Neutral citation number: [2020] EWHC 1601 (Ch)

Case No: CR-2019-MAN-000989

IN THE HIGH COURT OF JUSTICE
BUSINESS & PROPERTY COURTS
IN MANCHESTER
INSOLVENCY AND COMPANIES LIST (ChD)

Manchester Civil Justice Centre
1 Bridge Street West
Manchester
M60 9DJ

Date: 07/05/2020

Before:

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

- -

IN THE MATTER OF PAPERBACK COLLECTION & RECYCLING LTD (In liquidation)

AND IN THE MATTER OF THE INSOLVENCY ACT 1986

Between:

(1) CHRISTOPHER RATTAN
(2) LINDSEY COOPER

Applicants

- and -

NATURAL RESOURCES BODY FOR WALES

Respondent

- -
- -

Miss Lesley Anderson QC (instructed by **Taylors Solicitors**) for the **Applicants**
Mr. Justin Amos for the **Respondent**

- -

APPROVED JUDGMENT

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JUDGE HODGE QC:

1. This is my extemporary judgment on an application in the voluntary liquidation of Paperback Collection & Recycling Limited (Case No. CR-2019-MAN-000989). The application raises the apparently novel question of whether a fine imposed on a company by a criminal court is a provable debt in that company's winding-up. The same would apply if the company were in administration.

2. The Applicant is represented by Miss Lesley Anderson QC, instructed by Taylors Solicitors. She represents the joint voluntary liquidators who are the applicants, Mr Christopher Rattan and Lindsey Cooper. The Respondent to the application is a Welsh public body, the Natural Resources Body for Wales. That body is represented by Mr Justin Amos (of counsel).

3. The application is brought by way of a notice issued by the joint liquidators on 20th April 2020. The application notice seeks a direction pursuant to section 112 of the Insolvency Act 1986 that the liquidation funds representing the proceeds of sale of the company's assets, and subject to the claims of floating chargeholders, be distributed to those floating chargeholders.

4. The application is supported by the second witness statement of Mr. Rattan dated 15th April 2020. Reliance is also placed on the first witness statement of Mr. Rattan dated 30th September 2019 and the witness statement of Mr. Justin Edward Amos for the Respondent dated 21st October 2019. Those witness statements were made in support, and in response, respectively, to an application by the joint liquidators to stay a criminal prosecution that had been brought by the Respondent against the company in liquidation. That application came on for hearing before His Honour Judge Halliwell, sitting as a Judge of the High Court, in October of last year. In a reserved judgment, Judge Halliwell dismissed the application for a stay on the basis of want of jurisdiction in the court to order a stay of criminal proceedings at the instance of the defendant company's liquidators.

5. The application is brought under section 112(1) of the Insolvency Act which, so far as material, enables a liquidator to apply to the court to determine any question arising in the company's winding-up. By subsection (2), if satisfied that the determination of the question, or the required exercise of power, would be just and beneficial, the court may accede wholly or in part to the application on such terms and conditions as it thinks fit, or may make such other order on the application as it thinks just.

6. The need for the application arises out of criminal proceedings brought by the Respondent against the company by a summons dated 1st August 2019 and issued by the Caernarfon Magistrates Court. That summons was served on the company on 8th August 2019. On 24th April 2020, in the Crown Court at Mold, the company pleaded guilty to the relevant seven counts of the indictment by way of an agreed written basis of plea. That written basis of plea is at the very end of the hearing bundle. It made it clear that the liquidators themselves had committed no wrongdoing. The company had entered into creditors' voluntary liquidation on 25th June 2018, and the matters which were the subject of the seven offences had been committed by the company prior to its entry into creditors' voluntary liquidation and the consequent appointment of the liquidators. They had had no direct or personal knowledge of the company's affairs at the time during which the offences had been committed by the company. It was made

clear that no offences had been committed by the company since its entry into creditors' voluntary liquidation and the liquidators' appointment.

7. Sentencing of the company has been deferred until the resolution of the case against the two co-defendants, who were the company's directors. I understand that their trial is presently listed for three to four weeks beginning on 30th November 2020, although the present coronavirus pandemic may affect that trial date. The liquidators submit that, notwithstanding these pending criminal proceedings, the court should make the directions that the joint liquidators seek. They say that there is a strong case that, even if the Crown Court, on sentencing, were to impose any form of financial penalty, it would nevertheless not impact on the company's insolvent estate.

8. The application is not actively opposed by the Respondent, and it takes no objection to the grant of the relief sought. Indeed, in relation to the possibility of any fine, Mr. Amos points out that the Respondent, the prosecuting authority, really has no interest in the matter because it will not in any way benefit from the imposition of any fine, which is a matter for enforcement by, and for the benefit of, the Crown.

9. The factual background to the application is non-contentious and is as follows: Prior to its entry into creditors' voluntary liquidation the company had carried on the business of recycling from two commercial premises, one in Deeside and the other in Anglesey. Both sites were held by the company as lessee. The Respondent alleges that, at the date of liquidation, and prior thereto, substantial volumes of controlled waste were, and had been, stored at the company's premises. On 5th June 2018, and thus shortly before the entry into creditors' voluntary liquidation, the Respondent had served on the company a statutory notice pursuant to section 59 of the Environmental Protection Act 1990 in relation to the Anglesey site on the basis that the Respondent alleged that the waste had been deposited in contravention of section 33(1) of the 1990 Act and Regulation 12 of the Environmental Permitting Regulations 2016, and requiring it to be removed by 15th October 2018. No such notice has been served in relation to Deeside.

10. After the voluntary liquidators' appointment, they served notices, both in relation to Deeside and in relation to Anglesey, disclaiming, first, the leases and then the relevant waste, pursuant to section 178 of the Insolvency Act 1986. The effect of those notices is that from 27th September 2018, in respect of Anglesey, and 22nd November 2018, in respect of Deeside, the company has been released from any liability in respect of the waste, save to the limited extent provided by section 178, which provides that any person suffering loss or damage in consequence of the disclaimer is entitled to prove such loss in the liquidation.

11. The company had entered into various forms of security and, following their appointment, the liquidators have disposed of the company's assets. The estimated outcome, after providing for matters with priority to the floating charges, and costs and expenses, is that about £102,000 is available to be received by the floating chargeholders, but that s till leaves a deficiency in relation to floating charge creditors of some £438,000.

12. The liquidators' position is that, given the disclaimers, nothing which now happens in the criminal proceedings will impact on the insolvency estate so that the court should

now direct that the liquidators are entitled to distribute the company's remaining assets to the floating chargeholders.

13. In her skeleton argument, Miss Anderson comprehensively considers the position in relation to, first, restraint orders, secondly, confiscation orders, thirdly, fines and, fourthly, compensation orders. In relation to restraint orders, under Part 2 of the Proceeds of Crime Act 2002 (or POCA) Miss Anderson points to the fact that no application for a restraint order had been made against the company prior to its entry into voluntary liquidation. Had such an order been made prior to the date of the resolution for the company to be voluntarily wound up, the liquidator would have been prevented from taking any action against the property of the company subject to the restraint order, but that is not the position here; and Miss Anderson submits, in the court's view correctly, that the court can disregard the possible impact of any restraint order.

14. Turning to confiscation orders under Part 3 of POCA, Rule 14.2(2)(a)(iv) of the Insolvency Rules 2016 provides that any obligation arising under a confiscation order, or any other order made under Parts 2, 3 or 4 of POCA, is not provable as a debt against a company in any liquidation or bankruptcy. That is not disputed by the Respondent.

15. In accepting the guilty pleas lodged on behalf of the company by the liquidators, counsel on behalf of the Respondent prosecuting body had told the court that it was not intended to make any application under POCA given the company's status in liquidation and its financial position generally. For the moment I will pass over the position in relation to a fine.

16. So far as a compensation order is concerned, section 130(1)(a) of the Powers of Criminal Courts (Sentencing) Act 2000 provides that a court by or before which a person is convicted of an offence, instead of, or in addition to, dealing with him in any other way, may, on application or otherwise, make an order requiring him to pay compensation for, amongst other things, any loss or damage resulting from that offence, or any other offence which is taken into consideration by the court in determining sentence. Unlike a confiscation order or fine, which are punitive, a compensation order is, as its name suggests, compensatory in nature. Miss Anderson submits, by reference to Court of Appeal authority, that compensation orders are: (1) not normally suitable for complex cases, where the court should not embark on a detailed inquiry as to the extent of any injury, loss and damage, which is said to be better left to civil proceedings; and (2) not an order that should be made where the court is satisfied that the offender lacks the means to satisfy the order within a reasonable time so that there is no realistic possibility of compliance. Mr. Amos has pointed out that compensation orders are frequently asked for, and made, in cases of environmental waste prosecutions. However, he makes it clear that the Respondent prosecuting body has no intention of making any application for a compensation order against this company, no doubt bearing in mind its insolvent position.

17. So I am satisfied that there is no realistic prospect of any confiscation or compensation order being made when the Crown Court comes to consider sentencing the company.

18. That then leaves the position of a fine. Miss Anderson points to the fact that by Insolvency Rule 14.2(2)(c)(i), in bankruptcy a fine imposed for an offence is not provable in the debtor's bankruptcy. However, she makes the point that both the Insolvency Act and the Rules are silent as to the position in relation to the winding-up of a company. She refers to the note at page 1203 of the current (22nd) edition of *Sealy & Milman*, volume 1. There it is said:

> "Note that fines are now regarded as not provable in bankruptcy (reversing the former position as declared in *Re Pascoe* [1944] Ch. 310). The Cork Committee recommended that the law should be changed for all insolvency proceedings, but the legislators have done so only for bankruptcies."

Nevertheless, Miss Anderson points to other provisions in chapter 1 of Part 14 of the Insolvency Rules, relating to claims by and distributions to creditors in administration, winding-up and bankruptcy. Insolvency Rule 14.1 relates to the application and interpretation of that Part. Rule 14.1(3) provides that "debt", in relation to winding-up and administration, means (subject to the next paragraph) any of the following:

> (a) any debt or liability to which the company is subject at the relevant date;
>
> (b) any debt or liability to which the company may become subject after the relevant date by reason of any obligation incurred before that date;
>
> (c) any interest provable as mentioned in rule 14.23.

"Relevant date", for present purposes, means the date on which the company went into liquidation.

19. Insolvency Rule 14.1(6) provides that "liability" means, subject to an exception not material here, "a liability to pay money or money's worth, including any liability under an enactment, a liability for breach of trust, any liability in contract, tort or bailment, and any liability arising out of an obligation to make restitution". Insolvency Rule 14.1(5) makes it clear that, for the purposes of references 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.

20. Miss Anderson points out that in his witness statement made in opposition to the stay application, at paragraph 10 Mr. Amos indicated that the purpose of the criminal proceedings against the company was not to seek financial penalties or fines. He went on, at paragraphs 50 and 51, to deal with the approach to sentencing. He set out his understanding that if a criminal court ordered the company to pay a financial penalty and any ancillary order in respect of any offence or offences of which the company was convicted, it would not constitute a creditor's claim under the insolvency regime. That position was repeated in a letter from the Respondent dated 9th March 2020, where Mr. Amos stated that he did not take issue with the points the liquidators'

solicitors had made regarding the legal status in insolvency law of a fine imposed against a company in liquidation.

21. Given the foregoing analysis, Miss Anderson acknowledges that it is not entirely clear whether, on the present authorities, that is a correct view of the law; but she submits that, as a matter of principle, it is difficult to see how the liability to pay a fine imposed after the liquidation is a "debt" for these purposes. The better view, she submits, is that this is probably still not sufficient to create a debt or liability.

22. In this respect I disagree with Miss Anderson's submissions. In my view, it is clear, on the authority of *Re Pascoe*, that a fine **is** a debt provable in a company winding-up or administration, even though it is no longer provable in a personal bankruptcy. *Re Pascoe* was a decision of the Divisional Court in Bankruptcy, which at that time heard and determined appeals from decisions of the county court exercising insolvency jurisdiction. The case has a stellar cast list. It includes no less than one future Lord Chancellor and three future Lords of Appeal in Ordinary. The two judges of the Divisional Court were Morton J and Cohen J. Leading counsel for the trustee in bankruptcy, who was appealing from the decision of the Newcastle-upon-Tyne County Court was Mr. J.W. Morris KC, later Lord Morris of Borth-y-Gest. Leading counsel for the Crown, responding to the appeal, was Sir David Maxwell Fyfe KC, then Solicitor-General and later, as Viscount, and then the Earl of, Kilmuir, the Lord Chancellor. Morton J delivered the leading Judgment with which Cohen J agreed. The *ratio* of the decision was that that where a bankrupt had been convicted of bribery and ordered to pay a fine, the fine being a debt of record due to the Crown was a debt provable in the bankruptcy under the provisions of what was then section 30(3) of the Bankruptcy Act 1914. Morton J, with the agreement of Cohen J, made it clear that a fine was a bankruptcy debt. He also expressed the view, admittedly *obiter*, that if it were not a "debt", then it was a "liability", on the footing that the word "liability" seemed to him to be a very wide word. He thought that, if he had come to the conclusion that the fine was not a debt, he might have come to the conclusion that it was a liability.

23. It seems to me that a fine, even if imposed after the onset of insolvent liquidation, is a debt provable in that liquidation where it was triggered by offences committed prior to the entry into liquidation. That, it seems to me, is the clear effect of the decision in *Re Pascoe*. In that case, the fine pre-dated the making of the relevant bankruptcy order; but it seems to me that that does not matter. Where the criminal offence(s) which lead to the imposition of a fine by way of sentence are committed prior to the entry into liquidation, it seems to me that the fine is a contingent, or future, debt or liability. Thus, it seems to me that a fine **is** a debt provable in a company's administration or winding-up.

24. In the present case, however, the evidence is clear that there would, on any view, be a substantial deficiency as regards floating charge creditors. Any fine would be an unsecured debt in the winding-up; and, given the deficiency as regarding floating charge creditors, it seems to me that, as Miss Anderson submitted (although I have not accepted the first limb of the relevant part of her submission), on the facts of the present case any fine will not impact on the position of the company in winding-up. Although any fine would be a debt provable in the bankruptcy, because of the deficiency as regards floating charge creditors, I am satisfied that it will not impact on the insolvent estate.

25. For that reason, it seems to me to be appropriate to grant the relief sought by the liquidators, and to direct that the liquidation funds representing the proceeds of sale of the company's assets, and subject to the claims of the floating chargeholders, should be distributed to those floating chargeholders.

26. Since this judgment is potentially of wider implications in both company winding-up and company administration, I will direct that the liquidators should obtain a transcript of this judgment as part of the costs of this application, which will be costs in the liquidation.

This Judgment has been approved by the Judge.