

Neutral Citation [2020] EWHC 15 (Ch)

Claim No: BR-2013-005623

Appeal No: CH-2019-000193

**IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
APPEALS (ChD)**

**On appeal from the orders of Insolvency and Companies Court Judge Barber dated 17
January and 28 June 2019**

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

Date: 17 January 2020

Before:

THE HONOURABLE MR JUSTICE MARCUS SMITH

**IN THE MATTER OF RODERICK JOHN LYNCH
AND IN THE MATTER OF THE INSOLVENCY ACT 1986
AND IN THE MATTER OF AN APPEAL**

INSPIRATION FINANCE LIMITED

Appellant

- and -

(1) ALEX CADWALLADER

(in his capacity as trustee in bankruptcy of Roderick John
Lynch)

(2) RODERICK JOHN LYNCH

Respondents

Mr Christopher Boardman (instructed by **Charles Russell Speechlys LLP**) for the **Appellant**

The First Respondent's solicitor was present in court but made no representations

Mr Sajjad Nabi (instructed by **DWFM Beckman**) for the **Second Respondent**

Hearing date: 4 December 2019

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.

Mr Justice Marcus Smith:

Mr Roberick Lynch and Ruskin

1. Mr Roderick Lynch, the Second Respondent in this appeal, was the sole director and shareholder of a private-hire transport company known as Ruskin Private Hire Limited (“Ruskin”¹). Ruskin was incorporated in 2002 and carried on business as the provider of specialist accessible vehicles for the disabled under contract to the NHS and local authorities.
2. Ruskin and/or Mr Lynch personally obtained finance from (amongst others) the Appellant, Inspiration Finance Limited, then Inspiration Finance plc (“Inspiration”) and Aldermore Invoice Finance, a division of Aldermore Bank plc (“Aldermore”).

Administration and bankruptcy

3. In February 2014, Ruskin was placed into administration by an out-of-court appointment effected by Aldermore. On 12 March 2015, a bankruptcy order was made against Mr Lynch on a petition originally presented by HMRC but made subject to a change of carriage order in favour of Aldermore. On 19 March 2015, Mr Alex Cadwallader, the First Respondent and hereafter the “Trustee”, was appointed Mr Lynch’s trustee in bankruptcy.

The Inspiration Proceedings

4. On 23 June 2015, some three months after Mr Lynch was made bankrupt, Inspiration issued possession proceedings against Mr Lynch pursuant to a legal charge (the “Charge”) executed by Mr Lynch in favour of Inspiration over his home, 51 Lawrie Park Avenue (the “Property”). These proceedings (the “Proceedings”) were issued only against Mr Lynch in the County Court at Lambeth and sought possession of the Property as well as a money judgment in respect of monies said to be due from Mr Lynch to Inspiration. Although Inspiration knew of Mr Lynch’s bankruptcy, neither the Official Receiver nor the Trustee were named in these proceedings.
5. Inspiration initially obtained judgment in default of a defence against Mr Lynch in the Proceedings. That judgment was set aside, after an appeal hearing, by order of His Honour Judge Hand (sitting at the County Court in Central London, to which the Proceedings appear to have been transferred). Thereafter, Inspiration amended its Particulars of Claim and Mr Lynch pleaded a full defence (and a counterclaim) to Inspiration’s claims.
6. At this point, Inspiration applied to strike out Mr Lynch’s defence and counterclaim on grounds that Mr Lynch did not – as a bankrupt – have standing to defend the claim that Inspiration had itself brought against Mr Lynch. This application came before His Honour Judge Gerald, at a hearing on 23 November 2017. The order made by His

¹ The Annex to this Judgment lists the terms and abbreviations defined in this Judgment, together with the paragraph in which those terms are first used.

Honour Judge Gerald (the “Gerald Order”) recorded in its recitals the following two points:

- “(1) One of the reasons for the directions ordered below is to give the [Trustee] the opportunity fully and properly to consider whether he wishes to contest the enforceability of the [Charge] or the amount allegedly secured thereby and, if so, whether he wishes to become a party to these proceedings or whether he considers that the matters should be determined in another forum;
- (2) [Inspiration] will not seek judgment personally against [Mr Lynch] for the monetary sum claimed by it in [the Proceedings].”

7. In light of these recitals, the following orders were made:

- (1) Mr Lynch’s defence and counterclaim was struck out.² However, Mr Lynch remained a party to the proceedings.³
- (2) The Proceedings were adjourned to 16 February 2018 before His Honour Judge Gerald for further directions alternatively disposal of the Proceedings.⁴
- (3) Inspiration was directed to serve a witness statement and documents relevant to the Proceedings on the Trustee.⁵
- (4) The Trustee was encouraged to state his position regarding the Proceedings by 4:00pm on 22 December 2017.⁶
- (5) Provision was made for applications by Inspiration, Mr Lynch and/or the Trustee to be heard on 16 February 2018.⁷

8. His Honour Judge Gerald did not enter judgment against Mr Lynch, but instead adjourned the proceedings to a hearing on 16 February 2018 for further directions or disposal.

The Trustee’s decision not to oppose Inspiration’s claim

9. By a letter dated 19 January 2018, the Trustee confirmed that he had decided not to adopt Mr Lynch’s pleading or otherwise to oppose Inspiration’s claim. The Trustee’s reasoning in this regard was set out in greater detail in Mr Cadwallader’s statement.⁸

Mr Lynch’s application under section 303 of the Insolvency Act 1986

10. At this point, Mr Lynch made an application under section 303 of the Insolvency Act 1986. That application was dated 13 February 2018. By this application, Mr Lynch

² Paragraph 1 of the Gerald Order.

³ There is no express order to that effect, but this is clear from paragraphs 3, 7 and 8 of the Gerald Order.

⁴ Paragraph 2 of the Gerald Order.

⁵ Paragraph 3 of the Gerald Order.

⁶ Paragraph 4 of the Gerald Order.

⁷ Paragraphs 5 to 7 of the Gerald Order.

⁸ See the statement of Mr Cadwallader dated 13 February 2018 at paragraphs 22ff.

sought a direction from the court that the Trustee re-visit his decision of 19 January 2018 and contest the Proceedings.

11. Section 303 provides (so far as material):

“General control of trustee by the court

- (1) If a bankrupt or any of his creditors or any other person is dissatisfied by any act, omission or decision of a trustee of the bankrupt’s estate, he may apply to the court; and on such an application the court may confirm, reverse or modify any act or decision of the trustee, may give him directions or may make such other order as it thinks fit.
- (2) The trustee of a bankrupt’s estate may apply to the court for directions in relation to any particular matter arising under the bankruptcy.”

The Trustee’s application under section 313 of the Insolvency Act 1986

12. At about the same time, the Trustee applied for a charge over the Property pursuant to section 313 of the Insolvency Act 1986. Section 313 provides:

“Charge on bankrupt’s home

- (1) Where any property consisting of an interest in a dwelling house which is occupied by the bankrupt or by his spouse or former spouse or by his civil partner or former civil partner is comprised in the bankrupt’s estate and the trustee is, for any reason, unable for the time being to realise that property, the trustee may apply to the court for an order imposing a charge on the property for the benefit of the bankrupt’s estate.
- (2) If on an application under this section the court imposes a charge on any property, the benefit of that charge shall be comprised in the bankrupt’s estate and is enforceable, up to the charged value from time to time, for the payment of any amount which is payable otherwise than to the bankrupt out of the estate and of interest on that amount at the prescribed rate.”

Proceedings before Judge Barber

The First Barber Order

13. Both applications – that is, Mr Lynch’s application under section 303 and the Trustee’s application under section 313 – came before Insolvency and Companies Court Judge Barber on 17 January 2019. Judge Barber made an order on that date (the “First Barber Order”). The First Barber Order provided:

“UPON the application of [Mr Lynch] dated 13 February 2018 for relief pursuant to section 303 of the Insolvency Act 1986 (the “Section 303 Application”)

AND UPON the application of [the Trustee] dated 14 February 2018 for relief pursuant to section 313 of the Insolvency Act 1986 (the “Section 313 Application”)

AND UPON this Court by section 363 of the Insolvency Act 1986 having full power to decide all questions of priorities and all other questions, whether of law or of fact, arising in this bankruptcy

AND IT APPEARING to this Court to be necessary and desirable for the proper administration of this estate that the issue (as defined in paragraph 3 below) be the subject of an *inter partes* determination

...

AND OF THE COURT'S OWN MOTION

IT IS ORDERED THAT

1. The claim commenced by [Inspiration] in the [Proceedings] be and is hereby transferred to the High Court pursuant to section 41 of the County Courts Act 1984 and stayed until further order.
2. [The Trustee] shall by 4:00pm on 21 January 2019 issue a *pro forma* application (the "Section 363 Application"), joining Mr Lynch and Inspiration as respondents thereto, seeking pursuant to sections 303(2) and 363 of the Insolvency Act 1986, determination of the issue (as defined below in paragraph 3) together with such attendant issues, inquiries, directions and other relief as the court shall think fit and shall serve that application by 4:00pm on 22 January 2019.
3. The following issue shall be tried: whether, on a true construction of (a) a loan agreement dated 7 October 2011 made between Mr Lynch, Inspiration and [Ruskin] (the "Loan Agreement") and (b) [the Charge] and/or in the events which have occurred, the two advances of £100,000 made by Inspiration to or for the benefit of [Ruskin] on or about 27 June 2011 and 26 August 2011 respectively:
 - (1) Were loans by Inspiration made to Mr Lynch personally;
 - (2) Were loans by Inspiration to Mr Lynch made personally pursuant to the terms of the Loan Agreement;
 - (3) Were loans secured by the [Charge].
4. The following directions shall apply in the Section 363 Application for the purposes of determining the issue:
 - (1) Inspiration shall be treated as the Claimant and Mr Lynch shall be treated as the Defendant (hereafter together referred to as the "Parties" and, for the avoidance of doubt, the onus of proof on the issue shall be borne by Inspiration;

...

 - (4) Save as otherwise directed, the Trustee shall abide by the event of the trial of the issue;

...

 - (6) The Parties shall give standard disclosure by list by 4:00pm on 25 April 2019;

...

 - (9) The trial shall be listed on the first available date after 18 July 2019 with a time estimate of four days. All makers of witness statements shall attend trial for

cross-examination, failing which their evidence shall not be read without the permission of the court;

...

- (12) The Trustee is at liberty to file and serve a witness statement and/or a skeleton argument so as to update the court on any relevant matter.
- 5. The Section 313 Application is adjourned pending determination of the Section 363 Application.
- 6. The costs of the Section 303 Application are reserved to the judge hearing the Section 363 Application.
- 7. The Parties and the Trustee are each at liberty to apply to ICC Judge Barber for further directions on not less than three business days' notice to the other parties. All further directions and case management decisions in relation to either or both of (a) the Section 363 Application and (b) the stayed [Proceedings] transferred to this court by paragraph 1 of this Order are reserved to ICC Judge Barber.
- 8. The Trustee shall serve a sealed copy of this Order on the Parties."

Section 363 of the Insolvency Act 1986

- 14. Sections 303 and 313, which are referred to in the First Barber Order, have already been set out. Section 363 of the Insolvency Act 1986, which is also referred to in the First Barber Order, provides as follows:

"General control of court

- (1) Every bankruptcy is under the general control of the court and, subject to the provisions in this Group of Parts, the court has full power to decide all questions of priorities and all other questions, whether of law or fact, arising in any bankruptcy.
- (2) Without prejudice to any other provision in this Group of Parts, an undischarged bankrupt or a discharged bankrupt whose estate is still being administered under Chapter IV of this Part shall do all such things as he may be directed to do by the court for the purposes of his bankruptcy or, as the case may be, the administration of that estate.
- (3) The official receiver or the trustee of a bankrupt's estate may at any time apply to the court for a direction under subsection (2).
- (4) If any person without reasonable excuse fails to comply with any obligation imposed on him by subsection (2), he is guilty of a contempt of court and liable to be punished accordingly (in addition to any other punishment to which he may be subject)."

Inspiration's application to set aside the First Barber Order; and the making of the Second Barber Order

- 15. Inspiration was not before the court on this occasion, even though it was subject to various directions made by Judge Barber in the First Barber Order. Inspiration applied to have the First Barber Order set aside. That application came before Judge Barber on 28 June 2019. By an order of that date (the "Second Barber Order"), the Judge ordered

that the terms of the First Barber Order stand (paragraph 1),⁹ save to the extent varied by the Second Barber Order. Essentially, the directions for the trial of the issue were varied by new directions contained in paragraph 2 of the Second Barber Order:

“The directions in paragraph 4 of the [First Barber] Order shall be replaced with the following directions in the Section 363 Application for the purpose of determining the issue:

- (1) Inspiration shall file and serve its witness statements of fact by 4:00pm on 26 July 2019.
- (2) Mr Lynch shall file and serve his witness statements of fact by 4:00pm on 23 August 2019.
- (3) Inspiration and the Trustee shall file and serve any witness statements in reply by 4:00pm on 20 September 2019.
- (4) Inspiration and Mr Lynch are permitted to reply on expert handwriting evidence from a single joint expert on the issue of whether the letter of acknowledgement dated 12 October 2011 bears the genuine signature of Mr Lynch.
- ...
- (5) The trial shall be listed before an Insolvency and Companies Court Judge other than Judge Barber, on the first available date after 8 November 2019 with a time estimate of 4 days.

...”

Section 285 of the Insolvency Act 1986

16. In the course of argument on 28 June 2019, Judge Barber made clear that the basis – or, at least, one possible basis, for staying the Proceedings – was section 285 of the Insolvency Act 1986.¹⁰ This section provides:

“Restriction on proceedings and remedies

- (1) At any time when proceedings on a bankruptcy application are ongoing or proceedings on a bankruptcy petition are pending or an individual has been made bankrupt the court may stay any action, execution or other legal process against the property or person of the debtor or, as the case may be, of the bankrupt.
- (2) Any court in which proceedings are pending against any individual may, on proof that a bankruptcy application has been made or a bankruptcy petition has been presented in respect of that individual or that he is an undischarged bankrupt, either stay the proceedings or allow them to continue on such terms as it thinks fit.
- (3) After the making of a bankruptcy order no person who is a creditor of the bankrupt in respect of a debt provable in the bankruptcy shall –

⁹ See paragraph 1 of the Second Barber Order.

¹⁰ This is clear from an exchange between counsel for Inspiration and Judge Barber on 28 June 2019. See page 4 of the transcript of the proceedings on that date.

- (a) have any remedy against the property or person of the bankrupt in respect of that debt, or
- (b) before the discharge of the bankrupt, commence any action or other legal proceedings against the bankrupt except with the leave of the court and on such terms as the court may impose.

This is subject to section 346 (enforcement procedures) and 347 (limited right to distress).

- (4) Subject as follows, subsection (3) does not affect the right of a secured creditor of the bankrupt to enforce his security.
- (5) Where any goods of an undischarged bankrupt are held by any person by way of pledge, pawn or other security, the official receiver may, after giving notice in writing of his intention to do so, inspect the goods. Where such a notice has been given to any person, that person is not entitled, without leave of the court, to realise his security unless he has given the trustee of the bankrupt's estate a reasonable opportunity of inspecting the goods and of exercising the bankrupt's right of redemption.
- (6) References in this section to the property or goods of the bankrupt are to any of his property or goods, whether or not comprised in his estate."

Inspiration's appeal

- 17. Inspiration sought permission to appeal the First Barber Order and the Second Barber Order. Inspiration's principal contention was that, in staying the Proceedings and effectively transferring their substance into the Insolvency and Companies Court as a dispute between Mr Lynch and Inspiration (with the Trustee taking a neutral role), as opposed to allowing the Proceedings to continue in the County Court as a dispute between Inspiration and the Trustee (should he choose to defend those proceedings), the Judge had erred in law and had failed to have regard to the fundamental principles governing the conduct of a bankruptcy.¹¹
- 18. In the alternative, Inspiration contended that, even if there was no error of law in the making of the First Barber Order and the Second Barber Order, Judge Barber had wrongly exercised her discretion in making these Orders.¹²
- 19. By his order dated 3 November 2019, Fancourt J gave Inspiration permission to appeal on all grounds. The appeal was heard before me on 4 December 2019.
- 20. In order to determine the appeal, it is necessary to set out some bankruptcy fundamentals, before considering Inspiration's contentions regarding the First Barber Order and the Second Barber Order.

¹¹ See paragraph 3 of the grounds of appeal. It seems to me that paragraphs 1 and 2 of the grounds of appeal – which refer to the First Barber Order and the Second Barber Order being “wrongly” made – cannot be separated from paragraph 3.

¹² See paragraph 4 of the grounds of appeal.

Bankruptcy fundamentals

21. This appeal concerns the rule that a bankrupt's property vests in his or her trustee in bankruptcy, and the implications of that rule.

The basic rule: vesting of the bankrupt's property in the trustee

22. Section 306 of the Insolvency Act 1986 provides for the vesting of the bankrupt's estate in his or her trustee in bankruptcy:

"Vesting of bankrupt's estate in trustee

- (1) The bankrupt's estate shall vest in the trustee immediately on his appointment taking effect or, in the case of the official receiver, on his becoming trustee.
 - (2) Where any property which is, or is to be, comprised in the bankrupt's estate vests in the trustee (whether under this section or under any other provision of this Part), it shall so vest without any conveyance, assignment or transfer."
23. The composition of a bankrupt's estate is determined by reference to the provisions of section 283 and related sections of the Insolvency Act 1986. By section 283(1)(a), it comprises all property belonging to or vested in the bankrupt at the commencement of the bankruptcy. The bankruptcy commences on the day the bankruptcy order is made.
24. Thus, the Property – or, more specifically, Mr Lynch's interest in the Property – vested in the Trustee on 19 March 2015.

The bankrupt's protection from suit

25. A corollary of the vesting of the bankrupt's estate in the trustee in bankruptcy is that the bankrupt has protection from his or her creditors in relation to debts that are provable in the bankruptcy. This protection is conferred by section 285(3) of the Insolvency Act 1986,¹³ and it obliges creditors of the bankrupt to prove in the bankruptcy.

The bankrupt's loss of interest in the bankrupt's estate

26. Once vested in the trustee in bankruptcy, a bankrupt has no interest or standing to prosecute or defend claims regarding that property. This is the inevitable consequence of the vesting of the bankrupt's estate in the trustee. The law in this regard was set out very fully by Hoffmann LJ in *Heath v. Tang*:¹⁴
- (1) Hoffmann LJ noted that the combined effect of sections 306 and 285(3) of the Insolvency Act 1986 were that "the bankrupt ceases to have an interest in either his assets or his liabilities except in so far as there may be a surplus to be returned to him upon his discharge".¹⁵

¹³ Set out in paragraph 16 above.

¹⁴ [1993] 1 WLR 1421 at 1422ff.

¹⁵ At 1422.

- (2) Because the bankrupt's estate includes things in action¹⁶ (which, obviously, include but are not limited to causes of action), the bankrupt's ability to commence proceedings is limited, albeit not entirely excluded:¹⁷

"The property which vests in the trustee includes "things in action"...Despite the breadth of this definition, there are certain causes of action personal to the bankrupt which do not vest in his trustee. These include cases in which "the damages are to be estimated by immediate reference to pain felt by the bankrupt in respect of his body, mind or character, and without immediate reference to his rights of property": see *Backham v. Dale*, (1849) 2 HL Cas 579, 604 *per* Erle J and *Wilson v. United Counties Bank Limited*, [1920] AC 102. Actions for defamation and assault are obvious examples. The bankruptcy does not affect his ability to litigate such claims. But all other causes of action which were vested in the bankrupt at the commencement of the bankruptcy, whether for liquidated sums or unliquidated damages, vest in his trustee. The bankrupt cannot commence any proceedings based upon such a cause of action and if the proceedings have already been commenced, he ceases to have sufficient interest in them."

- (3) Equally, the bankrupt's role as a defendant to proceedings is circumscribed:¹⁸

"In cases in which the bankrupt is defendant, there is of course usually no question of the cause of action having vested in the trustee. Unless the defence is set-off¹⁹...the bankrupt will not be asserting by way of defence any cause of action of his own. But in cases in which the plaintiff is claiming an interest in some property of the bankrupt, that property will have vested in the trustee. And in claims for debt or damages, the only assets out of which the claim can be satisfied will have likewise vested. It will, therefore, be equally true to say that the bankrupt has no interest in the proceedings. As we have seen, section 285(3) deprives the plaintiff of any remedy against the bankrupt's person or property and confines him to his right to prove.

On the other hand, there are actions seeking relief such as injunctions against the bankrupt personally which do not directly concern his estate. They can still be maintained against the bankrupt himself and he is entitled to defend them and, if the judgment is adverse, to appeal."

27. Where a bankrupt has no standing to prosecute or defend a claim, it follows that he or she has no standing to appeal any order made in proceedings commenced by or against the trustee.²⁰

The purpose of the insolvency regime and the protection of the bankrupt

28. Hoffmann LJ explained the purpose of the (then) new insolvency regime introduced by the Insolvency Act 1986 in the following terms:²¹

¹⁶ Section 436 of the Insolvency Act 1986.

¹⁷ At 1423.

¹⁸ At 1424-1425.

¹⁹ Which will involve a claim that will vest in the trustee and so cannot permissibly be pleaded by the bankrupt: see Hoffmann LJ at 1426.

²⁰ See *Rochfort v. Battersby*, (1849) 2 HL Cas 388, cited with approval by Hoffmann LJ at 1425.

²¹ *Heath v. Tang* at 1427.

“The insolvency law has, of course, changed a great deal since the time of Lord Eldon and *In re Smith (A Bankrupt)*, *Ex parte Braintree District Council*, [1990] 2 AC 215 is authority for taking a fresh look at the construction of the Insolvency Act 1986 in modern conditions. Nevertheless, the principle that the bankrupt is divested of an interest in his property and liability for his debts remains fundamental in the new code. The consequences for the bankrupt’s right to litigate do not seem to us inconvenient or productive of injustice. The bankruptcy court acts as a screen which both prevents the bankrupt’s substance from being wasted in hopeless appeals and protects creditors from vexatious challenges to their claims.”

29. Of course, the existence of this “screen” between the bankrupt and the bankrupt’s creditors does not deprive the bankrupt of all protection. The bankrupt has, under section 303(1) of the Insolvency Act 1986,²² the power to apply to court, as Hoffmann LJ noted in *Heath v. Tang*:²³

“The rule that the bankrupt could not sue on a cause of action vested in his trustee was enforced with such rigour that he could not even bring proceedings claiming that the intended defendant and the trustee were colluding to stifle a claim due to the estate and which, if recovered, would produce a surplus. But in any case in which he was aggrieved by the trustee’s refusal to prosecute a claim he could apply to the judge having jurisdiction in bankruptcy to conduct the proceedings in the name of the trustee. The jurisdiction of the bankruptcy judge to give such directions is now conferred by statute. Section 303(1) of the Insolvency Act 1986 says:

“If a bankrupt or any of his creditors or any other person is dissatisfied by any act, omission or decision of a trustee of the bankrupt’s estate, he may apply to the court; and on such an application the court may confirm, reverse or modify any act or decision of the trustee, may give him directions or may make such other order as it thinks fit.”

But the jurisdiction goes back many years...”

The trustee in bankruptcy takes subject to “equities”

30. In *The Law of Insolvency*, Professor Fletcher says:²⁴

“The trustees’s acquisition of title to the property of the bankrupt is subject to an important qualification. This is to the effect that the trustee is essentially a *successor* to such title as the bankrupt actually had at the time of his adjudication, including any limitations or imperfections in that title, and can enjoy no better position in relation to the property than did the bankrupt himself formerly. It is customary to allude to this qualification of the trustee’s title by means of the expression that the trustee takes “subject to equities”. This expression accords naturally with the former practice, historically, of treating and indeed describing the trustee in bankruptcy as an “assignee” of the bankrupt’s property, for it is a well-known rule in the law of assignment that an assignee takes subject to equities. One consequence of the application of this principle to bankruptcy is that the trustee, as we have seen, is in general amenable to actions for specific performance to enforce contracts affecting his property which the bankrupt had previously concluded. The scope of these rights of action available against the trustee includes the enforcement of security arrangements, such as mortgages of or charges upon property, and the exercise of any right of set-off or reimbursement arising from previous transactions concerning the property, and the enforcement of any restrictive covenant into which the

²² Set out in paragraph 11 above.

²³ At 1423.

²⁴ Fletcher, *The Law of Insolvency*, 5th ed (2017) at paragraph 8-048.

bankrupt may have entered, such as a covenant not to assign a lease without the landlord's consent."

31. Thus, a trustee will take subject to the proprietary interest of a third party, including a legal or equitable charge.²⁵ In this case, the Charge over the Property will continue to encumber the estate passing, by way of statutory assignment, from Mr Lynch to the Trustee, and there is nothing in the Insolvency Act 1986 to prevent the holder of such a charge – here, Inspiration – from enforcing it. In the similar context of corporate insolvency, Jessel MR said this in *Lloyd v. David Lloyd & Co*:²⁶

"The real question is on what terms leave ought to be given to a mortgagee to proceed with or commence an action against a company for realising his security when the company is being wound up, either compulsorily or under a supervision order.

Now, as a rule, a mortgagee has a right to realise his security, and of course, as incidental to that, a right to bring an action for foreclosure. Those who say that he should be restrained from bringing or proceeding with such an action must either show some special ground for restraining him, or must say, "We can offer the mortgagee all he is entitled to, foreclosure or sale, as the case may be, at once without any proceeding in the action." That, of course, would be a reason for refusing leave to proceed with an action if commenced, or for not giving leave to commence a threatened action. But short of that, it appears to be that the court ought not under the 87th section of the Act²⁷ to interfere with the rights of a mortgagee.

In the present case there are no special circumstances whatever which make it inequitable for the mortgagee to prosecute his action, and no terms, either reasonable or unreasonable, are suggested on the part of the official liquidator for putting an end to it."

Inspiration's first ground of appeal: error of law

32. I turn, then, to Inspiration's first ground of appeal, which is that the First Barber Order and the Second Barber Order were made in disregard of basic principles of insolvency law and that, as a matter of law, the orders were wrong and should not have been made.
33. I consider that Inspiration's first ground of appeal to be well-founded, and that the course taken by the Judge was, as a matter of law, wrong in principle. I set out my reasons for this conclusion in the following paragraphs.
34. It is worth bearing in mind that the application by Mr Lynch before the Judge was made under section 303 of the Insolvency Act 1986 for an order directing the Trustee to contest the Proceedings.²⁸ In the event, the Judge never considered the substance of the Section 303 Application, but proceeded directly to propose to the parties the alternative

²⁵ See, for instance, *Lloyd v. David Lloyd & Co*, (1877) 6 Ch 339; *Re Wallis*, [1902] 1 KB 719.

²⁶ (1877) 6 Ch 339 at 343-344. See, also, to similar effect, *James and Cotton LJ*.

²⁷ This is a reference to section 87 of the Companies Act 1862, which provides:

"When an Order has been made for the winding up of a Company under this Act, no Suit, Action, or other Proceeding shall be proceeded with or commenced against the Company except with the Leave of the Court, and subject to such Terms as the Court may impose."

The similarities with section 285 of the Insolvency Act 1986 (set out in paragraph 16 above) are obvious.

²⁸ See paragraph 10 above.

course that came to be embodied in the First Barber Order and which the Judge described as the Section 363 Application:²⁹

“...And I see where the battle lines have been drawn, which is really the scope of section 303 and the question whether the perversity threshold has been reached. But what I wanted to explore with both of you, really, is the bigger picture, leaving aside any hostilities, but what seems to me to be a fundamental issue at the heart of this, which is as matters stand the existence and status of the debt claimed by Inspiration is not going to be subject of any *inter partes* based examination.”

35. With great respect to the Judge, this is to put the cart before the horse. There would only be no *inter partes* examination if Mr Lynch’s section 303 application failed. Were the application to have succeeded, then the Trustee would have taken such points as he considered advisable in the defence of the Proceedings, and there would have been an *inter partes* examination of Inspiration’s claims in the Proceedings. As it was, the Judge failed to consider the merits or the substance of the Section 303 Application. Instead, she directed the Trustee to make the Section 363 Application.³⁰
36. I do not consider, for the reasons that I will articulate, that this alternative course of action was actually open to Judge, but (even if it was) I consider that that alternative course of the Section 363 Application should not have been determined upon without:
- (1) An articulated reason as to why the Section 303 Application should not be allowed. It seems to me that – even if the Judge was right in considering that there was an alternative course to directing the Trustee to defend the Proceedings, it was necessary to articulate why that course was to be preferred. In short, if the Judge was right in considering that there were two routes by way of which the issues raised by Mr Lynch in the Proceedings could be resolved (namely, the Section 303 Application and the Section 363 Application), it was incumbent upon her to articulate why one course was to be preferred over the other.
 - (2) Ensuring that Inspiration was heard. Inspiration was a party to the Proceedings and – absent exceptional circumstances obliging the Judge to interfere in those Proceedings without notice to all the parties – Inspiration should have been heard prior to the making of the First Barber Order. (I accept that this deficiency was ameliorated, in that Inspiration was heard on the next occasion the matter was before the Judge, on the making of the Second Barber Order.)
37. These are, however, actually irrelevant procedural issues, because the course determined upon by the Judge was one that was not, in law, open to her. The Section 363 Application, as the Judge called it, involved:
- (1) Penetrating the “screen” that the Insolvency Act 1986 places between the bankrupt and the bankrupt’s creditors.³¹

²⁹ The transcript of the hearing on 17 January 2019 at page 2.

³⁰ See paragraph 2 of the First Barber Order, set out in paragraph 13 above. It is in any event slightly odd to compel the Trustee to make an application for directions to the court.

³¹ As described by Hoffmann LJ in paragraph 28 above.

- (2) Risking the bankrupt's substance being frittered away in litigation uncontrolled by the Trustee.³² The process envisaged by the Judge involved the issues in the Proceedings being litigated not only in a different forum – namely, the Insolvency and Companies Court – but with the involvement of the bankrupt, rather than the trustee in the litigation. It is quite clear from paragraph 4(1) of the First Barber Order³³ that the Judge envisaged the litigation in the Insolvency and Companies Court arising between Inspiration and Mr Lynch, with the Trustee playing a minimal role.
- (3) Circumventing or ignoring the proper route for ensuring the bankrupt's protection created by section 303 of the Insolvency Act 1986.

In short, the Section 363 Application drives a coach and horses through the regime created by the Insolvency Act 1986, and it would be surprising if jurisdiction to make the First Barber Order existed.

38. The Judge found the statutory basis for the jurisdiction she invoked to be sections 303 and 363 of the Insolvency Act 1986, which are set out in paragraphs 11 and 14 above. In her judgment of 28 June 2019 (the “Judgment”) – which resulted in the Second Barber Order – the Judge explained the course she took as follows:

“42. Having considered the matter with counsel at the hearing of Mr Lynch's section 303 application on 17 January 2019, I concluded that it was necessary and desirable for the proper administration of the estate that key aspects of the dispute between Inspiration and Mr Lynch (later defined as the “Issue”) be the subject of a full determination by this court.

43. Accordingly, I ordered that the Inspiration claim be transferred to the High Court (pursuant to section 41 of the County Courts Act 1984) and stayed. I further ordered the Trustee to issue an application pursuant to section 303(2) and section 363 of the Insolvency Act 1986 (the “Section 363 Application”³⁴), joining both Mr Lynch and Inspiration as respondents, for determination of the [Issue]...”

39. Thus, the Judge appears to have required the Trustee to do what he had otherwise not contemplated doing, namely to issue an application for directions under section 303(2)³⁵ and/or section 363(3) of the Insolvency Act 1986.³⁶ The directions that the Judge required the Trustee to seek were, essentially, for the court to determine the Issue, as the Judge defined that. The effect of the First Barber Order was to transfer the substance of the Proceedings in the County Court (which were stayed) from the County Court to the Insolvency and Companies Court in the High Court. The jurisdiction basis for enabling the Insolvency and Companies Court to determine the Issue was section 363(1), which provides that “[e]very bankruptcy is under the general control of the court and...the court has full power to decide all questions of priorities and all other questions, whether of law or fact, arising in any bankruptcy.”

³² See paragraph 28 above.

³³ Set out in paragraph 13 above.

³⁴ This term is also a defined term in the First Barber Order: see paragraph 13 above.

³⁵ That section is set out in paragraph 11 above.

³⁶ That section is set out in paragraph 14 above.

40. I do not consider that these provisions confer any such jurisdiction:

- (1) In *Revenue and Customs Commissioners v. Ariel*,³⁷ Mann J considered the extent to which section 303(2) could displace other procedural regimes:³⁸

“...In my view there is nothing in the wording of, or purpose behind, section 303(2) which requires such a displacement. The section itself is intended to allow “General control of trustee by the court”, but that must be in relation to matters within the bankruptcy itself and cannot be taken to allow the court to modify the rights of others who have acquired those rights entirely independently of the bankruptcy. Thus, if a trustee commits an act of trespass, whether in relation to land or goods, for which he is liable in damages, section 303(2) would not empower the trustee to apply for an order exonerating him from paying damages. As trustee, he is subject to the general law, and section 303 does not empower the court to disapply it. Its essential purpose is principally to allow those interested in the bankruptcy (including the trustee) to bring bankruptcy related matters before the court so that the court can make appropriate orders to take the bankruptcy forward...”

Mann J reached a similar conclusion in relation to section 363(1) of the Insolvency Act 1986.

- (2) I do not consider that the Proceedings can properly be said to arise in or under the bankruptcy within either section 303 or section 363. The fact is that Inspiration, like any chargeholder, is asserting proprietary rights against what was once the bankrupt’s (Mr Lynch’s) property, which now vests in the Trustee, and which the Trustee takes subject to. The proper forum for the assertion of such rights – which, as we have seen,³⁹ are vindicated outside the insolvency – is the County Court, and the Judge erred in interfering with that jurisdiction.

41. I accept that the Proceedings commenced by Inspiration were irregular in a number of respects, and that these irregularities may have obscured the position:

- (1) Although the Proceedings were commenced after the bankruptcy order was made against Mr Lynch, the Trustee was not made a party to the Proceedings, as he should have been. If Inspiration seeks possession of the Property pursuant to the Charge, then the Trustee must be made a party. It will, of course, be up to the Trustee (subject to the court’s supervision) to determine what role he plays, but Inspiration was obliged to ensure that the Trustee was bound by the outcome.
- (2) That does not mean to say that it was wrong to name Mr Lynch as a defendant to the Proceedings. Given that Mr Lynch is in possession of the Property, it was entirely appropriate to ensure that Mr Lynch was bound by any order for possession of the Property that the court were to make.⁴⁰ What was unequivocally wrong on Inspiration’s part was to seek to recover the debt said to have been

³⁷ [2016] EWHC 1674 (Ch).

³⁸ At [53]. Emphasis added.

³⁹ See paragraphs 30 to 31 above.

⁴⁰ This is an example of the need for an order against the bankrupt personally: see paragraph 26(3) above.

owed by Mr Lynch to Inspiration.⁴¹ Recovery of the debt said to be owed by Mr Lynch to Inspiration is unequivocally a matter for the bankruptcy (and Mr Lynch is entitled to protection from such claims),⁴² whereas the vindication of Inspiration's proprietary claims is not, for the reasons I have given.

These irregularities were, however, entirely appropriately resolved by His Honour Judge Gerald in the Gerald Order. Judge Gerald, quite rightly, ensured that the personal claim against Mr Lynch for a money judgment in the Proceedings was not pursued,⁴³ but that Mr Lynch otherwise remained a party.⁴⁴ He also took steps to bring the Trustee before the court, and sought to require the Trustee to make his position clear – which the Trustee did.⁴⁵ In these circumstances, there was no warrant for Judge Barber to interfere in the Proceedings in the County Court in the manner that she did and in doing so, the Judge erred as a matter of law.

42. It follows that the First Barber Order and the Second Barber Order must be set aside and other directions given. Before considering what those directions might be, it is appropriate that I deal with a number of other points arising out of the Judgment:

- (1) The Judge obviously considered that there were merits to Mr Lynch's defence of the Proceedings. That much is obvious from [4]ff of the Judgment. I am in no position to consider the merits: and, to be clear, I do not do so. The fact is that the merits of Mr Lynch's defence was a key issue in the Section 303 Application before the Judge on 17 January 2019, which the Judge failed to determine. The Judge should have considered whether the merits were such that the Trustee should be directed to defend the Proceedings pursuant to section 303 of the Insolvency Act 1986.
- (2) The Judge considered that the fact that Inspiration's claim in the Proceedings was contested by Mr Lynch rendered the Proceedings a matter for the insolvency jurisdiction. In the Judgment, the Judge said this:

“54. Mr Boardman, on behalf of Inspiration, submits that this court's power under section 363 is limited to deciding “all questions of priorities and all other questions whether of law or fact arising in any bankruptcy”. He submits that this power is directed (and here I quote from his skeleton argument) to “matters within the bankruptcy itself” and “cannot be taken the allow the court to modify the rights of others who have acquired rights independently of the bankruptcy: *Revenue and Customs Commissioners v. Ariel*...at [53]”.

55. With respect, this is what may colloquially be determined a “bootstraps” argument. The key question here is whether Inspiration have actually acquired any “rights independently of the bankruptcy”, as Mr Boardman put it. There is a serious issue to be tried as to whether Inspiration is, in fact, a secured creditor...In my judgment, this is a matter which may properly be determined “in

⁴¹ As I have described in paragraph 4 above, the Proceedings sought both possession of the Property and a money judgment against Mr Lynch.

⁴² See paragraph 25 above.

⁴³ See the second recital in the Gerald Order, set out in paragraph 6 above.

⁴⁴ See paragraph 7(1) above.

⁴⁵ See the first recital in the Gerald Order, set out in paragraph 6 above, and paragraphs 7(3), 7(4) and 9 above.

the bankruptcy”. Given the sums claimed by Inspiration and the value of the bankrupt estate overall, the question whether Inspiration is a secured creditor...has a material impact on the creditors as a whole. It is an issue which must be properly scrutinised and cannot be allowed to go by default, on an uncontested basis, however much Inspiration might prefer that.”

I consider that the Judge again fell into error in these passages, and that Mr Boardman’s submissions were well made:

- (a) It bears repeating that the question of whether the Proceedings were to be contested or uncontested was the very issue before the Judge in the form of the Section 303 Application. I cannot judge the merits of that application, but if the Judge was right, and the merits were as one-sided as she suggests in the Judgment, and Inspiration’s claims so material to the position of the unsecured creditors in the bankruptcy, then it may well be that Mr Lynch’s Section 303 Application should have been acceded to, and the Trustee required to defend the Proceedings.
- (b) Whilst I am perfectly prepared to accept that it is arguable (even well-arguable) that Inspiration was not a secured creditor, that does not mean to say that the existence of a dispute as to a secured creditor’s proprietary claim renders that dispute, *ipso facto*, a matter arising in the bankruptcy. It is simply a *non sequitur* to suggest that a dispute as to a creditor’s preferred status renders a possession claim unfit for the County Court and fit only for the Insolvency and Companies Court. As Jessel MR made clear in *Lloyd v. David Lloyd & Co*,⁴⁶ where there is an undisputed right to realise security pursuant to a charge or mortgage, the courts will not be troubled at all. The Trustee will simply accede to the creditor’s demands. It is the fact of a dispute regarding the creditor’s preferred status that will cause the courts to become involved. But that does not mean to say that the court that would ordinarily deal with such a question should be deprived of jurisdiction simply because the party giving the charge has subsequently been made bankrupt.
- (3) The Judge relied upon the decision of the Court of Appeal in *Nationwide Building Society v. Purvis*⁴⁷ as in some way qualifying the decision in *Heath v. Tang* considered in paragraphs 26ff above.⁴⁸ I do not consider that *Purvis* in any way qualifies *Heath v. Tang* – even if it could, given that both are decisions of the Court of Appeal. *Purvis* concerned a possession order irregularly made against two bankrupts. The Court of Appeal caused that order to be set aside on grounds of that irregularity. The decision says literally nothing about the sort of points the bankrupts would have been entitled to deploy in the event of regularly constituted proceedings, and there is nothing in the decision to qualify or undermine Hoffmann LJ’s analysis in *Heath v. Tang*. Indeed, *Heath v. Tang* was not even cited in the judgments of Morritt and Waller LJ in *Purvis*.

⁴⁶ See paragraph 31 above.

⁴⁷ [1998] BPIR 625.

⁴⁸ Judgment at [60].

- (4) The Judge relied upon the terms of the Gerald Order in support of the orders she made. Specifically, she relied upon His Honour Judge Gerald's reference to matters being determined "in another forum"⁴⁹ – which the Judge considered to be a reference to the Insolvency and Companies Court. It is not clear to me what Judge Gerald was referring to, but even if he was referring to the Insolvency and Companies Court that cannot of itself confer jurisdiction where none exists.

43. For the reasons I have given, Inspiration's first ground of appeal succeeds.

Inspiration's second ground of appeal: wrong exercise of discretion

44. In light of the conclusion that I have reached, it is unnecessary to consider this second ground of appeal in any great detail. Indeed, given the conclusions that I have reached on the law, it is difficult, if not impossible, to see how the Judge could properly have exercised any discretion she might have had in the way that she did.
45. In paragraph 36 above I identified two procedural concerns that I had in relation to the course taken by the Judge. The second of those concerns – making orders in a matter in respect of which Inspiration had an interest without Inspiration being before the court – was addressed by hearing Inspiration subsequently. However, the failure properly to dispose of the Section 303 Application was a serious one. I consider that even if the Judge was right in her legal analysis and I am wrong, it was incumbent upon the Judge to articulate why the Section 363 Application should prevail over the Section 303 Application. For that reason, also, I would have set aside the First Barber Order and the Second Barber Order.

Disposition

46. It follows that the appeal must be allowed, and the First Barber Order and the Second Barber Order be set aside. I will invite the parties to seek to agree an order enabling these proceedings – and specifically the Proceedings – to continue as expeditiously as is possible. Without in any way seeking to draft appropriate consequential orders, it seems to me that:
- (1) Provision needs to be made transferring the Proceedings back to the County Court for determination.
 - (2) Provision needs to be made to enable Mr Lynch to make his application under section 303 of the Insolvency Act 1986, which was before the Judge, but not – or at least not properly – determined by her.
 - (3) Provision needs to be made to enable the Trustee to re-consider his stance regarding the Proceedings. I say this not in any way to suggest that his decision not to defend the Proceedings was ill-advised, but merely to enable further consideration, if appropriate.
47. It follows that there should be no movement in the Proceedings until the Trustee has made his position clear and Mr Lynch's section 303 application has been disposed of.

⁴⁹ See the first recital in the Gerald Order, set out in paragraph 6 above.

However, I would consider it most unsatisfactory for any delay in the Proceedings to be more than 28 days. It seems to me that if Mr Lynch were minded to pursue his section 303 application, that application should be expedited and I would be prepared to make an order to that effect.

ANNEX

TERMS AND ABBREVIATIONS USED IN THE JUDGMENT

(footnote 1 of the Judgment)

TERM/ABBREVIATION	FIRST REFERENCE IN JUDGMENT
Aldermore	Paragraph 2
Charge	Paragraph 4
First Barber Order	Paragraph 13
Gerald Order	Paragraph 6
Inspiration	Paragraph 2
Issue	Paragraph 38 (in quotation)
Judgment	Paragraph 38
Proceedings	Paragraph 4
Property	Paragraph 4
Ruskin	Paragraph 1
Second Barber Order	Paragraph 15
Section 303 Application	Paragraph 13 (in quotation)
Section 313 Application	Paragraph 13 (in quotation)
Section 363 Application	Paragraph 13 (in quotation)
Trustee	Paragraph 3