Neutral Citation Number: [2012 EWHC 3764 (Ch)

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19 October 2012

Before :

HIS HONOUR JUDGE PETER LANGAN QC
(Sitting as a High Court Judge)

- -

Between :

HEATING ELECTRICAL LIGHTING AND PIPING LTD (IN LIQUIDATION)	Claimant
- and -	
(1) ROSS **(2) LOWE** **(3) HUSSAIN** **(4) OFFICIAL RECEIVER**	Defendants

- -
- -

Adam Deacock (instructed by *Schofield Sweeney*) for the **Applicants**

Sarah Harrison (instructed by) for the second **Respondent**

The third **Respondent** appeared in person

- -

Judgment

HIS HONOUR JUDGE PETER LANGAN QC:

Introduction

1. There is before the court an application by the liquidator of a company for the repayment of certain sums paid to a director out of the funds of the company. The application is made under s 212 (dealing with misfeasance) and/or s 239 (dealing with preferences) of the Insolvency Act 1986 (the 1986 Act). The director has died and his estate is insolvent. The claim against his estate is for judgment for the appropriate sums, together with interest and costs. As will appear later, there is no dispute as to the facts which, but for the insolvency, would justify the order which is sought. The only question for determination is whether the entry of such a judgment is barred by s 285(3) of the 1986 Act. The greater part of the hearing has been focused on a claim by the liquidator for costs against two of the proving executor of the director's last will. They were joined in the action pursuant to CPR r 19.8 and, putting matters as simply as possible, they contend that they are not to be treated in the same manner as persons who have actively and unsuccessfully defended a claim. Their contention is that there should be no order as to costs.

Parties and representation

2. Alan Ross was a director of the first applicant, Heating Electrical and Lighting Ltd (the company). The company is in liquidation. The second applicant (Mr Wood) is the liquidator of the company. The applicants have been represented by Mr Deacock.

3. Mr Ross has died. His estate has been named as the first respondent.

4. The second and third respondents (Mr Lowe and Mr Hussain respectively) are two of the three executors of the will of Mr Ross. Mr Lowe has been represented by Ms Harrison. Mr Hussain has appeared in person.

5. After the grant of probate, an order was made that the estate of Mr Ross be administered in bankruptcy. After the making of an insolvency administration order, the Official Receiver acts as receiver and manager of the estate until such time as a trustee in bankruptcy is appointed. By an order made at the pre-trial review, the Official Receiver was joined as fourth respondent, but he did not appear at the hearing.

Narrative

6. There is little or no dispute as to the history.

7. The company started to trade on 5 January 2009. Mr Ross was the sole director and shareholder.

8. In the latter part of 2009 the company was faced with a substantial claim in the employment tribunal by a former employee, Richard Smith (Mr Smith). The hearing was fixed for 1 March 2010.

9. On 18 December 2009 the company paid £48,920 to a third party in connection with the purchase of a car by Mr Ross.

10. On 9 February 2010 five payments of £9,000 each (£45,000 in total) were paid by the company into the personal bank account of Mr Ross.

11. On 10 February 2010 one payment of £8,000 and three payments of £9,000 each (£35,000 in total) were paid in the same manner.

12. On 19 February 2010 Mr Ross, accompanied by Mr Lowe who was acting as his business adviser, met Mr Wood in a public house. Mr Ross told Mr Wood that he wanted to put the company into liquidation in order to defeat Mr Smith's claim. After the meeting the company ceased trading.

13. Thereafter Mr Ross formally resolved to put the company into liquidation. He was advised by Mr Wood. Mr Wood was at the time unaware of the payments which I mentioned a few moments ago. He was also unaware of the fact that Mr Ross was intent on continuing to carry on the existing business under the aegis of a new company. In due course the statutory meetings of members and creditors were held, and on 17 March 2010 the company went into creditors' voluntary liquidation with Mr Wood as liquidator.

14. Mr Wood very soon discovered the payments which are the subject of this litigation. He asked Mr Ross for an explanation. The first explanation given (on 11 April 2010) was that 'I had the need to show I had a free balance of £120,000 to purchase a property ... these sums were never used, my son obtained his own mortgage on the property'. Subsequently, Mr Ross's solicitors said (in a letter dated 22 October 2010) that the money not used for the son's purchase had been applied to discharging company debts.

15. On 22 October 2010, before anything was resolved between Mr Wood and Mr Ross, Mr Ross died. He left a will in which he named as executors Mr Lowe, Mr Hussain and a gentleman called Philip Moreland, who is the stepfather of Mr Ross's widow.[1]

16. Mr Wood took the view that he should attempt to recover the payments from the estate of Mr Ross, but that he should not do so without obtaining the sanction of the creditors. He therefore convened a creditors' meeting for 23 November 2011. Mr Lowe attended the meeting. He confirmed that he was an executor of Mr Ross's will, but refused to allow Mr Wood to have a copy. He opposed the sanctioning of proceedings against the estate, relying on three alleged claims against the company, one on behalf of the estate, another by way of subrogation to the judgment which Mr Smith had obtained in the employment tribunal, and the third on behalf of Mr Ross's new company. All three proofs were rejected by Mr Wood, with the result that Mr Lowe was unable to vote against the sanctioning of proceedings, and Mr Wood was given the authority which he had sought.

17. At this stage it is convenient to interrupt the narrative by referring to correspondence between Mr Lowe (or his solicitors) and Mr Wood (or his legal representatives). The correspondence is extensive and it is not necessary to do more than give a flavour of it. The attitude displayed by Mr Lowe was described by Ms Harrison as 'posturing'. The description, in my judgment, qualifies for a prize for forensic charity.

---

[1] Mr Moreland is not a party to the proceedings because, although Mr Wood and his solicitors knew that there was a third executor, they did not have his name at the requisite time.

18. As early as 21 December 2010 Mr Lowe wrote to Mr Wood, accusing Mr Wood of 'misfeasance and targeted malice', of having given advice to Mr Ross while 'consuming copious amounts of alcohol', of engaging solicitors who had a conflict of interest, and of being deliberately deceitful:

> 'I believe that you will continue to act unprofessionally in this matter because you are being influenced by outside people, to this end I believe that you will not allow votes where they should be allowed, as this will benefit your hidden agenda.
>
> You therefore should be aware I will fund to challenge any decision by your office to not allow any legitimate votes in this matter.'

19. In a letter dated 31 (presumably an error for 30 June 2011 or 1 July), Mr Lowe told Mr Wood's solicitors that he saw:

> 'little reason to enter into further dialogue with you as your conduct is indeed questionable and you are clearly intent on making mischief and being vexatious.'

20. In a letter of 5 December 2011, Mr Lowe told Mr Wood that:

> 'I have made it very clear to you, if you wish to issue proceedings against me personally then do so and stop talking about it, I do not intend to be drawn in further to your lawyers' folly, my counterclaim will be made for my cost[s] and damages as a result of any precipitous action.'

Mr Wood was acting unprofessionally and was 'a person of very low integrity'.

21. I have selected these letters for no better reason than that they were written at intervals of approximately 6 months. They are typical of the intervening correspondence, which discloses on the part of Mr Lowe a determination not to co-operate with Mr Wood as liquidator, and manifests an intention to resist such proper inquiries and claims as Mr Wood might feel bound to make in carrying out his duties. All this was advanced in a manner which I would characterise as abusive.

22. I return to the chronology.

23. Mr Lowe was the first to issue proceedings. On 14 December 2011 he issued an application in which he challenged the decisions of Mr Wood to reject his votes at the meeting of 23 November and to admit the votes of Mr Smith.

24. On 23 December 2011 the applicants issued their claim against the first three respondents. In addition to the substantive relief claimed, the applicants asked that Mr Lowe and Mr Hussain 'or such other person(s) as the Court may think fit' should be appointed pursuant to CPR r 19.8(2)(b)(ii) to represent the estate of Mr Ross.

25. On 31 January 2012 both applications came before District Judge Jordan, who stayed the proceedings for 3 months. It appears that the object of the stay was to enable Mr Lowe and Mr Hussain to obtain a grant of probate. They were represented by counsel at the hearing.

26. The applications came back before District Judge Jordan on 11 May 2012. Mr Lowe and Mr Hussain were again represented by counsel. Three separate orders were made.

27. First, in Mr Wood's application, the court appointed Mr Lowe and Mr Hussain to represent the estate of Mr Ross. Directions leading to trial were given. These included an order that Mr Lowe and Mr Hussain file evidence by 28 June 2012; an order for attendance of witnesses for cross-examination; and a provisional listing for a 2-day hearing in the week of 15 October 2012.

28. The second order was also made in Mr Wood's application and was to the effect that the court ratified the issue and continuance of the proceedings. The costs of seeking that order were 'costs in the substantive application subject to the court's discretion at the determination of the case'. That somewhat opaque phrase seems to me to be the equivalent of 'costs reserved'.

29. The third order was made in Mr Lowe's application. It was recited that, in view of the order last mentioned, the application was no longer pursued, and it was ordered that the costs of the application be reserved to the judge hearing the substantive application.

30. No evidence having been filed by Mr Lowe and Mr Hussain by 28 June 2012, the applicants sought an 'unless order' which was made on 17 July 2012. This gave Mr Lowe and Mr Hussain until 17 August 2012 to file evidence, failing which they would be debarred from adducing any evidence at the trial without the leave of the judge.

31. There was no compliance with the unless order. Mr Lowe did, however, on 31 August 2012 file a listing questionnaire. Mr Lowe was at this stage acting as a litigant in person. He stated that he and Mr Hussain could not comply with the directions as to evidence because their former solicitors were exercising a lien over their papers. Mr Lowe was, however, going to call five witnesses (including himself) at the trial. He provided a detailed trial timetable, which allowed for a 4-day hearing (including reading time and time for consideration of judgment).

32. By this stage Mr Lowe, Mr Hussain and Mr Moreland had concluded that the estate of Mr Ross was insolvent.[2] They were advised by the court that it was necessary to obtain a grant of probate as a prerequisite to an insolvency administration order. Accordingly, probate was obtained on 6 September 2012 and the order for administration in bankruptcy was made on 24 September 2012.

33. On 26 September 2012 the deputy Official Receiver wrote to the court indicating that the Official Receiver intended to admit the applicants' claim to proof in the sum of £166,120 for voting purposes (ignoring interest and costs). The figure of £166,120 is erroneous, and results from counting as cumulative two claims which were in fact advanced as alternatives (Ms Harrison fell into the same mistake). The figure should have been £128,920, which is the aggregate of the payments described earlier in this judgment. The Official Receiver's letter went on to say that he did

[2] Mr Wood is sceptical about the genuineness of the conclusion and believes that the alleged insolvency is some kind of ploy: but, for the purposes of this judgment, I assume that the conclusion was reached honestly and was correct.

> 'not propose to make any further representations regarding the claim of Mr Christopher Wood and leaves the court to make whatever order it considers appropriate particularly concerning the quantifiable amount of that claim, particularly in relation to costs and interest.'

34. At the pre-trial review on 28 September 2012, His Honour Judge Keyser QC gave permission to the applicants to continue the proceedings to trial and directed that the Official Receiver be joined as fourth respondent.

The claim against the estate

35. The evidence regarding the state of the company's affairs at the time of the impugned payments is overwhelming. There is no doubt that, at the time that these moneys were extracted from the company by Mr Ross, the company was insolvent. Ms Harrison did not attempt to argue to the contrary. On my reading of the evidence, Mr Ross acted in a thoroughly dishonest manner, fully intending to defeat the creditors of the company (principally, but not exclusively, Mr Smith), while retaining the core business for his own benefit. Whether on the footing of misfeasance, or preference, or both, an order for repayment must inevitably be made, subject only to determination of the point raised by Ms Harrison under s 285(3) of the 1986 Act.

36. The first question which I was asked to decide was the amount of interest which should attach to the principal sum of £128,920. Mr Deacock argued for a rate of 8% pa over a period from 10 February 2010 to trial. I accepted his submissions as to the period, but took the view that, having regard to interest rates over the past 2½ years, 8% was too high. I indicated that I would allow 6%, and that gives an interest figure of £20,728.50.

37. This leaves the only controversial issue arising in relation to the claim against the estate. By 285(3) of the 1986 Act:

> 'After the making of a bankruptcy order no person who is a creditor of the bankrupt in respect of a debt provable in the bankruptcy shall—
>
> > (a) have any remedy against the property or person of the bankrupt in respect of that debt, or
> >
> > (b) before the discharge of the bankrupt, commence any action or other legal proceedings against the bankrupt except with the leave of the court and on such terms as the court may require.'

Section 285 applies to the administration in bankruptcy of the estate of a deceased person: The Administration of Insolvent Estates of Deceased Persons Order 1986, Art 3(1) and Sch 1, Part II, para 33.

38. The respective contentions on s 285(3) of the 1986 Act are straightforward. Ms Harrison says that the entry of judgment against the estate of Mr Ross would breach the prohibition against a person having any remedy against a bankrupt. Mr Deacock says that, while s 285(3)(a) bars the enforcement of a judgment, it does not prevent the mere entry of a judgment. Both submissions were made by way of assertion rather than analysis. After reflecting on them, I have come to the conclusion that Mr Deacock's approach is to be preferred.

39. The key to the problem lies, in my judgment, in s 285(1) of the 1986 Act:

> 'At any time when proceedings on a bankruptcy petition are pending or an individual has been adjudged bankrupt the court may stay any action, execution or other legal process against the property or person of the debtor or, as the case may be, of the bankrupt.'

The corollary of this must be that if the power to stay is not exercised, the proceedings can continue to their normal conclusion. The object of s 285(3)(a) must, I think, be to prevent one creditor from getting his hands on part of the bankrupt's estate to the actual or potential detriment of the general body of creditors. Allowing proceedings to run their normal course up to (but not beyond) judgment does not undermine this object, and is consistent with s 285(1) which envisages that a claim already commenced against the bankrupt will, unless stayed, remain on foot against him.

40. There will accordingly be judgment against the estate for the amount claimed, with interest, and not merely some form of declaratory relief.

Costs against Mr Lowe and Mr Hussain

41. The submissions on both sides were extensive, but it is possible, without doing any injustice, to cut to the chase comparatively briefly.

42. Counsel began on common ground. They accept as accurately stating the law this passage from Williams, Mortimer and Sunnucks on *Executors, Administrators and Probate* (Sweet & Maxwell, 2008), at para 66-01:

> 'In hostile litigation with outsiders, whether brought by the representative as claimant or brought against him as defendant, the representative will be in the same position as any other litigant. The costs will be in the discretion of the court but the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party. The representative will be personally liable to the other party for any costs order made against them [sic], and their [sic] liability will not be limited to the assets of the estate even if his liability on the rest of the judgment debt is limited to the assets. The judge making such an order will not be concerned as to whether the representative will be entitled to be indemnified against that order out of the estate.'

43. The thrust of Ms Harrison's submissions is that, while these principles govern the generality of litigation between personal representatives and third parties, the present case falls outside them. Mr Lowe and Mr Hussain were made parties pursuant to CPR r 19.8(2):

> 'Where a defendant against whom a claim could have been brought has died and—
>
> (a) a grant of probate or administration has been made, the claim must be brought against the persons who are the personal representatives of the deceased;
>
> (b) a grant of probate or administration has not been made—
>
> (i) the claim must be made against "the estate of' the deceased; and

(ii) the claimant must apply to the court for an order appointing a person to represent the estate of the deceased in the claim.'

As she makes clear in her written submissions, Ms Harrison does not go so far as to say that an adverse costs order can never be made against a person who is joined to represent an estate under CPR r 19.8(2)(b)(ii). Whether such an order is made must depend on the circumstances and, in particular, whether such a person has remained quiescent or has actively defended the claim. The question is, to use the current legal jargon, fact-sensitive. Thus far I agree.

44. Ms Harrison goes on to say that the position of Mr Lowe (and by extension that of Mr Hussain) in this litigation is not analogous to that of an 'ordinary' defendant, whether such a defendant is sued as a representative or in his personal capacity. Mr Lowe's presence on the record is attributable to the requirement that the action be duly constituted, and he is thus a mere 'technical' rather than a 'real' defendant. Further, the fact that he is a party has not caused the claimants to adopt a different course, or to incur greater costs, than would have been followed or incurred if it had not been necessary to seek an order under CPR r 19.8(2)(b)(ii).

45. These are courageous submissions, but they are made in extremis. I reject them without hesitation. Mr Lowe presented himself from the first as a person who was going to resist any unravelling of the transactions which are under challenge in this application. Indeed, he himself was privy to the formulation of a scheme (the liquidation) which would defeat Mr Smith's claim in the employment tribunal. Shortly before the application was launched, he informed Mr Wood's solicitors that 'any precipitous action will be defended in the strongest of terms', that lawyers would be instructed, and that costs would be sought from Mr Wood on an indemnity basis (letter of 22 November 2011). Mr Lowe never resiled from that stance. He never evinced an intention to occupy a purely formal position in the proceedings. Indeed, the filing of the listing questionnaire demonstrated to the reader a continuing intention to contest the claim and to do so at greater length than had been envisaged in the directions for trial. Overall, as Mr Deacock accurately said in his submissions, Mr Lowe did everything in his power 'to delay, block, drag out or frustrate the claim'. For him now to ask to be treated as some kind of cipher is, in the light of this history, risible.

46. Nor is there anything of substance in the suggestion that costs have not been increased by the participation of Mr Lowe. He could at an early stage have said that he would abide by any order that the court might make: indeed, given his knowledge of Mr Ross's affairs, that would have been the only proper response. If Mr Lowe had adopted that attitude, the case could have been listed for a one hour disposal hearing. Instead, the claimants had to go down the road towards a full trial.

47. There will accordingly be an order for costs against Mr Lowe.

48. I have had some limited hesitation about making a similar order against Mr Hussain. Although his name appears in correspondence prior to the directions order of 11 May 2012, it is not clear to what extent he had by that date hitched his horse to Mr Lowe's chariot. Certainly, there is no evidence that he engaged in the kind of prevarication, much less abusive correspondence, which characterised Mr Lowe's conduct. Notwithstanding Mr Deacock's submissions to the contrary, I find myself unable to make a costs order against Mr Hussain in respect of the period prior to 11 May 2012, or in respect of the directions hearing on that date. Thereafter, one cannot differentiate his position from that of Mr Lowe. It was plain that Mr Lowe was going to carry the case to trial and, if Mr Hussain's attitude was different (there is nothing to suggest that it was), it was incumbent on him to make his position plain. He did not do so.

49. It follows that the order for costs against Mr Hussain will be restricted to the period after 11 May 2012.

50. I should record that Mr Deacock also made submissions as to the effect of correspondence regarding settlement and on s 51 of the Senior Courts Act 1981. In the event, I do not find it necessary to consider these further points.

Supplementary questions

51. Counsel were agreed that it was not convenient to argue at the hearing three further questions which, given my conclusion on the main issue, might or might not arise for decision. They also agreed that, if the questions did arise, I should express a provisional view in this judgment and that a party wishing to contest that view could do so at a subsequent telephone hearing. A fourth point was raised by Ms Harrison in submissions.

52. *Reserved costs*. This refers to the two orders for reserved costs made on 11 May 2011. They should, in my judgment, fall under the general order for costs in favour of the claimant. I simply cannot see what argument there could be to the contrary.

53. *Indemnity costs*. The applicants made a CPR Part 36 offer on 11 January 2012. This was to accept £69,900 inclusive of interest, but exclusive of costs to be paid on the standard basis. The offer was not accepted and has been bettered at trial. I see no reason for not attaching the normal consequence, which is that costs will be assessed on the indemnity basis from the expiration of 21 days after the offer was made.

54. *Interim payment*. The applicants have submitted a statement of costs amounting to £115,596.40. Ms Harrison observes that this looks high, and may contain a serious error (a fee of £15,000 being shown for a conference with counsel!). Starting from a base of £100,000, and scaling down matters in accordance with Ms Harrison's submissions, I propose to make the following orders for payment on account: £30,000 against Mr Lowe and Mr Hussain jointly and severally; £15,000 against Mr Lowe alone. The higher aggregate ordered against Mr Lowe reflects the longer period covered by the costs order made against him.

55. *Conditional fee agreement* (CFA). The applicants' solicitors have acted under a CFA, and Ms Harrison raised the possibility that the criterion for success in the CFA might not have been met. The solicitors did not have the CFA in court, and there was no reason why they should have done as they had no notice that the point was to be raised. The convenient course will be for a copy of the CFA to be supplied to those instructing Ms Harrison and, if examination discloses a point which she wishes to argue, a further hearing can be arranged. The matter would be of considerable importance to both sides, and probably not suitable for a telephone hearing.