Neutral Citation Number: [2020] EWHC 1001 (Ch)

Case Nos: CR-2020-002025 and CR-2020-002029

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

Royal Courts of Justice
Rolls Building, Fetter Lane
London, EC4A 1NL
Date: 27 April 2020

Before :
MR JUSTICE SNOWDEN

- -

IN THE MATTER OF SAINT BENEDICT'S LAND TRUST LIMITED

AND IN THE MATTER OF THE INSOLVENCY ACT 1986

Between :

CHRISTINE HARPER **Applicant**

- and –

(1) LONDON BOROUGH OF CAMDEN COUNCIL **Respondents**
(2) PRESTON CITY COUNCIL

- -

IN THE MATTER OF SHORTS GARDENS LLP

AND IN THE MATTER OF THE INSOLVENCY ACT 1986

Between :

SHORTS GARDENS LLP **Applicant**

- and –

Respondent

LONDON BOROUGH OF CAMDEN COUNCIL

- -

Andrew Clark (instructed by **Harrison Carter**) for the **Applicants**
Tom Gosling (instructed by **Greenhalgh Kerr Solicitors Limited**) for the **Respondents**
Hearing dates: 7 and 24 April 2020

- -

APPROVED JUDGMENT

COVID-19: This judgment was handed down remotely by circulation to the parties' representatives by email. It will also be released for publication on BAILII and other websites. The date and time for hand-down is deemed to be 9.45 a.m. on 27 April 2020.

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MR JUSTICE SNOWDEN

MR JUSTICE SNOWDEN :

INTRODUCTION

1. These are two applications to restrain presentation of two separate winding-up petitions against Saint Benedict's Land Trust Limited ("SBLT") and Shorts Gardens LLP ("Shorts Gardens") by the Respondent councils ("Camden" and "Preston"). The petitions relate to unpaid liability orders in respect of National Non-Domestic Rates ("NNDR") and certain unpaid costs orders arising out of earlier litigation involving the parties.

2. I heard the application on 7 April 2020 in a busy applications court and reserved judgment due to the lateness of the hour. I circulated a draft judgment to the parties on 23 April 2020 in the usual way, but was then confronted with further evidence from the applicants about half an hour before the time fixed for the hand-down on 24 April 2020.

3. Having heard further submissions, I dismissed both applications and indicated that I would give my revised reasons in writing, which I now do.

The SBLT Petition

4. The SBLT petition is in the sum of £51,985.57 comprised of;

   i) a costs order made by me on 20 December 2019 in the sum of £20,040.00;

   ii) liability orders made by DJ(MC) Allison on 4 February 2020 in favour of Camden in respect of unpaid NDDR in respect of a property in Hatton Garden, London for 2018-2019 and 2019-2020 in the sum of £29,863.07 (including costs); and

   iii) a costs order made by Mostyn J on 27 February 2020 in the sum of £2,082.50.

5. SBLT has been involved in long-running litigation with both Camden and Preston in which it has contended that it is not liable for NNDR because it occupies properties for charitable purposes connected with the storage of property for homeless individuals. It is not, however, a charity registered under the Charities Act 2011, but a company incorporated under the Co-operative and Community Benefit Societies Act 2014.

6. On 20 December 2019, in addition to making the costs order upon which the SBLT Petition is partially based, I also made a general civil restraint order (the "GCRO") against SBLT for the reasons which I set out in a reserved judgment handed down on the same day: see [2019] EWHC 3576 (Ch). In short, SBLT had engaged in an extraordinary series of meritless and abusive applications in its attempts to avoid the payment of NNDR. The GCRO provided that for two years SBLT would be restrained from issuing any claim or making any application in the High Court or the County Court without first obtaining the permission of (i) Supperstone J, or (ii) if unavailable, any other High Court Judge who is designated by him or who is authorised to sit in the Administrative Court.

7. The GCRO has not been appealed. SBLT did ask that I should review it on the basis that it had been made in its absence. That request was wholly inappropriate given that, as I explained in paragraphs [30]-[39] of my judgment, SBLT was clearly on notice of

the hearing on 18 December 2019 to consider whether to make a civil restraint order and in fact sent counsel to the hearing to apply for an adjournment. When I refused the adjournment, counsel (who said he had limited instructions) withdrew and the hearing proceeded. At the conclusion of the hearing I then reserved my judgment which I handed down on 20 December 2019 and sent to the parties together with the GCRO.

8. The application to restrain the SBLT Petition is not made by SBLT itself, but is made in the name of Christine Harper. The application and statements in support, which are electronically signed, describe Ms. Harper as a director/trustee of SBLT. Ms. Harper is represented by Harrison Carter, which is not a firm of solicitors but claims to be a company entitled to provide legal services under one of the exemptions in section 23 of the Legal Services Act 2007. Harrison Carter shares the same office address as SBLT.

9. The petition in relation to SBLT was in fact presented to the Business and Property Courts in Manchester on 25 March 2020 but was rejected by the court office, apparently on the basis that there had been an application made in London to restrain its presentation. Nothing now turns on that because I have been informed by Mr. Clark, who appeared for Ms. Harper, that it is accepted (correctly in my view) that if the petition is allowed to proceed it should be treated as having been duly presented on 25 March 2020.

The Shorts Gardens Petition

10. The Shorts Gardens Petition has not yet been presented, but Camden contends that Shorts Gardens is indebted to it in the sum of £30,648.36 comprised of;

    i) a liability order dated 15 March 2019 made by DJ(MC) Rimmer in respect of unpaid NNDR for a property in Shorts Gardens, London WC2 for the period 28 August 2018 - 31 March 2019 in the sum of £25,948.36 (inclusive of costs); and

    ii) a costs order of DJ(MC) Newton dated 10 February 2020 in the sum of £4,700 in respect of a failed application to set aside the liability order.

11. The application in relation to Shorts Gardens purports to have been made by the LLP itself. The application and statements in support are electronically signed in the name of Johan Van Huyssteen who describes himself as a director of Harrison Carter.

12. In addition to representation by Harrison Carter, the link between the two applications is that Shorts Gardens contends that the property in respect of which it has been made subject to the liability order was in fact occupied at the relevant time by SBLT pursuant to a licence.

13. Each application seeks injunctive relief on the basis that the debts in question are genuinely disputed on substantial grounds or are subject to cross-claims. They also contend that it is inappropriate for a winding up petition to be proceeded with, "until 14 days after COVID-19 has been controlled through vaccination and/or the Government make an announcement that it is safe for the United Kingdom to come out of the lockdown".

ANALYSIS

The SBLT Petition

Ms. Harper's standing to apply

14. There is a preliminary issue as to whether an application can be made by Ms. Harper to restrain presentation of a petition against SBLT at all, or in any event in circumstances in which there is the GCRO against the company.

15. Ms. Harper's application expressly states that it is made under r.7.24(1) Insolvency (England and Wales) Rules 2016. That provides,

> "An application by a company for an injunction restraining a creditor from presenting a petition for the winding up of the company must be made to a court having jurisdiction to wind up the company."
>
> (emphasis added)

16. Rule 7.24(1) does not envisage an application for an injunction being made by any person other than the company. That is not surprising. In general, an injunction will only be granted where there is a threat to do an act which constitutes an invasion of a legal or equitable right of the applicant: see e.g. Fourie v Le Roux [2007] 1 WLR 320 at [25]-[30].

17. In the context of winding up proceedings, an injunction is granted to restrain the presentation of a winding up petition where the debt is genuinely disputed on substantial grounds. The reason for that is that under the Insolvency Act 1986, a creditor's winding up petition can only be presented by a creditor; that until a person has established that they are a creditor they are not entitled to invoke the statutory process; and the winding up procedure is not for the purpose of deciding a disputed debt: see Stonegate Securities v Gregory [1980] Ch 576 at pages 579-580 referring to Mann v Goldstein [1968] 1 WLR 1091 at pages 1098-1099. The legal right being invaded in such a case is the right of a company not to be subjected to the statutory winding up process other than at the instigation of an undisputed creditor. But that is the company's right, not the right of any director or shareholder.

18. What Ms. Harper contends in her statement – and Mr. Clark reiterated in submissions – was that as a director and shareholder Ms. Harper would be affected by a petition to wind-up the company and that she should therefore be regarded as having a sufficient interest in the subject-matter of the case so as to justify the grant of an injunction. When pushed on the nature of that interest, however, Mr. Clark could not point to any additional factors that went beyond the mere holding of office as a director or the holding of shares.

19. I do not consider that the mere holding of office as a director or the holding of shares in a company gives an individual a sufficient personal interest to apply for an injunction to prevent winding up proceedings being commenced against the company.

20. A director is an office-holder with powers and duties owed to the company under the company's constitution and the general law, and who may be given authority to act as agent on the company's behalf. But directors are not personally entitled to any remuneration or other benefit simply by virtue of holding office.

21. A share is a piece of property which consists of a bundle of rights against the company and the other shareholders under the company's constitution, but the making of a winding up order does not deprive the shareholder of his shares. It is simply that different rights apply under the company's articles in a winding up, and the shares may be valueless if the company has insufficient assets to pay its liabilities in full.

22. Mr. Clark referred to Mann v Goldstein as an example of a case in which he said that a director/shareholder had been allowed to apply for an injunction to restrain the advertisement of a winding up petition which had been presented against his company. I do not consider that this case supports his proposition that holding office or shares gives a person an individual right to apply for an injunction.

23. Mann v Goldstein involved two shareholders who each owned 50% of the shares in two hairdressing companies. One shareholder (A) and his wife ran one company and the other (B) and his wife ran the second company. They fell out and A presented a winding up petition against the company run by B. The board of the company run by B was deadlocked so could not authorise action to be taken on behalf of the company. In these circumstances, B and his wife brought an application in their own names against A for an injunction to restrain advertisement of the petition.

24. As Ungoed-Thomas J indicated at the end of the first paragraph in the judgment,

> "Leave was given to amend so as to join those two companies as defendants and enable the plaintiffs to sue, in a representative capacity, for shareholders in those companies, other than the defendant…"

That formulation makes clear that the claim was, with the permission of the court, brought in conventional derivative form to overcome the problem caused by the fact that the company in question was deadlocked. In addition, the company in question was made a party to the proceedings as a defendant so that it could be bound by the result.

25. As with all derivative actions, it is clear that the right of action being pursued by the representative claimants in Mann v Goldstein was that of the company itself. It was not their personal right of action. No such deadlock exists at SBLT and no steps to obtain a representation order have been taken by Ms. Harper in the instant case.

26. In addition, among a plethora of other meritless points, Ms. Harper's statement in support of the application sought to place reliance on section 168(5) of the Insolvency Act 1986. Section 168(1) provides that section 168 only applies to a company which is being wound up, and section 168(5) enables "any person aggrieved by an act or decision of the liquidator" to apply to the court. Whether or not Ms. Harper thinks she is aggrieved, the section plainly has no application in the current situation where SBLT is not being wound up and there is no liquidator who has taken any decision. Nor can it possibly apply by some sort of analogy.

The GCRO

27. In the instant case there is the additional point that SBLT is subject to the GCRO. As indicated above, the terms of the GCRO restrain SBLT from making any application to the High Court without first obtaining the permission of the nominated judge. Mr. Gosling submitted that Ms. Harper's application was a clear attempt to evade the provisions of the GCRO and was an abuse of process.

28. In answer, Mr. Clark sought to argue that bringing an application to restrain presentation or advertisement of a petition would be a purely defensive move, and so such an application by SBLT would not be caught by the GCRO. In support of that proposition he referred me to two cases.

29. The first was a transcript of an *ex parte* application made by a litigant in person to Neuberger J on 18 August 1997 in a matter entitled Glyn v Mathew. It would appear that the applicant was the subject of a vexatious litigant order and thought that in order to serve materials defending himself in proceedings brought against him, he needed the leave of the court. In the course of argument, the applicant asserted that "If I have proceedings instituted against me, I need leave to defend them", to which Neuberger J responded,

> "No, you do not...This order prevents you making an application in proceedings. You did not make an application, you merely defended. Defending proceedings brought by others is not making an application."

30. It seems to me that far from supporting Mr. Clark's submission, this exchange illustrates why he is wrong. To apply Neuberger J's point, the GCRO does not require SBLT to obtain permission merely to defend the winding up petition brought against it. That it is entitled to do by putting in evidence in opposition and appearing at the hearing of the petition to argue that the order should not be made. But the GCRO plainly does prevent SBLT from making a pre-emptive application to restrain presentation or applying in the winding up proceedings to restrain the advertisement of a petition without first obtaining the permission of the nominated judge to do so.

31. The second case was the judgment on an application for permission to appeal in R v The Common Professional Examination Board ex parte Mealing-McLeod, unreported, Court of Appeal, 19 April 2000. Ms. Mealing-McLeod was a mature student studying for the bar who had become embroiled in a number of disputes with the institutions at which she had been studying. She had eventually compromised an application brought against her by the Attorney-General by giving an undertaking that no proceedings would be instituted by her and no application made by her in any civil proceedings without the leave of the High Court as if it were an application under section 42(3) of the Supreme Court Act 1981 ("the Undertaking").

32. Ms. Mealing-McLeod then applied for leave to bring judicial review proceedings against a decision of the Board that she was not eligible for the Bar Vocational Course. She was granted permission to seek judicial review, but her application was then refused. She later withdrew her appeal, and the Board applied for payment to it of monies which had been paid into court by Ms. Mealing-McLeod as security for costs. Hidden J ordered the money to be paid to the Board, refused permission to appeal and

refused permission under the Undertaking for Ms. Mealing-McLeod to apply to the Court of Appeal.

33. Ms. Mealing-McLeod nonetheless applied to the Court of Appeal for permission to appeal. The Board did not press the question of whether that application was prevented by the Undertaking, and the Court of Appeal did not decide it. There was, however a discussion of the point in the judgment of Roche LJ who said,

> "In this case the applicant was defending the Board's application for this money to be paid to the Board. Normally a vexatious litigant does not require permission to defend proceedings. It seems that if such a defence fails, the vexatious litigant does require permission to institute appellate proceedings. At present, on the authorities, it appears to be the law that if the first instance judge is a High Court Judge and not merely refuses permission to appeal but also refuses permission under s. 42 of the 1981 Act, there is no way that further consideration can be given to the matter by this court. There is a danger that the judge at first instance, being convinced that his decision is correct, will refuse permission under s. 42 although this court might take a different view of his decision."

34. Although Mr. Clark placed reliance upon the first few sentences of that paragraph of Roche LJ's judgment, again, I do not think that it supports his argument. Roche LJ was plainly making the point that permission would not be required if all that the vexatious litigant was doing was defending the application for payment out which had been made against her. However, he accepted that she would require permission if she sought thereafter to make an application for permission to appeal, even in the existing proceedings. That analysis is consistent with the views expressed by Neuberger J in the argument in Glyn v Mathew and it entirely supports the conclusion that SBLT does require permission under the GCRO to bring any application, either to restrain presentation of a petition or to prevent advertisement.

35. I can see that the mechanics for giving notice to the other parties and making an application to the nominated judge for permission under a GCRO do not easily lend themselves to a situation where the company may have a limited time to apply to prevent the presentation or advertisement of a winding-up petition. But that is the consequence of the company incurring a civil restraint order by making repeated applications that are totally without merit, and the company only has itself to blame.

36. Accordingly, in my judgment SBLT would clearly be barred by the GCRO from making an application either to restrain presentation of a winding up petition against it or from making an application to restrain advertisement of an existing petition unless it has first followed the procedure under the GCRO for giving notice to Camden and Preston and then has obtained the permission of the nominated judge.

37. On the question of whether Ms. Harper was seeking to assist SBLT to evade the prohibition in the GCRO, in her original statement in support of her application, Ms. Harper gave no explanation why she saw fit to make the application rather than SBLT itself. Nor could Mr. Clark enlighten me on the point in argument. In my draft judgment which was due to be handed down on 24 April 2020, I therefore surmised that

Ms. Harper made the application precisely because she considered that the company was itself barred from making the application.

38. That prompted Ms. Harper to produce a further statement for the hand down of the judgment, asserting that she had made the application rather than SBLT because she qualifies for fee remission. That is of course not a good legal reason given that, as I have held, it is not for her to seek to vindicate the company's rights in any event. I should also say that I have considerable scepticism about the truth of that statement, given that notwithstanding her alleged entitlement to fee remission, Ms. Harper never made an application on behalf of SBLT before the GCRO was made against it.

39. In any event, whatever reason has been given, it is obvious that a civil restraint order against a company should not be capable of being evaded, or its efficacy diminished, by the simple expedient of a director or shareholder making the application instead of the company. Whatever Ms. Harper's alleged motivation, in my judgment her application was a clear abuse of process. Moreover, in the same way that disobedience to a civil restraint order is capable of being a contempt of court by the person who is the subject of the order, I also consider that, depending on the circumstances, a director or shareholder who seeks to assist their company to evade a civil restraint order by making an application in place of the company may arguably be committing a contempt of court.

40. As a consequence, I refuse the application for an injunction by Ms. Harper on grounds of lack of standing, and will dismiss it as an abuse of process.

41. However, as a further and independent basis for my decision, I shall explain my views of the (lack of) merits of Ms Harper's application.

Are the debts genuinely disputed?

42. As I have indicated, two of the component elements of the debt claimed by Camden and Preston are costs orders. My order was made on the same date that I made the GCRO. It has not been appealed. Mostyn J's order was made a couple of months later in relation to an application which he held was essentially an attempt to seek judicial review of a decision of DJ(MC) Rimmer made as long ago as 7 March 2019. Mostyn J described that application by SBLT as completely meritless and "of a piece with the torrent of spurious pieces of litigation" which I had outlined in my GCRO judgment. Mostyn J ordered that any further applications to the Administrative Court would be governed by the GCRO, and that pursuant to CPR 54.12(7) SBLT could not request that the refusal of permission be reconsidered at an oral hearing. Not daunted, SBLT has apparently applied to the Court of Appeal for permission to appeal and a stay, but no decision has thus far been taken by the Court of Appeal and the debt remains outstanding and unpaid.

43. The third component of the debt claimed by Camden and Preston relates to liability orders in respect of NNDR. A liability order is deemed a legally enforceable debt for the purpose of winding up proceedings until set aside pursuant to r.18(2) Non-Domestic Rating (Collection and Enforcement) (Local Lists) Regulations 1989, which provides;

> "Where a liability order has been made and the debtor against whom it was made is a company, the amount due shall be

> deemed to be a debt for the purposes of section 122(1)(f)(winding up of companies by the court) or, as the case may be, 221(5)(b) (winding up of unregistered companies) of that Act."

44. In Yang v. Official Receiver [2018] Ch 178 at paragraph [55] Gloster LJ said that dictates of certainty and expediency require that a bankruptcy court should not go behind liability orders, except in the event of fraud or some miscarriage of justice. And in the corporate context in Bolsover District Council v Dennis Rye Ltd [2009] 4 All ER 1140 Mummery LJ said at paragraph [5],

> "…liability orders are orders of the court like ordinary civil judgments. If a winding up petition is based on such orders the court will seldom look into them, or go behind them, in the absence of fraud, or in the absence of jurisdiction in the court that made the orders, or some other truly compelling circumstance."

45. Mr. Clark did not dispute this approach. He contended however, (i) that Camden had not produced any evidence of such liability orders having been made; and (ii) that the way in which SBLT's challenges to such liability orders had been dealt with amounted to a miscarriage of justice.

46. There would, of course, be an obvious inconsistency between a submission that the liability orders had never been made, and a second submission that referred me to the way that various challenges to such orders had been dealt with. What the first point therefore seemed to boil down to was a suggestion that the SBLT petition could not properly be presented in respect of the liability orders unless certified copies of the appropriate register of decisions of the Magistrates Court were produced to the Companies Court at this stage by Camden.

47. In that regard, Mr. Clark cited rules 66 and 68 of the Magistrates Court Rules 1981. Those rules require a clerk to the Magistrates Court to keep a register of orders, and also provide that certified copies of the register shall be admissible in other proceedings as proof of the orders made.

48. Rule 66 does not, however, provide that such orders shall be invalidated if the clerk does not keep the register, and as I indicated in my judgment dismissing SBLT's appeal against a decision of DJ Obodai on an earlier winding up petition brought by Camden and Preston, [2019] EWHC 3370 (Ch) at [21], the Magistrates Court Rules do not govern the conduct of winding up proceedings. The manner in which the facts alleged in a winding up petition are to be verified at the time of presentation is by a statement of truth. Such a statement was included in a separate witness statement of Camden's and Preston's solicitor verifying the petition in this case.

49. The position as I see it, therefore, is that SBLT has simply put Camden to proof of the orders. If necessary, evidence in that regard can be adduced by Camden at the time that the petition comes to be heard, but it is not a reason to restrain presentation, especially in circumstances in which SBLT has mounted several legal challenges to the liability orders in question, so that there seems to be every reason to believe that they do exist. As well as being incorrect in law, Ms. Harper's points are thus without any merit.

50. The second issue is whether I should now be prepared to look behind the liability orders on the ground that they amount to a miscarriage of justice or for some other compelling reason.

51. The liability orders were the subject of a contested hearing on 4 February 2020, having been previously listed for a hearing on 8 October 2019. That earlier hearing had been adjourned on SBLT's application ostensibly due to the ill-health of its primary witness who, among other things was to give evidence as to a disputed signature on the licence under which SBLT claimed to occupy the property. SBLT then failed to file any significant medical evidence (other than an out-patient prescription) concerning its witness, but made repeated last minute attempts to adjourn the hearing fixed for 4 February 2020. After DJ(MC) Allison refused the adjournment, SBLT's counsel withdrew, the case proceeded and the liability orders were made.

52. On 25 February 2020 Ms. Harper invited DJ(MC) Allison to state a case for the opinion of the High Court, contending that the judge had been wrong to refuse the request for an adjournment. In a fully reasoned decision dated 3 March 2020, the judge refused to state a case. The judge doubted that Ms. Harper had standing to make her application, held that the question which had been formulated for the case did not raise an issue of law or suggest that her decision had been taken in excess of jurisdiction, and that it was frivolous: see ss. 111-114 of the Magistrates Court Act 1980.

53. In addition to Ms. Harper's application, on 2 March 2020 SBLT itself applied to the Magistrates Court to review and set aside the liability orders and allow certain additional factual evidence to be admitted. The grounds for seeking a review were broadly similar to those which were relied upon in Ms. Harper's application to state a case. The new evidence was said to include evidence from a replacement director (though how he was proposing to give evidence as to the execution of the licence by the former director is unclear), together with some supposedly expert evidence on the question of whether the property in question was occupied for charitable purposes (though no report was then available).

54. Whatever I might think of the merits or demerits of that review application, the issue is whether there are any circumstances which might suggest that the manner in which the liability orders were made and the challenges to them have been dealt with by the Magistrates Court has involved fraud, a miscarriage of justice or some other compelling circumstance to justify this court going behind the orders at this juncture.

55. The answer is plain: there is not the slightest basis for such a conclusion. On the contrary, the orders were made at a hearing which seems to me to have proceeded entirely regularly, a challenge to the decision not to adjourn by way of a request to state a case has been carefully considered and rejected with comprehensive reasons, and the application for a review is pending.

56. Accordingly, I conclude that there is no genuine or substantial dispute about any of the debts relied on in the petition.

Is there a cross-claim?

57. The alternative basis relied upon by Ms. Harper for the grant of an injunction is that SBLT has a cross-claim against Camden which exceeds the debts due. In Ms. Harper's evidence, this is explained as follows,

> "31. Saint Benedict's Land Trust have a counterclaim of £40,103.98, with interest being approximately £41,192, together with all costs wasted and generated from the previous court actions regarding proceedings 2990 of 2018.
>
> 32. The grounds for the claim is that the monies paid to Greenhalgh Kerr by Harrison Carter on 6 November 2018 to be held on account, was done so under the instruction of the directors of Saint Benedict's Land Trust, being under duress of a petition being advertised."

58. This contention appears to be an attempt to rehash an argument which was raised before me last November when SBLT sought to challenge on appeal the decision of DJ Obodai in relation to the costs of an earlier petition brought against SBLT by Camden and Preston. As I outlined in my judgment on that occasion, having (it would seem) failed to obtain an injunction to restrain advertisement of the petition, on 5 November 2018 Harrison Carter indicated that they would be sending monies equal to the petition debt to Camden's solicitors on terms that they should be held in a client deposit account for SBLT to await the outcome of SBLT's applications to set aside the liability orders. Without waiting for any agreement to those terms, the monies were sent to Camden's solicitors. On receipt, Camden's solicitors pointed out that it was not open to SBLT unilaterally to dictate the terms upon which the monies would be received, and that they would accordingly treat the same as having paid the petition debt.

59. In circumstances where SBLT either had applied to restrain the advertisement of the petition on the grounds that the debt was disputed, but had failed (which was the suggestion at the hearing before me); or could have made such an application but chose not to, there can be no suggestion of any duress when the petitioners simply indicated that they would proceed to advertise the petition as they were entitled to do in accordance with the rules.

60. Alternatively, Ms. Harper's evidence and Mr. Clark's written submissions suggested that a claim in restitution would lie against Camden on the basis that SBLT made the payment in the mistaken belief that there were valid liability orders against it. That seems to be an attempt simply to relitigate challenges to the liability orders which have already been made and failed, or to launch collateral challenges to those decisions.

61. Moreover even if SBLT had a restitutionary or damages claim based on mistake or duress, it is difficult to see how it could give rise to any substantial cross-claim, since recovery of the monies paid by SBLT would simply have the result of reviving the original petition debt based upon outstanding liability orders which the monies paid were treated as having discharged. I cannot see how SBLT would not be required to give credit for that amount in any claim.

62. In any event, in contrast to a case in which the petition debt is itself subject to a genuine and substantial dispute, where the company simply alleges in answer to an undisputed debt that it has a cross-claim, the court has a discretion to allow the petition to proceed.

In Re Bayoil [1999] 1 WLR 147, the Court of Appeal emphasised that in order to justify a stay or dismissal of the petition in such a case, the cross-claim must be genuine and one of substance; that it must be one which the company has been unable to litigate; and that it must be in an amount exceeding the amount of the petitioner's debt: see per Nourse LJ at page 155F.

63. None of those features are present in the instant case. First, as I have indicated, the cross-claim has no substance. Secondly, the suggestion of such a cross-claim was raised in argument before me as long ago as November last year on the appeal against DJ Obodai's order, and there can be no suggestion that SBLT could not have sought to litigate it in the meantime (or at least to apply for permission to do so pursuant to its GCRO after 20 December 2019). Thirdly, there is also no basis upon which any such cross-claim could be said to exceed the petition debt. The amount paid over to Camden in 2019 was £40,103.98, recovery of that amount would revive the original debt in the same amount, and the undisputed debt in the current petition is £51,985.57.

64. Given those facts, together with the background of the inappropriate activities of SBLT which led to the GCRO being made and to which I have referred, I would unhesitatingly exercise my discretion to allow a petition to be presented and proceeded with so that the views and interests of the unpaid creditors who have been put to considerable trouble and expense by this company can be heard and considered.

The Shorts Gardens Petition

65. Many of the same points in relation to the approach of the court to unpaid liability orders which have been made in relation to SBLT also apply in the case of Shorts Gardens.

66. In particular, an application by the company to set aside the liability order was made by the LLP but was dismissed by DJ(MC) Newton on 10 February 2020. As in relation to SBLT, Shorts Gardens then applied on 2 March 2020 for a case to be stated in relation to the refusal by the judge to adjourn the hearing on 10 February 2020.

67. In fact, the judge had not refused any application for an adjournment. She had heard argument during the morning and announced that she was going to deliver her judgment after lunch. Counsel for Shorts Gardens then indicated that he had another hearing elsewhere that afternoon, but that since he had finished his submissions, he did not object to judgment being given in his absence. The judge proceeded to give judgment that afternoon, and representatives of the LLP and Harrison Carter remained to hear the judgment given.

68. Those (and other) matters were dealt with comprehensively by DJ(MC) Newton in a written decision dated 4 April 2020 explaining her reasons for refusing to state a case. Although Shorts Gardens has indicated its intention to apply for judicial review of that decision, for my part I see absolutely no basis for such an application, still less any possible basis upon which the judge's decision on 10 February 2020 could be described as a miscarriage of justice or as giving rise to any other compelling reason for this court to look behind the liability order.

69. The LLP also seeks to restrain the petition on the basis that there is a pending challenge by it to a further assessment to NNDR in respect of the same property in Shorts Gardens,

but for a subsequent rating period. I see no reason why the existence of such a challenge for a different time period should be relevant to the question of whether there is any genuine and substantial dispute about the unpaid liability order in respect of the earlier period.

COVID-19

70. The final ground relied upon in both applications is the COVID-19 pandemic. Reliance was initially placed in the evidence upon Ministerial Statements and reports that the Government was considering enacting temporary measures making changes to the insolvency regime during the pandemic.

71. After I had reserved judgment, on 23 April 2020, under the heading "New measures to protect UK high street from aggressive rent collection and closure", the Ministry of Housing, Communities and Local Government and the Department for Business, Energy & Industrial Strategy announced that the Government was intending to bring forward emergency legislation relating to the use of statutory demands and the presentation of winding up petitions.

72. The press announcement stated,

> "High street shops and other companies under strain will be protected from aggressive rent collection and asked to pay what they can during the coronavirus pandemic, the Business Secretary has set out today (23 April 2020).
>
> The majority of landlords and tenants are working well together to reach agreements on debt obligations, but some landlords have been putting tenants under undue pressure by using aggressive debt recovery tactics.
>
> To stop these unfair practices, the government will temporarily ban the use of statutory demands (made between 1 March 2020 and 30 June 2020) and winding up petitions presented from Monday 27 April, through to 30 June, where a company cannot pay its bills due to coronavirus. This will help ensure these companies do not fall into deeper financial strain. The measures will be included in the Corporate Insolvency and Governance Bill, which the Business Secretary Alok Sharma set out earlier this month."

73. After setting out quotes from various people focusing on the position of retailers and companies in the hospitality business, under the heading "Notes to Editors" the press announcement stated,

> "Under these measures, any winding-up petition that claims that the company is unable to pay its debts must first be reviewed by the court to determine why. The law will not permit petitions to be presented, or winding-up orders made, where the company's inability to pay is the result of COVID-19.

> The new legislation to protect tenants will be in force until 30 June, and can be extended in line with the moratorium on commercial lease forfeiture."

74. Although the clear focus of this announcement is on the plight of tenants of retail and commercial properties facing demands from their landlords, Mr. Clark pointed out that some parts of the Government's announcement could be interpreted to indicate that a much wider ban is contemplated – e.g. "High street shops *and other companies* under strain…" and "*any* winding-up petition that claims the company is unable to pay its debts must first be reviewed by the court to determine why" (my emphasis). Taken on its own, that last statement would apply to every creditor's winding-up petition proposed to be presented.

75. In support of his argument, Mr. Clark then sought permission to refer to the new statements produced by Ms. Harper and Mr. Van Huyssteen at the hand down hearing.

76. The background to the production of those new statements is that there was no indication in any of the original evidence from Ms. Harper and Mr. Van Huyssteen that either SBLT or Short Gardens was in financial difficulty. Quite the reverse, the emphasis was upon the fact that SBLT and Shorts Gardens were each disputing the underlying liability orders, and SBLT was asserting a cross-claim. Indeed, in each of his skeleton arguments on their behalves, Mr. Clark expressly stated,

> "For the avoidance of doubt, the applicant does not contend that it faces liquidity or operational challenges as a result of circumstances related to COVID-19."

77. It therefore came as something of a surprise that in Ms. Harper's new statement she asserted, in relation to SBLT,

> "The charity [sic] is in financial difficulties because the funding it had hoped to receive under the small business grants of £10,000 has not yet materialised and all of the charity income from personal property storage has stopped because its clients who are mainly on low income cannot afford to pay as the majority have either been furloughed or have lost their jobs completely.
>
> It is a fact that does not have to be proved, *judicial notice*, that almost all companies, but for some specialist companies, as in pharmaceuticals, specialist clothing, personal protection equipment or delivery companies, are affected by COVID-19 and we like all companies in the United Kingdom and the World are going to suffer from cash flow restrictions caused by the effect of the coronavirus."

78. Likewise, in relation to Shorts Gardens, Mr. Van Huyssteen stated,

> "…Shorts Gardens LLP is a property company that receives its income from rents since its tenants cannot pay as they have no income because of the effects of the COVID-19 pandemic.

> It is a fact that does not have to be proved judicial notice that almost all companies, but for some specialist companies as in pharmaceuticals, specialist clothing, personal protection equipment or delivery companies, are impacted by COVID-19 and we, like all companies in the United Kingdom and the World are going to suffer from cash flow restrictions caused by the effect of the coronavirus."

79. There was, however, no further detail given, and no financial information of any sort provided, as to the position of either SBLT or Shorts Gardens. Still less was there any explanation of the complete *volte face* that both applicants had performed in comparison to the way in which their argument had been put at the first hearing.

80. At present, although the indication in the Government's press announcement is that the proposed restrictions are intended to apply from next Monday 27 April 2020, no draft legislation has been published. The scope of the intended restriction and precisely how it will be implemented is unclear.

81. Mr. Clark therefore accepted, rightly, that I had to make my decision on the basis of the law as it stands; but he submitted that I could and should exercise my discretion as to whether it was just and equitable to grant an injunction on the basis of the new statements from Ms. Harper and Mr. Van Huyssteen, viewed in the light of the Government's announcement.

82. In that regard, in relation to SBLT, apart from Ms. Harper's lack of standing to which I have already referred, it does seem entirely clear that the proposed future restrictions on the presentation of petitions will not in any event not apply to the SBLT Petition, which, as I have indicated, was in fact presented on 25 March 2020 in Manchester and should be accepted as having been properly presented on that day.

83. Secondly, it seems overwhelmingly likely that the proposed legislation will be limited to companies in certain identified sectors of economic activity, and to relate to statutory demands and petitions based upon claims by landlords for arrears of rent. Although the press statement does contain phrases that might, if taken out of context, suggest a wider prohibition, when those phrases are read in the broader context of the announcement as a whole, I anticipate that the prohibitions are not intended to extend to entities such as SBLT and Shorts Gardens, neither of which is a tenant in the retail or hospitality industry, or to petitions which are not based upon arrears of rent, but are based upon outstanding court orders and longstanding arrears of NNDR owing under liability orders to local authorities.

84. Further, it seems from the Government's announcement that some threshold test is envisaged under which the restrictions on use of statutory demands and presentation of petitions will only apply where the reason that the company is unable to pay its debts is due to the coronavirus (although the mechanism for the application of that test is entirely unclear).

85. In this regard, I note that although the new statements from Ms. Harper and Mr. Van Huyssteen make sweeping statements about the economic effect of the coronavirus, they do not actually contend that SBLT or Shorts Gardens is unable to pay its petition debts as a result of the effects of the coronavirus. Still less do the statements give any

credible details to support any such conclusion. In fact, as Mr. Gosling pointed out, the majority of the unpaid debts upon which the petitions are based pre-date the impact of the coronavirus and have hitherto been contested for entirely different reasons.

86. In these circumstances, I do not accept Mr. Clark's submissions. In my judgment the *volte face* of Ms. Harper and Mr. Van Huyssteen as to the financial difficulties of SBLT and Shorts Gardens is entirely opportunistic and not credible. The reason that SBLT and Shorts Gardens have not paid the debts that they owe has nothing to do with the coronavirus, and they are not the sorts of entity owing the type of liabilities which the proposed legislation seems to be intended to protect. I therefore see no reason to exercise any discretion in favour of the applicants based upon the prospect that legislative measures are to be introduced to assist more deserving companies experiencing genuine financial hardship caused by the effects of the COVID-19 pandemic.

87. Independently of their arguments concerning the financial positions of SBLT and Shorts Gardens, the applicants also suggested that since the court system is under strain as a result of the pandemic, the challenges of SBLT and Shorts Gardens to the liability orders that formed part of the basis for the petitions against them might only proceed very slowly. They contended that it would be unjust for them to face winding up proceedings before they had the chance to exhaust their challenges to the liability orders.

88. I reject that submission. It obviously has no application to the unpaid costs orders in the SBLT case, and the manifest lack of merit in the challenges that have been mounted to the liability orders thus far gives no hint that SBLT or Shorts Gardens will have any more legitimate basis for challenging the orders in the future. Moreover, if there were any merit in such an argument in either case, it will be capable of being made on the basis of known facts and the then current circumstances prevailing at the date when the petition comes to be heard, rather than being made on a speculative basis now. There is also no just basis upon which to deprive creditors of the benefit of presenting petitions now in order to obtain the earliest possible relation-back date for the purposes of challenge to antecedent transactions.

DISPOSAL

89. For the reasons that I have now given, I refused both applications and dismissed them as an abuse of process. I also declared that both applications were totally without merit.

90. I ordered Ms. Harper and Shorts Gardens to pay the costs of Camden and Preston of their applications on the indemnity basis, and summarily assessed those costs in the amounts of £4,600 and £4,150 respectively.

91. I further directed that the petition in relation to SBLT should be endorsed by the court as having been properly presented on 25 March 2020.

POSTSCRIPT

92. Notwithstanding that an agreed order giving effect to my decision of 24 April 2020 had been submitted by counsel and sealed, at about 8 a.m. on Monday 27 April 2020, shortly before I was due to circulate and hand down this revised judgment, Harrison

Carter sent my clerk by email two further statements of Ms. Harper and a further statement of Mr. Van Huyssteen. Those statements sought to persuade me not to deliver this judgment, to reopen and reargue many of the points raised in it, together with the orders summarily assessing costs, and to stay my order pending an application to appeal to the Court of Appeal or Supreme Court [sic].

93. Ms. Harper raised, for example, a wholly misconceived argument that section 126 of the Insolvency Act 1986 would enable her to apply to restrain the advertisement of the SBLT Petition. That section plainly only concerns the power of the court to restrain other actions or proceedings against the company in light of the presentation of a winding up petition. For his part, Mr. Van Huyssteen sought at length to re-argue why I should exercise my discretion to restrain presentation of the Shorts Gardens Petition on the basis of the Government's announcement of 23 April 2020, including making the bizarre suggestion that I should "use this opportunity to help steer Parliament to what would be fair in the mind of public opinion".

94. None of the material sent has any merit whatever. It does not cause me to change my mind in the slightest and I refuse to grant a stay of my order. I also strongly deprecate the conduct of Harrison Carter in sending these materials. Regrettably, this conduct is of a piece with its general *modus operandi* of bombarding the court with argumentative correspondence purporting to make applications without any legal or procedural merit.