Neutral Citation Number: [2019] EWHC 886 (Ch)

Case No: BR-2016-000741

IN THE HIGH COURT OF JUSTICE
INSOLVENCY AND COMPANIES COURT
IN BANKRUPTCY

Rolls Building
Fetter Lane
London
EC4A 1NL

Date: 27/03/2019

Before:

CHIEF INSOLVENCY AND COMPANIES COURT JUDGE BRIGGS

- -

Between:

LONDON BOROUGH OF TOWER HAMLETS	**Petitioner**
- and -	
DEREK NARIS	**Respondent**

- -
- -

MR HOLBROOK (of **JE BARRING LLP**) for the **Petitioner**
MS DELGADO (of **BENCHMARK SOLICITORS LLP**) for the **Respondent**

Hearing dates: 19 March 2019

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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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CHIEF INSOLVENCY AND COMPANIES COURT JUDGE BRIGGS

Chief ICC Judge Briggs:

Introduction.

1. This is a disputed petition presented on 6 June 2016 in respect of liability orders made in the Thames Magistrates Court. An order that Derek Naris be made bankrupt is opposed on the ground that there has been a miscarriage of justice. The court should not be satisfied that the debts set out in the petition are payable.

The liability orders.

2. A total of 8 liability orders were made against Mr Naris. They broadly break down as to five liability orders in respect of non-domestic rates for a property known as Unit 3 100 The Highway ("Highway") and three liability orders in respect of council tax for a property known as 53 Barnfield Place. In his witness statement dated 11 January 2019 Mr Naris admits that he is liable for 5 of the orders totalling £9,460.91. The five include three in relation to 53 Barnfield for council tax and two for non-domestic rates while occupying the Highway. Mr Naris says "I accept that I am liable for these demands for business rates or council tax and that they were served at my residential address given above or a former business premises of one of the companies." The dispute relates to the remaining three orders in respect of non-domestic rates for the Highway totalling £75,592.91. Mr Naris explains the nature of the dispute:

   "The liability orders concern what is stated to be a premises known as [the Highway]. I do not accept there exists any such address…"

3. He explains that he took a lease of Unit 2 110 Pennington Street London E1 on 23 January 2011 in the name of James Cartwright. He used false names in the past in order to avoid an order that he be disqualified as a director. That is not relevant to the matter before me today. The only copy of the lease provided to the court defines the demised premises as "all that land situate and known as 110-116 Pennington Street, Wapping, London E1 2BB *and* 100 The Highway, London E1 ….". (my emphasis). The lease of the demised premises was registered under one title number. Accordingly, the lease demised to James Cartwright, who accepts he is Mr Naris, was the Highway registered under title number EGL155182 (the "Property") part of which included 110-116 Pennington Street (the "Lower Ground Floor").

4. On 9 May 2011 Mr Naris sub-let the "Lower Ground Floor West, 110-116 Pennington Street" to Urban Enterprise Limited ("UEL"), a company which he owned and managed. He states:

   "In or around March 2013 the landlord evicted the company from the subject property, the locks to the subject property were changed. The basis of the eviction was not clear. Whilst I was out of the subject property, the landlord sent people into the premises and smashed them up. I then had to bring an appeal to be readmitted. In July 2013 I reached an agreement with the landlord who let me back into the subject property…[UEL] went into liquidation on 29 August 2013…."

5. Mr Naris's witness statement states that an underlease of the Lower Ground Floor demised to UEL was subsequently granted to Fast Drinks Limited ("FDL") on 30 August 2013, although a lease provided to the Court contradicts his statement as it is dated 16 May 2011 and made between UEL and FDL. FDL is a company in which Mr Naris was a major shareholder. Mr Naris's story is confused more by an e-mail sent from a "fastdrinks" e-mail address on 20 December 2011 to "Business Rates" giving notification that UEL was occupying the Highway from 18 April 2011 and "would you please send the business rates bill to us directly as from the date of occupation". There is also an e-mail dated 4 January 2012 sent from "fastdrinks" that purports to enclose a lease for the Highway which was made in favour of UEL.

6. The crux of Mr Naris' defence can be gleaned from the following paragraphs of his witness evidence:

> "I recall a visit by a rates inspector from the Tower Hamlets Council, Michael Lodge around April 2015. He was enquiring as to who was occupying the premises and he told me that Tower Hamlets Council (the Petitioner) had sent out a number of rates demands to the property recently, but these had been returned in the post. I told him that Fast Drinks Limited was in occupation for the last 2 years but we had not received any rates demands and we had not returned any post. I filled him in with some of the events that had taken place at the premises in 2013 and that, because it had been substantially damaged, the property was not fully occupiable until about March 2014. I suggested that he send the rates demands to 3 Percy Circus as this is the company's registered office. I gave him some contact details and he left me his card. I heard nothing more until I received the statutory demand against me personally which was based on the 3 liability orders …. It now seems apparent that the council had been sending the demands to Unit 4 100 The Highway….which is a different postal address and is why I did not receive them. It is my belief that I did not receive the demands and other documents concerning Liability Orders 3-5 … because the postal address on the demands is incorrect. This is due to the fact that the "Unit 3" address can only be accessed from 110 Pennington Street."

7. In his application to set aside a statutory demand served on 21 March 2016 Mr Naris states that he lives at 53 Barnfield place and has "no knowledge of the liability for business rates at [Highway]. I do not own or occupy this property and I have not received any demand for payment and I am not aware of any orders of Thames Magistrates Court." Mr Naris was the tenant of the Highway. However he has accepted that he is liable for two liability orders in respect of non-domestic rates while occupying Highway. His first witness statement makes this clear "…9th May is the date when a company known as Urban Enterprise Limited took over occupation of the premises known in the demand as Unit 3 The Highway and I was no longer liable for business rates after this date as the company occupied the premises."

The appeals

8. The relevant liability orders were obtained on 2 September 2014, 4 November 2014 and 10 September 2015. The first of the liability orders related to the period commencing 29 August 2013. Mr Naris sought to set aside the liability orders on 3 March 2017 in the Thames Magistrates Court but failed. He appealed but the appeal was dismissed on 27 April 2018 by District Judge McIvor. A second appeal was also

dismissed on 9 October 2018 by Sharp LJ and Warby J. The basis upon which the first and second appeals were decided was that there had been a failure to appeal the liability order promptly (within a reasonable time).

Evidence of the London Borough of Tower Hamlets

9. Mr Uddin is the principle recovery officer employed by the London Borough of Tower Hamlets ("LBTH"). He makes the following points in his third witness statement:

> "With regard to the 3rd, 4th and 5th debts the Debtor contends that the 'premises known as Unit 3 The Highway do not exist…..My response….is as follows.
>
> First, sections 41 and 42 of the Local Government Finance Act 1988 establish the list which names each hereditament…..the hereditament is listed as "Unit 3 At 100 The Highway, E1W 2BX". Accordingly, correspondence was properly served by the Creditor at this address. Had the Debtor wanted to he could have applied to the Valuation Office Agency to "correct" the entry in the list. He did not do this. Secondly, if any correspondence is returned to the Creditor as undeliverable by the Royal Mail it would be noted on the Creditor's computerised record system and the original would be resent. In the normal post or by email if the Council held an email address. In this case I have checked the Creditor's computerised record system and can confirm that no documents that were sent to the Debtor regarding each of these five debts were recorded as returned. Thirdly, I note that even when the Debtor accepts that he was served such as when they were "served at my residential address"…….he did not respond by either making a payments or attending court to resist the making of a liability order. Fourthly, I am advised that a regular process does not require personal service and that there are irrebuttable presumptions of service that arise under the Local Government Act 1972, s233 (regarding notices served by local authorities) and the Magistrates Courts Rules 1981/552, reg 99 (regarding service of summonses). Finally, this is not an argument that the Debtor raised in the Liability Order proceedings. Indeed, on occasions the Debtor himself referred to the subject premises as "Unit 3,100 The Highway".

10. He exhibits the visiting officer's note. The note does not support the evidence given by Mr Naris.

The arguments advanced

11. Ms Delgado argues that there has been a miscarriage of justice. To quote from her skeleton argument she states:

> "Under section 271(1) of the Insolvency Act 1986 the court shall not make a bankruptcy order unless it is satisfied that the debt in respect of which the petition was presented, having been payable at the date of the petition or having since become payable, has neither been paid nor secured nor compounded for. Under section 266(3) of the Insolvency Act 1986 the court has a general power if it appears to it appropriate to do so, on the grounds that there has been a contravention of the rules or for any other reason, to dismiss a bankruptcy petition or stay proceedings on such petition. The history of the doctrine now enshrined in section 266(3) which gives the court discretion in bankruptcy proceedings to go behind a judgment debt.

In *McCourt & Siequen v Baron Meat* [1997] BPIR 114, 121 Warner J set out five broad principles to be applied. These were:

(1) A court exercising the bankruptcy jurisdiction (a 'bankruptcy court') although it will treat a judgment for a sum of money as prima facie evidence that the judgment debtor is indebted to the judgment creditor for that sum may, in appropriate circumstances, go behind the judgment, that is to say, inquire into the circumstances in which the judgment was obtained and, if satisfied that those circumstances warrant such a course, treat it as not creating or evidencing any debt enforceable in bankruptcy proceedings.

(2) The reason for the existence of that power of a bankruptcy court is that such a court is concerned not only with the interests of the judgment creditor and of the judgment debtor, but also with the interests of the other creditors of the judgment debtor. The point was succinctly made by James LJ in *Ex Parte Kibble, Re Onslow* (1875) LR 10 Ch App 373 at pp 376–377, in the following words: 'It is the settled rule of the court of bankruptcy, on which we have always acted, that the court of bankruptcy can inquire into the consideration for a judgment debt. There are obviously strong reasons for this, because the object of the bankruptcy laws is to procure the distribution of a debtor's goods among his just creditors. If a judgment were conclusive, a man might allow any number of judgments to be obtained by default against him by his friends or relations without any debt being due on them at all; it is, therefore, necessary that the consideration of the judgment should be liable to investigation.'

(3) It follows that the grounds upon which a bankruptcy court may go behind a judgment are more extensive than the grounds upon which an ordinary court of law or equity may set it aside.

(4) In particular, a bankruptcy court will go behind a judgment if satisfied that the judgment creditor manifestly had no claim against the judgment debtor on which the judgment could have been founded.

(5) There are two stages in bankruptcy proceedings at which a court may be called upon to exercise the power in question. The first is at the hearing of the petition, when the court has to consider whether or not to make a receiving order. Section 5(3) of the Bankruptcy Act 1914 provides: 'If the court is not satisfied with the proof of the petitioning creditor's debt, or of the act of bankruptcy, or of the service of the petition, or is satisfied by the debtor that he is able to pay his debts, or that for other sufficient cause no order ought to be made, the court may dismiss the petition.' The words that are particularly material there are 'If the court is not satisfied with the proof of the petitioning creditor's debt or … is satisfied by the debtor that … for other sufficient cause no order ought to be made'."

12. She refers to *Dawodu v American Express Bank* [2001] BPIR 983, where Etherton J (as he was) considered the jurisdiction of the bankruptcy court to go behind judgments and added "My only qualification to the summary by Warner J is that the cases establish that what is required before the court is prepared to investigate a judgment debt, in the absence of an outstanding appeal or an application to set it aside, is some fraud, collusion, or miscarriage of justice. The latter phrase is of course

capable of wide application according to the particular circumstances of the case. What in my judgment is required is that the court be shown something from which it can conclude that had there been a properly conducted judicial process it would have been found, or very likely would have been found, that nothing was in fact due to the claimant. It is clear that in those circumstances the court can inquire into the judgment and the judgment debt, even though the debtor himself has previously applied to have the judgment set aside, and even though that application has been refused and that refusal has been affirmed by the Court of Appeal – see *In Re Fraser; Ex parte Central Bank of London* [1892] 2 QB 633.".

13. Ms Delgado submits that a miscarriage of justice arises in this case as (I summarise) (i) Mr Naris was not in occupation of Highway; (ii) there was a failure to serve Mr Naris properly which amounted to a procedural defect; and (iii) the appeal court failed to hear the substance of Mr Naris's defence because it found that his appeal was not dealt with promptly. In respect of the last matter, Ms Delgado says the failure to hear the substance of the defence (summarised in (i) above) is crucial.

14. The occupation of Highway by FDL is said to be supported by landlord demands. The underlease provided to the court, made between James Cartwright and FDL is of the Lower Ground Floor. The premises that had been demised to UEL. The Lower Ground Floor (according to the underlease) is "part of all that land situate and known as 100 The Highway…"). James Cartwright took a lease of the Highway and the Lower Ground Floor. He has failed to demonstrate that he was not in occupation of the Highway during the relevant periods.

15. It is said that there is a miscarriage of justice because Mr Naris was not properly served. Section 233 of the Local Government Act 1972 governs service of documents or notices required or authorised by or under any enactment to be given to or served on any person by or on behalf of a local authority. Service may be effected by (i) personal service (ii) leaving at the person's address (iii) sending it by post to such an address (iv) where the name or address of a lessee cannot be ascertained after reasonable inquiry it may be given to a person who is or appears to be resident or employed on the land or (v) it may be affixed to some building or object on the land. The Non-Domestic rating (Collection and Enforcement) Regulations 1989/1058 provides, "without prejudice to section 233 of the Local Government Act 1972" notice will be served by "leaving it at or sending it by post to him" at "a hereditament which is a place of business". In his first witness statement he states "I accept that I am liable for these demands for business rates [for the period January to August 2011]… and that they were served at my residential address….or a former business premises for one of the companies." Mr Naris had not contended that the Highway was not a place of business.

16. I note that Mr Naris sought to run an argument that he had not been served in connection with an application before District Judge Rose. The nature of that application was to set aside liability orders for a property known as 111-121 Fairfield Road London E3 2QR. The District Judge heard oral evidence. Mr Naris argued that a company occupied the premises and not himself. The District Judge's judgment records "The only information the LA was given was that 'Mr Naris was responsible'. He never produced all the information requested." His appeal was on the basis that there had been a "substantial procedural error, defect or mishap" based on the

decision of the court to proceed in his absence as he was in prison. The judge said "there was no requirement by the applicant to seek judicial review of the decision of that bench and it is not my role to determine whether the bench was correct to proceed. What is clear is that the demands, final notices and summons were properly served. Mr Naris was aware of them. He was also aware of the hearings on 9 June and 7 July. All reasonable steps were taken to ensure that he was aware of the hearings on 4 August. It is difficult to accept his evidence that he did not receive that letter…..I do not conclude in these proceedings that this liability order was made as a result of a substantial procedural error, defect or mishap." The judge then turned to what is known as the Hamdan test. The test is named after a case. It requires an appeal to be made promptly. That means within a reasonable time. The court found that there had been a failure to act promptly.

17. I raise this as it is evident that Mr Naris, who the District Judge refused to believe on certain key issues (such as the existence of his step-father) was aware that there was a requirement to act promptly in this matter. He could have argued, in this matter, like the previous matter, that there had been a failure to serve the liability orders, but his failure to appeal promptly in respect of the Highway proceedings resulted in his inability to pursue an appeal on that ground.

18. Prior to the hearing of the bankruptcy petition no directions were sought for cross examination on the question service. I remind myself that evidence provided to the court must be considered against the background of all the other admissible evidence and material in order to judge whether it has any substance: see *Portsmouth v Alldays Franchising Ltd* [2005] BPIR 1394. Even though there has been no cross examination, the court may find that evidence provided by one or other party is not, on the balance of probabilities, credible because of inconsistencies. In my judgment the evidence is against Mr Naris and inconsistent with his position that the Highway did not and does not exist as an address.

19. The evidence of Mr Uddin is that the Highway is listed as a hereditament. Mr Naris never sought to challenge the valuation office as to the existence of the hereditament. He has accepted it was a hereditament by reason of accepting liability for the orders relating to the March to December 2011 period. Although he says he was served at his "residential address" his evidence is not that he objected to the demands on the basis that the Highway did not exist. To the contrary. He has referred to the Highway in evidence. This is unsurprising since the lease relied upon by Mr Naris confirms that the Highway is a property that was demised upon him together with the Lower Ground Floor. There is little evidence to add in respect of the summonses or liability orders. Considering the argument that the Highway did not or does not exist (thereby vitiating the evidence that service was properly effected pursuant to section 233 of the Local Government Act 1972 and the Non-Business Regulations) against the background of all the other admissible evidence and material the submission fails.

The affect of the Liability orders

20. Regulations 34(6) and 49(1) of the Council Tax (Administration and Enforcement) Regulations 1992 (SI 1992/613) ("CTR"), set out the circumstances in which a liability order will be made and its effect:

> "34(6) The court shall make the [liability] order if it is satisfied that the sum has become payable by the defendant and has not been paid."
>
> "49(1) Where a liability order has been made and the debtor against whom it was made is an individual, the amount due shall be deemed to be a debt for the purposes of section 267 of the Insolvency Act 1986"

21. It is beyond doubt that Regulation 49(1) of the CTR deems liability orders to fulfil the requirement in section 267(1) of the Insolvency Act 1986 that "A creditor's petition must be in respect of one or more debts owed by the debtor". A statutory demand may therefore be served in respect of such a liability.

22. Regulation 57(1) of the CTR, gives a debtor the right to challenge a liability order. Gloster LJ summed up the effect of these regulations in *Yang v Official Receiver and others* [2018] 2 WLR 307

> "regulation 49(1) of the CTR 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) of the CTR 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."

Human Rights

23. In her written submissions Ms Delgado claims that Mr Naris has not had a fair trial in accordance with Article 6 of the European Convention on Human Rights as effected by the Human Rights Act 1998. As the argument was not noticeably advanced during oral submission, I shall deal with the issue briefly. By Article 6, Schedule 1 of the Human Rights Act 1998 everyone "is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law" in the determination of his or her civil rights and obligations. In *Dias v The London Borough of Havering* [2011] EWHC 172 (Ch) Mr Justice Henderson, as he was, provided a thorough analysis of liability order procedure and enforcement. He explained:

> "It is apparent from the provisions cited above that liability orders can be made only after a fairly elaborate procedure has been followed, and the defendant has been given an opportunity to explain why he has not paid. The court may make the order only if it is satisfied that the sum has become payable, and that it has not been paid. If the defendant thinks that the order has been wrongly made, he is in principle entitled to challenge it either by judicial review or by an appeal by case stated. In the present case, however, Mr Dias took no active steps to present his case to the court, nor did he challenge or appeal against either of the liability orders."

24. It is self-evident that the description of the liability order procedure given by Henderson J extinguishes any argument that such orders are made in contravention of Article 6. Mr Naris does not explain why the tribunal was not independent or impartial. He does not argue that it was not established by law. He does not explain

why the public hearing was not fair other than to say that the Highway did not exist and therefore he was not served. In my judgment his argument that there was a breach of Article 6 is without foundation.

Conclusion

25. Mr Naris seeks to resist the making of a bankruptcy order on the grounds that the liability orders present a miscarriage of justice. In order to succeed Mr Naris is required, paraphrasing Etherton J in *Dawodu v American Express Bank*, to provide evidence that there was no properly conducted judicial process and demonstrate that had there been a properly conducted judicial process it would have been found, or very likely would have been found, that nothing was in fact due to the claimant. In my judgment there was no miscarriage of justice. First, Mr Naris admits liability in respect of a number of the liability orders that are the subject of the statutory demand and bankruptcy petition. Consequently, the petitioning creditor has a debt that exceeds £5,000 which has not been paid, secured or compounded for.

26. Secondly, the submission of Mr Naris that he is not liable for the non-domestic rates because the Highway does not exist is not credible. It is a hereditament that is liable to non-domestic rates. Thirdly the Highway was part of the demise that was the subject of a lease to Mr Naris. The same lease is relied upon by Mr Naris. He cannot rely on the lease for some purposes but not for others. Fourthly, the London Borough of Tower Hamlets effected service in accordance with the relevant legislation and regulations. Fifthly, the liability orders were made following a properly conducted judicial process. Sixthly, Regulation 49(1) of the CTR deems that the liability orders 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. Lastly, Mr Naris did seek to appeal the liability orders, but his appeals were dismissed. Although they were dismissed on the principle that an appeal should be made promptly that does not mean he did not have a fair hearing. The fact that Mr Naris failed to act promptly and was thereby precluded from raising any other argument does not equate, in my judgment, to a miscarriage of justice in the sense required for the court to go behind a judgment at a hearing of a bankruptcy petition. I conclude that there was no miscarriage of justice as there has been a properly conducted judicial process and even if there had not been a properly conducted judicial process, I would not have found that less than £5,000 was in fact due to the London Borough of Tower Hamlets.

27. I find that the petition is true, and the debts have not been paid secured or compounded for. Order accordingly.