IN THE COUNTY COURT AT BRISTOL

Case No: 43 OF 2019

Courtroom No. 15

2 Redcliff Street
Bristol
BS1 6GR

Tuesday, 4th February 2020

Before:
HIS HONOUR JUDGE PAUL MATTHEWS

B E T W E E N:

SARAH HELEN BELL and ANOR

and

NICOLA JANE IDE and ORS

MR S FENNELL appeared on behalf of the Applicants
MISS J POWERS appeared on behalf of the Fourth and Fifth Respondents

JUDGMENT
(As Approved)

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HHJ PAUL MATTHEWS:

1. This is an application made by the trustees in bankruptcy of Nicola Jane Ide in the context of an application which was made by Insolvency Act notice dated 29 January 2019, for relief in relation to two payments to the fourth and fifth respondents respectively under Sections 339, 340 or 423 of the Insolvency Act 1986. In the context of those insolvency proceedings, the fourth and fifth respondents, represented today by Miss Powers, have made an ordinary application themselves, which is dated 14 October 2019. This is essentially for either a striking out of these proceedings against them or for summary judgment in their own favour. It is largely based on a perceived defect in the service of the proceedings, thereby, as they say, depriving them of what they call a limitation defence.

2. In response to that application, which is before me today, the trustees in bankruptcy have now made an ordinary application by notice dated 13 November 2019, essentially to provide, although it is not the exact words, that the application of third and fourth respondents should be transferred to the High Court to be heard by a Section 9 judge. The intention being that although this matter is listed before me today sitting as a judge of the County Court, it should be heard by me today sitting as a judge of the High Court.

3. The rules about transfer of proceedings in insolvency are contained in Rule 12.30 and following of the Insolvency Rules 2016. Rule 12.30 (so far as relevant) says:

> ‘(1) The High Court may order insolvency proceedings which are pending in that court to be transferred to a specified hearing centre.
>
> (2) The County Court may order insolvency proceedings which are pending in a hearing centre to be transferred either to the High Court or another hearing centre.
>
> (3) A judge of the High Court may order insolvency proceedings which are pending in the County Court to be transferred to the High Court.
>
>> (4) The court may order a transfer of proceedings—
>>
>> (a) of its own motion;
>>
>> (b) on the application of the official receiver; or
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>> (c) on the application of a person appearing to the court to have an interest in the proceedings’.

4. There are then further rules: 12.31 dealing with proceedings commenced in the wrong court; 12.32 dealing with applications for transfer; 12.33 dealing with procedure following order for transfer; 12.34 dealing with consequential transfer of other proceedings and then 12.35

dealing with interpretation. Then there are other provisions dealing with block transfer orders.

5. What Mr Fennell on behalf of the trustees in bankruptcy says is that I have jurisdiction under Rule 12.30 to transfer not only the entire proceedings, that is to say the application by Insolvency Act notice in respect of the payments to the respondents under Sections 339, 340 and 423 of the Insolvency Act, but I also have power to transfer to the High Court simply the application of the respondents to strike out or for summary judgment on the application of the trustees in bankruptcy.

6. The main reason why the trustees in bankruptcy seek that transfer to the High Court is because they say that there are two authorities, decisions of the High Court, which are accordingly binding on a judge of the County Court. They say that these misapply the relevant law, and would therefore predetermine the result of the application being made on behalf of the respondents. The result would be that there would have to be an appeal to the High Court against the decision in which the correctness of those earlier decisions could actually be challenged. Accordingly, this application of the trustees in bankruptcy to transfer the respondents' application to the High Court would avoid the necessity for an extra layer of proceedings. In addition, Mr Fennell makes the point that there is a wider procedural point that. He says that these authorities are not well reasoned, and one of them (*Re HS Works Ltd* [2018] EWHC 1405 (Ch)) is not well known. Overall, he says, there is no disadvantage to the parties in transferring the matter to the High Court.

7. Miss Powers, in a very ably argued submission, first of all says that I have no power, sitting here in the County Court, to transfer the respondents' application to the High Court. However, even if I do, she says that the factors which are to be considered on any application for such transfer (by virtue of either the Insolvency Practice Direction paragraph 3, or CPR 30.3 paragraph 2) are not applicable to the facts of this case. Therefore, I should not exercise any power that I might have to order such a transfer. In any event, says Miss Powers, the reason given to transfer of this application, namely, to avoid inconvenient precedents, is an inappropriate reason, and does not justify such a transfer.

8. Turning to the first point, which is the question of whether there is jurisdiction to transfer the application of the respondents to the High Court, Miss Power refers me to two decisions of the High Court. These are *Re Kouyoumdjian* [1956] 1 WLR 558, a decision of Upjohn J (as he then was), and *Re A Debtor* [1985] 1 WLR 6, in which Scott J, as he then was, followed the decision of Upjohn J. In both of those cases, the learned judges concluded that

the then relevant provision for transfer of insolvency proceedings did not include transfer of *a part of* an insolvency proceeding. At the date of both cases the provision for transfer was contained in Section 100(2) of the Bankruptcy Act 1914, which provided that:

> "Any proceedings in bankruptcy may at any time, and at any stage thereof, and either with or without application from any of the parties thereto, be transferred by any prescribed authority and in the prescribed manner from one court to another court, or may, by the like authority, be retained in the court in which the proceedings were commenced, although it may not be the court in which the proceedings ought to have been commenced".

9. In the decision of *Re Kouyoumdjian*, Upjohn J stated (at page 561):

> "If that be the true meaning to be placed upon the word 'proceedings' towards the end of subsection (2), I think that it is an indication that although the opening words are very wide, this subsection is concerned with the case of the proceedings in bankruptcy in the sense of transferring the proceedings initiating the bankruptcy and everything that follows thereon. No one of course doubts that the whole bankruptcy proceedings can at any time and at any stage be transferred from court to court, but I do not think that this subsection is concerned at all with the case of a transfer of a particular application or motion in any particular bankruptcy. It is only referring to the transfer of the whole bankruptcy proceedings. Power to transfer part only of the bankruptcy proceedings would also in my judgment be productive of great administrative inconvenience".

Therefore, the judge held in that case that there was no jurisdiction in the court to accede to an application to transfer only a part of the insolvency proceedings.

10. And, in the case of *Re A Debtor*, Scott J said at page 14B:

> "I have jurisdiction under Section 100 of the Bankruptcy Act 1914 to order a transfer of the bankruptcy proceedings into this court. It is established by authority that such a transfer must be a transfer of the whole proceedings and cannot be a transfer simply for some limited purpose; see *Re Kouyoumdjian Ex parte the Trustee v Lord* [1956] 1 WLR 558".

The judge went on to say:

> "That requirement is however no problem in the present case. The present position of the bankruptcy is, I am informed, that all creditors have been paid 100 pence in the pound and that the only matter remaining to be dealt with is this matter of the costs of the negligence action'.

Accordingly, he said

> "there would be no inconvenience at all in transferring the whole proceedings to this court".

So there the judge, in a decision only some 35 years ago, reaffirmed the view taken by Upjohn J in 1956, but be it noted, again, on the old provisions in Section 100(2) of the Bankruptcy Act 1914.

11. However, in a more recent decision, *Hall & Shivers v Van Der Heiden* [2010] EWHC 537 (TCC), Coulson J (as he then was) reached an opposite conclusion. He had a case, it is fair to say, which was not quite the same as the case before me, where the County Court before which insolvency proceedings were pending had to give permission for certain litigation to be carried on. The County Court had not so far given that permission, and the litigation had reached the stage of trial. The defendant had not turned up at the trial in the High Court, and Coulson J was faced with that situation. He had to decide therefore whether it was competent for him, sitting in the High Court, to 'call in' the aspect of the case in which the County Court could give permission for the trial to go ahead, and then make that decision himself. What he said in paragraph 21 was:

> "It seems to me that pursuant to Rule 7.11 of the Insolvency Rules [of course, these are the old Insolvency Rules before 2016] that aspect of the bankruptcy proceedings which is related to this trial can and should be transferred from the Swindon County Court to the High Court in order that it can be dealt with on the day which has been fixed for the last five months. Rule 7.11 provides for a general power of transfer which the High Court can exercise. It seems to me that it is entirely in accordance with the overriding objective for this court to order a limited transfer of that one issue".

I interpolate to say that the provision in Rule 7.11 is now that contained in Rule 12.30, although the words are not necessarily exactly the same.

12. The judge then went on, at paragraph 22 of his judgment:

> "On this alternative analysis, the only other point that arises is whether or not a single part of the bankruptcy proceedings, if that is what this trial is, can be transferred by me from the Swindon County Court to the High Court. I believe it can be separately transferred because there is nothing in Rule 7.11 which says that it cannot, and Rule 7.11(4) suggests that it can. Moreover, I note that in Muir Hunter on Personal Insolvency in the June 2009 update, the learned editors say, 'It is suggested that in urgent and exceptional circumstances where it would be more appropriate for a judge of the High Court to deal with an aspect of the bankruptcy proceedings but that the trial proceedings should otherwise remain in the County Court, the High Court could make a similar limited transfer order pursuant to Rule 7.11(4) without the formalities required by these transfer rules'."

The judge continued,

> "I respectfully agree with that conclusion and in these circumstances, if it were necessary, I make a limited transfer order under Rule 7.11(4) so as to ensure that the aspect of the bankruptcy proceedings concerned with the defendant's potential liability to the claimants in this action be transferred to this court".

13. So there the judge reached the opposite conclusion to that reached in the earlier two High Court decisions. The judge does not appear to have had either of those two earlier decisions

cited to him. It is difficult therefore to say how the judge would have dealt with them, but it occurs to me that there are at least two points to be made about the decision of Coulson J. The first is that the earlier decisions were decisions necessarily on different statutory provisions; that is to say Section 100(2) of the Bankruptcy Act 1914 and not Rule 7.11 of the then Insolvency Rules or indeed, Rule 12.30 of the current rules, so that they are strictly speaking decisions on other earlier provisions arising in a different policy context. Secondly, it is clear that in the new Insolvency Rules, as in the rules which Coulson J was applying, the new policy of the civil procedure system, relying as it does on the overriding objective, plays a significant part. Indeed the learned judge expressly referred to this, so that it may well be that, had Coulson J been referred to those two earlier decisions, he might well have said that they were to be distinguished from the case before him.

14. I also notice that the Insolvency Practice Direction, which has only recently come into effect, appears in paragraph 3.6 to contemplate the transfer of a part only of existing insolvency proceedings, presumably under Rule 12.30 (the general power of transfer), because that paragraph begins with these words:

> 'Where an application or petition for the commencement of insolvency proceedings or any application or petition within existing insolvency proceedings is issued in a County Court hearing centre having insolvency jurisdiction, unless the application or petition is local business, the application or petition, but more usually the entirety of those insolvency proceedings, shall be transferred…'

There is then a list of various options for such transfer. It seems clear to me that the draftsman of that paragraph clearly contemplated the possibility that there would be a transfer under the rules, not of the entirety of the insolvency proceedings, but merely of a part such as an application, entirely in accordance with the view of Coulson J in the *Hall & Van Der Heiden* case.

15. Therefore, the question of jurisdiction to transfer being raised, I have to make a decision on the point, bearing in mind of course that I am sitting here in the County Court and that I am tbound by decisions of the High Court which are otherwise relevant and on point. I should say, by the way, that neither side sought to rely on the provisions of Section 42 of the County Courts Act, although it is primary legislation, which gives power to the County Court to transfer both proceedings and indeed parts of proceedings to the High Court. Therefore, I put that on one side.

16. It seems to me that, notwithstanding that the decision of Coulson J did not take into account the decisions of Upjohn J and Scott J in the earlier cases, those earlier cases are of less

importance because they were made on a different statutory basis and at an earlier stage in the development of insolvency regimes in this country. In the current regime a surer guide for a judge sitting, as I am now, in the County Court is that of Coulson J only 10 years ago, where he was clear that it was possible for the court to transfer only a part of proceedings, in particular a single application, to the High Court. I have therefore reached the conclusion that I do have the power to make a transfer, if it is appropriate, of simply a single application within existing insolvency proceedings. I must therefore consider now whether that jurisdiction should be exercised.

17. As I have said, Miss Powers on behalf of the respondents says that none of the relevant factors to be taken into account in the Insolvency Practice Direction at paragraph 3.5 and the factors set out in CPR Rule 30.3 paragraph 2 are relied on in this case. As to that, Mr Fennell for the trustees in bankruptcy says that the factors are non-exhaustive and that there is a very good reason why the matter should be transferred to the High Court. This is the existence of High Court authorities on the point which the trustees in bankruptcy would wish to challenge in this case.

18. I myself pointed to the words in paragraph 3.5(1) of the Insolvency Practice Direction 'whether the proceedings raise new or controversial points of law or have wide public interest implications'. Miss Powers very gamely said that this was not controversial because there were two High Court decisions which had settled the point. But I do not think that the matter can be dismissed as easily as that. It seems to me that, if the trustees in bankruptcy on reasonable grounds and in good faith say that they intend to challenge the authority of the decisions at first instance in the High Court on the basis that they are wrongly decided, that that is something which can properly be regarded as controversial.

19. In addition, it seems to me that the points themselves are of some public interest in knowing whether or not or to what extent potential limitation defences are available in this kind of insolvency proceedings in the same way as they are in relation to private law proceedings under the Civil Procedure Rules. Therefore, I respectfully consider that this would be a good case in principle for the court to exercise its power to transfer the application to the High Court.

20. That brings me therefore to the argument put forward by Miss Powers that the trustees in bankruptcy are simply seeking to bypass the doctrine of precedent by which I am bound as a judge of the County Court. She said that, by transferring to the High Court, I could leave myself free (sitting as a judge of the High Court) to decide the point for myself, having

regard of course to the comity that exists at the first instance level in the High Court. Miss Powers referred me to the well-known decision of the Court of Appeal in *Howard de Walden Estates Ltd v Aggio* [2008] Ch 26, where the Court of Appeal set out in very clear terms the relevant rules of precedent in relation to the court dealing with the relationship between the High Court and the County Court: see at paragraphs 90, 92 and 94. She pointed to the need for certainty which is provided by the doctrine of precedent. She argued that it was wrong to take away from her clients who had issued their application on the basis that it was in the County Court because that was where these proceedings had to start and that there were binding authorities of the High Court, which predetermined in effect the result of their application. It was wrong to take away the advantage which the system gave to her clients and the certainty of the result which where they would obtain by transferring this matter to the High Court.

21. As I said during the argument, it seems to me that it is in no one's interests to spin this litigation out as long as possible. The sooner that we reach a resolution of the litigation the better. If there is to be a challenge to the decisions of the High Court then the sooner that challenge can be argued out and dealt with the better, rather than having an entirely sterile stage of the proceedings before the County Court where there can be no such resolution leading inexorably to an attempted appeal to the High Court and possibly beyond. Therefore, I am not impressed by the argument that the trustees in bankruptcy are simply seeking to bypass the doctrine of precedent. On the contrary, it seems to me they are seeking to meet it head on by arguing that the decisions are wrong. Whether they will succeed is an entirely different matter, but it seems to me that it is in the interests of the parties and indeed the public interest that the argument should be had sooner rather than later.

22. Accordingly, I will accede to the application of the trustees in bankruptcy and transfer the application of the respondents to the High Court. Sitting in the High Court, I will now continue to hear the latter application.

End of Judgment

Transcript from a recording by Ubiqus
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