Neutral Citation Number: [2021] EWHC 3171 (Ch)

Case No: BL-2020-000043

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (CHD)

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

Date: 26/11/2021

Before :

DEPUTY MASTER BOWLES

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Between :

John McLinden	**Claimant**
- and -	
Shiao-Chen Lu	**Defendant**
-and-	
Shabnam Khan	
(On behalf of the Estate of Fazal Khair Khan)	**Third Party**

AND in the application between:

Shabnam Khan	
(On behalf of the Estate of Fazal Khair Khan)	**Applicant**
-and-	
(1) John McLinden	
(2)Shiao-Chen Lu	
(3) Mohamed Munaver Khan	**Respondents**

AND in the matter of Mr Mohamed Munaver Khan in Bankruptcy (No.5542 of 2013)	**Applicant**
AND in the matter of the Insolvency Act 1986	

Between	
Shiao-Chen Lu	**Applicant**
-and-	
Shabnam Khan	
(On behalf of the Estate of Fazal Khair Khan)	**Respondent**

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Morwenna Macro (instructed by **Regal Law Solicitors Ltd**) for **Shabnam Khan**
Oliver Phillips (appearing pro bono under the auspices of **Advocate**) for **Shiao-Chen Lu**
Mohamed Munaver Khan did not appear and was not represented

Hearing date: 15th July 2021

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Judgment Approved by the court for handing down (subject to editorial corrections)

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Deputy Master Bowles :

1. By paragraph 3 of my order, dated 29th March 2021, I directed the trial of a preliminary issue of what was termed in my order the 'Bankruptcy Issues'. This is my judgment on those issues.

2. At the date of the bankruptcy out of which those issues arise, the bankrupt, Mr Mohamed Munaver Khan (Mr Khan), was indebted to the Defendant, Ms Shiao-Chen Lu (Ms Lu), in sums totalling some £840,000. The debts reflected unpaid judgments and costs due to Ms Lu from Mr Khan, resulting from long standing and hard fought litigation between Ms Lu and Mr Khan. The petition upon which Mr Khan was made bankrupt was Ms Lu's petition. It was presented to the court on 16th December 2013 and Mr Khan was made bankrupt on the petition on 3rd February 2014.

3. A not insignificant part of the debts owing to Ms Lu at the date of the bankruptcy related to her unpaid costs of enforcement proceedings she had taken against Mr Khan, in respect of two properties registered in his name; 82 Westminster Way, Botley, Oxford OX2 0LP and 45 Avarn Road, Tooting SW17 9HB. In respect of both properties she had secured final charging orders and in respect of Westminster Way, she had, on 24th July 2013, secured an order for sale.

4. The Westminster Way property has now been sold by receivers appointed by the court by way of equitable execution; those receivers having been appointed on the application of the Claimant, Mr John McLinden (Mr McLinden), as a means of enforcing a substantial judgment, in the order of £340,000, that he has obtained against Ms Lu, in respect of his unpaid professional fees in representing Ms Lu in her litigation against Mr Khan.

5. The bankruptcy issues, with which this judgment is concerned, arise out of the further steps that Mr McLinden has taken to enforce his judgment against Ms Lu and relate, in this instance, to the final charging order obtained by Ms Lu in respect of 45 Avarn Road (the Property). That final charging order was granted by District Judge Lightman on 4th November 2011. It purported to secure the sum of £546,578.53, together with interest and costs, due and owing to Ms Lu, pursuant to a judgment she had obtained against Mr Khan in June 2010. I will refer a little later in this judgment to the way that he addressed the matter.

6. By an application dated 24th July 2019, issued, at that stage, in the Queen's Bench Division, Mr McLinden applied for a charging order over Ms Lu's equitable mortgage over the Property, created by her 2011 charging order. The effect of such an order, if granted, would be that any recovery made by Ms Lu, by way of enforcement of her charging order, would, itself, be subject to an equitable mortgage in favour of Mr McLinden, to the extent of Ms Lu's judgment debt, so that, in practice, the bulk, if not all, of her recovery would accrue to Mr McLinden in diminution, or extinction, of that debt. With commendable efficiency an interim charging order was granted in favour of Mr McLinden over Ms Lu's 2011 charging order on that same date.

7. The application to make Mr McLinden's interim charging order final came before Master McCloud on 17th September 2019. Ms Lu did not appear. Also before the court was an application notice, issued on 4th September 2019, by the Third Party, Shabnam Khan, for an order that she represent the estate of her grandmother, Fazal Khair Khan,

in order that, on behalf of the estate, she could object to Mr McLinden's interim charging order being made final; the basis of that objection being that the 2011 charging order had been wrongly granted, because the beneficial ownership of the Property lay with Fazal Khair Khan, such that the 2011 charging should be discharged and with it the interim charging order granted to Mr McLinden over the equitable mortgage created by the 2011 charging order.

8. The intervention of Shabnam Khan, on behalf of her grandmother's estate, will not have come as a complete surprise. Fazal Khair Khan had been a party to the application to make final the 2011 charging order and had, as I read the transcript of the hearing, although not present at the hearing, asserted, albeit in an inchoate fashion, her beneficial ownership of the Property. The approach, however, of the District Judge, in apparent reflection of the practice then obtaining in the Central London County Court, was that questions of beneficial ownership need not be resolved on an application to make final a charging order and that such questions needed only to be resolved at the time when a charging order was sought to be enforced by an application for possession and sale. On that footing and while, explicitly, preserving the rights of Fazal Khair Khan to assert her beneficial ownership, in answer to an application for sale, the District Judge made the charging order final. An appeal against that determination was, eventually, abortive.

9. With respect to the very experienced District Judge and, indeed, to the approach apparently then adopted in the Central London County Court, that approach was incorrect. The jurisdiction to make a charging order under the Charging Orders Act 1979 can only be exercised in respect of a beneficial interest, usually in land, held by the judgment debtor. It follows that, before granting a charging order, the court must be satisfied that the judgment debtor held a beneficial interest in the property to be charged and, therefore, that, if that question is disputed, the matter must be resolved before the charging order is made final.

10. The result, or consequence, of the failure of the District Judge to resolve the question of beneficial ownership of the Property when, nonetheless, making the 2011 charging order final, has been reflected in the current litigation and, as I understand it, in the approaches which were adopted by, respectively, Mr McLinden and Ms Macro, who appeared then, as now, for Shabnam Khan and the estate of Fazal Khair Khan, when the matter came before Master McCloud on 17th September 2019.

11. On the one hand, the District Judge's explicit failure to resolve beneficial ownership left it open to Ms Macro to contend that that question remained open and that, if it was found that Fazal Khair Khan was (and her estate is) the beneficial owner of the Property, then the 2011 charging order was made without jurisdiction and that it and Mr McLinden's interim charging order, parasitic upon it, must be discharged.

12. On the other hand, the fact, that the charging order was made final, in proceedings to which Fazal Khair Khan was a party, and was not (although the subject of what appears to have been an abortive appeal), ultimately, challenged on appeal, enabled Mr McLinden, before Master McCloud, and, in due course, Mr Oliver Phillips, who has appeared pro bono for Ms Lu, to contend that Shabnam Khan's intervention, on behalf of her grandmother's estate, amounted to an abusive attempt to re-litigate matters already decided and/or to re-open a matter already res judicata.

13. Master McCloud was not prepared, at the September 2019 hearing, to make a finding of abuse, or res judicata. She gave permission for Shabnam Khan to represent her grandmother's estate and she directed that Shabnam Khan should apply in the proceedings, which she transferred to the Chancery Division, for a determination as to whether the estate had an interest in the Property and standing to impugn the restriction which had been entered in the proprietorship register in respect of the Property to protect the 2011 charging order. In the absence of such an application, Mr McLinden's interim charging order was to be made final.

14. The application directed by Master McCloud was issued on 15th October 2019. In addition to seeking the determinations as to ownership and standing directed by the Master, it sought that the proceedings in which the 2011 final charging order had been made should be transferred to the High Court, that the estate be joined as a party and, materially, to the bankruptcy issues, Ms Lu give specific disclosure of all relevant documents pertaining to the bankruptcy petition and subsequent bankruptcy of Mr Khan.

15. The evidence lodged in support of that application elaborated somewhat upon that which had been before Master McCloud. In respect of beneficial ownership it reiterated that that ownership was determined by a declaration of trust dated 10th May 2010. More importantly, for present purposes, it raised, for the first time, in any detail, the question as to whether Ms Lu had surrendered the 2011 charging order to the Official Receiver, as a result of her conduct, in respect of that security, in the course of the bankruptcy proceedings against Mr Khan.

16. Specifically, the evidence raised the question as to whether, by valuing the 2011 charging order as £0, Ms Lu had, thereby, given up her security. The evidence also raised the possibility that the effect of sections 267(2)(b), 269 and 383 of the Insolvency Act 1986, together with the insolvency rules relating to proof of debt and to discharge from bankruptcy, might also have had that effect. If that were the case, then Ms Lu would not have had any beneficial interest in the Property, by way of the 2011 charging order, at the date when Mr McLinden sought to charge that interest and, consequentially, his interim charging order would fall to be discharged.

17. The application came before Deputy Master Linwood, on 4th May 2020. He joined the estate as a third party. Technically, it might have been better if the estate had been joined as a defendant to Mr McLinden's application for a charging order, but, in the event, nothing turns on this. He, also and rightly, directed the transfer in of the proceedings in which the 2011 charging order had been made, since any discharge of that charging order consequent upon the findings as to beneficial ownership would fall to be made in those proceedings. The Deputy Master made orders for specific disclosure pertaining to the, as yet, prospective bankruptcy issues and gave directions for the trial of the application and of the application to make final Mr McLinden's interim charging order. No directions were made as to pleadings.

18. The matter came before me on 5th November 2020. I was not satisfied that the matter was ready for trial. I considered that Mr Khan, as the legal and, on Ms Lu's case, beneficial owner of the Property was a necessary party to the proceedings. I also considered that, in the absence of pleadings, by way of points of claim and points of defence, the issues had not been sufficiently defined. At that stage Ms Lu was acting in person and, without in any way criticising her, her filed evidence was wide ranging and

unfocused. I also considered that the exercise of pleading out the issues would assist in determining whether it was appropriate to direct that the bankruptcy issues, once defined, should be determined as a preliminary issue. To that end, I directed a further pre-trial case management conference, to take place after the matter had been pleaded out.

19. That case management conference took place on 29th March 2021. By that date points of claim and points of defence had been filed and Ms Lu had the benefit of legal representation, by Mr Phillips. Mr Khan, although joined as a respondent to the estate's application, did not appear. By my order, of 29th March 2021, I directed the trial, as a preliminary issue, of the Bankruptcy Issues, as defined in my order. It seemed to me that, although not necessarily determinative of the proceedings, there was sufficient substance in the arguments sought to be advanced by the estate to warrant the determination of those issues, as a preliminary issue, and, thereby, to potentially preclude the necessity of a lengthy factual enquiry as to the beneficial ownership of the Property and a consideration and determination of the question of abuse of process.

20. The Bankruptcy Issues were defined and identified, in paragraph 3 of my order, as being whether, given the effect of sections 267, 269 and 383 of the Insolvency Act 1986 (the 1986 Act) and the Insolvency (England and Wales) Rules 2016 (the 2016 rules), in particular rule 14.16, Ms Lu had waived or surrendered her security in the Property in the course of the bankruptcy proceedings brought by Ms Lu against Mr Khan; in particular by valuing her security in the Property as nil in her petition and/or by failing to disclose her security in her proof of debt form, in those proceedings, and/or by electing to give up that security/proceed as unsecured in respect of the Property in order to allow, or enable, Mr Khan's Trustee in Bankruptcy to pursue the Property as an asset in the bankruptcy; and whether the conduct of Mr Khan's former Trustee in Bankruptcy had in any way affected the ability of the estate to pursue, or advance, its contention that Ms Lu had waived or surrendered her security in the Property.

21. Although not mentioned in my order, it was common ground, when the preliminary issue came to be heard, that, in respect, in particular, of the effect of Ms Lu's alleged failure to disclose the 2011 charging order in her proof of debt, it was rule 6.116 of the Insolvency Rules 1986 (the 1986 Rules) which was specifically in point.

22. In order to ensure that, in respect of the Bankruptcy Issues, all available arguments were left open to Ms Lu and, in particular, in order to enable her, if so advised and in circumstances explained later in this judgment, to make an application in the bankruptcy proceedings under rule 14.16 of the 2016 rules, which has now replaced rule 6.116 of the 1986 Rules, I further directed that Mr Khan's bankruptcy proceedings be transferred to this list, so that any such application could be made in those proceedings and heard at the same time and as part of the preliminary issue. That application was duly issued by Ms Lu on 25th April 2021.

23. Ms Lu's position on the preliminary issue is that she supports the continued existence of the 2011 charging order, in her hands, and, correspondingly, supports the validity of Mr McLinden's interim charging order over the 2011 charging order and his entitlement to make that order final. She does so because, if she retains and is able, ultimately, to enforce the 2011 charging order, the receipts of the sale of the Property will reduce, or extinguish, her liabilities to Mr McLinden.

24. The estate, as already explained, challenges the existence of the 2011 charging order, in Ms Lu's hands, and, consequently, both the validity of Mr McLinden's interim charging order over that interest and Ms Lu's ability to enforce the 2011 charging order against the Property, contrary to the estate's asserted beneficial interest.

25. Mr McLinden, although present remotely at the hearing of the preliminary issue and although supporting Ms Lu's arguments and position, took little or no active part in the argument.

26. The primary facts relevant to the Bankruptcy Issues fall into a relatively small compass and are not, in themselves, controversial. The only oral evidence that I heard came from Ms Lu and related to her intentions and understanding in respect of the various steps that she took, in Mr Khan's bankruptcy proceedings, in regard to the security afforded her by the 2011 charging order. Those matters went, as explained later in this judgment, to the questions of election and mistake raised in the proceedings.

27. The factual starting point in respect of the Bankruptcy Issues is not Mr Khan's eventual 2014 bankruptcy, upon the petition of Ms Lu, but an earlier petition, ultimately dismissed, issued by Ms Lu against Mr Khan in 2010. That petition was based upon a statutory demand dated 30th September 2010 in which Ms Lu asserted that the sum demanded was unsecured to the extent of £299,976.16. At the stage of her demand, she had obtained an interim charging order over the Westminster Way property but not over the Property. The allegedly unsecured figure of £299,976.16 was calculated on the basis of Mr Khan's overall indebtedness of £599,976.16, reduced by the value (£300,000) that Ms Lu placed upon her security, by way of interim charging order, over Westminster Way. Ms Lu's petition, presented on 15th December 2010, reflected the position set out in her statutory demand.

28. The petition came before Deputy Registrar Middleton on 14th July 2011. The petition was contested. By the date of the hearing Ms Lu had, on 10th December 2010, obtained an interim charging order over the Property. As appears from the reserved judgment of the Deputy Registrar, she, at that stage, valued that security at £200,000; this notwithstanding that Mr Khan had, by no later than 5th March, made it clear in his witness statement of that date, served in the proceedings to make final the 2011 charging order, that he denied any beneficial owner of the Property and, correspondingly, that the interim charging order be made final.

29. The 2010 petition was dismissed. The defence raised in answer to the petition by Mr Khan was that he had viable cross claims such as to reduce the amount outstanding and unpaid to a figure which, having regard to the secured element, fell below what the Deputy Registrar termed the bankruptcy level. To meet this contention an application was made on behalf of Ms Lu, at the hearing, to amend the petition by increasing the amount of the unsecured debt, from the pleaded amount of £299,976.16 to £621,126.93, by Ms Lu giving up her security for the benefit of creditors.

30. In the event, that amendment was not allowed; the Deputy Registrar ruling that, because the petition had, pursuant to section 268(1)(a) of the 1986 Act, been founded upon the statutory demand and because the petition, if amended, would no longer be based on that demand and could not, therefore, succeed, no basis existed for allowing the amendment.

31. The relevance, however, of the 2010 petition to the current proceedings lay, as submitted by Ms Macro, in Ms Lu's apparent willingness, as disclosed in the amendment application, to surrender her security and proceed as an unsecured creditor. Its further relevance, given her assertion, in her 2013 petition, that the 2011 charging order had a nil value as security, lay in the fact that, in 2011, she had ascribed a value of £200,000 to that charging order, even prior to its being made final and even although, by the date of the hearing of the 2010 petition, Mr Khan had made clear that he denied beneficial ownership of the Property and, consequently, Ms Lu's entitlement to a charging order over the Property as security for his indebtedness.

32. Ms Lu's position, as to the amendment application, as conveyed to me in her oral evidence, appeared, initially, to be that that application had been made without her authority. My eventual understanding, however, of her evidence was that she had not wanted to offer to give up her security, but that she had been told by her legal advisers that this was something that she must do and that she had acquiesced in that advice.

33. In regard to the averment, in her 2013 petition, that the 2011 charging order had nil value, notwithstanding the value placed upon it, in her 2010 petition, her evidence, which I accept, is that that averment was made by her on legal advice.

34. The 2013 petition, containing that averment, was, as already stated, presented in December 2013. It was founded upon a further statutory demand, dated 17th August 2013 and served personally upon Mr Khan on 23rd August 2013. The demand asserted an unsecured indebtedness of £475,039.81 and that Ms Lu held security to the value of £375,283.50. The security identified in the statutory demand included the 2011 charging order, but, as in the petition, it placed a nil value upon that security. The reason given for that nil value, both in the demand and in the petition (and, as set out later in this judgment, in Ms Lu's email correspondence with Mr Khan's trustee in bankruptcy) was stated to be the disputed beneficial ownership of the Property.

35. Within the petition, itself, paragraph 4 asserted an overall indebtedness of £840,323.31. In regard to security, paragraph 8 identified Ms Lu's security over Westminster Way, which, by the date of the petition had been reflected in an order for sale of that property. For the purpose of her petition she valued that security at £350,000. Paragraph 8 also adverted to the 2011 charging order over the Property. As already set out, for the purposes of the petition, she valued that security as £0, on the basis that ownership was still in dispute. By paragraph 9, she averred, accordingly, that for the purposes of her petition she regarded £490,323.01 (the difference, subject to a small typographical error, between the overall indebtedness and the value placed upon the secured indebtedness) as unsecured.

36. Following the grant, by Chief Registrar Baister, of the bankruptcy order against Mr Khan, on 3rd February 2014, Mr Timothy Bramston was, on 25th February 2014, appointed as Mr Khan's trustee in bankruptcy. Mr Bramston was a partner in a firm of insolvency practitioners, Griffins. He was assisted, in respect of Mr Khan's bankruptcy, by a Mr Andrew Foster (Mr Foster).

37. In April 2014, in preparation for the meeting of creditors, in respect of Mr Khan's bankruptcy, scheduled, I think, for 30th April 2014, Ms Lu entered into communications with Mr Foster, in connection with that meeting and in connection with her submission to the trustee of her proof of debt in respect of Mr Khan's bankruptcy. On 28th April

2014, Ms Lu sent copies of her proof of debt to Mr Foster. She had, as she told me, filled in the proof of debt form (Form 6.37) to the best of her ability. At paragraph 7 of the form, which requires a creditor proving in the bankruptcy to particularise his, or her, security and the date and value of that security, Ms Lu mentioned her security, by way of charging order, over 82 Westminster Way and a further property, 80 Willowbrook Road. She did not mention, or particularise the 2011 charging order over the Property, although she did mention that she had received, apparently, £10,000, in respect of the costs of the order for sale over 82 Westminster Way and that Mr Khan had made a payment of what she described as '£7,500 for security on account'.

38. Mr Foster, on receipt of Ms Lu's proof of debt, requested certain further information. He, also, asked Ms Lu to fill in new proof of debt and proxy forms, in, as I understand it, updated form. The new proof of debt form was submitted on 30th April 2014, in time, presumably, for the meeting of creditors. The new form repeated the reference to Ms Lu's security over 82 Westminster Way and 80 Willowbrook Road. Again, no mention was made of the 2011 charging order over the Property and, again, no particulars were given. The new form, as a result, as I understand it, of guidance from Mr Foster, did not include the references to the costs of sale of Westminster Way, nor to the monies received 'for security on account'.

39. Although not mentioned in either version of the proof of debt form, it is, I think, clear that Ms Lu made no secret of the existence of the 2011 charging order. The particulars of debt attached, certainly, to one of the proof of debt forms included a number of references to costs which had been incurred in respect of the charging order proceedings in respect of the Property and, by email to Mr Foster of 6th May 2014, Ms Lu provided Mr Foster with 'some 45 Avarn Road's court document for your information'. It would appear, therefore, that there had, already, prior to that date, been some discussion, or mention, of the Property, as between Ms Lu and Mr Foster.

40. Subsequent to that date, there followed, on 13th May 2014, a further email discussion between Mr Foster and Ms Lu, in respect of the 2011 charging order. A copy of the charging order was sent to Mr Foster by Ms Lu and, in the accompanying email, she explained that she had not valued 'this property in the bankruptcy as the ownership (was) in dispute' and that, although she had the final charging order she couldn't apply for sale since Fazal Khair Khan claimed to be the owner. In Ms Lu's words and as she saw it 'In another word it is not secured'.

41. In a further email, later that same day, Ms Lu went on to explain that, although District Judge Lightman had made the charging order final, he had, as already described in this judgment, purported to leave open the question of the ownership of the Property. For that reason, she could not, she said, put a value on the Property, meaning, I think, as security, and for that reason she saw it as 'a huge risk' to include it as part of her secured debt. She told Mr Foster that she would not mind if he wanted, in her words, 'to apply the sales of (the Property) for me'.

42. Mr Foster's response to the first of these emails was to state that his belief was that, in regard to the bankruptcy estate, the final charging order remained in place and that, in consequence, there was no equity in the Property to realise for unsecured creditors. He did not, apparently, give any consideration to the fact that the absence of any reference to the 2011 charging order in the proof of debt, or the nil valuation placed upon the charging order in the bankruptcy petition and statutory demand, had had any effect upon

the validity, or enforceability of the charging order in Ms Lu's hands; nor, indeed, that the charging order had, or was to be treated as having nil value.

43. In response to the second email, he explained that either the charging order was valid, in which case there would be no action to be brought by the bankruptcy estate, or it was not, in which case the trustee would assess the merits of attempting to realise the Property for the bankruptcy estate.

44. Ms Lu was cross examined by Ms Macro both as to this email exchange and, also, as to her reasons, generally, for not including the 2011 charging order in her proof of debt.

45. Her evidence, as to the former, was that she had discussed her situation with Mr Foster and explained to him that her financial difficulties meant that she could not take the risk of taking action to enforce the 2011 charging order and that it was in that context and, so she said, at the suggestion of Mr Foster that she proposed, in her second email, that she, in effect, surrender her security for the good, she said, of all parties. As appears from Mr Forster's second email, that proposal was not, at least at that stage, taken up.

46. Her evidence as to the latter (the absence of the 2011 charging order from her proof of debt) was that, in her mind and as set out in her first email of 13th May to Mr Foster, the 2011 charging order did not constitute security. To her mind, as she explained it to me, security was something which had an immediate cash value. The 2011 charging order did not meet that criterion and so, in her mind, was not to be regarded as security. That evidence echoed, substantially, what Ms Lu had said in paragraph 16 of her witness statement dated 26 April 2021, namely that she 'was simply not aware that a charging order which did not have any value needed to be included in the proof of debt form'.

47. The question of the 2011 charging order resurfaced at the end of 2014, when Mr Foster, in order, he said, to conclude his enquiries into Mr Khan's assets, emailed Ms Lu, in respect of both the Property and 82 Westminster Way. Mr Foster had noted that the 2011 charging order had not been registered and his speculation was that this was because the District Judge had left the question of beneficial ownership open. In fact, registration had simply been overlooked.

48. However, in a further email exchange with Ms Lu, Mr Foster indicated (in point of law erroneously) that the want of registration might invalidate the 2011 charging order and enable the Property to be treated as part of the bankruptcy estate. He explained that, in that event, Ms Lu would not have to incur the costs of sale proceedings and that, although, in that event, the proceeds of any sale would have to be applied to the benefit of all creditors, Ms Lu as the principal creditor, would receive, as things stood, the largest portion of the distribution.

49. Ms Lu's response to that suggestion, confirmed to me in her oral evidence, was that she was happy for the trustee to treat the Property as a bankruptcy asset if he was able to do so.

50. Mr Foster, then, as appears from a further email, of 27th January 2015, discussed matters with solicitors. The suggestion that want of registration invalidated the 2011 charging order was not pursued. The alternative suggestion was raised that Ms Lu might

surrender some part of her security to the Trustee and that, if, then, the Trustee was able to secure a sale of the Property, the net proceeds could then be divided.

51. That proposal, although referred to by Mr Bramston in his February 2015 report to creditors, never went forward and no further reference was made to it in either of the subsequent reports to creditors, nor in the trustee's final report to creditors dated 18 February 2018. At no stage, in any of their reports, did either the original trustee, Mr Bramston, or his successors, as trustee, a Mr Hunt and a Mr Harris, make any reference at all to Ms Lu's failure to attribute any value to the 2011 charging order in her petition, or to its absence from her proof of debt, or to any consequences, by way of surrender to the trustee of that security, arising from either of those facts. Mr Khan was discharged automatically from his bankruptcy in February 2015. The bankruptcy did not give rise to any dividend or distribution.

52. Against that backcloth of fact, the question for me is whether, notwithstanding the failure of Mr Khan's trustee, or trustees, to take any point on Ms Lu's failure to ascribe any value to the 2011 charging order in her petition, or to mention it in her proof of debt, and notwithstanding the trustee(s)' broad assumption, throughout the bankruptcy, that the 2011 charging order remained a valid security in Ms Lu's hands she had, whether by operation of law, or otherwise, surrendered that security.

53. In support of a positive answer to those questions, Ms Macro, for the estate, took, as her starting point, the nil valuation placed upon the 2011 charging order in Ms Lu's 2013 petition. She drew my attention to sections 267(2)(b) and 269 of the 1986 Act, to a passage in the judgment of David Richards J, as he then was, in **Barclays Bank v Mogg [2003] EWHC 2645 (Ch) at paragraph 15**, and to a passage in the judgment of Sir Christopher Slade, in **Platts v Western Trust & Savings Ltd [1996] BPIR 339 at 347.**

54. Both the passages relied upon emphasise what is one of the fundamental tenets of the bankruptcy regime, namely that a secured creditor must elect as between the benefit of his security and the potential benefits flowing from a bankruptcy and can, in consequence, only petition for bankruptcy if, either he gives up his security for the benefit of all the creditors of the debtor and proceeds as if unsecured, or if he limits his bankruptcy petition to the amount of his debt which is unsecured.

55. Ms Macro's submission, put at its starkest, is that when Ms Lu, in her 2013 petition, having earlier ascribed a value of £200,000 to the 2011 charging order, ascribed a nil valuation to the same security and, correspondingly, asserted that she was unsecured, save to the extent of the value that she placed on her security over Westminster Way, she, thereby, gave up the security, such as it was, afforded by the 2011 charging order for the benefit of all Mr Khan's creditors, with the consequence that, from the date of that petition thereonward, she no longer retained that charging order.

56. The relevant statutory starting point is section 267(2)(b) of the Act, which requires, as one of the conditions precedent to the presentation of a petition that the debt, in respect of which the petition is brought, is unsecured. A debt is secured, for purposes of this provision, 'to the extent that the person to whom the debt is owed holds any security for the debt (whether a mortgage, charge, lien or other security)': section 383 (2) of the Act. A charging order takes effect as an equitable mortgage under hand and, in consequence, the entire judgment sum purportedly secured by the 2011 charging order

was 'secured' for purposes of the Act and, prima facie, not available as a debt upon which a petition could be founded.

57. Section 267(2)(b) must, however, be read with section 269(1) of the Act, which provides that 'a debt, which is the debt, or one of the debts, in respect of which a creditor's petition is presented need not be unsecured if either (a) the petition contains a statement by the person having the right to enforce the security that he is willing, in the event of a bankruptcy order being made, to give up his security for the benefit of all the bankrupt's creditors, or (b) the petition is expressed not to be made in respect of the secured part of the debt and contains a statement by that person of the estimated value at the date of the petition of the security for the secured part of the debt.'

58. In a case where a statement has been made, in compliance with section 269(1)(a) and where a bankruptcy order is then granted on the petition in which that statement was made, section 383(3) provides that the creditor who made that statement is to be deemed to have given up the security specified in the statement.

59. In a case falling within section 269(1)(b) of the Act, section 269(2) provides that, for purposes of sections 267 to 270 of the Act, the secured and unsecured parts of the debt are to be treated as separate debts.

60. There is nothing in the 2013 petition which could be said to amount to a statement compliant with section 269(1)(a) and having, therefore, the consequences, by way of the deemed giving up of any part of Ms Lu's security, set out in section 383(3) of the Act. The placing of a nil value on the 2011 charging order has no relevance in regard to section 269(1)(a).

61. Nor does it seem to me that the nil value placed on the 2011 charging order, in the 2013 petition is of any avail, or advantage, to Ms Macro, in terms of a statutory surrender by Ms Lu of that security. The overall effect of the 2013 petition, as outlined in paragraph 34 of this judgment, was to make plain, or express, that the petition was only brought in respect of that part of the debt (£490,323.01) not covered by the value of the security and, in that sense, not secured. As is, I think, clear from paragraphs 15 and 16 of the judgment of David Richards J, in **Mogg,** supra, and, in particular his statement, at paragraph 15, that a petition can proceed in respect of a secured debt 'if the debt is more than the value of the security by at least the minimum amount to found a bankruptcy petition', a petition which is so expressed is sufficient, at least in principle, to satisfy section 269(1)(b) of the Act, such as to enable the petition to proceed. It is, no doubt, for that reason that the very experienced Chief Bankruptcy Registrar felt able to make the bankruptcy order against Mr Khan.

62. In regard to the estimation of the value of the security, required by the section, there are a number of things to note.

63. Firstly, there is nothing definitive about the required estimate of value. It is open to challenge by the debtor who is entitled to lead evidence such as to show that the true value of the security is such as to exceed the alleged amount of the unsecured debt, or that the true value of the security reduces the unsecured element of the debt below the bankruptcy level: see **Mogg** at paragraphs 16 and 23 and **Platts** at page 349.

64. Secondly, the estimation of the value of a security as nil, or as £0, remains an estimation of the value of the security. In this regard, I respectfully agree with the judgments of A L Smith LJ and Chitty LJ, in **Re Piers [1898] 1 QB 627**. As explained later in this judgment, that case was decided under the provisions of the Bankruptcy Act 1883 and in a different statutory context. Nonetheless, it is hard, if not impossible, to see how the valuation of something as nil, or as being valueless, is not ascribing, or estimating, a value to that thing.

65. Thirdly, in a case where section 269(1)(b)is relied upon, non-compliance with the section, even to the extent of failing to mention a security, or asserting the non-existence of a security, although a serious procedural flaw, does not render the petition a nullity, or preclude it from being cured by amendment: **Mogg**. The inclusion, in a petition, of a value for a security, including a nil value, which was not, in truth, an estimate of value would, as it seems to me, fall into the same category of error.

66. Fourthly, there is nothing in section 269(1)(b) to suggest that, in a case where that section applies to ground a petition, the consequence of a failure to mention a security, or to put in a true, in the sense of a genuine, estimate of the value of a security, gives rise to a surrender of the security, or a limitation of the value of the security to the amount put forward in the petition as a purported estimate. Ms Macro could point to no other provision of the 1986 Act, or the relevant Insolvency Rules giving rise to such a total or partial surrender.

67. Ms Macro did seek to place some reliance upon **Re Piers**. That case, however, as mentioned above, was decided under the Bankruptcy Act 1883, which provided, in terms, for a statutory surrender of a security if a creditor, having omitted the value of his security from his proof of debt purported to vote for his whole debt, rather than the balance of that debt after deducting the value of his security. I have not found the case to be of any assistance in determining the statutory effect of a failure to properly estimate the value of a security, as required by section 269(1)(b).

68. Fifthly and finally, on this aspect of the matter, it seems to me that the true consequence of a failure to comply with the provisions of section 269(1)(b), in a case where that section is relied upon to found a petition, is, simply, that the petition is defective and, susceptible of discharge, or dismissal, at the court's discretion, unless amended: **State Bank of India v Mallya [2021] BPIR 189**, **Wave Lending Ltd v Parmar [2019] BPIR 451.**

69. All that said, I am not satisfied that, in this case, the petition was defective or that there has been any material non-compliance with section 269(1)(b) of the Act. In particular, I am not persuaded that the nil valuation placed upon the 2011 charging order, both in the relevant statutory demand and in the 2013 petition was anything other than a genuine estimation, by, or on behalf of, Ms Lu of the value of that security, as at the date of the statutory demand and of the petition.

70. As already stated and as I accept, that valuation was placed on the 2011 charging order by Ms Lu's legal advisers and upon their advice. No suggestion has been made that, in so doing, Ms Lu, by her advisers, was not acting in good faith, or, therefore, that the estimate was not made in good faith. I see no reason at all to think that that was not the case.

71. I am aware (and Ms Macro, rightly made the point in her skeleton argument) that, in **Platts**, Sir Christopher Slade indicated, at page 347, that, in his view and in the context of that case the proper basis upon which the value of a security should be assessed, for purposes of determining, in that case in respect of a statutory demand, whether a debt was fully secured, or the extent to which it was not fully secured, was on the footing of the price obtainable upon a forced sale. I would also accept that, in many cases, that would be the correct mode of estimation for purposes of section 269(1)(b) and, further, that a forced sale of the Property, at the date of the demand, or the petition, would not have resulted in a nil valuation.

72. I do not think, however that Sir Christopher Slade, in **Platts**, was intending to lay down any kind of a general rule. Anyone with any knowledge of enforcement in this area will know that the forced sale value of a property is only one aspect, or ingredient, in the determination of the value of any security held over that property. Equally, if not more, important is the question of the existence and value of prior security, or, in the case of jointly owned property, the true availability of a sale.

73. In the usual case, however, the validity of the security, itself, is not in issue. In this case, because of the approach adopted by the District Judge, that validity had been, explicitly, left open to question, with the result that the security was, at least potentially, defeasible. In this context, as, indeed, illustrated by Ms Lu's attitude to the value, as security, of the 2011 charging order, as set out earlier in this judgment, one can well see that, looked at as an asset, the 2011 charging order could well be seen to have a nil, or minimal, value. Anyone acquiring the charging order would face the risk both that the security would prove to be unenforceable and that a failed attempt to enforce the security would result in significant liabilities as to costs.

74. In the result and, as set out above, I am not persuaded that the nil value placed on the 2011 charging order was anything other than a genuine and, I would add, realistic estimation of value. There has, in consequence, been no non-compliance with section 269(1)(b) of the Act and, even if there had been, then, for the reasons discussed above, that non-compliance would not have resulted in any form of statutory surrender by Ms Lu of the 2011 charging order.

75. Ms Macro is, however, on very much stronger ground, when I turn to the next aspect of her submissions, namely the effect of Ms Lu's failure to mention, or include, the 2011 charging order in her proof of debt.

76. The starting point, here, is rule 6.116 of the 1986 rules, being the insolvency rules in force at the date of Ms Lu's proof of debt. That rule provided that, if a secured creditor omitted to disclose his security in a proof of debt, he should surrender his security for the general benefit of creditors, unless the court, on application by him, relieved him from the effect of the rule on the ground that the omission was inadvertent or the result of honest mistake.

77. Rule 6.116 must be read with rule 6.98(1)(e) of the 1986 rules which provided that a creditor's proof of debt should state the particulars of any security held, the date when it was given and the value which the creditor put upon it.

78. Mr Phillips, by way of a preliminary point, sought to argue that the fact that Ms Lu's proof of debt included, as set out in paragraph 39 of this judgment, some references to

costs which had been incurred in respect of the proceedings which gave rise to the 2011 charging order, including the abortive appeal, meant that the 2011 charging order had not been omitted from Ms Lu's proof of debt.

79. That argument, only thinly raised, was untenable. The simple fact, acknowledged, in effect, by Ms Lu in her evidence to me, is that the 2011 charging order is not mentioned at all in Ms Lu's proof of debt, let alone with the degree of particularisation required by rule 6.98(1)e).

80. The debate, before me, as to the effect, of rule 6.116, turned, primarily, upon two questions; firstly, as to whether the effect of the rule, when applicable, was to give rise to an automatic surrender of the security, or whether the effect of the rule was, merely, or simply, to place an obligation upon the security holder to deliver up the security if called upon; secondly, as to whether, if the security was otherwise surrendered, Ms Lu should succeed in her application, brought in the bankruptcy proceedings, to be relieved from the consequences of her failure to disclose the 2011 charging order, on the grounds of honest mistake. Attached to that second question was a further question, namely as to whether, given that Ms Lu's application has been made some six years after Mr Khan's discharge from bankruptcy and three years after the trustees' final report, the court retained a sufficient jurisdiction, in respect of the bankruptcy proceedings, to determine Ms Lu's application, or whether, assuming the jurisdiction to exist, but given the need for finality, it would not be a proper exercise of discretion to allow the application.

81. In regard to the first question, Ms Macro relied upon a body of authority (**LCP Retail Ltd v Segal [2007] BCC 584, at paragraphs 20 to 23**, **Re J T Frith Ltd [2012] BCC 634, at paragraphs 22 to 29,** and **Re Peak Hotels and Resorts Ltd, Candey v Crumpler [2019] Bus LR 1901, at paragraphs 88 and 89** (High Court) **[2020] Bus LR 1452, at paragraph 86**, (Court of Appeal)) as establishing the proposition that, under rule 6.116 of the 1986 Rules, under the equivalent provision (rule 14.16) of the 2016 Rules and under the equivalent provision of the 1986 Rules (rule 4.96), in respect of corporate insolvency, the effect of a failure to disclose a security in a proof of debt was that the security was surrendered for the general benefit of creditors. Reliance was also placed upon a passage to the same effect, in **Muir Hunter on Personal Insolvency**.

82. Mr Phillips, in response, drew my attention, in particular, to the discussion of rule 6.116 in **Re Frith** and to the language of rule 14.16 of the 2016 Rules, which has now replaced rule 6.116 of the 1986 Rules.

83. In **Re Frith**, HH Judge Keyser QC discussed, without deciding, what he saw as the two alternative meanings of rule 6.116. While acknowledging that, in **Segal**, David Richards J (as he then was) had adopted the meaning of the rule relied upon by Ms Macro, namely that the omission to disclose a security resulted, without more, in the surrender of the security, he accepted the possibility that the rule could, alternatively, be read as giving rise not to a surrender but to an obligation in the security holder to surrender the security in question.

84. In regard to the choice between those two alternatives, Mr Phillips submitted that the re-wording of the rule in the 2016 Rules had established, the 2016 Rules being primarily

a consolidating provision, that the true meaning of rule 6.116 had always been the alternative construction canvassed in **Re Frith**.

85. The literal language of rule 14.16 of the 2016 Rules undoubtedly lends support to the alternative construction. The rule, as currently formulated, provides that 'if a secured creditor fails to disclose a security in a proof, the secured creditor must surrender the security for the general benefit of creditors, unless the court, on application by the secured creditor, relieves the secured creditor from the effect of the rule on the grounds that the omission was inadvertent or the result of honest mistake'. On its face, therefore, the rule does not effect a surrender but creates, merely, an obligation to surrender. On that footing, if correct, while Ms Lu is in breach of her statutory obligation to surrender the 2011 charging order, the charging order, nonetheless, remains in her hands.

86. I do not think that that analysis is correct.

87. It seems to me that, as a consolidating provision, rule 14.16, was not intended to change the effect, or meaning, of its predecessor, that, rather than rule 6.116 taking its meaning from rule 14.16, rule 14.16 should take its meaning from rule 6.116 and that, accordingly, the essential question remains the construction of rule 6.116.

88. In both these regards, I derive assistance from the first instance and Court of Appeal decisions, in **Candey v Crumpler**. That case, in so far as relevant for current purposes, turned upon section 214 of the BVI Insolvency Act 2003, which was, in all material terms, identical to rule 6.116 of the 1986 Rules and, in respect of which, it had been determined that BVI law mirrored English law.

89. Both at first instance, before Andrew Hochhauser QC, sitting as a Deputy Judge of the Chancery Division, and in the Court of Appeal, where the sole reasoned judgment was given by Rose LJ (as she then was), it was accepted that the English law equivalent to the BVI provision was rule 14.16 of the 2016 Rules and, further, at paragraph 89, at first instance, and at paragraph 86, in the Court of Appeal, that the meaning and effect to be given to that rule was that, where a security had been omitted from the proof of debt, the security was, thereby, surrendered.

90. What seems to me to emerge clearly from the foregoing is, firstly, that, both at first instance and in the Court of Appeal, the construction which David Richards J had placed upon rule 6.116, in **Segal**, was treated as correct and, secondly and correctly, in the context of a consolidating provision, that the new form of words, used in rule 14.16, had not modified, or altered, that meaning.

91. I see no reason at all to differ from any of the foregoing, even if, as a matter of precedent, I was entitled to do so.

92. Although, as set out at paragraph 83 of this judgment, Judge Keyser, in **Re Frith**, did not feel it necessary to decide between the two alternative constructions outlined in that paragraph, he indicated, at paragraph 26, that the view adopted by David Richards J 'had much to commend it'.

93. In forming that view, he drew attention to the fact that the 1986 Rules contained no provision as to the implementation of the surrender, as might be expected in the event that rule 6.116 only gave rise to an obligation to surrender. He, also, drew attention to

the fact that earlier insolvency legislation, in respect of proof of debt (paragraph 8 of Schedule 1 of the Companies (Winding- Up) Act 1890) had provided that a secured creditor who, notwithstanding his security, voted for his whole debt 'shall be deemed to have surrendered his security'. In that context (and the same point can be made in respect of paragraph 10 of Schedule 1 of the Bankruptcy Act 1883) and in the absence of any provision for the enforcement of the obligation to surrender, if that were the intended effect of the rule, he took the view that the likelihood was that the change in language from 'shall be deemed to surrender' to 'shall surrender' was more a matter of style than substance.

94. With respect, I entirely endorse all of the foregoing. It is perfectly clear that the idea of a deemed, or automatic, surrender, in the context of matters pertaining to proof of debt is well entrenched in insolvency legislation and I can see no good reason why that approach should not have been perpetuated in the 1986 Rules. Conversely, if, in the course of the insolvency reforms leading to the 1986 Rules a change from an actual and automatic surrender to an obligation to surrender had been intended, then one would expect that specific procedures would have been created for the enforcement of that obligation. There are none.

95. It would, furthermore, be odd, as it seems to me, to provide for an obligation to surrender consequent upon non-disclosure, both in the absence of enforcement procedure in respect of the surrender and in a context where, ex hypothesi, those who might wish to enforce the surrender would, by the very fact of the non-disclosure, be unaware that there was anything to enforce.

96. Taking everything together, I am satisfied that the effect of rule 6.116, in the context of the non-disclosure of a security, was to give rise to an automatic surrender of that security, subject to the right to seek relief from that consequence set out in the rule, or in its successor.

97. I add, finally, on this aspect of the argument, that, even if the true construction of rule 6.116 only gave rise to an obligation to surrender, there are, or may be, arguments that, on well-established principles of equity, the effect, in equity, of the existence of an enforceable obligation to surrender a security might, in any event, operate as a surrender of that security in equity, such that, beneficially, at least, the security would no longer remain in the hands of the non-disclosing security holder. In respect of an equitable mortgage, such as that created by a charging order, the operation of equity upon that equitable interest might well, as I see it, result in a complete surrender of that interest.

98. The last foregoing was not, however, pursued in argument and I, therefore, say no more about it.

99. In the light of my conclusion, in paragraph 96, the position, in this case, is that, subject to the result of her application for relief from the effects of rule 6.116, the 2011 charging order was surrendered by Ms Lu in 2014. I turn, therefore, to that application.

100. Ms Lu's application for relief has been made both under rule 6.116 and under rule 14.16. It is not suggested that the fact that the 1986 rules have been replaced by the 2016 Rules, in itself, precludes her from making application.

101. What is suggested, however, by Ms Macro is that in the context of Mr Khan's discharge from bankruptcy, in 2015, and, more particularly, the fact that the application has been made some three years after the trustee(s)' final report and after service in that report of the trustee(s)' notice, under section 331 of the Act that the administration of the bankrupt's estate was complete, there remain no extant bankruptcy proceedings in which the application can be made.

102. I did not have the benefit of any extended argument upon this question. It seems to me, however, that the wide power of the court under section 363 (1) of the Act 'to decide all … questions, whether of law or fact, arising in any bankruptcy' is not limited to any particular period, or, in particular, to the period prior to the closure, or completion, of the bankruptcy, that the question as to whether Ms Lu should be relieved from the effects of the surrender arising under rule 6.116 is a question arising in Mr Khan's bankruptcy and, therefore, that that section affords a sufficient jurisdiction to enable the court to determine Ms Lu's application.

103. It further seems to me that the ostensible breadth of the section 363 jurisdiction (see: **Sealy & Milman: Annotated Guide to the Insolvency Legislation 24th Ed. 2021**), coupled with the fact, for example, that jurisdiction exists under section 300(8) of the Act to revive a trusteeship after the discharge of the trustee, in order to deal with previously undisclosed assets, tends to the conclusion that, in bankruptcy, the bankruptcy proceedings, in their broadest sense, remain available as a vehicle, or platform, for the making of any necessary applications, notwithstanding the formal closure or completion of the bankruptcy.

104. On the footing, therefore, that jurisdiction exists, the next question is whether, Ms Lu should be relieved from the statutory surrender which otherwise arises under rule 6.116 on the ground that her omission to disclose the 2011 charging order was 'inadvertent or the result of honest mistake'.

105. I have no doubt but that Ms Lu's failure was not inadvertent. Inadvertence, in the context of a failure to disclose security, has been discussed in a number of cases under previous insolvency legislation (see: **Re Piers**, **Re Safety Explosives Ltd [1904] 1 Ch 226**). It is applicable to the situation where a security is omitted by forgetfulness, or accident. It is not applicable where a person, being aware of the existence of a security elects, having considered the advantages and disadvantages of his action, not to disclose the security, even if that decision is based upon incorrect information. Ms Lu was well aware of the existence of the 2011 charging order and, whatever her reasons for non-disclosure, that non-disclosure was not based upon inadvertence.

106. The harder question is whether her failure to disclose the 2011 charging order can properly be attributed to an honest mistake upon her part. After careful consideration, I have decided that it can.

107. Quite plainly the decision not to include the 2011 charging order in the proof of debt was, in itself, deliberate and not, therefore, as such, a mistake. Equally, I did not understand Ms Lu to be saying that she misunderstood, or was mistaken as to the consequences of the non-disclosure of the 2011 charging order. There is no suggestion, in the evidence, that she had any idea as to those consequences.

108. Her mistake, as I see it and if I accept her evidence, as set out, primarily, in paragraph 46 of this judgment, was her mistaken belief, or understanding, that a charging order with, as she saw it, no value and which, as she put it, had no immediate cash value did not constitute security and did not need to be mentioned in her proof of debt.

109. Ms Lu was, as already set out, cross examined on that evidence. Having heard and seen her I have seen no reason to disbelieve her. I accept her evidence and, consequently, I accept that her failure to include the 2011 charging order in her proof was an honest mistake on her part.

110. In reaching that conclusion, I have had regard to the fact that when submitting her proof Ms Lu was evidently unrepresented and, as she told me, filling in the document to the best of her ability. That lack of representation is confirmed, as I see it, by the extraneous matters, relating to the costs of sale of Westminster Way and the sum that she, seemingly, received from Mr Khan 'for security on account', neither of which constituted security and neither of which would have been included in her proof if Ms Lu had been in receipt of professional guidance. Her election, however, to mention those matters, as security, does, as I see it, illustrate her good faith and her desire to mention all matters that she believed to be material.

111. In reaching that conclusion, I have also had regard to Ms Macro's submission, on behalf of the estate, that Ms Lu's omission of the 2011 charging order from her proof reflected a deliberate intention to exclude from mention a security that she regarded 'as dubious and worthless / too risky to seek to enforce' and an indication of her wish that the trustee, rather than Ms Lu, seek to realise the Property.

112. I do not think that that submission is borne out by the facts.

113. Firstly, I have seen no evidence at all that Ms Lu was aware, when she filled in her proof of debt, of the statutory consequences of the omission of the 2011 charging order from her proof, or, therefore, that her failure to mention the security signified, or demonstrated, an intention to give up the 2011 charging order.

114. Secondly, I do not read Ms Lu's email exchanges with Mr Foster, following her submission of her proof of debt, as confirming, or indicating, that she had excluded the 2011 charging order from her proof of debt because she had wished to surrender, or give up, that security. What she told Mr Foster, on 13th May 2014, was very much what she told me, namely that, because of the difficulties with that security (in particular the dispute as to beneficial ownership), she did not regard the charging order as security. She did not tell Mr Foster that she had omitted the charging order so as to effect a surrender, or because it was her wish that it be surrendered. Her evidence, as set out at paragraph 45 of this judgment and which I accept, is that the suggestion that she might surrender the 2011 charging order was, in fact, one that first emanated from Mr Foster, in the context of their discussions on 13th May 2014.

115. My finding of honest mistake does not, as I read rule 6.116, entitle Ms Lu from relief from the statutory surrender of the 2011 charging order as of right. What it does is to open up the court's jurisdiction to grant that relief. The exercise of that jurisdiction remains a matter of discretion.

116. In that regard, Ms Macro, reminds me, rightly, of the importance of finality and submits that, in the interests of finality, I should not grant the relief sought. I do not think, however, that, on the facts of this case, those interests should preclude the grant of relief.

117. It seems to me that, in this case, the omission of the 2011 charging order from the proof of debt has not afforded Ms Lu any advantage in the bankruptcy, such as to render it unfair for her now to be relieved from the consequences of that omission. Nor, has her omission, in any other way, interfered with the proper conduct of the trustee(s) in respect of the bankruptcy estate.

118. Ms Lu's failure did not affect the quantum of her proof or her voting rights arising from that proof. Had the security been disclosed it would have been disclosed at nil value (that, as I have found, being a realistic estimate of its value) and would not, therefore, have reduced the quantum of Ms Lu's proof, or, correspondingly, the extent of her voting rights in the bankruptcy.

119. Likewise, while, had the security been disclosed at nil value, the trustee(s) could have redeemed it for the bankruptcy estate at nil value (rules 6.117, 14.17), the fact is that the trustee(s) were offered and declined the security and could, in any event and at any stage in the bankruptcy, have sought to take advantage of the statutory surrender arising out of the non-disclosure.

120. The position might have been different if Mr Khan's bankruptcy had reaped a dividend and if the grant of relief to Ms Lu had affected that dividend, or interfered with, or affected, any distribution. In the event, however, there has been no distribution.

121. In the result and subject to the point next discussed, I am satisfied that this is an appropriate case for the grant of relief under rule 14.16.

122. The point in question, which I propose to deal with in relatively short order, is whether, as submitted by Ms Macro, Ms Lu's conduct in respect of the 2011 charging order amounted to a common law election by Ms Lu to waive her right to the 2011 charging order and, thereby, to bring that right permanently to an end. If, independently of the operation of rule 6.116, there has been an election by Ms Lu to surrender, or waive, her security, then, plainly, there would be no good reason to make an order since the order would serve no purpose.

123. I am satisfied that Ms Lu's conduct has not given rise to a waiver, or surrender, of the 2011 charging order under the general law.

124. It is clear, I think, from all of the foregoing, that, subjectively, it was never Ms Lu's intention to surrender the 2011 charging order. The residual question is whether, viewed objectively, she, nonetheless, conducted herself in such a way as to demonstrate an unequivocal intention to waive, or surrender, her rights under the 2011 charging order. I am satisfied that Ms Lu did no such thing.

125. The three matters, I think, relied upon as demonstrating Ms Lu's unequivocal intention to waive, or surrender, her rights under the charging order, whether taken individually, or collectively, are the nil valuation of the charging order in the petition, the omission

of the charging order from the proof of debt and Ms Lu's post proof conversations with Mr Foster.

126. The nil valuation in the petition did not demonstrate, unequivocally, or at all, an intention to surrender the security. It simply, as I find, placed a realistic valuation upon the security, given the known outstanding dispute as to beneficial ownership.

127. The omission of the charging order from the proof of debt, in the context of a rule which contemplated, in its terms, that omission might derive from inadvertence, or honest mistake, did not, for that reason, amount to an unequivocal representation, or demonstration, of an intention to surrender. Whether that was the intention was, or would be, a matter for investigation.

128. The post proof conversations with Mr Foster, while demonstrating that Ms Lu was potentially willing to surrender the charging order, were all founded upon the footing, or understanding, that she had not done so.

129. There was no waiver by election and, in consequence, there is no further reason why I should not relieve Ms Lu from the statutory surrender which, but for my grant of that relief, would otherwise arise.

130. In the light of that conclusion, the final point raised in argument before me, by Mr Phillip's does not arise. His argument, at least initially, was that, even if the statutory surrender otherwise operated and even if Ms Lu's application to be relieved from that surrender failed, nonetheless the trustee(s) and, through them, the estate were, or would have been, estopped from denying that the 2011 charging order remained in Ms Lu's hands, by their acceptance, at all times, that she had retained that security and by her conduct, in reliance upon that acceptance, in continuing to assert her rights under the charging order. His further argument was that, because Fazal Khan was, or would have been, aware that the trustee(s) had not asserted rights over the charging order and because she, or, in due course, her estate, took no steps to challenge that omission, the estate should now, presumably by some species of acquiescence, be fixed with the results of the trustee(s)' inaction.

131. In closing, Mr Phillips did not seek to maintain his original position, which was that the estate was, or was to be regarded as a 'privy' of the trustee(s) and bound by their conduct. He rightly accepted that the trustee(s) owed their obligations to the general pool of creditors and that, in that context, could not be regarded as privies to the estate, even if, assuming the estate's beneficial ownership of the Property, they had, as a consequence of the bankruptcy and during the pendency of the bankruptcy, held the legal estate.

132. I was not, in any event, persuaded by Mr Phillip's submissions on this point.

133. It seems to me to be clear, in principle, that estoppel cannot be used to negative the terms of statute and that, if, subject to a successful application for relief, Ms Lu had, by the operation of statute, surrendered the 2011 charging order, the trustee(s) would not have been estopped from denying that fact.

134. As to Fazal Khan's, or her estate's, failure to take action against the trustee(s), in respect of the trustee(s) omission to assert their rights over the charging order, while their

‘standing by’ might have precluded a late challenge to the trustee(s) in respect of that omission, I fail to see how that ‘standing by’ could extend to Ms Lu.

135. In the result, however, and because I will, by my order herein, relieve Ms Lu from what would otherwise have been the effect of her omission of the 2011 charging order from her proof of debt, that charging order remains extant in her hands.

136. The consequences of that conclusion, subject to any further argument, when this judgment is handed down, seem to me to be these.

137. Firstly, that the court will now have to go on to consider (a) whether the result of District Judge Lightman’s ruling and notwithstanding his expressed intention that that ruling would not be determinative of the beneficial ownership of the Property, the effect of that ruling, given the terms of the Charging Orders Act 1979, was to render the beneficial ownership of the Property by Mr Khan res judicata and any challenge by the estate in respect of that ownership an abuse; and (b), if the estate’s challenge is not abusive, whether the estate makes out that challenge, such that the 2011 charging order and Mr McLinden’s parasitic interim charging order are both discharged.

138. Secondly, some consideration will need to be given to the possible position of the Official Receiver, in the absence of a continuing trusteeship. One formal question arises, namely whether, notwithstanding the completion of the bankruptcy and the discharge of Mr Khan, the residual effect of the bankruptcy was to leave the legal and the beneficial interest (subject to the estate’s challenge) in the hands of the Official Receiver, such that, for that reason, the Official Receiver should be joined.

139. A further question arises, resultant upon this judgment, namely whether the Official Receiver might now wish to revive the bankruptcy, take steps to require Ms Lu to put in an amended proof of debt, to include the 2011 charging order, and, thereafter, seek to redeem the charging order at her valuation.

140. These matters, together with further directions relevant to the outstanding issues, will fall to be considered when judgment is handed down. In the alternative judgment can be handed down without attendance, leaving these and all other ancillary, or consequential matters to be determined at a later appointment.