Going Behind Judgments in Bankruptcy Proceedings

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Introduction

The English courts exercising bankruptcy jurisdiction[1] have long held a special power to "go behind" a judgment, as distinct from setting it aside. An analysis of the modern decisions suggests that such a power is not commonly exercised. This is in contrast with Australia where there are a large number of cases in which the power has been exercised successfully, with unwanted consequences for the petitioning creditor.[2]

With those decisions in mind, what follows is not a potted history of an esoteric relic of the nineteenth century bankruptcy courts. Rather, it is an article that sets out the legal principles which underpin an apparently under-used and important potential defence to bankruptcy proceedings which can be relied upon by a well-informed debtor in appropriate circumstances.

Status of judgments in civil proceedings - generally

In civil proceedings generally, the judgments of the courts are (subject to strict exceptions) conclusive and a perfected judgment exhausts the court's jurisdiction because this accords with the fundamental principle that the outcome of litigation should be final.[3]

The risk of injustice is limited by procedural measures which are built into the system. Most notably, parties can seek a review on appeal of decisions which they deem incorrectly decided, but that right is limited by strict time limits[4] and the need for permission to be obtained (in the majority of cases).[5] Appeals themselves can be re-opened, but only in the

[1] References made in this article to the jurisdiction in bankruptcy should be taken to include the jurisdiction of the Companies Court to wind up companies.

[2] See generally: *Corney v Brien* (1951) 84 CLR 343; *Wren v Mahoney* (1972) 126 CLR 212; *Ahern v Deputy Commissioner of Taxation (Qld)* (1987) 76 ALR 137; *Olivieri v Stafford* (1989) 24 FCR 413; *Evans v The Heather Thiedeke Group Pty Ltd* (unreported; 28 September 1990); *Wolff v Donovan* (1991) 29 FCR 480; *Udovenko v Mitchell* (1997) 79 FCR 418; *Joossé v Commissioner of Taxation* (2004) 137 FCR 576; *Commonwealth Bank of Australia v Jeans* [2005] FCA 978; and *Katter v Melham (No 2)* (2014) 319 ALR 646; *Kuhadas v Gomez* [2014] FCCA 1130; & *Compton v Ramsay Health Care Australia Pty Ltd* [2016] FCAFC 106.

[3] *Taylor and another v Lawrence and another* [2002] EWCA Civ 90; [2003] QB 528 [9] (citing: *In re Barrell Enterprises* [1972] 3 All ER 631).

[4] E.g. CPR rr. 52.8(3) & (4); 52.11(2); 52.12(1)(b); 52.15 and see: PD52D.

[5] CPR r. 52.3.

most exceptional circumstances[6] and fresh evidence may be admitted but only where strict conditions are met.[7]

Viewed from the other end of the telescope, finality is also achieved by the imposition of strict time limits within which claims can be brought, even if the underlying cause of action continues to subsist.[8]

In *Committee for Privileges The Ampthill Peerage*, Lord Simon addressed the importance of the principle of finality.[9]

> "*But the fundamental principle that it is in society's interest that there should be some end to litigation is seen most characteristically in the recognition by our law - by every system of law - of the finality of a judgment. If the judgment has been obtained by fraud or collusion it is considered as a nullity and the law provides machinery whereby its nullity can be so established. If the judgment has been obtained in consequence of some procedural irregularity, it may sometimes be set aside. But such exceptional cases apart, the judgment must be allowed to conclude the matter. That, indeed, is one of society's purposes in substituting the lawsuit for the vendetta....*
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> *And once the final appellate court has pronounced its judgment the parties and those who claim through them are concluded; and, if the judgment is as to the status of a person, it is called a judgment in rem and everyone must accept it. A line can thus be drawn closing the account between the contestants. Important though the issues may be, how extensive so ever the evidence, whatever the eagerness for further fray, society says, "We have provided courts in which your rival contentions have been heard. We have provided a code of law by which they have been adjudged. Since judges and juries are fallible human beings, we have provided appellate courts which do their own fallible best to correct error. But in the end you must accept what has been decided. Enough is enough." And the law echoes: "res judicata, the matter is adjudged." The judgment creates an estoppel - which merely means that what has been decided must be taken to be established as a fact, that the decided issue cannot be reopened by those who are bound by the judgment, that the clamouring voices must*

[6] CPR r. 52.30.
[7] *Ladd v Marshall* [1954] 1 WLR 1489.
[8] See generally the Limitation Act 1980.
[9] [1977] A.C. 547, 576.

be stilled, that the bitter waters of civil contention (even though channelled into litigation) must be allowed to subside."

As well as emphasising the need for finality, Lord Simon's speech alludes to the fact that the need for finality is subject to the possibility that a party can invite the court to revisit a decision where the decision has been obtained by "fraud or collusion".

Once a court of competent jurisdiction has arrived at a decision, the matter is said to be *res judicata*. That phrase has been described by Lord Sumption as a "portmanteau term" which includes such principles as "cause of action estoppel" and "issue estoppel".[10]

Setting aside judgments in civil proceedings - fraud and collusion

In *Royal Bank of Scotland plc v Highland Financial Partners LP*[11] the Court of Appeal examined the circumstances in which a judgment can be set aside on the basis that it was obtained by fraud. Aikens LJ summarised the relevant principles as follows:[12]

"*The principles are, briefly: first, there has to be a 'conscious and deliberate dishonesty' in relation to the relevant evidence given, or action taken, statement made or matter concealed, which is relevant to the judgment now sought to be impugned. Secondly, the relevant evidence, action, statement or concealment (performed with conscious and deliberate dishonesty) must be 'material'. 'Material' means that the fresh evidence that is adduced after the first judgment has been given is such that it demonstrates that the previous relevant evidence, action, statement or concealment was an operative cause of the court's decision to give judgment in the way it did. Put another way, it must be shown that the fresh evidence would have entirely changed the way in which the first court approached and came to its decision. Thus the relevant conscious and deliberate dishonesty must be causative of the impugned judgment being obtained in the terms was. Thirdly, the question of materiality of the fresh evidence is to be assessed by reference to its impact on the evidence supporting the original decision, not by reference to its impact on what decision might be made if the claim were to be retried on honest evidence*."

[10] *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd (formerly Contour Aerospace Ltd)* [2013] UKSC 46*;* [2014] AC 160 [17].
[11] [2013] EWCA Civ 328
[12] *Ibid* [106].

In setting aside or rescinding an order for fraud or collusion, the court is exercising its inherent jurisdiction. Accordingly, the jurisdiction would appear not to be enjoyed by the County Court, it being a creature of statute.[13]

To summarise, judgments entered by the courts will (subject to any appeal) be binding between the parties. Such a judgment will also be conclusive evidence against all the world of its existence, date and legal consequences as between the parties and their privies.[14]

The jurisdiction in bankruptcy

The jurisdiction of the bankruptcy court is of a different nature. In deciding whether the judgment reflects a true liability of the debtor, it will not interfere with the judgment (which will remain effective for all other purposes). To persuade the bankruptcy court to look or "go behind" the judgment, it is not necessary to establish fraud or collusion. In appropriate cases, for the purpose of ascertaining whether the judgment creditor truly has a claim for bankruptcy purposes, the bankruptcy court will revisit the underlying facts which are said to give rise to and justify the judgment. This is most likely to occur on the hearing of a bankruptcy petition presented against the judgment debtor or when, during the formal process of insolvency, the office-holder is assessing the validity of a proof of debt.

Historical context

The jurisdiction of the bankruptcy court to go behind the decisions of other courts has been established since at least the nineteenth century. The early rationale behind the jurisdiction appears not to be born of a concern for the debtor, but out of a desire to promote the *pari passu* principle and ensure a rateable distribution of the bankruptcy estate. Per Sir W M James LJ in *In Re Onslow, ex p Kibble*:[15]

> "*It is the settled rule of the court of bankruptcy, on which we have always acted, that the court can inquire into the consideration for a judgment debt. There are obviously strong reasons for this, because the object of the bankruptcy laws is to procure the distribution of a debtor's goods among his just creditors. If a judgment were conclusive, a man might allow any number of judgments to be obtained by default against him by his friends or relations without any debt being due on them at all; it is, therefore, necessary that the consideration of the judgment should be liable to investigation*."

[13] *Salekipour and another v Parmar and another* [2016] EWHC 1466 (QB); [2016] 3 WLR 728.
[14] *Ampthill Peerage* [1977] AC 547.
[15] (1875) LR 10 Ch App 373, 376.

This concern extended to circumstances where a debtor (either out of resignation or otherwise) failed to engage in the legal process and allowed a creditor to obtain judgment in circumstances where there was no liability, or else, where liability was overstated.

Whilst it is the case (subject to a limited number of exceptions[16]) that prior to the presentation of a bankruptcy petition,[17] a creditor is entitled to the benefits of their own diligence, that does not extend to circumstances whereby that creditor is able to deprive the bankruptcy estate of a sum to which he is not properly entitled.

As was held in *In Re Hawkins. Ex Parte Troup*:[18]

> *"The Court will go into the whole matter, and see whether upon the whole it is fair to the whole body of creditors that the man, on the particular transaction between himself and the petitioning creditor, should have a receiving order made against him. In the same way, when a creditor comes to prove in bankruptcy the Court will go behind the judgment, and inquire into the whole transaction which preceded it. To make a man a bankrupt is obviously a strong interference with the rights of the general body of his creditors. Each creditor is materially affected to the extent that he cannot by his own diligence get the whole of his debt. From the moment of bankruptcy, though he be the most diligent of the creditors, he has to go into equal competition with the most idle."*

Notwithstanding the observations above, it seems that the concern of the bankruptcy court has not only been to ensure a rateable distribution of a bankrupt's property. It is a jurisdiction which (almost invariably) is invoked by the debtor, not opposing creditors, with a view to avoiding (or else reversing) the consequences of their being declared bankrupt.

Some acknowledgement of this is found in *In Re Hawkins; Ex parte Troup* where Lopes LJ held:[19]

> *"... it would be unjust and impolitic to allow a man to be subject to the pains and penalties of bankruptcy unless it is established that there were good grounds for so*

[16] In this regard see for example: s. 340 IA and the decision in *Nationwide Building Society v Wright* [2009] EWCA Civ 811; [2010] Ch 318.
[17] C.f. s. 284 IA.
[18] [1895] 1 Q.B. 404, 408 - 409.
[19] [1891-4] All ER Rep Ext 1280, 1284.

doing from the existence of a good petitioning creditor's debt, and unjust to the general body of creditors to permit one creditor by means of a judgment which had no solid foundation, to obtain an undue advantage over them and obtain payment of his alleged debt to their prejudice."

A point which one has to go rather further forward in time and the judgment of Warner J in *McCourt and Siequien v Baron Meats Ltd and the Official Receiver*[20] to find even passing acknowledgment of:

"The reason for the existence of that power of a bankruptcy court is that such a court is concerned not only with the interests of the judgment creditor and of the judgment debtor, but also with the interests of the other creditors of the judgment debtor." (emphasis added)

A similar observation is found in the recent decision of the *Federal Court of Australia in Compton v Ramsay Health Care Australia Pty Ltd*[21] where the following extract from the decision in *Ahern v Deputy Commissioner of Taxation (QLD)*[22] was relied upon:

"[The] cases rest on the broad principle that before a person can be made bankrupt the court must be satisfied that the debt on which the petitioning creditor relies is due by the debtor and that if any genuine dispute exists as to the liability of the debtor to the petitioning creditor it ought to be investigated before he is made bankrupt. Bankruptcy is not mere inter partes litigation. It involves change of status and has quasi-penal consequences."

In short, whilst the original purpose of the bankruptcy court's jurisdiction is said to have been to ensure the rateable distribution of the bankrupt's property, it is a jurisdiction which is generally relied upon by the debtor and not by opposing creditors.

When will a court go behind a judgment – the modern law

There are two stages in the bankruptcy process where the court can be called upon to exercise its power to go behind a judgment.[23] The first is at the hearing of the petition,[24] or

[20] [1997] BPIR 114.
[21] [2016] FCAFC 106.
[22] (1987) 76 ALR 137 at 147 to 148.

upon applications which revisit the decision behind the making of a bankruptcy order such as applications to set aside a bankruptcy order, annulment applications made under s.282(1)(a) of the Insolvency Act 1986 (**"IA"**) as well as applications under s. 375 IA.[25] The second stage is where the court has cause to review or otherwise investigate the validity of proofs of debts (whether for the purposes of proving or voting).

The way in which the court will exercise its jurisdiction is however less clear. In *McCourt & Siequen v Baron Meat* Warner J analysed a number of authorities from the nineteenth and early twentieth century and formulated the following five propositions from them:[26]

> *"As to that the authorities that were cited to us seemed to me to establish beyond question the following propositions:*
>
> *(1) A court exercising the bankruptcy jurisdiction (a 'bankruptcy court') although it will treat a judgment for a sum of money as prima facie evidence that the judgment debtor is indebted to the judgment creditor for that sum may, in appropriate circumstances, go behind the judgment, that is to say, inquire into the circumstances in which the judgment was obtained and, if satisfied that those circumstances warrant such a course, treat it as not creating or evidencing any debt enforceable in bankruptcy proceedings.*
>
> *(2) The reason for the existence of that power of a bankruptcy court is that such a court is concerned not only with the interests of the judgment creditor and of the judgment debtor, but also with the interests of the other creditors of the judgment debtor. The point was succinctly made by James LJ in Ex Parte Kibble, Re Onslow (1875) LR 10 Ch App 373 at pp 376–377, in the following words: 'It is the settled rule of the court of bankruptcy, on which we have always acted, that the court of bankruptcy can inquire into the consideration for a judgment debt. There are obviously strong reasons for this, because the object of the bankruptcy laws is to procure the distribution of a debtor's goods among his just creditors. If a judgment were conclusive, a man might allow any number of judgments to be obtained by default against him by his friends or relations without any debt being due on them*

[23] *McCourt & Siequen v Baron Meat* [1997] BPIR 114, 121 (as decided on 17 December 1984).
[24] Interestingly, the bankruptcy court does not appear to have the power to go behind the judgment on the hearing of a statutory demand (Practice Direction: Insolvency Proceedings [2014] BCC 502 [13.3.3]).
[25] Cf. *Yang v Manchester City Council* [2013] EWHC 3577 (Ch); [2014] BPIR 826.
[26] [1997] BPIR 114, 120.

at all; it is, therefore, necessary that the consideration of the judgment should be liable to investigation.'

(3) *It follows that the grounds upon which a bankruptcy court may go behind a judgment are more extensive than the grounds upon which an ordinary court of law or equity may set it aside.*

(4) *In particular, a bankruptcy court will go behind a judgment if satisfied that the judgment creditor manifestly had no claim against the judgment debtor on which the judgment could have been founded. Thus, in Ex Parte Kibble the court went behind a judgment obtained by default which was founded on a bill of exchange drawn by the debtor during his infancy. In Ex Parte Banner, Re Blythe (1881) 17 Ch D 480 it went behind a judgment giving effect to a compromise of an action brought by one party to a fraud against the other party to it for the fruits of it. Re Lennox, ex parte Lennox (1885) 16 QBD 315 was a somewhat similar case. In that case the court ordered an inquiry into the facts because the debtor, who had submitted to the judgment, tendered evidence to the effect that the debt on which the judgment was founded never really existed but was based on the fraud of the creditor. Lastly, in Re Fraser (above) the court went behind a judgment obtained by the holders of a bill of exchange against a former partner in the firm in whose name the bill had been accepted. He was not liable on the bill, but his defence to an action on the bill had been so ineptly conducted that judgment had been obtained against him under Ord 14 and that an application made on his behalf for the judgment to be set aside had failed.*

(5) *There are two stages in bankruptcy proceedings at which a court may be called upon to exercise the power in question. The first is at the hearing of the petition, when the court has to consider whether or not to make a receiving order. Section 5(3) of the Bankruptcy Act 1914 provides: 'If the court is not satisfied with the proof of the petitioning creditor's debt, or of the act of bankruptcy, or of the service of the petition, or is satisfied by the debtor that he is able to pay his debts, or that for other sufficient cause no order ought to be made, the court may dismiss the petition.' The words that are particularly material there are 'If the court is not satisfied with the proof of the petitioning creditor's debt or … is satisfied by the debtor that … for other sufficient cause no order ought to be made'. Those words*

import, among other things, that in a case where the petitioning creditor relies on a judgment debt the court may, in appropriate circumstances, go behind the judgment. The other stage at which the court may be called upon to do so is the stage of proof of debts. The court will then in appropriate circumstances reject a judgment creditor's proof."

The third of these - that the circumstances in which the bankruptcy court may go behind a judgment are more extensive than those upon which a court of law or equity may set the judgment aside - is of interest for two reasons. First and most obviously, it makes clear that the jurisdiction extends beyond those cases where there has been fraud or collusion as is the case in other civil proceedings.[27] Secondly, in drawing a distinction between "going behind a judgment" and "setting aside a judgment", it emphasises the fact that the bankruptcy court is not interfering with the original decision, rather it is refusing to allow the judgment to found the basis of a petition or proof of debt - see also Lord Esher in *Re Fraser, Ex parte Central Bank of London*:[28]

"*The Bankruptcy Court does not set aside the judgment, but goes round it; it has jurisdiction to inquire into the subject-matter upon which it is founded*."

This is in contrast to the settled practice of the High Court exercising its ordinary jurisdiction under which it can set aside its orders but not decline to enforce them.

In his fourth proposition Warner J identified the real concern of the court when exercising its insolvency jurisdiction, namely, whether there is a true liability which should allow the judgment creditor to cause a bankruptcy order to be made or alternatively to participate in the distribution of the assets:[29]

"*In particular, a bankruptcy court will go behind a judgment if satisfied that the judgment creditor manifestly had no claim against the judgment debtor on which the judgment could have been founded*."

[27] *Committee for Privileges, The Ampthill Peerage* [1977] A.C. 547.
[28] [1891-94] All ER Rep 939, 941.
[29] [1997] BPIR 114, 120.

This was not expressed to be an exhaustive description of the circumstances in which the court will go behind a judgment. Nevertheless, the words "...satisfied that the judgment creditor manifestly had no claim" set the bar relatively high.

In *Dawodu v American Express Bank* Etherton J revisited Warner J's decision in *Baron Meats* and added what he described as a qualification to the five propositions:[30]

> "*My only qualification to the summary by Warner J is that the cases establish that what is required before the court is prepared to investigate a judgment debt, in the absence of an outstanding appeal or an application to set it aside, is some fraud, collusion, or miscarriage of justice*". (emphasis added)

Etherton J observed that the phrase "miscarriage of justice" is capable of wide application before providing guidance as to its meaning in this context:[31]

> "*The... phrase [miscarriage of justice] is of course capable of wide application according to the particular circumstances of the case. What in my judgment is required is that the court be shown something from which it can conclude that had there been a properly conducted judicial process it would have been found, or very likely would have been found, that nothing was in fact due to the claimant. It is clear that in those circumstances the court can inquire into the judgment and the judgment debt, even though the debtor himself has previously applied to have the judgment set aside, and even though that application has been refused and that refusal has been affirmed by the Court of Appeal*..." (emphasis added)

It would seem to follow that if there has been a properly conducted judicial process, it is highly unlikely that a miscarriage of justice will be found. The criteria for establishing "not properly conducted" in this context could include circumstances ranging from serious procedural irregularity (giving rise to issues of natural justice) to fraud or collusion.

This chimes with older authority, see *In re Hawkins; Ex parte Troup* (as cited in *Dawodu*), Per Lopez LJ: [32]

[30] [2001] BPIR 983, 990.
[31] *Ibid*.
[32] [1895] 1 QB 404.

"In my opinion a judgment may be inquired into whether it be a judgment obtained by compromise or consent, directly, but not before, it is made out that either the one or the other has been improperly or unfairly obtained. I do not go the length of saying that it need be made out that it is fraudulent; it is sufficient, in my opinion, if it is made out that it was improperly or unfairly obtained." (emphasis added)

Ultimately, the outcome in any given case is intensely fact-sensitive and these statements of principle cannot be construed as if they were in a statute. Some reference to earlier authorities is useful, if only to see the myriad circumstances in which the bankruptcy court will exercise its special jurisdiction to look behind a judgment. By way of example, in *In re Fraser; Ex parte Central Bank of London*,[33] an individual whose liability on a bill of exchange had been determined in circumstances where he had failed to attend the hearing of the claimant's application for summary judgment and had unsuccessfully challenged the order to the Court of Appeal was nevertheless successful in inviting the bankruptcy court to go behind the judgment.[34] There was no suggestion that the judgment had been improperly or unfairly obtained or that there had been any failing in the judicial process. The result was plainly fair to the other creditors of the judgment debtor but it is not clear that the judgment could be said to have been "improperly or unfairly obtained".

Returning to the reasoning of Etherton J in *Dawodu,* he also cited (in a different context) the decision in *Re Flatau ex parte Scotch Whiskey Distillers Ltd*[35] and, in particular the judgment of Lord Esher MR where he held:

"*It is not necessary now to repeat that, when an issue has been determined in any other court, if evidence is brought before the Court of Bankruptcy of circumstances tending to shew that there has been fraud, or collusion, or miscarriage of justice, the Court of Bankruptcy has power to go behind the judgment and to inquire into the validity of the debt. But that the Court of Bankruptcy is bound in every case as a matter of course to go behind a judgment is a preposterous proposition. There is no statute which imposes any such obligation on the Court of Bankruptcy; s. 7 does no more than give a judicial discretion*" (emphasis added)

[33] [1891-94] All ER Rep 939.
[34] In *Barons Meat* Warner J described this as a case where the debtor's defence had been ineptly conducted although this is not immediately apparent from the report of the decision.
[35] (1889) 22 QBD 83, 85.

Again, it is suggested that Lord Esher's reference to "fraud, collusion or miscarriage of justice" should not be treated as an exhaustive list of circumstances in which the bankruptcy court will go behind a judgment. In the Australian case of *Corney v Brien*, Fulliger J adopted a similar formulation to that relied upon by Etherton J in *Dawodu*:[36]

> "*I have already quoted the statement of the principle by Cotton LJ in Ex parte Lennox; Re Lennox [(1885) 16 QBD 315, at p 326]. When the learned Lord Justice used the word "will", it is obvious that he did not mean "will always" or "will as a matter of course", and, with respect, I think that the whole trend of the cases before and since shows that he did not state the power, or the purpose for which the power might be used, too widely. No precise rules exist as to what circumstances call for an exercise of the power, but certain things are, I think, clear enough. If the judgment in question followed a full investigation at a trial on which both parties appeared, the court will not reopen the matter unless a prima-facie case of fraud or collusion or miscarriage of justice is made out*."

This decision and that in *Re Flatau; Ex parte Scotch Whisky Distillers Ltd* were addressed by the Federal Court of Australia in *Compton v Ramsay Health Care Australia Pty Ltd* where the threads were drawn together in the following way:[37]

> "*When the emphasised sentence [emphasis repeated immediately above] in the above passage is read in context, we do not consider it to represent an exhaustive statement of the circumstances in which a court of bankruptcy may or should 'go behind' a judgment which follows a "full investigation at trial on which both parties appeared". The cases discussed by Fullagar J in his judgment do not suggest as much. Nor does the joint judgment. The proposition that was advanced in In re Flatau; Ex parte Scotch Whisky Distillers Ltd (1888) 22 QBD 83 was that in every case a court of bankruptcy is bound to go behind the judgment and inquire into the validity of the debt. That was the proposition which was rejected at 85 per Lord Esher MR with whose judgment Fry LJ agreed. As Besanko J observed in Goyan v Motyka [2009] FCA 776 at [53], the principles must be applied flexibly in view of "the myriad of circumstances" that might arise."*

[36] (1951) 84 CLR 343, 356 – 357.
[37] [2016] FCAFC 106 [60].

It is respectfully suggested that this explanation also represents English law. Be that as it may, Etherton J's formulation has been relied upon and applied in a number of subsequent cases albeit without extensive argument as to the meaning of the phrase "miscarriage of justice".

It is likely that the phrase "miscarriage of justice" is broad enough to encompass any set of circumstances where judgment has been entered where the underlying liability was not properly owing. After all, what was simply a question of justice between the parties in the litigation that led to the judgment has become justice to all the creditors of the judgment debtor if the judgment is allowed to influence the amount that all the creditors are likely to receive in a formal insolvency process. Such a view would accord with the decision of Buckley LJ in *In re Van Laun. Ex parte Chatterton* where he held that the phrase requires that there be a good reason that judgment should not have been entered:[38]

> *"If there be a judgment it is not necessary to shew fraud or collusion. It is sufficient, in the language of Lord Esher, to shew miscarriage of justice - that is to say, that for some good reason there ought not to have been a judgment."*

Subsequent decisions appear to have given limited attention to what a miscarriage of justice comprises in this context. In *Re Shruth*, Gloster J (as she then was) seems to have found Warner J's requirement that "the judgment creditor manifestly had no claim against the judgment debtor" as being an example of miscarriage of justice.[39]

> *"Accordingly, in my judgment, there has been no miscarriage of justice; the Company has not demonstrated that International Brands "manifestly" had no claim. On the contrary, the deposition evidence points strongly to the existence of such a claim. It would be contrary to justice to permit the Company in litigation to put International Brands to the expense of relitigating the matter in a trial in this country."*

If one accepts that the focus of the miscarriage moves from the party litigants to the body of creditors, it is respectfully suggested that this approach is correct.[40]

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[38] [1907] 2 K.B. 23, 31.
[39] [2005] EWHC 1293 (Ch); [2006] 1 BCLC 294 [36].
[40] In this regard see also the decision of Registrar Briggs in *Barclays Bank v Atay* [2015] EWHC 3198 (Ch); [2016] BPIR 12,18 where the Registrar treated Etherton J's qualification as providing a hypothetical yardstick against which the underlying merits of the claim could be measured:

In summary, at a superficial level, the English authorities are inconclusive on the question whether it is enough to show that the judgment debt was not properly owing or whether it is necessary to show that there has been a judicial process which has been conducted improperly. However, for the reasons given above, it is suggested that the authorities are inconsistent only if too much weight is given to the precise meaning of the various judicial formulations of the principles. The general approach should be to concentrate on the question of whether the judgment debtor is truly indebted to the judgment creditor as reflected by the judgment. This is the approach adopted by Warner J in *Barons Meat* when he described the proper enquiry as whether:[41]

> "*the judgment creditor manifestly had no claim against the judgment debtor on which the judgment could have been founded"*

Will the bankruptcy court enquire into a judgment as a matter of course?

In *Re Flatau, Ex Parte Scottish Whiskey Distillers Limited* Lord Esher MR held that the court exercising its bankruptcy jurisdiction is not bound in every case to go behind a judgment but that the court has a power to do so: [42]

> *"....that the Court of Bankruptcy is bound in every case as a matter of course to go behind a judgment is a preposterous proposition. There is no statute which imposes any such obligation on the Court of Bankruptcy; s. 7 does no more than give a judicial discretion*"

However it seems unlikely that the bankruptcy court faced with an argument that the court should go behind a judgment could refuse to hear submissions on the point. In *Irving v Penguin Books Ltd*.[43] Peter Smith J heard an appeal from the decision of a Deputy Registrar where she had made a bankruptcy order against the appellant in circumstances where she had refused to hear submissions inviting her to go behind a judgment which gave rise to a costs order which, in turn, formed the basis of the petition debt.

"To test whether there has been a miscarriage of justice the court can ask, if following a properly conducted judicial process where argument is put and tested, preferably by all parties, it would be found that nothing is in fact due."

[41] [1997] BPIR 114, 120.
[42] (1888) 22 Q.B.D. 83 Page 86.
[43] [2002] EWHC 1387 (Ch).

Peter Smith J allowed the appeal on the basis that the Deputy Registrar had deprived herself of the jurisdiction to go behind a judgment of a different court:[44]

> *"[The Deputy Registrar] refused to hear any submissions based upon the decision of Etherton J in Dawodu v American Express [2001] BPIR 983. That case confirmed a long-established principle that the bankruptcy court is not bound by any order in other decisions and it can, if it is appropriate to do so, investigate the matters which have led to the judgment, and come, if it is appropriate, to a conclusion differing from the result of the judgment. It is unfortunate that she refused to hear that, because she deprived herself of a jurisdiction which she undoubtedly had to reconsider it."*

That is not to say that upon a debtor simply asserting that the judgment was wrongly entered, the bankruptcy court will "retry" the case before it in every case. In *Re Debtor (no 27 of 1927)*[45] the court held that a "prima facie case" had to be shown before it would go behind the judgment:

> "*True it is that the Bankruptcy Court may, on a prima facie case being shown, go behind a judgment for the purpose of satisfying itself that the debt enforceable thereunder was a real debt. But here counsel for the debtor has failed to show anything in the circumstances of this compromise which raises any such suspicion of unfairness or impropriety as to justify this court in looking behind the judgment to inquire into the consideration for the debt or the propriety of the compromise*."

Whilst *Re Debtor (no 27 of 1927)* was a case concerning a judgment entered by consent to which different rules may apply (see below), it is suggested that the approach is of equal application in cases where a regular judgment has been entered. If that is correct, a judgment debtor will need to show a *prima facie* case that the underlying liability was not properly owing and if so persuaded, it will be for the judgment creditor to satisfy the bankruptcy court that the judgment was properly entered.

An alternative approach would be to require a debtor to prove a procedural irregularity (or similar) as an initial step before the court would investigate the substance of the judgment.

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[44] *Ibid* [12].
[45] [1928] All ER Rep 501, 502.

Whilst this would be compatible with a strict reading of the judgment in *Dawodu*, for the reasons addressed above, it would place undue emphasis on the position as between the parties and give insufficient consideration to the question whether the debt is a true liability for bankruptcy purposes.

Accordingly, it is suggested that the correct approach is as set out in *Re Debtor (no 27 of 1927)*, with support for such a view being found in *Ramsay Health Care* where the Federal Court of Australia held:[46]

> *"While [the earlier decisions] accept that in some cases it may be appropriate to investigate, as a preliminary matter, whether or not the Court should 'go behind' the judgment (see Corney v Brien at 358; Wolff v Donovan at 486-487), they do not suggest that, if that preliminary investigation takes place, there are two stages of analysis. In our respectful view, if there is a preliminary investigation into whether or not to 'go behind' a judgment (as there was in this case), there is but one issue to be addressed, namely whether or not the Court should 'go behind' the judgment."*

Default Judgments and Consent Orders

The authorities approach consent orders and default judgments in a different way from those judgments entered following a judicial determination of the issues.

Default judgments

In *In Re Onslow, ex p Kibble* the vulnerability of a default judgment to investigation by the bankruptcy court was emphasised:[47]

> "*It is quite clear that in the Court of Bankruptcy the consideration for a judgment may be investigated, particularly when the judgment has gone by default*."

Similarly, in *Re Oraki; Oraki v Dean & Dean (a firm)*, Robert Ham QC observed the existence of a "wider power" where the judgment is one entered by default:[48]

> "*There is an even wider power where the judgment is a default judgment and, if it can be demonstrated that the debt upon which the petition is founded did not exist, then*

[46] *Compton v Ramsay Health Care Australia Pty Ltd* [2016] FCAFC 106 [68].
[47] (1875) L.R. 10 Ch.App. 373, 378.
[48] [2012] EWHC 2885 (Ch); [2013] BPIR 88 [13].

there is a ground within the meaning of s 282(1)(a) existing at the time the bankruptcy order was made: Royal Bank of Scotland v Farley [1996] BPIR 638."

In *Royal Bank of Scotland v Farley,* Hoffmann LJ observed:[49]

"*It seems to me that if it can be demonstrated by evidence subsequent to the bankruptcy order that the debt upon which the petition was founded did not exist, then it would be right to say that there was a ground existing at the time the order was made on which it should not have been made. That could be true, notwithstanding that, at the time of the order there was a default judgment in existence which had not yet been set aside. The bankruptcy court has always had a jurisdiction to go behind a default order and consider whether there really is a debt*."

What the decisions do not expressly address is the way in which the power to go behind a default judgment is "wider" when the judgment has been entered by default. In the Australian case of *Corney v Brien* Fullagar J observed:[50]

"*that wherever the judgment in question is a judgment by default, it appears that the court will always " go behind" the judgment."*

It is submitted that this is also good law in England. In other words, the court will investigate the default judgment as a matter of course without any requirement on the part of the judgment debtor to establish a "*prima facie* case".[51]

Consent orders

The bankruptcy court also retains the power to go behind a judgment in circumstances where that judgment was entered by consent. However, it seems that in order to persuade the bankruptcy court to go behind a compromise, a debtor will need to show that the judgment has been obtained unfairly.

[49] [1996] BPIR 638, 640.
[50] (1951) 84 CLR 343, 357.
[51] C.f. *Re Flatau ex parte Scotch Whiskey Distillers Ltd*; *Re Debtor (no 27 of 1927)*; and *Compton v Ramsay Health Care Australia Pty Ltd*.

In *Ex parte Banner. In re Blythe*,[52] the Court of Appeal went behind a consent order in circumstances where the defendant had agreed to judgment being entered against them. It is clear from the judgment of Brett LJ that the court took the view that the defendant had agreed to the compromise in circumstances where he had been the subject of dishonest pressure:[53]

> "*The action was brought, not to recover on a bonâ fide cause of action, but was used, as many actions are, as an instrument of oppression in order to extort money from the Defendants. Then the case want into Court, and the Defendants' counsel, one of the most honourable men at the Bar, was bound to give his client his advice. We do not know what he actually said, but it is obvious that he must have said, "If you go into the box with the defence which you are now setting up, your character in the face of all the persons who know you in Liverpool as a man of business will be gone, because, if you swear what you must swear to resist the Plaintiff's claim, it necessarily follows either that you will be perjured in this action or that you were perjured in the other. Therefore I advise you to yield."*

This assessment led Brett LJ to conclude:[54]

> "*In my view the judgment in the present case was a dishonest judgment, obtained by dishonest pressure, not because there was any doubt about the cause of action, not even because either party believed that there was any doubt about the cause of action, but, both parties knowing that there was no real cause of action, the one endeavoured to oppress the other by reason of that other's infamy known to him, and the other yielded, not because he believed there was, or doubted whether there was, a cause of action, but because he did not dare to face the consequences of his own infamy.*
> *Under these circumstances it seems to me that to allow the other creditors to be ousted of their rights by such a judgment would be a monstrous conclusion, and one not warranted by the law."*

However it should also be noted that where the parties are both legally represented, the threshold for invocation of the jurisdiction is likely to become more difficult to meet. Per Registrar Briggs in *Barclays Bank v Atay*:[55]

[52] (1881) 17 Ch.D. 480.
[53] (1881) 17 Ch.D. 480, 489.
[54] (1881) 17 Ch.D. 480, 490.
[55] [2015] EWHC 3198 (Ch); [2016] BPIR 12,18.

"Parties may compromise actions for all sorts of reasons which are not necessarily spelt out when the agreement is reduced to writing. The threshold for invocation of the jurisdiction becomes more difficult to meet where a compromise is agreed and all parties are legally represented. The view given by the author of 'Law of Insolvency' is where a debtor was properly represented by counsel and or solicitors at the negotiations which led to the compromise, there has to be some compelling reason to go behind a judgment. The compelling reason is a requirement to find that there is a miscarriage of justice."

In *Baron Meats*, Warner J held that the bankruptcy court would not go behind a judgment obtained by compromise in circumstances where the judgment creditor's conduct was blameless:[56]

"*There is thus, in my view, no authority for the proposition that a bankruptcy court may go behind a judgment obtained as a result of a compromise of a genuine claim in circumstances where the conduct of the judgment creditor was blameless; and that is this case, because there is no challenge to the bona fides of Baron's claim in the action that it brought, nor is any criticism made of Baron's conduct*"

A similar view was expressed by Fullagar J in the Australian case of *Corney v Brien*:[57]

"*Where judgment has been entered in pursuance of a compromise, ground must be shown for challenging the compromise as such before the subject matter of the judgment will be reopened*."

One explanation for requiring the compromise to be challenged is to be found in the decision of Lord Esher MR in *Ex parte Lennox* where he held that a judgment entered by consent is strong evidence of liability (albeit that the observation was made in contradistinction to a default judgment):[58]

"*It cannot be doubted that a judgment is prima facie evidence of a debt, and that a judgment or order to which a debtor has consented is far stronger evidence against him*

[56] [1997] BPIR 114, 124.
[57] (1951) 84 CLR 343, 357.
[58] (1885) 16 Q. B. D. 315, 323.

of the validity of the debt for which it purports to be given than mere judgment by default. It is very strong evidence against him."

A further reason is that a judgment entered by consent will normally constitute a reduced liability which has been accepted by the debtor in exchange for the creditor forgoing the (potential) benefit of their being awarded their judgment in full. In those circumstances, it is open to question whether a bankruptcy court should decline to give full effect to an agreement (which is in substance contractual) in circumstances where the manner in which that agreement was arrived at cannot be impugned.

Judgments obtained in foreign proceedings

Where a judgment is obtained in foreign proceedings there seems no reason in principle why the bankruptcy court's power to go behind either the foreign judgment or the judicial decision giving effect to that judgment in the English court should be curtailed.

Support for such a view is to be found in *Revenue and Customs Commissioners v Smart*,[59] where the bankruptcy court was invited to go behind the decision of the County Court which gave effect to a foreign judgment but declined to do so in circumstances where it found that the underlying liability was properly owing.

In the same case, the court was also invited to go behind a judgment entered against the debtor in the Lower Saxony Tax Court in circumstances where the debtor asserted that he was "'refused a translator and legal representative' and that the judge, in essence, bullied him into agreeing to pay the lower sum he agreed to pay by threatening him with judgment for the higher sum if he did not".[60]

On the facts, the Chief Registrar was unimpressed by either argument and refused to go behind the Lower Saxony Tax Court's judgment. Whilst being a case decided on the evidence (or lack of), it does show that in principle, the English court is willing to go behind judgments of foreign courts on *Dawodu* principles.

Also of interest in this regard is the decision of the Federal Circuit Court of Australia in *Kuhadas v Gomez.*[61] In that case Mr Kuhadas successfully applied to set aside a bankruptcy notice entered against him in Australia. The bankruptcy notice demanded payment of

[59] [2016] Lexis Citation 78; [2016] All ER (D) 158 (Jun).
[60] *Ibid* [17].
[61] [2014] FCCA 1130.

$1,253,214.38 AUS which represented the Australian dollar equivalent of a judgment for SGD1,211,289.70 which the respondent had obtained against Mr Kuhadas in the High Court of the Republic of Singapore, together with interest.

That judgment had been registered with the Supreme Court of New South Wales under s. 6 of the Foreign Judgments Act 1991 (**"FJA"**) and Manousaridis J held the status and effect of that judgment to be as follows:[62]

> "*In my opinion, when an order is made under s.6 of the FJ Act to register a foreign money judgment, once registered, the foreign judgment becomes a judgment debt of the court in which it is registered. The judgment debt so created is no different from any other judgment debt that is entered in a court in Australia."*

It was common ground that an agreement had been entered following judgment being entered in Singapore but prior to its registration in Australia (albeit that the legal effect of that agreement was in dispute). That dispute was resolved by the court in favour of Mr Kuhadas, with the judge finding that as a result of the agreement Mr Kuhadas was "released" from the Singapore judgment.

In those circumstances, the question was whether the court was entitled to go behind the judgment as entered in Australia. It was held that the registration of a judgment was analogous with a judgment entered by default:[63]

> *"....a court has not determined Mr Kuhadas's claim that the agreement has had that effect. The judgment debt that has been created as a result of the registration of the Singapore judgment under s.6 of the FJ Act, therefore, is analogous to a judgment that has been entered by default."*

This led the court to find that it was appropriate to go behind the order registering the Singapore judgment, even though Mr Kuhadas had not exercised his right under s.7 of the FJA to set aside the registration of that judgment.[64]

As has been suggested above, the English bankruptcy court is likely to go behind a default judgment as of course without the need for a judgment debtor to show a *prima facie* case.

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[62] *Ibid* [31].
[63] *Ibid* [35].
[64] *Ibid* [38].

Accordingly, and by analogy with *Kuhadas v Gomez*, a decision to register a foreign judgment under CPR 74 is likely to be investigated as of course.

However, in circumstances where the challenge is to the correctness of the decision of the foreign court, it is suggested that a debtor will need to establish a *prima facie* case that the judgment was wrongly entered or alternatively, that there has been a procedural defect which gives rise to a miscarriage of justice.

Proof of debt and application in corporate cases

As Warner J adverted to in his fifth proposition, the other stage in bankruptcy proceedings where the court may be called upon to go behind a judgment is the stage of proof of debts.[65]

A trustee in bankruptcy must be satisfied of both the validity and amount of every proof of debt lodged even where the debt is founded on a judgment (per Buckley LJ in *In re Van Laun. Ex parte Chatterton)*:[66]

> "*I think the trustee is entitled in every case, whether there be account stated, covenant or judgment, to say to the creditor who comes into the bankruptcy to prove, "Very well, you say you are a creditor; make out your case as if there was no account stated or no covenant or no judgment. Satisfy me that the amount for which you say you are creditor is right." That, of course, must be done reasonably*."

In deciding whether to accept or reject a proof, a liquidator (and a trustee in bankruptcy) will be acting in a quasi-judicial capacity.[67]

Both the trustee in bankruptcy and the bankruptcy court on an application under r. 6.105 IR will apply the same principles as identified above and as set out in *Barons Meat* and *Dawodu* when deciding whether to accept a judgment as proof of a debt.[68]

It is interesting to note that there appear to be no examples of the courts going behind judgments where the judgment founds the petition debt on a winding up petition. Similarly,

[65] [1997] BPIR 114, 121.
[66] [1907] 2 K.B. 23, 32; see also *Re Home and Colonial Insurance Co Ltd* [1930] 1 Ch 102 in the corporate context.
[67] *Re Menastar Finance Ltd (in liq), Menastar Ltd v Simon* [2002] EWHC 2610 (Ch); [2003] 1 BCLC 338 [44].
[68] *Ibidd* & *Re Shruth* [2005] EWHC 1293 (Ch) (both corporate insolvency cases).

there are few examples of the courts going behind judgments which found the basis of a proof of debt in cases of personal bankruptcy.

In French on Applications to Wind Up Companies, the editors take the view that similar considerations to those set out in *Dawodu* apply in respect of applications to wind up companies.[69] However, the majority of cases cited as authority are those relating to personal bankruptcy with those arising out of corporate insolvency cases being more limited in the extent of their application. That said, there seems to be no reason why a court hearing a winding up petition would not have the power to go behind a judgment when it is clear that it has such a power when an application is made under rr. 4.83 or 4.85 IR.

Conclusion

This article has focused on the circumstances in which the bankruptcy court will go behind judgments. The principle is well established. The bankruptcy court has a power to go behind a judgment on the hearing of a petition or when investigating into proofs of debts. It does not set aside the judgment but instead looks behind it and the judgment remains effective for all other purposes.

As to the grounds for doing so, it is not easy to find in the authorities a definitive statement of criteria for the exercise of this special jurisdiction. At a general level, it seems clear that the bankruptcy court will disregard a creditor's judgment if, on inquiry, the judgment creditor manifestly had no claim against the judgment debtor on which the judgment could properly have been founded. In most cases this is likely to require a debtor (or an officeholder) to establish that there was something “improper” in the judicial process or a “miscarriage of justice”. However, it is respectfully submitted that the discretion to look behind a judgment to inquire into the true liability of the parties is unstructured in the sense that it is the justice to the general body of creditors which is the relevant consideration and this will vary from case to case.

That said, where the judgment was entered following a full hearing on the merits, it is inevitable that the starting point will be a strong inclination to respect the judgment and in the absence of compelling evidence that something has gone awry, to accept it as an accurate statement of liability.

[69] Applications to Wind Up Companies, Derek French (2015, 3 edn) [7.504] *et seq*.

At the other end of the spectrum, default judgments have little force and, if the issue is raised, the bankruptcy court will inquire into the true liability of the judgment debtor as a matter of course.

Judgments entered pursuant to a compromise agreement appear to be in a different category. In such circumstances, there is a need to demonstrate that the judgment creditor's conduct was dishonest, oppressive or otherwise blameworthy. However, such considerations go to the nature of the compromise and (it has been argued) are not conditions which need to be established when inviting the bankruptcy court to go behind a judgment following a judicial determination as to the existence and quantum of the underlying liability.

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