

[2022] EWHC 2553 (Ch)



Claim No: HC-2015-002321

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

BETWEEN:

LITTLE MIRACLES LIMITED

Claimant

-and-

- (1) JONATHAN NICHOLAS OLIVER
- (2) FERMAIN PROPERTIES LIMITED
- (3) LOUISE JANE OLIVER

Defendants

Robin Howard (Direct Access counsel) for the Claimant
Jon Colclough (instructed by Wannops LLP) for the First Defendant
Hearing dates: 29 September and 14 October 2022

JUDGMENT

This Judgment was handed down remotely at 2.15pm on 14 October 2022 by circulation to the parties or their representatives by email and by release to The National Archives.

Deputy Master Nurse

Introduction

1. This is my Judgment following a hearing by MS Teams on 29 September 2022. The issue is whether I should make a Final Charging Order against the First Defendant's interest in 97A Catherington Lane, Waterlooville, Hampshire ('the Property'), and, if so, to decide the amount that would be secured by the Charging Order.
2. The Property is jointly owned by Mr Oliver and his wife, Louise Jane Oliver (the Third Defendant), who is currently also the Defendant in a Claim (PT-2022-000640) for an Order for Sale of the Property, which was issued by the Claimant following a Final Charging Order being made against her beneficial interest in the Property. That Claim has been transferred to the Portsmouth County Court.
3. There are three Applications with which this Judgment is concerned:
 - (1) The final hearing of the Claimant's Application, dated 11 August 2022, for a Charging Order, pursuant to which an Interim Charging Order was granted by Deputy Master Collaco Moraes on 17 August 2022; and
 - (2) Mr Oliver's Application, by an Application Notice dated 1 September 2022, to set aside the Interim Charging Order; and
 - (3) Mr Oliver's Application for:

"An order varying the Order of Chief Master Marsh dated 27 April 2016 as follows:

 - (1) *Delete paragraph 7.*
 - (2) *Vary paragraph 9, to delete the reference to the First Defendant."*

The relevance of the reference to the two paragraphs in the Order of Chief Master Marsh ('the April 2016 Order') is that the debt which the Claimant is now seeking to enforce is the consequence of the provisions in the April 2016 Order. In the Application Notice it is stated that:

"The Order is sought because the debts are provable in the Applicant's bankruptcy and cannot be the subject of enforcement action (as the Respondent is wrongly seeking to do)."

Background

4. Before referring to the arguments, it is necessary to explain more of the background, and, in particular, to set out a summary of the events and dates of primary relevance.

- (1) On 15 November 2012, the Claimant issued a Claim in the Portsmouth County Court against Mr Oliver and the Second Defendant, Fermain Properties Limited. The Particulars of Claim allege that there were one or more joint ventures between the parties going back to about 2004. Mr Oliver had been an employee of the Claimant in the early 1990s. By the date of the issue of the proceedings the relationship had broken down. It was alleged that Mr Oliver had acted unconscionably and in breach of his agreements with the Claimant. There are a number of alternative equitable causes of action alleged, such as, in particular, unjust enrichment and estoppel. The relief claimed included various Declarations about the ownership of properties, as well as damages.
- (2) Mrs Oliver was joined as the Third Defendant and served a Defence in October 2013.
- (3) On 29 May 2014 the Claim was settled on the terms of a 'Tomlin' Order, the Schedule to which was a document dated 5 May 2014 headed 'Deed of Settlement'.
- (4) On 10 October 2014 Mr Oliver was adjudged bankrupt ('the 2014 Bankruptcy') in the Portsmouth County Court.
- (5) On 21 October 2014 the Claimant issued an Application in the Portsmouth County Court seeking to enforce the terms of the Deed of Settlement ('the Enforcement Application').
- (6) Mr Oliver sent an email to the Portsmouth County Court stating that he had been made bankrupt and that he had been informed that all Civil Court Cases '*now end as I can't transfer sale any asset as it would be unlawful for me to do so*'.
- (7) On 25 April 2015, following a hearing attended by counsel for the Claimant and counsel for Mr Oliver's Trustee in Bankruptcy, District Judge Cawood ordered that the Claim be transferred to the High Court Chancery Division, where it was given the number HC-2015-000231.
- (8) I was told that in October 2015 Mr Oliver was discharged from his 2014 Bankruptcy (I assume this was an automatic discharge, one year after the Bankruptcy Order, pursuant to section 279(1) of the Insolvency Act 1986, as amended ('the IA 1986')).

- (9) Following various directions, the Enforcement Application was listed for a final Directions hearing before Chief Master Marsh on 13 January 2016. His Order on that occasion included permission to the Claimant to file and serve an amended Application Notice to include any claim for compensation and/or damages. Mr Oliver's Joint Trustees in Bankruptcy were joined as Fourth Defendants.
- (10) The final hearing of the Enforcement Application was fixed to be heard by Chief Master Marsh on 27 April 2016.
- (11) At the Hearing, the Claimant and the Trustees were represented by counsel, Mr and Mrs Oliver appeared in person, and the Second Defendant was represented by a Director of the Company, Mr Laurenson.
- (12) The Chief Master delivered his Judgment at the end of the day of the hearing. A transcript of the Judgment is on the Court file.
- (13) Following exchanges of emails with the Chief Master, the Order was sealed on 6 May 2016. The Order included:
- "7. The First Defendant do pay to the Claimant the sum of £18,285 by way of damages for breach of the Deed provided that the First Defendant do have liberty to apply to set aside or vary this order on the grounds that it is a claim provable in his bankruptcy.*
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- 9. The First and Third Defendants do pay 75% of the Claimant's costs of the Claim that proportion summarily assessed in the sum of £27,140 (£22,500 plus VAT and court fee of £140). There be no order for costs relating to the other parties to the claim."*
- (14) On 16 May 2016, the Claimant issued an application for a Charging Order against Mrs Oliver's beneficial interest in the Property in respect of the Order for payment of costs in paragraph 9 of the April 2016 Order.
- (15) On 18 May 2016 an Interim Charging Order was made by Deputy Master Lloyd against Mrs Oliver.
- (16) On 27 July 2016 a Final Charging Order was made by Deputy Master Pickering against Mrs Oliver charging her interest in the Property in the sum of £27,140 plus interest and £110 fixed costs.
- (17) On 12 August 2022, the Claimant issued an application for a Charging Order against Mr Oliver's beneficial interest in the Property in respect of both the damages ordered in paragraph 7 and the costs ordered in paragraph

9 of the April 2016 Order, being a total of £68,274.40 plus further interest and costs. The figure of £68,274.40 included £22,849.40 of interest, being calculated at the judgment rate of 8% from the date of the April 2016 Order.

(18) On 17 August 2022, Deputy Master Collaco-Moraes made an Interim Charging Order as sought. The return date then became 29 September 2022 before me.

5. It is notable that the Claimant, although it sought almost immediately to enforce the April 2016 Order for costs against Mrs Oliver, did not seek to enforce the April 2016 Order, both for damages and costs, against Mr Oliver by way of a Charging Order until more than six years after the April 2016 Order.

Discussion and Argument

6. I received Skeleton Arguments and oral submissions from counsel. Mr Howard represented the Claimant, and Mr Colclough represented Mr Oliver, and also Mrs Oliver. Counsel did not disagree in any significant way about the Law to be applied in this case. They did disagree fundamentally about how the Law should be applied.
7. Mr Howard's primary submission was that the debts in question, being those arising as a consequence of paragraphs 7 and 9 of the April 2016 Order, were not 'bankruptcy debts' and, alternatively so far as the paragraph 7 damages were concerned, it is now too late to argue otherwise. He further argued that the particular debts (or a substantial proportion of the debts) were liabilities that were incurred after Mr Oliver's 2014 Bankruptcy Order, and therefore were not bankruptcy debts.
8. On the other hand, Mr Colclough submitted that the debt now the subject of the Application for a Charging Order (and being the total of the two sums ordered in paragraphs 7 and 9 of the April 2016 Order) was a provable debt in Mr Oliver's 2014 Bankruptcy, so that Mr Oliver was released from that debt on the discharge of his bankruptcy.
9. The starting point is the definition of a 'bankruptcy debt'. Section 382 of the IA 1986 provides as follows:

“(1) “Bankruptcy debt”, in relation to a bankrupt, means (subject to the next subsection) any of the following—

(a) any debt or liability to which he is subject at the commencement of the bankruptcy,

(b) any debt or liability to which he may become subject after the commencement of the bankruptcy (including after his discharge from bankruptcy) by reason of any obligation incurred before the

commencement of the bankruptcy,

...

(3) For the purposes of references in this Group of Parts to a debt or liability, it is immaterial whether the debt or liability is present or future, whether it is certain or contingent or whether its amount is fixed or liquidated, or is capable of being ascertained by fixed rules or as a matter of opinion; and references in this Group of Parts to owing a debt are to be read accordingly.

(4) In this Group of Parts, except in so far as the context otherwise requires, "liability" means (subject to subsection (3) above) a liability to pay money or money's worth, including any liability under an enactment, any liability for breach of trust, any liability in contract, tort or bailment and any liability arising out of an obligation to make restitution."

10. Express provision is made in the Insolvency (England and Wales) Rules 1986 (in particular rule 14) for a creditor to prove in respect of a debt payable at a future time. Rule 12.3 (1) provides, subject to certain exceptions that are not relevant in the present case, that:

"in administration, winding up and bankruptcy, all claims by creditors are provable as debts against the company or, as the case may be, the bankrupt, whether they are present or future, certain or contingent, ascertained or sounding only in damages."

11. Mr Colclough referred me in particular to Lord Neuberger's speech in *Bloom v Pensions Regulator; sub nom. Re Nortel GmbH (In Administration); sub nom. Re Lehman Brothers International (Europe) (In Administration)* [2013] UKSC 52; [2013] 3 W.L.R. 504 ('the Nortel case'):

"88. In a number of cases, it has been held that, where an order for costs was made against a person after an insolvency process had been instituted against him, his liability for costs did not arise from an obligation which had arisen before issue of the bankruptcy proceedings, even though the costs order was made in proceedings which had been started before that insolvency process had begun

.....
89. In my view, by becoming a party to legal proceedings in this jurisdiction, a person is brought within a system governed by rules of court, which carry with them the potential for being rendered legally liable for costs, subject of course to

the discretion of the court. An order for costs made against a company in liquidation, made in proceedings begun before it went into liquidation, is therefore provable as a contingent liability under rule 13.12(1)(b), as the liability for those costs will have arisen by reason of the obligation which the company incurred when it became party to the proceedings.

90. I have little concern about overruling those earlier decisions, although they are long-standing..... Although most of the provisions of rule

13.12 and section 382 can be found in section 30(3), (4) and (8) of the Bankruptcy Act 1914, over the past three hundred years, “the legislature has progressively widened the definition of provable debts and narrowed the class of non-provable liabilities” to quote from the written case of Mr Phillips QC who relied on those cases.....

91. For the same reasons, I consider that the decisions of the Court of Appeal in *Glenister v Rowe* [2000] Ch 76 and *Steele* [2006] 1 WLR 2380 were wrongly decided, although I can see how it might be said that they were justified on the basis of *stare decisis*. The reasoning of Arden LJ in the latter case at paras 21-23 is instructive, because, as she says, the previous authorities in relation to provable debts suggested a “narrower meaning of contingent liability” than was adopted by the majority in *Sutherland*. That observation neatly illustrates why they were wrongly decided.

92. The Report of the Review Committee on Insolvency Law and Practice (“the Cork Report”, 1982, Cmnd 8558), para 1289, described it as a “basic principle of the law of insolvency” that “every debt or liability capable of being expressed in money terms should be eligible for proof” so that “the insolvency administration should deal comprehensively with, and in one way or another discharge, all such debts and liabilities”.

93. The notion that all possible liabilities within reason should be provable helps achieve equal justice to all creditors and potential creditors in any insolvency, and, in bankruptcy proceedings, helps ensure that the former bankrupt can in due course start afresh.”

12. This is consistent with the analysis of David Richards J in *Re T&N Limited* [2005] EWHC 2870 (Ch):

“[78] A succession of Bankruptcy Acts culminating in the Bankruptcy Act 1869 revolutionised the approach to provable claims. With a few exceptions, all claims were to be provable and it was no longer regarded as a sound basis for exclusion that the claim was difficult to quantify.

...

[82] Thus a wide range of contingent or unliquidated claims become provable, with a just estimate being made of the value of the claim. Proofs of debt were therefore admissible for unliquidated damages for breach of contract (*Re Sneezum, ex p Davis* (1876) 3 Ch D 463), for a contingent claim in respect of a repairing covenant in a lease (*Hardy v Fothergill*), for a contingent claim under a guarantee (*Wolmershausen v Gullick* [1893] 2 Ch 514), and for an annuity payable during joint lives and for so long as the recipient should lead a chaste life (*Ex p Neal, In re Batey* (1880) 14 Ch D 579). The provisions for valuing such claims for the purposes of proof are now contained in section 322 (3) and (4) (bankruptcy) and Rule 4.86 (winding-up)”

13. It is in my view clear that a bankruptcy debt means any debt or liability to which the bankrupt is subject at the date of the bankruptcy order; any interest payable on any such debt or liability in respect of any period ending on or before that date; and any

debt or liability to which the bankrupt may become subject thereafter, by reason of any obligation incurred before that date.

14. In the present case Mr Oliver's liability arose as a consequence of the obligation he had entered into prior to his 2014 Bankruptcy Order. The breach of that obligation resulted in an award of damages. It also resulted in a costs order against him which, as is stated in the *Nortel* case, was also provable in the 2014 Bankruptcy. The liability was:

".... A debt or liability to which he may become subject after the commencement of the bankruptcy (including after his discharge from bankruptcy) by reason of any obligation incurred before the commencement of the bankruptcy," and

"it is immaterial whether the debt or liability is present or future, whether it is certain or contingent or whether its amount is fixed or liquidated,....."

15. Accordingly, the contingent or unascertained liability was a provable debt in Mr Oliver's 2014 Bankruptcy and is not now a debt that can be enforced against him personally after his discharge from that bankruptcy.
16. However, I should consider whether there is anything in the April 2016 Order that should require me to reach a different conclusion.
17. I am concerned primarily with the terms and meaning of the April 2016 Order, but it is helpful to consider, so far as possible, the context in which that Order was made. At the Hearing, Mr and Mrs Oliver were in person, Philip Laurenson, a Director of Fermain Properties Ltd represented the Second Defendant, and the Claimant and Mr Oliver's Trustees in bankruptcy were represented by counsel, respectively Tahina Akther and Phillip Gale. The following paragraphs from the transcript of Chief Master Marsh's Judgment indicate both the arguments that were considered by him and the scope of the issues that he was deciding, so far as is relevant to the debt that is the subject of the current Charging Order Application.

"15. At today's hearing, I have had the benefit of a number of witness statements and I have received evidence from Mr Ramage and Mrs Oliver. However, for the most part, the issues which arise are not the subject of contested evidence."

"22. The claimant seeks in addition to an order for specific performance, damages or, put another way, compensation arising out of the events which have occurred. At the risk of stating the obvious, although the Deed of Settlement contemplated that completion would occur in about May 2014; it has not yet occurred..... The claimant's primary position is that it has suffered a

loss by virtue of not having obtained rental income for the two flats for the period from the beginning of June 2014 to the end of April 2016, which is a period of 23 months.

“ 23. Mr Ramage's evidence, which has not been challenged to any material degree, is that Flat 3 could have been let at a rental of £795 per month and that Flat 4 could have been let for a rental of £895 per month. That would lead to a loss of rental, on the claimant's case, of £18,285 in relation to Flat 3 and £20,585 in relation to Flat 4.

.....
“25. The more difficult question is, to the extent there is loss, who should pay for it. The agreement provided a contractual obligation relating to both Mr and Mrs Oliver to transfer their respective interests in Flats 3 and 4. By virtue of a failure to complete that transaction, loss has been occasioned to the claimant and it is common ground that the court has a power on making an order for specific performance to make, in addition, an award of damages or compensation. I have no difficulty concluding that in relation to Flat 3, there is a loss of £18,285 which is a loss arising from the first defendant's breach of the agreement and in relation to Flat 4, there is a loss of £20,585 arising from the third defendant's breach of the agreement.

“26. There is, so far as the first defendant is concerned, a difficulty in relation to his bankruptcy. However, it seems to me that is not a matter about which I either can or should make a determination today. As against the first defendant, I do not consider that I am able to direct a set-off but I will direct that judgment is entered for £18,285 with permission to apply if it is said that enforcement of that sum falls foul of bankruptcy provisions. I should add in parenthesis that Mr Oliver is now discharged from his bankruptcy.

.....
“36. Dealing with the costs of the claimant's application, the starting point, Ms Akter says, on behalf of the claimant, is that her client has been successful and the claimant should, therefore, recover its costs as against the first and third defendants and as against the trustees.

“38. So far as the first and third defendants are concerned, in principle, I consider that an order for costs should be made but the claimant has not been wholly successful and it is, I think, wrong in principle to visit the entire costs as against the first and third defendants in these circumstances. I am proposing to make an order, therefore, that they are jointly and severally liable for 75 per cent of the costs of the claim following the date the application was made.

“39. What I am going to do on this summary assessment, as is appropriate, take a fairly high level view. I have to resolve any doubts I may have in favour of the paying parties. Those doubts are relatively few. Broadly, I accept the schedule but what I am going to do is allow the schedule, that is 100 per cent level at £25,000, plus VAT, plus the court fee which is not vatable and the amount payable is 75 per cent of whatever that resulting sum is.”

18. It does not appear that Chief Master Marsh, although aware of Mr Oliver's bankruptcy, was invited to decide whether the liability that he was being asked to find

against Mr Oliver was a debt that was provable in the 2014 Bankruptcy. Indeed, he expressly recognises the *difficulty of enforcement* against Mr Oliver in paragraph 26 of the Judgment about which he states that he is *not* making any determination.

19. As for the joint costs order (paragraph 9 of the April 2016 Order) against Mr and Mrs Oliver, it appears that there was no argument about or consideration of the meaning and effect of the provisions of the IA 1986 so far as applicable to the costs of the Application to enforce the Deed of Settlement. It is clear, in my view, even without a consideration of the Judgment, that Chief Master Marsh did not decide that a costs Order against Mr Oliver was not a provable debt in the 2014 Bankruptcy. Indeed the Judgment, and the Order, are not concerned with *enforcement* even if the order can be said to be conclusive as to *liability*.
20. Mr Howard also argued that it was too late for Mr Oliver to apply to vary the order for damages in paragraph 7 of the April 2016 Order, and therefore the Order remains enforceable. I reject that argument for a number of reasons, any one of which is sufficient for present purposes:
 - (1) It is probably the case that, even without the ‘liberty to apply’ it would always have been the case that, if the Claimant attempted to enforce the Order, Mr Oliver was entitled to maintain that it was a provable debt in the 2014 Bankruptcy;
 - (2) There is no justification for imposing a time limit (certainly one that is shorter than the period during which the Claimant might be entitled to try to enforce the Order);
 - (3) The liberty to apply (in so far as relevant in the proceedings at all) was intended only to be permissive if and when the Claimant attempted to enforce the Order.
21. So far as the joint costs order is concerned, Mr Howard argued that Chief Master Marsh must have considered whether the 2014 Bankruptcy Order had any effect on the enforcement of the order against Mr Oliver and submitted that an unqualified order would be ‘entirely as would be expected’ in circumstances where the matter was heard after Mr Oliver had been discharged from bankruptcy. The answer to this is that, if the matter had been in issue, it is probable that the Chief Master might have felt similarly obliged to qualify the Order as in paragraph 7, but it was not necessary for him to do so because he was not dealing with enforcement of the costs liability. It is irrelevant whether, at the date of the hearing, Mr Oliver had been discharged from his bankruptcy. The question to be answered remained whether any costs order against him arising out of proceedings concerned with the enforcement of an

Agreement entered into prior to his 2014 Bankruptcy Order was the enforcement of a debt that was provable in that bankruptcy. The answer is clearly 'yes'. There can now be no further liability for breach of the Schedule to the Tomin Order and no further way of enforcing the terms of the April 2016 Order.

22. With the benefit of hindsight, what the Claimant should have done is prove the anticipated liability of Mr Oliver for both damages and costs in the 2014 Bankruptcy. That might have resulted in the running of time before Mr Oliver's discharge from bankruptcy being suspended. But the provable debt (whether estimated or as subsequently crystallised as a consequence of the April 2016 Order), would have been a provable debt, and indeed proved, in the 2014 Bankruptcy. The consequence would have been that the Claimant could only have received a dividend as a creditor in the 2014 Bankruptcy and, of fundamental importance for the purposes of the present application for a Charging Order, the debt could no longer be enforced against Mr Oliver.
23. Nothing in this Judgment is intended to, and does, affect the enforceability of the costs order in paragraph 9 of the April 2016 Order against Mrs Oliver.

Conclusion

24. Mr Colclough submitted, referring to what he described as the Claimant's insistence on making applications and, in particular, a statutory demand that is the subject of fresh proceedings (I have been told) in the Portsmouth County Court, that Mr Oliver has felt it necessary formally to apply for variation of the April 2016 Order. In my view that is not appropriate, although the reason in the Application Notice (namely that the debt was a provable debt in the 2014 Bankruptcy) is correct. I agree with Mr Colclough that Mr Oliver does not need to. Mr Colclough nevertheless submitted that some form of variation would make the position clear so that further attempts to enforce the April 2016 Order would be prevented. I am willing to make a Declaration in the Order to be made following this Judgment declaring that the Mr Oliver's liabilities as ordered in paragraphs 7 and 9 of the April 2016 Order were provable debts in his 2014 Bankruptcy from which he has been discharged. The precise form of words can await submissions from counsel.
25. The Claimant's application for a Final Charging Order is therefore dismissed. In so far as necessary, there should be an Order discontinuing the Interim Charging Order.

26. The final terms of the Order to be made, including the incidence and assessment of costs, can be the subject of argument, unless agreed, when this Judgment is formally handed down.

Deputy Master Nurse
14 October 2022