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Parallel Claims and Insolvency Proceedings

Where a petitioner brings a bankruptcy or winding-up petition, and at the same time pursues an ordinary civil action in respect of the same debt, the question arises as to how the petition should be dealt with.

In an ordinary civil context, where there are two parallel proceedings in respect of the same debt, a likely outcome is that the two claims are consolidated, or one claim is stayed pending the outcome of the other, pursuant to the court's case management powers under CPR 3.1.

By contrast, given the particular nature of insolvency proceedings, this is unlikely to happen for two reasons.

First, it is well-known that a winding-up or bankruptcy petition is a class remedy which is only suitable in respect of a debt which is not subject to a bona fide substantial dispute. A petitioner who seeks to maintain a parallel civil claim for that same debt may be seen as inadvertently admitting that the debt is in fact disputed, since a civil claim is predicated on the possibility that a trial is required to resolve the case. In other words:

(1) If the petitioner's position is that no genuine and substantial dispute exists, then the remedy is simply to convince the court of such in the insolvency proceedings and then ask the judge to proceed directly to make a bankruptcy or winding-up order. There would be no logical reason to have pursued the civil claim in the first place.

(2) Conversely, the petitioner's decision to pursue the civil claim can only be explained by the fact that it has implicitly accepted that the debt is subject to a genuine and substantial dispute and must be tried. If no such dispute existed, the petitioner would have had no need to pursue the civil claim at all.

As such, a petitioner who attempts to ride both horses at once risks having the petition struck out or dismissed for abuse of process, in that the respondent is being unfairly oppressed by the parallel proceedings.

Second, by pursuing a civil claim to obtain a money judgment on the debt, the petitioner is taking active steps to extinguish the underlying debt. That is because, upon a judgment being entered, the doctrine of merger replaces the

debt with a judgment-debt. Put another way, the petitioner is taking active steps to extinguish the very basis upon which the insolvency proceedings are premised.

Such a situation arose in Re a Company (No. 003028 of 1987) (1987) 3 B.C.C. 575. In that case, a Mr Astor brought a money claim for £200,000 in the Queen's Bench Division while at the same time pursuing a winding-up petition against the defendant company in respect of that debt. Scott J (as he then was) struck out the winding-up petition and held as follows.

"If the contentions made by Mr. Astor in his pleading in the Queen's Bench action are well-founded and the action succeeds, he will obtain damages for breach of contract and an order for the repayment of the £200,000. The £200,000 will then either be repaid by the company, or will not be repaid by the company. If the money is repaid by the company, the basis on which Mr. Astor petitions to wind up will be gone. If the winding-up petition were still pending, it would, in that event, have to be dismissed. Mr. Astor would have no further interest. If there is an order for repayment of the £200,000 obtained by Mr. Astor in the Queen's Bench action and the money is not repaid, he will then be in a position to present a petition to wind up. He will be an unpaid judgment creditor. He would be entitled ex debito justitiae to a winding-up order if the debt were not paid. Again, the current petition would serve no useful purpose at all." (at 586-587)

"If it had not been for the Queen's Bench action, I think an application to strike out would have been doomed to failure. But there is the Queen's Bench action. Mr. Astor started it, and is prosecuting it. He is entitled to do that. But he has in a real sense, I think, made an election in favour of the relief sought in that action. The implications of this election render improper the presentation and prosecution of the petition." (at 587-588)

It is therefore vital for a creditor to decide, at an early stage, which course to pursue. It can either commence insolvency proceedings (with the resulting risk that the debt is later found to be subject to a genuine and substantial dispute), or it can maintain an ordinary civil claim to obtain a money judgment (and then bringing insolvency proceedings upon that should it be necessary). It is, however, generally speaking a serious strategic blunder to attempt both at the same time.

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