Ref. BR-2024-000743

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES COURT (ChD)

7 Rolls Buildings
Fetter Lane
London

Before ICC JUDGE AGNELLO KC

IN THE MATTER OF

DEVONPORT CAPITAL LIMITED (IN ADMINISTRATION) (Applicant)

-v-

BEN NEWTON (Respondent)

MS R FARRELL appeared on behalf of the Applicant
MR B SHERIDAN appeared on behalf of the Respondent

JUDGMENT
13th JUNE 2025
(AS APPROVED)

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JUDGE AGNELLO:

1. I have before me a petition which now will stands dismissed. The parties do not object to this although there was some debate relating to whether permission to withdraw should be granted. There was no application for permission to withdraw. I should make it very clear that there is no distinction, in my judgment, in respect of what happens to the costs, as to whether I give permission to withdraw the petition or whether the petition is dismissed. The issue that I have before me which is who should be liable for the costs of this matter.

2. I need to explain a little bit of the background. The petitioning creditor issued a petition seeking the sum of approximately £1.9 million which is alleged to be owed by the debtor to the petitioning creditor. I know that the petition was dismissed but I will simply use the word debtor for the purposes of this judgment.

3. The petitioning creditor served a demand letter on 12 April demanding payment, which did not ask for the debtor to provide details of any defence, but it was a straightforward letter of demand. It then issued a statutory demand. The debtor had various personal issues to deal with, and he sought a breathing space moratorium, and thereafter he did not issue an application to set aside a statutory demand.

4. Instead, at first acting on his own, he put in a notice of opposition. Shortly thereafter, he obtained the legal assistance of Advocate, the Pro Bono Unit, and thereafter from January 2025 he has been legally represented in these proceedings. As a result of that, he has put in an amended notice of opposition setting out his grounds of defence.

5. Despite that and the evidence filed, it was only in May 2025, that the petitioning creditor communicated that it would no longer pursue the petition, effectively accepting that the evidence which had been filed raised a dispute, and on that basis, it sought to withdraw but wanted to make the application for its costs to be paid by the debtor. That is the matter which I have before me today.

6. Mr Sheridan on behalf of the debtor started with what I considered was an uncontroversial point, is that the debtor is the successful party in these proceedings and therefore the general rule is that costs follow the event. Miss Farrell, and I am very grateful for her answering the questions I put to her about her submissions, conceded that her client was effectively the unsuccessful party and therefore the starting point is whether costs should follow the event on the normal rules.

7. It is perhaps useful to put into a little bit of context the types of cases which relates to demands and petitions. When it comes to personal insolvency, a bankruptcy petition must be preceded by a statutory demand. A debtor has an opportunity to apply to set aside that statutory demand and one of the grounds in order to do so is that the debt is disputed on substantial grounds. Or as is commonly said, that the debtor succeeds in persuading the court on the summary judgment test.

8. As Miss Farrell accepted when I asked her, there is no obligation upon the debtor to make such an application. He is not prevented, again as accepted by Miss Farrell, in raising the issues at the petition hearing itself and those issues will include that he disputes the debt on substantial grounds. So, the test that he has to meet is that that ground is identical regardless as to whether he makes the application to set aside the statutory demand or raises a dispute at the petition stage.

9. I pause now to quickly run through the corporate insolvency. The reason I do that is that many of the cases which are before me come from corporate insolvency. Corporate insolvency, one can either present a statutory demand or can simply issue the petition. If a statutory demand is served, then the debtor company can apply for an injunction restraining the presentation of the winding up pet, but the company does not have to do so. The petition can then be presented; it can be advertised and then the company can dispute the petition at the hearing of the petition. Normally, that would be at a later date after directions have been given for evidence.

10. There is no distinction on the test applied to determine if there is a disputed debt, being is the debt bona fide disputed on substantial grounds? Any consideration of the authorities makes it, in my judgment, very clear that the same test applies. The difference is not in the approach; the difference is perhaps more procedural. In one, you can apply to set aside the statutory demand, in the other you apply for an injunction.

11. In corporate petitions, there is a further possibility where if the petitioning creditor goes straight for the petition, then of course at that moment in time, the company can either apply for an injunction to restrain advertisement of the petition or fight it out as a disputed petition at the date of the hearing of the petition. In none of those petitions, in my judgment, do any of the authorities indicate a difference in approach. If one is relying upon the matter as a disputed debt, the same test applies.

12. I turn now to the authorities in this matter. I start with one of the older decisions which is *Cannon Screen Entertainment Limited v Handmade Films (Distributors) Limited* [1988] 5 B.C.C. 207, a decision of Warner J reported in 1989 5 BCC at page 207. The submissions made there, this being a corporate case, was that the petitioner should not have to pay the costs because essentially it is said that it had not been informed of what the defence was in good time.

13. I go to page 209 at G and read the following passage:

> "I think Mr Price for his part relies on the basic rule that costs follow the event."

It points out that the effect of Handmade's offer now of a permanent undertaking is that it has concluded that Cannon is entitled to the relief claim (inaudible) application. That means he says that

> "Cannon has in these proceedings succeeded and is entitled to its costs."

14. I pause there to indicate there is absolutely no difference between the permanent undertaking which was being offered by Handmade and the permission to withdraw which was being offered and ended up being a dismissal. There is no distinction with the two in this particular petition.

15. I go back to the following passage after G.

> "I think that as to that, Mr Price is right. It is perfectly true as Mr (inaudible) submits that there is nothing improper in a creditor who has no notice of the substantial defence to his claim serving a statutory demand. But to my mind he does that at his own risk because the law calls for a creditor to adopt if he wants to enforce a debt by proceedings is to issue a writ and of course if he issues

> a writ and is sufficiently confident that there is no defence to his claim, the procedure under order 14 is available to him."

16. I pause there simply to add, and this is not in the quote, that order 14 is the old rule in respect of what is now part 24 summary judgment.

> "If instead of adopting that course, the creditor takes the short cut of serving a statutory demand with a view to presenting a winding up petition without having obtained a judgment, in my opinion, he does so at his risk as to costs. If it should turn out that there is a defence to his claim, he must pay the costs of the company against who he has chosen to take such proceedings."

17. There is a case I also referred both counsel to which the slightly later case of *Re A Company (No. 0012209 of 1991)*. This is reported at the Weekly Law Reports at page 351. It is the decision of Hoffmann J as he then was. Again, very similar facts there, but it is worth just reading the headnote where it says a winding up petition ought not to be used as an alternative for an application for summary judgment under Rule of the Supreme Court Order 14.

> "It is an abuse of process of the Company's Court for a creditor to present a petition for the winding up of a company which is solvent and which has raised a bona fide triable defence to the creditor's claim."

18. The same point was made as in Cannon Screen Entertainment, namely, that the defence had not been raised and therefore the petitioner in that case should not be liable for the costs. Just dealing with the last part of this judgment, he says referring to Cannon Screen Entertainment,

> "For those reasons, the injunction will go. The basis upon which the injunction is granted is that presentation of the petition is an abuse of the process of the court. I think it should be made clear that abuse of the petition procedure in these circumstances is a high risk strategy, and consequently I think that the appropriate order is that the petitioner should pay the company's costs on an indemnity basis."

19. I raise that because it goes further than Warner J which is that the high risk strategy which was adopted by the petitioners. In my judgment, both in individual insolvency and corporate insolvency cases, petitioners are put on full notice with these well-established cases that insofar as they are unsuccessful, costs follow the event. That is, in my judgment, entirely logical for another reason.

20. As set out in these two cases, petitioners have an alternative. They have a part 7 alternative and then they can apply for summary judgment. The petitioning creditor in this case did not do that. Therefore, in my judgment, the petitioning creditor in this case assumed what Hoffmann J as he then was called the high risk strategy and what Warner J indicates is a risk as to costs when an alternative exists and is not selected.

21. Both Counsel made submission in relation to a later decision in 2012, IN Re Syles & Sons Ltd, Teamforce Labour Ltd v Sykes & Sons Ltd [2021] EWHC 1005 (Ch) of Richard Snowden QC sitting then as a deputy high court judge. That judgment contained no reference

to the cases of Cannon Spring Entertainment or the decision of Hoffmann J. I was referred to the passages in this case at paragraph 22 :-

'There is no doubt that the general rule of CPR 44.2 that the losing party should pay the costs of the successful party's litigation applies with added force in the context of winding up petitions. It is well known that the presentation of a winding up petition will put heavy pressure to pay (inaudible). The Companies Court has always been assiduous to discourage the use of a winding up petition as a shortcut instead of issuing a claim form to establish liability in the normal way. I also accept Warner J's observation that the court should do nothing to encourage any belief that a person who thinks that he has a claim against a company can first try his luck in the Companies Court on the basis that he fails, the costs of that exercise will simply be added to the costs of a subsequent Part 7 claim. There is therefore considerable merit to adhering to the principle that save in exceptional circumstances, a petitioner whose petition fails on the basis that the debt is genuinely disputed should pay the costs of that failure.'

22. Paragraph 23 is heavily relied upon by Miss Farrell, so I shall read it as well.

> "However, in considering whether there are exceptional circumstances to justify departure from the general rule, I think that the court is entitled to take into account the communications between the parties prior to the presentation of the petition. In *Re Fernforest Ltd [1991] B.C.C. 680* there had plainly been attempts, albeit apparently not very convincing, by the company to set out the grounds upon which it is in dispute of the debt. I think that Mr Nersessian was right when he observed that Warner J's comments were addressed to the more limited question of whether a company facing a claim is under a duty to instruct lawyers to prepare a detailed defence prior to the claim being issued. Likewise, in *Re UK Aid Limited*. Blackburne J's conclusion that the petitioner had adopted a high risk strategy that had failed was made against a background which appears plainly from the report that the company's stance had been set out in length by its solicitors in correspondence prior to the petition being presented."

23. On the facts of this case, there is no evidence prior to the demand, the petitioning creditor wrote to the debtor inviting him to set out if he had any defence. What I have instead is a letter of demand which demands payment and so if it is not paid, bankruptcy proceedings will follow.

24. That is not a letter inviting a debtor to set out its defences. So, on the facts before me, there is no correspondence or extensive correspondence relating to any defence to the claim prior to the issue of the statutory demand. Miss Farrell relies quite heavily on some of the without prejudice correspondence.

25. I can take this fairly quickly. She relies on the fact that the debtor sought to try to settle. The debtor made offers and appears, she submitted, to admit the debt. I do not find any of those particular submissions really helpful or relevant for the following reason. Before me today, the petitioning creditor has accepted that the debt is disputed on substantial grounds. Without prejudice correspondence are attempts to settle matters and frequently as in this case, when a particular party does not have the benefit of legal advice.

26. So, therefore it is difficult to imagine why the petitioning creditor having taken a high risk strategy can rely upon the fact that in without prejudice correspondence the debtor was trying to reach some form of settlement and make some kind of an offer. That to my mind does not affect the fact that ultimately costs should follow the event, and the petitioning creditor was unsuccessful.

27. It does not follow, as Miss Farrell has submitted, that debtor must have admitted that there was a sum due so therefore the petitioner can have its costs. That to me is a somewhat unmeritorious argument to make. That is because the petitioning creditor has decided that there is a debt which is disputed which is why it is not proceeding and effectively accepting that it is the successful party. An alleged admission in without prejudice correspondence does not detract from the position on the evidence before the court. By its action, the petitioning creditor accepts that the debt is disputed on the evidence and therefore it would fail in its petition. Moreover, in any event, none of those offers were accepted by the petitioning creditor, including the last offer made which was made by the debtor. So, I do not find that the without prejudice correspondence in any way takes this matter to any type of exceptional circumstances as envisaged in the Sykes case.

28. So, I am faced with the position where there is no evidence of the debtor being invited to set out his defence before the demand was issued. No evidence in the without prejudice correspondence which could possibly justify any exceptional circumstances. Miss Farrell then has sought to rely upon matters raised in their evidence in reply . Again, the easy way to deal with it is simply saying that most of the matters she raised like the alleged lack of financial expertise, which was raised by her, was disputed by the debtor. So the court is unable to make any findings on those types of issues because there is no justification to reject the debtor' s evidence on those points.

29. I go back to the following point. The petitioning creditor has accepted that on the evidence this was the improper procedure to have taken. Costs would normally follow the event, but of course the matter remains one of the exercise of my discretion. However, the warnings set out both by Hoffmann J and Warner J, are warnings the petitioning creditor simply failed to heed. It sought to do the shortcut. It has failed. None of the facts that the reference to what is in the evidence can really assist it, bearing in mind that ultimately it has accepted on the evidence before this court that the debt is disputed on substantial grounds.

30. In relation to Miss Farrell's point about the contractual rights. Insofar as the debt is disputed, there can be no reliance on contractual rights and accordingly, that point takes her nowhere. And so accordingly, in my judgment, this is a case where in the exercise of my discretion costs should follow the event. Following and adopting the principles set out in Cannon Screen Entertainment and also in Re A Company 1991 the position of Hoffmann J., I do not consider what is set out by Richard Snowden QC in *Re Sykes* cuts across those.

31. The reliance in paragraph 23 of Sykes relates to the particular facts of that case. The evidence here demonstrates that the petitioning creditor did not seek any details or invite the debtor to set out his defence and therefore, the general points made by the learned judge in Re Sykes at paragraph 22 are applicable rather than what is set out at paragraph 23, which deals more with where one has details of the defence beforehand because somebody has asked or no details because nobody has asked which is the current case.

32. Accordingly, I will make an order for costs in favour of the debtor against the petitioning creditor. Before dealing with quantum, I will deal shortly with the order which I make. I will direct that it falls as the petitioning creditor is now in administration that I direct that the costs order falls to be dealt with under insolvency rule 3.51(2) as in either (a) expenses properly incurred by the administrator in performing the administrator's functions or (g) any necessary disbursements by the administrator in the course of the administration.

33. Mr Sheridan did not submit one rather than the other. I do not think he was submitting that it would be (a) or (g). It seems to me that it is probably (a) expenses. But what that does mean is that it is a priority which is higher than the remuneration or emoluments of any person employed or the administration remuneration which comes under (i). So, it has a priority over that. It is not to be dealt with as an unsecured creditor.

34. The administrator who came into the office in February 2025, elected to pursue this case, elected to send Miss Farrell here to argue the costs and in those circumstances, the adverse costs order will be an expense of administration. That needs to be put into the order.

35. In respect of the statement for pro bono costs, no dispute has been raised that such a costs schedule is not only suitable to send, but that the order can be made under Legal Services Act 2007 Sections 194 to 194(b), CPR 46.7 and practice direction 46.41. Mr Sheridan accepts that this was served late. I allow it. Obviously, it is a very short schedule. I allowed Miss Farrell to make the points that she wanted to make.

36. Her first point on the schedule which totals £6,050 is that she considered work done by the barristers more expensive and I should take that into account. I do not accept that. It is very clear in my experience that barristers are, I think I said during the hearing, very cheap. Not only the hourly rate, but the time they spend on documents is vastly lower than anything a solicitor would do. Miss Farrell's own schedule of costs is for £17,500.

37. I accept it covers a longer period of time but bearing in mind the difference even if it takes the longer period of time, it is something like double the 6,000. Miss Farrell also commented that seven hours spent on the attendance and preparation on 7 January seemed somewhat excessive. I reject that. The reason I reject that very simply is that this was Mr Thomas's evidence.

38. Picking up this case, reading all about it and having to deal with whether there were merits in what could be done for the debtor, that is what the seven hours were needed to prepare for the hearing. That is clear because when one comes to the assistance thereafter, which is the second box, the six hours, that is assistance provided following the hearing which deals with the witness evidence and matters like that.

39. Even taking the seven and the six hours together, in my judgment, that is not excessive. It appears to me for the work done and the issues raised, they are not simple legal issues, they are not inordinately complex issues which were raised to be argued. But they are issues which require careful drafting and ensuring that the proper research of the law is carried out. There is also a criticism for the preparation for this hearing.

40. I found Mr Sheridan's skeleton extremely useful and helpful. He covered all the points including the insolvency point about administration expenses and I do not consider that eight hours spent for that is disproportionate or unreasonable. All in all, it appears in my judgment that the costs schedule is reasonable and proportionate, and I will direct that the entirety of

the £6,050 shall be paid as an administration expense and under the terms already discussed by the petitioning creditor in administration to the debtor.

41. I should add that whilst the Hoffmann J case said that costs should be on an indemnity basis, Mr Sheridan did not make that point. I have dealt with it on the standard basis. Not that there was necessarily any difference, bearing in mind the very reasonable costs which have been sought and therefore I have simply dealt with this by way of the standard basis.

This transcript has been approved by the Judge