Neutral Citation Number: [2020] EWHC 1550 (Ch)

Case No: BR-2019-001363

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (ChD)
IN THE MATTER OF PRAMOD MITTAL
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

Royal Courts of Justice
Rolls Building
London, EC4A 1 NL

Date: 19/06/2020

Before :

INSOLVENCY AND COMPANIES COURT JUDGE BURTON

- -

Between :

MOORGATE INDUSTRIES UK LIMITED	**Petitioner**
- and -	
PRAMOD MITTAL	**Debtor**

- -
- -

Kate Rogers (instructed by **Clyde & Co**) for the **Petitioner**
Stephen Ryan (instructed by **Collyer Bristow**) for **Mr Mittal**

Hearing dates: 18 May 2020

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Approved Judgment

COVID-19: This judgment was handed down remotely by circulation to the parties' representatives by email immediately before a remote hearing by Skype. It will also be released for publication on BAILII and other websites. The date and time for hand-down is deemed to be 9.55 a.m. on 19 June 2020.

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INSOLVENCY AND COMPANIES COURT JUDGE BURTON

Insolvency and Companies Court Judge Burton :

1. This is the hearing of a petition dated 26 November 2019 presented by Moorgate Industries (UK) Limited ("Moorgate") against Mr Mittal, an Indian citizen and prominent businessman. The Petition was preceded by a statutory demand and served personally on Mr Mittal on 2 December 2019.

2. The Petition is in relation to a debt in the sum of £139,786,656.43 plus interest which continues to accrue. The debt arose following an award made in favour of the Petitioner on 31 July 2017 by the London Court of International Arbitration ("LCIA Award") against a company called Global Ispat Koksna Inustrija d.o.o. Lukavac ("GIKIL"). Mr Mittal and an Isle of Man registered company, Global Steel Holdings Limited ("GSHL") guaranteed GIKIL's debts. The guarantee resulted in proceedings being commenced by the Petitioner, under its name at the time, Stemcor UK Limited, in the Commercial Court against Mr Mittal and GSHL. On 19 January 2018, Sonia Tolaney QC, sitting as a Deputy High Court Judge made an order pursuant to which GSHL and Mr Mittal were jointly and severally liable to pay (i) US$166,812,349.90 in respect of principal and interest under the LCIA Award together with (ii) the legal costs of the arbitration; and (iii) interest and costs of the Commercial Court proceedings. I shall describe the sums ordered to be paid by Mr Mittal (jointly with GSHL) pursuant to the Commercial Court Order as the "Judgment Debt".

3. In the Petition, Moorgate deducted from the Judgment Debt, $18,053,066.01 in respect of payments which it has received in respect of principal and interest as well as a further sum of £66,000. This amount refers to a costs order made by ICC Judge Barber on 15 October 2019 when Moorgate withdrew an earlier petition (the "First Petition") and agreed to pay Mr Mittal's costs of £66,000 within 14 days (the "Costs Award"). The Petition states that Moorgate has set the Costs Award off against the Judgment Debt.

4. This is the third hearing of the Petition. The second hearing, originally listed with a time estimate of half a day fell on 30 March 2020, just a week after the Prime Minister announced a lock-down to prevent the spread of the Covid-19 coronavirus. The question arose as to whether the hearing could take place remotely. The Court directed that the hearing should proceed remotely, but for directions only.

5. At the hearing, I made directions for the parties, if so advised, to file further evidence and adjourned the Petition to the first available date after six weeks. I considered this to be sufficient time to give Mr Mittal a reasonable opportunity to instruct his lawyers, make arrangements to be able to attend the hearing remotely and prepare for the hearing - in each case, bearing in mind the constraints upon him as a result of his personal need to be shielded as a particularly vulnerable individual during the pandemic.

6. Earlier today I considered and dismissed an application by Mr Mittal for a further 12-week adjournment.

Grounds of opposition

7. Mr Mittal opposes the petition on the following grounds:

i) Moorgate is not entitled to set the £66,000 Costs Award off against the Judgment Debt. The Petition should be stayed until those costs are paid;

ii) until such time as Moorgate complies with its obligations under a settlement agreement dated 31 May 2018 ("Settlement Agreement") it is precluded from seeking to recover the Judgment Debt from Mr Mittal;

iii) there is a series of errors in the petition, as a consequence of which the Petition must, at the very least, be amended, re-verified and re-served;

iv) he will be able to discharge the Judgment Debt within a reasonable period of time and the Court should therefore exercise its discretion to adjourn the bankruptcy proceedings to enable him to do so.

I shall deal with each point in turn.

The Settlement Agreement

8. Mr Mittal's Notice of Opposition refers to an earlier, proposed settlement agreement to which GSHL was also a party. Moorgate contends that it did not enter into that agreement. Mr Ryan was, in any event, content simply to rely on the Settlement Agreement which was in substantially the same terms. Mr Mittal claims that as Moorgate has not exercised its right to terminate the Settlement Agreement, it remains bound by its terms and in particular:

i) Moorgate's claim against him is limited to $60 million (the "Settlement Sum");

ii) By clause 3.3, any payments received by Moorgate from GIKIL are considered to be payments made towards the Settlement Sum;

iii) By clause 3.5, Moorgate is obliged to: (a) continue taking steps to obtain payment from GIKIL; (b) obtain payments from GIKIL if Mr Mittal can provide evidence that GIKIL has monthly surplus cash in excess of $100,000; and (c) consider in good faith any other requests for assistance made by Mr Mittal to obtain payments from GIKIL.

9. Mr Ryan submitted that the purpose of the Settlement Agreement was to provide a basis for Mr Mittal to pay the Settlement Sum, (which would drop to $56 million in the circumstances set out under clause 3.2, which circumstances have not in fact arisen) and to impose an obligation on Moorgate to continue to try to obtain payments from the primary debtor, GIKIL. He said that it followed that if Moorgate intended to proceed against Mr Mittal for the entire debt, it was obliged first to terminate the Settlement Agreement and only upon doing so would it be free of its obligation under clause 3.5 to obtain payments from GIKIL.

10. I do not accept this interpretation of the Settlement Agreement. By clause 3.1, the debt due from Mr Mittal to Moorgate was indeed limited to $60 million. Clause 3.1.2 set out a series of multi-million dollar instalment payments to be made by Mr Mittal on or before five specific dates between 30 June 2018 and 20 January 2020. Clause 4,

"Default" provides that subject to a mechanism set out in Clause 4.1 (whereby Mr Mittal could extend the dates for payment of the instalments):

> "Moorgate shall have the right to claim the full amount of the Judgment and/or the Award less any payments already made under this Agreement and to pursue all and every proceedings against Mr Mittal and/or GIKIL to recover this sum in the event that:
>
> a) Mr Mittal fails to make any payment in full in accordance with Clause 3.1 as reduced (as the case may be) by the provisions of Clause 3.2 by the dates due for such payments; and/or
>
> b) Moorgate terminates this Agreement in accordance with Clause 11".

11. Clause 11, "Termination" provides:

> "Without affecting any other right or remedy available to it, Moorgate may terminate this Agreement with immediate effect by giving written notice to Mr Mittal if:
>
> a) Subject to Clause 4.1 Mr Mittal fails to pay any amount due under this Agreement on the due date for payment;
>
> b) Mr Mittal commits a material breach of any term of this Agreement;
>
> c) Mr Mittal (being an individual) is the subject of a bankruptcy petition other than that pursued by Moorgate; or
>
> d) any warranty given by Mr Mittal in Clause 10 of this Agreement is found to be untrue or misleading".

12. It was not in dispute that the instalment payments provided for at Clause 3.1 have not been made. In my judgment, the "and/or" connector between sub-clauses (a) and (b) of Clause 4 makes it clear that this payment default, alone, entitled Moorgate to pursue Mr Mittal for the full amount of the Judgment Debt. It is not obliged, in addition, to exercise its rights under Clause 11 to terminate the Settlement Agreement before being entitled to do so.

13. Having not terminated the Settlement Agreement, Moorgate remains bound by Clause 3.5 which provides that until the Settlement Sum is paid in full or the agreement is otherwise terminated:

> "Moorgate at its sole and absolute discretion agrees:
>
> (a) to continue the existing steps Moorgate is taking to obtain payments from GIKIL, including, but not limited to, monitoring and communicating with GIKIL in relation to GIKIL's cash flow;
>
> (b) to take steps Moorgate deems appropriate, including, but not limited to, giving notice to GIKIL of an intention to enforce the Award, to obtain payments from GIKIL if Mr Mittal can provide evidence to the satisfaction

of Moorgate that GIKIL has a monthly surplus cash flow in excess of $100,000 to make payments to Moorgate; and

(c) to consider in good faith any other requests for assistance made by Mr Mittal to obtain payments from GIKIL either through:

(i) Claim no. 166934 and Claim no, 166950 against GIKIL in the Municipal Court of Lukavac, Bosnia and Herzegovina; or

(ii) any other reasonable enforcement method".

14. Mr Mittal's Notice of Opposition refers to a letter dated 17 September 2019 in which GIKIL explained that in May and June 2019 GIKIL paid Moorgate $1.7 million, which was a far larger sum than the amount it was required to pay during the same period by $100,000 monthly instalments. The letter asks Moorgate to take this into account and thereby postpone the next monthly payment until 20 May 2020. Moorgate replied seeking further information.

15. The latest information in the court bundle was a further letter from GIKIL dated 15 May 2020 to which was attached an excerpt from GIKIL's business plan and cash flow forecast. This letter states that GIKIL has been facing a series of challenges as a result of the Covid-19 pandemic, the loss of its environmental permit and delays in significant sale contracts, the last in particular resulting in it not being in a position to resume the agreed monthly payments of US$100,000. The letter concludes that if the market begins to improve in the second half of the year, it may be possible for GIKIL to resume the monthly payments in October 2020. The attached annual business plan shows an anticipated loss for the year of US$1.6 million.

16. In my judgment, the steps taken by Moorgate and the replies it has recently received from GIKIL demonstrate that Moorgate has sufficiently complied with its obligations under Clause 3.5. Those obligations are far from onerous: Moorgate is merely required to take such steps "as it deems appropriate" to obtain payments from GIKIL and to consider in good faith any other requests for assistance made by Mr Mittal to obtain payments from GIKIL. GIKIL has clearly stated that it is not currently in a position to discharge any of the debt which it owes to Moorgate.

17. In summary, this ground of opposition is without merit. Following Mr Mittal's failure to meet his obligations under Clause 3.1.2 of the Settlement Agreement, Moorgate was entitled to pursue him for the full amount of the Judgment Debt, taking into account (as it has done in the Petition) payments received from GIKIL and taking such steps as it deems appropriate (as I have found it has done) to obtain further payments from GIKIL.

Stay pending payment of the Costs Award

18. I identified five elements to this claim:

i) Mr Ryan relies on section 266(3) of the Insolvency Act 1986 which provides:

"The court has a general power, if it appears to it appropriate to do so on the grounds that there has been a contravention of the rules or for any other

reason, to dismiss a bankruptcy petition or to stay proceedings on such petition; and, where it stays proceedings on a petition, it may do so on such terms and conditions as it thinks fit".

ii) It does not appear to be in dispute that during the negotiations leading up to Moorgate's request to withdraw the First Petition, Moorgate agreed to pay £66,000 "within 14 days". Mr Ryan explained that the original agreement was embodied in a proposed consent order but ICC Judge Barber highlighted that the Court's permission is required for a withdrawal. The resulting, revised order made no reference to the costs being paid "within 14 days".

It also does not appear to be in dispute that neither Moorgate nor its solicitors informed Mr Mittal of its intention to set the Costs Award off against the Judgment Debt. Mr Ryan submits that Moorgate consequently expressly or impliedly agreed that the sums could not be set off against each other.

iii) There is no mutuality between the two debts which are the subject of the purported set-off. The debt due from Mr Mittal *to* Moorgate (which I shall describe as "the Claim") comprises two elements: his liability to pay Moorgate's costs of the arbitration proceedings with GIKIL (to which Mr Mittal was not a party) and the costs of the Commercial Court proceedings (for which Mr Mittal and GSHL were jointly liable). The debt due *from* Moorgate, namely the £66,000 Costs Award, (which I shall describe as "the Cross-Claim") arose in the First Petition proceedings to which only Moorgate and Mr Mittal were parties. Mr Ryan submitted that each costs order therefore arises between different parties and from different proceedings.

iv) Moorgate has not sought to claim equitable set-off but in any event, equitable set-off would not be available as the debts are not of the same nature and cannot be said to be so closely connected that it would be manifestly unjust to enforce one without taking into account the other.

v) If I accept that the debts are not eligible for set-off, then Mr Mittal relies on the principle set down in *Martin v Earl Beauchamp* (1883) 25 Ch D 12 (CA) and *James M'Cabe v Governor and Company of the Bank of Ireland* (1889) 14 App Cas 413 (HL) that where a litigant fails in one action and then commences another for the same subject matter, the second must be stayed until the costs of the first have been paid.

19. Set-off has been widely acknowledged to be a complicated area of the law (see for example the Court of Appeal's judgment in *Axel Johnson Petroleum AB v MG Mineral Group* [1992] 1 WLR 270). Practitioners often conveniently divide set-off into various types of 'solvent set-off' on one hand and so-called 'insolvency set-off' on the other. Insolvency set-off rights are creatures of statute (Rule 14.24 and 14.25 of the Insolvency (England and Wales) Rules 2016 and section 323 of the Insolvency Act 1986) and arise only in the context of formal insolvency proceedings. The issues before the Court concerning Moorgate's petition for Mr Mittal's bankruptcy do not arise as a result of either Moorgate or Mr Mittal having already entered formal insolvency proceedings. Consequently, insolvency set-off does not apply.

20. Set-off outside of insolvency proceedings can take a variety of different forms: contractual set-off, legal set-off, equitable set-off and, sometimes included in the list is banker's set-off (more accurately regarded as a banker's right of combination of accounts). Equitable set-off overlaps with legal set-off (to which I shall return), is also seen at common law and can arise by agreement.

21. Both parties referred to *Geldof Metaalconstructie NV v Simon Carves Ltd* [2010] EWCA Civ 667 where the Court of Appeal undertook a detailed analysis of the authorities concerning equitable set-off and concluded that the relevant test requires:

> "cross-claims…so closely connected with [the plaintiff's] demands that it would be manifestly unjust to allow him to enforce payment without taking into account the cross-claim".

22. As summarised at paragraph 18(iii) above, Mr Ryan referred to the Claim and Cross Claim being insufficiently mutual and referred to *Ince Hall Rolling Mills Co Ltd v The Douglas Forge Co* (1882) 8 Q.B.D. 179 to demonstrate the importance the court places on "mutuality".

23. In *Ince Hall*, a company being wound up by the Court sought to recover the price of goods which it supplied to the defendant after the commencement of the winding up but in performance of a contract entered into before such commencement. The Court held that the defendant was not entitled to set off the price of the goods supplied after liquidation against debts due to it by the company before liquidation. The post-liquidation delivery of goods "gave rise to a debt due to them in a new capacity and interest, and that such a debt is not liable to a set off of a debt incurred by nominally the same company when it was carrying on its business independently and for its own benefit".

24. Mr Ryan submitted that this demonstrates how strict and narrow is the Court's requirement for mutuality. This is undoubtedly correct, but the case and the requirement for mutuality arose in the context of a company's liquidation. The rationale behind insolvency set-off was summarised in the Court's decision in *Ince Hall*: if the Court had allowed set-off, it would have resulted, in effect, in one creditor being paid in full out of the company's assets in preference to the company's other creditors. That offends the *pari passu* principle.

25. The correct test in relation to equitable set-off is as set out in *Geldof.* In relation to this test, Mr Ryan submitted that for the reasons summarised at paragraphs 18(iii) and (iv) above, the Claim and Cross-Claim were not so closely connected that it would be manifestly unjust for the Claim to proceed without taking the Cross-Claim into account. Mr Mittal incurred significant costs in defending the First Petition and it was not until the eve of its hearing (eight months after the First Petition was presented), still facing arguments concerning defective service, that Moorgate sought to withdraw it. Moorgate made no mention, when it agreed to pay the Costs Award, that it intended to set it off against the costs elements of the Judgment Debt. Mr Ryan submitted that against this background, it would be manifestly unjust to allow the set-off.

26. Ms Rogers contended that contrary to Mr Ryan's submissions summarised at paragraph 18(iii) above, the Claim and Cross-Claim both arose as part of the

enforcement of the Arbitration Award in the context of Moorgate seeking to enforce the Arbitration Award, *inter alia* by claiming under Mr Mittal's personal guarantee. The presentation of the Petition is a later stage of the same enforcement process. Both the Claim and Cross-Claim are in respect of costs orders and it would be manifestly unjust to require Moorgate to pay £66,000 to Mr Mittal at a time when he owes Moorgate c.£140 million.

27. Paragraph 2 of the Commercial Court Order provides:

> "The Defendants shall pay the Claimant the sum of £2,139,201.20 in respect of the Claimant's legal costs in the Arbitration, payable on the date of this Order".

Paragraph 5 provides for the Defendants to pay £160,733.39 for the costs of the Commercial Court proceedings, within 14 days of the date of the order.

28. The fact that paragraph 2 of the Commercial Court Order refers to costs of the Arbitration proceedings to which Mr Mittal was not a party, is of no relevance. His liability to pay them arises, as does his liability to pay the costs at paragraph 5, pursuant to the Commercial Court Order. Mr Ryan provided me with no authority to support his contention that the joint nature of Mr Mittal's liability under the Commercial Court Order rendered it ineligible to be the subject of equitable set-off against the Cross Claim.

29. In my judgment:

i) the wording of the Commercial Court Order is clear: Mr Mittal is personally liable to pay the full amount of the Claim. He is similarly personally entitled to receive the benefit of the Cross-Claim;

ii) the fact that he is jointly liable with GSHL to pay the Claim, but the sole beneficiary of the Cross-Claim does not result in them being ineligible for set-off;

iii) the Claim and Cross-Claim arose between the same parties (Mr Mittal and Moorgate) and in the context of Moorgate's on-going enforcement action;

and I note that whilst not relevant at this stage to these proceedings,

iv) the Claim and Cross-Claim are so closely connected that if Mr Mittal were to be made bankrupt, they would be sufficiently mutual for statutory set-off automatically to apply.

As a result the Claim and Cross-Claim are so closely connected that it would be manifestly unjust to require Moorgate to comply with its obligation to expend further sums, discharging the Costs Award when Mr Mittal continues, himself, to be in breach of the Commercial Court Order which required him to pay Moorgate's costs within 14 days.

30. Mr Ryan did not advance before me Mr Mittal's argument that Moorgate expressly or impliedly agreed that the sums could not be set off against each other. There are a number of authorities in which the Court has held that clear and unambiguous language is required if set-off is to be excluded (see for example the Court of

Appeal's review of the authorities in *BOC Group plc v Centeon LLC and another* [1999] 1 All ER (Comm) 970). No such language was discussed or agreed between the parties and it clearly did not form part of the Court order under which the Costs Award arose.

31. I find, therefore, that Moorgate was entitled to set the Costs Award off against the costs elements of the Judgment Debt.

32. Furthermore, even if Moorgate was not entitled to exercise a right of set-off:

    i) Neither Mr Ryan nor Ms Rogers were able to locate any authority in which the Court determined that a petitioner is not entitled to present a second petition, when the costs of the first remain outstanding;

    ii) CPR 38.7 provides that a claimant who discontinues a claim needs the permission of the Court to make another claim against the same defendant. There is no corresponding provision in the Insolvency Act 1986 or Insolvency (England and Wales) Rules 2016 requiring a petitioner to obtain the Court's permission before being entitled to present a second petition having been granted permission, as in this case, to withdraw the first due to a potential procedural defect.

    iii) There was no determination by the Court of the merits of the First Petition before granting permission for it to be withdrawn. Mr Mittal relies on the principle reflected in cases such as *Martin v Earl Beauchamp* (1883) 25 Ch. D 12 (CA) and *James McCabe v Governonr and Company of the Bank of Ireland* (1889) 14 App. Cas 413 (HL), that where a litigant has failed in one action, and commences a second action for the same cause, the second action must be stayed until the costs of the first have been paid. In each of the cases referred to, the Court had made a determination on the merits. For example, *Martin v Earl Beauchamp* concerned attempts by M to recover a bill of account first by proceedings in which he sued in his capacity as personal representative of EH who claimed to be next of kin of a party, WJ. Those proceedings were ultimately dismissed following a substantive hearing on the basis that the court was not satisfied that EB was the next of kin. M later commenced fresh proceedings, this time in his capacity as personal representative of WJ. The court held that the second proceedings were for the same matter under the same alleged claim to title, and as such, that the second set of proceedings must be stayed until the costs of the first had been paid.

    As the Court did not make any determination on the substantive claim in the First Petition, the facts of these cases are not, in my mind, sufficiently similar to persuade me that the principle relied upon by Mr Mittal, applies in the circumstances of the case before me.

33. In summary, in my judgment, even if I had decided that set-off does not apply, as I have not been provided with any authority in which the Court has held that a second petition may not be presented, when a costs order made on withdrawal of an earlier petition remains unpaid, Moorgate's failure to pay the Costs Award does not, in my judgment, justify the exercise of the Court's discretion under section 266 of the Insolvency Act 1986 to stay the petition until such costs are paid.

Errors in the petition

34. Rule 10.9(1) and (2) of the Insolvency (England and Wales) Rules 2016 provide:

> (1) The petition must state for each debt in relation to which it is presented—
>
> (a) the amount of the debt, the consideration for it (or, if there is no consideration, the way in which it arises) and the fact that it is owed to the petitioner;
>
> (b) when the debt was incurred or became due;
>
> (c) if the amount of the debt includes any charge by way of interest not previously notified to the debtor as a liability of the debtor's, the amount or rate of the charge (separately identified);
>
> (d) if the amount of the debt includes any other charge accruing from time to time, the amount or rate of the charge (separately identified);
>
> (e) the grounds on which any such a charge is claimed to form part of the debt, provided that the amount or rate must, in the case of a petition based on a statutory demand, be limited to that claimed in the demand;
>
> (f) that the debt is unsecured (subject to section 269); and
>
> (g) either—
>
> (i) that the debt is for a liquidated sum payable immediately, and the debtor appears to be unable to pay it, or
>
> (ii) that the debt is for a liquidated sum payable at some certain, future time (that time to be specified), and the debtor appears to have no reasonable prospect of being able to pay it.
>
> (2) Where the debt is one for which, under section 268, a statutory demand must have been served on the debtor, the petition must—
>
> (a) specify the date and manner of service of the statutory demand; and
>
> (b) state that, to the best of the creditor's knowledge and belief—
>
> (i) the demand has been neither complied with nor set aside in accordance with these Rules, and
>
> (ii) that no application to set it aside is outstanding.

35. Mr Ryan submits that as a result of the following errors, the Petition requires amendment, re-verification and re-service:

i) ***The Petition fails to mention the Settlement Agreement.*** Mr Ryan submitted that the debt claimed in the Petition arose first under the judgment. It was then compromised by the Settlement Agreement. The Petition should therefore refer not to the Judgment Debt but to the lesser amount in the Settlement Agreement. Alternatively if I find (as I have) that Mr Mittal's breach of the payment obligations under the Settlement Agreement entitled Moorgate to revert to claiming the full amount of the Judgment Debt, then the petition should clearly set that out, again requiring express reference to the Settlement Agreement.

ii) ***The Petition claims a greater amount than claimed in the statutory demand.*** Paragraph 12.2.2 of the Insolvency Practice Direction provides:

> "Where the petition is based solely on a statutory demand, only the debt claimed in the demand may be included in the petition".

A petitioner is entitled to rely upon a debtor's failure to comply with a statutory demand as evidence of his inability to pay debts as they fall due and his consequent insolvency.

The Petition, which claims £139,786,656.43 plus interest, was preceded by a statutory demand in which the Petitioner claimed a higher figure, GBP £140,712,493 ("SD Debt"). Mr Ryan explained that whilst, at first blush, this suggests that the Petition is for a lesser sum than claimed in the statutory demand, in fact, the opposite is true. A close examination reveals that since the date of the Statutory Demand, Moorgate has claimed an additional US$1,461,126 interest on the principal sums included within the Judgment Debt and £341,272.48 interest on the costs elements of the Judgment Debt. This is not immediately apparent because it has been absorbed and exceeded by a reduction in the overall debt as a result of different currency exchange rates: US$1 = 0.791102 GPB was the prevailing rate on 15 October 2019 when the Statutory Demand was prepared, and US$1 = 0.777369 GBP on 26 November 2019 when the Petition was prepared. If the exchange rate had not changed between the date of the Statutory Demand and the Petition: the Petition would reveal that an additional £1,497,166 is being claimed in respect of interest, on top of the SD Debt.

36. I see no reason why the Petition should have referred to the Settlement Agreement. Following Mr Mittal's failure to make the instalment payments, he became liable once again to pay the full amount of the Judgment Debt. I am satisfied that it was sufficient, in these circumstances, for the Petition only to refer to the Judgment Debt.

37. The general practice of the Insolvency and Companies Court suggests that the Petition should not have included interest accruing after the date of the Statutory Demand. Ms Rogers' argued that Moorgate was entitled to claim additional interest in the Petition because the Statutory Demand expressly claimed the principal debt *plus* interest which continued to accrue. Rule 10.9(1)(e) and paragraph 12.2.2 of the Insolvency Practice Direction state that the amount or rate must, in the case of a petition based on a statutory demand, be limited to that claimed in the demand. The form of petition used by Moorgate repeats this in the side notes for users. Whilst it is arguable that the Rule could be interpreted to mean that additional amounts may be claimed in respect

of interest accruing after the date of the statutory demand provided such interest is calculated at the same *rate* as notified in the statutory demand, this is not how the Court, in my experience, has traditionally understood the Rule.

38. No authority was cited to me in relation to this point and consequently I consider that insofar as the Petition claimed additional interest which accrued after the date of the Statutory Demand, it was defective.

39. Rule 12.64 provides:

> "No insolvency proceedings will be invalidated by any formal defect or any irregularity unless the court before which objection is made considers that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by any order of the court".

40. Mr Ryan does not seek to argue that the proceedings are invalidated by the error; merely that the Petition should be amended, re-verified and re-served. Ms Rogers says this is not necessary: the Court can simply waive defects provided no prejudice has been caused and the error can be cured. She relies on the overall lowering of the debt as a result of the exchange rate changes to say that there has been no prejudice to Mr Mittal.

41. I accept that no prejudice has been caused to Mr Mittal but not for the reasons given by Ms Rogers. The debt claimed in the Petition, which is in a form that expressly relies on Mr Mittal's failure to comply with the Statutory Demand, should not have exceeded the SD Debt. There is no statutory requirement to convert the Judgment Debt which is in a foreign currency, in either the Statutory Demand or the Petition. In *Re A Debtor (No. 51-SD-1991)* [1992] 1 WLR 1294, Morritt J (as he was) held that the definitions of "bankruptcy debt" and "creditor" in sections 382(1) and (2) and 383 of the Act showed that the debt referred to in sections 267(2) and 268(1) included a debt payable in foreign currency and that neither the Act nor the Insolvency Rules imposed any requirement for a statutory demand or petition to convert the debt claimed into sterling. In that case, the learned judge was considering an application to set aside a statutory demand. He said:

> "Counsel for the debtor emphasised the difficulties which could arise with debts payable in a foreign currency which is not freely convertible. Not only is that not this case, but it seems to me that the discretion of the court conferred by rule 6.5(4)(*d*) is more than adequate to deal with any difficulty which might arise in practice. If the debtor makes genuine attempts to satisfy the demand by paying what reasonably appears to be the sterling equivalent at the time of payment, that will probably be regarded as compounding the debt in a manner which the creditor cannot reasonably refuse (see section 271(3)) and a good reason to set aside the statutory demand under rule 6.5(4)(*d*), if the creditor declines to accept such alternative performance. Both points would also arise with a debt payable in a freely convertible currency if the debtor paid a sum in sterling equal at the rate of exchange prevailing at the date of payment to the debt payable in a foreign currency".

42. The only currency conversion provisions in the Insolvency Rules (Rule 14.21) requires that a proof for a debt incurred or payable in a foreign currency must state the

amount of the debt in that currency and that the office-holder must convert all such debts into sterling by reference to the exchange rate prevailing on the date of the bankruptcy order.

43. The fact that the exchange rate has moved in Mr Mittal's favour between the date of the Statutory Demand and the Petition does not alter the fact that the Petitioner has claimed more than £1 million in respect of additional interest that has accrued since the date of the Statutory Demand. If Mr Mittal had been in a position to discharge the Petition Debt, applying what I have always understood to be the practice of this Court (which requires the petition debt not to exceed the amount claimed in the statutory demand) that could have caused him prejudice. However it is clear that he was not in such a position and there is no evidence that the error as to the amount due, or the misleading features of the calculation, have resulted in him being prejudiced in any way. In my judgment it is appropriate for the Court to remedy the defect by directing that the amount claimed in the Petition shall be reduced to the amount claimed in the Statutory Demand.

Time to pay

44. Mr Mittal submits that even if the Court dismisses his grounds of opposition (as I have done) there are several bases upon which the Court can be satisfied that there is a real prospect of the debt due to Moorgate being discharged within a reasonable time.

Mr Mittal's claim in GSHL's liquidation

45. Mr Mittal claims to be subrogated to the claim of a company called STC India in GSHL's liquidation in respect of a sworn proof of debt dated 23 December 2019 for US$315,404,602. Furthermore, GSHL is jointly liable with Mr Mittal for the Judgment Debt. Any realisations paid out to Moorgate as a creditor in GSHL's liquidation will correspondingly reduce Mr Mittal's liability.

46. The parties have differing views of the likelihood of a distribution being paid to creditors by the liquidators of GSHL. The liquidators' most recent correspondence states that they are not *presently* aware of assets that would enable such a distribution to be made. Mr Ryan emphasised that the word "presently" suggests that the situation could change and Mr Mittal contends that the liquidators' assessment fails to take into account the very real prospects of a payment being made to both GSHL and himself as a result of a mediation in Nigeria.

The Nigerian Mediation

47. Mr Mittal's witness statement sets out the background to a substantial claim which a Nigerian company, "GN" is pursuing in Nigeria. 75% of the Nigerian company is owned by a Mittal family trust, 22.38% by GSHL and the remaining 2.62% by Mr Mittal and other individuals. Arbitration proceedings were commenced in 2008 but recently new impetus has been given to resolution of the dispute. Mr Mittal's witness statement refers to an "ICC mediation" but in a more recent email to Moorgate dated 15 May 2020 he refers to an arbitration. The email explains that the other side's counsel "has full authority to commence the process to guide the negotiations for the buyout of [GN's] interest" and that the "parties to the arbitration have indicated the following steps by these key dates". He then sets out a number of steps including a

settlement agreement being signed on or before 15 July 2020 with appropriate ratification by the Nigerian Government.

48. Mr Mittal's evidence is that GN has agreed to make a settlement payment to Moorgate out of whatever money it receives from the mediation provided (i) Mr Mittal has by then not been made bankrupt; and (ii) Moorgate agrees to accept the sum in full and final settlement of the Petition debt, its claim in the liquidation of GSHL, interest, the costs of the Petition and all other claims it may have against Mr Mittal. He continues:

> "Even if Moorgate rejects [GN's] offer, there is a reasonable prospect that the mediation may (if settlement is concluded – a matter on which I do not express any opinion) result in payment of the Petition debt in full through (i) the receipt of funds by GSHL, whether by way of a dividend from [GN] or directly, which will enable GSHL to make payments to Moorgate and me (upon my claim being admitted), (ii) the receipt of funds by [a company owned by the Mittal Family Trust] by way of dividend from [GN] which I am told by its directors it would be willing to pay to Moorgate on my behalf and/or (iii) payments by [GN] to Moorgate on my behalf".

49. Mr Ryan referred to evidence demonstrating that Moorgate was invited to sign a confidentiality agreement as a prerequisite to receiving more information about the mediation. Moorgate failed to respond and yet claims that it has insufficient information to be satisfied that the mediation could result in payment of the Judgment Debt. They cannot have it both ways, he says.

50. He also referred to Chief Insolvency and Companies Court Judge Briggs' recent decision in *State Bank of India v Mallya* [2020] EWHC 96 (Ch) where, at paragraph 52 of his judgment the Chief Judge summarised the law surrounding the exercise of the Court's discretion to adjourn a petition under section 266(3) of the Act.

> "[52] The discretion has long been available. The first statute that formalised the discretion was the Bankruptcy Act 1914. Section 5(3) of the 1914 Act gave discretion to dismiss a petition where the Court was not satisfied that there had been an act of bankruptcy or not satisfied as to proper service. Judicial consideration of the discretion introduced by section 5(3) of the 1914 Act shows that there were few limits other than it had to be exercised judicially. In Re A Debtor [1920] KB 432 McCardie J (sitting as part of a two-man Court) said that a judge appears to "possess the widest discretion in respect of granting adjournments" and that the limits imposed on the judge are that he "should exercise a judicial discretion". Mr. Justice Peter Smith said that the discretion remained "quite unfettered": Re Micklethwait [2003] BPIR 101, 102. There is some doubt whether it is completely unfettered but Mr. Justice Peter Smith was merely explaining that the discretion was wide. In Re A Debtor [1920] KB 432 the Court identified at least three circumstances where an adjournment may be sought. First to remedy technicalities; secondly "to enable the evidence on either side to be fully heard and thirdly to enable the debtor in the event of his being able to do so, to satisfy [the Court] of his power to pay his or her debts in full."
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> [53] The Court's discretion provided by section 266(3) of the Insolvency Act 1986 is supplemented by the Insolvency Rules 2016. Rule 10.24 provides that the

Court "may make a bankruptcy order if satisfied that the statements in the petition are true and that the debt on which it is founded has not been paid, or secured or compounded for". Whether or not the petition debt could be paid within a reasonable time was the subject of an appeal to Henderson J (as he was) in *Ross & Holmes v HMRC* [2010] BPIR 652:

> "[72] I come finally to the question of discretion, and whether the Chief Registrar should have granted a further adjournment. There is no doubt that the Court retains a discretion not to make a bankruptcy order, even where the petition debt has been clearly established and any grounds of opposition have been dismissed. However, the authorities establish that in such circumstances the discretion to adjourn should only be exercised if there is a reasonable prospect of the petition debt being paid in full within a reasonable period: see *Harrison v Seggar* [2005] EWHC 411 (Ch), [2005] BPIR 583, at para [7] per Blackburne J, and *Re Gilmartin (A Bankrupt)* [1989] 1 WLR 513, at 516F–G, per Harman J. Furthermore, as Blackburne J said, "[t]here must be credible evidence to support such a prospect if the Court is to grant an adjournment for payment".
>
> [73] Accordingly, the first question is whether there was credible evidence before the Chief Registrar on 20 July to establish a reasonable prospect that the petition debts would be paid in full within a reasonable time. In my judgment there was not. In the context of the long-drawn out history of the petitions, and the adjournments which had already been granted, it seems to me that a reasonable time for payment in full of the petition debts could have been no more than a further 2 or 3 months at the most. There was no credible prospect of payment being received within such a timescale, because the offer of security contemplated that nothing would probably happen for at least 6 months, and the terminal loss claims were still inchoate and unsupported by any draft accounts. In view of the past history of delay and broken promises, it was in my judgment appropriate to take a fairly hard line and to accord priority to HMRC's undoubted prima facie right to obtain bankruptcy orders over protestations that a further adjournment might finally yield the payment in full which had so signally failed to materialise in the past. Furthermore, the Court would in my opinion have been justified in harbouring a suspicion that the predominant purpose of the adjournment, from the debtors' point of view, was to enable them to realise their assets at a time of their choosing in a difficult property market."

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

51. Applying the principles to the billion Euro bankruptcy petition before him which, he said, was “by any measure extraordinary”, the Chief ICC Judge concluded that a reasonable period of time to adjourn the petition was 6 months. The circumstances which he considered to weigh heavily in favour of the adjournment included allowing a period of time for petitions before the Supreme Court in India and a settlement proposal before the Karnataka High Court to be determined. Neither were guaranteed

to succeed but the learned judge concluded that the evidence supported the view that the petitions stood a reasonable prospect of success, resulting in Dr Mallya's liability being extinguished and/or compromised. He also took into account a finding earlier in his judgment that the petitioner would need to amend the petition.

52. Mr Ryan submitted that *Mallya* underlines the wide scope of the Court's discretion. There, the Court adjourned the petition against Dr Mallya for 6 months. Mr Mittal merely asks for an additional 14 to 16 weeks in order to be able to conclude the mediation plus a short amount of time thereafter to allow for the payments to be made – perhaps therefore 17 to 18 weeks.

53. Moorgate vehemently opposes any further adjournment.

54. Distilling the principles set out in the judgment in *Mallya:*

    i) there must be a reasonable prospect of the petition debt being paid in full;

    ii) within a reasonable period; and with

    iii) credible evidence to support such a prospect.

55. In my judgment, in this case, none of the criteria is satisfied:

    i) The authorities clearly establish that the Court must be satisfied that the anticipated payment will be in *full* satisfaction of the Petition Debt. Mr Mittal's own evidence states that he is confident that the mediation will enable tens of millions to be paid to Moorgate and yet it is owed substantially more: £139 million. Consequently, the first part of Mr Mittal's proposal is dependent on Moorgate agreeing to accept a sum in full and final settlement. Moorgate is not obliged to accept anything less than the full amount of the Petition Debt;

    ii) Whilst the authorities state that the Court should have "credible evidence" to support the prospect of future payment, the best that Mr Mittal has been able to say in his evidence is that even if Moorgate refuses to accept such a settlement there is a *reasonable prospect* that the mediation *may* result in payment of the petition debt in full. That prospect appears to arise as a result of (i) the consequent, anticipated distribution in the liquidation of GSHL; (ii) a payment at the direction of the Mittal Family Trust; and (iii) a payment in respect of his own shareholding in GN;

    iii) The prospects of a return to GSHL are sufficiently speculative for its liquidators not, at this stage, to be prepared to place any reliance upon it. The latest correspondence from them states that they do not currently expect to be in a position to make any payment to unsecured creditors. Moreover, any sums which are received by the liquidators will be used first to discharge the costs and expenses of the liquidation. The only evidence Mr Mittal has been able to provide regarding a potentially very significant contribution from the company owned by the Family Trust is a sentence in his witness statement: "which I am told by its directors it would be willing to pay to Moorgate on my behalf". This is not corroborated by any additional evidence and there is no

express explanation why the directors of that company would consider it in the best interests of its shareholders to make such a payment;

iv) The Nigerian dispute has been on-going since 2008. Whilst Mr Mittal states that he is prevented by a confidentiality agreement from saying much more about the mediation, the position as far as this Court is concerned, is that there is no evidence to explain the other side's sudden incentive now, so swiftly to conclude the dispute.

v) The outcome of the mediation is also entirely speculative. Even on the most expeditious and best-case scenario, there is no evidence before the Court that it will be successful or result in the Petition Debt being paid in full. Mr Mittal's own evidence fails to provide any assurance: "if a settlement is concluded – a matter on which I do not express any opinion".

Conclusion

56. This is only the second hearing of the petition. There is no doubt that the Court retains a discretion not to make a bankruptcy order, even where the petition debt has been clearly established and any grounds of opposition have been dismissed.

57. However, for the reasons set out above, Mr Mittal's evidence does not persuade me that there is a reasonable prospect of the petition debt being paid in full within a reasonable period of time and upon handing down this judgment, I shall make a bankruptcy order.

Insolvency and Companies Court Judge Burton

19 June 2020