Neutral Citation Number: [2018] EWHC 2952 (Ch)

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

No. CH-2018-000183

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

Tuesday, 23 October 2018

Before:

MRS JUSTICE FALK

B E T W E E N:

(1) JASBINDER BHOGAL
(2) SUTINDER BHOGAL

Appellants

- and -

JEREMY KNIGHT
(In his capacity as Joint Supervisor of the Individual Voluntary Arrangement of William Gary Broughton)

Respondent

MS M. JONES (instructed by Cubism Law) appeared on behalf of the Appellants.

MS K. ROGERS (instructed by Fletcher Day) appeared on behalf of the Respondent.

Hearing date: 18 October 2018

J U D G M E N T

MRS JUSTICE FALK:

1 This is an appeal against an order of Deputy District Judge Harvey in the Brighton County Court, made at a hearing on 5 June 2018, that there should be no order for costs. The appellant seeks the costs of their application at first instance and that the respondent pay the costs of the appeal. Permission to appeal was granted by Arnold J on 29 August 2018.

Background

2 The background is that the appellants, Mr and Mrs Bhogal, challenged a decision of the respondent, Mr Jeremy Knight, who acts in his capacity as a joint supervisor of an Individual Voluntary Arrangement ("IVA") in respect of a Mr William Broughton, to reject their claim in the IVA. The challenge was brought under Section 263 of the Insolvency Act 1986.

3 Based on the facts not now in dispute, the appellants had lent Mr Broughton a total of £87,000 which had not been repaid. There was no written loan agreement. Mr Broughton became bankrupt on 29 March 2017. An IVA proposal was put forward on 28 April 2017, and the appellants made a claim in the IVA, but this was rejected on the basis of insufficient evidence. The supervisors accepted that a loan had been made but thought that it had been made to a company of which Mr Broughton was a director, a company called Baron Estates (Brighton) Limited, which had subsequently gone into liquidation. The supervisors considered that the appellants were claiming that they had a guarantee from Mr Broughton, which the supervisors did not consider was supported by evidence.

4 The sources of the confusion were, it seems, both the fact that the funds lent were actually paid to the company rather than to Mr Broughton, and the fact that there was a letter written by Mr Broughton to the appellants on 8 May 2008 which referred to the loan. Whilst the terms of that letter did refer to loans "made to me", i.e. to Mr Broughton, the letter also stated that Mr Broughton would "personally guarantee" that the loans were repaid.

5 The appellants' claim in the IVA was formally rejected on 30 January 2018, but this clearly followed earlier correspondence. It seems that not all of this correspondence was available to the court, but the evidence that was available did include an e-mail dated 4 January 2018 from Mr Knight to Mr Bhogal. That e-mail stated that "According to your own evidence", as well as the records of the company, £87,000 was lent to the company. The e-mail refers to the letter of 8 May 2008 and states that, on the basis of the information provided:

> "I do not consider that the guarantee is valid and enforceable."

The 30 January rejection also made a specific reference to "your claim to hold a personal guarantee".

6 The appellants issued their application challenging the supervisor's decision on 28 February 2018. The application was supported by a witness statement from Mr Bhogal (the First Appellant) dated 12 March 2018. Mr Knight put in no evidence in response. An initial hearing before another Judge on 20 March 2018 was adjourned because there was insufficient time to deal with the application, although certain directions were made, including giving the appellants relief from sanctions for failing to comply with the time limit for making a challenge and requiring a further witness statement in response to a request from Mr Knight that further evidence was needed. A second witness statement was produced by Mr Bhogal on 28 March 2018 attaching e-mail correspondence between Mr Knight and an accountant for the company to which the funds had been paid. That e-mail correspondence was initiated by Mr Knight on 22 March 2018, after the first hearing, in the light of a letter from the accountant that was attached to the appellant's first witness statement. Mr Knight sought further clarification and the accountant explained that the money was lent to Mr Broughton personally and that Mr Broughton had proved in the liquidation of the company for the sums due.

7 The matter came back to the County Court on 5 June 2018. In the absence of evidence from the respondent the facts were found in accordance with the appellant's evidence. It was common ground that because of the cross-reference in the terms of the IVA to the Insolvency Act 1986 and the Insolvency Rules, it was necessary to look at the Rules. On that basis it was agreed that the appeal against the decision should be treated as being made under Rule 14.8 of the Insolvency Rules. The Judge admitted the claim but, having heard what Mr Knight had to say, decided to make no order for costs. In a reserved judgment the Judge said that in all the circumstances it would be unfair on other creditors to bear the costs.

Grounds of appeal and submissions

8 The grounds of appeal were as follows: first, that the Judge could not depart from the usual rule that costs follow the event based on assertions about conduct which were unsupported by evidence and not agreed by the appellants. Second, that the Judge's aim of avoiding unfairness to the general body of creditors was the wrong approach. Third, that the usual rule applied and costs follow the event. Finally, that the Judge was wrong to fail to take account of the respondent's opposition to the application despite the failure to put any evidence in, leading to a requirement for two hearings and increased costs.

9 Ms Jones, for the appellants, submitted that evidence had been available to Mr Knight when he reached his decision to reject the claim, and this evidence meant that he should not have done so. No substantive additional evidence was subsequently produced. Ms Jones referred to the proof of debt that the appellants had submitted in the IVA, the fact that they were listed as creditors on Mr Broughton's own list of creditors, and the fact that Mr Broughton was, and the appellants were not, listed as creditors in the company's statement of affairs for the purposes of its liquidation, a document which Ms Jones submitted was one that Mr Knight could have obtained. She also referred to the fact that the 8 May 2008 letter from

Mr Broughton referred to loans "made to me". She submitted that the conclusion that Mr Knight reached was inconsistent with all of this evidence, and that there was no evidence to support the 8 May 2008 letter being represented as a guarantee.

10 Ms Jones further submitted that the only real new evidence available at the hearings was correspondence with the accountant, comprising a letter dated 7 March 2018, attached to the first witness statement, which referred to the fact that the creditor's list in respect of the company's liquidation did not include the appellants, their loans instead being included in the figure claimed by Mr Broughton in the liquidation, and also the subsequent e-mail correspondence attached to the second witness statement to which I have already referred. This evidence was supplied by the appellants and no evidence was provided by the respondent at any stage. The respondent also made no submissions on liability at the final hearing; the matter should not have gone to court, a consent order would have been possible and the respondent should have obtained legal advice to that effect.

11 Ms Jones relied on the case of *Business Environment Bow Lane v Deanwater Estates* [2008] EWHC 2003 (TCC), the principle from that case being that the court should not depart from the usual rule about costs unless it is in a clear position to do so on the basis of agreed or determined facts. Ms Jones said that here there was no evidence to support the Judge's findings. The Judge relied on assertions made by Mr Knight at the second hearing. The appropriate course would have been for Mr Knight to make an application to adduce further evidence, applying for an adjournment if necessary. In addition, if the Judge had said that the starting point was that no costs should be awarded under Rule 14.9 of the Insolvency Rules, that was wrong. (That Rule provides that an office holder is not personally liable for costs in respect of an application under Rule 14.8 unless the court orders otherwise.) There was no principle that an office holder can litigate with costs immunity.

12 For the respondent, Ms Rogers submitted that the question for the court was whether the Judge had erred in the wide discretion given to him. The principle that costs follow the event is simply a starting point and it is necessary to consider all the circumstances. An appeal can only be brought if a decision is wrong or unjust due to serious procedural or other irregularity. The Judge was entitled to take account of pre-action conduct under CPR 44.2(5)(a) and also further evidence not considered in the substantive proceedings. The Judge was entitled to conclude that the appellants were tardy in making their case clear. The further evidence provided following the adjournment at the first hearing also assisted the appellant's case, and the respondent properly stayed neutral. Ms Rogers relied on *Computer Machinery Ltd v Drescher* [1980] 1WLR 1379, 1385 to 1386, as authority for the proposition that the Judge was entitled to admit any evidence he considered relevant in making a decision about costs, even if that evidence was not admitted during a trial. Ms Rogers submitted that the *Business Environment* case related to the situation where a dispute is settled and was not in point.

13 In response to the argument that the supervisors had evidence available to conclude that the appellant's claim was valid before he rejected it, the documentary evidence actually before the court, particularly in the form of the 4 January e-mail and the 30 January rejection, made it clear that the claim was rejected on the basis that it was a claim under a guarantee.

Principles to apply

14 Under CPR 52.21(3), in order to allow the appeal the decision must either be wrong or unjust due to a serious procedural or other irregularity. In relation to costs a Judge has a significant degree of discretion available. To bring a successful challenge against a costs decision there must be an error of principle or the decision must otherwise be plainly wrong. The Judge must have exercised his discretion outside the generous ambit within which reasonable disagreement is possible. There is a particular reluctance to interfere with a

discretion exercised in relation to costs, and the Judge must have gone seriously wrong (see *Straker v Tudor Rose* [2007] EWCA Civ 368 at [2]).

Rule 14.9

15 Dealing first with the point raised about Rule 14.9 of the Insolvency Rules, which deals with awards of costs made against an office holder personally, in my view it is clear from the transcript of the hearing that the Judge was not using this as a starting point. There is no reason to think that the Judge was not applying general principles under which the normal rule is that costs are awarded to the successful party, but that it is necessary to look at all the circumstances of the case (and I note here that the Judge specifically stated in paragraph 3 of the judgment that he considered all the circumstances). Applying the normal rule means here that the starting point is that the appellants would be awarded their costs as expenses of the insolvency. An example of this approach being applied where a liquidator rejected a proof of debt is *Fielding & Anr v Hunt* [2017] 2 Costs LO 191.

Ground One: Evidence taken into account

16 I have read not only the judgment but also the transcript of the hearing about costs. It is clear that the Judge had read all the papers and took the documentary evidence, including both witness statements, into account. It is also clear from the judgment that the Judge took account of statements made by Mr Knight in the proceedings in which he explained the action he had taken. Specifically the transcript records Mr Knight explaining that the only evidence he had had was that the claim was not a claim against Mr Broughton but against one of his companies; that he had asked for evidence in support of the appellants' claim and had not received it, and as a result had felt that he had no alternative but to reject the claim. Mr Knight had gone on to say that he thought it was unreasonable for the creditors to bear the cost of the failure to provide evidence. In making these statements Mr Knight was

effectively both giving oral evidence and making submissions. In the judgment the Judge referred to what Mr Knight had said and he clearly accepted it.

17 I have carefully considered Ms Jones' submissions that it was not appropriate for the Judge to take account of these statements. I have considered both CPR 32.2 and CPR 32.6, to the effect that the general rule is that any fact needed to be proved by the evidence of witnesses must be proved by evidence in writing, and that evidence at hearings other than a trial is to be by witness statement unless the court orders otherwise. I also accept Ms Jones' submission that in relation to oral evidence the comments relied on by Ms Rogers in *Computer Machinery* were obiter and also relate primarily to the principle of whether additional oral evidence may be given, not the method by which it should be given. Having said that, however, there is a clear statement by the Judge in that case, Sir Robert Megarry VC, that the matter is for determination by the Judge when considering how to exercise his discretionary power, and a further statement that he did not consider the Judge to be affected by any rule which would exclude oral evidence. I should add that I agree with Ms Rogers that the *Business Environment* case does not assist. The comments relied on there, especially at paragraph 102(c), reflect comments by Chadwick LJ in the Court of Appeal decision in *BCT Software Solutions Ltd v C Brewer & Sons Ltd* [2003] EWCA Civ 939, paragraphs 22 and 23, to the effect that in a case where a claim is settled the court needs to satisfy itself whether it is in a position to make an order about costs at all, and that:

> "In addressing that question the court must have regard to the need (if an order about costs is to be made) to have a proper basis of agreed or determined facts upon which to decide… what order should be made."

The point being, of course, that where a claim is settled there will generally have been no findings of fact and often no clear winner. The reference in the *Business Environment* case at paragraph 102 to the court not departing from the "normal order" should be read with care and in that context.

18 If the comments made by Mr Knight, which the Judge took into account, had been unsupported by the documentary evidence, then I would have been more concerned by Ms Jones' submissions. However, in my view those comments were consistent with the documentary evidence, which was clearly considered and taken into account by the Judge. In the circumstances, if there was any irregularity in terms of the admission of oral evidence, then I do not think it was a serious one that would satisfy the requirements of CPR 52.21(3) and justify an interference with a decision about costs.

19 The Judge had read and understood Ms Jones' skeleton argument as well as the documentary evidence. The reason he made no order for costs was that the appellants were slow in making things clear. The respondent had been under the impression that the appellants were claiming that the loan was guaranteed by Mr Broughton rather than made to him. That was clear from the documentary evidence available to the Judge, including the various letters and e-mail exchanges attached to the appellants' two witness statements, quite apart from what Mr Knight said. Most importantly it was clear both from the 4 January e-mail and from the 30 January rejection of the claim, which in terms referred to the supervisors' understanding that the nature of the claim was one of guarantee. The 4 January e-mail stated that 14 days would be provided to enable the appellants to take legal advice. In fact more than 14 days was allowed. For whatever reason the appellants did not respond in a way that corrected the error. I agree with Ms Rogers that it was not open to Ms Jones to submit that the appellants were not able to respond because they had already provided the relevant information and could not provide more. The first witness statement in particular provided significantly more information. On the evidence available to the Judge I consider that he was entitled to conclude that the appellants were tardy and should have provided further information at an earlier stage, before their claim was rejected.

Other grounds of appeal

20 As regards ground two, in my view the Judge was not making any general point about not awarding costs to avoid unfairness to the general body of creditors. His conclusion was reached in the light of the particular circumstances in which Mr Knight was not clear about the facts about the loan until the conclusion of the e-mail correspondence attached to Mr Bhogal's second witness statement. Given the documentary evidence, I do not think that any account the Judge took of what Ms Jones labelled as Mr Knight's assertions was such as to place his decision outside the scope of his discretion. There was evidence available attached to the appellant's own witness statements which effectively told the same story as Mr Knight.

21 I do not think it is necessary to deal separately with ground three, but in relation to ground four there was some discussion about the nature of the jurisdiction the County Court was exercising under Rule 14.8 of the Insolvency Rules in the context of Ms Jones' submission that a consent order would have been appropriate. *Fielding v Hunt* [2017] EWHC 247 (Ch) at 2.1 makes it clear that the function of the court is to decide the case in the light of the evidence before the court, rather than simply to review whether the liquidator was right or wrong to reject proof of the debt. The Court approaches the decision afresh. The burden is also on the claimant.

22 I agree with Ms Rogers that this means it was open to the supervisors not simply to agree a consent order, but to require the appellants to produce sufficient evidence to the court to satisfy them that the claim should be admitted. It is also clear that the court in this case did not have time to deal with the matter properly at the first hearing. Whilst I can see the argument that having received not only the first but the second witness statement, the court might have taken the view that some award of costs was appropriate to reflect the fact that the appellants were put to the expense of a second hearing which the respondent did not

seek to oppose, the role of this court on appeal is not to decide what award of costs it would have made in the circumstances but to decide whether the decision actually made exceeded the wide ambit of discretion available to the Judge. The transcript shows that Ms Jones raised the question of whether a consent order should have been made at the hearing, so it was something of which the Judge was aware.

Disposition

23 In all the circumstances I do not consider that the Judge's decision exceeded his ambit of discretion. Accordingly, the appeal is dismissed.

CERTIFICATE

Opus 2 International Ltd. hereby certifies that the above is an accurate and complete record of the proceedings or part thereof.

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This transcript has been approved by the Judge (subject to Judge's approval)