

Case No: CH-2024-000004
Neutral Citation Number: [2024] EWHC 1842 (Ch)

IN THE HIGH COURT OF JUSTICE
CHANCERY APPEALS (ChD)
(ON APPEAL FROM CROYDON COUNTY COURT
DISTRICT JUDGE BISHOP)

7 The Rolls Buildings
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London
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Friday, 14 June 2024

BEFORE:

MRS JUSTICE JOANNA SMITH

BETWEEN:

JENNA LOUISE HOWE

Appellant

- and -

LECK HOLDINGS LIMITED

Respondent

MR J MCKEAN appeared on behalf of the Appellant
MR E YUSUPOFF (instructed by Richardson Lissack Limited) appeared on behalf of the Respondent

JUDGMENT
(Approved)

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(Official Shorthand Writers to the Court)

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MRS JUSTICE JOANNA SMITH:

1. This is an appeal from the decision of DJ Bishop ("**the Judge**") sitting in the County Court in Croydon on 2 January 2024. The Judge dismissed an application by the appellant ("**Ms Howe**") to set aside a statutory demand. By order of 16 February 2024, Rajah J granted permission to appeal this decision on three of the four grounds in the Appellant's Notice dated 10 January 2024.
2. The respondent, Leck Holdings Limited, ("**Leck**"), served a Respondent's Notice on 1 March 2024 inviting this court to uphold the decision of the Judge on different grounds to those given by the Judge.

The Background to the Statutory Demand

3. Ms Howe is the only child of Mr Roger Howe, ("**the Deceased**"), who died on 27 March 2020. The Deceased made a will on 4 July 2017 ("**the Will**") which names Rosina Ann Howe and Tina Frances Tucker, the Deceased's mother and sister respectively, as Executrices. Mr Edward Gratwick, the sole director and owner of Leck, was a witness to the Will. The Will made no provision for Ms Howe and, after her father's death, Ms Howe entered a caveat.
4. On 12 October 2020, the Executrices issued probate proceedings to remove the caveat, ("**the Probate Claim**"). Ms Howe's case in those proceedings was founded on alleging that the Will was invalid due to the signature of the other witness to the Will, Mr John Incz, having been forged. Mr Gratwick was identified by the Executrices as a witness in the Probate Claim. Before the matter came to trial, it was compromised by a consent order dated 22 December 2021. Pursuant to that order, the court pronounced for the force and validity of the Will, vacated the trial and ordered that Ms Howe should pay the Executrices' costs of the Probate Claim on the standard basis, to be assessed if not agreed. On 15 July 2022, Ms Howe's liability to the estate was agreed in the sum of £42,000, ("**the Debt**").
5. Meanwhile, on 25 February 2022, Ms Howe had issued a claim against the estate under the Inheritance (Provision for Family and Dependants) Act 1975 ("**the 1975 Act**").

Claim") seeking reasonable financial provision for her maintenance from the net estate of the Deceased which was valued at approximately £1.4 million. Together with other members of Ms Howe's family, the Executrices are the first and second defendants to the 1975 Act Claim. Once again, I am informed that Mr Gratwick has filed evidence in support of the Executrices' defence to that claim.

6. In November 2022, over three months after Ms Howe's liability for the costs of the Probate Claim had been determined in the sum of £42,000, the Executrices applied for the 1975 Act Claim to be stayed pending payment by Ms Howe of the Debt. This application was granted on 14 July 2023. HHJ Johns KC vacated the trial due to start in August 2023 and ordered that unless Ms Howe paid the Debt to the Executrices by 4.00 pm on 28 July 2023, the 1975 Act Claim would be stayed. He also ordered that Ms Howe should pay the Executrices' costs of this application in the sum of £8,000.
7. On 28 July 2023, the 1975 Act Claim was stayed due to Ms Howe's failure to pay the Debt. However, the order of 14 July 2023 gave Ms Howe liberty to apply to lift the stay on the basis of detailed evidence that payment of the Debt, "cannot be funded from other sources."
8. On 9 August 2023, Ms Howe applied to lift the stay, relying upon a witness statement confirming that she had no assets to fund the Debt and was not able to obtain any assistance from friends, family or anywhere else. She confirmed in her statement that she was making the 1975 Act Claim as a last resort to obtain help with her life and to fund the care of her children.
9. Pursuant to an order of 29 August 2023, HHJ Johns KC lifted the stay and gave directions for the 1975 Act Claim to go to trial. He ordered that the Executrices should pay Ms Howe's costs of the application, assessed in the sum of £8,000, and that:

"The costs shall be offset against the outstanding costs' liabilities owing from Ms Howe to the Executrices."

I understand this to be a reference to both the Debt and the existing order for £8,000 costs against Ms Howe.

10. The trial in the 1975 Act Claim has not yet taken place but I was informed today by Mr McKean, acting on behalf of Ms Howe, that it is fixed to take place in January of next year.
11. Leck was incorporated on 7 September 2023. On 8 September 2023, the Executrices assigned the Debt to Leck ("**the Assignment**"). The Assignment recorded that the Debt had been assigned for "valuable consideration." There is no evidence as to what that might be. Concerns were raised before the Judge below over the reason for the Assignment, including that it can only have been intended to make Ms Howe bankrupt. However, although these concerns were also voiced before me, ground 3 of the original grounds of appeal which addresses this point, has not received permission and thus I disregard it.
12. It is common ground that Leck did not send Ms Howe separate notice of the Assignment. Instead, it served her with the statutory demand on 9 September 2023. Ms Howe applied to set aside the statutory demand on 25 September 2023 ("**the Application**"). The Judge gave a short *extempore* judgment on 2 January 2024 dismissing the Application and granting Leck liberty to petition for Ms Howe's bankruptcy. Although the Judge made an error in her judgement, in that she thought that she needed to deduct the sum of £8,000 from the Debt to reflect the costs order that had been made on 29 August 2023 in Ms Howe's favour, this was corrected in her subsequent order. In effect, the order of 29 August 2023 for £8,000 to be paid by the Executrices to Ms Howe merely cancelled out the earlier order of 14 July 2023, requiring Ms Howe to pay £8,000 to the Executrices.

The Grounds of Appeal

13. The substantive grounds of appeal before this court were twofold. First, that the Judge erred in law in holding that the service of the statutory demand was itself sufficient notice of the Assignment for the purposes of section 136(1) of the Law of Property Act 1925 ("**the 1925 Act**"). Ms Howe said, in advance of this hearing, that the Judge should have set aside the statutory demand under Rule 10.5(5)(b) or (d) of the Insolvency (England and Wales) Rules 2016 ("**the Rules**"). Second, that the Judge erred in law in concluding that the 1975 Act Claim did not give rise to a counterclaim,

set off or cross-demand against Leck and that accordingly, there was an insufficient connection between the 1975 Act Claim and the statutory demand for the purposes of Rule 10.5(5)(a) of the Rules, such that sums awarded to Ms Howe pursuant to that claim could not be set off against the Debt. Again, Ms Howe says that the Judge should have set the statutory demand aside.

The Decision of the Judge

14. As to the question of notice, the Judge recorded Ms Howe's argument at paragraph 8 that no notice had been given to her of the Assignment in breach of section 136 of the 1925 Act. At paragraph 16, she recorded that, "rather lazily" the statutory demand was itself intended to be notice that the Debt was due and owing and that Leck could have, "made this point easier on themselves," by serving a notice prior to the statutory demand. However, in the same paragraph, she agreed with Leck that the statutory demand was itself capable of being sufficient notice. At paragraph 17, she said this:

"If I find in favour of the applicant today and set aside the statutory demand, then it is clear that all Leck would have to do is issue another statutory demand because whatever else could be argued, notice has now clearly been given; there is no argument or possible argument to rerun that and would cost more to the lawyers and the parties, would take up more court time and given the acceptance of the debt, subject to the £8,000, the matter would just have to, I think, be rejected at the next hearing. Therefore, if I took that point, as Mr McKean requests me to do, all that is happening is that more costs, more court time, are being thrown at the matter and that cannot meet the overriding objective."

Accordingly, she refused to set aside the statutory demand on this ground.

15. I can immediately say that she was right to do so as Mr McKean, for Ms Howe, realistically conceded at the start of today's hearing. Although neither party had been aware of it and it was not included in my authorities bundle, my judicial assistant, Mr Zachary Pullar, had located the case of *Coulter v Chief Constable of Dorset Police* [2005] 1 WLR 130, during his research in preparation for this hearing. Mr McKean accepts that the facts with which the Court of Appeal were concerned in that case, at least on this point, are on all fours with the facts in this case. It is plainly authority for the proposition that the fact that a statutory demand is defective, including because it

was served before notice had been given of an assignment, is not in itself a sufficient reason to set aside a statutory demand. There must be injustice that calls for the court's intervention (see paragraphs 19 to 23 of the Court of Appeal's judgment on the statutory demand procedure and paragraph 25 for the correct approach to an application to set aside). In the circumstances, Mr McKean did not pursue ground 1 of the appeal at this hearing.

16. As to Ms Howe's arguments under Rule 10.5(5)(a) of the Rules, the Judge observed at paragraph 10 that any set off or counterclaim should be equal to, or greater than, the claim for the Debt made in the demand and she said that:

"Leck are not party to the 1975 Act case that is still proceeding against the executors."

17. At paragraph 11, she expressed the view that Ms Howe believed the 1975 Act Claim to be one of substance, going on at paragraph 12 to say that Ms Howe, "clearly does have a triable issue." She noted that Ms Howe's case was not that she was not liable for the Debt but, rather, that she will not or cannot pay it because she considers it to be "unjust". She went on to say this at the end of paragraph 12 and paragraph 13:

"12. But I cannot see, because Leck Holdings are not party to those sets of proceedings, that there is a connection which is so close as to render them potentially liable for an order against them in equity as non-parties to proceedings.

13. Mr Gratwick and/or Leck Holdings have not been joined as parties to the 1975 Act proceedings in respect of this costs order. It is clear that if she was successful in the 1975 Act, the claimant can set off against the costs award and that that award has obviously been assigned, but I think it is the closeness of the connections and the fact that it would be for an unknown amount and an unknown award which could not be said to be due to the actions of Mr Gratwick as director of Leck Holdings."

18. In the only other paragraph in which I can see that the judge addressed her mind to the question of set off, paragraph 20, she said:

"There is no counterclaim here. There is no meaningful set off and the 1975 Act claim remains undetermined but also unquantified and it is right to say that the applicant may win, she may lose, the

matter may settle. But to argue now that any claim against the assignee would equal or exceed the value of the debt, in my view, is completely without corroboration at this time and I find that highly speculative."

She then refused to set aside the statutory demand.

19. Before turning to deal with the arguments on ground 2 of the appeal, I make a couple of observations about the judgment. First, there are a number of occasions in the judgment where the Judge appears to make findings about close connections. However, I agree with Mr Yusupoff, acting on behalf of the respondent, Leck, that these either appear to be focusing on the connection between Mr Gratwick and the Executrices or they are ambiguous as to precisely what the Judge has in mind. The extracts from paragraphs 12 and 13 of the judgment, to which I have just referred, illustrate this point.
20. Second, it is common ground that the Judge erred in law in dealing with this set off point, essentially because she wrongly sought to assess a connection between the 1975 Act Claim and Leck. She did not appreciate that, as Leck concedes, the Assignment took effect in law subject to equities which would include any right of equitable set off. However, as Leck makes clear in its Respondent's Notice, it continues to dispute that the 1975 Act Claim gives rise to a right of set off against the Executrices and accordingly that it can do so against Leck. Leck invites me to uphold the Judge's decision on this different ground.
21. It is common ground between the parties that the statutory demand in this case may only be set aside on one or more of the four distinct grounds identified in Rule 10.5(5) of the Rules. For the purposes of ground 2 of the appeal, it is also common ground that I am concerned only with the ground at 10.5(5)(a), namely that:

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

22. It is also common ground that this means that Ms Howe needs to demonstrate that the 1975 Act Claim satisfies the requirements of Rule 10.5(5)(a) because it is a counterclaim, set off or cross-demand which equals or exceeds the amount of the Debt

and which can be asserted against Leck. Ms Howe relies only upon the proposition that the 1975 Act Claim is an equitable set off.

23. The test for an equitable set off is not in dispute. It was stated in the case of *Geldof Metaalconstructie Nv v Simon Carves Ltd* [2010] EWCA (Civ) 667 per Rix LJ at 43 and was repeated by the Court of Appeal in *Bibby Factors North West Limited v HFD Ltd* [2016] 1 Lloyd's Rep 517 per Christopher Clarke LJ at 37 as follows:

"There is a single test for equitable set off but it has two elements. The composite test is whether the cross-claim is so closely connected with (the plaintiff's) demands that it would be manifestly unjust to allow him to enforce payment without taking into account the cross-claim. As Rix LJ put it in *Geldof* at paragraph 43(4), it is not coherent to have a doctrine of equitable set off which ignores the need for consideration of aspects of justice and fairness."

24. In *Geldof*, the close connection element of the test was described as the formal requirement, while the justice element was described as a functional requirement. At paragraph 43(v) Rix LJ said this:

"Although the test for equitable set off plainly therefore involves considerations of both the closeness of the connection between claim and cross-claim and of the justice of the case, I do not think that one should speak in terms of a two-stage test. I would prefer to say that there is both a formal element in the test and a functional element. The importance of the formal element is to ensure that the doctrine of equitable set off is based on principle and not discretion. The importance of the functional element is to remind litigants and courts that the ultimate rationality of the regime is equity. The two elements cannot ultimately be divorced from each other. It may be that at times some judges have emphasised the test of equity at the expense of the requirement of close connection, while other judges have put the emphasis the other way round."

25. In summary, Mr McKean in his skeleton argument and in his excellent oral submissions made to me today contends that there is a close connection in this case between the Debt and the 1975 Act Claim. He emphasises that in the 1975 Act Claim Ms Howe has made a claim in her witness statement for provision to meet the Debt and that the Executrices rely upon the fact of the costs order which gave rise to the Debt in their defence of that claim. He also points to the fact that the court has already accepted a considerable overlap because the 1975 Act Claim was stayed pending

payment of the Debt, a stay which was subsequently lifted upon Ms Howe filing evidence specifically addressing her ability to pay the Debt.

26. Mr McKean points out that there is also a close connection between the Probate Claim and the 1975 Act Claim. Indeed, he says that they are wholly intertwined. He points to the fact that both were concerned with the validity and effect of the Will, that there was an identity of parties, that Mr Gratwick was a witness for both and that, although the claims were different, their desired outcome or “purpose and intent” (as he put it) was to achieve the same end, namely, financial provision for Ms Howe from the Deceased's estate.
27. He points out that if one of these claims succeeded, the other would not be necessary and he points to the chronology of the claims and to their sequencing, the 1975 Act Claim following on after the failure of the Probate Claim. He submits that I should have regard to the "practical links" between these two sets of proceedings. (See *Geldof* at paragraph 47). He says that my inquiry must be an inquiry of substance and not form. In reality, he contends there is clearly a close connection.
28. Mr McKean also submits that where there is this close connection, it is likely to be unjust to allow enforcement of the Debt without taking into account the equitable set off. He says that there is a real prospect of a set off in the event of Ms Howe succeeding in her 1975 Act Claim, the test of real prospect being agreed between the parties, and that the Judge was wrong to suggest that the claim was speculative. If the 1975 Act Claim succeeds, Mr McKean says that an order will be made for reasonable financial provision and that there is a real prospect that this will be equal to, or in excess of, the Debt. Given the value of the estate of approximately £1.4 million and the evidence of Ms Howe as to her impecuniosity, he says it is inconceivable that any award would not cover the Debt and he points to the fact that it is common ground that the 1975 Act Claim enables the court to make provision for Ms Howe's debts.
29. Mr Yusupoff, who also made excellent submissions, rejects these arguments, pointing out that equitable set off will usually arise in the context of commercial contracts and mutual relationships. He contends that the right to enforce the Debt is an entirely different claim from the 1975 Act Claim and that the close connection with which I

must be concerned is between the Debt and the 1975 Act Claim, and not between the Probate Claim and the 1975 Act Claim which, in any event he says, proceed on incompatible facts. One alleges that the Will was invalid while the other presumes that it was valid.

30. Mr Yusupoff submits that the Debt is in respect of an order for costs, which is not disputed, and is immediately payable. As for the fact that Ms Howe is seeking payment of the Debt under the 1975 Act Claim, he accepts that this is true but says that if this alone is capable of establishing an equitable set off, then the same would be true in respect of any debt owed to a beneficiary or executor in similar proceedings.
31. As to procedural connections, Mr Yusupoff accepts that the Executrices could set off a costs order obtained in the 1975 Act Claim against the Debt owed by Ms Howe, but he says that this does not demonstrate a close connection because such a set off is available by a different route, namely, set off by judgment (See *Fearns v Anglo-Dutch Paint and Chemical Company Limited* [2010] EWHC 2366 (Ch) per George Leggatt QC sitting as a Deputy High Court Judge, at paragraph 37). He rejects the suggestion that the fact a stay was ordered in the 1975 Act Claim or the fact that evidence has been served demonstrating an inability on the part of Ms Howe to pay the Debt demonstrates a close connection.
32. As for justice and equity, Mr Yusupoff contends that Ms Howe was in the driving seat in the Probate Claim and that ultimately she withdrew that claim which was then compromised on the terms of the consent order. He says there is nothing unjust in her being required to pay costs immediately in such circumstances and he suggests that she has since shown an unwillingness to pay. He submits that if the statutory demand were to be set aside, there would be prejudice to Leck, although I understood him not to pursue this when I pointed out that this was somewhat difficult to assess in the absence of any evidence as to the value of the consideration provided in respect of the Assignment. Furthermore, I have no evidence whatever as to the financial circumstances of Leck.
33. Finally, Mr Yusupoff says that there is no real prospect of any ultimate award to Ms Howe exceeding or equalling the Debt. He points out that the 1975 Act Claim is

unquantified and inherently uncertain and he took me to *Ilott v The Blue Cross* [2017] UKSC 17 at paragraph 22 for the proposition that an individual's needs do not necessarily dictate the level of the award that is likely to be made.

34. I have considered all of the parties' submissions with care but, in the end, I am satisfied that the Judge erred in law and was wrong to dismiss the application to set aside the statutory demand, essentially for the reasons given by Mr McKean. I consider that there is a close connection between the Debt and the 1975 Act Claim.
35. The Debt arises because Ms Howe chose to pursue the Probate Claim against the Executrices with a view to challenging the validity of the Will and ultimately obtaining money from the estate. I reject the submission made by Mr Yusupoff that her conduct in this regard was unreasonable so as to sever any connection (and I observe in this context that Ms Howe had obtained her own expert evidence in the Probate Claim which differed from the evidence of the single expert but was precluded in the event from advancing it). The case was settled without any order for indemnity costs and thus no express recognition of any unreasonable conduct on her part.
36. Having failed in the Probate Claim and an order for costs having been made against her, Ms Howe commenced the 1975 Act Claim with a view, amongst other things, to obtaining an order in that claim for payment of the Debt. In my judgment, this is plainly a sufficient connection, notwithstanding that the nature of that claim is different. That the court considered the two to be interconnected during the course of the 1975 Act Claim is, to my mind, borne out by the fact that it originally stayed that claim pending payment of the Debt, only permitting the claim to advance upon Ms Howe filing satisfactory evidence of an inability to pay the Debt. The fact that this is not a commercial case does not, to my mind, mean that there cannot be an equitable set off and I was not shown any authority to that effect.
37. I consider that the circumstances to which I have referred would also make it inherently unjust for Leck to enforce the Debt without having regard to the existence of the 1975 Act Claim. It is accepted by Mr Yusupoff that in the event of the 1975 Act Claim succeeding and an order for costs being obtained against the Executrices, they would

have a right to set off, and Mr McKean asks rhetorically how can it be fair or just for Ms Howe to be denied a similar entitlement? I agree.

38. As for whether there is a real prospect of an equitable set off equalling or exceeding the amount of the Debt, I consider that there is. Even Mr Yusupoff did not agree with the Judge's apparent assessment that the 1975 Act Claim is "highly speculative" and I note that she also referred to it, somewhat inconsistently in her judgment, as "triable."
39. The 1975 Act Claim is going to trial. There is no suggestion that it could be struck out or that there is no real prospect of success on that claim. The only question, then, is whether there is a real prospect of Ms Howe recovering a sum that is equal to, or exceeds the value of, the Debt. In my judgment, there is. If she wins at trial, she will obtain an order for maintenance and, although it is of course unclear what that will be, there is good reason in my judgment to suppose, given the value of the estate and her needs as set out in her evidence, that it will exceed £42,000. I have not been shown any other evidence in the proceedings on which I could conclude that her needs are likely to be significantly reduced by the claims of others in the 1975 Act Claim. I am also not satisfied that there is anything in her conduct to which my attention has been drawn that affects this conclusion.
40. I note and agree with Mr McKean's assessment that even an award of costs in Ms Howe's favour at the ultimate hearing following a four day trial would almost inevitably equal, or exceed, the Debt.
41. For all those reasons, I dismiss the appeal on ground 1 but allow the appeal on ground 2. To my mind, costs will follow the event, but I shall of course hear submissions from the parties in the event that they wish to suggest otherwise.

Judgment on costs

42. I am now called upon to make a summary assessment of the costs of this appeal. The appellant's costs schedule is in the sum of £10,227.88. The respondent's costs schedule is remarkably similar, unusually, and is in the sum of £10,204.60.

43. Realistically, Mr Yusupoff did not make any criticism of the appellant's costs schedule beyond pointing out that the appellant was unsuccessful in relation to ground 1 of the appeal and had to withdraw it at this hearing such that costs in relation to that ground will have been wasted.
44. I take that on board, although I also observe that the authority that I referred to ought properly to have been identified by both parties.
45. But nevertheless, some costs have been wasted by reason of ground 1 being advanced and, in those circumstances, I am going to assess the costs at £7,500 to be paid in 14 days.

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This transcript has been approved by the Judge