Fehily and another v Atkinson and another [2016] All ER (D) 20 (Dec)

[2016] EWHC 3069 (Ch)

Chancery Division

EnglandandWales

Stephen Jourdan QC Sitting as a Deputy High Court Judge

1 December 2016

Practice – Parties – Capacity – Appellants entering into individual voluntary arrangements (IVAs) – Appellants being unable to comply with terms of IVAs – Bankruptcy orders being made in respect of appellants – Appellants appealing against making of orders – Whether second appellant having capacity to enter IVA – Whether district judge erring in approach to issue of capacity.

Abstract

Practice – Parties. The Chancery Division dismissed the appellant's appeal against the making of bankruptcy orders against her. The court held that, in making the orders, the district judge had not erred in holding that she had had capacity to enter into the orders. The court held that, among other things, the correct test for capacity was that stated in the 31st edition of Chitty on Contracts.

Digest

The judgment is available at: [2016] EWHC 3069 (Ch)

In November 2011, the Revenue and Customs Commissioners (the Revenue) issued petitions seeking bankruptcy orders against four individuals: Mr and Mrs F and Mr and Mrs W. Shortly before the petitions were due to be heard, the individuals proposed to their creditors that they enter into individual voluntary arrangements (IVAs) under Pt VIII of the Insolvency Act 1986. The proposals were made on the basis that the four individuals were jointly and severally liable to the debt to HMRC, and between them, each was liable for 25%. Mr and Mrs W complied with the terms of the IVAs. Mr and Mrs F did not, and in June 2013, the respondent supervisors issued petitions for bankruptcy orders against them under s 264(1)(c) of the Act. The bankruptcy orders were made by the district judge. In making the orders, the district judge applied the general test stated in the 31st edition of *Chitty on Contracts* (*Chitty*), which stated that, in relation to each matter or piece of business transacted, the party in question had to have an 'understanding of

the general nature of what he is doing'. Mrs and Mrs F applied for orders annulling the bankruptcy orders. The district judge dismissed the application, rejecting the contention that Mrs F did not have capacity to enter into her IVA. Mr F abandoned his appeal. Mrs F was granted permission to appeal.

The principal issue concerned the capacity of Mrs F to enter into the IVA. She contended that, among other things, she had lacked capacity to be bound by the IVA (see [73] of the judgment). Mrs F submitted that the district judge had applied the wrong test on her capacity to enter into the IVA, in that: (i) it was not the general nature of the transaction, but the actual transaction, that there needed to be capacity to understand; and (ii) the court ought not to consider capacity by reference to what advice could be obtained from those available to give advice to Mrs F, but rather on the basis that she had received competent advice. They contended that the 'understanding of the general nature of what he is doing' was not correct, as it understated the degree of comprehension required.

The appeal would be dismissed.

(1) From the authorities, the following general principles relevant to ascertaining capacity could be derived. First, in order to understand a proposed transaction, a person needed the mental capacity to recognise the issues that needed to be considered, to obtain, receive, understand and retain relevant information, including advice, and to weigh the information (including that derived from advice) in the balance in reaching a decision. Second, the question of whether a person lacked capacity was issue specific, to be judged in relation to the particular decision or activity in question and not globally. A person might have sufficient capacity for one type of decision but not another. Some transactions were more complicated and important than others. Third, the question might also be time specific, if a person's capacity varied over time. In that case, the court would need to consider the question of capacity in relation to specific times when decisions were required from the person asserting incapacity, taking into account the nature and complexity of those decisions. Fourth, the question was whether the person had the ability to understand the transaction, not whether they actually had understood it. Fifth, the fact that a person needed help in understanding the transaction did not prevent them from having the capacity to understand it (see [78]-[82] of the judgment).

Banks v Goodfellow [1861-73] All ER Rep 47 applied; *Masterman-Lister v Brutton & Co; Masterman-Lister v Jewell* [2003] 3 All ER 162 applied; *Dunhill v Burgin* [2014] 2 All ER 364 applied; *Park's Estate, Re, Park v Park* [1953] 2 All ER 1411 considered; *Mason v Mason* [1972] 3 All ER 315 considered; *Beaney, Re* [1978] 2 All ER 595 considered; *Sheffield City Council v E* [2005] All ER (D) 192 (Jan) considered; *R v Cooper* [2009] 4 All ER 1033 considered; *Haworth v Cartmel* [2011] All ER (D) 23 (Mar) considered.

(2) The understanding that a party actually had was not the correct issue. The question was what understanding they would be capable of having if given the advice and assistance that they needed (see [85] of the judgment).

Regarding the right level of understanding required, the correct question would have been whether Mrs F would have been able to understand the proposed IVA if she had received such advice and assistance as she had needed (see [86] of the judgment).

Masterman-Lister v Brutton & Co; Masterman-Lister v Jewell [2003] 3 All ER 162 considered.

(3) The authorities stated that, in order to have mental capacity, a person had to be capable of understanding the 'nature of the transaction' or the 'nature and effect of that particular transaction' or the 'nature of the contract'. What that meant was that the person had the ability to absorb, retain, understand, process and weigh information about the key features and effects of the proposed transaction, and the alternatives to it, if they were explained to the person in broad terms and simple language. There was a distinction between the key features of a transaction, and the ancillary, incidental or procedural aspects of it. The requisite capacity was to understand the key features. It was not necessary that a person had capacity to understand every detail of the proposed transaction. The law did not prescribe any fixed standard of sanity as requisite for the validity of all transactions. It required, in relation to each particular matter or piece of business transacted, that each party should have such soundness of mind as to be capable of understanding the general nature of what he was doing by his participation. The summary of the law in *Chitty* was accurate, although it would be possible to misinterpret it as only requiring the capacity to form a general impression of the nature of a contract, rather than the capacity to absorb, retain, understand, process and weigh information about the key features and effects of the contract, and the alternatives to it, if explained in broad terms and simple language (see [90], [99]-[102] of the judgment).

On the evidence, the district judge had applied the right test for assessing Mrs F's mental capacity to enter into the IVA. Taken as a whole, the evidence did not establish that it was more likely than not that Mrs F had lacked the mental capacity to enter into the IVA (see [103], [116] of the judgment).

Manches v Trimborn [1946] WN 63 considered; *Park's Estate, Re, Park v Park* [1953] 2 All ER 1411 considered; *Beaney, Re* [1978] 2 All ER 595 considered; *Masterman-Lister v Brutton & Co; Masterman-Lister v Jewell* [2003] 3 All ER 162 considered; *Sheffield City Council v E* [2005] All ER (D) 192 (Jan) considered.

Laurent Sykes QC (instructed under the Public Access scheme) for Mrs F.

Niall McCulluch (instructed by Clarke Willmott LLP) for the respondents.
Toby Frost Barrister.

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