Neutral Citation Number: [2021] EWHC 385 (Ch)

Case No: CR-2021-BRS-000011

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BRISTOL
INSOLVENCY AND COMPANIES LIST (ChD)

Case No: 1BS03452

IN THE COUNTY COURT AT BRISTOL
BUSINESS AND PROPERTY WORK

Bristol Civil Justice Centre
2 Redcliff Street, Bristol, BS1 6GR

Date: 26/02/2021

Before :

HHJ PAUL MATTHEWS

- -

Between :

JONES & PYLE DEVELOPMENTS LIMITED **Claimant**

- and -

JOHN CRAIG RYMELL **Defendant**

- -
- -

Benjamin Pyle, director, for the **Claimant**
The Defendant in person

Hearing dates: 16 February 2021

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to BAILII on the date shown at 10:30 am.

HHJ Paul Matthews :

Introduction

1. This is my judgment on two applications. One is by notice dated 15 November 2020 issued by the defendant in county court proceedings. The other is by notice dated 8 January 2021, issued by the claimant in the High Court. They both concern the enforceability of an order dated 19 April 2013, arising from a judgment given in the High Court, Mercantile Court in Bristol, on 17 April 2013. That judgment was given Mr John Jarvis QC, sitting as a deputy High Court judge, and the order implementing his judgment was made on 19 April 2013. The claim in which that judgment was given was a claim for damages for misrepresentation, and the judgment itself made a number of important findings of fact.

2. In the briefest summary, the claimant had purchased a plot of land from the defendant for £138,250 on 15 October 2007, but then found itself embroiled in a boundary dispute with a neighbour. The claimant accused the defendant of having made false representations during the conveyancing process as to the non-existence of any such boundary dispute. The claimant settled the boundary dispute eventually with the neighbour, and then successfully claimed damages from the defendant.

3. The order of 19 April 2013 required the defendant to pay the claimant damages of £50,273.28 together with interest of £1,884, as well as costs on the indemnity basis to be assessed if not agreed, with an interim payment of £30,000 to be paid by 15 May 2013. These three sums total £82,157.28. The defendant sought permission to appeal, but I understand that this was refused by Mr Justice Teare on 9 October 2013.

4. In June 2013, the defendant attempted to enter an IVA with his creditors, but this failed. Thereafter he was adjudicated bankrupt on his own petition in the County Court at Yeovil on 6 August 2013. Carolyn Dunn (later Meister) was appointed as his trustee in bankruptcy on 23 August 2021. The defendant was discharged from bankruptcy on 16 December 2014. It appears from the trustee in bankruptcy's second report to creditors that the usual automatic discharge from bankruptcy after one year had been suspended, in the case of the defendant, as a result of his non-cooperation. It also appears that the defendant owned a number of pension insurance policies which were not included in the bankrupt estate, presumably because they were not then accessible to creditors.

5. It appears that the defendant had an interest in a residential property known as 'Pentire', in Chard, Somerset, where he and his family lived. According to a document stated to be a declaration of trust dated 21 June 2015, the defendant owned a 20% beneficial interest, pursuant to an earlier declaration of trust dated 6 April 2007 (which I have not seen, and a restriction in relation to which appears to have been registered at the Land Registry on 2 November 2007). Such a 20% beneficial interest would have vested in his trustee in bankruptcy.

6. The document dated 21 June 2015 also states that a deed of assignment of 16 June 2015 transferred that 20% beneficial interest from the trustee in bankruptcy to the

defendant, in consideration of the sum of £45,000 paid to the trustee in bankruptcy. It further says that the defendant and his wife now hold the legal title on trust as to that 20% interest for their two children, on the basis that each of the children (who appear to have been minors at that date, having been born on 27 July 1997 and 20 September 2000 respectively) has paid £22,500 to the trustee's solicitors.

7. I should say that the deed of assignment does not mention the source of the funds used to pay the trustee, and neither does it refer to any trusts being then declared for the children. It appears that, if there were such express trusts (which would have had to be evidenced by signed writing to be enforceable), it is the document dated 21 June 2015 which achieved that. I should also say that the claimant says that the "Declaration of Trust" dated 16 June 2015 was in fact executed only in December 2016. At this stage, nothing turns on this.

8. The claimant asserts that the funds used for these payments had been transferred by the defendant to his children in an attempt to place assets beyond the reach of his creditors. The £45,000 paid was, according to the claimant, used to pay fees and costs of the trustee in bankruptcy, and the unsecured creditors apparently received nothing.

Enforcing the judgment

9. The claimant initially applied for a charging order on the defendant's interest in 'Pentire', and on 29 April 2013 an interim charging order was made by the court for the sum of £82,157.28. This appears to have included the sum of £30,000 on account of costs, which was in fact not due until 15 May 2013. That order was sealed only on 23 May 2013, but it is the date of the *order* and not the date of the *seal* that matters. In fact, as it turned out, this made no difference. As I have said, the defendant petitioned for his own bankruptcy, and he was adjudicated bankrupt on 6 August 2013. By virtue of sections 285 and 346 of the Insolvency Act 1986, that interim order could not be made final without the permission of the court.

10. The judgment debt itself was provable in the defendant's bankruptcy. The normal rule, under section 281(1) of the Insolvency Act 1986, is that *discharge* from bankruptcy operates to release the debtor from *all* the bankruptcy debts. The claimant however maintains that the judgment debt survived the defendant's bankruptcy, by virtue of section 281(3) of that Act. This provides that

> "Discharge does not release the bankrupt from any bankruptcy debt which he incurred in respect of, or forbearance in respect of which was secured by means of, any fraud or fraudulent breach of trust to which he was a party."

The claimant says that the judgment debt was incurred in respect of the fraud of the defendant, and that this is borne out by reference to the judgment of Mr Jarvis QC of 17 April 2013. The defendant says that the judgment debt is statute barred. I will return to both of these arguments later.

11. Mr Benjamin Pyle is the sole director of the claimant. The evidence which he relied on at the hearing was that he was "completely debilitated" and unable to progress any matters between March 2016 and July 2017. He gave no further particulars of what was wrong, although he offered to supply evidence to the court on a confidential basis, which I understand to mean that it would not be shown to the defendant. As a

general proposition, that is not acceptable. Any party must have the opportunity to deal with evidence which is being tendered against him or her.

12. On 27 October 2016 claimant once more applied for a charging order on the defendant's interest in 'Pentire'. An interim charging order was in fact made on 9 November 2016, and a hearing for a final charging order was listed for 20 December 2016. The defendant's wife wrote to the former trustee in bankruptcy about this development. However, she did not give any details of the creditor or the debt concerned. There would be no reason to suppose that the former trustee would remember this particular case amongst so many others. There was no suggestion that the trustee was to be paid for spending time on this enquiry.

13. The trustee responded confirming "that the bankruptcy was concluded and that creditors bound by the bankruptcy can take no further action against [the defendant] or the property". But that generic statement does not mean that the judgment debt in this case was caught. The more significant point was, of course, that the documents appeared to show that any interest which the defendant had in the property had been sold by the trustee in bankruptcy back to the defendant, who now claimed to hold it on trust for his children. In the light of the documents, and in particular the declaration of trust dated 21 June 2015, the claimant agreed to its application for a final charging order being dismissed, and a consent order to that effect was made on 20 December 2016.

14. There was further correspondence between the claimant and the defendant in May and June 2018, and May and June 2019. Each side put forward its own position. The claimant was seeking to enforce the judgment debt, and the defendant was relying on his discharge from bankruptcy as having released him from it. Curiously, it was not until June 2019 that the defendant produced any official confirmation of his discharge from bankruptcy. The certificate from the County Court at Yeovil was dated 24 June 2019.

15. The claimant issued a further money claim on 30 September 2020, against the defendant and his wife, using the online County Court money claims service, once more relying on the judgment debt. The defendant approached the Insolvency Service, who advised him of two matters. The first was that the judgment debt was not against the defendant's wife and therefore the new claim (based on the judgment debt) could not succeed against her.

16. The second matter was that (according to the Insolvency Service) the judgment debt fell within the bankruptcy and was "not pursuable outside the bankruptcy". It is not clear what documents the Insolvency Service had seen in making that statement. But the short statement of the case put to them by the defendant in his enquiry makes a clear reference to an allegation that the defendant (and his wife) had been found guilty of fraudulent misrepresentation at the trial. Be that as it may, the Insolvency Service did not mention section 281(3) of the 1986 Act.

The present applications

17. Returning to the present proceedings, the claimant made an application by notice dated 21 September 2020 for an order that the defendant attend court on 8 December 2020 for questioning on his means. The court made that order on 2 October, requiring

the defendant to attend the County Court at Yeovil for the purpose. The defendant then made an application by notice dated 15 November 2020 to "strike out application of 2 October 2020", meaning, of course, to set aside the order of 2 October. On 7 December 2020, that application came before DDJ Loughridge, sitting in the County Court at Weston-super-Mare, at a telephone hearing.

18. The order made by the deputy district judge on 7 December 2020 recites that at the hearing the claimant was represented by Mr Pyle (the director of the claimant), and the defendant appeared in person. The defendant's application raised an issue about the enforceability of the judgment debt created by the order of 19 April 2013, which was to be the subject of the questioning about means. For this reason, the deputy district judge adjourned the application and transferred the next hearing to the County Court at Bristol, to be listed on the first available date after 1 February 2021. He also vacated the hearing in Yeovil (by then refixed for 12 January 2021). In addition, the order directed that the parties had to file and serve any evidence on which they wished to rely, together with legal submissions, by 4 PM on 18 January 2021.

19. On 16 December 2020, the claimant made an application by notice to the High Court, at the Business and Property Courts in Bristol, for permission to issue a writ of execution in relation to the same judgment debt. By letter dated 21 December 2020, the Bristol court staff told the claimant that it should apply to the County Court at Yeovil in the first instance. On 28 December 2020, therefore, the claimant made a similar application to the county court in Yeovil. On 8 January 2021, following a telephone conversation with court staff on 7 January 2021, the claimant made a further (and apparently identical) application by notice to the High Court, Business and Property Courts in Bristol, for an order for permission to issue a writ of execution, again in relation to the same judgment debt.

20. On 12 January 2021, the defendant sent an email to the Chancery listings officer at Bristol, attaching a copy of an order made by DDJ Hovington sitting at the County Court Money Claims Centre in Salford, in the new claim brought by the claimant against the defendant and the defendant's wife, under reference G69YJ920. That order, made without a hearing, and apparently on the court's own initiative, struck out that claim on the grounds that it was an abuse of the court process. I am not concerned further with that claim today.

21. On 18 January 2021, the defendant sent a further email to the court staff Specialist Team at Bristol (which deals with the work of the Business and Property Courts in Bristol) confirming that he had received the order of 7 December 2020, which had been dated 14 January 2021, but only on 18 January 2021. Since that order had directed evidence and submissions by 18 January 2021, the defendant sought "an updated order … based on a realistic timescale". Of course, unless otherwise stated, orders speak from the date on which they are made, not the date they are sealed: CPR rule 40.7. And the defendant had taken part in the telephone hearing of 7 December 2020, so he knew about the order.

22. Nevertheless, on 29 January 2021 I gave further directions for the hearing before me. I also directed that the claimant's application of 8 January 2021 be heard together with the defendant's application of 15 November 2020. At the hearing before me, conducted remotely via MS Teams, Mr Pyle once more appeared on behalf company, and the defendant appeared on his own behalf (although he joined by audio only).

Each of them addressed me on the issues that arise. Neither is a lawyer, of course. But each side had prepared lengthy statements, and the defendant's wife had also prepared one, all of which were contained in the hearing bundle and which I read beforehand.

The effect of discharge from bankruptcy

23. The first point to consider is whether the judgment debt survived the defendant's discharge from bankruptcy. I have already set out section 281(3) of the 1986 Act. It is clear that "fraud" in that subsection refers to fraud in the sense of the tort of deceit at common law, as exemplified by *Derry v Peek*: see *Mander v Evans* [2003] 1 WLR 2378, [25].

24. The judgment in the original claim of Mr Jarvis QC, sitting as a deputy judge of the High Court, stated at paragraph 5 that the claim brought was "brought by way both of fraudulent misrepresentation and negligent misrepresentation". At paragraph 42, the deputy judge stated that he preferred the claimant's evidence to the defendant's evidence where they differed. Paragraph 43 the deputy judge assessed the oral evidence of the defendant and his wife by saying that they had "not been honest in giving their evidence in court". At paragraph 62 the judge stated "that the representations were both false for the reasons which I have already given".

25. At paragraph 63, the deputy judge said:

> "The question is then asked: 'If the representations were untrue, were they made by the defendant knowingly or without belief in their truth or recklessly careless whether they were true or false?' I have indicated that I find that the defendant actually knew that the representations were untrue. It seems to me therefore, going back to the *Derry v Peek* test which I set out earlier in this judgment, that those tests are satisfied. It seems to me the *Derry v Peek* test is satisfied in that the representations made in the form GE053 are satisfied in that the defendant knowingly made the false representation and, in addition, he did so without belief in its truth. In any event, I would have been satisfied that he made it recklessly careless whether it was true or false."

26. For present purposes, it is not necessary for me to go further than this, though in fact the judge went on to consider the question of negligent misrepresentation, and held {at paragraph 64) that the defendant (on whom the burden now rested) had failed to show that he was not negligent.

27. In my judgment, the judgment debt in the present case was a debt of the defendant provable in his bankruptcy "which he incurred in respect of … fraud … to which he was a party", within section 281(3) of the 1986 Act. That means that the defendant's discharge from his bankruptcy in December 2014 did *not* discharge his liability for this debt. It was therefore open to the claimant to seek to enforce it against him thereafter. As I have already said, the former trustee in bankruptcy told the defendant's wife that that "creditors bound by the bankruptcy can take no further action against [the defendant] or the property". The problem was that this debt *survived* the bankruptcy, and therefore to that extent this was a creditor *not* "bound by the bankruptcy".

28. In principle, therefore, the claimant was entitled thereafter to seek to enforce the judgment debt against the defendant.

Time limit for enforcement of judgment

29. The defendant raises a further point, which is that the limitation period for enforcement has run out. This might be thought (as perhaps the defendant thought) to be the case of an action, in the sense of "legal proceedings", brought on the judgment. The limitation period for such an action is six years, by virtue of section 24 of the Limitation Act 1980. But it was held in *National Westminster Bank v Powney* [1991] Ch 339, CA, that an application to enforce an *existing* judgment debt by some form of execution was not an *action* bringing "a claim upon any judgment" within section 24. So it is not, strictly speaking, a *limitation period* which matters.

30. In fact, the claimant's original application of last September, which sought an order for the defendant to be examined on his means, was brought under CPR Part 71. The rules in that part do not however contain any time limit for such an order to be obtained. But in practice no one would ask for such an order unless it would be possible thereafter to issue execution on any assets thereby discovered. And that is what the claimant's application notice of 8 January 2021 seeks to do.

31. The time limit for issuing execution is contained in CPR rule 83.2(3)(a) (replacing RSC Order 46 rule 2(1)(a)). This provides (so far as material) that:

> "(3) A relevant writ or warrant must not be issued without the permission of the court where—
>
> (a) six years or more have elapsed since the date of the judgment or order …"

32. In *Patel v Singh* [2003] EWCA Civ 1938, Peter Gibson LJ (with whom Sir Anthony Evans agreed) referred to *National Westminster Bank v Powney* [1991] Ch 339, and to *Duer v Frazer* [2001] 1 WLR 919 (a decision of Evans-Lombe J) , and said:

> "21. … In my judgment, therefore, consistently with what this court said in *Powney*, the court must start from the position that the lapse of six years may, and will ordinarily, in itself justify refusing the judgment creditor permission to issue the writ of execution, unless the judgment creditor can justify the granting of permission by showing that the circumstances of his or her case takes it out of the ordinary. That may be done by showing the presence of something in relation to the judgment creditor's own position, or, as Sir Anthony Evans suggested in the course of the argument, in relation to the judgment debtor's position. Thus the judgment creditor might be able to point, for example, to the fact that for many years the judgment debtor was thought to have no money and so was not worth powder and shot but that, on the judgment creditor winning the lottery or having some other change of financial fortune, it has become worthwhile for the judgment creditor to seek to pursue the judgment debtor."

33. The defendant also referred to *Good Challenger Navegante SA v Metalexportimport SA* [2003] EWCA Civ 1668 and *Society of Lloyd's v Longtin* [2005] EWHC 249. But these decisions also refer to *Patel v Singh*, and in my judgment add nothing to what is

said there. In accordance with *Patel v Singh*, I therefore ask myself, what is there in the present case to take the case out of the ordinary?

34. I find that there are in fact a number of matters. First of all, there is the fact that the defendant was bankrupt from 6 August 2013 until 16 December 2014. This is a period of some sixteen months. During that time, the claimant could not in practice execute the judgment.

35. Secondly, there was the need for the trustee in bankruptcy to investigate the trust which had purportedly been created and which was relevant to the questions (i) what was the defendant's interest in the residential property, and (ii) whether that interest was available to the creditors. That took some time too.

36. Thirdly, the claimant makes the point that once the trustee in bankruptcy was appointed he was effectively isolated from the bankruptcy process, and did not know what was going on, and this lasted for some time after the bankruptcy came to an end. At the same time, he says, he was "completely debilitated" (but, for the reason given, I do not think I can place any reliance on that).

37. Fourthly, the claimant says that the defendant knew well that the claimant during all this time was attempting to collect the judgment debt. It was not sleeping on its rights. In November 2016 it tried again to obtain a charging order. The defendant during this period simply relied on the discharge from bankruptcy. Yet he was told (in the 2016 application for a charging order) about the effect of section 281(3) of the 1986 Act.

38. Fifthly, there are a number of documents in the bundle in which the defendant *acknowledges* the existence of the judgment debt during the enforcement period (though he incorrectly says that it has been discharged by the bankruptcy). If this were a case of seeking to bring a fresh claim on an existing judgment, these would amount to acknowledgements for the purpose of the Limitation Act. In my judgment I can take these into account in considering whether it would be just to give permission to enforce this judgment debt outside the six year period.

39. Sixthly, it appears that, whereas previously the defendant had no assets with which to satisfy the debt, he is now of an age where he is able to access his pension policies, which did not form part of the bankrupt estate. So he could potentially pay the outstanding judgment debt (as Peter Gibson LJ suggested in *Patel v Singh*).

40. On the other side, the defendant says that the claimant has delayed enforcement, and has not explained the delay. He complains that no letter was sent by the claimant asking for payment until May 2018. That is of course true, but the defendant was still in bankruptcy until the end of 2014, and it was August 2015 before the final report of the trustee was sent to the creditors (the final creditors' meeting was held in October 2015). In my judgment, it was perfectly reasonable of the claimant to see what result of the bankruptcy was before proceeding to seek to enforce the undischarged judgment debt.

41. An enforcement procedure was indeed attempted in November 2016, but withdrawn on finding out that the property which would be the subject of the charging order was apparently not beneficially owned by the defendant. The correspondence in 2018 in 2019 shows clearly that the claimant had not given up. The defendant does not allege

that he would suffer any particular prejudice (apart from having to pay his just debts) if the court gave permission to the claimant to issue execution. I accept that he has obtained the wrong impression from the responses given by the former trustee in bankruptcy and by the Insolvency Service, but that is not a good reason to refuse permission if it would otherwise be given.

42. Drawing the threads together, and considering the matter overall, in my judgment it would be demonstrably just for me to give permission for this judgment, of which the defendant has been acutely aware ever since it was granted, and which has survived his discharge from bankruptcy, to be enforced against him now.

Conclusion

43. The defendant's application dated 15 November 2020 to set aside the order of 2 October 2020 is accordingly dismissed. The matter is remitted to the County Court at Yeovil to relist the questioning of the defendant on his means. The claimant's application of 8 January 2021 to issue execution to enforce the 2013 judgment succeeds. I will deal with any consequential matters on paper in the first instance. Written submissions must be sent to me by email with copy to the other side by 4 PM on Tuesday 2 March 2021, and any submissions in reply must be sent to me by email with copy to the other side by 4 PM on Friday 5 March 2021.

Postscript

44. After the hearing on 16 February 2021, Mr Pyle sent some further documents to the court, evidencing his medical condition in 2016-17. They arrived at the Civil Justice Centre some days ago, but, as unfortunately sometimes happens, they took several further days to reach me. I saw them for the first time only yesterday, by which time I had completed this judgment. As I said earlier in this judgment, the court does not normally act on evidence provided by one party to the proceedings which another party cannot see and respond to. That would not be fair. However, as I say, I had already completed this judgment, and accordingly I have not looked at this further material, or taken it into account in any way. My decision is based entirely on the materials and the arguments before me at the hearing on 16 February.