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Case Nos: 2018-001239; 2017-001162; 2018-000423

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

Royal Courts of Justice
Rolls Building, 7 Fetter Lane, London

Date: 13/03/2019

Before :

INSOLVENCY AND COMPANIES COURT JUDGE JONES

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Between :

(1) ISLANDSBANKI HF **(2) THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS** **(3) SHINECLEAR HOLDINGS LIMITED**	**1st/2nd/3rd Petitioners**
- and -	
KEVIN GERALD STANFORD	**Respondent**

- -
- -

MR JOSEPH ENGLAND (instructed by **Harrison Drury & Co Limited**) for the **1st Petitioner**
MR PAUL JOSEPH (instructed by **HMRC**) for the **2nd Petitioner**
Ms RAQUEL AGNELLO Q.C. (instructed by **Pinsent Masons LLP**) for the **3rd Petitioner**
MR ANDREW CLUTTERBUCK Q.C. and MR GREGORY DENTON-COX (instructed by **Simmons & Simmons LLP**) for Kaupthing ehf, a supporting creditor
MR DANIEL BURKITT instructed by **Arnold & Porter Kaye Scholer LLP** for Mr Stanford

Hearing dates: 20 December 2018 and 22 February 2019

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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INSOLVENCY AND COMPANIES COURT JUDGE JONES

I.C.C. Judge Jones:

A) Introduction

1. Sadly, Mr Stanford's exceptional business and financial success from the 1980s until about 2008 has transformed into insolvency. From about 2012 he has been embroiled in unresolved litigation within the Duchy of Luxembourg ("Luxembourg") with Kaupthing ehf upon which he relies for change in his fortune. Kaupthing ehf claims a debt of over £461 million. Mr Stanford alleges fraud and contends that this caused his demise. He asserts that a successful outcome will result in the release to him of shares worth at least some £50 million otherwise secured in favour of Kaupthing ehf.

2. However, his other creditors, all with substantial debts, have now sought or supported the making of a bankruptcy order. I made that order at the end of part-heard proceedings at 15:39 on Friday 22 February 2019. So far as the Kaupthing ehf litigation is concerned, its further progress will be a matter for the trustee in bankruptcy taking account of the interests of creditors. This judgment provides the reasons for my decision.

B) The Petitions and Supporting Creditors

3. I had three petitions before me:

   a) The amended petition of Islandsbanki HF relying upon a purported execution of an Icelandic Court judgment registered within this jurisdiction having been returned unsatisfied. The petition was presented on 6 April 2017 in the County Court of Maidstone. The total indebtedness relied upon in the petition is £1,310,976.93. Mr Stanford disputed the execution and, therefore, the ability to petition but not the debt.

   b) A petition of the Commissioners for Her Majesty's Revenue and Customs ("HMRC") relying upon a statutory demand for an undisputed tax debt in the region of £7.1 million. The debt arises from self-assessed tax and interest for the 2001-2002 tax year. The petition was presented at the Rolls Building on 22 August 2017. It was opposed on grounds alleging an abuse of process or in the alternative relying upon the court's discretionary power to dismiss or adjourn. It is second in time and it was accepted by all parties at the 22 February 2019 hearing that HMRC could support the first petition and seek substitution if required.

   c) A petition of Shineclear Holdings Limited for an undisputed debt in the region of £6 million. It was presented in the Maidstone County Court on 20 September 2017 and relies on a statutory demand served after presentation of Islandsbanki HF's petition. Whilst the debt is not disputed, the ability to present a petition is because of alleged, previous dealings between Mr Stanford and Kaupthing ehf.

4. The list of creditors intending to appear on the hearing of the Islandsbanki HF petition include HMRC and Shineclear Holdings Limited. There are five other creditors of whom three have identified the amount claimed to be owed and those debts total about £11 million. In reaching my decision I took account of the absence of any opposing creditors. I took account of the views of supporting creditors except for appreciating that Kaupthing ehf was inevitably conflicted by personal interest because of the Luxembourg litigation. I took account of the views of Shineclear Holdings Limited as an undisputed creditor except to the extent that they were affected by the conflict of interest arising from the fact that their petition was disputed.

C) The Grounds of Opposition

5. The grounds of opposition raised on each petition may be summarised at this stage as follows:

   a) Whether the purported execution of Islandsbanki HF's judgment debt was invalid either because there was no execution as required by this petition to establish Mr Stanford's inability to pay his debts pursuant to ***section 268(1)(b) of the Insolvency Act 1986*** ("the Act") or such execution as there was is so deficient that the requirements of that provision are not met.

   b) Whether HMRC's petition is an abuse of process by reason of threats and extortion. If not, whether it should be dismissed because bankruptcy will jeopardise the outcome of the extant proceedings in Luxembourg. In the further alternative whether the petition should be dismissed or adjourned in circumstances of Mr Stanford having a written agreement with a third party to lend him the amount required to pay the tax debt, conditional upon dismissal of the other two petitions.

   c) Whether Shineclear Holdings Limited is bound by representation, contractual agreement or estoppel from presenting a petition. Directions concerning expert evidence and issues concerning whether a specific dispute needs to be determined by a trial remain extant. It will be some time before this petition will be ready for final hearing.

D) Three Petitions and Substitution

6. The bankruptcy order made on 22 February 2019 was made on the first petition in time but having substituted HMRC as supporting creditor. The procedural issues referred to under the next sub-heading mean it is necessary first to explain the following:

   a) Normally there is only one petition. Bankruptcy is a class remedy asking for distribution of the debtor's realised assets on a pari passu basis subject to the statutory waterfall. Therefore, a petition will not be dismissed (whether by agreement or determination) without considering whether any supporting creditor might (as appropriate) take over its carriage or be substituted as the

petitioning creditor by amendment (see **Rules 10.28 and 10.29 of the Insolvency Rules 2016** ("the Rules"), which applied from 6 April 2017).

b) In that context, ***paragraph 12.3 of the Practice Direction: Insolvency Proceedings*** [2018] B.C.C. 241 requires an intending petitioner to conduct an Official Search with the Chief Land Registrar in the register of pending actions for pending petitions presented against the debtor. If an existing petition is found, the intended petition will normally not be presented. The creditor may support the petition and, if appropriate and necessary, apply for a change of carriage order or substitution.

c) However, a second petition is not prohibited by the ***Practice Direction***. ***Paragraph 12.3*** requires a certificate to be signed stating that a search has been conducted within 7 days of the date of presentation and either: (a) no petition is believed to have been presented or, (b) if one is pending, that the second petition is issued at risk as to costs.

d) A reason why that "risk" may be taken might be because the creditor will not be able to ask for carriage of the petition and substitution may not be available. For example, if the petition debt is found to be genuinely and substantially disputed, there could be no change of carriage and the creditor may not be able to ask for substitution because no statutory demand had been served or judgment executed for the purposes of ***section 267(2)(c) and 268 of the Act*** (see **Rule 10.27(2)(c)**). They provide that:

   i) A petitioner must not only establish an unsecured debt, not disputed on substantial and genuine grounds, for a liquidated sum (payable immediately or in some certain, future time) but also that the debt is one the debtor appears unable to pay or to have no reasonable prospect of paying (see ***section 267 of the Act***).

   ii) In contrast to establishing a company's inability to pay debts for a winding up petition, Parliament has decided that there are only two methods for a bankruptcy petition to establish that requirement: non-payment of the debt following lapse of 3 weeks after service of a statutory demand; or a return unsatisfied (in whole or in part) of execution or other process issued in respect of the debt on a judgment or order of the court (see ***section 268 of the Act***).

e) However, the existence of a second petition does not prevent that petitioner from supporting the first petition and applying for change of carriage or substitution if able to do so. The advantage summarised at (f) below might justify it for the benefit of all creditors.

f) There may be significant advantage in relying upon the earlier presentation date of the first petition. Although a bankruptcy starts from the day it is made (see ***section 278 of the Act*** - in contrast to the back-dating of the commencement of a liquidation to the date of presentation), ***section 284 of the Act*** provides (subject to limits protecting third parties) that any disposition of property made by the future bankrupt between presentation and the vesting of

the bankruptcy estate in a trustee following a bankruptcy order is void unless made with the prior consent or subsequent ratification of the court.

7. In this case HMRC presented a second petition without appreciating the existence of Islandsbanki HF's petition. The hearing proceeded with all parties accepting that HMRC could apply for substitution in reliance upon the statutory demand served before presentation of Islandsbanki HF's petition. In contrast, Shineclear Holdings Limited accepted it could not apply to substitute but it could seek a bankruptcy order on its petition should the first two petitions be dismissed.

8. Islandsbanki HF's petition could not be dismissed until consideration was given to HMRC's right to apply for substitution. As previously explained, Mr Stanford opposed HMRC's petition. It followed that the grounds of opposition had to be determined before Islandsbanki HF's petition could be dismissed if HMRC might be substituted.

E) Procedure

9. Those matters set the scene for the order made on 22 February 2019 but they are also relevant to some procedural confusion. The Islandsbanki HF petition was first argued on 20 December 2018. By the end of the day, there remained a possibility that the grounds of opposition might succeed. The petition was adjourned part-heard and it was directed that the other two petitions should be listed at the same time. The adjournment would also allow necessary, further legal research by counsel and enquiry might be made by solicitors (if they chose to do so) into the authenticity of the Writ of Control relied upon by Islandsbanki HF for the execution returned unsatisfied.

10. I was not informed of an application by Islandsbanki HF for permission to appeal that order and no judgment was sought from me for that purpose. That was unfortunate. I had not anticipated that a decision to adjourn part heard required reasons nor that listing of the other petitions could be considered controversial. I recollect referring to the possibility of hearing HMRC next and may have assumed that counsel appreciated the reason for this rather than orally set out the matters under sub-heading "D" above. I was informed at the hearing on 22 February that permission to appeal was sought to obtain clarity. If so, the matter could and should have returned to me rather than trouble a busy High Court Judge.

11. It does not appear that the Judge who heard the appeal was informed of the need for further legal research or of the possibility of further enquiry. Nor (and potentially most importantly) that it was properly explained that the court might need to consider the question of substitution and, if so, the grounds of opposition to HMRC's petition before Islandsbanki's petition could be determined.

12. Be that as it may, Islandsbanki HF sought and obtained an order that its petition should be "*disposed of by way of judgment at the hearing listed for 22 February 2019 prior to any hearing of the petition of HMRC*". It appears that Mr Stanford and Shineclear Holdings Limited supported the making of such order. HMRC did not attend.

13. This meant I had to give judgment on 22 February on the Islandsbanki HF petition but hearing that petition before HMRC's did not mean (and no Judge would have intended it to mean) that the grounds of HMRC's petition and the objections to it should not be considered. They had to be if there was the possibility that Islandsbanki HF's petition might be dismissed but for the substitution of HMRC. There was such a possibility.

14. The hearing on 22 February proceeded (in summary) as follows: Ms Agnello Q.C. succinctly and most helpfully explained the current position of Shineclear Holdings Limited's petition. I heard from Mr Joseph, who appeared for HMRC. At that stage HMRC was not applying for substitution but chose to do so later. HMRC and Mr Stanton, by his counsel Mr Burkitt, were ready and able to argue Mr Stanton's grounds of opposition. I also had assistance from time to time from Mr Clutterbuck Q.C., who appeared for Kaupthing ehf, as a supporting creditor but properly recognising the relevance to his submissions of the potential conflict arising from the existence of the Luxembourg litigation. I heard further from Mr England for Islandsbanki HF and Mr Burkitt concerning the issue of law which had required further enquiry and they added to their previous submissions.

F) Islandsbanki HF's petition

F1) Date the Writ of Control was Issued and Executed

15. That issue of law is whether there can have been execution returned unsatisfied satisfying the requirements of ***section 268(1)(b) of the Act*** when the purported execution occurred within the time limit prohibiting execution prescribed by the revised ***Lugano Convention***, ***the Civil Jurisdiction and Judgments Act 1982***, ***CPR Part 74, Rule 74.9*** and the Registration Order dated 23 March 2016. The following ground of opposition is quoted from Mr Burkitt's skeleton argument:

> *"Paragraph 2 of the Registration Order provides **[1/5]**:*
> *"The defendant has permission within one month … after service on him of notice of registration of the judgment to appeal against the registration and execution on the judgment will not issue until; (a) after the expiration of that period, or in the event of an appeal, after the appeal has been determined." (underlining added)*
> *D's evidence is that he was not served with the Registration Order (**W/S Stanford 1 § 3 [2/18-19]**). P has not filed any evidence denying this in reply. "*

16. The absence of evidence in reply was attributed in correspondence to an inability to obtain evidence from a process server. The only evidence concerning service, however, is from Mr Stanford and there has been no application to cross-examine him. His evidence is to be accepted for this hearing.

17. In any event the Writ of Control relied upon was issued on 30 March 2015. The Registration Order is dated 23 March 2016. The Notice of Enforcement relied upon is dated 1 April 2016 and the evidence indicates that the latest date for attendance at Mr Stanford's property was 14 April 2016. The one-month period stipulated in paragraph 4 of the Registration Order had not expired when the Writ was sealed or when the purported execution occurred.

18. Mr England submitted that the premature issuing and execution was a procedural defect which could be waived or for which time could be abridged. It was submitted that ***CPR Part 3, Rule 3.10*** applied:

> *"… an error of procedure such as a failure to comply with a rule of practice direction … (a) … does not invalidate any step taken in the proceedings unless the court so orders; and (b) the court may make an order to remedy the error."*

19. In support of his submission he prayed in aid the decision of Mr Justice Jacob, as he then was, in ***Skarzynski v Chalford Property Company Ltd*** [2001] BPIR 673 upon which he also relied in response to other grounds of objections concerned with the manner of execution of the Writ of Control. The Judge decided that the word *"returned"* in ***section 268(1)(b) of the Act*** does not have a technical meaning. It requires proof that execution or other process failed to satisfy the debt. If that fact is proved, it should not be undermined by procedural defects or irregularities.

20. In reaching that decision he distinguished or did not follow the Court of Appeal's decision in ***Re A Debtor (No 340 of 1992), ex parte the Debtor v First National Commercial Bank plc and another*** [1996] 2 All ER 211. First because in that case there was no such defect or irregularity, the execution did not happen. Second because insofar as the judgment of Lord Justice Millett, as he then was, stated the opposite, that part of his judgment was *"obiter dicta"* and would not be followed. I am bound by Mr Justice Jacob's decision including his conclusion upon legally binding precedent.

21. However, in my judgment the origins of the prohibition within the Registration Order and of ***CPR Part 74, Rule 74.9*** determine this issue. ***Article 47(3) of the revised Lugano Convention 2007***, provides that:

> *"During the time specified for an appeal pursuant to Article 43(5) against the declaration of enforceability and until any such appeal has been determined, no measures of enforcement may be taken other than protective measures against the property of the party against whom enforcement is sought."*
>
> And Article 43(5) provides:
>
> *"An appeal against the declaration of enforceability is to be lodged within one month of service thereof …".*

22. In this case the time specified for an appeal was extant because there had been no service of the Registration Order. Plainly, the bankruptcy exception to the application of the revised ***Lugano Convention*** does not apply. The issue concerns whether the foreign judgment relied upon by the Writ of Control was capable of being enforced. The answer is then to be applied to the requirements of ***section 268(1)(b) of the Act*** for bankruptcy proceedings.

23. The revised ***Lugano Convention*** has direct effect within this jurisdiction because it was concluded by the European Union (see ***Dicey, Morris & Collins***, 15th edition, 11-020). Furthermore, whilst it was unnecessary for the revised ***Lugano Convention*** to be incorporated into our law, primary and secondary legislation have dealt with

consequential matters. ***The Civil Jurisdiction and Judgments Regulations 2009 (SI 2009/3131)*** has inserted the ***Article 47(3)*** prohibition within ***section 4A of the Civil Jurisdiction and Judgments Act 1982*** as follows:

> *4A Enforcement of judgments, other than maintenance orders, under the Lugano Convention*
>
> *(1) ...*
>
> *(2) A judgment ... registered under the Lugano Convention shall, for the purposes of its enforcement, be of the same force and effect, the registering court shall have in relation to its enforcement the same powers, and proceedings for or with respect to its enforcement may be taken, as if the judgment had been originally given by the registering court and had (where relevant) been entered.*
>
> *(3) Subsection (2) is subject to Article 47(3) of the Lugano Convention (restriction on enforcement where appeal pending or time for appeal unexpired), to section 7 (interest on registered judgments) and to any provision made by rules of court as to the manner in which and conditions subject to which a judgment registered under the Lugano Convention may be enforced."*

24. Mr England has submitted that ***section 4A(3)*** permits Rules of Court to be made which abridge time for the period of appeal or otherwise override the prohibition. Therefore, CPR Part 3, Rule 3.10 should be applied.

25. I do not agree. ***Section 4A(3)*** makes enforcement of a judgment once registered subject to ***Article 47(3)***. The reference to ***section 4A(2)*** being subject also to *"Article 47(3) ... section 7 ... and ... rules of court as to the manner in which and conditions subject to which a judgment registered under the Lugano Convention may be enforced*" is not to be construed as enabling Rules of Court to override or otherwise alter the agreement between signatories to the treaty. The power to make rules is to give effect to the revised ***Lugano Convention***. This is both its ordinary meaning and purposive construction.

26. There is a binding prohibition against enforcement until time for appeal has expired. No jurisdiction to enforce exists during the prohibited, appeal period unless the protective measure applies. Breach of that prohibition cannot be described as a procedural defect for the purposes of the ***Civil Procedure Rules***. Even if that was wrong, and I do not suggest it might be, plainly the Court should not exercise its power under ***CPR Part 3, Rule 3.10*** to invalidate the execution to give effect to the revised ***Lugano Convention***. Equally the court should not exercise any inherent power to waive or ignore the breach.

27. The Convention has enabled the European Union and the other signatories to reach agreement for (amongst other matters) judgment recognition and enforcement within each other's jurisdiction but subject to its precise terms. One of the terms agreed is that *"no measures of enforcement"* shall take place during the appeal period for a declaration of enforceability for a foreign judgment (subject to the *"protective measure"* exception which does not apply here) and there is no provision within the revised ***Lugano Convention*** to abridge time.

28. It follows that there has been no enforcement for the purpose of ***s.268(1)(b) of the Act***. The Writ of Control was invalid. Islandsbanki HF is unable to establish that Mr

Stanford was unable to pay his debts in accordance with the requirements of that provision.

F2) Other Matters

29. Mr Burkitt's submissions identified additional matters which caused him to submit that there was no execution for the purpose of ***s.268(1)(b) of the Act***. In the light of the decision above, I need only deal with them to the extent that might be required should this matter go further. I note that because there has been no cross-examination, I am not able to decide any issues of fact in dispute except to the extent that facts can be established from the documents.

30. Mr Burkitt in his skeleton argument identifies the following troubling catalogue of errors (omitting those matters that need not be referred to and subject to my amendments):

a) *"The date [on the Writ of Control, which fails to mention the Lugano Convention] has not been entered where it says "THIS WRIT WAS ISSUED by the Central Office of the High Court on (date)". There is a seal dated 30 March 2016 but above that there is a faint seal which appears to give the date as "14 Aug 2015". The petition states … the relevant action no is FJ74/16. This number has been written in pen on the Writ at* ***[5/110]****. It is difficult to reconcile this with the (fainter) action date seal of 14 Aug 2015.*

b) *The Writ wrongly refers to an Icelandic judgment debt of ISK 7,542,463 (GBP 42,362.80 on 30 March 2016) [on the front page, whilst referring to a judgment equivalent to £356,296.96 above and within the schedule on the second page].*

c) *According to a letter dated 13 April 2016, the enforcement officers (High Court Enforcement Group Ltd (****"HCE"****)) only provided D's then solicitors with the first page of the Writ* ***[3/83]****.*

d) *Notice of Enforcement dated 1 April 2016 … the debt is said to be £356,408.71 [plus £91,377 interest and £90 fee]. The second page [of the Writ of Control] apparently confers no authority to execute in respect of interest* ***[5/111]*** *(and no provision for interest is made in the Registration Order* ***[1/5]****).*

e) *In April 2016, enforcement officers visited D's property …. D's evidence is that this upset his wife and that … to stop this (for a period of 6 months), he signed an agreement with P dated 10 May 2016 … This document says "the debtor owes creditor ISK 165.804.818,- according to a judgment from the district court of Reykjanes in Iceland" … the GBP equivalent of ISK 165.804.818 is not mentioned. The GBP equivalent of ISK 165.804.818 on 10 May 2016 was GBP 934,604.80.*

f) *[GBP 934,604.80] bore no relation to the amount of the debt in the Writ (dated 30 March 2016) or Notice of Enforcement (dated 1 April 2016) and, in fact, the judgment amount was ISK 74,095,634 (GBP 417,660.572 on 10 May 2016) with no daily rate for interest going forward ….*

g) *On 6 June 2017, P presented a bankruptcy petition for GBP 1,310,976.93* ***[1/1-3]****. That (enormous) figure is said to be the loan principal plus interest ….*

h) *The return [of execution] contains no statement of the manner in which or when execution took place. It is dated 14 February 2017 … James Robbins' witness statement (dated 9 May 2017) refers to [High Court Enforcement Group Limited] HCE having attempted enforcement in April 2016. A letter from HCE to P's solicitors dated 14 April 2016 … states that enforcement officers attended D's property on 13 April 2016 …*

*i) The letter of 14 April 2016 describes how HCE enforcement officers walked up D's driveway and entered a garage on 13 April 2016, noting a number of vehicles subject to third party claims, but says **[3/77]**: 'Our Agents then walked around the property to ensure that all assets listed on the large document previously sent to your good selves were listed. Unfortunately, our Agents were denied peaceful entry to the main house' … the return stated that D had no goods or chattels in the bailiwick against which to levy execution. That was a false return. HCE had a list of assets but were unable to gain access to D's house to levy execution against them. "*

31. So far as the validity of the Writ of Control is concerned, I observed during the hearing on 20 December 2018 that this could be investigated by reviewing the court file in the Queen's Bench Division pending the next return date. That would have been the appropriate course but on 22 February Mr Burkitt accepted that no further enquiries have been made. In those circumstances I conclude that Mr Stanford has not satisfied the burden upon him of challenging the authenticity of the Writ of Control.

32. The various criticisms of the wording of both the Writ of Control and the Notice of Enforcement together with the failure to provide page 2 of the Writ are justified on the unchallenged evidence before me. Mr England describes these errors or deficiencies as formal defects or irregularities. He relies upon ***Skarzynski v Chalford Property Company Ltd*** (above).

33. I must address that submission within the context explained by Mr Justice Jacob of the Act not intending the bankruptcy process to be affected by *"technicalities which do not matter"*. In reaching his decision the Judge drew attention to the use of the words *"or other process"* within ***section 268(1)(b) of the Act***. The addition of other processes must mean the requirement for a return to be unsatisfied could not have been intended to have a technical meaning. The Judge identified the following examples with reference to the Court of Appeal's decision in ***Re A Debtor (No 340 of 1992)*** (above):

a) The failure of a sheriff to endorse what happened at auction does not mean the *"execution or other process' route"* had not been travelled. The fact that no or not enough money was produced as a result of the process was sufficient to establish the required inability to pay debts.

b) In contrast, an endorsement that the writ was returned unsatisfied cannot make good the fact that entry had been refused and therefore there was no execution. In that circumstances there could be no return.

34. It is clear from those examples that I must also look at all that occurred before reaching a decision. The return appears accurate to the extent that goods found within a garage were said to belong to third parties. The objection to the return is that access to the house was refused and, therefore there was no search for goods in the premises against which to execute. Those are to be taken as established facts.

35. Taking all matters into consideration I have decided that: The error in the judgment amount within the Writ of Control is technical bearing in mind the judgment sum on page 1 is lower that the registered judgment and the error would and did not cause difficulty when it was enforced because there was nothing to execute against. The failure to provide page 2 of the Writ of Control, it being assumed as an issue that this occurred, was very poor execution but again nothing turned upon it and it should be

treated as technical. The unexplained and inaccurate substantial increase in amount in the Notice of Enforcement is to be heavily criticised but it made no practical difference for the purposes of execution and ***section 268(1)(b) of the Act***. The return is not to be treated as false. The absence of reference to access having been returned is technical, if required.

36. That leaves the point that the petition relies upon a debt far exceeding the 7,542,463.00 ISK (GBP 42,362.80 on 30 March 2016) for which the Writ of Control was issued and enforced. ***Section 268(1)(b) of the Act*** enables a petitioner to rely upon an unsatisfied return to establish an inability to pay debts. The petition debt must be the debt to which that return refers. Therefore, the petition debt is overstated but this could be amended and, therefore, would not justify refusal of a bankruptcy order. No material confusion or prejudice has resulted.

37. I need not address the agreement dated 10 May 2016 relied upon, if necessary, by Islandsbanki HF. I add that the delay before the return and Mr Robbins' witness statement were provided raises potential issues over accuracy and reliability. However, the evidence has not been challenged by cross-examination and must be accepted on its face.

38. It is the fact that the Writ of Control was invalid and that fact alone which caused me to decide to refuse a bankruptcy order upon the petition of Islandsbanki HF subject to considering whether to substitute HMRC as creditor.

G) HMRC Petition – Grounds of Opposition

G1) Threats and Extortion

39. Mr Burkitt's skeleton argument for this hearing submits that HMRC's petition should be dismissed because:

> *"HMRC officers threatened bankruptcy proceedings or a bankruptcy order (and its chilling effect on that litigation and/or [Mr Stanford's] negotiations to settle it) to extort payment from [Mr Stanford]"*.

40. There is no doubt the court may and most probably would exercise its discretion to refuse to make a bankruptcy order on a petition presented or pursued for an inequitable purpose whether applying ***section 266(3) of the Act*** and/or the court's inherent jurisdiction. Extortion is an obvious example when the court will take that route subject to the interests of the creditors as a whole and, for example, any application for substitution. However, as with the pleading of fraud, this is an allegation which should only be made if it can be properly particularised. As courts have stressed on many cases, the more serious the allegation of misconduct, the greater the need for sustainable particulars.

41. This is an extremely serious allegation which could have far-reaching and damaging consequences if wrongly made with the result that it should be subject to rigorous scrutiny. If, as here, the submission is to be made purely on paper and without cross-examination, there must be clear documentary evidence to support the submission. It

is to be remembered that this is a submission made in open court with the names of those whom it is alleged committed this misfeasance identified.

42. A starting point on the documentary evidence before me is the service upon Mr Stanford of a statutory demand on 17 March 2017 at Gatwick Airport. The location is surprising but has not been a cause for complaint before me. I do not understand the communications leading to that event to be criticised either but they should not be. It is apparent that by July 2016 HMRC was expecting *"immediate payment or credible proposals that include a substantial upfront payment and clearance of the debt with a payment profile over a few months"* (HMRC 20/07/16 email – p.492). Mr Stanford needed third party lending pending resolution of his complicated litigation with Kaupthing ehf (e-mail 1/11/16 – p.498) and could not make an acceptable offer (e-mails 18 and 19/08/16 – pp. 484, 496).

43. It was in that context that Mr Stanford made an allegation in correspondence of HMRC being oppressive, threatening and jeopardising ongoing negotiations with Kaupthing ehf(e-mail 1/11/16 – p.498). On the evidence before me that was unfounded and correctly not pursued before me. It probably reflects the tension he must have felt between his difficulties resolving the Luxembourg litigation to pay HMRC and their existing entitlement to payment of a debt due and owing. The reality is that his allegations may have reflected the financial pressure he was under but they did not reflect the true position concerning his discussions and negotiations with HMRC.

44. By 22 March 2017 it was being represented that a settlement agreement with Kaupthing ehf would take no more than 4 weeks now that the issuing draft proceedings had brought them to the table (22/03/17 email – p.507 – an email containing comments of thanks and appreciation).

45. Mr Burkitt relied heavily on an HMRC email sent 3 April 2017 (p.515). His submissions of criticism view that email in isolation and are inappropriate. In this letter HMRC state: they require full settlement quickly; they can but will not present a petition after a further week has expired (reflecting the expiry of 21 days after service of the statutory demand); identify the key issue to be how quickly a settlement with Kaupthing ehf can be achieved to enable payment of the debt in full, whilst observing that HMRC will not just let time go by; explain the offer of security (which I note was for significantly less than the amount of the debt) is unattractive in particular because payment is needed quickly after all the time that has expired to date; state that the short, further time being given will enable Mr Stanford to obtain the payment up front from Kaupthing ehf to which his adviser or agent referred in the 22 March 2017 email (p.507).

46. This is not to be construed as HMRC insisting that Mr Stanford should request a payment to them from Kaupthing ehf and thereby interfere with the negotiations. The contents of the email reflect and respond to what was represented to them by Mr Stanford as to his expectation of receipt of funds from Kaupthing ehf to enable payment to HMRC.

47. In May 2017 Mr Stanford was again representing his aim to achieve a settlement with Kaupthing ehf on terms allowing repayment of HMRC's debt in full (p.525). By the end of May those negotiations were apparently progressing well (31/5/17 email -

p.529). However, negotiations with a mediator stalled by mid-June (14/6/17 email – p.535). By July HMRC was apparently reiterating its desire for crystallisation and Mr Stanford needed forbearance to enable him to settle the debt in the short term (email 14/7/17 – p.537). HMRC observed, however, that the debt had been on the books awaiting settlement as promised without any reduction for about a year (15/7/17 email – p.539).

48. Mr Burkitt's submissions then criticised an HMRC email sent on 18 July (p.542) which complains about Mr Stanford seeking to extend time when he should have paid the debt within the time already given to him to enable settlement with Kaupthing ehf. There is no cause for that criticism. The position was made clear at the end of the email where it states that additional lines of funding should be found if settlement was more than 2/3 weeks away.

49. The offer of £1.5million security over Mr Stanford's house was repeated and rejected (emails 24/7/17 – p.547, 548). An email of 31 July 2017 referred to some success in BVI litigation and estimated settlement with Kaupthing ehf within 6 weeks (p.550). HMRC wanted a clear time line (email 31 July – p.552) and payment earlier than 31 August as Mr Stanford had proposed (emails 1/8/17 – pp 553, 554).

50. On 7 August an email proposed payment of £1.5 million through a third party, £1million on 21 August, the balance 14 days later and a further £500,000 to be raised (p.577). HMRC's response was that the legal team had been instructed to file a petition (7/8/17 – p.578).

51. Mr Burkitt's submissions next criticised correspondence requiring payment of £10,661,456.24 not the £7 million (the subject of HMRC's petition) when the balance between those sums was not due and could not be relied upon in a bankruptcy petition (email 11/8/17 – p.595). A problem with his criticism is that it ignores the fact that the statement refers to Mr Stanford having assured HMRC that they will receive full payment of the whole debt. HMRC was responding to that assurance.

52. Even if that reference was an error, and I cannot conclude it was from the documentation, there is no evidence on which to base the submission of intended extortion.

53. Furthermore, the submission entirely ignores the substance of the email. Namely, that HMRC will not start bankruptcy proceedings if payments on account offered by Mr Stanton and as listed in the email are made. Bankruptcy proceedings will start if any of those payments are missed. I repeat, those are payments proposed by Mr Stanton. There was no extortion. It is correct that Mr Stanford raised issue with HMRC's understanding that the whole debt is due in reply (11/8/17 – p.597) but the points above stand.

54. Mr Burkitt sought to equate this HMRC email with the decision of ***Re A Debtor [No 883 of 1927]*** [1928] 1 Ch.199 in which the Court of Appeal laid down the clear distaste for the petitioners' improper conduct as identified. On the first petition they had demanded payment of solicitor and client costs of related actions against other parties for which the debtor had no liability or responsibility as the price of dismissal. The Court of Appeal described this as extortion when dismissing a second petition

presented to recover the agreed sum including those costs which had not been paid. That does not equate with this case.

55. In my judgment Mr Burkitt has no basis from which to submit extortion and should not have done so. This decision takes account of HMRC's email in reply (11/8/17 – p.600). It is wrong to suggest that this correspondence establishes evidence proving that HMRC was using the threat of bankruptcy to get more than they were legally entitled, as Mr Burkitt submitted.

56. By email 18 August 2017 (p.605) Mr Stanford's funders had withdrawn their offers to lend and he could not make an interim payment. He returned to proposing payment of HMRC's debt by 31 October 2017 on the basis that he could commit to settling with Kaupthing ehf. A petition was presented on 22 August. By 31 August 2017 Kaupthing ehf had apparently decided not to continue negotiations because of the HMRC statutory demand (p.616).

57. No further correspondence is criticised until an HMRC email dated 18 January 2018 (p.629). Mr Burkitt submitted that HMRC's requirement of payment of 50% of the petition debt by 23 January 2018 for there to be an adjournment of the petition was contrary to legal principle and an abuse of process justifying dismissal of the petition.

58. There is a fundamental principle that the process of bankruptcy should not be abused. Within the wide boundaries of that principle lies the discretion to dismiss a petition if it is being used as an individual debt collecting exercise rather than as a class remedy. However, HMRC's requirement comes nowhere near this arena.

59. Mr Burkitt, as I understood him, also relied upon ***section 284 of the Act***. As previously mentioned, it will have the effect that any such payment (being a payment after presentation) will be void if a bankruptcy order is subsequently made subject to prior consent or subsequent ratification by the court. Consent is most unlikely to be given for payments to the petitioning creditor because it would result in one creditor obtaining advantage over others contrary to the *pari passu* principle of distribution to be applied to this class remedy. However, that is no basis for dismissing this petition because HMRC asked for a part payment of the petition debt before being willing to agree an adjournment.

60. Mr Burkitt also relied upon the decision of the Court of Appeal in ***Re Otway*** [1895] 1 Q.B.812. The facts may not appear to be entirely clear from the report but if there is doubt, they are apparent from the reference to ***In re Atkinson, Ex parte Atkinson*** 9 Morr. 193. The facts involved a fraud. The fraud being to require a new payment as the price for an adjournment not as part payment of the petition debt. This is obviously not such a case.

61. The conclusion to be drawn from the matters above is that the allegations of extortion and abuse of process ought not to have been made. I reach that decision for the reasons set out above but make clear that I have also taken account the evidence within Mr Stanford's witness statement commenting upon the negotiations. I accept the submission of Mr Joseph for HMRC when he succinctly said (as I noted): There was nothing for which the officers concerned could be criticised they having acted pursuant to their duty to recover sums properly due.

G2) Loss of Mr Stanford's Main Asset

62. Mr Burkitt submitted that HMRC's petition should be dismissed because bankruptcy will deprive Mr Stanford of the one asset which will enable him to pay his creditors. Namely, his claim against Kaupthing ehf (see, for example, paragraph 6 of Mr Stanford's 29 March 2018 witness statement). This was not raised in opposition to the petition of Islandsbanki HF but it must equally apply and I do not think I can reach an adverse conclusion from that omission.

63. If the submission was correct, the court would have a discretion to dismiss a petition in those circumstances notwithstanding an undisputed debt. A reason being that it would be contrary to the interests of the creditors and potentially unfair and unjust to the debtor insofar as the asset is worth more than the debts. The jurisdiction can be found within ***section 266(3) of the Act*** and/or is inherent. It is a jurisdiction identified and applied within ***Re Otway*** (above) as a separate holding to the one previously considered.

64. The court when exercising that jurisdiction will have in mind whether any other assets will be available in any event. If not, the court might, in exceptional circumstances, exercise its general discretion to decline to make a bankruptcy order or a winding up order on the basis that the order would serve no useful purpose. However, a debtor faces a heavy burden in persuading the court not to make an order on that basis and it is not raised here (see ***In re Maud (No.2)***, [2018] EWHC 1414 (Ch), [2019] Ch. 15, Mr Justice Snowden at [46]).

65. Mr Burkitt's first submission is that a bankruptcy will prevent the prosecution of his case in the Kaupthing ehf, Luxembourg litigation or at least make it considerably more difficult. Mr Stanford explains that litigation within his statement dated 29 March 2018. Whilst I have read all he says, I need only provide a summary for this judgment of the following facts and matters stated by Mr Stanford:

    a) Mr Stanford borrowed over £460 million from Kaupthing ehf to build a portfolio of shares in well-known retailers (largely of fashion) worth more than the debt.

    b) A dispute with Kaupthing ehf resulted in a settlement Deed of Undertaking made 13 March 2009. As part of the agreement Mr Stanford acknowledged that Kaupthing ehf held the portfolio as security and (in round terms but to be developed below) under clause 2.2(b) would set off its value against his debt.

    c) On 21 July 2011 Kaupthing ehf started proceedings in Luxembourg for a debt of over £250 million but failed to give credit for the portfolio and sought appropriation for costs and interest of an *"unexplained payment"* of over £22 million made on 3 March 2009. His portfolio included shares Mulberry Group plc worth over £300 million at the time.

    d) Nothing appeared to have happened with the portfolio. However, in August 2012 it was discovered that Mulberry shares had been sold without disclosure

some 10 days before the settlement Deed of Undertaking. This was the source of the *"unexplained payment"*.

e) Mr Stanford responded to Kaupthing ehf's claim by asserting that the Deed of Undertaking should be set aside on various grounds including fraud. Opinions from eminent Leading Counsel had been obtained supporting the conclusion that this case has merit.

f) On 8 February 2017 Mr Stanford rejected an offer of settlement *"stated to be worth £56,343,190 to me"*. He was *"advised by my Luxembourg lawyers and believe that my defence and counterclaim have excellent prospects of success and that I am highly likely to recover (at least) what is left of my portfolio, i.e. the Mulberry shares (currently worth £109,681,929.76) and the £11.6 million in cash from the sale of my House of Fraser shares"*.

66. Mr Burkitt's submissions were restricted by the fact that there is no evidence to establish that the Luxembourg proceedings could not be pursued by a trustee in bankruptcy. There is no evidence concerning future funding of the proceedings by Mr Stanford and no explanation (if one exists) as to why such funding would not be available during bankruptcy. Mr Stanford would presumably assist the trustee and in any event would be under a statutory duty to do so (***section 333 of the Act***).

67. A suggestion in evidence that Mr Stanford was no longer taking an active part in the proceedings was met by Mr Burkitt's instructions that Mr Stanford was in the process of instructing new Luxembourg lawyers and that funding difficulties might be resolved by a conditional fee arrangement. Assuming that is correct, there was no evidence or anything said upon instructions to the effect that the new arrangements could not be made or be used by a trustee.

68. Subject to one submission considered below, there is no evidence that bankruptcy will deprive Mr Stanford's estate of the chose(s) in action which he identifies as the only asset which will enable him to pay his acknowledged creditors. Bankruptcy will result in the chose(s) in action vesting in his trustee (that is not in dispute) and the trustee can act in the interests of creditors when deciding whether to continue the defence and counterclaim, whether to settle and, if so, the amount to be agreed. Indeed, Mr Stanford's decision to refuse an offer worth more than £56 million illustrates that point. He may or may not have been right to reach that decision but any such decision by an insolvent person should be made in the interests of the creditors. They come first. The person to make that commercial assessment objectively will be a trustee in bankruptcy.

69. Mr Burkitt objected to such an outcome because the trustee may decide to sell the chose(s) in action to Kaupthing ehf or a connected person or associate. That is no ground for objection. It will be for the trustee to decide whether such a sale would be in the best interests of the creditors having taken account of all other relevant options and any expert advice required. If the trustee in the course of duty decides that is the most appropriate route, it will be because it is the route considered most beneficial for the creditors in all the circumstances of the insolvency.

70. Mr Burkitt's alternative course was to submit that clause 2.2(b) of the Deed of Undertaking will result in the shares being valued at the date of bankruptcy. At this

date that would be only some £54.6 million and, therefore, the potential future value of the shares will be lost.

71. That submission runs immediately into the fundamental problem that Mr Stanford's case, the case upon which he needs to succeed in the Luxembourg proceedings, is that the Deed of Undertaking should be set aside. If so, clause 2.2(b) will not apply.

72. Mr Burkitt submitted that this decision should be made on the premise that the litigation advanced by Mr Stanford might fail and the Deed of Undertaking still bind his estate. If so, clause 2.2(b) will have the damaging effect he identified. Whilst that is inherently unattractive in the light of the opinions on merits apparently obtained and the size of Kaupthing ehf's secured debt, it has some logic.

73. I approach clause 2.2(b) with caution because I am only being asked to consider it within the context of this submission. My construction in that limited context is that there is an argument that the clause requires the acknowledged debt to be reduced as at 13 March 2009. The reduction will reflect the reasonable value of the shares pledged to Kaupthing ehf (as agreed or valued). The deduction will also include any value subsequently realised by Kaupthing ehf or member of its group on sale or disposal. That deduction will take place at the date of realisation. Realisation will occur upon a sale or disposal *"outwith the Kaupthing Group and/or any earlier occurring event in relation to [Mr Stanford] the result of which causes Kaupthing to value any or all of the Pledged Assets appropriated"*.

74. The words *"any earlier occurring event in relation to [Mr Stanford] the result of which causes Kaupthing to value any or all of the Pledged Assets appropriated"* give rise to the possibility that they might apply should Kaupthing ehf value the pledged shares at the date of a bankruptcy order to prove as an unsecured creditor within a bankruptcy for the balance between its debt of over £460 million and the value of the shares as at that date. I cannot and should not go further than identify this as a possibility and I assume for current purposes only that it is so.

75. What that would mean is that Mr Stanford is asking the court to avoid that date on the basis that the value of the share portfolio will increase between now and the date Kaupthing ehf duly succeeds in its claim, which he is currently defending and counterclaiming against on the basis that the Deed of Undertaking will be set aside.

76. That request appears open-ended leaving conduct of the litigation in the hands of Mr Stanford not a trustee in the meantime. Inevitably, there is no evidence to establish that the shares will increase and not decline in value. It is a request based on an assessment of merits contrary to the opinions apparently received by Mr Stanford from Leading Counsel and Luxembourg lawyers. It is not a proper basis for the exercise of the court's discretion to dismiss the petition.

77. The outcome would also be contrary to the views of supporting creditors. Ignoring for these purposes Kaupthing ehf, Mr Stanford's creditors want a trustee to take control of the assets of his estate available for bankruptcy. This submission must fail.

G3) Loss of Mr Stanford's Main Asset

78. Mr Burkitt's final submission, as contained in his skeleton argument for the 22 February hearing, is that HMRC's petition should be dismissed because:

> *"HMRC's refusal to await (a) the outcome of the Luxembourg proceedings for payment in full (and accept payments and security in the meantime) and/or (b) the dismissal of the Islandsbanki and Shineclear petitions for payment in full were not the reactions of a hypothetical reasonable creditor"*.

79. This submission as presented by Mr Burkitt relies upon ***section 271(3) of the Act*** which requires an offer to secure or compound the petition debt, the acceptance of which offer would have required the petition to be dismissed. The offer must have been unreasonably refused. Mr Burkitt refers me to the decision of ***HMRC v Garwood*** [2012] BPIR 575 for guidance upon the application of that provision.

80. Insofar as the submission relies upon an offer to pay in full from the possible, future fruits of a successful outcome of the Kaupthing ehf Luxembourg litigation, this is not an offer to secure or compound. Even if it was, it cannot seriously be contended that it was an offer unreasonable to refuse. The future of the litigation is unknown in so many senses and it is certainly not unreasonable to take the view that the litigation should be under the control and decision making of a trustee. It is also an offer which takes no account of the other creditors or of their ability to obtain a bankruptcy order in the meantime.

81. The reference in the skeleton argument to a failure to accept payments and security in the meantime falls away when the correspondence between Mr Stanford and HMRC is considered, as summarised above. HMRC was acting as a reasonable creditor when deciding that the security and payments offered were insufficient. Nothing new has appeared.

82. At best this is an offer to support a request for an adjournment on the basis that payment in full will be received in a reasonable time. It cannot be presented as such because payment is uncertain and in any event will not be within a reasonable time.

83. The real point made and the submission upon which Mr Burkitt concentrated under this ground of opposition concerns dismissal of the other two petitions. Mr Stanford relies upon a conditional loan agreement between himself and Mr Jitendra Virwani purportedly executed on 2 August 2018 but with a flying signature page (although I will assume it is properly executed). The agreement will take effect once the bankruptcy petitions of Islandsbanki HF and Shineclear Holdings Limited are dismissed. Should that occur, Mr Virwani is to lend £8 million to be used by Mr Stanford to pay HMRC after he sends a draw down notice to him. The loan is to be repaid in full together with interest accrued at 12% annually by 1 August 2021.

84. Other terms to mention include: An event of default will occur and the loan with accrued interest will become immediately due and payable if (amongst other circumstances) Mr Stanford becomes insolvent or admits in writing his inability to pay his debts as they mature or any bankruptcy proceeding or debt arrangement is instituted by or against Mr Stanford (clause 7). The agreement is governed by

Luxembourg law (clause 17). Claims or disputes not resolved by good faith negotiations will be finally settled by arbitration (clause 17).

85. This is not an offer to secure or compound. It is an offer to pay from third party funds in the future should the conditional agreement become unconditional. As such it also does not fall within ***section 271(3) of the Act*** or within the category of an offer to pay in full within a reasonable time for which an adjournment might be sought.

86. In any event and taking account of the wide discretion under ***section 266(3) of the Act*** and/or the court's inherent jurisdiction, there are still fundamental problems for this proposal. First it ignores Mr Stanford's other creditors (again excluding Kaupthing ehf from this category). This applies to the supporting creditors and any others. It also applies to Islandsbanki HF. Whilst it cannot petition in reliance upon the purported execution in 2017, it is an undisputed creditor. Similarly, Shineclear Holdings Limited. Its debt is not in dispute.

87. Second, Mr Stanton's insolvency is at odds with clause 7 of the loan agreement. He will commit a default and the loan will become immediately due and payable as soon as he draws down any part of it. He is insolvent. It is also very difficult to see how he can accept an obligation to repay the loan and interest by 1 August 2021. There is no evidence from which to conclude the Luxembourg litigation will be resolved by that date.

88. Third, it is not in issue that it will take some time before the petition of Shineclear Holdings Limited is resolved. It is not possible to establish that Mr Stanford's grounds of opposition are likely to succeed. In the meantime, he will be in control (with or without funding and continuing representation) of his major asset, the chose(s) in action before the Luxembourg court not a trustee in bankruptcy. It is perfectly reasonable for a creditor to view this was unacceptable and to want a trustee in bankruptcy to have control of the litigation in the interests of Mr Stanford's creditors. That is the view of the other creditors as implied from their support for a bankruptcy order.

89. It is also not unreasonable to anticipate that substitution will be sought if the opposition to Shineclear Holdings Limited's petition succeeds and/or that another bankruptcy petition will have been presented in the meantime preventing the agreement becoming unconditional whether upon its express terms or in practical effect. I have in mind the supporting creditors and Islandsbanki HF.

90. Further, there is no binding obligation between HMRC and Mr Stanford and/or Mr Virwani. Mr Virwani does not have to send a draw down notice. Mr Virwani does not have to lend to Mr Stanford if he remains insolvent and unable to repay the loan as required. HMRC cannot enforce payment to itself. The unexplained inclusion of a Luxembourg governing law clause and the broad arbitration clause appear to put significant potential obstacles in place should there be a claim or dispute concerning enforcement by Mr Stanford to achieve payment to HMRC.

91. For all or any of those reasons, in my judgment this ground of opposition has no merit.

H) Decision

92. In the circumstances of my decision that Islandsbanki HF was not able to rely upon the purported execution of its judgment debt, it was right to substitute HMRC as a creditor whom it was accepted without issue was able to present a petition at the date of presentation of Islandsbanki HF's petition. HMRC is identified as a supporting creditor on the list before me but it would be right if necessary in any event to waive the requirement of delivery of a notice of intention to appear in the circumstances of HMRC's existing petition and the procedure to date.

93. The requirements of Rule 10.27 of the Rules were met. I decided HMRC's petition should stand as the amended form of the Islandsbanki HF petition. There was no point in requiring actual amendment, verification or re-service. There was no point in adjourning the petition. The papers were in order and these are main proceedings. HMRC asked for a bankruptcy order and one was made in the exercise of the court's discretion at 15.39.

Order Accordingly