IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

[2014] EWHC 4496 (Ch) Case No: CH/2014/0132

Court No. 11

7 Rolls Building
Fetter Lane
London
EC4A 1NL

Wednesday, 17th December 2014

Before:
THE HONOURABLE MR MR JUSTICE NUGEE

B E T W E E N:

KEVIN MUNDAY and CAROLYN MUNDAY

and

MR HILBURN and MR FIELDS

Transcript from a recording by Ubiqus
61 Southwark Street, London SE1 0HL
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MR D LIGHTMAN appeared on behalf of the Appellants
MR A SOLOMON appeared on behalf of the Respondents

JUDGMENT
(Approved)

MR JUSTICE NUGEE:

Introduction

1. This is an appeal from an order of His Honour Judge Dight sitting at the Central London County Court made on 10 February 2014 (and as drawn up dated 12 February 2014) by which he struck out the claimants' claim and ordered them to pay the defendants' costs of the action and an interim payment of £20,000.

2. The claim had been brought by Mr Kevin Munday and his wife, Mrs Carolyn Munday, and was a claim for damages for fraudulent misrepresentations, together with various alternative claims for financial relief. The basis on which His Honour Judge Dight struck out the claim was, briefly, that Mr Munday had been made bankrupt in 2011 and his claims had vested in his trustee in bankruptcy. It was, therefore, an abuse of process for him to pursue them in this action.

3. The claimants appeal relying, among other things, on the fact that on 29 January 2014 Mr Munday's bankruptcy was annulled and, therefore, there is no abuse of process. Permission to appeal was given by Peter Smith J on 11 April 2014.

Facts

4. Mr and Mrs Munday had bought a house at 265 Malden Road, New Malden, Surrey in 2002 as a family home. I can take, conveniently, a statement of the other pertinent facts from a judgment given by Mr Recorder Chapman QC on 27 February 2014 in related proceedings in which the current defendants sought possession of the property from the current claimants. He said this at paragraph [2]:

> '2. The defendants [that is Mr and Mrs Munday] were the owners and occupiers of the house subject to various mortgages. They fell into arrears on their mortgages which they were unable to pay and by 2009 the first mortgagee was threatening to take possession of the property and sell it.

> 3. Mr Fields and Mr Hilburn were in partnership together in a firm called Fast Track Homebuyers. Their business involved offering homeowners a sale and rent back scheme under which the homeowner would sell their house to Fast Track for a price well below market value but raising enough money to pay off their debts on terms that they were granted an assured shorthold tenancy and an option to buy back the property at a price which gave Fast Track a profit on the deal.
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> 4. The scheme was attractive to distressed homeowners because it held out the prospect of being able to pay off their debts while remaining in their home. Mr and Mrs Munday were introduced to Mr Hilburn and had a meeting with him on 6 October 2009. He offered them a sale and rent back scheme. On 24 November 2009 they entered into such a scheme with Mr Hilburn but there is a dispute between the parties which I have to resolve as to the exact terms of the scheme.'

He then proceeded to resolve that dispute and at paragraph [8] said:

> '8. I find that the transaction took place on 24 November 2009 and was as summarised by the defendants' own solicitors in a letter before claim dated 24 February 2012. First, the Mundays transferred the property to Mr Hilburn for a consideration of £193,000. Second, Mr Hilburn granted the Mundays an assured shorthold tenancy in the property for a term of two years at a monthly rent of £1,250 and by agreement Mr Hilburn deducted from the purchase price the sum of £30,000 amounting to two years' rent in advance.
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> 9. Thirdly, Mr Hilburn granted the Mundays an option to purchase the property on 24 November 2011 at a price of £249,000 plus a sum to compensate Mr Hilburn for any expenditure on the property during the option period.'

Going ahead to paragraph [13], he said:

> '13. After completion of the transaction the parties purported to amend the transaction by executing a replacement option agreement dated 1 December 2009. However, this seems to have been just a draft document with many blanks and I am doubtful whether it was certain enough to be valid. For example, it did not specify when the option was to be exercised.
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> 14. However, the option agreements of 24 November and 1 December 2009 both contain the following material clauses. One, that the option was not exercisable if the Mundays were in material breach of their tenancy. Two, that the option should not be registered against the title of the property and, three, that Mr Hilburn would not sell or otherwise dispose of the property to a third party without requiring the third party to enter into an identical option agreement with the Mundays.'

At paragraph [16] he said:

> '16. In November 2010, Mr Hilburn sold and transferred the property to Mr Fields as part of a scheme to refinance the transaction. In breach of the option agreement, Mr Hilburn failed to require Mr Fields to enter into an option agreement with Mr and Mrs Munday. The existence of the assured shorthold tenancy and option agreement were concealed from the new mortgagees, no doubt to facilitate grant of a new mortgage. However, Mr Fields accepts in these proceedings that he is bound by the assured shorthold tenancy and by the option agreement.
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> 17. Mr Hilburn said in evidence that he did not get Mr Fields to execute an option agreement with the Mundays because he did not regard Mr Fields as being a third party. Mr Fields said in his evidence that he did not notify his lender of the tenancy and option agreement by mistake. I must say that I regard both those explanations as disingenuous. Mr Solomon sought to mount an argument that on a true construction of the option agreement Mr Hilburn did not have to procure execution of the option agreement by Mr Fields before completion of the sale of the property but I do not accept that argument.
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> 18. It seems to me that on a true construction of the option agreement it must have been an obligation to procure execution of a new option agreement before completing the transaction because the execution of an option agreement could not be enforced after completion. In any event, Mr Fields has not executed an option agreement with the Mundays though he accepts that he is bound by the existing one.
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> 19. By a notice dated 2 June 2011 the Mundays purported to exercise the option agreement of 24 November 2009 but there are no proceedings to enforce the option agreement and no reliance is placed on the notice of 2 June 2011 or on rights under the option agreement in these proceedings. No doubt the Mundays are not in a financial position to be able to exercise or to complete any option to repurchase the property.
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> 20. It is common ground that the Mundays have paid no rent since 24 November 2011 other than payment of £1,250 on 3 July 2012. On 28 December 2011, Mr Fields offered the Mundays a new assured shorthold tenancy but they did not take up the offer. On 15 May 2012, Mr Fields served on the Mundays notice under Section 21 of the Housing Act 1988 requiring possession after 23 July 2012 or at the end of a tenancy period next after the end of two months of service of the notice. It is not disputed in these proceedings that the notice was *prima facie* valid if, as I have found, the parties were bound by the two-year assured shorthold tenancy.'

I need not read any more of that judgment. He went on to find that there was no defence to

the claim to possession and ordered the Mundays to give possession and, indeed, possession, I understand, was taken.

5. To that account I need to add the following. On 15 February 2011 Mr Munday was made bankrupt. At some stage, I do not think I am told the exact date, the official receiver became the trustee in bankruptcy, no doubt under Section 295(4) of the Insolvency Act 1986 which provides that:

> 'As from the giving of notice under subsection (3) in a case in which no notice has been given under section 293(2), the official receiver shall be trustee of the bankrupt's estate.'

On 15 February 2012, Mr Munday was discharged from that bankruptcy. On 28 August 2012, which was, in fact, the same day as the initial hearing in the possession proceedings, the Mundays issued the claim form in these proceedings, initially in the Chancery Division of the High Court. The particulars of claim followed. I do not think I have the precise date. As originally issued, they sought, among other things, rescission and various claims to damages and other financial relief. However, pursuant to permission given on 7 June 2013 by Her Honour Judge Guggenheim, the particulars of claim were amended. The claim to rescission was dropped and the primary relief claimed was now damages for fraud, although there were various other claims for financial relief joined, such as damages for breach of fiduciary duty or breach of trust or breach of contract against the first defendant, who I should say is Mr Hilburn, and claims in dishonest assistance or knowing receipt and various other heads against the second defendant who is Mr Fields.

6. On 18 July 2013, the defence was amended. That included at paragraph 2. a plea referring to Mr Munday's bankruptcy as follows:

> 'It is understood that the First Claimant was declared bankrupt on 15 February 2011. The events underlying the claims took place prior to the bankruptcy, and all such claims therefore vest in the Trustee in Bankruptcy and not the First Claimant. No assertion to the contrary has been made by the First Claimant notwithstanding requests for the same

> from the Defendants. The following is without prejudice to the contention that the First Claimant may not bring these claims.'

A reply was served on 16 August 2013. So far as that plea of bankruptcy is concerned, the only plea in reply was paragraph 3. which was to this effect:

> 'As to paragraph 2, the first Claimant denies that he is not able to bring this claim. Whilst it is admitted that he was declared bankrupt on 15 February 2011, the full facts, legal character and modus operandi of the fraud upon which the present cause of action is found was not known to the first Claimant during the 12 month period in which the first Claimant was an un-discharged bankrupt.'

7. This application to strike out was issued by the defendants on 5 December 2013. On 11 December 2013 the claimants responded by Mr Munday applying to annul his bankruptcy. On 29 January 2014 an order was made in the Kingston-upon-Thames County Court duly annulling his bankruptcy on the grounds that the bankruptcy debts and expenses had been paid in full. That was the position on 10 February 2014 when the matter came before His Honour Judge Dight.

Judgment of His Honour Judge Dight

8. In paragraph [11] of his judgment, His Honour Judge Dight said:

> 'It seems to me as a matter of law that on the making of the bankruptcy order in 2011 and the appointment of the official receiver the causes of action upon which the first claimant relies vested in the official receiver. Having regard to the decision of the Court of Appeal in *Heath v Tang* [1993] 1 WLR 1421 and in particular the judgment of Hoffman LJ, as he then was, I have come to the conclusion that the first claimant had no locus to commence the current proceedings. The question is, therefore, as rightly identified by counsel whether the effects of the annulment order of 29 January operate so as to put him back in a position where the causes of action were always vested in him so that he can carry on with these proceedings or whether they are fatally flawed by the fact of him not having a cause of action at the time the proceedings were commenced and whether the proceedings are an abuse of the process.'

Having identified that, he said at paragraph [16] that:

> 'The starting point is that the bankrupt's estate, which included these

> causes of action, was vested in the official receiver. No specific appointment was made by the Court annulling the bankruptcy order and, therefore, the default provisions apply, namely the bankrupt's estate "reverts to the bankrupt." No terms of the reversion were "directed" by the Court. The question then is what the word "revert" means in the context.'

Then he gives his views on that which he summarises at the end of paragraph [16] as 'The effect of the reversion is simply to assign to the bankrupt the causes of action some considerable time after the proceedings were commenced.' Then he turns to the question of abuse of process at paragraph [20]. He cites from paragraph [15] of the judgment of Mann J (who gave the only reasoned judgment in the Court of Appeal) in *Pickthall v Hill Dickinson* LLP [2009] EWCA 543. In paragraph [21] he says this:

> 'Although the Court of Appeal found that there was relevant knowledge in that case, it seems to me that the essence of the decision of the learned judge was the absence of a cause of action. As he says in paragraph 22 of his judgment, "the claimant is the wrong person to assert the cause of action," before adding, "and knows that he is."'

In paragraph [22] he continues:

> 'In my judgment in the present case there is insufficient evidence to show that the first claimant did not have the relevant knowledge. In any event, it seems to me that there can be no doubt that he had no cause of action at the relevant time and did not acquire the cause of action until after the annulment was pronounced by the Court. I would, therefore, categorise the proceedings as an abuse of process and strike them out.'

He then deals with certain authorities on the effect of annulment and at the end of that he said they did not help him in construing the section. At paragraph [28] he concludes:

> '28. For those reasons, I have come to the conclusion that the first claimant did not have during the course of these proceedings a right to take proceedings based on the pleaded causes of action. I am not satisfied on the evidence that he did not know the relevant facts. In all those circumstances, I come to the conclusion that this does amount to an abuse of process and the claim should be struck out.
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> 29. So far as the second claimant is concerned, the position of the defendant in the application notice is that the second claimant's claim should be stayed pending the joining of the official receiver. The basis of that submission is that the causes of action are jointly owned and both

> owners must be claimants to enable the claims to be litigated. Now that the official receiver no longer has a role because she has now been divested of the causes of action and, therefore, cannot be joined to the proceedings in lieu of the first claimant, in those circumstances it seems to me that there would be no purpose in staying the claim because the defect which has been identified by the defendants can no longer be remedied and that, therefore, against the second claimant as well the right course is for the claim to be struck out.'

9. He refused permission to appeal and in his brief reasons for the decision to refuse appeal he said as follows:

> '(1) The proceedings were an abuse of the process. (2) By virtue of Section 282(4) the causes of action statutorily reverted to D on 29.1.14 and he therefore was not previously entitled to bring this claim. (3) There is no evidence to show that Cs were not aware of his lack of entitlement. (4) It would be wrong in principle to allow C1 now to proceed when he commenced the claim without a right to do so, see Mann J in *Pickthall v Hill Dickinson LLP*. (5) C2's claim cannot proceed without C1 who must be a party if the claim were to continue.'

10. It can be seen from that brief summary of his judgment that there were three points which formed the basis of his decision. Firstly, the effect of Section 282 of the Insolvency Act was that the claim reverted to Mr Munday on his annulment in the sense that the claim was reassigned to him. Secondly, Mr Munday had no right to bring the proceedings and *Pickthall* established that this was an abuse. Thirdly, that there was no evidence to show that the claimant was not aware of his lack of standing.

11. On this appeal Mr Lightman, who appears for the claimants but did not appear below, challenges each of these points. In essence, he says, (1) the effect of the annulment is to treat Mr Munday as if he had never been made bankrupt and hence retrospectively to validate the claim as if he had had it vested in him all along; (2) *Pickthall* did not establish that it is an abuse of process to bring a claim where, in fact, a claimant does not have a cause of action vested in him but only that it is an abuse of process for a claimant to bring a claim when he knows that the cause of action he is suing on is not vested in him; (3) that the learned judge wrongly put the onus on the claimants to establish a lack of knowledge in this

respect whereas the onus should be on the applicants, in this case the defendants, to demonstrate that there was an abuse and hence to demonstrate that the claimants had the requisite knowledge.

12. Mr Lightman accepted in his submissions before me two matters which he made clear at the outset of his submissions. The first was that His Honour Judge Dight was right to hold that the causes of action vested in the official receiver as Mr Munday's trustee in bankruptcy under the principle of *Heath v Tang*. Subject to one possible point which I deal with below, this seems to me to be plainly right. I have, in fact, recently considered the *Heath v Tang* principle in two cases concerning the bankruptcy of a Mr Hayes. See *Grant v Hayes* [2014] EWHC 2646 (Ch) and *Hayes v Butters*, unreported, 10 December 2014. As I there explained, the law is well established. By Section 306 of the Insolvency Act, the bankrupt's estate vests in the trustee immediately on his appointment or, in the case of the official receiver, on his becoming trustee; by Section 283(1) the bankrupt's estate comprises all property belonging to or vested in the bankrupt at the commencement of the bankruptcy; and by Section 436 property is defined as including, among other things, things in action. There is no statutory definition of things in action but it is well established that it includes claims that can only be realised by taking proceedings. In the present case, none of the claims which are advanced in these proceedings are purely personal claims of the type which do not vest in the trustee, nor are any of the claims hybrid claims as explained in the decision of the Court of Appeal in *Ord v Upton* [2000] Ch 352 of the type I had to consider in the *Hayes v Butters* case. Nor does Mr Lightman suggest that any of the claims pleaded postdate the bankruptcy. It is, therefore, common ground that all the claims vested in the official receiver on his becoming trustee.

13. The second point Mr Lightman expressly accepted is that each cause of action sued on is a joint cause of action. I confess to having had, and indeed to having expressed in the course

of argument, some doubts about this. While I can certainly see that a claim to rescind a contract entered into by A and B with C is a claim that must be pursued jointly by A and B, and that the same may very well be true of a claim for breach of that contract, it is not obvious to me that it follows that claims in tort or for breach of trust or the like, even if they arise out of a transaction which is a contract entered into jointly and in relation to property which is held jointly, are necessarily joint claims. I would have thought it distinctly arguable that each claimant in such a case had his or her own independent claim for damages which he or she could pursue without joining the other but I have had no argument on the point. As I say, Mr Lightman expressly accepted that each cause of action here was a joint cause of action.

14. I said that the undoubted vesting in the trustee under the principle of *Heath v Tang* was subject to one point. This is the point that was raised by Peter Smith J when giving permission to appeal on paper. He said this:

> 'The causes of action, and in particular the causes of action arising out of the option which was granted in respect of the property, are vested in the appellants as trustees. They hold the benefit of the cause of action upon trust for themselves as beneficial joint tenants. However, upon the first appellant's bankruptcy the legal title to the actions which were vested in them jointly would not have passed to the trustee because it is not possible to sever a joint tenancy at law. The consequence of the first appellant's bankruptcy would therefore be that his beneficial interest in the property in the cause of action would vest in the trustee but he would remain trustee with the second appellant, would then hold the property in the claims upon trust for her and the trustee in bankruptcy. On that analysis, it is arguable that the bankruptcy had no impact on the claims at all and that it was properly constituted.'

He then went on to give another reason. Again, Mr Lightman has not taken that point and I have heard no argument upon it. Mr Solomon, who appears for the defendants, invited me to express some views about it but in circumstances where neither party has argued the point one way or the other, I do not think it appropriate to do so.

15. It follows from Mr Lightman's acceptance of these two fundamental points that it is

common ground as follows. Firstly, the claims were originally vested in Mr and Mrs Munday jointly. Secondly, on bankruptcy or, to be more accurate, on the official receiver becoming trustee, the claims became vested in Mrs Munday and the official receiver jointly. That is, of course, subject to Mr Lightman's argument that the effect of the annulment is retrospectively to change that position. Thirdly, on the annulment on 29 January 2014 the causes of action have again become vested in Mr and Mrs Munday.

What did *Pickthall* decide?

16. I will deal with this point first and I can take this point relatively briefly as, in the end, Mr Solomon did not argue against it. His Honour Judge Dight, as we have seen, proceeded on the basis that *Pickthall* decided that it was the absence of the cause of action that constituted the abuse: see in particular paragraphs [21] and [22] of his judgment which I have read. Mr Lightman submits that that is wrong and that *Pickthall* is only authority for the proposition that it is an abuse for a claimant to issue proceedings *knowing* that he does not have a cause of action at the time of issue. This submission, as I say, is not really opposed by Mr Solomon and, in any event, in my judgment is well founded.

17. In *Pickthall*, Mr Pickthall was made bankrupt in 2001. After his discharge in 2006, he wanted to bring a claim for professional negligence against his former solicitors but was advised by counsel that that claim was vested in his trustee in bankruptcy, then the official receiver, and that he needed an assignment before he could sue. Despite that advice, he brought proceedings in February 2007 without having obtained an assignment, the limitation period being then just about to expire. Mann J in giving the leading judgment in the Court of Appeal held that it was an abuse of process for him to have started proceedings at a time when to his knowledge he did not have the cause of action vested in him and further refused to permit him to amend to plead the assignment which he had later obtained.

18. It was already well established before *Pickthall* that it was an abuse of process for a

claimant to issue proceedings at a time when the claimant thought he might have a claim against the defendant but did not then know that he had a cause of action. The cases were all collected by Cooke J in *Nomura International plc v Granada Group Ltd.* [2007] EWHC 642 (Comm) and it is not necessary for me to refer to them other than very briefly. They are firstly, the decision of the Court of Appeal in *Steamship Mutual Underwriting Association Limited v Trollope & Colls Limited* [1986] 6 ConLR 11 at 25 where May LJ (*obiter*) said:

> "'In my opinion, to issue a Writ against a party even in connection with a building dispute where cross-claims may subsequently be made, when it is not intended to serve a statement of claim, and where one has no reasonable evidence or grounds on which to serve a statement of claim against that particular party, is an abuse of the process of the Court.'"

Secondly, *West Bromwich Building Society v Mander Hadley & Co* [1998] *The Times* 9 March where at the end of paragraph 15, Millett LJ (as he then was) said that:

> "It is an abuse of process to bring proceedings when there is no present intention of prosecuting them and when the plaintiff is unaware of any valid basis for its claim. An individual Writ would be struck out as a matter of course in such circumstances."'

Thirdly, *Barton Henderson Rasen v Merrett and Ernst & Young* [1993] 1 Lloyds Rep 540 where Savile J, as he then was, said at 541:

> "'To my mind at least in the absence of very special circumstances, it could hardly be suggested that it would be a proper use of the processes of the Court to issue a Writ with no intention of following it up with a statement or points of claim, in circumstances where the plaintiffs were unaware of any basis on which they could bring proceedings against the defendants…If a plaintiff starts an action with no present intention of pursuing it, being unaware of any basis for a claim, then on the face of it that plaintiff is not using the processes of the Court for the purposes for which they were designed."'

Finally, Cooke J himself in the *Nomura* case at paragraph [37] in which he said:

> 'In my judgment, when regard is had to these authorities the key question must always be whether or not, at the time of issuing a Writ, the claimant was in a position properly to identify the essence of the tort or breach of contract complained of and if given appropriate time to marshal what it

> knew, to formulate Particulars of Claim. If the claimant was not in a position to do so, then the claimant could have no present intention of prosecuting proceedings, since it had no known basis for doing so. Whilst therefore the absence of present intention to prosecute proceedings is not enough to constitute an abuse of process, without the additional absence of known valid grounds for a claim, the latter carries with it, as a matter of necessity, the former. If a claimant cannot do that which is necessary to prosecute the claim by setting out the basis of it, even in a rudimentary way, a claimant has no business to issue a Claim Form at all "in the hope that something may turn up.'"

19. In the *Pickthall* case itself, Mann J said that the case before the Court of Appeal was even clearer. See his judgment at paragraph [22] where he said:

> 'In the cited cases it was at least apparent that if there was a cause of action then the claimant was the right person to assert it in proceedings. In the present case the claimant is the wrong person to assert the cause of action, and knows that he is. The proceedings could immediately be subject to an irresistible application to strike out, precisely for that reason. If those are the only facts, the conclusion that the proceedings are an abuse is inevitable.'

That passage refers to the claimant's knowledge that he is the wrong person to assert a cause of action and throughout Mann J's judgment there are repeated references to the claimant's knowledge. I will not read them all out but see paragraphs [8], [12], [14], [15], [17], [23], [24] and [27]. The most pertinent comment which he makes on this is at paragraph [15] where he says:

> 'In my view, the starting point is that where a man starts proceedings knowing that the cause of action is vested in someone else, then it is hard to see why those proceedings are not an abuse. He has started proceedings in which, even if he proves all the facts he wants to prove and establishes all the law he wants to establish, he will still lose because he does not have a right to sue. It is hard to see how that cannot be an abuse. Only people who own causes of action, or who have an appropriate interest in proceedings, have any business asserting the cause of action or starting proceedings. Any other use of the Court's proceedings is improper. The position would be likely to be otherwise if the claimant does not know, or is uncertain, as to whether he has title to the relevant cause of action. In those circumstances, at least until it is authoritatively determined that the claimant does not own the cause of action, it may well not be appropriate to characterise the proceedings as an abuse, but that is different from the case currently under consideration.'

That passage was in fact cited by His Honour Judge Dight in his judgment at paragraph [20] but he seems not to have drawn from it what I regard as its plain meaning, namely that *Pickthall* is only authority for the proposition that issuing proceedings knowing that you do not have the cause of action vested in you is an abuse. It does not follow that it is an abuse to issue a claim if the claimant does not know or is uncertain whether the cause of action is vested in him. Indeed, it suggests that in such circumstances there is likely to be no abuse.

20. The matter so far at any rate as I am concerned was put beyond doubt by a subsequent decision of the Court of Appeal called *Pathania v Adedeji* [2014] EWCA Civ 681 where Floyd LJ gave the only reasoned judgment. He said at paragraph [12]:

> 'In *Pickthall v Hill Dickinson and another* [2009] EWCA Civ 543 (unreported, 11 June 2009) this Court was concerned in part with preventing a litigant from taking a benefit from a past abuse of the court's process by litigating a cause of action which the litigant knew he did not possess. Mr Pickthall commenced negligence proceedings against solicitors at a time when he knew he did not have a cause of action, but hoped that he would obtain one by assignment from the official receiver who had become trustee of Mr Pickthall's estate.'

He then cited from Mann J's judgment, italicising the words in paragraph [15], '*knowing that the cause of action is vested in someone else*,' and the words in paragraph [22], *'and knows that he is*.' Then at paragraph [15], Floyd LJ concludes:

> 'Where a bankrupt is commencing or pursuing a claim which he knows he does not have, the abuse of process in commencing or pursuing that claim is obvious. No claimant is entitled to sue on a right which he knows belongs to someone else. The abuse lies in knowingly pursuing a claim which, as presently constituted, is bound to fail. The abuse does, however, depend on actual knowledge of the lack of title to the cause of action, not on what he or she ought to have known.'

I am bound by that decision of the Court of Appeal and it follows that it is not an abuse to issue proceedings where the claimant in fact does not have the cause of action vested in him unless he knows that to be the case. The fact that he ought to have known it is not enough. It should be noted, however, that *Pathania* establishes that it is an abuse not only to issue

proceedings knowing that the cause of action is not vested in you but to continue them: see paragraph [15] which I have read. This does go beyond *Pickthall* which was a case where Mr Pickthall undeniably knew the position at the outset. Mr Lightman accepted in the course of argument on the basis of what Floyd LJ says in *Pathania* that if Mr Munday knew he had no cause of action vested in him either when the proceedings were issued or at some point during the continuation of proceedings thereafter that would, therefore, be an abuse.

Did Mr Munday know he did not have the cause of action vested in him?

21. His Honour Judge Dight found, as I have already referred to, that: 'There is insufficient evidence to show that the first claimant did not have the relevant knowledge.' That is paragraph [22]. He repeated that at paragraph [28] where he said: 'I am not satisfied on the evidence that he did not know the relevant facts.' For good measure, he repeated it when filling out the form for reasons for refusing permission to appeal where he said: 'There is no evidence to show that Cs were not aware of his lack of entitlement.' This is not a finding of actual knowledge. As Mr Lightman says, it appears to put the onus on the claimants but Mr Lightman submits that the general rule is quite clear. See the summary of the relevant principles by Jacob J in *Re Thomas Christy Ltd (in Liq)* [1994] 2 BCLC 527 at 535 (drawn from the judgment of Drake J in *North West Water Ltd. v Binnie & Partners (A Firm)* [1990] 3 All ER 547). "(1) The Court should exercise great caution before striking out an action either by reason of issue estoppel or as an abuse of process... (3) but the onus of proving abuse of a process lay firmly on the party alleging it." Moreover, Mr Lightman said, the application was never in fact put on the basis that the claimants actually knew that the cause of action was vested in the trustee and hence it was not surprising that the claimants' knowledge was not squarely addressed in the evidence but, he said, there was material before the Court which did contain very strong indications that the claimants' then advisers took the view that the cause of action had not vested in the trustee.

22. Mr Solomon said that this was not the basis on which the appeal had been brought, that it was not the way in which the case had been put below, that there was no witness statement from the claimant or from his solicitor, Mr Vaughan, which went to this issue.

23. I should set out the facts such as they appear to me to be. I will say first that Mr Munday is a builder and Mrs Munday is a GP administrator. I infer, and nobody has suggested otherwise, that neither of them is likely to have had any familiarity with the technical operation of the Insolvency Act save insofar as their legal advisers have chosen to explain it to them.

24. Mr and Mrs Munday were initially represented by a Mr Oliver White of counsel on a direct access basis. There is no evidence before the Court as to what advice he gave back in 2011 but in July 2011 he purported to exercise the option on their behalf as referred to by Mr Recorder Chapman QC in his judgment. I infer that at that stage he had failed to appreciate that any claim on the option would have been vested in the trustee, assuming that the official receiver had by then become the trustee.

25. On 21 June 2012, the defendants' solicitors, GCS, pointed out to McFaddens, who by that stage had been instructed as solicitors for the Mundays, that among other things:

> 'We note that your client, Kevin Munday, was adjudged bankrupt on 15 February 2011 and was not discharged until 15 February 2012, yet purports to have served the notice exercising the option contained in the first option agreement whilst bankrupt. Could you please let us have evidence that the Official Receiver/Trustee in Bankruptcy was made aware of the existence of the option agreement(s) and that any interest in such option agreement(s) that would have vested in the Official Receiver/Trustee in Bankruptcy had been waived.'

That is not a reference specifically to things in action having also vested in the trustee in bankruptcy but was certainly enough to alert McFaddens to the potential for the bankruptcy to have an impact on the rights of the Mundays. As far as I have been told, there was no response to that particular suggestion.

26. Proceedings, as I have already said, were issued in August 2012. I draw the inference from that that those then acting for the claimants believed that the cause of action was vested in them. It is not like Mr Pickthall's case where he issued proceedings in order to avoid, so he hoped, the imminent expiry of a limitation period and knew that there was no claim vested in him but hoped to get in an assignment. This is what Mr Vaughan, the Mundays' current solicitor, says in his witness statement at paragraph 12:

> 'McFaddens LLP clearly took the view that the First Claimant had the 'title' to issue the proceedings, as these were issued about six months after he was discharged from his bankruptcy.'

I tend to agree.

27. In about December 2012 McFaddens ceased acting. By 4 June 2013 the Mundays were represented by their current firm, that is Mr Vaughan's firm, Berrymans Lace Mawer. On 4 June 2013 GSC wrote to them and this was the entire force of the letter:

> 'This claim relates to events which occurred prior to Mr Munday's bankruptcy and therefore we would ask you to provide confirmation, together with evidence, that Mr Munday's trustee in bankruptcy is fully aware of this claim and Mr Munday's interest in it and provide confirmation, together with evidence, of Mr Munday's trustee in bankruptcy's position in relation to Mr Munday's interest in this claim. In other words, has Mr Munday's trustee in bankruptcy assigned any right of action which is vested in him to Mr Munday or disclaimed his interest in the same and if he has not, please explain the basis upon which Mr Munday has the right to bring the claim.'

That is a fairly clear explanation of the legal position.

28. As we have already seen, on 18 July 2013 the defendants' defence was amended expressly to refer to the fact of bankruptcy. That appears to have prompted Mr Vaughan to speak to someone in the official receiver's office, namely a Mr Quinn. He says that he spoke to him on 16 August 2013:

> 'and explained to him that the reason why I was calling was that the defendants' solicitors were pursuing an argument that the claim vested in the official receiver. I told him that the view I took was that the claim was not part of the bankruptcy estate as it was only pursued after

> Mr Munday was discharged from his bankruptcy and the full factual matrix of the facts giving rise to the fraud were only discovered after February 2012.'

A bit later down he says that Mr Quinn said that he would retrieve his files from archives and then take a view and invited Mr Vaughan to set out his views in an email to him.

29. On the same date, as we have already seen, the reply was served and I have already read paragraph 3 of the reply. That begs more questions perhaps than it answers and perhaps not very surprisingly triggered a request for further information which came on 13 September 2013. Before that was answered, on 18 September 2013 Mr Vaughan did send an email to Mr Quinn as he says Mr Quinn had invited him to do. I am not going to read it all out because it is quite long but, among other things, he said this:

> 'As I am sure you will appreciate, Mr Munday is not a sophisticated character, and only discovered that he had been the victim of a fraud on or around June 2012. The claim in fraud took some time to unravel. As is common with instances of fraud, victims of fraudulent acts are not immediately aware what has happened. Mr Munday had visited Mr Eppel of McFaddens LLP (my predecessor) after he was discharged from his bankruptcy. The letter of claim was sent on 15 August 2012 and the claim form was issued on 28 August 2012.'

He then said: 'Mr Hilburn's solicitors are (opportunistically in my view) raising this as a possible issue. This is unfortunate...' Then under the heading, 'My views':

> 'Having regard to the above, I do not think that an assignment to the right of the action in fraud is required. For limitation purposes, I consider the relevant date to be when the fraud came to my client's attention. No claim in fraud was considered until on or around June 2012. This is also the relevant date in my view for the purposes of considering whether an assignment of this cause of action is required. Mr Munday was open and disclosed the documents to yourselves but was not aware of any fraud committed until after he was discharged from his bankruptcy.'

Then he said:

> 'I take the view that an assignment is not required. If notwithstanding the above, you feel that the right of action needs to be assigned to Mr Munday, then I shall be grateful if this can be arranged as soon as possible.'

I draw the inference from that email that that is precisely what Mr Vaughan thought at the time. He was, of course, as is accepted by Mr Lightman, quite wrong that the date on which Mr Munday first knew that he had been the victim of a fraud was relevant to the question when the cause of action accrued. Although under Section 32 of the Limitation Act 1980 time does not start running for limitation purposes until the claimant has discovered the fraud or could have discovered it with reasonable diligence, the cause of action is complete as soon as the damage is suffered. Nevertheless, it seems to me clear from the terms of that email that Mr Vaughan, for whatever reason, did not understand that to be the case at the time.

30. Mr Vaughan says that on 23 September 2013 he had a telephone conversation with Mr Quinn and he says this:

> 'I received a call from Mr Quinn. He told me that his duties were to the creditors only and, having regard to those duties, he was unable to give me the assurances which I had requested that the claim did not form part of the bankrupt's estate. He could not confirm the position either way. He told me that it potentially could and put forward three options to the first claimant. Firstly, the first claimant could simply ignore it and see what the judge decided at the trial of the claim. Secondly, the first claimant could seek an assignment of the right of action. He explained that in order to do so, the first claimant would have to pay costs in the sum of £1650 plus VAT and a percentage of the value of the claim. Thirdly, he advised that having regard to the fact that the petitioning debt was only £9,000-odd, he advised that the first claimant could apply to the Court to annul the bankruptcy order made on 15 February 2011. He advised that this would be the most attractive option in light of the small petitioning debt.'

Mr Vaughan then goes on to say that:

> 'Although the first claimant's case was that the claim did not form part of the bankrupt's estate, as a belt-and-braces exercise and in order to focus the parties' minds to the essence of the claim as opposed to a submission on whether the claim was vested in the official receiver, the first claimant took the decision to apply to the Court to annul the bankruptcy order. This course of action was recommended to me by the official receiver as the effect of the annulment order would be to restore the first claimant to the position he was in before he was declared bankrupt and he would be treated as if no bankruptcy order was made in the first

place.'

31. On 30 October 2013 the claimants sent further information in response to the request, settled by Mr Oliver White of counsel. Those answers to the request for further information were so far as relevant as follows:

> '7. For the avoidance of all doubt, the First Claimant does not accept that this request is in any way compliant with applicable law and procedure and the First Claimant is not inclined to reply to a request for information which on its true construction is an exercise in fact finding which bares [sic] no relevance to the material issues in dispute and is confined to the Defendant's need to support the contention that the First Claimant has no *locus standi* to bring these proceedings, which for the avoidance of doubt is strongly denied.
>
> 8. That the extent that the following may assist the Defendants in dispensing with the aforementioned line of enquiry, the First Claimant will state as follows. At the date the First Claimant was declared bankrupt the property in respect of which these proceedings relate was no longer in the First Claimant's ownership and did not form part of the Bankrupt's estate.
>
> 9. The First Claimant has subsequently been discharged from Bankruptcy. Following this, the First Claimant, through his legal representatives has conducted a lengthy investigation into the possible commission of civil fraud, which resulted in the commencement of these proceedings. Throughout this period the First Claimant has not been notified (*either directly or through his representatives*) of any contemplated intervening action or threat of action by the Trustee in Bankruptcy, a fact which the Defendants should pay considerable regard to.'

Apart from those paragraphs, most of the rest of the further information that was requested was met with a refusal to provide any details and I agree with Mr Solomon that this reply was distinctly uninformative.

32. On 28 November 2013 GSC wrote again to Berrymans Lace Mawer, having received that, and said:

> 'With regards to your clients' Replies to our clients' Part 18 Request, these are clearly unacceptable and your clients have totally failed to address matters properly. With this in mind, it is our clients' intention to make an application to the court to strike out the First Claimant's cause of action on the grounds that he has no right to bring or pursue this

> claim, because any claim he could have would vest in his Trustee in Bankruptcy.'

The response came on 2 December. Among many other things, it described the threatened application to strike out the first claimant's claim on the basis that he had no right to bring or pursue the claim as unmeritorious, inequitable and misguided. It suggested that GSC had misunderstood the position. It said that if they proceeded with the application it would be rigorously defended and it said this:

> '6. As you will note from Paragraph 3a of the Reply to the Amended Defence, the claim in fraud as it currently stands was only known following the discharge date.
>
> 8. The proposed application is bad in law and lacking in locus. It is not within the Defendants' gifts to apply to strike out in circumstances (as in the present case) where disclosure was made upon accrual of knowledge and no interning' – that should no doubt be intervening – 'steps have been taken (for good reason) by the Official Receiver to assign the claim into his name which would be the ordinary course of action in the event that the Official Receiver took the view that the claim vested in the estate.
>
> 9. Furthermore, the claim relates to a fraud underscoring a disposition of property which took place before the date of bankruptcy. As a matter of settled law, it could not be said that the First Claimant was obliged to notify the Official Receiver at the date of bankruptcy that the property giving rise to the claim (notwithstanding the fact that the cause of action was not known to the First Claimant) fell within the bankrupt's estate either at the date of bankruptcy or at any time in the subsequent year.'

Then it again said that if the defendants pursued this 'disingenuous and wholly misconceived application it would be robustly defended.'

33. On 4 December 2013 GSC, not perhaps surprisingly, said:

> 'We do not understand your purported explanation:
> a. The date on which your client knew about the claims against our clients is irrelevant. The only question is whether the relevant causes of action had accrued as at the date of his bankruptcy; if so, they are vested in the First Claimant's Trustee in Bankruptcy and, unless and until the Trustee in Bankruptcy assigns the cause of action to the First Claimant, he is unable to bring any claim against our clients.'

They then suggested that if it was really misconceived perhaps the claimants' solicitors

might like to furnish authorities.

34. On the next day, 5 December 2013, the application to strike out was issued as already referred to. On 6 December Berrymans Lace Mawer replied to GSC referring to *Pickthall* but saying the facts were clearly distinguishable and then saying this:

> 'Against the background of the above, you will be aware from our clients' Reply to the Amended Defence, Replies to the Part 18 Requests, and inter-partes correspondence, that the first claimant's position is that he does have title to sue. It cannot be said that the first claimant's claim is an abuse of process as it is clear that the first claimant's position is that he does have title to sue, as the claim was not vested in estate. Until the contrary has been established, the proceedings are not an abuse of process.'

Then they indicated that without prejudice to their submission that no assignment was needed, their client was in advanced discussions with the official receiver and/or creditors to annul the bankrupt order and/or obtain a letter of disclaimer from the official receiver.

35. On 9 December GSC replied:

> 'Whether or not the First Claimant decided that he had title to sue, is irrelevant. Either he does or he does not. No doubt his legal team would have advised him on the position when first being retained by him and if they have incorrectly advised him, then that is a matter between the First Claimant and his legal team.'

36. In support of the application to strike out, a witness statement was made by Michael Shapiro of GSC. That summarised the basis for the application at paragraph 5 as being as follows:

> 'a. The First Claimant was declared bankrupt on 15 February 2011 (and discharged on 15 February 2012);
> b. At the time that the First Claimant was declared bankrupt, the causes of action he relies upon against the Defendants had accrued.
> c. Accordingly, those causes of action vested in the First Claimant's Trustee in Bankruptcy, and the First Claimant has no right to bring the present claims against the Defendants.'

Having set out a lot of the correspondence which I have already referred to, the summary that Mr Shapiro came to at paragraph 21 was:

> 'In the circumstances, it is clear that any causes of action the First Claimant had, vested in his Trustee in Bankruptcy, and that his Trustee

> in Bankruptcy has neither disclaimed nor assigned those causes of action.'

In the context of a mooted application for a wasted costs order against the first claimant's legal team, Mr Shapiro said this:

> 'The claimants have been represented by counsel since at least October 2011, at which time the first claimant was an undischarged bankrupt. As stated above, I wrote to the claimants' then solicitors on 21 August 2012, a week before the claim form in this matter was issued, raising the issue of the effect of the first claimant's bankruptcy on the claimant's claims. Notwithstanding the first claimant's legal team being on notice of the bankruptcy issue, they nevertheless issued proceedings.'

I have looked through the entirety of Mr Shapiro's witness statement and he does not anywhere say in terms:

> 'I ask the Court to find that the first claimant actually knew at the date when he issued proceedings or during the continuation of the proceedings that the cause of action was not vested in him.'

37. On 9 January 2014 Mr Quinn wrote to Mr Vaughan saying:

> 'On the basis that the Court will grant an annulment of the bankruptcy order, the Official Receiver, on current information, does not intend to progress any right of action that forms part of the bankruptcy estate between now and the hearing of your client's application.'

As already referred to, on 29 January 2014 the annulment order was duly made.

38. A skeleton put before His Honour Judge Dight by Mr Solomon, who appeared for the defendants before him as he does before me, dated 7 February 2014 said this:

> '1. By application dated 5 December 2013, Ds applied to strike out C1's claim and to stay C2's claim. The basis of the application is that C1 had no right to bring this claim due to his bankruptcy, and it therefore falls to be struck out as an abuse.'

At paragraph 12:

> 'Where a bankrupt brings a claim in respect of a cause of action which is vested in his trustee, the bankrupt has no locus to bring the claim. Accordingly, there is an unarguable defence, and C1's case should be struck out, or summary judgment ordered.'

39. Mr White, who appeared for the claimants before His Honour Judge Dight, also put in a

skeleton which is undated. He said this at paragraph 13:

> 'C1 does not accept that as a principle in law C1 was not entitled to issue proceedings in his name. The claim relates to the fraudulent misrepresentations made by D resulting in the disposition of C's property. At the time of C1's bankruptcy the property to which this claim relates was registered in D2's name and did not fall within C's bankruptcy estate. C nevertheless made full disclosure of the events giving rise to the transfer and sale of this property to his OR who has acknowledged an awareness of these events at all material times.'

Then at paragraph 14 he said:

> 'Without prejudice to C1's principle [sic] assertion that the question of C1's locus to issue proceedings has been superseded by the effect of the annulment order, C does not accept that D's calculation as to the correct date of accrual of a cause of action is correct for the purposes of establishing whether C had sufficient locus. Regard for present purposes, must also be had to the actual date of C's discovery of the fraud, which crystallised after the date of C's discharge and which resulted in the commencement of these proceedings, the relevance of which is set out in the two paragraphs below.'

Then he goes on to deal with the *Pickthall* case and does at paragraph 16 say:

> 'In giving judgment, Mann J, correctly distinguishes between a Claimant who knowingly issues proceedings in circumstances where he can be said to be aware that the cause of action does not vest in him and a situation akin to the present one, where C cannot be said, on any analysis, to have knowingly issued proceedings in the belief that he had no *locus* to do so.'

40. In his judgment, His Honour Judge Dight in a passage which I have not so far referred to said at paragraph [5]:

> 'The claimants say that they did not become aware of the matters which have enabled them to plead their fraud allegations until after the first claimant was adjudicated bankrupt,'

a matter which I will mention in a moment. At paragraph [6]:

> 'It seems to me that subject to the potential for an extension of time under the Limitation Act 1980 and in particular Section 32, the main causes of action on which the claimants rely accrued on the execution of the option agreements and on the sale of the property by the first defendant to the second defendant, all of which occurred prior to the making of the bankruptcy order in 2011.'

I infer that those paragraphs reflect a submission made by Mr White as foreshadowed in his skeleton argument that because the claimants only become aware of the facts of the fraud after the bankruptcy, the claims had not vested in the trustee in bankruptcy.

41. That is the material which is before me. On that material it seems to me that the position is as follows. The first question is, as Mr Lightman raises:- upon which party is the onus of proof on this question? My answer to that is that the onus is on the defendants as the parties making the application. I have heard nothing to suggest, and been referred to no authority to suggest, that the onus in this particular type of abuse is on the claimants to show that they did not have knowledge and I have no reason to suppose that that is the law. The second question is:- did His Honour Judge Dight find as a fact that the claimants had the requisite knowledge? In my judgment, he did not. He expressed himself three times, in each case in very similar language. I have already referred to those three occasions. They are at paragraph [22] and paragraph [28] of his judgment, and again in the form in which he gives his reasons for refusing permission to appeal. In each case he is careful to say that there was insufficient evidence or that he was not satisfied on the evidence or that there was no evidence to show that the claimants or the first claimant did not know of the lack of cause of action. Had His Honour Judge Dight gone on to say, 'and I find as a fact that the claimants did know,' I would have had to consider whether that finding was properly open to him given the evidence that was before him, but he did not and I am not going to assume that that is what he meant when, in his very carefully worded judgment, he declined to say that.

42. The answers to those two questions, it seems to me, are strictly speaking sufficient to lead to the setting aside of his order. If, as *Pathania* makes clear, it is necessary to show that either on issue or during the continuation of proceedings the claimants had actual knowledge, not just that they ought to have known, that the cause of action was not vested in Mr Munday before that can be characterised as an abuse, the learned judge's failure to find that means

that no abuse has been established.

43. I think I ought in the circumstances of this case to go on to express my own views on the material that is before me. Having considered that material extensively, I agree with Mr Lightman that it sufficiently shows two things. Firstly, that the defendants' application was put on the basis, as indeed Mr Solomon accepted before me, that Mr Munday in fact had no locus and, therefore, the claim as formulated was bad in law. It was not expressly put on the basis that the claimant had actual knowledge of that, either on issue of the proceedings or at some time during the continuation of the proceedings. Indeed, as one can see from the correspondence, the defendants' solicitors took the view that it did not matter if the claimants' solicitors had failed to explain the true position to the claimant. That may explain why those on the claimants' side did not expressly deal with the claimant's knowledge in more detail than they did. Secondly, that for whatever reason the claimant's legal advisers, Mr Oliver White of counsel and Mr David Vaughan of his solicitors, were acting on the basis that the cause of action was not vested in the trustee. This is what they told the defendants' solicitors repeatedly and in strongly worded terms but it goes beyond that. It is also what Mr Vaughan said to Mr Quinn. So far as Mr Vaughan's evidence is concerned, he was never told the contrary. Indeed, according to Mr Vaughan, Mr Quinn said that he could not confirm the position one way or the other.

44. Now, it is, of course, possible that Mr White and Mr Vaughan were saying one thing to the defendants' solicitors and to Mr Quinn but privately saying something entirely different to the claimants. However, I do not think that it would be an appropriate inference to draw in the present case. First, it seems to me that it would be no more than speculation and there is no sound basis for drawing such an inference. By far the more likely explanation in fact is that they were saying these things to the defendants' solicitors because that is what they believed the position to be at law or, at any rate, that they believed that there was a doubt

about the position and that there was a perfectly tenable argument to that effect. Secondly, to seek to draw an inference of that type might have a tendency to undermine the claimants' privilege which would offend against the principles on which privilege is accorded. I do not need to pursue that latter point further as I would in any event have held, had it been necessary to do so, that the defendants had neither tried to establish, nor succeeded in establishing, that the claimants had actual knowledge at the time of issue of the proceedings, or at any time during the continuation of the proceedings, that the causes of action were not vested in Mr Munday.

45. It follows, in my judgment, that there was in fact no abuse of process established either in the claimants issuing these proceedings or in continuing these proceedings. I think it is important to add that this does not mean that the Court is powerless to stop claims going forward where a claimant in fact has no standing but due to erroneous advice of his lawyers wrongly believes he does. In order to succeed at trial, a claimant must, of course, not only show that there is a good claim vested in someone but that it is vested in him. If, therefore, it can be shown that the claim, whether good or bad, is incontrovertibly not vested in him and for that reason the action is doomed to failure, whatever its merits, the Court must be in a position to stop the claim proceeding to trial. I do not see any procedural difficulty in this. The defendant in an appropriate case can apply to strike the claim out on the basis that the statement of case discloses no reasonable cause of action, see CPR rule 3.4(2)(a), or can apply for what is often called reverse summary judgment, see CPR Part 24, or can apply to have the matter determined as a preliminary issue. All that I have decided is that he cannot strike out on the basis that there is an abuse of the *Pickthall* type unless he establishes that the claimant either brought or continued the action knowing that the cause of action was not vested in him. Of course, if the Court rules, despite the claimant's advisers' best endeavours, that the cause of action is not vested in him, then it would constitute an abuse for the

claimant to continue with the action thereafter at any rate if the position could not be cured. It follows that at the time when this application was issued, that is on 5 December 2013, subject to the annulment point which I am coming to, the first claimant did not have the cause of action vested in him and it was a perfectly well founded application. However, by the time of the hearing that was no longer the case. It is common ground that after the annulment the cause of action was vested in Mr and Mrs Munday again. It was, therefore, no longer true that the claim as constituted was doomed to fail for lack of standing. Indeed, there is no dispute that if there was a claim at all Mr and Mrs Munday were by then the right persons to pursue it. In these circumstances, it seems to me that the annulment did cure the lack of standing and once it had taken place, the claim should have been allowed to go to trial.

46. I must add two comments on that. Firstly, Mr Solomon sought at one stage to persuade me that the claim is hopeless for other reasons. The essence of the claim is that Mr and Mrs Munday were persuaded to part with their property on the basis that they would be able to buy it back but by selling it to Mr Fields Mr Hilburn had put it beyond their reach. Mr Solomon said this was nonsense as Mr Fields always accepted that he would honour the option and, moreover, an open offer was made in a letter of 21 June 2012 before the proceedings were issued to enter into a new option, an offer which Mr and Mrs Munday did not take up, no doubt as Mr Recorder Chapman said because they were not in a financial position to do so. In these circumstances, Mr Solomon submitted that the claim was entirely misconceived on its merits. There may well be considerable force in what he says and it is no doubt in the claimants' interests to scrutinise with care whether they do have any sustainable claim, even if they prove the facts which they allege, but it does not seem right to me on this appeal to go into the merits of the pleaded case when that was not the basis on which the application was made, not the basis on which the application was decided by

His Honour Judge Dight, and not a basis which Mr Lightman had come prepared to argue. As I made clear to Mr Solomon in the course of argument, and as he fairly accepted, I consider that I should approach the appeal on the basis that there may be a viable claim, however much one may harbour doubts about it.

47. Secondly, it is not I think suggested that the fact the cause of action was not vested in both claimants at the outset makes the proceedings incurably bad. There was some ancient authority to that effect but the modern law is that even if there is a defect in the proceedings when issued in that either the claimant's cause of action is not then complete, or that the claimant's cause of action is not then vested in the claimant, it is open to the Court to cure the defect. That sufficiently appears from a decision of the Court of Appeal in *Hendry v Chartsearch Ltd.* [1998] CLC 1382 when Evans LJ said that:

> 'In accordance with modern practice generally, the Court has a general discretion which should not be restricted by hard-and-fast rules of practice, if not of law, such as that which is suggested here.'

That was a case where the defendants applied to strike out the claim on the ground that the plaintiff was not party to the agreement on which he sued and the plaintiff maintained that shortly before the hearing of the application he had taken an assignment from his company of its claims against the defendants under the agreement. The defendants resisted leave to amend on the ground that it was not appropriate to add a fresh cause of action unless the plaintiff had some valid cause of action at the date of the writ.

48. That was said by all three members of the Court of Appeal in *Maridive & Oil Services (SAE) & Anor v CNA Insurance Company (Europe) Ltd.* [2002] EWCA Civ 369 to be binding on them. See Mance LJ at paragraph [23]:

> 'We are in my view bound by *Hendry v Chartsearch Ltd.*, which appears to me also to reflect the appropriate modern approach.'

Chadwick LJ at paragraph [54]:

> 'I agree with his conclusion' – that is Mance LJ's conclusion – 'that we are bound by the decision of this Court in *Hendry v Chartsearch Ltd* [1998] CLC 1382. There is no absolute rule of law or practice which precludes an amendment to rely on a cause of action which has arisen after the commencement of the proceedings in circumstances where (but for the amendment) the claim would fail.'

And Ward LJ at paragraph [70]:

> 'I agree with My Lords, whose judgments in draft I have had the chance to read, that we are bound by *Hendry v Chartsearch Ltd*.'

It is also illustrated by the *Maridive* case itself. That was not a case of a claimant not having title to sue but not having a cause of action at all at the date of issue of proceedings, the claimant having purportedly made a demand under an instrument called a lease bond in the name of one person and that demand being held to be invalid and the claimant seeking to amend to introduce reliance on a second demand in the name of the right person which was not made until after the proceedings had been issued.

49. The principle was also applied shortly afterwards in *Smith v Henniker-Major & Co* [2002] EWCA Civ 762, another decision of the Court of Appeal in 2002, in which Robert Walker LJ said at paragraph [92]:

> '92. The first argument was that at the time of issue of the claim form Mr Smith had no cause of action at all (or if different, no title to sue at all) and that the claim form was therefore a nullity (or of no effect) and could not be cured by amendment. The judge rejected that argument.
>
> 93. In my view the judge was right to do so. Mr Symons relied on the decision of this Court in *Ingall v Moran* [1944] KB 160. But that decision was on a different point (change of capacity); was described (while still extant) as a blot on English jurisprudence; and has since been overturned by Section 35(7) of the Limitation Act 1980 and CPR 17.4(4). So far as it embodied any larger principle it has been overtaken by the modern approach as described by Evans LJ in *Hendry v Chartsearch Ltd* [1998] CLC 1382, para 23. In that case this Court disapproved the more rigid approach adopted in *Eshelby v Federated European Bank Ltd* [1932] 1 KB 254.'

That, although a dissenting judgment in the result, was agreed to by both of the judges in the majority, Carnwath LJ at paragraph [103] and Schiemann LJ at paragraph [130]. A further

illustration of the principle was drawn to my attention by Mr Lightman, namely a decision of Blackburne J in *Finlan v Eyton Morris Winfield (A Firm)* [2007] EWHC 914 (Ch) where he said at [46]:

> 'The modern practice is to allow an amendment, the effect of which is to make good a defect in the claimant's title to sue even though the event relied on did not arise until after the proceedings were issued so that in strict law the claimant did not have a cause of action at the time he issued his process.'

He then referred to *Maridive*. Both *Smith v Henniker-Major* and that case, *Finlan*, are cases where, although there was said to be a cause of action at the date when the claim was issued, the claimant did not have it vested in him and subsequently took an assignment and sought to amend to plead the assignment.

50. The fact that at the date when the proceedings were issued the causes of action were not vested in Mr and Mrs Munday but in Mrs Munday and the official receiver does not therefore present an obstacle to the proceedings being pursued to trial, if necessary after an amendment.

Is an amendment necessary?

51. In my judgment, no amendment is necessary to the particulars of claim. The particulars of claim by CPR 16.4(1)(a) must include a concise statement of the facts on which the claimant relies but in general it is only necessary to state the facts which entitle the claimant to relief. It is not necessary usually to anticipate defences which might be pleaded. Once a defence is taken I agree that the correct place to respond to it is in reply. It is not in this case the position that the claimant never had a title and that the particulars of claim as drawn do not disclose a cause of action in the claimant. The defence is that subsequently to having acquired that cause of action, if it exists at all, it has been assigned to the official receiver as trustee. The fact that it has now been reassigned is, to my mind, correctly pleaded in the reply. This is because on proof of the facts in the particulars of claim and no more the

claimants would be entitled to recover. Once one adds in the undeniable fact of Mr Munday's bankruptcy, that must be countered by a plea of annulment but it need not be anticipated in the particulars of claim. Mr Solomon referred me to the *Maridive* case where the second demand had been pleaded in the reply and the Court of Appeal all said that that was the wrong place to plead it and it should have been pleaded in the particulars of claim. In my judgment, that case is materially different. Unless a valid demand was pleaded in the particulars of claim, there was no plea of the facts necessary to establish a claim at all.

52. So far as the reply is concerned, I do take the view that the reply requires amendment. There is before me no application to amend as there was before His Honour Judge Dight no application to amend, no doubt because until the strike-out had been dealt with one way or the other it was thought that it did not arise. It seems to me however that there is a very strong case for leave to amend being granted. The annulment is not disputed or disputable as a fact, nor is its effect on the claims going forward and I can see no good reason for refusing amendment to the reply. A refusal would simply force the claimants to start again. There is no question in this case, as there was in some of the other cases, of the complications arising from the limitation period having expired in the meantime.

53. That makes it strictly unnecessary to deal with the question of the effect of the annulment but I have heard argument on the point and it is probably appropriate for me to express my views. His Honour Judge Dight in his judgment, as we have seen, took the view that the annulment which caused the cause of action to revert to the bankrupt was the same as a simple assignment of the causes of action after the proceedings were commenced. Having looked at various authorities which were put in front of him he said at paragraph [27]:

> 'Those cases do not, in my judgment, help me in construing the section. They are cases which contain general statements about the effects of annulment. Section 282(4) is a specific provision dealing with the ownership of property pre-, during and post-bankruptcy and the wording of it is, in my judgment, perfectly clear.'

54. Under Section 282 of the Insolvency Act there are two grounds on which the Court may annul a bankruptcy order. The first in 282(1)(a) is 'that, on any grounds existing at the time the order was made, the order ought not to have been made.'

The second in 282(1)(b) is:

> 'that, to the extent required by the rules, the bankruptcy debts and the expenses of the bankruptcy have all, since the making of the order, been either paid or secured for to the satisfaction of the Court.'

It may be noted that the first case is one where on policy grounds there are no doubt good reasons for putting the bankrupt, so far as it is possible to do so, in as good a position as if the bankruptcy had never been made because *ex hypothesi* the order ought not to have been made. That policy reason does not apply, or at any rate not to the same extent, to the second ground for annulment because under the second ground the bankruptcy order was properly made but there are good reasons for annulling the order where the purpose of the bankruptcy has been entirely fulfilled. I accept however that the effect of the annulment under Section 282 cannot differ according to which limb of 282(1) the Court acts under.

55. Mr Lightman relies on general statements that the effect of annulment is to treat the bankrupt as if the order had never been made. For example, he referred me to *The Law of Insolvency* by Ian F. Fletcher, (4th edn, 2009) at paragraph 11-044:

> 'The most important effect of an annulment of a bankruptcy order is that in principle the person to whom the order relates is to be regarded in law as though the order had never been made,'

and to similar statements in various authorities collected together in his skeleton as follows:

(1) *Choudhury v Inland Revenue Commissioners* [2000] B.C.C. 765 where Aldous LJ stated at 768:

> 'When a bankruptcy order is annulled, it is annulled *ab initio* save for the

> certain matters which are specifically dealt with in the rules.'

(2) *Lambeth LBC v Simon* [2007] B.P.I.R 1629 where Registrar Simmonds stated at 20:

> 'It is trite law that the effect of an annulment is as if the order had not been made which contrasts sharply to a discharge from bankruptcy which, subject to exceptions, discharges the debtor from his outstanding debts.'

(3) *Smeaton v Equifax plc* [2013] EWCA Civ 108 where Tomlinson LJ stated at 49:

> 'An annulment is a substantive order which has the effect of cancelling the bankruptcy order as if it had never been made.'

I do not find statements of this general type of much assistance. The *Choudhury* case was a case where Aldous LJ was dealing with permission to appeal and on usual principles should not have been reported or cited as authority. The *Lambeth* case was a case where the registrar was concerned with the ability of a creditor to pursue a debt after annulment as opposed to a discharge; and the *Smeaton* case was concerned with other matters and not with the status of acts taken during the currency of the bankruptcy. None, therefore, was specifically dealing with the question with which I am concerned which is how to characterise things that are done between the bankruptcy order being made and the bankruptcy order being annulled.

56. There are a few cases which Mr Lightman relied on as dealing, albeit usually quite briefly, with that and they are as follows. Firstly, *Boyd & Hutchinson (A Firm) v Foenander* [2003] EWCA Civ 1516. In that case, Mr Foenander sought permission to appeal. He was given permission to appeal and he was then adjudicated bankrupt. An application was made to strike out the appeal on the basis that he had no standing. At paragraph [8] Chadwick LJ says this:

> 'Faced with that application, Mr Foenander, who has addressed us through Miss Adshead who has been assisting him in this litigation, seeks an adjournment of this appeal. On his behalf she points out that an

> appeal against the refusal to annul the bankruptcy order may yet succeed; and that if it does, the effect will be that Mr Foenander will have been, throughout, a person entitled to pursue the appeal for which this Court has already given permission. Accordingly, she submits, the opportunity for Mr Foenander to pursue this appeal should be preserved by adjourning the appeal until the question whether or not the bankruptcy order should be annulled has been finally determined; that is to say, first determined by the High Court on appeal from the Registrar, and then perhaps, on any further application for permission to appeal or appeal, by this Court. That may be some way in the future. There is obvious force in her submission that the Court should not dismiss the appeal, on the basis that Mr Foenander has no standing to pursue it, while there remains a possibility that he will regain such standing.'

As can be seen, really the only comfort that Mr Lightman can draw from that passage is the single word 'throughout,' but it is not clear to me if Chadwick LJ is there expressing his own view or is simply recording the submission of Miss Adshead. It was not necessary to the decision, the actual decision in that case being that the appeal was hopeless so that there was no reason to adjourn it. So far as appears from the report, it was not the case that anything had been done, any steps taken, between the time when Mr Foenander was made bankrupt and the matter coming before the Court.

57. Secondly, there is a decision of Peter Smith J in a case called *Hoare v Inland Revenue Commissioners* [2002] EWHC 775. In that case, Mr Hoare had obtained the rescission of a bankruptcy order but the registrar had declined to annul the bankruptcy order. The learned judge said at paragraph [2]:

> '2. The position of Mr Hoare would appear to be academic at first blush having retained' – that should be "obtained" I assume – 'the rescission of the bankruptcy order as opposed to its annulment but there are very compelling reasons from Mr Hoare's point of view as to why there should be an annulment, the effect of which means that the bankruptcy order was never made at all where the rescission is a retrospective termination of the bankruptcy.
> '3. The compelling reasons are the commercial arrangements which Mr Hoare has with third parties as there are clauses which might expose him to pay a substantial sum of money triggered in the event of a bankruptcy order having been made. That is the important difference.'

That is the entirety of the relevant material in his judgment. It is to be noted that the

counter-parties to the commercial agreements which Mr Hoare was said to have entered into were not parties to that application and one would have thought that whether the annulment had the effect of disentitling them to trigger the clauses in those arrangements would ultimately turn on the true construction of those arrangements. I can well see, however, that once an annulment had been granted it might be too late for those counter-parties to take advantage of clauses in that form. It is not obvious to me, however, that if one of the counter-parties had already triggered the clause on the bankruptcy order having been made it would have been a defence for Mr Hoare to say subsequently, 'I have had the bankruptcy order annulled.' I therefore do not regard that case as actually answering the question which arises in the present case.

58. Then there is the decision of the Court of Exchequer Chamber in *Bailey v Johnson* (1872) Law Rep. 7 Ex. 263. In that case Mr Bailey had been made bankrupt and a trustee was appointed who realised his estate and paid the proceeds into a bank run by the banking firm of Harvey and Hudson. Then Harvey and Hudson were themselves made bankrupt. Then the order adjudicating Mr Bailey bankrupt was reversed on appeal. It was held that Mr Bailey was entitled to set off the sum standing to the credit of the trustee in the bank's books against a claim which the bank had against him. Cockburn CJ said:

> 'We are all of opinion that the judgment of the Court of Exchequer is right and ought to be affirmed. In the first place, it is quite clear that s.81 of the statute applies to the case of a bankruptcy being annulled by whatever means… What, then, is the effect of the section upon such property of the bankrupt? There can be no doubt that if the defendant's bankruptcy had been annulled prior to the bankruptcy of Harvey and Hudson, this would have been money standing to the account of the defendant in their books, which would have formed an item of mutual credit, and which he would have been entitled to set off against the debt due to them… The effect of s. 81 is, subject to any bona fide disposition lawfully made by the trustee prior to the annulling of the bankruptcy, and subject to any condition which the Court annulling the bankruptcy may by its order impose, to remit the party whose bankruptcy is set aside to his original situation. Here the Court of Bankruptcy has imposed no condition; the general provision of the

> section has therefore its full effect, and that effect is to remit the bankrupt, at the moment the decree annulling his bankruptcy is pronounced, to his original powers and rights in respect of his property. We must therefore look at the money as though it were money paid in in his name instead of in the name of Bullard' – that is his trustee – 'for having become his by virtue of the annulling of his bankruptcy, it is to be considered as his at the moment when it was paid in; as his, therefore, at the time of the bankruptcy of Harvey and Hudson.'

Brett J expressed a short concurring judgment saying:

> 'I am of the same opinion, and I agree with the Lord Chief Justice that it is impossible logically to stop short of giving to the word revert in s. 81 the full interpretation which he has placed upon it.'

Two judges, Lush J and Grove J, are simply expressed as having concurred. Blackburn J reserved his position. On this point, however, he said:

> 'Without determining whether the effect of s.81 is in every case to go back to the beginning, and to place the bankrupt in the position of having always owned what is by the section to 'revert' to him, as to which I do not wish to express any dissent from what the Lord Chief Justice has said, but only to abstain from expressing an opinion, what here appears is that at the time of Harvey and Hudson's bankruptcy a proceeding was going on which finally ended in annulling the defendant's bankruptcy, and this created at least an inchoate equitable claim of such a kind as ought to be taken into account.'

Keating J said, 'I agree,' which I take to mean 'I agree with Blackburn J.' Mellor J also said he was of the same opinion. In those circumstances, it seems to me that although the Chief Justice and one other judge expressed the view that the effect of annulment was to remit the party whose bankruptcy is set aside to his original situation in the way in which I have read from this judgment, two of the other judges expressed no view on it and three of the other judges seem to have reserved their position expressly. It is undoubtedly some authority in support of the proposition that once the bankruptcy has been annulled the bankrupt is for all purposes to be treated as if he had never been made bankrupt but it is, as one can see, not exactly compelling authority.

59. Mr Lightman also referred to the terms of Section 282(4) of the Insolvency Act which are in

these terms:

> 'Where the Court annuls a bankruptcy order (whether under this section or under Section 261 [or 263D] in Part VIII)— (a) any sale or other disposition of property, payment made or other thing duly done, under any provision in this Group of Parts, by or under the authority of the official receiver or a trustee of the bankrupt's estate or by the Court is valid, but (b) if any of the bankrupt's estate is then vested, under any such provision, in such a trustee, it shall vest in such person as the Court may appoint or, in default of any such appointment, revert to the bankrupt on such terms (if any) as the Court may direct; and the Court may include in its order such supplemental provisions as may be authorised by the rules.'

He suggested that the reason for enacting 282(4)(a) was that otherwise the effect of the annulment would be to defeat any disposition by the official receiver or trustee as having had no effect and being invalid because the effect of the annulment was to relate back and wipe out the bankruptcy for all purposes. It does not seem to me that it is possible to be sure whether that is the reason for the introduction of 282(4)(a). It is obviously a provision of practical value. Mr Solomon suggested on the contrary that it was for the avoidance of doubt but, again, I do not think that is necessarily a complete explanation. I can see that if a person in the position of the bank in *Bailey v Johnson* knows at the time that he receives money from a trustee that there are proceedings on foot to annul the bankruptcy, he knows that the trustee that has paid him money under a defeasible title and if that title is subsequently defeated I would have thought that absent Section 284(4)(a) he would be at risk of having to give the money back. That does not, however, it seems to me, help resolve the question which is before me.

60. On the other side to *Bailey v Johnson* are two cases relied on by Mr Solomon. One is a case called *Inland Revenue Commissioners v McEntaggart* [2004] EWHC 3431 (Ch), a decision of Patten J as he then was. This was a civil claim brought under Section 15 of the Insolvency Act 1986, Section 15(1)(a) making a person personally responsible for the relevant debts of the company if at any time he is involved in the management of the

company in contravention of Section 11 of the Act. Section 11 of the Act provides in subsection (1) that:

> 'It is an offence for a person who is an undischarged bankrupt to act as director of, or directly or indirectly to take part in or be concerned in the promotion, formation or management of, a company, except with the leave of the Court.'

In that case, the first defendant, Mr McEntaggart, had been made bankrupt in July 1995, and remained an undischarged bankrupt until July 1998 when he obtained an order for annulment. It was found that he had indeed acted or been concerned in the promotion, formation or management of a company in the intervening period. Patten J held that the annulment did not take away his liability under Section 15. His reasoning appears at paragraph [38] as follows:

> 'The question the court has to decide in order for criminal proceedings to be brought under [section 11(1)], is whether at the relevant point in time, which must be when the offence was committed, the person who it is said acted as a director, was then an undischarged bankrupt. The answer to that question in this case is clearly yes. At the time when the first defendant is said to have acted as a director, he was, and there is really no dispute about this, an undischarged bankrupt. The consequence of that is that without more the offence would have been committed, and nothing subsequently, for example the discharge of his bankruptcy rather than its annulment, could have affected that. By the same token, for the purposes of s.15, there would have been at that stage, a contravention of s.11, and that would remain the position, notwithstanding the subsequent termination of the bankruptcy.
> There is nothing in the 1986 Act by way of specific provision which takes away the criminal liability imposed by s. 11(1) merely because the bankruptcy order is subsequently annulled. And in my judgment, it would be curious if the automatic annulment of the order, which comes about under s.282 on the payment of the indebtedness, had the effect of removing criminal liability which is imposed by s.11 specifically to prevent persons who are at that time, undischarged bankrupts, from participating in the promotion, formation or management of the company. It seems to me that the public interest which is protected by that provision, and in respect of which there can be criminal liability, is, as a matter of principle, entirely unaffected by the fact that subsequently the bankruptcy order is annulled rather than discharged, because the bankrupt was able to pay off his creditors.'

Then he said that that does seem to be the criminal law, see *DPP v Ashley*

[1955] Crim LR 565. Then he says:

> 'It seems to me quite clear that the absence of any specific provision to the contrary, means that notwithstanding the subsequent order for annulment, liability under s.11 and s.15 remain intact. For those reasons the annulment point provides, in my judgment, no defence in these proceedings to the claims against either defendant.'

61. The other authority on which Mr Solomon relies is a somewhat old authority now called *Markwick v Hardingham* (1880) 15 Ch. D. 339, a decision of the Court of Appeal. The facts are quite complicated but in essence the plaintiff had previously appointed the defendant, a solicitor, as his agent to collect rents of his property but had become bankrupt in 1845. The defendant carried on collecting the rents. In 1849 he took a transfer of a mortgage which the plaintiff had granted over the property and in 1877 the plaintiff's bankruptcy was annulled. The plaintiff originally brought proceedings in common form as mortgagor against mortgagee for redemption but was met with a plea of the statute of limitations. Then he subsequently amended his claim to change it into a claim by a client against his solicitor, the case being made by the amended statement of claim, (this is taken from page 350 of the judgment of the Court given by James LJ), being that:

> "Mr Dennett [that is the defendant] took the assignment of the mortgage and received the rents and profits as solicitor and agent of the plaintiff and that a relation of principal and agent existed after the bankruptcy."

That case was rejected by the Court on the basis, (and this is at the bottom of 348), that the bankruptcy absolutely determined the retainer and employment of Mr Dennett unless it was expressly or impliedly renewed. At page 350 the Court said:

> 'It may be further suggested on the evidence of Mr Dennett's letters that he considered himself liable to account to the assignee in respect of the property, viz. as agent; that the assignee might have assented to this view and so ratified the agency and that the plaintiff by reason of the annulment of the bankruptcy has now the same right that the assignee had and may call for an account of the agency. It is difficult to give such an effect to the annulment. The annulment revested in the bankrupt so much of his assets as was *in specie* and available at the time of such annulment but it is not easy to see how it can make the ex-bankrupt the

> legal representative of the assignee so as to transfer to him the right of adopting and ratifying the supposed agency.'

In the end they said that at the time when the defendant's letters, which were relied on to take the case out of the statute of limitations, were written, the plaintiff was in point of law a stranger to the property. Then they said at 352:

> 'Is it possible to connect the correspondence between the plaintiff and Mr Dennett with the former's subsequent acquisition by reverter of his estate through the annulment of the bankruptcy? We are unable to find any legal principle on which such a connection can be made.'

It seems to me that properly analysed that case is, as Mr Solomon suggested, authority against the proposition put forward by Mr Lightman because had the effect of the annulment been that the bankruptcy was to be treated as if it had never taken place, there would have been nothing to determine the agency which was, as they held, determined by the bankruptcy and retrospectively Mr Dennett would have been treated as having been the bankrupt's agent throughout but, as can be seen, that was not the conclusion that the Court of Appeal came to.

62. In my judgment, so far as it is possible to discern any principle behind these authorities, the effect of the authorities is this: the statutory provision that the estate reverts in the bankrupt means that it is revested or reassigned to the bankrupt. I agree with His Honour Judge Dight that that is the natural meaning of the word ‘revert’. From the date of the annulment, subject to the effect of 282(4)(a), the former bankrupt is to the greatest extent possible to be in the same position as if he had never been made bankrupt, but this does not retrospectively change the character of acts which were carried out between the date of bankruptcy and the date of annulment. If, for example, a criminal offence was committed in that intervening period the annulment does not retrospectively wipe out the offence. I agree with Mr Solomon that if an abuse of process has been committed in that intervening period the annulment does not retrospectively wipe out that abuse. Similarly, if the effect of the

bankruptcy is to put an end to an agency, as we have just seen, the retrospective annulment of the bankruptcy does not cause the agency magically to revive. To that extent, in my judgment, the reverting does not have a completely retrospective effect. It does not change the characterisation of acts at the time that the acts took place. That, in my judgment, can be squared with the decision of the Court of Exchequer Chamber in *Bailey v Johnson* for the reasons I have already given. At the time that the bank received money from the trustee it was actually on notice that the trustee's title was being actively challenged by the bankrupt and, therefore, it knew it was taking a defeasible title. When that title in due course was defeated it was not surprising that the Court found that it did not lie in the bank's mouth to say that when it received the money it received the money from the trustee. To that extent, the money was to be treated as paid on behalf of the bankrupt but it does not mean that it was actually his money at the time when it was paid in.

63. In my judgment, therefore, the first ground of appeal (that His Honour Judge Dight was wrong on the effect of a statutory annulment) fails but, for reasons I have already given, I will allow the appeal on the other grounds. It is not I think necessary to say anything else. I have some doubts as to whether the position of the second claimant was appropriately dealt with in paragraph [29] of His Honour Judge Dight's judgment but it is not necessary to go into that because I will allow the appeal.

I am sorry I had to go on so long. Mr Lightman?

MR LIGHTMAN: My Lord, that leaves the question of what order to make now, My Lord. What we seek is obviously setting aside the order of His Honour Judge Dight.

MR JUSTICE NUGEE: Yes.

MR LIGHTMAN: Setting aside the costs orders which were made by the judge below and also I seek our costs of this appeal.

MR JUSTICE NUGEE: Yes.

MR LIGHTMAN: We have served a bill of costs in respect of that and which I can hand up. I don't know whether I should anticipate the arguments my learned friend makes or wait for him to make them and I will respond to them.

MR JUSTICE NUGEE: Well, the first question is whether there is opposition to the principle that the defendants should pay the costs of the appeal so I will ask Mr Solomon to rise.

MR SOLOMON: My Lord, there is. Also, My Lord, with great respect, I would ask for permission to appeal. I'm happy to address you on the-

MR JUSTICE NUGEE: I do not think I can give you it. It is a second appeal. I think you will have to ask the Court of Appeal: see the Access to Justice Act.

MR SOLOMON: My Lord, yes.

MR JUSTICE NUGEE: I will say if it is of any assistance to you in the Court of Appeal that the case is a difficult one.

MR SOLOMON: I'm grateful. In terms of costs, My Lord, what my learned friend says, that he wants to set aside the order of His Honour Judge Dight striking out the claim, I don't oppose that. I can't oppose that.

MR JUSTICE NUGEE: No. Thank you very much.

MR SOLOMON: He said he wants to set aside the costs order-

MR JUSTICE NUGEE: He does.

MR SOLOMON: -of His Honour Judge Dight and he asks for his costs today.

MR JUSTICE NUGEE: He does.

MR SOLOMON: So it is those latter two which I oppose, My Lord. Firstly, Your Lordship has said that our application was correct when it was made.

MR JUSTICE NUGEE: It was well founded on 5 December 2013.

MR SOLOMON: Yes.

MR JUSTICE NUGEE: That is true.

MR SOLOMON: And that Your Lordship has also indicated I think provisionally that the Court would be minded to grant permission to amend the reply.

MR JUSTICE NUGEE: Yes, I do not regard that as something that is before me.

MR SOLOMON: No.

MR JUSTICE NUGEE: I do not think any application has been made.

MR SOLOMON: It isn't, but it needs to be and it is an indulgence, it would be an indulgence of the Court to grant that. So the application was well founded.

MR JUSTICE NUGEE: I am not sure that it is an indulgence. Where somebody does not plead something in the first place and then has a change of heart and pleads something later, then to that extent it is an indulgence but where subsequent events take place, you could not have pleaded them when the reply was first served because they did not exist.

MR SOLOMON: Well, with great respect, it could have existed. The only reason it didn't exist is because they hadn't applied for annulment.

MR JUSTICE NUGEE: Because they had not taken steps to regularise the position earlier. Yes.

MR SOLOMON: It could and should have been done before the claim was commenced. The only reason it was done when it was done was because of our application.

MR JUSTICE NUGEE: Yes. No, I accept that.

MR SOLOMON: The order below then in respect of our costs should remain. We should have our costs of our application, which was a proper application and well made, and that order should remain in place. Secondly-

MR JUSTICE NUGEE: Well, except that the costs order that you have got from His Honour Judge Dight is the costs of the action and I do not think on any view you can maintain that.

MR SOLOMON: My Lord, I accept that. The costs of the action, I accept we can't have the costs of the action. We should have our costs of our application below. Your Lordship should

substitute the order for costs of the action to costs of the application below for the reasons I've just said.

MR JUSTICE NUGEE: Yes. Well, I understand that. The difficulty I have with it, I will be quite frank with you, Mr Solomon, is that although on 5 December they did not have locus and you were right about that, they were applying, and I cannot remember, although I am sure it is in the judgment, when they first told you they were going to apply for annulment.

MR SOLOMON: In December.

MR JUSTICE NUGEE: Shortly after the issue.

MR SOLOMON: Yes.

MR JUSTICE NUGEE: It may have been the next day. Yes, it is the next day, 6 December. Once they have said we are going to regularise the position by applying for annulment, if I am right in my substantive judgment then really from that point on the continued pursuit of the strike-out was at your risk.

MR SOLOMON: My Lord, I-

MR JUSTICE NUGEE: I can see that the costs for putting together the application and the witness statement and issuing the application on 5 December at a time when there had been no indication they were going to do anything to cure it and they simply seemed to be obtusely unable to see what you were saying is one thing. Once they have said to you by way of belt and braces, 'We do not think it is necessary, but we are going to annul,' then why should you not have waited to see if the annulment application was successful because if the annulment application had failed, you would have carried on and succeeded but once the annulment application succeeds, in my judgment it made your application unsuccessful.

MR SOLOMON: Well, at the very earliest then was the date after having received notification that the annulment was successful.

MR JUSTICE NUGEE: Yes.

MR SOLOMON: Which is late January.

MR JUSTICE NUGEE: Why not when they told you they were going to do it?

MR SOLOMON: Well, at that point we couldn't have withdrawn our application because we didn't know it would be successful.

MR JUSTICE NUGEE: You could have waited. You could have asked them when the annulment was going to take place and wait until then. That is admittedly with the benefit of hindsight. I understand that.

MR SOLOMON: In the event that wouldn't have made any difference, My Lord, because there was a PTR which would have happened in any event and then the application came on. So in effect, we did wait. Apart from the hearing itself [inaudible] soon after the annulment, there was nothing else we could have done.

MR JUSTICE NUGEE: Yes.

MR SOLOMON: So the costs order below is not as simple as my learned friend would have it. My submission-

MR JUSTICE NUGEE: Well, I think he has not asked for any costs order below, as I understand it. He has only asked for costs of the appeal. He has said he has asked for it to be set aside which I think I can do.

MR SOLOMON: Yes. No, I accept that. I accept that point, My Lord.

MR JUSTICE NUGEE: Yes. Shall we park that for the moment?

MR SOLOMON: I'll park that for the moment. The second point, and this is a substantive point of appeal before Your Lordship, is that the way in which it was put by my learned friend orally yesterday, which found favour with Your Lordship, was put like that for the first time orally. It had never previously been asserted that the solicitors and counsel representing the claimants had been erroneous in their approach to the law and that the advice to the claimant had been erroneous and, therefore, he was under a specific belief. So, therefore,

My Lord, until it was put like that it was a very different case. It certainly was argued very differently below.

MR JUSTICE NUGEE: Well, I accept that.

MR SOLOMON: And it was never suggested for a moment that the advice was erroneous.

MR JUSTICE NUGEE: Well, I think to be fair it was suggested by Mr White in his skeleton and, as appears from the judgment, before His Honour Judge Dight that *Pickthall* required the claimant to have known there was a cause of action and that was not the case being advanced by you.

MR SOLOMON: Yes, I accept that, but the point that found favour with Your Lordship wasn't made until yesterday orally.

MR JUSTICE NUGEE: Well, I think it is an elaboration of the same point. I mean, I understand that you thought you were primarily coming to me with your first point on which I have actually agreed with you.

MR SOLOMON: Quite. Well, My Lord, that's another point. I've got a list of points on costs, My Lord.

MR JUSTICE NUGEE: Yes.

MR SOLOMON: The primary substance of the appeal, indeed the only way in which it was put until amended, was about the retrospective effect of the annulment which the appellants have lost on and that was the part which most of the time and effort of the parties went into getting out, and most of the authorities went to that and significant submissions went to it. So given that they have lost on the most significant part, My Lord, in my submission there should be no order as to costs on appeal.

But taking a step back and returning to the point I was making before, really what the point, what has been said to Your Lordship by Mr Lightman is accepting for the first time in terms that the claimants' representatives for years had acted erroneously and I said yesterday

negligently and I think there's authority in support of my submission. It was *Nelson v Nelson*. My Lord, you have got-

MR JUSTICE NUGEE: I am not going to decide on something to which they are not parties as to whether people have acted negligently.

MR SOLOMON: No, I'm not asking Your Lordship. I'm not asking Your Lordship. The way I put it is like this: if that's right, then it seems very unfair that when my clients make an application based on their refusal to accept what we told them in terms, and it's difficult to know what more we could have done other that to-

MR JUSTICE NUGEE: No, no, you were very clear in what you said and correct in what you said.

MR SOLOMON: Then it has an impact on all the costs throughout up until that point. And, although, My Lord, I accepted that His Honour Judge Dight's order has to be set aside, in fact there is a very significant argument to be had about costs and it will no doubt arise in the stayed wasted costs application which we've got against the legal representatives of the claimants. Now, My Lord, all my-

MR JUSTICE NUGEE: I do not think I can take into account a possible application for wasted costs which I know very little about.

MR SOLOMON: Well, it is not a possible, it's an extant application.

MR JUSTICE NUGEE: Well, yes.

MR SOLOMON: But what I'm suggesting to Your Lordship in the context of that is that rather than making a decision today, costs should be reserved to the judge determining that application when the whole picture in the round can be seen because this hearing, this appeal, is intimately linked, as my learned friend's submission on this point made clear, intimately linked to the erroneous conduct of the solicitors below.

MR JUSTICE NUGEE: Can I be clear what it is you are asking me to do? There are two questions.

MR SOLOMON: My Lord, I am putting it in the alternative I think.

MR JUSTICE NUGEE: Okay. There are two questions. Firstly, which I *prima facie* do regard as a matter for me rather than anybody else, is the costs of the appeal.

MR SOLOMON: Yes.

MR JUSTICE NUGEE: You are asking me to make no order as to costs.

MR SOLOMON: If Your Lordship is going to make an order, no order as to costs because of this outcome as Your Lordship has determined.

MR JUSTICE NUGEE: Yes.

MR SOLOMON: Or costs reserved generally either to the judge hearing the wasted costs application or to the end of the trial. And Your Lordship will have realised that there are costs orders that have been made in the linked proceedings.

MR JUSTICE NUGEE: Yes, the possession proceedings.

MR SOLOMON: Possession proceedings that haven't been settled.

MR JUSTICE NUGEE: That have not been paid?

MR SOLOMON: No, and I imagine there is no chance of being paid.

MR JUSTICE NUGEE: Except by being set off against any costs order that falls on your clients.

MR SOLOMON: Perhaps, yes. That is right, My Lord. It is perhaps right that there would be set-off. There's another point that I understand the claimants' representatives are acting under a CFA. I understand that only because of Mrs Munday's witness statement which says that the solicitors are acting on a no win no fee and we haven't seen-

MR JUSTICE NUGEE: You have not seen it?

MR SOLOMON: We haven't seen the CFA. It's never been provided and so, with great respect, there's no way you can assess costs now and-

MR JUSTICE NUGEE: Assessment is the second question. The first is what order and then the second question is should it be detailed or summary and-

MR SOLOMON: But if the CFA is unenforceable, then liability falls away as well.

MR JUSTICE NUGEE: Well, that is true but I am not going to decide that today I hope. You are not asking me to decide that.

MR SOLOMON: Well, you can't. Your Lordship can't.

MR JUSTICE NUGEE: No.

MR SOLOMON: But that's another good reason to have it reserved.

MR JUSTICE NUGEE: Suppose I were against you and just ordered your clients to pay the costs, assessed costs of the appeal, that would not preclude you from saying on assessment there are no costs because there is an unenforceable CFA.

MR SOLOMON: Yes, I imagine that's right or at least-

MR JUSTICE NUGEE: I am pretty sure that is right.

MR SOLOMON: Your Lordship has made that clear now.

MR JUSTICE NUGEE: So back to the costs of the appeal. I have got three alternative submissions. Well, I think two really. Firstly, there should be no order as to costs and secondly that they should be reserved to somebody else.

MR SOLOMON: Yes.

MR JUSTICE NUGEE: I have to say I am not attracted by the second one. I understand why you make it but I do think that the appeal before me, that I ought to determine the costs because it is a bit unfair on anybody else to expect them to deal with those.

MR SOLOMON: I accept that, My Lord. I can see the force in that but I've also made submissions to Your Lordship about the costs below.

MR JUSTICE NUGEE: I was going to come to that. The costs below, you accept that the order that His Honour Judge Dight made has to go.

MR SOLOMON: Yes.

MR JUSTICE NUGEE: That must be right. You ask me to what, reserve all the costs below?

MR SOLOMON: I think my submission would be in three alternatives. My primary-

MR JUSTICE NUGEE: In order of priority, in order of preference?

MR SOLOMON: In order of priority, one is our costs below.

MR JUSTICE NUGEE: Yes.

MR SOLOMON: Secondly, no order as to costs below or, thirdly, costs reserved.

MR JUSTICE NUGEE: Right.

MR SOLOMON: It's certainly not right that the appellants should have their costs below.

MR JUSTICE NUGEE: Yes. Thank you. Well, let me see if I can sort this out first.

Mr Lightman, the costs of the appeal I am not going to reserve. You have heard what I have said. It does not seem to be to be appropriate to do so but what do you say should be the order as to the costs of the appeal? You have heard what Mr Solomon says about that.

MR LIGHTMAN: Yes, my primary argument is that we should have all our costs of the appeal.

MR JUSTICE NUGEE: Yes.

MR LIGHTMAN: And my secondary argument would be that you make a small discount to reflect the parties' time, court time in particular, that was spent on the retrospective issue concerning annulment.

MR JUSTICE NUGEE: Right. I will deal with that now.

I now have to deal with costs both of the appeal and what order, if any, should be made as to costs below. I will deal firstly with the costs of the appeal as a matter of principle.

It was suggested to me by Mr Solomon that because of outstanding applications for wasted costs it might be appropriate to reserve the costs of the appeal to some other judge, either the judge hearing the wasted costs application or to the judge hearing the trial, but that does not seem to me to be appropriate. The appeal is a separate and discrete step in the proceedings, indeed in a different Court, and I regard it as unfair for any other judge to be expected to resolve the question of what is the appropriate costs order for the appeal. I

therefore will not reserve those costs and will decide them myself now.

Secondly, Mr Solomon suggests that there should be no order as to costs. He does so on the basis that the argument which has ultimately found favour with me was not one which initially formed one of the grounds of appeal. It only came by way of an amended ground of appeal and, even then, was not articulated in the way in which Mr Lightman articulated it orally to me so that some more preparation time and some more time in court has been taken up on issues upon which I have in fact found in the defendants' favour. Mr Lightman asks for his costs or alternatively for those costs to be subject to a small discount.

I do take the view there was only one overall issue in the appeal, namely whether the appeal should be allowed or dismissed. It is not a case, as one sometimes has, of some claims failing and some claims succeeding but a case where some arguments for the appeal being allowed failed and some arguments for the appeal being allowed have succeeded. I do not think it appropriate in those circumstances to make no order as to costs. It does seem to me that the defendants who have resisted this appeal ought in principle to pay the costs under the general rule which is that if the Court thinks fit to make an order for costs the unsuccessful party should pay the successful party. However, I do see the force of what Mr Solomon says, that quite a bit of time and quite a bit of preparation has been taken up in relation to issues where in the event I have preferred the defendants' submissions and I do think it appropriate to discount the claimants' costs under the power do so. I will therefore order that the defendant do pay 70% of the claimants' costs. I have not so far decided whether that should be summarily assessed or subject to detailed assessment and I will now consider that.

Let us deal with the costs of the appeal first. Summary or detailed. You hear what Mr Solomon says about the CFA.

MR LIGHTMAN: May I take instructions, My Lord, once again?

MR JUSTICE NUGEE: I ought to say, Mr Lightman, while you are taking instructions that if there is a CFA point floating around, my strong inclination is not to summarily assess the costs because it may do a serious injustice to one party or the other.

MR LIGHTMAN: My Lord, may I propose instead that Your Lordship makes an interim payment in respect of my fees, my brief fees, which are not subject to any CFA and leave the question of detailed assessment to be dealt with separately.

MR JUSTICE NUGEE: Yes, I will therefore direct the costs to be paid on the standard basis. I take it you are not asking for an indemnity basis?

MR LIGHTMAN: No, My Lord.

MR JUSTICE NUGEE: No. On the standard basis to be the subject of detailed assessment if not agreed.

What do you say about an interim payment, Mr Solomon?

MR SOLOMON: I'm surprised, My Lord, given the witness statement by Mrs Munday, I always forget which number she is, that all the lawyers aren't on a CFA since her application was specifically based on the fact that her lawyers were on a CFA. Mr Lightman's fee, his brief fee, for this hearing you might be surprised to-

MR JUSTICE NUGEE: I have not seen the statement of costs yet.

MR SOLOMON: It amounts to a bold fee of £20,000 which, with great respect, it appears the claimants have absolutely no prospect of paying and I don't know quite how... I very much doubt his solicitors have got that payment on account. Presumably it is put in solely on the basis that the defendants will pay it if they win the appeal. But if there is going to be detailed assessment, it should all be subject to detailed assessment.

MR JUSTICE NUGEE: Well, no, no, it will all be subject to detailed assessment. I am not going to summarily assess part of the costs. What Mr Lightman is asking for-

MR SOLOMON: For an interim payment.

MR JUSTICE NUGEE: Is an interim payment and the rules provide that if a detailed assessment is ordered the Court should order a reasonable sum on account of costs unless there is a good reason not to.

MR SOLOMON: Well, there is good reason, My Lord.

MR JUSTICE NUGEE: Which is what?

MR SOLOMON: The good reason is in respect... I think Mr Lightman has only asked for an interim payment in respect of his costs.

MR JUSTICE NUGEE: That is right.

MR SOLOMON: Because he says he is not on a CFA.

MR JUSTICE NUGEE: Yes.

MR SOLOMON: My Lord, my fee was exactly half that of Mr Lightman's. That's not necessarily an indication that my fee was reasonable, My Lord. It is an indication-

MR JUSTICE NUGEE: You could have been unreasonable as well but not so grossly so, you say.

MR SOLOMON: Quite, and if Your Lordship has in mind the *Guide to the Summary Assessment of Costs* Your Lordship will see the Chancery Division for half a day, a junior of 10 years' call, and I'm looking at page 1780, My Lord.

MR JUSTICE NUGEE: Yes.

MR SOLOMON: It doesn't say what a day's hearing is but half a day is 1,397. Even my maths would show me that twice that is less than 20,000.

MR JUSTICE NUGEE: Yes. These are not run-of-the-mill proceedings. These are complex insolvency proceedings.

MR SOLOMON: I accept that, yes. Even if they are not run-of-the-mill proceedings and even if you triple it or quadruple it, you are still less than half Mr Lightman's fees. Now, the amount to be awarded on an interim payment on account is the amount of the minimum that the appellants would succeed in obtaining on a detailed assessment. With great respect to

Mr Lightman, it's not clear that the appellants would succeed in obtaining as much as £10,000, probably significantly less. So, with great respect, and there's no point making that order because there is more than that outstanding costs to be paid by the appellants to the respondents so it's not going to make any difference.

MR JUSTICE NUGEE: Well, it will because it would enable set-offs one way or the other to be implemented.

MR SOLOMON: Well, they haven't paid and there is no enforcement proceedings.

MR JUSTICE NUGEE: No.

MR SOLOMON: No ability to take enforcement proceedings because there is no property. There's nothing there. So the reality is it will just be a paper award and it's much more sensible simply to do the whole thing on detailed assessment.

MR JUSTICE NUGEE: Yes, I see. Mr Lightman, what do you say about that? I think there are two points, yes. Firstly, what do you say about quantum but secondly, it is not really appropriate to make an award at all in circumstances where, as Mr Solomon says, it is just a paper award.

MR LIGHTMAN: My Lord, to deal with that point first. Actually, I'm not privy to the full details of what costs orders there are.

MR JUSTICE NUGEE: Are you instructed in the possession proceedings? Are you aware of that?

MR LIGHTMAN: I don't know whether the respondents are suggesting that they will not take any steps to enforce any costs awards until there has been a detailed assessment of these costs which in total amount to more than £40,000 for costs of appeal. If my learned friend is saying actually they are not going to take any steps in respect of any [inaudible]-

MR JUSTICE NUGEE: He is probably not in a position to say that but what he is saying is that at the moment there does not seem to be any property to enforce against.

MR LIGHTMAN: Yes. Well, My Lord, it's important in this case that there should be an interim

payment made. If they consider that it can be set off against some other liability, then that's [inaudible].

MR JUSTICE NUGEE: I would have thought if there has been an order for assessed costs and for an interim payment on account of costs in the possession proceedings, which again I do not know, I would have thought there would be a set-off of mutual debts even if I were to order an interim payment but that is not a matter I have got to decide. What about quantum?

MR LIGHTMAN: Quantum, My Lord. Well, this is, as Your Lordship has said, a difficult case. I was new to the case for the appeal.

MR JUSTICE NUGEE: Yes.

MR LIGHTMAN: It was appropriate that there should be new counsel involved, especially with a wasted costs issue being floated and fought. I had to prepare a skeleton argument in support of the application for permission, grounds of appeal and then prepare for this one-day hearing plus also attend for judgment this afternoon.

MR JUSTICE NUGEE: Yes.

MR LIGHTMAN: As I say, it is a weighty matter. There is also an application for a stay in which I was involved which involved Mrs Munday putting a witness statement forward. My Lord, if I can just refer you to that. It's divider two, page 14. She specifically says this at paragraph [8].

MR JUSTICE NUGEE: Yes.

MR LIGHTMAN: 'We have no savings. Due to my low wages and Kevin's status as a self-employed builder being unable to work full time since December 2013, we do not have £20,000. We are not in a position to raise finance to cover payment of 20,000 [inaudible] appeal.' That is the 20,000 for me.

MR JUSTICE NUGEE: Yes.

MR LIGHTMAN: 'My parents are in the process of selling their home and once the sale goes

through will provide us with sufficient money to fund the barrister's fees for the appeal. Unfortunately, [inaudible] potentially cover that and costs of the appeal. The solicitors have a no win no fee [inaudible].' So it was plain from her witness statement how they were going to pay the money for this appeal. My learned friend has said he was curious how they obtained it. Well, evidence is before us how they were going to do so.

In my submission, this is a serious and weighty appeal which takes it fully outside the ordinary run of cases. I was briefed afresh to deal with a complicated situation and in large part, apart from the issue of annulment, Your Lordship has drawn upon argument put forward on behalf of the appellants.

MR JUSTICE NUGEE: Yes.

MR LIGHTMAN: For this appeal and that it is appropriate there should be an appropriate interim payment on account of costs.

MR JUSTICE NUGEE: What do you say an appropriate interim payment is?

MR LIGHTMAN: My Lord, my brief fee for all the work that's been done including today is £20,000 and, bearing in mind all factors, I would suggest £15,000 would be an appropriate interim payment.

MR JUSTICE NUGEE: You seem to overlook, Mr Lightman, that I have only ordered the defendants to pay 70% of the costs.

MR LIGHTMAN: At the very least, My Lord, I would say £10,000, particularly what my learned friend, his brief fee-

MR JUSTICE NUGEE: He said that would be too high.

MR LIGHTMAN: Well, he-

MR JUSTICE NUGEE: Okay. I am going to draw a line under this. I have something to go to at 4.30 so I am going to try to cut this short.

I am now asked to make an interim payment on account of costs. It is agreed by both

counsel (and I agree) that the costs of the appeal will have to go to detailed assessment. The general principle is that where a Court orders detailed assessment it should make an order for interim payment unless there are good grounds for not doing so. Mr Solomon says in this case there are good grounds for not doing so, partly because he suggests there is some doubt as to whether the claimants would ever have been in a position to fund Mr Lightman's fees. I should say that Mr Lightman in the light of queries as to the CFA under which his solicitors are acting accepts that no interim payment should be given on account of his solicitors' costs but he asks for an interim payment on account of his own costs, he not acting on a CFA basis.

Mr Solomon, as I have said, suggests there is some doubt as to whether the claimants could really have been liable for Mr Lightman's costs of the appeal but I have before me evidence from Mrs Munday that the funding for the barrister's costs is coming from the sale of her parents' house and I have no reason to disregard that evidence. Mr Solomon also says that there are outstanding costs orders in favour of the defendants in the possession proceedings, which I am sure is correct, and that there is no prospect of them being paid. I am sure that is also likely to be the case but it seems to me that is not a good reason for not making an interim payment. It means that if an interim payment is ordered it may very well be that the defendants will be able to take advantage of a set-off of mutual debts to that effect.

In those circumstances, it does seem to me appropriate to make an order for an interim payment. I have been told, although I have not seen, that Mr Lightman's fee for all the work which he has done on this appeal, including the amendment to the appeal and the application for a stay and skeleton arguments and the like is £20,000. I have limited the costs which the defendants are liable for to 70% of the claimants' costs which takes one down to £14,000. I take the view that 50% of that is a reasonable estimate of the minimum

sum which is likely to be ordered at detailed assessment. I will therefore order that the defendants do pay £7,000 on account of costs. 28 days?

SOLICITOR: It probably doesn't matter.

MR JUSTICE NUGEE: It probably does not matter.

MR LIGHTMAN: I think you've probably heard my learned solicitor say that, My Lord.

MR JUSTICE NUGEE: Yes, it probably does not matter because of the set-off, if there is one, but I will say within 28 days.

MR LIGHTMAN: I'm very grateful.

MR JUSTICE NUGEE: Costs below. Mr Lightman?

MR LIGHTMAN: Yes, My Lord, [inaudible]. Your Lordship has seen the correspondence in December. The application was issued on the 5th.

MR JUSTICE NUGEE: Yes.

MR LIGHTMAN: The letter on the 6th. The letter of the 6th-

MR JUSTICE NUGEE: It says they are going to take steps to annul.

MR LIGHTMAN: It also referred to the *Pickthall* case.

MR JUSTICE NUGEE: Yes.

MR LIGHTMAN: And to the importance of knowledge. The response on... And, yes, it talked about the assignment with the annulment. GSC's response said that *Pickthall* doesn't assist. The contrary is the case and it doesn't matter whether he knew or didn't know. It also said at page 131 of the bundle: 'We know your client is now seeking to cure the position, if indeed it is capable of being cured,' etc.

MR JUSTICE NUGEE: Yes.

MR LIGHTMAN: 'Nothing you have said has changed our clients' position regarding the application that has now been made to the Court.' So what they are saying and what they said was that it doesn't really make any difference whether you apply for annulment or not.

MR JUSTICE NUGEE: Yes.

MR LIGHTMAN: And so their position, if we had written our letter the day before they still would have proceeded with their application.

MR JUSTICE NUGEE: Yes.

MR LIGHTMAN: And so-

MR JUSTICE NUGEE: What are you asking for?

MR LIGHTMAN: What I'm asking for... First of all, obviously to set aside the order for costs.

MR JUSTICE NUGEE: That is not disputed.

MR LIGHTMAN: That is not disputed. Secondly that they shouldn't get their costs below and, thirdly, that since the issue, the core issue, was *Pickthall*, knowledge or no good cause of action that in fact, and that was a core issue which was raised.

MR JUSTICE NUGEE: Yes.

MR LIGHTMAN: That in fact there should be a contrary costs order, costs of the applicants, then respondents to this appeal, should pay the appellants' costs of the application below. The core issue was *Pickthall*, whether or not the claimants or Mr Munday for that matter knew at the time when he issued proceedings with Mrs Munday that he did not have title to bring the claim and right from the outset it was made clear, and it was made clear also in Mr Vaughan's witness statement and the enclosures to that and in this letter of 6 December, that the issue was of knowledge and that he did not even regard himself as having had title [inaudible]. That is determinative of a key issue in the application and the application to annul combined with that and the annulment order being made meant that the application itself was doomed to failure.

MR JUSTICE NUGEE: Yes, thank you. Mr Solomon says there is an outstanding application for wasted costs so it should all be dealt with together.

MR SOLOMON: My Lord, the wasted costs order is dependent on whether Your Lordship sets

aside the order below.

MR LIGHTMAN: No, it isn't.

MR JUSTICE NUGEE: Well, I rather suspect it will not be. It is not before me. I have not seen it and I do not want to see it but I think there is some force in what Mr Solomon says, that there are ongoing proceedings as to the costs of the application in the County Court which will in due course come before a County Court judge. There is a lot to be said for the idea that it should be dealt with all in one go.

MR LIGHTMAN: My Lord, if I could just see the order. The order below might indicate.

MR JUSTICE NUGEE: The order below is at tab five.

MR LIGHTMAN: Tab five, yes, My Lord.

MR JUSTICE NUGEE: It does not-

MR SOLOMON: We didn't get an order for wasted costs below. That's a separate application.

MR JUSTICE NUGEE: Paragraph 8: 'Any application by the defendants for an order for costs against the claimants' legal representatives to be made within 21 days, to be referred to His Honour Judge Dight.

MR LIGHTMAN: Yes. My Lord, we don't have that application or I haven't seen it myself so-

MR JUSTICE NUGEE: Again, I am going to cut this short.

In the unusual circumstances of this case in which His Honour Judge Dight made provision in his order at paragraph 8 for the defendants to be able to apply for an order for costs against the claimants' legal representatives from time to time and I am told that such an application has been made and that that was reserved to His Honour Judge Dight himself, it does mean that Mr Solomon is right that it makes sense for the costs of the application before His Honour Judge Dight also to be reserved to the judge in the County Court dealing with that application.

I should say in case that application is not pursued, if that application is not pursued, then

we would have to reserve it to the trial judge. That is not entirely satisfactory because it will require His Honour Judge Dight or whoever else deals with it to have to unpick the views that I have expressed on the appeal and what effect they might or might not have had on the application which would mean going through again the correspondence which I have gone through in my judgment but it does seem to me that it would not also be entirely satisfactory if I were to seek to make an order at this stage in relation to the costs of the application below in circumstances where, as I have said, there is an outstanding application for wasted costs. In all the circumstances, it seems to me to be more appropriate for all the applications in relation to those costs to be dealt with together.

Is there anything else?

MR LIGHTMAN: My Lord, presumably what would go, however, is the interim payment that was ordered.

MR JUSTICE NUGEE: Yes, that is the interim payment on account of costs, paragraph 4 of the order of Judge Dight. Paragraphs 1, 2, 3, 4 will go. I think 6, 7, 8 stay in. Yes. Thank you both very much. I will just rise. Sorry to have kept you late. Thank you both for your very interesting and well-argued submissions.
