Neutral Citation Number: [2017] EWHC 681 (Ch).

Appeal Ref No BK150A

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
ON APPEAL FROM THE WAKEFIELD COUNTY COURT
IN BANKRUPTCY

IN THE MATTER OF THAKORBHAI RANCHHODJI PARMAR No 116 of 2015
AND IN THE MATTER OF RAMA PARMAR No 117 of 2015

Royal Courts of Justice
Rolls Building

Date: 31 March 2017

Before :

MR MARTIN GRIFFITHS QC
(SITTING AS A DEPUTY JUDGE OF THE CHANCERY DIVISION)

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Between:

WAVE LENDING LIMITED	**Petitioner/Respondent**
- and -	
(1) THAKORBHAI RANCHHODJI PARMAR	**Debtors/Appellants**
(2) RAMA PARMAR	

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MATTHEW COLLINGS QC
(instructed by **Howes Percival LLP**) for the Appellants/Debtors
STUART CUTTING (instructed by **Moore Blatch**) for the **Respondents/Petitioners**

Hearing date: 29 March 2017

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Judgment Approved

Martin Griffiths QC:

1. This is a fully-argued application for permission to appeal and for appeals to be granted against bankruptcy orders made on the creditor's petition against each of the two appellants, who are husband and wife. Although there were two debtors, and two bankruptcy orders, it is common ground that, for the purposes of the present appeals, no distinction arises between the two of them. The matter has been argued throughout on a basis which applies equally to both.

2. The bankruptcy orders are dated 24 May 2016 and were made by District Judge Jackson after a full day of argument and on the basis of a carefully reasoned judgment. The District Judge dealt with a large number of points argued before her, not all of them contained in the notice of opposition and skeleton argument filed in advance of the hearing. Her task was therefore a great deal harder than mine, because, on appeal, most of the points argued before the District Judge have been abandoned, and I have been able to concentrate on the much more limited argument now advanced by Mr Collings QC (who did not appear below) on behalf of the debtors and in support of the appeals.

The facts

3. The essential facts are as follows. The appellants took out various buy-to-let mortgages from Freedom Lending in 2007 and the creditor has succeeded to Freedom Lending's rights under the mortgage agreements. There were defaults under the mortgage facilities. Judgment was obtained against Mr Parmar by the creditor on 24 September 2008 in the sum of £611,139.18 and against Mrs Parmar on the same day and in the same amount. The creditor sold property pursuant to a possession order, but this still left a debt of £493,882.24 (owed by Mr Parmar) and £494,135.24 (owed by Mrs Parmar). Not all of this outstanding debt was unsecured because final charging orders were obtained over various unsold properties owned by Mr and Mrs Parmar. But the creditor valued these securities at less than the outstanding debts.

4. The creditor therefore issued and served statutory demands on Mr and Mrs Parmar, both dated 7 July 2015. Each statutory demand set out the amount of the original judgment debt (and the date of the judgment), the amount of interest and costs to be added, the amount by which the debt had been reduced by the sale of properties, the addresses of the properties over which charging orders had been obtained, and an estimate of the value of the security provided by those charging orders (based on the estimated value of the unsold properties subject to the charging orders). The statutory demands then stated the figure which was stated to be the "anticipated shortfall" between the debts and the securities. In the case of Mr Parmar, the statutory demand identified "a total anticipated shortfall in the sum of £427,785.34" and continued: "This demand is in respect of the anticipated shortfall only and it is not intended to waive the security held." Legal costs of £420 and process server's fee of £102 were then added, making the statutory demand addressed to Mr Parmar a demand for the sum of £428,307.34. The figures for Mrs Parmar were only slightly different, but the wording and the format of the statutory demand addressed to Mrs Parmar were otherwise identical.

The issue

5. The debtors do not criticise the statutory demands for dealing with the secured and unsecured debts in this way. The difficulty arises in respect of the subsequent petitions based on those statutory demands. Unlike the statutory demands, the petitions (which are essentially identical, save for small differences in the applicable figures) do not break down the debt between the secured and unsecured amounts. Instead, paragraph 3 of the petition in Mr Parmar's case states "The debtor is justly and truly indebted to us in the aggregate sum of £428,307.34". No breakdown of that sum is contained in the

petition, but I can see that it corresponds to the sum stated to be left unsecured in the calculation in the statutory demand. Paragraph 5 of the petition in Mr Parmar's case then states: "On 23/07/2015 a statutory demand was served upon the debtor... in respect of the above-mentioned debt." Paragraph 6 says: "We do not, nor does any person on our behalf, hold any security on the debtor's estate, or any part thereof, for the payment of the above-mentioned sum." The petitions were issued on 26 October 2015.

6. The issue raised by this appeal is whether it is permissible for the petition to be based upon a bald statement of the unsecured amount of an otherwise secured debt, by reference to a statutory demand which contains a more detailed calculation, including an estimate of the value of the security.

The law

7. Every bankruptcy petition must be in respect of "one or more debts" which satisfy the requirements of section 267 of the Insolvency Act 1986 ("the Act"). These requirements are set out in section 267(2) as follows:-

> "Subject to the next three sections, a creditor's petition may be presented to the court in respect of a debt or debts only if, at the time the petition is presented—
>
> (a) the amount of the debt, or the aggregate amount of the debts, is equal to or exceeds [£5,000],
>
> (b) the debt, or each of the debts, is for a liquidated sum payable to the petitioning creditor, or one or more of the petitioning creditors, either immediately or at some certain, future time, and is unsecured,
>
> (c) the debt, or each of the debts, is a debt which the debtor appears either to be unable to pay or to have no reasonable prospect of being able to pay, and
>
> (d) there is no outstanding application to set aside a statutory demand served (under section 268 below) in respect of the debt or any of the debts."

8. It is, therefore, a mandatory requirement, by section 267(2)(b) of the Act, that the debt upon which the petition is based is "unsecured". This is, however, "subject to the next three sections"; i.e. sections 268-270 of the Act. These provide a derogation from the statutory bar on a secured debt being the basis of a bankruptcy petition. The derogation is to be found in section 269 of the Act, which provides as follows:-

Discussion

> **"269.— Creditor with security.**
>
> (1) A debt which is the debt, or one of the debts, in respect of which a creditor's petition is presented need not be unsecured if either—
>
> (a) the petition contains a statement by the person having the right to enforce the security that he is willing, in the event of a bankruptcy order being made, to give up his security for the benefit of all the bankrupt's creditors, or
>
> (b) the petition is expressed not to be made in respect of the secured part of the debt and contains a statement by that person of the estimated value at the date of the petition of the security for the secured part of the debt.
>
> (2) In a case falling within subsection (1)(b) the secured and unsecured parts of the debt are to be treated for the purposes of sections 267 to 270 as separate debts."

9. In the present case, the creditor was not willing to give up the security (and said so in the statutory demands). Therefore, section 269(1)(a) did not apply. How then, if at all, could it be said that the petitions met the requirements of sections 267-269 of the Act?

10. The learned District Judge dealt with this point carefully and at length in paragraphs 37 - 60 of her impressively clear and well-structured judgment. She began by pointing to the detail provided in the statutory demands. She noted that "what is clear from the statutory demand is that the sum claimed is not the judgment sum... It is the unsecured sum...". She then turned to the petitions, and said "the petition is not the petition for the full sum due and payable to this creditor. It is a petition solely for the sum claimed in the statutory demand, i.e. the liquidated sum payable immediately which is unsecured." She then quoted the provisions of section 269(1) and (2) of the Act, which I have already set out.

11. She then said "...this petition is not a petition under either section 269(1)(a) of section 269(1)(b), because it is neither a debt which is secured but the security has been given up, nor is it a debt which is secured in part but only the unsecured part is being pursued in the petition." Since section 269(2) is only a definition applied to section 269(1)(b), it followed that the District Judge was saying this was not a case in which the petition was within section 269 of the Act at all.

12. Mr Cutting appeared for the debtors at the hearing of the petitions, and continued to represent them before me as respondents to the appeals. I asked him if he agreed with that sentence from the judgment below. At first he said that he did not, but he said he would like to consider the point over the short adjournment. After the short adjournment, he said that, on reflection, his position was that he did agree with it. I understand why the point was a difficult one for his clients, and he was right to consider it carefully. He was also right to recognise immediately that there were difficulties with either position.

13. Where a creditor is owed a liquidated sum, and has security for part but not all of it, it is possible for the petition to bring itself clearly within the provisions of section 269. A creditor who considers the security to be worthless, may be willing to give up the security for the benefit of all the creditors. He will then be able to invoke the provisions of section 269(1)(a). But a creditor who, as in this case, considers the security to be valuable, may not wish to give it up. He will then usually invoke the provisions of section 269(1)(b). This requires the petition "to be expressed not to be made in respect of the secured part of the debt" and also to "contain a statement by that person of the estimated value at the date of the petition of the security for the secured part of the debt." The difficulty for the creditors in this case is that the petition does not "contain a statement... of the estimated value at the date of the petition of the security for the secured part of the debt." It contains no figures at all except the net figure claimed, without any reference to the gross debt or the estimated value of the security. It is true that an intelligent reader can see that the figure in the petition corresponds to the figure in the statutory demand. But that does not mean that "the petition... contains a statement... of the estimated value at the date of the petition of the security for the secured part of the debt." It does not.

14. That is why I think Mr Cutting was correct to conclude that the District Judge was right to say that the creditors' petitions in this case were not petitions under section 269 of the Act.

15. But if the petitions did not satisfy the provisions of section 269, were they compliant with section 267? Section 269 is a qualification of section 267, and is one of the sections to which section 267 is expressly subject. Without the benefit of section 269, the

petitions in this case had to come within the unqualified provisions of section 267 itself.

Meaning of "liquidated sum"

16. The judgment below decided that "these are petitions simply for an unsecured sum". However, a petition debt is required to satisfy all the conditions of section 267(2), and not merely the provision that it should be "unsecured". One of these conditions is that the debt, or each of the debts, is for a "liquidated sum".

17. The District Judge said that the petition debt was "the sum claimed in the statutory demand, i.e. the liquidated sum payable immediately which is unsecured." She plainly did believe, therefore, that the petition debt was for a "liquidated sum".

18. There is no definition of "liquidated sum" in the Act (except that section 267(3) provides that a debt is not a liquidated sum for these purposes by reason only that the amount of the debt is specified in a criminal bankruptcy order, which does not help in this case). Neither Counsel referred me to any authority on the meaning of the phrase.

19. Counsel for the respondent debtors suggested that "An unliquidated sum is a sum which has not been precisely determined." On that definition, the sum claimed in the statutory demand, and from there claimed in the petition, was not a liquidated sum. The unpaid balance of the judgment debt and associated interest and costs was precisely determined. But the credit to be given for the value of the securities was not. It depended upon an estimate of the property values, and the accuracy of the estimate had not been adjudicated, and was not ascertainable without further enquiry. That is the usual position when security depends on the value of an unsold property, because property values are not as easily reckoned as, say, the cost of a newspaper, which has a clear price attached to it which is invariably paid by those purchasing it.

20. In the present case, the statutory demands made no claim to precision. The statutory demand addressed to Mr Parmar, for example, said "It is estimated that a sale price of approximately £84,000 would be obtained in respect of 26 Ramsden Street and a sale price of approximately £269,900 in respect of 3 Main Street". The use of the word "approximately" speaks for itself. A net debt based on estimated sale prices stated to be approximate could not have been a "liquidated sum" for the purposes of section 267 of the Act.

21. The wording of section 269 is also instructive. The obvious course for a creditor whose debt is only partly secured is to present under section 269(1)(b) a petition which refers to the total debt, both secured and unsecured, and contains a statement of the "estimated value" at the date of the petition of the security for the secured part of the debt. An "estimated value" is expressly permitted if the petition is brought under section 269(1)(b). It is not, in my judgment, permitted if it is brought under section 267 alone, without reference to the following sections, because an "estimated value" cannot provide the basis for a "liquidated sum" as required by section 267(2)(b) when section 269 does not apply.

22. In *Hope v Premierpace (Europe) Ltd* [1999] BPIR 695, Rimer J held that a statutory demand for £17,000, which the petitioner alleged the respondent had misappropriated, was not a claim for a "liquidated sum" and could not form the basis of a petition. It was a claim for damages or for an account and payment. I note that the fact that the petitioner put a precise figure on it did not make it a liquidated sum.

23. In *McGuinness v Norwich and Peterborough Building Society* [2011] 1 WLR 613, Briggs J rejected an argument that a claim under a particular form of guarantee was properly characterised as a claim in damages. He decided that the guarantee in question

created a debt obligation which was, therefore, properly characterised as a "liquidated sum". However, in *obiter dicta* he doubted the decision in *Hope v Premierpace (Europe) Ltd* [1999] BPIR 695 and made the following observations:-

> "24. The first is that it does seem remarkable that a person from whom £1,000 has simply been stolen should be unable to present a bankruptcy petition (following a statutory demand), whereas a person with a £1,000 contract debt may do so, always assuming that there is not a bona fide defence to either claim on reasonable grounds. As Proudman J said in *Truex v Toll* [2009] 1 WLR 2121, 2129, the question whether a sum is liquidated and whether there is a defence of the claim are entirely separate issues.
>
> 25 Secondly, I have real doubt whether distinctions based on different causes of action (ie debt, account and payment, damages) satisfactorily address the purpose behind section 267(2)(b) of the Act, which seems to me to distinguish between cases where there is no issue as to the amount of a liability, and cases where some process of assessment by the court is necessary, before the amount can be identified. I can well understand that a claim for an account which depends upon the defendant providing disclosure as to the amount of an alleged secret profit cannot possibly be a claim for a liquidated sum. By contrast, a claim to recover stolen money, where the precise amount stolen is known by the claimant, seems to me in principle to be a claim for a liquidated sum, even though the form of action is one for account and payment."

24. His judgment was taken to the Court of Appeal, where Patten LJ, in a judgment with which Moses and Ward LJJ agreed, conducted a detailed historical review of authorities casting light on the term "liquidated sum" in section 267(2) of the Act, and on the related term "bankruptcy debt" elsewhere in the legislation: *McGuinness v Norwich and Peterborough Building Society* [2011] EWCA Civ 1286; [2012] 2 BCLC 233 at paragraphs 12-35. He then said, at paragraph 36:-

> "These authorities indicate and I think establish that a debt for a liquidated sum must be a pre-ascertained liability under the agreement which gives rise to it. This can include a contractual liability where the amount due is to be ascertained in accordance with a contractual formula or contractual machinery which, when operated, will produce a figure. *Ex parte Ward* (1882) 22 Ch D 132 is the obvious example of that. Claims in tort are invariably unliquidated because they require the assistance of a judicial process to ascertain the amount due by way of damages. In some cases the calculation of the award will be straightforward and obvious but the unliquidated nature of the claim excludes it from being a good petitioning creditor's debt which satisfies the requirements of s.267."

25. At paragraph 39, Patten LJ says:-

> "In *Re Broadhurst* (1852) 22 LJ Bank 21 the measure of liability under the contract was readily calculable but that did not make it a liquidated claim. As Maule J put it in his judgment, there was no specific sum engaged to be paid to the creditor."

26. These authorities confirm my view that the sum claimed in the petition was not a "liquidated sum" within the meaning of section 267(2). None of the debts claimed in the petitions was "a pre-ascertained liability under the agreement which gives rise to it", in the words of Patten LJ. I accept that Patten LJ is there referring to the particular liability in the case before him, which happened to be a liability claimed under an agreement. Of course, other types of "pre-ascertained liability" may give rise to a debt which can properly be characterised as a "liquidated sum". In this case, the judgment debts, the interest and the prescribed costs could all be said to be "pre-ascertained" from

the sources which gave rise to them. A judgment debt is not an agreement, but it does give rise to "a pre-ascertained liability". However, a crucial component of the debts claimed in the petitions, without which the amount of the debt could not be stated, was the value placed on securities over unsold properties. These values were not pre-ascertained. Even if (which was not the case) the creditors had put a precise rather than an approximate value upon them, this would not, in my judgment, have produced "liquidated sums".

Conclusion

27. The petitions therefore complied neither with section 269, nor with section 267 in the absence of section 269, and it follows that the decision of the District Judge cannot stand in that respect. It is conceded by the respondents that the petitions, in that case, required amendment and that, without amendment, the petitions should not have been granted, whether under Rule 7.55 of the Insolvency Rules 1986 or any other power that the District Judge or I have. There was an application to amend the petitions before the District Judge, but she did not consider it or rule upon it because she did not think that amendment was necessary. The parties agree that the effect of my decision is that the appeals should be allowed, the existing bankruptcy orders should be discharged and the petitions should be remitted to the County Court so that any applications to amend may be determined, and any necessary directions given for the further conduct of the bankruptcy proceedings.

28. There is one other point which I have to determine. The appellants challenged, not only the petitions, but also the statutory demands. This was not because of the passages I have cited, dealing with the amounts claimed, but because both statutory demands wrongly stated that the appropriate court for setting aside the demands was the High Court in London. It was, in fact, either the Wakefield County Court or Leeds. The District Judge dealt with this at paragraphs 16 - 26 of her judgment in which, for reasons she explained, she concluded that no prejudice had been suffered by the debtors and, applying the dictum of Newey J in paragraph 16 of *Agilo Ltd v William Henry* [2010] EWHC 2717 Ch, she exercised her discretion against setting the statutory demands aside. I think this was a decision that she was entitled to make, I agree with it, and I affirm it without the need to say any more: see *Re Portsmouth City Football Club Ltd (In Liquidation)* [2013] EWCA Civ 916, [2013] BCC 741 per Mummery LJ at paragraph 38.