Neutral Citation No: [2018] NICh 9 ***Judgment: approved by the Court for handing down (subject to editorial corrections)****	***Ref:*** **McB10631** ***Delivered:*** **09/05/2018**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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CHANCERY DIVISION (BANKRUPTCY)

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2014/54006

RE: ERNEST FULTON

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2014/50790

RE: CYRIL FULTON

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McBRIDE J

Introduction

[1] This is an appeal by Ernest Fulton ("EF") and Cyril Fulton ("CF") against the decision of Master Kelly dated 24 October 2016 whereby she:

(a) dismissed CF's application to set aside a statutory demand served by AIB Group (UK) Plc ("the Bank") and ordered him to pay costs; and

(b) dismissed EF's application to set aside a statutory demand served by the Bank and ordered him to pay costs.

[2] The Bank was represented by Mr Gowdy of counsel. EF and CF each acted as a litigant in person.

Preliminary Issues

[3] At the hearing EF initially applied to adjourn the proceedings. I refused this application and indicated that I would give my reasons at the end of the substantive hearing. EF then made an application that I should recuse myself from hearing the appeal. I also declined this application and indicated that I would give my reasons at the end of the substantive appeal. My reasons for refusing the application to adjourn and to recuse myself are set out in a separate judgment entitled Re Cyril Fulton & Ernest Fulton (Adjournment & Recusal applications), unreported 2014/54002 and 2014/54006.

Background

[4] 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.

[5] On 23 November 2012 the Bank served a statutory demand on CF dated 8 November 2012 claiming that he owed the Bank the sum of £937,584.60. These monies represented facilities advanced by the Bank to EF and CF jointly as partners in the partnership. The Bank served a similar statutory demand dated 8 November 2012 in the same terms on EF. These statutory demands are hereinafter referred to as "the first statutory demands".

[6] On 26 November 2012 CF and EF each applied to set aside the first statutory demands.

[7] On 15 August 2013 the premises were sold by the administrative receivers for £1,750,000.

[8] On 27 November 2013 Master Kelly set aside the first statutory demands. The Bank appealed this decision and on appeal Horner J on 1 April 2014 allowed the appeal and reversed the decision of Master Kelly. The matter was then further appealed to the Court of Appeal by CF and EF. The Court of Appeal refused leave to appeal on the basis the ground of appeal set out by CF and EF would be rendered academic if the Bank issued fresh statutory demands with the consent of the partnership administrator.

[9] On 7 May 2014 the Bank obtained the consent of the partnership administrator to issue fresh statutory demands and on 15 May 2014 fresh statutory demands were served on CF and EF, hereinafter referred to as the "second statutory demands". The second statutory demand served by the Bank on EF claimed £904,992.30 was due and owing in respect of loan facilities advanced by the Bank to CF and EF jointly. On the same date CF was served with a second statutory demand in the same terms. The second statutory demands both relate to monies advanced to CF and EF jointly when partners in the partnership.

[10] On 23 May 2014 EF and CF each applied to set aside the second statutory demands.

[11] On 24 October 2016 Master Kelly dismissed EF and CF's applications and it is against this decision that CF and EF now appeal.

Evidence

[12] CF and EF filed a number of affidavits and submissions in support of their application to set aside the statutory demands.

[13] In particular EF filed affidavits sworn on 26 August 2012, 1 March 2013, 15 September 2015, 4 December 2015, 21 April 2016, 6 May 2016 and 21 October 2016. CF filed affidavits sworn on 26 November 2012, 1 March 2013, 4 March 2013, 27 June 2013, 13 February 2015, 9 September 2015 and 26 August 2016. Affidavits were filed on behalf of the Bank by Mr Patrick Shortt sworn on 8 June 2015, 10 June 2015 and by Mr Kenneth Rutherford, solicitor sworn on 17 September 2014.

The evidence of CF and EF

[14] As appears from the various affidavits filed CF and EF aver that the second statutory demands should be set aside on a number of grounds. In summary the grounds are:

(i) The debt demanded by the Bank is unascertained and unliquidated.

(ii) The Bank by its actions put the partnership into administrative receivership.

(iii) The statutory demands failed to adequately disclose the security held by the Bank.

(iv) The value of the partnership assets exceeds the debt claimed.

(v) The sum demands and statutory demands do not take into account realisations in the administration of the partnership and do not take into account security held by the Bank.

(vi) The Bank is liable to CF and EF for its reckless, irresponsible and dishonest conduct. As a result of this conduct and the systemic failings in the banking sector the contractual relationship between the Bank and the partnership is void and all the Bank's security rights are unenforceable.

(vii) The Bank deliberately sold the premises at a gross under-value and failed to market them on the open market and CF and EF rely on an expert valuation report and accounts of Boucher Development Ltd, the purchaser of the premises.

(viii) CF and EF submit that the sale was not conducted with propriety and there was collusion, criminality and conspiracy by the Bank in respect

of the sale. They aver that the premises were sold by the Bank to Corbo or a connected company created by Corbo, a company entirely owned by Sam Morrison. They state that Patrick Shortt, a Bank official, deliberately put the partnership into administration so he could sell the premises at an under value to Mr Morrison. CF and EF aver that Patrick Shortt was an associate of Sam Morrison. They further aver that the Bank had a commercial relationship with Corbo and Sam Morrison and advanced a 100% mortgage to Corbo to purchase the premises. In all the circumstances, they aver that the Bank did not act independently but rather flouted its duties to CF and EF and acted criminally and in collusion with PWC and Mr Morrison to sell the premises at an under value. CF and EF further aver that the Bank conspired with Savilles (valuers), Sam Morrison and PWC (administrative receivers) to put the company and the partnership into receivership so that the Bank could then sell the premises at an under value to Mr Morrison.

Evidence on behalf of the Bank

[15] Mr Patrick Shortt, an employee of the Bank in its Specialist Lending Services Department, in an affidavit sworn on 8 June 2015 denies that he had a prior association with Sam Morrison of Corbo. In relation to the sale of the premises he avers that the premises were sold by the administrative receivers and not the Bank to Boucher Developments Limited, a special purchase vehicle created by Sam Morrison and others to purchase the premises. He accepts that the Bank advanced funds to Boucher Developments Limited to purchase the premises. Mr Shortt states that when the administrative receivers proposed to sell the premises they produced a recommendation dated 24 April 2013 to the Bank to explain why they believed the asset should be sold at that price even though the proposal meant the Bank would suffer a substantial shortfall. Essentially the proposed sale price was justified on the basis of lack of interest in the asset and the genuine risk that further open market process might not achieve a figure of £1,750,000. The Bank did not therefore, in these circumstances, object to the sale.

[16] In his further affidavit sworn on 10 June 2015 Mr Shortt denies that the partnership was placed into administration at the behest of the Bank. He asserts that CF and EF voluntarily appointed administrators over the partnership after taking independent legal advice about the matter.

[17] Mr Rutherford, a partner in the firm of C&H Jefferson Solicitors, acting for the Bank, in his affidavit sets out the history of the service of the first statutory demands and the outcome of the various court proceedings before Master Kelly, Horner J and the Court of Appeal. He then avers that the administrators gave consent to the Bank to pursue bankruptcy proceedings against CF and EF on 7 May 2014.

Submissions of CF and EF

[18] Although the affidavits set out a number of grounds for setting aside the statutory demands, at the substantive appeal hearing CF and EF indicated that they were relying only on the following grounds:

(a) the Bank sold the premises at an under-value; and

(b) the Bank had acted criminally and in conspiracy with others in respect of the sale process.

[19] In support of their proposition that the premises were sold at a gross undervalue CF and EF relied on a report by Mr Christopher Callen from CBRE dated February 2013 and on accounts for Boucher Road Developments Limited dated 31 July 2015.

[20] Mr Callen, valuer and director in CBRE, was instructed by CF and EF to prepare an expert valuation report to assess the market value of the premises. In his report he concluded at paragraph 50 as follows:

> "Taking the worst case scenario of vacant possession … produces in my opinion a market value in the region of £4M. If Fultons were to have remained in possession on the basis of a lease from the bank and administrators had not been appointed, I believe that the value would have been between £4.5M and £5M."

[21] Abbreviated financial statements for Boucher Road Developments Limited dated 31 July 2015 contain a note that the premises were revalued on 8 September 2015 by CBRE at £4,875,000 and then states:

> "The Directors are of the opinion that the above valuation represents the open market value of the investment property …"

[22] CF and EF therefore submitted that if the premises had been sold at open market value this would have extinguished their liability to the Bank and on this basis the statutory demands ought to be set aside.

[23] CF and EF further submitted that the sale process gave rise to a number of concerns including criminality, fraud and conspiracy on the part of the Bank. They submitted that the illegal and criminal conduct of the Bank, in disposing of the premises in the manner in which they did, meant that the Bank was estopped from enforcing its security.

Submissions on behalf of the Bank

[24] Mr Gowdy on behalf of the Bank submitted that all the grounds set out in the affidavits for setting aside the second statutory demands were made in the earlier proceedings to set aside the first statutory demands and were either abandoned or Horner J had ruled against CF and EF in respect of those grounds. In these circumstances, he submitted that it was an abuse of process for CF and EF to rely on the same grounds.

[25] In respect of the submission that the sale of the premises was at an under value Mr Gowdy did not seek to rely on the principles of res judicata or abuse of process. He further conceded that affidavit evidence by the Bank, denying that the sale was at an under-value, was not sufficient to prevent a statutory demand being set aside as there remained an arguable dispute about the marketing process. Rather, Mr Gowdy submitted that even taking the Fultons' claim at its height there were no grounds to set aside the second statutory demands.

[26] He submitted that neither EF nor CF had a counterclaim, set-off or cross demand which equalled or exceeded the amount of the debt specified in the second statutory demands and therefore there was no basis upon which the court should exercise its discretion to set aside the statutory demands. This was because:

(a) The premises were an asset of the company and not an asset of the partnership. Therefore any claim for sale of the premises at an under-value belonged to the company and not to CF and EF.

(b) Any claim relating to a sale at an under-value was not a claim against the Bank but rather against the administrative receivers who conducted the sale.

(c) Even if CF and EF had a claim against the Bank the claim did not equal or exceed the amount of debt claimed in the second statutory demands.

Legal Provisions

[27] Rule 6.005(4) of the Insolvency Rules (Northern Ireland) 1991 provides that on any application to set aside a statutory demand:

> "The court *may* grant the application if
>
> (a) the debtor appears to have a counterclaim, set-off or cross demand which equals or exceeds the amount of the debt or debts specified in the statutory demand; or
>
> (b) the debt is disputed on grounds which appear to the court to be substantial; or

(c) it appears that the creditor holds some security in respect of the debt claimed by the demand, and either Rule 6.001(6) is not complied with in respect of it, or the court is satisfied that the value of the security equals or exceeds the full amount of the debt; or

(d) the court is satisfied, on other grounds, that the demand ought to be set aside."

Ruling by Master Kelly

[28] Master Kelly held that the grounds upon which CF and EF sought to have the statutory demands set aside fell outside the scope of Rule 6.005(4). This was because the premises were owned by a third party, namely the Company. She held that as Rule 6.005(4) does not extend to third party claims or third party assets neither CF nor EF had any viable grounds for applying to set aside the statutory demands.

Consideration

[29] Although the application to set aside the statutory demands was originally based on a number of grounds, CF and EF during the substantive hearing indicated that they wished to rely only on the grounds that the sale was at a gross under-value and the conduct of the sale of the premises involved criminality and conspiracy by the Bank.

[30] Mr Gowdy had submitted that all the other grounds were in any event res judicata or otherwise an abuse of process. Given the approach taken by CF and EF at the hearing, it is not necessary for me to rule on the question as to whether the other grounds set out in the affidavits of CF and EF are res judicata or otherwise an abuse of process.

[31] The grounds upon which a court may set aside a statutory demand are set out in Rule 6.005(4) of the Insolvency Rules (Northern Ireland) 1991. Given that CF and EF are no longer disputing the debt and are not submitting that the Bank holds security which equals or exceeds the debt, the only relevant grounds upon which the court may set aside the statutory demands are those set out in paragraphs (a) and (d) of Rule 6.005 (4).

[32] In Moore v Commissioners of Inland Revenue [2002] NI 26 at pages 8 and 9 of his judgment Girvan J stated:

"Although at first sight the wording of Rule 6.005 and some decided cases may suggest that a debtor served with a statutory demand bears a heavier burden than is borne by a defendant in summary judgment applications

> or applications to set aside judgment and that an onus of proof is thrown on him, in reality the test applicable should be no different."

Earlier in the same judgment he stated that:

> "In summary judgment applications the plaintiff must show that the defendant has no arguable case. In an application to set aside regularly obtained judgments the test appears to be whether the defendant in the interests of justice should be permitted to defend the action. In either set of proceedings it is clear that if a defendant has in reality no defence to the plaintiff's claim allowing the defendant to defend would be unjust to the plaintiff. Refusing leave to defend would not be unjust to the defendant since it would merely delay the enforcement of the plaintiff's indisputable right and send to trial an indefensible case."

[33] Applying these principles, if CF or EF raises an arguable case that the requirements under Rule 6.005 paragraph (a) or (d) are met then the statutory demands will generally be set aside in the exercise of the court's discretion and the matter allowed to proceed to a full trial for a proper consideration of all the arguments and counter arguments.

Rule 6.005(4) paragraph (a)

[34] Under Rule 6.005(4)(a) the court may set aside a statutory demand if:

> "The debtor appears to have a counterclaim, set-off or cross demand which equals or exceeds the amount of the debt or debts specified in the statutory demand."

[35] As appears from this rule the debtor has to establish 3 things:

(a) He has a counterclaim, set-off or cross demand, ("debtor's claim");

(b) His claim is against the creditor; and

(c) His claim equals or exceeds the amount of the debt specified in the statutory demand.

[36] It was accepted that the company would have a debtor's claim against the receiver if the premises had been sold at an under-value.

[37] Both EF and CF submitted that in addition to any claim by the company they had their own separate debtor's claim in respect of the premises being sold at an under-value. CF submitted that as he was a Director and a 25% shareholder in the company he had thereby sustained loss, namely a diminution of his shareholding, arising from breach of duties owed to him by the receiver. EF also submitted, without producing any evidence, that he was a beneficiary under a Trust which had a shareholding in the company which owned the premises and therefore he also could claim for the loss sustained by him by reason of the receiver's breach of duty in selling the property at an under-value.

[38] The question in dispute is whether either CF or EF can bring a claim against the receiver on the basis that they have suffered loss, namely a diminution in the value of their shareholding due to the receiver's actions in selling the premises at an under-value. This question was considered by the House of Lords in the case of Johnson v Gore Wood & Co [2002] 2 AC 1. In Johnson v Gore Wood the plaintiff was a director and shareholder in a company. He brought a claim against the company's solicitors for professional negligence. The company had previously brought a claim against the solicitors which had been settled. The plaintiff's claim arose out of the same facts and he claimed there was a loss to his shareholding due to the solicitor's negligent actions. It was argued on behalf of the solicitors that damage had been suffered by the company and not Mr Johnson who was only a shareholder in the company. Mr Johnson submitted that the solicitors owed a duty to him personally and if this was breached he was entitled to recover any damage he had suffered as a personal loss separate and distinct from the company. After reviewing the authorities Lord Bingham held at page 35E-36A as follows:

> "(1) Where a company suffers a loss caused by a breach of duty owed to it, only the company may sue in respect of that loss. No action lies at the suit of a shareholder suing in that capacity and no other to make good a diminution in the value of the shareholder's shareholding where that merely reflects the loss suffered by the company. A claim will not lie by a shareholder to make good a loss which would be made good if the company's assets were replenished through action against the party responsible for the loss, even if the company, … has declined or failed to make good that loss.
>
> (2) Where a company suffers loss but has no cause of action to sue to recover that loss, the shareholder in the company may sue in respect of it (if the shareholder has a cause of action to do so), even though the loss is a diminution in the value of the shareholding. …
>
> (3) Where a company suffers loss caused by a breach of duty to it, and a shareholder suffers a loss separate and

> distinct from that suffered by the company caused by breach of a duty independently owed to the shareholder, each may sue to recover the loss caused to it by breach of the duty owed to it but neither may recover loss caused to the other by breach of the duty owed to that other."

Further at page 36(b) Lord Bingham held that in a strike out application the court had to consider whether the claim is sustainable. He then stated:

> "In some cases the answer will be clear, as to where the shareholder claims the loss of dividend or diminution in the value of his shareholding attributable solely to depletion of the company's assets …"

[39] A receiver owes no general common law duty of care to a mortgagor or subsequent incumbrancers. Fisher and Lightwood, The Law of Mortgages, 4th Edition at paragraph 28.9, however states that a receiver:

> "… is under duties imposed by equity to ensure that whilst, discharging his duties to manage the property, he deals fairly and equitably with the mortgagor and others interested in the equity of redemption and takes account of their interests."

[40] Therefore, when a receiver exercises a power of sale he is under a duty to obtain the best price reasonably obtainable and the mortgagor or other persons interested in the equity of redemption can claim for equitable accounting against the receiver if he breaches this duty – see Silvan Properties Ltd v Royal Bank of Scotland Ltd [2004] 4 All ER 480.

[41] Burgess v Auger [1988] 2 BLC 478 established that neither a director nor a shareholder of a company has an interest in the equity of redemption. Further, in Parker-Tweedale v Dunbar Bank Plc [1991] Ch 12 the court held that a beneficiary under a trust of the mortgage property has no interest in the equity of redemption.

[42] I am therefore satisfied that neither EF nor CF come within the third category set out by Lord Bingham in Johnson which gives them a right to make a separate claim notwithstanding that the company also has a claim against the receivers. This is because neither CF nor EF is owed a duty of care by the receiver. They cannot therefore submit that they have a loss separate and distinct from that suffered by the company caused by breach of a duty independently owed to them as directors or shareholders.

[43] I am also satisfied CF and EF do not come within the second category set out by Lord Bingham as the company has a cause of action.

[44] Insofar as EF and CF have claims for a diminution in value of their shareholdings, this would represent a loss which would be made good if the company enforced its rights against the receiver. Therefore, as CF and EF's loss is merely a reflection of the loss suffered by the company, such a claim comes within the first category set out by Lord Bingham in Johnson v Gore Wood. Consequently, a claim does not lie against the receiver by EF or CF for this loss.

[45] I am therefore satisfied that neither EF nor CF has a debtor's claim. In these circumstances CF and EF have failed to satisfy the first limb of Rule 6.005(4)(a). To succeed in having a statutory demand set aside under Rule 6.005(4)(a) it is necessary to prove all three limbs. Given my finding that they have failed to satisfy the first limb, I find that their applications to have the statutory demands set aside under this Rule must fail.

[46] If I am wrong about that finding, I am further satisfied that CF and EF fail to satisfy either limb 2 or limb 3 of the test.

[47] I am satisfied that neither CF nor EF has a claim against the creditor, that is the Bank, for any alleged sale at an under-value by the receiver. The sale was conducted by administrative receivers. The receivers act as agents of the company and not the Bank who is the creditor in this case. Therefore, any claim regarding a sale at an under-value would be against the administrative receivers and not against the Bank. As the creditor bringing the statutory demand is the Bank, I am satisfied neither CF nor EF has a claim against the creditor for any alleged sale of the premises at an under-value and therefore the second limb of Rule 6.005(4)(a) is not satisfied.

[48] Further, I am satisfied that the third limb of Rule 6.005(4) is also not met. Mr Callen's report valued the premises in circumstances where administrative receivers were appointed and in circumstances where administrative receivers were not appointed. In the present case the partnership was in administration and therefore Mr Callen's valuation was £4M. If the sale had actually proceeded at a price of £4M I am satisfied that there would still have been a shortfall. The liability to the Bank after sale of the premises was £3,139,157.00. Therefore, even if the premises had been sold at £4M rather than £1.75M, the additional revenue of £2.250M would still have left a remaining debt of approximately £890,000. Therefore, I am not satisfied that there is an arguable case that any claim by CF and EF in respect of a sale at an under-value would exceed or equal the debt they each owe to the Bank.

[49] In the circumstances none of the limbs in Rule 6.005(4)(a) is met and there is therefore no basis upon which to set aside the statutory demands in accordance with this paragraph.

Rule 6.005(4)(d)

[50] The second basis upon which CF and EF seek to set aside the statutory demand is that the sale was conducted improperly. They allege criminality and conspiracy by the Bank and seek to set aside statutory demands on the basis of Rule 6.005(4)(d).

[51] Paragraph (d) of Rule 6.005(4) provides that the Court may set aside a statutory demand if:

> "the court is satisfied, on other grounds, that the demand ought to be set aside."

[52] The only evidence of fraud or criminality before the court consists of bald assertions by CF and EF. When the court made enquiry in relation to the evidence which EF and CF were relying upon to support their case, EF admitted that he had no evidence. He averred that this was because he had been denied discovery in the case. He submitted that the fact of the sale at an under-value was, without more, evidence of criminality and collusion by the Bank. He further stated that the Bank for some unknown reason conspired with the valuers and others to put him and his family into receivership and sell the premises at an under-value to Mr Morrison.

[53] There is no evidence before the court of criminality save bald assertions by EF and CF. Such bald and speculative assertions are not sufficient, in this case, to establish an arguable case. EF accepted he had no documentary or other proof of criminality and therefore there is not a shred of evidence to support the case being made. I therefore do not find that an arguable case has been made out to set aside the statutory demands on the grounds of alleged collusion, fraud and conspiracy.

Conclusion

[54] I am satisfied that in the exercise of my discretion I should not set aside the statutory demands. I therefore dismiss the application by EF and CF and affirm the order of Master Kelly. In particular I am satisfied that neither CF nor EF made out an arguable case that any of the grounds in Rule 6.005 apply. Further, I am satisfied that there is no other basis upon which I should exercise my discretion to set aside the statutory demands.

[55] In all the circumstances I dismiss the applications.

[56] I will hear the parties in respect of costs.