

If this Transcript is to be reported or published, there is a requirement to ensure that no reporting restriction will be breached. This is particularly important in relation to any case involving a sexual offence, where the victim is guaranteed lifetime anonymity (Sexual Offences (Amendment) Act 1992), or where an order has been made in relation to a young person

This Transcript is Crown Copyright. It may not be reproduced in whole or in part other than in accordance with relevant licence or with the express consent of the Authority. All rights are reserved

IN THE HIGH COURT OF JUSTICE
BUSINESS & PROPERTY COURTS OF
ENGLAND AND WALES
APPEALS LIST (ChD)
[2021] EWHC 181 (Ch)



No. CH-2020-000011

Rolls Building
Fetter Lane
London, EC4A 1NL

Tuesday, 19 January 2021

Before:

HIS HONOUR JUDGE HODGE QC
(Sitting as a Judge of the High Court)

B E T W E E N :

KRISHAN KUMAR

Appellant

- and -

KEVIN HELLARD

Respondent

MR TIMOTHY BECKER (instructed on a Direct Access basis) appeared on behalf of the
Appellant.

THE RESPONDENT was neither present nor represented.

J U D G M E N T
(via Skype for Business)

JUDGE HODGE QC:

- 1 This is my extemporaneous judgment on the substantive hearing of an appeal by Mr Krishan Kumar, who is 82 years of age, against a bankruptcy order made against him in the County Court at Romford by District Judge Kemp on 19 December 2019. The respondent to this appeal is Mr Kevin Hellard, an insolvency practitioner, in his capacity as the liquidator of Highfield Distribution (UK) Ltd.
- 2 The bankruptcy order was founded upon a statutory demand dated 5 June 2019 which then led to the presentation of a petition against the appellant on 2 August 2019. The petition debt was said to be some £62,392.04 but the respondent/petitioner accepts that the amount of interest on the various judgment debts which formed the petition debt had been overstated and that the correct amount should be £60,160.06.
- 3 The petition had first come on for hearing before District Judge Oldham on 17 October 2019 when it was adjourned to 19 December 2019. One of the peculiarities of the case is that, at the time this petition was presented, there was a pending petition by the Legal Services Commission which had been presented on 2 August 2018. The existence of that petition was unknown, both to the petitioner and to the district judge, because that petition had been presented against Krishnan Kumar and a search against the name of Krishan Kumar had therefore failed to disclose the existence of that petition. That is of potential significance because two of the judgments on which the present petition is founded post-date the presentation of that earlier petition. However, even if one discounts the petition debt in the present petition by the amounts of those two judgments, some £23,000, that still leaves a balance well in excess of the present bankruptcy limit of £5,000.
- 4 Although the district judge's bankruptcy order might not have been made had he known of the existence of the earlier petition, it seems to me that that does not affect the position on this appeal. The district judge did not know of the earlier petition and it therefore cannot be said that he was wrong to make the bankruptcy order, notwithstanding the existence of that earlier petition. It may be that any bankruptcy order founded upon the later petition might be liable to be annulled under s. 282(1)(a), or reviewed and set aside under s. 375, of the Insolvency Act 1986; but it seems to me that it is not a matter that falls within the purview of an appeal from the district judge's decision because there was no error on his part, on the material before him, in making a bankruptcy order, even though there was an earlier, and extant, bankruptcy petition.
- 5 Although not identified in terms in the appellant's grounds of appeal, which were prepared by the appellant in person (where it is simply said that the order ought not to have been made in the absence, at the hearing, of Mr Kumar), the real basis for this appeal, as identified by Mr Timothy Becker (of counsel), who appears for the appellant, is that, on the material before the district judge, a real question had been raised as to the appellant's litigation capacity. I am satisfied that the appeal should be allowed on that basis.
- 6 Before the district judge, there was a letter (unsigned) purporting to come from the appellant, although possibly written by his daughter (who holds a Lasting Power of Attorney for her father) dated 15 December 2019. That letter stated that the appellant was currently suffering from Alzheimer's disease. The letter indicated that there was a further consultant's appointment on 6 January 2020. The writer referred to the appellant's poor state of health and said that, as a result, he would be unable to attend court. The letter asked the court to adjourn the hearing fixed for 19 December to the first available date after 1 February, which

should give ample time for the appellant's consultant to advise, as necessary, in writing after his next consultant's appointment on 6 January. That letter was accompanied by a number of documents. There was a letter indicating that the appellant had been due to have a meeting with his consultant on Friday 11 October 2019. There was the report of the assessment on that day, apparently from a trainee doctor, Dr Gerard, which confirmed to the patient and his family that Mr Kumar had Alzheimer's disease. That letter was dated 6 November 2019.

- 7 There was also a letter, apparently from the appellant's general practitioner, Dr Faye Dannhauser, dated 18 October 2019, recording that the writer was in receipt of Mr Kumar's full medical record, that he had been seen in a memory clinic in 2016, and that he had been diagnosed with dementia in November 2016. It stated in terms that he had lacked capacity at that time to attend court and lacked the ability to retain information. It said that he had been referred again to the memory clinic. The writer did not anticipate that his condition would have improved since 2016. There was also a statement of unfitness for work for a period of six months from 18 October 2019. All of that evidence raised serious questions as to the appellant's litigation capacity. That letter to the county court was dated 15 December. It was apparently referred not only to the court but also to the solicitors acting for the petitioning creditor, Blake Morgan. They wrote to the court on 17 December in response to the appellant's letter to the court of the 15th in which he had requested an adjournment on medical grounds. Blake Morgan made it clear that they did not agree to the adjournment for the following reasons: (1) there was no clear evidence currently before the court that Mr Kumar will be unable to attend; (2) the letter is unsigned; (3) the letter is not a formal application for an adjournment; and (4) the solicitors submitted that the matter should be addressed, if at all, at the hearing given its proximity and the time Mr Kumar had had to raise the point before then, as was clear from the dates on the letters he had provided.
- 8 The court has before it a transcript of the hearing before the district judge; it extends to only two pages. The district judge indicated that he received the letter from Blake Morgan expressing concern about the appellant's letter. The district judge said that it was not so much the letter from the appellant that was a concern, but the enclosures with it, and in particular the letter which appeared to be signed by Dr Dannhauser. The district judge then said, questioning whether the appellant had capacity: "I do not know if you have got any instructions on what is said there or generally on those communications?" Counsel then appearing for the petitioning creditor, Mr Shepherd, responded: "Yes, sir, well, the liquidator opposes the application for an adjournment which is what the letter amounts to, and if I may begin with some aspects of this ... adjournment application..." He then went on to address the nature of the evidence and said that it was not completely clear from that evidence that the appellant was incapable of attending court or of standing in opposition to the petitioner's application. The evidence suggested that further investigations need to be done. He then went on to address the nature of the substantive application which he said was relevant because it was not a formal trial in which there would be any need for evidence to be given or for cross-examination. It was said that the appellant's illness was not strictly relevant to the formal application and, on one level, there was no need for him to be present.
- 9 The transcript then goes on to make it clear that the district judge made the bankruptcy order because the debt remained outstanding and that that was considered sufficient to warrant the making of a bankruptcy order. There is no indication that the petitioning creditor's representative, or the district judge, returned again to the issue of the appellant's litigation capacity or lack thereof.
- 10 Since the hearing, the appellant has attended his consultant for the further consultation in January of last year. There is before the court a further letter of 8 January 2020 from Mr Tim

Stevens, a consultant in Old-Age Psychiatry. He states that Mr Kumar is an 81-year-old whom he assessed in his clinic on 6 January 2020. It was Dr Stevens's first contact with him, but he had previously been assessed in detail by a colleague of Dr Stevens on 11 October. Mr Kumar was said to have a diagnosis of dementia in Alzheimer's disease with cerebrovascular disease. The evidence for that was said to be his history of progressive cognitive decline over approximately eight years as well as his performance on cognitive testing, which showed global impairment in multiple domains, namely: attention, memory, fluency, language and visuo-spatial ability. Brain imaging in the form of a CT head scan carried out in March 2019 had shown mild to moderate global cortical atrophy, with moderate volume loss in the hippocampi, as well as white matter ischemic changes indicative of cerebrovascular disease. The dementia was said to be of moderate degree. The appellant lived with his daughter and her family and was well cared for, but he was unable to leave the home on his own because of disorientation and anxiety. His condition was of such a nature that further decline in his cognitive abilities was inevitable. The letter concluded:

“In my opinion, Mr Kumar's impairment in short-term memory and fluency make it highly unlikely that he would be able to participate in Court proceedings in any meaningful way, and that the anxiety such proceedings would trigger would be highly detrimental to his mental health.”

- 11 That evidence was, of course, not before the district judge because it did not exist at the time of the hearing before the district judge; it only came into existence as a result of the later consultation. It therefore could not have been put before the district judge, although the appellant had sought an adjournment to enable it to be put before the court following his forthcoming consultation. It is confirmative of the evidence of lack of litigation capacity that was before the district judge on 19 December.
- 12 The bankruptcy order having been made on 19 December 2019, an appellant's notice was filed on 9 January 2020. It was referred to Marcus Smith J on 3 March 2020. Marcus Smith J gave permission to appeal. His reasons are as follows:

“(1) The intended appellant is a litigant in person who wrote to the court prior to the hearing seeking an adjournment on the grounds of ill health. That adjournment was refused by the district judge, who then proceeded to hear the bankruptcy application and to adjudge the intended appellant bankrupt.

(2) That is a case management decision with which this court would not ordinarily interfere. However, it is clear from the documents in the court file, and from the transcript of the hearing before the district judge, that the intended appellant's ill health went to his capacity. Whilst it is not clear from the transcript precisely what material was before the district judge, it is evident that the intended appellant suffers from a form of dementia involving Alzheimer's disease and is, or potentially is, a protected party within the meaning of CPR 21.

(3) In these circumstances, the district judge should have made a determination as to the intended appellant's capacity and status. The district judge did not do so but rather permitted the application to proceed because the hearing was not a formal trial involving cross-examination and there was no formal need for the intended appellant to be present.

(4) CPR 21.3(3), which applies in insolvency proceedings by virtue of r. 12.1 of the Insolvency Rules 2016, prevents any party from taking any step in the proceedings without the permission of the court until the protected party has a litigation friend. I do not consider that the district judge gave permission to proceed under CPR 21.3(3) or, if he did, he gave permission without properly considering the question of capacity.

(5) In these circumstances, there is a real prospect that the order will be set aside on appeal and permission to appeal must be given.

(6) CPR 21.3(4) provides that any step taken before a protected party has a litigation friend has no effect unless the court orders otherwise. In all the circumstances, given this provision, it is appropriate that any steps to be taken after service of this order on the Official Receiver pursuant to the order be stayed.

(7) I appreciate that capacity is not one of the grounds for appeal put forward by the intended appellant. Given the provisions of CPR 21, this is a matter where it is appropriate that the court acts of its own motion.”

- 13 Mr Becker, who now appears for the appellant, seeks permission - which I give - to amend the grounds of appeal to raise the issue of the appellant’s litigation capacity. I am entirely satisfied on the evidence that is before the appeal court that, on the evidence that was before him, the district judge should expressly have addressed the issue of the appellant’s litigation capacity. Had he done so, he would have formed the view that there was a need for a litigation friend and that no steps should be taken in the bankruptcy proceedings without the court’s permission until a litigation friend had been appointed.
- 14 I am satisfied that the bankruptcy order was wrongly made for that reason; and that it was also unjust because of a serious procedural error in the proceedings in failing to appoint a litigation friend. I am satisfied that the bankruptcy order must be set aside and the appeal allowed.
- 15 The question then is: What further steps should be taken? It seems to me, on the material before the court, appropriate for the court to appoint a litigation friend so that the present petition can proceed. The court has power to do so under CPR 21.6(1). Since the appellant’s daughter, Kusum Kumari, has a Lasting Power of Attorney for her father, she is the appropriate person to appoint. I therefore appoint her to act on this petition as the appellant’s litigation friend.
- 16 I have looked at the CE-file for the earlier, extant, bankruptcy petition which is now proceeding in the name of the Lord Chancellor (as the successor to the Legal Services Commission). That petition is proceeding under case number BR-2018-001194. It presently stands adjourned to 22 February 2021 at 10 a.m. for a non-attended pre-trial review. It seems to me the appropriate course is for the court to transfer this present bankruptcy petition from the County Court at Romford to the Business and Property Courts of England and Wales, Insolvency and Companies List (Ch), to come on for hearing on that day with the Lord Chancellor’s bankruptcy petition. It would appear that the appellant wishes to contest both petitions and it is therefore sensible for them to be case-managed, if not heard, together. I have already discussed the terms of an order with Mr Becker to give effect to all of this.

- 17 So far as costs are concerned, it seems to me the appropriate order for costs in the lower court, where the appellant did not of course attend, is simply that they be costs in the petition. So far as the Official Receiver's costs, if any, are concerned, since the bankruptcy order is being set aside, they must be borne by the petitioning creditor. The petitioning creditor was aware of the issue of litigation capacity, yet he (through his counsel) simply brushed over it at the hearing before the district judge. In those circumstances, it is appropriate that the petitioning creditor should bear any costs of the Official Receiver.
- 18 So far as the costs of this appeal are concerned, Mr Becker has produced a separate skeleton argument dedicated to the issue of costs. He has referred me to exchanges of emails in which the respondent had been invited to consent to the appeal being allowed. The respondent's response was that he had already notified the court that he would not attend the appeal hearing and would not be making any submissions; but: "That does not mean that we consent to the appeal." It is clear that the appeal was brought about because of the petitioning creditor's approach at the hearing before the district judge in, effectively, not entertaining the district judge's express concern about lack of capacity. The issue was treated as one of simple non-attendance at the hearing on the part of the debtor, rather than a question as to his litigation capacity. Had the issue of litigation capacity been addressed, no bankruptcy order would have been made, at least without addressing that issue, and the need for this appeal would not have been there. In those circumstances, it is appropriate that the respondent should pay the appellant's costs of the appeal.
- 19 I have received a statement of those costs. There is the court fee of £255 and the administrative costs of preparing the bundles for this appeal. That was done by Kusum Kumari pursuant to her Lasting Power of Attorney. She seeks 20 hours at the litigant in person rate of £19 an hour, totalling £380. In addition, there are Mr Becker's fees of £1,000 for the skeleton argument and £2,250 for attending this hearing. On top of that, there is VAT at £650, making £3,900 in all.
- 20 I am satisfied that those fees are all reasonable and proportionate and I will therefore summarily assess the costs payable by the respondent in the total sum of £4,535, which includes the court fees of £255 and VAT of £650.
- 21 That concludes this extempore judgment.
-

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

*Transcribed by Opus 2 International Limited
Official Court Reporters and Audio Transcribers
5 New Street Square, London, EC4A 3BF
Tel: 020 7831 5627 Fax: 020 7831 7737
civil@opus2.digital*

This transcript has been approved by the Judge