Neutral Citation Number: [2024] EWHC 1536 (Ch)

CH-2023-BHM-000040

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

Birmingham Civil and Family Justice Centre
33 Bull Street, Birmingham, B4 6DS

Date: 20/06/2024

Before :

MR JUSTICE ZACAROLI

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Between :

GAVIN PAUL CARTER	**Applicant/ Appellant**
- and –	
(1) TERRI ANN DAVIES **(2) KAREN FOX (OFFICIAL RECEIVER)** **(3) BENJAMIN NEIL JONES** **(4) ARVINDAR JIT SINGH**	**Respondents**

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Arfan Khan and Wojciech Nicholas Andrew Zalewski (instructed by **Ardens Solicitors**) for the **Appellant**
Tony Watkin (instructed by **Lodders Solicitors**) for the **First Respondent**
The **Second Respondent** provided a report to the Court but was not represented on the appeal.
The **Third and Fourth Respondents** were not represented on the appeal.

Hearing date: 23 May 2024

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JUDGMENT

Mr Justice Zacaroli:

1. This is an appeal against the decision of District Judge Shorthose dated 24 November 2023 refusing to annul a bankruptcy order made against the appellant, Gavin Carter, on 28 February 2023. The application to annul the bankruptcy order was made under s.282(1)(a) of the Insolvency Act 1986 ("IA 1986"), on the basis that the order should not have been made, in the following circumstances.

2. The bankruptcy petition was based on an undisputed judgment debt of £42,000. At the first hearing of the petition, in July 2022, the petition was adjourned in order to give Mr Carter time to pay. He was then anticipating an inheritance from the sale of his mother's house. At the adjourned hearing, in October 2022, the petition was further adjourned due to Mr Carter's ill-health.

3. At the further adjourned hearing of the petition, on 28 February 2023, Mr Carter was not present, and the bankruptcy order was made in his absence.

4. In the meantime, on about 6 January 2023, Mr Carter had obtained a moratorium under the Debt Respite Scheme (Breathing Space Moratorium and Mental Health Crisis Moratorium) (England and Wales) Regulations 2020 (the "Regulations").

5. In those circumstances the following ought to have happened: the petitioning creditor should have notified the court of the moratorium, and the court should have stayed the petition (unless, possibly, it gave permission for the petition to proceed).

6. That did not happen, because due to an oversight within the petitioner's solicitor's firm, the solicitor with conduct of the proceedings did not know of the moratorium.

<u>The Regulations</u>

7. By Regulation 6, a "moratorium debt" is any qualifying debt: (1) that was incurred by a debtor in relation to whom a moratorium is in place; (2) that was owed by the debtor at the point that the application for the moratorium was made; and (3) about which information was provided to the Secretary of State by a debt advice provider under the Regulations.

8. It is common ground that the petition debt was a moratorium debt under Regulation 6.

9. By Regulation 7(2), the effect of a moratorium is that the creditor may not take any of the steps identified in para (6) unless:

> "(a) these Regulations specify otherwise, or
>
> (b) the county court or another court or tribunal where legal proceedings concerning the debt have been or could be issued or started has given permission for the creditor to take the step."

10. The steps prohibited by para (6) are any steps to:

> "(a) require a debtor to pay interest that accrues on a moratorium debt during a moratorium period,
>
> (b) require a debtor to pay fees, penalties or charges in relation to a moratorium debt that accrue during a moratorium period,
>
> (c) take any enforcement action in respect of a moratorium debt (whether the right to take such action arises under a contract, by virtue of an enactment or otherwise), or
>
> (d) instruct an agent to take any of the actions mentioned in sub-paragraphs (a) to (c)."

11. "Enforcement action" is to be construed – by Regulation 2(1) – in accordance with para (7) of Regulation 7. This provides that a creditor takes enforcement action if they take any of the following steps in relation to a moratorium debt:

> "(a) take a step to collect a moratorium debt from a debtor,
>
> (b) take a step to enforce a judgment or order issued by a court or tribunal before or during a moratorium period regarding a moratorium debt,
>
> (c) enforce security held in respect of a moratorium debt,
>
> (d) obtain a warrant,
>
> (e) subject to regulation 12(4)(d), sell or take control of a debtor's property or goods,
>
> (f) start any action or legal proceedings against a debtor relating to or as a consequence of non-payment of a moratorium debt,
>
> (g) make an application for a default judgment in respect of a claim for money against the debtor,
>
> (h) take steps to install a pre-payment meter under paragraph 7(3)(a) of Schedule 2B to the Gas Act 1986 or paragraph 2(1)(a) of Schedule 6 to the Electricity Act 1989 to take payments in respect of a moratorium debt, or use a pre-payment meter already installed to take such payments, unless a debtor had provided their consent for the installation of the pre-payment meter before the moratorium started,
>
> (i) take steps to disconnect a debtor's premises from a supply of gas under paragraph 7(3)(b) of Schedule 2B to the Gas Act 1986 or electricity under paragraph 2(1)(b) of Schedule 6 to the Electricity Act 1989 unless the debtor had taken the supply of gas or electricity illegally,

(j) serve a notice to take possession of a dwelling-house let to a debtor on grounds 8, 10 or 11 in Schedule 2 to the Housing Act 1988 or take possession of a dwelling-house let to a debtor having served such a notice,

(k) serve a notice to take possession of a dwelling let to a debtor or take possession of a dwelling let to a debtor having served such a notice:

(i) on the ground of breach of contract specified in section 157 of the Renting Homes (Wales) Act 2016 where that breach relates to rent arrears, or

(ii) on the grounds specified in section 181(2) of the Renting Homes (Wales) Act 2016, or

(iii) on the grounds specified in section 187(2) of the Renting Homes (Wales) Act 2016

(1) contact a debtor for the purpose of enforcement of a moratorium debt,

(m) make an application in respect of a debtor for commitment to prison under regulation 16 of the Non-Domestic Rating (Collection and Enforcement) (Local Lists) Regulations 1989 or regulation 47 of the Council Tax (Administration and Enforcement) Regulations 1992, or

(n) take any of the steps in this paragraph in relation to a joint debtor."

12. By para 7(12):

> "Any action taken contrary to this regulation shall be null and void."

13. Regulation 10 deals with existing legal proceedings at the start of a moratorium, and provides as follows:

> "(1) If at the start of a moratorium a creditor to whom a moratorium debt is owed has a bankruptcy petition or any other action or other proceeding in any court or tribunal pending in relation to a moratorium debt, then the creditor must notify the court or tribunal of the moratorium.
>
> (2) After a court or tribunal has received a notification referred to in paragraph (1) or is otherwise made aware of a moratorium-
>
> (a) any bankruptcy petition in relation to a moratorium debt must be stayed by the court until the moratorium ends or is cancelled, and

(b) the court or tribunal must deal with any other action or proceeding in relation to a moratorium debt in accordance with this regulation.

(3) Subject to paragraph (5), if at the start of a moratorium any action or proceeding that relates to a moratorium debt is pending in a court or tribunal then such action or proceeding may continue until the court or tribunal makes an order or judgment in conclusion of such action or proceeding.

(4) Where a debtor makes an admission before or during a moratorium in connection with an action or other proceeding relating to a moratorium debt, a creditor who is a party to the action or proceeding may enter judgment in that action or proceeding during the moratorium if they would otherwise be entitled to do so.

(5) Subject to paragraph (7), during a moratorium a court or tribunal must take all necessary steps to ensure that any action or proceeding to enforce a court order or judgment concerning a moratorium debt does not progress during the moratorium period.

(6) For the purpose of paragraph (5), the progression of an action or proceeding includes (but is not limited to)-

(i) holding a hearing during a moratorium period,

(ii) making or serving an order or warrant, writ of control, writ of execution or judgment summons, and

(iii) instructing an enforcement agent to serve an order, warrant, writ of control, writ of execution or judgment summons.

(7) This regulation does not prevent a court or tribunal from sending notices or correspondence to a debtor in relation to an action or proceeding.

(8) This regulation is subject to regulation 7(2)(b).”

14. Regulation 11(1) precludes contact by the creditor or its agent with the debtor, including by making demand as a precursor to starting any legal proceedings in connection with the moratorium debt. This is subject, however, to exceptions provided for in para (2), including, by (2)(b)(iv), contacting a debtor “in relation to any action or legal proceedings in a court or tribunal permitted under regulation 10”.

15. By Regulation 16, any person who applies for a moratorium must take reasonable care to provide accurate information, and must not withhold relevant information.

16. Regulations 17 to 19 make provision for creditors to seek a review of a moratorium and to apply to court to have it set aside.

17. Part 2 of the Regulations deals with a "breathing space moratorium", and Part 3 deals with a "mental health crisis moratorium." The former alone is relevant in this case. Pursuant to Regulation 24(1) any application for a breathing space moratorium must be considered by a debt advice provider, who must – among other things – consider whether the condition that the debtor is unable, or is likely to become unable, to repay some or all of their debt as it falls due is satisfied.

The judgment

18. The judge's reasons are contained in his written judgment dated 24 November 2023.

19. It was common ground before the judge that the effect of the moratorium was that the petition should have been stayed, and the bankruptcy order ought not to have been made.

20. The judge held, however, that he retained a discretion under s.282(1)(a) (because the opening words of s.282(1) are that the court "may" annul a bankruptcy order). He cited the first instance decision in *Khan v Singh-Sall* [2022] EWHC 1913 (Ch) for the proposition that the court must exercise its discretion by considering all the factors and giving them appropriate weight.

21. In deciding to exercise his discretion against annulling the bankruptcy order, the judge took account in particular of the following factors.

22. There was evidence from Mr Carter himself that by November 2022 he had sufficient money to buy a property for £190,000, and still had over £77,000 in a bank account as at 9 December 2022. Even with other debts of £9000, Mr Carter therefore had sufficient funds to pay the debt in November and December 2022.

23. Instead of paying the debt, and notwithstanding that the petition had earlier been adjourned to provide him with time in order to pay the debt, he travelled to Romania with his girlfriend, for several months, apparently for health reasons, and applied for the moratorium.

24. The judge inferred, in the absence of any other explanation, that Mr Carter must have failed to give full disclosure to the debt advisor, when applying for the moratorium, given that he had sufficient funds to pay his debts.

25. If the bankruptcy order was annulled, the petition would remain in place and – in the absence of payment – would undoubtedly result in a bankruptcy order at the next hearing.

26. In light of these factors, the judge concluded that – although the bankruptcy order should not have been made – the fact that the moratorium was obtained

with the benefit of flagrant non-disclosure ultimately trumped the failure of the petitioner to notify the court of the existence of the moratorium.

Grounds of Appeal

27. Mr Carter appeals that decision, with permission granted by me, on the ground that, by reason of moratorium, the bankruptcy order was null and void. Accordingly, the judge erred in failing to set it aside.

28. These grounds were later developed in "perfected" grounds of appeal. It is there contended that the judge was wrong in law not to have annulled the bankruptcy order because it was contrary to the statutory scheme. He ought to have concluded that the county court did not have jurisdiction to entertain the application to make a bankruptcy order, and that the order was therefore null and void.

29. The respondent raised two preliminary points: that the appellant's notice was filed out of time (and time should not be extended); and that the appellant needed the court's permission to advance a new point of law on appeal (and that such permission should be refused).

First preliminary point: extension of time for filing appeal notice

30. Mr Carter applied in the appellant's notice for an extension of time for filing the notice. By an order dated 9 January 2024, HHJ Rawlings determined that no extension of time was necessary, because the appeal notice was in fact served in time.

31. The respondent contends that an extension of time was in fact required, for the different reason that the appeal notice was defective in that it did not include grounds of appeal. The "perfected" grounds of appeal were not provided until 19 February 2024.

32. The appeal notice does in fact contain, in essence, the grounds of appeal that are now relied on, albeit that these are mistakenly included in section 11 – "evidence in support" of applications made in section 10. That error does not, in my view, invalidate the appeal notice. Accordingly, I reject the respondent's contention that the appeal notice was out of time.

Second preliminary point: permission to advance a new point on appeal

33. Mr Watkin submitted that Mr Carter conceded before the judge that the judge had a discretion to exercise under s.282(1)(a) and that he seeks to resile from that concession on appeal.

34. It is true that Mr Zalewski, who appeared alone for Mr Carter below, accepted at para 6 of his skeleton argument that it is self-evident that the jurisdiction under s.282 is to be exercised by way of discretion. He nevertheless contended that in this exceptional case the court should set it aside or annul it (whichever was the more appropriate) because the order was irregular and null and void pursuant to regulation 7(12).

35. While the details of the argument have developed on appeal, as naturally happens, I think that the argument remains essentially the same: that because of Regulation 7(12) the bankruptcy order was null and void, and so should have been set aside or annulled.

36. On this appeal, the argument has primarily focussed on s.282(1)(a) and the power to *annul* the bankruptcy order. During the course of argument, I raised the possibility that – if it is correct that the bankruptcy order is null and void – then the correct approach is to apply for a declaration in reliance on Regulation 7(12) that it is null and void and so the court's order should be set aside on that ground. I note that this appears to be the possibility canvassed in Mr Zalewski's skeleton argument below, in referring to setting aside the order, as opposed to annulling it.

37. On this basis, I do not think that Mr Carter's arguments on appeal represent the abandonment of a concession made below. If that is wrong, I in any event give permission for a new point to be argued on appeal. It is a pure point of law. The appeal is not from a trial involving findings of fact. If the point succeeds it would not have required any different findings of fact to be made. The delay in formulating the argument since the decision below is not significant, and has not led to any delay in the listing of the appeal. There is no relevant prejudice to the respondent in the point being raised: Mr Watkin acknowledged that he is fully able to meet the point. Accordingly, taking into account all the relevant factors (as mandated by *Notting Hill Finance Ltd v Sheikh* [2019] EWCA Civ 1337, per Snowden J at §27), it is just to permit Mr Carter to run this point on appeal.

38. For the avoidance of doubt, I reject the contention that the new point cannot be taken on appeal because of Mr Carter's conduct in relation to the obtaining of the moratorium. The conduct complained of is that – on the available evidence – he clearly had sufficient funds to pay his debts at the time he made his application for a moratorium. That is a powerful factor (as the judge found) against exercising the discretion in s.282(1)(a) to annul the bankruptcy order. The "new" point, however, is one which goes to jurisdiction, on the basis that the bankruptcy order was a nullity. However unmeritorious, I do not think that Mr Carter's conduct is relevant to this point, if it is correct that District Judge Shorthose had no option but to set aside or annul the bankruptcy order.

Khan v Singh-Sall

39. As I have noted, the arguments on appeal focused primarily on whether the court had jurisdiction to make the bankruptcy order. Both parties relied on the decision of the Court of Appeal in *Khan v Singh-Sall* [2023] EWCA Civ 1119, being an appeal from the decision referred to and relied on by the judge. The Court of Appeal decision had in fact been handed down by the time of the hearing before the judge, but neither side referred the court to it.

40. The case concerned an application to annul a bankruptcy order on the ground that the order ought not to have been made, because the debt on which the petition was based was disputed on substantial grounds.

41. On the annulment application, the district judge concluded that the bankruptcy order ought not to have been made on two grounds, one of which was that the debt was disputed. He nevertheless exercised his discretion to refuse to annul the bankruptcy order. An appeal against that order was dismissed by Mr David Mohyuddin QC, sitting as a deputy Hight Court Judge.

42. The Court of Appeal dismissed the further appeal to it. The appellant submitted to the Court of Appeal that there was no jurisdiction to make the bankruptcy order, which therefore ought to have been set aside as of right, or at the very least it should be set aside only in exceptional circumstances.

43. Nugee LJ, with whom Lewis and Snowden LJJ agreed, distinguished between different kinds of jurisdiction, or lack thereof.

44. On the one hand, there were cases where the court lacked jurisdiction to make a bankruptcy order altogether – for example where the debtor's centre of main interests was not in England: see, for example, *Raiffeisnlandesbank Oberösterreich AG v Meyden* [2016] EWHC 414 (Ch). In that case, Nugee J held that the position under the general law is that once it becomes apparent to the court that an order has been made without jurisdiction, a party or any person affected by it is entitled to have it set aside as a matter of right (see §21 of *Khan*).

45. On the other hand, there were cases where there had been a "failure to comply with one or other of the various statutory requirements that need to be complied with before the court can properly make a bankruptcy order." In that case, "the result of the failure to comply with the requirements may mean that the court ought not in the circumstances to exercise the power that it has to make the respondent bankrupt" (as opposed to lacking all jurisdiction to make the respondent bankrupt): see §49 of *Khan*.

46. The Court of Appeal (at §49) concluded that a bankruptcy order made in respect of a disputed debt fell into the second category: "where the court under s.271 IA 1986 ought not to have made Mr Khan bankrupt, but could have done so had the petition, or the evidence, been in a different form." The court accordingly retained a discretion to refuse to annul the bankruptcy order.

47. In my judgment, however, there is – on the way in which the argument is put on behalf of Mr Carter – a logically prior question in this case, which is whether the bankruptcy order which the court purported to make is – because of the Regulations – null and void. If it is, then it simply does not exist, and the court's order purporting to make a null and void bankruptcy order should be set aside for that reason.

48. That was the approach taken in *Lees v Kaye* [2022] EWHC 1151 (QB) in relation to steps (in the form of an eviction from and sale of a property) taken in contravention of a mental health crisis moratorium under the Regulations. HHJ Dight, sitting as a High Court Judge, concluded that Regulation 7(12) is unequivocal: the effect of any action taken contrary to Regulation 7 "shall be null and void … as between the applicant and the respondents it is as if those actions had never been taken." Accordingly, he granted the application for a

declaration that the execution of the writ of possession was null and void in accordance with Regulation 7(12).

49. HHJ Dight judge was invited to exercise his discretion against granting the relief sought, as to which he said, at §71-72:

> "71. … However, it seems to me that my primary task here is to construe the Regulations in light of the dispute between the parties. I have done so and have set out my conclusions above. While there may, in the circumstances, be a limited discretion as to whether to make declarations as to the construction of the Regulations and the consequences of that construction there would be little point in declining to do so.
>
> 72. Moreover, given that I have reached the conclusion that the first respondent has taken actions in evicting the applicant and in selling the Lease which, because they are breaches of regulation 7, are null and void the first respondent would, in my judgment, have to identify and prove very exceptional circumstances to persuade me to subvert the policy of the Regulations and deprive the applicant of the protection which the Regulations are designed to confer on her and was conferred on her by grant of the Moratorium as a consequence of her receiving mental health crisis treatment. The factors relied on by the first respondent do not begin to satisfy that heavy burden."

50. Accordingly, I turn to consider whether on a proper interpretation of the Regulations, the bankruptcy order made in this case was null and void.

Was the bankruptcy order null and void?

51. Mr Khan, leading Mr Zalewski, for Mr Carter, submitted that the bankruptcy order was null and void by reason of Regulation 7(12).

52. He accepted that making a bankruptcy order is not prohibited by Regulation 7(7)(f), read together with Regulation 7(8), because that only prohibits *starting* any legal proceedings (including, therefore, by presenting a bankruptcy petition).

53. He submitted, however, that making a bankruptcy order is taking a step "to collect" a moratorium debt, or to "enforce a judgment or order issued by a court or tribunal" within Regulation 7(7)(a) or (b).

54. Mr Watkin disputed that a bankruptcy order is a step either to collect a debt or to enforce a judgment. He submitted that any step taken in proceedings which already exist (including in relation to a bankruptcy petition) as at the date of the moratorium is governed by Regulation 10, and not by Regulation 7, except where it is expressly identified in Regulation 7. Regulation 7(g), for example, prohibits making an application for default judgment in respect of a money claim, something which would otherwise be permitted under Regulation10.

55. He submitted that while, under Regulation 10, the court is mandated to stay a bankruptcy petition after it has been notified of the existence of a moratorium, there is nothing in the Regulations which states that a bankruptcy order made in violation of that stay is null and void. Regulation 7(12) does not apply to it, because that only applies to steps taken in violation of Regulation 7.

56. I agree with Mr Watkin that a bankruptcy order is neither a step to collect a moratorium debt under Regulation 7(7)(a) nor a step to enforce a judgment under Regulation 7(7)(b).

57. As to Regulation 7(7)(a), bankruptcy does not, and is not intended to, result in the *collection* of the petition debt. Indeed, the consequence of the presentation of a bankruptcy petition is that any payment made by the debtor, including of the petition debt, is rendered void in the event that a bankruptcy order is then made, unless ratified by the court: s.284(1) of the Insolvency Act 1986. A bankruptcy order may ultimately lead to the debt being discharged, if there are sufficient assets to mean that via the process of realising assets, proof of debt and payment of dividends, all creditors' debts are paid in full. It is not, however, accurately characterised as a debt collection process.

58. In relation to Regulation 7(7)(b), Mr Khan cited a text book, Enforcement of a Judgment, 12th ed., by Stephen Allinson which, at §3-02, contained a table in which various "methods of enforcement" of a judgment are set out, one of which is insolvency procedures for personal insolvency. While it is true that bankruptcy and winding-up are sometimes described as processes for enforcing debts, they are a process of *collective* enforcement on behalf of all unsecured creditors of the debtor (including those with, and without, the benefit of judgment debts). I consider, in contrast, that Regulation 7(7)(b) is intended to refer to the process by which a creditor seeks to enforce their judgment on a bi-lateral basis against the debtor.

59. That is reinforced by the fact that every other step identified in para (7)(b) refers to bi-lateral action against the debtor. It is also supported by the fact that the drafter has chosen to include a bankruptcy petition within the matters prohibited by Regulation 7(7) by way of extension of the definition of "legal proceedings" to include a bankruptcy petition, but that only covers the *commencement* of proceedings. If bankruptcy was considered to be a process of enforcement of a judgment then the presentation of a petition would already have been covered by para (7)(b) as a step taken to that end, so there would have been no need to include it within the concept of legal proceedings.

60. Moreover, para (7)(b) refers only to enforcement of a judgment. As a collective process, bankruptcy relates to debts, whether judgment debts or not. Since para (7)(b) cannot on any view be regarded as including a bankruptcy order made on the petition of a non-judgment debt, that supports the view that it is intended to encompass enforcement of judgments in a bilateral sense, and does not extend to the collective bankruptcy process.

61. Mr Khan relied on the very broad scope of "enforcement action" within para (7), including merely *contacting* a debtor for the purpose of enforcement of a moratorium debt. That, however, merely begs the question as to the meaning

of "enforcement". Contacting a debtor for the purposes of ongoing legal proceedings already commenced at the date of the moratorium (i.e. those referred to in Regulation 10, and which includes a bankruptcy petition) is expressly permitted: see Regulation 11(2)(b)(iv).

62. Mr Khan also submitted that Regulation 7(12) is incorporated by reference into regulation 10 so that, if an existing bankruptcy petition is not stayed pursuant to Regulation 10(2)(b), any step taken in the petition thereafter is null and void. He relies on Regulation 10(8) which provides that Regulation 10 is subject to Regulation 7(2)(b).

63. This gives rise to a further question, namely whether Regulation 10(2)(a) is itself subject to Regulation 7(2)(b). If it is not, then I do not see how the cross-reference in Regulation 10(8) to Regulation 7(2)(b) can assist Mr Khan's argument: if the mandatory stay on a bankruptcy petition under Regulation 10(2)(b) is not subject to Regulation 7(2)(b), then I see no way in which it can, as a matter of construction, be subject to Regulation 7(12).

64. This question arises because, if all the words contained in Regulation 7(2)(b) are to be taken into account, they do not readily have any application to the mandatory stay on a bankruptcy petition in Regulation 10(2)(a). That is because, Regulation 7(2)(b) permits the court to give permission for the creditor to take "such step", which is a reference back to the body of Regulation 7(2): "any of the steps specified in paragraph (6)".

65. For the reasons I have already set out above, a step taken to progress a bankruptcy petition, which already existed at the date of the moratorium (including making a bankruptcy order) is not a step "specified in paragraph (6)".

66. That would suggest that the drafter did not intend that Regulation 10(2)(a) was to be subject to Regulation 7(2)(b), as giving permission to take a step under 7(6) would never have any relevance to anything done to progress a bankruptcy petition.

67. As against this, however, Regulation 10(8) says that "this regulation" is subject to Regulation 7(2)(b), which would suggest that the whole of it is so subject.

68. In fact, apart from Regulation 10(2)(a), the only other part of Regulation 10 to which the cross-reference to Regulation 7(2)(b) makes any sense is Regulation 10(5). That is because everything else in the Regulation is permissive: allowing proceedings already in existence at the commencement of the moratorium to continue. Regulation 10(5), in contrast, requires a court of tribunal to ensure that proceedings to *enforce* a judgment concerning a moratorium debt "do not progress". It makes sense for that obligation to be subject to the power of the court under Regulation 7(2)(b) to permit enforcement action to continue.

69. If Regulation 10(2)(b) had been intended to relate only to regulation 10(5), then it might be expected to have said that. In my view, the better

interpretation is that the cross-reference to Regulation 7(2)(b) is intended to make any part of Regulation 10 which prohibits a creditor pursuing proceedings subject to the power of the court (derived from Regulation 7(2)(b)) to give permission to the contrary. The purpose of Regulation 7(2)(b) is to ensure the court retains control over proceedings before it. I see no purpose in prohibiting the court from retaining such control in respect of a bankruptcy petition. Indeed, for reasons I develop below, I consider that there are reasons to interpret the Regulations as ensuring that the bankruptcy court *does* retain control in respect of a pending bankruptcy petition.

70. That still does not, however, lead to the conclusion suggested by Mr Khan. In my view, by making Regulation 10(2)(a) subject to the power to give permission under regulation 7(2)(b), the drafter did not intend to, and has not, rendered Regulation 10(2)(a) also subject to Regulation 7(12). Accordingly, Regulation 7(12) does not have the effect of rendering null and void any step taken in contravention of the stay in Regulation 10(2)(a).

71. Mr Khan also relied on the purpose of the Regulations (citingss.6 and 7 of the Financial Guidance and Claims Act 2018, the Explanatory Memorandum to the Regulations, and the Impact Assessment to the Regulations dated 27 August 2019). Mr Watkin agreed that their purpose is to incentivise more people to access professional debt advice, to do so sooner, and to enable them to enter the debt solution that is most appropriate in view of their individual circumstances. I do not see how that points, however, to the drafter intending that any step taken in an existing bankruptcy petition in breach of the requirement that the petition should be stayed is a nullity.

72. Accordingly, I consider that:

(1) On the true interpretation of the Regulations, the making of a bankruptcy order is *not* enforcement action within Regulation 7(7).

(2) The making of a bankruptcy order, in circumstances where there has been a failure to comply with the mandatory requirement to stay the bankruptcy petition under Regulation 10(2)(a), is contrary to Regulation 10, but that it is not action taken contrary to Regulation 7, and so is not expressly null and void.

73. That leaves the possibility that, although not expressly rendered null and void by the Regulations, it is implicit in the Regulations that a bankruptcy order made in contravention of the mandatory stay in Regulation 10(2)(b) is null and void. I do not think, however, that the Regulations should be read in this way.

74. First, if my conclusion – that the Regulations do not expressly render a bankruptcy order obtained in disregard of Regulation 10(2)(a) null and void – is correct, then that suggests a deliberate choice, which points against construing the Regulations as reaching the same result by implication.

75. Second, there is in my view good reason for treating a bankruptcy order differently from the steps prohibited expressly by Regulation 7(12). Each of the steps identified in Regulation 7(7) occurs in the context of a bi-lateral form

of enforcement action. The consequences of the step being rendered null and void impact, therefore, only on the debtor and creditor.

76. Given that bankruptcy is a collective process, on the other hand, the making of a bankruptcy order impacts, or at least potentially impacts, on third parties, including all other creditors of the debtor, whether they are owed qualifying debts or non-qualifying debts (including therefore the holders of non-moratorium debts).

77. For example, upon the making of a bankruptcy order, the official receiver automatically becomes trustee (s.291A(1) IA 1986), in whom the property comprised in the bankrupt's estate vests from that moment (s.306(1) IA 1986). As a consequence, the bankrupt loses the power to deal with his property, which itself can have an effect on third parties with whom the bankrupt was dealing or purports to deal with thereafter. The official receiver, as trustee, assumes the function of getting in, realising and distributing the bankrupt's estate (s.305 IA 1986). Inevitably, in doing so, the trustee will (as has happened in this case) incur costs and expenses. In addition, all unsecured creditors cease to have any remedy against the person or property of the bankrupt as from the making of the bankruptcy order (s.285(3) IA 1986).

78. These considerations are self-evidently insufficient to mean that a creditor should be free, in relation to a moratorium debt, to obtain a bankruptcy order against the debtor. Regulation 10(2)(a) makes that clear. The fact, however, that a bankruptcy order has consequences that impact on all creditors of the debtor, not merely those with moratorium debts, in my view justifies the conclusion that the drafter of the Regulations intended the court to maintain a discretion, in the event that a bankruptcy order was made in ignorance of the mandatory stay under Regulation 10(2)(a), to permit the bankruptcy order to remain.

Jurisdiction

79. Once it is accepted that a bankruptcy order wrongly obtained in such circumstances is not null and void, then I do not consider there is any other jurisdictional hurdle to the court exercising its discretion under s.282(1)(a) by refusing to annul the bankruptcy order.

80. The Regulations do not give rise to a fundamental lack of jurisdiction – like that discussed in *Khan* in relation to a debtor whose centre of main interests is elsewhere.

81. That is certainly so if Regulation 10(8) is to be construed as I have determined above. If that is right, then the court has jurisdiction to make a bankruptcy order, notwithstanding the existence of a moratorium, if it gives permission under Regulation 7(2)(b). This case is therefore an example of an occasion when there was a failure to comply with one or other of the statutory requirements that should have been complied with before the court could properly make a bankruptcy order: namely, the petitioning creditor should have brought the existence of the moratorium to the attention of the court, and

should have requested the court to give permission to apply for a bankruptcy order, notwithstanding the moratorium.

82. Even if the obligation on the court to stay a pending petition is not subject to the power of the court to give permission under Regulation 7(2)(b), I nevertheless think that the lack of jurisdiction to make a bankruptcy falls into the same category. The existence of the moratorium means that the bankruptcy order cannot be made unless the procedure for setting aside the moratorium is followed. That, nevertheless, is better characterised as an occasion when there was a failure to comply with one or other of the statutory requirements that should have been complied with before the court could properly make a bankruptcy order.

Conclusion

83. For the above reasons, I conclude that District Judge Shorthose was correct to conclude that he retained a discretion under s.282(1)(a) in determining whether to annul the bankruptcy order, and – there being no separate appeal against the exercise of that discretion – the appeal is therefore dismissed.