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Case No: 2009 FOLIOS 812,863,865,1203&1386; 2010 FOLIO 125; 2011 FOLIO 227
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/09/2011

Before :

THE HON MR JUSTICE FLAUX

Between :

- (1) BRITISH ARAB COMMERCIAL BANK
PLC
- (2) ARAB BANKING CORPORATION (BSC)
- (3) ABC ISLAMIC BANK (EC)
- (4) CREDIT AGRICOLE CORPORATE AND
INVESTMENT BANK (formerly CALYON)
- (5) THE HONG KONG AND SHANGHAI
BANKING CORPORATION LIMITED
- (6) HSBC BANK MIDDLE EAST LIMITED
- (7) BNP PARIBAS
- (8) EUROPEAN ISLAMIC INVESTMENT
BANK PLC and 11 others

Claimants

- and -

AHMAD HAMAD ALGOSAIBI AND BROTHERS
COMPANY and others

Defendants

Andrew Twigger QC (instructed by **Stephenson Harwood** for the **First Claimant**, **Herbert Smith** for the **Second and Third Claimants** and **Clyde & Co** for the **Fourth Claimant**)

Tim Lord QC, **Alexander Polley** and **Douglas Paine** (instructed by **Reed Smith**) for the **Fifth and Sixth Claimants**

Fred Hobson (instructed by **Clifford Chance**) for the **Seventh Claimant**

Louise Hutton (instructed by **SNR Denton**) for the **Eighth Claimant**

David Quest and **Sandy Phipps** (instructed by **Withers**) for the **AHAB**

Defendants

Adrian Parkhouse of **Farrers** for **Madame Sana'a**

Hearing dates: 12 September 2011

Approved Judgment

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

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THE HON MR JUSTICE FLAUX

The Hon Mr Justice Flaux :

Introduction

1. This is my judgment on the issue raised between the Fifth and Sixth Claimants (to whom I will refer as “HSBC”) on the one hand and the First to Fourth, Seventh and Eighth Claimants (to whom I will refer as “the opposing banks”) on the other, at the return date in relation to various interim charging orders made in favour of the Claimants against the Defendants, some made by me in favour of HSBC on 27 July 2011, the others by other judges of the Commercial Court during August 2011, over five flats in Mayfair and the shareholding in a company which owns the freehold of one of them, in all of which the Claimants contend the Defendants have a beneficial interest.
2. At the hearing on 12 September 2011, the opposing banks resisted the making final of the charging orders obtained by HSBC on the basis that the effect of that would be to give HSBC priority in enforcing its judgment against the Defendants, which would be unfair and prejudicial to the opposing banks. The opposing banks urged the court, in the exercise of the discretion it has under CPR 73.8(2) as to whether to make a charging order final, to refuse to make HSBC’s orders final, but rather to make the opposing banks’ orders final, upon their undertaking to share any proceeds of enforcement *pari passu* among the banks including HSBC.
3. I should add that, at the hearing, Mr Quest, on behalf of the AHAB Defendants (all the Defendants except Madame Sana’a and Algoasibi Trading Services Limited), raised an issue as to whether the Claimants were correct in their contentions that the AHAB Defendants were beneficially interested in the five properties, in circumstances where, in each case, the legal ownership of the property is vested in a special purpose vehicle company. That issue gives rise to questions such as (1) whether those companies are mere nominees of the AHAB Defendants and, if so, the legal effect of that conclusion and (2) whether the AHAB Defendants are beneficially interested in the properties by virtue of a resulting trust. After some debate in argument, it was accepted by all parties that those sorts of questions could not be decided without a trial under CPR 73.8(2)(d) which is what I ordered. A four day trial of that issue is now fixed for hearing before me on 28 November 2011.
4. In the circumstances, I did not determine at the hearing on 12 September 2011 whether any of the Claimants was entitled to final charging orders now, since that must await the outcome of the trial. However, it was agreed between HSBC and the opposing banks that it would be sensible to decide the issue between them as to whether HSBC would have priority over the opposing banks in the event that the charging orders were made final. Accordingly, I heard argument on that issue and reserved judgment.

Background

5. On various dates in 2009 HSBC and some of the opposing banks (the First to Fourth Claimants), who collectively I will describe as “the June Claimants”, issued separate claims against the AHAB Defendants and (in the case of some of them) Madame Sana’a, claiming substantial sums under various loan facilities. The individual Defendants are all members of the prominent and ostensibly wealthy Saudi Algoasibi

family and the First and Second Defendants are the corporate vehicles of that family. The defence of the AHAB Defendants to these claims was in essence that all the facilities were unauthorised, because they had been procured through the fraud of Madame Sana'a's husband Maan Al Sanea and his companies. Madame Sana'a's defence to the claims against her rested on Article 20 of the Saudi Companies Law and the authority of her husband. The actions thus all raised similar facts and issues and, on 20 April 2010, Burton J ordered that they be heard together. The trial was fixed for June 2011.

6. From April 2011 the June Claimants very sensibly cooperated with each other in the presentation and preparation of the banks' case at trial. For example they either jointly instructed an expert (as in the case of Saudi law) or cooperated in the instructions to the expert (as in the case of handwriting). There was cooperation in preparing for and making submissions at the various Pre-Trial Reviews, with different Claimants dealing with different but common issues to avoid duplication of costs. Joint Voluntary Particulars were produced. Similarly, there was cooperation in the written and oral opening submissions at trial, with different Claimants' counsel addressing different common issues. Without wishing to denigrate in any way the cooperation which occurred, to an extent it was necessary because of the indications I had given at the Pre-Trial Review stage that the Claimants should cooperate to avoid duplication of time and costs.
7. The trial of the June Claimants' actions began on 9 June 2011 and continued on 10 and 13 June 2011, with oral submissions from counsel for the various Claimants and the Defendants. On 15 June 2011, the fourth day of the trial, the AHAB defendants admitted their joint and several liability to the June Claimants for the various contractual debts. Following a further hearing on 16 June 2011, I made similar orders against the AHAB Defendants and Madame Sana'a, providing for the AHAB Defendants to pay the judgment debts by 4 pm on 23 June 2011 and for Madame Sana'a to pay the judgment debts by 4 pm on 30 June 2011. The total judgment debts owed to the June Claimants are in the region of US\$250 million.
8. On 24 June 2011, the AHAB Defendants confirmed in a letter to the June Claimants that they would not seek to contest or dispute their liability for the contractual debts to the June Claimants in any other jurisdiction, but they otherwise reserved their rights fully in relation to enforcement in any jurisdiction, including their rights to resist or object to any enforcement proceedings.
9. On about 1 July 2011, the June Claimants cooperated in making similar applications for disclosure by the AHAB Defendants and Madame Sana'a of all their assets worldwide, with the obvious objective of obtaining a list of assets against which to enforce the judgment debts. Those applications were considered by me at a further hearing on 7 July 2011, at which I made penal orders against the AHAB Defendants and Madame Sana'a, requiring each of them to provide a witness statement setting out details of their assets. Witness statements have been provided pursuant to that order.
10. Also on 7 July 2011, I entered judgment in favour of the Eighth Claimants for the AHAB Defendants to pay the outstanding debt under their facilities, in an amount in excess of US\$79 million plus interest and costs. Judgment in favour of the Seventh Claimants in an amount in excess of US\$4million was entered by me on 15 July 2011.

To date, no payments in relation to the judgment debts have been made by the AHAB Defendants or Madame Sana'a to any of the Claimants.

11. On 27 July 2011, HSBC made an application before me on an ex parte basis for interim charging orders over the five properties in Mayfair and a share in an English company which owns the freehold of one of the properties, on the grounds that the AHAB Defendants and Madame Sana'a were beneficially interested in those assets.
12. HSBC was aware of these assets effectively from three sources: (i) a detailed study made by HSBC and its legal advisers of the documents disclosed by the Defendants in the proceedings, which made reference to these assets; (ii) information received from HSBC Private Bank which had granted mortgages over two of the properties at the behest of the AHAB Defendants and (iii) independent research by HSBC and its legal advisers at the Land Registry and Companies House, which revealed that, on 16 June 2011, the last day of the trial, the three properties in relation to which HSBC Private Bank had not granted mortgages (and over which therefore HSBC Private Bank did not have a charge) had been charged in favour of the AHAB Defendants' professional advisers, including their solicitors, Withers LLP.
13. I granted the interim charging orders sought on 27 July 2011. Those orders were served on the opposing banks, who promptly made applications for their own interim charging orders over the same assets. On 2 August 2011, Cooke J made orders in favour of the First to Fourth Claimants and on 5 August 2011, he made orders in favour of the Eighth Claimants. On 16 August 2011, Blair J made orders in favour of the Seventh Claimants.
14. It is common ground (i) that, although the AHAB Defendants and Madame Sana'a are insolvent, in that the amount of the overall debt due to creditor banks (not just HSBC and the opposing banks, but also many other banks) far exceeds their assets, given that they are not domiciled or incorporated within the jurisdiction, the English statutory insolvency and bankruptcy regimes have no application; and (ii) that, although a bankruptcy process is theoretically available in Saudi Arabia, it is at best an imperfect one which would not result in a *pari passu* distribution of assets.
15. In other words, there is nothing available against the Defendants which could be described as a compulsory statutory scheme which requires apportionment as between the creditors. On the contrary, it would appear from the terms of the High Order of the King's Committee in Saudi Arabia, that precedence and priority will be given to the local creditors, including the Saudi banks, even though they are not secured creditors and therefore (at least from an English lawyer's perspective) stand in no better position than the current Claimants.

The relevant statutory provisions

16. The Charging Orders Act 1979 provides, so far as relevant, as follows:

“1 Charging orders.

(1)Where, under a judgment or order of the High Court or a county court, a person (the “debtor”) is required to pay a sum of money to another person (the “creditor”) then, for the

purpose of enforcing that judgment or order, the appropriate court may make an order in accordance with the provisions of this Act imposing on any such property of the debtor as may be specified in the order a charge for securing the payment of any money due or to become due under the judgment or order.

(5) In deciding whether to make a charging order the court shall consider all the circumstances of the case and, in particular, any evidence before it as to—

(a) the personal circumstances of the debtor, and

(b) whether any other creditor of the debtor would be likely to be unduly prejudiced by the making of the order.

3 Provisions supplementing sections 1 and 2.

(1) A charging order may be made either absolutely or subject to conditions as to notifying the debtor or as to the time when the charge is to become enforceable, or as to other matters.”

17. CPR 73.8 provides as follows:

“Further consideration of the application

73.8

(1) If any person objects to the court making a final charging order, he must –

(a) file; and

(b) serve on the applicant;

written evidence stating the grounds of his objections, not less than 7 days before the hearing.

(2) At the hearing the court may –

(a) make a final charging order confirming that the charge imposed by the interim charging order shall continue, with or without modification;

(b) discharge the interim charging order and dismiss the application;

(c) decide any issues in dispute between the parties, or between any of the parties and any other person who objects to the court making a final charging order; or

(d) direct a trial of any such issues, and if necessary give directions.

(3) If the court makes a final charging order which charges securities other than securities held in court, the order will include a stop notice unless the court otherwise orders.

(Section III of this Part contains provisions about stop notices.)

(4) Any order made at the hearing must be served on all the persons on whom the interim charging order was required to be served.”

Summary of the submissions of HSBC and of the opposing banks

18. At both the ex parte hearing on 27 July 2011 and the inter partes hearing on 12 September 2011, the essential submission of HSBC concerning priority was that, where there is no compulsory statutory regime of insolvency or bankruptcy applicable which requires apportionment (and, as set out above, there is no such applicable regime here) the historic “first past the post” rule applies on enforcement of judgments. Accordingly, it was submitted that the interim charging orders in favour of HSBC created defeasible charges in their favour created earlier in point of time than the interim charging orders in favour of the opposing banks, and which therefore take priority over the opposing banks and any other creditors. Mr Tim Lord QC for HSBC relies in particular on paragraph 14 of the judgment of Cooke J in **FG Hemisphere v Republic of Congo** [2005] EWHC 3103 (Comm) (to which I refer in more detail below).
19. Mr Andrew Twigger QC (who acted for the First to Fourth Claimants and whose submissions Mr Hobson for the Seventh Claimant and Miss Hutton for the Eighth Claimant adopted) submitted that, notwithstanding the absence of such a compulsory statutory regime, the court should not make HSBC’s interim charging orders final, but should adopt a solution which apportions the fruits of enforcement between the Claimant banks on a *pari passu* basis.
20. The basis for that solution is said to be, in summary:
 - (1) That Cooke J overstates the position in the **FG Hemisphere** case and that the correct legal analysis is that there is not some general rule, in what I will describe by way of shorthand as “non-statutory insolvency regime” cases, that the first creditor to obtain an interim charging order should take priority. Rather, the opposing banks submit that, since the court has a discretion under CPR 73.8 and the Charging Orders Act 1979 as to whether to make an interim charging order final, the court retains a discretion in an unusual and exceptional case such as the present, to refuse to make HSBC’s orders final, if it considers it fair and just to do so.
 - (2) That on the unusual facts of this case and given the conduct of HSBC, the court is justified in taking an approach which seeks to exercise that discretion in favour of all the Claimant banks, not just HSBC.

Whether there is a general rule

21. In **FG Hemisphere**, the applicant FGH, which was a judgment debtor of the Republic of Congo (“Congo”) sought a third party debt order in its favour in respect of the purchase price of a cargo of oil due from Glencore to a company called Sphynx. In other proceedings commenced by another judgment creditor of Congo, Kensington, Cooke J had decided, about two weeks before the FGH application, that this was in fact a debt due to Congo, because Sphynx and other interposed entities were a sham, so that Kensington was entitled to final third party debt orders against Congo in respect of the sums due from Glencore: see **Kensington International v Republic of Congo** [2005] EWHC 2684 (Comm). Cooke J declined to make an order in favour of FGH.
22. The basis upon which FGH sought to obtain such an order was that the reopening of the earlier judgment that this would entail was justified because, where the judgment debtor was or may be insolvent in this country (as was contended to be the case with the Congo) in the sense of having insufficient assets here to pay its English judgment creditors, the creditors should rank *pari passu* in relation to the attached assets (see the judgment at paragraphs 4 to 6).
23. As Cooke J said at paragraph 6, that raised an issue of principle which he went on to consider. He pointed out in paragraph 7 that the authorities to which he had been referred in that context, culminating in the decision of the House of Lords in **Roberts Petroleum v Bernard Kenny** [1983] 2 AC 192, were cases where the court had been concerned to protect the operation of the statutory insolvency regime. However, as Cooke J pointed out, that regime could not apply to Congo, which was a sovereign foreign state.
24. It is true that, as Mr Twigger QC contends, the learned judge appears to have been influenced, in his conclusion that there were no exceptional grounds justifying his reopening his judgment in favour of Kensington, by the fact that there was no evidence that Congo was insolvent worldwide (so that FGH could seek to enforce elsewhere), whatever the undoubted problems of enforcement against Congo in this jurisdiction (see paragraphs 13 and 16). Nonetheless, it is clear that one of the reasons why Cooke J was not prepared to reopen that earlier judgment and make the order sought by FGH, was that he considered that, in non-statutory insolvency regime cases, the historic first past the post rule applies on the enforcement of judgments, rather than some *pari passu* principle that the court has no means of imposing or enforcing.
25. This is the principle relied upon by Mr Lord QC on behalf of HSBC. It is dealt with by Cooke J in paragraphs 14 to 17 of his judgment in **FG Hemisphere**, which are worth quoting in full:

“14 It now appears that another judgment creditor, to which I shall refer as Walker, has pursued a different asset of the Congo in this country, and that Mr. Justice Morison has determined that Walker can enforce its judgment against shares in a company owned by the Congo and thus indirectly against the property owned by that company. Kensington, it appears, had obtained a charging order on those same shares but abandoned its claim when it realised that it would rank behind Walker's

charge and that there were likely to be insufficient assets for both creditors. In my judgment, that showed a correct appreciation of the law. Where no compulsory statutory regime of apportionment can apply, the historic first past the post rule applies on enforcement of judgments, and the effect of a charging order or third party debt order is that a defeasible charge is obtained which gives priority over other creditors, if it is then confirmed and made final at the later stage.

15 This court could not establish nor administer a judicial insolvency scheme even if it was asked to do so. Despite the contentions advanced by FGH, it does seem to me that in practice this is what would be involved if the court were to order a payment into court and then have to determine what the position was with regard to a number of different creditors, all of whom had been given notice. If FGH was correct in its contention, all creditors would have to be notified and included in any set of third party debt proceedings, and each would then have to prove its debt and an apportionment would then have to be made. Questions would then arise as to whether apportionment would take place with or without regard to preferential creditors in statutory schemes. That was not, in my judgment, envisaged by the terms of CPR 72. No such judicial administration of a liquidation was in mind at all. The court was not expected to order a payment into court and then run its own liquidation just because it was suggested, or even established, that an entity such as a state, not subject to statutory insolvency rules, was defaulting on its debts, that there were a number of creditors with English court judgments in their favour, and that there was difficulty in locating assets in England which were sufficient to meet those judgment debts.

16 Here it would appear that the Congo can pay the judgment debts of which the court has knowledge and that there are a number of assignees of bank loans who, with judgments in their favour, are seeking, with some difficulty, to locate assets of the Congo worldwide upon which those judgments can be executed. There is no evidence that the Congo is insolvent on a worldwide basis, nor even evidence about the extent of assets in this country, nor even of FGH's attempts to locate them. FGH does not have much to call upon when seeking the exercise of the court's discretion in its favour. Once therefore its arguments as to entitlement to pari passu payment on the grounds of the Congo's quasi insolvency in this country are rejected, there is no reason why it should take advantage of Kensington's hard-earned fruits of litigation, even after allowing Kensington its litigation costs, and, in my judgment, there can be no special or exceptional reason for me to reopen the orders I made on the 28th November of this year.

17 This is a case which illustrates the old rule to which Lord Denning, Master of the Rolls, and Lord Chief Justice Goddard, in separate decisions made reference. In **Pritchard v. Westminster Bank** Lord Denning said this:

“The general principle when there is no insolvency is that the person who gets in first gets the fruits of his diligence.”

Lord Chief Justice Goddard in **James Bibby Ltd. v. Woods** [1949] 2KB 449, said this:

“Garnishee proceedings are one form of execution and, as I have said more than once in the course of the argument, it not infrequently happens that where there are several claims or may be several claims against money the person who gets in first gets the fruits of his diligence.”

26. The starting point for Mr Twigger’s attack on any suggestion, derived from the judgment of Cooke J in that case, that there is some general rule that in non-statutory insolvency regime cases, first past the post applies, is that, not only is that conclusion inconsistent with the fact that section 1 of the Charging Orders Act and CPR 73.8 give the court a discretion as to whether to grant a charging order or make it final, but also there is nothing in the decision of the House of Lords in **Roberts** which compels or even points towards that conclusion.
27. **Roberts** was the case which finally established the principle that, where the judgment debtor was insolvent, so that the statutory insolvency regime (whether the judgment debtor was a company or an individual) came into force either before a charging order was made or between the making of an interim order and an application to make the order final, that was without more “sufficient cause” for not making a charging order final. RSC Order 50 rule 1(6), the former provision dealing with charging orders, provided that on further consideration, “the court shall, unless it appears... that there is sufficient cause to the contrary, make the order absolute.”
28. The main speech on this issue was delivered by Lord Brightman. His Lordship analysed a number of earlier decisions of the Court of Appeal, culminating in the case of **Burston Finance v Godfrey** [1976] 1 WLR (to which I will return in more detail below) which the Court of Appeal in **Roberts** had followed and applied. In **Burston**, the judgment debtors were adjudged bankrupt after the interim charging orders had been made (under the Rules of the Supreme Court, these were described as orders *nisi*) but the day before the return date at which the charging orders were to be made final (or in the former terminology, absolute). Notwithstanding the intervening bankruptcy, the Court of Appeal concluded that a bankruptcy adjudication between the order *nisi* and further consideration, was not sufficient cause by itself for refusing to make the order absolute. That decision had been followed by the Court of Appeal in **Roberts**, which was a case where the shareholders of the judgment debtor company had passed a resolution for its voluntary liquidation two days before the court was due to consider making the charging order absolute. The Court of Appeal applied **Burston** by parity of reasoning and made the charging order absolute, notwithstanding the intervening voluntary liquidation.

29. The House of Lords reversed the Court of Appeal and disapproved **Burston**. The ratio of their Lordships' decision can be found in Lord Brightman's speech in two passages at 211E-212B and 213F-H:

“**Burston** therefore is a decision of the Court of Appeal that a bankruptcy adjudication, and by parity of reasoning the liquidation of an insolvent company, between order nisi and further consideration is not sufficient cause by itself for refusing to make the order absolute. The decisions in **Hudson**, **Wilson** and **Rainbow** were interpreted as being based on the fact that there were in each case significant circumstances in addition to the presentation of a winding up petition, notably the preparation of a scheme of arrangement or moratorium, from which it could be inferred that an understanding existed between creditors as to common forbearance from pressing ahead with individual remedies, in the interests of all: "a holding back of action for the common benefit" (p. 731).

In the instant case it is plain that there was no understanding for forbearance but at most a hope among many of the creditors that there would be. Roberts agreed neither at the meeting of March 26 nor later to exercise any forbearance. In none of the reported cases which your Lordships have been asked to consider has actual liquidation, and therefore the actual imposition of the statutory scheme for regulating the affairs of an insolvent, intervened between order nisi and the further consideration, except in **Burston**. In the other relevant cases liquidation, or a scheme of arrangement, was in imminent prospect but was not a fact.

No doubt there are differences between winding up procedures and bankruptcy procedures, but I doubt whether it is possible to decide this case in favour of Kenny without disapproving **Burston**. Admittedly each case is a matter for individual judgment in the circumstances of that particular case; for the question is whether it appears to the court or to the judge that sufficient cause is shown against making the order absolute. There are no facts relied upon by Kenny in the instant case except its insolvency plus intervening liquidation; and if they are "sufficient cause" in the instant case, similar circumstances ought to have been "sufficient cause" in **Burston** .”

“My Lords, I return to the point at issue; whether Bristow J. correctly held that the liquidation of Kenny, that is to say the imposition on the assets of an insolvent company of the statutory scheme for the distribution of those assets among the unsecured creditors, was a "sufficient cause" for not converting the order nisi into an order absolute. I think that he was correct, for the reasons which I have stated. I reach this conclusion without any regret. First, it may help to avert an unseemly scramble by creditors to achieve priority at the last moment.

Secondly, it establishes a clear working rule, and avoids the uncertainties of an inquiry as to whether a scheme of arrangement "has been set on foot ... and has a reasonable prospect of succeeding" (*per* Lord Brandon of Oakbrook [1982] 1 W.L.R. 301, 307). I would allow this appeal, discharge the order absolute which was made by the registrar and restored by the Court of Appeal, and also discharge the order nisi. ”

30. It is certainly true that, as Mr Twigger submitted, Lord Brightman does not deal with what the position would have been if there had been no intervening bankruptcy or liquidation (and thus no statutory insolvency regime in place or imminent) or suggest that, in such a case, there is a general rule that the charging order should be made absolute or final. I am not sure to what extent that negative proposition assists Mr Twigger, since one would not really expect the House of Lords to deal with a hypothetical case, which was far removed from the facts of the case they were considering.
31. However, Mr Twigger placed particular reliance on what Lord Brightman said at 212A: “Admittedly each case is a matter for individual judgment in the circumstances of that particular case...” as negating any suggestion that there is a “general rule” of first past the post in non-statutory insolvency regime cases. Mr Twigger relies upon this passage in support of his submission that the court has a discretion in every case which should be exercised in favour of all the creditors and that, on the unusual facts of the present case, the order which the opposing banks seek is the order which the court should make, as it best approximates to fairness and equity. In support of that submission, he also relied upon a number of the earlier decisions of the Court of Appeal to which Lord Brightman referred, and it is necessary to consider those in a little more detail.
32. So far as the cases particularly relied upon by Cooke J in **FG Hemisphere** are concerned, Mr Twigger points out, correctly, that **Bibby v Woods** [1949] 2 KB 449 was not a case of insolvency of the judgment debtor or insufficiency of assets, so that in one sense it does not take the argument either way very far.
33. **Prichard v Westminster Bank** [1969] 1 WLR 547 was a case where the debtor had died and the estate had been found to be insolvent. The executors administered the estate and paid a dividend of 15 shillings in the pound to all the creditors, including the claimant. Not content with this, the claimant commenced proceedings against the estate and obtained judgment for the balance of his claim. He then obtained garnishee orders *nisi* (as interim third party debt orders were then called) against various bank accounts. At the hearing to determine whether the orders should be made absolute, the bank (as executors and garnishees) objected to the orders being made absolute, but the registrar made the orders absolute.
34. The Court of Appeal reversed that decision and set aside the orders absolute. Mr Twigger relied on a short passage in the judgment of Lord Denning MR at 549D-E:

“The general principle, when there is no insolvency, is that the person who gets in first gets the fruits of his diligence; see *per* Lord Goddard L.J. in **James Bibby Ltd. v. Woods & Howard**

[1949] 2 KB 449, 455. But it is different when the estate is insolvent. Under the Administration of Estates Act, 1925, s. 34, and Schedule 1 thereto it is quite plain that, when an estate is insolvent, the bankruptcy rules apply. This brings in section 33 of the Bankruptcy Act, 1914. Subsection (5) shows that the date of death is equivalent to a receiving order; and subsection (7) shows that all debts proved are to be paid *pari passu*.”

35. However, it is clear that Lord Denning had in mind the effect of the operation of the statutory insolvency regime in the United Kingdom where the judgment debtor is insolvent, not some general exception to the general principle he stated, which would apply to a judgment debtor who was insolvent, but not subject to any statutory insolvency regime or the like. Accordingly, I am not sure that that passage takes Mr Twigger very far in his argument.
36. In support of his submission that the court should exercise its discretion not to make a charging order final if to do so would be contrary to the equity of the matter generally, as he submits would be the case here, because HSBC would obtain priority in terms of enforcement over the opposing banks, Mr Twigger relied on two passages in the judgment of Buckley LJ in **D Wilson (Birmingham) Ltd v Metropolitan Property Developments Ltd** [1975] 2 All ER 814. That was a case in which the judgment debtor presented its own petition for winding up after garnishee orders *nisi* were made but before further consideration as to whether to make them absolute. Nonetheless, the registrar made the orders absolute, but that decision was reversed by the Court of Appeal, which discharged the orders.
37. In the course of his judgment, at 817j-818d, Buckley LJ said:

“It has been submitted on behalf of the judgment debtor that this is not a case in which the court ought to attach the debt due from the garnishee because the judgment debtor here is insolvent, at any rate in the sense that it is wholly unable for the time being to pay its debts as they fall due, and that there is on foot the proposal for a scheme of arrangement, the object of which is to ensure that the assets of the company shall be realised for the best and equal advantage of all the creditors, and that to allow attachment at this stage to satisfy the judgment creditor's judgment would be to give the judgment creditor a preference which, in the circumstances, would be contrary to the policy of the 1948 Act and contrary to the equity of the matter generally.

Counsel for the judgment debtor draws attention to the fact that under the terms of RSC Ord 49 the making of a garnishee order is a discretionary matter, and that it is not disputed by the judgment creditor. He has further submitted that the court will not, consequently, make such an order if so to do would be inequitable, and that also is not disputed. Counsel for the judgment debtor went on to say that it would be inequitable to make an order in such a case as the present because its effect would be to confer a preference on the creditor and that, a

fortiori, the court ought not to make such an order which would have such an effect where a winding-up petition has already been presented for winding-up the company. Nor, he says, ought an order to be made after presentation of a petition for winding-up an insolvent company where the only real alternative to making the winding up order is the approval by the court of a scheme under s 206.” (*emphasis added*)

38. Mr Twigger also relied upon a later passage in the judgment at 819f-820a:

“Counsel for the judgment creditor in this case has presented a most ingenious argument to this effect, that since the debt which is here sought to be attached was a debt which resulted from the judgment creditor's own action as sub-contractors, in this case it would be just and equitable that the judgment creditor should be allowed to get an advantage over the other creditors of the company. But although that argument has a certain attraction about it, I do not think it is a basis on which we can decide this case. I think we have got to bear in mind that where insolvent estates are to be administered it is the policy of the law that creditors should, so far as possible, be treated with equality, and the fact that in the present case the debt which the judgment creditor seeks to attach would not have come into existence had the judgment creditor not performed a contractual obligation which he was bound to the judgment debtor to perform does not seem to me to be a reason for disregarding that general policy.

The position is, I think, that a court in considering whether or not to exercise its discretion to make absolute a garnishee order in circumstances such as this, must bear in mind not only the position of the judgment creditor, the judgment debtor and the garnishee, but the position of the other creditors of the judgment debtor and must have regard to the fact that proceedings are on foot, and were on foot at the time the garnishee proceedings were launched, for ensuring the distribution of the available assets of the judgment debtor company among the creditors *pari passu*. So, notwithstanding the ingenuity of that argument of counsel for the judgment creditor, I think this is a case in which the registrar ought not to have made absolute the garnishee orders nisi.” (*emphasis added*)

39. The first passage I have underlined goes some way to support Mr Twigger's submission that the court should exercise its discretion against making an order final, if to do so would be inequitable, but in my judgment, it is important not to take these passages in the judgment of Buckley LJ out of context. As the second passage I have underlined makes clear, what Buckley LJ had in mind was the statutory insolvency regime designed to protect the general body of the creditors by ensuring a distribution of inadequate assets on a *pari passu* basis.

40. Mr Twigger is seeking to transpose the statements Buckley LJ made in that context into the present case where he urges equality, not for all the creditors of the AHAB Defendants or even all the banks who are creditors, but for one particular group of creditors, those banks which have obtained judgments from the Commercial Court. He is seeking to do so where the statutory insolvency regime and the policy behind it do not apply and, in so far as the AHAB Defendants are subject to any insolvency scheme at all, it is the rather imperfect one applicable in Saudi Arabia, which would seem to favour and give priority to Saudi creditors. It does not seem to me that Buckley LJ had anything like the present case in mind, or indeed anything beyond the statutory insolvency regime.
41. I was also referred to a further judgment of Buckley LJ in the later case of **Rainbow v Moorgate Properties Ltd** [1975] 1 WLR 788 which concerned the liquidation of a judgment debtor which was another company in the same group as the judgment debtor in **Wilson**. In that case the Court of Appeal considered that a moratorium on the enforcement of debts agreed at a meeting of creditors with a view to a proposed scheme of arrangement, even though it was not binding on the judgment creditors, who were not party to it, did amount to a reason why it would be “improper to give the plaintiffs an advantage over other creditors” as Buckley LJ put it at 794C. However, it seems to me that, like **Wilson**, the decision was very much one made in the context of the statutory insolvency regime, particularly since, the day before the charging orders were made absolute by the registrar, the company had presented its own winding up petition.
42. Mr Twigger placed particular reliance on certain passages in the judgments in **Burston Finance v Godfrey** [1976] 1 WLR 719. Although reliance on a decision of the Court of Appeal which was disapproved by the House of Lords may not be an auspicious basis for any reliance being placed upon the judgments, Mr Twigger submits that, in the relevant respects, what Megaw and Shaw LJ said was not disapproved by their Lordships.
43. The passage in the judgment of Megaw LJ on which Mr Twigger particularly relies is at 732E-H and is as follows:

“The true principle, I think, as emerges from the recent authorities, cannot be more precisely stated than as it was put by counsel, as recorded in the judgment of Buckley L.J. in **Wilson** [1975] 2 All E.R. 814 , 818 (part of the passage I have already read), where the Lord Justice says : “He” (i.e. counsel) “has further submitted that the court will not, consequently, make such an order if so to do would be inequitable, and that also is not disputed.”

Applying that principle here, this is, I think, on the facts before us, a marginal case. In the end, after hesitation, I have reached the conclusion that the trustee in bankruptcy has failed to show that it would be inequitable in the circumstances that the order should be made absolute. So sufficient cause is not shown and the charging order should stand. I reach that conclusion mainly because there was here, so far as the evidence goes, no understanding nor any indication of any attempt to reach an

understanding among the creditors of the bankrupts, or among any of them, as to common forbearance from pressing individual remedies, in the interests of all. Nor is there any evidence that the plaintiffs exercised undue haste to obtain a preferred position for themselves as compared with the general body of creditors; nor that they took, or sought to take, unfair advantage of any knowledge which they had acquired of any other matter or circumstance which was unknown to the other creditors.”

44. Mr Twigger submits that, although the first reason Megaw LJ gives in the second paragraph quoted, as to why sufficient cause had not been shown that the order should not be made absolute, namely that there was no understanding among the creditors as to common forbearance, was disapproved by the House of Lords as a reason for making the order absolute as opposed to leaving matters to the statutory insolvency regime, there had been no disapproval by the House of Lords of the other reasons given for making the order absolute. This was essentially because Megaw LJ was saying that it was the absence of those reasons and factors, namely undue haste in obtaining a preferred position or taking unfair advantage of knowledge acquired by the particular judgment creditor unknown to the other creditors, which justified the making of an order absolute.

45. A further statement that the conduct of the judgment creditor might justify refusing to make a charging order absolute is to be found in the judgment of Shaw LJ at 736H-737B:

“Nonetheless it would seem that where a judgment creditor has a good title to his judgment and has not acted unfairly in relation to the other creditors he should not be refused an order absolute. Of course, where the circumstances are such that the subject matter of the charging order nisi would be valueless to the judgment creditor so that it would be pointless to make the order absolute, refusal would be justified. In such a case the creditor is deprived of nothing which will advantage him in seeking satisfaction of his judgment.

Another class of case where refusal to make an order absolute might be justified is where a creditor of an apparently insolvent debtor has so acted as to suggest or indicate that he is prepared, in common with the general or a substantial body of the creditors of that debtor, to forgo the active and immediate pursuit of a claim. To go back on such an indication by seeking an order absolute would be conduct so inequitable as to forfeit the right of the creditor to ask that his interest should be supported or furthered by a judicial order. On this basis some of the recent cases can be understood and explained.”

46. As I said, Mr Twigger submitted that the House of Lords had not disapproved these passages in the judgment. By parity of reasoning with what Megaw and Shaw LJ said, he submitted that in any case (not just one where the statutory insolvency regime

applies) the existence of the sort of factors identified will justify a refusal to make an order final.

47. Mr Twigger also relied upon the decision of HHJ Paul Baker QC in **Calor Gas v Piercy (Re a Debtor Nos 31/32/33 of 1993)** [1994] 2 BCLC 321 as demonstrating that even where the statutory insolvency regime is in place, the court retains a discretion to make the charging order absolute. However, that case was an exceptional one where, because all the other creditors of the judgment debtor were only creditors for small sums so that on administration and sale by the trustee in bankruptcy, they would only receive a very small sum, the learned judge was able to conclude that they would not be “unduly prejudiced” within the meaning of section 1(5) of the Charging Orders Act if the order were made absolute in favour of the judgment creditor: see 336g-i. Accordingly, I am not sure that case assists Mr Twigger in his argument that the court has a general discretion to achieve equity between the creditors. All that case demonstrates is that, even where the statutory regime applies, the court has a residual discretion in an exceptional case to make a final charging order.
48. Mr Twigger’s submission in relation to these various authorities generally was that, whilst they are not easy to interpret, they all indicate attempts by the court to do equity between the various creditors.
49. The arguments raised by Mr Lord, as to why Mr Twigger’s submissions that there was some general discretion in non-statutory insolvency regime cases to decline to make final charging orders in favour of HSBC were misconceived, can be shortly stated. His principal submission was that the cases relied upon by Mr Twigger were all ones where the statutory insolvency regime applied and the reason why, in such cases, the court declined to make a charging order or third party debt order final, is that to make an order final would prefer one creditor over the general body of creditors, which the statutory insolvency regime is designed to prevent. However, nothing in those cases had any bearing on a case such as the present, where the statutory insolvency regime does not apply and where the opposing banks were not seeking fairness and equity for the general body of creditors, but only the section of creditors which they comprise.
50. He submitted that this was particularly so in the case of **Burston**. That was a case where the Court of Appeal was indicating that an order would not be made final, in circumstances where the judgment creditor by his conduct has in effect put the general body of creditors “off the scent”, so that they have not invoked the statutory regime, for example by issuing a bankruptcy petition. The judgments did not validate the same analysis in the case of a sub-group of creditor banks as in the present case. In any event, Mr Lord queried how much reliance could be placed on **Burston** when the House of Lords had not expressly endorsed anything said in that case.
51. Mr Lord submitted that, outside cases where the statutory insolvency regime applies, the first past the post rule applies, for precisely the reasons given by Cooke J, that it is no part of the Court’s function or jurisdiction to impose on the parties some form of informal insolvency regime. He submitted that the attempt by Mr Twigger to avoid this consequence by the undertaking which the opposing banks would propose to give, to distribute the assets *pari passu* between themselves and with HSBC would not work, because it failed to address the position of other creditors of the Defendants, specifically the many other banks which are creditors.

52. In my judgment, only limited assistance can be gained from the authorities on which Mr Twigger relies, precisely because they are all ones where on one basis or another, the statutory insolvency regime of distribution *pari passu* between all the unsecured creditors applies. It is perhaps not surprising that there is little authority which bears directly on the question I have to decide. This is because, in most cases where a final charging order in favour of one creditor will lead to the other creditors receiving nothing due to the insolvency of the judgment debtor, the statutory insolvency regime will apply, because the judgment debtor is domiciled or registered in the United Kingdom. In cases where the judgment debtor is not insolvent and has sufficient assets to pay all his or its debts, objection is unlikely to be taken by other creditors to the making of a final charging order in favour of the judgment creditor. Cases like the present or **FG Hemisphere** must be comparatively rare.
53. I have reached the conclusion that Cooke J was right in saying that in non-statutory insolvency regime cases, the general rule is that the principle of “first past the post” applies. However, it is only a general rule, to which there may be exceptions when it is appropriate in the exercise of the court’s discretion not to make a charging order final. It seems to me that (despite Mr Lord’s submissions to the contrary) there may be exceptional cases where even though no statutory insolvency regime applies, it is appropriate to conclude that someone in the position of HSBC should not have the benefit of a final charging order.
54. It seems to me that this conclusion flows from the fact that both section 1 of the Charging Orders Act 1979 and the terms of CPR 73.8 recognise the existence of a discretion as to whether to make an order final. However, I do not consider that the discretion is a general one at large. Rather, subsection (5) talks about any other creditor being “unduly prejudiced” by the making of the charging order. I agree with Mr Twigger that Mr Lord is wrong in suggesting that this provision is only intended to inure to the benefit of the general body of creditors, since it refers in terms to “any other creditor” as opposed to “all other creditors”. However, the expression “unduly prejudiced” seems to me to recognise that a charging order in favour of one creditor will almost certainly, in one sense, prejudice other creditors, because it gives that creditor security against which to enforce his judgment which the other creditors do not have, but it is only where that prejudice is “undue” that the court should consider not making a final charging order.
55. In my judgment, the prejudice to other creditors, such as the opposing banks in the present case, can only be said to be “undue” if there is something about the judgment creditor’s conduct which would cause undue prejudice if there were a final charging order or if there are some other exceptional circumstances, which mean that other creditors will suffer some prejudice over and above the prejudice they would inevitably suffer, if an order were made in favour of the judgment creditor.
56. There is no authority directly on the point as to when, in non-statutory insolvency regime cases, the prejudice to other creditors will be “undue” or as to what constitutes an exceptional situation, so that it would be appropriate for the court to exercise its discretion not to make a charging order final. However, I accept that (although the House of Lords in **Roberts** disapproved the ratio of **Burston** and therefore care must be taken in placing too much reliance on the judgments) the judgments of Megaw LJ and Shaw LJ in that case do provide some guidance as to when it would be appropriate not to make a charging order final because of exceptional circumstances,

such as aspects of the judgment creditor's conduct. Nonetheless, in my judgment, it is of some significance that all the examples the two Lords Justice give are ones of what might be described as "sharp conduct" by the judgment creditor: putting other creditors off the scent by purporting to agree to forego immediate pursuit of a claim or undue haste in obtaining a preferred position or unfair use of special knowledge.

Whether the conduct of HSBC or the facts of this case justify making the order sought by the opposing banks

57. Having decided that there is a limited discretion even in a non-statutory insolvency regime case to decline to make a charging order final, I turn to the second issue raised by the opposing banks' submissions, whether because of the conduct of HSBC and/or because the facts of this case are otherwise exceptional, the court should exercise its discretion not to make HSBC's orders final, but instead to accept the opposing banks' undertaking and make their orders final.
58. Mr Twigger submits that there are four aspects of the conduct of HSBC which mean that they have obtained an unfair advantage over the opposing banks. These are set out in his Skeleton Argument as follows and I will consider each in turn:
- (1) The June Claimants (including HSBC) have co-operated before, during and after the trial to obtain judgments against the AHAB Defendants and Madame Sana'a and in the initial stages of enforcement. HSBC would not be obtaining the fruits only of their diligence, but the fruits of the diligence of all the June Claimants.
 - (2) It was no more than a piece of luck which enabled HSBC to get in first: they were only able to take enforcement action as a result of confidential information they obtained from HSBC Private Bank, which was not available to the other June Claimants.
 - (3) Ms MacDonald of Reed Smith, HSBC's solicitors, attended a meeting on 21 July 2011 with the other June Claimants' representatives to discuss a common approach to enforcement. This was after HSBC had become aware of the assets which became the subject of the charging orders but it is said that she (and therefore HSBC) conducted themselves so as to suggest that they were continuing to cooperate with the other June Claimants as before and that they saw a common interest in *pari passu* distribution of assets of exactly the type against which they were, in fact, about to enforce.
 - (4) HSBC argued before me at the *ex parte* application for interim charging orders that it was likely to be "every bank for itself" without revealing that they had participated in a meeting with the other June Claimants to discuss a solution which would result in a *pari passu* distribution.
59. I do not consider that too much can be made of the extent of cooperation between the June Claimants. As I have indicated, to an extent the division of responsibility for submissions on certain issues or the sharing of experts were required of the June Claimants by the court in the exercise of case management powers. As Mr Lord points out, there was no litigation sharing agreement between the June Claimants and

no agreement to share the Defendants' assets in the event of judgments being obtained (a matter to which I will return in the context of the 21 July meeting).

60. In fact, as Mr Lord also pointed out, there had in the past been separate settlement discussions between each of the banks and the AHAB Defendants. Had any particular discussion led to a settlement, the bank in question would have expected to retain whatever sum the AHAB Defendants might have agreed to pay, without sharing it with the other June Claimants. Overall, the suggestion that, if HSBC obtains final charging orders, it will be obtaining the fruits of all the June Claimants' diligence, whilst it provides an arresting "sound bite", is on analysis something of an overstatement.
61. As for the point about knowledge gained from the HSBC Private Bank, as I have already said at paragraph 12 above, HSBC became aware of the Mayfair properties and the shareholding not merely because of information from the Private Bank, but also because of diligent work by the legal advisers of HSBC on the Defendants' disclosure and in searches at Companies House and the Land Registry. To that extent, awareness of the assets was the product of HSBC's own diligence.
62. Furthermore, it is not suggested, nor could it be, that in using information obtained from HSBC Private Bank, HSBC was acting in any way improperly, since HSBC Private Bank had a contractual right under the terms of the facilities it granted (as did HSBC in relation to the facilities it had granted to the AHAB Defendants) to share any confidential information with other companies within the HSBC Group. An obvious reason for requiring such a contractual right would be to facilitate any enforcement proceedings against the borrower, as in the present case. Accordingly, as I see it there is no question of HSBC's use of this knowledge amounting to an unfair advantage over the other creditor banks such as Megaw LJ referred to in **Burston**.
63. The third and fourth aspects of HSBC's conduct can be considered together, since they stand or fall together. I agree with Mr Lord's characterisation of the meeting of 21 July as Mr Twigger's "high point" but, on analysis, it does not amount to the sort of unfair or misleading conduct which could begin to justify refusing to make final charging orders where these would otherwise be appropriate.
64. There are two important points to be made about the meeting. First that the meeting and the discussions which took place at it were expressly agreed to be subject to common interest privilege between the banks. It follows that on the *ex parte* application, I could not have been told what had been discussed without HSBC breaching that privilege.
65. Second, it is not suggested that HSBC or Ms MacDonald on their behalf agreed anything at the meeting about cooperation in relation to enforcement. The question of cooperation was raised and she said that she would take her clients' instructions. No indication was given as to what the attitude of HSBC might be. The case is thus a very long way on the facts from what Shaw LJ had in mind in **Burston**, namely indication of a willingness to forego pursuit of a claim or to forego enforcement.
66. When I pressed Mr Twigger in argument as to what he was submitting should have happened, he accepted that he could not say that at the meeting Ms MacDonald should have disclosed to the other banks the existence of the assets of which HSBC

had become aware. That must be right: to have done so would have been a serious breach of her professional duty to her clients. Rather, Mr Twigger submitted that she should not have attended the meeting, given that it was expressed to be subject to common interest privilege. He submitted that if you attend a meeting which is expressed to be on that basis, it is implicit that you do not know that there is not in fact a common interest.

67. That may very well be right, but the critical question in this context is what unfair advantage HSBC can be said to have gained through attendance at the meeting, which would make it inequitable for them to have their charging orders made final. It cannot be said that the other banks were misled into thinking that HSBC would not take steps to enforce against the Mayfair properties and the shareholding, since by definition the other banks were not aware of those assets at that stage and, in any event, it is not suggested that HSBC agreed anything or gave any indication of its attitude at the meeting.
68. Mr Twigger seemed to be suggesting that if Ms MacDonald had not gone to the meeting, the opposing banks would have applied for charging orders at that stage so that their charging orders would have had equal priority with those obtained by HSBC. However, that cannot be right, since the opposing banks only became aware of the assets when served with the interim charging orders which I had made on 27 July. Non-attendance by Ms MacDonald at the meeting would have told them nothing about the assets which could conceivably have enabled them to obtain charging orders sooner than they in fact did.
69. I did not understand it to be being argued that the failure to disclose the meeting to the court at the *ex parte* hearing was a breach of the duty of full and frank disclosure such that the interim orders should be discharged, in which case, in one sense, the failure to disclose it has no bearing on whether the orders should be made final. However, even if the meeting and what had happened at it had been disclosed to me at the *ex parte* hearing, I am quite sure that it would have made no difference to my decision to grant the interim charging orders HSBC was seeking. This is because it is not suggested that, at the meeting, HSBC had agreed to cooperate on enforcement or indicated they would forego enforcement or in any way misled the opposing banks in a way which would have made it inequitable for them to obtain charging orders over the Mayfair properties and the shareholding.
70. Overall, I do not consider that HSBC's conduct can be said to be such as to make it inequitable that the general rule should apply that the charging orders should be made final. This leaves what might be described as Mr Twigger's more general point, that the circumstances of this case are so unusual and exceptional that the court should strive to do justice and equity between HSBC and the opposing banks. In one sense, this point must have less impact once it is determined (as I have determined) that the discretion given to the court as to whether to make a charging order final is not a general discretion to seek to do justice between the judgment creditor and other creditors. However, since I consider that the court must retain a residual discretion in an appropriate exceptional case to decline to make a charging order final, I will need to consider whether this case has some exceptional aspect (other than HSBC's conduct) which would justify the court departing from the general rule of first past the post.

71. Much was made by Mr Twigger in this context of the fact that unless, in effect, the court made an order the effect of which was that HSBC and the opposing banks participated *pari passu* in the proceeds of enforcement against the Mayfair properties and the shareholding (assuming that, at the trial in November, the court concludes that the AHAB Defendants are beneficially interested in those assets), the opposing banks might well not recover anything on enforcement, because of the difficulties of enforcing in Saudi Arabia and the unlikelihood of other assets being available elsewhere against which the opposing banks could enforce.
72. It does not seem to me that that this amounts to an exceptional aspect. In a very real sense, the position is no different from that of FG Hemisphere in the case before Cooke J. Whilst it is correct that the judge concluded on the basis of the information he had heard in **Kensington** that the Congo was not insolvent worldwide, which is a difference from the position of the AHAB Defendants here, nonetheless there were major difficulties enforcing the judgments obtained by the various judgment creditors against Congo. Just as enforcement by the June Claimants against the Saudi Arabian assets will be, on the AHAB Defendants' own case before me in opposing orders for disclosure of their Saudi Arabian assets, impracticable if not impossible, so in the Congo cases, enforcement by the judgment creditors against assets of the state within the state was wholly impracticable.
73. The judgment creditors had to search for assets elsewhere in relation to which they could establish a sufficient interest on the part of the Congo to justify enforcement. Hence the decision in **Walker International v Republic of Congo** [2005] EWHC 2813 (Comm), where Morison J concluded that the shares in an English company Jackson, which owned a property in Sackville Street, were beneficially owned by Congo. It is to that litigation that Cooke J refers in paragraph 14 of his judgment in **FG Hemisphere**, recording that, with a correct appreciation of the law, Kensington had abandoned its claim to the shares in that company once it realised that Walker had already obtained interim charging orders over those shares.
74. Thus, Cooke J recognised the applicability of the general principle of first past the post both to the Glencore debt over which Kensington had obtained the third party debt order and, by his approval of Kensington's abandonment of its claim to a charging order over the shares in Jackson, to the charging orders obtained by Walker. He applied that general principle notwithstanding that if FG Hemisphere could not share *pari passu* in the proceeds of enforcement against the Glencore debt, enforcement against any other asset was going to be impracticable.
75. A related point is that, whilst the course which the opposing banks advocate, through their undertaking to share *pari passu* between each other and HSBC, may overcome the difficulty Cooke J identified at paragraph 15 of his judgment of the court administering some form of judicial insolvency scheme between the current Claimants, that does not address the wider issue of the other creditors. The proposed *pari passu* scheme by virtue of the undertaking to the court only covers the June Claimants and the Seventh and Eighth Claimants. It does not cover other banks which may be creditors of the AHAB Defendants and which wish to seek to enforce against assets in this jurisdiction.
76. Mr Twigger sought to make light of this issue in his submissions, suggesting that there were unlikely to be any other creditor banks which wished to enforce against the

Mayfair properties and shareholding so that the court could safely accept the opposing banks' undertaking and not concern itself with the wider ramifications of how to deal with other judgment creditors who are not within the limited group giving the undertaking.

77. With all due respect to Mr Twigger, I am by no means confident he is right. Thus, on 22 September 2011, after the hearing on the present application, I received a letter from Standard Chartered Bank which was not party to the proceedings before me (although it did make an application for disclosure of witness statements) but which has obtained judgment against the AHAB Defendants in Bahrain, upon which it now wishes to sue in England and to seek to enforce against the Mayfair properties and shareholding by way of interim charging orders.
78. There may very well be other banks in the same position. As matters currently stand, those other banks would have no basis for ranking *pari passu* with HSBC and the opposing banks, unless either the opposing banks offer to extend their undertaking to any other bank which comes along with a judgment or the court could enforce some judicial insolvency scheme, which it cannot because it has no jurisdiction. I certainly do not consider that such jurisdiction is provided by the ability of the court under section 3(1) of the Charging Orders Act to impose conditions pursuant to which a charging order is granted.
79. Of course, those additional banks could not pray in aid the cooperation with HSBC and other matters relied upon by the opposing banks, but then in a very real sense, neither can the Seventh and Eighth Claimants, who were not party to the proceedings at trial. In my judgment these difficulties of administering what Mr Twigger would have it is justice and equality between the various actual and potential judgment creditor banks, demonstrate that, where (as I have decided is the case here) the conduct of the "first past the post" judgment creditor gives rise to no unfairness in giving that creditor's charging orders priority, there is on analysis no exceptional aspect which would justify taking a different approach.

Conclusion

80. It follows that HSBC will have priority over the opposing banks in the event that the charging orders are made final. The question whether the Claimants are in fact entitled to such orders will have to await the outcome of the trial of the issue of beneficial interest between the Claimants and the AHAB Defendants in November.