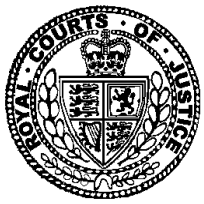

Neutral Citation Number: [2024] EWHC 1764 (Ch)

Case No: CH-2023-BRS-000011

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BRISTOL
CHANCERY APPEALS LIST (ChD)

Bristol Civil Justice Centre
2 Redcliff Street, Bristol, BS1 6GR

Date: 10 July 2024

Before :

HHJ PAUL MATTHEWS
(sitting as a Judge of the High Court)

- -

Between :

ANTHONY JAMES BROOM	**Respondent**
- and -	
MARIA DEL PILAR MOLINA AGUILAR	**Appellant**

- -
- -

Stefan Ramel (instructed by **DAC Beachcroft**) for the **Respondent**
Daisy Brown (instructed by **Harrison Clark Rickerbys**) for the **Appellant**

Hearing date: 9 April 2024

- -

This judgment was handed down remotely at 10.30am on 10 July 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

HHJ Paul Matthews :

Introduction

1. This is my judgment on the appeal of Maria Del Pilar Molina Aguilar ("the appellant") against the major part of the decision of District Judge Taylor handed down on 16 November 2023 at Bristol, after a hearing there on 10 and 11 October 2023. The appeal was instituted by appellant's notice dated 6 December 2023. I gave permission to appeal on 9 February 2024. The respondent to the appeal is Anthony James Broom, who is the current trustee in bankruptcy of the appellant's husband, Michael Alan Chambers ("Mr Chambers"). This judgment also deals with the cross-appeal of the respondent against one part of the decision of District Judge Taylor, notice of which was filed on 11 March 2024, and heard by me at the same time as the appeal.

2. The decision made by the district judge was made on an application brought by the appellant under section 375 of the Insolvency Act 1986, to rescind the order of District Judge Davies made on 18 March 2015 at Gloucester County Court. The order of District Judge Davies itself was made on an originating Insolvency Act application by the respondent's predecessor in title, Eric Stonham, under sections 339 and 340 of the 1986 Act. The order required the appellant to pay sums exceeding £200,000 to Mr Stonham in respect of transactions at an undervalue (or alternatively preferences), interest and costs.

Background

3. The background to this matter is complex, and what follows is only a summary to make the rest of this judgment intelligible. The appellant is a Spanish national, who moved to the UK in 1972 and married Michael Chambers. They lived together in England for more than forty years, until early in October 2014, when, as found by the district judge, they emigrated to Spain, where they now live. In order to avoid any confusion, I should make clear that, on her marriage, the appellant appears to have changed her name to Maria del Pilar Chambers, in accordance with then common English practice (though no legal rule). However, on 28 April 2005, the appellant by deed poll returned her name, as she was entitled to, from Maria Del Pilar Chambers to her earlier name of Maria Del Pilar Molina Aguilar. So far as I am aware, "Molina Aguilar" is not hyphenated, but follows the Spanish custom of using the father's and the mother's family names together in a two-word phrase.

4. The appellant and Mr Chambers originally bought a house in Arlingham, Gloucestershire. In 1978 Mr Chambers became a self-employed builder. To raise finance for his development work the Arlingham house was charged to a bank. In 1988, to raise further finance, the Arlingham property was sold and a smaller house acquired in Dursley, Gloucestershire, to which the charge was transferred. It appears that the borrower in each case was the appellant and Mr Chambers jointly. This borrowing was refinanced in 1993 with a mortgage loan from and the house charged to Birmingham Midshires, dated 6 October 1993. This mortgage loan is referred to as the "First Mortgage Account". On the face of it, this loan was entirely for the benefit of Mr Chambers's business. He paid the instalments on the loan.

5. In 1996 Mr Chambers was made bankrupt on the petition of HM Customs & Excise in relation to liability for a VAT surcharge. The appellant bought her husband's beneficial interest in the house from the Official Receiver, and it was assigned to her on 25 February 1998. Thereafter the appellant was and remained the sole beneficial owner of the property. However, although the appellant requested Birmingham Midshires to remove Mr Chambers from the mortgage, they refused, and so the legal title remained registered in the joint names of both the appellant and her husband. Thereafter, the appellant paid the instalments on the mortgage loan.

6. The appellant permitted her husband to use parts of her property for his building and development business. These included a large garage, most of the outdoor yard and driveway space, and use of some rooms in the house itself. From about 1998 Mr Chambers took over the payment of the mortgage instalments, which were paid directly from his bank account. The appellant's case is that this represented payment or compensation for the use that he was making of their home for the purposes of his business. In December 2000, the appellant agreed to enter into a further charge of her house to secure finance for her husband's business. I have not seen that charge, but it appears that it was granted by the appellant and Mr Chambers jointly, which would be consistent with the legal title. The former trustee's evidence was that the borrower was once again the appellant and Mr Chambers jointly, though the judge below made no findings about this.

7. The first loan made on that further security was in December 2000, for £15,001. This is known as the "Second Mortgage Account". But the charge also secured further advances. These were made in August 2001 (£20,000: "Third Mortgage Account"), February 2004 (£78,235: "Fourth Mortgage Account") and October 2005 (£85,000: "Fifth Mortgage Account"). The sums so advanced were all put into Mr Chambers' business, and the appellant did not benefit from any of them directly. I have not seen any loan agreements, but, in account statements for all these accounts, Birmingham Midshires' "customer" is stated to be the appellant and Mr Chambers jointly. Nevertheless, Mr Chambers paid all the instalments on all of them.

8. In December 2006 Mr Chambers paid £7000 to the appellant, on 4 January 2008 the sum of £10,000 and on 15 January 2008 the sum of £15,000. These are referred to hereafter as the "lump sum payments". The appellant's case is that these were part repayment of funds which she had in effect lent him, by consenting to charges to secure the sums being placed on her house. On 22 January 2008 the appellant paid £15,000 to her husband, on her case as a further loan.

9. The recession in 2008 affected Mr Chambers' business, and led to his petitioning for his own bankruptcy. He was adjudicated bankrupt for the second time on 23 April 2009. Mr Eric Stonham was appointed his trustee in bankruptcy in July 2009. (In May 2020 he was replaced by the respondent, who is his current trustee.) Mr Stonham sought to claim an interest in the appellant's house, on the basis that her husband had had such an interest. He applied to register a restriction against the title. The appellant objected, explaining her purchase of her husband's original beneficial interest after his first bankruptcy, and the matter was referred to the adjudicator. However, Mr Stonham withdrew his application by letter dated 9 May 2011, before it could be dealt with by the adjudicator. It is convenient to mention here that the appellant sold the Dursley house in November 2013.

The letter of claim and its aftermath

10. In March 2014 solicitors acting for Mr Stonham, DAC Beachcroft, wrote what was in effect a letter before claim to solicitors who had previously acted for the appellant, Rickerbys (now Harrison Clark Rickerbys), on the assumption that they continued to do so. This letter intimated a claim against the appellant on the basis of sections 339 to 342 of the Insolvency Act 1986, dealing with transactions at an undervalue and preferences, arising out of payments made under each of the five separate mortgage accounts with Birmingham Midshires.

First Mortgage Account

11. It was first said that, after Mr Chambers' first bankruptcy and the assignment of his beneficial interest to the appellant, the appellant was the only person liable to Birmingham Midshires under the First Mortgage Account. However, Mr Chambers continued to pay the mortgage instalments on that account to the appellant at least up to the date of the second bankruptcy order in April 2009. These were said to amount to £32,765.06 in the five years before that order was made. The letter said that there must have been an arrangement between the appellant and her husband to make those payments, and that amounted to a transaction at an undervalue. It further said that payments on the whole five years were caught because Mr Chambers was insolvent during the whole of that period.

Second and Third Mortgage Accounts

12. The letter then proceeded to deal separately with claims arising under the Second to Fifth Mortgage Accounts. The letter distinguished between the Second Mortgage Account and Third Mortgage Account on the one hand, and the Fourth Mortgage Account and the Fifth Mortgage Account on the other. As to the former pair of accounts, Mr Stonham assumed that the appellant and her husband were jointly liable for those loans. But Mr Chambers paid all the instalments on these accounts before his second bankruptcy, amounting to £17,316.16. Again, it was said that there must have been an arrangement between the appellant and her husband to make those payments, and that amounted to a transaction at an undervalue. However, the transaction at an undervalue was only as to *half* the value of the payments (because Mr Chambers was himself liable as to one half), amounting to £8,658.08.

Fourth and Fifth Mortgage Accounts

13. As to the latter two accounts (the Fourth and Fifth), Mr Stonham proceeded on the basis that, in accordance with Rickerbys' letter to Mr Stonham of 17 August 2012, the appellant borrowed the money from, and was solely liable to, Birmingham Midshires for its repayment, and then relent it to Mr Chambers. In this case, Mr Chambers, in paying all the instalments directly to Birmingham Midshires, made payments of 100% of the appellant's liability, amounting to a transaction at an undervalue. The total amount paid in respect of these accounts in the five years before the second bankruptcy amounted to some £77,973.53. Accordingly, the total claimed on this basis for all four accounts (£77,973.53 + £8,658.08) was £86, 631.61.

Further claim

14. However, the letter then went on to assert another claim against the appellant in respect of the Second to Fifth Mortgage Accounts, on the footing that the appellant's case that she borrowed the money from Birmingham Midshires herself and lent the advances to her husband "was manufactured in an attempt to prevent [Mr Stonham] from pursuing a claim against [the appellant] in relation to the lump sum payments that were made to her totalling £32,000". This was said to be based on inconsistencies between (a) evidence given by Mr Chambers in his bankruptcy, and (b) the information provided by the appellant in response to enquiries from Mr Stonham. The main claim intimated above is predicated on the information provided by *the appellant* being correct.

15. If, however, *Mr Chambers'* evidence were correct, and the reality was that the appellant and Mr Chambers were jointly and severally liable to Birmingham Midshires in respect of the Second to Fifth Mortgage Accounts, each was entitled to the benefit of one half of the loans advanced, and therefore the appellant could only have lent her one-half share to her husband. In this alternative scenario, all the lump sum payments made by Mr Chambers to the appellant in December 2006 and January 2008 would amount *either* to preferences within section 340 *or* transactions at an undervalue within section 339.

16. They would be preferences if at that time the appellant was a creditor and the monies received were not used to discharge the liability to the mortgagee (as to which there is no evidence). Only the payments made in January 2008 would be caught as preferences. Alternatively, they would be transactions at an undervalue because they were not made in order to discharge any liability owed by Mr Chambers to the appellant. They were simply gifts. The claim would be £32,000 if they were transactions at an undervalue, or £25,000 if they were preferences (because of the two-year time limit for preferences).

17. The letter summarised the position in this way:

> "… Given the conflicting positions asserted by [the appellant] and Mr Chambers to date, [Mr Stonham] will also plead an alternative claim to the one relating to the advances made after the first bankruptcy order. The alternative claim will be on the basis that the lump sum payments to your client totalling £32,000 were transactions at an undervalue or, alternatively, that the lump sum payments totalling £25,000 were preferences.
>
> […]
>
> The minimum value of our client's claims is £57,765.06 plus interest. The maximum value is £119,396.67 plus interest."

18. The *minimum* sum of £57,765.06 has evidently been arrived at by adding £32,765.06 (for the instalments paid on the First Mortgage Account) to the sum of £25,000 (as preferences within the statutory time limit in respect of the lump sum payments of £32,000). The *maximum* sum of £119,396.67 has been arrived at by adding the same £32,765.06 (for the instalments paid on the First Mortgage Account) to £86,631.61, being the total of £77,973.53 (the whole of the instalments paid under the Fourth and Fifth Mortgage Accounts) to £8,658.08 (being half of the instalments paid under the Second and Third Mortgage Accounts). However, there is also an *intermediate* sum of

£64,765.06, which can be obtained by adding the same £32,765.06 (for the instalments paid on the First Mortgage Account) to the sum of £32.000, treating the lump sums paid as transactions at an undervalue rather than preferences, so that the *whole* of those lump sum payments is caught. This is relevant in considering the claim as issued.

Chasing for a reply

19. Having sent their letter to Harrison Clark Rickerbys on 28 March 2014, Mr Stonham's solicitors chased for a reply by a further letter of on 11 April 2014. This elicited a response of the same date from Harrison Clark Rickerbys, to say that they had no current instructions from the appellant. By letter dated 14 April 2014, Mr Stonham's solicitors asked Harrison Clark Rickerbys to confirm the date on which they forwarded the letter before claim to the appellant. On 29 April 2014, not having received a reply to their enquiry, they once again chased for one. In fact, also on 14 April 2014, they had written directly to the appellant, enclosing a copy of the letter before claim dated 28 March 2014. Unfortunately, they sent this to the appellant at *the Dursley property*, which (as I have already mentioned) had been sold by her in November 2013, and it was returned to them undelivered.

Further letters

20. The appellant's and her husband's children include a son, Alistair Chambers, who is married to a lady called Stephanie. It appears that she, as she was entitled to do, took her husband's name on marriage, and is consequently known as "Mrs Chambers". Alistair and Stephanie have children together, and live in a property called Manor Farm in Quedgeley, Gloucestershire. The registered proprietor of that property is a company called Chambers Builders Ltd, which was set up in 2009, and of which Alistair is a director. Mr Stonham's solicitors carried out some tracing work, involving the use of inquiry agents, and found this property, via the website for Chambers Builders Ltd. An inquiry agent telephoned the house and asked if this was the correct address for "Mrs Chambers". The agent was told that it was. On 30 June 2014, they sent a further letter addressed to *the appellant* at the Manor Farm. There was no response to this letter.

The present proceedings

Issue and attempted service

21. On 29 August 2014 the Insolvency Act notice making the present claim against the appellant was issued in Gloucester County Court. A listing direction for a first hearing (15 minutes) was given for 9 October 2014. On 10 September 2014 the application itself, the evidence in support (a witness statement from Mr Stonham dated 1 September 2014), and a copy of the listing direction were sent by post addressed to the appellant at Manor Farm. Two further letters in the same terms were sent dated 17 September 2014 to the appellant, one at the same address, and one to the Dursley property. Mr Stonham's solicitors also found an address in the UK for a tile business (called "Terra Rustica") in which the appellant had been a partner, and attempted to send the proceedings to her at that address as a well. All of these letters were returned undelivered to the solicitors. By letter also dated 17 September 2014, they sent a copy

of the proceedings to Harrison Clark Rickerbys "for your information". On 9 October 2014, DJ Davis relisted the adjourned application to be heard on 4 February 2015.

22. On 6 November 2014, two enquiry agents called at Manor Farm and served the proceedings upon Stephanie Chambers, no doubt in the initial belief that she was the appellant. On 15 December 2014, and again on 17 December 2014, the respondent's solicitors wrote to Stephanie Chambers. With the latter letter, they sent a copy of the notice of hearing fixed for 4 February 2015, saying "we trust that you will ensure that the order is brought to your mother-in-law's attention". Stephanie Chambers did not respond to either letter.

Application for service by an alternative means

23. On 4 February 2015, on the hearing of the adjourned application, the then trustee made an application for service by an alternative means, supported by a witness statement which recounted the attempts that had been made to serve the proceedings. At that hearing, DJ Davis made an order under CPR rule 6.15 granting permission to the trustee to serve the proceedings upon the appellant "by the following means of service":

    (1) sending a text message in specified form to a mobile telephone number believed to belong to the appellant;

    (2) leaving a voicemail in specified form on the mobile telephone with that number;

    (3) sending a text message in specified form to a mobile telephone number believed to belong to the appellant's husband;

    (4) leaving a voicemail in specified form on the mobile telephone with that number;

    (5) sending a message via Facebook messenger to any Facebook account held by the appellant "and her partner Mr Chambers";

    (6) leaving the application and the evidence in support with the trustee's solicitors at their office in Bristol for collection by the appellant in business hours on or before 28 February 2015.

24. The specified form of message asked the appellant to contact "the trustee's solicitors at their Bristol office as soon as possible and by no later than 28 February 2015". It is not clear from the terms of the order of how the six methods of service interacted with each other. For example, they could be alternatives, or they could be (or some of them could be) cumulative. A plausible interpretation (based in part on the fact that, in the order itself, the first five are numbered, but the sixth is not) is that any of the first five methods should be coupled with the sixth. But it is not necessary to deal with that on this appeal. The judge below accepted that the trustee had complied with all of them. He also accepted that there had been no response from the appellant. But in his judgment he also proceeded on the basis that, by the time that this order was applied for and obtained, the appellant was no longer resident in England, but was domiciled in Spain.

The relief sought by the application notice

25. The proceedings as issued referred to the same five mortgage accounts and also the lump sum payments amounting to £32,000. The application notice asked for various declarations concerning the mortgage instalment and lump sum payments. In summary, and using the same paragraph numbers as the notice, the first nine of these were:

> 1. The arrangement between the appellant and her husband whereby he paid mortgage instalments on the First Mortgage Account in the five years before his second bankruptcy amounted to transaction(s) at an undervalue.
>
> 2. The arrangement between the appellant and her husband whereby he paid mortgage instalments on the Second Mortgage Account in the five years before his second bankruptcy amounted to transaction(s) at an undervalue.
>
> 3. *In the alternative to declaration 2*, it amounted to a preference in respect of 50% of each payment in the two years before his second bankruptcy.
>
> 4. The arrangement between the appellant and her husband whereby he paid mortgage instalments on the Third Mortgage Account in the five years before his second bankruptcy amounted to transaction(s) at an undervalue.
>
> 5. *In the alternative to declaration 4*, it amounted to a preference in respect of 50% of each payment in the two years before his second bankruptcy.
>
> 6. The arrangement between the appellant and her husband whereby he paid mortgage instalments on the Fourth Mortgage Account in the five years before his second bankruptcy amounted to transaction(s) at an undervalue.
>
> 7. *In the alternative to declaration 6*, it amounted to a preference in respect of 50% of each payment in the two years before his second bankruptcy.
>
> 8. The arrangement between the appellant and her husband whereby he paid mortgage instalments on the Fifth Mortgage Account in the five years before his second bankruptcy amounted to transaction(s) at an undervalue.
>
> 9. *In the alternative to declaration 7*, it amounted to a preference in respect of 50% of each payment in the two years before his second bankruptcy.

26. The tenth such declaration related to the lump sum payments, and was:

> "10. The payments made by Mr Chambers to [the appellant] in the sums of £7,000 on 6 December 2006, £10,000 on 4 January 2008 and £15,000 on 15 January 2008 amounted to transactions at an undervalue."

The eleventh such declaration was "in the alternative to paragraph 10", and was that the same three payments amounted to *preferences*.

27. Paragraphs 12-15 of the notice sought specific orders, the substantive one being the first of them, as follows:

> "12. Pursuant to the declarations in paragraphs 1 and 2 or 3 and 4 or 5 and 6 or 7 and 8 or 9 and 10 or 11 above, [the appellant] do pay to the Applicant the sum of

> £57,765.06 or £64,765.06 or £119,396.67, or such other sum as the Court thinks fit."
>
> Paragraph 13 sought interest, paragraph 14 costs, and paragraph 15 "Such further or other relief as the Court deems appropriate".

The letter of claim and the application notice compared

28. Comparing the letter before claim and the application notice as issued, two points in particular strike me. The first is that the amounts of money sought to be claimed from appellant in this claim under paragraph 12 correspond exactly to the amounts claimed in the letter before claim as the minimum and maximum amounts of the claim, and that the difference between them depends on whether the allegations based on the evidence of Mr Chambers is preferred to the information from the appellant. In other words, they are *alternatives*, and the claim to the value of the lump sum payments of £32,000 is explained as arising only in the case that Mr Chambers' evidence is preferred to the appellant's information, as so clearly stated in Mr Stonham's solicitors' letter of 28 March 2014, the relevant part of which is set out at [17] above.

29. The second point that strikes me is that paragraphs 10 and 11 of the application notice, dealing with the lump sum payments, do not make clear that the claims there made are in the alternative to the claims in paragraphs 2 to 9. (The claim under paragraph 1 stands alone, and is unaffected by this.) Strictly, I doubt that it was required to be stated to be an alternative claim. It is a claim which arises in certain circumstances, that is, if the facts proved justify it. The detailed allegations of fact are not in the application notice. They are in the supporting witness statement. An Insolvency Act application notice is much more like the claim form in a Part 7 claim, and the witness statement like the particulars of claim.

30. In his witness statement dated 1 September 2014 in support of his claim, Mr Stonham discusses the lump sum payments at paragraphs 58 through to 70. Amongst other things, he says this:

> "60. If the Court makes a finding that the [appellant] did not loan the sums of £78,235 and £85,000 to [Mr Chambers], then the lump sum payments totalling £32,000 amount to either preferences within the meaning of section 340 of the Act or transactions at an undervalue within the meaning of section 339 of the Act.
>
> […]
>
> 64. In the event that [Mr Chambers'] version of events is found by the Court to be accurate, then the consideration for the [appellant] allowing [Mr Chambers] to use her share of the mortgage advances and allowing the advances to be secured against the Property was [Mr Chambers'] agreement to pay the mortgage instalments …
>
> 65. If that is the case, then the lump sum payments totalling £30,000 amount to transactions at an undervalue as the [appellant] is not a creditor of [Mr Chambers] as she claims …
>
> […]

> 67. If, notwithstanding above, the [appellant] is found to have been a creditor at the time and the payments were made in order to partially discharge sums owed to her, then they will amount to preferences."

31. It is thus clear from the evidence in support, consistently with the letter before claim, that the claim in relation to the lump sum payments is an *alternative* claim to that in respect of the Second to Fifth Mortgage Accounts. As pleaded, it all depends on whether the court prefers the evidence of Mr Chambers to the information supplied by the appellant. But the two claims are clearly alternative. Hence the three sums mentioned in paragraph 12 of the application notice. The claim is either for the sum of £57,765.06 or £64,765.06, if the claim to the lump sum payments succeeds, whether as preferences (£57,765.06) or transactions at an undervalue (£64,765.06), or for the sum of £119,396.67, if the claim under the Second to Fifth Mortgage Accounts succeeds. The claim as intimated in the letter before claim and in the witness statement does not extend the claim to *both* £119,936.67 *and a further* £32,000.

The hearing of the substantive application

32. On 18 March 2015, the hearing of the substantive application took place before DJ Davis. The trustee was represented by counsel, but there was no attendance by or representation of the appellant. The order made by the court on that day recited that the court was satisfied that the appellant had been served with the proceedings in accordance with the order of 4 February 2015. The court declared that

> "1. The arrangements or understandings between Mr [Michael] Chambers and the [appellant] whereby Mr Chambers made the following payments in connection with the mortgage is secured against [11 Woodmancote, Gloucestershire GL11 4AF] in respect of the following mortgage accounts and in respect of the following periods of time amounted to transactions at an undervalue contrary to section 339 of the Insolvency Act 1986:
>
> 1.1 Payments totalling £32,765.06 made in the period from 26 April 2004 to 26 January 2009 in respect of the First Mortgage Account;
>
> 1.2 Payments totalling £3,487.31 made in the period from 19 May 2004 to 19 January 2009 in respect of the Second Mortgage Account;
>
> 1.3 Payments totalling £5,170.77 made in the period from 6 May 2004 to 6 February 2009 in respect of the Third Mortgage Account;
>
> 1.4 Payments totalling £43,989.87 made in the period from 4 May 2004 to 4 February 2009 in respect of the Fourth Mortgage Account;
>
> 1.5 Payments totalling £33,986.66 made in the period from 10 November 2005 to 10 February 2009 in respect of the Fifth Mortgage Account.
>
> 2. [The payments made by Mr Chambers to the appellant and the sums of £7,000 on 6 December 2006, £10,000 on 4 January 2008 and £15,000 on 15 January 2008, totalling £32,000] amounted to transactions as an undervalue contrary to section 339 of the Insolvency Act 1986."

The court accordingly ordered the appellant to pay to the trustee the sum of £119,396.67 under paragraph 1, and £32,000 under paragraph 2 (a total of £151,396.67), together with interest in the sums of £56,370.18 and £18,843.80 respectively (a total of £75,213.98), and costs summarily assessed in the sum of £35,799.80.

Attempts at enforcement

33. It appears that the trustee made no attempt to serve this order upon the appellant in England. Eventually, however, in 2019 the then trustee applied for a European Enforcement Order against the appellant in her local Spanish court. The original trustee was replaced by the current trustee (the respondent) by a block transfer order of the Bristol court sealed on 20 May 2020. On 9 October 2020 the Spanish court requested payment from the appellant in the sum of €283,253.31 and €84,500 interest and costs. In December 2020 it sent a notice to the appellant to request her to attend court. It sent another such notice in April 2021. The appellant attended the court on 3 May 2021 where she was informed that the trustee had appointed Spanish lawyers and applied for the execution of the order against her assets.

34. On 2 February 2022 the appellant applied under section 375 of the Insolvency Act 1986 to set aside the order of the English court made on 18 March 2015. The respondent filed evidence in answer to the application on 29 March 2023, and the appellant filed evidence in reply on 25 April 2023. Directions to trial given on 16 May 2023, and the set-aside application was heard on 10 and 11 October 2023. As I have already said, judgment was handed down on 16 November 2023. The judge dismissed the appellant's application, except in relation to the so-called "lump-sum payments" of £32,000, which the judge held could not be obtained as well as the sum of £119,396.67.

This appeal

Notice of appeal and respondent's notice

35. As I have already said, the appellant's notice was dated 6 December 2023, and sealed on 7 December 2023. The six grounds of appeal were as follows:

> "Ground 1: The Judge fell into error in his finding … that the Former Trustee's posting of the proceedings to the Appellant's relatives in the UK and leaving them at the Former Trustee's UK lawyers office for collection was good service … on the Appellant, a Spanish national who was domiciled in Spain and for whom no permission had been obtained to serve outside the jurisdiction …
>
> Ground 2: The Judge wrongly took into account … in exercising his discretion, what he perceived to be a positive obligation on the putative defendant domiciled outside of the jurisdiction to take active steps to be served with proceedings in the UK.
>
> Ground 3: the Judge reached a conclusion … that 'the Appellant has however failed to establish that she was not aware of the application by the trustee' without the factual findings to support it and despite inconsistent factual findings that the Appellant's relatives were concealing the application from her.

> Ground 4: The Judge fell into error by concluding … that the defence was 'weak' and would not meet the test of having a real prospect of success on the basis of the Trustee's counsel's mischaracterisation of the defence is relying on 'vague oral statements between husband-and-wife with no contemporaneous documents to support it'.
>
> Ground 5: the Judge failed to take into account that neither the Former Trustee nor the Trustee had served (or attempted to serve) the final order on the Appellant.
>
> Ground 6: the Judge improperly took into account … and relied heavily on the truth of narrative contained in an email sent by a process server, Mr Paul Lowe, that the Appellant had confirmed her identity to him during a telephone call despite Mr Lowe not turning up to be cross examined (as ordered by the court) and in the face of evidence that Mr Lowe previously provided false information about the Appellant confirming her identity to him."

36. The trustee filed a respondent's notice dated (and sealed on) 11 March 2024, seeking to cross-appeal the district judge's rejection of the claim for the "lump sum" payments of £32,000. On 9 February 2024, I gave permission to the appellant to appeal on all of the grounds except ground 3. I do not think that I specifically dealt with the question of the cross-appeal. I certainly did not give permission to appeal in relation to it. I will return to this point later.

General points

37. Before turning to consider the appeal and cross-appeal, I set out a few relevant points concerning appeals. Under CPR rule 52.21(1), an appeal is limited to a review of the decision of the court below, unless the court considers that in the circumstances of a particular appeal it would be in the interests of justice for there to be a rehearing: *R (Zhou) v Home Secretary* [2024] EWCA Civ 181, [17]-[18]. Here there is no need for a rehearing (and no-one so suggested), so that this appeal is a review.

38. Secondly, rule 52.21(3) provides that the appeal court will allow the appeal where the decision was (a) wrong, or (b) unjust, because of serious procedural or other irregularity in the lower court. Here wrong means wrong in law, wrong in fact, or wrong in the exercise of discretion. In *Allied Fort Insurance Services Ltd v Creation Consumer Finance Ltd* [2015] EWCA Civ 841, the case of an appeal from a decision granting summary judgment, Sir Geoffrey Vos C (with whom Tomlinson and King LJJ agreed) said:

> "The appeal is … not a rehearing but a review. The degree of respect given by the appeal court to the first instance judgment is likely to depend on the reason for the order granting summary judgment. If the reason turns on a pure point of law, without any material factual dispute, then the appeal court will simply decide whether the first instance decision was correct or incorrect. … "

39. As to appeals on questions of fact, in *Volpi v Volpi* [2022] 4 WLR 48, Lewison LJ (with whom Males and Snowden LJJ agreed) said:

> "2. … i) An appeal court should not interfere with the trial judge's conclusions on primary facts unless it is satisfied that he was plainly wrong.
>
> ii) The adverb 'plainly' does not refer to the degree of confidence felt by the appeal court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty, that the appeal court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached.
>
> iii) An appeal court is bound, unless there is compelling reason to the contrary, to assume that the trial judge has taken the whole of the evidence into his consideration. The mere fact that a judge does not mention a specific piece of evidence does not mean that he overlooked it.
>
> iv) The validity of the findings of fact made by a trial judge is not aptly tested by considering whether the judgment presents a balanced account of the evidence. The trial judge must of course consider all the material evidence (although it need not all be discussed in his judgment). The weight which he gives to it is however pre-eminently a matter for him.
>
> v) An appeal court can therefore set aside a judgment on the basis that the judge failed to give the evidence a balanced consideration only if the judge's conclusion was rationally insupportable.
>
> vi) Reasons for judgment will always be capable of having been better expressed. An appeal court should not subject a judgment to narrow textual analysis. Nor should it be picked over or construed as though it was a piece of legislation or a contract."

40. As to evaluative judgments, in the Supreme Court in *R(Z) v Hackney LBC* [2020] 1 WLR 4327, [56], [74], Lord Sales (with whom Lords Reed, Kerr and Kitchin agreed) endorsed the view of Lewison LJ in the court below. This was that the appellate court can interfere with an evaluative judgment (there, a proportionality assessment) only where *either* the court below made a significant error of principle, *or* there is an identifiable flaw in the court's reasoning, such as a gap in logic, a lack of consistency, or a failure to take account of some material factor, *which undermines the cogency of the conclusion*.

41. As for appeals against decisions in the exercise of the court's discretion, in *Azam v University Hospitals Birmingham NHS Foundation Trust* [2020] EWHC 3384 (QB), Saini J said:

> "50. An appellate court will only interfere with a discretionary evaluation where an appellant can identify one or more of the follows errors:
>
> (i) a misdirection in law;
>
> (ii) some procedural unfairness or irregularity;
>
> (iii) that the Judge took into account irrelevant matters;

> (iv) that the Judge failed to take account of relevant matters; or
>
> (v) that the Judge made a decision which was "plainly wrong".
>
> 51. Error type (v) requires some elaboration. This means a decision which has exceeded the generous ambit within which reasonable disagreement is possible."

This statement of principle was approved by the Court of Appeal in *ABP Technology Ltd v Voyetra Turtle Beach Inc* [2022] EWCA Civ 594, [21].

42. Thirdly, rule 52.21(4) provides that the appeal court may draw any inference of fact which it considers justified on the evidence. Fourthly, the court below must give reasons for its decisions: *Bassano v Battista* [2007] EWCA Civ 370. But these must be read on the assumption that the judge knew how to perform the judicial functions and the matters which had to be taken into account: *Piglowska v Piglowski* [1999] 1 WLR 1360, 1372. As Lewison LJ said in *Volpi v Volpi*, they will always have been capable of being better expressed.

Findings of fact

43. In his judgment, the district judge made a number of important findings of fact, which are not challenged on appeal. They include the following:

(1) The respondent did not know until early May 2014 that the appellant had moved from Dursley. He thereafter caused enquiries to be made. Those enquiries did not however reveal that the appellant was living abroad. The respondent did not know where the appellant was living in 2014 and 2015. [Paragraph 58 of the judgment]

(2) The appellant *either* did know of the attempts by the trustee in bankruptcy to contact her at Manor Farm, Quedgeley (the home of her son and daughter in law), *or* deliberately sought to avoid finding out. [Paragraph [41(ii)]

(3) The appellant knew that the trustee was seeking to pursue her and that she deliberately sought to evade service of the application. [Paragraph 66]

(4) The Insolvency Act notice issued on 29 August 2014, launching the present proceedings, was not served personally on the appellant. [Paragraphs 12, 13, 16, 18, 23, 30, 60]

(5) The notice (and evidence in support) were sent by post addressed to the appellant five times in September 2014. These were: twice to her at Manor Farm, and once to her at each of her former residence at Dursley, which she had sold and vacated in November 2013, a firm called Terra Rustica of which she had previously been a director, and her solicitors (who had no instructions to accept service). [Paragraphs 13 and 14]

(6) The appellant had emigrated from England to Spain with her husband in early October 2014. [Paragraph 6]

(7) The appellant was telephoned by the trustee's enquiry agent on 8 October 2014 when she was travelling on the continent, and she answered it. [Paragraph 41(vi)]

(8) On 6 November 2014, enquiry agents attended at Manor Farm and personally served the appellant's daughter in law, Stephanie Chambers with a copy of the proceedings, in the apparent belief that she was the appellant. The documents were sent by Stephanie Chambers directly to the appellant's solicitors, who returned them to the trustee's solicitors. [Paragraphs 16, 46, 47]

I note in passing that findings (2) and (3) may not be completely consistent. But the timings for the events described in each finding are not stated, and they may therefore refer to different periods. In any event, I do not think that anything turns on this.

44. On the other hand, the judge made no finding as to where in fact the appellant was living between the sale of the Dursley property in November 2013 and her emigration to Spain in October 2014. Her evidence referred to both staying with friends and visiting Spain. However, he did find that she deliberately tried to distance herself from Manor Farm. The judge also made no finding that (assuming it were relevant) the appellant had voluntarily submitted to the jurisdiction of the English court.

Law

Section 375 of the Insolvency Act 1986

45. The application to the court below was one to set aside the order of 18 March 2015. It was made under section 375 of the Insolvency Act 1986. This relevantly provides:

> "(1) Every court having jurisdiction for the purposes of the Parts in this Group may review, rescind or vary any order made by it in the exercise of that jurisdiction.
>
> (2) An appeal from a decision made in the exercise of jurisdiction for the purposes of those Parts by [the county court] or by [an insolvency and companies court judge] lies to a single judge of the High Court; and an appeal from a decision of that judge on such an appeal lies … to the Court of Appeal."

46. In *Re a Debtor (No 32 of 1991)* [1993] 1 WLR 314, Millett J (as he then was) referred to the jurisdiction under section 375, and said (at 318-19):

> "Where an application is made to the original tribunal to review, rescind or vary an order of its own, however, the question is not whether the original order ought to have been made upon the material then before it but whether that order ought to remain in force in the light either of changed circumstances or in the light of fresh evidence, whether or not such evidence might have been obtained at the time of the original hearing."

47. In *Papanicola v Humphreys* [2005] 2 All ER 418, Laddie J referred to a number of authorities on section 375, and said:

> "25. It seems to me that a number of propositions can be formulated in relation to s 375. Some of them are derived from the passages cited above:
>
> (1) The section gives the court a wide discretion to review vary or rescind <u>any</u> order made in the exercise of the bankruptcy jurisdiction.

> (2) The onus is on the applicant to demonstrate the existence of circumstances which justify exercise of the discretion in his favour.
>
> (3) Those circumstances must be exceptional.
>
> (4) The circumstances relied on must involve a material difference to what was before the court which made the original order. In other words there must be something new to justify the overturning of the original order.
>
> (5) There is no limit to the factors which may be taken into account. They can include, for example, changes which have occurred since the making of the original order and significant facts which, although in existence at the time of the original order, were not brought to the court's attention at that time.
>
> (6) Where the new circumstances relied on consist of or include new evidence which could have been made available at the original hearing, that, and any explanation by the applicant gives for the failure to produce it then or any lack of such explanation, are factors which can be taken into account in the exercise of the discretion."

48. In *Holtham v Kelmanson* [2006] EWHC 2588 (Ch), a trustee in bankruptcy applied to the registrar for, and obtained, an order for sale for leasehold property belonging to the bankrupt. But the bankrupt was not present or represented at the hearing. He applied under section 375 for an order setting aside the order for sale. A different registrar refused the application on the basis that there was no material difference between the first hearing and the second. The bankrupt appealed. Evans-Lombe J said:

> "8. Mrs Registrar Derrett treated the application before her as an application to review under section 375 and dismissed it because in her view there was no evidence before her of any new circumstances of which Mr Registrar Rawson had not been aware of at the time he made his order. It seems to me, and, after some discussion, it was accepted by both parties, that the fact that Mr Holtham had not been present or represented before Mr Registrar Rawson, whereas before Mrs Registrar Derrett he was both present and represented by solicitors and counsel able to support his opposition to the order sought by the trustee, constituted a material difference between the hearings before the two Registrars so allowing a review of the order of Mr Registrar Rawson under section 375 … "

As it happened, the appeal failed on the merits. But the point as to the jurisdiction under section 375 remains.

Sections 339 and 340 of the 1986 Act

49. The order of 18 March 2015 had been made on an application under sections 339 and 340 of the 1986 Act. These relevantly provide:

> "339. (1) Subject as follows in this section and sections 341 and 342, where an individual is [made] bankrupt and he has at a relevant time (defined in section

341) entered into a transaction with any person at an undervalue, the trustee of the bankrupt's estate may apply to the court for an order under this section.

(2) The court shall, on such an application, make such order as it thinks fit for restoring the position to what it would have been if that individual had not entered into that transaction.

(3) For the purposes of this section and sections 341 and 342, an individual enters into a transaction with a person at an undervalue if—

(a) he makes a gift to that person or he otherwise enters into a transaction with that person on terms that provide for him to receive no consideration,

(b) he enters into a transaction with that person in consideration of marriage [or the formation of a civil partnership], or

(c) he enters into a transaction with that person for a consideration the value of which, in money or money's worth, is significantly less than the value, in money or money's worth, of the consideration provided by the individual.

340. (1) Subject as follows in this and the next two sections, where an individual is [made] bankrupt and he has at a relevant time (defined in section 341) given a preference to any person, the trustee of the bankrupt's estate may apply to the court for an order under this section.

(2) The court shall, on such an application, make such order as it thinks fit for restoring the position to what it would have been if that individual had not given that preference.

(3) For the purposes of this and the next two sections, an individual gives a preference to a person if—

(a) that person is one of the individual's creditors or a surety or guarantor for any of his debts or other liabilities, and

(b) the individual does anything or suffers anything to be done which (in either case) has the effect of putting that person into a position which, in the event of the individual's bankruptcy, will be better than the position he would have been in if that thing had not been done.

(4) The court shall not make an order under this section in respect of a preference given to any person unless the individual who gave the preference was influenced in deciding to give it by a desire to produce in relation to that person the effect mentioned in subsection (3)(b) above.

(5) An individual who has given a preference to a person who, at the time the preference was given, was an associate of his (otherwise than by reason only of being his employee) is presumed, unless the contrary is shown, to have been influenced in deciding to give it by such a desire as is mentioned in subsection (4).

> (6) The fact that something has been done in pursuance of the order of a court does not, without more, prevent the doing or suffering of that thing from constituting the giving of a preference."

50. In relation to the interpretation of section 339, section 436 relevantly provides

> " 'transaction' includes a gift, agreement or arrangement, and references to entering into a transaction shall be construed accordingly … "

Procedural rules

51. The relevant procedural rules for these proceedings at the time of the events with which I am concerned were contained in rule 7.51A and Part 12A of the Insolvency Rules 1986, inserted by the Insolvency (Amendment) Rules 2010. Rule 7.51A of the 1986 Rules provided that:

> "The provisions of the CPR in the first column of the table in this Rule (including any related practice direction) apply to insolvency proceedings by virtue of the provisions of these Rules set out in the second column with any necessary modifications, except so far as inconsistent with these Rules.

Provisions of CPR	*Provisions of these Rules*
CPR Part 6 (except 6.30 to 6.51) (service of documents)	Chapter 3 of Part 12A
[…]	[…]"

52. Obviously, "CPR" refers to the Civil Procedure Rules 1998, as amended. I should also make clear that CPR rules 6.30 to 6.51, referred to above, comprise almost the whole of Section IV of CPR Part 6. Section IV is concerned with service of proceedings out of the jurisdiction.

53. Because they are referred to later, I set out here the text of CPR rules 6.14 and 6,15, in the form in which I understand them to have been in 2014-15:

> "6.14. A claim form served within the United Kingdom in accordance with this Part is deemed to be served on the second business day after completion of the relevant step under rule 7.5(1).
>
> 6.15.—(1) Where it appears to the court that there is a good reason to authorise service by a method or at a place not otherwise permitted by this Part, the court may make an order permitting service by an alternative method or at an alternative place.

> (2) On an application under this rule, the court may order that steps already taken to bring the claim form to the attention of the defendant by an alternative method or at an alternative place is good service.
>
> (3) An application for an order under this rule—
>
> (a) must be supported by evidence; and
>
> (b) may be made without notice.
>
> (4) An order under this rule must specify—
>
> (a) the method or place of service;
>
> (b) the date on which the claim form is deemed served; and
>
> (c) the period for—
>
> (i) filing an acknowledgment of service;
>
> (ii) filing an admission; or
>
> (iii) filing a defence."

54. Chapter 3 of Part 12A of the 1986 Rules had the cross-heading "SERVICE OF COURT DOCUMENTS" and consisted of rules 12A.16 – 12A.20. Rule 12A.16(3) provided that:

> "(3) For the purpose of the application by this Chapter of CPR Part 6 to the service of documents in insolvency proceedings—
>
> (a) an application commencing insolvency proceedings (including a winding-up petition, a bankruptcy petition or an administration application), or
>
> (b) an application within insolvency proceedings against a respondent,
>
> is to be treated as a claim form."

55. Rule 12A.17 provided that:

> "Except where different provision is made in these Rules, CPR Part 6 applies in relation to the service of court documents within the jurisdiction with such modifications as the court may direct."

56. Rule 12A.20 provided that:

> "CPR Part 6 applies to the service of court documents outside the jurisdiction with such modifications as the court may direct."

57. Part 6 of the then current *Practice Direction: Insolvency Proceedings* [2014] BCC 502 provided:

> "6.1. Except where the Insolvency Rules otherwise provide … CPR Pt 6 applies to the service of court documents both within and out of the jurisdiction as modified by this Practice Direction or as the court may otherwise direct.
>
> 6.2. Except where the Insolvency Rules otherwise provide or as may be required under the Service Regulation, service of documents in insolvency proceedings will be the responsibility of the parties and will not be undertaken by the court.
>
> 6.3. A document which, pursuant to r.12A.16(3)(b), is treated as a claim form, is deemed to have been served on the date specified in CPR r.6.14, and any other document (including any document which is treated as a claim form pursuant to r.12A.16(3)(a) …) is deemed to have been served on the date specified in CPR Part 6.26, unless the court otherwise directs. …
>
> 6.4. Except as provided below, service out of the jurisdiction of an application which is to be treated as a claim form under r.12A.16(3) requires the permission of the court.
>
> 6.5. An application which is to be treated as a claim form under r.12A.16(3) may be served out of the jurisdiction without the permission of the court if:
>
> > (1) the application is by an office-holder appointed in insolvency proceedings in respect of an individual or company with its centre of main interests within the jurisdiction exercising a statutory power under the Act, and the person to be served is to be served within the EU; or
> >
> > (2) it is a copy of an application, being served on a Member State liquidator (as defined by art.2 of the EC Regulation on Insolvency Proceedings).
>
> 6.6. An application for permission to serve out of the jurisdiction must be supported by a witness statement setting out:
>
> > (1) the nature of the claim or application and the relief sought;
> >
> > (2) that the applicant believes that the claim has a reasonable prospect of success; and
> >
> > (3) the address of the person to be served or, if not known, in what place or country that person is, or is likely, to be found.
>
> 6.7. CPR 6.36 and 6.37(1) and (2) do not apply in insolvency proceedings."

58. By paragraph 1.1(6) of the *Practice Direction*,

> " 'Insolvency proceedings' means:
>
> > (a) any proceedings under the Act, the Insolvency Rules, the Administration of Insolvent Estates of Deceased Persons Order 1986 (SI 1986/1999), the Insolvent Partnerships Order 1994 (SI 1994/2421) or the Limited Liability Partnerships Regulations 2001 (SI 2001/1090);

(b) any proceedings under the EC Regulation on Insolvency Proceedings or the Cross-Border Insolvency Regulations 2006 (SI 2006/1030)."

Effect

59. The effect of these provisions was that the provisions of CPR Part 6 which chapter 3 of Part 12A of the 1986 Rules applied to insolvency proceedings did *not* include the main rules relating to service *out of* the jurisdiction. Although rule 12A.20 provided for Part 6 to apply to service outside the jurisdiction, it was (by virtue of rule 7.51A) only the *general* provisions in Part 6 that so applied. The specialist "service out" provisions contained in rules 6.30 to 6.51 expressly did not apply. Instead, the Insolvency Practice Direction made appropriate provision for service out.

60. By the time of the events with which I am concerned, this was the 2014 Practice Direction, the relevant provisions of which were set out above. This, by paragraph 6.4, required permission to be sought and obtained in order to serve the proceedings out of the jurisdiction, unless paragraph 6.5 applied. It is not suggested that the present case fell within the latter, exceptional, paragraph. Accordingly, permission was required from the court under paragraph 6.4. No application for such permission was ever made, let alone granted. Instead, there was the application (already referred to above) made to the court on 4 February 2015 for permission to serve the proceedings by an alternative means (under rule 6.15), and the order made by the court on that day.

Ground 1

61. Ground 1 (set out above, [35]) concerns the question whether the appellant was validly served with the proceedings. The judge below held that she had been so served, because of what he called "the deeming provisions" within CPR rules 6.14 and 6.15, and that it was irrelevant whether the respondent actually received the proceedings. He also held that the order for service by an alternative means was not a nullity. It remained valid until set aside, and no application had been made for it to be set aside.

62. What the appellant says is that, since she was never served personally with the proceedings, and was outside the jurisdiction when the application was made for an order permitting service by an alternative means, the court never had any jurisdiction over her. Hence the decision of DJ Davis on 18 March 2015 should have been set aside by DJ Taylor as one having been made without jurisdiction.

63. The respondent asks how the trustee could make an application for permission to serve the appellant out of the jurisdiction in Spain when he did not know that she was there. He also says that, had he known that she was there, he would have made such an application and, in all likelihood, would have obtained it. He also says that it is not the law that, for service to be validly effected on a defendant in the jurisdiction, that defendant must have been in the jurisdiction at the time.

Discussion

64. This is a case where it is desirable to start from first principles. The early common law rule was that the English court had jurisdiction over a defendant only where the

issue of an original Royal writ (and there were many of those, one for each form of action) led to the defendant's appearing before the court. If necessary, mesne process could be issued directed to the sheriff of the relevant county to compel him or her to appear. This might involve the requirement of sureties for appearance ("attachment"), distraint on the defendant's goods ("*distringas*"), or even arrest ("*capias ad respondendum*") for this purpose. The Uniformity of Process Act 1832 (2 & 3 Will IV c 39) by section 1 replaced the multiplicity of originating processes by a single one, the *writ of summons*, specifying the cause of action, and commanding the defendant to enter an appearance at court. Section 3 of the Act provided that judgment could be obtained by the plaintiff in default of appearance by the defendant.

65. Thus, the rule that the court acquired jurisdiction by the appearance of the defendant was in effect replaced by a rule that it acquired jurisdiction over a defendant who was *served* with process whilst physically within the territorial jurisdiction, and whether or not he or she subsequently entered an appearance in court. Later cases established that it did not matter, in the case of a person served within the jurisdiction, whether he or she was also domiciled or resident within the jurisdiction, or whether he or she was there at the time of the *issue* of the writ.

66. Supplemental rules were subsequently developed in two quite different directions. The first was to give the English court jurisdiction in certain cases over persons who were outside the territorial jurisdiction and could not be served within it (so-called "long-arm" jurisdiction). This was achieved by statute, the Common Law Procedure Act 1852. Section 18 of that Act enabled the service of a writ of summons out of the jurisdiction upon a British subject in certain circumstances, and section 19 allowed *notice* of such a writ to be served upon a foreign subject in similar circumstances. In each case this would (by statute) confer jurisdiction on the English court over the defendant. This jurisdiction was passed on through successive Judicature Acts to the current Senior Courts Act 1981, section 19(2)(b). Moreover, the circumstances in which this jurisdiction could be exercised have been considerably expanded. The current rules are contained in CPR Part 6 Section IV (rules 6.30 – 6.47), and Practice Direction 6B.

67. The second development ran in the opposite direction, and was judge-led. It was to enable the English court to *decline* jurisdiction over persons otherwise served within the territorial jurisdiction. Originally, it was very narrow in scope, arising from the idea (as to which see *eg McHenry v Lewis* (1882) 22 Ch D 397) that litigation about the same thing in two different courts might be shown to be vexatious to the defendant in this country and should therefore be stayed: see *St Pierre v. South American Stores (Gath & Chaves) Ltd* [1936] 1 KB 382, 398, CA. But it was later relaxed (see *The Atlantic Star* [1974] AC 436, HL), and eventually it became aligned with the more generous Scottish principle of *forum non conveniens*: see *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460, HL. It is unnecessary for present purposes to say anything more about this.

68. Notwithstanding these two developments, the basic rule remained. It has been restated by the courts in many subsequent decisions. For example, in *Barclays Bank of Swaziland Ltd v Hahn* [1989] 1 WLR 506, it was argued, on the basis of the then current procedural rules, that service could validly be effected on a person who had already permanently left the country, by posting the document through the letter box

at his or her last known address within the jurisdiction, so long as the plaintiff could bring the existence of the writ to the defendant's notice within seven days.

69. The relevant procedural rules were then contained in the Rules of the Supreme Court 1965 (the RSC), Ord 10. Rule 1(2) relevantly provided that

> "A writ for service on a defendant within the jurisdiction may, instead of being served personally on him, be served—*(a)* by sending a copy of the writ by ordinary first class post to the defendant at his usual or last known address … "

And rule 1(3) relevantly provided that

> "Where a writ is served in accordance with paragraph (2) … any affidavit proving due service of the writ must contain a statement to the effect that … the copy of the writ … will have come to the knowledge of the defendant within seven days .. "

70. Lord Brightman, with whom all their lordships agreed, said (at 510H-511C):

> "My Lords, I accept the appellant's proposition that the defendant must be within the jurisdiction at the time when the writ is served, and I do not find it possible to agree the Court of Appeal's approach. This approach would mean that a writ could validly be served under Order 10 on a defendant who had once had an address in England but had permanently left this country and settled elsewhere, by inserting the copy writ through the letter box of his last address, provided that the plaintiff was able within seven days to communicate to the defendant the existence of the copy writ; for in such circumstances the plaintiff could properly depose that the copy writ would have come to the knowledge of the defendant within seven days after it was left in the letter box of his last known address. This appears to me to outflank Order 11 (relating to service of process outside the jurisdiction) in every case where the defendant was formerly resident in this country and is capable of being contacted abroad within seven days."

71. As I say, that was a decision on the provisions of the RSC, the former procedural rules applicable to the High Court (but not the county courts, which were then governed by the County Court Rules 1981). The current procedural rules, the CPR, apply to both the High Court and the county court. They were made under the Civil Procedure Act 1997. That Act makes no specific provision for proceedings involving service on persons out of the jurisdiction, but confers power to make rules about "any matters which were governed by the former Rules of the Supreme Court or the former county court rules" (section 1(2), Sch para 1). There was no suggestion in the present case that the relevant CPR were not within that rule-making power.

72. In *Chellaram v Chellaram* [2002] 3 All ER 17, a case decided on the CPR, Lawrence Collins J said:

> "47 … it has always been, and remains, a fundamental rule of English procedure and jurisdiction that a defendant may be served with originating process within the jurisdiction only if he is present in the jurisdiction at the time of service, or deemed service. *Barclays Bank of Swaziland Ltd v. Hahn* is simply an illustration of this principle (as is another case, not cited in argument, *Cadogan Properties*

> *Ltd v. Mount Eden Land Ltd* [2000] I.L. Pr 722, in which the Court of Appeal held that if the defendant is outside England, an order for substituted service in England could not be obtained unless permission to serve proceedings out of the jurisdiction had been obtained). CPR Part 6 contains general rules about service of documents and does not only apply to service of a claim form (see *Godwin v. Swindon Borough Council* [2001] 4 All ER 641, 646 (CA)), but I do not consider that CPR 6.5 has swept away the general principle so far as it relates to service of the claim form."

73. This dictum was disapproved by May LJ (with whom Wilson LJ agreed) in *City & Country Properties Ltd v Kamali* [2007] 1 WLR 1219. But the third judge in that case, Neuberger LJ, took a different view, saying that the dictum "deserves respect and serious consideration".

74. In a later decision of the same court, differently constituted, *SSL International plc v TTK LIG Ltd* [2012] 1 WLR 1842, the question was whether originating process could be served on a foreign company not carrying on business in the jurisdiction by personally serving one of that company's directors whilst he was temporarily in England. The courts both at first instance and on appeal held that CPR rule 6.6(3(b) (dealing with personal service on "a company or other corporation by leaving it with a person holding a senior position within the company") did not apply.

75. Stanley Burnton LJ (with whom Mummery and Arden LJJ agreed) said this:

> "57 It is a general principle of the common law that absent specific provision (as in the rules for service out of the jurisdiction) the courts only exercise jurisdiction against those subject to, *ie* within, the jurisdiction. Temporary absence, for instance on holiday, does not result in a person not being subject to the jurisdiction. In my judgment, Lawrence Collins J's statement of principle in *Chellaram v Chellaram (No 2)* [2002] 3 All ER 17 was correct if read with that qualification, and was not inconsistent with the decision in *City & Country Properties Ltd v Kamali* [2007] 1 WLR 1219.
>
> 58. Furthermore, I do not think that it is any answer that an individual who has no connection with this jurisdiction may be personally served if he is here temporarily. If he is here, to state the obvious, he is here. If a director of a foreign company which does not carry on business here is passing through this country, the company is not here.
>
> 59. If a claim has any real connection with this jurisdiction, permission to serve out of the jurisdiction may be sought and will be granted. I therefore fail to see the need or the rationale for CPR Part 6.5(3)(b) to apply to foreign companies that have no presence within the jurisdiction. … "

76. Accordingly, that was a case in which the court affirmed the (qualified) correctness of the basic principle set out by Lawrence Collins J in *Chellaram*, but also declined to allow the provisions of CPR Part 6 Section II (dealing largely with service *within* the jurisdiction) to be used to "outflank" (to use Lord Brightman's word in the *Barclays* case) the provisions of that Part dealing with service *out of* the jurisdiction.

77. In *Clavis Liberty Fund 1 LP v HMRC* [2015] 1 WLR 2949, Warren J referred to the discussion in *SSL International* of *City & Country Properties*, and said:

> "31. I am clearly bound by that explanation of *City & County Property Properties Ltd v Kamali* [2007] 1 WLR 1219 even though there might be perceived a tension between the reasoning of May LJ (adopted by Wilson LJ) in that case and the reinstatement, if I can put it that way, of the fundamental principle stated in *Chellaram v Chellaram (No 2)* [2002] 3 All ER 17."

I, too, am similarly bound.

78. I should specifically deal with the decision of the Court of Appeal in *Rolph v Zolan* [1993] 1 WLR 1305, which was cited to me by the respondent. This was an appeal from the county court. The plaintiff carried out building work for the defendant at his north London home, and billed it in 1985. In 1991 (just within the limitation period) the plaintiff sued the defendant on the bill in the county court, and the county court served the proceedings by sending them by post to the defendant's last known address (*ie*, in north London). The premises concerned still belonged to the defendant, but he had emigrated to Spain in 1986, and no longer lived there.

79. The relevant provisions of the County Court Rules 1981 (as amended) at that time were in Order 7 and Order 8. Order 7 was headed "Service of documents" and Order 8 was headed "Service out of England and Wales". A glance at the provisions of Order 7 shows that its rules were concerned with service within England and Wales, whereas those in Order 8 were concerned with service outside England and Wales. (In reading the rules, it is necessary to bear in mind that, at the time that they were made, each county court was a separate court, and the expression "foreign court" used in Order 7 meant a county court *other* than the one in which the proceedings were issued.)

80. Order 7 relevantly provided:

> "1(1) Where by virtue of these rules any document is required to be served on any person and no other mode of service is prescribed by any Act or rule, the document may be served—
>
> > *(a)* if the person to be served is acting in person, by delivering it to him personally or by delivering it at, or sending it by first class post to, his address for service or, if he has no address for service—
> >
> > > (i) by delivering the document at his residence or by sending it by first class post to his last known residence …
>
> […]
>
> 10(1) Subject to the provisions of any Act or rule (including the following paragraphs of this rule), service of a summons shall be effected—
>
> > *(a)* by the plaintiff delivering the summons to the defendant personally; or

> *(b)* by an officer of the court sending it by first class post to the defendant at the address stated in the request for the summons.
>
> (2) Unless the plaintiff or his solicitor otherwise requests, service shall be effected in accordance with paragraph (1)(b)."

81. Because a friend of the defendant collected the mail addressed to him at the premises and forwarded it to him, the defendant received the proceedings within the four months of the validity of the writ, during which service in England and Wales could be effected. But the defendant did nothing in response, and the plaintiff obtained a default judgment. The defendant subsequently applied to set aside the judgment. The district judge set it aside, on the basis that the defendant had not been properly served. On appeal to the circuit judge, that decision was affirmed. The plaintiff appealed to the Court of Appeal, constituted by Dillon and Butler-Sloss LJJ, and his appeal this time was successful.

82. Dillon LJ (with whom Butler-Sloss LJ agreed) referred to the decision of the House of Lords in *Barclays Bank of Swaziland Ltd v Hahn*, but said that the relevant rule of the RSC governing postal service specifically referred to postal service "on a defendant within the jurisdiction", whereas the relevant county court rule did not. Dillon LJ traced the separate history of the wording of the relevant rules of the RSC and the CCR. Postal service on individuals had been introduced into the RSC only in 1979, and into the CCR (in the form that Ord 7 rule 1 was in at the time) only in 1984.

83. He then said (at 1313 D-G):

> "Against that history of the rules, I find it impossible by any process of mere construction to limit the scope of the present Ord 7, rr 1 and 10 to service only on a defendant 'within the jurisdiction,' by analogy to RSC, Ord 10, r. 1.
>
> It is suggested that nonetheless the court can and should limit the scope of Ord 7, rr 1 and 10 by reference to RSC, Ord 10, r 1, because section 76 of the County Courts Act 1984, which replaced an earlier statutory provision to the same effect, provides:
>
> > 'In any case not expressly provided for by or in pursuance of this Act, the general principles of practice in the High Court may be adopted and applied to proceedings in a county court.'
>
> But that section is primarily directed to extending the powers of the county court where the County Court Rules make no express provision, not to curtailing express provisions in the County Court Rules. For my part, I regard the limitation in RSC, Ord 10, r 1, as interpreted in *Barclays Bank of Swaziland Ltd. v. Hahn* [1989] 1 WLR 506 to postal service on defendants who are within the jurisdiction at the time of service as a very specific limitation, and not a general principle of practice in the High Court within the meaning of section 76 of the Act of 1984. Postal service itself is a matter of specific rules, and not a matter of general principles of practice.
>
> Accordingly, I would hold that the summons, was properly served under the County Court Rules 1981. It follows that the default judgment was regular."

84. In passing, I mention that the phrase "defendant within the jurisdiction" in RSC Ord 10 r 1(2), on which Dillon LJ relied in the extract above, actually appears as part of a longer phrase, namely "writ for service on a defendant within the jurisdiction". At that time, when a writ was issued by the High Court, if the defendant's address was stated in the writ to be one outside the jurisdiction, but no leave had been obtained to serve out, the writ was automatically endorsed by the court "Not for service out of the jurisdiction". It may therefore be that the phrase "writ for service on a defendant within the jurisdiction" referred to the *kind* of writ it was, rather than to where the defendant was to be served. But I heard no argument on this, and it is obviously unnecessary to reach any concluded view on that point.

85. In *Fairmays (formerly Palmer Cowen) (A Firm) v Palmer* [2006] EWHC 96 (Ch), Evans-Lombe J referred to *Rolph v Zolan*, and said:

> "11. I respectfully agree with Mr Justice [Lawrence] Collins' conclusion in the *Chellaram* case that the arrival of CPR 6 does not require the earlier authorities and, in particular, the *Barclays Bank of Swaziland* case to be swept away. It should be noted that notwithstanding that Lord Justice Dillon's judgment in *Rolph's* case appears inconsistent with the *'fundamental rule'* suggested by Mr Justice Collins in *Chellaram,* the principle that service of proceedings, issued for service within the jurisdiction, can only be effectively served when the defendant is physically present within the jurisdiction, is one which the Court of Appeal applied in *Cadogan Properties Ltd v Mount Eden Land Ltd* after the coming into force of the CPR as cited by Mr Justice Collins. I also respectfully accept Mr Justice Collins' conclusion at paragraph 46 of his judgment in *Chellaram* that *Rolph's* case can be distinguished as passing under the particular provisions of the County Court Rules which governed it, which provisions are to be contrasted with the provisions of the RSC then in force, which contrast was highlighted by Lord Justice Dillon, and with the provisions of CPR 6.5(1)."

86. I agree, equally respectfully, with the comments expressed by Evans-Lombe J about the compatibility of the decision in *Rolph v Zolan* with the "fundamental principle" expressed by Lawrence Collins J in *Chellaram*. I would also respectfully apply the same reasoning to distinguish the decision in *Rolph v Zolan*, under the CCR, from that in the present case, which is decided on the basis of the CPR, as modified by the relevant Insolvency Rules. In my judgment, the decision in *Rolph v Zolan* was a decision on the specific words of the particular rule in the CCR, and does not express any general principle applicable to this case.

87. A feature of the present case is that the respondent relied, and the judge founded his decision, on service having been effected on the appellant following an order made against her permitting service by an alternative means. In *Cadogan Properties Limited v Mount Eden Land Limited* [2000] ILPr 722, CA, the plaintiff had purported to serve an originating summons (marked "Not for service out of the jurisdiction") on a Guernsey company without obtaining leave to serve out. When the company (which had become aware of the proceedings) pointed this out, the judge simply made an order for substituted service. The company successfully appealed against this order.

88. Peter Gibson LJ (with whom Waller LJ agreed) said:

> "5. … the judge overlooked the fact that Mount Eden was a foreign company which could not be served without leave being obtained on evidence and without originating process in appropriate form being issued. The importance of due compliance with Ord. 6, r.7 had been stressed by this court in *Leal v Dunlop Bio-Processes International Ltd* [1984]1 WLR 874 and *Camera Care Ltd v Victor Hasselblad AB* [1986] ECC 373. Substituted service in England of the originating summons, marked not for service out of the jurisdiction, when the person to be served was a Guernsey company, and no leave to serve out of the jurisdiction had been sought or obtained, was simply not possible."

89. That was a case under the RSC. The same point has been made more recently, in a case under the CPR. In *Marashen Ltd v Kenvett Ltd* [2018] 1 WLR 288, David Foxton QC (as he then was, sitting as a deputy judge of the High Court) said:

> "17. … an order for service by an alternative method within the jurisdiction against a defendant who is resident outside of the jurisdiction can only be made if the court has satisfied itself that the case is a proper one for service out of the jurisdiction, *and has made an order to that effect*" (emphasis supplied).

90. The respondent relies on two other cases. In *Lonestar Communications Corp v Kaye* [2019] EWHC 3008 (Comm), Teare J made a number of orders at an interlocutory stage of proceedings. These included an order for service by alternative means on one of the defendants, against whom a failed attempt to serve under the Hague Service Convention had been made, and who therefore may well have been out of the jurisdiction (the judge made no finding as to this). But the judge did not refer to the interplay between service by an alternative means and service out of the jurisdiction, and there was no discussion about, much less application to the court for, permission to serve out. The authorities cited above were not mentioned.

91. In *Kea Investments Ltd v Watson* [2023] EWHC 1768 (Ch), Miles J made an order for service by an alternative means in a case where the defendant was not responding to the claimant, but was not obviously outside the jurisdiction, although there were foreign elements in the case. In this case also there was no reference to the possible need for permission to serve out, and no reference to the authorities which I have referred to above. In these circumstances, I cannot treat either *Lonestar* or *Kea Investments* as justifying a departure from the law as stated in *Cadogan Properties* and *Marashen*.

92. On the other hand, in *BBG v Persons Unknown* [2023] EWHC 2355 (KB), the claimant sought and obtained a without notice interim injunction against persons unknown who, on the evidence, were seeking to blackmail him by threatening to reveal confidential personal information about him. There was some evidence that the defendants were outside the jurisdiction, but the judge made no finding to that effect. Application was successfully made to her both for an order for service by an alternative means and for permission to serve documents out of the jurisdiction. That decision is accordingly consistent with *Cadogan Properties* and *Marashen*. The decisions of Foxton J (as he became) in *M v N* [EWHC 360 and of HHJ Pelling QC in *Interbunker Holdings SA v W SrL* [2021] EWHC 2649 are to the same effect. In each case the court was prepared to make an alternative service order under 6.15 in relation

to service abroad, but in each case the court had assumed jurisdiction over the defendant by giving permission to serve out.

93. In my judgment, the authorities make clear that, in a case where the defendant is *in fact* outside the jurisdiction, the "fundamental rule" adverted to by Lawrence Collins J in *Chellaram* and approved in qualified form by the Court of Appeal in *SSL International* applies. That person is simply not subject to the jurisdiction of the English court, *unless* brought within the relevant statutory extension to persons abroad. In the present case of insolvency proceedings in 2014-15, the rules governing that extension were contained in the 2014 Practice Direction. But, no permission having been obtained for service on the appellant out of the jurisdiction, that statutory extension did not apply either. So, in my judgment, the court had no jurisdiction over her.

94. It is true that rule 6.15 was applied to insolvency proceedings by virtue of rule 7.51A of the 1986 Rules. It is also true that rule 12A.20 provided that CPR Part 6 was to apply to service outside the jurisdiction. But rule 6.15 is a rule which, as *Cadogan Properties*, *Marashen*, *M v N, Interbunker Holdings* and *BBG* make clear, can be applied only in relation to persons over whom the court *has* jurisdiction. As I have said, there are two ways to achieve that. *Either* the person is physically within the territorial jurisdiction at the time of the order for alternative service, *or* permission has been given for service of the proceedings on that person out of the jurisdiction under the statutory extension. Rule 6.15 cannot be used as a "bootstraps" argument to create "long-arm" jurisdiction, and thus "outflank" the special provisions for permission to be obtained for service out.

95. The respondent pointed to the problem that his predecessor faced in this case. The predecessor trustee did not know, when he applied for and obtained the alternative means service order, that the appellant was no longer within the jurisdiction. In those circumstances, the respondent said, he should be allowed to proceed on the basis that she was still in the jurisdiction at the time. I do not agree. Jurisdiction is fundamental, and the English rules are clear. The court has jurisdiction over a person *within* its territorial jurisdiction. It also has jurisdiction over persons *outside* that territory, but *only* when the statutory conditions are satisfied. Here, no permission having been obtained to serve out, they were not. The English court does not have jurisdiction over persons outside the territory just because the claimant honestly but mistakenly, and even reasonably, believes (if that be the case) that the intended defendant is actually within it. (In fact the judge below did not find any of that. His finding was simply that the trustee did not know where she was at the time.)

96. I further respectfully agree with Lavender J in *Osbourne v Persons Unknown* [2023] EWHC 39 (KB), when he said:

> "24. … In circumstances where the Claimant does not know either the identity or the location of the person or persons who possess or control the Two [Non-Fungible Tokens] … the jurisdiction of the court can only be established by service of the claim form out of the jurisdiction."

In my judgment, the correct approach was that taken by the claimants in *M v N, Interbunker Holdings* and *BBG*, who sought and obtained permission to serve out. Here the respondent did not know where the appellant was living at the material time.

By applying for an alternative service order, but not permission to serve out, he took the risk that she was no longer within the jurisdiction. Unhappily for him, that risk matured.

97. The consequence is this. At the time that the court made the alternative service order in relation to the appellant in February 2015, it had no jurisdiction over her. Accordingly, compliance with that order could not amount to service of the proceedings upon her under English law. Hence the court on 18 March 2015 had no jurisdiction to make the substantive order which it purported to make. That in turn meant that there was indeed a proper basis for the appellant's application under section 375 to set aside the substantive order. But the error of the judge below, in not recognising that the court in March 2015 had no jurisdiction over the appellant, meant that the judge addressed the application on a false basis, and (unsurprisingly) reached the wrong conclusion. The appeal must therefore be allowed on this ground alone.

98. Strictly speaking, that conclusion means that I do not need to consider the other grounds of appeal. But, in case this case goes further, and I am held to have gone wrong in relation to the first ground of appeal, I will briefly consider the others, and express my conclusions on those grounds as well.

Ground 2

99. Ground 2 (set out above, [35]) is that the judge wrongly took into account, in exercising his discretion under section 375, what he perceived to be a positive obligation on the putative defendant domiciled outside of the jurisdiction to take active steps to be served with proceedings in the UK. The appellant says that there is no basis for such an obligation, and indeed authority for saying that, until a foreign party is properly served, there is no obligation on that party to respond at all. She refers to *Al-Zahra (Pvt) Hospital v DDM* [2019] EWCA Civ 1103. In that case, the claimant sued a hospital and medical experts all out of the jurisdiction in respect of allegedly negligent treatment. She was given permission to serve her claim form out of the jurisdiction, and the time for service was extended twice. On a question being raised as to whether the extensions of time were properly granted, the judge (on appeal from the master) held that they both were. The defendants appealed to the Court of Appeal, which allowed the appeal, setting aside service of the claim form on the defendants.

100. Haddon-Cave LJ said:

> "79. First, Foskett J was wrong to place weight, let alone considerable weight, on the fact that the Defendants had not responded to the Claimant's initial communications and to suggest that 'all' the Claimant's preparations had been hampered by the Defendants' failure to respond to any of the correspondence from the Claimant's solicitors … It is far from clear that it did. In any event, the co-operation of foreign defendants is not necessarily always to be expected as a matter of course. Indeed, the lack of response from a foreign defendant may make it all the more important for a claimant to consider obtaining early foreign law advice."

101. Sir Timothy Lloyd said:

> "93. In my judgment Foskett J was clearly wrong to rely… on the Claimant's preparations having been 'hampered by the failure of the Defendants to respond to any of the correspondence from the Claimant's solicitors'. In the case of a Defendant or prospective Defendant who or which is within the jurisdiction of the court, that may be a legitimate attitude. … But if the prospective or actual Defendant is not within the jurisdiction, those acting for a Claimant cannot assume that their approaches to a foreign person or entity will receive any particular response, let alone a constructive response. From the point of view of the foreign party, there is, or at least there may be, no reason to respond. Claimants' representatives need to bear in mind that, unless and until proceedings are validly served on the foreign Defendant, that party is under no obligation to respond at all. Correspondingly, they need to give proper attention to the requirements of the rules as regards service outside the jurisdiction, and to the practical difficulties that this may sometimes involve, with the concomitant need, in many cases, to obtain an extension of time for such service."

102. David Richards LJ agreed with both judgments.

103. In the light of this authority, I accept the proposition of law put forward by the appellant. There is no duty on a foreign putative defendant who has not been validly served under the "long-arm jurisdiction" to respond or otherwise co-operate. Indeed, in accordance with the analysis which I have already carried out, it is difficult to see how there could sensibly be such a duty at a time when *ex hypothesi* the court has no jurisdiction over such a defendant. But the respondent says that the judge did not decide that there was such an obligation, or that the appellant was in breach of it.

104. On reflection, and after considering the judgment in more detail, and also the parties' submissions, I agree with the respondent. The judge simply said, put at its highest, that the appellant knew that the trustee was seeking to pursue her and that she deliberately sought to evade service of the application. That is a fact which he was entitled to find on the evidence before him. But it does not entail any obligation on the appellant to respond before being served, and I do not think that the judge so held, or that he took any such purported obligation into account in reaching his decision. His point was that the appellant knew that there were proceedings, and that she sought to evade service of them upon her. That is one of the circumstances of the case. I cannot say that the judge was not entitled to take it into account as part of the exercise of his discretion under section 375. On the facts, therefore, there is nothing in this point.

Ground 4

105. Ground 4 (set out above, [35]) is that the judge concluded that the defence was 'weak' and would not meet the test of having a real prospect of success on the basis of the respondent's mischaracterisation of the defence is relying on 'vague oral statements between husband-and-wife with no contemporaneous documents to support it'. The appellant says (correctly) that the judge did not refer to either of the two sections of the Insolvency Act 1986 that the claim against her was brought (ss 339 and 340). Moreover, he did not in his judgment consider the defence put forward, that the bankrupt in paying mortgage instalments directly to the bank was not entering into a transaction at an undervalue, because by so paying he was repaying sums that he

(jointly with his wife) had borrowed from the bank for his own business. It so happened that the loan was secured on the appellant's property, but that did not alter the fundamental nature of the transaction. Nor did it mean that the appellant was really borrowing the money and lending it on to the bankrupt.

106. The respondent submits that the merits of the defence to the claim are not a matter explicitly identified as a factor for the court to take into account in exercising its discretion under section 375. In any event the judge himself said that they were "dwarfed by the other issues". The "weak" part of the defence appears to refer to the argument based on an alleged oral agreement, unsupported by any contemporaneous document, between the appellant and the bankrupt whereby the latter would pay the former rent.

107. It is not necessary for me to reach a concluded view on these various points. But I am first of all clear that the judge was entitled to take the merits into account as part of the exercise of his discretion. In *Papanicola*, for example, Laddie J says that "There is no limit to the factors which may be taken into account". On the other hand, I do not think that it was possible simply to dismiss the defence in the way that the judge did. There should have been a greater focus on the defence actually put forward, even if it was put forward late. To my mind, the argument about whether in the circumstances there had in fact been any transaction at an undervalue at all was serious, and deserved to be taken seriously, rather than dismissed as it was. In my judgment, for what it may be worth, there was a real prospect of success in the defence. If I had not decided to allow the appeal on Ground 1, I would have done so on this ground.

Ground 5

108. Ground 5 (set out above, [35]) is that the judge failed to take into account the fact that neither the former trustee nor the respondent had served (or attempted to serve) the final order on the appellant. The appellant says that this denied her the opportunity to apply immediately to set aside the order. The respondent says that this is not something that the court can take into account under section 375 in any event. In addition, he says that the trustee did not know where to find the appellant. Further, he says that there was no prejudice to the appellant other than additional interest due on the sums ordered to be paid. As he puts it, this could be dealt with by reducing the amount of interest payable.

109. I do not accept that this was not something that the court could take into account under section 375. It may be that it was not *of itself* "something new to justify the overturning of the original order". But, as long as there was something of that kind, this circumstance was something which in addition could and should properly be taken into account by the court in the exercise of its discretion. However, the judge does not appear to have done this. The submission that the trustee did not know where to find the appellant proves too much. The trustee never thought that the appellant was outside the jurisdiction. He could have applied to the court for directions as to the service of the order, but did not do so. Overall, however, in my judgment this was a minor failure by the judge. I would not have allowed the appeal on this basis alone.

Ground 6

110. Ground 6 (set out above, [35]) is that the judge improperly took into account the truth of an email sent by a process server that the appellant had confirmed her identity to him during a telephone call despite the process server's not being available for cross-examination (as ordered by the court) despite evidence that he had previously provided false information about the appellant's confirming her identity to him. The appellant says that it was procedurally irregular for the judge to accept the process server's evidence when it was challenged (and therefore ordered to be subject to cross-examination) without his attendance and such cross-examination's taking place. The respondent relies on CPR rule 32.19 (his skeleton says "31.19", but this is clearly a slip) to support a submission that the email in question cannot be challenged. He also says that the judge had "a wealth of material", beyond than that of the process server, on which to base his findings.

111. CPR rule 32.19(1) provides that:

> "A party shall be deemed to admit the authenticity of a document disclosed to him under Part 31 (disclosure and inspection of documents) unless he serves notice that he wishes the document to be proved at trial."

Rule 32.19(2) deals with the time within which such a notice must be served.

112. CPR Part 32 Practice Direction relevantly provides:

> "27.2 All documents contained in bundles which have been agreed for use at a hearing shall be admissible at that hearing as evidence of their contents, unless –
>
> (1) the court orders otherwise; or
>
> (2) a party gives written notice of objection to the admissibility of particular documents.
>
> […]
>
> 27.12 The contents of the trial bundle should be agreed where possible. The parties should also agree where possible—
>
> (a) that the documents contained in the bundle are authentic even if not disclosed under Part 31; and
>
> (b) that documents in the bundle may be treated as evidence of the facts stated in them even if a notice under the Civil Evidence Act 1995 has not been served.
>
> Where it is not possible to agree the contents of the bundle, a summary of the points on which the parties are unable to agree should be included."

113. CPR rule 32.19 deals with the authenticity of a document disclosed by a party. The opposing party is deemed to admit the authenticity of the document, unless it is challenged by the notice procedure. But the opposing party does not thereby admit that the document is *admissible in evidence* as truth of its contents, much less that those contents are indeed true. On the other hand, paragraph 27.2 of the Practice

Direction to CPR Part 32 provides that documents contained in an "agreed hearing bundle" *are* admissible in evidence as to the truth of their contents, subject to (i) contrary court order, or (ii) challenge by notice. Again, however, even if they are thereby rendered admissible, they are not conclusive.

114. The appellant did not challenge the *authenticity* of the email. So, rule 32.19 is irrelevant here. However, at the trial she did challenge the *truth* of the information contained in it. Yet she did not do so by virtue of the notice procedure provided for in paragraph 27.2 of the practice direction, and there was no court order negativing the effect of that paragraph. Assuming that the email was before the court in an agreed hearing bundle, that means that the email *was* admissible in evidence, and hence the judge was entitled to take it into account. Since the maker was not present, the judge could take it into account as hearsay. He properly warned himself about its importance and weight in the absence of cross examination. He made no error of law, and directed himself correctly on the matters to take into account. He was entitled to reach the view that he did. In these circumstances this ground of appeal is not made out.

Conclusion on the appeal

115. I have held that Grounds 1, 4, and 5 are made good, although 5 is less important, and insufficient on its own to allow the appeal. If I had not found Ground 1 to succeed and to justify allowing the appeal, I would have done do on the basis of Grounds 4 and 5 taken together. Accordingly, for the reasons given, I will allow this appeal, and set aside the order of DJ Taylor of 16 November 2023. The powers of the court in this respect are set out in CPR 52.20, which relevantly provides:

> "(1) In relation to an appeal the appeal court has all the powers of the lower court …
>
> (2) The appeal court has power to—
>
> > (a) affirm, set aside or vary any order or judgment made or given by the lower court;
> >
> > (b) refer any claim or issue for determination by the lower court;
> >
> > (c) order a new trial or hearing;
> >
> > (d) make orders for the payment of interest;
> >
> > (e) make a costs order."

116. This rule makes clear that I have the power to make any order which the judge below could have made on the application made by the appellant under section 375 of the 1986 Act. The decision under that section is however a matter of discretion, and not of right: see *Papanicola v Humphreys*, referred to above. Since I have set aside the decision of the judge below, I may exercise the discretion afresh. I would not do so if I thought that the error made by the judge prevented the finding of appropriate facts upon which to exercise it. That would be a case for remitting the matter to the lower court for a fresh decision to be made. But that is not this case.

117. The court had no jurisdiction over the appellant at the time of the orders of DJ Davis of 4 February 2015 and 18 March 2015. If this had been established before him on 18 March 2015, he would not have made the order that he did on that day. The question for me is whether the order of 18 March 2015 ought to be set aside in the light of changed circumstances, that is, the recognition that in fact the court had no jurisdiction over the appellant at that time. To this, in my view, there is only one answer. It ought to be set aside. I accept that the judge below found (at its highest) that the appellant knew that the trustee was seeking to pursue her and that she deliberately sought to evade service of the application. But I do not think that that can affect the position. Unless and until the court made an order with which she was bound to comply, she had no duty to co-operate. It never did so.

Cross-appeal

118. Although, in the light of my decision on the appeal, it is now academic, I turn to the respondent's cross-appeal. This concerns the judge's decision that the maximum claim made in the proceedings was the sum of £119,396.67 in relation to the five mortgage accounts, *or* the lump sum payments of £32,000. Yet the order made by DJ Davis was for *both* £119,396.67 *and* £32,000, making £151,396.67 (plus appropriate accrued interest). The respondent says that the first time the order was challenged on this point was in the skeleton argument served the day before the hearing from the district judge. He further says that the judge applied the wrong test for allowing the application in relation to this part of the case. Thirdly, he says that, properly construed, the claim was not for *either/or*, but for *both*. The appellant says that the court has the power to review the decision by DJ Taylor under section 375, not only because the underlying order was wrong, but also because the appellant was not present or represented at the hearing.

119. There is a procedural point with which I must first deal. For some reason, I did not deal with the question of permission to appeal on this cross-appeal. I am afraid that I must have overlooked it. In these circumstances, the sensible thing to do is to deal with it as a "rolled-up" application, where I consider both permission and substance together.

120. I accept that the district judge did not ask himself whether there were exceptional circumstances for the purposes of section 375. Nevertheless, the fact remains that the appellant had not been present or represented at the hearing before DJ Davis in March 2015. Following the decision in *Holtham v Kelmanson* [2006] EWHC 2588 (Ch), that was enough to engage the review jurisdiction conferred by that section. DJ Taylor also held that DJ Davis had reached what he regarded as the wrong conclusion, because in his view the two parts of the trustee's claim were alternative, rather than cumulative, and, in the absence of representation from the appellant, DJ Davis had unwittingly come to the opposite view. At paragraphs 10-18 and 25-31 above, I considered the claim of the trustee in some detail, including the paragraphs from the first witness statement of the former trustee to which the respondent now refers, and I concluded that the claims were indeed alternative, as DJ Taylor said. In these circumstances, I consider that DJ Taylor was right in his decision on section 375 in relation to the cross-appeal, though not for all the right reasons. I therefore give the respondent permission to appeal, but dismiss the cross-appeal.

Overall conclusion

121. For the reasons given above, the appeal is allowed, and the order of 18 March 2015 is set aside. The cross-appeal is dismissed. I am grateful to the counsel and solicitors concerned for all their considerable assistance. I am only sorry that it took longer than I had anticipated to produce this judgment. I should be grateful to receive a draft minute of order for consideration.