Neutral Citation Number [2024] EWHC 1883 (Ch)

CR 2023 007328

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (CHD)

IN THE MATTER OF SEATON MANAGEMENT LIMITED
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

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

Date: 26/07/2024

Before :

ICC JUDGE BARBER

- -

Between :

SEATON MANAGEMENT LIMITED **Applicant**

- and –

STEPHEN HENRY EVANS-JONES **Respondent**

- -

Mr Michael Smith (instructed by **Coyle White Devine)** for the **Applicant**
The Respondent appeared in person

Hearing date: 23 May 2024

- -

Approved Judgment

This judgment was handed down remotely by email and MS Teams. It will also be sent to The National Archives for publication. The date and time for hand-down is 9 a.m. on 26 July 2024

ICC Judge Barber

1. At a hearing on 23 May 2024, I dismissed the Respondent's applications for relief from sanction and for disclosure and granted a final injunction restraining the Respondent from presenting a winding up petition against the Applicant based on sums claimed in a statutory demand dated 11 December 2023. This judgment sets out my reasons for those decisions.

Background

2. The Applicant is a company carrying on business in mortgage broking and management consultancy activities. The Respondent is a solicitor. He and the sole director of the Applicant, Ms Charlotte Williams, are former friends.

3. In June 2023, the Respondent rang Ms Williams saying that a colleague from his old law firm, Field Fisher LLP, had called him. The Respondent's colleague had a client, Mr Cliff, who was looking for a bridging loan to try and save an asset that had been placed into administration. The borrower would be Vision One Investments Limited. The Respondent asked Ms Williams if it was something that she thought her company, the Applicant, could assist with. Ms Williams was told that there was a valuation of £17.5m and that the client needed to clear the current lender in two weeks to the amount of roughly £9.5m.

4. Acting on behalf of the Applicant, Ms Williams agreed to assist. The terms upon which she agreed to do so are in dispute. Ms William's evidence is that the Respondent said that he wanted her to 'look after' him for the referral and that she (acting on behalf of the Applicant) orally agreed to do so, although no specific figures were discussed. The Respondent's evidence is that it was orally agreed between the Applicant (acting by Ms Williams) and the Respondent that the Applicant would pay the Respondent 50% of the Applicant's fee for the referral. Ms Williams disputes this, saying that she would never have agreed to a 50-50 split on behalf of the Applicant simply for a referral.

5. Acting on behalf of the Applicant, Ms Williams called the client and explained that she would be charging a fixed broker fee of £100,000 in addition to any occupation fee the lender would pay to her. This was agreed. Ms Williams then found a potential lender.

6. Progress to completion was not smooth sailing. Ms Williams found herself having to do more work than initially anticipated. The valuation of the asset was considerably lower than initially represented and there were CCJs against both the client and the corporate vehicle he intended to borrow through. Ultimately however, the transaction completed around 9 November 2023.

7. Ms Williams' evidence is that it was only after completion that the Respondent started demanding half of the fees paid to the Applicant for the deal.

8. On 25 November 2023, the Respondent sent the Applicant an invoice for £96,000 in the name of Charlton Mills Advisory Limited for an alleged 'profit share'. The invoice was disputed on the same day.

9. On 9 December 2023, the Respondent withdrew the Charlton Mills invoice and sent the Applicant a different invoice, this time in his own name, for £97,603.50; again, for an alleged profit share.

10. Two days later, on 11 December 2023, the Respondent sent the Applicant a statutory demand.

11. The Applicant's solicitors wrote to the Respondent on 21 December 2023 confirming that the debt was disputed and seeking an undertaking from him that he would not present a winding up petition.

12. The Respondent responded on 21 December 2023 saying (inter alia)

> 'In respect of the statutory demand, it is for the court to decide whether there is a genuine dispute, not you.
>
> My details for service on my home address and this email. There is no point in me engaging with you any more on this'.

13. On 30 December 2023, the Applicant filed the application to restrain presentation. The application was also sent in draft to the Respondent on the same day.

14. The first hearing of the application was listed in the ICC Judge Interim Applications list on 5 January 2024. Shortly before the hearing, the Respondent agreed to give an undertaking not to present pending determination of the application. Directions through to final hearing were also agreed between the parties. ICC Judge Greenwood made an order reciting the undertakings and setting out the agreed directions ('the Greenwood Order').

15. By paragraph 2 of the Greenwood Order, the Respondent was required to file and serve the evidence he wished to rely on in opposition to the application to restrain by 19 January 2024. He did not do so.

16. He filed a witness statement on 13 February 2024 and an application for relief the next day. The Respondent also filed an application for disclosure against both the Applicant and Ms Williams on 14 February 2024, seeking (inter alia) access to Ms Williams' mobile phone to check for (after the event) 'Whatsapp' messages which he maintained evidenced the alleged 50-50 oral fee-sharing agreement. Ms Williams denies that any such Whatsapp messages were ever exchanged.

17. On 4 March 2024, having conducted a non-attendance pre-trial review of the injunction application, Judge Greenwood listed a hearing of the relief application and disclosure application.

Relief from sanction: principles

18. The principles governing relief from sanction are well-known and were not in issue. They are addressed in CPR 3.9 and Denton v TH White Ltd [2014] EWCA Civ 90.

19. Under CPR 3.9, on an application for relief, the court will consider 'all the circumstances of the case, so as to enable it to deal justly with the application, including the need (a) for the litigation to be conducted efficiently and at a proportionate cost; and (b) to enforce compliance with rules, practice directions and orders.'

20. As confirmed in Denton at [24]:

> 'A judge should address an application for relief from sanctions in three stages. The first stage is to identify and assess the seriousness and significance of the "failure to comply with any rule, practice direction or court order" which engages rule 3.9(1). If the breach is neither serious nor significant, the court is unlikely to need to spend much time on the second and third stages. The second stage is to consider why the default occurred. The third stage is to evaluate "all the circumstances of the case, so as to enable [the court] to deal justly with the application including [factors (a) and (b)]".'

21. It is wrong to assume that, even if a breach is serious or significant and there is no good reason for the breach, the application will automatically fail: Denton at [31]. In Denton at [37] the court quoted with apparent approval paragraph 26 of the 18th Implementation Lecture on the Jackson reforms:

> '[the relationship between justice and procedure] has changed not by transforming rules and rule compliance into trip wires. Nor has it changed by turning the rules and rule compliance into the mistress rather than the handmaid of justice. If that were the case, we would have, quite impermissibly, rendered compliance an end in itself and one superior to doing justice in any case'.

22. At [38] in Denton, the court continued:

> 'It seems that some judges are approaching applications for relief on the basis that, unless a default can be characterised as trivial or there is a good reason for it, they are bound to refuse relief. This is leading to decisions which are manifestly unjust and disproportionate. It is not the correct approach and is not mandated by what the court said in the Mitchell case: see in particular para 37. A more nuanced approach is required as we have explained'.

23. In general, the strength of a party's case is irrelevant to the question of whether relief from sanctions is to be granted. However, there is an exception where, on a summary judgment basis, the case of the party seeking relief is bound to succeed or fail: R (Hysaj) v Secretary of State for the Home Department [2014] EWCA Civ 1633 at [46]-[47]. As put by Moore-Bick LJ (in the context of a relief from sanction application during an appeal) at [46]:

> 'Only in those cases where the court can see without much investigation that the grounds of appeal are either very strong or very weak will the merits have a significant part to play when it comes to balancing the various factors that have to be considered at stage three of the process.'

Discussion and conclusions

24. In my judgment the breach in the present context was serious and significant. The deadline imposed by the Greenwood Order gave the Respondent 2 weeks in which to file his evidence. He took over 5 weeks. The delay in filing responsive evidence impacted on the directions given at the Non-Attendance Pre-Trial Review and put in jeopardy the timeous final disposal of an application designed to be a summary process.

25. In my judgment no good reason has been given for the breach (or indeed the failure to make an 'in-time' extension application).

26. The Respondent's first witness statement in support of his relief from sanctions application did not set out any meaningful reasons at all for the late filing, citing simply unspecified 'personal reasons' which he implied had rendered him unable to meet the agreed deadline.

27. His second witness statement, filed shortly before the hearing before me, relied upon the facts that he was involved in another set of legal proceedings and had recently moved to a new firm.

28. Exhibited to the second witness statement was a copy of an application issued on 8 December 2023 in the other set of proceedings, together with an acknowledgement of service of the same date by the Respondent, confirming that he would not be contesting the application in question. These developments, however, pre-date the date on which the Respondent served the statutory demand, triggering, at his own election, an inherently time-critical process. The commencement of the other set of proceedings also pre-dates the date on which the Respondent agreed the timetabling for evidence ultimately set out in the Greenwood Order.

29. The same point arises in relation to the other matter raised by the Respondent in connection with the delay (that he had recently moved firms): again, the move pre-dated the date of the statutory demand and the date on which he agreed the timetabling ultimately incorporated into the Greenwood Order.

30. Moreover the suggestion (at [7] of his first witness statement and at [20] of his second statement) that he was *unable* to comply with the Greenwood Order for personal reasons was at best misleading and at worst untrue; as made clear from the evidence of Mr Sheahan, the Applicant's solicitor, the Respondent had engaged in numerous written exchanges with the Applicant's solicitor regarding this matter over the period between 20 January and 11 February 2024, in which the Respondent was seeking to negotiate a deal. Indeed, at the hearing before me, the Respondent stated in terms that he had been 'putting off the witness statement' and 'trying to get it settled';

comments which strongly support a conclusion that the Respondent made a conscious decision not to comply with the deadline laid down in the Greenwood Order, rather than finding himself unable to comply with the deadline due to personal issues.

31. The Respondent's submissions at the hearing to the effect that he was a litigant in person avail him of nothing; even putting to one side the fact that the Respondent is a solicitor (and, despite his protestations to the contrary, a solicitor with litigation experience), being a litigant in person is not of itself considered a good reason for failing to comply with court orders: Elliott v Stobart Group Ltd [2015] EWCA Civ 449.

32. Turning next to stage three (all the circumstances): by his second witness statement in support of the relief application, the Respondent contended that the Applicants had not been prejudiced by the late filing. That is incorrect (see [24] above) but in any event the issue of prejudice is simply one of numerous factors for the court to consider when deciding whether or not to grant relief from sanction.

33. The Respondent also argued that he should be allowed to rely upon his late evidence on the ground that 'the evidence filed conclusively proves my case'. In reality, the evidence filed late in answer to the injunction application did nothing of the sort, as tacitly acknowledged by the fact of the application for disclosure and expressly acknowledged in the evidence in support of that application.

34. The matters addressed in the Respondent's skeleton argument on the issue of relief from sanction did not take him much further. Indeed, during the course of the hearing, when asked by the court, the Respondent admitted that he had 'cut and paste' much of the relief from sanction section of his skeleton argument from an article he had found on the internet, without crediting the true author.

35. I would add that, for reasons addressed in a later section of this judgment, this *is*, in my judgment, a case in which the court can see, without much investigation, that the Respondent's defence to the injunction application is bound to fail. It follows, in my judgment, that in this case the merits do have a significant part to play when it comes to balancing the various factors that have to be considered at stage three of the Denton process.

36. Taking into account all the circumstances of this case, including but not limited to (1) the need (a) for the litigation to be conducted efficiently and at a proportionate cost and (b) to enforce compliance with rules, practice directions and orders and (2) the fact that the Respondent's defence to the injunction application is bound to fail, I have concluded that relief from sanction should be refused.

Disclosure

37. The Respondent's application for disclosure was made against both the Applicant and Ms Williams. Ms Williams is not a party to the injunction application. In broad terms, the Respondent sought disclosure and a forensic examination of the contents of Ms Williams' phone and cloud storage over a given period, with a view to finding evidence in support of his claim that a 50-50 split of commission was orally agreed. He claims that he and Ms Williams exchanged 'Whatsapp' messages, after the oral agreement was entered into, that support his case, although he cannot say what the

messages said, or when they were sent. Ms Williams denies that any Whatsapp messages supportive of the Respondent's case were ever sent.

38. There is jurisdiction to order disclosure in winding up proceedings, but that jurisdiction is sparingly exercised: Superdrug Store Plc v Protein World Ltd (unreported, 13 July 2023). Given the nature and purpose of an application to restrain presentation, the nature of the enquiry undertaken by the court on such an application, and the usual urgency of the same, in my judgment it is clear that only very exceptional circumstances would justify an order for disclosure in the context of such an application.

39. Third party disclosure is in any event the exception and not the rule; issues of proportionality and relevance apply: the White Book (2024 ed.) Vol 1 at paragraphs 31.17.1-4.

40. An order for forensic examination of a mobile device is not an order for disclosure. It is an order under CPR r.25.1(c)(ii) for inspection of relevant property. These are intrusive orders that are strictly confined to cases where the relief can be shown to be both necessary and proportionate: the White Book at paragraph 25.1.18.

41. On an application for such relief, it is relevant to consider whether the applicant has completed an examination of his or her own sources: M3 Property Ltd v Zedhomes Ltd [2012] EWHC 780 (TCC) at [12(h)].

42. In the present case, even putting to one side for present purposes the Court's refusal of relief from sanction, in my judgment the Respondent has not made out a persuasive case for the disclosure and inspection orders sought.

43. No exceptional circumstances have been shown.

44. It is also clear from the Respondent's evidence that he has not completed a reasonable examination of his own sources. Whilst he claimed to have deleted the alleged Whatsapp messages from his own phone, he also accepted in email correspondence with the Applicant that 'Whatsapp messages can be recovered even when deleted from phones and back up'. By paragraph 13 of his second witness statement in support of the disclosure/inspection application, he reiterated that Whatsapp messages 'can still be recovered [when deleted], but by a specialist'. This begs the question of why he should not simply take the appropriate steps, with the assistance of a data retrieval specialist if necessary, to recover the alleged messages on his *own* phone, rather than demanding highly intrusive disclosure and inspection orders involving the personal mobile phone of a non-party. No adequate or persuasive explanation was put forward in evidence or in submissions. Indeed, at paragraph 14 of his second witness statement, the Respondent openly stated:

> 'I do not see why I should have to incur the cost of an expert to retrieve my messages when the Court can assist me by making the order I have requested.'

45. This is no justification for such an intrusive order. It is rendered all the more unattractive when considered in the context of paragraph 5(1)(c) of the Solicitors' Code of Conduct, which expressly requires any fee sharing arrangement to be 'in

writing'. When reminded by the court of this requirement during the hearing, the Respondent denied that the requirement existed; a perverse and troubling reaction. As a practising solicitor, the Respondent would do well to refresh his understanding of the Code.

46. The Respondent went on to state that he had informed *the client* in writing of the terms of the fee sharing arrangement at the time that the arrangement was agreed. Whether or not that is true is not a matter for this court to decide. Suffice it to state that no such contemporaneous written record was adduced in evidence.

47. In my judgment a further ground of dismissal is that the disclosure sought is not 'necessary in order to fairly dispose of' the injunction application. For the purposes of the injunction application, the court is not deciding whether, on the balance of probabilities, an oral agreement was reached on given terms; the court is instead deciding whether or not there is a substantial dispute. It is an intentionally summary process.

48. On the evidence as a whole, in my judgment it is clear that the Respondent is seeking to abuse this summary process with a view to avoiding a Court Fee for a Part 7 claim. This was tacitly admitted in his written evidence. At paragraph [13] of his first witness statement in support of the disclosure application, for example, he stated:

> '… the court fee for Part 7 proceedings for the amount the Applicant is claiming will be circa £5,000. This is an amount the [Respondent] cannot afford, and it is unnecessary for issue [sic] Part 7 proceedings where an order for disclosure of these messages will bring the claim to a swift conclusion and in a cost-effective manner.'

49. For all these reasons, I have dismissed the disclosure and inspection application.

50. In light of my refusal of relief from sanction and dismissal of the disclosure application, I was invited by Mr Smith to proceed to final disposal of the injunction application. I acceded to this request on the basis that it would plainly further the overriding objective to do so.

Application to restrain presentation – principles

51. The legal principles applicable to the application were largely uncontroversial.

52. In this regard I was referred to Coilcolour v Camtrex [2015] EWHC 3202, in which Hildyard J summarised the relevant principles as follows:

> '31. The court will grant an injunction to restrain presentation of a winding up petition where it considers that the petition would be an abuse of process and/or that the petition is bound to fail (to the extent they are different): Mann v Goldstein [1968] 1 WLR 1091. See also Buckley LJ in Bryanston Finance Ltd v De Vries (No. 2) [1976] Ch 63 at p.77:

"If it could now be said that, on the available evidence, the presentation by the defendant of such a petition as is described in the injunction would prima facie be an abuse of process, the plaintiff company might claim to have established a right to seek interlocutory relief. Otherwise I do not think it can. If it were demonstrated that such a petition would be bound to fail, it could be said that to present it, or after presentation to seek to prosecuted, would constitute an abuse: Charles Forte Investments Ltd v Amanda [1964] Ch 240."

32. The court will restrain a company from presenting a winding up petition if the company disputes, on substantial grounds, the existence of the debts on which the petition is based. In such circumstances, the would-be petitioner's claim to be, and standing as, a creditor is in issue. The Companies Court has repeatedly made clear that where the standing of the petitioner, and thus its right to invoke what is a class remedy on behalf of all creditors, is in doubt, it is the court's settled practice to dismiss the petition. That practice is the consequence of both the fact that there is in such circumstances a threshold issue as to standing, and the nature of the Companies Court's procedure on such petitions, which involves no pleadings or disclosure, where no oral evidence is ordinarily permitted, and which is ill-equipped to deal with the resolution of disputes of fact.

33. The court will also restrain a company from presenting a winding up petition in circumstances where there is a genuine and substantial cross-claim such that the petition is bound to fail and is an abuse of process: see e.g. Re Pan Interiors [2005] EWHC 3241 (Ch) at [34]-[37]. If the cross-claim amounts to a set-off, the same issue as to the standing of the would-be petitioner arises as in the case where liability is entirely denied. Even if not qualifying as a set off, a genuine and substantial cross-claim exceeding the would-be petitioner's claim will also result in the petition being dismissed in accordance with the same settled practice, save in exceptional circumstances (as a discretionary matter). That is also because, if the cross-claim is established, the would-be petitioner will have no sufficient interest either in itself having a winding up ordered, or to invoke the class remedy which such an order represents.

34. Further, it is an abuse of process to present a winding up petition against a company as a means of putting pressure on it to pay a debt where there is a bona fide dispute as to whether that money is owed: Re a Company (No 0012209 of 1991) [1992] BCLC 865.

35. However, the practice that the Companies Court will not usually permit a petition to proceed if it relates to a disputed debt does not mean that the mere assertion in good faith of a

> dispute or cross-claim in excess of any undisputed amount will suffice to warrant the matter proceeding by way of ordinary litigation. The court must be persuaded that there is substance in the dispute and in the Company's refusal to pay: a "cloud of objections" contrived to justify factual enquiry and suggest that in all fairness cross examination is necessary will not do.
>
> 36. As stated by Chadwick J (as he then was) in Re a Company (No 6685 of 1996) [1997] BCC 830 at 838:
>
> "I accept that any court, and particularly the Companies Court, should not seek to resolve issues of fact without cross-examination where there is credible affidavit evidence on each side. But I do not accept that the court is bound to hold that there is a need for a trial in circumstances in which, on a full understanding of the documents, the evidence asserted in the affidavits on one side is simply incredible".'

53. I accept such guidance with gratitude.

Application to restrain presentation - discussion and conclusions

54. In my judgment this is a plain case for final injunctive relief.

55. The alleged agreement was oral and there is a live dispute about its terms which can only be resolved by cross-examination.

56. As rightly submitted by Mr Smith, this is a paradigm case of disputed issues of fact that cannot be resolved in the Insolvency and Companies Court on a petition. The dispute needs to be resolved by Part 7 Claim.

57. The Respondent was not even sure who the contracting parties were at the time of issuing an invoice; first issuing an invoice in the name of his family company and then issuing an invoice in his own name in a different sum.

58. It is an abuse of process to present or threaten to present a winding up petition against a company as a means of putting pressure on it to pay a debt where there is a bona fide dispute on substantial grounds as to whether that money is owed: Re a Company (No 0012209 of 1991) [1992] BCLC 865.

59. In my judgment the Respondent knew full well that the debt was disputed at the time of serving the statutory demand. He served the demand with a view to putting pressure on the Applicant to pay the disputed debt. This was not an appropriate use of the statutory demand process. The Respondent was then given an opportunity prior to issue of the injunction application to withdraw the demand and to offer a permanent undertaking but refused to do so. The Applicant had no option but to seek injunctive relief.

Conclusion

60. On the evidence before me I am satisfied that a final injunction should be granted.

61. I shall hear submissions on costs and any other consequentials on the handing down of this judgment.

ICC Judge Barber