IN THE HIGH COURT OF JUSTICE
BUSINESS & PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY APPEALS (ChD)
NEUTRAL CITATION NUMBER
[2020] EWHC 3698 (Ch)

Case No: CH-2020-000053

7 Rolls Building
Fetter Lane
London
EC4A 1NL

Tuesday, 24th November 2020

Before:
THE HONOURABLE MR JUSTICE TROWER

B E T W E E N:

INTEGRAL LAW LTD

and

DAVID ISRAEL JASON

MR M HIRST appeared on behalf of the Applicant
MR S ADAIR appeared on behalf of the Respondent

JUDGMENT
(Approved)

MR JUSTICE TROWER:

1. This is an appeal against the order of Deputy ICC Judge Barnett made on 17 January 2020. By that order he dismissed the application of Integral Law Limited (the "Company") dated 30 September 2019 to restrain the presentation of a winding up petition presented against it by Mr David Jason (" Mr Jason").
2. The debt to be claimed in the proposed petition threatened by Mr Jason was £15,152.52 said to be arrears of salary. It was described in a statutory demand served by him on the Company and dated 9 September as follows:

> "The creditor was an employee of the company since the company started trading during the relevant period of 28 April 2019 up to and including 31 August 2019 at an agreed salary of £90,000 per annum equating to a monthly gross salary of £7,666.67 (payable net of tax and NIC of approximately £5,050.84). Three months' salary equals £15,152.52. The salary was not paid and on 1 September 2019 the creditor resigned from the company. The company is indebted to the creditor for that three months' salary on a net of tax and NIC basis".

3. The application that came before Deputy ICC Judge Barnett on 17 January 2020 had been issued by the Company on 30 September 2019. Initially on 11 October 2019, ICC Judge Burton had made an order restraining presentation of a petition pending a full inter partes hearing of the Company's application. She had also given directions for the filing of evidence to facilitate its determination on the return date.
4. The effect of the order by the Judge was that Mr Jason was then free to present a winding up petition against the Company. On 14 February 2020, the Company issued an appellant's notice seeking an order for a new trial and for a stay of execution of the order made on 17 January.
5. The Company's initial application for a stay was refused by Falk J on 27 February 2020 on the grounds that the interests of the Company's creditors as a whole were engaged and that she was not satisfied that the balance of justice came down in favour of granting any relief.
6. This refusal was in effect set aside or varied by an order made without notice by Nugee J on 3 March 2020 by which he granted an interim injunction restraining presentation of a winding up petition over a very short return date seven days later. Mr Stuart Adair who appears on this appeal on behalf of Mr Jason was very critical of the circumstances surrounding the making of this application and said that, despite a number of requests, the Company has never provided Mr Jason with a note of the hearing or the skeleton argument that was put before Nugee J at that hearing.
7. The order made by Nugee J was then replaced by certain undertakings given by Mr Jason to Morgan J on 10 March 2020, which undertakings continue in force.
8. Subsequently the Company sought permission to amend its grounds of appeal, to rely on those amended grounds and an amended skeleton argument on the appeal, and to adduce new evidence on the appeal. On 10 August 2020, I refused the application for permission to adduce new evidence on the grounds that the *Ladd -v-Marshall* [1954] EWCA Civ 1 principles had not been satisfied because the evidence had been available to the Company at the time of the hearing before the Judge and there was no proper explanation as to why it had not been produced below.
9. Subject to an important qualification, I also allowed the applications for permission to rely on amended grounds of appeal and an amended skeleton argument because the transcript of

the hearing below and the judgment were not available at the time the original grounds were settled and the amended grounds were expressed in a more focused and comprehensible manner than had been the case with the original grounds. The qualification was that the permission to rely on amended grounds of an appeal and an amended skeleton argument did not extend to the reference in either document to (or any reliance on) new evidence for which permission had not been granted.

10. I also gave permission to appeal. As I put it, "I am just persuaded that there is a real prospect of success on the Company's contention that the ICC Judge took the wrong approach to the question of whether the case advanced by the Company was manifestly incredible". Neither party sought to challenge those orders. It follows that the evidence on the appeal is limited to the evidence that was before the Judge.

11. As this is an appeal against a decision refusing to restrain the presentation of a winding up petition I should start with the legal principles which are applicable in such a case. There does not seem to be very much dispute between the parties. The court will grant relief restraining presentation of a winding up petition against a company if the company disputes on substantial grounds the existence of the debt on which the petition is to be based.

12. As Hildyard J explained in *Coilcolor Ltd -v- Camtrex Ltd* [2015] EWHC 3202 (Ch) at para [32], where the standing of a petitioner, and thus its right to invoke a class remedy on behalf of all creditors is in doubt, it is the court's settled practice to dismiss the petition. There are numerous authorities which establish and discuss that essential principle but it is important to set it in its proper context because the position, although familiar, is not quite as straight forward as it might at first blush appear to be.

13. There is a very helpful description of the exercise that the court is required to carry out in the judgment of Norris J in *Angel Group Limited -v- British Gas Trading Limited* [2013] BCC 265 at para [22] where he said as follows, (excluding from this citation the citations that he himself included in his description of the principles):

> "The principles to be applied in the exercise of this jurisdiction are familiar and may be summarised as follows:
> a. A creditor's petition can only be presented by a creditor, and until a prospective petitioner is established as a creditor he is not entitled to present the petition and has no standing in the Companies Court.
> b. The company may challenge the petitioner's standing as a creditor by advancing in good faith a substantial dispute as to the entirety of the petition debt (or at least so much as will bring the indisputable part below £750).
> c. A dispute will not be "substantial" if it has really no rational prospect of success.
> d. A dispute will not be put forward in good faith if the company is merely seeking to take for itself credit which it is not allowed under the relevant contract.
> e. There is thus no rule of practice that the petition will be struck out merely because the company alleges that the debt is disputed. The true rule is that it is not the practice of the Companies Court to allow a winding up petition to be used for the purpose of deciding a substantial dispute raised on *bona fide* grounds, because the effect of presenting a winding up petition and advertising that petition is to put upon the company a pressure to pay (rather than to litigate)

> which is quite different in nature from the effect of an ordinary action.
> f. That the court will not allow this rule of practice itself to work injustice and will be alert to the risk that an unwilling debtor is raising a cloud of objections on affidavit in order to claim that a dispute exists which cannot be determined without cross-examination.
> g. The court will therefore be prepared to consider the evidence in detail even if, in performing that task, the court may be engaged in much the same exercise as would be required of a court facing an application for summary judgment".

14. In making an assessment as to whether a debt is disputed on substantial grounds, it is well established that the threshold is not a particularly high one, see for example *Tallington Lakes Limited -v- South Kesteven District Council* [2012] EWCA Civ 433 at para [22], per Etherton LJ. It follows therefore that, having considered the evidence in detail, and having concluded that there is a *bona fide* defence, albeit one that might only be regarded as shadowy in an application for summary judgment, an injunction to restrain presentation of a petition may be justified.
15. Nonetheless, the court is required to consider the credibility of the evidence in support of the company's assertion that it has established the existence of a *bona fide* dispute on substantial grounds as to the petition debt. As Chadwick J said in *Re a Company (No 06685 of 1996)* [1997] BCC 830 at 838, after a detailed review of the authorities:
> "I do not accept that the court is bound to hold that there is a need for a trial in circumstances in which, on a full understanding of the documents, the evidence asserted in the affidavits on one side is simply incredible".
16. This reflects the fact that the company against which petition is presented or threatened must show that the dispute is both *bona fide* and based on substantial grounds as established by credible evidence.
17. When assessing credibility in the similar (albeit not identical) context of a summary judgment application, the exercise the court is required to carry out is explained by Glidewell LJ in *National Westminster Bank Plc -v- Daniel* [1993] 1 WLR 1453 at 1457 where he said:
> "I think it is right to ask, using the words of Ackner LJ in the *Banque de Paris* case, at p. 23, "Is there a fair or reasonable probability of the defendants having a real or *bona fide* defence?" The test posed by Lloyd LJ in the *Standard Chartered Bank* case, Court of Appeal (Civil Division), Transcript No 699 of 1990 "Is what the defendant says credible?" amounts to much the same thing as I see it. If it is not credible, then there is no fair or reasonable probability of the defendant having a defence".
18. In my view, that is an approach which the Judge was required to carry out in the present case, when assessing the question of credibility.
19. Finally on the law, as has been made clear on many occasions (see e.g. Park J in *Argyle Crescent Limited -v- Definite Finance Company Limited* [2004] EWHC 3422 (Ch) at para [5]), this principle and approach is applicable both to the question of whether or not there is a *bona fide* dispute in relation to the putative petitioner's debt and to the question, if relevant, of whether any cross-claim is put forward in good faith and with sufficient substance to justify it being determined in a normal civil action.

20. In his judgment, the Judge recited the fact that Mr Jason was employed by the Company between the end of April 2019 and 1 September 2019. He also explained that the Company accepted that amounts earned by Mr Jason during the course of his employment for June, July and August 2019 amounted to £16,356.95. Although I think that this may not have been accepted by the Company at the outset, the Company now says in its skeleton argument in support of the appeal that this amount constituted Mr Jason's total net salary for that period of his employment by the Company.
21. It was submitted by the Company that it is entitled to set off this amount against a loan which it made to Mr Jason on 6 June 2019. The loan was said by the Company to be in the sum of £25,302.44 of which £16,356.95 has been applied against his salary entitlement for June, July and August and it therefore follows that an amount totalling £8,944.49 is outstanding. It is therefore the Company's case that far from it being indebted to Mr Jason in the sum of approximately £16,000, he is indebted to it in the sum of approximately £9,000.
22. There is no issue between the parties that five sums totalling £25,302.44 were paid by the Company to Mr Jason on 6 June 2019. However, Mr Jason contended that these were not a loan. Rather, he said that they were payment of arrears of salary which he was owed in respect of the months of January, February, March and April 2019 by his previous employer ABJ Solicitors together with one month of salary owed to him by the Company in respect of his employment by it during the month of May.
23. It is not in issue between the parties that Mr Jason had not been paid his salary by ABJ for the first four months of 2019. It is plain that at least one of these payments cannot have been part of a loan because it is common ground that the sum of £5,075 odd was the May salary for his employment by the Company. This was relied on by Mr Adair to demonstrate that there was at least some internal contradiction in the evidence adduced on behalf of the Company and I think that there is force in that submission.
24. Mr Jason said that the reason that the Company paid him in June in respect of salary originally due from ABJ was that the Company was the successor to ABJ's business. The consequence of this was that the Company was in any event liable for any unpaid salary on the simple basis that this was what agreed. Alternative he said that he was entitled to this by operation of Regulation 4 of the Transfer of Undertakings, Protection of Employment Regulations 2006, ("TUPE") which provides for the automatic transfer of all of a transferor's liabilities under or in connection with the contract of employment of any person employed by the transferor at the time of a relevant transfer. A relevant transfer is a transfer of an economic entity retaining its identity so as to fall within Regulation 3 of TUPE.
25. It follows that the question for determination by the Judge was whether or not the Company had raised a *bona fide* dispute on substantial grounds to the effect that amounts that would otherwise have been outstanding in respect of salary had in fact been discharged by way of repayment of a loan.
26. He reached the conclusion that the Company's case as to the loan was manifestly incredible. In reaching that conclusion he had regard to the decision of an authorised officer of the Solicitors Regulation Authority (the "SRA") which was responsive to a succession application submitted to it and signed by Mr Jason. This made plain in the Judge's view that the Company had acquired the ABJ business lock, stock, and barrel. He was satisfied that in those circumstances it was clear that there was a relevant transfer of the undertaking of the business of ABJ to the Company, being a transfer of an economic entity retaining its identity so as to fall within Regulation 3 of TUPE.
27. This of course meant that there was a logical and rational reason why it was that the Company might have paid Mr Jason the sum of c.£25,000, when the bulk of that amount

had originally been a liability of ABJ's. The Judge went on however to explain that that was not an end to the matter because he had to examine the payments to identify their true nature. He took account of the fact that the relevant payments were made out of the Company's office account into its salaries account and from its salaries account to Mr Jason. He also had regard to the fact that in a number of cases the description of the payment referred to it as being ABJ salary.

28. The Judge considered the arguments made by the Company, which he said were unsupported by any evidence and made late in the day, that the payments were loans and he weighed that up against his clear conclusion that the Company was in any event liable for the outstanding salary in respect of Mr Jason's employment by ABJ. Against that background, he concluded that the Company's defence in relation to the loan was manifestly incredibly.

29. A number of the grounds of appeal that are advanced by the Company against the Judge's conclusion overlap. Additionally, some that are included in the revised grounds document are grounds for which, as Mr Jason submits, the Company's appeal is bound to fail because it has been refused permission to adduce further evidence.

30. For all material purposes, it seems to me that there are two substantive grounds of appeal albeit advanced in a number of different formulations. First it was said that the Judge was wrong in his finding that the sum of £25,000 paid by the Company to Mr Jason was not an advance by way of loan. Secondly, it was said that the Judge was wrong to conclude that there was a relevant transfer as between ABJ and the Company for the purposes of TUPE, and for that or any other reason, the payment made to Mr Jason were by way of salary originally payable pursuant to his employment by ABJ.

31. Before addressing those grounds, which are essentially appeals on the facts, I should mention a ground which reads as an appeal on a point of law. The Company contended that the Judge erred in law and was wrong to apply the manifestly incredibly test in the given circumstances. However Mr Hirst for the Company confirmed that it did not therefore mean to contend that the Judge was wrong to direct himself that he had to be satisfied that the Company's case was manifestly incredible. The essence of this ground of appeal, consistent with the others, was that the way he applied the test to the facts was erroneous. It follows that, as with the other grounds, this is a challenge to the Judge's fact finding on the basis of the evidence that was put before him.

32. This therefore is an appeal in which all of the grounds rely on a submission that the Judge went wrong on the facts. There was no oral evidence, but nonetheless the Judge carried out an exercise evaluating the evidence. In such circumstances, any appeal court must be cautious before it interferes. As the Court of Appeal said in *Prescott -v- Potamianos & Another* [2019] EWCA Civ 932 at para [76]:

> "On a challenge to an evaluative decision of a first instance Judge, the appeal court does not carry out a balancing task afresh but must ask whether the decision of the judge was wrong by reason of some identifiable flaw in the judge's treatment of the question to be decided, such as a gap in logic, a lack of consistency, or a failure to take account of some material factor which undermines the cogency of the conclusion".

33. In my view it is appropriate to deal first with the appeal as it relates to the finding of a business transfer from ABJ to the Company and secondly to the appeal against the finding in relation to the loan. The reason for this is because the Judge's conclusions on the former

went a long way towards his conclusions on the latter.

34. Mr Jason's witness statement dated 7 November 2019 was clear that the Company was a successor to ABJ, that it took over the former undertaking and employees of ABJ and that he believed that TUPE applied to the transferring employees. His evidence to this effect was corroborated by the notice of succession forms and decision of an authorised officer of the SRA confirming, amongst other things, that the SRA was satisfied that the whole of ABJ's business had been acquired by the Company. This meant amongst other things that the Company was a successor practice of ABJ's for insurance purposes and more generally.

35. The Company relied on the fact that there was no written business transfer agreement in evidence. It did not however put in any evidence for the hearing before the Judge to contradict what Mr Jason's evidence proved on this aspect of the case. In my view the Judge's finding that, even in the absence of an acquisition agreement, it was clear that the Company had acquired the ABJ business lock, stock, and barrel so as to give rise to the consequences arising under Regulation 4 of TUPE was open to him on the evidence. Indeed, I consider that there was no evidence before him which justified him in reaching any other conclusion.

36. As to the second series of grounds of appeal, the Company said that the Judge was wrong to reach the conclusion on the allegation of loan. It submitted that he was wrong to conclude that the Company's case that the amounts paid by the Company to Mr Jason were by way of loan was manifestly incredible. The Company argued that, although the sum of £25,302.44 is a very strange amount for a loan, this was because the Company understood and intended that it would be referable to the unpaid salary owed to him by ABJ. It relied on the evidence of Mr Carroll (the principal person employed by the Company who has given evidence in these proceedings) that:

> "Given the length of time that [Mr Jason] had not drawn a salary from his own company, he requested [the Company] to assist him with managing his personal finance. [The Company] agreed to advance the Respondent a sum equivalent to the salary that [Mr Jason] was owed by his company, and that the advance would be transferred at the same time as the May 2019 payroll".

37. The Company said that this is why the loan was quantified in the way that it was. It also said that this was the explanation for the way in which the payments were accounted for and in particular for the recording in the Company's books and records as if they were payments of salary in respect of ABJ. The absence of a loan agreement was said by the Company to be symptomatic of and consistent with the nature of the parties' relationship more generally.

38. Mr Jason submitted that on the evidence before him, the Judge was both entitled and indeed bound to reach the conclusion that he did. He said that there were a number of aspects of the evidence which more than justified the Judge's conclusion. They include the fact, which was particularly relied on by the Judge, that there is not a single piece of contemporaneous documentation which justifies the proper treatment of these payments as being by way of loan. All of the material in the contemporaneous bank statements appeared to confirm that this was the case and it was of some significance that, while the money originally emanated from the Company's office account, it passed through the Company's salary account.

39. He also submitted that it made no sense for a loan in the specific amounts identified to be made by way of five separate payments on the same day and from the same bank account rather than as one single payment which would have been much the most natural way of

dealing with the payment if it were in fact a loan. Mr Jason also relied on the fact that the day after the payments approximately £25,000 was paid by him to the Company by way of investment into the Company. The payment was made by a company known as Melitz Josher Limited and was an equity payment that he made for the purpose of acquiring a 25% equity share in the Company.

40. The Judge did not place a great deal of weight upon that particular factor but I accept the submission made on behalf of Mr Jason to this extent. It is at least inconsistent with a £25,000 loan being made by the Company to Mr Jason immediately beforehand for that to be the case where Mr Jason himself then invested £25,000 into the Company on the following day.

41. Set against this evidence of real substance in support of Mr Jason's case, the Company submitted at the hearing before the Judge that the position of Mr Jason was untenable in light of the clear and obvious dispute of fact which was admitted in his skeleton argument for the hearing before ICC Judge Burton. In that skeleton it was said that:

> "It would appear that there is an issue to be tried. [Mr Jason] claims by his statutory demand that [the Company] owes him £15,152.25 net in respect of unpaid wages. The [Company] disputes that such debt is owing and avows that they are owed a debt by way of unpaid advance. [Mr Jason] notes there is no documentary evidence before the court of the purported advance."

42. This passage from Mr Jason's skeleton argument was relied on by the Company in its revised skeleton argument in support of the appeal as reflecting a recognition by Mr Jason that there is an issue to be tried which satisfies the applicable test. The Company also picked up on principle (e) as described by Norris J in the passage from his judgment in *Angel Group* that I cited earlier in this judgment. It relied on a contention that in paragraph nine of his witness statement Mr Jason admitted to using the insolvency courts as a means of debt collecting which it said is an abuse of process. This is because he said that the purpose of the petition was to bring this matter to the forefront of the applicant's mind and to seek payment of the debt due quickly and for fear that the Company may cease trading.

43. The problem with both of these submissions is that they do not of themselves help on the question of whether or not there is a *bona fide* dispute on substantial grounds. The most that can be said about them is that they reflect a recognition by Mr Jason that he was in dispute with the Company as to the existence of a loan and that he wished to bring matters to a head quickly. This state of mind illustrates the importance of the court adopting a critical approach to the merits of any dispute, being astute to identify cases where a petition is being used for the purposes of pressuring a company into paying a disputed debt which is of itself an abuse.

44. However, at the end of the day the answer in this as in many other cases depends entirely on the question of whether or not the evidence is sufficient to substantiate a *bona fide* dispute on substantial grounds. If it is not, the fact that Mr Jason described the dispute which did exist as being one in which it appeared that there was an issue to be tried or chose winding up proceedings rather that some other form of legal process, cannot of itself justify an order restraining presentation.

45. In the present case the question for the Judge was whether the Company's case as to the loan stood up to scrutiny. The question for me is different. It is whether the evaluative exercise which the Judge carried out in deciding whether or not there was a *bona fide* dispute on substantial grounds is one which he carried out properly or whether he was wrong by reason of some identifiable flaw in his treatment of the question to be decided such as a gap in logic, a lack of consistency or a failure to take account of some material factor which undermines the cogency of his conclusion.

46. As to this, it is my view that the Judge correctly identified the issue he had to decide when at paragraph five of his judgment he said as follows:

> "The principle issue for me is whether (i) there are substantial grounds of dispute between the parties or (ii) it can be said that the account being put forward by Mr Carroll is manifestly incredible such that I should give it no credence".

47. In my view the Judge was entitled to reach the conclusion that he did to the effect that the Company's case in relation to a loan as it was advanced at the hearing before him, and on the basis of the evidence he was shown, was manifestly incredible. In particular he was entitled to place weight on the complete absence of any documentary evidence in support of the Company's contention that there had been a loan. He was entitled to rely on the way in which the Company accounted for the payments that were made and the form of Mr Jason's payslips. He was entitled to be sceptical that the making of a series of payments in amounts which reflected with precision the outstanding arrears of salary was far more consistent with Mr Jason's case than it was with the case advanced by the Company.

48. In all the circumstances I am satisfied that the Judge did not go wrong in the evaluative exercise that he carried out. The consequence of this is that Mr Jason was entitled to serve his statutory demand and is entitled to present a winding up petition based on the debt contained in it. The Company's appeal therefore fails.

End of Judgment

Transcript from a recording by Ubiqus
291-299 Borough High Street, London SE1 1JG
Tel: 020 7269 0370
legal@ubiqus.com

Ubiqus hereby certify that the above is an accurate and complete record of the proceedings or part thereof

This judgment has been approved by the judge.