IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
CHANCERY DIVISION

CH-2019-000212

[2020] EWHC 545 (Ch)

The Rolls Building
7 Rolls Buildings
Fetter Lane
London, EC4A 1NL

Wednesday, 26 February 2020

Before:

MRS JUSTICE FALK

B E T W E E N :

JEWELITE TRADING LIMITED — Appellant

- and -

THE LORD MAYOR & CITIZENS OF THE CITY OF WESTMINSTER — Respondent

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MR J. COUSER (instructed by ASW Legal) appeared on behalf of the Appellant.

MS W. PARKER (instructed by Judge & Priestley) appeared on behalf of the Respondent.

J U D G M E N T

MRS JUSTICE FALK:

1 This is an appeal by Jewelite Trading Limited (the "Company") against a winding up order made on 8 July 2019 by ICC Judge Prentis. The background and the basis of the petition was liability orders made in relation to periods between 2012 and 2017 in respect of two properties, at Jermyn Street and Ormond Yard, in respect of non-domestic rates as regards both properties, and also council tax in respect of the Jermyn Street property. Those liability orders were obtained by the respondent. The total sum involved is in the region of £72,000.

2 A statutory demand was issued on 20 July 2017, and sent to the Company's registered office. There was no application to set that statutory demand aside. The final demand was made on 30 October 2017. A winding up petition was issued on 1 November 2017 and served on 15 November 2017.

3 The Company attended a hearing on 18 December 2017 and indicated that it would be disputing the liability orders in the magistrates' court. This led to a series of adjournments of the petition throughout 2018. There was a hearing at the magistrates' court on 8 February 2019, at which the application to set aside the liability orders was withdrawn. That led to a judicial review application challenging that decision, which failed. There is a confirmation of that failure, in the form of a refusal of permission to apply for judicial review issued in August 2019.

4 There was a further hearing of the petition on 13 February 2019, and another hearing on 20 March 2019 before ICC Judge Jones. At that hearing, on 20 March, both parties were represented by counsel, and the matter was listed for directions on a date to be fixed. The date was not fixed at the time, but was subsequently fixed, and that led to an order being made by ICC Judge Jones which, although dated 20 March, was only sealed on 7 May 2019, containing the date for the hearing. The hearing date was fixed for 8 July.

5 At the petition hearing on 13 February the Company had been given permission to file evidence disputing the petition debt, which it had done, and that led to the decision to adjourn for directions in March. I will return to some aspects of that evidence later, but just to say that there is a limited amount of information in that evidence suggesting that a now dissolved different company called D4 & D3 was in occupation of one of the two properties under licence for part of the period.

6 At the hearing ordered for 8 July the respondent was represented but the Company did not attend. The Company says that was because it received no notice of the hearing. At the hearing ICC Judge Prentis considered the evidence and decided to make a winding up order. It is that order that is being challenged.

7 There are two grounds of appeal:

(1) The first is that the order ICC Judge Prentis made was unjust because of a serious procedural error. The Judge mistakenly believed that the order of 20 March had been validly served, when it had not. It is said that had the Company been represented at the hearing on 8 July, directions would have been given and the matter would have been set down for final determination. In other words, the Company would have had a further opportunity to contest the petition.
(2) The second ground is that ICC Judge Prentis was wrong to treat the directions hearing listed on 8 July as entitling him to wind up the Company in

circumstances where the Company did not attend, and was not represented. The judge should have just adjourned the matter, and reserved costs.

8 Dealing with these grounds in turn, in relation to ground (1), the Company relies on notice of the hearing not being appropriately served. It was served to an email address of an individual at the Company's solicitors, but unfortunately went to junk email. The Company relies on the fact that the email address used was not actually the email address of the solicitor dealing with the matter, a Mr Wyatt, but instead a paralegal, and it is said that is important because the Company had filed a notice of change providing for service of documents by email to Mr Wyatt's email address, and no other email address.

9 There are a number of difficulties with that. The first is that the notice of change referred to in fact relates to the judicial review proceedings. It was filed in those proceedings, and not in the winding up proceedings. Although the Company says that the solicitors were on the record for the winding up proceedings as well, that is disputed by the respondent council. I was referred to an email from Mr Wyatt dated 27 February 2019 attaching witness evidence in the winding up proceedings, and saying, "We are instructed solely to assist with filing and serving the evidence on behalf of Jewelite Trading Limited". I agree with Ms Parker that that is not consistent with saying, "We are the solicitors acting on this matter", or that, "We are content to accept service".

10 But a more significant point is that in fact the notice of the hearing, in the form of the order dated 20 March, was sent to the Company's registered office by post. That is an acceptable form of service. It was not in dispute that the Insolvency Rules apply, with modifications, relevant parts of CPR 6, and CPR 6.20(2) explicitly states that:

> "A company may be served–
> (a) by any method permitted under this Part; or
> (b) by any of the methods of service permitted under the Companies Act 2006…"

11 It is well known that under section 1139 of the Companies Act 2006 service by post to a company's registered office is adequate service. There has been no suggestion that the item of post was not received, and there is no evidence to support any allegation of non-receipt, so the normal presumption that if posted the item was delivered in the ordinary course of post, applies. There is no evidence to displace that presumption.

12 On that basis, it is not fatal to service that the order was also sent to an email address at the Company's solicitors. The order was validly served by being sent to the registered office. I note that the statutory demand was sent to the same address, and there was no suggestion that that was not received.

13 Finally, I also note that the Company was represented at the hearing on 20 March, at which the adjournment was ordered. It therefore clearly had knowledge, through its advisers, that the matter would be relisted. But it appears to have taken no steps to enquire about when it was to be relisted for.

14 In the circumstances, I must reject ground (1) of the appeal. There was effective service, and I do not agree that the fact that it was also sent to an email address at the solicitors which the Company says was the wrong email address, means that there was no effective service. The order was validly served.

15 The key ground is ground (2). Mr Couser for the Company accepts that ICC Judge Prentis had a broad discretion as to the action he should take. But he submits that it was not appropriate in the circumstances for a winding up order to be made, and that he should have adjourned the case again. In particular, he relies on the fact that even if it is assumed that the 20 March order had been received, the Company had received no notice that it was at risk of actually having a winding up order made against it at the hearing on 8 July. It would have thought that the hearing was for directions only.

16 So, on the basis of that 20 March order, it was wrong, Mr Couser says, for the judge to wind up the Company. He correctly points out that winding up is a very draconian step, and submits that it was too extreme a step for the judge to take in circumstances where the Company had been present or represented at previous hearings.

17 Mr Couser suggested that there is an analogy with the principles applied in deciding whether a defence should be struck out under CPR 3.4. He agreed that this is not in fact a strikeout case, but said that I should look at it in a similar way, because the effect is similar. And I should take into account in particular the seriousness of the sanction.

18 In approaching my decision on this ground of appeal, I need to decide whether the judge went wrong, that is whether he was wrong to make the winding up order (which is clearly a serious step) without, for example, checking whether there was a good reason for the Company not to have attended. In terms of the tests on appeal, the key question is whether the decision of the judge was unjust because of a serious procedural irregularity.

19 I have concluded, that taking all the circumstances into account, it is not appropriate to allow the appeal. There are a number of points to consider.

20 The first and preliminary point I would make is that the application to me is an application by way of appeal. I need to decide whether the judge was wrong, as I have already indicated. It is not an application to review, set aside or vary the winding up order. That is an application that could have been made by the Company to the Companies Court under Rule 12.59 of the Insolvency Rules. The making of a winding up order in the absence of the company being wound up might be thought to be a situation where that was an appropriate way forward. So, although a winding up order is a serious matter, there is specific provision for the court to rescind or vary its own orders. I need to look at this as an appeal, and not an application for review.

21 Moving on to the substantive points, the first and overwhelmingly significant point is that this Company has had a very significant period in which to challenge the liability orders. Those liability orders date from 2012 onwards. There were adjournments of the winding up petition throughout 2018 in order to enable the Company to challenge them, but when it did seek to challenge them in the magistrates' court, it seems that it was unable to produce evidence, and it withdrew its application.

22 Importantly, by withdrawing its application, it was not precluded from renewing it, but there is no evidence that it has done so. I accept that the refusal of judicial review may only have occurred in August 2019, after the winding up order was made, and therefore during a period where the Company's director would not have been able to act on behalf of the Company. However, an application could have been made, for example, to vary the winding up order so as to permit the director to challenge the liability orders on the

Company's behalf. Some evidence might at least have been filed showing the basis on which the Company intended to challenge the orders. I have seen no such evidence. The only evidence I have seen from the Company is the evidence that was filed in the Companies Court in February 2019 as part of the original challenge to the petition.

23 The second point to make is that Judge Prentis considered the totality of the evidence. He looked at the evidence to which I have just referred, and he determined whether in his view there was a genuine dispute over the debt. Based on the evidence before him, there was at least some element of undisputed debt. I have mentioned already that there was some indication that, in relation to one of the properties, another company, D4 & D3, had been in occupation for part of the period, but that accounted for nothing like the entirety of the debt, and indeed that company was only formed in 2013, after part of the liability was incurred.

24 In circumstances where the judge considered all the evidence, and recognised that on the basis of that evidence at least part of the debt was undisputed, it was within the scope of his discretion to decide to wind the company up, rather than grant yet a further adjournment of the proceedings.

25 The judge would no doubt have been aware of the numerous adjournments that had already occurred, and could see for himself the limited evidence that had been filed. It is also important to note that he was considering the position in July 2019. The evidence that had been filed was filed some months earlier, and at least one item of that evidence, evidence from the liquidator of D4 & D3, had indicated on its terms that the liquidator would be producing further evidence within a matter of up to four weeks from the date of that evidence. However, no further evidence had been produced.

26 The next matter I take into account is that the Company was represented at the hearing in March. It therefore knew that there would be a further hearing on a date to be fixed, but no action seems to have been taken to check when that would be, and certainly there is no indication that any real effort was being made to put together further evidence to demonstrate that the Company was not liable.

27 Furthermore, as already mentioned, the order providing for the hearing in July was sent to the Company's registered office. That registered office is at a firm of accountants. There is no suggestion that the document was not received, and accountants might be expected to be under a professional obligation to pass such a document on, as they no doubt did in respect of the statutory demand, also sent to the same address.

28 I also take into account that the Company has produced no evidence that it is actually solvent. The only evidence available is that produced for the winding up proceedings. As already mentioned, Mr Couser submitted that I should consider the tests that a court would apply in determining whether to strike out a defence. One of the points to consider is the degree of hardship that the striking out would cause. But I have had no evidence about the Company's current position.

29 I am told by Mr Couser, on instruction, that the Company's director is very keen to set aside the winding up order. I will come back to that. But there is no evidence of solvency; there is no evidence that the Company has funds; and I am informed on behalf of the respondent that the Company appears to be well overdue in its filings at Companies House. So there is no basis to determine the Company's current financial position.

30 It is also relevant in deciding what step I should take that nothing has been received from the Official Receiver. In granting permission to appeal, Trower J specifically ordered that the appellant's notice and the appeal bundle should be served on the Official Receiver, to enable him to appear at the appeal, and draw the court's attention to any matters that may be relevant. That is an order that should have been served by the Company on the Official Receiver. Mr Couser told me that his instructing solicitors had answered "yes" when he asked them whether everything that was meant to be done by the Company on the appeal had been done, although he had not specifically asked about serving the Official Receiver. But it is somewhat surprising that the court has heard absolutely nothing from the Official Receiver in circumstances where the usual practice, if not to attend, would be to provide written submissions.

31 That makes it even more difficult for the court to determine the Company's current position, and, in particular, the potential impact of setting aside a winding up order on other creditors.

32 Other points I take into account are as follows. Although reference has been made to D4 & D3 as an occupier of one of the premises, I understand, based on the evidence, that D4 & D3 did not include the council as a creditor when it was wound up. I was also told by Mr Couser on instruction that there were other companies that had also occupied the premises instead of Jewelite, but there was no evidence about that.

33 Furthermore, I was pointed by Ms Parker to evidence produced by the council which indicated that the premises licence in relation to one of the premises, Ormond Yard, was held in the name of the Company. This was evidence available to ICC Judge Prentis.

34 As already mentioned, the liability orders are up to eight years old. There has been very ample opportunity for the Company to challenge them. The petition was first heard on 18 December 2017, and then there were a number of adjournments until the hearing before the magistrates' court. The director, Mr Travis, who was present in court today, has at no stage put in any evidence, whether as to solvency or the basis of the dispute which Mr Couser says there is over the entirety of the liability orders.

35 Although it was indicated before me that Mr Travis was putting together evidence, and was waiting for some bank statements from Metro Bank before being able to submit the entire package to the council, I am not persuaded by that. There has been such a significant period of time to put that evidence together that I cannot accept that it has only been possible, for example, to produce bank statements now. Even if they could be produced, that would only be a part of the evidence that might be needed in order to demonstrate that the Company had no undisputed debt over the threshold for a winding up order.

36 During the hearing today a proposal was put by Mr Couser on behalf of his client that I should adjourn the appeal for a short period, both to allow the position in relation to creditors to be confirmed with the Official Receiver and, in particular, to confirm whether there are other creditors apart from Westminster Council, and to enable Mr Travis to provide a guarantee of the disputed liability, and potentially in relation to costs wasted by the adjournment.

37 In a little more detail, as I understand it, that guarantee would initially be in the form of an undertaking to the court that within a stated period the director would provide a guarantee of the Company's liability to the council.

38 Ms Parker opposed that, both on the basis that there was no indication of what assets the director might have to support any such guarantee, so it was open to question whether it would it be worth the paper it is written on, but also because of the amount of time that has elapsed, and the absence of any evidence before the court.

39 I agree that it is not appropriate to adjourn. I make that decision based on the fact that such a significant period of time has already elapsed that it should have been more than sufficient to put any such evidence together, and to come up with a well-formulated proposal, one that is not simply put through counsel, but is properly documented, and allows a proper and considered response to be made, rather than something that is put to the court at the hearing without an opportunity for the respondent to consider it properly.

40 I also take into account the fact that we do not have anything from the Official Receiver, and it would cause potential difficulties if the court were to make a decision based on an undertaking in relation to one creditor, bearing in mind that a winding up process is of a collective nature designed to protect all creditors.

41 In all the circumstances, I have concluded that the judge's decision was not unjust because of a serious procedural irregularity. Notice of the hearing was served. The Company was also clearly in fact on notice that there would be a further hearing. It had failed to produce evidence, despite a significant period in which it could do so, which demonstrated or gave any good evidence that there was a dispute over the entirety of the debt or at least over such an amount of the debt that would make a winding up order inappropriate. And it has produced no evidence of its solvency.

42 So, both considering the matter as an appeal, in terms of whether the judge took a wrong step, and considering the request for adjournment, I have decided to dismiss the appeal, and refuse the application for adjournment.

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