IN THE HIGH COURT OF JUSTICE
IN THE CHANCERY DIVISION

No. GLC 590/00

Royal Courts of Justice
The Strand
London WCA 2LL

Wednesday 31st January, 2001

B e f o r e:

MR. JUSTICE ETHERTON

– – – – – – –

LATIF KOWALE DAWODU

Appellant

– v –

AMERICAN EXPRESS BANK

Respondent

– – – – – – – – –

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(Official Shorthand Writers to the Royal Courts of Justice)

The Appellant appeared in person.
MR. BOGLE appeared on behalf of the Respondent.
MR. ROGERS appeared on behalf of the Official Receiver.

J U D G M E N T
(As Approved)

MR. JUSTICE ETHERTON: This is an appeal from the order of Registrar Jaques on 10th November 2000, adjudicating Mr. Latif Kowale Dawodu bankrupt on the petition of American Express Bank ("the Bank"). Mr. Dawodu has appeared before me in person. Mr. Bogle has appeared as counsel for the Bank. Mr. Rogers has been present on behalf of the Official Receiver. The order of Registrar Jaques, to which I have referred, incorrectly states that the order was made on the petition of American Express (Europe) Limited ("AEE"), but nothing turns on this error.

The issue

The petition, which is dated 17th July 2000, was based on a series of judgment debts and interest totalling £15,316.06, arising from proceedings concerning Mr. Dawodu's bank account facility with the Bank.

I shall refer to the various judgments and awards which are the subject matter of the petition. First, the petition refers to a judgment dated 28th January 1998, in action BO604141 in the Bow County Court. That was a judgment obtained by the Bank on an application for summary judgment in relation to Mr. Dawodu's overdraft. The sum for which judgment was given was £10,430.89. Secondly, the petition refers to and relies upon an award of costs in the action BO604141, which were assessed at £2,016.70, making a total in respect of those proceedings in the Bow County Court of £12,447.59. Interest amounting to £1,530.54 is then added to that sum for the period from 29th September 1998 to 12th April 2000, making a sub−total at this point of £13,978.13.

The next judgment which is relied upon in the petition is a judgment dated 19th February 1998 in action BO705533, which was commenced by Mr. Dawodu against the Bank in the Central London County Court. Those proceedings were struck out, and on 19th February 1998 costs were ordered to be paid by Mr. Dawodu to the Bank. Those costs were subsequently taxed and allowed at

£1,337.93. Notification of that taxation is dated 19th February 1998, and the order was drawn up on 16th March 1998.

Those sums produce in total the figure of £15,316.06, to which I have already referred.

None of those orders which are relied upon by the petitioning creditor have been appealed by Mr. Dawodu. Application was made on 18th August 2000 by Mr. Dawodu to set aside the judgment in action BO604141. That application was struck out by District Judge Mullis of Bow County Court on 4th December 2000. The sum of £1,337.93, which were the costs ordered to be paid in action BO705533, is not disputed by Mr. Dawodu. His complaint before me, however, is that judgment should not have been given against him in action BO705533, and he claims that he has in fact his own claim against the Bank for at least some £46,000. In short, Mr. Dawodu claims: (1) that the Bank made wrongful deductions from his account, which are described in the bank statements before me as "Adjustment Withdrawals and Transfer Withdrawals"; (2) the Bank has charged interest on his overdraft in excess of the rate permitted under the contract between him and the Bank; (3) the Bank has wrongly added interest on his overdraft to capital, and then subsequently charged interest on the aggregate - in effect, the Bank has wrongly charged compound interest; (4) the Bank has miscalculated the sums due as a matter of simple arithmetic. Adjusting these items results in the balance which Mr. Dawodu claims is due to him from the Bank.

In addition, Mr. Dawodu claims that he has a claim or set−off against the Bank in respect of the sum of £2,676.56, which he demanded AEE to transfer to the Bank in 1993, but which was not transferred.

Mr. Dawodu claims that the Court should, in these insolvency proceedings, look behind the judgment in action BO604141 for the following reasons. Firstly, he says that at the time of the summary judgment hearing in that action he was unable to attend the hearing

because he was unable to leave Nigeria. I add that he had no legal representation at that time in England in those proceedings. His passport had been taken from him in the course of a burglary, and he was unable to obtain a visa until after the date of the hearing. Shortly after his return to England from Nigeria, he commenced proceedings in the High Court against AEE, the Bank and Lloyds Bank, in which, among other things, he sought to restrain the Bank from presenting a bankruptcy petition based on the judgment in action BO604141. Those High Court proceedings were determined by an order of Master Moncaster on 27th July 2000, when, among other things, the Master ordered that the claim against the Bank by Mr. Dawodu be dismissed.

Thereafter, Mr. Dawodu made an application to set aside the judgment in action BO604141 by application dated 18th August 2000. That application was struck out on 4th December 2000 on the basis of his failure to progress that application and in particular to comply with an "unless" order on 3rd November 2000, which gave directions for the progress of the application. He says, however, that he did not receive copies of the order for directions in that application, or the "unless" order to which I have just referred, until after the application was struck out and the bankruptcy order against him had been made. His case is that he was himself waiting to hear from the Court as to what steps he should take.

He submits that, as a matter of general principle, the Insolvency Court is both entitled to and bound to look behind a judgment on which a bankruptcy petition is based in order to see whether the allegations of the debtor challenging the debt are true, and that it is so entitled and bound whether or not any appeal is pending against the judgment or there is any pending application to set aside the judgment.

Principles to be applied on this appeal.

This is an appeal from the order of Registrar Jaques, to which I have already referred. It is a true appeal, and not a rehearing. In order to overturn the decision of the learned Registrar, I must be satisfied that

he made a material error of law, or that there was no evidence to support the Registrar's decision - see Re Gilmartin (1989) 1 WLR 513.

As I have already said, there is no pending appeal in respect of action BO604141, and there is no application to set aside the judgment in that case. Mr. Dawodu says that this is not conclusive. He refers me in particular to the Insolvency Act 1986 Section 266(3), which is in the following terms:

> The Court has a general power, if it appears to it appropriate to do so on the grounds that there has been a contravention of the rules or for any other reason, to dismiss a bankruptcy petition or to stay proceedings on such a petition; and, where it stays proceedings on a petition, it may do so on such terms and conditions as it thinks fit."

He has also referred me to Rule 6.25(1) of the Insolvency Rules 1986, which is as follows:

> On the hearing of the petition, the Court may make a bankruptcy order if satisfied that the statements in the petition are true, and that the debt on which it is founded has not been paid, or secured or compounded for."

Mr. Dawodu relies upon a series of cases which he submits are material to the statutory provisions and the Rule to which I have just referred. Those cases are as follows: Re Lennox [1885] 16 QBD 315; Re Fraser [1892] 2QBD 633; Re Victoria [1894] 2QBD 387; R v. Henderson AC 720; Re Hawkins [1895] 1QBD 404; Re Flatan [1889] 22 QBD 83; Re Saville [1887] 4 Morr 277; Re Lipscombe [1887] 4 Morr 43; Re Howell [1915] 84 LJKB 1399; Re Turvey [1918−1919] B & CR 128; Re Onslow [1875] LR 10 Ch 375; and Re Newey (1913) 107 LT 812. I was also referred by Mr. Dawodu to the case of McCourt v. Baron Meats Limited and The Official Receiver [1997] BPIR 114.

His submissions in relation to these cases and the statutory provisions to which I have referred, are summarised in his written submissions at paragraph 4.24 and 4.26 as follows:

> 4.24: Mr. Dawodu submitted [before the learned Registrar] that in view of serious allegations of fraud, collusion, miscarriage of justice, unfairness, impropriety or mistake made and tendered in evidence, the learned Registrar ought to make a full enquiry into whether there was any good petitioning creditor's debt.
>
> 4.26: Notwithstanding the submissions and legal authorities cited by Mr. Dawodu, the registrar erred in holding that he had no power to go behind the judgment save where there was fraud or collusion or miscarriage of justice or mistake or unfairness or impropriety on the part of the petitioning creditor."

The law is conveniently summarised in the following way in the note to Section 266(3) of the Insolvency Act 1986 in Muir Hunter on Personal Insolvency:

> Under the old law the bankruptcy court had a power (under case law) to inquire into the consideration for a judgment debt, whether upon hearing a petition or upon adjudicating upon a proof of debt; for otherwise a debtor might, by default, suffer judgment without any or any adequate consideration and deprive his just creditors of their rights: see ex parte Kibble (1875) LR 10Ch.App. 373.
>
> However, the judgment or order was held to be conclusive, unless the consideration (i.e. the cause of action or substance of the claim) could be questioned: see Re Beauchamp [1904] 1 KB 572. As a general principle, the validity of the judgment debt would only be inquired into, where there was evidence of fraud or collusion or miscarriage of justice, or there was no good petitioning creditor's debt apart from the judgment."

Then there is a reference in the note to Re Hawkins, Re Flatan, Re Saville, Re Lipscombe, Re Fraser, Re Howell and Re Turvey.

I shall refer briefly to some of the passages in the authorities to which I have just referred. I will start with Re Flatan [1889] 22 QBD 83, a decision of the Court of Appeal. I refer to the following passage in the judgment of Lord Esher M.R (at pages 85 to 86):

> Another point was taken - viz., that although an action has been tried by the proper tribunal, a judge alone or a judge with a jury, and definite issues have been thoroughly tried out and decided against the debtor, and judgment has been given against him accordingly, he against whom judgment has thus been given, without his being able to suggest that there was any miscarriage of justice at the trial, is entitled to go into the Court of Bankruptcy, and, even though he has appealed against the judgment, assert that the action was not properly tried, and say to the registrar, you must try every one of the issues over again, upon the same evidence if I choose, or upon new evidence, and you have no discretion in this matter. 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 show that there had been fraud, or collusion, or miscarriage of justice, the Court of Bankruptcy has power to go behind the judgment and to enquire 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."

I interpose to say that that is a reference to section 7 of the Bankruptcy Act 1883.

I next refer to the case of Re Lennox (1885) 16 QBD 315, which was a case concerning a judgment obtained by consent. I read from the judgment of Lord Esher M.R:

> 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 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. Nevertheless it seems to me that, upon certain allegations being brought forward, the Court is entitled to enquire into the alleged debt and the Court, exercising a judicial authority, is bound to do so upon a sufficient case being shown. Circumstances may be alleged that would shew that the judgment ought to be disregarded in bankruptcy. Those circumstances must differ in each particular case, and if, when the case is brought before the Court at that stage, the Registrar is of opinion that, even if all the circumstances alleged were proved, they would not be sufficient to induce him to set aside that which is strong *prima facie* evidence against the debtor, and to disregard the consent judgment, he may stop there and say, I will not hear the evidence; it would be useless to hear it if that is all you can allege. Of course his view would be subject to an appeal. But, if the circumstances alleged before him and offered in evidence are such that, if proved, they would clearly shew that there was no debt at all, and certainly if they would shew that that which was alleged to be a debt was a mere fraud, and a fraud known to the petitioning creditor who had obtained the judgment, and acted upon by him, it seems to me that it would be monstrous to say that the Court of Bankruptcy ought to stop, and say that, although these allegations were made, and even though (for the argument must go to that length) they were so made that the Court must have the strongest suspicion that there never was any debt, yet it was bound as a matter of law, to say that it was 'satisfied' that the receiving order ought to go. That would be asking the Court to say that which to the mind of the judge who was making the declaration would not be

> true. He could not say that he was ‘satisfied'. It seems to me that when such allegations are made and proof is offered of them, an inquiry into the debt ought to be made. Of course, if the allegations fail to be proved - if something less is proved - the Court entering into the inquiry with a strong *prima facie* case against the allegations - the debtor having consented to a judgment which is the strongest evidence against him - if any part of his proof fails, he must take the consequences. I should say that the Court ought to lean heavily in favour of a judgment so obtained. But the question is whether, even though it were proved to the satisfaction of everyone that there was no original debt, yet the judgment must be enforced merely because the debtor had consented to it. I think the hands of the Bankruptcy Court are not thus tied by such a consent of the debtor, and the Court is not to be made an instrument to act upon an alleged debt, where in truth and in fact there never was a debt at all."

I next refer to Re Hawkins (1895) 1QB 404. This again was a decision of the Court of Appeal. I refer to the judgment of Lopez L.J. at p.412, where he said this:

> In my judgment, both an ordinary judgment and one obtained by compromise may be enquired into 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 to the length of saying that it must have been fraudulently obtained; it is sufficient, in my opinion, if it is made out, that the judgment was improperly or unfairly obtained."

In McCourt v. Baron Meats Limited (1997) BPIR 114 Warner J. summarised what appeared to him to be the effect of the authorities in the following way at page 120:

> As to that, the authorities that were cited seemed to me to establish beyond question the following propositions:

(1) A court exercising the bankruptcy jurisdiction ("a bankruptcy court"), although it can 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 L.J. in Ex parte Kibble, Re Onslow (1875) LR 10 Ch App 373 at 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 enquire 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 amongst 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.'

(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 ChD 480, he 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 enquiry 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 fault of the creditor. Lastly, in Re Frazer (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 the judgment had been obtained against him on 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 of the proof of the petitioning creditor's debt, or of the act of bankruptcy, or 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 of 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 creditor's proof."

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. The latter phrase 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 enquire 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 - see Re Fraser [1892] 2QB 633.

Challenges to the judgment in action BO604141

As I have indicated, the essence of Mr. Dawodu's complaint is that he was not able to attend the summary judgment hearing on 28th January 1998. He was in Nigeria and was unable to leave for reasons which were not his fault. His passport had been taken in a burglary, and he was awaiting a visa. As I have indicated, on his return he reasonably promptly commenced proceedings against the Bank, AEE and Lloyds Bank in the High Court, in which he sought, among other things, an injunction to restrain the Bank from commencing bankruptcy proceedings. When that claim was dismissed, he then began an application in action BO604141 to set aside the judgment in that action, which is part of the foundation of the bankruptcy petition in these proceedings. Directions were given by the Court as to the

conduct of the application to set aside the summary judgment, and that order was followed by an "unless" order. On the basis of non−compliance with those orders, the application was struck out. Mr. Dawodu says, however, that he did not receive either the original order for directions or the "unless" order. He only received those after the application had been struck out, and after he was adjudicated bankrupt.

That sets the general background for what is a potential miscarriage of justice, in relation to the summary judgment in action BO604141. Mr. Dawodu seeks to reinforce the allegation of miscarriage of justice by putting before me, as he submits he put before Registrar Jaques, various substantive points, which he submits, had they been properly taken into account on the Bank's claim in action BO604141, would not only have defeated that claim but would have led to a judgment in his favour on his counterclaim in those proceedings.

I summarise them again. Firstly, wrongful debits. There were wrongful debits shown on his account statements, purportedly in respect of "Adjustment Withdrawals" and "Transfer Withdrawals", which were never in fact made or authorised by him. Secondly, the rate of interest charged by the Bank was in excess of that permitted by the contract between the Bank and Mr. Dawodu. Thirdly, the interest charged by the Bank on his overdraft was not simple interest on the debit balance, but in effect interest on interest which was not authorised under the contract between the Bank and Mr. Dawodu. Fourthly, the interest figures had been miscalculated by the Bank as a matter of arithmetic. Finally, fifthly, there should also be taken into account, he submits, a failure to credit to his bank account £2,676.56 which he had directed to be transferred by AEE to the Bank for the credit of his account in 1993.

Judgment of Registrar Jaques.

As I have said, the judgment of the learned Registrar was given on 10th November 2000. At that hearing, the Bank was represented by counsel, but not by Mr. Bogle, who appeared before me. Mr.

Dawodu appeared before the Registrar, as he has appeared before me, acting in person. I have been provided with a note of the judgment of the Registrar, prepared by counsel who did appear for the Bank on that hearing, Miss Rosanna Bailey. That note has not been approved by the Registrar, and Mr. Dawodu takes exception to it. He said that it is inaccurate and one−sided. Mr. Dawodu has not produced his own note of the judgment. Certainly the Registrar had the benefit of extensive written and oral submissions from Mr. Dawodu. It appears to be common ground that Mr. Dawodu addressed the Registrar for in excess of two hours. It appears that various points were taken by Mr. Dawodu before the learned Registrar, which have not been pursued before me.

Doing the best that I can, taking into account specific points taken by Mr. Dawodu as to the note of the judgment of the learned Registrar, it appears to me that the learned Registrar considered the various authorities cited by Mr. Dawodu and summarised their effect as being that "the Court can go behind the judgment, but the Court must be satisfied that there is some fraud, collusion or mistake"; (2) took into account that the proceedings in action BO604141 were decided in the absence of Mr. Dawodu; (3) took into account the then pending application to set aside the judgment in action BO604141 (incorrectly referred to by the Registrar as an appeal); (4) took into account the prospects of success of that application; (5) took into account the delay in making the application to set aside the summary judgment.

While I consider that Mr. Dawodu is correct in stating that the Registrar summarised the law too narrowly in that the Registrar failed to refer to the possibility of going behind a judgment on the ground of miscarriage of justice, I find that the learned Registrar did in fact go on to take account of the fact that Mr. Dawodu, as I have said, was not present at the hearing, and to consider whether or not it was likely that the judgment in action BO604141 was wrong, or might be set aside. (I note that at that stage, at the hearing before the learned Registrar, the application to set aside the judgment had not been struck out.)

In the circumstances, on the basis that I am restricted to a review on this appeal and not to a re−hearing, I cannot say that the learned Registrar erred in any material respect. I cannot say that the exercise of his discretion was materially flawed in law or in principle.

That is the end of the matter, but out of deference to the arguments of Mr. Dawodu, the huge amount of effort that he has put into challenging the decision in action BO604141 over many years, and the sense of injustice that he plainly feels, I shall go on to consider whether, if I were treating this as a rehearing, I would have come to a different conclusion from the Registrar. I shall therefore consider in turn each of the specific grounds on which the Bank's claim in action BO604141 is challenged.

Wrongful debits shown on the account statements.

Mr. Dawodu says that he only became aware of the wrongful items shown as "Withdrawal Adjustments" and "Withdrawal Transfers" when he was sent copies of statements by the Bank in the course of action BO604141. Until that time he says he received statements which did not disclose the existence of these items. Mr. Dawodu also says that, in action BO604141 and constantly thereafter, he was asking for a breakdown of the figure of £5,795.04, which the bank statements showed as the closing balance of the account in December 1993 and the basis of the claim in action BO604141.

I find that the Bank has supplied to Mr. Dawodu, and there is in evidence before me, bank statements for the period between 1990 and January 1993. Those statements show certain debits from the account described as "Withdrawal Adjustments" and "Transfers". Although Mr. Dawodu says that he was not sent those statements on the dates that they bear, and had he been sent them he would have objected to them, I find on the balance of probabilities that he was sent these statements on or shortly after those dates. Mr. Dawodu told me that he is unable to produce the statements which he did in fact receive from the Bank, but, he says, did not include the statements to which I

have just referred, because he says that these are in Nigeria. I note that the statements upon which the Bank relies and which do set out details of "Withdrawal Adjustments" and "Withdrawal Transfers" all bear the appearance of regular contemporaneous statements intended to be sent to Mr. and Mrs. Dawodu as customers of the Bank. They bear, for example, directions to the customer as to what should be paid in respect of balances outstanding at the date of each of the statements. They bear the names of Mr. and Mrs. Dawodu. They bear different issue dates.

Accordingly, in my judgment, Mr. Dawodu has not made out any claim that the debits of which he complains were improper, he having failed to take any point in relation to those debits while his bank account was operative.

Excessive rate of interest

The contractual relations between Mr. Dawodu and the Bank were governed by a written contract dated 2nd September 1987 ("the Account Contract"). The Account Contract contained, amongst other things, the following provisions.

> (c) interest on any debt arising on the current account will be charged at 2œ % above your base for the time being. Changes in your cost of funds will be nationally advertised and displayed in, or available on request from, your branches in the United Kingdom."
>
> (e) interest will be charged to the account in accordance with your practice from time to time. Currently interest is charged monthly."

Mr. Dawodu complains that he has not been supplied with details of the Bank's base rate pursuant to his various requests for information. He referred me in particular to a request dated 9th November 2000 in these insolvency proceedings which asks for details of the Bank's base rate from time to time during the period October 1987 to December 1993. In order to see whether the Bank has charged

interest on his overdraft in accordance with the rate specified in clause (c) of the Account Contract, Mr. Dawodu has taken the base rate of other banks and carried out a calculation. He submits as a result of that exercise that the rate of interest charged by the Bank on his overdraft must have been in excess of that permitted under the Account Contract.

In my judgment, this claim is highly speculative and opportunistic. Although it is correct to say that in action BO604141 and in subsequent proceedings Mr. Dawodu has put the Bank to proof of the sums allegedly due in respect of his bank account, the specific allegation that the Bank imposed excessive and unauthorised rates of interest was only raised very recently. As I have mentioned above, the request for information specifically in respect of the base rate of the Bank was only made in November 2000 after service of the bankruptcy petition. I am not satisfied that Mr. Dawodu has any realistic prospect of showing that the rates of interest imposed by the Bank on the overdrawn balances were unauthorised by the Account Contract. Furthermore, it would not in any event, in my judgment, be right at this point in time to go behind the judgment in action BO604141 in respect of this issue, which was not specifically taken at that time by Mr. Dawodu in his defence and counterclaim, or in his written submissions on the summary judgment application.

Interest on interest

The Bank's practice was to calculate interest due from time to time on the overdrawn balance of the account, and to add that interest to the overdrawn balance. Interest in respect of future periods would be calculated on the previous balance, i.e. a balance which included past charges for interest. Mr. Dawodu submits that the Bank was therefore charging compound interest and this was not authorised by the Account Contract. It is well established to be the regular practice of bankers to add interest on their customer's overdraft to the outstanding overdrawn balance, and it is recognised in law that the effect of this exercise is that the interest thereby loses its character as interest and becomes capital, in effect a further advance - see

Halsbury's Laws (4th ed.) Vol. 3(1) para 299; IRC v. Holder [1931] 2KB 81; Paton v. IRC [1938] AC 341. There is nothing in the Account Contract which precludes this practice. Furthermore, although, as I find, Mr. Dawodu was regularly sent bank statements showing the interest being added to the overdraft balance, he never complained of this practice while his account with the Bank was being operated. He acquiesced in it. Accordingly, I can see no basis for going behind the judgment in action BO604141 on this ground.

Miscalculation

Mr. Dawodu has carried out a calculation, which he submits shows that, even on the basis of the rates of interest which the Bank itself has sought to impose, and also the practice of adding outstanding interest to the overdrawn balance from time to time, the Bank has miscalculated interest by some £1,390.19. This calculation was carried out by Mr. Dawodu for the purpose of these insolvency proceedings following the service of the bankruptcy petition. Although, as I have said, Mr. Dawodu did put the Bank to proof in action BO604141 of the capital and interest alleged to be due to the Bank, this specific point on miscalculation was not taken in action BO604141, and I am left entirely uncertain whether there is any merit in the point at all.

The non credit of £2,676.56

In action BO604141 Mr. Dawodu alleged in his defence that AEE wrongfully failed to comply with its instructions to transfer £2,676.56 from his Platinum Card account with AEE to the credit of his account with the Bank. He alleged that, had his instructions been followed, Mr. Dawodu would have had a credit balance on his account with the Bank. Mr. Dawodu submits that he is entitled to raise this allegation in defence to and in order to defeat the claim of the Bank in respect of his overdraft, because, he says, AEE was a party to the Account Contract. Also, he submits that the Bank and AEE are related companies and are, or ought to be, treated as the same entity for legal purposes.

As to AEE being a party to the Account Contract, Mr. Dawodu relies upon clause (h) of the Account Contract, which is in the following terms:

> you may now and in the future provide American Express Europe Limited with information as to our account with you and disclose to American Express Financial Services Limited such information as to our account as may be necessary to enable them to administer such account."

As to the companies being related and the need to treat them in effect as the same, he relies not only upon clause (h) of the Account Contract, but also upon a letter from the Bank to Mr. Dawodu dated 11th September 1995, which states that his account will, with effect from 1st October 1995, be handled by American Express Services Europe Limited, although the account will remain with the Bank. He also relies upon a letter dated 21st June 1996 from American Express Services (Europe) Limited, which shows that that company is administering his Platinum Card account.

Mr. Dawodu's claim that AEE was a party to the Account Contract and his claim that the Bank and AEE are to be treated as the same in law, or equally liable for any default in transferring the £2,676.56 in 1993 to the credit of Mr. Dawodu's bank account, are plainly wrong in law. Whether or not those companies are associated companies, it is elementary that they are to be regarded as distinct legal entities. I can see no basis whatever for saying that AEE was a party to the Account Contract.

Conclusions

Accordingly, my conclusions are as follows.

First and foremost, it is not possible on this appeal to say that Registrar Jaques erred materially in law when he concluded that he should not go behind the judgments and orders giving rise to the judgment debts relied upon in the bankruptcy petition. Although he

stated the legal test too narrowly, he in fact took into account all relevant matters in the exercise of his discretion.

Secondly, even if this were a rehearing and not an appeal, I would not have dismissed the bankruptcy petition. In that connection, I am particularly influenced by the following facts. If Mr. Dawodu's criticisms of the Bank are considered in detail, they are either plainly unsustainable in law, or can only be described as speculative and in some cases opportunistic, raised, as they have been, with specificity only very recently. A long period has elapsed since the judgment in action BO604141. Finally, although not present at the hearing of the summary judgment in that action, Mr. Dawodu did serve a defence and counterclaim and did put in written submissions for the summary judgment hearing, which would have been taken into account on the summary judgment application. Although in his defence and his written submissions for that hearing Mr. Dawodu put the Bank generally to proof of what was due, the only positive substantive points that he made were as to the charging of compound interest and the failure of AEE to transfer the £2,676.56 which I have already mentioned. Both of those criticisms are plainly unsustainable in law.

Accordingly, I dismiss this appeal.