Neutral citation number: [2018] EWHC 2015 (Ch)

IN THE HIGH COURT OF JUSTICE
BUSINESS & PROPERTY COURTS OF ENGLAND & WALES
CHANCERY APPEALS (Ch D)

No. CH-2017-000049

Rolls Building

Monday, 9 July 2018

Before:

HIS HONOUR JUDGE HODGE QC

(Sitting as a Judge of the High Court)

B E T W E E N :

HARRIETT LOCK — Appellant

- and -

AYLESBURY VALE DISTRICT COUNCIL — Respondent

THE APPELLANT appeared in person with Ms Myfanwy Lock.

MR THOMAS COCKBURN appeared on behalf of the Respondent.

APPROVED J U D G M E N T

JUDGE HODGE QC:

1 This is my extemporary judgment on an appeal by Harriett Lock (as debtor) against a bankruptcy order made against her by District Judge Sweeney (sitting in the County Court at Milton Keynes) on 17 January 2017 under a petition (number 42 of 2016) which had been presented by the respondent to this appeal, Aylesbury Vale District Council, on 20 January 2016. That bankruptcy petition was founded upon a statutory demand in the sum of £8,067-odd in respect of allegedly unpaid council tax. That statutory demand had been served on 12 October 2015.

2 There had been a number of case management hearings during the course of the petition. At one of those hearings, District Judge Ahmed had made an order on 3 March 2016 requiring the petitioner to file and serve evidence in support of the petition and for the appellant to file and serve any evidence in reply. Evidence in support of the petition was filed in the form of a witness statement from Gary Wright, a ratings and recovery manager for the Revenues and Benefits Department of the petitioning creditor, dated 15 March 2016. That evidence addressed the liability order on which the petition debt was founded but it said nothing about the assets available to the appellant and the reasons why it was asserted that a bankruptcy order would achieve any sensible purpose.

3 Ms Lock responded to that evidence by way of a lengthy and discursive witness statement dated 14 April 2016 extending to some 16 pages. In the course of it she did not in terms address her financial situation; but it is clear that she was a person who was living in social housing and dependent, initially, upon benefits and, more latterly, upon financial support from her daughter, Myfanwy, who was the only person in the household said to be earning any money.

4 The matter came on for hearing on further occasions, including a hearing on 10 October 2016 before District Judge Perusko. He adjourned the further hearing of the petition to 17 January 2017 and made an order requiring the debtor, no fewer than seven days before that re-listed hearing, to file and serve a skeleton argument setting out her submissions as to why the petition should not be granted. For reasons not explained before me, a lengthy skeleton argument, extending to some 18 pages, was prepared by or on behalf of the appellant and dated 12 January 2017, yet it was not filed at court or served on the respondent to this appeal, the petitioning creditor, until early on the morning of the day set aside for a full day hearing of the bankruptcy petition. At paragraphs 20 to 32 of that skeleton argument, the appellant addressed an argument that a bankruptcy order would serve no purpose or be of no benefit to the respondent to this appeal. Indeed, at paragraph 33, it was asserted that a bankruptcy order would, in fact, be disadvantageous to the respondent to the appeal for two reasons there set out.

5 The hearing on 17 January 2017 took place before District Judge Sweeney. The appellant appeared before the district judge, as she had done on previous occasions, as a litigant in person, assisted by her daughter Myfanwy. The respondent petitioning creditor was represented by Mr Bryden (of counsel). The district judge made the bankruptcy order which is the subject of this appeal. The approved transcript of his judgment is very short, extending only to six paragraphs spread over less than a page. He said that he was going to make a bankruptcy order on the footing that there was a liability order in place which had not been set aside, rescinded, challenged, or in any way rendered unenforceable. The statutory demand similarly had been issued and not been set aside. In those circumstances, there was said to be a *prima facie* entitlement to a bankruptcy order.

6 The district judge said that the court had given the appellant the opportunity at its hearing on 10 October 2016 to put forward grounds or a skeleton argument as to why the petition should not be granted so that both the creditor and the court would know the submissions

she was relying upon. The district judge said that the appellant had failed to comply with that requirement and, in those circumstances, he considered it to be inappropriate for her now to start raising points that could and should have been raised at an earlier point. The district judge said that he appreciated that the appellant was a litigant in person, but District Judge Perusko would similarly have appreciated that when he made the order, and that it was clear that the order was there to be complied with but had not been.

7 The district judge then went on to refer to an undertaking which had been given by the appellant to make a formal appeal against the liability order which again the district judge said had not been done. The district judge said the matter had been going on for 21 months since the liability order was issued and 15 months since the issue of the statutory demand. In his judgment, further delay was not appropriate when the appellant had been given ample opportunity both to lodge her appeal and to file a skeleton argument.

8 He concluded his judgment by saying that, there being a liability order backed up by a statutory demand which had not been set aside, the petitioner was entitled to a bankruptcy order, and he made one. It is against that order that the appellant now appeals. Her appellant's notice was filed on 13 February 2017 but an extension of time for appealing was granted by Barling J on 31 March 2017.

9 The application for permission to appeal came on for hearing before Morgan J on 19 April 2018. By that stage, there were grounds of appeal extending to some 18 pages and a skeleton argument for the appellant, dated 19 February 2018, which extended to some 30 pages. Morgan J gave permission to appeal in relation to the ground of appeal that the district judge had not considered the point made by the appellant at the earlier hearing before District Judge Perusko on 20 October 2016 that a bankruptcy order would serve no useful purpose and would be of no benefit to the respondent so that it would not be an appropriate exercise of discretion to make a bankruptcy order.

10 Save to that extent, the applications for permission to appeal on other grounds, and to rely on further evidence on the hearing of the appeal, were adjourned until immediately after the hearing of the appeal for which permission had been granted. The appeal and the applications were reserved to Morgan J although I understand that he has since released them so that they could be heard by me, sitting as a judge of the High Court under section 9 of the Senior Courts Act 1981.

11 On 9 May 2018, that hearing was listed at 11.30 today, with a time estimate of three hours. Morgan J gave directions for further skeleton arguments and, as a result, I have had a further skeleton argument from the appellant dated 3 May 2018. There is also a further skeleton argument, dated 17 May 2018, from the respondent, supplementing an earlier skeleton argument which had been served for the purposes of the hearing before Morgan J on 19 April.

12 At the hearing before me, the appellant has addressed me through her daughter Myfanwy, although I also gave an opportunity to the appellant herself to address me at the end of her daughter's submissions and the appellant availed herself of that opportunity. In total, I heard from the appellant, largely through her daughter, for about 1½ hours either side of the luncheon adjournment. For the respondent, I was addressed for about an hour by Mr Thomas Cockburn (of counsel), appearing for the respondent local authority. Ms Myfanwy Lock then addressed me briefly in reply for about 15 minutes. It is now about 10 past 4 and, therefore, my judgment will inevitably be more compressed than it otherwise might.

13 Essentially, the argument advanced on behalf of the appellant on this ground of appeal is that a bankruptcy order would serve no useful purpose and would be of no benefit to the respondent because the appellant has absolutely no assets to satisfy any liability in her bankruptcy and no investigation by a trustee in bankruptcy or the official receiver would

bring any assets to light. As a result, the district judge should not have exercised his discretion to make a bankruptcy order.

14 Reliance is placed on the terms of section 266(3) of the Insolvency Act 1986, which gives the court a general power, if it appears to it appropriate to do so for any reason, to dismiss a bankruptcy petition. It is said that there is authority that the court will not make a bankruptcy order if doing so would serve no useful purpose. That is an argument that should have been considered by the district judge but was not. By failing to consider the argument, it is said that the district judge had failed judicially to exercise his general discretion under section 266(3). The court will not make a bankruptcy order where it would confer no benefit, and the court should conduct a higher level of scrutiny into a public body petitioning creditor than other petitioning creditors.

15 It is said that here there will be no value to creditors by the making of a bankruptcy order. There is no dividend in the bankruptcy estate to be obtained and there is no need for any official receiver or trustee in bankruptcy to investigate the debtor's affairs. The appellant has no income and through ill-health she has no income-earning capacity. She does not own a home but rents from a social landlord. She is said to have capital of less than £100. Although it is not strictly in evidence, I was told that her capital amounts to only a little more than £60.

16 During the course of the appeal, reference was made by Ms Lock to a bankruptcy checklist. This was not formally in evidence before the district judge, as was pointed out to me by Mr Cockburn, but he indicated that the respondent did not resist it being before the court. It makes it clear that the respondent council was aware, prior to the presentation of the bankruptcy petition - the bankruptcy checklist being dated 14 January 2016 - that Mrs Lock was not working, was not in receipt of any benefits, and was not a homeowner. In the light of that information, it was said that the case was an unusual one where normally bankruptcy

would not be an option as there were no clear assets; but the checklist went on that there was "… a possibility that the appellant may have received funds from an inheritance. However, it must be stressed that [the respondent had] no documents to support this and this would have to be investigated by any appointed Trustee". Having "liaised with" others, "it was decided that bankruptcy would be authorised due to the above and the fact that [the council had] no other way of recovering the debt."

17 The appellant submits that in the light of that checklist, the bankruptcy petition should not have been presented or pursued. The appellant disputes that she had any real entitlement to any assets. The possible inheritance to which the reference was made was said to be no more than a legacy under an estate where probate had been granted some years before and where nothing had been received or was likely to be received. Probate was said to have been granted in February 2009 and the legacy, which was said to be only £3,000, dated back to that time. Since then, the appellant had been in receipt of income support and other benefits, although they had since been discontinued.

18 For the appellant, it was pointed out that the respondent had clearly investigated the appellant's financial affairs prior to the presentation of the bankruptcy petition and earlier service of the statutory demand. It was said that the respondent, as the public body charged with the administration of housing benefit, and as the council tax billing authority was well aware of the appellant's financial position. It was pointed out that at no stage, and notwithstanding the order made by Deputy District Judge Ahmed, had the appellant ever been directed to file any evidence of her current or prospective assets.

19 For the respondent, Mr Cockburn indicated that when hearing the application for permission to appeal, Morgan J had determined that District Judge Sweeney had been wrong in refusing to allow the appellant to make submissions as to whether a bankruptcy order should be made. It was said that Morgan J had not accepted that it had been appropriate in the

circumstances for the district judge to have proceeded in the way that the court had. Mr Cockburn would therefore not make any submissions on that aspect of the matter and would not address the *Denton* principles. However, Mr Cockburn emphasised the limited nature of the ground on which permission to appeal had been given. He pointed out that a number of the appellant's submissions had extended well beyond the limits of this particular ground of appeal; in particular submissions on whether the Magistrates' Court hearing the application for the liability order had applied the correct test fell well outside the authorised ambit of the present hearing.

20 Mr Cockburn made it clear that he would limit his submissions to the sole ground upon which permission to appeal had already been given. As to that, he said that the issue was not one of legal principle. It was accepted that a petitioning creditor did not have an absolute entitlement to a bankruptcy order, and that a petition might be dismissed if it would serve no proper purpose, as where the debtor had no assets. The question in the instant appeal, however, was whether the appellant had satisfied the court that there were no assets, present or prospective, which were available for distribution to creditors. The proper purpose of the making of a bankruptcy order was the proper administration of a bankrupt's assets for the benefit of all creditors.

21 The proper test for bringing a bankruptcy or winding up petition was said to have been considered by Mr Gabriel Moss QC, sitting as a deputy judge of the High Court, in *Shepherd v The Legal Services Commission* [2003] BPIR 140. There, certain principles had been identified, which Mr Cockburn did not understand to be in dispute. He accepted that, in principle, a lack of assets could form a proper basis for refusing a bankruptcy order; but to engage the discretion, a debtor must establish to the court's satisfaction both that there were no assets and no prospect of such assets.

22 I was taken to passages in the judgment of the Court of Appeal in the case of *Re Betts* [1897] 1 QB 50. In particular, I was taken to a passage in the judgment of Lord Esher MR at page 52 where it was said that if the court was clearly convinced, not merely by the statement of the debtor but from all the circumstances of the case, that there could not be any assets, or any prospect of any coming into existence, and that if a bankruptcy order or, as it then was, a receiving order were made, the only effect would be a mere waste of money and costs, then, in such a case, the court had a discretion in the matter and would be justified in exercising that discretion by refusing to make the order.

23 I was also taken to passages in the judgment of Sir Robert Megarry VC, delivering the judgment of the Divisional Court in Bankruptcy, in the case of *Re Field* [1978] Ch 371. At page 375, letter G, the Vice Chancellor recognised that a person might indeed be too poor to be made bankrupt, but he observed that the burden of proof was heavy.

24 At page 376, letters C to D, the Vice Chancellor referred to Lord Esher's statement that if a debtor merely swore an affidavit saying that it was no use making him bankrupt because he had no assets and no prospects of having any, the court would not accept that as a ground for not making a bankruptcy order because, at that stage, the court was in no position to know whether the statement was true. The Vice Chancellor observed that during the process of bankruptcy, much that was unknown earlier became revealed.

25 At page 378, letters B to D, the Vice Chancellor observed that the debtor had not put forward any evidence save his own to support his contention that he had no assets at present and that there was no prospect of his ever having any. Indeed, his affidavit was said to say nothing explicit on the latter point. That, of itself, would, on the authorities, be fatal to the appeal. Further, even if the debtor's own evidence were accepted at its full face value, the Vice Chancellor was far from being clearly convinced that there were no assets and would

be none. He went on to say that it was plain that the burden of proof in such matters was heavy, and rightly heavy, and there the debtor had not discharged it.

26 Mr Cockburn emphasised that the debtor's evidence alone was insufficient. He submitted that the appellant had not adduced sufficient evidence, either at the time of the hearing before the district judge, or at the present time, to engage the court's discretion. The appellant's evidence was said primarily to address the historic position and not the position at the present time or in the future.

27 He referred me in particular to what was said at paragraphs 25 and 29 of the skeleton argument for the hearing before the district judge. That evidence was said to relate to the past and, in any event, to be incomplete. It was said that the appellant had not set out any comprehensive evidence of the extent of her assets at the time of the bankruptcy hearing or as to her future prospects. It was said that the respondent had been aware of a potential for recovery and had been in no position to assess the appellant's assets, present or future. The appellant's evidence was said not to have addressed her prospects of acquiring any assets.

28 In addition to the inadequacy of evidence as to the appellant's assets, present or prospective, it was also said that questions had been raised which required investigation. Questions were raised by the circumstances in which the liability order had been obtained as to the appellant's circumstances which had not been addressed in her evidence. Counsel's understanding was that the appellant's income support had been terminated, which had suggested that she was able to work. There was no evidence that the council's investigations had ever come to any form of clear conclusion. It was not for the council to have to conduct an investigation to ascertain the extent of the appellant's assets. The burden was on the debtor to show that she had none and, on the evidence, she had been unable to discharge that heavy burden.

29 Cases such as *Hemsley v Bance* [2016] EWHC 1018 (Ch), [2016] BPIR 934, a decision of Mr Registrar Jones, had been concerned with a second bankruptcy. At paragraph 33, the registrar had found that in the circumstances, the purposes of bankruptcy would not be achieved by a second bankruptcy; but that was on the basis that the debtor had satisfied the registrar of his defence on the evidence before him. He had satisfied the registrar that this was not a case for him to exercise his discretion to make a second bankruptcy order. There had already been an investigation in the context of the earlier bankruptcy.

30 From the decision of Chadwick J in the case of *Bell Group Finance (Pty) Limited v The Bell Group (UK) Holdings Limited* [1996] BCC 505, at page 512, letters D to E, Mr Cockburn submitted that the court had jurisdiction to make bankruptcy order in circumstances where a bankrupt had no assets and where the only purpose of the order would be to enable an investigation to take place into the bankrupt's affairs. Lack of assets could not by itself be a ground for refusing an order if there was some other reason to make one. Mr Cockburn submitted that neither the council nor the court was in any position to know what the appellant's assets were. There was a need here for a thorough investigation, and for a report back from the official receiver or trustee in bankruptcy.

31 Mr Cockburn also made the point that no other creditors had opposed the making of a bankruptcy order. He took me to observations at first instance of Buckley J in the case of *Re Crigglestone Coal Company Limited* [1906] 2 Ch 327, at pages 331 to 332. There, Buckley J had said that it might be appropriate to refuse a bankruptcy order if other creditors opposed the making of one. Those comments were approved on appeal to the Court of Appeal. Mr Cockburn pointed out that here no other creditors have opposed the making of a bankruptcy order. The appellant, through Ms Myfanwy Lock, points out that nor have any creditors positively supported the making of a bankruptcy order.

32 It is also said by Mr Cockburn that there is no other alternative means of recovery for the respondent. At the time of the bankruptcy hearing, and at the present time, the appellant is not in receipt of any housing benefits. So there is no question of the respondent being able to make any deduction from them. Income support, housing benefit, and council tax reduction have all been terminated.

33 Mr Cockburn also referred to observations in *Re Field* at pages 377G to 378B, pointing to the availability of an application for rescission of any bankruptcy order if no assets were ultimately discovered. In summary, Mr Cockburn submitted that the council and the court is in no position to know the full extent of the appellant's financial position. The appellant has not sufficiently evidenced her lack of any assets, present or prospective, of significance. She has not demonstrated that she has no such assets. Her evidence is not sufficiently comprehensive. It would therefore not have been a proper exercise of the district judge's discretion to have refused to make a bankruptcy order even if he had considered the point, which he did not. In the present case, the court can be satisfied, the respondent submits, that making a bankruptcy would achieve and secure a proper purpose. Those were the submissions.

34 The proper purpose of a bankruptcy order was recognised by Mr Registrar Jones at paragraph 14 of his judgment in *Hemsley v Bance*. Bankruptcy provides a system of collective execution against a debtor's property and ensures a fair distribution of assets amongst creditors, including the resolution of disputes, as economically as possible. In addition, it allows investigations into the bankrupt's assets and affairs. Where appropriate, it provides or introduces measures to protect the public from future misconduct and/or to encourage others not to follow the same path. Its purpose is also to protect a bankrupt from harassment by creditors and to provide the opportunity for a fresh start. That is achieved by creditors being required to prove in the bankruptcy and by the debtor being released from his bankruptcy debts upon discharge, subject to the limitations prescribed by Parliament.

35 I acknowledge that, on the authorities, a debtor bears a heavy burden in demonstrating that there are, and will be, no assets available for distribution by an official receiver or trustee in bankruptcy for the benefit of the bankrupt's creditors, and also in demonstrating that no useful investigation of the bankrupt's assets and affairs can be undertaken in the bankruptcy. The authorities make it clear that there is such a heavy burden on a bankrupt.

36 In bankruptcy petitions of the present kind, however, founded upon unpaid council tax, it does seem to me that there is a burden upon a public authority, petitioning for a debtor's bankruptcy, to at least raise a *prima facie* case that a bankruptcy order will achieve some useful purpose. That is recognised by the form of bankruptcy checklist that was used by the council in the present case. The bankruptcy petition itself said nothing about what purpose a bankruptcy order might achieve. That, I can understand. However, when Deputy District Judge Ahmed came to direct the filing of evidence by the petitioning creditor, and then the debtor, the petitioning creditor's evidence did not address in any way the perceived benefits of a bankruptcy order, notwithstanding that the petitioning creditor's own bankruptcy checklist had recognised that the case was an unusual one and that normally bankruptcy would not be an option as there were "no clear assets". The reason why a statutory demand had been served, and a bankruptcy petition presented, was what was described as" the possibility" that the debtor might have received funds from an inheritance, although it was stressed that the petitioning creditor had no documents to support that, and that the matter would have to be investigated by any appointed trustee.

37 It does seem to me that when Deputy District Judge Ahmed directed the petitioner to file and serve any evidence in support of the bankruptcy petition that that possibility should have been raised in the witness statement that was served by Mr Wright on behalf of the local authority. I can well understand why, this not having been raised, the matter was then not addressed in the detailed witness statement that the debtor put in in response.

38 As Ms Myfanwy Lock submitted on behalf of her mother, she had never been directed to file any evidence of current or prospective assets and, in particular, had never had her attention drawn to the fact that the whole basis of the petitioning creditor's thinking was that there was the possibility of an inheritance. Otherwise than that, it was quite clear that the appellant had nothing to put together to make any bankruptcy order of any real purpose.

39 I well understand the view that, according to Mr Cockburn, Morgan J took that the district judge, before the bankruptcy petition came on for an effective hearing, should not simply have stopped at the point at which he found there to be a liability order, giving rise to jurisdiction to make a bankruptcy order, but should have gone on to have considered, in accordance with section 266(3) of the Act, whether it was appropriate to make a bankruptcy order.

40 I can well understand that the district judge was highly critical of the appellant for having failed to comply, without apparent explanation or justification, with the requirement to have filed a skeleton argument in support of her case not less than seven days before the hearing of the bankruptcy petition. I can well understand how he was annoyed at the fact that a lengthy skeleton argument, extending to some 18 pages, had been prepared on 12 January 2017 but was not sent to the court or to the petitioning creditor until the morning of the hearing, where a day had been set aside for the hearing of the bankruptcy petition on an effective basis. I can also understand how the length of the skeleton argument must have daunted the district judge. It would have been very difficult for him to have attempted to see the wood for the trees; but, nevertheless, he should at least have skim-read the skeleton argument and identified one of the points that was made there, and made in a bold typed heading, which was whether a bankruptcy order would serve any purpose or benefit to the petitioning creditor. That is a matter that he should have considered, as Morgan J apparently recognised.

41 It therefore falls to this court to exercise the discretion which the district judge omitted to exercise. By CPR 52.21(3):

> "(3) The appeal court will allow an appeal where the decision of the lower court was—
>
> (a) wrong; or
>
> (b) unjust because of a serious procedural or other irregularity in the proceedings in the lower court."

42 It does seem to me that the bankruptcy order was unjust because the district judge did not consider whether any useful purpose would be served by making a bankruptcy order. In my judgment, he was wrong to make the bankruptcy order that he did. Although it may have got lost amongst the volume of evidence and submissions that were before the court, the reality was that there was no proper evidence before the court that there were any assets, whether present or prospective, which could be realised, or were likely to be realised, in any bankruptcy. There was nothing before the court to indicate that any investigation of the bankrupt's affairs would bring anything more to light. The petitioning creditor had not expressly drawn the attention of the debtor to the belief that there might be the possibility of funds from an inheritance, and the debtor had had no opportunity to address that possibility in evidence. It does not seem to me that that unraised possibility justified the making of a bankruptcy order, in terms of giving rise to any need for an investigation of the bankrupt's assets or affairs. Everything in evidence about the bankrupt and her financial affairs indicated that she was not worth powder or shot, and that a bankruptcy order would achieve no useful purpose.

43 As a matter of good practice, it seems to me that if, as is entirely right, a local authority undertakes the sort of assessment that was undertaken here by way of a bankruptcy

checklist, then the unusual circumstances justifying a bankruptcy petition should be put fairly and squarely before the court so that the respondent to the bankruptcy petition has the opportunity of addressing the point in evidence. For those reasons, it seems to me that, exercising the district judge's discretion afresh, it would not be appropriate to uphold the bankruptcy order in the present case.

44 In her further skeleton argument, the appellant indicates that she should have the opportunity of addressing the other grounds of appeal and pursuing the application for further evidence for the purposes of showing that the bankruptcy order was obtained by fraud. She invites the court to still proceed to consider, allow submissions on, and determine, the application for permission to appeal in respect of the other grounds of appeal and the related application for permission to adduce fresh evidence. She submits that if the petition were simply dismissed on the ground for which permission has presently been given, the appellant would be unfairly prejudiced by being deprived of the opportunity of pursuing the other grounds of appeal. I would not accede to that argument.

45 It seems to me that if the court is to allow the appeal on the ground for which Morgan J has given permission already, which I have indicated that I am minded to do, then the appeal is allowed, the bankruptcy order is set aside, and it would not be appropriate to use the court's scarce resources to pursue other matters which would be of entirely academic interest and of no materiality to the ultimate outcome of the appeal. That would not be consistent with the overriding objective.

46 So, in summary, I allow the appeal on the short ground for which Morgan J gave permission on 19 April. I allow the appeal on that ground and hold that it is unnecessary to consider the other grounds of appeal or the application to adduce further evidence. I therefore allow the appeal and set the bankruptcy order aside.

CERTIFICATE

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