de Moscou* case should be viewed, namely as laying down what was sufficient "in that case" as opposed to in all cases. (Something of the same thinking may arguably be discerned in David Richards J's point in the *Magyar Telecom BV* case about the link between questions of connection and effect.) It seems to me, if that is right, that the cases should be approached on that footing and not on the footing that

they set out hard and fast rules that must be adhered to in all cases and in all circumstances. That is not to say that the discretion may be exercised capriciously or wantonly. The common thread in the authorities appears to me to be that there must be some purpose in making the order that is sought and that such purpose may arise in various ways, for example as a result of the presence of assets, or some contractual connection to the jurisdiction; it may arise where there is need to fill a lacuna in the law of other jurisdictions, or where there is some other benefit for the creditors and/or the debtor or some combination of the foregoing. The approach has been characterised by a degree of pragmatism, albeit principled pragmatism. Thus the courts here will probably not exercise the discretion to wind up a foreign company or bankrupt a foreign individual where there are no assets, there is no connection to the jurisdiction and there is no purpose to be fulfilled (at one end of the scale); but they probably will if there is an obvious benefit, a strong connection and something to administer (at the other end of the scale). There is necessarily a wide spectrum between those two polarities.

107. If I am right about that, Mr Swainston's submissions on *Owo-Samson* take on a meaning that, I confess, eluded me in the course of the hearing; for the court, quite simply, must behave judicially, in a principled manner, or, if you like, with *Wednesbury* reasonableness, in exercising the unfettered discretion it has been given in the face of the wide range of possible circumstances with which it may be confronted, and provided it has done so, any order made should not be undone, at least not lightly.

108. In the exercise of the discretion, broadly speaking, and as far as practicable, there should be the same approach to both companies and individuals. That, it seems to me, must be so in a world in which individuals may be as globally active as companies, as able to move their assets at the click of a mouse as any corporation. There is in this respect some parallel between Mr Kekhman and Mr Thulin.

109. Mr Kekhman voluntarily submitted to the jurisdiction of this court, a factor mentioned in *Banque des Marchands de Moscou v Kindersley* (see paragraph 54 above).

110. There is no suggestion in this case that the bankruptcy order was sought for an improper purpose (cf. *Ex parte McCulloch*) beyond, the Applicants would say, Mr Kekhman's seeking to avoid the harsh consequences of Russian law (much as it might be said the companies in the two scheme cases mentioned above sought to avoid the potential consequences for them of the lack of a scheme jurisdiction in their respective countries). I do not think that that is primarily a matter for the English courts, at least not in this case. Mr Kekhman must take his chances as to any consequences in Russia. For reasons to which I shall come, it seems to me that his decision to seek and obtain relief here has had no real practical effect on his creditors and in particular the Applicants.

111. Rather, it seems to me that Mr Kekhman has come to this jurisdiction to fill a lacuna in the laws of the country where he is domiciled and resides. Many of the cases we have looked at, though primarily, I accept, in the corporate realm, indicate that the courts here have often been content to assist in such circumstances (see, for example, *Banque des Marchands*, *Garuda* and *Magyar Telecoms BV*). The circumstances of this case may be unusual, but that fact does not undermine the principle. There are

examples where the court has acted in the teeth of creditor opposition (as in the *Garuda* case).

112. Mr Kekhman had some connection to this jurisdiction before he came here to make himself bankrupt. As we have seen, there was contractual documentation providing for English law and English jurisdiction, there was a contempt application on foot, and the fraud proceedings seem to have been in contemplation, as was Mr Kekhman's claim against Bank of Moscow and Mr Afanasiev (although perhaps only in a defensive sense). Contractual connection, as we have seen from the case law (for example *Re Rodenstock*), is another factor that has been taken into account when assuming insolvency jurisdiction; the existence of a cause of action and the need to investigate it have also been considered relevant.

113. Rehabilitation (or the possibility of rehabilitation) of the debtor appears to have been a consideration for some time but is now, I suggest, a major factor to be taken into account. The law of bankruptcy has developed over the years to relieve debtors as well as to give an orderly remedy to creditors. Deeds of arrangement were introduced in 1825 to provide one form of relief. We have seen references to the legislation for the relief of debtors in one of the earlier authorities. We have seen in *Re Painter* something of the controversy that surrounded the introduction of debtors' petitions in the nineteenth century. The last century saw considerable further liberalisation of the bankruptcy regime with the introduction by the Insolvency Act 1986 of individual voluntary arrangements and automatic discharge from bankruptcy after three years. In the late 1990s the Department of Trade and Industry became interested in American liberal approaches to bankruptcy and published *Bankruptcy – A Fresh Start* (2000) and a white paper, *Productivity and Enterprise: Insolvency – A Second Chance* (2001). The three year discharge period was reduced under the Enterprise Act 2002 to one year or less in certain cases. Emphasis was given to debtor rehabilitation in a way never seen before, so that benefit to the debtor of the various procedures introduced assumed an importance it had not thitherto enjoyed.

114. Those developments went hand in hand with an increase in consumer debt leading to the use of debtors' petition on an unprecedented scale. In the late 1990s in the High Court we rarely saw more than five debtors' petitions a day at most; by the 2000s we were having to deal with 20-40 a day, almost all of them showing credit card debt of between £30,000 up to £150,000, virtually all of them presented by debtors with no assets whatsoever. Yet the court (and county courts up and down the country) made orders on such petitions; as far as I am aware, none was ever met with an application to annul. The benefit of the bankruptcy order could only have come from discharge and release of the debtor; if there was any benefit to the creditors it can only have come in an ability to write off the debt in their books, though in most cases I would imagine they had done that some time ago already.

115. The forthcoming Enterprise and Regulatory Reform Bill will, according to the Ministry of Business, Innovation and Regulatory Reform's website, provide for a process whereby an individual may apply electronically for his or her own bankruptcy to an adjudicator, thus "replacing an unnecessary court function with a more efficient administrative process". There will, as I understand it, be little or no place for the subtleties of discretion under this new arrangement which is expressly aimed at encouraging "earlier financial rehabilitation for indebted individuals, thereby reducing reliance on credit facilities".

116. Rehabilitation of the debtor is, in my view, now a firmly established purpose of our bankruptcy law.

117. I therefore reject Ms Toube's suggestion that a debtor's petition of this kind, being simply self-serving, is in some way wrong because it might serve the debtor alone and not the creditors. The Court of Appeal recognised the legitimacy of a self-serving purpose in *Shierson v Vlieland-Boddy*. It is not, however, the sole purpose of this bankruptcy and never was. Furthermore, it is of limited value in this case if Mr Kekhman cannot benefit from rehabilitation in his home country, which is the Applicants' case.

118. A major plank of Mr Kekhman's case for making a bankruptcy order was that it would be recognised and would be enforceable in the Russian Federation. I turn then first to the expert evidence to answer the question above by reference to that ground of utility.

119. With great respect to Professor Sergeev and without in any way impugning the integrity of his evidence, I prefer the evidence of Professors Dozhdev and Yarkov. I do so not because in this case there are two opinions on one side and one on the other or because Professor Yarkov appears, as was conceded, to enjoy particular prestige in the area with which we are primarily concerned, much less because of Professor Sergeev's expertise being largely on material rather than procedural law (for a good academic may be expected to master more than one narrow area of his subject) but for the reasons I set out below.

120. First, Professors Dozhdev and Yarkov approach the questions of recognition and enforceability head on, asking the questions and going on to answer them in the negative by reference to a number of compelling points on which I comment below; whereas Professor Sergeev approaches the issues in an indirect fashion by asking whether there could be good reasons to refuse recognition. I find the first approach more compelling than the latter.

121. Both Professors Dozhdev and Yarkov start from the proposition that there are two bases for recognition in the Russian Federation of foreign orders of the kind with which we are concerned, namely treaty and reciprocity (Professor Dozhdev paragraph 10; Professor Yarkov paragraph 3.32). The same point was made, incidentally, by Mr Torkanovskiy in paragraph 11 of his report, and Professor Sergeev also accepts it (see paragraph 10 of his report, although he refers to "reciprocity and comity" rather than just to reciprocity). The point is dealt with in article 1(6) of the Bankruptcy Act:

> "The decisions of foreign states' courts on insolvency (bankruptcy) cases shall be recognised [in] the territory of the Russian Federation in compliance with the international treaties of the Russian Federation.
>
> In case of lack of international treaties of the Russian Federation the decision of foreign states' courts on insolvency (bankruptcy) cases shall be recognised [in] the territory of the Russian Federation on the basis of reciprocity, except as otherwise envisaged by a federal law."

122. Professor Dozhdev says (paragraph 12) that:

> "At present, the Russian Federation does not take part [in] any international treaty on…cross-border bankruptcy. The preparatory works on the implementation of the UNCITRAL Model Law initiated by the Ministry of Economic Development of the RF in 2008 are presently on hold. The references made in paragraph 18 of Ivanyan's opinion to the existing international treaties are misleading".

Professor Sergeev does not suggest that there are any relevant international treaties which would assist recognition of the bankruptcy order in the Russian Federation.

123. That leaves reciprocity. I was told that this is not a term of art and that the word should be given its natural meaning. Professor Dozhdev says it is not the same as comity (paragraph 20.2). He also says that the principle is interpreted narrowly by the Russian courts (paragraph 20.3) and does not operate as what he describes as "a competitive liberal gateway for the recognition of foreign judgments" (21). He goes on to say that it "turns [on]…a test [of] formal correspondence of rendering and enforcing legal systems"; and:

> "Since there are deep differences in [the] Russian and English approach to the issues of cross-border bankruptcy and to the bankruptcy of individuals especially, one cannot seriously rely on the reciprocity ground for recognition and enforcement of [the b]ankruptcy order on Mr Kekhman in Russia".

There are indeed deep differences. As Mr Gourgey pointed out in his closing submissions, there really cannot be reciprocity based on comparing the Russian and English regimes where quite simply there is no equivalent bankruptcy regime in Russia. They seem to me to be irreconcilable and thus to exclude any possibility of reciprocity.

124. Professor Yarkov expresses himself on the issue of reciprocity in the most emphatic terms. He contests the very idea that it could apply, going as far as to say, "It is nonsensical to assume that the Russian courts would recognise a foreign bankruptcy order against a Russian citizen in circumstances where that individual could not be made bankrupt under Russian law" (paragraphs 3.38 and 3.38.2). His reasons for asserting that can be briefly stated. First, only the courts of the Russian Federation (especially the commercial or arbitrazh courts) have bankruptcy jurisdiction pertaining to the insolvency of a Russian individual; the question of such person's bankruptcy must be resolved in the place of his residence, and the individual concerned is not free to bypass that proposition of Russian law. Mr Kekhman's attempt to invoke the jurisdiction of the English court violated the exclusive jurisdiction of the Russian courts, which would be regarded in Russia as an abuse. Secondly, article 1195 of the Russian Civil Code provides that the personal law of an individual is the law of the state of that person's citizenship. Thirdly, the absence of a personal insolvency regime for individuals who are not entrepreneurs was an expression of Russian legislative will which provided for unlimited liability in cases such as Mr Kekhman's. That legislative will was itself expressed in article 24 of the Civil Code:

> "A citizen shall be liable for his obligations with all property belonging to him with the exception of property upon which, in accordance with a statute, execution may not be levied. The list of property of citizens on which execution may not be levied shall be established by civil procedure legislation."

125. Professor Dozhdev also relies on the exclusive jurisdiction point (paragraph 22.2 of his report), public policy considerations (paragraph 22.4), the sensitivity of the Russian courts to foreign interference with norms of Russian law (paragraph 22.3) and points out the requirement of notice to parties before a foreign judgment can be recognised (paragraph 22.1).

126. I do not think I need to deal with the less significant points mentioned in the previous paragraph. The analysis of the Applicants' experts canvassed above seems to me to be convincing and in my view prevails over Professor Sergeev's "no obstacle to recognition" approach. Furthermore, that approach and his more generalised consideration of the public policy issue do not meet head on the article 24 point. I accept the view that the courts of the Russian Federation would be unlikely to override a clear statutory provision. That view is not, it seems to me, undermined by the judgment of the Federal Arbitration Court of the North-Western District of 28 August 2008 (*Re Albrecht*) which concerned the recognition of a German trustee of a non-Russian citizen so again does not meet the jurisdiction points canvassed above, much less is it undermined by any of the other case law or materials to which I was taken.

127. Accordingly I conclude on the balance of probabilities that the English bankruptcy order is (and always was) unlikely to be recognised or enforced by the courts of the Russian Federation.

128. Even if I am wrong about that, as a matter of fact it is highly unlikely now that there will even be an attempt to seek recognition or enforcement of this bankruptcy order in Russia. As long ago as 28 November 2013 the trustee reported that the property in Russia had been arrested before his appointment and that his solicitors had advised him that it was not appropriate to challenge the bailiffs' actions. The creditors' committee also confirmed that they did not wish him to incur costs by becoming involved in the matter (H57/paraphs 2.1 and 2.2). There is no change of position in his most recent report.

129. I turn next to the effect of the Russian interim order(s) on Mr Kekhman's assets, the second question of Russian law that arises. Ingenious though the arguments mounted on Mr Kekhman's behalf may be, I do not think they stack up for two reasons. The first is that the purpose of the Russian order was to secure assets in the jurisdiction up to the value of the bank's claim, and Mr Kekhman's assets in Russia were plainly less than that amount since Mr Kekhman must have been insolvent at the time the order was made. Secondly, I rudely interrupted Ms Toube when she was cross-examining Professor Sergeev to ask him whether, if Mr Kekhman had gone back to the court to ask whether he could remove the £200,000 from the jurisdiction, the court would have allowed him to do so or said that he could not do so. Professor Sergeev said that the court would not have given its approval.

130. Mr Kekhman conceded to Ms Toube in cross-examination that he knew about the arrest order before he applied for his bankruptcy order.

131. I think those points are sufficient to enable me to conclude that Mr Kekhman ought not have brought the money into this jurisdiction for the purpose of his bankruptcy. If I am wrong about that, then at the very least he should have been franker with the court about the obligations to which the Russian order gave rise or could have given rise, especially if, as he appears to have believed, the court was giving weight to his promise to bring funds into the jurisdiction. As I mentioned in the course of the hearing, I did not go into the matter at the second hearing of the petition precisely because I was concerned that what Mr Kekhman was doing was artificial. Plainly the £200,000 was never available. It should never have left the Russian Federation. This is an important matter about which the court was misled.

132. Thus, a major factor relied on in support of the making of the bankruptcy order, recognition, has now gone, the Russian assets disclosed as potentially available to a trustee were never available for realisation and the trustee has taken the pragmatic view that he should not challenge that position. In two important respects, then, this bankruptcy lacked utility from the first.

133. That does not, however, entirely dispose of the question of utility. The cases make plain that investigation of the debtor's affairs can be an important consideration; indeed oddly Mr Kekhman himself relied on the need to look into his underlying business assets, a reflection of his having lost control of them as I have already mentioned more than once. The non-Russian assets can still be investigated by the trustee who indeed continues to investigate them and make realisations (see paragraph 136 below). Ms Toube contends that Mr Kekhman has failed to live up to his promise of cooperation. It is true that in his latest report the trustee mentions cooperation "to a point" (paragraph 6.3), which is not wholly satisfactory and does concern me. Nonetheless, there has been considerable cooperation to date. Mr Kekhman has provided information to the official receiver as well as to his trustee. On the last day of the trial I was given a schedule demonstrating extensive cooperation over a protracted period, including after discharge. The qualification regarding Mr Kekhman's cooperation is recent. The information the trustee is seeking goes to a contentious matter (the Cannes property) about which Mr Kekhman may prove to be right. Some of the information the trustee now seeks is from Mrs Kekhman. Mr Kekhman cannot be answerable for a position adopted by his wife, unless, of course, it is demonstrated that he is inducing her not to cooperate. Mr Kekhman would do well, however, to remember that he will need the assistance of the trustee if he wishes to pursue his claim.

134. Further evidence of the fact that Mr Kekhman has generally been cooperative is that the trustee did not apply for suspension of the discharge period.

135. I made it clear at the pre-trial review that I did not want further evidence from the parties on utility: I wanted the independent views of the trustee to which I would attach greater weight. I turn, then, again to his reports and in particular that of 28 February 2014 (H/63).

136. Leaving aside the £200,000 (which was never really an asset but has now been eaten up in costs) and the other Russian assets, which were never available, his reports show

that there have been realisations, some resulting from his investigations, and that there are possible further realisations:

> (a) the Bentley motor vehicle in France which is expected to realise £35,000 (H/63/3.2);
>
> (b) the watches which have already been sold to the value of £224,000 (H/63/3.3);
>
> (c) a further watch valued at £4,000 may be recovered (H/57/2.5; H/63/3.4);
>
> (d) icons to the value of £7,500 (H/63/3.5);
>
> (e) the stocks and shares held through the VK Family Foundation, though it seems unlikely to me that they will produce a return to creditors, at least in the foreseeable future and in all likelihood never;
>
> (f) the trustee is investigating the possible recovery of a property in Cannes which was purchased in 2010 for €2.2 million (Mr Kekhman denies that it is an asset, but that is what the trustee is investigating) (H/63/3.9 ff.);
>
> (g) the trustee is looking into a gift by Mr Kekhman to his son of $1 million (H/63/3.16);
>
> (h) he is also looking at charitable donations Mr Kekhman has made and looking into payments made out of various bank accounts;
>
> (i) finally, he expressed cautious optimism that a proposed development by LQ Smolny might eventually produce an indirect return, though I am sceptical.

A summary of receipts and payments to 28 February 2014 shows receipts of £443,394.42 and payments of £368,963.87, leaving £74,430.55. At the end of his report the trustee expresses the view that these (and a number of other matters) mean that the bankruptcy does have utility (H/63/6.1 ff.) and the hope that his report, read together with his previous reports, demonstrates that (H/63/6.5). That this is the view of an officer of this court and is one expressed in circumstances where funding is likely to be a real difficulty means, I think, that I should attach considerable weight to it. There has been, then, and always was utility in this bankruptcy, and that utility continues.

137. To the list above I must add a further asset that appears to have vested in the estate and the fate of which is of significance to the question of utility, and that is Mr Kekhman's claim against Bank of Moscow and/or Mr Afanasiev. I have no idea of its value (if any), but this again is something that the trustee will have to consider dealing with now that Bank of Moscow has got around to issuing its claim against Mr Kekhman. It may be (although I think it is unlikely) that the trustee will want to take it

up; it may be that he will wish to consider assigning it to Mr Kekhman, or indeed someone else. Plainly, however, the value and utility of the claim are matters that need to be considered, and the trustee is the best person to embark on an evaluation.

138. There is, then, and was when the order was made commercial subject-matter on which the bankruptcy order was and remains capable of operating in the form of the action as well as in the form of the non-Russian assets.

139. It may be objected that what we now know was not known at the time the bankruptcy order was made. However, the assets did exist at the time the order was made.

140. Ms Toube objects that the realisations are being consumed in fees and have been minimal in the context of Mr Kekhman's deficiency; but that, with respect, is true of many bankruptcies, possibly most. Utility cannot be equated solely with a return to creditors, desirable though that outcome must always be.

141. Hand in hand with the utility of the trustee's investigation goes the possibility of an orderly realisation of such of Mr Kekhman's assets as remain, all of which now seem to be located outside Russia. Apart from the matters identified above which remain to be resolved, there appears to be constructive contact between the trustee and the Curaçao receiver of the VK Family Settlement Foundation. Subject to costs, there remains the possibility, albeit a remote one, I accept, of a pari passu distribution to creditors. I find all that more attractive and more constructive than the law of the jungle advocated by Ms Toube and Mr Gourgey.

142. If there is the utility I have described above, by contrast there is no real prejudice to the Applicants. If the English bankruptcy will never be recognised in Russia, then the free-for-all can continue over there in relation to the few assets that might be left over after execution; as to assets elsewhere, all the creditors will be in the same position vis-à-vis one another. Ms Toube contends that the trustee is just another brick in the wall, another party to contend with; but sensible creditors may use his office to create order where otherwise there would be chaos. I am unpersuaded by Mr Gourgey's protest of unfairness. It is true that his client's claim has been delayed (but not stifled) by the bankruptcy, but that is the by-product of any bankruptcy for a creditor in the position of Mr Gourgey's client. There is no special unfairness in this case. The reference to "English" debts and creditors in the skeleton arguments (see paragraph 28 above) is not one I understand.

143. Nor does it seem to me that there has been prejudice as a result of Mr Kekhman's failure to make full disclosure about the arrest or as a result of the arrest itself of his assets in Russia. Those were gone, for practical purposes, even before the bankruptcy order was made, so there is no special prejudice to the Applicants who simply, like other creditors who do not have the benefit of an arrest, have missed the boat.

144. The arguments are finely balanced. Two major bases on which the bankruptcy order was sought (recognition in Russia and the existence of assets that that might come into the bankruptcy estate) have fallen away. However, notwithstanding the fact that it now appears there can be no recognition of the bankruptcy order in the Russian Federation, and notwithstanding what we now know to be the true position regarding the assets in that country, I conclude, for the reasons explored above, that the bankruptcy order still had utility when it was made, and that the matters about which

the Applicants complain do not outweigh such utility, so that even if this court had known the true position regarding the problems of recognition and resulting from the arrest of the Russian assets, it still could and probably would have made the bankruptcy order on the basis that there was commercial subject matter on which it could operate, it would have enabled Mr Kekhman's affairs to be looked into, made possible an orderly realisation of his non-Russian assets and assisted his own financial rehabilitation even if only outside the Russian Federation (a potentially important consideration to someone with international interests).

145. It follows, in my view, that the discretion to annul ought not to be exercised in the circumstances of this case on the grounds I have considered so far. For the same reasons, notwithstanding a significant change in position since the bankruptcy order was made, in the sense that the court now knows important things it did not know when the order was made, the court should also decline to rescind the order.

146. That still leaves the question whether the court ought to annul or rescind on the ground that the order was made on the basis of misleading information.

147. Ms Toube has produced an extensive schedule of complaints about misleading information. It is divided into two parts, the first dealing with non-disclosure to the court when the bankruptcy order was made, the second with non-disclosure to the official receiver and/or the trustee. Mr Swainston demonstrated quite easily that some of the points she had taken were bad in that they were simply wrong: for example, the £8,754 cash at bank had been disclosed; and the alleged disparity in his client's disclosure of the number of bank accounts he held could easily be attributed to the period covered by the question he was asked (see points 18 and 19 in the second part of the schedule). However, he made the further point at the beginning of the trial that the schedule went far beyond the allegations originally relied on and which he had come to court to meet and that many were seen for the first time when the schedule was served with Leasing's skeleton argument. He produced a coloured version of the schedule with allegations not raised in the evidence and to which he took objection coloured red. The red portions are quite extensive. To the best of my recollection there was no challenge to Mr Swainston's submission that these had not been foreshadowed in the evidence, so I propose to take little or no account of them. There is, however, other material.

148. I shall deal first with the first part of the schedule.

149. A major objection is, of course, to what the court was told about recognition. I do not think it would be fair to lay that at Mr Kekhman's door. He relied on the report of Ivanyan & Partners. I have no reason to suppose that that was put forward as legal opinion other than in good faith, a conclusion that I also feel bound to reach because what it contained is broadly in line with the views of Professor Sergeev. It may well be wrong (as I have found it to be, but only for the purposes of these applications) but that is not the beginning and the end of the matter. I cannot conclude that it was put forward with a view to misleading the court.

150. The non-disclosure of the arrest of the Russian assets is more serious. I have dealt with it already.

151. The failure to disclose that the freehold property listed at point 3 in the schedule and the Mercedes (point 6) as being subject to arrest is plainly unsatisfactory, but these points were not foreshadowed in the evidence. I can make no criticism of Mr Kekhman's negative answer to the question whether he had been visited by a bailiff or enforcement officer in the six months before presentation of the petition because I do not know whether he was or not. Certainly it has not been proved that his answer was incorrect; and Leasing cannot complain that he answered the question he was asked and not the wider question it wishes he had been asked about the arrest generally. I have already explained why the non-disclosure of the arrest of the Russian assets has had no real practical consequences for the bankruptcy.

152. There is criticism of Mr Kekhman's failure to disclose the property in Cannes. Again this was not raised at the outset, but to be fair to Leasing it is something that has only cropped up as a result of the trustee's investigations (an example, perhaps, of the utility of the bankruptcy). However, whilst the trustee considers that it is a bankruptcy asset (see his report of 28 November 2013 (H57/2.13)) it would appear from the same report (and from the most recent one) that Mr Kekhman claims otherwise but is still to provide further information which the trustee is awaiting; so I cannot and should not prejudge the issue.

153. Complaint is made about Mr Kekhman's failure to disclose his shares held through his interest in the VK Family Private Foundation, but the matter was explored at the adjourned hearing of the petition and was referred to in the order I made, so there can be no question of the court having been misled. Whether the underlying shares have any value (Mr Kekhman recorded stocks and shares having no value) remains to be seen. But again, the issue points to the utility of having a trustee.

154. Next it is said that Mr Kekhman failed to disclose the value of a policy. That is true as far as it goes, but I agree with Mr Swainston that the important thing is that he disclosed its existence. That makes clear that he was not trying to conceal an asset.

155. Finally, there is a complaint about his disclosure regarding his dependents (point 10); but the position was canvassed at the adjourned hearing of the petition, so again there is no evidence that the court was misled.

156. The second part of the schedule contains many of the same complaints as the first. I do not propose to repeat now what I have said above. There are, however, additional matters.

157. The first is Mr Kekhman's failure to disclose the registration of the Bentley in France in the name of Mrs Singermann, but this does not appear to have hampered the trustee; indeed it would appear that Mr Kekhman has assisted the trustee in recovering the vehicle for the estate.

158. There is some strength in the criticism that Mr Kekhman failed to disclose at the outset his valuable watches under the category of jewellery. He did, however, disclose jewellery generally to a value of £854,700 to the official receiver, he has delivered it up, and as we have seen it has been sold, so it has made no difference to the conduct of the bankruptcy. There is no evidence of concealment. Again, however, all this evidences the utility of the investigations that have taken place. Much the same may be said about the valuable watch given by Mr Kekhman to his son, some cufflinks, a

detail I have not mentioned so far, the icons (which Mr Kekhman regarded as objects of personal devotion but delivered up when he was told that that was no answer to the vesting) and the donations, all of which have resulted in realisations or are being investigated with a view to making realisations for the benefit of creditors.

159. I cannot realistically decide whether or not Mr Kekhman disclosed all his credit cards. I do not know why he never proposed an individual voluntary arrangement, nor do I care: that is a matter for him; the time has now passed for him to do so (he has had his discharge); and I have no doubt that the Applicants would be against one just as they oppose this bankruptcy, so it is hard to understand why they have complained at all other than to display their zeal to find every fault they possibly can.

160. Whilst aspects of Mr Kekhman's non-disclosure might in some circumstances warrant annulment, in the context of this bankruptcy and for the reasons set out above they do not appear to me to be sufficiently serious or material to warrant annulment or rescission, either of which would be a disproportionate response. Many of the matters complained of were not properly relied on in the evidence. Some are trivial. Most important, however, is the fact that there does not appear to have been any attempt to conceal assets from the official receiver or trustee. The latter makes no or no serious complaint about the information or cooperation he has received.

161. None of the complaints made, in my view, warrants annulment or rescission.

162. I should add one final point. I have considered whether my failure to adjourn the petition so that notice could be given to the creditors would warrant finding that the order ought not to have been made so that it should be annulled; but for the reasons given in paragraph 18 I do not think that is so.

Result

163. For all the reasons I have given I would propose to dismiss these applications.

Postscript

164. I should end this judgment by thanking all concerned in the preparation and conduct of these difficult applications for their considerable and patient assistance, well prepared and indexed bundles delivered on time, concise and disciplined advocacy, and skeleton arguments of the highest standard on which I have been able to draw quite extensively. All those matters contributed to our getting through an enormous amount of material in a relatively short time.