Neutral Citation Number: [2022] EWHC 1077 (Ch)

Appeal Court Ref: CH 2021 000035

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

ON APPEAL FROM THE COUNTY COURT
AT KINGSTON-UPON-THAMES
IN BANKRUPTCY

District Judge Smart

11 February 2021

Rolls Building
Fetter Lane, London, EC4A 1NL
Date:3 May 2022

Date: 3 May 2022

Before :

Jonathan Hilliard QC
sitting as a Deputy Judge of the High Court

- -

Between :

Richard Henry Addison	**Appellant**
- and -	
London European Securities Limited	**Respondent**

- -
- -

Alexander Goold (instructed by **Wilson Barca LLP**) for the **Appellant**
Madeline Dixon (instructed by **Rosenblatt**) for the **Respondent**
Hearing date: 28 January 2022

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JUDGMENT

JONATHAN HILLIARD QC sitting as a Deputy Judge of the High Court:

Introduction

1. This is an appeal against the 9 February 2021 order of District Judge Smart (the "**Order"**). By the Order the Judge dismissed the application (the **"Application"**) of the Appellant (**"Mr Addison"**) to set aside a statutory demand (the **"Statutory Demand"**) served on him by the Respondent (**"LES"**) and authorised LES to present a bankruptcy petition after 23 February 2021. Permission to appeal was granted by Zacaroli J on 29 July 2021.

2. There are three issues on the appeal:

   (1) whether Mr Addison has standing to pursue the appeal given that he was adjudged bankrupt on 2 June 2021;

   (2) whether (if Mr Addison does have standing) the District Judge was wrong to refuse to set aside the Statutory Demand under rule 10.5(5)(b) of the Insolvency (England and Wales) Rules 2016 (the **"Insolvency Rules**");

   (3) whether (if Addison does have standing) the District Judge was wrong to refuse to set aside the Statutory Demand under rule 10.5(5)(d) of the Insolvency Rules.

3. Issues (2) and (3) form the basis of the two grounds of appeal (the **"First Ground of Appeal"** and **"Second Ground of Appeal"** respectively).

4. I dismiss the appeal. While I consider that Mr Addison does have standing to pursue the appeal, in my judgment the First and Second Grounds of Appeal should be rejected.

5. The appeal has been ably argued on both sides, and I am grateful for the assistance offered by Counsel.

The core legislative provisions

6. Under section 267(2) of the Insolvency Act 1986 (the **"1986 Act"**), subject to three exceptions that are immaterial for present purposes,

> "*a creditor's petition may be presented to the court in respect of a debt or debts only if, at the time the petition is presented-*
>
> *(a) the amount of the debt, or the aggregate amount of the debts, is equal to or exceeds the bankruptcy level,*
>
> *(b) the debt, or each of the debts, is for a liquidated sum payable to the petitioning creditor, or one or more of the petitioning creditors, either immediately or at some certain, future time, and is unsecured,*
>
> *(c) the debt, or each of the debts, is a debt which the debtor appears either to be unable to pay or to have no reasonable prospect of being able to pay, and*
>
> *(d) there is no outstanding application to set aside a statutory demand served (under section 268 below) in respect of the debt or any of the debts.*"

7. Section 268(1)(a) explains that one of the two situations in which a debtor will for the purposes of section 267(2)(c) appear to be unable to pay a debt, is if the debt is payable immediately and

> "*the petitioning creditor to whom the debt is owed has served on the debtor a demand (known as "the statutory demand") in the prescribed form requiring him to pay the debt or to secure or compound for it to the satisfaction of the creditor, at least 3 weeks have elapsed since the demand was served and the demand has been neither complied with nor set aside in accordance with the rules…*".

8. Under rules 10.5(5)(a), (b) and (d) of the Insolvency Rules 2016, three of the grounds on which the Court may set aside on application a statutory demand are where

> *"(a) the debtor appears to have a counterclaim, set-off or cross demand which equals or exceeds the amount of the debt specified in the statutory demand;*
>
> *(b) the debt is disputed on grounds which appear to the court to be substantial; [or]*
>
> *…*
>
> *(d) the court is satisfied, on other grounds, that the demand ought to be set aside.*"

Relevant background

9. The District Judge dealt with the factual background at paragraphs 20 to 40 of his 9 February 2021 judgment (the **"Judgment"**). I summarise the main points below.

10. By loan and guarantee dated 27 September 2017 (the **"Loan Agreement"** and the **"Guarantee"** respectively), Mr Addison guaranteed repayment of a loan of £275,000 (the **"Loan"**) made by LES to Lodge Inns (Pendle) Limited (**"Pendle"**). Mr Addison was a director and shareholder of Pendle. By clause 2.1 of the Guarantee, Mr Addison agreed to pay to LES on demand the "*Guaranteed Obligations*". These obligations were defined in clause 1.1 of the Guarantee as "*all present and future payments obligations and liabilities of the borrower due owing or incurred under the Loan Agreement*". It is common ground that the Loan was a Guaranteed Obligation.

11. The Loan was originally due for repayment by 27 September 2018 but time was extended to 26 January 2019. The sum lent was not repaid by 29 January 2019.

12. On 25 April 2019, Pendle and LES entered into a written option agreement to offer additional security (the **"Option Agreement"**). In outline, the Option Agreement gave LES the right (the **"Option"**) to buy land from Pendle at an agreed price of £1.4m. The land in question was known as Pendle View Fisheries, Clitheroe By Pass, Barrow, Clitheroe BB7 9DH (the **"Property"**). I shall return to the terms of the Option Agreement below in more detail, because it is central to the First Ground of Appeal. The Option Agreement was registered as a unilateral notice on 21 May 2019.

13. LES gave notice of default to Pendle in respect of the Loan by letters dated 24 May 2019 and 2 July 2019.

14. LES applied to the Land Registry for entry of a restriction in Form N against the Property pursuant to clause 12.1 of the Option Agreement. Pendle resisted this, arguing that the Option Agreement was unenforceable, and applied for cancellation of the unilateral notice.

15. On 8 November 2019, a LPA receiver was appointed over Pendle by another creditor, Saving Stream Security Holding Limited (**"SSSH"**), who held two registered charges over the Property dating from before the Option Agreement.

16. By 11 December 2019 letter, LES wrote to the LPA receiver's property consultants, making an offer outside the terms of the Option Agreement to purchase the Property for £1.55m. The offer was not accepted and expired a week later. In the witness evidence placed before the District Judge by LES, it was suggested that the LPA receiver had contended that the Option did not bind the receiver, and that LES was concerned that the LPA receiver or SSSH might try to sell the Property to a third party notwithstanding the Option.

17. As a result of e-mail correspondence from Mr Addison, LES came to know that the LPA receiver had invited best and final offers for the Property by 7 February 2020 from certain bidders, but not from LES.

18. LES's solicitors, Memery Crystal, wrote to the LPA receiver's solicitor, notifying them of LES's concerns that the LPA receiver was trying to exclude LES from the sale of the Property, and indicating that LES intended to exercise the Option.

19. By notice dated 10 February 2020, LES exercised the Option, triggering an obligation to complete the purchase of the Property on 10 March 2020.

20. By letter dated 11 February 2020, LES demanded payment from Mr Addison of the Guaranteed Obligations.

21. In Pendle's response to LES's statement of case before the First-tier Tribunal, signed by Mr Addison's co-director, Mr Canning, and dated 14 February 2020, Pendle asserted, among other things, that there was no consideration for the Option Agreement or alternatively that the Option Agreement was frustrated. The basis of this assertion was the appointment of the LPA receiver meant that Pendle was unable to sell the Property to LES.

22. According to the witness evidence placed before the District Judge by LES, there were without prejudice discussions between LES and the LPA receiver to explore a sale outside the Option Agreement but there had been no further discussions since around February 2020. LES stated that it had contemplated litigation against the LPA receiver but that there were a number of issues including that SSSH could step in at any time and exercise its own power of sale. LES stated that it had not put in any bid since February 2020 and was no longer interested in acquiring the Property.

23. On 2 March 2020 LES served the Statutory Demand on Mr Addison for £374,125, stated to be due pursuant to the terms of the Guarantee, and comprising the Loan of £275,000, interest of £96,375 and an exit fee of £2,750.

24. By 9 March 2020 application notice supported by a witness statement from Mr Addison, Mr Addison applied to set aside the Statutory Demand pursuant to Rules 10.5(5)(b) and (d) of the Insolvency Rules. That Application was made on the four bases set out in [14] of the Judgment, and also on the basis that LES had failed to take all reasonable steps to bring the Statutory Demand to his attention. None of these four bases in [14] are advanced before me, so I do not need to deal with them further.

25. Completion of the purchase of the Property did not occur on 10 March 2020 or at all.

26. The matter first came before the District Judge on 22 June 2020 but there was insufficient time to hear the Application given the 45 minute time estimate, and directions were given for a final hearing.

27. In August 2020, Pendle withdrew its opposition to entry of the restriction over the Property and its application for the cancellation of the notice.

28. After two adjournments, on 22 June 2020 and 6 October 2020, the Application was heard by the District Judge on 2 December 2020. In the Judgment, the District Judge dismissed the Application, and, by paragraph 2 of his Order of the same day, permitted LES to present a bankruptcy petition against Mr Addison after 23 February 2021. The Judge refused permission to appeal.

29. Mr Addison appealed and in his appellant's notice sought a stay of paragraph 2 of the Order. That application was refused by Zacaroli J by order dated 24 February 2021.

30. LES subsequently presented a bankruptcy petition against Mr Addison and Mr Addison was adjudged bankrupt in the County Court at Kingston-upon-Thames on 2 June 2021 (the **"Bankruptcy Order"**).

31. Zacaroli J granted permission to appeal against the Order on 29 July 2021. He does not appear to have been made aware at the time of that grant of permission that Mr Addison had been made bankrupt. He was- according to an e-mail from his clerk- informed the next day after granting permission.

The Judgment

32. As the District Judge explained in [15] of the Judgment, by the time of the 2 December 2020 hearing before him, the initial grounds of challenge asserted by Mr Addison had mainly fallen away. As the District Judge set out at [16], the main arguments run by Mr Goold before him were that (i) there had been no demand under the Guarantee prior to the Statutory Demand, meaning that there was no debt to be demanded, and (ii) a new point that LES's exercise of the Option had the effect of repaying Pendle's liability to LES, meaning that there remained no Guaranteed Obligations under the Guarantee for Mr Addison to guarantee. These arguments were put to him under rules 10.5(5)(b) and (d) of the Insolvency Rules in the alternative.

33. The District Judge dealt with rule 10.5(5)(b) at [57]-[63] of the Judgment, and rejected the arguments put to him on behalf of Mr Addison. As part of that, he rejected at [61] argument (i) above based on the absence of a prior demand. No challenge is made on the appeal to the conclusion at [61]. Instead, the First Ground of Appeal is based on argument (ii) above.

34. He dealt with rule 10.5(5)(d) at [64]-[71] and [73]-[83] of the Judgment, and again rejected Mr Goold's arguments put to him. While it did not form part of the argument put to him at the December 2020 hearing, the District Judge considered the Court of Appeal decision in *Remblance v Octagon Assets Limited* [2009] EWCA Civ 581, which he had come across in the course of preparing his draft judgment. Following circulation of that draft judgment, he allowed at the request of Mr Goold further written submissions on the application of *Remblance*. The District Judge refused to set aside the Statutory Demand under rule 10.5(5)(d). By the Second Ground of Appeal, Mr Addison contends that the District Judge was wrong to do so, on the basis that the District Judge erred in his application of *Remblance.*

35. Having set out the basic background above, it is convenient to take the First and Second Grounds of Appeal on their merits first, before turning to the question of standing.

The First Ground of Appeal: whether the District Judge was wrong to refuse to set aside the Statutory Demand under rule 10.5(5)(b) of the Insolvency Rules

36. The test for whether the debt is disputed on grounds that appear to be substantial is that set out by the Court of Appeal in *Collier v P&M.J.Wright (Holdings) Ltd* [2007] EWCA Civ 1329 at [21]. It is not sufficient that the dispute is arguable. There has to be something to suggest that the assertion is sustainable. This was common ground on the appeal.

37. Mr Addison bases this ground of appeal on the construction of clause 11.2 of the Option Agreement. Therefore, to evaluate this ground, it is necessary to set out the main terms of the Option Agreement.

38. The Option Agreement is dated 25 April 2019 and is stated to be made in consideration of entering into the Loan Agreement dated 27 September 2017. It is evident from, among other things, clause 4 that the purpose of the Option was to provide additional security for the Loan in circumstances where the deadline for repayment of the Loan had passed on 29 January 2019 without such repayment being made. Its key terms for present purposes are as follows:

    (1) On the date of the Option Agreement, LES will pay the Option Sum to Pendle, which is stated to be £1 (clause 2.1).

    (2) Pendle grants LES an Option during the Option Period (which is a year from 25 April 2019) to buy the Property at the Purchase Price of £1.4m (clause 2.2).

    (3) The Option Agreement shall automatically terminate upon Pendle discharging all sums under the Loan Agreement (clause 4).

    (4) LES may exercise the Option at any time during the Option Period where Pendle is in default under the Loan Agreement which are not remedied within 21 days by serving an Option Notice on Pendle (clause 6.1).

    (5) On the date of exercise of the Option, LES will pay the Deposit to Pendle's conveyancer as agent for Pendle on terms that on completion the Deposit and accrued interest is paid to Pendle (clause 6.2). The Deposit is defined as "*10% of*

the Purchase Price less the Loan Amount being the sum of £375,000 plus any sums owning [sic] under the Loan Agreement (exclusive of VAT)" (clause 1.1).

(6) If the Option is exercised in accordance with the terms of the Option Agreement, Pendle will sell the Property to LES for the Purchase Price of £1.4m (clause 7.1).

(7) Completion will take place on the Completion Date, which is one month after the date of service of the Option Notice (clause 11.1).

(8) "*On completion [LES] will pay the Purchase Price less the Deposit, any sums outstanding under the Loan Agreement and the Option Sum to [Pendle]*" (clause 11.2).

(9) Pendle consented to the entry of a restriction against the Property in terms that LES's consent would be required to any disposition of the Property (clause 12.1).

39. In [42] of the Judgment, the District Judge stated that the main argument made by Mr Addison in this regard was:

> "*that the time for completion had expired- the 'Completion Date' being a month after the service of the option notice. It was submitted that Pendle's debt to [LES] had been extinguished as from that date. Alternatively the issues of: (i) whether the Option Agreement was valid and binding, as between [LES] and Pendle and its LPA receiver; and (2) whether the exercise of the option has had the effect of extinguishing Pendle's debt; and hence (iii) whether there is anything on which the guarantee bites, gave rise to a dispute on substantial grounds.*"

Mr Addison's position on point (i) before me was that the Option Agreement was valid.

40. The District Judge's reasoning on the argument at [42] is set out at [59] and [60] of the Judgment:

> "*59. I can state my conclusions on the application of Rule 10.5(5)(b) quite shortly. Firstly, the indebtedness of the principal debtor, Pendle has not been discharged in circumstances where, although the Option under the Option Agreement has been exercised, no payment has been made by the Respondent. The maxim "Equity looks as done that which ought to be done" (See Snell's Equity, 34th Edition, paragraph 5-015) may well be the basis for the existence of an equitable interest arising under a contract for the sale of land, but as the authors state,*
>
> > *"Whilst the principle may be justifiable, it gains little real support from the maxim. First, where, for example A is under a duty to grant B a lease, or to assign a right to B by way of security, it seems odd that equity could somehow pretend the duty had been immediately performed. This leads to the absurdity that, for example, the court, having found that an assignment has not been made, then immediately says that it can, by putting on an equitable hat, regard that assignment as having occurred".*
>
> *60. I regard it as plainly incorrect, or no more than fanciful to contend that the debt has been discharged. It would in reality require a decree of specific performance to be made before this would be the case. Specific performance is, of*

course, an equitable remedy and it is not a foregone conclusion that it would be granted."

41. Mr Goold repeats this submission on appeal. His argument is that, following the exercise of the Option, the effect of clause 11.2 was to extinguish from the Completion Date Pendle's debt under the Loan Agreement. He contends that the reason for this is that clause 11.2 is a piece of contractual machinery that calculated a net sum due. If he is correct that Pendle's debt was extinguished from the Completion Date, then there would be no Guaranteed Obligations left under the Guarantee and no debt due under the Guarantee from Mr Addison.

42. In my judgment, the District Judge was correct to hold that Mr Addison's construction of clause 11.2 was not sustainable. My reasons are as follows:

(1) The exercise of an option creates a binding contract for the sale of land: *Emmett & Farrand on Title* at 2.084. The relevant terms are set out in clauses 7 to 11 together with those provisions for Part 1 of the Standard Commercial Property Conditions (Second Edition) incorporated by clause 8.1.

(2) Clause 11.1 provides what is to happen on the Completion Date, namely completion. The clause therefore distinguishes the occurrence of completion from reaching the Completion Date. Clause 11.1 does not provide that completion happens automatically on the Completion Date. Completion is, at its most basic, the payment of the purchase price in return for the handing over of the documents of title and the giving of vacant possession, rather the reaching of the date set for completion.

(3) Clause 11.2 provides specifically what LES must do on completion. What clause 11.2 requires of LES on completion is that LES pays a particular sum to Pendle (the **"Remaining Sum"**). That sum is calculated in a way that deducts from the £1.4m Purchase Price a number of items, namely the sum outstanding under the Loan, the Deposit and the Option Sum. Clause 11.2 does not state that automatically on the *Completion Date*, the outstanding sums under the Loan will be written off.

(4) In my judgment, that necessarily carries with it the implication that *on paying the Remaining Sum to Pendle*, the sum outstanding under the Loan will be given up. Therefore, as the District Judge concluded, such payment was necessary to discharge Pendle's loan debt.

(5) Were it otherwise, LES would have the Loan written off automatically on the Completion Date even if Pendle wrongly refused to complete on that date, which one would not expect to be the intention.

(6) This tallies with clause 6.2, which provides that "*on completion*" the Deposit together with accrued interest will be paid to Pendle. Again, one would not expect this to bite if Pendle wrongly refused to complete on the Completion Date.

(7) Therefore, on completion, LES pays the Remaining Sum, the outstanding sum under the Loan is put towards the Purchase Price and the Deposit (if any) is paid to Pendle. Putting to one side the Option Sum of £1, which is meant to be paid on entering into the Option, the full Purchase Price is paid on completion.

(8) Here, completion has not taken place, either on the Completion Date or at all.

(9) Therefore, Pendle's debt under the Loan Agreement and the Appellant's debt under the Guarantee have not been extinguished.

43. I am clear in my view on the effect of clause 11.2 and do not regard the contrary argument as sustainable. Therefore, in my judgment the District Judge was correct to find that the debt is not one that is disputed on grounds that appear to be substantial.

44. Mr Goold raised a number of other arguments under the First Ground of Appeal, each of which was linked to the above core submission. In my judgment they are incorrect. They are as follows:

(1) The Appellant criticises the District Judge for- the Appellant contends- having in [59] decided the issue rather than whether the debt was disputed on substantial grounds. In my judgment, there is nothing in this point. The District Judge was explaining in [59] and [60] why he regarded the contention that the debt had been discharged as fanciful, and that necessarily involved explaining what he thought the right answer was. It is plain from [58] of the Judgment that by concluding that the contrary argument was fanciful, the District Judge considered that the debt was not disputed on substantial grounds. He used the word "*fanciful*" because it was the word used in [31] of the extract from *Bryce Ashworth v Newnote Limited* [2007] EWCA Civ 793, a case that the District Judge noted was referred to in *Collier* itself.

(2) Mr Goold submitted orally that the District Judge's discussion of *Collier* at [47] of his Judgment raised a question-mark over whether the District Judge understood the relevant test correctly. The District Judge commented that the decision had been based on the previous Insolvency Practice Direction, which referred to a genuine triable issue, and that [11.4.5] of the current version simply required the Court to determine the application in accordance with Rule 10.5. Again, I do not consider that Mr Goold's submission is correct. It is clear from [58] and [60] that the District Judge understood the relevant test, as it is from the last two sentences of [47] itself, where the Judge stated that "*Mr Goold appeared to accept that the prospects of disputing the debt should be real, and not frivolous. It is not enough that a dispute is arguable, there has to be something to suggest that the assertion is sustainable.*"

(3) Mr Goold argued that the District Judge reached his decision by reference to the equitable maxim "equity looks as done that which ought to be done" and that it is not entirely clear why he was referring to this. In my judgment, the District Judge, having stated that the Loan debt had not been discharged without LES making a payment under clause 11, was then going on to explain that one could not treat LES through application of the equitable maxim as having already made such a payment and therefore treat the debt as already having been discharged. I agree with the District Judge that the equitable maxim does not have such an effect. Mr Addison did not contend that it did. I do not consider that it is necessary to go into the precise limits of the maxim and the correctness of the comments in the extract from *Snell's Equity* (34th edition, 2019) cited in [59] of the Judgment to reach this conclusion.

(4) Mr Goold argues that the District Judge erred in [60] of the Judgment in suggesting that a decree of specific performance would be required before the Loan debt was discharged, because Pendle's claim would have been for damages for non-

completion. However, in my judgment that misses the point being made by the District Judge. His point was that to reach a stage at which the Loan debt was discharged and therefore at which no debt was due under the Guarantee, LES would need to have performed its payment obligations under clause 11, and that would- absent LES doing so voluntarily- require a decree of specific performance to cause LES to decide to make such payment. As for any claim for damages for non-completion, I consider that, and the District Judge's treatment of it, below under the Second Ground of Appeal.

45. Finally, for completeness, I should mention that Mr Goold suggested in the course of argument that the construction of the definition of the Deposit referred to in [42] of the Judgment (rather than that set out in [29]) was not one he put forward, and Ms Dixon agreed with this. Neither party suggested that I need to reach a conclusion as to the precise meaning of Deposit for the purposes of this appeal, so I say nothing more on it.

46. Accordingly, I dismiss the First Ground of Appeal.

The Second Ground of Appeal: whether the District Judge was wrong to refuse to set aside the Statutory Demand under rule 10.5(5)(d) of the Insolvency Rules

47. I shall start with the applicable legal principles, then set out the District Judge's reasoning and evaluate the Second Ground of Appeal.

48. Rule 10.5(5)(d) provides a residual discretion to set aside a statutory demand. The circumstances which will normally be required before a Court can be satisfied that the demand ought to be set aside are circumstances which would make it unjust for the statutory demand to have its ordinary consequences: *Re A Debtor (No.1 of 1987)* [1989] 1 WLR 271 per Nicholls LJ at 276, as quoted by both members of the majority in *Remblance* at [33] and [57]. *Re A Debtor* and *Remblance* concerned rule 6.5(4)(d) of the Insolvency Rules 1986, which is now rule 10.5(5)(d) of the Insolvency Rules.

49. Where there is an appeal against a refusal to set aside a statutory demand under rule 10.5(5)(d), the issue is whether there was an error of legal principle in the judge's discretionary decision not to set aside the statutory demand, or whether, for some other reason, his decision was plainly wrong: *Remblance* at [23], [48] and [56]. The judge will have made an error of legal principle where he took into account irrelevant factors or failed to take into account relevant factors: *Remblance* at [48].

50. In *Remblance*, the Court of Appeal allowed by a 2-1 majority an appeal against Mann J's refusal in two judgments to set aside the statutory demand against Mr Remblance under rule 6.5(4)(d) of the Insolvency Rules 1986. In that case, Mr Remblance had guaranteed the obligations of the principal debtor, JBR Leisure Limited (**"JBR"**). JBR owed rent under a lease. However, JBR was in dispute with the landlord about alleged breaches for the covenant of quiet enjoyment. JBR had brought proceedings against the landlord for substantial damages, the landlord's strike-out application had failed, and the case was due to be heard the following year: [9]. It was common ground in *Remblance* that JBR would be likely to succeed in resisting insolvency proceedings if a statutory demand was served on it, because it appeared to have a counterclaim or cross claim which equalled or exceeded the amount of the debt specified in the statutory demand: [34], [43]. Therefore, JBR would have been likely to succeed in an application

under what was then rule 6.5(4)(a) of the Insolvency Rules 1986, now rule 10.5(5)(a) of the Insolvency Rules.

51. Dyson LJ, one of the two members of the majority, reasoned that:

(1) "*it is material to the application of sub-paragraph (d) [of rule 6.5(4)] in relation to a statutory demand served on a guarantor to consider whether a statutory demand in respect of the principal debt would be set aside as against the principal debtor under sub-paragraph (a)*" and "*[t]he judge rightly recognised this*": [42];

(2) "*[p]rima facie, it is unjust to require the principal debtor to face the consequences of bankruptcy where he appears to have a counterclaim, set-off or cross demand which equals or exceeds the amount of the debt specified in the statutory demand. Having regard to the principle of co-extensiveness, it is equally unjust in such circumstances to require the guarantor to face the consequences of bankruptcy*": [46];

(3) the appeal involved a challenge to the judge's exercise of discretion and such a challenge could only succeed if the judge's decision was plainly wrong or he took into account irrelevant factors or failed to take into account relevant factors: [48]; and

(4) reading the judge's two judgments together, the judge considered that the fact that the guarantor had the means to pay the debt was an important factor which militated against setting aside the statutory demand, and the judge was wrong to do so, because it was difficult to conceive of circumstances where ability to pay could be the sole or principal reason for refusing to set aside a statutory demand: [48].

52. Similarly, Ward LJ, the other member of the majority, considered that:

(1) the reason why the judge did not accede to the debtor's arguments in his first judgment was that he was satisfied that the debtor could pay the debt and that this swung the balance of fairness against making the creditor wait until the issues had been decided: [61];

(2) the reasons for the judge's decision in his second judgment were that (i) as in his first judgment, it was not unjust if it was the choice of the debtor not to pay, and (ii) more importantly, Mr Remblance would not be able to resist enforcement if judgment were to be given against him: [63];

(3) the judge was in error in relying on reasons (i) and (ii): [65] and [72]-[73]; and

(4) given that JBR had a counterclaim and was likely to be able to set a statutory demand aside, justice demanded similar treatment for Mr Remblance: [72]-[73]. His failure to pay should not be held against him in that regard, because his reason for not paying was that he felt strongly that his company had suffered great damage by the breach of the landlord's covenant of quiet enjoyment.

53. Therefore, the appeal was allowed and the Court exercised its discretion afresh by setting aside the statutory demand.

54. In the present case the District Judge came across *Remblance* while preparing his draft judgment and therefore did not receive submissions on it during the December 2020 hearing. Having set out at [66] of his Judgment an extract from *Muir Hunter on Personal Insolvency* that referred to *Remblance*, he explained at [67] that he had considered the case, and set out his initial reasoning in his draft judgment as recorded in [70] of the Judgment. He allowed the parties the opportunity to make further written submissions before hand-down, and dealt with those further submissions at [81]-[83] of the Judgment. Therefore, his reasoning is split across two sections in the Judgment.

55. Turning to the District Judge's reasoning, at [81] of the Judgment, the District Judge stated that he remained of the view set out in [70] and that he accepted Ms Dixon's submissions summarised in [80]. His summary of those submissions was as follows:

> "*…In Remblance there was a substantial undisputed cross-claim which had survived a strike out application- the creditor was being sued by the principal debtor in the county court. There was a real prospect that the principal debt would be reduced or extinguished. In the present case the cross-claim was hypothetical, and there was no evidence that Pendle was willing or able to pursue it; and its existence had not been relied on by [the Appellant]. Pendle had maintained that the Option was unenforceable until August 2020, five months after the statutory demand was served. The reality was that the Property would be sold by the LPA receiver. The Applicant's conduct as a co-director of Pendle bore the hallmarks of an evasive debtor.*"

56. The core of the District Judge's reasoning at [70] was as follows:

> "*Is it unfair and unjust to allow [LES] to go down the statutory demand route in circumstances where the principal debtor, Pendle, is not taking proceedings against the Respondent to compel it to complete the sale of the Property under the Option Agreement, the Option having been exercised? The Applicant's case was not put in this manner. The evidence shows that Pendle has challenged the enforceability of the Option, and indeed there may be something to be said for the view that it repudiated it and that by its conduct the Respondent accepted the repudiation. But assuming for present purposes that there is a real, as opposed to a fanciful prospect that a court would grant specific performance against the Respondent, I note that this is not a case where [the Appellant] has said that for some reason [he] has been unable to procure that Pendle commences such proceedings for specific performance. He is a director and has a 47.5% shareholding and his solicitor has a 25% shareholding. There is no evidence of disagreements between the directors or with the other shareholders. Plainly it suited Pendle to do all it could to resist the consequence that the Property worth, perhaps, (at least at one point) up to £3 million, or at any rate worth more than the option price got sold for the sum due under the Option Agreement, until a late stage. With the possibility that the Property may end up being sold by a receiver, and one might imagine, the uncertainties over whether a suit seeking specific performance would succeed, I see no immediate prospect of Pendle taking such proceedings. I see no injustice in this case in permitting the insolvency route to be taken by [LES].*"

The reference to the £3m figure is to a valuation given in 2018. As the Judge explained in [38] of the Judgment, Mr Addison had suggested in the last of his witness statements,

dated 10 November 2020, that it would be in LES's interests to complete the purchase of the Property for £1.4m, noting that this was much less than the £3m valuation given in 2018 or LES's own offer of £1.55m in December 2019. I should also mention that the Judge explained in [29] of the Judgment that Mr Addison had stated in his 15 June 2020 witness statement that he understood that the Property was worth £2-2.5m. He also set out in [39]-[40] of his Judgment that LES's solicitor Mr Coles had stated in his 24 November 2020 witness statement that he believed the value of the Property to be lower than £1.4m, final bids over £1.25m having been asked for by the LPA receiver by 12 November 2020. That witness statement went on to say that the Property was marked as under offer on the LPA receiver's website.

57. Having referred at [81] to his view in [70] and accepted Ms Dixon's submissions summarised at [80], the District Judge went on to state at [81]-[83] that:

(1) While there would undoubtedly be defences pleaded to a specific performance cross-claim by Pendle, he doubted that it would be struck out. "*It might well be a startling exercise of judicial discretion to make a decree of specific performance [in Pendle's favour] after a considerable delay, and with a LPA receiver having been appointed, but the prejudice to the purchaser and receiver would be a relevant consideration, and mere delay may well be insufficient to bar specific performance"*: [81].

(2) "*I do not consider that a viable damages claim has been articulated so far which would avail the principal debtor if sued, for the reasons given by Ms Dixon*": [82]. These reasons were that Pendle would fail to show that it was able and willing to give good title, and in any event there was no evidence that the damages awarded would equal or exceed the debt or reduce it below the threshold for presentation of a bankruptcy petition, because there was evidence that the Property exceeded the Purchase Price: the LPA receiver had previously rejected an offer by LES to purchase it for £1.55m and there was evidence of a previous valuation at £3m: [79].

(3) "*There was no evidence before me that the directors of Pendle, including the Applicant have any present intention to procure that Pendle litigates to compel [LES] to complete the purchase of the Property under the Option Agreement. The evidence suggests that the LPA receiver is marketing the Property and may well sell it before long*": [83].

58. He concluded that "*I cannot see that it would be unjust in all the circumstances of this case to permit [LES] to rely upon its statutory demand and I decline to set it aside*": [83].

59. Mr Goold submits that the District Judge applied the decision in *Remblance* the wrong way round. What the District Judge did, Mr Goold submits, was to look at the prospects of Mr Addison prevailing on Pendle to bring proceedings against LES, of Pendle bringing those proceedings, and of Pendle's prospects of success in those proceedings, whether in a claim for specific performance or damages. Mr Goold submits that the correct approach based on *Remblance* would have been to look at the position of Pendle defensively. The District Judge should have asked what defences would Pendle have had if LES had gone down the insolvency route against Pendle. Those defences would have included a cross-claim for specific performance of the Option Agreement and/or

damages, which would have included at least the equivalent amount due under the Loan.

60. Specifically, Mr Goold submitted in his skeleton that (i) if LES had brought insolvency proceedings against Pendle, it *should* (Mr Goold's emphasis) have been met with a response by way of counterclaim, set-off or cross demand that Pendle had a specific performance and/or damages claim against LES for failure to complete under the Option Agreement, (ii) LES appeared to have treated the Option Agreement as valid, (iii) now that Pendle no longer sought to challenge the validity of the Option Agreement, there was nothing to stop the performance of that agreement subject to the LPA receiver, (iv) Pendle's counterclaim, set-off or cross demand made it unjust for LES to be able to pursue Mr Addison as guarantor in respect of the same debt, (v) while it was true that Mr Addison acting alone could not have compelled Pendle to bring proceedings against LES for specific performance, (a) the directors of Pendle wished the LPA receiver to take steps to sell the land to LES, (b) whether steps were taken by the LPA receiver to enforce the Option Agreement was out of Mr Addison's and indeed Pendle's hands, and (c) point (b) made it all the more unjust that LES should be able to proceed against Mr Addison by way of bankruptcy, and (vi) the issue was not whether there was an immediate prospect of Pendle taking proceedings to enforce the Option Agreement but whether, if LES attempted to bring insolvency proceedings against Pendle, it *should* (again, Mr Goold's emphasis) have been met with a counterclaim, set-off or cross demand under the Option Agreement.

61. Ms Dixon submits that (i) *Remblance* did not establish any general principle that it is unjust for a creditor to proceed with a statutory demand served on a guarantor whenever it is *asserted* that the principal debtor would have a cross-claim against the creditor, (ii) Mr Addison must show that there was an error of principle in the District Judge's discretionary decision not to set aside the Statutory Demand, or that for some other reason his decision was plainly wrong, (iii) the District Judge did not make any error of principle and his decision was not plainly wrong, (iv) on the contrary, the District Judge understood Mr Addison's case that Pendle's purported counterclaim against LES for breach of the contract which arose upon exercise of the Option made it unjust for LES to pursue bankruptcy proceedings against Mr Addison where insolvency proceedings against the Company would- on Mr Addison's case- not have succeeded, and he correctly considered whether those circumstances would give rise to injustice on the facts of this case, holding that it would not for the reasons set out in [80]-[83] of the Judgment, which rendered the case distinguishable from *Remblance*, and (v) if, contrary to the foregoing, the District Judge did err, then I should exercise the discretion afresh to refuse to set aside the Statutory Demand under rule 10.5(5)(d).

62. Starting with *Remblance* itself, the key finding in the case was that it would be unjust to allow the creditor to proceed against the guarantor by the insolvency route if the creditor could not proceed against the principal debtor by that route, as pithily summarised in the extract from *Muir Hunter on Personal Insolvency* set out by the District Judge at [66] of the Judgment.

63. The reason for this is that the guarantor should not be placed in a worse position than the principal debtor. If insolvency proceedings against the latter would fail, so should they against the former. That was how the Court applied the co-extensiveness principle that a guarantor should only be liable to the same extent that the principal debtor is.

64. In *Remblance*, it was inevitable that the principal debtor would have resisted insolvency by pointing to its cross-claim, and the principal debtor was already well on the way to litigating the cross-claim to a final conclusion. Here in contrast there was a very serious issue as to whether, to use the language of Ms Dixon's submissions recorded at [80] of the Judgment, the cross-claim, was more than "*hypothetical*" and there was any evidence that "*Pendle was willing or able to pursue it*". Therefore, the District Judge was right to examine these questions, particularly in relation to a cross-claim based on specific performance in circumstances where its existence had not been relied on by Mr Addison previously.

65. I do not take the District Judge in doing so to have been ignoring the basic submission made to him by Mr Goold, and reflected in the extract from *Muir Hunter* quoted by the District Judge, that if insolvency proceedings could be successfully resisted by the principal debtor by reason of a cross-claim, it would be unjust for the guarantor to be in a worse position.

66. To deal with Mr Goold's submission that the Judge did in fact approach the matter the wrong way round by simply asking whether Pendle would proactively have brought a cross-claim, it is necessary to consider the factors that the District Judge did take into account.

67. Dealing first with the District Judge's treatment of whether Pendle would have a cross-claim in damages, the District Judge did not consider that a viable damages claim had been articulated: [82]. In my judgment he was referring in [82] to the question of whether Pendle could raise such a claim in response to a statutory demand, as can be seen by his reference to "*if sued*" in [82] and the fact that he is dealing in [82] with the point made by Ms Dixon recorded in [79], which is dealing with resisting a winding-up petition.

68. In my judgment, he was entitled to conclude that there was no damages claim that would allow Pendle to resist a winding-up petition. The evidence put forward by Mr Addison was that the Property was worth more than £1.4m: see the material referred to by the District Judge in [70] of his Judgment and the other material from Mr Addison referred to at [49] above. Moreover, there was no evidence that, even if the value was lower than £1.4m, the value would be so much lower as to reduce the debt below the bankruptcy threshold of £750.

69. Turning next to the District Judge's evaluation of whether Pendle could claim specific performance, the cross-claim he was evaluating was one to seek an order for completion of the purchase of the Property by LES on Pendle taking the relevant steps to transfer title. If LES duly completed, then that would- under clause 11.2 of the Option Agreement- discharge Pendle's debt to LES under the Loan. The District Judge dealt at [81] with the argument of Ms Dixon recorded in detail at [78]. He rejected her reliance on Pendle's argument before the First-tier Tribunal that the appointment of the LPA receiver meant that Pendle no longer owned the Property. While the District Judge thought that there would undoubtedly be defences pleaded to a specific performance claim and that it would be a "*startling exercise of judicial discretion*" to order specific performance after a considerable delay and with an LPA receiver in place, he doubted that the specific performance claim would be struck out. I do not read him as just evaluating whether Pendle would take proactive steps to bring a specific performance claim outside insolvency proceedings against it. Rather he was evaluating the argument

of Ms Dixon recorded at [78], having recorded at [74] the fact that Mr Goold pointed out that the creditor in *Remblance* would not have been able to successfully utilise insolvency proceedings against the principal debtor, and having set out in [66] an extract from *Muir Hunter on Personal Insolvency* that made a similar point.

70. Tied to this, it is also clear from the penultimate line of [80], and from [70] and [83], that he considered that at the lowest the Property may well be sold before long by the LPA receiver. While he put the position slightly lower at [70], he accepted at [81] the submissions at [80] that "*[t]he reality was that the Property would be sold by the LPA receiver*". More broadly, he accepted at [81] the submission in [80] that "*the cross-claim was hypothetical, and there was no evidence that Pendle was willing or able to bring it*", and he stated at [83] that "*[t]he evidence suggests that the LPA receiver is marketing the Property and may well sell it before long*". As he had recorded earlier in his Judgment at [39]-[40], the evidence before him was- among other things- that final bids had been asked for by 12 November 2020.

71. Therefore, in my judgment, while the District Judge did not conclude that a specific performance claim brought by Pendle in response to insolvency proceedings would *if brought* be unsustainable, he considered that such a claim would face real difficulties (which Mr Goold frankly accepted before me would be the case). Importantly, the District Judge also considered that there was no evidence that Pendle was willing or able to bring such a claim and that the cross-claim was therefore effectively a hypothetical one. Accordingly, he considered, as set out in the submissions in [80] accepted by him at [81], that the situation was some distance from that in *Remblance* where there was a substantial cross-claim which had survived a strike-out application, and therefore where there was a real prospect that the principal debt would be reduced or extinguished. Tied to this, the Judge took into account the conduct of Mr Addison by accepting at [81] the submission that his conduct as co-director of Pendle bore the hallmarks of an evasive debtor. I do not read this as being his primary reason, but that it fed into his assessment of the credibility of the assertion that Pendle would bring a specific performance cross-claim.

72. In my judgment, the District Judge was entitled to reach the conclusion in relation to specific performance that the cross-claim was hypothetical and that there was no evidence that Pendle was willing or able to bring it. He was entitled, and correct, to take into account whether there was a specific performance claim that would actually be brought in practice. Whether a vendor brings a claim in specific performance to complete a property purchase is a commercial decision requiring consideration of whether the vendor is able and willing to transfer the property in question in return for the agreed sum. Here:

    (1) by the time of the December 2020 hearing, nearly 10 months had elapsed since exercise of the Option and no such claim had been brought;

    (2) there was no direct evidence that such a claim would be brought in any circumstances;

    (3) rather, for a significant number of months- until around August 2020- Pendle had denied the validity and enforceability of the Option, and done so formally in proceedings before the First-tier Tribunal;

(4) the possibility of a specific performance cross-claim had not been raised before;

(5) it would be, as Mr Goold accepted, a very difficult cross-claim to bring;

(6) one would in turn expect the point in (5) to factor in to whether the cross-claim was brought;

(7) far from any steps to bring about performance of the Option, what was happening on the ground was the LPA receiver being well advanced in the process of seeking to sell the Property;

(8) the Property, on the evidence before the District Judge, might well have been sold shortly, in which case specific performance would be impossible;

(9) Mr Addison was contending (and contended before this Court) that whether steps were taken by the LPA receiver to enforce the Option Agreement was out of his and Pendle's hands;

(10) consistent with that, Mr Goold put his argument in his skeleton below and before me on the basis that if insolvency proceedings were brought against Pendle, Pendle *should* have met them with cross-claims for specific performance and damages, rather than necessarily that it *would* have (although the oral submission before me appeared to me to be put on the latter basis or in terms consistent with it); and

(11) the District Judge appears to me to have considered that Mr Addison was blowing hot and cold by seeking to challenge or support the challenging of the Option Agreement initially (prior to August 2020), then to resist the Statutory Demand by relying on the validity of the Option Agreement, and then- on *Remblance* being raised- going further by suggesting that Pendle should or even would mount a specific performance claim to enforce the Option Agreement, and the Judge appears to me to have been taking this change of stance into account when deciding on the credibility of whether a specific performance cross-claim would actually have been brought by Pendle or was merely "*hypothetical*".

73. Returning to the more general submission made by Mr Goold, in my judgment the District Judge was not losing sight here of the need to examine what if any defences Pendle might have if faced with a statutory demand. He was evaluating the likelihood of a cross-claim for specific performance, having recorded Mr Goold's submission on *Remblance* and Ms Dixon's submissions about these cross-claims.

74. There was focus in [70], and the first sentence of [83], on the absence of any sign of Pendle bringing a specific performance claim now to compel LES to complete the purchase of the Property, or of Mr Addison taking any steps as director and 47.5% shareholder, with a solicitor who had a 25% shareholding, to procure that Pendle do so. In isolation, this could be read as suggesting, as Mr Goold argued, that the District Judge was focusing on whether Pendle would bring such a claim *outside* the context of insolvency proceedings against it, and determining the application of rule 10.5(5)(d) by answering that question. However, in my judgment, that is not the case. As explained above, he recorded correctly in [74] the submission put to him about whether insolvency proceedings against Pendle would have succeeded, set out Ms Dixon's arguments on those at [78]-[80] and then discussed these at [81]-[83].

75. Accordingly, in my judgment there was no error of legal principle in the District Judge's discretionary decision, and there is no other reason that renders his decision plainly wrong.

76. Had I decided that the District Judge had made one of the errors referred to in the last paragraph, I would have exercised the discretion afresh and reached the same conclusion as the District Judge. Ms Dixon sought to put before the Court an updated extract from the title register showing that the Property was sold for £1.47m, a sum higher than the Purchase Price, on 3 February 2021, after the December 2020 hearing and just under a week before the final version of the Judgment was handed down. She submitted that if I was exercising my discretion afresh, I should have regard to this because of its relevance to whether specific performance would be available to Pendle, and that it demonstrated clearly that it would not have been because Pendle could not convey the Property to LES. Mr Goold did not resist, either in his supplemental skeleton or orally, the admission of this updating evidence, and dealt in his submissions with what I should make of this evidence if I was exercising the discretion afresh. I consider he was correct to do so and that I should- if exercising the discretion afresh- have regard to this evidence on *Ladd v Marshall* [1954] 1 WLR 1489 principles, given that it post-dates the December 2020 hearing and therefore could not have been obtained before the hearing, it is important because of its relevance to whether specific performance could be sought, and it is accepted that what the title register shows is correct. Moreover, it is also evidence of the position at the time of the Judgment because the sale occurred before the Judgment was handed down. If I had exercised my discretion afresh, I would have concluded that Pendle had no viable damages or specific performance claim that would allow it to resist insolvency proceedings. In reaching this conclusion, I would take into account that the Property had actually been sold on 3 February 2021.

Whether Mr Addison has standing to pursue the appeal against the refusal to set aside the Statutory Demand given that he was adjudged bankrupt on 2 June 2021

77. Much of the oral submission before me concerned this final issue. Ms Dixon's argument was succinct and clear. The core of it is as follows:

(1) A bankrupt's estate vests in his trustee in bankruptcy immediately on his appointment or, in the case of the Official Receiver, on his becoming trustee: section 306(1) of the 1986 Act.

(2) A bankrupt's property includes things in action: section 436(1) of the 1986 Act.

(3) A bankrupt therefore does not have the right to appeal against a judgment against him, even where the judgment founds the petition debt: *Heath v Tang* [1993] 1 WLR 1421. That is because a bankruptcy order divests the bankrupt of any further interest in what debts he owes because it provides that he shall no longer be under any personal liability: *Royal Bank of Scotland v Farley* [1996] BPIR 638.

(4) While *Heath v Tang* makes clear that there is a residual category of case where the bankrupt retains the right to appeal, the nature of the action needs to be one that relates *solely* to the bankrupt's mind, body and character: *Agba v Luton Borough*

Council [2020] EWHC 1160 (Admin). Only then can it be said to be a cause of action personal to the bankrupt that does not vest in the trustee.

(5) A statutory demand which is not set aside creates a presumption that a debtor is insolvent: *Shalson v DF Keane Ltd* [2003] 2 WLUK 704. That is a presumption about his assets and liabilities which does not relate solely to his body, mind or character. Therefore, the debtor has no standing to appeal against the Order here.

(6) He would have standing to appeal against the bankruptcy order as a matter of common sense and fairness, since his status has been fundamentally changed: *Sands v Layne* [2017] 1 WLR 1782. However, he has not sought permission to do so and is now well out of time. The reasoning in *Sands v Layne* does not apply to an appeal against the Order, since the service of the Statutory Demand did not fundamentally change Mr Addison's status.

Arguments (4) and (5) were put orally in the alternative on a broader basis, namely that whether or not the cause of action had to relate solely to the bankrupt's mind, body and character in order to be personal to the bankrupt, a right to set aside a statutory demand related to his assets and liabilities, and his ability to meet his debts, so it was not something personal to the bankrupt.

78. In bare outline, Mr Goold's response to this is two-fold:

(1) if Mr Addison's right to apply to set aside a statutory demand, and hence to appeal the court's refusal to do so was a thing in action at all for the purpose of the 1986 Act, it was a purely personal claim;

(2) if necessary to put his case higher, such a right is *not* a thing in action at all and therefore cannot vest in the Official Receiver.

Mr Goold rightly did not object to the admission of the evidence of the fact of the subsequent bankruptcy of Mr Addison. This was evidence not available at the time of the hearing before the District Judge, of importance to the disposition of the appeal and the fact of the bankruptcy was not in dispute.

79. The Official Receiver's position is that any right to appeal vests in the Official Receiver, but that the Official Receiver leaves it to the Court to decide.

The treatment of rights of appeal on bankruptcy

80. To deal with these submissions, it is necessary to examine more broadly the circumstances in which a person has a sufficient interest to continue to litigate a matter he was involved in prior to his bankruptcy. Having evaluated what the test is for when a person can do so, one can then apply it to the present situation. Both Counsel agreed that there was no case that directly decides the specific point before me.

81. There is a substantial body of case-law on when *claims* of the bankrupt vest in his trustee in bankruptcy and when they do not. A bankrupt may often wish to continue to litigate for his own benefit a claim that he had at the point of the bankruptcy order if he views it as of value to him. I shall therefore start with claims by the bankrupt, before going on to deal with situations where the bankrupt is a *defendant* and when a claim or

application can continue against a defendant who is made bankrupt and therefore continue to be defended by the bankrupt. This reflects the division drawn between Hoffmann LJ in *Heath v Tang* [1993] 1 WLR 1421, which I shall come onto in a moment.

82. While this is a convenient way of dealing with the case-law, I do not consider that Hoffmann LJ was seeking in *Heath* to suggest the distinction between cases where the bankrupt was a claimant and where the bankrupt was a defendant was a rigid one or an exhaustive classification of all cases. On the contrary, for example he expressly referred to a bankrupt bringing a cross-claim with respect to a claim against him as being a case that straddled both categories. Some cases concerning whether the bankrupt can continue litigation or a certain aspect of litigation cannot neatly be fitted into the category of bankrupt as claimant or bankrupt as defendant. However, pigeonholing such situations into bankrupt as claimant or defendant is unnecessary because the essential question is in my judgment the same in both situations, namely whether the litigation or aspect of it can be regarded as something personal to the bankrupt.

The bankrupt as claimant

83. On the making of a bankruptcy order, the official receiver becomes trustee of the bankrupt's estate, unless the court appoints another person: section 291A(1) of the 1986 Act.

84. A bankrupt's estate vests in his trustee in bankruptcy immediately on his appointment, or in the case of the official receiver, on his becoming trustee: section 306(1). The function of the bankruptcy trustee is to get in, realise and distribute the bankrupt's estate: section 305(2).

85. Subject to what follows later in section 283, a bankrupt's estate comprises "*(a) all property belonging to or vested in the bankrupt at the commencement of the bankruptcy, and (b) any property which by virtue of any of the following provisions of this Part is comprised in that estate or is treated as falling within the preceding paragraph*": section 283(1).

86. Property is intended to be a broad concept for these purposes, it being in the public interest that trustees of a bankrupt are able to get in, realise and distribute the bankrupt's estate in accordance with the statutory scheme amongst the bankrupt's creditors: *Avonwick Holdings Limited v Sayers* [2016] EWCA Civ 1138 at [40]-[41]. It includes *"money, goods, things in action, land and every description of property wherever situated and also obligations and every description of property whether present or future or vested or contingent, arising out of, or incidental to property*" (section 436(1)), and property includes, with certain exceptions, powers over property (section 283(4)).

87. Given that a bankrupt's property includes things in action, it is capable of including causes of action, and rights of appeal against the rejection by a Court of such causes of action. There can be no distinction in this regard between the claim and the appeal: the appeal is a continuation of the claim once it had failed at first instance.

88. However, as Hoffmann LJ explained in *Heath*, that does not mean that *all* of the bankrupt's causes of action vest in the trustee, because

> "*there are certain causes of action personal to the bankrupt which do not vest in his trustee. These include cases in which "the damages are to be estimated by immediate reference to pain felt by the bankrupt in respect of his body, mind or character, and without immediate reference to his rights of property." See Beckham v. Dale (1849) 2 H.L.Cas.579, 604, per Erle J. and Wilson v. United Counties Bank Ltd. [1920] A.C. 102.*" (1423A-B; underlining added)

89. Hoffmann LJ does not purport to define exhaustively what causes of action will be personal to the bankrupt for these purposes. Rather he states that they will *include* cases in which damages are to be estimated by immediate reference to the pain felt by the bankrupt in respect of his body, mind or character, and without immediate reference to his rights of property (***"body, mind and character cases"***).

90. Just over a decade after *Heath v Tang*, Lord Walker explained in his judgment in *Mulkerrins v PricewaterhouseCoopers (a firm)* [2003] UKHL 41 that

> "*the wide language used in successive statutes to describe the bankrupt's estate was from an early stage interpreted by the court as excluding rights of action which are classified as personal to the bankrupt, rather than relating to his property.*" ([22])

91. He then went on at [25] to set out the then most recent authority, the Court of Appeal decision in *Grady v HM Prison Service* [2003] EWCA Civ 527, explaining that

> "*[t]he Court of Appeal (in a judgment of the court delivered by Sedley LJ) observed (at para 14) that there is "no bright line" between personal rights of action and those which form part of a bankrupt's estate, but (para 24) that all the reasoning in the authorities tends to place on the non-vesting side of the line a claim which is primarily directed at the restoration of a contractual relationship in which the claimant's skill and labour are the essential commodity*".

In *Grady*, Sedley LJ treated at [11] Hoffmann LJ in *Heath* as having explained that *among* the causes of action personal to the bankrupt which do not vest in the trustee were body, mind and character cases.

92. In *Mulkerrins* itself, the appellant alleged that her former professional advisers, PricewaterhouseCoopers, had negligently failed to protect her from bankruptcy. While not deciding the point ([18]), Lord Millett expressed scepticism about whether the claim vested in the trustee in bankruptcy, stating that "*it would be very surprising if a claim of this character could be made available to the creditors. They would be claiming damages for the making of the very bankruptcy order under which their claim arose.*" ([17]).

93. Mr Goold relied on the Court of Appeal decision in *Avonwick Holdings Limited v Sayers* [2016] EWCA Civ 1138 as an example of rights relating to litigation not being property. In that case, it was held that privilege was not property of a bankrupt which automatically vests in the trustee in bankruptcy. The core reasoning is at [63]:

> "*Following the Morgan Grenfell case and the Simms case, the bankrupt can only be deprived of privilege if IA 1986 expressly so provides or it is a necessary implication of the express language of its provisions. The only provisions relied*

> *upon by the Trustees in the present case on this aspect are the definition of "property" in section 436(1) and the treatment of a "power over or in respect of property" in section 382(4), in conjunction with the general provisions in sections 283 and 306 for the automatic vesting in the trustee of the bankrupt's property comprised in his estate. All those provisions are in general terms. They do not expressly treat privilege as property of the bankrupt which automatically transfers from the bankrupt to the trustee. Nor is that a necessary implication of the provisions*."

94. I accept that *Avonwick* is an example of rights relating to litigation not constituting property. Moreover, in a general sense, privilege is something personal to the bankrupt and therefore the case is in that respect a demonstration of rights personal to the bankrupt not vesting in the trustee in bankruptcy. However, as the first sentence of the extract above makes clear, the starting point in that case turned on a point based on the specific characteristics of privilege, which is that the bankrupt could only be deprived of privilege by express provision in a statute or necessary implication. Therefore, the judgment does not, and did not need to, seek to provide a general touchstone for determining which rights relating to litigation do vest in the trustee in bankruptcy.

95. Reliance was placed by Ms Dixon on *Agba v Luton Borough Council* [2020] EWHC 1160 (Admin). In *Agba*, Choudhury J held that a bankrupt could not commence proceedings to challenge to a liability order made against her in respect of unpaid council tax. He rejected the argument that the cause of action on the facts before him was personal to the bankrupt, because "*the liability as to Council tax is clearly connected to the property. Indeed, absent the appellant's interest in the property there would be no such liability. It is difficult to see how this could reasonably be construed as a right or a cause of action personal to the bankrupt.*" ([27]). He went on to state, in the sentence relied on by Ms Dixon:

> "*Even if it could be regarded as something personal to the appellant, it is clear from the authorities referred to above that the nature of the action needs to be one that relates "*<u>solely</u>* to his body, mind and character" (my emphasis), and that any damages seeking to recover compensation must be for damage to his body, mind and character as opposed to other causes of action which might be considered in respect of a right to property.*"

96. This sentence is technically obiter, as the Judge had held that the cause of action was not personal to the bankrupt. In my judgment, for the reasons above, *Heath and Grady* in particular do not bear out the proposition that causes of action personal to the bankrupt are limited to those relating solely to his body, mind and character.

97. Drawing the above cases together:

(1) Most claims that a bankrupt had at the time of bankruptcy vest in his trustee in bankruptcy, because they are "things in action" and therefore form part of the bankrupt's estate;

(2) There are circumstances in which a claim may be found to be personal to the bankrupt such that it does not vest in the trustee in bankruptcy or Official Receiver;

(3) There is no simple bright line test for determining what falls on one side of the line and the other: e.g. *Mulkerrins* at [25];

(4) One important category of cases that fall on the personal side of the line are cases in which "*the damages are to be estimated by immediate reference to pain felt by the bankrupt in respect of his body, mind or character, and without immediate reference to his rights of property*": *Heath*, but that does not exhaust the field of personal claims.

The bankrupt as defendant

98. Hoffmann LJ explained in *Heath* that the analysis where the bankrupt was a defendant was different:

> "*In cases where the bankrupt is defendant, there is of course usually no question of the cause of action having vested in the trustee. Unless the defence is set-off (a situation to which we shall return later) the bankrupt will not be asserting by way of defence any cause of action of his own.*" (1424E-F)

99. He went on to explain that:

> "*But in cases in which the plaintiff is claiming an interest in some property of the bankrupt, that property will have vested in the trustee. And in cases for debt or damages, the only assets out of which the claim can be satisfied will have likewise vested. It will therefore be equally true to say that the bankrupt has no interest in the proceedings. As we have seen, section 285(3) deprives the plaintiff of any remedy against the bankrupt's person or property and confines him to his right to prove.*
>
> *On the other hand, there are actions seeking relief such as injunctions against the bankrupt personally which do not directly concern his estate. They can still be maintained against the bankrupt himself and he is entitled to defend them and, if the judgment is adverse, to appeal. This distinction was the basis of the decision in Dence v. Mason [1879] W.N. 177 in which a bankrupt wished to appeal against an order made before the bankruptcy granting an injunction to restrain passing off and ordering him to pay costs. His trustee declined to appeal but the court said, at p.177, that the bankrupt himself could appeal against the injunction*
>
> > *"which was a personal order against him, notwithstanding the bankruptcy, though he had no interest in the order as to costs, his estate being now vested in the trustee.*"
>
> *This implies that the bankrupt would not have been entitled to appeal against an order which was enforceable against his estate. This appears clearly from the decision of the House of Lords in Rochfort v. Battersby (1849) 2 H.L.Cas. 388…*" (1424F-1425A)

100. He concluded his review of the authorities as follows:

> "*These authorities in my judgment demonstrate that in principle a bankrupt cannot in his own name appeal from a judgment against him which is enforceable only against the estate vested in his trustee.*" (1425H)

101. In *Heath* itself, the question for the Court was whether a bankrupt could bring an appeal against a judgment on which the bankruptcy petition was founded. Hoffmann LJ considered that he could not. Given its potential importance to the present question, I set out his reasoning in full:

> "*Is there anything different about the judgment upon which the bankruptcy petition was founded? It is submitted that the difference is that in such a case the bankrupt does have an interest, because if he can get rid of the judgment, he may be able to have the bankruptcy order annulled on the ground that it should never have been made. Whether it is set aside or not will depend upon whether apart from the judgment the bankrupt would have been solvent or whether an order would in any event have been made on the application of supporting creditors: see In re Noble (A Bankrupt) [1965] Ch. 129 . On the other hand, it may equally be said that if only the bankrupt could pursue a claim for a large sum which he claims to be owing to him, he would be able to pay all his creditors and have the bankruptcy annulled on that ground. It is clear, however, that this is not a ground upon which he may bring proceedings. Furthermore, an exception for the petitioner's judgment would give rise to anomalies in cases in which the defence was a claim of set-off, such as the applicant Mr. Heath asserts in this case. The contractual claim relied upon as a set-off would undoubtedly have vested in the trustee and therefore no longer be available to the bankrupt as a common law set-off to challenge the petitioner's claim. It would fall to be set off for the purposes of proof under section 323 of the Insolvency Act 1986 : see New Quebrada Co. Ltd. v. Carr (1869) L.R. 4 C.P. 651 , In re A Debtor; Ex parte Peak Hill Goldfield Ltd. [1909] 1 K.B. 430 . This right of set-off can be asserted only by the trustee. So in my view there is nothing sufficiently special about the petitioner's judgment to take it out of the general principle.*
>
> *It must be borne in mind that rule 6.25(2) of the Insolvency Rules 1986 (S.I. 1986 No. 1925) says:*
>
> > *"If the petition is brought in respect of a judgment debt, or a sum ordered by any court to be paid, the court may stay or dismiss the petition on the ground that an appeal is pending from the judgment or order, or that execution of the judgment has been stayed."*
>
> *Although this provision confers upon the court a discretion (see In re Flatau; Ex parte Scotch Whisky Distillers Ltd. (1888) 22 Q.B.D. 83) it has been said more than once that if the appeal appears to be bona fide, the court should adjourn the petition until it has been heard: Ex parte Yeatman; In re Yeatman (1880) 16 Ch.D. 283 , In re Noble (A Bankrupt) [1965] Ch. 129 . In the ordinary case, therefore, a bankrupt will not have to seek directions under section 303(1) for an appeal against the petitioner's judgment unless he failed either to lodge an appeal before the hearing of the bankruptcy petition or to satisfy the registrar or judge that the appeal was bona fide. In both classes of case it would not be unreasonable for the bankrupt to have to obtain the authority of the bankruptcy court before he could pursue an appeal.*

> *The main respect in which the bankrupt may be disadvantaged by not being allowed to appeal in his own name is that in that capacity he would almost certainly (subject to consideration of the merits of his appeal) qualify for legal aid. On the other hand, the trustee would not. If therefore the bankrupt is merely allowed to use the trustee's name in an appeal, legal aid will probably not be available. On the contrary, since the trustee is personally liable for costs awarded against him in proceedings brought in his name, the bankrupt will have to find the money to indemnify the trustee against such costs. Even in advance of the appeal, the trustee will probably be ordered to give security for the respondent's costs and this would have to be provided by the bankrupt. These are formidable obstacles but, as we have said, they will exist only in cases where the bankrupt has failed to persuade the court to exercise its discretion under rule 6.25(2) . It does not seem to me that there will be many such cases which also qualify upon their merits for legal aid. Neither of the applicants before us has legal aid. In those circumstances, we do not think that they justify us in departing from the general principle that the bankrupt has not locus standi to appeal.*
>
> *The insolvency law has of course changed a great deal since the time of Lord Eldon and In re Smith (A Bankrupt), Ex parte Braintree District Council [1990] 2 A.C. 215 is authority for taking a fresh look at the construction of the Insolvency Act 1986 in modern conditions. Nevertheless, the principle that the bankrupt is divested of an interest in his property and liability for his debts remains fundamental in the new code. The consequences for the bankrupt's right to litigate do not seem to us inconvenient or productive of injustice. The bankruptcy court acts as a screen which both prevents the bankrupt's substance from being wasted in hopeless appeals and protects creditors from vexatious challenges to their claims*."

102. In *Royal Bank of Scotland v Farley* [1996] BPIR 638, another of the cases relied on by LES, Hoffmann LJ explained that:

> "*[t]he essence of [the decision in Heath] is that a bankruptcy order divests the bankrupt of any further interest in what debts he owes because it provides that he shall no longer be under any personal liability. An appeal from the judgment against him or an application to set aside the judgment against him is therefore a matter for his trustee, but does not concern the bankrupt.*" (640-1)

103. Therefore, his analysis ultimately turns on whether the bankrupt has an interest in relation to the claim in question. The bankrupt has been divested of any further interest in the debts that he owed and in the property that he held, so he no longer has an interest in claims relating to them.

104. Nonetheless, there are still cases where the claim or application brought against the defendant is sufficiently personal to the bankrupt defendant that he has standing to continue to litigate in respect of them, such as by appealing the order made against him. The example given by Hoffmann LJ in *Heath* of an appeal against an injunction granted before bankruptcy against the bankrupt personally is one. Appealing against a bankruptcy order is another. In *Sands v Layne* [2017] 1 WLR 1782, the Court of Appeal held that a right to appeal against a bankruptcy order did not vest in the trustee in bankruptcy. The reasoning for this is set out by Arden LJ, giving the leading judgment, at [47], as follows:

> "*Normally, any cause of action which may lead to the recovery of money or other assets which form part of the estate in bankruptcy will form a part of the estate held on statutory trusts following the making of the bankruptcy order (Heath v Tang [1993] 1 WLR 1421). However the right to appeal against a bankruptcy order itself is of a different order as common sense and fairness dictate that the right of appeal against the bankruptcy order should remain with the bankrupt whose status has been fundamentally changed. Moreover, if Mr Couser were right on this point, the Trustee who decided to appeal against the bankruptcy order would be challenging the very order under which he acquired title to the bankrupt's assets…*"

105. Finally, I was taken by both Counsel to the decision of HHJ Pelling QC sitting as a Judge of the High Court in *In the Matter of GP Aviation Group International Limited* [2013] EWHC 1447 (Ch). The Judge had to decide whether a company's statutory right of appeal against a tax assessment constituted property for the purposes of s.436 of the Insolvency Act, as part of considering whether this right of appeal could be assigned to the respondents in that case. The Judge concluded, at [26] to [31], that it was not.

106. The Judge stated at [14] that "*[t]here is an interesting debate within the authorities as to whether in personal bankruptcies the reason why the bankrupt loses standing to prosecute an appeal is because the right to appeal is a property right that has vested in the trustee or whether it is simply an incident of the fact of bankruptcy*". He went on, having received detailed submission from the parties, to set out the authorities that he considered bore on the point.

107. As part of his reasoning, he concluded at [30] that Hoffmann LJ in *Heath* was not deciding that the right to appeal was a property right that vested in the trustee as part of the bankrupt's estate, and concluded at [31] that:

> "*All this leads me to conclude that a bare right to appeal is not property within the meaning of s.436 of the IA. A right of appeal available to a bankrupt is one that the bankrupt loses locus to bring or maintain once he or she is adjudicated bankrupt because the only assets out of which the underlying liability can be met have vested in the trustee and not because the right is a chose that vests in the trustee. The trustee has a statutory right (but not the obligation) to exercise any right of appeal that the bankrupt might have had as and from the moment at which the bankrupt is made the subject of a bankruptcy order. Similarly a right to appeal available to a company in liquidation can only be exercised by the office holder once appointed because he she or they then become the only agents of the company entitled to do so. Again however that is not the result of the right to appeal being treated as a property interest.*"

108. In *GP Aviation*, the situation before the Judge was one where the company had been seeking to dispute through its appeal that it owed a tax liability. I consider that it is important to read the judgment in that context, because as Ms Dixon pointed out, in many cases rights of appeal have been treated as property forming part of the bankrupt's estate.

109. The Judge concludes in [31], referring to what the situation would have been had the case concerned an individual rather than a company, that the reason the trustee in bankruptcy is the party that must bring such an appeal is because the assets out of which

the tax liability can be met are now vested in the trustee in bankruptcy, so the bankrupt no longer has locus to bring the appeal.

110. In *GP Aviation*, it was necessary for the Judge to form a view on the precise reason why, and process through which, a bankrupt lost on bankruptcy the standing to exercise a "bare" right of appeal of the type before the Judge, and therefore whether it was "property" was the purposes of the 1986 Act that was capable of assignment. The Judge was not concerned with the question of the *circumstances in which* the trustee in bankruptcy did and did not have a right to appeal. Our case is concerned with this latter issue. Therefore, in my judgment, the case does not assist in relation to the issue before me.

111. I draw from the case-law in this section on the bankrupt as defendant the following points:

(1) A bankrupt who is a defendant will normally not have standing to bring an appeal.

(2) However, there are cases where the bankrupt can appeal an order against him.

(3) The latter group of cases is not limited to cases concerned solely with his body, mind or character.

(4) One way of characterising the latter group of cases is as those concerning something personal to the bankrupt. *Sands*, for example, was a case concerning the status of the bankrupt.

(5) However, as in cases where the bankrupt is claimant, there is no more specific bright-line rule than that for determining in marginal cases whether the matter should be regarded as personal to the bankrupt or not.

(6) Some of the factors relied on in the cases to determine whether the matter should be regarded as personal to the bankrupt are:

(a) whether the bankrupt's status is at issue: *Sands*;

(b) what common sense and fairness dictates: *Sands*;

(c) whether it is natural to regard the action as vesting in the trustee in bankruptcy and for the trustee rather than the bankrupt to continue the litigation: *Sands*;

(d) whether the judgment in the litigation is or would be enforceable against the estate of the bankrupt (as where it will result in a provable debt or a proprietary claim against assets held by the trustee in bankruptcy) or not (as in the case of an injunction to restrain the bankrupt from taking particular steps): *Heath*;

(e) tied to that, whether there are other routes by which the litigation can or could have been dealt with, such as (i) the bankrupt seeking to invoke section 303 of the 1986 Act or (ii) the bankrupt persuading the Court not to make a bankruptcy order in the first place and therefore the defendant continuing the substantive litigation in the ordinary way: *Heath*;

(f) the breadth of the concept of the bankrupt's estate, and the public interest that lies behind this: *Heath*.

Application of the principles above to the present case

112. For the reasons above, I consider that the correct question to ask is whether the right to apply to set aside the statutory demand and to appeal against the refusal to set aside the Statutory Demand was something personal to the bankrupt, rather than to ask whether it is a body, mind and character case.

113. In my judgment, Mr Addison does have standing to bring the appeal, for the following reasons**:**

(1) The making of a statutory demand is an important part of the process towards making a person bankrupt and therefore changing his status in the manner set out in *Sands*. Therefore, similarly, the question of whether a statutory demand can be set aside is intimately tied up with the question of whether a person should be made bankrupt and his status. It is part of that process, not something independent of it, like whether a judgment debt is owed.

(2) The right to appeal against the Court's refusal to set aside a statutory demand is not something that can enure for the benefit of the estate by its nature. It cannot be turned to account for the estate's benefit.

(3) Similarly, the case is very far away from the situations considered in *Heath* where the claims against the bankrupt were enforceable only against the estate vested in the trustee.

(4) Rather a statutory demand creates via statute an evidential presumption that the recipient appears to be unable to pay his debts.

(5) Setting aside a statutory demand may lead to annulment of the bankruptcy order under section 282(1)(a) of the 1986 Act on the basis that the bankruptcy order ought not have been made. As Ms Dixon points out, annulment is not inevitable, for example if there are other creditors. However, as in *Sands*, being able to appeal against dismissal of the statutory demand allows the bankrupt to seek to challenge the change in his status brought about by the bankruptcy order.

(6) As in *Sands*, by the nature of the right of action to set aside a statutory demand, a trustee in bankruptcy would have little interest in pursuing an appeal against a refusal to set aside such a demand, because it would not be in the interests of the bankrupt estate to expend funds doing so.

(7) Therefore, were it to vest in the trustee in bankruptcy, such a right of appeal would become illusory in practice or close to it if- as here- a bankruptcy order was then granted off the back of the statutory demand. The appeal would become a dead letter, or close to it, from the moment of bankruptcy. Unlike in *Heath*, the ability of the bankrupt to apply to the Court under 303(1) of the 1986 Act to have the trustee given directions therefore offers little protection.

114. I have taken into account Ms Dixon's persuasive submissions, including that Mr Addison should have appealed the Bankruptcy Order. It is true that Mr Addison would have had standing to appeal and also that- as Zacaroli J explained in his 24 February 2021 reasons for refusing a stay- Mr Addison had the right to ask the Court hearing the bankruptcy petition to grant a stay pending appeal of the refusal to set aside the Stautory Demand. However, in my judgment the fact that Mr Addison could have appealed the Bankruptcy Order is outweighed by the above points and it is in any event unattractive for the bankrupt to have to prosecute a new appeal against the Bankruptcy Order rather than continuing the appeal against the refusal to set aside the Statutory Demand.