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IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
CHANCERY APPEALS (ChD)
[2024] EWHC 1326 (Ch)



No. CH-2022-000161

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

Friday, 19 April 2024

Before:

MR JUSTICE ADAM JOHNSON

B E T W E E N :

REGAL 38183 LTD
(No. 11449290)

Appellant

- and -

(1) DBCG UK LIMITED
(2) BARON CHARLES CLAOUE DE GOHR

Respondents

ANIFA AZRI appeared on behalf of the Appellant

BARON CHARLES CLAOUE DE GOHR appeared on his own behalf and on behalf of the First Respondent

J U D G M E N T

MR JUSTICE ADAM JOHNSON

- 1 This is an appeal against a winding up order made by the court on 3 August 2022 against Regal 38I83 Ltd. I will refer to this as the Company. The Appellant is the former owner of the Company. The Petitioning Creditor in the winding up was DBCG (UK) Ltd. That is owned by the Appellant's former husband, Baron Charles Claoue de Gohr; it is convenient to refer to him as the Respondent.
- 2 The background includes ongoing divorce proceedings which have resulted in a number of disputes between the Appellant and the Respondent. One concerns the financial settlement between them and there is presently a question whether that should be resolved in England or in France. There have also been private Family Court proceedings concerning their children, which have resulted in a detailed fact finding judgment of HHJ Gibbons. An application for permission to appeal against that judgment has been refused, but I understand there is now a pending application to reopen the appeal.
- 3 Coming back to the present matter, the Company, I am told, was intended to be a start-up venture by the Appellant in the field of green finance. Although the Company never traded it appears the Appellant had, and has, some attachment to it and to the idea of the venture which was to be developed using it.
- 4 In any event as I say, it never traded, and Companies House records show that it last filed accounts on 15 March 2022. These were accounts for a dormant company and showed the position as at 31 July 2021. They showed no activity and referenced net assets of only £1. Companies House records also show that in June 2022, shortly before the Petition which gave rise to the winding up order that was heard, the Appellant herself filed an application to strike the Company off the register voluntarily, but this was later withdrawn.
- 5 The debt referenced in the Petition is said to have arisen as a result of loans made by DBCG (UK) Ltd to the Company between October 2018 and December 2019 totalling some £27,000. The Petition also refers to DBCG (UK) Ltd having secured a judgment against the Company in Case No. H7Q70P0M for part payment, although the Petition does not reference how much the judgment was for. The judgment seems to have been the result of County Court proceedings.
- 6 The Petition also goes on to refer to efforts to recover the debt without success. It says that the Company "*has well documented substantial assets abroad but has refused to pay loans or respond to any emails, letters or court documents.*" The reference to substantial assets abroad is, of course, at variance with the asset position given in the Company's filed accounts. The Petition goes on: "*I am requesting that the Company is wound up since it is allegedly insolvent and the director made personally liable for the debt.*" The Petition is signed by the Respondent.
- 7 The Appellant, for her part, denies ever having been served with County Court proceedings and says she has still not seen any documents in those proceedings. None are in the bundle for the Appeal. She also says that she was never properly served with the Petition. The Petition itself gives the registered office address of the Company and there is a certificate of service from a process server evidencing service at that address, but the Appellant says that by 2022 – the Petition is dated April 2022 – she had stopped using that registered office address, as the Respondent knew from disclosures made by her in the Family Court proceedings.

- 8 The Appellant's main point though is this. She denies that the sums advanced to the Company were ever intended to be by way of loan. She says that they were, in effect, maintenance payments made for her benefit and for that of her children during the course of her marriage to the Respondent. She says that the payments were made by his company to her company for his convenience. Her point is that it is simply wrong to have proceeded on the basis that the funds advanced to the Company were a loan and were due to be repaid.
- 9 The Appellant has certain other related points. She says that the Court was wrong not to adjourn the application for a winding up order. She also says that the Court did not adequately consider, or make due allowance for, the wider context, including the need to make special provision for her given certain findings already made in the Family Court proceedings. She also relies on findings made by HHJ Gibbons in the fact finding judgment I have mentioned in which the Judge referred to the Respondent's actions causing financial stress and forming part of a wider pattern of controlling behaviour.
- 10 The Respondent has a different perspective. He sees the funds paid as having been loans and mentioned that the Court in the winding up action had available to it bank account statements describing the relevant payments in those terms. He said that the arrangements between the companies were something quite different to the financial arrangements he had with the Appellant in their personal capacities as husband and wife. He said he did not follow why the Court was being troubled with an application by a company which had never traded. He said that the efforts made to recover the loans were perfectly proper, and just what he was required to do as a director of his own company acting responsibly and in that company's best interests.
- 11 I should say, incidentally, that although the Official Receiver was appointed as liquidator of the Company, it seems that nothing has happened in the liquidation. According to the Appellant, that is because the liquidator is awaiting the outcome of the present Appeal, and according to the Respondent, it is because the liquidator has said the Company is effectively worthless and has closed the file. I do not know which is correct, but I note here the point referenced specifically in the Petition about the possibility of personal liability on the part of the Company's director, i.e. the Appellant, and so I do not feel able to discount entirely the possibility of claims against the Appellant by the liquidator if the winding up order persists.
- 12 Having set out the background, let me come to state my conclusion.
- 13 In making the winding up order in August 2022, the Judge was exercising a discretion: see Insolvency Act 1986 s.125. Although there is no rule of law about it, the convention is that the discretion will not be exercised in favour of making a winding-up order, where the debt relied on is bona fide a disputed debt, see for example *Botleigh Grange Hotels Ltd v Revenue and Customs Commissioners* [2018] EWCA Civ. 1033 at para. [8].
- 14 I have come to the view here that there was a sufficient dispute about the debt relied on to mean that the winding-up order should not have been made. In saying that, I make no criticism at all of the Judge who dealt with the matter summarily in the winding up list in the usual way, but the fact remains that there was a wider context which he was apparently not aware of and thus did not take into account, but which was material to the exercise of his discretion. By this I mean, most particularly, that there was a dispute which still remained to be resolved about the proper treatment of the funds advanced by DBCG (UK) Ltd to the Company. I follow, of course, the Respondent's point that the bank statements describe those funds in a particular way, but, as I pointed out in argument, that is not in itself

determinative, and there is another way of looking at things, which is the way the Appellant sees it, and she characterises the payments in an entirely different way; that is why there is a dispute.

- 15 The fact that the Appellant and the Respondent were formerly married lends colour to the argument that the funds were advanced without any expectation of being repaid on demand or on a commercial basis. The point is reinforced by the concession very properly and fairly made by the Respondent during submissions, in response to my question, namely that there had never been any clear agreement on when repayment would occur - there was an understanding that the funds would be repaid at some time, but it was never agreed when. I note of course the County Court judgment referenced in the Petition but there is obviously a dispute about that as well. I have no real information about it. It seems to me that there is sufficient uncertainty about the terms on which the funds were advanced that I should regard that judgment with some care and circumspection for the purposes of this Appeal.
- 16 Such matters taken in the round lead me to think that there was, in fact, a dispute at the time which the Judge did not, through no fault of his own, take into account.
- 17 Pausing there, I should say that one aspect of this which has given me pause for thought is that the Appellant did not, in fact, appear at the hearing in August 2022 at which the winding up order was made. There had been an earlier hearing in June 2022; the Appellant apparently was not available for that hearing and had asked for an adjournment and sent a statement to the Court set out in an email, making many of the points I have referred to, including that the advances to the Company were not by way of loan. In the event, the hearing in June 2022 was adjourned, but it seems on the basis that the papers were not in order rather than on the Appellant's application. Neither though did she then appear at the adjourned hearing in August 2022, which is what one might have expected. In fact, the Appellant said to me that she did not even enquire in June about what the outcome of the hearing had been at that stage; she simply waited to be told something, and the next she knew was when she was told about the winding up order. A point against her, therefore, is that she had the opportunity of making before the Judge below many of the same points now made on this Appeal and she failed to take that opportunity, and so she ought not to be allowed to take the points now.
- 18 All the same, however, the fact is that the points were set out in the statement I have referred to that the Appellant provided to the Court in support of her adjournment application in June. In her statement to the Court set out in her email of 14 June she said expressly that she had never received any loan and made the point that the sums paid to the Company were freely sent and that she never agreed to a loan, so the Appellant cannot be criticised for now taking an entirely new point on appeal. It is a point which, as far as she was concerned, was in play all along. The matter received only limited attention from the Judge in the usual way, and I mean no criticism at all in saying that because he cannot be expected to have considered every item of correspondence sent to the Court during the course of the proceedings. The Respondent though did not draw attention to the wider context. The upshot was that the Court proceeded on the basis that the usual order was being sought, the papers appeared to be in order and so a winding up order was made in the usual way. But the fact is that an important part of the overall picture was missing, and I think therefore the discretion was exercised wrongly, and what should have happened is that the Petition should have been dismissed so the dispute about the true nature of the advances made to the Company could be properly sorted out. I think the justice of the case, whatever defaults occurred on the part of the Appellant, militate in favour of the Court now intervening and taking action to facilitate that outcome.

- 19 As I have said, the Respondent in argument said there was a distinction to be made between the commercial operations of the two companies and the personal interests of himself and the Appellant. I fully see that point, but the fact is that in cases such as this the lines can become blurred, and difficulties of classification can arise. That is precisely what gives rise to the dispute here. It seems to me that once one recognises there is a dispute about the proper treatment of the £27,000, it becomes obvious that the proper forum for resolving the question is in the context of the financial settlement proceedings which are still ongoing between the Appellant and the Respondent. That is a sensible and appropriate forum in which to test whether the funds made available via DBCG (UK) Ltd were intended to be repaid or not. I think the matter can be raised in that context wherever the financial settlement proceedings are to be resolved, be it in France or in England. I am also confident that had the Judge who dealt with the winding up proceedings been properly appraised of the wider context he would have come to the same view.
- 20 That is subject to one important caveat which is that if it is correct, as I assume it to be, that the Appellant herself has no materials concerning the County Court judgment referred to in the Petition, such materials should be provided to her so that she can, if possible, take advice and decide what, if any, further steps to take in relation to it.
- 21 For all those reasons, I would allow the Appeal.
- 22 The Appellant has made an application for costs. I think it appropriate to grant that application also. It involves very modest sums. I will make an order for the Appellant to recover her Court fees of £550 plus an allowance of £304 corresponding to work on the case under the provisions for the costs of litigants in person contained in the Civil Procedure Rules, r.46.5.
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CERTIFICATE

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This transcript has been approved by the Judge.