Permission to appeal--Barons Finance litigation continues

10/09/2015

Restructuring & Insolvency analysis: Permission to appeal has been granted in Re Barons Finance Ltd (in liquidation). David Bowden of David Bowden Law examines the latest development in the Barons Finance litigation and considers the court's decision to grant permission to appeal where relief from sanctions was refused.

Original news

Re Barons Finance Ltd (in liquidation) [2015] EWHC 2007 (Ch), [2015] All ER (D) 126 (Jul)

A company had assigned its book debts and gone into liquidation. The liquidator applied to have the assignment set aside. The Chancery Division allowed the application as, on the evidence, the assignment had been fraudulently backdated and was automatically avoided under the Insolvency Act 1986, s 127 (IA 1986).

What were the facts in this case?

A petition to wind up Barons Finance Limited (BFL) was issued on 9 May 2012 and a winding-up order was made on 19 September 2012. Mr Gopee claimed that the debts owing to BFL had been assigned by him to himself and Barons Bridging Finance 1 Limited (the assignees). Mr Gopee alleged this was done by a written assignment which he says is dated 31 March 2012.

The assignment provided as follows:

'The Assignor hereby assigns and transfers absolutely to the Assignee, with full title guarantee, all the debts currently held in the Assignor's books and records which the Assignor shall hand over to the Assignee on a date to be fixed when for the purpose of executing a transfer of all the legal charges currently held in the name of [the Company]...shall be executed (sic) and which in any event shall not exceed a period of 6 months from today's date.'

The consideration for this assignment was claimed to be the payment by the assignees of moneys owed to Kensington Mortgage Company. The assignment was executed by Mr Gopee alone on behalf of all the various companies.

The liquidator of BFL (Mr Alan Coleman) applied to the court to set aside the purported assignment of all of BFL's book debts. At trial the liquidator made four submissions that the assignment was either void and/or should be set aside because of provisions in IA 1986:

- the assignment was made after the presentation of the petition, had been fraudulently backdated and was therefore void (IA 1986, s 127)
- it was a transaction at an undervalue (IA 1986, s 238)
- it was a voidable preference (IA 1986, s 239), and/or
- it was a transaction to defraud creditors (IA 1986, s 423)

How does a 1722 case about a diamond ring fit into this?

The trial judge based his judgment by reference to *Armory v Delamirie* [1722] 1 Strange 506, [1558-1774] All ER Rep 121.

This was a first instance decision of Chief Justice Pratt sitting in Middlesex Assizes where he had to direct a jury in a trover case. A chimney sweeper's boy found a jewelled ring and took it to a goldsmith. His apprentice pretended to weigh it but removed the stones instead. The goldsmith offered three halfpence for the ring. This was refused and the goldsmith returned the ring but without the stones.

The trial judge directed the jury that unless the goldsmith produced the jewels and showed them 'not to be of the finest water' that the jury should presume the strongest against him and make the value of the best jewels the measure of their damages. Several jewels were examined to prove what a jewel of the finest water that would fit the socket would be

worth. The jury determined damages in accordance with this direction that the value of the missing stones was of the finest water.

The liquidator had produced a schedule of debts owned by BFL. Mr Gopee was asked to verify this and failed to do so. The judge applied the principle in *Armory v Delamirie* which meant that he resolved any evidential doubts against Mr Gopee. The liquidator stated that the schedule showed outstanding debts of £373,000. Mr Gopee claimed some book debts were void and/or unenforceable under the Consumer Credit Act 2006 (CCA 2006). Mr Gopee produced no evidence to substantiate this but rather the evidence is that Mr Gopee had pursued the debtors for payment. The trial judge ruled it did not lie in Mr Gopee's mouth to assert that these book debts were worthless by applying the rule in *Armory v Delamirie*.

What did the trial judge find?

On 15 December 2014, Deputy Registrar Briggs gave directions that any evidence on which Mr Gopee relied was to be served by 23 February 2015. No evidence was served until 10.27am on the first day of trial (9 July 2015). Mr Gopee had not made an application for an extension of time. Mr Gopee sought to serve a four-page typed witness statement with 104 pages of documents exhibited. The trial judge refused to permit Mr Gopee to rely on either his statement or the documents exhibited. In relation to relief from sanctions, the judge ruled that:

- no good reason had been given for the delay, nor for the failure to seek an extension
- it would be unfair to the liquidator to have to deal with this evidence today, and
- an adjournment would be costly for the liquidator and unfair to other litigants

While Mr Gopee was allowed to make submissions to the judge, because the judge refused to allow his late witness statement in as evidence, Mr Gopee did not go into the witness box to be cross-examined as to when or how the disputed assignment was made.

The judge found that the assignment was made after the commencement of the winding-up proceedings and was therefore void. However, if he was wrong on that, in the alternative he ruled that the assignment should be set aside under both IA 1986, ss 238 and 423.

However, it should be noted that in arriving at his judgment, the judge adopted a 'hot and cold' approach. Although the judge refused to allow Mr Gopee's late evidence in, the judge refers to this and its inconsistencies with other documents or evidence as further reasons to justify his judgment.

What arguments were made at the oral permission hearing?

A number of bad points were made by Mr Gopee. These related to an application he had made seeking disclosure of documents from the liquidator about correspondence with debtors and/or the Financial Conduct Authority (FCA) (and its Office of Fair Trading (OFT) predecessor). He also submitted that his human rights were breached. His main point was that he thought there was going to be a pre-trial review (which did not take place) and he was not treated fairly at trial (bearing in mind the serious allegations of fraud) when the judge refused to allow his witness statement in as evidence.

What did the Court of Appeal rule?

Lady Justice Gloster granted permission to appeal castigating the approach taken by the judge below as 'harsh'. She said this appeal has real prospects of success.

Gloster LJ said what concerned her about this case is the allegation of fraud in relation to the assignment. The liquidator claims that Mr Gopee had back-dated the document. However, because the judge below did not permit Mr Gopee to put in his witness statement, he was not given the opportunity to give evidence or to be cross-examined.

Gloster LJ said this is a clear allegation of fraud. While Mr Gopee is an experienced litigant, that did not put him in the same position as counsel. She said she had formed the impression from reading the judgment below, that it is arguable that Mr Gopee was not given a proper opportunity to rebut the allegation of backdating of the assignment and that the judge below did not adequately consider the evidence of the backdating.

What will happen next with this case?

The grounds of appeal have to be amended within 28 days to admit the evidential matters in relation to the findings of fraud or the transaction being at an undervalue. The appeal will be listed for a one-day hearing. If feasible the constitution of the court hearing the appeal shall include Gloster LJ and one other judge with chancery experience. Gloster LJ reserved the costs of the permission application to the hearing of the appeal. She ordered that the stay remain pending the outcome of the appeal.

What happened with Mr Gopee's application seeking permission to appeal the orders of HHJ Mackie QC in the London Mercantile Court?

Immediately prior to this oral permission hearing, Gloster LJ handed down her written reserved judgment (*Barons Finance Ltd & Ors v Numerous Defendants* [2015] EWCA Civ 944) refusing Mr Gopee permission to appeal the orders made by HHJ Mackie QC. Judge Mackie had previously made a case management ruling on 5 February 2014 (*Re Gopee and others* [2014] EWHC 138 (QB), [2014] All ER (D) 62 (Feb)) that all Barons Finance cases pending in various county courts be transferred to the London Mercantile Court for him to case manage and then determine. Judge Mackie had enjoined Mr Gopee from taking any steps to bring or continue any legal proceedings in any county court to recover money or seek possession of property whether due to him or his companies.

Judge Mackie had also ruled against Mr Gopee in the case of *Barons Finance Ltd and another company v Makanju* [2013] EWHC 153 (QB), [2013] All ER (D) 87 (Feb) when he had granted Makanju permission to appeal a possession order made by DJ Manners in Clerkenwell & Shoreditch County Court in favour of BFL. In the course of that judgment he had observed that:

> 'The loans were generally made to people who have arrived in this country quite recently and are under severe financial pressure, at high rates of interest usually secured by charges on the borrowers' homes'

and

> 'These Defendants generally claim that they entered into the loans under severe financial and personal pressures and have only recently learned of the legal grounds upon which the original judgments, often obtained by default or after only perfunctory resistance, may be challenged. The Defendants often say that they were unaware of their legal rights when entering into the transaction in dispute.'

Judge Mackie has now retired and his place has been taken by HHJ Waksman QC. Gloster LJ ruled that because Judge Mackie has now retired, Mr Gopee's allegations that he will not receive a fair trial because of bias cannot be sustained. Gloster LJ also ruled that neither Mr Gopee nor his companies had lost their ability to acquire properties or interests in them such as charges or to protect these by registration with HM Land Registry.

Is there any news on what regulators may be doing?

Deputy Judge Halpern QC notes in his judgment that the FCA has obtained a restraint order under the Proceeds of Crime Act 2002 from HHJ Pegden QC in the Crown Court at Southwark against Mr Gopee's companies.

Gloster LJ has directed (para [18]) that her judgment refusing permission be sent also to HM Land Registry, the Insolvency Service and the FCA.

What wider issues will this appeal raise?

Litigation lawyers will find that this appeal will have to deal with two important points of wider importance.

The first is whether the nearly 300-year-old rule in *Armory v Delamirie* can still stand. This was a ruling in a trial and it is doubtful that its status is elevated to some intractable rule. It has previously found to be inapplicable in other cases such as *Wentworth v Lloyd* (1864) 10 HLC 586.

In *Keighley Maxsted & Co v Durant* [1901] AC 255, the House of Lords had to obliquely consider the application of *Armory v Delamirie*. Here Keighley Maxted (KM) authorised a corn merchant (Roberts) to buy wheat on a joint account for himself and them at a certain price. Roberts, on his own behalf and without authority, bought wheat at a higher price than the authorised one from Durant. KM however later agreed with Roberts to buy the wheat at that higher price but eventually

failed to do so. Durant resold it at a loss and sued them for loss. The rule in *Armory v Delamirie* was one of the arguments that the unsuccessful respondent prayed in aid but it did not find favour with any of the eight judges in the House of Lords.

The second is the proper approach to an application for relief from sanctions under CPR rule 3.9. Lord Justice Jackson noted in his report the importance of adherence to rules or deadlines and the impact on other court users. Initially the Court of Appeal took a tough line on this in *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1537, [2013] All ER (D) 314 (Nov) where relief was refused to a litigant who was late in lodging a costs budget. Then it retreated from this in *Denton v White* [2014] EWCA Civ 906, [2014] All ER (D) 53 (Jul) where relief was granted and a three stage test was expounded:

- identify and assess the seriousness or significance of the failure to comply with any rule, practice direction or court order
- consider why the failure or default occurred--it would be inappropriate to produce an encyclopaedia of good and bad reasons for a failure to comply, and
- CPR 3.9(1) requires that in every case the court will consider 'all the circumstances of the case, so as to enable it to deal justly with the application'

Where there has been a serious or significant breach, and no good reason has been provided then an application for relief from sanctions will not automatically fail. Mr Gopee will have to produce some good reasons for being late in serving his evidence. It seems clear that he is involved in a lot of litigation as well as dealing with regulators and is dealing with it all personally. Whether this will be enough to persuade the Court of Appeal to prise the door further ajar on this than it did in *Denton* will remain to be seen. There is a delicate balance to be struck. If relief from sanctions is refused, then Mr Gopee has a finding of fraud made against him with no chance to rebut this in evidence which Gloster LJ branded 'harsh'. Mr Gopee may seek to argue he was punished twice--not only was he not allowed to put in his late witness statement but then the judge applied the evidential presumption in *Armory v Delamirie* against him too. Conversely, if relief is allowed, then this sets a bad precedent in seeming to condone the service of witness statements 4.5 months late and on the morning of trial.

If the appeal is allowed on this basis, it may almost be as if the Jackson reforms had never happened.

The views expressed by our Legal Analysis interviewees are not necessarily those of the proprietor