Anami Holdings Limited v Sandwell Metropolitan Borough Council [2018] EWHC 1913 (Admin)

QBD, ADMINISTRATIVE COURT

CO/614/2018

Mccombe LJ, Davis J

Tuesday, 19 June 2018

19/06/2018

J U D G M E N T

A P P E A R A N C E S

MR G JONES QC (instructed by Rainer Hughes) appeared on behalf of the Appellant.

MR T GOSLING (instructed by Greenhalgh Kerr) appeared on behalf of the Respondent.

_____LORD JUSTICE McCOMBE:

1 This is an appeal, by way of case stated, by a company called Anami Holdings Limited ("AHL") from the adjudication of 19 October 2017 of District Judge Wheeler sitting in the Wolverhampton Magistrates' Court. By his adjudication, the learned district judge refused AHL's applications to set aside three liability orders issued at the suit of Sandwell Metropolitan Borough Council ("the Council") in Sandwell Magistrates' Court on 19 and 21 October 2014 and 18 October 2016 respectively, in respect of national non-domestic rates (which normally people call "business rates") totalling £44,428.26.

2 The three orders were made in respect of commercial property ("the Property") known as Unit 1, Dudley Street, West Bromwich, West Midlands as follows: (1) a liability order, dated 9 September 2014, for an amount of £2,480.32 in respect of the period 9 December 2013 to 31 March 2014; (2) a liability order, dated 21 October 2014, in the sum of £24,084.50 in respect of the period 1 April 2014 to 31 March 2015; (3) a liability order dated 18 October 2016 in the sum of £17,863.44 in respect of the period 1 April 2015 to 21 December 2015, totalling the sum somewhat in excess of £44,000, which I have mentioned already.

3 At all material times, AHL was, until 21 December 2015, the freehold owner of the Property and was registered on 19 February 2007 with freehold title absolute under title number WM698689. AHL contended that from 18 January 2014 the Property had been let by it to a company called General Freeholds Limited ("GFL"), and that that company remained the occupying tenant until AHL sold its freehold interest in December 2015. Accordingly, AHL

contended that it was not liable for business rates in respect of the Property, but that GFL was. Mr Jones, who appears for AHL this morning, in helpful submissions, told us that the GFL company was part of the same family of companies as AHL, although Mr Gosling said that that was a matter which, until Mr Jones mentioned it, was not known to him.

4 AHL claimed that it had not received the summonses in respect of the complaints by which the Council sought the liability orders. The Council contended that they had been served by post in the ordinary way to AHL's registered office at an address in Epping in Essex, as registered at Companies House, pursuant to regulation 13(2)(c) of the Non-Domestic Rating (Collection and Enforcement) (Local List) Regulations 1989. AHL claimed to have first heard of the liability orders when notified by letter of 21 November 2016, sent coincidentally to the same registered office address, by the Council's solicitors.

5 By email of 5 December 2016, AHL's solicitors notified the Council, and endeavoured to notify the Sandwell Magistrates' Court, that it wished to apply to set aside the orders made. Having had no reply from the court, on 12 April 2017 AHL's solicitors wrote a further email asking for an update of its purported application to set aside. This message received a "bounce-back". An attempted telephone communication mentioned in the correspondence seems to have failed – it turned out that Sandwell Magistrates' Court had become a victim of the court closure programme – at which point the solicitors addressed the matter to the Dudley Magistrates' Court and asked for AHL's application to be listed.

6 The application was supported by a witness statement of 13 July 2017 from Mr Jasdip Hare, a director of AHL, accompanied by a notice of the same date given under section 2 of the Civil Evidence Act 1985, stating AHL's intention to rely on that statement as hearsay evidence at the hearing of the application, and stating that the evidence was "considered to be uncontroversial and [...] not capable of significant challenge". The statement from Mr Hare exhibited a bulky exhibit of documents over 100 pages in length. This exhibit included what purported to be a counterpart of the lease of 18 January 2014 between AHL as landlord and GFL as tenant in respect of what I understand to be the Property (although it is somewhat differently described) for a term of "7 years from [...]", no date being given, at a rent of £7,539-odd per annum for the first two years, and thereafter £30,159-odd, payable by equal quarterly payments in advance on the usual quarter days, with provision for review on 18 January 2018.

7 The final page of the lease document bears spaces for signature by two parties "acting by a director in the presence of [...]". The first space, to be normally signed by the landlord, bears a manuscript signature, which Mr Jones has helpfully translated for us this morning as being "General Freeholds Limited", and the witnessing signature of one "J Singh", described as an accountant. The document bears no evidence of a stamp or a seal and does not appear to have been registered with HM Land Registry. There were other features of the lease to which reference is made in the case stated, to which I shall return. It does not appear from the exhibited correspondence that a copy of this document had been provided to the Council before its inclusion in Mr Hare's exhibit, notwithstanding correspondence going to the issue of liability extending back over a number of years.

8 The application to set aside the orders was opposed by a witness statement of 26 July 2017 of Mr Anthony Griffiths, a manager within the Revenues and Benefits Service Department of the

Council. As Mr Hare's own exhibit shows, Mr Griffiths had significant involvement with this matter in the material period. He gave evidence of service by post of the relevant documents, including the relevant summonses on AHL at its registered offices pursuant to the Regulations, which in some respects the learned district judge clearly found unsatisfactory. In the statement, Mr Griffiths gave evidence that AHL had failed to supply any evidence backing up the existence of a true letting, such as utility bills, proof of insurance, proper evidence of demand and payment of rent and the like. It was noted in the statement that GFL's last filed accounts were made up to 30 December 2012, and that the company had been struck off the Register of Companies and dissolved on 6 October 2015, some two months before AHL itself sold its freehold interest. It appears that Mr Hare, AHL's deponent, had in fact been a secretary of GFL for a period of years in the past.

9 In the light of these matters, Mr Griffiths asserted that the Council believed that the lease was "a sham, being a document executed by the parties with the sole intention of allowing [AHL] to avoid the payment of business rates, rather than with any real intention to allow the purported tenant to occupy the Property". Thus the Council's contention was that AHL remained the "owner" of the Property within the meaning of sections 45(1) and 65(2) of the Local Government Finance Act 1988 and was liable for the rates in question.

10 There was a further witness statement in reply from Mr Hare of 11 August 2017, also accompanied by a notice under the 1995 Act, stating the intention to adduce it as hearsay and still maintaining that the evidence was considered uncontroversial and not capable of significant challenge. This latter statement is perhaps somewhat surprising given the contents of the second statement which was clearly designed to refute Mr Griffiths' clear assertion that the lease appeared to be a sham. No one could seriously have thought that the evidence was either uncontroversial or not capable of significant challenge, which lends one to question the decision of AHL not to produce Mr Hare for cross-examination at the hearing of the applications.

11 The further statement took issue with certain matters as to the contents of the liability orders, which do not appear to have been ultimately in issue before the district judge. It also stated again that the summonses leading to the making of the orders had not been received by AHL, reminding the reader that in the exhibit to the first statement there was included a copy letter of 11 July 2014 asking the Council to correspond with AHL at an address in Regent Street in London and not at the Epping address, and informing the Council that the property was under lease from January 2014 to GFL, whose address was at New Cavendish Street in London. There was no copy of the lease provided to the Council at that stage. It is to be noted, however, that some of the correspondence sent by the Council to the Epping address, including the letter of 21 November 2016 from the Council's solicitors which I have mentioned requiring payment of the sums due under the liability orders, appear to have been duly received by AHL.

12 The application first came before the magistrates' court on 7 September 2017, when it had to be adjourned to a new date owing to a lack of court time. We are told in the materials produced by the respondent that the Council made it clear that it intended at that time to adduce oral evidence in opposition to the application, and that the challenge to Mr Hare's written evidence was also stated to the court.

13 The case returned for a full hearing of the applications on 19 October 2017, when, as I have said, the applications were refused. At that hearing, Mr Hare, AHL's witness did not attend, but

Mr Griffiths of the Council did attend and was cross-examined by counsel then appearing for AHL (not Mr Jones QC who appears for AHL today).

14 As the district judge records in the case stated, the parties were in agreement as to the test that had to be applied on the applications. It is common ground that that remains the test that we have to consider in dealing with the present appeal. The test was stated by Stanley Burnton J (as he then was) in *R (on the application of Brighton and Hove City Council) v Brighton and Hove Justices & Anor*[2004] EWHC 1800 (Admin), as follows. The jurisdiction:

"cannot be exercised simply because the defendant disputes his liability to pay the NNDR in question. That there is a genuine and arguable dispute as to that liability is a necessary condition for a decision by justices to set aside a liability order, but it is not a sufficient condition. The power of a magistrates' court to set aside a liability order it has made is an exceptional one, to be exercised cautiously. In my judgment, in general a magistrates' court should not set aside a liability order unless it is satisfied, in addition to there being a genuine and arguable dispute as to the defendant's liability for the rates in question, that:

(a) the order was made as a result of a substantial procedural error, defect or mishap; and

(b) the application to the justices for the order to be set aside is made promptly after the defendant learns that it has been made or has notice that an order may have been made."

15 The District Judge in his decision found that there was no "genuine and arguable dispute" in the present case, because the purported lease appeared to be a sham and no sufficient issue had been raised to demonstrate that it was not. The District Judge says in the stated case that he found the evidence of Mr Griffiths from the Council to be "poor". He was extremely critical of the record-keeping by the Council, and of Mr Griffiths' own failure to check details about communications with AHL and about the service of formal documents. He described Mr Griffiths' record-keeping of telephone communications to be "shambolic".

16 In spite of these matters, the District Judge said he had not specifically said that AHL had satisfied him that there had been a "substantial procedural error or mishap", nor did he say specifically that the applicant had not made that out. However, as he says in the stated case, he had come to the conclusion that AHL had not satisfied him that there was truly a genuine and arguable dispute at all.

17 As to that matter, the district judge recorded the submission on behalf of AHL, repeated on this appeal, that it need only to demonstrate a genuine and arguable dispute which was, it was said, a low bar for an applicant to satisfy before a liability order is set aside and the matter is sent back for a further full hearing. The judge in his oral judgment said that "it can't be less than an evidential burden - to provide some evidence on which to hang the hat of a genuinely arguable case". He says in the case stated that he was conscious of the comment of Neuberger J (as he then was) in *National Westminster Bank v Jones*[2001] 1 BCLC 98 as follows:

"Because a finding of a sham carries with it a finding of dishonesty [...] and because the court places great weight on the existence and provisions of a formally signed document, there is a strong and natural presumption against holding a provision or a document a sham."

In the case stated, the learned district judge emphasised the words “formally signed document”.

18 The judge then set out in the stated case a number of features of the lease that he found curious, in subparagraphs (a) to (k) of paragraph 15 of the case. He noted the attestation and the absence of a company seal. He noted that, whereas a director may sign a document on behalf of the company, this had not occurred here: it had been signed in the name of the company itself. The signature that appeared on the document appeared first in the space where the landlord, i.e. AHL, would usually sign, not the tenant. He notes that, as the lease is supposed to be a counterpart, why was the original not produced, or at least a copy of the landlord's part? He said he had been provided with no details as to the negotiations leading to the grant of the lease. He asked himself where were the copy letters and files from the applicant AHL and GFL? Were there agents involved? Were there diligence checks carried out by the tenant? Did solicitors act on either side, and, if so, where are their documents? If there were no solicitors, he asked, who drafted the lease? There was no evidence he could see of payment of stamp duty, and, whereas the lease had been granted for seven years and would normally have been registered with the Land Registry, it had clearly not been done. He also noted there was no evidence of a mortgagee's consent to the letting.

19 He said further in later parts of the stated case that he had been given no evidence whatsoever of GFL's actual occupation of the Property by way of evidence as to the nature of its business, by way of trading invoices, publicity documents, a website or the like. Nor was there evidence of payment for use of the utilities. There was no satisfactory evidence of rental payments either. The judge's conclusion stated at paragraph 18 of the case stated was this:

“I concluded that GFL was, to all intents and purposes, a dormant company. No explanation was provided to me as to how on earth it would have been in a position to pay the Business Rates comprising the Liability Orders, over £42,000. There was so much wrong with the argument that the Applicant had genuinely leased the Property to GFL. There was so much missing from the evidence of Mr Hare, such evidence not being tested in cross-examination. There was no possible room for doubt, in my mind. The presumption postulated by Neuberger J [...] had been rebutted. This arrangement was clearly a sham. The Applicant, to my mind, did not get anywhere close to establishing that it had a genuine and arguable case, however low the bar is set.”

20 The district judge refused the applications, with costs to be paid by AHL. He records in the case that he was satisfied that he had jurisdiction to order the payment of costs pursuant to section 64 of the Magistrates' Courts Act 1980, which provides as follows:

“(1) On the hearing of a complaint, a magistrates' court shall have power in its discretion to make such order as to costs—

(a) on making the order for which the complaint is made, to be paid by the defendant to the complainant;

(b) on dismissing the complaint, to be paid by the complainant to the defendant, as it thinks just and reasonable [...]”

21 The judge says that the applications to set aside the order were proceedings consequent upon the complaint and fell accordingly within the section. He noted in paragraph 22 of the case stated the decision of Cockerill J in *R (on the application of Khan) v Feltham Magistrates' Court*[2017] EWHC 3042 (Admin), decided after his own decision in the present case, in which the court decided that there was jurisdiction to award costs in a case such as this under section 64 of the 1980 Act.

22 The judge has now posed three questions for the decision of this court in the following terms:

"(1) Was I entitled to conclude, on the evidence before me, that there was no genuine and arguable dispute as to the Applicant's liability to pay the Business Rates comprising the Liability Orders?

(2) Given the respective positions of the Applicant and the Respondent as to the validity of the lease and the Applicant's assertion that the question of 'sham' gave rise to a factual dispute which should be tested at a full hearing, was I entitled to conclude that there was no genuine and arguable dispute?

(3) Was I entitled to order the Respondent's costs to be paid by the Applicant?"

23 On the present appeal against the decision of the learned district judge, AHL contends, in cogent and helpful submissions from Mr Jones QC, that each of these questions should be answered in the negative. Mr Jones relies upon the well-known decision of the Court of Appeal in *Snook v London & West Riding Investments* [1967] 2 QB at 801 and the statement of Diplock LJ (as he then was) at page 802 as follows:

"As regards the contention of the plaintiff that the transactions between himself, Auto Finance and the defendants were a 'sham,' it is, I think, necessary to consider what, if any, legal concept is involved in the use of this popular and pejorative word. I apprehend that, if it has any meaning in law, it means acts done or documents executed by the parties to the 'sham' which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create."

24 He also cites the decision of Megarry J, sitting, unusually, in the Queen's Bench Division, in *Miles v Bull*[1969] 1 QB 258, in which Megarry J said in two passages this. First:

"On the other hand a transaction is no sham merely because it is carried out with a particular purpose or object. If what is done is genuinely done, it does not remain undone merely because there was an ulterior purpose in doing it."

He then cites from *Ferris v Weaven* and continues:

"Mere circumstances of suspicion do not by themselves establish a transaction as a sham; it must be shown that the outward and visible form does not coincide with the inward and substantial truth."

25 It seems to me that what was required to be demonstrated on this application was what the inward and substantial truth may have been; all that was produced was the outward and visible form. Mr Jones submits that the learned judge adopted a wrong approach both as to the nature of the evidence required to establish a genuine and arguable dispute, as what is and is not a sham transaction in law. The crux of the argument on the former point is that this is said to have been an interlocutory hearing, at which it was not for the district judge to make findings of fact but merely to decide whether or not there was a real issue to be tried in substantive liability order proceedings. All the judge, it is submitted, could properly do was to record that the Council intended to make a case that the lease was a sham and to direct such a hearing to be held. It is argued that the situation was akin to an application in Civil proceedings generally to set aside a judgment obtained by default, or, by way of analogy, to an application for summary judgment on which a defendant seeks leave to defend.

26 On the second question, it is argued that the features of the apparent lease transaction picked out by the judge as supporting his view that it was a sham do not go to the question of whether the executed lease was or was not intended by the parties to it to be a lease, i.e. intended to be a proper lease. It is submitted that the judge focused entirely upon whether he believed there was a genuine lease entered into between the two companies (which seemed to me to be the question, in fact), rather than what is submitted to be the correct question: whether, regardless of motive, the lease was intended to have legal effect between the parties to it. It is said that the learned judge failed properly to have regard to the purport of the decision in *Snook*, which I have quoted above.

27 Assuming in favour of AHL that the bar to relief on the application was to show a good, arguable case by analogy to similar applications under the Civil Procedure Rules that there was a true lease intended by the apparent parties to it, it seems to me that the judge was fully entitled to say that it was necessary to find evidence upon which one would "hang the hat of a truly arguable case". Mere assertion by AHL that the property was let to GFL clearly would not do. The statements of Mr Hare amounted to little if anything more than this. There needed on AHL's case to be some cogent evidence to suggest that both parties intended a true lease. The apparent tenant was of the most tenuous character and had been dormant at all material times. There was no evidence from GFL that it intended to take a lease at the property from an associated company (inaudible) that might have been expected. The only thing that was produced was the very strange lease document produced for the first time in the evidence in support of the applications, with all the strange attributes that the learned judge identified, and the two unsigned letters dated 25 September and 18 November 2014, on stationery headed as being that of GFL, stating that it was the tenant but anonymously unsigned. It is strange, as clearly the judge was entitled to find, that that lease document did not see the light of day until the application to set aside was made.

28 To justify what Stanley Burnton J characterised as this "exceptional" jurisdiction, there needed to be at least something to suggest a true landlord-and-tenant relationship. All the features to which the judge pointed were strong grounds for thinking that the lease document was nothing more than a mask to conceal the reality and to bolster the mere assertions that had been made in the witness statement, without any substance behind it at all. If the test to be applied is akin to that for, say, resistance to summary judgment, or to achieve the setting aside of a default judgment, then I consider that the judge was entitled to find that AFL's evidence did

not come close to passing that test. There was nothing in substance adduced to back up an entirely shadowy case of tenancy with nothing of reality behind it.

29 I do not accept the submission that the learned judge ignored the decision in *Snook*. He cited the decision in *National Westminster Bank v Jones*, which it was clear was fully in his mind. That case dealt extensively with the law deriving from several of the authorities, including *Snook* itself.

30 For my part, therefore, I would answer questions 1 and 2 in the case "yes". On the question of jurisdiction to award the Council its costs of the applications, I would not be inclined to depart from the judgment of Cockerill J in *Khan* unless I was persuaded that it was clearly wrong. As it is, in spite of the short, cogent and skilful argument deployed against that decision in this case, I find Cockerill J's reasoning persuasive and I would follow it in this case. Therefore, I would answer the district judge's question 3 also in the affirmative, and I would therefore dismiss the appeal.

31 MR JUSTICE WILLIAM DAVIS: I agree.

MR GOSLING: My Lords, there is an application for the respondent's costs of the appeal.

LORD JUSTICE McCOMBE: Have we got jurisdiction to order them?

MR GOSLING: I understand that----

LORD JUSTICE McCOMBE: I do not think there is going to be dispute about that.

MR GOSLING: I think now we are on more familiar territory----

LORD JUSTICE McCOMBE: We are in CPR territory.

MR GOSLING: -- (inaudible) falls under the CPR from now on.

LORD JUSTICE McCOMBE: You ask for costs.

MR GOSLING: Yes.

LORD JUSTICE McCOMBE: Have there been any schedules served?

MR GOSLING: There have.

LORD JUSTICE McCOMBE: Right. Maybe I missed them.

MR JUSTICE WILLIAM DAVIS: No, well, I received yesterday, and I am afraid I have left it in my room. I know it has arrived.

LORD JUSTICE McCOMBE: Mr Jones, have you seen any schedule?

MR JONES: I have not, no. I am enquiring with my solicitor as to whether she has.

LORD JUSTICE McCOMBE: Your solicitor has been unduly modest, sitting so far behind. She should have come a bit closer to you.

MR JONES: (After a pause). My Lord, I have a copy now. I cannot say----

LORD JUSTICE McCOMBE: Would it be helpful if you addressed submissions in writing as to any -- on the principle? I do not think you can oppose on order for costs, can you, Mr Jones?

MR JONES: I concede jurisdiction.

LORD JUSTICE McCOMBE: And we cannot resist an order being made against your client for costs.

MR JONES: Not sensibly, no.

LORD JUSTICE McCOMBE: No. So could you do this: we will make an order for costs, but please, if there is a dispute as to quantum, perhaps the submissions could be addressed to us in writing.

MR JONES: Very well.

LORD JUSTICE McCOMBE: Is that fair? Does that give you more time? That is what I am thinking about. Or do you want to do it now?

MR JONES: No, I have not seen this until moments ago.

LORD JUSTICE McCOMBE: Well, we do not have our copies with us.

MR JONES: I am quite content.

LORD JUSTICE McCOMBE: It should not take you very long.

MR GOSLING: It is a modest schedule (inaudible).

LORD JUSTICE McCOMBE: What is the modest sum being sought, Mr Gosling?

MR GOSLING: Just over £9,150.

LORD JUSTICE McCOMBE: Right.

MR GOSLING: Which compares favourably to the appellant's £25,000.

LORD JUSTICE McCOMBE: They have said 25, have they?

MR GOSLING: Indeed.

LORD JUSTICE McCOMBE: Well, there we are. Okay, please could you address any submissions as to costs in writing, addressed to my judicial clerk, and I will then consult with William Davis J as to the course to be taken?

MR JONES: Equally, if the sum can be agreed, we will inform your clerk accordingly.

LORD JUSTICE McCOMBE: That would be most helpful. Thank you both very much for your assistance orally and in writing. Mr Jones, notwithstanding our unkindness to you, we found your submissions very helpful.

CERTIFICATE

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