Neutral Citation Number: [2020] EWHC 2854 (Admin)

Case No: CO/2349/2020

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Bristol Civil and Family Justice Centre
2 Redcliff Street, Bristol BS1 6GR

Date: 2 November 2020

Before :

MR JUSTICE GRIFFITHS

- -

Between :

PHILIP JOHN LAMBERT **Appellant**

- and -

FOREST OF DEAN DISTRICT COUNCIL **Respondent**

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- -

Horatio Waller (direct access) for the **Appellant**
Jessica Brooke (instructed by Helen Blundell, Legal Services, Cotswold, Forest of Dean District Council and West Oxfordshire) for the **Respondent**

Hearing date: 19 October 2020

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE GRIFFITHS

Mr Justice Griffiths :

1. This is Mr Lambert's appeal by way of case stated from the decision of the Gloucestershire Magistrates' Court ("the Magistrates") on 28 February 2020 to refuse the Appellant's repeat application dated 5 November 2019 ("the 2019 Application") for the setting side of liability orders previously made against him in respect of various sums in respect of unpaid national non-domestic rates ("business rates") claimed by the Respondent local authority ("the Council") totalling £8,303.10.

Questions of law

2. This being an appeal by way of case stated, the facts are those stated in the case and cannot be disputed in this appeal. The appeal considers only the legal questions which have been stated by the Magistrates.

3. The questions of law stated by the Magistrates ("the Questions") in the case stated dated 10 June 2020 ("the Case Stated") are as follows:-

   i) Was this Court able to conclude in law that because this application had previously been adjudicated on in 2018 and dismissed, that the issue of bankruptcy did not now give Mr Lambert a right to have the application to set aside liability Orders further considered? ("Q1")

   ii) Was it open to the Magistrates Court to decide whether the previous application in 2018 to set aside liability orders, was a nullity because of Mr Lambert's bankruptcy or should this question have been made to a different tribunal? ("Q2")

   iii) Were the justices correct in law to have considered that the reasoning in *Yang v Official Receiver* [2017] EWCA Civ 1465 which is authority concerning liability under the statutory scheme for council tax, was applicable in the case of the applicant, in that matters raised by the applicant concerned service and liability for business rates under the Non-Domestic Rating (Collection and Enforcement) Regulations 1989/1058? ("Q3")

4. Mr Lambert has been represented before me by Horatio Waller, and I am grateful to him and to Jessica Brooke (who represented the Council) for their helpful written and oral submissions.

5. Mr Waller conceded that the answer to Q2 is "yes". That seems obviously correct, as a matter of jurisdiction. It was a decision they needed to make, and did make, as part of their consideration of Q1. I need, therefore, say no more about Q2. Mr Waller also shrewdly recognised that Q3 did not add anything of substantial value to his client, and, properly analysed, forms part of the argument in relation to Q1 if it arises at all. He therefore did not pursue a formal answer to Q3. Instead, he directed his argument, as I shall now direct my judgment, to Q1.

Application for extension of time

6. The appeal is filed out of time. The case stated was dated 10 June 2020 and the Appellant's Notice had to be filed within 10 days (on or before 19 June) but it was not

in fact filed until 2 July 2020. Mr Lambert did lodge what he intended to be his appeal papers on 19 June, the trouble being that he did so on the wrong form. Instead of using Form N161 ("Appellant's Notice"), he used N461 ("Judicial Review Claim Form"). He says this was based on incorrect advice he obtained from the court office by telephone. I make no finding about whether that is so; as there is no evidence about what question he asked, and precisely what answer he received. But I have no doubt it was an honest misunderstanding on his part, at least. Although the form he used was inappropriate, and the way in which he filled it in was even more so (he ticked the box, for example, saying the application was "being made under the terms of Section 18 Practice Direction 54 (Challenging removal)", which would only be appropriate to a deportation case), he did attach the Case Stated to it, and so the nature of his appeal was clear, although his Grounds of Appeal were not drawn up until 10 July 2020.

7. He applies for relief from sanctions and for an extension of time. Since he lodged the Case Stated on 19 June, albeit on the wrong form, his breach was not as serious as if he had failed to lodge at all, and I understand his explanation for the delay in lodging in proper form. The balance of justice clearly falls in favour of an extension of time, in my judgment. I therefore grant the extension of time and will proceed to consider my substantive decision, the case having been fully argued before me.

Background

8. The background to the Questions in the Case Stated is as follows.

9. The 2019 Application made by Mr Lambert to the Magistrates was for the setting aside of liability orders ("the Liability Orders") in respect of three properties:

    i) Liability orders dated 27 August 2013 and 24 September 2013 in respect of 3 High Street, Cinderford;

    ii) Liability order dated 23 September 2014 in respect of 32 High Street, Cinderford; and

    iii) Liability orders dated 30 April 2015 and 25 June 2015 in respect of Unit 3 Linear Business Park, Cinderford.

10. Mr Lambert failed to pay and on 12 September 2016 he was made bankrupt on a petition presented by the Council. A trustee in bankruptcy was appointed on 4 May 2017.

11. On 16 October 2017 Mr Lambert applied to the Magistrates to set aside the Liability Orders ("the 2017 Application") and on 24 October 2017 he applied to annul his bankruptcy.

12. He had, therefore, in October 2017 launched a war (as it were) on two fronts: first, a battle to have the Liability Orders set aside (of which this appeal by way of case stated is part) and, second, a battle against his bankruptcy.

13. These two battles have progressed simultaneously, as follows:

    i) The 2017 Application was adjourned on 24 November 2017 and 19 January 2018, and dismissed on 16 February 2018. I will return to the detail of the 2017 Application to set aside the Liability Orders presently.

ii) Mr Lambert's application to annul his bankruptcy was struck out for failure to comply with an "unless" order on 16 February 2018. On 12 November 2018 he made a second application to annul his bankruptcy. This was dismissed by Insolvency and Companies Court Judge Mullen in a judgment given on 8 July 2019. Mr Lambert attempted to appeal, but permission to appeal was finally refused by Trower J on 2 October 2020 after an oral hearing. A limited civil restraint order was made against Mr Lambert by ICCJ Mullen on 3 September 2020. It related only to the bankruptcy proceedings.

14. Returning to the 2017 Application to set aside the Liability Orders, this was in respect of precisely the same Liability Orders which were the subject of the 2019 Application to set aside (this is a fact forming part of the Case Stated at para 3(a)). It was listed on 24 November 2018 and again on 19 January 2018, but was adjourned on both occasions. Mr Lambert attended both those hearings. It was finally heard by the Magistrates on 16 February 2018, and they dismissed it. Mr Lambert failed to attend on that occasion, although the date had been set at the hearing on 19 January 2018 which he did attend (Case Stated para 7(a)). No point is taken in relation to his non-attendance; nor could it be.

15. The basis of the decision reached on the 2017 Application at the hearing on 16 February 2018 ("the 2018 Hearing") is set out in the Case Stated, as follows:

i) The 2018 Hearing considered a detailed application and considered the relevant test (para 3(b)).

ii) The Liability Orders in question were identical to those challenged in the 2019 Application (paras 3(a); para 3(d); see also the detailed investigation of this point referred to in para 5(b)).

iii) The 2017 Application was identical to the 2019 Application (para 3(f)).

iv) The ability of Mr Lambert to make the 2017 Application in spite of being an undischarged bankrupt was not an issue raised at the 2018 Hearing; indeed, it was not raised within the 2017 Application proceedings at all (para 3(c)).

I pause here to observe that, since the 2017 Application was an application made by Mr Lambert in his personal capacity, and without any permission from or intervention by his trustee in bankruptcy, it was in his favour that his capacity to make and pursue it was not being questioned, because it meant that it was decided on its other merits. It is only because he wants another go, having failed in the 2017 Application, that he now argues that those proceedings were a nullity, so that he can try again with the 2019 Application.

v) The court record shows that the 2017 Application was dismissed at the 2018 Hearing on the basis that (i) the Council had fully complied with rules as to service, (ii) the application had not been made promptly, and (iii) there was no genuine dispute as to liability (Case Stated para 7(b)).

The 2019 Application and the Magistrates' decision

16. Mr Lambert made the 2019 Application (which is the subject of the Case Stated) on 5 November 2019.

17. It was heard and dismissed by the Magistrates on 28 February 2020, on the following basis:-

    i) The 2019 Application was the same as the 2017 Application (Case Stated para 3).

    ii) The hearing of the 2017 Application was not, despite Mr Lambert's bankruptcy, "automatically deemed a nullity" (para 3(g)).

    iii) The Court had already adjudicated upon the application in 2018 and therefore the application could not be re-heard by the Court (para 7(f)).

Discussion and decision on Q1

18. Q1 (to which I now turn) is (I remind myself) posed by the Magistrates in the Case Stated in the following terms:

> "Was this Court able to conclude in law that because this application had previously been adjudicated on in 2018 and dismissed, that the issue of bankruptcy did not now give Mr Lambert a right to have the application to set aside liability Orders further considered?"

19. In arguing that the answer to Q1 should be "No", Mr Waller has on behalf of Mr Lambert made the following points.

20. First, he emphasised Mr Lambert's position that the Liability Orders should not have been made in the first place.

21. However, he recognises that this question of the underlying merits of the original Liability Orders is not the question before me. That was determined when those orders were first made. Whether it could be reopened was then determined against Mr Lambert in the 2017 Application at the 2018 Hearing. Whether it can be further argued was the question decided by the Magistrates upon hearing the 2018 Application and is the question which now comes before me.

22. Second, he argues that justices have an inherent power to set aside a liability order made previously in their Court, and he cites *R (Brighton and Hove City Council) v Brighton and Hove Justices (Hamdan, Interested Party)* [2004] EWHC 1800 at para 26 in that respect. At para 31, Stanley Burnton J explained the limits of any such jurisdiction:

> "It is important to take into account that the jurisdiction which Maurice Kay J held to exist cannot be exercised simply because the defendant disputes his liability to pay the NNDR in question. That there is a genuine and arguable dispute as to that liability is a necessary condition for a decision by justices to set aside a liability order, but it is not a sufficient condition. The power of a

> magistrates' court to set aside a liability order it has made is an exceptional one, to be exercised cautiously. In my judgment, in general a magistrates' court should not set aside a liability order unless it is satisfied, in addition to there being a genuine and arguable dispute as to the defendant's liability for the rates in question, that:
>
> (a) the order was made as a result of a substantial procedural error, defect or mishap; and
>
> (b) the application to the justices for the order to be set aside is made promptly after the defendant learns that it has been made or has notice that an order may have been made."

23. It will be seen that this was applied at the 2018 Hearing when the court dismissed the 2017 Application, in part, because it had not been made promptly (in addition to there being, as the 2018 Hearing found, no genuine dispute as to liability).

24. Mr Waller concedes that there is no case in which it has been said that, a previous application to set aside having failed, another may be made subsequently by a fresh proceeding.

25. It would be surprising if such a case were ever decided, because it appears contrary to the requirement of promptness, quite apart from question of res judicata to which I shall shortly turn, that it should be so.

26. Mr Waller particularly argues that magistrates must have an inherent power to hear a fresh application to set aside where there has been a mistake, not only in the making of the original orders, but in the previous proceedings to set them aside. However, and (again) even before considering the scope and implication of res judicata, as I shall presently, no mistake is assumed or identified in the facts of the Case Stated.

27. Mr Waller refers me to a witness statement made by Mr Lambert dated 27 February 2020 (before the hearing of the 2019 Application on 28 February 2020) in which Mr Lambert claims (at paras 39-40) that, relying on legal advice given to him, he proceeded on the basis that "although I could swear a declaration, I was not permitted to challenge the liability as the Insolvency Act did not allow this."

28. This is not in the Case Stated, and it should be if it is to be the basis of a submission that there was an error of law. I will nevertheless consider it, for what it is worth. Mr Waller argues that Mr Lambert only failed to pursue his challenge at the 2018 Hearing (from which he absented himself) because of this; and he argues that this was a misapprehension on Mr Lambert's part, which means that he should not be bound by the outcome.

29. However, the whole basis of the nullity argument advanced in the present proceedings is that the decision on the 2017 Application was a nullity because Mr Lambert was an undischarged bankrupt who did not have standing to make it. If that is right, then Mr Lambert's legal advice was correct and he was not proceeding under a misapprehension at all. Mr Waller therefore qualifies his submission to say that Mr Lambert did not benefit from a consensus as to whether he had a right to have the Liability Orders set

aside on his own application in the 2017 Application. However, it is not necessary for there to be a consensus before proceedings result in binding outcomes.

30. The nullity argument is related to the point raised by Q3 about the implications of *Yang v Official Receiver* [2017] EWCA Civ 1465. The Case Stated shows that the Magistrates who dismissed the 2019 Application understood *Yang* to be a case "indicating that people who are bankrupt can sometimes be restricted on bringing further applications, sometimes not" (Case Stated para 7(e)). This appears to be part of their reasoning in concluding that the 2019 Application should be dismissed, on the basis that it had already been determined in the identical 2017 Application, and "We did not find the previous proceedings were automatically deed a nullity due to the applicant's bankruptcy" (Case Stated para 3(g)).

31. *Yang v Official Receiver* was a case in which an undischarged bankrupt did indeed successfully apply to have liability orders set aside: this is apparent from the first instance judgment [2013] EWHC 3577 at para 4 and from the judgment of Gloster LJ on appeal [2017] EWCA Civ 1465 at para 13. Mr Lambert's grounds of appeal tried to distinguish the authority on the basis that it concerned liability for council tax rather than national non-domestic rates, but this does not appear to be a material distinction.

32. Nugee J (as he then was) considered this question more directly and thoroughly in *Munday v Hilburn* [2014] EWHC 4496, in which he decided that, for a bankrupt to bring legal proceedings on a right of action vested in the trustee in bankruptcy, rather than himself, is an abuse of process rather than a nullity. Indeed, Nugee J found that a lack of standing might be cured even after issue of proceedings, if the bankrupt subsequently had the bankruptcy order annulled (as Mr Lambert was, of course, attempting to by his parallel proceedings commenced in October 2018, albeit that he was ultimately unsuccessful in that attempt): see *Munday* at paras 45-50.

33. This brings me to the argument that the 2017 Application, although finally determined against Mr Lambert at the 2018 Hearing in respect of the identical Liability Orders, did not preclude Mr Lambert from bringing what the Case Stated says was an identical application in 2019. It is this that Q1 addresses. The Magistrates decided that "The Court had already adjudicated upon this application in 2018 and therefore the application could not be reheard by this Court" (Case Stated para 7(f)). Q1 is essentially asking if that was wrong.

34. In my judgment, it was not wrong, and the answer to Q1 is, therefore, "Yes".

35. The cause of action in the 2019 Application was identical to the cause of action in the 2017 Application: that is apparent from the facts stated in the Case Stated and cannot be challenged. Consequently, the strictest form of res judicata discussed by Lord Sumption in *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2014] AC 160 at para 17 applies; namely, cause of action estoppel. It follows (as discussed by Lord Sumption at para 20, citing *Arnold v National Westminster Bank plc* [1991] 2 AC 93, 105) that the bar on re-litigation is absolute, unless fraud or collusion is alleged, such as to justify setting aside the earlier judgment. There is no basis for doing that in this case.

Standing

36. The Council also objects to Mr Lambert bringing the proceedings at all, on the basis that the right to challenge the Liability Orders vested in Mr Lambert's trustee in bankruptcy, and so he was not at liberty to make the 2019 Application in his personal capacity, or to pursue it subsequently in this appeal by way of case stated. The Council argues that he does not have standing to pursue this appeal.

37. Since the appeal was fully argued on all points, I have decided the appeal (against Mr Lambert on Q1) on its merits before considering the threshold objection to his standing. However, the objection to standing is a substantive point and I will deal with that too.

38. This question is not the same as the nullity issue I have already discussed, but there is an overlap. The provisions considered by Nugee J in *Munday v Hilburn* [2014] EWHC 4496 apply. A person who conducts proceedings without standing is doomed to fail and the proceedings themselves are an abuse of process. That does not mean they are a nullity. But lack of standing is fatal to the success of the proceedings and they will not be allowed to continue once the point has been taken and decided.

39. Section 306 of the Insolvency Act 1986 provides:

> "(1) The bankrupt's estate shall vest in the trustee immediately on his appointment taking effect or, in the case of the official receiver, on his becoming trustee.
>
> (2) Where any property which is, or is to be, comprised in the bankrupt's estate vests in the trustee (whether under this section or under any other provision of this Part), it shall so vest without any conveyance, assignment or transfer."

40. The bankrupt's estate is, for these purposes, defined by section 283(1) to include "all property belonging to or vested in the bankrupt at the commencement of the bankruptcy".

41. Property, for these purposes, is defined in section 436 to include

> "…things in action, land and every description of property wherever situated and also obligations and every description of interest, whether present or future or vested or contingent, arising out of, or incidental to, property".

42. The right to bring proceedings challenging the Liability Orders (assuming it to exist) would be a thing in action. It is, moreover, an interest arising out of, or incidental to, property. It is a right based on the Liability Orders, and therefore existed at the date of Mr Lambert's bankruptcy. Therefore, it vested in Mr Lambert's trustee in bankruptcy as soon as he was appointed. It follows that it does not vest in Mr Lambert and proceedings brought upon it by Mr Lambert are doomed to fail and an abuse of process, following *Munday v Hilburn* [2014] EWHC 4496 at paras 16-20 and 45.

43. Mr Lambert's attempts to annul his bankruptcy order have failed, and so annulment is not a route now open to him in order to remedy the position. The final refusal by Trower

J on 2 October 2020 of his renewed application for permission to appeal closes that off definitively.

44. The discussion of Warren J in *R (Singh, a bankrupt) v Rose (trustee in bankruptcy)* at paras 15-49 to which I was referred by Mr Waller seems to me to confirm rather than refute that conclusion. It also cites the observation of Hoffmann LJ in *Heath v Tang* [1993] 1 WLR 1421 at 1427B: "The bankruptcy court acts as a screen which both prevents the bankrupt's substance from being wasted in hopeless appeals and protects creditors from vexatious challenges to their claims."

45. The cause of action claimed by Mr Lambert in the present case does not fall within the exceptions in section 283(2), (3), (3A) and (5) of the Insolvency Act 1986. Nor is it within the category of personal causes of action referred to by Hoffmann LJ in *Heath v Tang* [1993] 1 WLR 1421 at 1423A-C.

46. Consequently, Mr Lambert does not have standing to pursue this appeal.

Conclusion

47. The appeal, therefore, fails on every point. It is, I regret to say, totally without merit. There were no errors of law. Challenges to the facts in the Case Stated were inadmissible. Mr Lambert did not have standing to bring the proceedings. The Liability Orders in question were made as long ago as 2013, 2014 and 2015. Mr Lambert has been made bankrupt as a result of his failure to pay them. His challenges to the bankruptcy have all failed, and he has been made the subject of a Civil Restaint Order in the bankruptcy proceedings. His challenge to the Liability Orders in the 2017 Application was made when he was not entitled to bring it, because he was a bankrupt (although it was not nullity). It was not brought promptly and it lacked substantive merit (as the Magistrates found when they dismissed the 2017 Application). He then brought the 2019 Application, for which he also lacked standing, and it was a hopeless application because the matter was res judicata against him. It was totally without merit. He then brought this appeal by way of case stated, which has failed on every point, and is also totally without merit.

48. He must bring no more proceedings in relation to the Liability Orders unless any such proceedings have first been reviewed to see if they have any merit. He has shown no sign of accepting the judgments against him, or of giving up claims which have been decided against him more than once. He has wasted the time and resources of the Council and of the Court. I will make an Extended Civil Restraint Order accordingly.