



Neutral Citation Number: [2020] EWHC 3360 (Ch)

Case No: CR-2018-011062

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

IN THE MATTER OF CARE COMMUNITY LIMITED
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

Royal Courts of Justice
The Rolls Building
London, EC4A 1NL

Date: 04/12/2020

Before :

INSOLVENCY AND COMPANIES COURT JUDGE BURTON

Between :

**ISOBEL SUSAN BRETT AS LIQUIDATOR OF
CARE COMMUNITY LIMITED**

Applicant

- and -

**MR MOHAMED HUSSEIN ADAM (1)
MRS SAIMA ADAM (2)**

Respondents

Darragh Connell (instructed by **Howes Percival**) for the **Applicant**
The First Respondent appeared in person. The Second Respondent provided medical evidence to explain her non-attendance and a written request, which was accepted by the Judge, for the First Respondent to represent her.

Hearing dates: 17, 18, 19 & 23 November 2020

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

COVID-19: This judgment was handed down remotely by circulation to the parties' representatives by email. It will also be released for publication on BAILII and other websites. The date and time for hand-down is deemed to be 4.00pm on 7 December 2020

.....

Insolvency and Companies Court Judge Burton :

1. By application notice dated 18 December 2018, Isobel Brett, the liquidator of Care Community Limited, commenced proceedings against the Respondents. She sought orders in respect of their alleged breaches of fiduciary and statutory duties and alleged transactions at an undervalue under sections 238 and 423 of the Insolvency Act 1986. The claims against the First Respondent were on the basis that, according to the Liquidator, he was a *de facto* director of the Company from its incorporation until its liquidation. The claims against the Second Respondent were for the periods when she was appointed as a *de jure* director of the Company.
2. On 23 November 2020 I gave judgment for the Liquidator, holding that the First and Second Respondents be jointly and severally liable to pay the Liquidator £804,530.64 (“Judgment Debt”). This sum represented unexplained transfers from the Company’s account to the First Respondent’s personal bank account. I further held that the order should not be enforced to the extent that it exceeds the value of the “Shortfall” in the liquidation. The term “Shortfall”, I explained, referred to the amount necessary to meet the Liquidator’s costs and expenses and the total value of Third Party Creditor claims which she admits to proof. The term “Third Party Creditors” refers to the claims of creditors other than those of the First and Second Respondents and their family members, there being an unhelpful circularity in requiring the Respondents to pay sums that they claim on their own behalf and on behalf of their adult children in their capacity as creditors of the Company.
3. Counsel was not immediately in a position to provide a figure in respect of the Shortfall and submitted that once it had been quantified, the Liquidator would wish to apply for an interim payment on account of the Judgment Debt. I gave directions for the parties to make written submissions regarding the appropriate form of order, to include my decisions in respect of costs: namely for the Respondents to be jointly and severally liable to pay the Liquidator’s costs, subject to a 5% reduction in respect of the Liquidator’s unsuccessful claim under section 423, assessed on an indemnity basis from 26 November 2019 and subject to detailed assessment if not agreed. I included provision for a payment on account of £68,000.
4. On 24 November 2020, Mr Connell provided the Applicant’s written submissions, including a schedule of creditors’ claims, the Liquidators’ incurred and anticipated time charges and expenses (“Schedule”) and a draft order. The First Respondent filed written submissions on 26 November 2020. Written submissions have not been received from or on behalf of the Second Respondent.
5. The Liquidator’s Schedule is appended to this Judgment and includes:
 - i) The claims of creditors who are recorded in the Statement of Affairs, totalling £71,184.78
 - ii) those who have actually submitted proofs in the liquidation, totalling £48,341.55; and
 - iii) a column showing (i) and (ii) added together, giving rise to a “Grand Total” of £116,673.18.

6. Pursuant to a creditors' resolution passed on 28 September 2016, the Liquidator is entitled to seek 50% of any sums recovered in respect of antecedent transactions. That entitlement would provide the Liquidator with remuneration of £402,265. Properly recognising that the entitlement is disproportionate, the Liquidator, in her written submissions, states:

“Taking into account all the circumstances, the Applicant in her capacity as office-holder and as an officer of the Court, does not view such a resolution as constituting appropriate remuneration. Accordingly the Applicant’s costs will be sought in the liquidation on a time spent basis. A replacement fee resolution will be sought from creditors on a time spent basis”.
7. She calculates her time costs to 22 November 2020 to be £98,083.34. She estimates additional time costs to conclude the liquidation of £44,353 and estimated legal costs for enforcement of her costs of £5,000. Added to this are unpaid disbursements of £2,678.84, estimated future disbursements of £1,500 and an ATE insurance premium of £72,912. This brings a total of £221,527.18 on which VAT is payable, making an overall total figure in respect of the incurred and anticipated costs and expenses of the liquidation (“Total Liquidation Costs”) of £265,832.62.
8. When this figure is added to the Grand Total, the estimated Shortfall is £421.324.40.
9. The Liquidator seeks an interim payment of 50% of the Judgment Debt (£402,265.32) for the following reasons:
 - i) It is less than the value of the estimated Shortfall (if one includes, in the Shortfall the total of all Third Party Creditor Claims from both the Statement of Affairs and those who have lodged proofs);
 - ii) The Court’s judgment is already known;
 - iii) 50% amounts to a reasonable proportion of the Court’s judgment;
 - iv) The Court’s judgment reflects findings of a breach of directors’ statutory and fiduciary duties;
 - v) The amount sought is likely to enable a dividend to be paid to third party creditors who, if unsecured, would ordinarily rank after the Liquidator’s costs and expenses; and
 - vi) The First Respondent is still entitled to substantiate his Proof of Debt in the liquidation.
10. The Liquidator observes:

“it remains possible that further creditors will prove in the liquidation and/or existing creditors may submit amended proofs of debt. It is likewise possible that the liquidator’s costs and expenses of the liquidation may increase somewhat to reflect additional work undertaken reviewing further material that may be submitted to substantiate the First Respondent’s Proof of Debt”.

11. The first part of Mr Adam's written submissions seeks to challenge the Judge's findings and is not relevant to the form of order consequent upon the Judgment. As regards the schedule of Third Party Creditors, he states that employee claims should not be included. This appears to be on the basis (i) that the Redundancy Payment Service ("RPS") has met their claims; and (ii) he paid £29,208.44 of employee claims shortly after the Company ceased trading.
12. Mr Adam's understanding of the rights and obligations of the RPS is not correct. If, and to the extent that the RPS has met employee claims, it would be subrogated as a creditor in place of each employee for the amounts paid out. It appears that to date, no claims have been made by or in respect of employees.
13. Mr Adam's first witness statement dated 17 April 2019 states that the amount claimed by Payroll Bureau (£314.16) has been paid by him and that he has also paid £4000 to Pro Driver Services (which was noted in the Statement of Affairs as a creditor for £8457.39). This seems to be a likely explanation for their failure, to date, to lodge a proof of debt.
14. Mr Adam states that HMRC's claim for £14,781.35 includes estimated sums for August 2016 and £5,879.58 for September 2016, whereas the Company ceased trading in July 2016. He submits that this should reduce HMRC's debt to £3,022.19.
15. He sets out a reason why he considers the CQC's total claim of £9,665.20 should not be admitted for proof as it is in part extinguished by set off in respect of earlier, overpayments; and the remainder relates to periods after the Company ceased trading.
16. He similarly states that the amount claimed by a creditor called Peninsula refers, in the main, to a period after the Company ceased trading and should be reduced from £23,895 to £810.
17. In summary, Mr Adam submits that the total amount of Third Party Creditor claims that should be admitted for proof is £5,573.21.

The Order

18. There is no evidence before the court of the extent to which the Liquidator has received or scrutinised Third Party Creditor claims. She would not be obliged or necessarily expected to do so having not yet advertised for final proofs. Mr Adam submits that no claim should be allowed in respect of the CQC or Peninsula as they relate to periodic or instalment payments falling due after the date the Company ceased to trade. However, matters may not be as simple as that: the Company's liquidation may have triggered contractual default damages or accelerated payment provisions which can properly form the subject of the creditor's proof.
19. I commented in my judgment, delivered in open court, that the uncommon feature throughout this case, is that beyond relatively small amounts which appear to be due to third party creditors, the only parties who claim to be significant, unpaid creditors of the company are the Respondents. The costs and expenses incurred by the Liquidator might well have been avoided if she had been provided, from the start, with the Respondents' full cooperation, if they had delivered up such books and records of the Company as they held, including the accounting records and bank

statements showing the ultimate destination of Company funds which were transferred to Mr Adam's personal account together also with information regarding third parties who held other such records.

20. When the directors failed to provide any books and records, the Liquidator's train of enquiry, starting with the bank statements and the limited accounting information filed at Companies House, raised more questions than they answered. The Respondents continued to withhold information even after the Liquidator commenced proceedings. Mr Adam left it as late as just a few days before trial before he sought to justify some of the transactions in a witness statement which I refused to admit in evidence. Acting fairly, the Liquidator nevertheless deducted from her claim amounts which exhibits to the witness statement demonstrated were payments made on the Company's behalf as legitimate Company expenditure.
21. As the Respondents' breach of duties and lack of cooperation greatly exacerbated the Liquidator's costs and expenses, I held that the amount of the Judgment Debt that may be enforced against the Respondents should include those costs and expenses. The majority of her time charges have already been incurred and it is clear that further time will need to be spent dealing with the admission or rejection of proofs, distributions to creditors, enforcement of the Court order and the preparation and submission of final receipts and payments accounts.
22. The First Respondent objects to any order being made in relation to the Liquidator's claim to recover her ATE insurance premium on the basis, he says, that it is a general business expense not related to this trial. He misunderstands the nature of ATE insurance arrangements which relate specifically to litigation risks. In accordance with my judgment, the cost of the insurance is recoverable by the Liquidator from the Respondents.
23. The discrepancies between the value of Third Party Creditor claims as set out in the Statement of Affairs, and those which have actually been submitted during the four years since the commencement of the liquidation, are significant. Whilst I reject Mr Adam's interpretation of the RPS's right to claim as a creditor, he raises points, which at first blush, appear to justify greater scrutiny when the Liquidator comes to admitting or rejecting the proofs of HMRC, the CQC and Peninsula.
24. It is not clear whether the Liquidator has already challenged the value of HMRC's claim or assessed the merits of the points raised by Mr Adam in relation to the claims of the CQC and Peninsula, but I shall direct that if she has not already done so, she shall make proportionate enquiries to do so.
25. Taking all these factors into account, I shall make an order in the form of the sealed order served by the Court with this judgment which is made in expectation, as stated by the Liquidator, that she obtains a resolution for her remuneration to be charged on a time-cost basis. In the event that such a resolution is not made by creditors, she will need to apply to court for directions pursuant to the liberty to apply provisions of the order:
 - i) If and to the extent not already undertaken, the Liquidator shall investigate, at proportionate expense, the points raised by the First Respondent in relation to

the claims of HMRC, CQC, Peninsula and if a claim is submitted by or on their behalf, the Company's employees;

- ii) The First and Second Respondents shall make an interim payment to the Liquidator of £360,000 ("Interim Payment") which takes into account her claim for incurred and anticipated time costs and expenses together with the amount so far claimed in the liquidation by third party creditors, plus interest and an amount in respect of anticipated employee claims, bearing in mind that a RPS claim is likely. The Interim Payment shall be on account of the Judgment Debt.
- iii) A payment on account of £68,000 in respect of the Liquidator's costs of the proceedings. As there has been a short delay in providing the final form of order and as the Respondents were not represented, I shall extend the time for payment of the interim costs order to 14 days from the date of the final form of order, so that they shall be paid on or before 21 December 2020.
- iv) As provided for in my judgment, to hasten the conclusion of the Company's liquidation, Mr Adam shall have until 4pm on 21 December 2020 to serve on the Liquidator all and any evidence to support his claim to be a creditor of the Company for £1,620,667, after which, absent an order or the court or the Liquidator's consent, he shall be precluded from relying on any further evidence in relation to the claim. Mr Adam stated in his written submissions:

"I have already substantiated my Proof of Debt in the hearing but this has not been looked into. What is the proof of debt likely to achieve as this hearing has already been concluded. There is no logic of the relevance in providing proof as it will be unnecessary with further costs to be incurred by the Applicant and the Court should minimise any such further time or costs to be thus incurred. The Court has disregarded the respondents' debt and concluded matters without referring to the respondents' debt, the Court should therefore not include any requirement for proof to be made for the respondents' debt. I request that no such provision is made in the Order or a timetable to be set for me to substantiate my proof of debt which are all unnecessary.

I shall include the intended provision, qualified by the words, "if they so choose" and it will be for the Respondents to consider whether they wish to take any further steps to support or withdraw their own proof.

- v) There shall be liberty for the Liquidator to apply for a final order, specifying the balance which may be enforced against the Respondents once she has concluded her further investigations, advertised for and adjudicated upon final proofs.

Liquidator's Schedule

Creditor Analysis

Name	Statement of Affairs	Claims Submitted	Largest of SA or Claim	Liquidator's time costs and Expenses	
				Liquidator's Time Costs	£
Employees (pref)	25,187.06	-	25,187.06	Time costs as at 22/11/2020	95,083.34
Employees (non)	32,632.00	-	32,632.00	Estimated Time costs to conclude	44,353.00
HMRC	2,853.15	14,781.35	14,781.35	Estimated legal costs for enforcement of costs	5,000.00
Pro Driver Services	8,457.39	-	8,457.39		
Take Five Solutions	1,741.02	-	1,741.02		
Payroll Bureau	314.16	-	314.16		
Care Quality Commission	-	9,665.20	9,665.20	Disbursements	
Peninsula	-	23,895.00	23,895.00	Unpaid Disbursements	2,678.84
				Estimated Future Disbursements	1,500.00
Associate	1,620,667.00	1,620,667.00	1,620,667.00	ATE Insurance Premium	72,912.00

Total Claims:	1,691,851.78	1,669,008.55	1,737,340.18	Total:	221,527.18
Total Less Associate:	71,184.78	48,341.55	116,673.18		

TOTAL 265,832.62

Daily Interest:	8%	25.57
Est Interest to:	24/11/2020	38,818.61

155,491.79	THIRD PARTY CREDITORS' CLAIMS	155,491.79
ESTIMATED THIRD PARTY CREDITOR CLAIMS INC. INTEREST TO 24/11/20 (Excluding Mr and Mrs Adam)		

TOTAL RECOVERY REQUIRED BASED ON ESTIMATED TIME COSTS: 421,324.40
 (Excluding Legal Costs to date)