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Re Kraus (in bankruptcy) Horton (as trustee in bankruptcy of Kraus) v Eurobeam Services Ltd and others

[2023] EWHC 173 (Ch), [2023] All ER (D) 10 (Feb)

The Chancery Division decided the costs of an application brought by the applicant as trustee in bankruptcy of the debtor pursuant to s 366 of the Insolvency Act 1986. The court held, among other things, that (i) the first respondent should be ordered to pay the trustee's costs of and occasioned by the s 366 application, including the costs of and occasioned by a joinder application, up to and including the hearing of 9 October 2018; and (ii) the third respondent should be jointly and severally liable with the first respondent for the trustee's costs of and occasioned by the joinder application, up to and including the hearing of 9 October 2018 and solely liable for the costs of and occasioned by the s 366 application from the date of his joinder as a respondent on 9 October 2018 to the date of the trustee's written election in April 2020 not to proceed further with the s 366 application.

Catchwords

PRACTICE – COSTS – TRUSTEE IN BANKRUPTCY

Background

In January 2016, the debtor was adjudicated bankrupt. In March, the applicant trustee was appointed. As a result of investigations into the debtor's affairs, the Official Receiver and the trustee became aware of an alleged loan of £300,000 to the debtor from the first respondent company (Eurobeam) (the Eurobeam loan). That was purportedly secured upon the debtor's matrimonial home (the property) by way of a second charge (the charge).

At the material time, a friend of the debtor (R) was the sole director of Eurobeam and was an equal shareholder in it, together with his wife. The second respondent (BNI) was a firm of solicitors which had acted for Eurobeam in connection with the Eurobeam loan.

The trustee sought details of the recipients of certain funds. No substantive response having been received, in December 2016, he applied to the County Court at Central London for relief against both Eurobeam and BNI under [s 366](#) of the Insolvency Act 1986.

At a hearing in January 2017, the District Judge QC made an order directing the trustee to write to each of the respondents by a given date requesting any further information or documentation required, directing the respondents to provide the information and documentation, and directing the trustee to file and serve his evidence in reply thereafter.

Subsequently, R and another stated that, of the sum of £300,000 originally said to have been advanced by Eurobeam in April/May 2015, £122,000 represented loan money said to have been advanced informally by R personally to the debtor (the Roth loan).

In October 2019, joinder of R as third respondent to the s 366 application was ordered.

The trustee sought an order: (i) that Eurobeam and R (jointly and severally) should pay the trustee's costs of and

occasioned by the joinder application; (ii) that Eurobeam alone pay the trustee's (other) costs of and occasioned by the s 366 application up to 9 October 2018 and (iii) that Eurobeam and R (jointly and severally) should pay the trustee's costs of and occasioned by the s 366 application from 9 October 2018 onwards.

Eurobeam and R sought an order that the trustee should pay their costs of and occasioned by the s 366 application.

Issues and decisions

Whether the trustee's application would be allowed.

On the evidence, the trustee's legitimate enquiries regarding the Eurobeam loan, the Roth loan and the charge would not have been adequately addressed without the issue and continued pursuit of s 366 proceedings. The approach adopted by Eurobeam and R had been obstructive and ambiguous from the outset. Even after issue of the proceedings, there had been repeated failures to respond and/or properly to engage with the trustee. The trustee had been reasonably entitled to conclude throughout that there was a serious ongoing risk that Eurobeam and latterly R would not cooperate with him otherwise than under compulsion of a court order (see [145] of the judgment).

It was clear that the s 366 proceedings had largely achieved their purpose: the provision of documentation and information on the debtor's dealings, affairs or property. In addition, in relation to the costs of and occasioned by the joinder application, the trustee had clearly been the successful party (see [146] of the judgment).

Neither Eurobeam nor R had made out a persuasive case for an order for costs in their favour. The trustee could not on any footing be described as the unsuccessful party. Eurobeam and R had been under a public duty to assist the trustee in his legitimate enquiries regarding the Roth loan, the Eurobeam loan and the charge. Their lack of constructive engagement had been unreasonable. Eurobeam and R only had themselves to blame for the length of time and number of hearings it had taken to bring the s 366 proceedings to a close, and the costs involved in that process (see [148] of the judgment).

Consequently: (i) Eurobeam would be ordered to pay the trustee's costs of and occasioned by the s 366 application, including the costs of and occasioned by the joinder application, up to and including the hearing of 9 October 2018; (ii) R would be (a) jointly and severally liable with Eurobeam for the trustee's costs of and occasioned by the joinder application, up to and including the hearing of 9 October 2018; and (b) solely liable for the costs of and occasioned by the s 366 application from the date of his joinder as a respondent to the date of the trustee's written election not to proceed further with the s 366 application (see [149] of the judgment).

Further, both Eurobeam and R would be ordered to pay the trustee's costs of and occasioned by the trustee's subsequent application, made under the liberty to apply provision contained in the order of 29 October 2019, for a further hearing to be listed on the issue of costs (see [150] of the judgment).

Hunt v Renzland [\[2008\] BPIR 1380](#) considered

Care People Ltd, Re [\[2013\] All ER \(D\) 254 \(Oct\)](#), [\[2013\] EWHC 1734 \(Ch\)](#) applied

Harvest Finance Ltd (In Liquidation), Re; Jackson v Cannons Law Practice LLP [\[2014\] EWHC 4237 \(Ch\)](#), [\[2014\] All ER \(D\) 216 \(Dec\)](#) applied

Judgment date

1 February 2023

Judge

ICC Judge Barber (Chancery Division)

Representation

Dawn McCambley (instructed by Ince Gordon Dadds LLP) for the applicant.
Stephen Innes for the first and third respondents.

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