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*(subject to editorial corrections)**

2014 No 50790

IN THE HIGH COURT OF JUSTICE IN NORTHERN

CHANCERY DIVISION (BANKRUPTCY)

BETWEEN:

CYRIL FULTON

Appellant

-and-

AIB GROUP (UK) PLC

Respondent

McBRIDE J

Application

[1] By Notice of Appeal dated 27 October 2016 Cyril Fulton ("CF") appealed against the decision of Master Kelly dated 24 October 2016 when she ordered that:

(i) CF's application to set aside a statutory demand dated 15 May 2014 be dismissed with an order for costs against CF; and

(ii) CF's Notice of Intention to Oppose the Making of a Bankruptcy Order be struck out with an order for costs against CF.

[2] When the matter was initially listed on 18 January 2018 Mr Ernest Fulton ("EF") son of CF informed the court that he would be representing CF as CF had granted him this right on foot of a Power of Attorney. The court adjourned the hearing until 14 February 2018 to hear submissions on this issue. The court refused the application and indicated that it would give reasons for its decision after hearing the substantive appeal. Reasons for the decision are set out in Re Cyril Fulton (Power of Attorney: Rights of Audience), 2014/50790, unreported.

[3] When the matter was listed for hearing Cyril Fulton ("CF") appeared as a litigant in person. The Bank was represented by Mr Gowdy of counsel.

[4] As set out above CF by notice dated 27 October 2016 appealed against the decision of Master Kelly dated 24 October in respect of two matters. This judgment deals only with the appeal against the Master's decision to strike out CF's Notice of Intention to Oppose the Making of a Bankruptcy Order. His appeal against the order to dismiss the application to set aside the statutory demand dated 15 May 2014 is dealt with in the judgment Re Cyril Fulton and Ernest Fulton, 2014/54002 and 2014/54006, unreported.

Chronology

[5] Before dealing with the submissions and evidence it is necessary to set out the background to the present appeal.

[6] CF and EF were partners in Fulton Fine Furnishings ("the partnership"). Administrators were voluntarily appointed by CF and EF in respect of the partnership on 19 July 2012 due to its insolvency and PWC were appointed as administrators. CF and EF were also Directors of Fulton Fine Furnishing Ltd ("the company") which was voluntarily placed in administrative receivership on 19 July 2012. The Company owned premises situate and known as Balmoral Plaza, Boucher Road, Belfast ("the premises"). The partnership traded from these premises.

[7] On 23 November 2012 AIB Group (UK) Ltd ("the Bank") served a statutory demand on CF. The Bank claimed that CF owed it a sum of £250,000 on foot of a Deed of Guarantee and Indemnity, dated 10 October 1996, whereby he guaranteed debts of the company. ("the guarantee statutory demand").

[8] On 26 November 2012 CF applied to have the guarantee statutory demand set aside.

[9] On 15 August 2013 the premises were sold by the administrative receivers of the company.

[10] The hearing to set aside the guarantee statutory demand was determined by the Master on 27 November 2013. She ordered that the guarantee statutory demand should be set aside. The case was then appealed to Horner J and on 1 April 2014 he granted the Bank's appeal and dismissed the application to set aside the guarantee statutory demand.

[11] CF appealed to the Court of Appeal. On 29 April 2014 the Court of Appeal refused leave to appeal and CF's appeal was struck out with no order as to costs.

CF's evidence and submissions

[12] CF filed affidavits sworn by him on 23 May 2014, 24 November 2014, 13 February 2015, 9 September 2015 and 26 August 2016 in respect of his application to oppose the Bankruptcy petition.

[13] In his "Notice by Debtor to oppose Bankruptcy Petition" dated 25 May 2014 CF relies on the following grounds:

> "(1) that use of the Bankruptcy Petition herein amounts to an abuse of process it being not for the genuine purpose of vesting my estate into the control of the trustee in the interests of such lawful creditors as those to whom I am accountable.
>
> (2) Instead the Petitioner AIB Group (UK) PLC (hereinafter referred to as AIB) along with it servants and agents deploy this process for the purpose of causing me undue influence to pay to AIB the sum of £250,000 which claimed sum remains under dispute in circumstances evident from the letter addressed to the Lord Chief Justice on the 2 May 2014 by my son Ernest Fulton a copy of which is attached…
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> (3) The context that applies to my continual challenge of liability to AIB is covered in an affidavit sworn by me on the 23 May 2014 a copy of which is attached…
>
> (4) In addressing the issues herein I ask this Honourable Court to order AIB …to file and serve sworn detailed evidence of the reconciliation of its dealings with me over my business interests and of the real intent behind its use of the Petition process herein.
>
> (5) I also invite this Honourable Court to determine the issue of discrimination that prevails hereon AIB on the one hand failing to pay its debts to its main lawful creditor the sovereign state of the Republic of Ireland as admitted by its CEO in the article attached…yet deploying unlawful means to try and extract from me monies which have at no stage been verified as due and owing in a full and proper reconciliation of its dealings with my business interests."

[14] The affidavit dated 23 May 2014 sets out the following grounds upon which CF seeks to oppose the making of a Bankruptcy Order:

> "(i) That the amount of the alleged indebtedness in the said statutory demand is disputed as AIB along with its servants and agents having filed to provide full and frank particulars of all realisations achieved in the administrative receivership and administration of the assets and activities of my family's former business…Furthermore AIB continue to hold valuable security for which no regard is provided in the arithmetic reconciliation of its position with me.
>
> (ii) That AIB is liable to me for a sum far in excess of what it claims as its entitlement against me, such sum being the measure of loss and damages caused to me by its negligent conduct which at a macro and micro level resulted in the implosion of my family's former business…regulators determined that AIB and its senior management had been reckless, irresponsible and dishonest in their conduct …being subsequently revealed as of the criminal variety as illustrated in its complicit role over the manipulation of the benchmark Libor interest rates.
>
> (iii) That AIB has intermeddled in asset realisation of my family's former said business in a manner designed to short change my interests it having engaged with Sam Morrison's business over the Balmoral Plaza premises …in an unlawful complicity which resulted in an improper realisation of the true value of the said premises."

[15] In the later affidavits CF states that he opposes the grant of the Bankruptcy petition on the basis that the Hawthorne Restaurant partnership was excluded from the premises; the premises were sold at an under value, and that the Bank was responsible for creating the circumstances relating to the appointment of administrative receivers to the company.

[16] At the hearing CF relied on his affidavit evidence. He submitted that he opposed the making of a Bankruptcy petition on the basis the Bank put the company into administrative receivership; sold the premises at an under-value and was guilty of collusion and criminality. He accepted that he had no evidence to prove his allegation of collusion and criminality but submitted this was because he was denied discovery which he submitted would have established criminality on the part of the Bank.

Submissions on behalf of the Bank

[17] The Bank relied on affidavits filed by Mr Rutherford sworn on 17 September 2014 and Mr Patrick Shortt sworn on 8 June 2015.

[18] Mr Gowdy, on behalf of the Bank submitted that all the grounds set out by CF to oppose the making of the Bankruptcy petition were either raised or should have been raised by CF, when he applied to have the guarantee statutory demand set aside. His attempt to rehearse the same arguments in these proceedings was barred by reason of the doctrine of res judicata, issue estoppel or on the basis it was an abuse of process of court.

[19] He relied on the authorities of Moore v Commissioners of the Inland Revenue [2002] NI 26 and Turner v RBS [2000] BRIP 683 as authority for the proposition that once an order is made dismissing an application to set aside a statutory demand that conclusively determines the liability of the debtor to pay the debt demanded by the creditor and the only basis on which a court hearing a bankruptcy petition could look behind the dismissal of the application to set aside the statutory demand was where there was a change of circumstances of the order of a change of legislation rendering the debt unenforceable.

[20] He therefore submitted that the Court of Appeal's order dismissing CF's application to set aside the guarantee statutory demand conclusively determined the liability of CF to pay the debt demanded by the Bank and therefore the only basis upon which this court could look behind the Court of Appeal's order was if there was a significant change in circumstances since the date of the Court of Appeal's order. He submitted that there was no evidence of any change of circumstances since the application to set aside the statutory demand was dismissed.

[21] In the alternative he submitted that in the event the court permitted CF to raise arguments about the appointment of administrative receivers; sale of the premises at an alleged under value and criminality on the part of the Bank, these arguments did not give rise to a defence to liability on the guarantee.

Consideration

The Bankruptcy scheme and res judicata

[22] Under the Insolvency Rules (NI) 1991 if a statutory demand is not set aside the creditor is free to petition for the adjudication of the debtor. Rule 6.005(6) provides:

> "If the court dismisses the application, it shall make an order authorising the creditor to present a bankruptcy petition either forthwith or on or after a date specified in the order."

[23] Article 245 of the Insolvency (Northern Ireland) Order 1989 sets out the relevant provisions in respect of the making of a Bankruptcy petition. It provides as follows:

> "(1) The High 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—
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> (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.
>
> …
>
> (3) The High Court may dismiss the petition if it is satisfied that the debtor is able to pay all his debts or is satisfied—
>
> (a) That the debtor has made an offer to secure or compound for a debt in respect of which the petition is presented,
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> (b) That the acceptance of that offer would have required the dismissal of the petition, and
>
> (c) That the offer has been unreasonably refused;
>
> and, in determining for the purposes of this paragraph whether the debtor is able to pay all his debts, the Court shall take into account his contingent and prospective liabilities.
>
> (4) In determining for the purposes of this Article what constitutes a reasonable prospect that a debtor will be able to pay a debt when it falls due, it is to be assumed that the prospect given by the facts and other matters known to the creditor at the time he entered into the transaction resulting in the debt was a reasonable prospect."

[24] In Moore v Commissioners of Inland Revenue [2002] NI 26 Girvan J stated at page 30 paragraphs (b) to (f) as follows:

> "While there is some conflict of authority whether the debtor on the hearing of the petition is able to raise again the same objection to the debt if he has been unsuccessful in setting aside the statutory demand it appears that the prevailing view is that he cannot reopen the issue. In Brillouet v Hachette Magazines Ltd, decided in 1991 but reported at [1996] BPIR 518, Vinelott J held that the principle of res judicata precluded the debtor raising the same point on appeal. A different view was taken by Evans-Lombe J in Eberhardt & Co Ltd v Mair [1995] 1 WLR 1180.
>
> If the debtor cannot re-open the issue determined on its application to set aside the statutory demand then the effect of the application to set aside the statutory demand is to determine the liability of the debtor to meet the debt. While the refusal of an application to set aside a statutory demand does not give rise to a judgment and therefore does not of itself determine the bankrupt status of the debtor it is an essential and preliminary step on the way to that adjudication which determines the status of the debtor. If at the hearing of the petition the debtor is legally precluded from raising again the issue of the status of the demand then the refusal of the application to set aside the debt is determinative of an issue between the parties and therefore falls within Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms 1950."

[25] In Brilloute v Hachette Magazines Ltd [1991], [1996] BPIR 518, at 520(b) to (d) Leggatt LJ quoted Vinelott J the trial judge with approval when he said:

> "At page 2H of his judgment Mr Justice Vinelott said: 'Unless there is some change of circumstances … it seems to me that all the petitioning creditor is required to do is to show that he has made a statutory demand, that either no attempt has been made to set it aside or an unsuccessful attempt has been made, and that the amount of the debt has neither been paid nor secured nor compounded for. The debtor cannot go back and re-argue the very grounds on which he unsuccessfully sought to have the statutory demand set aside'."

[26] In Brilloute v Hachette Magazines Ltd Vinelott J said an example of a change of circumstances had to be something in the order of a change of legislation rendering the debt unenforceable. I am satisfied that whilst a change in circumstances must be something more than a minor change, any change which goes to the issue whether the debt is due and owing would be, in my view, sufficient to permit the court to look behind the dismissal of the application to set aside the statutory demand.

[27] Subsequently in Turner v RBS [2000] BRIP 683 Chadwick LJ at paragraph [19] confirmed that this represented a correct statement of the position and at paragraph [48] and [49] he stated:

> "[48] …Questions as to the existence of the debt at the date of the presentation of the petition, and any cross-claim, are intended to be dealt with on an application to set aside the statutory demand — that is to say, before the petition is presented.
>
> [49] Rule 6.25 of the 1986 Rules provides that on the hearing of the petition, the Court may make a bankruptcy order if satisfied that the statements in the petition are true and that the debt on which it is founded has not been paid or secured or compounded for. So the Court is not bound to make a bankruptcy order; there is some residual discretion in the Court to decide on the hearing of the petition whether or not to make the bankruptcy order. But it cannot have been intended, as it seems to me, that when exercising the discretion (which it undoubtedly has under Rule 6.25), whether or not to make a bankruptcy order at the hearing of the petition, the Court is required to revisit the arguments which have already been advanced on the hearing of the application to set aside the statutory demand; and which have already been rejected at that hearing."

[28] A very similar issue has recently been considered by the Court of Appeal in Harvey v Dunbar Assets Plc [2017] EWCA Civ. 60. The Court of Appeal held that it was not open to a debtor to go over the grounds of dispute which had been raised before and abandoned on an earlier application. The Court of Appeal relied on and affirmed its earlier decision in Turner v Royal Bank of Scotland.

[29] On the basis of these authorities, I am satisfied that it is now well established that the Bankruptcy scheme set out in the 1989 Order, provides that questions as to the existence of the debt at the date of the presentation of the petition, and any cross-claim, are intended to be dealt with on an application to set aside the statutory demand — that is to say, before the petition is presented. It is therefore incumbent

on the debtor, at the statutory demand stage, to raise any defences or cross claims he may have. It is therefore, I find, contrary to the intention of Parliament, having put this Bankruptcy scheme in place in the 1989 Order, for the Court to consider disputes as to the existence of the debt and any cross claim at the Bankruptcy petition stage, save in exceptional circumstances. Exceptional circumstances exist, by way of example, where there has been a significant change in circumstances since the date the application to set aside the statutory demand was dismissed.

[30] Consequently, failure to apply to set aside a statutory demand or an unsuccessful attempt to do so, conclusively determines the liability of the debtor to pay the debt demanded by the creditor. Any attempt to either litigate or re-litigate liability for the debt at the petition stage, I find, is res judicata or otherwise an abuse of the process of court unless there has been a change of circumstances between the dismissal of the application to set aside the statutory demand and the hearing of the Bankruptcy petition.

[31] CF in the present application seeks to oppose the grant of the petition on the grounds set out in various affidavits. He relies on the grounds set out in his affidavit sworn on 23 May 2014 which was filed in support of his application to set aside the guarantee statutory demand. He further relies on the grounds set out in his later affidavits. In these he seeks to oppose the making of a bankruptcy petition on the grounds that the Bank sold the premises at an under-value and put the Company into administrative receivership.

[32] In my view the grounds set out in all the affidavits are res judicata as CF's application to set aside the guarantee statutory demand was dismissed by the Court of Appeal on 29 April 2014. That decision conclusively determined his liability to pay the debt demanded by the Bank. All the matters pleaded in the affidavit dated 23 May 2014 were exactly the same issues as were raised in CF's attempt to set aside the guarantee statutory demand as appears from the fact this affidavit was filed in support of that application. The matters raised in the later affidavits were either matters that were raised or should have been canvassed when he applied to set aside the guarantee statutory demand. I therefore find that CF's attempt to rehearse the same arguments before this court is res judicata, unless he can establish there has been a significant change in circumstances since 29 April 2014.

[33] During the course of submissions CF submitted that that he only became aware of the sale of the premises at an under value after the Court of Appeal ruling in April 2014 and consequently he submitted that this represented a change in circumstances and therefore the court should hear and determine this matter.

[34] The affidavit evidence filed by CF did not set out details about the date he learned of a sale of the premises at an alleged under-value. Given the lack of evidence before the Court in respect of the matter and the fact CF, a litigant in person wished to submit that there was a change in circumstances, and therefore the

doctrine of res judicata did not apply I permitted CF to give oral evidence on this discrete matter.

Oral Evidence of CF

[35] In examination-in-chief CF said that he only became aware of the sale of premises after the Court of Appeal hearing. He stated he first became aware of a sale of the premises, when his solicitor, Maura McKay, from Shean Dickson Merrick, solicitors, informed him that a "sweet deal" had been done with Mr Morrison. CF understood this to mean that it was a sale in Mr Morrison's favour.

[36] When he filed his affidavit dated 23 May 2014 in support of his application to set aside other statutory demands issued by the Bank CF stated at paragraph 2(iii):

> "… AIB has intermeddled in asset realisations of my family's former said business in a manner designed to short change my interest in it having engaged with Sam Morrison's business over the Balmoral Plaza premises of my family's former business in an unlawful complicity which resulted in an improper realisation of the true value of the said premises".

In evidence CF confirmed that this paragraph was based on the "sweet deal" comment made to him by his solicitor. He stated that it was only at a later stage, probably in or around August 2014 that he became aware of the actual sale price when he was provided with the Estimate Outcome Statement dated 22 August 2014.

[37] Under cross-examination CF accepted that Shean Dickson Merrick, solicitors acted for him when he appeared before Master Kelly in relation to his application to set aside the guarantee statutory demand. Thereafter, he instructed another firm of solicitors who acted for him in the appeal to Horner J and the appeal to the Court of Appeal. CF then acted as a litigant in person when he applied to oppose the making of the Bankruptcy Order. Subsequently, he re-instructed Shean Dickson Merrick, solicitors to act on his behalf.

[38] I am satisfied that when CF signed his affidavit on 23 May 2014 paragraph 2(iii) was a reference to the "sweet deal" comment made to him by Maura McKay, solicitor in Shean Dickson Merrick, solicitors. I am satisfied that she made this comment when she was initially instructed to act as his solicitor. This flows from the time sequence set out in paragraph [37] above. Therefore, I find, the comment was made to CF before the application to set aside the statutory demand was appealed to Horner J. I am therefore satisfied that CF had knowledge of the sale of the premises long before the Court of Appeal ultimately dismissed his application to set aside the guarantee statutory demand. I am also satisfied that he knew that the sale was at an alleged under-value as this is what he understood "sweet deal" to mean. I therefore

do not accept his evidence that the first time he knew about the sale of the premises at an alleged under-value was after the Court of Appeal ruling.

[39] I am therefore satisfied that there is no change in circumstances between the date of the Court of Appeal's order and the date of this hearing which would permit the court to look behind the Court of Appeal's dismissal of his application to set aside the guarantee statutory demand.

[40] Given my findings that the matters raised by CF to oppose the grant of the petition are res judicata, this court will not therefore reconsider these matters at this stage being the petition stage.

[41] CF has not provided any evidence to establish any of the grounds set out in Article 245 which would prohibit the High Court from making the Bankruptcy Order and in the exercise of my discretion I dismiss CF's notice to Oppose the Making of a Bankruptcy Order. Accordingly, I am satisfied that the Master did not err in dismissing his application.

[42] I dismiss the appeal and I will hear argument in respect of costs and the petition.