

[2015] EWHC 3881 (CH)

IN THE HIGH COURT OF JUSTICE

IN BANKRUPTCY

IN THE MATTER OF MICHAEL PAUL CHINN

AND IN THE MATTER OF THE INSOLVENCY ACT 1986

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

Tuesday, 10 November 2015

BEFORE:

REGISTRAR BARBER

BETWEEN:

STEVEN JOHN PARKER

Applicant

- and -

(1) NICHOLAS NICHOLSON

(2) RICHARD HOOPER

(3) MICHAEL PAUL CHINN

Respondents

JOHN BRIGGS (instructed by Boyes Turner) appeared on behalf of the Applicant

DANIEL LEWIS (instructed by Moon Beever) appeared on behalf of the First and Second Respondents

No representation or appearance for or by Mr Chinn, the Third Respondent

Judgment
(As Approved)

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(Official Shorthand Writers to the Court)

REGISTRAR BARBER:

1. This is an application by Mr Steven Parker of Opus Restructuring LLP; Mr Parker being the trustee in bankruptcy of Michael Paul Chinn. He seeks directions pursuant to section 303 of the Insolvency Act 1986 as to (1) whether the proof of debt filed by the first and second respondents, a Mr Nicholson and Mr Hooper of Haslers Insolvency and Recovery Services, the joint liquidators of Staffsmart UK Ltd, should be admitted, for voting purposes only, in whole or in part, in the bankruptcy; and (2) whether a meeting of creditors should be convened by the trustee or by the court at the request of the liquidators.
2. The bankrupt, Mr Chinn, has been joined to the application as third respondent, but does not appear before me today.
3. The trustee has filed two statements in this application, dated respectively 22 April and 23 July 2015. The first and second respondents (hereinafter the liquidators) have filed evidence in response, in the form of the witness statement of Mr Nicholson of 26 June 2015 (which carries with it fairly substantial exhibits), albeit I should say at the outset that the liquidators' primary position is that the application is misconceived.
4. The bankrupt, Mr Chinn, has had an opportunity – perhaps two opportunities looking at the various directions given – to file evidence, but has declined so to do.
5. By way of background, a bankruptcy order was made against Mr Chinn on 25 November 2014 on the petition of Her Majesty's Revenue & Customs. The trustee was appointed, on a Secretary of State appointment, with effect from 3 December 2014. I am told that the trustee had no previous relationship with Mr Chinn, but was initially approached by the bankrupt's tax adviser, a Ms Coleman, post bankruptcy order, with a view to applying for annulment on the grounds of payment in full. It would appear that it later transpired that the bankrupt's assets were not sufficient to discharge all of his debts and at that point, so I am told, the trustee set about investigating his affairs and realising assets, instructing Boyes Turner LLP to assist him.
6. From the evidence before me, it appears that as at 5 August 2015, known creditors' claims are as follows: HMRC in the sum of £35,729; BIS in the sum of £28,327,000; HSBC in the sum of £4,768; Crest in the sum of £46,000 and the liquidators' claim in the sum of £4.4 million.
7. It is the liquidators' proof which forms the subject matter of this application. The application, it would appear, arises in the context of a request by the liquidators in March of this year for a creditors' meeting for the purposes of removing the trustee and appointing two other insolvency practitioners in his place.
8. Turning, then, to the liquidators' proof: this was submitted to the trustee in or about January 2015 under cover of a letter of 27 January. The proof relates to a series of claims arising out of the bankrupt's directorship of Staffsmart UK Ltd, which went into liquidation in July 2010 with a deficiency as regards creditors of upwards of £3.8 million. The bankrupt has since offered (and has had accepted) an eight year disqualification undertaking in respect of his stewardship of Staffsmart. The matters of unfitness which were accepted comprised a failure to maintain, preserve and/or deliver up adequate accounting records spanning a four year period from April 2006 to April 2010.
9. The liquidators' proof, as submitted in January 2015, is in the sum of £4.4 million and is summarised as follows:

“Claim for overdrawn loan account and/or preference, misfeasance and/or wrongful or fraudulent trading claims.”

10. In the eight pages which followed the initial proof – I pause here to say that far more documentation has since been adduced in support of the proof – there is a breakdown, setting out how the £4.4 million has been arrived at. In summary, the broad heads of claim are as follows: (1) loan account/239 preference: £143,000 odd (2) 212 misfeasance/diversion of cash: £2.7 million odd (3) dishonest assistance (AAW): £301,000 odd, dishonest assistance (International): £114,000 odd (4) failure to pay Crown claims: £4.4 million odd and (5) wrongful trading: £444,000 odd, coming to a rough total of £8.1 million, which sum, for the purposes of the proof, is limited to £4.4 million on the basis of the deficiency as regards creditors understood to exist in the context of Staffsmart.
11. Each of these heads of claim is then set out, in turn, in the summary accompanying the proof. As I have indicated, at that stage, on submission of the proof, the summary submitted with it amounted simply to eight pages, but there is a thumbnail sketch nonetheless in relation to each of the heads of claim relied upon in arriving at the overall sum claimed.
12. Ordinarily, the court would not be involved at this stage. I say this because, ordinarily, an office holder called upon to adjudicate on a creditors' claim for voting purposes will simply get on and do so. There is then a well-trodden appeal path laid down in the Insolvency Rules for dealing with any challenges to the office holder's decision on the proof.
13. By his skeleton argument, Mr Briggs has submitted that this case is different. At paragraph 23, he puts the matter thus. Having set out that Mr Chinn and the liquidators (perhaps understandably) disagree in the views on the merits of the liquidators' claim, he continues:

“In the circumstances, the trustee considered that he had no option but to seek the directions of the court, since admission wholly or in part or rejection would inevitably give rise to an appeal and bedevil the bankruptcy (hence the suggestion that in a complex matter like this if the liquidators were convinced of their case they seek leave to commence proceedings).”
14. By the penultimate paragraph of his second witness statement, the trustee puts the matter as follows:

“I therefore do not wish to put myself in a position where I accept the liquidators' claim at present, specifically because I have been put on notice that the bankrupt vehemently disputes these claims and then face criticism of a court application issued by the bankrupt for the way I have handed the liquidators' claim. Nor do I wish to reject the liquidators' claim and then face legal action from the liquidators for wrongfully rejecting their claims. I find myself to be in a very difficult and exposed position, which was the very reason why I made my application.”
15. On behalf of the liquidators, Mr Lewis submits that the application is misconceived. He submits that it is a “fundamental aspect of an office holder's role to adjudicate on creditors' claims”. He points out that in the event that a party is dissatisfied they may appeal that decision and, if they do not appeal within a given time, they are bound by the decision. On that basis, he submits that the approach has a considerable advantage, which is that costs are not expended on an application which may prove not to be necessary.

16. Mr Lewis further referred me to the comments of Neuberger J (as he then was) in the case of Re T&D Industries plc [2000] 1 WLR 646 at 657, which comments were addressed to administrators but are of broader application:

“My decision tends to emphasise the fact that a person appointed to act as an administrator may be called upon to make important and urgent decisions. He has a responsible and potentially demanding role. Commercial and administrative decisions are for him and the court is not there to act as a sort of bomb shelter for him.”
17. On behalf of the trustee, Mr Briggs submits that the comments of Neuberger J in Re T&D should be treated as confined solely to cases where what is involved is an administrative or commercial decision. He seeks to distinguish that situation from the present, where the office holder’s role is to adjudicate upon a given claim and submits that, in that context, it is readily apparent why an office holder may seek the assistance of the court, the court being experienced in the adjudication process.
18. It seems to me that Mr Briggs’ attempt to distinguish the comments of Neuberger J does not wholly succeed. I do not read those comments as being limited simply to commercial and administrative decisions. It seems to me that they can equally well apply to contexts such as the present, where it is clearly envisaged by the Insolvency Rules that the office holder will take the initial first step, of making a decision on a proof, safe in the knowledge that there is an established appeal process that any dissatisfied with his decision can invoke and knowing that, within that process, it is expressly acknowledged in the rules that, ordinarily, save where the court orders otherwise, the office holder is not to be held liable for the costs of any such appeal.
19. Moreover, as rightly pointed out by Mr Lewis, the comments of Neuberger J in referring to the court as not being (in his words) “a sort of bomb shelter” to office holders, are particularly appropriate in this case. I say this because the trustee has expressly acknowledged, in his second witness statement, that he *is* effectively treating the court as a bomb shelter. His very motivation, in coming to court, is to avoid criticism from either one of two parties in disagreement. His role, however, is to make hard decisions such as this.
20. I was further referred to the case of Re Stetzel Thomson & Co Ltd [1988] 4 BCC 74, in which the court confirmed that the court should decline to give directions (in that case under section 112 of the Insolvency Act 1986) where some alternative, more appropriate, course was available, particularly where the estate was in funds.
21. Finally, I was also referred to a principle exemplified by the case of Re James McHale Automobiles Ltd [1997] BCC 202 in which it was held that section 112 should not be invoked to create an equivalent right to that under section 236 which was otherwise unavailable. Mr Lewis relied upon this authority as authority for a broader proposition, namely, that the general power of the court to give directions should not be invoked ordinarily to create a procedure, for example as to meetings for removal of a trustee, for which there are specific rules which have not been applied. This, it seems to me, is an important aspect of the case. In the context of an ordinary voting appeal under rule 6.94(2), the chairman who is responsible for the voting decision cannot appeal against his or her own decision; that is to say, it is for others to challenge the decision and to bring that challenge to court within the appropriate time scale. If they do, the onus is upon the challenger to satisfy the court, both that the chairman’s decision was wrong and as to what the decision ought to have been, *having regard to matters as they stood as at the date of the meeting*. For an office holder to seek to sidestep that process, by bringing the matter to court, *ahead of* the decision and asking the court to tell him

what the decision should be, in relation to a meeting which could take place some time in the future, is, in my judgment, wholly misconceived.

22. I do not say that there are no circumstances at all in which an office holder might properly seek guidance from the courts before adjudicating on a creditor's claim for voting purposes. By way of example, he may wish to seek assistance on a point of law, particularly in an area of developing jurisprudence, such as whether or not a given claim should be treated as liquidated or unliquidated. During the course of submissions, I was taken to a further example along these lines, where the office holders sought directions on whether given claims, which were 'post liquidation' debts on one analysis, should be treated as provable. That was an application brought in a case known as Day v Haine [2007] EWHC 2691.
23. Ordinarily, however, subject to exceptional circumstances or areas which require a definitive ruling, such as those that I have mentioned, it is for the office holder to get on and make a decision on the proof. What is not acceptable is for an office holder to invite the court, outside of the established appeal process which is clearly set out in the Insolvency Rules 1986, to supplant the office holder's role entirely. It is, as I have said, for the office holder to adjudicate on the claim and for those who disagree with his decision then to choose whether or not to invoke the appeals process, a process in which, as indicated, the office holder is ordinarily protected on costs under the Insolvency Rules (see rule 6.94(5): see too rule 6.105).
24. The effect of the trustee's decision to take the curious path of coming to court first, before adjudicating on the liquidator's proof, *is that the creditors in this bankruptcy have been denied a creditors' meeting for about eight months, whilst the trustee, who was not a creditor appointment, has remained in office as sole trustee.*
25. Both the appeal framework set out in the Insolvency Rules and the jurisprudence which has developed around that framework acknowledge the time critical nature of decisions on a creditors' proof for voting purposes. Often such decisions need to be taken quickly and they bear significantly in many cases on the course which a given insolvency will take. The legislature has recognised this by imposing tight time constraints upon the issue of appeals.
26. Moreover, the breadth of the factual enquiry required on any such appeal will depend upon the scope of the appeal itself. By way of example, the appeal might relate to all claims listed on a given proof, but equally it might only relate to one of many claims listed in the same proof. The scope of a given appeal will in turn impact on the length of time the matter takes to get to hearing and also the length of the hearing itself.
27. A further factor to be borne in mind is that the court's ruling on an appeal against a decision on a proof for voting purposes will only determine the validity of the proof for the purposes of voting *at a given creditors' meeting*. It will not determine the validity of the proof for the purposes of participating in a *dividend* or, indeed, even for the purposes of voting at a *subsequent* meeting. At a subsequent meeting, the office holder (or whoever else chairs the meeting) may, for example, have further evidence before him and may take a different view on the value to be attached to the proof for voting purposes. This was clearly acknowledged in the well-known cases of *Power v Petrus Estates Limited* 2009 BPIR 141 and the Chelsea FC case (1995 1 BCLC 459). Indeed, in the context of the Chelsea FC case, Blackburne J went so far as to describe the decision reached by the court on such appeals as "provisional".
28. Taking all such factors into consideration, it seems to me that applications such as that before me today should be strongly discouraged. Whilst I can quite see that there may be exceptional situations in which some discrete guidance is required from the court on a given point relating to a proof of debt (such as whether the debt should be treated as

liquidated or unliquidated for example), for an office holder to seek the wholesale abnegation of his responsibility to rule on that proof is a matter which the court should rarely entertain. The ruling now, by the court, on whether and if so in what sum the liquidators' proof should be admitted for voting purposes, would occupy what can only be described as an incongruous position within the framework of this bankruptcy.

29. For all of these reasons I decline to give such a ruling.

(Proceedings)

REGISTRAR BARBER:

30. Given the hour I do not propose to deliver a lengthy judgment on the issue of costs. For the reasons which I have already given in the context of my ex tempore judgment on the application itself, I consider that this application was, in the circumstances, wholly misconceived and ought not to have been brought.
31. That, then, is the starting point and, as with any matter, it falls upon me to determine costs. Naturally, I am mindful of the fact that, within the context of the usual appeal structure for challenging decisions on proofs laid down by the rules, the office holder has the protection of rule 6.94(5). In this case, however, the office holder has chosen to adopt a route which had the effect of denying him that protection. He is, therefore, in much the same position as any other litigant who chooses to bring a misconceived application and in consequence causes others joined as respondents to that application to run up unnecessary costs.
32. On an application of the factors to which I must have regard as set out in CPR 44, naturally one of the factors that I take into account is that the trustee has been wholly unsuccessful in this application. That is a factor pointing strongly in favour of a costs order being made against the trustee and in favour of the respondents. On behalf of the trustee, Mr Briggs has submitted that it was only at the eleventh hour that the first and second respondents raised preliminary objections to the application and on that basis, the respondents having 'come along for the ride' as it were and having engaged with the application on a substantive basis rather than applying at an early stage to strike it out, he contends that the first and second respondents should simply have to bear their own costs, consequent upon their own relative inertia.
33. It seems to me that this argument must be seen in the context of the correspondence before me, to which I have been referred in some detail. The starting point is an email of 10 April, some seven months ago, in which the liquidators' solicitors effectively query the sense of the application that was (at that stage) still being proposed. That email ought properly to have given the trustee pause for thought, but notwithstanding the same he decided to press on.
34. There was then, at a slightly later stage, another point at which the liquidators' solicitors, by letter of 6 May, set out a proposed way forward, which envisaged the timeous calling of a meeting on the footing that, if the meeting resulted in the removal of the trustee, the application could be stayed. Whilst this was not 'spelling out' the ultimate position of the liquidators on the wisdom of the application, it is a sign of the liquidators taking steps to find a short way through what would otherwise be (and has been) an expensive and wasted application.
35. The trustee, acting by Mr Briggs, relies upon a consent order, which the parties all agreed to, dated 14 May. This, inter alia, provided for evidence to be filed by the third

respondent on the issues of whether or not the proof should be admitted and if so in what sum. Mr Briggs argues that this consent order was an example of the first and second respondents engaging with the application in substance, rather than taking preliminary objections to it. Mr Briggs says that the liquidators cannot have it both ways. They were at that stage, he says, as much at fault as the trustee in pursuing this application.

36. It was only, he maintains, at the stage of the letter of 25 September 2015, that the liquidators made crystal clear what their position was on the appropriateness of the application. On that footing and having regard to the usual principle that creditors are ordinarily responsible for the costs of proving their own debts, Mr Briggs urges me not to make any costs order in favour of the first and second respondents.
37. Notwithstanding his persuasive submissions, however, it seems to me, having regard to the circumstances giving rise to this application, together with the correspondence exchanged in the run up to its issue and during the course of it, that it would not be appropriate to treat the liquidators' failure to apply to strike out the application as standing in the way of a costs order in their favour. Mr Briggs has made quite clear that the trustee had experienced solicitors and counsel advising on the matter and has indicated that the advice received by the trustee was that the application should be brought and should be proceeded with.
38. It seems to me, therefore, that even if the liquidators had raised, more expressly, their concerns at an earlier stage, the trustee is likely to have pressed on with the application in any case. They did, in fairness, flag concerns about the wisdom of the application as early as their email of 10 April 2015 and it would be wrong, it seems to me, to punish the liquidators in costs for not having taken more active steps to bring an end to an application that they had no say in beginning. Indeed, they had no (or minimal) prior notice that the application was to be issued and raised concerns very shortly thereafter.
39. Overall, what weighs with me is that this is and always has been a misconceived application. It is not for the liquidators to advise the trustee on appropriate procedure; he has own advisors for that purpose. Nor does this case fall into the category, which is well acknowledged, of a party to a process sitting by and watching in silence knowing that another party is making a huge error. That is not how the correspondence reads in this case. There were concerns flagged, sufficient concerns, for any reasonable office holder to have paused and taken stock.
40. Ultimately, the trustee has lost and the respondents have been successful and notwithstanding Mr Briggs' helpful submissions I am not persuaded that this is a case in which the liquidators should bear any part of their own costs. The trustee has brought this on himself and it is wholly appropriate in my judgment that there be an order that the applicant trustee pay the first and second respondents' costs of and occasioned by this application, such costs to be the subject of detailed assessment if not agreed.
41. I am also satisfied that this is an appropriate case in which to grant the first and second respondents liberty to apply for personal cost orders against the trustee, both in relation to their costs and in relation to the issue whether the trustee should be permitted to recoup his own costs from the insolvent estate. Those personal costs applications,

however, should be on appropriate notice to the trustee and that much is common ground.