



Neutral Citation Number [2023] EWHC 593 (Ch)

BR 2020 000102

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (ChD)
IN THE MATTER OF MOHAMMED KAMAL AHMED
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

Royal Courts of Justice
7 The Rolls Building
Fetter Lane
London
EC4A 1NL
Date: 21/03/2023

Before :

ICC JUDGE BARBER

Between :

MOHAMMED KAMAL AHMED

Applicant

- and -

(1) ELIAS HUSSAIN
(2) CHRISTOPHER WILLIAM PARKMAN
(AS TRUSTEE IN BANKRUPTCY OF
MOHAMMED KAMAL AHMED)

Respondents

Chelsea Sparks (instructed by Proximo Legal Services) for the Applicant (on the adjournment application only)

Mark Jones (instructed by Cartwright Cunningham Haselgrove & Co) for the First Respondent

Daniel Judd (instructed by Isadore Goldman Limited) for the Second Respondent

Hearing date: 24 February 2023

Approved Judgment

This judgment was handed down remotely by email. It will also be sent to The National Archives for publication. The date and time for hand-down is 9.30 a.m. on 21 March 2023.

Approved Judgment**ICC Judge Barber**

1. On 24 February 2023, having declined to adjourn the same, I dismissed the Applicant's application to rescind a bankruptcy order made against him on 24 May 2021. This judgment sets out my reasons for these decisions.

Background

2. The bankruptcy order dated 24 May 2021 was made against the Applicant ('the Debtor') on the petition of the First Respondent ('the Petitioner') in the sum of £391,629.39 presented on 5 February 2020. The petition was based upon a statutory demand dated 23 August 2019. The statutory demand was based on a series of judgment debts.
3. The Debtor's application to set aside the statutory demand was dismissed on 10 December 2019. Personal service of the petition was effected on 26 February 2020.
4. The bankruptcy order was made at the sixth hearing of the petition. In very broad summary, the prior adjournments of the petition were principally for (i) anticipated sales of two properties pursuant to court order to take place (the two properties in question being 307 Katherine Road and 112 Strone Road, hereafter, 'Katherine' and 'Strone') (ii) security to be provided by the Debtor's brother, Dabir Ahmed ('DNA'), over his beneficial share in each of those properties, either to secure the entirety of the petition debt, or some lesser sum, and (iii) proposals to bridge any gap between the funds thus realised and the balance of the petition debt.
5. Over the months leading up to the final hearing, the parties had engaged in correspondence regarding the possibility of additional security being offered by the Debtor's brother, DNA, in respect of his own legal and beneficial interest in Katherine and Strone.
6. During the course of that correspondence, on 18 March 2021, the Petitioner's solicitor, Mr Nigel Smith, sent two partially completed CH1 forms to DNA. Each of the forms referred to securing the liabilities of the Debtor and DNA incurred in litigation comprising 4 case numbers, namely B10CL156, D01CL573, E02CL879 and OBO01696.
7. By email dated 9 April 2021 (sent at 13.38), DNA made a counter-offer of sorts, forwarding a letter to the Petitioner's solicitor, Mr Smith, seeking the removal of security held over other jointly owned property and enclosing a form of undertaking. The Petitioner however did not wish to give up any other security held.
8. Then on 9 April 2021 (at 16.16), DNA emailed two undated but signed forms of charge to Mr Smith. These charges had been modified from Mr Smith's original drafts in that, in box 9 of each, only two case numbers were referred to in respect of the proposed security. This posed a difficulty, in that the forms provided covered sums accruing in some but not all of the various actions in which orders for payment had been made against the Debtor. The petition debt is made up of liabilities accrued in proceedings under three separate case numbers, namely, OBO01696, B10CL156 and D01CL573. The charges executed by DNA and provided to Mr Smith on 9 April 2021 secured all sums due in respect of the last two case numbers, but not the first case number, thereby

Approved Judgment

omitting sums totalling £52,189.09. Additionally, the apparently linked demand for Mr Smith to take immediate steps to remove all other charges held by the Petitioner over property of the Debtor and DNA was not agreed. The parties were accordingly not in agreement as at 9 April 2021.

9. On 12 April 2021, the case was listed at 2pm for what was to be the penultimate hearing of the petition. The Debtor maintains that he sent two emails to Mr Smith prior to the 2pm hearing; one email was sent at 09.14, attaching a witness statement and another email was sent at 10.52, attaching four documents, each apparently being CH1 forms. The Debtor maintains that these four files comprised copies of both the undated CH1s sent by his brother on 9 April 2021 and two new CH1s which had been amended to include 12 April 2021 as the date and the additional case number, 0BO01696 ('the updated CH1s').
10. The Debtor also maintains that DNA sent copies of the updated CH1s to Mr Smith, by email on 12 April 2021 at 10.50.
11. Mr Smith's email account acknowledged receipt of an email sent at 10.50 by DNA and an email sent at 10.52 by the Debtor, which, on the face of it, strongly suggests that the emails (attaching the updated CH1s) were received at Mr Smith's firm. Mr Smith did not see the emails at the time, however, and can now find no record of those emails on his computer. The hearing bundle prepared by Mr Smith's firm for the bankruptcy hearing on 24 May 2021 accordingly did not contain copies of the two updated CH1s.

The Rescission Application

12. The application before the court is made under s375(1) Insolvency Act 1986, which provides:

'Every court having jurisdiction for the purposes of the Parts in this Group may review, rescind or vary any order made by it in the exercise of that jurisdiction'
13. This provision confers a discretionary power to review, rescind or vary a bankruptcy order if there are exceptional circumstances justifying the exercise of such discretion and/or if there is a material difference to the position as it was known to the court when the order was originally made. When considering an application to rescind a bankruptcy order, the court is free to consider any new material that was not considered at the time the bankruptcy order was made.

Grounds

14. The grounds of the application, as set out in the application notice, are that:

'On 24.05.21, at the time of the Bankruptcy Order, the Petitioner was offered and had security and did not make the Insolvency Court aware of the security and instead concealed the security from the Court'.
15. In short, the Debtor maintains that the court was misled by Mr Smith and by the Petitioner's counsel, Mr Jones, at the final hearing of the petition on 24 May 2021 as to the existence and/or extent of the security purportedly offered by DNA, as the court was not taken to the updated CH1s.

Approved Judgment

16. On the evidence before me, it is clear that the court was neither deliberately misled, nor materially misled, at the hearing on 24 May 2021.
17. On the evidence before me, it is clear that Mr Smith's failure to include the updated CH1s in the hearing bundle for the hearing on 24 May 2021 was an entirely innocent error. Put simply, he did not spot them in his inbox and so did not include them in the bundle or copy them to counsel. It is also clear from the evidence that although the Petitioner's counsel, Mr Jones, had not seen the updated CH1s in the run-up to the hearing on 24 May 2021, in his skeleton argument he specifically referred to the assertion of their existence and to their potential effect. The suggestion that Mr Jones deliberately misled the court in any way is entirely unfounded.
18. On the evidence before me I am satisfied that the foregoing innocent errors did not materially affect the outcome of the hearing of 24 May 2021. I reach this conclusion for the following reasons.
19. On 12 May 2021, shortly ahead of the final hearing of the petition on 24 May 2021, the sales of Katherine and Strone had completed. From the completion statements, the net sale proceeds were as follows:
- | | |
|---------------|-------------|
| (1) Strone | £163,064.51 |
| (2) Katherine | £177,089.99 |
| Total: | £340,154.50 |
20. As a matter of basic arithmetic, even if the entirety of the equity so released was applied against the petition debt, there would still be a shortfall of £51,474.89 (ie £391,629.39-£340,154.50).
21. The Debtor's 50% beneficial share of those funds amounted to £170,077.25; a shortfall as against the petition debt of £221,552.14.
22. Whilst the updated CH1s were, in error, not included in the hearing bundle for the hearing on 24 May 2021, Counsel's skeleton argument for that hearing nonetheless expressly addressed, not only what the shortfall was (applying only the Debtor's 50%, £221,552.14), but also, what the shortfall would be even if 100% of the net proceeds of Strone and Katherine (ie both the Debtor's and DNA's share) was applied in reduction of the petition debt (£51,474.89).
23. From the transcript of the hearing on 24 May 2021, this was also explored in exchanges between the judge and counsel.
24. Moreover, it is clear from the transcript that the Debtor himself raised the issue of the updated CH1s at the hearing of 24 May 2021 (albeit referring to them mistakenly as TR1s) and went on to concede that there remained a shortfall of £51,000 odd between the security realisable and the petition debt. He asked for a further adjournment, but his request was refused on the basis that he had been granted numerous adjournments already.
25. The Debtor also contends that, at the time of the hearing of 24 May 2021, the Petitioner held additional security, in the form of charging orders, over other properties jointly

Approved Judgment

owned by the Debtor and his brother. This is correct, but the total sum secured by the charging orders across all such properties, including Strone and Katherine, was £340,301.30, which fell short of the petition debt by some £51,328.09, for which the Petitioner held no security. The charging orders in each case were based upon identical liabilities and the Petitioner was not entitled to double recovery.

26. It followed that, having realised his security against the Debtor's equitable interest in Strone and Katherine, the Petitioner's ability to seek further sums as against the additional properties was constrained to the balance of the total sums secured (£340,301.30) less £170,077.25 (Debtor's 50%), bringing the total sum remaining secured under the charging orders down to £170,224.05. This is substantially less than the shortfall of £221,552.14. Moreover, even if one assumed security over the entirety of the equity in Katherine and Strone, rather than 50%, there was still a shortfall of £51,474.89.
27. In short, on any footing, as at 24 May 2021, there remained a shortfall of at least £51,474.89, a sum significantly in excess of the bankruptcy minimum. The debtor having already been granted numerous adjournments, it is entirely unsurprising that at the sixth hearing of the petition, a further adjournment application was refused and a bankruptcy order granted.
28. In the event, following the making of the bankruptcy order on 24 May 2021, DNA demanded that 50% of the sale proceeds of Strone and Katherine be remitted to him, which sums were ultimately paid over to him on or about 19 July 2021. It is apparent from DNA's demand for these sums to be paid to him that he did not consider himself bound by whatever security he had purportedly offered prior to the final hearing of the petition.

Conclusion

29. On the evidence before me, there are no exceptional circumstances justifying the exercise of the court's discretion under s.375 to rescind the bankruptcy order. In my judgment, the rescission application should be dismissed as totally without merit.
30. For the sake of completeness, I would add that, at the outset of the hearing before me, the Debtor sought by Counsel an adjournment of the rescission application with a view to obtaining the transcript of the judgment delivered by Deputy ICC Judge Frith when dismissing an earlier annulment application based on similar grounds. I declined the request for an adjournment. In my judgment no good purpose would be served by awaiting the transcript of Deputy ICC Judge Frith's judgment. For reasons previously explored, the rescission application is on any footing totally without merit. It should be dismissed at the first opportunity. Adjourning the application would simply take up more court time and run up more expense for no good purpose.
31. For all these reasons, I have rejected the application for an adjournment and have dismissed the rescission application as totally without merit.

ICC Judge Barber