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Re Preston; Preston v Beaumont and another
Preston v Beaumont and another

[2022] EWHC 234 (Ch), [2022] All ER (D) 78 (Feb)

The Chancery Division dismissed the appellant's appeal against the decision of the Country Court that adjudged the appellant bankrupt. The court held, among other things, that: (i) the judge was not wrong to treat the first hearing as anything other than a directions hearing, with the opposed petition to be heard on a future date; (ii) the judge did not fail to act in accordance with minimum expectations of due process; (iii) the judge was not wrong to conclude as a matter of principle that an opposition to a bankruptcy petition should not be considered where there had already been a determination of an application to set aside a statutory demand, even if the grounds were not ones previously taken at the demand stage; and (iv) the judge was not wrong to conclude that the grounds of opposition were an abuse of process because a number of the grounds could only be raised at the petition stage.

Catchwords

PRACTICE – BANKRUPTCY – APPEAL

Background

In February 2021, the County Court heard the first hearing to consider one of the appellant's grounds of opposition to the bankruptcy petition. There had been insufficient time remaining to consider the grounds in full, and, therefore, a further hearing had been required. Following the first hearing but before the further hearing the first of the judge's orders (the February order) had been received by the parties which provided that the opposition had been dismissed and that the bankruptcy petition would be adjourned for a further hearing.

In March 2021, the second hearing had taken place and the judge handed down a reserved judgment on the disclosure application (the disclosure judgment) and had given an ex tempore judgment dismissing the grounds of opposition to the bankruptcy petition (the bankruptcy judgment) having adjudged the appellant bankrupt.

The appellant appealed in the present proceedings on ten grounds that: (i) the judge was wrong in respect of the bankruptcy petition to have treated the first hearing as anything other than a directions hearing, with the opposed petition to be heard on a future date; (ii) the judge had failed to act in accordance with minimum expectations of due process, in particular, the appellant, and P, counsel representing him, had only one clear day's notice of the second hearing and the judge had failed to read the skeleton argument filed on behalf of the appellant, or to hear oral submissions; (iii) the judge was wrong to have concluded as a matter of principle that an opposition to a bankruptcy petition should not be considered where there had already been a determination of an application to set aside a statutory demand, even if the grounds were not ones previously taken at the demand stage; and (iv) the judge was wrong to have concluded that the grounds of opposition were an abuse of process because a number of the grounds could only be raised at the petition stage.

The appellant appealed on other/further grounds of which permission on grounds (v) and (vii)-(ix) had been limited to the extent that those grounds flowed from grounds (i)-(iv).

In September 2021, following the appellant having renewed his application for permission in respect of grounds (vi) and (x) it had been ordered that the application was to be heard together with the appeal. Ground (vi) was that the judge was wrong to have heard and made the bankruptcy order at the second hearing in circumstances where the petition had not been effectively served; and ground (x) was that the judge had wrongly dismissed the claim that the first respondent petitioner had been unreasonable in refusing an offer of payment.

Issues and decisions

(1) Whether the first hearing should have been a directions hearing for the second hearing, and if in fact it was, whether the appellant was properly allowed to put his case at the second hearing.

At the first hearing, the judge had considered whether further directions would be required and concluded that they were not. As such, the hearing was a directions hearing, simply one at which the judge determined that no further directions were required. The judge further dismissed the disclosure application and rejected the idea that there had been a proposal to pay, but otherwise made no determination of the bankruptcy petition, which she had listed for a later date. She stated that an hour should suffice, and that was agreed. An hour would not have been required for the handing down of a reserved judgment. The judge had obviously intended to address other matters; that meant the hearing of the petition. The judge had anticipated that the second hearing would address the grounds of opposition and that one hour would suffice for that (see [16], [21] of the judgment).

At the second hearing, the exchange had been consistent with the question of the bankruptcy still being an open one to be determined; it was flatly inconsistent with the terms of the February order. That was further reflected in the bankruptcy judgment. The judge considered and dismissed each of the grounds of opposition. There would have been no need for her to do that in an ex tempore judgment if the notice of opposition had already been dismissed by the February order (see [23], [24] of the judgment).

It was clear that there had been an error in drawing up the February order that had not been detected by the judge before it was issued. CPR 40.12 permitted the parties in such circumstances to apply to have the order corrected. Although the appellant had raised the point in the skeleton for the second hearing, and the inconsistency in the course of the submissions before the judge, no such application had been made. Had that been done, the February order would have been corrected, as it was evident that the judge went on to consider and determine the grounds of opposition only at the second hearing. It followed that the judge had followed her directions and had heard the grounds of opposition at the second hearing (see [25], [26] of the judgment).

In the present case there had been little, if any, prejudice. It had always been the case that the gap between the first hearing and the second hearing would be short, and it was P herself who had first mooted the second hearing date. The appellant had had time to prepare and submit a further skeleton argument and P had been able to appear on his behalf. The allegation that the judge had not read the appellant's skeleton argument was based on the first respondent's skeleton and what was said to be the undue reliance placed on that skeleton. The judge had referred to the appellant's witness statement which had contained a mixture of evidence and submission which had addressed all of the grounds of opposition, which the appellant's skeleton had not, and the bankruptcy judgment had dealt with the various grounds of opposition in the same order that they were handled in the appellant's witness evidence. Given the more comprehensive nature of the witness statement it would have been logical for the judge to draw more heavily from that document, particularly in circumstances where she had the statement (and the first respondent's skeleton) throughout the period between the first and second hearings but had only received the appellant's skeleton the day before. It did not follow that the judge had not read the skeleton; she simply had had no need to refer to it in her judgment (see [28]-[30] of the judgment).

Further, the judge had plainly received the appellant's skeleton. When P had raised the apparent issue with the terms of the February order, which had been an issue raised in the skeleton but not in the appellant's witness statement, the judge had been familiar with the point. That strongly suggested that she had read the skeleton. It was therefore clear that the judge both received and read the appellant's skeleton in advance of the second hearing. She plainly had not agreed with it, but that was not something that undermined due process (see [31], [32] of the judgment).

It was true that the appellant had not put in responsive evidence for the second hearing, but it was also true that the responsive evidence he had sought to advance, for use at the present hearing, had been excluded. There was no reason to believe that he would have had a different outcome before, so he could not be said to have been prejudiced in that regard. In the circumstances, the fact that the appellant had limited notice of the second hearing had not caused any obvious prejudice (see [33], [34] of the judgment).

The fact that directions were considered by the judge at the first hearing had meant it left no independent role for ground (i). Both aspects of ground (ii) would fail (see [18], [25], [34] of the judgments).

Ladd v Marshall [1954] 3 All ER 745, [1954] 1 WLR 1489 applied

(2) Whether the judge had erred in concluding as a matter of principle that an opposition to a bankruptcy petition should not be considered.

There were two findings which had relied on abuse of process. First, the bankruptcy judgment had related to the appellant's witness statement which had addressed two issues: double recovery by virtue of an alleged right of the first respondent to recover under a policy of insurance; and quantum in respect of a costs award. However, the appellant recognised that the costs issue went to quantum and so was dealt with under a different head. As such, the bankruptcy judgment was dealing only with the double recovery point. In his statement, the appellant had recognised that the judge was being asked to revisit an issue that was addressed at the set aside stage but argued that there was fresh evidence. The judge ruled that there was no change of circumstances. That was a finding that she was plainly entitled to make. The issue of double recovery had been central to the disclosure application argued at the first hearing and was at the heart of the disclosure judgment, such that the judge was fully apprised of it. Having made that finding, she had been right to conclude that the attempt to re-argue a decided point was an abuse of process (see [38], [39] of the judgment).

Second, the judge found that the 'deposit issue' had been one previously dealt with in a previous judgment in 2019 (the 2019 judgment). In his witness statement, the appellant in fact made two points in respect of the deposit: that the deposit was not protected in accordance with s 213 of the Housing Act 2004 (the deposit issue); and that certain prescribed information was not provided in the form provided by the Housing (Tenancy Deposits) (Prescribed Information) Order 2007, SI 2007/797 (the additional deposit issue). Referring to the 2019 judgment, the appellant asserted that only the additional deposit issue had been dealt with by that judge, who found that there was no triable issue in respect of it. That assertion did not reflect the 2019 judgment. The deposit issue had been dealt with; and the additional deposit issue had been addressed. In both cases that judge had found that there was no genuinely triable issue. Those findings were not appealed and so were final (see [40]-[42] of the judgment).

It followed that the judge was right to have found that the issue had been before the judge in the 2019 judgment, and right to have found that an attempt to reopen the point before her was an abuse of process. Accordingly, grounds (iii) and (iv) would fail. To the extent that the judge had dismissed arguments as being an abuse or process, she had been right to do so (see [43], [44] of the judgment).

Ground (v), (vii)-(ix) could only have formed the basis of an appeal to the extent that they flowed from grounds (i)-(iv). It followed that there was no way they could do so, and they would also fail (see [45] of the judgment).

(3) Whether the judge was wrong to have heard and made the bankruptcy order at the second hearing in circumstances where the petition had not been effectively served.

The judge had relied on the evidence as to service, which she had been entitled to do. The appellant, in his skeleton for the second hearing complained that he had not had the opportunity to put in responsive evidence. However, the trial judge considered the witness statement that the appellant sought to adduce and had excluded it (see [46] of the judgment).

Accordingly, there was no further evidence to consider and no basis to revisit the trial judge's finding of fact (see [46] of the judgment).

(4) Whether the judge had wrongly dismissed the claim that the first respondent had been unreasonable in refusing an offer of payment.

The ground related to the judge's exercise of her discretion under s 271(3) of the Insolvency Act 1986. In her judgment she had identified the correct test and gave full reasons for the exercise of her discretion (see [47], [48] of the judgment).

Accordingly, there had been no basis to revisit that exercise and ground (x) would also fail. The appeal would be dismissed (see [48], [49] of the judgment).

Appeal dismissed.

Judgment date
8 February 2022

Judge
Richard Farnhill (sitting as a deputy judge of the Chancery Division)

Representation
Miss Wendy Parker (instructed on a direct access basis) for the Appellant.
Mr David Warner (instructed by Trethowans LLP) for the First Respondent.

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