

ENGLAND AND WALES / JUDGMENT

# White v Davenham Trust Ltd

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Neutral Citation Number: [2011] EWCA Civ 747 IN THE COURT OF APPEAL (CIVIL DIVISION) ON APPEAL FROM THE HIGH COURT OF JUSTICE CHANCERY DIVISION MR JUSTICE FLOYD

[2010] EWHC 2748 (Ch) Case No: A2/2010/2721 Royal Courts of Justice Strand, London, WC2A 2LL  
Date: 28 June 2011 Before: LORD JUSTICE MAURICE KAY, VICE PRESIDENT OF THE COURT OF APPEAL CIVIL DIVISION LORD JUSTICE LLOYD and LORD JUSTICE ELIAS

- ----- Between: MARK EUGENE WHITE  
- and - DAVENHAM TRUST LTD  
- -----  
- ----- Claimant Appellant Defendant Respondent Peter Arden QC and  
Kavan Gunaratna (instructed by Coyle White Divine) for the Appellant Barry Isaacs QC  
(instructed by DWF LLP) for the Respondent Hearing date: 18 May 2011  
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## Judgment

Lord Justice Lloyd: 1. 2. 3. This appeal is from an order of Mr Justice Floyd made on 1st November 2010. He allowed an appeal against an order dated 18th May 2010 of Deputy Registrar Schaffer setting aside a statutory demand served by Davenham Trust Limited (DTL) on Mr Mark White. Lord Justice Etherton gave permission for this second appeal to be brought. Mr White gave a personal guarantee to DTL for the liabilities of a company, St George's Property Services (London) Limited (SGPS) of which he was a director at the time. SGPS was not only personally liable to DTL for the repayment of the relevant credit facilities; it also gave security by a charge on land as well as a fixed and floating charge on its assets generally. Mr White's fellow director also gave a personal guarantee. SGPS is now in administration. DTL still has security by way of a charge over one property. It demanded payment by Mr White under his guarantee in September 2009. When he did not pay, it served a statutory demand on him in October 2009. He 4. 5. 6. 7. 8. 9. applied to set the statutory demand aside and the deputy registrar granted that application. However, as already mentioned, Mr Justice Floyd allowed DTL's appeal. His judgment is at [2010] EWHC 2748 (Ch), [2011] BPIR 280. We have to decide whether he was right to allow the appeal. Floyd J held one issue to be properly arguable, as to whether DTL is entitled to the full amount of the interest which it claims by way of default interest. However, there is no dispute as to Mr White's liability to repay the principal or to pay interest at the lower (but not that low) rate

applicable apart from any default. On any basis a large sum is due to DTL from SGPS and is the subject of Mr White's guarantee. At the time of the service of the demand the undisputed debt was about £750,000. With interest accrued since then, even at the lower rate, it is said to be over £1 million by now. The question is whether, and if so how, the existence of the security given by SGPS affects DTL's ability to take steps against Mr White by way of or towards bankruptcy proceedings. A creditor who seeks to enforce his debt against an individual debtor may commence an action against him in a relevant court. Alternatively he may wish to take bankruptcy proceedings immediately. If there is a genuine dispute about the entire debt, or a cross claim which would equal or exceed the debt, he is precluded from invoking the bankruptcy system, by virtue of provisions which I will mention. In order to start bankruptcy proceedings the creditor must satisfy the provisions of ss.267 and 268 of the Insolvency Act 1986. I need not read those but among the requirements is that the debt must be unsecured – s.267(2)(b) – and it must be one which (so far as relevant) the debtor appears to be unable to pay: s.267(2)(c). Under s.268(1) the debtor appears to be unable to pay the debt, for this purpose, if and only if one of two conditions is satisfied. The first is that a statutory demand has been served on the debtor, at least three weeks have elapsed since then, and the demand has been neither complied with nor set aside. The second is that execution or other process on a judgment for the debt has been returned unsatisfied in whole or in part. The prohibition on a secured creditor presenting a petition is subject to two exceptions, under s.269. The first is if the creditor states that, if a bankruptcy order is made, he is willing to give up his security for the benefit of all creditors. In that case, therefore, the creditor is secured but if the bankruptcy process follows he will be treated as unsecured and the asset over which the security exists will form part of the bankruptcy estate available for distribution as between all the creditors. The second case is where the petition is expressed not to be made for the secured part of the debt and the estimated value of the security is stated. In that case there are deemed to be two separate debts, one secured (to the amount of the value of the security) and the other unsecured (for the balance) and the bankruptcy petition is only for the unsecured balance. By virtue of s.383 of the 1986 Act the only security which is relevant for this purpose is security over an asset or assets of the particular debtor in question. Lying behind these arrangements is the fact that bankruptcy proceedings are not intended as a means for a single creditor to enforce his debt against the debtor but rather as a method of collective realisation of the assets of a debtor who cannot pay his debts, to be distributed for the benefit of all creditors with claims on those assets. A creditor who is fully secured over assets of that debtor does not need to take bankruptcy proceedings, and should not do so, unless he is willing to give up the security, because the asset over which the security exists will not be part of the estate divisible for the benefit of the creditors generally. That is why a secured creditor cannot present a bankruptcy petition under s.267(2)(b) unless either he is willing to give up the security or his security is not adequate to cover the whole debt, in which case he ranks with the other unsecured creditors but only so far as the shortfall is concerned. 10. That summary goes back to first principles of bankruptcy law as set out in the Insolvency Act 1986 and the related rules, but it is worthwhile to bear it in mind when considering the provision on which this appeal turns. That is Insolvency Rule 6.5 which is in Chapter I of Part 6 of the Insolvency Rules 1986, dealing with statutory demands. Rule 6.1 deals with the form and content

of the statutory demand. I need only note that by rule 6.1(5), if the creditor holds security for the debt, the full amount of the debt is to be specified but the nature of the security must be specified in the demand as well as the value which the creditor puts on it at the date of the demand. The amount of which payment is claimed by the demand is to be the full amount of the debt less the amount specified as the value of the security. Thus, consistently with the provisions of the Act, the statutory demand applies only to the shortfall where the security is inadequate. 11. Rule 6.4 deals with the application to set aside a statutory demand and rule 6.5 with the hearing of such an application. I can go straight to rule 6.5(4) which specifies the grounds on which the court may grant the application. “(4) The court may grant the application if— (a) the debtor appears to have a counterclaim, set-off or cross demand which equals or exceeds the amount of the debt or debts specified in the statutory demand; or (b) court to be substantial; or the debt is disputed on grounds which appear to the (c) it appears that the creditor holds some security in respect of the debt claimed by the demand, and either rule 6.1(5) is not complied with in respect of it, or the court is satisfied that the value of the security equals or exceeds the full amount of the debt; or the court is satisfied, on other grounds, that the (d) demand ought to be set aside.” 12. The procedure by way of a statutory demand was one of the new features of bankruptcy law introduced in 1986 as a result of the recommendations of the Cork Committee. It allows the question to be determined at a preliminary stage whether the creditor is entitled to invoke bankruptcy proceedings, before the presentation of the bankruptcy petition itself, with the extensive consequences of that event. It was not long before the court had to consider the ambit of rule 6.5(4)(d). We were shown a decision of this court in *Re A Debtor* (No. 1 of 1987) [1989] 1 WLR 271, the judgment being given by Nicholls LJ. Having said what I have already about the structure of the bankruptcy legislation I can go directly to the presently most relevant passage which is at p.276 D – F. “When therefore the rules provide, as does rule 6.5(4)(d), for the court to have a residual discretion to set aside a statutory demand, the circumstances which normally will be required before a court can be satisfied that the demand “ought” to be set aside, are circumstances which would make it unjust for the statutory demand to give rise to those consequences in the particular case. The court’s intervention is called for to prevent that injustice. This approach to sub-paragraph (d) is in line with the particular grounds specified in sub-paragraphs (a) to (c) of rule 6.5(4). Normally it would be unjust that an individual should be regarded as unable to pay a debt if the debt is disputed on substantial grounds: sub-paragraph (b). Likewise, if the debtor has a counterclaim, set-off or cross demand which equals or exceeds the amount of the debt: sub-paragraph (a). Again, if the creditor is fully secured: sub-paragraph (c).” 13. I should add that, consistently with what I have already said about secured creditors, it is clear, and common ground, that rule 6.5(4)(c) only applies where the security is over assets of the particular debtor. That was held to be the case by Knox J in *Re A Debtor* (No. 31 of 1988) [1989] 1 WLR 452 as regards rule 6.1(5), which I have mentioned. It is agreed that the same applies under rule 6.5(4)(c).

14. Mr White relied on rule 6.5(4)(d) by analogy with (4)(c). On his behalf Mr Arden QC, in his clear and able submissions, referred us to a recent decision of the Court of Appeal relating to the interrelationship between subparagraphs (a) and (d), by way of analogy. To the contrary, Mr Isaacs Q. C., appearing for DTL as he did below, argued succinctly and cogently that the analogy sought to be drawn is false and illegitimate. 15. 16. 17. The recent case in question is *Remblance v. Octagon Assets* [2009] EWCA Civ 581,
- [2010] 1 BCLC 10. Like the present, that case concerned a statutory demand served on a debtor who was liable as a surety. He contended, and it was accepted as arguable, that as between the creditor and the principal debtor, the latter had a cross-claim against the creditor such that if the principal debtor had been an individual and the creditor had served a statutory demand on that individual, it would have been set aside under rule 6.5(4)(a). By a majority, the Court of Appeal held that in such a case the surety debtor was entitled to have the statutory demand set aside under rule 6.5(4)
- (d) by analogy because his liability should be regarded as co-extensive with that of the principal debtor. The main issue on this appeal is whether the same applies where the creditor has security over the assets of the principal debtor and for that reason could not serve a statutory demand on the principal debtor having regard to rule 6.5(4)(c) but has the benefit of an unsecured debt owed by the guarantor. I must refer to the judgments in *Remblance* in some detail because of the significance attached to that case by Mr Arden in his submissions. There the principal liability was for unpaid rent. The tenant was a company of which Mr Remblance was the sole executive director and shareholder. The tenant had brought proceedings against the landlord, Octagon, for damages for breach of covenant, the likely amount of damages being held by the judge to exceed the amount of the unpaid rent. Those proceedings were still pending. Instead of counterclaiming for the unpaid rent against the tenant, Octagon served a statutory demand on Mr Remblance as guarantor under the lease. It was common ground that if, hypothetically, a statutory demand had been served on the tenant it would have been set aside under rule 6.5(4)(a) even though the lease contained a “no set-off” clause so that the landlord could get judgment against the tenant for the rent. Such a judgment might or might not have been stayed pending the resolution of the cross-claim. It seems also to have been accepted that Octagon could have obtained judgment against Mr Remblance and that he would not have been able to have the judgment stayed pending the resolution of the tenant’s cross-claim. Nevertheless the majority of the Court of Appeal held that rule 6.5(4)(a) should be followed by analogy under paragraph (4)(d) and that the statutory demand served on Mr Remblance should be set aside. 18. In argument before us it was said to be relevant that Mr Remblance had sought to amend to add a ground of appeal relying on the proper construction of the lease, to show that the tenant’s liability and therefore also that of Mr Remblance was disputed. That application was rejected by all members of the court: see paragraphs 31, 55 and 74.

19. Mummery LJ would have upheld the judgment of Mann J refusing to set the statutory demand aside, but Dyson and Ward LJJ disagreed with him and held that the statutory demand should be set aside. It is possible to detect some differences between the reasoning in the judgments of the majority but it does not seem to me that these matter for present purposes. It was not a case in which security for the debt was a relevant feature. Mann J had, however, placed some reliance on the fact that the debt was not very large (some £11,000 or so) and that Mr Remblance appeared in practice to be capable of paying it. 20. Dyson LJ said this at paragraph 41: "It was unjust to allow Octagon to proceed against Mr Remblance by the insolvency route if it could not proceed against JBR by that route. The reason for that is easy enough to see. Mr Remblance's obligation was not an obligation himself to pay the rent and discharge JBR's obligations under the lease. It was an obligation to see to it that JBR discharged its obligations to Octagon and to make good to Octagon all losses sustained "through the default of the tenant in respect of any of the before mentioned matters." The distinction between the two types of obligation is well established. ... Their obligations were co-extensive." 21. He went on at paragraph 44 to accept that the court has a discretion not to set aside the statutory demand even if one of the conditions under the rule is satisfied, but he said that if one of those conditions is satisfied the demand will usually be set aside. He continued as follows: "That is because it will usually be unjust to require the principal debtor to face the consequences of bankruptcy if he appears to have a counterclaim, set-off or cross demand. There may be circumstances where the principal debtor's ability to pay is a relevant factor. But as Nicholls LJ said, the theme running through rule 6.5(4) is that a statutory demand will be set aside where it is just to do so. In my judgment, it is difficult to see how it can be just not to set aside a demand where the principal debtor satisfies one of the conditions in sub-paragraph
- (a) merely because he can afford to pay the debt." 22. At paragraph 45 he made the point that, if the principal debtor had a genuine cross-claim, the fact that the debtor could afford to pay would not be a good reason to refuse to set aside a statutory demand. At paragraph 46 he said that, having regard to the co-extensiveness principle, the position should be the same in relation to a guarantor under paragraph (4)(d) as it is for the principal debtor under paragraph (4)(a). He then said this: "Justice requires that the two cases should be treated in the same way. Prima facie, it is unjust to require the principal debtor to face the consequences of bankruptcy where he appears to have a counterclaim, set-off or cross demand which equals or exceeds the amount of the debt specified in the statutory demand. Having regard to the principle of co-extensiveness, it is equally unjust in such circumstances to require the guarantor to face the consequences of bankruptcy. It is as unjust to the guarantor to require him to pay the debt as a condition of avoiding the consequences of bankruptcy as it is unjust to the principal debtor to require him to pay the debt as a condition of avoiding the consequences of bankruptcy." 23. At paragraph 50 he mentioned the question of obtaining judgment in civil proceedings and said this, on the basis that Mr Remblance would be liable to have judgment entered against him for the unpaid rent and could not have execution of that judgment stayed pending the trial of the

tenant's cross-claim: "But in my judgment that is immaterial to the question whether he should succeed in an application to set aside a statutory demand under rule 6.5(4)(d). The question whether execution of a judgment should be stayed is distinct from the question whether a statutory demand should be set aside. That is demonstrated by the fact that, as is conceded, JBR would be likely to succeed in an application to set aside a statutory demand by Octagon under rule 6.5(4)(a) in circumstances where it might well fail in an application to stay the execution of a judgment in favour of Octagon." 24. His conclusion overall can be seen from two further short paragraphs from his judgment, paragraphs 52 and 54, as follows: In my judgment, justice required the statutory demand "52. to be set aside in this case. There are no good reasons for distinguishing between the position that obtains in this case from the position which would have obtained if an application had been made by JBR under rule 6.5(4)(a) to set aside a statutory demand made against it. Having regard to the principle of co-extensiveness, justice requires the two cases to be treated alike. 54. I do not accept that rule 6.5(4)(a) should be regarded as anomalous. It is a rule which reflects the interests of justice. So too is rule 6.5(4)(d). I do not see why the fact that the guarantor does not have the counterclaim, set-off or cross-claim should of itself mean that he does not have the benefit of the co-extensiveness principle and is not in the same position as the debtor so far as rule 6.5(4)(d) is concerned."

25. Ward LJ attached some importance to the terms of the guarantee and to the fact that the tenant was the alter ego of Mr Remblance. At paragraph 72 he said this: "In view of the fact that JBR has a counterclaim which may exceed the arrears of rent, it is likely, assuming that the Insolvency Rules applied to it, that it would be able successfully to rely upon rule 6.5(4)(a) to set the statutory demand aside because it would be unjust not to do so. Having regard to the co-extensive nature of the guarantor's liability, and the underlying need for comparable treatment being afforded under rule 6.5(4)(d), justice demands similar treatment for Mr Remblance." 26. In this part of his judgment he did not in terms agree with Dyson LJ, as distinct from the following paragraphs, 73 and 74, where he did agree with him as regards how to exercise the court's discretion afresh, having held that the judge had erred on this point. However, it seems to me that in what he said at paragraph 72 he was in agreement with Dyson LJ and that this is therefore, so far as relevant, the ratio of the decision in that respect. As regards the exercise of the discretion his reasons can be summarised in a passage from paragraph 73 of his judgment as follows: "I conclude, in agreement with Dyson LJ, that justice demands that Mr Remblance be placed in a comparable position with JBR and that since JBR would not be in peril of immediate payment of the arrears of rent, neither should Mr Remblance be required to pay these arrears under threat of bankruptcy. It is not just to differentiate between them."
27. Mr Arden drew an analogy between the position of the surety as established in that case, where rule 6.5(4)(a) would apply as between the creditor and the principal debtor, on the one hand, and for present purposes the position where rule 6.5(4)(c) would apply as between the creditor and the principal debtor. He relied on the passage I have cited from Nicholls LJ and accordingly argued that by parity of reasoning the statutory demand in the present case

should be set aside under rule 6.5(4)(d) because of the application of the co-extensiveness principle and the analogy with the position as it would be if a statutory demand had been served by the creditor on the debtor in the present case. 28. Having reviewed the legislation and some of the principal cases relied on I must now go back briefly to the start of the present proceedings before I apply these principles to the facts of the present case.

29. Mr White's application to set aside the statutory demand was based on a number of propositions. One was that there was a triable issue as to whether the full amount of interest claimed was due. The second, and now the relevant point, was the existence of security for the debt given by the principal debtor, SGPS. So far as the first point was concerned Mr White contended that the rate of interest was so high as to constitute an extortionate credit transaction within the meaning of s.244 of the Insolvency Act. On that basis he argued that the administrators ought to apply for an order under that section which could at the very least be expected to reduce the amount of interest payable. That is an application which, under the Act, is only open to an office-holder such as the administrators. Alternatively he argued that the additional rate of interest was a penalty at common law and was accordingly invalid and unenforceable. When the case came before the deputy registrar he was not satisfied that the security was sufficiently valuable to cover the full amount of the debt as claimed, he held that there was no triable issue as to the transaction being an extortionate credit transaction, and he held that the liability to pay the additional interest was not a penalty. Nevertheless, under the court's residual discretion under rule 6.5(4)(d) he set aside the statutory demand for reasons including the fact that Mr White was unable to influence the administrators and that DTL could enforce the security leaving an ultimate balance, if any, payable by Mr White and ascertaining his 30. 31. liability in that way. Against that judgment DTL appealed and Mr White served a respondent's notice. In the meantime Mr White had applied to remove the administrators and to have them replaced on the basis that they were not giving adequate consideration to the possibility of applying to have the transaction set aside or varied under s.244. That application succeeded before the registrar but DTL's appeal to the High Court succeeded before the Chancellor: see [2010] EWHC 2538 (Ch), [2011] BPIR 242. An appeal to this court against the Chancellor's order was heard in April and judgment is pending. Floyd J held that there was no real prospect of a challenge being mounted on the basis of an extortionate credit transaction under s.244 but that there was a triable issue as to the validity of the increase in the interest rate as a penalty at common law. This however would only affect the liability of SGPS, and accordingly the guarantors, for the additional interest, not for the principal or the basic interest payable absent a default. He also held that it did not provide a good reason to set aside the statutory demand. In that respect the judge had regard to cases which establish the freedom of a creditor to choose between different remedies available to it, including a number of cases on that point decided in Australia, Canada and Hong Kong. He said that the existence of a secured remedy against the principal debtor should not place the creditor in a worse position as regards bankruptcy proceedings against the guarantor than if he had no such security: see paragraph 34. In that respect therefore he held that the position was different if

the principal debtor could rely on rule 6.5(4)(a) or (b), on the one hand, as compared with that where the relevant provision was rule 6.5(4)(c).

32. Mr Arden submitted that the principle of co-extensiveness as between, on the one hand, the creditor and the principal debtor and, on the other hand, the creditor and the guarantor is the basis of the decision in *Remblance* and that it should apply in relation to rule 6.5(4)(c) just as it does to the other paragraphs of the rule. Why, he asked rhetorically, should there be a difference between this case and the others? 33. 34. It seems to me that the effect of rule 6.5(4) as a preliminary filter in relation to bankruptcy proceedings against a debtor is broadly speaking as follows. If the debtor has a counterclaim, set-off or cross-claim which equals or exceeds the relevant debt, then the policy is that the creditor should not use bankruptcy proceedings but should issue civil proceedings as the proper way in which the true state of indebtedness between the creditor and the debtor may be determined, whether the cross-claim is a set-off so that it would extinguish the claim or not, as in the case of some cross demands, and whether or not, as one sees from *Remblance*, the debtor would be entitled to have a judgment for the basic debt stayed pending the resolution of the cross-claim. Likewise, and even more so perhaps, if the debt is disputed on apparently substantial grounds the creditor may not use bankruptcy proceedings but must issue civil proceedings in which the dispute as to the debt may be resolved in the proper manner. This would apply whether the debtor's liability is primary or secondary, on the basis that the guarantor of a disputed debt cannot be made liable any more than can the principal debtor until the dispute is resolved. By the same token if the liability is secondary and if the principal debtor would have a cross-claim, even if it does not amount to a true defence to the claim, the guarantor can be seen as equally entitled to take the benefit of the cross-claim in ascertaining the state of account which is subject to the guarantee, at least for the purposes of bankruptcy proceedings. That is the effect of the decision in *Remblance* as applied to the different rules. 35. 36. 37. 38. The position under rule 6.5(4)(c) seems to me to be different. It is concerned with regulating the position as regards the debtor's assets and liabilities. The debtor may have no possible defence to a claim on the personal covenant to pay but in terms of bankruptcy proceedings the creditor is not to claim on a personal debt without bringing into account the security or releasing it: see rule 6.1(5) to which I have referred and also rules 6.09 and 6.115 – 119. If however the security which the creditor holds is given not by the particular debtor but by a third party, whoever that third party may be, that security is not over an asset which can have any effect on the bankrupt estate of the particular debtor and it is accordingly irrelevant for the purposes of rule 6.1(5) and correspondingly for the purposes of rule 6.5(4)(c). The case of third party security is similar to that of security given by the debtor in one respect since the existence of the security is no answer to a personal claim for payment. On the other hand it is different from the case of security given by the debtor because security by a third party is of no relevance to the debtor's estate as such since the asset over which the security exists can never form part of the assets of the particular debtor divisible between his creditors. The authorities are consistent on this point, as relied on by Mr Isaacs. He showed us first a passage from Lord Lyndhurst, Lord Chancellor in *Re*

Plummer (1841) 1 Ph 56, then Sir George Jessel MR in the Court of Appeal in *Ex parte West Riding Union Banking Company*, *In Re Turner* (1881) 19 Ch D 105 at 112 referring back to Lord Lyndhurst, and lastly *The Liverpool* (No 2) [1963] P 62 at p.84 where Lord Justice Harman giving the judgment of the Court of Appeal said this, again referring back to Lord Lyndhurst: "It is a well-known rule in bankruptcy that a creditor having a security against the estate of a debtor must either surrender his security and prove for the whole debt, or value his security and prove for the balance, but it has never been the law that a creditor having a security against a third party for his debt must give credit for that when proving in the bankruptcy: see for instance, *In the matter of John Plummer and William Wilson*." Thus the authorities show that the existence of third party security does not affect the eventual realisation by insolvency procedures of the assets of the debtor. That seems to me to be correct in principle. It is clear and common ground that a creditor which has several remedies can choose which to enforce, at what time, in which order and in what way, being limited only by the proposition that it cannot recover more than is due to it on the debt with interest and costs by way of its several recovery procedures: see *China and South Sea Bank v. Tan* [1990] AC 536 at 545, Lord Templeman: "The creditor had three sources of repayment. The creditor could sue the debtor, sell the mortgage securities or sue the surety. All these remedies could be exercised at any time or times simultaneously or contemporaneously or successively or not at all. If the creditor chose to sue the surety and not pursue any other remedy, the creditor on being paid in full was bound to assign the mortgaged securities to the surety. If the creditor chose to exercise his power of sale over the mortgaged security he must sell for the current market value but the creditor must decide in his own interest if and when he should sell. The creditor does not become a trustee of the mortgaged securities and the power of sale for the surety unless and until the creditor 39. 40. 41. 42. is paid in full and the surety, having paid the whole of the debt is entitled to a transfer of the mortgaged securities to procure recovery of the whole or part of the sum he has paid to the creditor. The creditor is not obliged to do anything." Thus it is not open to a guarantor to argue that the creditor should pursue the principal debtor first or should realise security given by the principal debtor first. Mr Arden did not argue that Mr White would have any defence to civil proceedings for the undisputed amount of the debt, on this basis or any other. In my judgment the co-extensiveness principle which was the basis of the decision in *Remblance*, and which applies by reference to each of rules 6.5(4)(a) and (b), does not apply to rule 6.5(4)(c) because the purpose of the latter provision is different. As against a given debtor, if a creditor has security over that debtor's assets which is more than sufficient, there is no reason to allow the creditor to pursue bankruptcy proceedings because the existence of the security means that the creditor has no interest in that debtor's estate. He would not be able to prove for his debt, and there is no reason for him to be able to invoke the collective realisation of assets which is the point of insolvency proceedings, unless he is willing to give up his security. By virtue of s.267 of the 1986 Act he is not even entitled to present a bankruptcy petition. It follows that there is every reason why he should not be entitled to take the preliminary step of serving a statutory demand. If, however, the security given to the creditor is over the assets of a different person, then the existence of that security does

not constitute any reason why the particular creditor should not proceed against this other debtor, who has given no security over his assets, for an undoubted debt by way of a personal claim or by way of insolvency proceedings. There is no bar to the creditor presenting a bankruptcy petition in relation to such a debtor and there is therefore no reason why the creditor should not serve a statutory demand as a preliminary to the presentation of a petition if the demand is not satisfied. In the passage quoted at paragraph 11 above, Nicholls LJ mentioned rule 6.5(4)(c) as being an example of it being unjust for a creditor to be able to proceed by way of bankruptcy against a debtor over whose assets the creditor is fully secured. It seems to me that the point can be put in a different way. Since the fully secured creditor is not entitled to present a bankruptcy petition against a debtor over whose assets he has his full security, it is not merely because of injustice that he should not be able to serve a statutory demand, but because there is no justification at all for allowing such a creditor to take a preliminary step towards insolvency proceedings which the creditor would not be allowed to invoke. If it is to be seen as an example of injustice, the creditor's lack of any right to present a bankruptcy petition if the statutory demand is not complied with is what makes it unjust. There is no doubt, as I see it, that if DTL had issued proceedings against Mr White for payment, it would get judgment for all but the disputed amount of interest on a summary basis. Having obtained judgment it would be entitled to enforce the judgment by normal procedures. If some enforcement process were used and the judgments were not satisfied in full, DTL could then present a bankruptcy petition in reliance on s.268(1)(b) of the 1986 Act. I see no reason why, in that situation, it should not invoke bankruptcy proceedings directly by way of the service of a statutory demand. If that is clear, at least as regards the undisputed part of the debt, there seems to me to be no reason to require DTL to go the long way round of getting a judgment first before proceeding towards insolvency. We were shown a judgment of the Court of Appeal in *Budge v. A. F. Budge Contractors Ltd* [1997] BPIR 366, in the course of which Peter Gibson LJ said this at page 371 between C and E: "it is appropriate when considering whether to set aside a statutory demand under that paragraph to consider the consequences if one does set it aside ... Similarly, in my view, there is no point in setting aside a statutory demand and requiring a creditor to litigate his claim that he is owed money by the debtor if it cannot be foreseen that there will be any ground on which the creditor will be denied his claim were the matter to be litigated. That would only be to increase costs to no purpose whatever."

43. Mr Isaacs relied on that passage from the judgment. Mr Arden for his part showed us a sentence later on the same page at 371 at G as follows: "The real question, as it seems to me, in this case is whether Mr Budge can show a substantial reason, comparable to the sort of reason one sees in paras (a), (b) and (c) of r 6.5(4), why the demand ought to be set aside."
44. Mr Arden argued that this passage shows that each paragraph of rule 6.5(4) ought to be considered in the same way. Peter Gibson LJ had, shortly before that passage, quoted from Nicholls LJ in *Re A Debtor* (No 1 of 1987), as I have quoted it earlier in this judgment. Neither in *Budge* nor in Nicholls LJ's case did any issue arise concerning the ambit and effect of cases within rule 6.5(4)(c). It does not seem to me that either of those decisions can be taken

as authority to show that a case within paragraph (c) is in fact comparable with cases within paragraph (a) and (b). The present case appears to be the first occasion on which the application of paragraph (d) by analogy with paragraph (c) has had to be considered. As it seems to me, for the reasons given above, the analogy is not close between the cases covered by paragraphs (a) and (b) on the one hand and those covered by paragraph (c) on the other.

45. Mr Arden would say, in opposition to the point outlined at paragraph 41 above, that it does not stand well with the fact that in *Remblance* it was held that a statutory demand could be set aside under rule 6.5(4)(a) even if the creditor would have been able to obtain judgment against either the principal debtor or the surety, and, at least in the latter case, enforcement of the judgment would not be stayed. That is a fair point, but that case is covered, as regards the principal debtor, by rule 6.5(4)(a) in terms, and the majority of the Court of Appeal in *Remblance* have shown us why the co- extensiveness principle should apply in that type of case. There is no good reason to apply that principle as between one debtor over whose debts the creditor is fully secured and another debtor who has given either no security or a security which is not adequate. 46. For those reasons in my judgment the existence of third party security, which on a statutory demand against the debtor who gave the security would bring into application rule 6.5(4)(c), is by itself entirely irrelevant under rule 6.5(4)(d) to a statutory demand served on a separate debtor even if liable as guarantor for the same debt but who has given no security himself. In my judgment the judge was correct on that point at paragraphs 33 – 34 of his judgment. For that reason I would reject the grounds of appeal relating to this aspect of the case. The judge cited from a number of judgments in Australia, Hong Kong and Canada consistent with this which had been cited to him by Mr Isaacs. Mr Isaacs showed us the same cases. For my part while I accept that they are consistent with the principle, I reach this conclusion without any need to rely on them or on any authority outside the law of England and Wales other than the decision of the Privy Council in *China and South Sea Banking v. Tan* already cited. 47. In his grounds of appeal and in his skeleton argument Mr Arden pointed to provisions in clauses 6 and 7 of the guarantee and criticised what the judge had said in particular about clause 6. That clause states that the guarantee is to be in addition to, and not to prejudice or be prejudiced by, any other securities or guarantees which the creditor holds or may hold from or on account of the principal debtor. For my part, on this aspect of the case I feel no need to say anything more than the judge was in my judgment right in what he said about clause 6 at paragraphs 33 and 65 of his judgment and about clause 7 at paragraph 64 of his judgment.
48. Mr Arden also made a point in his skeleton argument, though not elaborating on it separately by way of oral submission, that Mr White was in an unfairly difficult position because he could not obtain the benefit of the security held by DTL without paying the debt in full even though part of the debt is hotly disputed for reasons that I have given. That is true and it does pose a problem where part of the debt is disputed. It is a problem that could be overcome by agreement no doubt, on the basis of conditional payment of the disputed part of the debt. It seems to me likely that, absent agreement, a solution to that effect could possibly be arrived at by an application to the court if necessary. However the point is not in

any event relevant since there has been no tender of any part of the debt.

49. Mr Isaacs submitted that the facts of the present case provide a good illustration of the reason why a creditor should be allowed to proceed against a guarantor even if it has a security given by the principal debtor. DTL would not be able to take steps to enforce its security without the agreement of the administrators of SGPS or the leave of the court, because of the Insolvency Act 1986, Schedule B, paragraph 43(2). The judge accepted that it was by no means clear that DTL would have obtained such consent or leave. That is quite apart from the difficulty presented by Mr White's continuing attempt to have the current administrators removed from office. Nor was it a propitious time to sell the property, even if DTL had been able to do so. In addition there would remain the question whether the value of the security did in fact cover the whole debt. 50. For all these reasons, I consider that the judge was correct in his reasoning and his conclusion, and I would dismiss this appeal. Lord Justice Elias 51. I agree. Lord Justice Maurice Kay 52. I also agree.

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