CH/04/PTA/0103

Neutral Citation Number: [2005] EWHC 1189 (Ch)
IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

The Royal Courts of Justice
Strand
London WC2A 2LL

Thursday, 10 March 2005

B e f o r e:

MR JUSTICE PETER SMITH

DENNIS RYE

CLAIMANT

- v -

THE LIQUIDATOR OF ASHFIELD NOMINEES LTD

DEFENDANT

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(Official Shorthand Writers to the Court)

MR S HOCKMAN QC appeared on behalf of the Claimant

MR P SHENTON appeared on behalf of the Defendant

JUDGMENT
(As approved by the Court)

1. MR JUSTICE PETER SMITH: This is an appeal by the appellant against the judgment of Master Rogers on 10 February 2004, when he disallowed three new points which were raised by the appellant on the assessment of costs claimed by the respondent, the Liquidator of Ashfield Nominees Limited, in a bill of costs which was for assessment before the Master, arising out of an order made by His Honour Judge Behrens in the Chancery Division, Leeds District Registry, on 30 August 2002.

2. The assessment of the costs remains adjourned because the learned Master granted permission to appeal on one point and not the other two. That has led to a delay of some 13 months and there may be some consequences of that.

3. Both parties acknowledged that the position as regards amendments was a reversal on appearance but in substance no different to the practice that applies to amendment of pleadings under CPR 17. When an alteration is made to a challenge the Master has the jurisdiction to disallow it, but he has no right to refuse for it to be incorporated. The parallel procedure therefore is on an application for permission to amend a pleading and the normal rule is enshrined in CPR 17.3.5 that, absent any prejudice however late and how inexcusable the amendment is, the general principle is to grant permission to amend to raise points.

4. The learned Master regrettably fell into error because he did not apply that principle when disallowing the amendments. He disallowed them all because they were late. One regularly has cases where late matters arise, which cause hearings to go off, but there is no procedure within the Civil Procedure Rules to debar people from presenting cases solely because of the lateness of the production. The lateness is measured in the terms of prejudice.

5. The reality is that the respondents, for whom Mr Shenton appears, suffered no prejudice that was not capable of being compensated. Mr Shenton would have been unable to deal with the points at that time, but an adjournment would have enabled him to deal with it.

6. Mr Shenton submitted before me that the other factor to be borne in mind on appeal under CPR 52 (a burden assumed by the appellants) is that the appeal must have a real prospect of success, that is to say, the argument must be more than fanciful. He submitted that I could go on and determine a question of law, or even a clear question of fact, and not waste the parties' time in remitting it back to the Master if it was a plain and obvious case. I agree with his analysis; there is absolutely no point in hearing an appeal, the result of which is capable of being determined, and simply remitting matters back to the Costs Judge to have the same result.

7. The argument in question concerns the remuneration of the liquidator's bill. The entitlement to it arises out of the following part of the order of His Honour Judge Behrens, and it says this:

> "… UPON Dennis Rye undertaking to pay the sum of £143,546.47 to King & Brook solicitors by 4pm on 6 September 2002

> AND UPON King & Brook solicitors irrevocably undertaking to pay from monies held in their client account within 7 days of agreement or resolution:
>
> (i) Such sums as should be found due from the liquidator following detailed assessment of solicitors costs and disbursements and counsel's fees pursuant to the CPR on a solicitor/client basis
>
> (ii) Such remuneration costs and expenses as the liquidator shall be entitled to in accordance with the Insolvency Rules 1986.
>
> IT IS ORDERED BY CONSENT THAT:
>
> 2. The winding up be stayed pursuant to section 147 of the Insolvency Act 1986.
>
> 3 At his own request, the liquidator be removed [as liquidator] … by reason of the matters set out above and on the Court being satisfied that all creditors' claims, costs and expenses … have been paid or secured in full."

8. I have heard, without any evidence, certain matters that took place in respect of that order. The undertaking was a precise amount but represented a snapshot of the liquidator's own costs, and his solicitors' costs, without necessarily indicating that the liquidator's costs had been calculated on an hourly basis. I am very reluctant to determine any factual issue without hearing proper evidence, but the division lines appear very startling and it is fair to say that the arguments put forward by the appellant (and what the arguments meant) only appeared gradually during the course of the appeal.

9. Mr Reid, the liquidator, had, shortly before the hearing before Master Rogers, served a witness statement and in paragraph 21 he says this:

> "I would confirm that the creditors agreed to my remuneration being charged on a time basis. The resolution was passed on 15 November 2000 and a copy of the resolution is now produced … and marked "NER1"."

10. NER1 shows that at the meeting of creditors, the creditors voted that the remuneration be calculated by reference to the time spent by the liquidator and his staff. That is a reference to 4.127 of the Insolvency Rules 1986. Sub-rule (1) provides that the liquidator is entitled to receive remuneration for his services. Sub-rule (2) says:

> "The remuneration shall be fixed either -
>
> (a) as a percentage of the value of the assets…. or

(b) by reference to the time properly given by the insolvency practitioner (as liquidator) and his staff attending to matters arising in the winding up."

11. Sub-rule (3) provides that where the liquidator is other than the official receiver it is for the liquidation committee, if there is one, to determine whether the remuneration is to be fixed under 2(a) or (b). Sub-rule (4) sets out the requirements that the committee has to look at.

12. Sub-rule (5) provides that:

> "If there is no liquidation committee, or the committee does not make the requisite determination, the liquidator's remuneration may be fixed (in accordance with paragraph (2)) by a resolution of a meeting of creditors, and paragraph (4) applies to them as it does to the liquidation committee."

13. And then the important sub-paragraph from the appellant's point of view:

> "(6) If not fixed as above, the liquidator's remuneration shall be in accordance with the scale laid down for the official receiver by general regulations."

14. I should also refer to sub-rule 4.129 which provides that:

> "If the liquidator's remuneration has been fixed by the liquidation committee, and he considers the rate or amount to be insufficient, he may request that it be increased by resolution of the creditors."

15. That clearly shows that the liquidation committee fixes the remuneration (that is to say back to sub-rule (2)) as either a percentage or on a time basis, but if they subsequently also fix the rate, as say the actual hourly rate or the amount (that is to say the global amount) and the liquidator thinks it is insufficient, he can request that it be increased by a resolution of creditors. If the liquidator considers that the remuneration fixed by the liquidation committee or by resolution of the creditors, is insufficient, he can go to court under 4.130. Conversely, if any creditor believes that the remuneration is excessive, he too can go to court.

16. The position therefore, as at the time of the order of His Honour Judge Behrens, was as follows. The basis for the remuneration had been fixed as being the hourly rate as opposed to the value, but no committee, either of creditors or the liquidation committee had had at that time, or has thereafter, determined the rate or the amount of the remuneration. That is still the position now.

17. Mr Shenton's response to that is that he accepts that that is the position because the reality is that what was contemplated was that the quantum of the remuneration, in accordance with the method of fixing determined by the creditors' committee, was to

be subject to assessment by the Taxing Judge. That makes sense because it actually gives the appellant an opportunity which it would not otherwise have of challenging the remuneration, because if the remuneration was fixed in accordance with the Insolvency Rules, that would be fixed either by a liquidation committee or a creditors' committee, subject to a review as I have set out above. In none of those processes would the appellant participate because he is not a creditor.

18. It is clear that the appellant, at least until this appeal, believed that he had a right to challenge the liquidator's costs because he has lodged objections to the liquidator's costs on quantum. That can only have been done, in my view, on the basis that he knew that the judge was fixing the amount of the remuneration. It seems to me therefore that what the appellant has agreed is that the remuneration be fixed under the principles of the Insolvency Rules, as to quantum, by the Taxing Judge. No other basis seems to me to make sense. It is impossible to believe that the appellant participated in a procedure on the basis which is now put forward. That procedure is in effect that because the remuneration of the liquidator has not been finally determined (and I use that phrase deliberately, as opposed to "fixed") by the creditors or the liquidation committee and because there is no such body in existence now, the liquidator was agreeing to be presented with a *fait accompli*, namely, as nothing has happened, despite the fact that there had been challenges to the bill, your bill as to quantum, all of that was irrelevant because all is now available, as a result the order is for the default fixed rate procedures.

19. I derive that conclusion from two reasons. First, the precise amount that was provided for is the consent order (and I notice it was so precise that actually the figures were changed round because they were typed up wrongly as opposed to the original ones; 4 and 5 were transposed) and, second, the fact that the appellant has acquiesced in a procedure whereby the remuneration of the liquidator as to quantum would be determined by the Taxing Judge. That can only happen if the appellant believes that the effect of the order was that the quantum was to be determined by the judge and that he was given jurisdiction to do that by consent. The arguments put forward by the appellant are ingenious but they ignore the fact that for the whole period of this assessment, until this point was taken, it was always contemplated that the appellant would have a right to be heard on the amount of the costs. The present argument involved the appellant having no right to be heard on the costs, but the reason for that is because if this ingenious point is successful, he no longer wishes to be heard on the point of quantum (I suspect because the Official Receiver's rate is so abysmally low that he is quite happy to pay it without any argument). I do not believe that that was the contemplation of the parties and I do not believe that is the way they have conducted themselves during the period of this assessment. It is far too late, in my view, for this point to be taken by the appellants. It seems to me that I should, in the light of the way in which the appellant has conducted themselves already, determine that whatever might have been the position, the appellants have waived any right to require the assessment to be done by the procedures under the Insolvency Rules as opposed to being fixed by the court.

20. There is a further point that I should raise. At the moment the liquidation is stayed, but it seems to me that if this point was going to be progressed, the short response would be for the respondents to seek to reopen the winding up with a view to reconvening a creditors or a liquidation committee for the purpose of fixing the remuneration.

Although the appellant is a contributory and would have had a right to be heard on that stay application, I cannot conceive how the court would, with any justice, refuse the option to reopen the stay so that the remuneration of the liquidators can be assessed in accordance with the way in which it was fixed by the creditors' committee on 15 November 2000. If that happens, all of this would become an entirely academic exercise because I cannot imagine that the creditors' committee are going to challenge the remuneration in the way in which the appellant does. But whatever happens, the logical and inevitable conclusion would be that the appellants would lose their present valuable right to challenge the remuneration on a merits basis and they would be simply presented with a figure which they would then have to pay. However, as I have said, the fact that for the period of the assessment they have been fighting on the merits, shows that that was not what was contemplated.

21. For all of those reasons it seems to me that the appeal, ingenious though it is on this point, has no realistic prospect of success and I refuse permission to appeal on point 3.

22. I remit points 2 and 4 to be determined by the Master.

23. It is not appropriate for me to assess costs summarily today. The reasons for that are as follows. First, there is going to be another hearing before the Master. Second, there may be payments due back from the other way if they successfully challenge the interim payments that have been made. Third, it appears to me that part of the costs have been reserved to the Master anyway and if there is a serious argument over the uplift I should not become involved in that. That said, there should be an interim payment. I have in mind an interim payment of £10,000.