[2021 Gib LR 311]

LEEDS, WOOD and HELLARD (as joint trustees of the insolvent estate of PLATON ELENIN, formerly known as BORIS BEREZOVSKY (deceased)) v. MAINSTAY TRUST LIMITED, CHURCH LANE TRUSTEES LIMITED and SUGARBAY VENTURES LIMITED

COURT OF APPEAL (Kay, P., Rimer and Elias, JJ.A.): June 17th, 2021

2021/GCA/06

Civil Procedure—judgments and orders—default judgment—setting aside—locus standi—under CPR r.40.9 person "directly affected" by judgment or order can apply for setting aside—third party debtor against whom judgment creditor seeks to enforce judgment not directly affected by underlying judgment—trustee directly affected by judgment representing direct threat to trust assets

The claimants/appellants sued for repayment of an alleged loan.

In 2001, Steadfast Trustees Ltd. ("Steadfast") established a trust which was governed by Gibraltar law. As trustee of the trust, Steadfast acquired the entire issued share capital of Sugarbay Ventures Ltd. ("Sugarbay"). Platon Elenin (deceased) (formerly known as Boris Berezovsky) ("PE") had transferred to Steadfast as trustee the sum of £500,000 to enable it to enter into an agreement for the purchase of a residential property in the United Kingdom, which was to be acquired as the private residence of one of PE's daughters. The property was to be purchased through Sugarbay. In February 2002, PE instructed the transfer of £4,745,869.50 (the completion funds). Steadfast lent the sum of £5,190,630 to Sugarbay, its wholly owned company, to enable Sugarbay to fund the purchase of the property.

Steadfast was trustee of the trust until 2005, after which there were a number of changes of trustee: Mainstay Trust Ltd. ("Mainstay") was trustee from July 2005 to June 2011; LMC Trustees Ltd. ("LMC") from June 2011 to January 2013; and Church Lane Trustees Ltd. ("CLT") from January 2013.

In 2005, some three years after the advance to Sugarbay, a facility letter was drawn up which provided *inter alia* that the repayment of the Sugarbay loan was on seven days' notice. In 2007, Mainstay, which was by then the trustee, held a meeting of directors and noted that the trust had received

from PE by way of loan the sum of £4,739,115.14. Mainstay signed a loan deed with PE which provided *inter alia* that the loan was repayable on 60 days' notice. In 2008, Mainstay countersigned a letter from PE recording as loans various other sums (totalling £11,511) provided by PE to the trustee.

PE died in 2013 and the claimants ("the PE trustees") were appointed as trustees of his insolvent estate.

In 2014, CLT, which was then trustee, as Sugarbay's sole shareholder passed a written resolution to the effect that the debt of £5,201,669 was extinguished and 10 Sugarbay shares were issued to CLT. The entire trust fund was appointed to a beneficiary in April 2014.

In July 2018, CLT commenced a claim in Gibraltar against the PE trustees, Steadfast and LMC seeking declarations that (i) the sums of £4,739,115.14 and £11,511 were transferred by PE to Steadfast to be settled on the terms of the trust; and (ii) CLT was not liable to PE's estate for those sums. Mainstay had been struck off the register of companies and it was not originally a defendant to the 2018 claim. The PE trustees applied successfully for Mainstay to be reinstated and it was added as a defendant. In December 2018, shortly after being served with the claim, Mainstay's sole director resigned. In their defence, the PE trustees claimed that the loans were due and owing by Mainstay.

The PE trustees sued Mainstay for repayment of the sum of £4,750,626.14 under the alleged loan arrangements. As no acknowledgment of service form was filed, the PE trustees obtained a default judgment which led to enforcement proceedings being commenced in England.

The PE trustees obtained an interim third party debt order against Sugarbay in the sum of £4,837,863.88 and an interim charging order against the property. They also obtained permission to serve those orders out of the jurisdiction on CLT and Sugarbay. CLT and Sugarbay then became aware of those proceedings and the default judgment. The PE trustees applied unsuccessfully for a stay of the 2018 claim pending the outcome of the English enforcement proceedings. In June 2019, Sugarbay applied for the setting aside or stay of the English enforcement proceedings.

CLT and Sugarbay contended that the sums due under the Mainstay loan upon which the default judgment was founded were not valid and that the sums had been settled onto the trust. They brought an application in the Supreme Court seeking the setting aside of the default judgment. The application was made pursuant to CPR r.40.9 which provided that a person who was not a party but who was directly affected by a judgment or other order might apply to have the judgment or order set aside or varied.

Restano, J. directed himself that for a non-party to be "directly affected" he must have an interest capable of recognition by the law that was *prima facie* materially and adversely affected by its enforcement. The judge considered that Sugarbay could not challenge the validity of the default judgment in the English enforcement proceedings but that it had a recognizable interest in challenging its validity. He considered that an inquiry as to whether a non-party was "directly affected" was one that should not take place in a rigid manner but should be a pragmatic one as to

the effect of the judgment. He concluded that in all the circumstances Sugarbay was within the scope of CPR r.40.9 and had standing to make its application. In relation to CLT, the judge considered that CLT's status as the controlling shareholder of Sugarbay did not entitle it to claim that it was "directly affected" by the default judgment; nor could it claim that the property at risk was in substance its asset. However, as the last in the line of successor trustees, it faced the prospect of a claim to satisfy the judgment, or to meet any shortfall on a sale of the property, under the chain of indemnity covenants given by the trust's successive trustees. Restano, J. concluded that CLT could also claim to be "directly affected" by the default judgment. Restano, J. held that the circumstances in which the PE trustees commenced their claim were abusive. The 2018 claim on the underlying merits of the loans/settled funds issue was not fanciful and that there was a real prospect of success in the defence of the PE trustees' assertion that the money provided by PE to the trust over and above the initial £500,000 had been advanced by way of loans rather than settled into the trust. The judge made an order setting aside the default judgment and adding Sugarbay and CLT as parties to the PE trustees' proceedings. (That judgment is reported at 2019 Gib LR 232.)

The PE trustees appealed, submitting that the judge was wrong to hold (i) that either CLT or Sugarbay was "directly affected" by the default judgment for the purposes of CPR r.40.9; and (ii) that the obtaining by the PE trustees of their default judgment was an abuse of process justifying setting it aside.

Held, allowing the appeal in part:

(1) A third party debtor against whom a judgment creditor sought to enforce a judgment was not "directly affected" by the underlying judgment and did not have standing to apply to set it aside. The court could see why Restano, J. was sympathetic to Sugarbay's bid to set the judgment aside. He considered that Sugarbay would not be entitled to challenge the merits of the Gibraltar default judgment in the English enforcement proceedings; and, if it also did not have the standing to apply to set the judgment aside, it faced the risk of losing the property to the PE trustees on the basis of an untested case that the alleged loans were genuine, whereas both its directing mind and will (that of CLT, its sole director) and the PE trustees knew their genuineness to be disputed. However, the court considered Restano, J. to be in error. A third party debtor facing enforcement proceedings such as Sugarbay was not "directly affected" by the underlying judgment debt. The court would allow the PE trustees' appeal against the judge's decision that Sugarbay had standing under CPR r.40.9 entitling it to apply to set the default judgment aside (paras. 86–91).

(2) The PE trustees' appeal against Restano, J.'s holding that CLT was "directly affected" by the default judgment and was entitled to have it set aside would be dismissed. Albeit for slightly different reasons, the court agreed with Restano, J.'s decision in this respect and would uphold his

decision to set aside the default judgment. CLT had interests, rights and duties as a trustee of the trust, the latter including a duty to the trust's beneficiary to preserve the trust assets for her and to take all proper steps to prevent their wrongful appropriation by strangers to the trust (i) whose claim to do so was disputed by CLT; and (ii) who were seeking to appropriate them in advance of the determination of that dispute in the 2018 proceedings which CLT had properly and responsibly instituted. The default judgment represented a direct threat to the trust assets in which CLT had a proprietary interest and which, as trustee, it had a right and duty to protect in the interests of the trust's beneficiary. The judgment "directly affected" CLT's interest and it was fully entitled to take the prompt steps it did to challenge it (paras. 92–102).

(3) Although the abuse of process issue did not formally arise for consideration, the PE trustees were offended by Restano, J.'s criticism of their forensic tactics. The criticism of the PE trustees was that they were already parties to the well-advanced 2018 proceedings directed at a determination of the "loans/settled funds" dispute between them and CLT, but that instead of awaiting the trial in that litigation to resolve the dispute, they separately, and covertly, started a second claim against Mainstay, which they knew would not be defended and which they foresaw as providing them with a default judgment on their loans claim that would pre-empt any decision in the CLT claim. The PE trustees' submissions did not justify their actions. The question was not whether the PE trustees' chosen process was open to them, but whether they acted abusively. The court considered that they did. Their chosen procedure was directly aimed at working an obvious unfairness on CLT, the claimant in proceedings already in place that it had brought against the PE trustees. The court would dismiss this ground of appeal against Restano, J.'s decision (para. 108; para. 114).

Cases cited:

(1) *Abdelmamoud* v. *Egyptian Assn. in Great Britain Ltd.*, [2015] EWHC 1013 (Ch); [2015] Bus. L.R. 928; on appeal, *sub nom. Mohamed* v. *Abdelmamoud*, [2018] EWCA Civ 879; [2018] Bus. L.R. 1354, considered.

(2) *Ageas Ins. Ltd.* v. *Stoodley Advantage Ins. Co. Ltd.*, [2019] Lloyd's Rep. I.R. 1, referred to.

(3) *Employers' Liability Assur. Corp*. v. *Sedgwick, Collins & Co. Ltd*., [1927] A.C. 95, followed.

(4) *Henderson* v. *Henderson* (1843), 3 Hare 100; 67 E.R. 313; [1843–60] All E.R. Rep. 378, referred to.

(5) *Hepworth Group Ltd.* v. *Stockley*, [2006] EWHC 3626 (Ch); [2007] 2 All E.R. (Comm) 82, considered.

(6) *Hunter* v. *Chief Constable*, [1982] A.C. 529; [1981] 3 W.L.R. 906; [1981] 3 All E.R. 727, considered.

(7) *IPCom GmbH & Co. KG* v. *HTC Europe Co. Ltd.*, [2013] EWHC 2880 (Ch), considered.
(8) *Jacques* v. *Harrison* (1884), 12 Q.B.D. 165, considered.
(9) *Johnson* v. *Gore Wood & Co.*, [2002] 2 A.C. 1; [2001] 2 W.L.R. 72; [2001] 1 All E.R. 481; [2001] C.P.L.R. 49; [2001] BCC 820; [2001] 1 BCLC 313; [2001] P.N.L.R. 18, referred to.
(10) *Latif* v. *Imaan Inc*, [2007] EWHC 3179 (Ch), considered.
(11) *Windsor* v. *Chalcraft*, [1939] 1 K.B. 279, considered.

Legislation construed:
Civil Procedure Rules (S.I. 1998/3132), r.13.3: The relevant terms of this rule are set out at para. 52.
r.40.9: "A person who is not a party but who is directly affected by a judgment or order may apply to have the judgment or order set aside or varied."

Supreme Court Rules, O.27, r.15: The relevant terms of this rule are set out at para. 59.

A. Clutterbuck, *Q.C.* and *D. Lilly* (instructed by Phillips LLP) for the claimants/appellants;
P. Caruana, *Q.C.* and *C. Allan* (instructed by Peter Caruana & Co.) for the defendants/respondents.

1 **RIMER, J.A.:**

Introduction

This appeal is against the decision of Restano, J. (judgment and order both dated December 11th, 2019, reported at 2019 Gib LR 232) in a dispute arising out of the determination of the late Platon Elenin ("PE"), formerly known as Boris Berezovsky, to arrange in 2001 for the purchase of Warren Mere House, in Surrey, England ("the property"), for occupation by his daughter, Elizaveta Berezovskaya ("EB"). The arrangements for the purchase were complicated, as is the subsequent story, and the end result has been litigation in both the Supreme Court and the English High Court of Justice in which this appeal is the latest episode and a five-day trial in the Supreme Court commencing on June 28th, 2021 is the next. An outline of the parties and issues is as follows.

2 The claimants are Michael Leeds, Nicholas Wood and Kevin Hellard, insolvency practitioners, who sue as the trustees of the insolvent estate of PE. I shall refer to them initially as "the claimants" but, from para. 38 onwards (to make clear to whom I am referring in the then context), as "the PE trustees." PE died on March 23rd, 2013, an insolvency administration order was made by the High Court of Justice on January 26th, 2015 and the claimants were appointed as such trustees at a meeting of creditors held later the same day. The sole defendant to their claim was Mainstay Trust

Ltd. ("Mainstay"). Their claim form was issued on April 17th, 2019 and was accompanied by particulars of claim of the same date. By it, the claimants sought the payment by Mainstay of £4,750,626.14. They relied on documents allegedly made in March 2007 and May 2008 purporting to record loans by PE to Mainstay of £4,739,115.14 and £11,511 respectively. Mainstay was at those dates the first successor trustee of a Gibraltar trust established in August 2001 (the Warren Trust), through which the property had been bought. It had been bought by Sugarbay Ventures Ltd. ("Sugarbay"), a company wholly owned by the trust, of which the original trustee was Steadfast Trustees Ltd.

3 Mainstay failed to file an acknowledgment of service and on May 10th, 2019 the claimants obtained a default judgment ordering Mainstay to pay them, by Friday, May 24th, the sum of £4,772,989.69, being the amount of the claim plus £19,233.55 interest and £3,130 costs.

4 The judgment was not satisfied by May 24th, and on May 28th, 2019 (the next working day after a Bank Holiday weekend) the claimants issued applications in the High Court of Justice seeking its enforcement. Their target was the property and, on the same day, they obtained *ex parte* from Birss, J. (as he then was) (i) under CPR Part 72, an interim third party debt order against Sugarbay in the sum of £4,837,863.88 (Sugarbay being said to be a debtor of Mainstay for a sum exceeding the judgment debt); and (ii) under CPR Part 73, an interim charging order against the property, of which Sugarbay was still the registered proprietor. They served those orders on Sugarbay, Steadfast and EB out of the jurisdiction and gave notice of them to Church Lane Trustees Ltd. ("CLT"), the current trustee of the trust and sole shareholder of Sugarbay.

5 It was only then that Sugarbay and CLT became aware of the claim and default judgment. On June 29th, 2019, Sugarbay issued an application in the High Court to set aside or stay the enforcement proceedings. On August 22nd, 2019, CLT and Sugarbay ("the applicants") issued an application in the Supreme Court to set aside the default judgment and to be added as parties to the claimants' claim. They so applied under CPR Part 40.9, which provides that a person who is not a party, but is "directly affected" by a judgment or order, may apply to have it set aside or varied. Their application was supported by a witness statement of Robert Guest, a CLT director.

6 It is that latter application, which was opposed by the claimants, that was the subject of the judge's decision now under appeal. By his judgment of December 11th, 2019, Restano, J. held that both applicants had standing under CPR Part 40.9 to make the applications. He further held that the claimants' commencement of their claim had been an abuse of the process of the court, which provided a good reason under CPR Part 13.1(1)(b) to set the default judgment aside. He also held that the applicants' cases in answer to the claimants' claim had a real prospect of success and that the

judgment could and should also be set aside under Part 13.3(1)(a). Having so ordered, he added the applicants as defendants to the claimants' claim and directed a joint case management hearing both in that claim and in the separate claim that CLT had in 2018 earlier commenced in Gibraltar against the claimants, Mainstay and others, to which I shall come.

7 With the permission of the judge, the claimants now appeal against that decision. They say he was wrong to hold: (i) that either applicant was "directly affected" by the default judgment for the purposes of CPR Part 40.9; (ii) that the obtaining by the claimants of their default judgment was an abuse justifying its setting aside; and (iii) that the default judgment should also be set aside on the basis that the applicants had a real prospect of defending the claimants' claim (the point under that head being that the applicants' application had not been brought or conducted on that ground). The claimants ask this court to reinstate the default judgment. Before coming to the issues arising in the appeal, I must first tell the story more fully.

The facts

8 By a declaration of trust made under seal on August 15th, 2001, Steadfast Trustees Ltd. ("Steadfast"), a Gibraltar company, established the Warren Trust ("the trust"). The trust is governed by Gibraltar law and is subject to the jurisdiction of its courts. Steadfast was the sole trustee. It was a discretionary trust for the benefit of EB, her husband, their future children, other named beneficiaries and any other beneficiaries added pursuant to cl. 19. The trust fund was defined as including an initial fund of US$50 and "all moneys . . . paid by any person . . . to and accepted by the Trustees as additions to the Trust Fund." Clause 8 of the declaration of trust empowered the trustees to pay or apply the trust property for the advancement or benefit of any beneficiary. Clause 13 empowered the protector to appoint new trustees. Clause 19 empowered the trustees (with the written consent of the protector so long as there was one) to add to the class of beneficiaries. The protector was Damian Kudriavtsev, or any new protector appointed in accordance with cl. 16. Ten months later, Mr. Kudriavtsev was replaced as protector by PE.

9 By an unsigned letter of August 16th, 2001 (nothing turns on the lack of signature), PE wrote to his bank, Steadfast and Curtis & Co. (English solicitors acting in the purchase of the property) giving instructions for the transfer from his bank of £500,000 to Curtis & Co. to enable the exchange of contracts. He wrote that the "£500,000 is to be treated as a contribution by me into the Warren Trust. There will be additional contributions of capital to conclude the purchase at a later date." The letter made no suggestion that he was *lending* the £500,000 to Steadfast and it is agreed he was not; it was an outright contribution to the trust fund. Nor did it

suggest that the "additional contributions of capital" would be lent to it. Steadfast was proposing to use Sugarbay as the vehicle for the purchase of the property. Sugarbay is a British Virgin Islands company, incorporated in May 2001, of which Steadfast acquired ownership and control on August 17th, 2001.

10 On August 16th, 2001, Steadfast signed a memorandum noting that the trust had been established, identifying its beneficiaries and resolving that "an initial contribution of £500,000 into the Trust from [PE] be and is hereby accepted as an addition to the Trust Fund." It further resolved (i) that the trust would apply that capital to Sugarbay to enable it to exchange contracts for the purchase of the property at the price of £5m. (£450,000 was to be used for the deposit); (ii) that "further contributions into the Trust Fund are expected in order to enable the purchase to be completed"; and (iii) that EB and her family were to be permitted to occupy the property and have full and unrestricted enjoyment of it.

11 On February 27th, 2002, PE provided a further £4,745,869.50 to Steadfast to enable the completion of the purchase. There is no contemporary evidence before us suggesting he was *lending* that money to Steadfast as opposed to settling it into the trust in the like way as he had earlier settled the £500,000. The purchase was completed and, on March 25th, 2002, Sugarbay was registered at H.M. Land Registry as the proprietor of the property. The completion statement records the purchase price as £4.5m., the deposit as £450,000, the cost of fixtures and fittings as £500,000 and the balance required on completion as the said sum £4,745,869.50. EB has since completion occupied the property as a private residence.

12 Steadfast had put Sugarbay in funds to purchase the property by (as is agreed) *lending* it £5,190,630, all of which had derived from PE ("the Sugarbay loan"). The assets of the trust thus became represented by (i) Steadfast's shareholding in Sugarbay, and (ii) the benefit of the Sugarbay loan.

13 On June 7th, 2002, PE was appointed the protector of the trust in place of the original protector.

14 On July 20th, 2005, by a deed of retirement and appointment made between PE (as protector), Steadfast and Mainstay, Mainstay was appointed the sole new trustee in place of Steadfast. Recital G recited that—

> "it is intended that the property and assets now in the Trust Fund . . . including but not limited to the items set out in the Schedule 2 ('the Trust Property') shall be transferred to or under the control of the New Trustee [*i.e.* Mainstay]."

Schedule 2, headed "Trust Property," identified such property as comprising *only* the 1,000 $1 shares in Sugarbay. By cl. 2 of the operative

parts, Steadfast, "hereby transfers the Trust Property to the New Trustee . . ." By a separate deed of indemnity dated July 20th, 2005, Mainstay agreed to indemnify Steadfast against all liabilities as a former trustee, such indemnity being limited as explained in the deed.

15 Like other like deeds featuring in the history of the trust, that is an imperfectly drawn one. The trust's assets included not just the Sugarbay shares, but also the benefit of the Sugarbay loan, although it appears that at the date of this deed its terms had not yet been formally recorded (that did not happen until September 2005) and that may be why its existence as a trust asset was apparently not at the forefront of the mind of the deed's author. It was, however, later to be essential to the claimants to be able to show that the benefit of that loan had passed from Steadfast to Mainstay—and also that it then stayed with Mainstay and did not pass to its successor trustees.

16 As to whether the benefit of the loan did then pass to Mainstay, there is an argument that it did not, namely that on one interpretation of the deed cl. 2 operated to transfer only the Sugarbay shares, not also the benefit of the loan. But I need say no more about that since (a) there is plainly also a contrary argument, (b) the claimants, CLT and Sugarbay are agreed that the benefit of the loan *did* then pass to Mainstay, and (c) we are not required to decide the point. Whether, as the claimants assert, the benefit of the Sugarbay loan then *remained* with Mainstay is another question, to which I shall come.

17 On September 2nd, 2005, Mainstay signed, and Sugarbay counter-signed, a letter from Mainstay to Sugarbay setting out the terms and conditions "upon which we have made a loan to you in the amount of £5,189,115.14," which they described as "the Facility." This is the Sugarbay loan, the making of which is not in dispute, although the loan must in fact have been made by Steadfast in 2001/2002 when PE put it in funds to buy the property. The letter recorded that the loan was repayable on seven days' notice and interest free, save that interest could be charged at Mainstay's discretion on any amount not repaid after any such notice.

18 On March 14th, 2007, Mainstay and PE executed a deed in which Mainstay was described as the borrower and PE the lender. It recited that PE had *loaned* the sum of £4,739,115.14 to Mainstay on February 27th, 2002 (described as "the loan date"); and the operative parts purported to record "the terms upon which such sum was loaned." For some reason such sum was slightly lower than that transferred by PE in February 2002. Mainstay acknowledged its receipt of the sum on the loan date and the deed proceeded to set out the terms of the loan, including that it was repayable upon 60 days' notice and that interest was payable at a rate of PE's choice on any part of it not then repaid. Whatever else may be said about that document (and CLT, the current trustee, asserts that it was a sham and a

nullity), its recital that in 2002 PE had lent the money to *Mainstay* was untrue. Any loan then made can only have been made to Steadfast. Mainstay did not exist in 2002; it was incorporated on November 4th, 2004.

19 The minutes of a meeting of Mainstay's directors, Mr. Keeling and Ms. Jenkins, held on March 14th, 2007 confirmed that on February 27th, 2002 the trust had received the sum of £4,739,115.14 from PE by way of loan. Paragraph 4 of the same document noted that "the whole amount of loan received from [PE] has been applied by the Trust in making a loan . . . to [Sugarbay] for the purpose of Sugarbay's purchase of [the property]."

20 Mainstay at some point started to prepare draft trust accounts. Those initially prepared for the period between 2002 and 2005 reflected that all the money provided by PE for the purchase of the property had been outright contributions to the trust, not loans. No final accounts were drawn up during this period. The documents, however, include manuscript notes of a discussion on May 9th, 2006, apparently between Mr. Keeling, Mr. Jacobson and Mr. Wilson, as to whether, apart from the initial £500,000, PE's contributions to the purchase of the property should be shown as settled funds or loans; and, at some point after about May 2006, Mainstay started to produce draft accounts for the trust for periods ended December 31st, 2002 and subsequent years purporting to show the PE funds as having been lent to the trust rather than settled into it.

21 On May 11th, 2008, PE signed and (on May 19th) Mainstay countersigned a loan facility letter dated May 11th. This related to various payments made to the trust between August 22nd, 2001 and September 27th, 2005 totalling £11,511. The letter recorded that PE and the trust had "agreed that the payments listed . . . made or procured by me in connection with the Warren Trust, will constitute loans from me to you upon the terms and conditions set out . . ." It provided for the loan to be repayable on seven days' notice and for any amount not repaid to bear interest at a rate of PE's choice but capped at 4% over the sterling base rate for the time being. Whilst I do not understand CLT to question that PE did make these payments, it asserts that this document, in characterizing them as *loans*, is another sham and nullity.

22 By cl. 1 of a deed of retirement and appointment made on June 8th, 2011, Mainstay retired as the trustee of the trust and was expressly discharged from its trusts; and LMC Trustees Ltd. ("LMC") was appointed as the new trustee in its place. LMC gave Mainstay an indemnity covenant, limited as described,

> "from and against all actions, proceedings, accounts, claims and expenses which may be brought or made against it in connection with the trusts of the Settlement in any way relating thereto or to the Trust Fund . . ."

This deed raises a question as to whether it operated to pass the benefit of the Sugarbay loan from Mainstay to LMC. The claimants assert that it did not, CLT and Sugarbay assert that it did.

23 The parties' difference arises because recital G, drafted in narrower language than its equivalent in the earlier July 2005 Mainstay deed of appointment, can be read as recording an intention that only "the Trust Property" as defined in Schedule 1 was to pass to LMC, such property being there defined as comprising only the Sugarbay shares; and cl. 2 of the operative parts purports to do no more than transfer that property to LMC. The claimants' case on their enforcement application to the High Court was that this meant that the benefit of the Sugarbay loan, having passed to Mainstay with the 2005 deed of appointment, remained in Mainstay and did not pass to LMC upon the latter's appointment as the new trustee. That was another essential part of their case for the making of the two interim orders against Sugarbay.

24 In his skeleton argument for the purposes of the appeal, Sir Peter Caruana, Q.C., for CLT and Sugarbay, asserted that the claimants' argument that the benefit of the Sugarbay loan did not pass to LMC was "obviously legally flawed and spurious." He did not there develop that beyond stating that the Sugarbay loan was indisputably an asset of the trust that Mainstay had held as a trustee, not beneficially. In his oral argument, Sir Peter indicated that reliance for his clients' case about the effect of the deed would or might also be placed on s.5(1) of Gibraltar's Trustees Act 1895, which is in like form to that of s.40(1)(a) of the English Trustee Act 1925, which derives, like s.5(1), from s.12(1) of the English Trustee Act 1893. Gibraltar's Trustees Act apparently has no equivalent of the useful new provision introduced by s.40(1)(b) of the English Act of 1925. The difference between the parties as to the effect of the deed featured in Sugarbay's application (see para. 5 above) challenging the interim enforcement orders made against it by the English High Court: its case was that it was not a debtor of Mainstay. Whether the effect of the deed was, or was not, to assign the benefit of the Sugarbay loan to LMC is a question we are not called upon to decide.

25 Following its retirement as trustee, Mainstay wrote to Gibraltar's Registrar of Companies on September 11th, 2012 explaining it was no longer carrying on business or trading, had "no debts, liabilities or charges registered against it in Gibraltar or abroad" and asking to be struck off the register under s.331 of the Companies Act 1930. Mainstay appears to have overlooked (a) its purported earlier acknowledgments of debt liabilities to PE for nearly £5m., and (b) any question that it might still hold the benefit of the Sugarbay loan, worth over £5m.

26 On December 11th, 2012, PE wrote a letter to LMC, witnessed by two other signatories, waiving all—

> "right, title and interest to any and all claims to receive repayment of any capital, interest or other amounts arising from any advances which have been made by me to date, to the trustees of the Warren Trust."

Whilst asserting that this letter supports their argument that money was *lent* by PE to the trust, the claimants also say it was ineffective to release Mainstay from its debtor obligations because (i) it was not addressed to Mainstay, and (ii) it was anyway an avoidable transaction under s.339 and s.341(a) of the Insolvency Act 1986.

27 LMC remained the sole trustee of the trust until January 31st, 2013, when, by another ill-drawn deed of retirement and appointment, it retired as trustee and CLT was purportedly appointed in its place. Clause 1, with special brilliance, records the new appointment as being made by "the Protector" pursuant to the powers in cl. 13 of the August 2001 declaration, whereas the protector, PE, was not a party to the deed: *Hamlet* without the prince comes to mind. This was a point which the claimants, apparently as something of an afterthought, raised before the judge, but he held it did not affect CLT's standing before him, the point was not repeated to us and the argument proceeded on the basis that CLT's inheritance of the status of sole trustee of the trust is not in question.

28 The January 2013 deed contains an indemnity covenant by CLT in favour of LMC, limited as explained, in respect of "all actions, proceedings, accounts, claims and demands which may be brought or made in connection with the trusts or [*sic*: should be "of"] the Settlement or in any way relating thereto . . ." Save for reciting an intention that "the property now subject to the trust of the Trust (hereinafter referred to as 'the Trust Fund') shall forthwith be transferred to and under the control of the New Trustees," no further reference is made in the document to such intended transfer. In light of the question as to what trust property passed to LMC under its 2011 deed of appointment, there is also a question as to what passed to CLT under the 2013 deed.

29 PE died on March 23rd, 2013.

30 Mainstay was struck off the Gibraltar register of companies on March 28th, 2013.

31 On February 24th, 2014, a deed was executed between EB (the trust beneficiary occupying the property) and CLT. Its substance was that EB thereby consented both to (i) a proposal by CLT to exercise its power under cl. 19 of the declaration of trust to name her mother, Nina Slavina, as an additional beneficiary of the trust; and (ii) to any exercise by CLT of the power of advancement in favour of Ms. Slavina it might then make.

32 On April 2nd, 2014, CLT passed a resolution purporting to extinguish the Sugarbay loan and ten further Sugarbay shares were issued to CLT.

That amounted to a purported capitalization of the Sugarbay loan and its conversion into equity. Any question as to the validity of that exercise is one on which we are not required to express a view.

33 That exercise was performed in anticipation of the deed executed by CLT four days later, on April 6th, 2014. It is expressed to be supplemental to both the declaration of trust and a deed of appointment made by Mainstay on August 26th, 2005, of which latter a copy is not in evidence before us but which, according to the recitals of the 2014 deed, made a revocable appointment in favour of EB, who is recited as currently having "an interest in possession in the Property Fund," although what that "Fund" comprises is unexplained. By cl. 2 of the operative parts, and in exercise of its appointment powers, CLT declared that it held "the Trust Fund (including, for the avoidance of doubt, the Property Fund) upon trust for Ms. Slavina absolutely."

34 Also on April 6th, 2014, Sugarbay, presumably in the belief it was by then released from the burden of the Sugarbay loan, executed a deed of gift in favour of Ms. Slavina. Ms. Slavina was a party to it and executed a counterpart. By the operative parts, Sugarbay "assigns by way of gift" all its interest in the property, undertakes on demand to execute all documents necessary to perfect or complete the gift and, in the meantime, "undertakes to hold [the property] on trust as nominee for [Ms. Slavina] absolutely."

35 The effect of the two deeds of April 6th, 2014 was to leave (i) CLT holding the Sugarbay shares as a bare trustee for Ms. Slavina absolutely, and (ii) Sugarbay holding the property as a bare trustee for her absolutely as well. As explained, there is, however, a question as to whether Sugarbay remained fixed with the Sugarbay loan or whether it had been validly capitalized.

36 On January 26th, 2015, the claimants were appointed trustees of PE's insolvent estate as explained in para. 2 above. On September 20th, 2017, they wrote to CLT demanding repayment of the loans totalling £4,750,626.14 purportedly recorded by the documents of March 14th, 2007 and May 11th, 2008. Their case at that stage was that this money was owed to them by CLT, although it is obscure how they believed it could be. How had CLT assumed the asserted obligation? There followed correspondence between the claimants' solicitors, Holman Fenwick Willan LLP ("HFW") and CLT's solicitors, Peter Caruana & Co. ("Caruana"), in which the latter denied the claim. They asserted that the two loan documents of 2007 and 2008 were shams and nullities and that the money the subject of the disputed loans had been settled into the trust by PE.

37 On December 21st, 2017, Caruana, whilst maintaining the challenge to the claimants' claims, informed HFW that "currently" there was no trust fund; and, in para. 3 of their letter of January 10th, 2018 (also advancing

arguments against the soundness of the claims that the PE money had been *lent* to the trust rather than settled into it) they explained that "the entire trust fund of the Trust (comprising the shares and shareholder loans of Sugarbay) was appointed to a beneficiary of the Trust in April 2014. Consequently, as matters stand there is no trust fund of the Trust." In so writing, they may have overlooked that the Sugarbay loan had purportedly been extinguished in the capitalization exercise; and they did not mention Sugarbay's gift of the property to the unnamed beneficiary. By their later letter of March 5th, 2018, Caruana refused to provide HFW with the documents evidencing the appointment of the trust fund. On July 10th, 2018, HFW wrote to Caruana further arguing the "loan/settled funds" dispute and concluding by saying that, unless they provided a substantive response and certain requested documents by July 30th, 2018, the PE trustees would commence proceedings against CLT without further notice, a threat they did not carry out.

38 In light of the impasse with the PE trustees on the loans/settled funds dispute, on July 27th, 2018, CLT commenced its own claim in the Supreme Court. It joined as defendants (i) the claimants, to whom I shall from now on refer instead as "the PE trustees," (ii) Steadfast, and (iii) LMC. It did not also join Mainstay which, at the date of the issue of the claim form, remained struck off the register of companies. CLT sought declarations (i) that the sums the subject of the two alleged loans had been paid by PE as additions to the trust fund and so were settled on the terms of the trust; and (ii) that CLT was not indebted to the PE trustees in the amounts of the alleged loans or at all. CLT served its claim form and particulars of claim on all defendants between October 1st and November 7th, 2018.

39 At the same time as all this was happening, CLT and Sugarbay were also getting cold feet about the potential impact of the PE trustees' claims upon the appointment of the trust assets and the gift of the property to Ms. Slavina by the April 2014 deeds. If the claims should prove to be well-founded, CLT foresaw the risk of the trust being faced with liabilities it had no means of meeting, because Ms. Slavina was now the beneficial owner of the property. They were initially minded to commence proceedings for the rescission of the deeds on the basis they had been made by CLT and Sugarbay on the mistaken assumption that CLT had no creditors and that no-one was claiming otherwise.

40 In the event, they did not. Instead, CLT, Sugarbay, Ms. Slavina, EB and Steadfast entered into a complicated agreement dated October 18th, 2018. It recited CLT's unawareness of the PE/Mainstay loan agreements of 2007 and 2008 and its belief that they may have amounted to an improper re-categorization by Mainstay as loans of funds originally settled into the trust by PE. It recited that, if that belief was wrong and the loan agreements were valid, the effect of the 2014 deeds was that there was

thereafter no trust fund with which to meet such debts, or from which to meet any indemnity claims from Steadfast and successive trustees in respect of them. It recited that the April 2014 deeds were therefore made under a fundamental mistake of fact and that CLT and Sugarbay had elected to rescind both.

41 There followed some complicated provisions which it is unnecessary to detail but whose substance was to achieve a consensual suspension of the effect of the April 2014 deeds until the final resolution of the dispute with the PE trustees over the alleged loans by PE. Its thrust was that (i) if such resolution was adverse, CLT and its predecessor trustees could have recourse to the appointed assets to meet any liability to the PE trustees, and (ii) if it was favourable, CLT and Sugarbay would ratify and confirm the April 2014 deeds. The overall effect was that Ms. Slavina's entitlement under those deeds was postponed to any need to have recourse to such assets to meet the claims in respect of the disputed loans.

42 CLT had, however, also become aware that the PE trustees were applying to have Mainstay restored to the register. It learned at some point that Mainstay had been so restored on July 30th, 2018. In his affidavit sworn on June 12th, 2018 in support of the application, Mr. Leeds (a PE trustee) had deposed that the PE trustees' then intentions, once Mainstay was restored, were (so I infer) first to obtain a judgment against Mainstay and then, as Mr. Leeds made clear, to have a liquidator appointed over Mainstay and procure the pursuit of claims down the chain of trustee indemnity covenants to CLT and, if necessary, to the beneficiary to whom the trust assets were said to have been appointed. CLT was at that stage unaware of those intentions.

43 On November 7th, 2018, having at least learnt of the restoration of Mainstay to the register, CLT applied to add it as a defendant to its claim. Steadfast and LMC consented to that, Mainstay (which was represented at that stage but soon ceased to be) said it did not oppose the order and the PE trustees indicated that they neither supported nor opposed it. Mainstay was added as a defendant on November 30th, 2018, following which CLT served amended claim forms and particulars of claim on all defendants. The pleadings closed on January 16th, 2019. A case management conference ("CMC") was fixed for May 31st, 2019.

44 As I have said, CLT did not know that the PE trustees had decided to commence their own claim against Mainstay. They issued it on April 17th, 2019. That is the claim described in para. 2 above. The PE trustees launched it knowing that Mainstay was without directors and would not defend it, and knowing of the dispute as to the genuineness of the alleged loans raised by the proceedings already in place at the suit of CLT in which they were parties and which was proceeding towards a trial. They gave no notice to Steadfast, LMC, CLT or Sugarbay that they were proposing to

sue Mainstay. Having launched their claim, they obtained the default judgment referred to in para. 3 above and then proceeded at the earliest possible date to obtain the consequential interim enforcement orders referred to in para. 4. Having obtained those orders on May 28th, 2019, they then applied on May 31st, 2019 at the hearing of the CMC in the CLT claim for a stay of that claim pending the enforcement of the orders. Yeats, J., who heard both that application and the CMC, adjourned both to a later date. The PE trustees' plan was, if they could, to stay the further prosecution of the CLT claim, leaving them free to enforce the default judgment against Mainstay by way of a sale of the property and thereby recover, so they hoped, the amount of the PE loans for the benefit of his estate's creditors.

45 The plan was, however, spoilt when (i) on June 28th, 2019, Sugarbay applied in England for the dismissal of the enforcement proceedings, alternatively their stay; (ii) on August 22nd, 2019, CLT and Sugarbay applied in the PE trustees' Supreme Court claim to set aside their default judgment against Mainstay; and (iii) the bid to stay the CLT claim failed. I summarized the outcome of the Supreme Court application in paras. 6 and 7. The present position in England is that the *inter partes* hearing on Sugarbay's opposition to the enforcement proceedings has been consensually adjourned pending the determination of this appeal; Restano, J.'s decision to set aside the default judgment had of course undermined their foundation. CLT's claim in the Supreme Court against the PE trustees and others is due to be tried over five days starting on June 28th, 2021.

New evidence on the appeal

46 The judge was aware that the trust fund had been appointed to a beneficiary in April 2014: he referred in para. 13 of his judgment to the Caruana letter of January 10th, 2014 which had disclosed the making of that appointment. The various deeds of 2014 and the agreement of October 18th, 2018 were, however, not before him. For the purposes of their appeal, the PE trustees wished to adduce them in evidence; and the respondents, CLT and Sugarbay, agreed that they could and should be. We accordingly allowed them to be put in evidence. Certain of them had been disclosed in the CLT claim and we also gave permission for their use in the appeal under CPR Part 31.22(1)(b).

The judge's decision

47 CPR Part 40.9 provides that "A person who is not a party but who is directly affected by a judgment or order may apply to have the judgment or order set aside or varied." The judge directed himself that for a non-party to be "directly affected" he must have an interest capable of recognition by the law that is *prima facie* materially and adversely affected by the judgment or order or would be materially and adversely affected by its

enforcement, for which he drew upon *Abdelmamoud* v. *Egyptian Assn. in Great Britain Ltd.* (1) ([2015] EWHC 1013 (Ch), at paras. 58–59), a decision of Edward Murray sitting as a Deputy High Court Judge which was upheld by the Court of Appeal. He held further that the requirement that the effect of the judgment is "direct" means, or includes, that it must not be indirect, *i.e.* "without any further intermediate step," for which he drew on *Ageas Ins. Ltd.* v. *Stoodley Advantage Ins. Co. Ltd.* (2), a decision of His Honour Judge Cotter in Bristol County Court.

48 The judge considered first whether Sugarbay was directly affected by the default judgment. Its case was that it had been relieved of liability under the Sugarbay loan by CLT (via the purported capitalization) and now stood to lose the property. It was not a party to the loan documents upon which the PE trustees had obtained their judgment in Gibraltar but was materially and adversely affected by the judgment; but for that judgment, there would be no enforcement proceedings in England against it. Sugarbay asserted that it was not open to it in resisting the English enforcement proceedings to advance a challenge to the validity of the default judgment itself. It could only do that in Gibraltar by being permitted to challenge it under CPR Part 40.9.

49 The PE trustees' case was that Sugarbay was not "directly affected" by the judgment so as to be entitled to challenge it under Part 40.9. The subject of the judgment was not the Sugarbay loan, in which Sugarbay does have an interest, but the PE loans to the trust, in which it does not. They argued that it was nevertheless open to Sugarbay in the English enforcement proceedings to challenge the validity of the loans upon which the default judgment was based, although that was out of line with the view expressed by Birss, J. in his short extempore ruling at the *ex parte* hearing for the interim orders, to the effect that it was not for the English court to resolve any issue as to the validity of the judgment. The judge preferred Sugarbay's position, saying (2019 Gib LR 232, at para. 30), it would "not get very far in the English enforcement proceedings in mounting a challenge to the validity of the loans." In asserting that Sugarbay, as a third party debtor, had no standing to challenge the default judgment, the PE trustees cited the decision of the House of Lords in *Employers' Liability Assur. Corp.* v. *Sedgwick, Collins & Co. Ltd.* (3), but the judge gave his reasons for distinguishing that authority.

50 The judge's conclusion as regards Sugarbay's position was (i) that it could not challenge the validity of the default judgment in the English enforcement proceedings, but that (ii) it did have an interest in challenging its validity and that the *Employers' Liability* case was not an authority debarring it from doing so. He held that Sugarbay had a "recognisable interest" in challenging the judgment, but he still had to be satisfied that Sugarbay's interest was sufficiently "direct" to bring Sugarbay within the

scope of Part 40.9. The PE trustees' submission was that Sugarbay had no such "direct" interest because the impact upon it was not a consequence of the default judgment but only that of the subsequent enforcement proceedings. The judge rejected that as representing "a mechanical rather than a contextual and pragmatic assessment of the situation" (*ibid.*, at para. 33). He had derived from the decision of Briggs, J. (as he then was) in *Latif* v. *Imaan Inc.* (10) that an inquiry as to whether a non-party is "directly affected" was one that "should not take place in a rigid manner" but should be a "pragmatic one as to the effect of the judgment" (*ibid.*, at para. 29). His conclusion was that in all the circumstances Sugarbay was within the scope of Part 40.9 and had standing to make its application under it.

51 The judge turned to CLT's position. He held that CLT's status as the controlling shareholder of Sugarbay did not entitle it to claim that it was "directly affected" by the default judgment; nor could it claim that the property at risk was in substance its asset. On the other hand, as the last in the line of successor trustees, it faced the prospect of a claim to satisfy the judgment, or to meet any shortfall on a sale of the property, under the chain of indemnity covenants given by the trust's successive trustees, including CLT. In addition, the default judgment was inconsistent with the claim that CLT was advancing in its 2018 proceedings against *inter alios* the PE trustees. In summary, and again influenced by *Latif*, the judge held that it was right for the validity of the alleged loans to be adjudicated upon before the pursuit of the enforcement proceedings in England, being proceedings which would become redundant if the PE trustees fail to establish that they are judgment creditors of Mainstay. His conclusion was that CLT also had standing entitling it to claim to be "directly affected" by the default judgment.

52 Having concluded that both Sugarbay and CLT had standing under CPR Part 40.9 to make their applications, and having held that the default judgment was regularly entered, the judge turned to consider whether, as a matter of discretion, he should set it aside. That was dealt with in CPR Part 13.3, which provides:

> "(1) In any other case, the court may set aside or vary a judgment entered under Part 12 if—
>
> (a) the defendant has a real prospect of successfully defending the claim; or
>
> (b) it appears to the court that there is some other good reason why—
>
> (i) the judgment should be set aside or varied; or
>
> (ii) the defendant should be allowed to defend the claim."

53 The applicants' main point was that the claimants had acted in five abusive ways in obtaining the default judgment and that their conduct in this respect was a good reason, under Part 13.3(1)(b), for setting the default

judgment aside. The judge dealt with the "abuse" argument between paras. 49 and 59 (*ibid.*). He referred to various well-known authorities, considered the five heads of alleged abuse and upheld one of them. He held that the circumstances in which the PE trustees commenced their 2019 Gibraltar claim was abusive, and explained why in paras. 58 and 59. He then gave his reasons for also holding, under Part 13.3(1)(a), that the applicants' case on the underlying merits of the "loans/settled funds" issue was not a fanciful one and that they had a real prospect of success in their defence of the PE trustees' assertion that the money provided by PE to the trust over and above the initial £500,000 had been advanced by way of loans rather than settled into the trust.

54 Having decided as he did, the judge made an order setting aside the default judgment and adding both CLT and Sugarbay as parties to the PE trustees' proceedings.

The appeal

55 In para. 7, I summarized the PE trustees' three heads of appeal against Restano, J.'s decision. At the hearing, Mr. Clutterbuck, Q.C., for the appellants, said he did not wish to pursue head (iii). He acknowledged (rightly in my view) that the judge was correct to hold that, if the respondents have standing to challenge the PE trustees' default judgment on the merits, they have a real prospect of defending the claim that the PE money was lent to, rather than settled into, the trust. In short, if (which Mr. Clutterbuck, Q.C. disputes) the respondents or either of them have or has standing under CPR Part 40.9 to challenge the default judgment, it follows that, as the judge held, the judgment must be set aside.

56 A further consequence of that concession is that the judge's finding that the PE trustees had acted abusively in the commencement of their claim also does not strictly arise for consideration on the appeal: it was an alternative ground for setting aside the judgment. We did, however, have argument on the abuse point from Mr. Clutterbuck, who said his clients were offended by the judge's conclusion; and we had argument in response from Sir Peter Caruana.

57 In the circumstances, whilst the question of the respondents' standing to challenge the default judgment is formally the only question we have to decide, I shall deal also with the abuse of process issue. The standing issue, however, occupied most of the debate and I deal with that first.

Are Sugarbay and/or CLT "directly affected" by the default judgment?

58 For convenience, I repeat the language of CPR Part 40.9. It provides:

"Who may apply to set aside or vary a judgment or order

> A person who is not a party but who is directly affected by a judgment or order may apply to have the judgment or order set aside or varied."

59 The Rules of the Supreme Court that preceded the CPR had no exactly equivalent provision, the closest being RSC O.27, r.15, providing that "Any judgment by default . . . may be set aside by the court or a judge upon such terms as to costs or otherwise as such court or judge may think fit." That offers little help in discerning the breadth of Part 40.9. The key to it reposes in its provision that any non-party applying under it to have a judgment or order set aside or varied must be able to show that he is thereby "directly affected." It is the sense of those words that has been at the heart of the argument.

60 An application under Part 40.9 raises two questions: (i) does the applicant have the *standing* to make it; and (ii) if yes, should the court accede to it? The first question turns exclusively on whether the applicant is "directly affected" by the judgment or order. If he is not, that is the end of the application. If he is, the court must then consider what, if any, relief to grant. Whereas applications under the former RSC O.27, r.15 could be made only in respect of a default judgment, Part 40.9 applications can be made in respect of any judgment or order.

61 There are at least two categories of case in which a Part 40.9 applicant will be likely to demonstrate a standing for his application. One is where the judgment or order "directly affects" a proprietary interest of his. An example is *IPCom GmbH & Co. KG* v. *HTC Europe Co. Ltd.* (7), in which Roth, J. held that Part 40.9 was ([2013] EWHC 2880 (Ch), at para. 44)—

> "broad enough to cover the case where a non-party seeks to contend that inspection of a document ordered against a party will involve disclosure of its confidential business secrets, at the very least in a case where, as here, that non-party's interest is sufficiently clear to be referred to in the order itself."

Another category is insurance cases: a non-party insurer will be likely to have the standing to apply to set aside a judgment obtained against his insured so as to enable it to defend the claim, insurance policies usually providing for the insurer's right to take over its insured's defence. This is illustrated by *Windsor* v. *Chalcraft* (11), in which an insurer applied under the former RSC O.27, r.15 to set aside a default judgment against his insured. There is no doubt that an insurer has the like standing under Part 40.9. These two categories of case are clear, but there can be no suggestion that the categories are closed.

62 *Hepworth Group Ltd.* v. *Stockley* (5) is a decision of His Honour Judge Behrens. I refer to it because it is discussed in an important decision to which I shall come. Its (simplified) facts were as follows. The claimant company, HGL, contracted to buy a hotel from S, the defendant. Part of the

purchase consideration was the transfer of a Spanish property owned by C, who ran HGL. C transferred the property direct to S, although S was unaware that it was C who had transferred it. S accepted HGL's repudiation of the contract, forfeited the deposit and was entitled to damages from HGL. The order in the litigation obliged S to return the Spanish property to HGL, but S did not have to do so until HGL had satisfied its liability to S for costs and damages; if it failed to do so, S would be entitled to apply for an order for the sale of the property so as to enable the satisfaction of those obligations.

63 Following the making of the order, C, who was not a party to the proceedings, applied under Part 40.9 to have it varied so as to require S to transfer the Spanish property to him unconditionally. The judge held that, whilst HGL had a restitutionary claim to recover the property from S, albeit on such conditions as the court might impose, C had no such right: the obligation to transfer the property to S had been that of HGL, not of C, who was a stranger to the contract. In the circumstances, following the acceptance of HGL's repudiation C had no right against S to claim a re-transfer and so was not "directly affected" by the order so as to be entitled to apply under Part 40.9 to have it varied. The essence of the decision was that, as against S, C did not have an interest in the property sufficient to show he was "directly affected" by the order.

64 The decision that featured most in the argument is the one on which the judge placed material reliance, namely that of Briggs, J. in *Latif* v. *Imaan Inc.* (10). Sir Peter Caruana, in defending the judge's decision, apparently regarded it as his best case. Mr. Clutterbuck, Q.C. was respectfully critical of it, asserting that it is impossible to identify its *ratio decidendi.*

65 The facts in *Latif* were as follows. Some time before July 2007, Lexi Holdings plc started a Chancery Division claim for compensation for over £100m. against Shaid Luqman and others, including Imaan Inc., a company controlled by Luqman. The claim was based on frauds allegedly committed by Luqman as a former director of Lexi. In July 2007, Messrs. Latif and Arif (who may or may not have traded under the name of Hamra Financial Associates, but whom Briggs, J. called Hamra) started a Queen's Bench Division claim against Imaan for the repayment of an alleged loan of £4.9m.; and, on September 18th, 2007, they obtained a default judgment against Imaan. On November 16th, 2007, on its own application, Lexi was added as a defendant to the Hamra action, which was then transferred to the Chancery Division. On November 26th, 2007, Briggs, J. permitted Lexi to re-amend its already much amended claim so as to enable it to challenge the validity of a charge Imaan had given Hamra over a property called Rutland Court to secure the Imaan/Hamra debt. The essence of Lexi's amended claim was that the Imaan/Hamra loan was a fiction and that the charge was a device devised by Luqman to shield his and Imaan's assets

from Lexi's grasp. On December 6th, 2007, Briggs, J. gave judgment against Imaan for £8.9m. and declared that Lexi had a general equitable charge over all Imaan's assets for the purpose of enforcing it, including over Rutland Court and another Imaan property.

66 Both actions came before Briggs, J. on December 17th, 2007 (he was the retained judge in the Lexi litigation). They had not been consolidated, but Hamra, Lexi and Imaan were parties to both. At the hearing, Lexi applied under Part 40.9 to set aside the default judgment in the Hamra action. It is a mystery to me why Lexi, by then a party to the Hamra claim, could make a non-party application, and the judgment indicates ([2007] EWHC 3179 (Ch), at para. 12) that it had been added as a party precisely so that it could do so. I do not understand any of that and Briggs, J. did not explain it.

67 Briggs, J. set aside the default judgment and the substance of the basis for doing so (drawn from paras. 11–13 of his extempore judgment (*ibid.*)) was that (i) the existence or non-existence of the Imaan loan was "a highly material fact relevant to the validity or otherwise of the Imaan/Hamra charge"; (ii) Lexi should be "treated as having a sufficient interest in the matters recorded by the judgment, namely the making of the loan and its non-payment, to intervene to have that judgment set aside"; (iii) this was "a proper case to recognise an interest in a third party in having a judgment set aside"; and (iv) "one has to ask, how could Lexi pursue, as against Hamra and Imaan, a claim that Hamra has no proprietary interest arising out of the charge, by alleging that there never was any loan to support it in the first place for as long as it remains a party to proceedings in which there is a judgment, which effectively purports to recognise that there was."

68 An instructive authority that sought to bring clarity to the standing requirement of Part 40.9 is *Abdelmamoud* v. *Egyptian Assn. in Great Britain Ltd.* (1), a decision of Edward Murray sitting as a Deputy High Court Judge. The Association was a charitable company, limited by guarantee and operated through a committee of directors. The claimant made a loan to the Association, it defaulted on an interest payment following which the claimant demanded repayment and, when none was made, sued it for payment and obtained a default judgment. Four of the Association's members then made a Part 40.9 application to set the judgment aside. The Master granted their application, but Mr. Murray allowed the claimant's appeal and dismissed the application.

69 After referring to *IPCom* (7), *Hepworth* (5) and *Latif* (10), Mr. Murray said ([2015] EWHC 1013 (Ch), at para. 58) that these authorities—

> "all, in my view, support the proposition that in order for a non-party to be 'directly affected' by a judgment or order for the purpose of CPR Rule 40.9, it is necessary that some interest capable of recognition by the law is materially and adversely affected by the judgment or order

> or would be materially and adversely affected by the enforcement of the judgment or order. In *IPCom*, the interest was the non-party's interest in the preservation of its confidential business secrets. The enforcement of the order for disclosure would have potentially harmed it economically. In *Hepworht* [*sic*] the non-party applicants clearly had an interest in a general sense in recovering the Spanish property that they had transferred to the defendants (and so were affected by the order, one might even say 'directly' using that word in its everyday sense), but they had no restitutionary or other interest in the Spanish property recognised by the law and so were not 'directly affected' by the order for the purpose of CPR Rule 40.9. In *Latif* the non-party was 'directly affected' by the default judgment obtained by the claimants because that default judgment prevented its challenging the validity of a charge on residential property in which it had an equitable interest."

70 Mr. Murray proceeded to allow the appeal on the ground that the members of the Association had no proprietary interest in its assets or direct liability for its debts and so were not "directly affected" by the default judgment. This was, if I may say so, obviously correct and his decision was upheld by the Court of Appeal (Longmore, McCombe and Newey, L.JJ.).

71 In argument to us, Mr. Clutterbuck, Q.C. was critical of the final 15 words in the first sentence of the quotation from Mr. Murray, those relating to being "directly affected" by the *enforcement* of the judgment or order. He submitted that they were an unwarranted gloss on Part 40.9. Sir Peter Caruana, by contrast, submitted that the challenged words were legitimate and he noted that the Court of Appeal had uttered no comment on them, let alone criticism.

72 That the Court of Appeal made no reference to the gloss is not one I regard as significant: the case did not require it to do so. I regard it as improbable that by his suggested gloss Mr. Murray had any thought that he might be widening the reach of Part 40.9. In particular, I doubt if he was contemplating that someone who was not "directly affected" by the judgment but was nevertheless "directly affected" by its enforcement would have standing to apply under Part 40.9. If he was, I would respectfully disagree with his gloss. The question posed by Part 40.9 must always be whether the applicant is "directly affected by [the] judgment or order . . ."

73 In many, perhaps most, cases it will not be difficult to identify who is "directly affected" by a judgment or order. For example, a money judgment obtained against a company will affect the company directly. In most cases, however, it is unlikely to have any *direct* effect on anyone else. Depending on its magnitude, it may affect the interests of the company's other unsecured creditors; and may affect the value of its shares. But any such effect on creditors and shareholders is only *indirect.* None could have any standing to challenge the judgment under Part 40.9.

74 A point about the *enforcement* of an order relevant to this appeal is that, as in this case, a judgment creditor may seek its enforcement by proceeding against a third party debtor. In my view, however, there can in principle be no question of any such debtor against whom a judgment creditor seeks to enforce the judgment being thereby "directly affected" by the judgment. Nor, therefore, can such a debtor have a standing to apply to set it aside.

75 By way of a simple example of that, C claims to be a creditor of D in the sum of £10,000. D refuses to pay, C sues him and obtains a default judgment. D has accounts with three banks, each with a credit balance in excess of £10,000. Following the judgment, D could, if he chose, draw on any or all of them to pay the judgment debt and each bank would be obliged to honour his mandate. If, however, he chooses not to pay, any one of the banks is at risk of an application by C for a third party debt order under CPR Part 72. In the meantime, however, none would have a standing to apply under Part 40.9 to set aside or vary the judgment, because none could claim to be "directly affected" by it. One of them may in due course be the subject of a third party debt order and will thereupon be "directly affected" by *that* order. But it will still not be "directly affected" by the default judgment, although it may be said to be indirectly affected by it. It will have no standing at any point to apply under Part 40.9 to have it set aside.

76 This conclusion is supported by the decision of the House of Lords in *Employers' Liability Assur. Corp.* v. *Sedgwick, Collins & Co.* (3). A Russian insurance company ("Rossia") had a branch office in London. By decrees passed in 1918, the Soviet Government put it and other Russian insurance companies into liquidation. In 1923, the respondents ("Sedgwick") sued Rossia for money said to be owed to it, served the writ at the London office and obtained a judgment against Rossia in default of appearance. Sedgwick then obtained a garnishee order nisi (as interim third party debt orders were then known) attaching debts due from the appellant ("ELAC") to Rossia. ELAC applied to have the default judgment set aside and Sedgwick applied to have the garnishee order nisi made absolute. Master Ball (i) refused to set the judgment aside, but (ii) on discretionary grounds, also refused to make the garnishee order absolute. Fraser, J. affirmed both decisions. The Court of Appeal (i) on ELAC's appeal, upheld the decisions below refusing to set the judgment aside, but (ii) on Sedgwick's appeal as to the refusal to make the garnishee order absolute, directed an issue as to whether ELAC owed anything to Rossia. At some point an order for the winding up of Rossia was made in England and Rossia's liquidator indicated he did not propose to question the default judgment.

77 In its appeal to the House of Lords, ELAC contended (i) that the Master and Fraser, J. had been right to refuse to make the garnishee order absolute, the making of such an order being a discretionary matter, and that

the Court of Appeal had been wrong to direct an issue as whether ELAC had any liability to Rossia; and (ii) that all three lower courts had been wrong not to set aside the default judgment. The main burden of the argument and their Lordships' speeches was addressed to the correctness of the Court of Appeal's decision to direct the issue in the garnishee proceedings, although Lord Sumner observed ([1927] A.C. at 106) "that in one respect at least reliance is rightly placed on matters which would have also gone to the merits of the application to set the judgment aside." ELAC's appeal against the direction of the issue was dismissed.

78 As to ELAC's appeal against the refusal to set aside the default judgment, their Lordships were unanimously succinct in agreeing that it too should be dismissed. Viscount Cave, L.C. (*ibid.*, at 105) said that:

> "Apart from the objection that [Rossia] had not been served with this application, [ELAC] have no such direct interest as to entitle them to apply to set aside the judgment. The liquidator [of Rossia] does not attack it, and no reason is shown why it should be set aside. Of course it will be open to the appellants in the garnishee proceedings to argue that nothing is due from them to [Rossia] which can be attached; but if this argument should fail the not undesirable result of these proceedings will be that a sum due in England from an English company to a Russian corporation will be appropriated to the payment of a debt owing in England by that corporation to another English company."

79 Lord Shaw of Dunfermline agreed with Viscount Cave's speech. Lord Sumner dealt briefly with the appeal against the refusal to set aside the judgment, saying (*ibid.*, at 105):

> "[T]wo orders made in chambers form the subject of this appeal. The first dismissed the present appellants' summons to set aside a judgment recovered by [Sedgwick] against a third party, [Rossia]. This being a judgment to which the applicants were not parties, it has been held on the authority of Jacques v. Harrison (1884) 12 QBD 165 that they were not competent to ask that it should be set aside. Jacques v. Harrison is a decision of the Court of Appeal on a point of practice, and it has been followed without question for over forty years. It would require strong grounds indeed to induce your Lordships to disapprove it now. For my part I think that it is correct, and, accordingly, that the summons to set aside this judgment was rightly dismissed."

80 Lord Parmoor said (*ibid*, at 113):

> ". . . [ELAC], as garnishees applied to set aside the judgment. Their application came on for hearing before Master Ball in chambers on February 25, 1925. He refused to set aside the judgment. This decision

was confirmed by the judge in chambers, and the Court of Appeal. The accuracy of this decision was not seriously disputed before their Lordships. There is no ground for interfering, under this head, with the decision of the Courts below."

81 Lord Blanesburgh said (*ibid.*, at 126): "As to the other order appealed from, I am in entire agreement with the opinions expressed by all your Lordships."

82 That is an important decision on the standing of a third party debtor to apply to set aside the underlying judgment upon which the debt order is based. I interpret it as authority that under the then practice, namely that obtaining under O.27, r.15, a third party debtor did not have the standing to do so. That is made clear in the first sentence of Viscount Cave's quoted remarks, which makes two points: (i) that ELAC's application was defective as it had not served its application on Rossia, the defendant in Sedgwick's claim (a procedural requirement explained in Bowen, L.J.'s judgment of the court in *Jacques* v. *Harrison* (8) (12 Q.B.D. at 168ff)); and (ii) that ELAC anyway had "no such direct interest as to entitle them to apply to set aside the judgment." His next sentence, on its face going to the merits of any set aside application, appears to me, if I may respectfully say so, strictly inapposite: if ELAC had no "direct interest" entitling it to make its application, a consideration of the merits of an application it was not competent to make could not arise.

83 Lord Shaw agreed with Viscount Cave and Lord Sumner made it clear that *Jacques* was authority for the conclusion that ELAC was "not competent" to ask for the setting aside of the default judgment. That went exclusively to the question of ELAC's *interest* in being entitled to make its application, and Lord Sumner's view, like Viscount Cave's was that it had none. Lord Parmoor observed that the dismissal of ELAC's "set aside" application in the courts below "was not seriously disputed before" the House. Lord Blanesburgh simply agreed with all his colleagues as to the fate of the appeal. Their Lordships' speeches record the extensive arguments about the validity and regularity of the default judgment in the context of the appeal in relation to the merits of the garnishee order, but none of that was apparently regarded as relevant to the appeal in respect of the dismissal of the set aside application. Lord Blanesburgh agreed with his colleagues as to the fate of that appeal.

84 I should say a word about *Jacques*, a decision on the provisions of RSC O.27, r.15. Like Part 40.9, it was not a rule restricting applications under it to those who were parties to the proceedings; it also enabled strangers to them to apply, provided they had what the courts regarded as a sufficient standing to do so. In *Jacques*, a landlord had obtained a default judgment against the lessee under a building lease and the court set the judgment aside at the behest of the liquidator of the equitable mortgagees

of the lease: he was held to be "interested in the matter" and "affected by the judgment" and was given liberty to defend the action in the defendant's name. *Jacques* was not a case concerning the claim of a third party debtor to set the underlying judgment aside, but I infer from both Viscount Cave's and Lord Sumner's quoted observations in the *Employers' Liability* case (3) that the references in Bowen, L.J.'s judgment of the court to an O.27, r.15 applicant needing to show he was "interested in the matter," or "is affected by the judgment," or was "injuriously affected" were regarded as establishing a hurdle that a third party debtor was unable to surmount.

85 As noted, Viscount Cave said in terms that ELAC had "no such direct interest as to entitle them to apply to set aside the judgment." He was there unconsciously reflecting the "directly affected" requirement of CPR Part 40.9 that would later supersede RSC O.27, r.15. When, 72 years later, the CPR superseded the RSC, it is in my view highly improbable that Part 40.9 was directed at broadening the class of those entitled to apply to set judgments and orders aside. It is far more likely that, in its "directly affected" requirement, it was aimed at encapsulating the principle that had underpinned the practice of the courts for more than a century.

86 I regard the *Employers' Liability* decision as providing high authority that under the former practice a third party debtor was regarded as having no "direct interest" in the underlying judgment and thus as having no standing entitling him to apply to set it aside. I would hold that the like position applies equally under Part 40.9, and that such a debtor is not "directly affected" by such a judgment. In my judgment, to conclude otherwise would be to misinterpret the plain sense of those words.

87 Having identified what I regard as the essence of the principles, I turn to the judge's conclusion that each of Sugarbay and CLT was "directly affected" by the PE trustees' default judgment so as to give them standing to apply to set it aside.

Sugarbay

88 I can well see why Restano, J. was sympathetic to Sugarbay's bid to set the judgment aside. He considered that Sugarbay would not be entitled to challenge the merits of the Gibraltar default judgment in the English enforcement proceedings; and, if it also did not have the standing to apply to set the judgment aside, it faced the risk of losing the property to the PE trustees on the basis of an untested case that the alleged loans were genuine, whereas both its directing mind and will (that of CLT, its sole director) and the PE trustees knew their genuineness to be disputed. Any judge presented with such circumstances would be bound to view with sympathy Sugarbay's blandishments for salvation from such apparent injustice; and Restano, J. gave his reasons for upholding Sugarbay's claim to have been "directly affected" by the judgment.

89 I respectfully conclude, however, that he was in error in so holding. I have given my reasons why a third party debtor facing enforcement proceedings such as Sugarbay is not "directly affected" by the underlying judgment debt. The *Employers' Liability* case (3) also provides authority for that position. Restano, J. was taken to the *Employers' Liability* case and he cited the passage from Viscount Cave's speech I have quoted (2019 Gib LR 232, at para. 27). But (*ibid.*, at para. 31), he distinguished the case by observing that the liquidator had confirmed that he did not propose to contest the validity of the judgment and that Viscount Cave stated ([1927] A.C. at 103) that the validity of the judgment was established beyond controversy, whereas in the present case Mainstay could hardly be said to have admitted the default judgment in positive terms after full investigation.

90 That is true but I consider, with respect, that Restano, J. overlooked that the extensive discussion in their Lordships' speeches about, and their conclusions as to, the regularity and validity of the underlying judgment went not to ELAC's appeal against the refusal of the lower courts to set it aside, but to its separate appeal to restore the Master's and Fraser, J.'s discretionary decisions to refuse to make the garnishee order absolute. For reasons given, I regard it as apparent that the unanimous, and briefly expressed, decision by their Lordships to refuse ELAC's separate bid to set aside the default judgment was founded simply on ELAC's lack of standing to make that application.

91 I would allow the PE trustees' appeal against the judge's decision that Sugarbay had standing under Part 40.9 entitling it to apply to set the default judgment aside.

CLT

92 I turn to consider the appeal against Restano, J.'s holding that CLT was "directly affected" by the default judgment so as to entitle it to apply to set it aside. The judge accepted that CLT could not claim that the threat to the property flowing from the default judgment "directly affected" it, since the property was not its asset. It was Sugarbay's. He accepted too that CLT could not claim to have been "directly affected" in its capacity as a shareholder of Sugarbay.

93 He did, however, still regard CLT as "directly affected" by the PE trustees' claim against Mainstay. He recognized, first, that the enforcement by the PE trustees of a sale of the property might result in their suffering a shortfall, for which they would or might then seek recoupment by procuring successive claims down the chain of trustee indemnity provisions against CLT. I record that the parties were agreed that the shortfall possibility is not pure theory: there is apparently a real current risk that there might be one. Restano, J. held that, given this possible future chain of events if the default judgment is left undisturbed, it was understandable that CLT

wanted to resolve the position without delay. He further held that CLT's 2018 claim directed at demonstrating that the alleged loans were not genuine was inconsistent with the PE trustees' default judgment in their claim against Mainstay and that the decision in *Latif* (10) required him to adopt a pragmatic approach that, as he said (2019 Gib LR 232, at para. 40), required him "to give weight to [CLT's] desire for its position to be resolved expeditiously, clearly and consistently by the courts." He explained that the 2018 proceedings were well under way and that it was (*ibid.*, at para. 42)—

> "right for the validity of the loans to be adjudicated upon before enforcement proceedings are pursued in London and which will become redundant if [the PE trustees] fail in establishing that they are judgment creditors in the first place."

94 In challenging the judge's conclusion as to CLT's position, Mr. Clutterbuck, Q.C. submitted that CLT's wish for an accelerated resolution of the loans/settled funds dispute was not a legal right justifying the setting aside of the default judgment. CLT was not a party to the PE trustees' claim, it was not bound by the default judgment and was entitled to proceed with its own claim. In any claims ultimately brought against CLT down the chain of indemnities at the suit of the PE trustees, it would be open to CLT to challenge their justification. The judge's invocation of *Latif* as justifying his decision was mistaken. In *Latif* there was a contest between competing creditors of Imaan, namely between Hamra and Lexi. In addition, Lexi had a charge over Imaan's assets and so had an interest in challenging Hamra's claim to a prior charge over certain of them that secured its judgment debt. Another distinguishing feature was that Lexi was a party to the Hamra claim, which played a material part in Briggs, J.'s decision to set aside the default judgment. CLT was not a party to the PE trustees' claim.

95 In these circumstances, it is said that *Latif* provided no precedent for Restano, J.'s decision. The Mainstay judgment was a money judgment that had no direct effect on CLT: it did not enable the PE trustees to enforce it against either CLT or its property. It was also not binding on CLT, which was at liberty to defend its corner on the loans/settled funds dispute in any claim it may meet under the chain of indemnities. That CLT might be faced with such a claim also shows why the Mainstay judgment had no "direct effect" on it: it is at most at risk of suffering an *indirect* effect after the taking of various intermediate steps, involving first an indemnity claim against LMC and then a further one against CLT.

96 These submissions were cogently advanced but I respectfully regard them as suffering from a fundamental flaw. They fail to recognize CLT's interest, rights and duties as a trustee of the trust, the latter including a duty to the trust's beneficiary to preserve the trust assets for her and to take all proper steps to prevent their wrongful appropriation by strangers to the trust (i) whose claim to do so is disputed by CLT, and (ii) who are seeking

to appropriate them in advance of the determination of that dispute in the proceedings that CLT had properly and responsibly instituted for that purpose in 2018. It is of course correct that the trust assets were the subject of an appointment to Ms. Slavina in April 2014, but since then CLT has remained the holder of the Sugarbay shares as a trustee for her, and Sugarbay has remained the registered proprietor of the property and, in the meantime, in light of the PE trustees' claims, all necessary parties executed the October 2018 "as you were" agreement which, whilst not unwriting the deeds of appointment, at least *de facto* restored CLT to the position it was in immediately before their signature. In my judgment, CLT's right and duty to take all proper steps to preserve the assets of the trust remain the same now as they were before the execution of the 2014 deeds.

97 The PE trustees' plan with regard to their claim against Mainstay, formed and executed covertly at a time when the 2018 CLT claim was well advanced, is clear. It was to obtain a foreseeably undefended money judgment against Mainstay, follow that up by obtaining a third party debt order against Sugarbay and a charging order against the property, and then to sell the property so as to recoup, if they could, the amount of the alleged loans. Put another way, their objective was to appropriate the bulk of the trust asset represented by the Sugarbay loan and then to appropriate the property, held by Sugarbay, in or towards satisfaction of the default judgment. If there was no surplus on the sale of the property (and it is agreed there is a risk of a shortfall), their plan, when fully executed, would reduce to nil (i) the value in the trust's hands of the excess of the Sugarbay loan over the amount of the judgment debt, and (ii) the value of the only other trust asset, CLT's shareholding in Sugarbay. They intended to execute their plan in advance of any ruling in the CLT claim as to whether the disputed loans were or were not genuine and to that end applied, unsuccessfully, for a stay of that claim. The first step in the implementation of their plan was to obtain the default judgment.

98 The obtaining of that judgment amounted to a direct attack on the assets of the trust. It was the key to the door that gave the PE trustees the opportunity of executing their plan. CLT has a direct interest in the trust assets so threatened. First, as for the benefit of the Sugarbay loan, for reasons earlier given, the PE trustees' position is that that asset, having passed to Mainstay in 2005, remained with it and did not pass to LMC in 2011 or thence to CLT in 2013 under the relevant deeds of appointment. Assuming that position to be formally correct, the consequence cannot, however, be that Mainstay retained the benefit of the loan for itself beneficially. As Sir Peter submitted in his skeleton argument, Mainstay was only ever a trustee of such benefit and did not hold it beneficially; and, following its retirement as a trustee upon the execution of the 2011 deed of appointment, it must have continued to hold it as a trustee. As cl. 1 of that deed expressly discharged Mainstay from the trusts of the trust, it cannot,

however, have continued to hold it upon such trusts. It can only have continued to hold it as a constructive trustee for its respective successor trustees and now, therefore, for CLT. CLT must in turn be entitled as against Mainstay to a right to the benefit of the loan as an outstanding trust asset and to call for an assignment of it. It has, therefore, a direct proprietary interest in the benefit of the loan. The PE trustees' default judgment was aimed at enabling them to appropriate that asset for the benefit of PE's estate.

99 As for the other trust asset, the shareholding in Sugarbay, CLT is the shareholder. The further objective was to use the default judgment to enable the PE trustees to appropriate and sell Sugarbay's only asset, the property. That will have the effect of reducing the value of CLT's shareholding either to nil or little more.

100 The position, therefore, is that the default judgment represents a direct threat to trust assets in which CLT has a proprietary interest and which, as trustee, it has a right and duty to protect in the interests of the trust's beneficiary. The judgment "directly affected" CLT's said interest and it was fully entitled to take the prompt steps it did to challenge it. It is no answer to say that the judgment could only affect CLT "indirectly," in consequence of subsequent claims down the chain of indemnities. If, as the PE trustees assert, the judgment is unchallengeable by CLT, its intended, and direct, effect is (i) to defeat the purpose of CLT's claim, which is to achieve an orderly determination of the loans/settled funds dispute and preserve the trust assets in the meantime; (ii) to subject the trust to a major liability, which can only be satisfied out of trust assets (*i.e.* the appropriation of the Sugarbay loan); and (iii) thereby to put the trust assets in which CLT has a proprietary interest in immediate jeopardy. It is obvious that CLT had the standing to apply to set the judgment aside so as to prevent the injustice it represented. Their proposition that CLT must sit quietly by whilst leaving them free to appropriate the trust assets before first making good their claim to be entitled to do so is one I would reject.

101 If, for any reason, I am in error in holding that CLT has a proprietary interest in the Sugarbay loan, it makes no difference to my overall conclusion. The Sugarbay loan must be a trust asset. The default judgment purports to establish the existence of a trust liability that the PE trustees are seeking to enforce against that asset. CLT's position is that there is no such trust liability, and so no such right of enforcement, and it is seeking to establish the former in its 2018 claim. CLT, as the current trustee of the trust, has the right and duty to protect that asset from jeopardy. The default judgment presents the threat of immediate jeopardy to it and so it is one by which CLT is "directly affected." CLT must be entitled under Part 40.9 to apply to set it aside.

102 I would dismiss the PE trustees' appeal against Restano, J.'s holding that CLT was "directly affected" by the default judgment and was entitled to have it set aside. Albeit for slightly different reasons, I respectfully agree with his decision in that respect. I would uphold his decision to set aside the default judgment.

The abuse of process issue

103 As explained, this does not formally arise for consideration, but the PE trustees were offended by Restano, J.'s criticism of their forensic tactics and Mr. Clutterbuck, Q.C. made submissions to us in their defence, which I should deal with.

104 CLT had alleged five heads of abuse against the PE trustees. In the event, Restano, J. upheld only one of them. I quote his decision on the ground he upheld (2019 Gib LR 232, at paras. 58–59):

> "58 I have already found that the 2018 claim was not commenced abusively. The same, however, cannot be said about the circumstances in which this claim was commenced. The claimants were aware that shortly after [Mainstay] was added to the 2018 claim on November 29th, 2018, [Mainstay's] sole director resigned. It was also aware that it was likely that [Mainstay], once restored, would not have any substantial assets with which to pay the sum claimed. In these circumstances, a judgment without an adjudication on the merits appeared highly likely. They also knew that [CLT], [Mainstay's] successor trustees (as well as Steadfast and LMC) were challenging the validity of the loans in the 2018 claim which were governed by Gibraltar law and that an adjudication on that issue was underway. The effect of this claim was therefore to stymie the 2018 claim which is confirmed by the fact that the claimants are now seeking to stay that claim.
>
> 59 In response, the claimants say that a challenge can be brought in the English proceedings and that, in any event, the default judgment puts [CLT] in the position it wants, namely that it relieves it of liability and that it should therefore be commending the claimants' actions. As I have already said above, there will be little or no scope for any effective challenge in the English proceedings to the validity of the loans which is a question of Gibraltar law and which is already before the Gibraltar courts. Further, the suggestion that [CLT] will achieve what it wants as a result of the claimants' actions is, with respect, only accurate in the most abstract sense. [CLT] is a professional and licensed trustee and the latest successor in the chain of trusteeship. It has rejected the claim in detail in pre-action correspondence where it has also stated that in April 2014 it appointed the entire trust fund of the trust (comprising the shares and shareholder

> loans of Sugarbay) to a beneficiary of the trust. Such a step is likely to have been taken based on [CLT's] understanding that there is no outstanding liability under the loans and this has the potential of unravelling if the claimants are correct about the status of the loans. There is also the question of a possible shortfall. [CLT's] position is not therefore as simple as the claimants are suggesting and it is understandable that [CLT] wishes to have the issue properly determined. In order to do so, [CLT] has had to bring this application together with Sugarbay and will need to resist the claimants' application for a stay of the 2018 claim. Sugarbay is also resisting the English enforcement proceedings. This multiplicity of actions with numerous parties in different jurisdictions with the risk of inconsistent judgments is precisely what *Henderson* v. *Henderson* . . . abuse of process is designed to prevent. Whilst there will be cases where bringing a claim and obtaining a default judgment against a company with no assets and no directors is not objectionable, this is not such a case and my broad merits-based assessment given the facts of this case is that the claimants' conduct was abusive."

105 Restano, J.'s reference to the "broad merits-based assessment" derived from the speech of Lord Bingham of Cornhill in the well-known decision of the House of Lords in *Johnson* v. *Gore Wood & Co.* (9) ([2002] 2 A.C. at 31). I am not convinced that the type of abuse condemned in *Henderson* v. *Henderson* (4) and *Johnson* was of the like nature as the conduct of which Restano, J. criticized the PE trustees in this case. Those cases were more concerned with parties being successively vexed by litigation raising issues which had been, or could and should have been, raised in earlier litigation between the same parties. The burden of the criticism of the PE trustees in this case is that they were already parties to well-advanced proceedings in Gibraltar directed at a determination of the "loans/settled funds" dispute between them and CLT, but that instead of awaiting the trial in that litigation to resolve the dispute, they separately, and covertly, started a second claim against Mainstay, one they knew would not be defended and which they foresaw as providing them with a default judgment on their loans claim that would pre-empt any decision on it in the CLT claim and would (they hoped) enable them to proceed immediately to enforce their claims against the trust's assets. It was a naked attempt to circumvent CLT's claim and to enforce their own disputed claim, without any prior judicial determination of its merit.

106 Mr. Clutterbuck's submission in defence of the PE trustees' actions was that there was nothing wrong in anything they did. They were entitled to sue Mainstay even though it was expected it would not defend the claim. It was legitimate to do so because Mainstay had assets, namely the benefit of the Sugarbay loan. The claim did not "stymie" the CLT claim, which could proceed to trial (his clients' attempt to stay it had failed) and CLT

would not be bound by the default judgment in the PE trustees' claim, to which it is not a party. CLT and Sugarbay were not being twice vexed by reason of the PE trustees' claim because neither was a party to it. There was no risk of inconsistent judgments as the default judgment was an administrative act, not a judicial one. Further, Sugarbay's liability to the PE trustees depended on its liability under its own loan, not on the validity of PE's alleged loan so that, as Mr. Clutterbuck, Q.C. put it in his skeleton argument, "there is thus no inconsistency if the enforcement proceedings against Sugarbay are successful even if the loans made by [PE] to the Trust were ultimately found to be invalid." Any successful enforcement against Sugarbay would not prevent CLT raising any defence it wished in any indemnity claim that might be brought against it by LMC. Moreover, the short cut that the PE trustees hoped to achieve via their judgment against Mainstay and its enforcement against Sugarbay was consistent with the current emphasis on efficiency and economy in litigation to which Lord Bingham had referred in *Johnson* (9).

107 None of that comes even close to justifying the PE trustees' actions in proceeding as they did against Mainstay and then seeking to enforce their judgment against Sugarbay; and Mr. Clutterbuck, Q.C.'s words quoted in the seventh sentence of the previous paragraph encapsulate why the PE trustees' actions were so obviously abusive. Abuse of the court's process can be manifested in a myriad of ways. In *Hunter* v. *Chief Constable* (6), Lord Diplock opened his speech by saying that ([1982] A.C. at 536):

> "This is a case about abuse of the process of the High Court. It concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people. The circumstances in which abuse of process can arise are very varied . . ."

108 Mr. Clutterbuck, Q.C.'s submissions amounted to no more than an attempt to justify the PE trustees' actions by pointing out that all they did was permitted by a literal application of the procedural rules and would not have impaired the trial of the CLT claim. Both elements of that may be true. The question, however, is not whether the PE trustees' chosen process was open to them, it was whether in adopting it they were acting abusively. In my judgment they were. Their chosen procedure was directly aimed at working an obvious unfairness on CLT, the claimant in proceedings already in place that it had brought against the PE trustees. I hope I have sufficiently explained that unfairness in my explanation of why CLT was entitled to have the default judgment set aside; and to repeat it here would

be a work of supererogation. In summary, however, the purpose of CLT's claim was to achieve a just and orderly determination of its dispute between CLT and the PE trustees as to whether the alleged loans were genuine. The purpose of the PE trustees' claim was to pre-empt such just determination and instead, covertly, to obtain an undefended default judgment against Mainstay that would enable them, if they could, then to achieve its enforcement in English proceedings by appropriating the benefit of the trust asset represented by the Sugarbay loan, selling the property, thereby devaluing CLT's shareholding in Sugarbay, another trust asset, and pending the execution of such enforcement actions, to stay the CLT claim. The commencement of the PE trustees' claim was a blatant attempt to defeat the justice to which CLT was entitled by having the "loans/settled funds" dispute resolved in its claim. That was an abuse of the process of the court. It deserved to fail, as it has. It should not have been attempted.

109 In his reply, Mr. Clutterbuck, Q.C. submitted that the reason the PE trustees' claim had been made covertly was so as not to tip CLT or Sugarbay off that it was targeting the property, in case either might then be prompted to take steps to protect the property from the PE trustees' clutches. I understood that submission to have been advanced as lending an element of propriety to the PE trustees' actions and perhaps thereby to moderate the sting of the abuse of which they stand accused.

110 The point did not feature in Mr. Clutterbuck's skeleton argument (which like most such documents was hardly skeletal). We were shown no evidence supporting the assertion apart from Mr. Wood's witness statement of May 20th, 2019 in support of the applications for the interim orders made to Birss, J. on May 28th, 2019. It is worth quoting what he said, which makes the PE trustees' intentions very clear:

> "29. Given the imminent CMC in the Gibraltar Proceedings [*i.e.* in CLT's claim: it was listed for May 31st, 2019], the Trustees ask for these applications to be dealt with on an urgent basis so that, if the relief sought on these applications is granted, the Trustees can apply for a stay of the Gibraltar proceedings at the upcoming CMC, pending the determination of the enforcement of the Judgment.
>
> 30. Furthermore, I understand that an interim third party debt order and charging order would ordinarily be made against Sugarbay without notice, and if the orders are made, they operate immediately, including in a proprietary way, thus safeguarding the position of the judgment creditor. In order for these orders to be made on a without notice basis, it is necessary that they are made before any application for a stay of the Gibraltar Proceedings is made by the Trustees because CLT is not only the trustee of the Trust, but is also the sole director of Sugarbay . . . Thus, if the Trustees made an application for a stay of the Gibraltar proceedings on the basis that enforcement

> proceedings of the Judgment were being taken, but interim orders had not yet been made, Sugarbay would be informed of these applications before interim orders had been made, and there would be nothing to prevent Sugarbay from dealing with either the Sugarbay Loan or the Property. The Trustees are anxious not to find their enforcement proceedings against Sugarbay thwarted by virtue of the fact that Sugarbay receives, through CLT, notice of the enforcement proceedings being taken against them before interim orders are made."

111 The note of the hearing before Birss, J. records that Mr. Lilly, counsel for the PE trustees, informed the judge that his clients had not wanted to "tip off" Sugarbay. Mr. Wood had not explained why CLT had not been notified of the PE trustees' proposed claim against Mainstay, but Mr. Lilly shed some light on that at the CMC held before Yeats, J. three days later, on May 31st, 2019, when developing his surprising submission that CLT and Steadfast could have no commercial interest in the enforcement proceedings because, if the PE trustees achieved their intended aim of paying of the alleged debt to them, that would give CLT all it hoped to achieve by its claim. That submission was not just surprising, it was wrong. The primary purpose of the CLT claim was to obtain a declaration that the trust is subject to no such indebtedness to the PE trustees as they were claiming so as to free its assets from the risk of that claim and enable them to be enjoyed by Ms. Slavina. Mr. Lilly went on to explain to Yeats, J. that, because (so he said) CLT had no commercial or legal interest in the English enforcement proceedings, "that is precisely why [the PE trustees] did not inform CLT or Steadfast or any other of the parties to these proceedings of entering judgment in default or making a claim against Mainstay, nor of the *ex parte* application in England."

112 On hearing that, Yeats, J., who had conscientiously read the papers in advance, reminded Mr. Lilly that he had told Birss, J. that they had not wanted to tip off Sugarbay about the enforcement proceedings, which Mr. Lilly agreed was always a factor. But, warming to his theme, Mr. Lilly then repeated that "when making the claim in Gibraltar against Mainstay, there was no reason to join any of the parties to these proceedings to those proceedings, nor notify them of it," also saying again that those parties had "no commercial or legal interest" in the PE trustees' proceedings against Mainstay. That repeated assertion was still wrong. CLT's interest in what the PE trustees were seeking to do is obvious.

113 What all that confirms is that the PE trustees' decision to launch their Mainstay claim and then enforce it against Sugarbay was a blinkered operation in which they appear to have engaged without any thought as to its potential unfairness on CLT. They had identified a short cut to the money they claimed was due and they took it. It may, of course, turn out that their claim that PE had lent the money to the trust was and is justified;

that remains to be decided at the trial of CLT's claim. But, if so, the PE trustees cannot have known that when they embarked upon their plan. And, if not, they appear to have been oblivious of the damage their actions, if successful, would do to CLT as the trustee of the trust and to the trust's beneficiary.

114 In my judgment, the PE trustees' action in proceeding as they did was a clear abuse of the process of the court. Restano, J. was right so to find. I would dismiss this ground of appeal against his decision.

Disposition

115 I would allow the PE trustees' appeal against that part of Restano, J.'s decision holding that Sugarbay was "directly affected" by the Mainstay default judgment so as to give it standing to apply to set aside that judgment. Otherwise, I would dismiss the appeal. That means that I would affirm Restano, J.'s decision to set aside the default judgment obtained by the PE trustees against Mainstay. For the avoidance of doubt, I add that that means, of course, that the default judgment is set aside for all purposes, including as providing the basis for the enforcement proceedings against Sugarbay. I would invite the parties to endeavour to agree the form of the order necessary to give effect to this court's judgment.

116 **ELIAS, J.A.:** I agree.

117 **KAY, P.:** I also agree.

Appeal allowed in part.