Neutral Citation Number: [2019] EWHC 2174 (Ch)

Case No: D30YE032
Appeal No: 8BS0149C

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BRISTOL
INSOLVENCY AND COMPANIES LIST (ChD)
ON APPEAL FROM THE COUNTY COURT AT YEOVIL
(District Judge Corrigan)

Bristol Civil Justice Centre
2 Redcliff Street, Bristol, BS1 6GR

Date: 08/08/2019

Before :

HHJ PAUL MATTHEWS
(sitting as a Judge of the High Court)

- -

Between :

Rupert Jolyon Richard St John Webster	**Appellant**
- and -	
Alison Virginia Ashcroft	**Respondent**

- -
- -

Robert Trevis (instructed by **direct access**) for the **Appellant**
Oliver Wooding (instructed by **Clarke Willmott LLP**) for the **Respondent**

Hearing dates: 1 August 2019

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Approved Judgment

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

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HHJ Paul Matthews :

Introduction

1. This is my judgment on an appeal brought by the appellant against the decision of District Judge Corrigan, sitting in the County Court at Yeovil, on 13 November 2018 in relation to the costs of a bankruptcy petition presented against him by the respondent. On that day, the petition itself was dismissed, the appellant having paid the statutory demand debt in full since the date of the previous hearing. In the exercise of his discretion, the district judge ordered the appellant to pay the costs of the petitioning creditor, and refused to order her to pay his costs. (I note in passing that District Judge Corrigan in fact has now just retired from the bench.)

2. After the appellant lodged an appellant's notice in the County Court at Yeovil, the matter was transferred to the Bristol District Registry of the High Court, Chancery Division. Under CPR PD 52A, para 3.5 and Table 2, an appeal from a district judge in the County Court in a personal insolvency matter lies to the High Court. Under the Insolvency Practice Direction of 25 April 2018, amended 10 July 2018, paras 17.2(4) and 1.1(8), (9), a judge authorised under s 9(1) of the Senior Courts Act 1981, such as I am, may deal with such an appeal.

Procedural background

3. The appeal arises out of long-running litigation between the appellant and the respondent, in which two costs orders, dated 20 December 2011 and 4 August 2014, were made against the appellant in favour of the respondent. The respondent served a statutory demand dated 14 February 2017 on the appellant on 1 March 2017. The appellant applied to the County Court at Taunton on 17 March 2017 for an order that the statutory demand be set aside. That application was transferred to the Bristol District Registry of the High Court on 12 April 2017

4. However, in 2015 an extended civil restraint order had been made against the appellant, with a duration of two years. On 26 April 2017, I extended that order against the appellant for a further two years. When the appellant issued his application at Taunton on 17 March 2017, he did not first apply for permission to do so under the extended civil restraint order. He first applied for such permission by email dated 17 July 2017, and by application notice in form N244 on 21 July 2017. On 29 August 2017, whilst I was on annual leave, HHJ Cotter QC ordered that the appellant's application be placed before me, as I am the judge designated under the extended civil restraint order as amended and extended in April 2017. In the meantime, however, on 7 August 2017 the respondent had already presented a bankruptcy petition in the County Court at Taunton against the appellant, based on the statutory demand served on 1 March 2017.

5. On 14 September 2017, on my return from annual leave, I dealt with the appellant's application dated 21 July 2017 on the papers, and gave permission to the appellant under the extended civil restraint order to apply to set aside the statutory demand. In my reasons for doing so, I said that there was a question whether the appellant needed permission at all under the civil restraint order before applying to the court to set aside a statutory demand. But I also said that I did not need to decide this question because I was satisfied that, even if the application were caught by the civil restraint order, it

would be appropriate in this case to give permission to the appellant to make it. I will return to this later.

6. In the light of my order of 14 September 2017, the parties agreed to adjourn the hearing of the bankruptcy petition in order to allow the application to set aside the statutory demand to be heard first, and on 30 October 2017 District Judge Corrigan formally adjourned the petition. On 9 March 2018 District Judge Cope, sitting in the Bristol District Registry, heard and dismissed the appellant's application. On 13 November 2018 District Judge Corrigan heard the adjourned bankruptcy petition in the County Court at Yeovil. By that date, however, the appellant had paid the outstanding statutory demand debt, and so the judge dismissed the petition. However, as I have already said, taking into account the fact that the debt had been paid by the appellant only after the petition had been presented, he ordered the appellant to pay the respondent's costs of the petition and refused to order the respondent to pay the appellant's costs.

Grounds of appeal

7. The appellant's grounds of appeal attached to his appellant's notice were originally prepared by him when acting in person. On 21 March 2019 I refused permission to appeal on the papers, for reasons given at the time in writing. The appellant renewed his application for permission at a hearing on 5 June 2019, at which he was represented by Robert Trevis of counsel, instructed under the direct access scheme. In his skeleton argument for that hearing, Mr Trevis redrafted the grounds of appeal.

8. After hearing Mr Trevis (the respondent not being present or represented at that hearing) I gave permission to appeal on one ground only, namely

> "whether the order of 14 September 2017 giving permission under the ECRO dated 23 March 2015 (as extended by the orders of 22 March 2017 and 26 April 2017) to apply to set aside the statutory demand dated 14 February 2017 (served on the appellant on 1 March 2017) retrospectively validated the application made without permission under the said ECRO by notice dated 17 March 2017 to set aside the said statutory demand to a date before 7 August 2017, so that at the time that the petition for the appellant to be adjudicated bankrupt was presented (on 7 August 2017) there was outstanding an application to set aside the statutory demand within section 267(2)(d) of the Insolvency Act 1986, so that the said petition could not be validly presented."

9. I remind myself that CPR rule 52.21(3) provides that the appeal court will allow the appeal where the decision of the court below was (a) wrong, or (b) unjust because of serious procedural or other irregularity in the proceedings below. Here 'wrong' means wrong in law, wrong in fact, or wrong in the exercise of discretion. I record that on the appeal no challenge was made to any of the facts found by the district judge and on which he relied. Nor was there any suggestion of any procedural or other irregularity below, such as to engage paragraph (b) of the rule.

The appeal

10. At the hearing of this appeal the appellant was again represented by Mr Trevis, and Mr Oliver Wooding appeared for the respondent. Mr Trevis relied on the skeleton

argument which had been prepared for the application for permission in June, but also on commentary on s 267 in *Muir Hunter on Personal Insolvency* and an authority referred to in that commentary, *Times Newspapers Ltd v Chohan (Limitation Periods)* [2001] 1 WLR 184. He also made an additional point. This was that the appellant did not in fact need permission under the ECRO to apply to set aside a statutory demand. Mr Wooding pointed out that the ground of appeal permitted by my order of 5 June 2019 was predicated on the assumption that the ECRO did apply to require permission for such an application. But he did not seek to argue that he was not in a position to make submissions on the point, although, as he said, those submissions would be less full than they might otherwise have been.

Scope of the ECRO

11. In arguing the point about the scope of the ECRO, Mr Trevis reminded me that I had raised the same point myself in my reasons for giving permission on 14 September 2017. On that occasion I said this:

> "The first question is whether the defendant needs permission to apply to the court to set aside a statutory demand. The ECRO provides in section 2 that the defendant be restrained "from… Making applications in any court specified below concerning any matter involving or relating to or touching upon or leading to the proceedings in which this order is made without first obtaining the permission of" the named judge. The courts specified in the order as amended in April 2017 included the County Court.
>
> The words of the restraint are very wide indeed. On the face of it an application in the County Court for an order to set aside a statutory demand in respect of sums said to be due under orders made either in the same proceedings between the parties or in earlier proceedings between them covering the same subject matter falls within the restraint. I note the reference by Lewis J in *Society of Lloyd's v Noel* [2015] EWHC 734 (QB), [54], to the perceived need in that case to make an exception in the restraint for an application to set aside a statutory demand served by Lloyds on Mrs Noel, and to the earlier decision of Popplewell J in the same case (not unfortunately available to me) making a similar point. That of course reinforces the initial impression that such an application would otherwise fall within the terms of the restraint.
>
> Before I could conclusively determine this question, however, I should need to give the claimants the opportunity to be heard. But I do not need to do this, because I am satisfied that, even if the application is caught by the ECRO, it is appropriate in this case to give permission to the defendant to make it. Whatever the form of the proceeding, in substance it is a response by the defendant to a procedure launched against him by the claimants, i.e. to make him bankrupt. Just as he could obviously defend the petition for his bankruptcy without the need for permission, so to a person in the position of the defendant should normally be able to apply to set aside the statutory demand served on him. Otherwise he would be defending the inevitable bankruptcy petition with one hand tied behind his back.
>
> I say 'normally', because, if it were clear that there were no grounds whatever challenging the demand, then there would be no point in giving permission. But,

> looking at the material provided by the defendant, I am not in a position to say that. I emphasise that that does not indicate any view as to the strength of the points which the defendant wishes to make. Their evaluation is for another day."

Appellant's submissions

12. Mr Trevis submits that an ECRO ought not to catch an application by an alleged debtor to set aside a statutory demand, because in essence it is a step taken in accordance with the rules of court after an alleged creditor has taken the initiative, out of court, in serving a statutory demand on the alleged debtor. It is therefore wholly defensive rather than offensive, and it is only the way that the court procedure is structured that requires that the alleged debtor take the first step in court.

Respondent's submissions

13. Mr Wooding submits that the ECRO in the present case *does* catch an application to set aside a statutory demand. In section 2 of the order the relevant part begins:

> "It is ordered that you be restrained from issuing claims or making applications in any court specified below concerning any matter involving or relating to or touching upon or leading to the proceedings in which this order is made without first obtaining the permission of [one of two named judges]".

14. The courts then specified are the High Court and "any County Court". That section continues:

> "It is further ordered
>
> (1) this order relates to applications or claims by [the appellant] made against the claimants in their capacity as executors of the estate of Valerie Hilda Margaret Webster and trustees of (being the freehold owners of) the property known as The Priory, [address and title number] ("the Property") and their successors in title;
>
> (2) the matters subject to this order exclude any personal claim that [the appellant] may bring or is advised to bring in professional negligence as a disappointed beneficiary or otherwise;
>
> (3) for the avoidance of doubt, the matter is subject to this order include any claim or application in relation to the occupation of, possession of, ownership of, or access to the Property."

15. Mr Wooding argues that an application to set aside a statutory demand is a positive step initiating court proceedings and therefore falls squarely within the wording of the ECRO, as long as the subject matter is the same. Here he says the statutory demand is based upon costs orders made in earlier litigation between the parties which led to the ECRO being imposed in the first place. The point of an ECRO is to act as a filter on applicants who have made multiple applications that are totally without merit, so as to allow to go forward only those applications which are proper to be heard. He accepts that it would normally be appropriate for the court in such a case to give permission to make such an application as this. He refers to the decision of Lewis J in *Society of Lloyd's v Noel* [2015] EWHC 734 (QB), where there was an assumption that the

application would have been caught by a civil restraint order but that it would be appropriate for the court to give permission.

Discussion

16. Mr Trevis is of course right to say that in substance the alleged debtor in applying to set aside a statutory demand is responding to an out of court procedure initiated by the alleged creditor. It is a defensive move. He is also right to say that it only happens like that because the court rules are so structured. But the whole point about the civil restraint order regime is to prevent the court system being overwhelmed with unmeritorious applications *made to the court*. And I cannot get away from the fact that, in applying to set aside a statutory demand, an alleged debtor is engaging the court process for the first time, rather than responding to the engagement of the court process by someone else. So I am clear that Mr Wooding is right to say that in principle an ECRO will cover an application to set aside a statutory demand arising out of the same subject matter. I also think he is right to say that it will normally be appropriate for the court to give permission for such an application to be made. On the other hand, if the application is bound to fail, then there will be no point in doing so. And then the filter system will have served a useful purpose. So I reject the first point made by Mr Trevis.

Section 267(2)(d)

Appellant's submissions

17. His next point is that the wording of s 267(2)(d) of the Insolvency Act 1986 is mandatory. So far as material, it provides:

> " … a creditor's petition may be presented to the court in respect of the debt or debts only if, at the time the petition is presented –
>
> …
>
> (d) there is no outstanding application to set aside a statutory demand served … in respect of the debt or any of the debts."

18. In support of his view that the wording is mandatory he refers to the decision of Anthony Mann QC (as he then was), sitting as a deputy High Court judge, in *Times Newspapers Ltd v Chohan (Limitation Periods)* [2001] 1 WLR 184. In that case a statutory demand had been served on 11 January 2000. No application to set aside was made within the prescribed time limit. Then, on 18 February 2000, two things happened. The creditor presented the petition, and the debtor issued an application out of time for an extension of time in which to apply to set aside the statutory demand. It was not clear which had happened first: the former was timed, but the latter was not. It was later found that neither party knew what the other was doing at the time. The application out of time thereafter came before a deputy registrar, who extended time for applying to set aside, but in the same order dismissed the application to set aside itself. Subsequently, another registrar made a bankruptcy order based on the statutory demand. He held that the extension of time for appealing did not have the effect that an application to set aside should be treated as outstanding at the time of the petition. Alternatively, if he were wrong about that, he held that the condition in paragraph (d)

was an irregularity which could be waived and should be waived in the circumstances. The bankrupt appealed to the High Court judge against the making of the bankruptcy order.

19. The deputy judge agreed with the registrar that there was no breach of the requirements of paragraph (d). I will come back to that. But he went on to say this:

> "25. That conclusion makes it unnecessary for me to consider the registrar's view that any defect in this respect was one that could be waived. I have to say that I am not convinced that in this respect the registrar was correct, though I would agree with him that if this was a waivable defect then this is clearly a case in which the defect ought to be waived. In the light of my views as to the nature and effect of paragraph (d), however, it is unnecessary for me to express a view on this."

20. Mr Trevis relies on this as showing that failure to comply with paragraph (d) cannot be waived. With respect, however, I think the language of the deputy judge is not so strong as that. It is the expression of a doubt, of course, and doubts should be respected and taken into account. But it is clear from the last sentence of the quotation above that the deputy judge did not mean to express any concluded view. Sitting, as I am, in a court of coordinate jurisdiction, I do not consider that the convention that judges at High Court level normally follow each other's judgements applies in this case. In this respect, I am fortified by the contrary (if tentative) view apparently expressed by Lindsay J in *HM Customs and Excise v Jack Baars Wholesale* [2004] BPIR 543, referred to in the commentary in *Muir Hunter on Personal Insolvency*, already mentioned (although I was not taken to the text of the judgment itself), and by the decision of Norris J in *Regis Direct Ltd v Hakeem* [2012] EWHC 4328 (Ch), to which I shall come shortly.

21. To my mind, in any event, the more important point in the *Chohan* case is that the deputy judge considered the wording of paragraph (d) in some detail. He said that:

> "23. … That paragraph means that there must be a valid application outstanding at the relevant time, that is to say one properly made and made in time. An application made out of time is not such an application. Technically, unless and until the court extends the time for making the application, it cannot be a valid application."

This is relevant to Mr Trevis's point that, at the time of the presentation of the petition in August, there was outstanding an application by the appellant to set aside the statutory demand, and therefore s 267(2)(d) was not satisfied, and the petition could not have been validly presented.

Respondent's submissions

22. Mr Wooding said that the permission given on 14 September 2017 to the appellant to apply for an order setting aside the statutory demand was prospective only, and not retrospective. There were very few examples of potential or actual retrospectivity in the CPR, such as rule 3.1(2)(a) and rule 6.15(2) (neither of which was at all relevant to the present case). He submitted that, properly analysed, the provisions of the

Practice Direction relating to civil restraint orders made clear that permission under such an order to make an application was prospective only.

23. CPR Practice Direction 3C, so far as relevant, provides:

> "3.3. Where a party who is subject to an extended civil restraint order –
>
> > (1) … makes an application in a court identified in the order concerning any matter involving or relating to or touching upon or leading to the proceedings in which the order is made without first obtaining the permission of a judge identified in the order, the … application will automatically be … dismissed –
> >
> > > (a) without the judge having to make any further order;
> > >
> > > …
>
> 3.4. A party who is subject to an extended civil restraint order may not make an application for permission … without first serving notice of the application on the other party in accordance with paragraph 3.5.
>
> 3.5. A notice under paragraph 3.4 must –
>
> > (1) set out the nature and grounds of the application; and
> >
> > (2) provide the other party with at least seven days within which to respond."

24. Mr Wooding points to the provision in paragraph 3.3(1)(a) which results in an application made in breach of the permission requirement being automatically dismissed without the need for any further order. He says the procedure in paragraph 3.4 shows that the other party must know of the intended application before it is made, and paragraph 3.5(2) shows that there must be a gap of seven days between the notice of the application and the next step taken by the applicant. He says that accordingly where the party subject to an extended civil restraint order issues an application in the court without first having obtained permission under the civil restraint order, the effect is that the application is automatically dismissed. Hence, by the time the petition in the present case was presented, there was no "outstanding application to set aside the statutory demand", and the condition in s 267(2)(d) was accordingly satisfied.

Discussion

25. The respondent's argument therefore is that the permission requirement once fulfilled looks forward only and not backwards as well. In this connection I may also mention another part of the judgment of Mr Mann QC in *Times Newspapers Ltd v Chohan (Limitation Periods)* [2001] 1WLR 184. That case of course concerned an application (out of time) for an extension of time in which to make an application to set aside a statutory demand rather than an application for permission under an ECRO to make such an application.

26. The deputy judge said:

> "21. Mr Lamacraft's submissions on the point were advanced succinctly and can be shortly stated. He says that when Mr Deputy Registrar Brettle extended the time for making the application to set aside had the effect of relating back the application to set aside itself so that it should be treated as having been extant at the moment it was presented to the court…
>
> 22. Mr Morgan drew attention to the opening words of section 267(2) and in particular the words "at the time the petition is presented". That, he said, is the time at which one judges the question of the fulfilment of the requirements of the rest of the subsection, and in this case there was no outstanding application at the time of the petition. 'Application' means a valid and timeous application. Although there was an application of a sort outstanding, it was not in time and was therefore not valid. The subsequent extension of time for making the application did not have retrospective effect so as to deem something to be the case that was not in fact the case at the time the petition was presented…
>
> 23. I agree with the registrar that there was no breach of the requirements of paragraph (d). That paragraph means that there must be a valid application outstanding at the relevant time, that is to say one properly made and made in time. An application made out of time is not such an application. Technically, unless and until the court extends the time for making the application, it cannot be a valid application."

27. The same reasoning, as it seems to me, applies to the present case. Indeed, in this case is even stronger. Applications to extend time are, as already noted, one of the few cases where there is any attempt at retrospectivity in the CPR. There is no trace of any such retrospectivity in the provisions relating to applications for permission under civil restraint orders to make applications in existing proceedings. If an application for an extension of time, subsequently granted, does not retrospectively validate an application to set aside a statutory demand so that for the purposes of section 267(2) there remains an outstanding application, then it can hardly be the case that an application made without permission under a civil restraint order could be validated retrospectively so as to produce that same effect for the purposes of this section.

No material difference

28. Mr Wooding contended that, even if the order of 14 September 2017 *did* retrospectively validate the application to set aside, it made no material difference. He relied on the decision of Norris J in *Regis Direct Ltd v Hakeem* [2012] EWHC 4328 (Ch), an appeal from the County Court. There the debtor on 22 August 2010 issued an application to set aside a statutory demand that had been served upon him. Unfortunately, the court wrongly failed to process that application and it was never served on the creditor, who presented a bankruptcy petition on 13 October 2010, still unaware of the application's existence. The district judge was told at the hearing of the petition that an application to set aside the statutory demand was outstanding but nevertheless made the bankruptcy order. Seemingly in ignorance of the existence of the bankruptcy order, a few days later the application to set aside the statutory demand was then heard and dismissed on its merits.

29. The debtor argued that the bankruptcy order was void for non-compliance with s 267(2)(d). Norris J held that it was not, despite the non-compliance. He said:

> "19. The petitioner who knows there is an outstanding application to set aside the demand knows he will not be able to establish that the debtor is unable to pay the debt but that is not the position here. At the time when the petition was presented Regis did not know there was an outstanding application to set aside the statutory demand and they did not know that because through a combination of the court taking a bad point and Mr Hakeem's inactivity no sealed application notice was issued and Mr Hakeem had not, in accordance with the Insolvency Rule 7.43 served notice of his application on Regis.
>
> 20. In those circumstances Parliament would not have intended that the petition issued by such a creditor should be void, a nullity and automatically of no effect. It seems to me that in those circumstances the petitioner correctly presented the petition, and the question that arises is whether under section 266(3) the court should dismiss it or state, and if staying it whether to stay at on terms or otherwise. That said, I do think DJ Gill erred in law in making the bankruptcy order on 22 March 2011. The correct course to follow would have been to have adjourned the petition once it became clear Mr Hakeem's application to set aside the statutory demand was outstanding. When the fate of that application was known, the petition could be restored and ruled on."

30. Section 266(3), referred to by Norris J, provides as follows:

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

31. Norris J went on to hold that the correct course would have been to adjourn the petition until the outcome of the application to set aside was known. However, it was now known that the application failed. There was no suggestion that if the petition had been presented immediately after the application to set aside had been dismissed (some three days later) the debtor would have had any answer to it. Accordingly, there was no prejudice to the debtor, and the appeal court should affirm the bankruptcy order.

Discussion

32. In the *Regis Direct* case the creditor did not know of the debtor's application to set aside the statutory demand because it had not been properly processed by the court and the debtor did nothing about it. In the present case the creditor, if she knew of the application made to set aside statutory demand, was entitled to take the view that it was automatically dismissed by virtue of PD 3C para 3.3(1)(a), and therefore did not know that there was a valid outstanding application to set aside when the petition was presented. It is only if I were to hold on this appeal that the giving of permission on 14 September 2017 retrospectively validated the application to set aside that the creditor would *now* know that there had in fact been a valid application outstanding at the time of the presentation of the petition.

33. But the important difference between this case and the *Regis Direct* case is that, in this case, once permission had been given in September 2017, the hearing of the

petition was adjourned to await the result of the hearing of the application to set aside. That means that what Norris J said ought to happen actually *did* happen here. It also means that the judge at the hearing of the bankruptcy petition knew the result of the application to set aside.

34. In accordance with the usual convention, I should follow the decision of Norris J that the presentation of a bankruptcy petition in breach of s 267(2)(d) does not render the petition void, but on the contrary, it is "correctly presented", unless I am convinced that the decision is wrong. I am not so convinced, despite the doubt of Mr Mann QC on the "waivability" of the defect in the *Chohan* case. That being so, and the application to set aside having been dismissed on its merits, I cannot see that the district judge, in deciding in the exercise of his discretion what costs order to make made any error of law or failed to take into account material considerations (and only such considerations).

Conclusion

35. In my judgment the district judge went wrong neither in law nor in the exercise of judicial discretion. Accordingly, this appeal fails, and must be dismissed.