Neutral Citation No. [2014] NICh 8

Ref: **HOR9223**

Judgment: approved by the Court for handing down
*(subject to editorial corrections)**

Delivered: **31/03/2014**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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CHANCERY DIVISION (BANKRUPTCY)

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12/131771 and 12/131764

BETWEEN:

CYRIL FULTON
AND
ERNEST FULTON

Applicants/Respondents;

-and-

AIB GROUP (UK) PLC

Appellant.

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HORNER J

Introduction

[1] This is an appeal against a decision of Master Kelly dated 27 November 2013 when she set aside three statutory demands each dated 8 November 2012 served by the AIB Group (UK) Plc ("AIB"). The first statutory demand relates to the alleged liabilities of a partnership carried on by Cyril Fulton ("CF") and Ernest Fulton ("EF") trading as Fulton Fine Furnishing ("the Partnership"). It is claimed that CF and EF are indebted jointly and severally in the sum of £1,314,584.67 against which they are entitled to off-set certain securities held by AIB. CF and EF were each served with a statutory demand in respect of this liability. I will call this statutory demand one. The second statutory demand relates to a guarantee given by CF in respect of Fulton Fine Furnishings Limited ("the Company") in the sum of £250,000. I will call this statutory demand two.

Facts

[2] The background to the application before the Master includes the following:

(i) The Partnership carried on business as Fultons at Balmoral Plaza, Boucher Road, Belfast. The premises were owned by the Company. CF had guaranteed the liabilities of the Company in the sum of £250,000. The Company was placed in administrative receivership on 11 July 2012 and Mr Steven Cave and Mr Paul Rooney of Price Waterhouse Coopers ("PWC") were appointed joint administrative receivers of the Company.

(ii) Statutory demand one relates to the balance allegedly due in respect of the Partnership's trading facilities. The Partnership was placed in administration on 19 July 2012 after AIB demanded repayment of the Partnership's facilities by letter of 18 July 2012. The joint administrators were Mr Cave and Mr Rooney and they continue with the administration process. The amount due in respect of statutory demand one, it is claimed, is £937,584.60 which takes into account the amount which AIB is likely to realise from securities which it holds.

[3] The issues that arose for determination before the Master included the following:

(i) The service of the statutory demands was a legal process and in breach of the moratorium arising on the partnership administration.

(ii) The service of the statutory demands while the moratorium was in place constitutes "other grounds" pursuant to Rule 6.005(d). Further, in the alternative. it was argued that;

(iii) A credit balance of more than £2m is held in administration, which exceeds the sums due to the respondent by the partnership and/or the limited company;

(iv) The debt was disputed on grounds which are substantial;

(v) The court could not be satisfied as to the value of the security held by the respondent, or that the debts were for a liquidated sum.

[4] However, unlike the proceedings before the Master, this court was told just before the appeals commenced that the Administrators now consented to legal proceedings or a legal process being instituted against the partnership. The Insolvent Partnerships Order (NI) 1995 was amended by the Insolvent Partnerships (Amendment) Order 2006 so as to apply the corporate insolvency remedy of

administration to insolvent partnerships. The 2006 Order includes provisions which are relevant to the moratorium insofar as the paragraphs of Schedule B1 to the Insolvency (NI) Order 1989 were modified by the 1995 and 2006 Orders. In particular paragraph 44(5) states:

> "(5) No legal process (including legal proceedings and distress) may be instituted or continued against the partnership or partnership property except—
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> (a) with the consent of the administrator, or
>
> (b) with the permission of the Court."

[5] The administrators do consent to the institution of any legal process by AIB against the Partnership. The central issue for this court, therefore, is to decide whether they can do so in circumstances which will have a retrospective effect. I am informed that there is no case in which a court has had to consider the effect of an administrator retrospectively giving permission for a legal process to be instituted. However in the Governor of the Company of the Bank of Ireland v Colliers International (UK) Plc (In Administration) (2012) EWHC 2942 (Ch) legal proceedings commenced in breach of the moratorium were cured by the retrospective grant of a court permission. It is noted that under the relevant provision referred to above the consent of the administrator and the permission of the court are not distinguished in any way. (David) Richards J in his judgment in the Colliers International UK Plc (In Administration) case looked in considerable detail at the issue of retrospective permission under the Insolvency Act in England which mirrors the Insolvency Order in Northern Ireland. He said at paragraph 31:

> "Having regard to those considerations, there is little to support a conclusion that proceedings brought without permission required by various provisions of the Insolvency Act are a nullity and much to support the contrary conclusion."

He then continued at paragraph 32:

> "In addition to the consequences of holding that proceedings are a nullity, it is clearly relevant to have regard to the purpose of the provisions in the context of insolvency. It is important to note that the requirement for permission for the commencement of proceedings applies to insolvency proceedings under the control of the court: bankruptcy, winding up by the court and administration. It does not apply to a company and creditors' voluntary winding-up. This

> suggests the real purpose of these proceedings is not so much protection of creditors as the purpose identified by Black LJ in Boyd v Lee Guinness Limited (1963) NI 49:
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> "**This section is one of a series of provisions designed to ensure that when a winding-up order has been made by the court the whole of the task of supervising the collection and distribution of the company's assets should be committed to the winding-up court and, accordingly, that all proceedings having any bearing upon the winding up of the company should remain under the supervision and control of that court.**"
>
> Given that purpose, it is hard to see why the court should not be permitted to grant retrospective permission if in the circumstances it is appropriate to do so."

Richards J goes on to say that:

> "There is in the case of administration, the additional consideration that consent may be given by the administrator. I can think of no convincing reason why an administrator should not be permitted to grant retrospective consent."

I agree. While this decision on the power of the administrator to grant retrospective permission is obiter, it is highly persuasive.

[6] For the avoidance of doubt, I consider that the service of a statutory demand is a legal process and is not akin to the service of a notice under a contract making time of the essence or the acceptance of a repudiatory breach of contract by a company in administration: see Re Olympia and York Canary Wharf Limited (1993) BCLC 453. In that case Millet J said:

> "'Process in each of the Bankruptcy Acts means aprocess which requires the assistance of the court and does not extend to the service of a contractual notice, whether or not the service of such notice is a pre-condition to the beginning of legal proceedings."

[7] In Re Frankice (Golders Green) Limited (In Administration) (2010) EWHC 1229 (Ch) Norris J considered the meaning of "legal process" in the context of

whether steps which had been taken by the Gambling Commission in relation to the business of three companies fell within the scope of the moratorium imposed by paragraph 43(6) of Schedule B1 of the Insolvency Act 1986. He said at paragraph 39:

> "I think the word **process** suggests something with a defined beginning an ascertainable final outcome and which, in the interim, is governed by a recognisable procedure. I think the word **legal** indicates that that process must in some sense invoke the compulsive power of the law, and it suggests that the procedure must be quasi-legal in nature. One indicator of that might be that the process results in an appeal rather than, for example, reconsideration by means of judicial review, but I accept the submission of Mr Bompas that an appeal, of itself, does not determine whether a process is a legal or administrative one."

Further, at paragraph 47 he goes on to say:

> "In the instant case, I consider that the nature of the decision which the regulatory panel is called upon to make and the circumstances in which and the procedure according to which the decision is made, fall within the description of **legal process**. It is difficult to articulate why I have formed this impression. There is undoubtedly a **process**. It is governed by a procedure. The whole process has about it the stamp of a case being presented by the commission, being answered by the licensee and being decided upon according to legal advice and for declared reasons by an independent and impartial regulatory panel from whose deliberations employees of the commission are excluded."

[8] In the matter of Arucana Limited (2009) EWHC 3838 (Ch) HHJ David Cooke had to decide whether presentation of a petition to wind up a company constituted a legal process. He said at paragraph 7:

> "In my view, a winding up petition is within the ordinary meaning of the terms **legal process** and **legal proceedings**, since it is a procedure by which a creditor has resort to the process of the court to obtain the remedy he seeks. There is no obvious policy reason why winding up proceedings should be

> excluded from the general prohibition on legal process in paragraph 43, unless it is by implication from the fact that specific and more limited prohibitions are set out in paragraph 42, headed with reference to **insolvency proceedings** while the heading to paragraph 43 refers to **other legal process**, possibly implying that it refers to process other than insolvency proceedings. But it is trite law that in construing a statute the headings to the clauses are of little if any weight and regard must principally be had to the terms of the operative provisions themselves."

[9] I consider that the service of a statutory demand is part of a legal process which a creditor must follow if it wants to make a debtor bankrupt under the relevant legislation: see Articles 241 and 242 of the Insolvency (NI) Order 1989 and Rules 6.001 – 6.006 of the Insolvency Rules.

[10] However, given the consent of the administrators, it is no longer necessary for me to decide whether paragraph 43 places a moratorium on the making of a bankruptcy order in respect of the several estates of the members of the partnership. I decline to do so.

[11] Further, the Master concluded at paragraph 22 of her judgment in respect of statutory demand two:

> "It also seems to me that it is at the very least arguable that the administration moratorium applies to this statutory demand as well. In the circumstances, I am satisfied this statutory demand also ought to be set aside."

[12] Obviously that argument no longer applies to statutory demand two given the consent of the administrators. There is no doubt that a creditor which has several remedies can chose which to enforce, at what time, in which order and in what way, being only limited by the restriction that it cannot recover more than is due to it on the debt with interest and costs by way of its several recovery procedures: see White v Davenham Trust (2012) 1 BCLC 123. Insofar as the Master might be suggesting in her judgment that there are other substantial grounds for disputing the debt, I disagree. Prima facie I can see no objection to a creditor serving a statutory demand on a guarantor where the guarantee is legal and enforceable and the principal debtor is hopelessly insolvent.

[13] CF and EF argue that statutory demand one should be set aside on other grounds. I disagree for the following reasons:

(i) The totality of the evidence makes it clear that the Partnership is insolvent. It seems that the best estimate is that creditors will only receive 35 pence in the pound.

(ii) The Master is correct in holding at paragraph [20] that the balance of receipts held by the Partnership administrators could not be applied against the sums demanded by the bank, as such sum is held by the Partnership administrators for distribution among the creditors of the Partnership as a whole.

(iii) The debt due is a liquidated amount being the aggregate sums due in respect of amounts lent ie. contractual debts. In Volume 1 of the Supreme Court Practice (1999) at 6/2/5 it is stated:

> "A liquidated demand is in the nature of a debt, ie. a specific sum of money due and payable under or by virtue of a contract. Its amount must either already be defined or capable of being ascertained as a mere matter of arithmetic. If the ascertainment of a sum of money, even though it be specified or named as a definite figure, requires investigation beyond mere calculation, then a sum is not a **debt or liquidated demand**, but constitutes **damages**."

(iv) A possibility that further credits may be applied to the Partnership's liability, either as a result of a dividend in the Partnership administration or from the realisation of security, does not alter the underlying nature of the liability as a liquidated debt.

(v) In Re A Debtor (No. 64 of 92) (1994) 2 All ER 177 it was held that where a debt is part secured, the debt remains liquidated, even though the security has not been realised. I agree with the submission of Mr Gowdy on behalf of AIB that the scheme of the Insolvency Order and the Insolvency Rules assumes that a secured creditor can move for bankruptcy remedies in respect of the unsecured part of the debt, even if the secured creditor has not yet enforced the secured part of the debt.

(vi) The onus is on CF and EF, the debtors, to prove that the security held by AIB equals or exceeds the amount of the debt: see Rule 6.005(4)(c). The court should only set aside a statutory demand if the debtor can

show that the creditor is fully secured: see, for example, Owo-Samson v Barclay's Bank Plc (2003) EWCA Civ. 714 at paragraph [23].

Conclusion

[14] Many of the arguments made before the Master were rendered nugatory when the administrators consented to the institution of a legal process, including legal proceedings. I have concluded that such a consent can have retrospective effect. I am satisfied for the reasons which I have set out that no grounds remain which would permit the court to set aside either statutory demand one or statutory demand two.