



Neutral Citation Number: [2022] EWHC 1241 (Ch)

Case No: C00CF255

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN CARDIFF
CHANCERY APPEALS (ChD)

On appeal from the County Court in Cardiff

Orders of Deputy District Judge Regan dated 3 March 2021 and District Judge Morgan dated 4 May 2021

County Court Case Number: C00CF255

Appeal Ref: CF032/2021CA (DJ Morgan)

Appeal Ref: CF022/2021CA (DDJ Regan)

Cardiff Civil Justice Centre
2 Park Street
Cardiff CF10 1ET
Date: 24 May 2022

Before :

MR JUSTICE ZACAROLI

Between :

SABZ ALI KHAN

**Appellant/
Defendant**

- and -

**STEPHEN JOHN HUNT AS TRUSTEE IN
BANKRUPTCY OF ABDUL REZA PAKZAD**

**Respondent/
Claimant**

Mr Khan appeared in person
There was no attendance by the Respondent

Hearing date: 17 May 2022

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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.

Approved Judgment**Mr Justice Zacaroli :**

1. This is a renewed oral application by Mr Sabz Ali Khan for permission to appeal two orders: an order of Deputy District Judge Regan dated 3 March 2021 and an order of District Judge Morgan dated 4 May 2021.
2. The following is a brief summary of the very long history to this matter.
3. On 3 June 2015, DJ Watson, made an order requiring Mr Khan to repay the sum of £25,950 to Mr Hunt (as trustee in bankruptcy of Mr Pakzad) on the basis that it was received by him pursuant to a transaction at an undervalue. Mr Khan was ordered to pay costs, to be the subject of detailed assessment on the standard basis, and was ordered to pay £30,000 on account of the costs. That sum has yet to be paid.
4. Permission to appeal the order of DJ Watson was refused by HHJ McCahill (on 10 July 2015, certifying the application totally without merit, confirmed in a further order of 4 August 2015) and by HHJ Denyer (on 17 August 2015).
5. Mr Hunt prepared and served a bill of costs. Mr Khan did not serve points of dispute. Mr Hunt applied for a default costs certificate (“DCC”) which was granted on 3 February 2016.
6. Mr Khan then made two separate applications to set aside the DCC.
7. First, on 9 March 2016, Mr Khan applied to Bristol County Court to set aside the DCC. That came before Employment Judge Livesey sitting in the County Court on 27 June 2016. In his written judgment, Judge Livesey noted that Mr Khan had produced no points of dispute. He raised only generalised objections, including that the costs bill was substantial, unreasonable, scandalous and unfair. He claimed that the CFA was fraudulent but did not develop that submission before the judge. The judge concluded that in the absence of Points of Dispute (either in the original application or before him) which would enable him to set aside the DCC, the application should be dismissed. There was no appeal against that order.
8. Second, Mr Khan made an application in Cardiff which came before DJ Phillips on 12 April 2016. In the order of that date, it was ordered that Mr Khan’s application to (among other things) set aside the orders of 3 February 2016 (the DCC) and of 3 June 2015 (DJ Watson’s order) be refused. It appears that Mr Khan did seek permission to appeal that order, but that was also refused.
9. Some two years later, on 25 April 2018 Mr Khan made a third application to set aside the DCC (a fee being paid on that date). The application was not heard, however, until 25 October 2019. In the meantime, on 15 April 2019, Birss J made an extended civil restraint order (“ECRO”) against Mr Khan, which expired on 14 April 2021.
10. On 11 July 2019 Birss J gave permission – to the extent that Mr Khan needed it – to make his application to set aside the DCC. Birss J noted that there was considerable difficulty with the application given the passage of time and the fact that Judge Livesey – in a judgment dated 27 June 2016 – had already dismissed an application to set aside the DCC. On this basis, in fact, he said that had it been clear that permission was needed under the ECRO he would have refused it. It appears, therefore, that he gave permission

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only because it seemed fair to do so in circumstances where permission may not have been required. There is nothing in this reasoning of Birss J to suggest that he had concluded that any *res judicata* issue which existed as a result of Judge Livesey's order could be overcome.

11. This further application to set aside the DCC came before DJ Phillips on 25 October 2019. Mr Hunt was not represented before him. DJ Phillips allowed the application, noting concern at the points raised by Mr Khan, including the fact that the amount of costs in the DCC far exceeded a costs budget (albeit it was not known whether a costs management order had been made). He also noted complaints about the success fee relating to a period of work undertaken when Mr Khan was not a party; and complaints that no success fee should be allowed in any event.
12. After considerable delay, Mr Hunt applied to set aside the order of DJ Phillips. This came before DDJ Regan on 3 March 2021. He allowed the application, setting out his reasons in a judgment dated 10 March 2021. In essence, he determined that in light of the orders made in 2016 by DJ Phillips (upheld on appeal) and Judge Livesey, the DCC stands "and no order made now by a DJ can set it aside". DJ Phillips had accordingly been wrong, in 2019, to set aside the DCC.
13. I considered Mr Khan's application for permission to appeal on the papers and, save in one respect to which I refer at the end of this judgment, I refused permission.

The appeal against the order of DDJ Regan

14. In support of his appeal against the decision of DDJ Regan, Mr Khan took me to the Bill of Costs and pointed out many items which he contends are clearly wrong, as being incurred before the action against him began, or being related to other matters undertaken by the trustees in bankruptcy of Mr Pakzad.
15. The problem with these points, however, is that they fail to address the key reason why DDJ Regan set aside DJ Phillips' order, namely because it could not stand in circumstances where Mr Khan's two previous applications to set aside the DCC had been dismissed and (in one case) applications to appeal by Mr Khan had been unsuccessful and (in the other case) no appeal had been made.
16. Mr Khan's answer to that is that the order of Judge Livesey is void, on one of two bases.
17. First, Mr Khan says that the order is void because the judge was an employment judge who was not authorised to sit in the County Court. The order clearly stated that he was "sitting as a judge of the County Court". My own enquiries have confirmed that Judge Livesey, although appointed as a judge of the employment tribunal, was cross-assigned to, and thus authorised to sit in, the County Court from December 2015. There is accordingly nothing in Mr Khan's objection to Judge Livesey on this ground.
18. Second, Mr Khan contends that Judge Livesey's order was made without jurisdiction because he was not a specialist judge assigned to hear insolvency cases within the Business and Property Court. He relied on *Kamal Siddiqi v Taparis Ltd* [2019] EWHC 417 (Ch). In that case, a bankruptcy petition had been presented in the County Court at Slough (which is not a Business and Property Court centre). Until very shortly before the first hearing of the petition, there had been no notice of opposition. One was,

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however, filed shortly before the hearing. If the petition was unopposed, then it could be heard at the County Court in Slough. If it was opposed, however, it would have to have been transferred to a Business and Property Court centre. The judge in the County Court at Slough concluded that because the notice of opposition was served late, the petition was unopposed and he proceeded to make a bankruptcy order. On appeal, HHJ Cooke concluded that he had been wrong to do so and this amounted to a serious procedural irregularity. The petition was opposed and, accordingly, the case should have been transferred to a Business and Property Courts centre.

19. In my judgment, the principle to be derived from that case does not apply here. Mr Khan rightly points out that DJ Watson's order was made in the bankruptcy proceedings relating to Mr Pakzad. Those proceedings were governed by the Insolvency Rules 1986 (now the Insolvency Rules 2016, but it is not suggested that there is any material difference between them for present purposes). Rule 12.41 of the Insolvency Rules 2016 states that CPR parts 44 and 47 apply to costs in Insolvency Proceedings. CPR 47.4 provides that all applications and requests in detailed assessment proceedings must be made to or filed at the appropriate office. Practice Direction 47PD4.1 defines the appropriate office as the district registry or county court hearing centre in which the case was being dealt with when the judgment or order was made. That is the County Court at Bristol. The order of Judge Livesey was undoubtedly made in the County Court at Bristol. Once detailed assessment has commenced, and so the case is governed by the procedure provided for in CPR 47, I do not think that merely because the order requiring detailed assessment was made within bankruptcy proceedings, that means that issues arising in respect of costs must be treated differently from any other detailed assessment proceedings assigned to the County Court. A judge of the County Court at Bristol was competent to hear applications relating to the detailed assessment proceedings. Accordingly, I reject this alternative basis for arguing that Judge Livesey's order had no effect.
20. For these reasons, I do not think there is a real prospect of establishing on appeal that DDJ Regan was wrong to conclude that the order of Judge Livesey was a proper and effective order. I would add that even if it was not an effective order, Mr Khan would still have had to overcome the fact that DJ Phillips had himself also dismissed, in 2016, an application by Mr Khan to set aside the DCC and Mr Khan's attempt to appeal that order failed.
21. The other basis on which Mr Khan seeks permission to appeal DDJ Regan's order is that DDJ Regan abused his discretion by permitting the application by Mr Hunt 13 months late. This was an exercise in case management by the judge. An appeal against such a decision faces a very high hurdle. DDJ Regan reserved his judgment in order to study the files more thoroughly. In his written judgment he carefully considered all the circumstances. It is not alleged that he took into account an irrelevant consideration, or failed to take into account a relevant matter. DDJ Regan found (in Mr Khan's favour) that the delay by Mr Hunt in applying to set aside DJ Phillips' order was very long and unjustified. He noted, however, that the case was unusual by reason of its long history, the fact that it involved not one but two prior orders refusing to set aside the same DCC, which had not been shown to DJ Phillips when he made his order setting it aside, and that Mr Hunt was not himself guilty of any other delay or default in the long proceedings (compared to Mr Khan's delay of three and a half years between the date of the DCC and his application to DJ Phillips in 2019). DDJ Regan's decision that the interests of

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justice lay in setting aside DJ Phillips' order, notwithstanding Mr Hunt's delay, is not one which is perverse or outside the ambit of reasonable discretion. Accordingly, I consider that there is no real prospect of success in respect of an appeal against the order of DDJ Regan.

22. I note that this was my conclusion on dismissing the application for permission to appeal on papers, and nothing Mr Khan has said at the oral renewal hearing has taken matters any further. One additional point that Mr Khan did make is that his witness statement, served the day before the hearing before DDJ Regan, had not been read by DDJ Regan. It is clear from DDJ Regan's written judgment, however, that while at the hearing of Mr Hunt's application he had not yet had the chance to read much of the relevant material – including material filed only the day before (which I infer included Mr Khan's witness statement) – he read it subsequently and before giving judgment. Indeed, that is precisely the reason he gave for not delivering judgment immediately: he wanted to go away and read the materials in much more detail than DJ Phillips had been able to do in 2019.

Appeal against the order of DJ Morgan

23. The application before DJ Morgan was to annul the bankruptcy order made against Mr Khan on 8 September 2017. That order was made on the basis of a petition dated 14 March 2017, itself based on the DCC.
24. Mr Khan sought permission to appeal the bankruptcy order. Permission was refused by HHJ Jarman QC on 6 March 2018. Mr Khan applied to recuse HHJ Jarman QC, but that application was refused by Birss J on 24 May 2018. Mr Khan applied to set aside Birss J's order. Mr Khan renewed his application for permission to amend, and applied to amend his grounds of appeal. On 10 July 2018, Rose J gave permission to amend the grounds of appeal but refused permission to appeal. On 26 July 2018, Mr Khan applied to set aside Rose J's order. On 5 March 2019 all outstanding applications by Mr Khan were dismissed.
25. His application to annul the bankruptcy order was made on 15 January 2020. The essential ground of the application, as presented to DJ Morgan, was that the DCC had been set aside by order of DJ Phillips. DJ Morgan dealt with this as follows: First, the order of DJ Phillips had itself been set aside by DDJ Regan (see above) and unless and until the order of DDJ Regan was overturned on appeal, it meant that the DCC stood; Second, and in any event, at the time the bankruptcy order had been made, the DCC was in effect (DJ Phillips' 2019 order coming some two years later). That was sufficient in itself to mean that there was no ground on which the bankruptcy order ought not to have been made at the time that it was made. In my judgment, there is no real prospect of showing that DJ Morgan was wrong in law on either of these points. On the latter basis, I note that he was able to point to the reasons of Davis LJ in refusing permission to reopen an earlier application for permission to appeal to the Court of Appeal (on 14 October 2020), including the fact that all orders made consequent upon the DCC while it remained in force (including the bankruptcy order) were valid.
26. Mr Khan made a number of points in his original skeleton argument in support of the application for permission to appeal on the papers. I addressed those in my written reasons for refusing the application. Most were not developed at the hearing, and I need say no more than that the conclusions and reasons I gave in refusing permission on the

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papers remain valid. At this oral renewal hearing, Mr Khan has made a number of further points.

27. First, he repeated the point that Judge Livesey had not been authorised to hear his application to set aside the DCC. I have addressed, and dismissed, that point above.
28. Second, he maintained that the debt on which the bankruptcy petition was based was disputed on substantial grounds, because he disputed the amounts set out in the DCC. The problem with this ground is that until it was set aside the DCC established the quantum of the costs debt (it being common ground that there was undoubtedly a costs liability, the only issue being as to quantum). Once Mr Khan had applied (twice) to set aside the DCC and those applications had been dismissed, it was no longer open to him to contend that there was a dispute on substantial grounds.
29. As I have noted above, that point was confirmed by Davis LJ on one of the applications to appeal to the Court of Appeal in this case, as DJ Morgan noted at §9 of his judgment. In his reasons for refusing permission to appeal dated 14 October 2020, Davis LJ said, at a time when the most recent order in the saga relating to the DCC was that of DJ Phillips setting aside the DCC:

“The applicant [that is Mr Khan] now relies on the fact that subsequently, on his application, without attendance by the respondent and long after the decision of HHJ Petts on 25 October 2019, DJ Phillips set aside the default costs certificate. I do not know on what basis the application was made out but, be that as it may, the applicant seems to think that that order invalidates all prior proceedings based on the default costs certificate and shows that there was no debt owing. That is wholly wrong. It does not. The court orders are valid until set aside. The default costs certificate was valid and in force throughout that time until 25 October 2019 and all bankruptcy charging and sale orders, etc based on it were likewise valid and based on a debt then extant”.

30. That was before DJ Phillips’ own order was set aside. The position now is that much worse for Mr Khan, because the setting aside of DJ Phillips’ order means that not only was there a valid DCC at the date of the bankruptcy petition, but it is now no longer possible for Mr Khan to challenge the DCC.
31. Mr Khan referred me to a passage in the judgment of Neuberger J in *Guinan iii v Caldwell Associates* [2003] EWHC 3348 (Ch), at §16:

“I turn then to what at least to my mind is the central point in the case, which is whether or not Mr Caldwell has an arguable case. In this connection it is I think common ground, and consistent with what was said by Laddie J in paragraph 60 of his judgment in *Thomas-Everard & Others v The Society of Lloyds*, Lawtel (otherwise unreported as far as I am aware), 18th July 2003, that: “The court’s assessment of the seriousness of the challenge should [not] differ from one stage to the other.” In other words, if there is what he called “a genuine triable issue” then, whether

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it is raised at the statutory demand stage, the petition stage or the annulment stage, it is an equally valid point. However, as I mentioned, that is not the end of the matter in this case, because, even if there is a genuine triable issue, that does not automatically mean that I should annul the bankruptcy; I still have a discretion. But, subject to that, as I think Mr De La Rosa, albeit sub silentio has accepted, the test is the same: is there a genuine dispute”

32. That, however, does not address the problem that Mr Khan has in this case. His problem is that the question whether the DCC is wrong and should be set aside has already been adjudicated on, and the court has decided the point against him. It is the inability to reopen that decision which precludes him from raising points of dispute on the bill of costs at this very late stage.
33. Mr Khan also referred me to *Law Society v Dua* [2020] EWHC 3528. That case, however, concerned the principle of abuse of process where a party sought to bring proceedings in respect of a matter which had been determined in earlier proceedings, where there was no *res judicata* because the parties to the two sets of proceedings were not the same. In the present case, the orders which create a *res judicata* were made in proceedings between Mr Khan and Mr Hunt on the same application (to set aside the DCC) as was sought in the later application (before DJ Phillips in 2019). Accordingly, the *Dua* case does not assist Mr Khan.
34. Mr Khan then contended that DJ Morgan was wrong to refuse to annul the bankruptcy order because the bankruptcy petition wrongly stated that the debt was unsecured, when in fact Mr Hunt had security under charging orders over certain properties. This was not a point addressed by DJ Morgan at all. Assuming in Mr Khan’s favour that he had nevertheless relied on this point before DJ Morgan, it is in my judgment not open to him to rely on it now because it was raised, and dismissed, at another hearing that took place shortly after the making of the bankruptcy order. That hearing took place before DJ Porter-Bryant in October 2017, on Mr Khan’s application to annul the bankruptcy order. DJ Porter-Bryant exercised his discretion by refusing to annul the bankruptcy order. Mr Khan says that the point he now seeks to take was not taken before DJ Porter-Bryant. It is clear, however, from DJ Porter-Bryant’s judgment that it was indeed the same point. I understood the thrust of Mr Khan’s submission on this to be that the person he had instructed to argue the case had not got the point across properly. That, however, is no answer to the point that the application having made on this ground, and dismissed, it is not open to Mr Khan to argue the same point some four (or now five) years later.
35. Finally, Mr Khan sought to argue that where there has been a miscarriage of justice, it is possible – indeed mandatory – that an earlier order dismissing Mr Khan’s application can be re-opened. It is not enough, however, for Mr Khan to assert that there was a miscarriage of justice because the amounts claimed in the DCC were wrong. While he maintains that that is so, his objection to the DCC was dismissed on its merits by Judge Livesey and (for the reasons given by DDJ Regan and DJ Morgan as noted above, against which I do not think an appeal has a real prospect of success) it is not open to Mr Khan to reopen that conclusion.

Limited Civil Restraint Order

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36. There is one aspect of DJ Morgan's order upon which I did not dismiss Mr Khan's application for permission to appeal in writing. That is paragraph 4 which made a limited civil restraint order against Mr Khan. I adjourned the application for permission to appeal that paragraph of the order to this oral hearing, because it was unclear to me what orders had been certified as being totally without merit, since the earlier ECRO.
37. In the meantime, I have received a letter from Mr Hunt's solicitors which has identified the following orders as certifying one or other application of Mr Khan as being totally without merit: two applications to the Court of Appeal, which Davis LJ certified as totally without merit and the order of DJ Morgan itself, which did the same. On that basis, DJ Morgan was bound to consider making, and was entitled to make, a limited civil restraint order. Mr Khan has not identified any reason why the exercise of DJ Morgan's discretion in making that restraint order was wrong in law, for example because he took into account irrelevant matters or was an order that no reasonable judge could have made. Accordingly, I am not persuaded that there is a real prospect of success in respect of that ground of appeal.

Conclusion

38. For the above reasons, I dismiss Mr Khan's applications for permission to appeal the order of DDJ Regan and the order of DJ Morgan.