

TRANSCRIPT OF PROCEEDINGS

[2020] EWHC 3738 (Ch)

Ref. CR-2020-MAN-000473

**IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN MANCHESTER
INSOLVENCY AND COMPANIES LIST (ChD)**

**IN THE MATTER OF SAINT BENEDICT'S LAND TRUST LIMITED
AND IN THE MATTER OF THE INSOLVENCY ACT 1986**

Before HIS HONOUR JUDGE HALLIWELL sitting as a Judge of the High Court.

B E T W E E N:

CAMDEN BOROUGH COUNCIL and PRESTON CITY COUNCIL

Petitioners

AND

SAINT BENEDICT'S LAND TRUST LIMITED

Respondent

**MR T GOSLING (instructed by Greenhalgh Kerr) appeared on behalf of the
Petitioners**

MR C WOLMAN (instructed by Direct Access) appeared on behalf of the Respondent

APPROVED JUDGMENT

18th NOVEMBER 2020

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JUDGE HALLIWELL:

1. This is the final hearing of a winding up petition in respect of Saint Benedict's Land Trust Limited to which I shall refer as "the Company". The Petition was presented by

Camden Borough Council and Preston City Council. It is based on the Company's putative liability for costs and non-domestic rates. Before me Mr Gosling of counsel has appeared on behalf of the Petitioners and Mr Wolman of counsel has appeared on behalf of the Company.

2. Unfortunately, the precise objects of the Company are obscure. No doubt it was originally registered under the *Industrial and Provident Societies Act 1965*. It is now registered by the Financial Conduct Authority under the provisions of the *Co-operative and Community Benefit Societies Act 2014*. Since the Company is registered on this basis, it has not been entered on the register maintained by the Charity Commission. However, on the available evidence, I am satisfied it can be regarded as a charity. I have been shown correspondence from which it can be seen HMRC have treated it as such and it appears from the witness statement dated 21st of August 2020 of Mr Keith Gregory that the Company was set up with the objective of assisting homeless people living in hostels and on the streets by storing their belongings. If, indeed, this is the Company's sole object, it would qualify as a charity for the relief of poverty and, more specifically, those in need by reason of financial hardship or other disadvantage under the provisions of the *Charities Acts 2006 and 2011*.

3. For a trust to be charitable, it must have objects that are exclusively charitable. Whilst it is unfortunate the Company has not adduced a memorandum setting out its objectives in full, I shall assume it is indeed to be treated as a charity. On the basis that the Company's objects are as described by Mr Gregory, it was formed for a purpose that is potentially of significant value to the community.

4. The dispute between the parties which has ultimately given rise to this Petition, and indeed the following proceedings, has a long and unfortunate history which is reflected in the observations of Snowden J in three judgments. His first judgment dated the 6th of December 2019 is at *[2019] EWHC 3370*. In it, Snowden J refused the Company permission to appeal an order of DJ Obodai in respect of the costs of a previous winding up petition presented by the local authorities in the present proceedings. In his second judgment, at *[2019] EWHC 3576*, Snowden J made a general civil restraint order against the Company requiring it to obtain the leave of the Administrative Court before issuing further claims and proceedings. Under this judgment, the Company was required to pay the local authorities' costs of £20,040. Thirdly, on the 27th of April 2020, Snowden J refused an application by Miss Christine Harper for an injunction to restrain presentation of two winding up petitions, including this one. The application was issued during the currency of the general civil restraint order and, although she was described as a director or trustee of the Company, it was

issued by Miss Harper personally in her own name rather in the name of the Company. Not surprisingly, Snowden J took the view that Miss Harper did not have standing to make the application herself. This judgment is at [2020] EWHC 1001.

5. The winding up petition was presented or is deemed to have been presented on 25th of March 2020 in respect of a putative debt of £51,985.57. The constituent elements are £20,040 under Snowden J's costs order dated the 20th of December 2019, £29,863.07 in respect of a liability order made by District Judge Allison in the Magistrates' Court on 4th February 2020 for national non-domestic rates and costs and £2,082.50 in respect of an order for costs made by Mostyn J on the 27th of February 2020.

6. The Petitioners rely on the provisions of *section 122(1)(f)* and *123(1)(e)* of the *Insolvency Act 1986*. *Section 122(1)(f)* provides that a company may be wound up if unable to pay its debts and, by *section 123(1)(e)*, this is deemed if proved to the satisfaction of the court that the company is unable to pay its debts as they fall due. It can be seen from the judgment of Harman J in *Cornhill Insurance Plc v Improvement Services Ltd [1986] 1 WLR 14* that insolvency can be inferred where a company fails to pay its debts when due. However, a winding up order will not be made in respect of a debt which is genuinely disputed on substantial grounds, since the Petitioner will not then have the standing to present a petition. By analogy, the court may decline to wind up a company if it has a genuine and serious cross-claim which exceeds the petition debt.

7. In the present case, the essential formalities for a winding up order have been satisfied. The Petition has been presented and served in accordance with the Insolvency Rules, it has been advertised, the certificate of compliance has been filed and I am advised no supporting or opposing creditor has indicated an intention to maintain an appearance.

8. However, on the Company's behalf, Mr Wolman submits that the Petition should be dismissed, or at least I should decline to make a winding up order, based on issues relating to the Company's alleged indebtedness and its intention to advance a cross-claim. The Company challenges District Judge Allison's liability order for national non-domestic rates. It does not dispute liability under the cost orders of Snowden J and Mostyn J but maintains it has a cross-claim which equals or exceeds the judgment debts.

9. The obvious place from which to start is DJ Allison's Liability Order on 4th of February 2020 in the Magistrates Court. On behalf of the Petitioners, Mr Gosling submits that the operation and effect of a liability order in the Magistrates' Court is straightforward. Relying upon *Regulation 18(2)* of the *Non-Domestic (Rating Collection and Enforcement) (Local*

Lists) Regulations 1989, he submits that, once such an order has been made, the amount due under the order is deemed to be a debt for the purpose section 122(1)(f) of the *Insolvency Act 1986* and, by virtue of *Regulation 18(3)*, the amount due for this purpose is the amount outstanding under the liability order itself.

10. In the present case, the local non-domestic rating list was altered on the 5th of August 2020 - after the liability order of the 4th of February 2020 - and it was altered with retrospective effect to the advantage of the Company, by reducing the area of the hereditament for which it is liable from 111.19 square metres to 81.98 metres square metres. On this basis, Mr Gosling accepts that the Company's liability for rates over the periods 2017 to 2018, 2018 to 2019 and 2019 to 2020 has been reduced in aggregate by a sum of £5,009.31.

11. It follows that the amount outstanding under the liability order falls to be reduced by that amount and, in turn, the petition debt is reduced from £51,985.57 to £46,976.46. However, Mr Gosling submits that the alteration to the list does not operate to terminate DJ Allison's liability order or extinguish the Company's liability. It simply requires an adjustment to the outstanding sum within the meaning of *Regulation 18(3)*. By way of analogy, Mr Gosling relies upon the decision of the Court of Appeal in *Yang v The Official Receiver* [2018] Ch 178. A valuation tribunal determined that property had wrongly been designated as a house in multiple occupation. The applicant, an individual, was the owner of the property and she had been made subject to a liability order under the Council Tax Regulations and ultimately adjudged bankrupt. In the light of the valuation tribunal's determination, the district judge rescinded the bankruptcy order but refused to annul it. An appeal of his decision was dismissed by HHJ Hodge QC, sitting as a judge of the High Court, and the Court of Appeal dismissed the appeal from him.

12. Gloster LJ observed that the original liability order remained in effect until rescinded, except in the case of fraud or some miscarriage of justice. At [55] she said as follows.

“In my judgment, the only sensible interpretation of *section 282(1)(a)* of the *IA 1986* is that contended for by the local authority: namely that *regulation 49(1)* deems the liability orders to constitute a legally enforceable debt, regardless of the underlying factual position relating to the relevant property, unless and until the liability order is set aside under the specific statutory procedure laid down for doing so. Dictates of certainty and expediency require that a bankruptcy court should not go behind the liability orders, except in the event of fraud or some miscarriage of justice. At the date

that the BO was made, the liability orders remained in place and had not been set aside. The effect of *regulation 49(1)* was therefore statutorily to deem them as constituting a legally enforceable debt from the time they were made until the time they were set aside...”

13. In my judgment, these principles apply in the same way to the statutory regime governing insolvent companies. In the present case, Mr Wolman does not advance a case based on fraud so I cannot go behind the liability orders in the absence of collusion, mistake or miscarriage of justice. There is no suggestion of collusion and the liability order was not made by mistake. Mr Wolman’s case is thus based on miscarriage of justice on the grounds that, following the retrospective reassessment of the area of the hereditament, the order does not accurately reflect the area for which the Company is liable.

14. In support of this part of his case, Mr Wolman referred me to the judgment of Etherton J (as he was) in *Dawodu v American Express* [2001] BPIR 93. In that case, an appeal was dismissed in relation to a bankruptcy order based on judgment debts. Although the bankruptcy order was permitted to stand, the bankruptcy registrar was considered to have adopted a test that was too narrow when asking himself whether the original judgment was vitiated by fraud, collusion or mistake since it was also necessary to ask whether the bankrupt could advance a case based on miscarriage of justice. Mr Wolman also submitted that such a case does not necessarily have to be advanced by launching an appeal. He referred me to *de Lasala v de Lasala* [1980] AC 456 and *Kuwait Airways v Iraqi Airways* [2001] 1 WLR 429 as authorities for the proposition that it is possible for a party to proceed, in the alternative, by bringing a fresh action to set the judgment aside.

15. These principles were not disputed by Mr Gosling. The real questions are whether DJ Allison’s liability order has, indeed, given rise to a miscarriage of justice and the Company is thus entitled to have the order set aside.

16. Mr Wolman submits that the order has been vitiated by the alteration, with retrospective effect, of the local non-domestic rating list on 5th August 2020. For the Petitioners to successfully rely on the order will thus give rise to a miscarriage of justice.

17. Mr Gosling’s answer is that the rating authority, Camden Borough Council, has recalculated the company’s rates liability to reflect the alteration. There can be no miscarriage of justice because this has operated to reduce the outstanding sum under *Regulation 18(3)* and, on the hearing of this Petition, the Petitioners are content to limit the Petition debt to the reduced amount.

18. I am not satisfied that the alteration of the list would, in itself, operate to reduce the outstanding sum in the way Mr Gosling submits. Consistently with the observations of Gloster LJ in *Yang v the Official Receiver (above)*, the liability order remains in effect. *Regulation 18(3)* relates only to the unpaid balance of the amounts due under the liability order itself from time to time. However, I remind myself that this is a jurisdiction in insolvency and the issue is whether the Company is deemed unable to pay its debts. Camden Borough Council is entitled to rely on an extant Court order and the issue is thus whether, in all the circumstances, it would be a miscarriage of justice for me to make a winding up order based on DJ Allison's liability order. Had the Petitioners sought to rely, at the hearing of the Petition, on the full amount encompassed by the liability order notwithstanding the alteration to the list, it is conceivable that this would have given rise to a miscarriage of justice. In any event, it would then have been open to the Company to submit it had withheld payment for that reason, not because it was unable to pay its debts. However, the Petitioners do not seek payment of the full amount; they have confirmed that the Petition debt under DJ Allison's liability order is now confined to the amounts payable in respect of the revised area following the alteration. In this way, the risk of a miscarriage of justice has been avoided.

19. Mr Wolman submits that it would be open to the Company to seek an order setting aside the liability order and, if it obtains such an order, Camden Borough Council will have to start from scratch the process of issuing another demand and, if necessary, a summons for another court hearing. He submits it would then be open to the Company to raise new points, including an argument based on the proposition that a third party, House of Panache Limited, occupies a divided part or parts of the putative hereditament and the Company cannot, thus, be regarded as a single occupier. Relying on the judgment of Mr Justice Saini in *ATOS IT Services v Fylde Borough Council* [2020] EWHC 647, Mr Wolman submits that the Company would not be in rateable occupation.

20. Mr Wolman advances an additional ground for challenge based on the provisions of *section 43* of the *Local Government Finance Act 1988*, under which the liability for non-domestic rates is imposed. *Section 43(5)* of the *1988 Act* contains a formula for the assessment of the chargeable amount where the ratepayer is a charity and *subsection (6)*, thus, applies. *Section 43(6)* makes two alternative provisions.

21. The first such provision applies where "the ratepayer is a charity or trustees for a charity and the hereditament is wholly or mainly used for charitable purposes (whether of that charity or of that and other charities)". Mr Wolman submits that the Company is a

charity and, on the basis that the hereditament was being used for the purposes of storing the possessions of homeless people, consistently with the charitable objects, the Company is entitled to charitable relief under *Section 43* of the *1988 Act*.

22. In answer to these arguments, Mr Gosling submits that District Judge Allison's Liability Order is an extant court order which has not been successfully appealed or otherwise challenged. Unless and until set aside, it is binding on the Company. Mr Wolman's submissions are based simply on speculation about the merits of arguments that were not advanced in the Magistrates Court but would be open to the Company in the event an order is obtained setting aside the Liability Order. Mr Gosling also submits that, had the Company taken the opportunity to advance a case at the hearing before District Judge Allison based on the use being made of the hereditament under the provisions of *Section 43* of the *Local Government Finance Act 1988*, the burden of proof would have been on the Company to establish its case supported by admissible evidence. He submits it did not do so. It appears from Snowden J's judgment at *[2020] EWHC 1001, [51] - [53]* that the Company applied to adjourn the hearing before District Judge Allison and withdrew when the application failed. It can thus be inferred it did not take any of the points that are now being pursued.

23. Mr Gosling submits that the Company's prospective challenge to District Judge Allison's liability order is in the nature of a collateral attack on the determination of a court of competent jurisdiction and, in the light of the procedural history, the Company should not be offered any encouragement in adopting such a course now.

24. In my judgment, Mr Gosling's submissions on this aspect of the case are essentially correct. The Company remains subject to an extant liability order of the Magistrates' Court for non-payment of non-domestic rates and is liable for the non-payment of such rates. Having been made aware that the Petition debt has been adjusted downwards to reflect the alteration to the list, the court can reasonably infer, from non-payment, that the Company is unable to pay its debts. However, this is subject to any cross claim or other rights vested in the Company.

25. As it happens, the Company maintains it is entitled to a cross-claim against the Petitioners which exceeds the petition debts. Based on the judgments of the Court of Appeal in *Re Bayoil* [1999] 1 WLR 147, it is a well-established principle of law that a judge will be justified in staying or dismissing a winding up petition if the cross-claim is genuine and

serious, the company has been unable to litigate it and it is for an amount which exceeds the petition debt.

26. The Company is currently precluded from issuing proceedings without first obtaining the permission of the Administrative Court under Snowden J's order dated 20th December 2019. However, a Particulars of Claim has been prepared by Mr Wolman on its behalf, supported by a statement of truth. I have taken the statement of truth to have been signed by Miss Harper on the 7th of October 2020. Notwithstanding that the Particulars of Claim was prepared after the date for delivery of the Company's evidence under DJ Carter's order dated 17th of August 2020, the Petitioner did not object to it being deployed in support of the Company's case and I admitted it for that purpose at the commencement of the case.

27. The claim or cross-claim, encompasses applications for an order setting aside District Judge Allison's liability order dated the 4th of February 2020 and earlier orders on the part of District Judge Rimmer in December 2016 and January 2017. It includes a claim for damages in the sum of £42,804. If the Petition debt stands at £46,976.46, the pecuniary claim is less than the petition debt and is insufficient, in itself, to warrant an order staying or dismissing the petition under the principles of *Re Bayoil*.

28. However, in my judgment, it fails to satisfy the other parts of the test. The constituent parts of the putative cross-claim for £42,804 are a claim for restitution or unjust enrichment by reason of an order for the payment of £8,011.06 under a liability order of DJ Rimmer in December 2016, £9,946.40 under DJ Rimmer's consequential costs order, and £6,105.78 under a liability order in June 2017 to 2018 (which together amount to £24,804), a claim for £16,040.74 in respect of seven liability orders and an additional £2,700 allegedly incurred according to paragraph 51 of the draft Particulars of Claim in respect of the costs incurred as a litigant in person.

29. The amounts paid under the liability orders were, in part, encompassed in a payment made to the petitioners following presentation of the previous winding up petition that gave rise to a costs order made by DJ Obodai. This is the order for which permission to appeal was sought in the first of the trilogy of hearings before Snowden J, to which I referred earlier.

30. A point is now being taken in relation to the service of the summonses under which at least some of the liability orders were obtained. However, as Mr Gosling pointed out in his submissions for the Petitioner, the Company's case on service is based largely on inference and in view of the historic timescale over which those orders were originally made, it is now too late for the Company to challenge the orders on that basis. Moreover, to the extent that

the Company discharged the sums due in satisfaction of the amount encompassed in the winding up petition before DJ Obodai, the Company is seeking to recover sums that were paid to the Petitioners to meet the debts for which they had previously petitioned.

31. No doubt, the Petitioners have appropriated the amounts they have received towards the Company's identified liabilities at the time and, at least partly on that basis, the previous winding up petition was dismissed. It was at least implicit in Mr Wolman's case before me that the amounts were effectively paid under duress but, if so, the underlying liability ought to have been referred to the Court for determination at that stage rather than being left in abeyance and determined at some undefined time in the future. A dispute followed in relation to the costs of the proceedings, which was resolved by DJ Obodai in favour of the Petitioners. Permission to appeal District Judge Obodai's order has been refused. In my judgment, it is now too late for the Company to seek to resurrect those issues for determination in a fresh set of proceedings.

32. It was also submitted that the Company has prospective claims against the Petitioners for various liabilities in respect of misfeasance in public office and damages for breach of statutory duty. On the available evidence, those claims are no more than speculative. It is alleged that a council officer or employee, Mr Quick, wrongly withheld or denied to the Company its right to charitable relief. It is also alleged that Mr Quick prevented another council employee, Mr Waters, attending court and, having done so, he misled the court about the reasons for Mr Water's absence. Of course, it was not for Mr Quick to resolve whether the Company was entitled to charitable relief. That was a matter for the court, but he was entitled to take the stance that the Company should prove it was entitled to relief.

33. The factual basis for the allegations in relation to Mr Waters are likely to be contested and, if they are pursued, they will require careful scrutiny. However, the tort of misfeasance in public office requires an abuse of public power or authority. The public officer must know that he is abusing his power or authority or at least be recklessly indifferent as to the real limits and he must act with the intention of harming the claimant - in this case the Company - or with knowledge of the probability of such harm. The cause of action is founded on bad faith. For the Company to establish a case on that basis would, by no means, be straightforward.

34. Similarly, damages for breach of statutory duty are recoverable only if the claimant can identify a statutory duty which has been broken and show that it was imposed for the

protection of a class of person in which the claimant is itself included. Before me the Company has failed to do so.

35. It is regrettable that this point has been reached. However, in my judgment, the Petitioners have successfully made out their case for a winding up order. I am now minded to make the usual compulsory order but before doing so I shall hear further from counsel.

We hereby certify that the above is an accurate and complete record of the proceedings or part thereof.