Neutral Citation Number: [2021] EWHC 1767 (Ch)

Case No: BR-2017-001525

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (ChD)
INSOLVENCY

The Rolls Building
7 Rolls Building
Fetter Lane
London WC2A 2LL

Date: Friday, 28th May 2021

Before:

MR JUSTICE FANCOURT

- -

Between:

ROBERT HURST

Applicant

- and -

(1) EVELYN GREEN
(2) DAVID ROBERT GREEN
(3) IAN MABLIN

Respondents

- -
- -

The Applicant appeared in person
MR MARK TUSHINGHAM for the **Respondents**

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Approved Judgment

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2nd Floor, Quality House, 6-9 Quality Court, Chancery Lane, London WC2A 1HP.
Telephone No: 020 7067 2900. DX 410 LDE
Email: info@martenwalshcherer.com
Web: www.martenwalshcherer.com

MR JUSTICE FANCOURT :

1. This is an application that was issued on 30 September 2020 by Mr Hurst to annul a bankruptcy order that was made against him on 15 February 2018. The application is expressed to be made pursuant to s.282(1)(a) of the Insolvency Act 1986. Mr Hurst, who has presented his argument this morning with considerable skill and clarity and with great courtesy to the court, has also relied to some extent on the allied jurisdiction conferred by s.375 of the Insolvency Act, although that was not the express basis of the application. The application was supported by a witness statement of Mr Hurst dated 30 September 2020.

2. The application relates to the circumstances in which an order was made on 3 August 2016 by Master Price for payment of a substantial sum of money by Mr Hurst to the respondents to this application and for costs. The respondents are the sister and brother-in-law of Mr Hurst, Mr and Mrs Green, and Mr Matlin, who is an accountant and who was the accountant of Mr Hurst's late mother, Hannah Hurst. The three respondents are trustees under trusts established by Mrs Hurst during her lifetime and which were the subject of challenge by Mr Hurst after her death.

3. In giving his judgment, Master Price dismissed as unarguable Mr Hurst's counterclaim in those proceedings that the disposals of property made by Mrs Hurst on 8 July 2003 were voidable for undue influence exercised over her by the respondents. In particular, at the hearing before Master Price the respondents had relied on a letter from a partner of the firm then known as Berwin Leighton Paisner (BLP), Mr Whitehead, who had confirmed in response to Mr Hurst's challenge to the transactions that his mother had entered into that he was entirely satisfied that the circumstances in which his firm had advised Mrs Hurst were correct and that she understood what she was doing. The letter, dated 16 September 2014, said:

> "You state in paragraph 3 that your mother did not have a clue as to the contents of the many documents which she had been requested to sign by David and was wanting to undo whatever had been done. We are totally comfortable that this firm BLP acted properly in advising your mother and implementing the planning connected with 29 Norris Lee. Your mother was present at a number of meetings at which the basis of the planning was explained to her. Points were clarified and ultimately she decided to proceed."

4. The respondents also relied at that hearing in 2016 on the fact that Mrs Hurst's accountant, Mr Matlin, was involved in giving advice to her about the proposed transactions. Master Price was impressed, in particular, with Mr Whitehead's letter in reaching his conclusion that no case of undue influence was arguable, but that was not the only reason for his decision.

5. Mr Hurst has spent the years since 2016 trying to unpick the veracity of that letter and prove that Mrs Hurst only had one meeting with a solicitor at BLP, who was not Mr Whitehead, who attended at her house on the instructions of Mr Green or Mrs Green, and that Mrs Hurst was not properly and independently advised on the transactions.

What he seeks to do is establish by that means that Master Price was misled by the evidence and arguments of the respondents; that the dismissal of his counterclaim was therefore wrong; and that the judgment entered on the respondent's claim against him should therefore not have been entered until after there had been a trial of the undue influence claim. As a consequence, the judgment debt arising from the 2016 order, in respect of part of which the bankruptcy petition was presented, should have been set aside and the bankruptcy order therefore should not have been made. That, as I say, is the basis of the argument for annulment.

6. The first difficulty that presents itself to Mr Hurst is that he did not seek to appeal that part of Master Price's decision and order. He did seek to appeal other aspects of Master Price's decision and was granted permission to appeal, but the appeal ultimately failed. Having failed to appeal the dismissal of the undue influence counterclaim, Mr Hurst cannot therefore challenge the validity of the conclusion reached on the counterclaim, or challenge the existence of the debt, save by alleging that the judgment should be set aside for some other reason, viz the alleged fraudulent misleading of the court in the evidence of the respondents.

7. The next difficulty for Mr Hurst is that he has tried on several previous occasions to have his bankruptcy order annulled or to obtain related relief from the court on the basis that the judgment of the Master was obtained by deception, i.e. fraud, because what was said in Mr Whitehead's letter was untrue. The primary evidential basis for the allegation and the attempts to set aside the judgment previously were what Mr Hurst alleges that he was told by his sister, Mrs Green, in a without prejudice meeting on 15th August 2018, namely that Mrs Hurst had never travelled to BLP's offices and only had a meeting with a lawyer from BLP once in her home. The first application to annul the bankruptcy was made principally on the ground that the evidence that was before the Master was contradicted by what Mrs Green had told Mr Hurst, and that first attempt alleged in terms that there had been a fraud perpetrated which gave rise to the bankruptcy debt.

8. On 22 July 2019 ICC Judge Prentis dismissed that application and Mr Hurst appealed the dismissal. Before the appeal was heard by me in February 2020, Mr Hurst received from the Solicitors Regulation Authority, to which he had complained about Mr Whitehead's conduct, two letters. One was a letter dated 24 September 2019, stating that Mr Whitehead had told the SRA that the statement he made in his letter of 16 September 2014 had been made on the basis of instructions from his clients, i.e. at that time the respondent trustees. The second was a letter from the SRA dated 20 December 2019 in which they said that Mr Whitehead could have chosen better wording in his 2014 letter and that they had reminded him of the need to be more careful in future, but that otherwise the proceedings that Mr Hurst had started against him were not going to be pursued further. Those two letters were not shown to me when I heard Mr Hurst's appeal.

9. Mr Hurst has explained to me today that he had been advised by a barrister, he accepts possibly wrongly, that those letters could not be put in evidence before me on the hearing of the appeal. As a matter of fact, therefore, I did not have them in front of me on that occasion. I held that the judge's assessment of the evidence and his application of the law could not be criticised and that on the evidence as a whole, as it was before me, it could not be argued that the property dispositions were disadvantageous to Mrs

Hurst or that undue influence had in fact been exercised over her, and I therefore dismissed Mr Hurst's appeal.

10. Mr Hurst then sought permission further to appeal from the Court of Appeal, which was refused by Newey LJ as being totally without merit. Only 5 days after my decision to reject Mr Hurst's appeal, Mr Hurst then issued a second application to annul his bankruptcy, this time on grounds that the petitioning creditors (the respondents) were in contempt of court and, therefore, could not present a petition to the Bankruptcy Court. The allegation of contempt was based on the factual discrepancy alleged about Mrs Hurst's dealing with BLP that had been relied on in the first annulment application. ICC Judge Jones dismissed that application on the basis that an ICC judge did not have jurisdiction to consider the particular allegations of contempt that were being advanced.

11. A month or so later, Mr Hurst therefore issued a contempt application, returnable before a High Court judge. He once again alleged that the respondents had given false evidence in their witness statements before Master Price.

12. On 21st April 2020 Zacaroli J, who heard that application, refused permission to bring contempt proceedings. He held that the application was an abuse of process as it was made for a personal collateral reason, not in the public interest, namely to provide ammunition with which Mr Hurst could make a yet further application to seek to annul his bankruptcy. Zacaroli J did have the two letters written by the SRA before him. Indeed, those formed the primary basis of the case then advanced by Mr Hurst that there had been misleading, indeed knowingly dishonest evidence put before Master Price by the respondents. Zacaroli J considered the involvement of Mr Whitehead, the letter that Mr Whitehead had written in 2014 and the terms of the SRA's letters and said as follows:

> "I do not consider that the fact Mr Whitehead did not identify in terms the information as to the meetings with Mrs Hurst in 2003 came from instructions from clients falsifies the terms of his letter. In reality, the SRA's letter provides no support at all for the allegation that the June 2016 statements were false.

The June 2016 statements were the witness statements of the respondents relied on in front of Master Price. Zacaroli J was therefore making a finding of fact as to the significance and potential relevance of the letters written by the SRA, on which Mr Hurst was relying on that occasion and on which he relies today.

13. Mr Hurst once again tried to appeal Zacaroli J's decision, and once again his application was refused as being totally without merit. Four weeks after that, Mr Hurst issued an application for pre-action disclosure against BLP in relation to the circumstances in which Mr Whitehead's letter of 16 September 2014 was written. Mr Hurst was seeking, in other words, to seek to uncover the information that was given to Mr Whitehead at about that time by his clients and what those instructions were.

14. In response to that application, BLP asserted that the communications in question were privileged, and shortly after that Mr Hurst withdrew the application for pre-action disclosure by consent. Mr Hurst explained that he had reached the conclusion that there were no documents at all relating to those matters, and therefore there was no point in pursuing a disclosure application. Instead, five days after the withdrawal of the

disclosure application Mr Hurst issued this application. This application too is pursued on the ground that Master Price was deceived by the untruthful evidence of the respondents and the untruthfulness of the letter of Mr Whitehead. Mr Hurst submits that he is now in possession of new evidence that enables him to prove those matters, and by "new" he clarified that he means evidence that was received since the date of Judge Prentis' judgment in July 2019. It is of course clear that, in order to justify making a further application to annul the bankruptcy, Mr Hurst must be able to point to persuasive and material evidence that he has obtained and has not previously been able to put before the court in connection with the same matters.

15. The new material on which Mr Hurst relies is helpfully set out in a list in paragraph 4(q) of his skeleton argument. The matters that are relied on are, first and second, the two letters from the SRA in September and December 2019. These, it is true, were not letters that Mr Hurst had available to deploy before Judge Prentis, and he did not in fact, for reasons that I have explained, deploy them before me in February 2020, but he did rely on them in front of Zacaroli J, and Zacaroli J concluded that the September letter, which is the one principally relied on by Mr Hurst, provides no support at all for the allegation that the evidence before Master Price was false.

16. Zacaroli J also held that the case that Master Price was misled deliberately was thin and speculative. He said that he did not accept that it was only on receipt of the SRA's letter that Mr Hurst realised that he had a strong case to make an allegation of dishonesty. Zacaroli J also said that it was not permissible for Mr Hurst to use a committal application as a means of making a collateral attack on my judgment of February 2020. In other words, Mr Hurst was raising the same factual allegations, albeit in a different procedural form, in order to seek to re-open the conclusions that I have reached and persuade another judge to reach a different conclusion.

17. The other new matters on which Mr Hurst seeks to rely are not, in my judgment, of any real significance in seeking to establish a case of fraud by the respondents. Those matters (at least those of them on which Mr Hurst expressly relied in his argument to me today) were: first, the departure of Mr Whitehead from BLP in December 2019. As to this, I think Mr Hurst frankly accepts that, on its own, no inference can possibly be drawn that that was anything to do with the letter of September 2014, or the investigation by the SRA, since the SRA had after all decided that there was not allegation of misconduct to be further investigated.

18. Next, Mr Hurst points to a letter written by him dated 5 May 2020. That was a letter written to Mr Osuntokun, the Managing Partner of BLP, in which Mr Hurst asks in his capacity as his mother's executor for information in relation to Mr Whitehead's letter. He asks in particular about the dates of the meetings and the basis on which the tax planning was explained, the solicitors who attended the meetings, the capacity in which BLP was advising Mrs Hurst, and whether she was a client of the firm at that time. Mr Osuntokun did not reply to the letter. Mr Hurst seeks to draw from that a number of inferences. He says the obvious inference is that Mrs Hurst was not a client. There is also an inference, he says, that there are no documents evidencing the meetings in question, and there is also an inference that the meetings described, apart from one meeting on 8 July, did not take place.

19. In my judgment, it is impossible in all the circumstances to draw any of those inferences from a simple non-reply to a letter. This was not a first letter written by a representative

of a former client asking for information about the client's affairs. This was a letter that was written in May 2020 following 6 years of engagement, correspondence and litigation in one form or another between Mr Hurst and the respondents that directly involved BLP, and in relation to which BLP had had to write on many occasions. If there had been a reply from BLP to the May 2020 letter refusing disclosure of information on the basis that Mrs Hurst was not a client, then of course the position might well have been very different, but it is not possible safely to draw any of the inferences that Mr Hurst says should be drawn. It is not indeed surprising in all the circumstances that the Managing Partner of BLP, who himself had presumably no involvement at all in these matters, who would have known nothing about it and was being asked about matters that had occurred 17 years previously, did not trouble to respond, even if old-fashioned standards of courtesy would have required a reply.

20. The next matter relied upon by Mr Hurst, and I think in fairness to him the point principally relied on as providing some new evidence of deception and fraud, is the response of a Ms Kayser, an employee of BLP, to a request made by Mr Hurst to disclose evidence substantiating the assurance that was given by Mr Whitehead in the September 2014 letter about BLP's conduct. The initial response of Ms Kayser was to assert that those matters were confidential and should not be disclosed. At a later stage privilege was specifically relied upon as precluding BLP from supplying the evidence and information requested.

21. In any event, that matter was overtaken in July 2020 by the issue of the application for pre-action disclosure in relation to the same material. Once again, BLP replied to that application asserting privilege and, as I have said, Mr Hurst then withdrew that application with the agreement of BLP. I am afraid I do not understand the explanation that Mr Hurst gave as to why the application was withdrawn. Mr Hurst says that he concluded that no documents existed, but he could have pursued the application in order to seek to challenge the assertion of privilege, as he did very cogently in his submissions before me this morning. But I am not here to re-hear any application for disclosure. That argument should have been pursued on the application that Mr Hurst issued in 2020. If he had succeeded on the point, then the only basis on which BLP were refusing to give disclosure would have fallen away and Mr Hurst would have obtained whatever documents were in existence relating to those matters.

22. Mr Hurst would then not have had to try to persuade me to draw inferences about whether documents existed or, if so, what they contained. He would have found out the true position. But instead of that he chose to withdraw his application. In those circumstances, it is wholly inappropriate for the court to draw any inference from the basis on which BLP declined to produce the documents and information that was being sought.

23. The next point relied upon is essentially the same point, which is that the new solicitors instructed on behalf of the respondents, Peters & Peters, refused in July 2020 to supply evidence of the instructions, which according to the BLP September 2014 letter and the SRA's letter of September 2019 had been given to Mr Whitehead. The request was made, but it was the same request in substance as had been made in the application for pre-action disclosure, and therefore if, as must be assumed, the answer of privilege was a good answer to that application, it remained a good answer and explanation of why Peters & Peters did not supply the evidence in response to the further letter written.

24. There were further points enumerated in Mr Hurst's skeleton argument, but clearly none of these amounts to new material or evidence capable of supporting a case that Master Price was misled or deceived. None of them is new, and to be fair to Mr Hurst, he did not rely upon them in his oral submissions to me today.

25. There is accordingly, in my judgment, nothing new at all on the basis of which Mr Hurst can today apply for a third time seeking to annul his bankruptcy. The material relied upon is exactly the same as it was in previous applications, namely the inaccuracy of the Whitehead letter of September 2014, what Mrs Green told Mr Hurst about the involvement of BLP in August 2018, the two SRA letters (for what they are worth), inferences of a highly speculative nature Mr Hurst seeks to draw from all that material, and the conduct of the respondents and their solicitors in opposing his applications. This third application to annul the bankruptcy is therefore the clearest possible abuse of process seeking to re-litigate issues that have already been determined. There is no new material of any cogency or materiality and Mr Hurst's case seeks to advance arguments that have previously been rejected as being totally without merit and involve a collateral attack on previous decisions of judges of this court. Even if it were not an abuse of process falling to be dismissed on that basis, the merits of the application are, in my judgment, very weak, for the reasons previously given in previous judgments, and they do not nearly amount to a credible case of fraud or collusion. There is no evidence of fraudulent misleading of the court or collusion, or objectively any serious miscarriage of the proceedings, which would be necessary before Mr Hurst could seek to go behind the judgment debt on which the bankruptcy petition was presented.

26. I entirely accept that Mr Hurst honestly and genuinely believes that there has been such a miscarriage, but I fear that he is not able to be objective about it and can only see a conspiracy involving his brother-in-law and sister, and possibly others. I gave detailed reasons in my judgment of 5 February 2020 why these were not transactions that were tainted by undue influence. I refer, if necessary, to paragraphs 58-63 of my judgment. It is not necessary to rehearse them again in this judgment.

27. For the reasons that I have given therefore, principally because the application is an abuse of process, I dismiss it and record that the application was totally without merit.

This judgment has been approved by Fancourt J.