Neutral Citation Number: [2014] EWHC 3566 (Ch)

Appeal Reference CH/2014/0200

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
ON APPEAL FROM THE HIGH COURT OF JUSTICE
IN BANKRUPTCY
IN THE MATTER OF DOUGLAS JOHN MAGGS

Date: 30/10/2014

Before :

Mr John Baldwin QC

(sitting as a Deputy Judge of the Chancery Division)

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Between :

LUDSIN OVERSEAS LIMITED	Appellant/Creditor
- and –	
DOUGLAS JOHN MAGGS	Respondent/Debtor

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- -

Gregory Banner (instructed by Wallace LLP) appeared on behalf of the Appellant.

Jonathan McNae (instructed by Jeffrey Green Russell Limited) appeared on behalf of the Defendants.

Hearing date: 23 October 2014

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Judgment

1. This is an appeal from the order of Deputy Registrar Lawson dated 28 March 2014 whereby he set aside a statutory demand on the basis that the creditor, the Appellant, had the benefit of a security which was of greater value than the debt, and he made a costs order including an order for an interim payment in spite of the fact that the sums owing to the creditor were far in excess of the monies which might be payable to the debtor by way of costs. There is also an application to adduce fresh evidence on appeal as well as an application that this appeal be by way of rehearing rather than review.

2. The relevant provisions for setting aside statutory demands where there is some security for the debt are in Rule 6.5 of the Insolvency Rules. That Rule provides, so far as is relevant, as follows:

> 6.5 ...
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> (3) On the hearing of the application [to set aside], the court shall consider the evidence then available to it, and may either summarily determine the application or adjourn it, giving such directions as it thinks appropriate.
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> (4) The court may grant the application if—
>
> (c) it appears that the creditor holds some security in respect of the debt claimed by the demand and... the court is satisfied that the value of the security equals or exceeds the full amount of the debt;

Thus it is crucial to know whether the value of the security equals or exceeds the amount of the debt.

3. The debt in this case arises out of the judgment of Ms Vivian Rose dated 19 June 2012 wherein she found the Respondent, Mr Maggs, liable to the Appellant, Ludsin, for fraudulent misrepresentation. Judgment was entered against Mr Maggs (and others) in the sum of £1,400,000 together with interest of £356,000 and costs. An appeal to the court of appeal was dismissed and on 31 May 2013 Ludsin served a statutory demand (dated 8 May 2013) on Mr Maggs for the unsatisfied part of the judgment due to it, being over £350,000 at that time.

4. On 14 June 2013, that is to say, subsequent to the issue of the statutory demand, Ludsin obtained an interim charging order over Mr Maggs' interest in a property in Oxfordshire known as Bellmans. A final charging order was made on 29 July 2013. However, that charge ranked behind (a) a legal charge over Bellmans in favour of Mr Maggs' and his wife's mortgagee, and (b) a final charging order in

favour of another judgment creditor, an entity known as DPM, over Mr Maggs' interest in Bellmans.

5. During the summer of 2013 some payments were made to reduce the debt and by the time of the hearing before Deputy Registrar Lawson it was common ground that the debt was (a) over £300,000 and (b) was not fully secured unless Bellmans was worth more than just over £2.9 million.

6. The application to set aside the statutory demand came before Chief Registrar Baister on 24 July 2013 and he adjourned it indicating, but not ordering, that the parties should agree a valuation of Bellmans. The matter came before the court again on 19 September 2013 and Deputy Registrar Nicholas Briggs adjourned the application again and gave directions, *inter alia*, to the effect that the parties shall jointly instruct an expert to report on the open market value of Bellmans. I was told that there was no discussion before the court as to whether or not the valuation was to be 'open market' and that this was something the Deputy Registrar inserted into the order of his own motion.

7. I was shown correspondence to the effect that when it came to instructing the expert, Ludsin sought to obtain a 'forced sale' valuation as well as an 'open market' one, but Mr Maggs did not consent to this since the order of 19 September 2013 did not provide for it.

8. A further hearing was scheduled for 19 November 2013 and this was adjourned by consent to allow RICS to appoint a single joint expert on the open market value of Bellmans. There was a further adjournment by consent on the 17 January to enable a Mr Green, the appointed expert, to prepare a report 'on the value' of Bellmans. He duly prepared his report on the open market value and concluded, albeit with some caveats, that the open market value of Bellmans was £3.35 million. The matter came before Deputy Registrar Lawson on 3 March 2014 and in addition to the report of Mr Green, there was a walk-by valuation from Savills at £2m to £2.5m (given 22 January 2013) as well as a much higher valuation given by an acquaintance of Mr Maggs. The Deputy Registrar reserved judgment.

9. Prior to hand down of the judgment but after a draft had been circulated to the parties, Ludsin made further representations to the Deputy Registrar as a result of new matters which had come to light. It transpired that on 25 March 2014 DPM,

the entity with a higher ranking charge over Bellmans than Ludsin, had been granted an order for the sale of Bellmans, with vacant possession to be given by 16 June 2014. The 'floor price' in the court's order, below which DPM would have to seek permission before effecting a sale was £2.5 million and this figure, apparently, was set by reference to valuation evidence adduced by DPM and presented to the court. Neither Mr nor Mrs Maggs had challenged this valuation on the application by DPM and Ludsin considered this to be an acknowledgement by them that Bellmans was worth less than Mr Green had opined, and less than the sum which would secure its debt. Ludsin wrote to the Deputy Registrar apprising him of these new matters and urged him to reconsider the terms of his draft judgment and grant an adjournment of the application to set aside so that this recent development could be explored more fully or until Bellmans was sold.

10. There was further oral argument prior to hand down and the Deputy Registrar decided that the valuation evidence of Mr Green was the only valuation evidence before him, that the matters with respect to the order recently obtained by DPM, including the valuation evidence adduced by DPM, were not in evidence before him, and he found no reason to depart from his draft judgment which he duly handed down. In that judgment he considered the evidence before him and was satisfied that the value of the security equalled or exceeded the full amount of the debt and he set aside the statutory demand. He was also of the view that it would not be right for him to adjourn the application until Bellmans was sold. It is that judgment which is under appeal.

11. The main challenge to the Deputy Registrar's judgment was that he, mistakenly, treated the open market valuation given by Mr Green as the appropriate valuation for assessing whether or not the debt was adequately secured. Counsel for Ludsin, argued, relying on the observations of Sir Christopher Slade in *Platts v Western Trust and Savings Limited* [1996] BPIR 339, 347G[1], that the valuation of a property on the basis of a forced sale was the correct basis. He pointed out that, as a matter of fact, the parties had not agreed that the open market value was the appropriate value and submitted that what the Deputy Registrar should have done

[1] "On the face of it, the debtor's valuation evidence is perhaps less persuasive than that of the lenders, because it does not appear to value the property on the basis of a forced sale, which would itself seem to me to be the correct basis."

was discount the open market value by an appropriate factor to reach the forced sale value or adjourn the matter for further evidence about the proposed sale of Bellmans.

12. It is now appropriate to consider whether the fresh evidence should be admitted and whether or not the appeal should take the form of a review or rehearing. It was common ground that if the fresh evidence were not admitted, then the hearing should take the form of a review – see CPR 52.11(1). Counsel for Ludsin submitted that if the fresh evidence were admitted, then the interests of justice demanded that the appeal take place by way of rehearing. Counsel for Mr Maggs disagreed. To make sense of all this, it is necessary to consider the fresh evidence. There was no dispute about the criteria which must be satisfied on an application to adduce fresh evidence on appeal – see CPR 52.11(2) and §52.11.2 of the 2014 White Book.

13. The fresh evidence is in the form of a witness statement of Mr Weinberg, a solicitor on behalf of Ludsin. His evidence addresses two matters.

14. First he draws attention to Mr Green's report and the fact that Mr Green had been told that and had based his report on the assumption that the floor area of Bellmans is approximately 10,800 sq ft. Mr Weinberg pointed out that the property is currently being marketed by Knight Frank who have provided a floor plan in their brochure and a statement to the effect that the total gross internal area of Bellmans is 5,166 sq ft, that is to say, less than half that assumed by Mr Green. Mr Weinberg goes on to exhibit correspondence with Mr Green inviting him to provide a fresh valuation based on this smaller floor area of the property. Mr Green was initially unwilling to engage with further questioning about his report, but ended by confirming that the size of the floor area did not have any impact on his valuation, that the fact that the floor area may be less than he had assumed was immaterial to his conclusion. It may be surprising to some that a difference in floor area as great as that shown here on a residential property in South Oxfordshire has no effect on a surveyor's valuation, but that was the upshot of this correspondence.

15. Secondly, Mr Weinberg relates what has happened following the making, on 25 March 2014 and at the behest of DPM, of an order that Bellmans be sold. That

order took effect from 9 April 2004 and four agents were invited to inspect the property and make proposals for its marketing. Knight Frank were selected as selling agents and the property was offered to the market at £2.5m in accordance with the floor price provided by the order.

16. Knight Frank's marketing generated limited interest and only one offer was received by the end of July 2014. This was from a developer and was in the sum of £1.5m. The offer was increased to £1.615m on about 20 August, notably still well below Mr Green's valuation. On 2 September DPM made an application to Chief Master Marsh to reduce the floor price at which a sale contract could be concluded without further permission from the court. Mr Maggs relied upon Mr Green's valuation in these proceedings to resist the application whereas DPM produced an independent valuation from a Mr Smee of Quantum Valuations LLP. He valued the property at £1.75m and his basis was 'market value' as defined by the RICS[2]. In reaching his conclusion, two of his four comparables were the same as those referred to by Mr Green. Both of them sold for less than £2.5m.

17. Having considered matters, Chief Master Marsh ordered that the floor price be reduced to £1.995m. He also gave permission to apply on paper to reduce the floor price further if no sale was forthcoming. The position as of 13 October 2014 was that the property still had not sold and an application was in preparation for a further reduction of the floor price. At the hearing before me on 23 October 2014 I was told that this application had been made and was successful. I was shown the order of Chief Master Marsh which provided that the floor price for the sale of Bellmans had been reduced to £1.7m.

18. So the position at the hearing before me was that after 6 months marketing at asking prices ranging from £2.5m to £1.7m no-one had come forward with an offer to purchase Bellmans at a price which provided any security for Ludsin's debt. Ludsin submitted that this fresh evidence was compelling factual evidence of the real value of Bellmans and that I should admit it into evidence. Ludsin contended that this real factual evidence was far more persuasive than the opinion

[2] The estimated value amount for which an asset or liability should exchange on the valuation date between a willing buyer and a willing seller in an arm's length transaction after proper marketing and where the parties had each acted knowledgeably, prudently and without compulsion.

evidence of Mr Green and that the proper conclusion of the court must be that Ludsin's debt is not secured and the statutory demand should not be set aside.

19. This brings me to the next point which is whether the appeal should be by way of review rather than rehearing. Counsel for Mr Maggs urges that the appeal should be by way of review and that this fresh evidence is of limited, if any, value since the proper question is whether or not Deputy Registrar Lawson was right in March of this year to conclude that Bellmans was worth £3.3m and the debt was therefore fully secured. Counsel for Ludsin disagreed submitting that justice demanded a rehearing since that would enable the court to consider the matter on the basis of up to date factual evidence rather than mere opinion evidence from a valuer. He also submitted that even if the matter did proceed by way of review, nevertheless the fresh evidence was highly probative. He asks, rhetorically, how could Bellmans possibly be worth £3.3m in March when no purchaser has come forward in the months following and offered £2m, especially in circumstances where the evidence is that the relevant property market is buoyant[3].

20. Counsel for Mr Maggs criticised this fresh evidence as 'more crystal ball gazing' and submitted that it was no more valuable than the opinion of Mr Green. He submitted that if I took account of this fresh evidence I would be either trying to evaluate two forms of crystal ball gazing in the light of each other or swapping one form of crystal ball gazing for another. He submitted that neither of these approaches was appropriate.

21. I disagree with this analysis of the crystal ball. It does not seem to me that evidence of failed attempts to sell a property at a particular price to support a conclusion that the property is not worth significantly more than that price is crystal ball gazing as to the relevant value (i.e. 'is it worth more than £x') at all. It is evidence of simple facts.

22. I confess to finding the debate about whether the appeal should be by way of review or rehearing rather arid in the present case. It seems to me clear that the interests of justice demand that I approach the matter of the adequacy of Ludsin's security with the most up to date and reliable facts available, so long as those facts

[3] 'improving and optimistic' according to Mr Green, 'buoyant' according to Mr Smee.

are really probative of the matter in issue and whether they show Bellmans to be worth more or less than the sum opined by Mr Green and acted upon by the Deputy Registrar. In my judgment the most important matter is whether or not the debt is adequately secured now, for if it is the statutory demand should be set aside, and if it is not the statutory demand should remain.

23. It seems to me that the best indication of the value of an asset at any particular time is what someone will pay for it after reasonable attempts have been made to sell it. There is now before the court direct evidence of that. The fact that no-one has been prepared to offer £2m for Bellmans despite 6 months' marketing by a well-known and reputable agent is, in my judgment, highly persuasive if not conclusive evidence that Bellmans is not currently worth £2.9m, the price which it would have to achieve if Ludsin's debt were to be fully secured. That evidence in my view is far more persuasive than the opinion of Mr Green given in February of this year.

24. In these circumstances I grant permission to adduce the fresh evidence and conclude that the interests of justice demand that the appeal proceed by way of rehearing. The evidence on that rehearing satisfies me that the statutory demand should not have been set aside and I allow the appeal.

25. In the light of my decision I do not have to deal with the appeal against the costs order and, in particular, with whether or not the costs ordered to be paid should have been ordered to be set off rather than paid.