When will the insolvency court review, rescind or vary any order made by it? (Discovery (Northampton) Ltd and other companies v Debenhams Retail Ltd and others)

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Restructuring & Insolvency analysis: This article analyses the latest decision in the challenge to the company voluntary arrangement (CVA) entered into by Debenhams Retail Ltd (Debenhams) in 2019. Southampton Estates Ltd (Southampton) sought, pursuant to rule 12.59 of the Insolvency Rules 2016 (IR 2016), SI 2016/1024, that Sir Alastair Norris, sitting as a High Court judge, review and vary his earlier decision that the Debenhams CVA was valid and enforceable. Written by Kate Rogers, barrister, at Radcliffe Chambers.

Discovery (Northampton) Ltd and other companies v Debenhams Retail Ltd and others [2020] EWHC 260 (Ch)

What are the practical implications of this case?

This decision gives a helpful re-statement of the width of the power contained in IR 2016, SI 2016/1024, r 12.59 (at para [11]). Practically this means that this exceptional jurisdiction will rarely be exercised. While it has always been difficult to invoke the jurisdiction under IR 2016, SI 2016/1024, r 12.59, with each decision refusing to do so it becomes more and more difficult for litigants hoping to rely on this provision of the IR 2016, SI 2016/1024.

More specifically, the judgment offers some guidance as to what will amount to a sufficient change of circumstance to warrant a review of an earlier decision—if a particular point or argument was always known about at the time of the decision now under review, then the fact that there has been a later judgment on that argument by another court will not warrant a review, if the subsequent decision does not change the law. This appears to be the case even if there was no authority on the point prior to the subsequent decision.

The obiter observation of Laddie J in *Papanichola v Humphreys* [2005] EWHC 335 (Ch), where he suggested that the equivalent of the IR 2016, SI 2016/1024, r 12.59 jurisdiction might be exercised if there was a 'new argument', was said not to fit with the mainstream decisions. Therefore, relying on that decision will now be more perilous.

What was the background?

Southampton, along with other applicants, challenged the CVA entered into by Debenhams in the summer of 2019. Southampton applied for an expedited hearing of that CVA challenge in order that the possibility of Debenhams entering administration by 29 September 2019 remained open. An expedited hearing was ordered, and Southampton was required to file a 'position paper' rather than a pleading for time purposes.

The position paper included a submission (ground three) that Southampton's proprietary rights could not be abrogated by the CVA. That submission had two limbs:

- a CVA cannot abrogate a landlord's right to forfeit, and
- a CVA cannot force a landlord to accept an early termination of a lease

At the expediated hearing only the first limb of ground three was taken; the second limb was expressly not taken.

Norris J (as he then was) found that the CVA was valid and remained enforceable—see [2019] EWHC 2441 (Ch), [2019] All ER (D) 67 (Sep) and News Analyses: Debenhams CVA challenge dismissed (Discovery (Northampton) Ltd and others v Debenhams Retail Ltd and others), and CVAs can compromise landlords' claims for future rent (Discovery (Northampton) Ltd and others v Debenhams Retail Ltd and others).

Meanwhile, when considering whether to approve a scheme of arrangement, Mr Justice Zacaroli determined that it was not possible to force a surrender of a lease on a landlord (*Re Instant Cash Loans Ltd* [2019] EWHC 2795 (Ch), (at para [25] (ff) (i), [2019] All ER (D) 212 (Oct)). He held that

while the reduction of future rent was within the scope of a scheme of arrangement, it must be left to each landlord to decide whether to accept a surrender.

In reliance on Zacaroli J's decision in *Re Instant Cash Loans Ltd*, Southampton sought that Sir Alastair Norris review his decision to order that the Debenhams CVA was valid and enforceable. Southampton effectively wanted to run the second limb of ground three as set out in its position paper.

What did the court decide?

Sir Alastair Norris declined to exercise the jurisdiction under IR 2016, SI 2016/1024, r 12.59 for the five reasons given at para [13]:

- the decision of Zacaroli J did not amount to a sufficient change of circumstance, it was a decision on a point that Southampton already raised. The fact that there was a decision on the argument did not change the law
- Southampton had received the benefit of an expedited hearing (which involved limiting the points taken) and it would be unfair to now allow it to avoid paying the price for that expedited hearing by having the option of running further points after the event
- the review jurisdiction does not exist to enable a party to either re-run arguments that were unsuccessful at the first hearing, or to run arguments that were overlooked or thought not to have sufficient prospects of success at the first hearing. As Lord Justice Lewison said in *FAGE UK Ltd and another v Chobani UK Ltd and another* [2014] EWCA Civ 5, [2014] All ER (D) 234 (Jan), 'The trial is not a dress rehearsal. It is the first and last night of the show' (at para [114](ii))
- the point raised by Southampton is not a discrete point of law as was submitted—it led to further questions about whether the CVA could be modified, and
- although Sir Alistair Norris thought the submission that the consequence of a refusal to rescind or review his decision was to leave in place a CVA that Debenhams could not promote and the creditors' meeting could not approve, was a point of 'very real weight', it was open to Southampton to seek the permission of the Court of Appeal to raise the point as part of any appeal

Permission to appeal the earlier decision that the CVA was valid and enforceable was sought on four grounds and granted on each one (at para [15]). Debenhams was granted permission to cross-appeal on the one point decided against it (at para [16]).

It should be added that—as a preliminary point—Debenhams contended that IR 2016, SI 2016/1024, r 12.59 was not engaged, because the judge's earlier decision was not decided under Parts 1–7 of the Insolvency Act 1986 (IA 1986) That was rejected factually, on the basis that the decision was made pursuant to IA 1986, s 6. However, the author suggests that this is a point that has been raised in similar contexts on more than one occasion. The scope of IR 2016, SI 2016/1024, r 12.59 in respect of the ambit to which it applies (rather than the scope of the discretion to be exercised) is therefore causing some difficulty and it is suggested that clarity is due on that point.

Case details

- Court: High Court, Business and Property Courts of England and Wales, Insolvency and Companies List (ChD)
- Judge: Sir Alastair Norris
- Date of judgment: 13 February 2020

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