Neutral Citation Number: [2019] EWHC 1946 (Admin)

Case No: CO/1135/2018

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/07/2019

Before :

MR JUSTICE MOSTYN

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Between :

BROXFIELD LTD	**Appellant**
- and -	
SHEFFIELD CITY COUNCIL	**Respondent**

- -
- -

Christopher Royle (instructed by **Keebles LLP**) for the **Appellant**
Rowena Meager (instructed by **Sheffield City Council Legal**) for the **Respondent**

Hearing date: 2 July 2019

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Approved Judgment

Mr Justice Mostyn:

1. This is my judgment on an appeal by way of case stated against the decision of District Judge Redhouse given on 14 September 2017. The signed stated case was produced in March 2018. The appeal came before me on 11 July 2018. I was of the opinion that aspects of the stated case required clarification and I remitted it for amendment pursuant to section 28A(2) of the Senior Courts Act 1981. The amended case emerged in November 2018. By an order made by me on 5 December 2018 I required the case to be further amended to deal with an argument advanced at trial by the respondent local authority but on which the court had not ruled. The re-amended case emerged in January 2019, and the appeal was reconvened before me on 2 July 2019. Obviously, the delay that has arisen in dealing with this appeal is regrettable.

2. Section 28A(3) of the Senior Courts Act 1981 provides:

> "The High Court shall hear and determine the question arising on the case (or the case as amended) and shall—
>
> (a) reverse, affirm or amend the determination in respect of which the case has been stated; or
>
> (b) remit the matter to the magistrates' court, or the Crown Court, with the opinion of the High Court,
>
> and may make such other order in relation to the matter (including as to costs) as it thinks fit."

3. The controversy in this case revolves around demands for business rates sent by the local authority to the appellant on 25 January 2016 in respect of a property known as Courtwood House in Sheffield. There were three separate demands, reflecting three separate hereditaments, for the period 18 December 2015 to 31 March 2016, totalling £62,514.01.

4. Those demands were not paid and on 21 April 2016 the local authority caused summonses to be issued seeking liability orders. The appellant indicated its intention to contest the liability orders sought by the local authority, arguing that from 18 December 2015, and throughout the liability period in question, rateable occupation, and therefore liability to rates, had validly passed to, and reposed in, a company called Busy Bodies Business Services Ltd ("Busy Bodies").

5. At this point it is worth reflecting on the evidence about Busy Bodies that was before the District Judge. The company was formed under the name of Liquid Air Energy Company Ltd on 24 May 2012. It was a shelf company with assets of £1 and a single £1 share vested in CFS Secretaries Ltd. It changed its name on 29 August 2014 to Busy Bodies Business Services Ltd but remained dormant, on the shelf. Richard Stock of 68 Fortune Green Road, Hampstead was appointed director on 17 July 2015. Its single share remained vested in CFS Secretaries Ltd. Its accounts to the year ended 31 May 2015 show that it remained dormant and had assets of £1. On 22 December 2015 the Registrar of Companies issued a notice for Busy Bodies to show cause why it should not be struck off under section 1000 Companies Act 2006. Such a notice is issued where the Registrar has reasonable cause to believe that a company is not carrying on business

or in operation. On 5 January 2016 the Registrar determined to take no further action under section 1000 of the Companies Act 2006, cause having been shown why the company should not be struck off. It is not known what was shown or by whom.

6. On 12 May 2016 Nicholas Davis was appointed a director. He was a witness before the District Judge. The accounts for the year ended 31 May 2016 show that the company remained totally dormant with assets of £1 and no revenue or expenditure. On 10 January 2017 the company was wound up by the court on the petition of Leeds City Council, a creditor of it. The papers at Companies House do not show the scale of the debt or to what it relates, but the identity of the creditor certainly gives a clue.

7. In a witness statement made on 4 November 2016 Nicholas Davis stated:

> "In my first statement I explained that although according to the publicly available documents from Companies House Busy Bodies appears to be effectively dormant, it is in fact operative. As mentioned above, I own a separate property company, Coda Properties Ltd which is a financially successful company (the last filed accounts for 2015 show a net worth of over £414,000). On successful property developments I have worked on, I have arranged a company loan from Coda Properties to meet the needs of Busy Bodies, and have repaid this by assigning rental income to Coda Properties and thereby repaying the loan. Therefore, even if Busy Bodies effectively has a nil balance sheet, it is able to access funds to meet its obligations through the arrangements with Coda Properties Ltd."

The accounts of Coda Properties Ltd to 31 December 2015 do not explicitly show any such loans or readily reveal from what source such loans might be made – at that date it had cash of only £37,111. Moreover, had such loans been made "to meet the needs of Busy Bodies" then the receipt and expenditure would have been reflected in the accounts of Busy Bodies; but no such activity is detailed. Nor is there any mention in the accounts of Busy Bodies of it having entered into a single lease, let alone two leases, on 18 December 2015.

8. Yet that was the case advanced by the appellant. On 30 December 2015 the appellant wrote to the local authority stating that it had acquired Courtwood House on 18 December 2015 and that "the building has been leased to Busy Bodies from the 18th December 2015". In his witness statement dated 1 November 2016 Jacob Schreiber, a director of the appellant company, stated: "On 18 December 2015, Broxfield entered into a lease with Busy Bodies". In his witness statement dated 4 November 2016 Nicholas Davis stated: "On 18 December 2015, Broxfield entered into a lease with Busy Bodies." None of these statements was true. No lease or other contractual bargain was made on 18 December 2015.

9. On 25 January 2016 the local authority asked to see a copy of the lease. On 1 February 2016 the appellant wrote to the local authority stating: "as requested please find enclosed a copy of the lease for the above premises". That document proclaimed itself to be a lease made on 18 December 2015. It had a footer which gave the document's numeric code and iteration. This was 8249803-4. It provided for the basic rent to be £1000 plus 50% of sub-rent. The permitted use was the use of the property as offices

for subletting. Yet in clause 4.16.1 under-letting of the property was prohibited. Although the document proclaimed itself to be a lease it did not contain any contractual term. Rather, 'term' was defined as meaning "the contractual term granted by this lease together with any extension holding-over or continuation of it". No contractual term was granted anywhere by the lease. It was an internally inconsistent and nonsensical document.

10. The document had two pages numbered 26. These had the signatures executing the document as a deed. The first page 26 had the signature of Mr Stock on behalf of Busy Bodies. This signature was witnessed by Mr Davis giving his address as 68 Fortune Green Road, which was of course Mr Stock's address. The second page 26 had the signature of Mr Schreiber on behalf of Broxfield.

11. The plain representation made on the production of this lease document to the local authority on 1 February 2016 was that it had been signed, and thus created, on 18 December 2015. This was not true.

12. During the course of the hearing before the District Judge a witness on behalf of the appellant, Mr Brown, was asked to go and examine his files. He produced an exchange of emails on 1 February 2016. At 12:14 Mr Brown sent an email to Mr Schreiber stating: "Can you sign the attached page for the lease and get the tenant to sign and return please then I can forward to council". At 17:00 Mr Schreiber replied: "attached" and attached two PDF files which were the two pages 26 referred to above. There was no evidence that the persons signing the two pages 26 were doing anything more than signing separate copies of the single page enclosed with Mr Brown's email. The two pages 26 have the same footer at the rest of the document namely 8249803-4.

13. On 25 February 2016 the local authority wrote to the appellant stating that they had reviewed the lease that was supplied on 1 February 2016 and they considered that the lease was invalid because it did not contain a valid term for the duration of the tenancy nor could such a term be implied from the lease. On 1 March 2016 the appellant replied: "It would appear that you had been sent an incomplete lease; please find attached our file copy". This version of the lease contained a new page 4 which provided that the term would be "the contractual term of three years granted by this lease together with any extension, holding over or continuation of it". This new page 4 had a different footer number, namely 8249803-5. Obviously, what the appellant had done was to update the word version of the file to correct the deficiency concerning the lack of a term. From the updated file the revised page 4 was extracted and swapped into the original hard file. However, this process generated a new file number in the document's metadata which was reflected in the changed footer on the new page 4. In her judgment the District Judge said this about this crude inconsistency:

> "[Mr Brown] could not provide any explanation as [to] the inconsistency in the numbers shown on the bottom of each page of the first supplied document (which are the same on every page) and the second document (which has a different number on the page containing the 'term')".

14. At every turn to this point the appellant had been proclaiming to the local authority that it had validly passed rateable occupation to Busy Bodies. Yet their actions on the ground were very different. The documentary evidence showed that on 8 February 2016

and 1 March 2016 the appellant, as owner, granted licences over parts of the building to other businesses. Of course, it could not have legitimately or validly done so were there a valid lease in operation between it and Busy Bodies.

15. Further, it is clear that no rent was ever paid by Busy Bodies. There was evidence from Mr Schreiber that Mr Davies paid £1000 in cash, but this was disbelieved by the District Judge, rightly in my judgment. Had it been paid it would have been recorded in the accounts of Busy Bodies, or at the very least there would have been some documentary evidence; but there was none.

16. Thus, the court was being asked to accept as bona fide a tenancy arrangement whereby the tenant did not take possession and paid no rent.

17. I have recorded above how the case of the appellant both in its correspondence with the local authority and in its witness statements to the court was that there was a single lease. Hence the repeated use of the singular definite and indefinite article in its language. Yet as prefigured above, a second lease emerged late in the day. This was a so-called lease of a car parking space outside the building again supposedly entered into on 18 December 2015. This lease on page 11 has the signature of Mr Stock giving his address at 68 Fortune Green Road, and the signature of Mr Schreiber. Now it is perfectly acceptable for a lease to provide for entitlements and obligations to arise before the date of its execution. But it is not acceptable for a lease to say that it was executed on a certain date when it was not. That is tantamount to forgery. In her amended case the District Judge stated:

> "My findings were that the car park lease was not signed on 18 December 2015 and that I was unable to establish who signed it on behalf of Busy Bodies. It was unlikely to have been in existence prior to the council's application for a liability order as it would have been produced to the local authority before the litigation commenced."

This is a damning finding so far as the credibility and bona fides of the appellant is concerned.

18. At trial before the District Judge the case of the local authority was that no valid lease or other valid contractual arrangement had been entered into between the appellant and Busy Bodies which had the effect of passing rateable occupation to the latter company; and that in any event the whole arrangement was an obvious sham. The District Judge found the first limb of the local authority's case proved. Having made that finding she determined that it was unnecessary for her to go on to consider the question of sham. I considered that that was a mistake, and in fairness to the District Judge she has acknowledged that it would have been helpful for her to have addressed the second limb. Thus, in her re-amended case she stated that she was satisfied, having reviewed the evidence and her previous findings, that the whole arrangement was a sham.

19. I propose first to deal with this second limb because, of course, if the arrangement is a sham, I can deal quite shortly with the legal argument about the validity of the supposed contractual arrangement between the appellant and Busy Bodies.

20. The classic definition of a sham was given by Diplock LJ in *Snook v London and West Riding Investments Ltd* [1967] 2 QB 786, at 802:

> "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."

Diplock LJ went on to justify this definition by reference to "legal principle, morality and the authorities". His reference to morality clearly signifies that he intended the legal definition to correspond to the natural literal definition; he did not intend that the meaning in law should be a term of art.

21. That definition was expressly approved by Lord Fraser of Tullybelton in *WT Ramsay Ltd v Inland Revenue Comrs* [1982] AC 300 at 337. Earlier, at 323 he said:

> "To say that a document or transaction is a "sham" means that while professing to be one thing, it is in fact something different. To say that a document or transaction is genuine, means that, in law, it is what it professes to be, and it does not mean anything more than that."

22. In *A v A* [2007] 2 FLR 467 at [34] Munby J rightly stated that Diplock LJ's statement of the law has always been treated as canonical.

23. Thus, in my opinion courts should be careful of being beguiled by the irresistible temptation of senior judges to apply spin, gloss and tweaks to a very simple literal concept. For example, reference has been made to the decision of Neuberger J in *National Westminster Bank plc v Jones* [2000] BPIR 1092 at [59] where he said that because "a degree of dishonesty is involved in a sham", it follows that "there is a strong and natural presumption against holding a provision or a document a sham."

24. For my part, I struggle with the concept of a "strong presumption". A presumption is merely a starting point, and it yields to the evidence in the case. In *Quinn v Quinn* [1969] 1 WLR 1394 Lord Justice Winn said about a presumption: "[it] operates solely in the field of evidence; indeed, its function is to make good a lack of evidence." In 1906 an American judge described presumptions as the "bats of the law, flitting in the twilight, but disappearing in the sunshine of actual facts" (*Mackowick v Kansas City* St. J. & C.B. Ry., 196 Mo. 550, 571, 94 S.W. 256, 262, Lamm J). If the evidence satisfies the court that it is more likely than not that the arrangement was a sham, then it matters not how "strong" the starting point was.

25. Mr Royle argues that the ratio of the decision in *National Westminster Bank plc v Jones* is that because a finding of sham obviously will involve dishonesty, and because dishonesty is a serious finding, the court should be slow to make it and should require "very cogent evidence" before reaching such a finding. I am surprised that after the seminal decision of the House of Lords in *Re B (Children)* [2009] 1 AC 11, such a submission should still be made. At [64] Baroness Hale stated:

> "Lord Nicholls' nuanced explanation [in *Re H (Minors)(Sexual Abuse: Standard of Proof)* [1996] AC 563, 586D-H] left room for the nostrum, "the more serious the allegation, the more cogent the evidence needed to prove it", to take hold and be repeated time and time again in fact-finding hearings in care proceedings (see, for example, the argument of counsel for the local authority in *Re U (A Child) (Department for Education and Skills intervening)* [2004] EWCA Civ 567, [2005] Fam 134, at p 137. It is time for us to loosen its grip and give it its quietus."

And at [70]:

> "My Lords, for that reason I would go further and announce loud and clear that the standard of proof in finding the facts necessary to establish the threshold under section 31(2) or the welfare considerations in section 1 of the 1989 Act is the simple balance of probabilities, neither more nor less. Neither the seriousness of the allegation nor the seriousness of the consequences should make any difference to the standard of proof to be applied in determining the facts. The inherent probabilities are simply something to be taken into account, where relevant, in deciding where the truth lies."

See also Lord Hoffmann at [15] to the same effect. The fact that an allegation is serious, or that its consequences, if proved, will be serious, is not a reason for subversively elevating the standard of proof from the simple balance of probability, nor for suggesting that the quality of the evidence, should such an allegation be made, needs to be better than if the seriousness of the allegation were less grave. The court has to consider on the admissible evidence whether the charge is more likely than not made out, no more no less.

26. In her reasoning in the re-amended case the District Judge at [7]-[9] set out with admirable clarity and succinctness the law in relation to sham transactions; at [10] the argument of the appellant as to why the evidence did not justify a finding of sham; and at [11] the argument of the local authority as to why it did. At [12] she rendered her decision in these terms:

> "I have reviewed my summary of the evidence and my factual findings as set out in the original case stated and I have considered the issue of sham. If I am wrong in relation to the questions I have asked as to my findings in relation to the validity of the lease I find that the local authority have established, on the balance of probabilities that the document produced to the local authority was a sham."

27. This reasoning is criticised by Mr Royle as being insufficiently full and rendered after too great a delay. The second criticism is completely groundless. It was not as if the District Judge was giving this judgment from scratch. Her findings had been promptly rendered after the request for a case stated had been served. The only delay was in her analysis of her findings in the context of the allegation of sham. In any event I am not

satisfied that the degree of delay comes remotely close to the level where it can be said that a fair trial has been compromised.

28. The first criticism is equally groundless. Judgments nowadays are generally much too long. In my opinion this judgment cannot be criticised for having been insufficiently expressed.

29. The definition of a sham is a matter of law, although, as I have pointed out, the legal definition is aligned with the natural literal definition. Whether an impugned arrangement is or is not a sham is however a matter of fact. In the recent Supreme Court decision of *Perry v Raleys Solicitors* [2019] UKSC 5 Lord Briggs at [52] condensed the jurisprudence as to the constraints on appeals against findings of fact as follows:

> "They may be summarised as requiring a conclusion either that there was no evidence to support a challenged finding of fact, or that the trial judge's finding was one that no reasonable judge could have reached."

30. In my judgment having regard to the evidence which I have set out above, no reasonable judge could have reached a decision other than this one. It was an overwhelming case of sham. There was never any bona fide intention to pass rateable occupation to the man of straw that was Busy Bodies. Busy Bodies never had the means to pay the rates nor was it ever intended that it should do so. The arrangements that were set up were not bona fide and untrue evidence was given to the court.

31. Having affirmed the District Judge's finding as to sham I can deal quite shortly with the validity point.

32. It is not now argued that a legal lease was created. It is virtually impossible for Mr Royle to argue that an equitable lease came into being. Equity steps in to perfect minor errors in attestation; it would never step in fundamentally to rewrite a document to say something that it does not say. Nor would it step in in circumstances where the appellant's case was dishonest.

33. I agree fully with the District Judge that what happened here did not create either a contractual tenancy or licence. Once it emerged that it was a distinct possibility that all that Mr Schreiber and Mr Stock had signed were individual copies of page 26 alone, it was incumbent on the appellant to prove that this were not so and that they had signed the whole document. This they failed to do. This is a good example of an evidential burden switching in circumstances where all the relevant knowledge reposes on one side and where, if it were not so, the other party would be left to prove a negative. Further, even taking the case at its highest from the appellant's point of view – what did they sign? On their case they signed up to version 8249803-4 which was, as I have explained above, a largely nonsensical document.

34. For all these reasons I affirm the decisions of the District Judge and dismiss the appeal.

35. My formal answers to the questions posed in the re-amended case are as follows:

    i) Q: Was I entitled to conclude, on the evidence adduced, that there was no legal lease in existence?

A: Yes, and this applies equally to the purported lease in respect of the car park.

ii) Q: Was I entitled to conclude that there was no equitable lease?

A: Yes.

iii) Q: Was I entitled, on the evidence adduced, to find that Busy Bodies had neither an agreement for a lease; nor made payment of rent; nor gone into occupation of the property; nor had an immediate right to possession?

A: Yes.

iv) Q: Was I entitled to find that there was no personal licence?

A: Yes.

v) Q: Was I wrong to decline to exercise the court's inherent power to correct mistakes of construction and interpretation?

A: No.

vi) Q: Was I entitled to find, on the evidence adduced, that the document was a sham?

A: Yes.