Harvey v Dunbar assets PLC – Appeal against refusal to set aside second statutory demand

Technical Bulletin No: 747

Case: Harvey v Dunbar Assets PLC [2017] EWCA Civ 60, CA, 13 February 2017

Synopsis: The Court of Appeal has held that it was an abuse of process for a debtor to rely on argument that had previously been advanced and dismissed on its merits in connection with his appeal against the dismissal of his application to set aside a second statutory demand.

Topics covered: Bankruptcy proceedure, Statutory demand, bankruptcy, abuse of process

The Facts

This was an appeal from the decision of HHJ Kaye QC. Members are referred to technical bulletin 657 for the first instance decision.

Briefly, Mr Harvey had provided a guarantee to Dunbar Assets Plc (the Bank), supporting the liabilities of a company, Vision Development Ashbrooke Limited (the Company), up to a maximum of £720,000. Upon the Company's default, the Bank called in the guarantee and served a statutory demand (SD1) on Mr Harvey. Mr Harvey argued that the Bank was estopped from enforcing the guarantee, and claimed that he was induced to enter the guarantee by oral assurances from a representative of the Bank that the Bank had never enforced a personal guarantee of this nature and would not do so in the future. Mr Harvey's application was dismissed, with the defence to SD1 found to have no reasonable prospect of succeeding.

It then came to Mr Harvey's attention that a statutory demand against a co-guarantor had been set aside on the basis of a forged signature. Mr Harvey argued that the validity of his guarantee was dependent on the valid signature of each of the jointly and severally liable co-guarantors. Mr Harvey was given permission to appeal on this new ground, making no further reference to the promissory estoppel ground. The appeal was allowed and SD1 was set aside. However, the Bank subsequently and successfully demonstrated the authenticity of the alleged forged signature and proceeded to serve a second statutory demand (SD2) on Mr Harvey. Mr Harvey challenged SD2 on the same promissory estoppel ground he had pursued in 2011, introducing new evidential statements from members of the Dunbar Action Group, who claimed to have had similar experiences with the Bank.

The central question for the court was: If:

a) a debtor's application to set aside a statutory demand (here SD1) is dismissed on the merits, by application of the familiar test that the debtor has no reasonable prospect of establishing a defence or cross claim which would either extinguish the debt or reduce it below the minimum bankruptcy level of £750; but

b) SD1 is subsequently set aside on appeal, on an unrelated ground;

c) the unrelated ground is then disposed of in the creditor's favour, in other proceedings to which the debtor is not a party; and

d) the creditor then serves a second statutory demand on the debtor, relying on precisely the same debt as he did when he served SD1,

is it open to the debtor to apply to set aside SD2 on the same grounds which he unsuccessfully raised in opposition to SD1, and which he never sought to uphold on the appeal from SD1?

The application to set aside SD2 came before the same first instance judge who originally heard the estoppel argument. Applying the reasoning in *Turner v Royal Bank of Scotland* [2000] BPIR 683 CA, Judge Kaye QC stated:

"As far as I can see the circumstances of this case are precisely those which are sought to be covered by the doctrine of res judicata, i.e. simply an attempt to re-litigate the same point which has already been decided between the two parties involved [para 42]."

The judge concluded the new evidence given by Mr Harvey added little and even if *res judicata* did not apply, he would nonetheless have dismissed the appeal based on the substantive point not being made out.

The Decision

Mr Harvey's claim to have SD2 set aside was dismissed by the CA.

The Procedural Question – re-raising an issue already decided/ abuse of process

Turner prevents parties from re-litigating the same issue as it would be a waste of court time and the parties' money. This does not change because a party has found a better way of putting the same point, or wants to put in more evidence to support the same point.

Mr Harvey was not only seeking to rely on the same arguments as before; he had chosen on three separate occasions not to pursue a possible appeal against the decision, opting only to pursue the forged signature line of argument.

There were no special or exceptional circumstances to justify the reopening or rearguing of the same legal point and it would be an abuse of the bankruptcy court's practice to allow the same point to be argued again.

The Substantive Question – promissory estoppel

Given the CA's determination above, this question was considered *obiter*.

While Mr Harvey had argued that the new evidence in support of his case to set aside SD2 was material (claiming that it demonstrated a widespread practice at the Bank which strongly supported a promissory estoppel finding), the CA held that the only relevant evidence was the words spoken between Mr Harvey and the Bank that led him to provide

the guarantee.

The doctrine of promissory estoppel normally requires an existing legal relationship between the parties in the context of which a promise or assurance is made. Here, there was no pre-existing legal relationship between Mr Harvey and the Bank; indeed it was his conversation with the Bank's representative that led to the creation of such a contractual relationship.

It was not credible that an experienced and hard-headed man of business like the appellant could possibly have supposed that the Bank was inviting him to execute a guarantee which would never be enforced. Mr Harvey knew the bank would not advance the loan to the Company without his signing the guarantee – he could not have believed the whole guarantee process was a farce.

A belief that the Bank probably would not exercise its strict legal rights was not enough, and there was no reasonable chance of successfully arguing the point at trial.

Comment

This decision sets a new principle in the law of bankruptcy on which there was no previous authority directly on the point, specifically, that the courts should not entertain arguments that have previously been dismissed at an earlier stage in the bankruptcy process. This is a sensible approach as it prevents the debtor having a second bite of the cherry. The CA made clear that the facts of a case would have to be exceptional for the rule in *Turner* not to apply.

The decision is also helpful for confirming that an attempt to set aside a guarantee based on promissory estoppel will not readily succeed. Guarantors often pursue arguments of this nature in the face of their guarantee being called in and lenders will delight in the short thrift given to it in this case.
