Case No: CH-2019-000082

Neutral Citation Number: [2019] EWHC 1559 (Ch)

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
INTERIM APPLICATIONS LIST (ChD)

7 Rolls Building
Fetter Lane
London EC4A 1NL

Friday, 5 April 2019

BEFORE:

MR JUSTICE FANCOURT

BETWEEN:

MARK HOWELL

Applicant

- and -

HUGHES & OTHERS

Respondents

REPRESENTATION not provided

JUDGMENT
(As Approved)

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1. MR JUSTICE FANCOURT: By an order of Insolvency and Companies Court Judge Burton made on 25 March 2019, the applicant, Mark Howell, was adjudged bankrupt. The creditors' petition had been determined in principle as long ago as 23 August 2018 by Deputy Judge Schaffer, who handed down a long and careful judgment following a two-day hearing in June 2018. But, despite holding that all of the applicant's arguments against making a bankruptcy order failed, Judge Schaffer adjourned the petition generally on 31 August 2018 with liberty to restore. The reason for that was that the applicant had obtained an interim stay of the underlying debts on which the petition was based. The stay was later set aside by Murray J in November 2018 and thereafter the petition was restored for hearing in December and further adjourned on two occasions until finally disposed on 25 March 2019.

2. On 28 March 2019, the applicant issued two appellant's notices, one against the bankruptcy order of Judge Burton that had just been made and the other against the refusal of Judge Schaffer on 23 August to dismiss the petition. I think that the reference in that appellant's notice must have been intended to be a reference to the order made on 31 August rather than 23 August, when no order appears to have been made. In both the appellant's notices, the applicant seeks a stay of the bankruptcy order until after the hearing of his appeal.

3. Also on 28 March 2019, the applicant issued an application returnable today for an order annulling the bankruptcy order section 282 of the Insolvency Act 1986, or alternatively rescinding it under section 375, and for a stay, and to re-impose an order made by Birss J and later continued by Barling J that the petitioning creditors should not disclose the existence of their petition. Those orders were made at a time when the applicant was seeking to challenge the legitimacy of the statutory demand on which the petition was based. The only matter that I am dealing with today is the application for a stay and, ancillary to it, the question of non-disclosure of the petition that the applicant seeks to renew.

4. The applicant inevitably faces substantial difficulty in pursuing his appeal against the order of 31 August 2018, having made his application for permission to appeal about six months late and with the hearing of the petition having continued in the meantime without an appeal but with all parties treating the petition as still live. The appeal against the bankruptcy order itself, by way of contrast, was extremely prompt and the grounds of appeal are, in brief summary, the following:

> (1) that the petitioning creditors' debt was secured on an inheritance that the applicant was expecting to receive, part of which related to the sale of a property of his deceased aunt;
>
> (2) that the applicant had made an offer of payment or security for the petition debt that no reasonable person would have refused; and
>
> (3) that the petitioning creditors acted in breach of the Birss J and Barling J orders in informing the supporting creditors of the petition.

On all three of those grounds, the applicant will argue that the petition should have been dismissed.

5. As for the separate application to annul or rescind the bankruptcy order, no further grounds are identified than those relied on for the appeal, so there is nothing relied on as being a material change in circumstances, such as an ability now to pay all the bankruptcy debts and expenses.

6. The reasons put forward in the application for a stay are the following. The first is an alleged contempt of court by the petitioning creditors in informing the supporting creditors of the petition, which they say had an important effect on a change of attitude by the petitioning creditors at the hearing on 25 March 2019 and what is said to be the:

> "... probable loss of valuable commercial contracts and the stifling of an important claim when it is realistically likely that the order ought not to have been made."

7. The valuable commercial contracts are not further explained in the applicant's tenth witness statement in support of his application except as being a potential loss of valuable instructions from clients and by reference to eight pages of the exhibit to his statement, which he describes as a small selection of instructions from clients that are in immediate jeopardy should the unjust order come to their knowledge. One of those pages is an email from an estate agent on 7 March this year saying, "I have the following enquiry, if you can assist." It appears to relate to two potential investors in real property for whom the applicant was to arrange access. The other pages in the eight pages are emails between 11 May 2018 and 16 October 2018 relating to other agency work, some of which indicate that a commission would be payable to the applicant on a completed transaction in return for his assistance or some facilitation of the transaction.

8. It therefore appears, although there is no direct evidence, that the applicant carries on work as a kind of intermediary or sub-agent, putting investors in contact with investment opportunities and hoping to earn a commission that way. There is no evidence as to which, if any, of the matters referred to in the emails are still live or in what circumstances, if at all, they may result in money being paid to the applicant.

9. The important claim referred to in the applicant's reasons for a stay is a County Court claim (as it now is) between the applicant and the supporting creditor, or rather the residue of a claim originally brought in the High Court and which part was not struck out there before being transferred to the County Court at Central London. That claim is valued at about £50,000 plus interest and is vigorously disputed by the supporting creditor. Further hearings in relation to that case are due to take place first in the High Court on 30 April 2019, where the applicant has applied to vary a costs order previously made, then on 9 May in the County Court on an application by the applicant to amend his particulars of claim, and on 13 June in the County Court on a case management conference.

10. It is not possible, on the basis of the evidence before me at this stage, to make any assessment of the prospects of that claim succeeding or its true value. It is therefore clear that the applicant may suffer some prejudice, if the bankruptcy order were to be annulled or rescinded or set aside at some stage in future, if the County Court claim was of real value but, for whatever reason, the Official Receiver did not choose to pursue it. Whether that is what will happen or whether the Official Receiver will pursue it or assign the cause of action back to the applicant is unknown at this stage. The Official Receiver has had no chance yet to assess its merits.

11. The evidence of specific prejudice in relation to valuable commercial contracts, as they are called, is much vaguer. There is no clarity in the evidence about what, if anything, the applicant needs to do (which, as a bankrupt, he cannot do) to turn those contracts into money, or any evidence to explain why knowledge of his bankrupt status will prevent any money that has already been earned from coming to him or his trustee, or why, specifically, knowledge of his status would prevent him from continuing to facilitate deals in the way that he has done or might cause those with whom he deals to stop engaging with him.

12. It is well established as a matter of the approach of this court that a stay of a bankruptcy order, as opposed to the stay of a petition, will not usually be granted. That is because of the potential prejudice to existing creditors where the Official Receiver will not be able to take steps to secure assets of the estate and prejudice to others with whom the bankrupt may deal before, if it proves to be the case, his challenge to the bankruptcy order fails.

13. In *Floyd Foster v Davenport Lyons*, a case unreported but where judgment was given on 23 December 2011, David Richards J said:

> "The usual position in appeals against bankruptcy orders is that a stay will not be ordered. This is for the reasons, which I indicated earlier, of the need to secure in particular the assets to the estate, to identify creditors and to obtain information. If there is a complete stay of a bankruptcy order and either permission to appeal is refused or, if allowed, the appeal is unsuccessful, there may well in the meantime have been dealings which would be to the disadvantage of creditors."

14. In the decision of the Court of Appeal in *Re: A Debtor (No. 644)* [1969]; [2001] BPIR 901, which concerned an appeal against the refusal of a stay of a bankruptcy order pending the hearing of the appeal, Russell LJ, giving the only reasoned judgment, said:

> "Only the rarest kind of circumstance can justify such a stay and, in my view, such circumstances are absent here."

15. David Richards J continued:

> "There may, of course, be circumstances when it is appropriate to modify the full effect of a bankruptcy order in circumstances where there appear to be substantial grounds for an appeal and where a bankruptcy order would cause irreparable damage to the debtor. The court will be concerned, if possible, to fashion some remedy or order which holds the rein pending balancing the interests of the creditors on the one hand and the debtors on the other. An example of such steps being taken is a decision of Morgan J in *Emap Active Ltd v Hill*. In order for those interests properly to be balanced and for an appropriate regime to be put in place, it is essential that the interested parties are represented before the court. That is to say in particular, of course, the debtor on the one hand, the trustee in bankruptcy on the other, and perhaps also the petitioner and supporting creditors but their role would, I apprehend, be less important. For that to occur, of course, notice of the application for a stay should be given to the trustee in bankruptcy or to the Official Receiver if a trustee has not been appointed. I will consider that, save in exceptional circumstances, a stay of the bankruptcy order pending an appeal should not be granted unless notice has been given to the Official Receiver or to the trustee in bankruptcy."

16. The position is also summarised in the following way in the new edition of Fletcher's *Law of Insolvency,* at paragraph 7.003:

> "The court will be exceedingly circumspect over the matter of ordering such a stay in view of the attendant risks for innocent parties who thereafter have dealings with the debtor may suffer loss if he ultimately fails to obtain a rescission of the bankruptcy order on appeal. Moreover, since any who have become creditors after the date of the making of the bankruptcy order are excluded from participation in the assets being distributed in that bankruptcy administration, the extent of their loss may be proportionately greater than that of the creditors in the bankruptcy whose advertisement is stayed. Since the bankruptcy order remains in force despite the stay of advertisement and since the day on which it was made constitutes the date of commencement of the bankruptcy, the trustee in bankruptcy will later be able to assert that transactions which had taken place between the bankrupt and other persons after the commencement of the bankruptcy are void as against him."

17. The 2016 Insolvency Rules, rules 10.32 and 10.45, do in fact provide for the possibility of a stay on notification of the bankruptcy to the Land Registry or on publication of the bankruptcy in the Gazette or elsewhere. In fact, in this case, the bankruptcy order has

already been entered in the register of individual insolvency, though that is a step that can be reversed if appropriate to do so.

18. The question, then, is whether the circumstances are here sufficiently compelling for a stay of the bankruptcy order to be granted.

19. First of all, I consider a general stay of the order and my conclusion is that the circumstances here do not justify it. First, the prospects of success on appeal or in seeking to annul or rescind the bankruptcy order do not appear to be strong so as to amount to a significant factor in the exercise of my discretion. I consider the merits of the proposed appeals only for this purpose. What I say will not bind the Judge who in due course decides whether to give permission to appeals.

20. There may be a realistic argument on the question of whether the court's order of 20 December 2018 made the petitioning creditors' debt a secured debt or alternatively an offer to provide security such that the debt could no longer be relied upon or that the petition should be dismissed. However, by March 2019, the supporting creditor had appeared on the scene and had given notice of its own £42,000 debt or thereabouts and it was by then apparent that the expected inheritance would probably fall short of the petitioning creditors' debt by about £10,000. For both those reasons, the prospect of the inheritance could not at that stage secure the petition debt. It is appropriate to note that the applicant disputes the supporting creditor's debt on the grounds of his cross-claim, which is the subject matter of the County Court proceedings.

21. As to whether no reasonable creditor would have refused the offer, if there was one, in March 2019, I have real doubts that there is any realistic argument there if the first ground of the appeal does not succeed.

22. The argument based on breach of the orders of Birss J and Barling J appears to me to be wrong in principle. The order bound the petitioning creditors. The supporting creditor (in the form of her litigation friend and deputy) knew about the petition before those orders were made and he also knew about it as a partner in the firm of lawyers acting for the petitioning creditors. Neither the petitioning creditors themselves nor anyone acting on their behalf with their authority have breached the order. In any event, the order made (the bankruptcy order) was solely on the basis of the petitioning creditors' debt, not the supporting creditor's, and the petitioning creditors were entitled to change their mind and seek a bankruptcy order for any reason.

23. Secondly, the risk to creditors is, in my judgment, real. The 20 December 2018 order contemplates that the inheritance, or at least the initial payment from the sale of one property, would be paid to the petitioning creditors' solicitors. As a result of the bankruptcy order, that clearly will not now happen. If the bankruptcy is stayed, the applicant may himself receive those monies and they may disappear before a stay is lifted and indeed other monies received by the applicant from his previous commercial dealings may similarly disappear.

24. Thirdly, if a stay is granted, it is clear that the applicant is minded to keep his bankruptcy under wraps so far as possible. He is convinced that the order was unjustly

made and should not have been made and that he has good prospects of rescinding or annulling it in due course. He will not therefore tell those with whom he is dealing about his bankruptcy, not least because he asserts that it will cause him to lose commercial business. There is therefore inevitably risk to anyone who may become his creditor after today without knowledge of the bankruptcy.

25. Fourth, if a stay is granted, the applicant proposes to continue to litigate against the supporting creditor in the High Court and in the County Court. The applicant has shown himself to be a serial and persistent litigator. The approach he takes will cause the supporting creditors to continue to incur costs that they will not, in certain circumstances, be able to claim in the bankruptcy. It is clear that the applicant is quite determined to pursue the claim come what may, having already been through a number of interim hearings and appeals to the Court of Appeal in order to be able to do so. The costs for the supporting creditors could therefore be considerable.

26. Fifth, if, on an objective assessment, the claim in the County Court is worth pursuing, the Official Receiver or a trustee in bankruptcy can be expected to do so in due course. If not, they may in any event be willing to assign the benefit of the claim to the applicant.

27. Sixth and finally, a measure of protection for the applicant in relation to the County Court claim, where there is some evidence that prejudice may otherwise be caused, can be achieved by the court by other means. For all those reasons, I decline to stay the bankruptcy order generally.

28. I must then consider whether or not it is appropriate to exercise the discretion given by rule 10.32(5) to order that there be no notification of the bankruptcy order to the Land Registry or publication in the Gazette. A more limited stay of this kind does not, of course, prevent the Official Receiver or a trustee from seeking to secure the assets of the estate, but it does nothing to protect those who may deal with the applicant in the interim period and it does not assist the applicant in relation to the continuation of the County Court proceedings.

29. The benefit for the applicant is that it may remove the risk of harm to his interests in his continuing work, whatever exactly that is, but an order staying publication will not prevent the Official Receiver or a trustee from making enquiries with those with whom the applicant has done business, with a view to identifying sums due from them to the applicant. It would be wrong to make any order that fettered the Official Receiver's ability to protect the assets of the estate in that way. The Official Receiver can and should do that. So the harm that the applicant complains about will be likely to be suffered in any event.

30. I consider that the balance comes down in favour of refusing to exercise the power in rule 10.32. There is no persuasive evidence that permanent harm will be done to the applicant's business interests, either reputationally or from loss of particular clients, and such harm as there is may well result in any event, for the reasons I have just given.

31. There is no evidence that money that has already been earned or is contingently payable to the applicant in connection with the agency deals referred to in his exhibit will be lost, and the evidence of damage to future business is no more than assertion on his part without any detail or proper explanation to support it. On the other hand, there is inevitably a real risk of prejudice to others dealing with the applicant in what may be a prolonged period of time pending determination of his appeals and his application to annul or rescind. It is clear that the applicant intends to continue with his business plans.

32. I can, however, make specific provision that will protect the applicant's legitimate interests in the County Court proceedings and consider that I should do so. It would be wrong to allow those proceedings to fall by inaction prior to any informed decision on whether they should be continued for the benefit of the estate of the applicant or for the applicant's benefit in the event of an annulment or rescission of the bankruptcy order.

33. In the course of argument on this application, the supporting creditors indicated that they were willing to undertake to apply for a stay of the applications to be heard in the High Court and in the Country Court. The Official Receiver also indicated that she was agreeable to making such an application to each court informing the court of the circumstances and the reason for the application.

34. The application for the stay should, in my judgment, be pending the happening of any of the following events:

(1) annulment or rescission of the bankruptcy order, whether pursuant to the appeals or the application that has been issued;

(2) a decision by the Official Receiver or a trustee to pursue the applications in the High Court and the County Court and/or claim for the benefit of the estate those actions;

(3) a decision by the Official Receiver whether or not to assign the right of action to the applicant.

If a decision is made not to assign the benefit of the action to the applicant, then the stay should nevertheless continue until the applicant's appeals and annulment application have been determined.

35. The terms, therefore, of the request for a stay need to be carefully drafted and I should be grateful for the assistance of counsel in that regard. For all the reasons that I have given, I therefore dismiss the application for a stay of the bankruptcy order or for the imposition of any confidentiality obligation.

Epiq Europe Ltd hereby certify 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