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IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURT
IN MANCHESTER (ChD)
CHANCERY APPEALS (ChD)
[2022] EWHC 2731 (Ch)



No. CH-2021-MAN-000004

Manchester Civil Justice Centre
1 Bridge Street West
Manchester
M60 9DJ

Wednesday, 13 July 2022

IN THE MATTER OF THE **INSOLVENCY ACT 1986**

Before:

THE HON. MR. JUSTICE FANCOURT
VICE-CHANCELLOR OF THE COUNTY PALATINE OF LANCASTER

B E T W E E N :

CAGE LITIGATION LIMITED
(Formerly Cage Consultants Limited)

Intended Respondent

- and -

(1) NAVEED IQBAL

(2) REHANA KAUSER IQBAL

Intended Appellant

MR J. VICKERY (instructed by Viceroy Law) appeared on behalf of the Intended Appellant.

MR S. HODGE (instructed by Mills & Reeve LLP) appeared on behalf of the Intended Respondent

No appearance or representation on behalf of Naveed Iqbal

Hearing date: 13 July 2022

A P P R O V E D J U D G M E N T

THE VICE-CHANCELLOR:

- 1 This is an application for permission to appeal out of time and, if that permission is granted, for permission to appeal against an order of District Judge Richmond, dated 13 May 2021, with the appeal to follow if permission is granted.
- 2 The appellant is Mrs Rehana Iqbal who was the second respondent to the application that the District Judge heard. Mr Vickery of counsel appeared on her behalf today. Mr Hodge of counsel appears on behalf of the applicant in the court below, Cage Consulting Limited (“Cage”).
- 3 The District Judge heard a three-day trial of an application, first issued on 12 February 2019 by Cage, as assignee of the liquidator of a company called Totalbrand Limited. The application was for orders against Naveed Iqbal and Rehana Iqbal in relation to matters alleged to be either transactions at an undervalue, or transactions defrauding creditors or preferences entered into between that company and the two respondents to the application.
- 4 Mr Naveed Iqbal, the first respondent, was a director of the company until November 2015 and Rehana Iqbal was the wife of the other director of the company, Saeed Iqbal, who remained a director until the company went into liquidation on 28 July 2016. Naveed Iqbal is the brother of Saeed Iqbal and so the brother-in-law of Mrs Iqbal.
- 5 The District Judge found that Saeed Iqbal was the driving force behind the company and that the husband and wife directors were acting in accordance with his directions so far as all financial matters were concerned. At the end of the trial, the District Judge gave an *ex tempore* judgment. He held that Naveed Iqbal had acted in breach of his fiduciary duties to the company, causing it a loss of £80,000 and further held that payments made by the company to Mrs Iqbal, between 10 December 2015 and the liquidation, amounting to £127,340 in total, were preferences. The District Judge therefore entered judgment against them both in those amounts, plus interest and costs, and in the case of Mrs Iqbal, for an extra 10% in accordance with the provisions of CPR Part 36.
- 6 The District Judge refused both respondents permission to appeal, and both of them applied to the High Court for permission. Mr Naveed Iqbal's application has been compromised and withdrawn. Mrs Iqbal's application is still on foot, notwithstanding a failure to comply with an unless order earlier in the proceedings, for which she was (just) granted relief against sanctions at an earlier time. Her appellant's notice was issued about fourteen days late. The reason for that was that the notice was wrongly sent to the court by post, rather than CE-filed. At all times, Mrs Iqbal has had a firm of solicitors acting for her, Viceroy Law, but they appear to be less than fully conversant with the rules of court for dealing with appeals.
- 7 However, the court office took almost two weeks to return the incorrectly-filed written documents to Viceroy Law, who then, without any further delay, CE-filed the appellant's notice. It is therefore fair to say that the delay in this case in filing an appellant's notice has two separate causes, and it is not entirely the fault of Ms Rehana's solicitors. If there is arguably merit in the proposed appeal, it would, in my judgment, be wrong to allow the delay in issuing the appellant's notice to prevent it from being considered further on its merits.

- 8 Although a relief against sanctions approach applies to the late filing of an appellant's notice, and the breach is serious and unexplained, in the sense that there is no good reason given for it, the court has to take into account all the circumstances. It counts against Mrs Iqbal that she has previously been granted relief against sanctions for a different failure. However, if the major part of the delay in issuing the appellant's notice was down to the court office, it seems to me it would be very harsh to refuse relief. For that reason, I will therefore, in this case, grant the permission to appeal out of time, and move on to consider whether permission to appeal should be granted.
- 9 The evidence that was before the judge was quite heavy in terms of documents. He also heard from a number of witnesses, including Mr Saeed Iqbal and Mrs Iqbal. There were three different types of payments that were claimed as preferences against Mrs Iqbal. These were, first, for about £41,000, ostensibly paid to her for rent or rent arrears, second, some so-called wages amounting to £6,840, and third, the largest amount, £81,200, said to be in respect of repayments of loans made by her to the company.
- 10 The District Judge concluded on the basis, principally, of the evidence of Mrs Iqbal's husband, Saeed, that he had, by making the payments to his wife, intended to get the money out of the company somehow into his wife's and his hands by any means available to him. It is important to set out the relevant part of the judgment of the District Judge in which he expresses his conclusions. The relevant paragraphs are paragraphs 38-42 as follows:-
- "38. Mr Vickery will forgive me for saying that his is the approach that I think perhaps overthinks it because he has come up with many varied and novel arguments as to why these individual sums should not be paid but at the end of the day, I think with the exception of that very first payment of £850 for the wages, I think he is well and truly caught by the evidence that Shahid Iqbal gave. As I say I found him to be a credible witness, and if I find him to be a credible then I have to accept him, if I can use the phrase that my mother would have used, warts and all.
39. That is this. Very, very clearly in response to cross-examination he said he was just trying to get the money to his wife. I am afraid these transactions, label them how you will, all have the hallmarks of a company which is going down, of a director trying to move money out of the company to his wife, give them any name he possibly can in the hope of rescuing something of the money that has been put in. As I say I do not think one can, for example, consider this to be the sort of running account arrangement which was referred to me in authority.
40. It might be different if it is two companies, it might be different if it is a bank and an individual perhaps. It is certainly not the case when it is a family and a family in which as I find that Shahid Iqbal was really the prime mover. The truth of the matter is that these monies were coming in and out of the account as Shahid wished them to and as he said himself, *'I want to get these monies out'*. The company was insolvent at the relevant time, and I have absolutely no doubt that they were all a fraudulent preference, insofar as there need to be preferences, because that is what Mr Iqbal's evidence amounts to.

41. He was preferring his wife to everybody else. The company was therefore preferring his wife to everybody else, and the wages were transactions at an undervalue because they were not really wages at all. On the evidence as it has come out to me what they really were payments that Mr Iqbal was speedily trying to get out of the company in the hope of rescuing something, and as I go back to the cross-examination question that was put to him by Mr Groves, he wanted to get the money out to his wife.
42. I think really, although I think Mr Vickery it was who landed upon it that Mrs Iqbal was perhaps annoying her husband to get this money out, I felt actually on the evidence as it came out that was really rather a lame excuse. The truth of the matter, as I have said, is that Shahid Iqbal was the prime mover. I do not think it mattered whether his wife was nagging him for money to pay the mortgage or not. If he felt that money was needed to pay the mortgage, he would move it out and then the money could go back in and the money could go out and the money could go back in, and these payments were all preferences and I do not think he could have a running account."

- 11 The reference to a "running account" in that passage is to a relationship between a company and another party where, as summarised by Mr Vickery on behalf of Mrs Iqbal, there is first an active account between them, second, there is a creditor debtor relationship, and third, there is an expectation of further or continuing debits and credits on the account. What the District Judge was saying in his judgment is that this cannot be considered to be the sort of running account arrangement which was referred to in an authority cited to me, namely Professor Sir Roy Goode's textbook on commercial law.
- 12 There is no challenge to the findings of fact made by the District Judge as to Saeed Iqbal's intentions in paying money out of the company to his wife, or to the finding of the insolvency of the company at the relevant times. There is, therefore, on the judge's findings, in addition to the presumption of an intention to prefer a spouse of a director, a positive finding that Saeed Iqbal did intend to prefer his wife in making these payments.
- 13 The issue that arises on appeal relates to the reference in the judgment to the relationship with Mrs Iqbal not being a running account relationship. The two grounds of appeal that are still live are the following –
 1. The District Judge erred in law in holding as between the second respondent and Totalbrand Limited there could not be a running account.
 2. Having found that Mrs Iqbal had been preferred within the meaning of section 239 of the Insolvency Act in the sum of £127,340, the learned District Judge erred in law in failing to give any credit for payments from the second respondent to the company during the relevant period. The relevant period referred to there is 10 December 2015 to 28 July 2016.
- 14 Mrs Iqbal's evidence was that she owned a property at 60 Sherborne Street, Cheetham Hill, Manchester, of which the company was the tenant. She says that it had been agreed the company would pay for the property at the rate of £35,000 a year, monthly in advance. The

company paid sporadically and was in arrears, and the rent was then paid. She said in relation to wages, she was a machinist, being paid by the company for working sixteen hours a week.

- 15 She says nothing in her witness statement about any relationship of lender and borrower, as between the company and her, or in relation to the making of loans, other than a short passage in her witness statement in relation to rent, where she says as follows,

"It was only when I insisted that the rent be paid by the company, that he arranged for it to be paid and he often asked me to lend the monies paid back to the company."

- 16 Mr Vickery has helpfully produced in his skeleton argument a table of payments which identify sums passing between the company and Mrs Iqbal, and identified them as being either wages or rent or loan. There was no evidence at all before the District Judge in relation to these matters, other than bank statements. There was no oral evidence that explained, other than in the passage in Mrs Iqbal's witness statement that I have just referred to, why and on what basis rent was being paid, or why wages were being paid, or why there was a relationship of lender and borrower between the company and Mrs Iqbal. There were, as I say, merely bank statements from which Mrs Iqbal seeks to extract a narrative of a running account between her and the company in relation to loans.

- 17 The arguments which have been advanced on behalf of Mrs Iqbal by Mr Vickery in relation to ground one of the appeal are essentially the following –

1. That the District Judge was wrong to conclude (if he did conclude) that it was not possible for there to be a running account relationship between a company and the wife of a director. If the District Judge had reached that conclusion of law, then I agree that he would have been wrong to do so, but I do not consider he did find his decision on the basis of any legal as opposed to factual conclusion.
2. The District Judge should have considered in his judgment, and he did not consider, what a running account was. I have already summarised the essence of it, and it is true that the District Judge did not say in his judgment what he considered a running account to be, although he did refer to extracts from Professor Goode's textbook.
3. Third and most materially, Mr Vickery submits that if the District Judge had considered more carefully what the nature of a running account was, he would have come to the conclusion that there was a running account on the facts of this case between the company and Mrs Iqbal.

- 18 Mr Vickery says that the payments themselves, as summarised in his table, are evidence of a creditor/debtor relationship on a continuing basis, and that the District Judge should have concluded, on the basis only of this evidence of payments going back and forth, that there was such a relationship.

- 19 I am wholly unable to accept that argument, attractively though it was put. The key finding of the District Judge, which Mr Vickery is not able to challenge, is that it was Mr Saeed Iqbal who decided when payments were made out by the company to his wife. The evidence before the District Judge was that it was Mr Iqbal who decided when any payments were made in the opposite direction.

- 20 The attempt to establish a running account relationship simply on the basis of payments in and out fails because it simply assumes what is sought to be established, namely that the payments each way are in the nature of a running account. The evidence before the District Judge was to the contrary. Although there was no proper explanation of the reasons why individual payments were made at the time they were, Mr Saeed Iqbal had said it was all about getting money out of the company and paid to his wife.
- 21 I am unable to accept in those circumstances, on the facts that the District Judge found and which are not challenged, that there was even arguably a running account relationship here. It is not, I emphasise, because Mrs Iqbal was the wife of a director of the company, but because there was no evidence to establish that there was a relationship of that kind between the company and Mrs Iqbal, as opposed to her being a convenient recipient of monies from the company at Mr Iqbal's direction, which then, on occasions, were directed by him to be repaid, for whatever reason, to the company.
- 22 Mr Vickery said the District Judge was wrong to find that there was any preference in this case, because if one looks at the schedule of payments backwards and forwards, it is possible to conclude that over time (and in one example on a single day) a sum paid by the company to Mrs Iqbal was repaid, and therefore the company was no worse off overall and therefore there was no preference. I do not accept that his argument is correct as a matter of law, unless it can be proved that there was a running account.
- 23 The statutory provisions in section 239 of the Insolvency Act require one to look at each payment (or other thing done) to a creditor at a relevant time when a company was insolvent and consider the intention with which the payment was made. A preference is given if the company does anything vis-à-vis a creditor which has the effect of putting that person in a better position in the event of the company going into insolvent liquidation: s.239(4). If any payment was made at a relevant time with the intention of putting the recipient of that payment into a better position then it is a preference. I therefore consider that ground one has no reasonable prospect of success.
- 24 Ground two is an attempt to overturn the exercise of discretion by the District Judge who, having found there was no running account, then had to consider whether it was appropriate to order the sums paid to Mrs Iqbal to be repaid. Again, there is no challenge to the factual findings and on this occasion, the challenge to the exercise of discretion is twofold.
- 25 First, it is said that the District Judge should have looked at the fact that according to Mr Vickery's helpful table, on occasions it is possible to say that the sums paid to Mrs Iqbal were shortly afterwards repaid. On one occasion, indeed, this was even on the very same day as the payment out was made. He therefore suggests that, as a matter of discretion, the judge should have taken into account that there was, effectively, a repayment.
- 26 The judge did not address this issue specifically in his judgment, though Mr Vickery assures me it was an argument raised at the hearing. Nevertheless, the insuperable difficulty facing it, in my judgment, is that there was no evidence to establish that the monies which, from time to time, were paid out of Mrs Iqbal's account to the company, were in the nature of a connected payment or repayment, with earlier sums that had been paid out to her. For example, on Mr Vickery's table, the first four items are payments to Mrs Iqbal in December 2015, and there is then a sum paid on 15 January 2016, from Mrs Iqbal to the company, in a slightly

larger amount, but at a time between just over a month and two weeks after the various payments that were made to Mrs Iqbal.

- 27 These might or might not have been connected but there was no evidence to establish that the later payment was in the nature of a repayment or, indeed, that the payment made to Mrs Iqbal in the first place was of a repayable sum. In the absence of any such evidence, I do not see how the District Judge could rationally have decided to exercise his discretion against ordering payment of the preferences on the basis that there was a later repayment and so the company and its general creditors were in no worse position. I accept in principle that such an argument may be available, and can be a reason for exercising discretion in favour of the payee. However, that presupposes that the connection between the later repayment and the earlier payment is established by evidence.
- 28 The high point of Mr Vickery's case was really the three payments at £25,000 that were all made on 18 May 2016. First, one to Mrs Iqbal; then one back to the company; and then a further payment in the same amount to Mrs Iqbal. The net effect of these payments is that £25,000 was paid on that day to Mrs Iqbal, not £50,000. Whether that was in substance the intention of transaction was not established in evidence. Indeed, the only evidence that was given in relation to these matters, I was told by Mr Hodge on instructions (Mr Hodge not having been counsel at the trial, but Mr Vickery did not demur in his reply), was that when Mr Saeed Iqbal was asked about those payments he said they were not a mistake, but offered no other explanation.
- 29 In those circumstances, one obvious inference that could be drawn, namely that the repayment by Mrs Iqbal was a mistake, which was then reversed, was not available to the District Judge, and there was no other sufficient explanation to justify a netting off approach as a matter of discretion. Thus, it seems to me that that argument cannot be sustained on the facts of this case.
- 30 The further argument advanced by Mr Vickery was that the effect of section 239(3) of the Insolvency Act, 1986, requires the court to take that approach. The sub-section reads as follows:-
- "The court shall, on such an application, made such order as it thinks fit, for restoring the position to what it would have been if the company had not been given that preference."
- 31 Mr Vickery submits that this requires the court to consider the overall position as far as the company is concerned, taking account of later payments that were made, so that it is only the net amount of the loss, as it were, to the company that is relevant. I am unable to accept this argument. By virtue of s.239(3), the court shall make an order to restore the position to what it would have been if the company had not made *that preference*. Regardless of what may happen afterwards, e.g. a repayment of the sum, it is only where a relationship in the nature of a running account is established, which is not the case here, that one can net off the position between the company and the creditor in overall terms. (Of course, if a payment is genuinely made with a view to its being repaid then it is unlikely that the company was influenced by a desire to put the creditor into a better position.) .
- 32 Therefore, although the District Judge did not consider these matters in his judgment, it seems to me that both arguments advanced in relation to this ground are doomed to fail, once it is

established that there was no running account between the company and Mrs Iqbal and there being no evidence that the payments made were in the nature of loans.

- 33 For all the reasons I have given, perhaps at too great length, I therefore refuse the application for permission to appeal.
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CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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