

Neutral Citation Number: [2018] EWHC 3856 (Ch)

Case No: CH-2018-000009

**IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
APPEALS (ChD)**

Rolls Building
7 Rolls Building
Fetter Lane, London
EC4A 1NL

Monday, 23 July 2018

Before:

THE HONOURABLE MR JUSTICE MARCUS SMITH

Between:

LOMO TELECOMMUNICATIONS LIMITED

Appellant in the appeal
Respondent in the proceedings below

-and-

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Respondent in the appeal
Petitioner in the proceedings below

No appearance was made by or on behalf of the Appellant in the appeal/Respondent in the proceedings below

Mr. Christopher Buckley (instructed by **HMRC's solicitors**) appeared on behalf of the Respondent in the appeal/Petitioner in the proceedings below

Hearing date: 23 July 2018

Approved Judgment

MR JUSTICE MARCUS SMITH:

Introduction

1. By an order, sealed on 18 December 2017, Chief Registrar Briggs made an order that Lomo Telecommunications Limited (“Lomo”) be wound up by this court, under the provisions of the Insolvency Act. It was his order that the costs of the petition be paid out of the assets of Lomo.
2. The petitioner is HM Revenue & Customs (“HMRC”), a creditor of Lomo, which is registered under company number 08364976.
3. The order of Chief Registrar Briggs is being appealed. Permission to appeal was granted by Nugee J, by an order dated 25 May 2018, and today is the hearing of that appeal. Although on previous occasions Lomo has been represented by one of its directors, a Mr Chuks Ajuka, Mr Ajuka has not appeared before me today; nor has any other representative of Lomo. This is intrinsically odd, since this is Lomo’s appeal. HMRC has appeared today, and I am very grateful to Mr Christopher Buckley of counsel for his submissions on this occasion.
4. Although it would have been open to me simply to dismiss the appeal without more, given that there was no-one present for Lomo today, without any explanation or excuse for this absence, that course did not commend itself to me. So far as possible, I have sought to test the grounds of appeal on the merits and I deal with them on that basis.
5. Reviewing the grounds of appeal, there are three grounds that are advanced by Lomo. The first ground is that no statutory demand was served to found the winding-up order, and that, therefore, these proceedings are invalid. The second ground is that the director acting for Lomo, Mr Ajuka, was not, before the Chief Registrar, given the opportunity properly to present Lomo’s case fully. The third ground is that Lomo disputes the debt that HMRC claims against it.
6. I deal with these three points in turn.

The first ground

7. The statutory definition of an inability to pay debts is set out in section 123(1) of the Insolvency Act 1986. A company is deemed by that section to be unable to pay its debts if one of five disjunctive criteria are met. It is true to say that the first disjunctive criterion of section 123 (section 123(1)(a)) does refer to the service of a statutory demand in a prescribed form, and, to that extent, it is fair to say that the requirements of section 123(1)(a) have not been met in this case. But Mr Buckley points out that section 123(1)(a) is not the ground which is relied upon in this case by HMRC. HMRC relies upon section 123(1)(e), which provides that a company is deemed unable to pay its debts if it is proved to the satisfaction of the court that the company is unable to pay its debts as they fall due.

8. This is a head under section 123(1) which pertains with or without the service of the statutory demand. I have been shown authority to this effect, which I am not going to quote from, I will simply cite it. It is the decision of Harman J in *Cornhill Insurance plc v Improvement Services Limited* [1986] 1 WLR 114. I am satisfied that, if you can prove to the satisfaction of the court that the company is unable to pay its debts as they fall due, then the order that was made by the Chief Registrar can follow. In this case, HMRC set out in a letter to Lomo dated 26 June 2017 the extent of the debts owed by it. This amounted to £126,768.73. The position before the Chief Registrar, and the position before me, is that significant portions of these debts were unpaid.
9. It is fair to say that since the decision of the Registrar, by reason of the regularisation of the Lomo's, the debt has reduced by some £67,000. However, that makes no difference to the fact that the company is unable to pay its debts, as they fall due. The balance of what is now £146,768 remains outstanding, as at today's date. It therefore seems to me that the absence of a statutory demand is nothing to the point, and that the Chief Registrar was entitled to make the winding-up order that he did, on 18 December 2017. I, therefore, dismiss the first ground of appeal.

The second ground

10. The second ground is that there was no opportunity on the part of Lomo, through Mr Ajuka, to present Lomo's case fully before the Chief Registrar. As I understand it, the matter came before the Chief Registrar on two occasions. On the first occasion, it was adjourned and on the second occasion, although potentially it might be possible to say that an adjournment was sought, it certainly was not granted. It was not granted because, reading between the lines of the court record, the Chief Registrar invited the company then to regularise its position, including payment of sums outstanding, as the price, as it were, for the adjournment of the first hearing. That did not occur, and the Chief Registrar did not see fit to adjourn matters further. That, clearly, was a decision that lay well within the ambit of judicial discretion and I am certainly not going to revisit that decision on this occasion. It seems to me that the Registrar was entirely entitled to take the course that he did, and that this appellants court will not review adjournment questions of a lower court, save in wholly exceptional circumstances.
11. That being the case, the question is really this: can Lomo point to any question that was either misaddressed or not addressed by the Chief Registrar, that renders the decision to wind up the company one that is susceptible of an appeal? The short answer is that, apart from the third ground of appeal, to which I will proceed in a moment, Lomo has identified nothing in the decision of the Chief Registrar to suggest that it was, in any way, wrong. There is simply no suggestion, apart from, as I say, the third ground of appeal, to suggest that the Chief Registrar erred in any way at all. In these circumstances, I reject the second ground of appeal and I will simply observe that broad averments on appeal that a party has not been able to present a case fully, do not take the appeal any further. There really does need to be substance in such a ground, for the court on the appeal to be able to take the point properly and to deal with it. That has not happened in the case of ground two, which, as I say, is dismissed.

The third ground

12. I turn, then, to the third ground, which is the fact that the debt is disputed. Here, Lomo makes a mistake regarding the inter-relationship between insolvency law and revenue law. The fact is that the debts which HMRC claim in their letter arise from computations derived from the returns actually filed by Lomo. In those circumstances, these sums cannot be disputed in this court.
13. The remainder of the petition debt arises out of statutory debts, arising out of the failure to pay sums that have been assessed as due by HMRC. Such debts cannot be challenged in insolvency proceedings and are, instead, susceptible to challenge in the First-tier Tribunal (Tax). That is clear from the decision of *HMRC v Chamberlin* [2011] EWCA Civ 271.
14. It does seem to me that it cannot be said before the Chief Registrar and it cannot be said before me, that the debt can be disputed, or is disputed, on genuinely substantial grounds. As I indicated, the regularisation of aspects of Lomo's position have resulted in a reduction in the penalties due. However, the sum due, according to HMRC, continues to run well above £750. It seems to me that that justifies the winding up order that was made by the Chief Registrar. In these circumstances, I, therefore, also dismiss the third ground of appeal.

Disposal

15. The appeal is, therefore, dismissed.

Judgment approved by the court
Mr. Justice Marcus Smith

Lomo v. HMRC

Transcript from a recording by Ubiquis
291-299 Borough High Street, London SE1 1JG
Tel: 020 7269 0370
legal@ubiquis.com

This transcript has been approved by the judge.