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Case No: CH-2022-000212

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY APPEALS

7 Rolls Buildings,
Fetter Lane,
London,
EC4A 1NL

Date: 18 April 2023

Before:

MR JUSTICE MILES

- -

Between:

RAMESH PHILIPPE DUSORUTH

Appellant

- and -

ORCA FINANCE UK LIMITED (IN LIQUIDATION)

Respondent

- -

- -

MR RORY BROWN (instructed by **GSC Solicitors LLP**) for the **Applicant**
MR WILSON LEUNG (instructed by **Stephenson Harwood LLP**) for the **Respondent**

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APPROVED JUDGMENT

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MR JUSTICE MILES:

1. This is a renewed application for permission to appeal from the orders of ICC Judge Mullen dated 16 September 2022 and 3 November 2022. The judge decided that the original bankruptcy order had been made on a petition for a debt which was not liquidated but refused in the exercise of his discretion to annul the order.

2. I made a decision on the papers on 1 February 2023 refusing permission to appeal. The appellant has renewed his application for permission to appeal orally. He has been represented by Mr Brown of counsel, who has advanced his arguments persuasively and comprehensively.

3. There is a single ground of appeal, which turns on a point of law. The contention is that because the debt claimed in the petition was not for a liquidated sum the bankruptcy order was made without jurisdiction or power, so that on the annulment application under section 282 of the Insolvency Act 1986 the court was effectively obliged to annul the bankruptcy order and had no real discretion to refuse to do so.

4. The debt claimed was an amount of money representing sums alleged to have been misappropriated by the appellant.

5. In the bankruptcy petition, the respondent described the debt as liquidated.

6. The judge decided in his careful and comprehensive judgment that the debt was not, in fact, liquidated, following the approach in *Hope v Premierpace* [1999] BPIR 695.

7. The appellant's argument starts with section 267 of the 1986 Act. That provides (so far as material):

> "(2) Subject to the next three sections, a creditor's petition may be presented to the court in respect of a debt or debts only if, at the time the petition is presented—
>
> […]
>
> (b) the debt, or each of the debts, is for a liquidated sum payable to the petitioning creditor, or one or more of the petitioning creditors, either immediately or at some certain, future time, and is unsecured."

8. Section 271 of the 1986 Act provides (materially) that:

> "(1) The court shall not make a bankruptcy order on a creditor's petition unless it is satisfied that the debt, or one of the debts, in respect of which the petition was presented is either—
>
> (a) a debt which, having been payable at the date of the petition or having since become payable, has been neither paid nor secured or compounded for, or

> (b) a debt which the debtor has no reasonable prospect of being able to pay when it falls due."

9. The application before the judge was made under section 282 of the 1986 Act, which provides materially as follows:

> "(1) The court may annul a bankruptcy order if it at any time appears to the court—
>
> (a) that, on any grounds existing at the time the order was made, the order ought not to have been made."

10. *Hope v Premierpace* concerned an application under section 282 to annul a bankruptcy order. The application was made on two grounds: first, one concerning procedural justice; and, second, that the debt was not liquidated. The second issue was whether a claim for the return of misappropriated monies, or compensation for those sums, amounts in law to a liquidated debt. Rimer J concluded first that the bankruptcy order should be annulled on the grounds of procedural unfairness. He then turned to the second argument, and decided that the debt claimed was not liquidated. He said more than once that the point went to the court's jurisdiction to make the bankruptcy order in the first place. He concluded that because the debt was not a liquidated sum for the purposes of section 267 of the Act, the court had no jurisdiction to make a bankruptcy order. He concluded that no bankruptcy order could properly have been made on the petition and he discharged the bankruptcy order.

11. In *Owo-Samson v Barclays Bank* [2003] EWCA Civ 714, the Court of Appeal was concerned with an application under section 282 to annul a bankruptcy order. The debtor argued that the bankruptcy order ought never to have been made because the debt in that case was fully secured and that the court therefore ought never to have made an order bankrupting the debtor. The debtor had not raised arguments about security at the time of the bankruptcy hearing and only raised them for the first time on the annulment application.

12. The Court of Appeal concluded that the debtor was correct to argue that the debt was fully secured and that the bankruptcy order ought not to have been made.

13. At [35] Carnwath LJ said this:

> "However, the word 'may' in section 282 makes clear that the court's power to annul, even if the grounds are made out, is discretionary. The court is not bound to set aside the petition, particularly if, as here, the creditor is found to have acted reasonably and the debtor has failed to raise defences which were open to him at an earlier stage. In such a case, a critical factor in exercising the discretion, in my view, must be the prospects, if the order is annulled, of the debtor being able to satisfy the petitioner and meet his other liabilities."

(The reference to the court not being bound to set aside the petition must have been a slip – the passage must be read as meaning that the court is not bound to annul the bankruptcy order.)

14. The Court of Appeal concluded that it lacked the materials to exercise its own discretion and remitted that issue to first instance.

15. The appellant also relied on the decisions of Nugee J in *Raiffeisenlandesbank Oberösterreich AG v Meyden* [2016] EWHC 413 (Ch), [2016] EWHC 414 (Ch). The appellant was represented but the respondent was not. The court concluded that the centre of main interests (or COMI) of the debtor was not in England and Wales. The requirement of a local COMI is a jurisdictional one in the sense that the court does not have the power to open bankruptcy proceedings in respect of a debtor whose COMI is not within the jurisdiction. Nugee J decided that the court therefore lacked jurisdiction and that any exercise of the power under section 282 to annul a bankruptcy order could only realistically be exercised one way – by setting aside the order.

16. *Meyden* was not concerned with an argument made after the bankruptcy order that the conditions in section 267 had not been met.

17. The appellant's counsel recognised that but said that Nugee J's reasoning in the *Meyden* case was not restricted to territorial jurisdiction. He pointed out that Nugee J considered and applied domestic cases where the court had been held to lack the power to make a relevant order and, in that sense, lacked jurisdiction. I accept this observation. Nugee J referred to domestic cases including *Munks v Munks* [1985] FLR 576. He decided that there is a general principle of domestic procedural law that where an order is made without power, the court will set it aside as of right on the part of the party affected by it. Nugee J then went on to consider whether the statutory jurisdiction in section 282 of the 1986 Act supplanted that rule. He decided that it did not. He concluded that in a case where the bankruptcy order was made without jurisdiction, the court would have only one real choice under section 282 – i.e. to set aside the order. Though not his wording, it was in effect a one-way discretion.

18. Counsel for the appellant submitted that the same reasoning applies with equal force to a case where the debt was not liquidated for the purposes of section 267, so that (as Rimer J put it in *Hope*) the court did not have jurisdiction to make the bankruptcy order.

19. As I have said, Nugee J did not have the benefit of adversarial argument in *Meyden*. It does not appear that he was referred to *Owo-Samson*. He certainly did not refer to it in his judgment and I have no doubt that he would have addressed it had it been cited to him.

20. Counsel for the appellant accepted that the *Owo-Samson* case presented a serious obstacle for his arguments. He argued however that *Hope* is directly applicable because it concerned the question of whether there was a liquidated sum. He said that Rimer J expressly decided that the court lacked jurisdiction under section 267 to make an order where the sum is not liquidated. The true principle established by *Meyden* is that where an order is made without jurisdiction, the court will exercise its power under section 282 to set aside a bankruptcy order as of right.

21. Counsel contended that these are two clear decisions at first instance which, taken together, show that the judge was wrong. He also noted that *Meyden* came later than *Owo-Samson* and said that it should be followed.

22. He also argued that *Owo-Samson* can be distinguished on the basis that it was concerned with the presence or absence of security rather than the question whether the debt was liquidated. He submitted that there is a material difference between the two requirements: the condition that the debt is liquidated is a "threshold" requirement, which comes first and must be determined before the question whether the debt is fully secured falls to be considered.

23. He also submitted that in a case such as *Owo-Samson* it is difficult to say that the original order was irregular because the debtor did not raise the points about security. He submitted more generally that it is more likely that the question of security will be raised only at a later stage. He said that the threshold question whether the debt is liquidated is more likely to be addressed at the bankruptcy hearing itself.

24. When I gave a decision about permission to appeal on the papers, I concluded that the appeal faced the insuperable hurdle of *Owo-Samson* as a binding decision of the Court of Appeal concerning the interplay of sections 267(2)(b) and 282 of the 1986 Act. I concluded that the Court of Appeal decided that the court had a real (two-way) discretion under section 282 even where the conditions for a valid petition under section 267(2)(b) were not satisfied.

25. Having had the benefit of Mr Brown's oral submissions, I remain of the view that *Owo-Samson* is binding authority for the proposition that the court has a discretion whether to annul an order which did not comply with the requirements of section 267(2)(b).

26. The Court of Appeal in *Owo-Samson* decided that the petition had not satisfied one of the statutory conditions. At [31] of the judgment Carnwath LJ indeed said that under section 267(2)(b), a pre-existing security which exceeds the debt is an "absolute bar" to the presentation of the petition. But at [35] he said that the court retains a discretion not to annul. In other words, though the petition did not overcome an absolute bar to its presentation, this did not deprive the court of a full (two-way) discretion whether to annul the bankruptcy order. As he explained, bankruptcy proceedings are a class remedy and when considering annulment the court may need to consider the other creditors of the debtor.

27. I do not see how one can rationally parcel out one of the statutory conditions found in section 267(2)(b) - that the debt must be unsecured - from the other condition - that it must be for a liquidated sum. The two conditions are contained in the very same subsection. They are two requirements which must both be met. I do not think that one can be seen as more of a "threshold" requirement than the other: they are both preconditions for the presentation of a valid petition. I do not think that there is any force in the suggestion of counsel that debtors may not always raise questions about security on the hearing of petitions. The present issue is a hard-edged one of principle about the court's jurisdiction and it cannot turn on (anyway unevidenced) predictions about the probabilities of debtors raising one of the issues (security) rather than the other (liquidated debt or not).

28. In short, to my mind *Owo-Samson* establishes, that whatever may be said at the time of the hearing of the bankruptcy petition concerning the court's jurisdiction to make an order on a petition which does not comply with 267(2)(b) of the 1986 Act, if a bankruptcy order is actually made on such a petition, when it comes to a subsequent

application to annul, the court retains a full discretion to decide whether or not to do so. The court may for instance refuse to do so because of the position of other creditors. Section 282 gives the court a full discretion not to annul the order even where the necessary preconditions for presentation of a petition have been held not to have existed at the time the order was made. And for the reasons already given I do not think that the appellant has advanced a realistically arguable case for distinguishing *Owo-Samson*.

29. Mr Brown did not suggest (and could not) that the non-citation of *Hope* meant that *Owo-Samson* was per incuriam. As for the decision in *Meyden*, Nugee J did not consider a case where the preconditions in section 267(2)(b) of the 1986 Act were not met as that point was not before him. I accept that there is some force in the argument of Mr Brown that Nugee J drew his conclusion from domestic cases concerning orders made without power or in excess of power. But he did not have the benefit of citation (it appears) of a potentially relevant decision of the Court of Appeal which was binding on him and which (at the very least) qualifies those principles at least in the case where the petition did not comply with the statutory pre-conditions of section 267(2)(b).

30. It also seems to me that there may well be important differences between that kind of case and a case where the court lacks territorial jurisdiction even to open bankruptcy proceedings because the debtor's COMI is elsewhere. But that is not this case.

31. At any rate I conclude that there is binding Court of Appeal authority which covers this case. The judge was right to hold that he had a real (two-way) discretion whether to annul the bankruptcy order. There is no appeal from the exercise of the discretion against the Appellant.

32. For these reasons, despite Mr Brown's skilful arguments I have decided that the application for permission to appeal must be dismissed. Though it concerns permission to appeal, this judgment may be cited in later cases as it turns on a point of law.

(This Judgment has been approved by Mr Justice Miles.)