IN THE HIGH COURT OF JUSTICE CH-2018-000341

CHANCERY DIVISION

[2019] EWHC 1079 (CH

Rolls Building
Fetter Lane
London, EC4A 1NL

Monday, 8 April 2019

Before:

MR JUSTICE MORGAN

B E T W E E N :

RELIANCE WHOLESALE LIMITED — Appellant petitioner

- and -

AM2PM FELTHAM LIMITED — Respondent

MR J. WIGLEY (instructed by Teacher Stern) appeared on behalf of the Appellant petitioner.

MS R. COYLE appeared on behalf of the Respondent.

J U D G M E N T

MR JUSTICE MORGAN:

1 This is an appeal by Reliance Wholesale Limited against an order made by the ICC judge, Chief Registrar Briggs, on the 5th December 2018. Permission to appeal was granted by Falk J on the 19th February 2019. The proceedings in which the order was made consisted of a winding-up petition presented by Reliance Wholesale Limited, to which I will refer as "the petitioner", against a company AM2PM Feltham Limited, to which I will refer as "the company". The petition alleged that the company had failed to repay to the petitioner a loan of some £39,000. Notice of the petition was given in the London Gazette, and the petition was due to be heard on the 5th December 2018.

2 Payment of the debt or the alleged debt was made by the company to the petitioner's solicitors on 3rd December 2018. By his order of 5th December 2018, the chief registrar ordered that the petition be dismissed. This was in accordance with the agreement of both parties who were represented by counsel at the hearing before him. Ms Horner of counsel appeared on behalf of the petitioner, and Ms Coyle of counsel appeared on behalf of the company. On the hearing of the appeal, Mr Wigley has appeared on behalf of the petitioner, and Ms Coyle has again appeared on behalf of the company.

3 The order of 5th December 2018 made no provision for the costs of the petition. The result was that each party would bear its own costs of the petition, and indeed that is what the chief registrar decided should happen. The petitioner now appeals, and contends that the chief registrar ought to have made an order that the company do pay the petitioner's costs of the petition. Accordingly, the appeal relates only to the question of costs.

4 It is necessary to refer to some communications between the solicitors acting for the parties prior to the 5th December 2018. This material to which I will refer was not placed before the chief registrar. It has been the subject of an application before me to admit new evidence, and that application has not been resisted, and accordingly I will proceed on the basis that this material is indeed properly before me. It may be that I will need to make use of this material if I am persuaded to allow the appeal and am then required to make my own decision as to the proper order as to costs in this case.

5 There was some communication between the parties on the 5th November 2018, but I go first to an email dated 7th November 2018 from the solicitors for the company to the solicitors for the petitioner. Indeed, the documents to which I will refer are between solicitors, but I will not repeat each time "solicitors for the company" or "solicitors for the petitioner"; I will endeavour to simply refer to the company and the petitioner. So, on the 7th November 2018 the company wrote to the petitioner stating why the alleged debt was not in fact due and owing. The case that was put was that although the petitioner had made an earlier payment of £39,059.26 to the company, that payment was on behalf of a third company with which both sides were connected, the third company being Premier Exports London Limited, to which I will refer as "Premier". The email of 7th November 2018 then explains that Premier owed the company money, and it is said that what the petitioner was doing was discharging Premier's debt to the company. It is said conversely this was not a case whereby the petitioner was making a loan to the company which the company would be expected to repay.

6 There is some basis for accepting the company's account as to the payment, but significantly in my judgment only up to the extent of £33,059.26. The balance of £6,000 has not been explained either in this email or anywhere else as being a payment of money due from

Premier to the company which the petitioner was paying on Premier's behalf. Indeed the documents I have been shown indicate that £6,000 was due from the company to somebody, and the only two candidates are the petitioner who made the payment, and Premier who is involved as an associated or sister company. On the basis of the material before me, although the documents endeavour to put forward a defence to the entire £39,000-odd, they fail to identify why it is that the company does not owe £6,000 to the petitioner.

7 The email of 7th November 2018 as well as asserting there was a defence to the petition debt goes on to refer to an underlying dispute. The underlying dispute is said to give rise to a possible claim under s.994 of the Companies Act 2006, but neither in this email or in any subsequent email is it demonstrated that the company would have a monetary cross-claim against the petitioner. The most that might be said is that the facts which might be relevant to the dispute about the alleged debt might also be relevant or overlap with facts relevant to the 994 petition, but that does not seem to me to take the matters very much further, particularly when I ask myself whether there is a *bona fide* dispute on substantial grounds to all of the petition debt. At any rate, the 7th November 2018 email from the company seeks to make the case that the money claimed is not due so that it is not a proper case for winding up.

8 Some time seems to have gone by, at any rate so far as the material before me is concerned. The next thing I have on the 30th November 2018 is the petitioner writing to the company seeking to refute the idea of a defence to the petition debt. The letter in question encloses five documents which are said to establish the existence of a debt, but that material has not been placed before the court. That may be an oversight, but the material was not before the chief registrar whose decision is under appeal, and it has not been put before me. Counsel for the petitioner would have liked me to have accepted from him this material, but in the event it has not been necessary for me to decide one way or the other whether to accede to that invitation.

9 Continuing with the 30th November 2018 the company wrote to the petitioner a letter or email which is headed, "Without prejudice save as to costs". This is a long email which again develops the case that there is a defence to the petition debt, and that the case is complicated by the existence of possible s.994 proceedings. This email says that it is the company's intention to bring proceedings against Premier, and they identify one shareholder of Premier in particular, a Mr Bogardi, whose conduct it appears will be criticised.

10 Significantly so far as the fate of the petition is concerned, para.11 of this email makes a statement that the company is prepared to pay the alleged debt. It is absolutely clear from that paragraph, which I need not read out, that that preparedness to make the payment is reluctant and under what is called severe protest. It is also said to be without any admission of liability, and indeed the position is reserved as to proceedings to recover the payment in due course.

11 In the light of that statement it is simply not possible to draw the inference that might be drawn in another case. It is not possible to say that because the petition debt is paid by the company, that indicates that the petition debt was all the time due and owing. The payment in this case is made under protest, reserving a right to recover it. I cannot infer an acceptance by the company that the money was properly due to the petitioner.

12 Staying with the 30th November, the next thing that happens is the petitioner writes to the company saying they do not accept there is any dispute regarding the petition debt. They note the offer to pay. They deal with that. The petitioner then says the total sum

required to secure what they say is the withdrawal of the petition is £44,580.26, which is essentially the petition debt plus legal costs of £5,500.

13 Later that day, 30th November 2018, the company writes to the petitioner saying they will pay the petition debt. As to costs, they say this:

> "In relation to the costs, can you please provide a breakdown for my consideration? If costs are not agreed, then they will have to be assessed in the usual way. Once you have received payment of the principal sum, can you please let me have a consent order for my approval, providing for the petition to be dismissed, together with payment of your client's costs to be assessed if not agreed."

14 Whilst that letter may be open to some interpretation, it is quite clear that the petitioner's solicitors, when they read it, understood that the company was agreeing in principle to pay the petitioner's legal costs, albeit there was possibly going to be an argument about the amount of those costs.

15 The next thing that happened was on the 3rd December 2018 the company paid the petition debt. Also on that date, the petitioner wrote to the company giving a breakdown of the petitioner's legal costs. Whilst there is some detail given of the costs, it can certainly be said that the solicitor's own fees are specified as a global sum without any identification of what work was done to add up to that cost. The petitioner goes on to say that it does not consider a consent order is necessary. It says this:

> "Given that the petition debt will be paid today, and we are agreed that costs are to be the subject of detailed assessment if not agreed, I will instruct counsel to seek the dismissal of the petition on that basis."

It is pointed out that there is a clear assumption there that the company would pay the petitioner's costs, and that was not contradicted, at any rate not contradicted prior to the hearing of the petition on the 5th December 2018.

16 The petition came on for hearing before the chief registrar on the 5th December 2018. Unfortunately the recording equipment did not function, and I do not have a transcript of what was said to the chief registrar, nor a transcript of the rulings and decisions and reasons which he gave. I have however a note prepared by Ms Horner of counsel; she was counsel for the petitioner. And I also have a note prepared by Ms Coyle of counsel acting for the company. While pre-reading this material I was very concerned to attempt to discover whether, perhaps outside court, counsel had agreed between themselves on instructions that the company would pay the petitioner's costs. I am going to assume in favour of the company that there was no such agreement. There may have been a misunderstanding. The parties may have come very close to reaching that agreement, but when the question of costs was raised before the chief registrar, he proceeded on the basis that there was an issue which was for him to decide.

17 If I had made a finding that the chief registrar had been told that the question of costs had been agreed, and he had decided to disregard that agreement, and make his own decision, that would have been a surprising thing for the registrar to have done; and if he had done it, it would have been a ground for this court to intervene. But as I say, I am assuming in favour of the company that that is not what the registrar was told; he was led to believe that there was an issue which quite rightly he recognised he had to determine as best he could.

18 It is also relevant, without reading out substantial parts of the note for this purpose, to say that the registrar was not told that there had been an agreement as to costs in correspondence, although it is entirely possible that the correspondence would be construed that way. So, it is not a criticism of his decision that he did not refer to the agreement in correspondence when he was not made aware of it.

19 So, the position before the chief registrar was that there was a winding-up petition where the debt had been paid, and everyone agreed the petition should be dismissed. It also appears to have been the situation that the parties expected the registrar to deal with the question of costs, and he endeavoured to do so.

20 Counsel before me are agreed as to the principles which fell to be applied by the chief registrar in relation to determining who should pay the costs. I have been shown a number of authorities that consider that matter. I will just list them at this point. The first and with respect the most important is the case of *Re Nowmost Company Limited* [1997] BCC 105. *Fitzgerald & Law (A firm) v Ralph* [1998] PPIR 49. *Re Blackman (a debtor)* [1999] BCC 446. And a Scottish case, *Yell.com v Internet Business Centres Limited* [2003] SLT (Sheriff Court) 80.

21 Just in passing before reverting to two of the cases in particular, some of the comments in the cases indicate that if there is a winding-up petition based upon a petition debt, and the debt is paid before the hearing of the petition, it is normally right to infer that the payment indicates that the money was after all due. That is said in *Re Blackman* at p.448D; and again in *Yell.com* at para.12. I do not think I can draw that inference in this case, in a case where the money is paid under protest with reservation of a right to seek its recovery. So, that is a feature of the case it is right to acknowledge.

22 The principles to be applied were set out in detail with full explanation by Lindsay J in the *Nowmost* case. Mr Wigley for the petitioner summarised the principles which one finds in *Nowmost* in five propositions, and I will quote what is said in Mr Wigley's skeleton argument:

> "(1) In dismissing a winding-up petition by consent where the company have made late payment of the petition debt, the usual practice is for the court in its discretion to order the company to pay the petitioner's costs.
> "(2) The onus is on the company to lay before the court any material upon which it intends to rely to displace the normal order for costs in the petitioner's favour.
> "(3) Whilst such material does not necessarily have to be formal evidence properly so described, and the court is not barred from adopting a pragmatic approach to the acceptability of such material, disputed averments and or submissions unsupported by evidence, formal or otherwise, is not sufficient to displace the ordinary order which the petitioner could expect to be made in its favour.
> "(4) It is for the court in each case to judge whether the company has satisfied the onus upon it such that the usual order should be displaced.
> "(5) On being told that the issue of costs was disputed, the court should either in a pragmatic way have whatever material sought to be relied up by the company handed up to it to see if a quick solution can be arrived at, or should invite the company to consider whether it wished to ask for a brief adjournment in order that the material which was being referred to could be put into evidence and be considered as necessary by the petitioner's advisers."

23 The way in which *Nowmost Co Limited* and *Fitzgerald & Law* were dealt with is illustrative of the practical questions which arise on applications of this kind. In *Nowmost* Lindsay J hearing an appeal was prepared to receive in a pragmatic way somewhat informal evidence on behalf of the company and, having done so, came to the view that the company had not discharged the onus of avoiding the usual default order against it. In *Fitzgerald & Law*, Evans-Lombe J considered the material before him, but reached the conclusion that he simply could not make a decision which was a judicial and fair decision between the rival parties on that material, and he then directed the issue to be dealt with.

24 Those being the principles, I now go to what the chief registrar said when he explained his decision to make no order as to costs. I have got two marginally different versions of what he said, one in the note of Ms Horner, and one in the note of Ms Coyle. Rather than read both of them, I will read the second because it has a sentence which I can well believe the registrar said, and which is indicative of something that is material to my decision. So, proceeding in that way, what the chief registrar said:

> "I am told by the petitioning creditor that they were not aware of there being protests to the sum. The fact that the company did not restrain or prevent with an injunction led to this presumption. This appears weak to say the debt is accepted. I am told there is correspondence to contradict this. I am also told the background in that there is a minority shareholder claim, and that the petitioning creditor is using this for a collateral purpose to put pressure on the debtor. It seems difficult to determine without the documents. Looking at it in the round and considering CPR 44.2 I make no order as to costs."

25 Ms Coyle on behalf of the company submits that this reasoning is a proper application of the legal principles to which I referred. She says that the chief registrar was effectively deciding that there was enough in what the chief registrar had been told to persuade him that the company had discharged the onus on it to avoid the usual default order as to costs. Mr Wigley on behalf of the petitioner criticises this reasoning. He submits that on the basis of the material before the chief registrar and his response to it, there were only two possible things the chief registrar could have done. The first, which Mr Wigley says should have been done, is the chief registrar should have reached the conclusion on the material before him that the company had simply gone nowhere near enough to discharge the onus upon it. Alternatively, the chief registrar could have taken the view, as was taken in the *Fitzgerald & Law* case, that the matter could not be determined on inadequate material, and would have to be sent to be determined in some other way on further material. As to that second alternative, that after all is what the parties had apparently been asking the chief registrar to do, to send the matter off in that way.

26 I am sympathetic to the approach taken by the chief registrar. He was dealing with the winding-up list; no doubt there were many cases to get through; this case had been disposed of, save in relation to the matter of costs; and the costs were not very large, they were something of the order of £5,500. The chief registrar could see that there was a great deal that could be said on either side potentially, and it was difficult for him to decide who was right and who was wrong on the material before him. That is why he said correctly, "It seems difficult to determine without the documents". I stress that the chief registrar did not have the material that I have had, to which I have already referred in this judgment.

27 However despite that sympathy, and despite the appeal to pragmatism urged upon me by Ms Coyle, it seems to me that the registrar's decision did not amount to a truly judicial decision dealing with the point on which there was a dispute, and on which there were

arguments on either side. Accordingly, with great respect to a very experienced chief registrar, I take the view it was wrong in principle for him to deny the petitioner its costs in that way, when the chief registrar was not really in a position to come to a conclusion on the material before him.

28 I would therefore uphold the challenge to the chief registrar's judgment on that ground. It is agreed that the matter is now to be decided either by the appeal court at this hearing or at some future hearing which I will direct to take place. Neither side showed enthusiasm for a further hearing, although no doubt the party who might lose if I made a final decision today might marginally prefer a further hearing at which the matter could be gone into another time.

29 Having reflected on what I should do, having the benefit of the evidence which the parties wanted to put before the court, I have reached the conclusion that I am able with adequate confidence to decide the appropriate outcome as to the costs of the petition. I think I can get out of the way certain points. It is said that the petition was not justified, and the petitioner should not have its costs because the petition was very much wrapped up with or confused with other proceedings under s.994, and it is possible to infer that the purpose behind the petition was a collateral purpose, making the petition an abuse of the process of the court. I am not persuaded that the company has done anything like enough to get a case of that kind on its feet. I am not persuaded that that is the approach I should take on the material before me.

30 Equally, as I have said more than once, this is not a case where I infer that there is a virtual admission by the company that it owed the money as in some of the cases to which I have referred. It seems to me that the case all turns on my assessment on the material before me as to whether the company raised a *bona fide* dispute on substantial grounds in relation to the petition debt. I will assume in the company's favour that they would have a lot to say, possibly persuasively, in relation to the part of the petition debt which was up to £33,059.26, however I have been unable to see anywhere a *bona fide* defence on substantial grounds to the part of the petition debt represented by the £6,000 paid by the petitioner to the company.

31 On that basis the petitioner was entitled to present its petition, at any rate based on a petition debt of £6,000. The petition is not invalidated because the petition debt was said to be more than £6,000. Accordingly, if the company had not paid £6,000 on the 3rd December 2018 the petitioner would have been entitled to continue with its petition and seek the winding-up of the company. On that basis, it seems to me that the petition was justified, and I can find that to be the case on the material before me. The petition was dismissed but that was because the full amount of the petition debt was paid before the hearing. But the ordinary order should be made, which is that the company should pay the petitioner's costs of the petition. I will hear whether the parties ask me to do a summary assessment of those costs, but if they do not ask for that, then I will direct that the costs will be the subject of a detailed assessment if not subsequently agreed.

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