Neutral Citation Number: [2021] EWHC 2310 (Admin)

Case No: CO/2229/2020

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

Leeds Combined Court Centre
1 Oxford Row, Leeds, LS1 3BG

Date:18/08/2021

Before :

MR JUSTICE JULIAN KNOWLES

- -

Between :

THE QUEEN ON THE APPLICATION OF WAJID HUSSAIN	**Claimant**
- and -	
KIRKLEES BOROUGH COUNCIL	**Defendant**

- -
- -

Rashid Ahmed (instructed by **Ashwells Law LLP**) for the **Claimant**
Aidan Reay (instructed by **Kirklees Borough Council**) for the **Defendant**

Hearing dates: 19 January 2021

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Approved Judgment

Mr Justice Julian Knowles:

Introduction

1. This is an application for judicial review with the permission of His Honour Judge Davis-White QC (sitting as a High Court judge) dated 30 September 2020.

2. The decision challenged is that of Kirklees Borough Council (the Defendant/the Council) dated 23 May 2020 in which it refused the Claimant's application for a grant under the Retail, Hospitality and Leisure Grant Fund (the RHLGF) for a property at New Street, Huddersfield, on the basis that the Claimant was an undertaking in difficulty (also referred to as an undertaking in distress). (An application by the Claimant for a grant for another property was refused on the same basis, however no application has been made in relation to that. This application for judicial review relates to the New Street property only).

3. The point at issue appears to be a novel one.

4. In his Skeleton Argument of 28 December 2020 and his evidence, the Claimant sought an order striking out the Council's Defence because of a failure to file its defence and/or evidence in accordance with the dates specified in the order of His Honour Judge Klein (sitting as a High Court judge) of 25 August 2020. It would appear there was an administrative error by a Council solicitor as to dates, for which she has apologised. There has been no prejudice to the Claimant and the delay involved was small. To the extent necessary, I grant relief from sanctions under CPR r 3.9 and 3.10, and give leave for the Council to defend the claim and to rely on the evidence it has filed.

The RHLGF: the background

5. The RHLGF was created as a result of grants made by the Secretary of State for Business, Energy and Industrial Strategy to local authorities pursuant to s 31 of the Local Government Act 2003. Its purpose is to support businesses in the retail, hospitality and leisure sectors with their business costs during the coronavirus pandemic. Local authorities are responsible for making grants under the scheme. For completeness, I note that the RHLGF has now ended, however as this claim concerns a decision taken when it was operational, I will use the present tense. In simple terms, one grant is available to a rate payer per property, the amount of which varies according to the property's rateable value.

6. The administration of the RHLGF by local authorities is governed by the Guidance issued to them by the Department of Business, Energy and Industrial Strategy (BEIS) and entitled *Grant Funding Schemes – Technical Frequently Asked Questions (FAQ) for Local Authorities* and sub-titled *Small Business Grant Fund and retail, Hospitality and Leisure Grant Fund Guidance (*the Guidance). The Guidance contains the main conditions pursuant to which the funding was provided to local authorities and by which they awarded grants.

7. The relevant version of the Guidance in force as at the date of the decision in respect of the Claimant was published in March 2020.

8. The RHLGF is a form of state aid and so was subject to the requirements of EU law. The RHLGF as reflected in the Guidance forms part of a package of measures which were notified by the UK to the European Commission on 23 March 2020 (*COVID-19 Temporary Framework for UK authorities*). These measures are aimed at remedying the liquidity shortage faced by undertakings and ensuring that disruptions caused by the COVID-19 outbreak do not undermine businesses' viability. In a letter dated 6 April 2020 to the Foreign Secretary, the Commission indicated that it did not object to the measures that the UK had proposed.

9. Paragraph 2.5 of that letter (entitled 'Beneficiaries') said that the final beneficiaries of the measure would be small and medium-sized enterprises (SMEs) and large companies in the UK, with some conditions and exclusions for certain types of business (in broad terms, financial institutions and the like). Importantly for the purposes of this challenge, it went on to provide for a further exclusion from the scope of eligibility for grant aid:

> "Aid may be granted under the measure only to undertakings that were not in difficulty within the meaning of the General Block Exemption Regulations (GBER) on 31 December 2019."

10. For reasons I will come to, the Council refused the Claimant a grant because it held he was an undertaking in difficulty as at the relevant date. The Claimant disputes that. This case therefore turns on the meaning of 'undertaking in difficulty' and the application of that meaning to the facts of the case.

11. For the definition of 'undertaking in difficulty' one needs to go to EU legislation. Footnote 4 to the letter of 6 April 2020 said that:

> "Wherever reference is made in the measure to the definition of 'undertaking in difficulty' as contained in Article 2(18) of Regulation (EU) No 651/2014, it shall be read as also referring to the definitions contained in Article 2(14) of Regulation (EU) No 702/2014 and Article 3(5) of Regulation 1388/2014 respectively."

12. Article 2(18) is lengthy and quite technical in parts. The relevant part for present purposes is sub-paragraph (c), which provides:

> "'undertaking in difficulty' means an undertaking in respect of which at least one of the following circumstances occurs:
>
> …
>
> (c) Where the undertaking is subject to collective insolvency proceedings or fulfils the criteria under its domestic law for being placed in collective insolvency proceedings at the request of its creditors.
>
> …"

13. The definitions in the other two Regulations referred to in Footnote 4 are identical.

14. This restriction preventing the granting of aid to undertakings in difficulty was incorporated directly into the Guidance (albeit that uses the term 'undertakings in distress' instead). Paragraph 57 provides:

> "57 *How should grants be administered where a business is in administration or liquidation as of the 11th March ?*
>
> These grants have been created to provide support to active businesses. Businesses that were in liquidation or were dissolved as of the 11th March will not be eligible. Businesses that fall into administration or are dissolved after 11 March and before their grant paid will also not be eligible.
>
> Businesses which fail the undertaking in distress test on 31 December 2019 are also ineligible for payments under the COVID-19 Temporary Framework for UK Authorities, see Q84 & Q87."

15. Questions 84 and 87 were:

> "*84. What checks are councils expected to make regarding State aid ?*
>
> Businesses will be required to confirm that they comply with the scheme conditions, for example, that they did not fall within the definition of an undertaking in distress on 31 December 2019, and have not received more than the maximum permitted funding for State aid. Local authorities will write to businesses to ask for confirmation of this.
>
> …
>
> *87. What does it mean to be an Undertaking in Distress ?*
>
> [The text of Article 2(18) is then reproduced verbatim]"

The factual background

16. I take the factual background primarily from the first witness statement of Bernadette Thorp dated 22 September 2020. She is the Council's Business Rates Team Manager.

17. She explains that grants under the RHLGF are administered by local authorities in their catchment area according to rules (namely, the Guidance) set by central government. They are payable to the registered ratepayer of a hereditament as at 11 March 2020. As I have already explained, Ms Thorp confirms that undertakings in distress are not eligible to receive a grant.

18. Ms Thorp says the Claimant was the occupier of the property at New Street on 11 March 2020 but was refused a grant because he was an undertaking in distress.

19. Ms Thorp goes on to explain why the Council reached this conclusion. She says at [8]-[9]:

> "8. Mr Hussain was served with a statutory demand on the 4th December 2018 and bankruptcy proceedings had been issued against him, the last bankruptcy claim was stayed whilst he applied to set aside the liability order that was the subject matter of the Statutory Demand (a separate address to 32 New Street – this application was respect of 351 Bradford Road, Batley). He failed in this application at hearing in Kirklees Magistrates Court on 30th October 2019. Following his application failing, Mr Hussain made an arrangement in November 2019 to settled debt owed in relation to 351 Bradford Road but to date he has failed to make payments as agreed. Therefore, the Council are now entitled again to pursue the statutory demand and recommence bankruptcy proceedings against him.
>
> [In fact, in her second statement of 5 November 2020 Ms Thorp corrected this to make clear that actual bankruptcy proceedings have not in fact been commenced against the Claimant]
>
> 9. The property [at] 32 New Street, Huddersfield, HD1 2BU, is a shop and premises with a rateable value of £30750. Our records indicate that Mr Hussain is liable on a personal basis from the 1st April 2018 onwards. Mr Hussain has never paid any business rates at all to the Council for the property."

20. Ms Thorp then goes on to explain some complicated evidence about various tenants and sub-leases on these premises which Mr Hussain and others had maintained to the Council showed that others were in occupation at various times. However, this evidence not satisfy the Council to change the liability for business rates. He applied to the magistrates in relation to the liability order for the New Street property but this was dismissed on 3rd July 2019. She goes on to say that the Council's records show him as the liable person with effect from 1st April 2018. At [17] she says:

> "17. As set out above the council have maintained liability from 2018 with Mr Hussain onwards as there was insufficient evidence of any sub-lets to third parties. Mr Hussain, until the RHLGF scheme was introduced, strongly protested that he was not in occupation."

21. At [21] she says:

> "Mr Hussain seems to feel that as the statutory demand served was in relation to a separate address that he is not deemed to be an undertaking in distress. I have however been advised that as an individual, any proceedings are collective and he cannot be deemed to be an undertaking in distress for one address but not for another. Bankruptcy is against the person and not the property."

22. Ms Thorp produces as Ex BT1 the version of the Guidance which she says was in force at the time the Claimant made his application. The Claimant seems to take issue with this in his response to her witness statement of 28 September 2020 at [24], however in her second witness statement of 5 November 2020 she reiterates at [5] that the relevant

version of the Guidance excluded undertakings in distress. There appears to be some ambiguity in the use of the word 'Guidance', according to the witness statement of Council solicitor Sara Mondon, which I do not need to go into. I am quite satisfied at the time the Claimant's application was refused the totality of the central government guidance issued to local authorities which they used to determination applications made clear that undertakings in distress (difficulty) as defined in Article 2(18) of the GBER are and were excluded from the scope of RHLGF. This was an explicit condition of the European Commission's approval of the UK's proposal for state aid given on 6 April 2020 which I quoted earlier.

23. Ms Thorp produced as her Ex BT5 a financial report on the Claimant as at 4 September 2020 that the Council obtained from the large accounting firm Mazars. This showed he had total known assets of £23124 and total liabilities (including the debt to the Council) of £54855, making his net asset position minus £31731. The Council debt was calculated as 92% of his known liabilities. He had £23124 equity in a property in Dewsbury on which there was a delinquent mortgage and a number of charges. There was another delinquent mortgage which could not be attributed to any property. He was also disqualified from acting as a director due to misconduct in relation to two companies.

24. In her second witness statement at [8]-[13] Ms Thorp again sets out details of the unsuccessful attempt by the Claimant to set aside the Council's statutory demand (which was made in the County Court) and his attempt to set aside the liability order (which was made in the Magistrates' Court). The upshot was the Claimant's attempts all failed and his liability remained; he then failed to honour a payment plan agreed with the Council (apart from one payment of £1000 on 3 December 2019); and thus at 31 December 2019 the balance outstanding on the statutory demand debt was £9100.86.

25. So, says Ms Thorp in [11] as at that date:

> "In order to take bankruptcy proceedings against an individual the sum of £5000 must be owed, therefore the Council was in a position to start a bankruptcy claim against him. This was the position solely in respect of the debt owed for 351 Bradford Road – without accumulating other considerable debts owed by Mr Hussain for properties within Kirklees Council district. The total sum owed by Mr Hussain in respect of 351 Bradford Road is £7100.86 as a payment of £2000 was made on 4 June 2020."

26. She goes on at [12]-[13]:

> "12. The position of Kirklees Council is that it could have taken bankruptcy proceedings against Mr Hussain on the basis of the substantial sum outstanding to the Council as a creditor. Therefore, as at the relevant date 31 December 2019, the Defendant could therefore properly be classed as an 'undertaking in distress'; as per the General Block Exemption Regulation definition of undertakings in difficulty as this includes an undertaking which 'fulfills the criteria under its domestic law for being placed in collective insolvency proceedings at the request of its creditors.'

> 13. It is apparent that Mr Hussain fulfils the criteria under domestic law for being placed in collective insolvency proceedings at the request of his creditors. This could be done by either pursuing him under the existing statutory demand and then commencing bankruptcy proceedings against him. Alternatively my client is entitled to serve a new statutory demand for the debt detailed above and further can include the debt relating to 22 Corporation Street and 32 New Street, if the debt from all 3 properties is claimed, he owes a total of £50513.52 Mr Hussain has never paid any business rates to the Council for 32 New Street. This debt was also outstanding as at 31 December 2019 and adds further weight to the Defendant's position that the Claimant was an undertaking in distress."

The decision

27. The challenged decision of 23 May 2020 referred to the property in New Street, Huddersfield, which the Council said had a rateable value (RV) of £30750. It went on:

> "Our records show that you have recently applied for a grant under the government's coronavirus scheme. We have considered your request in relation to government guidance on the scheme and unfortunately you do not appear to be eligible to receive this grant.
>
> The reason for this is:
>
> - You are not financially viable; you have business rates debt for which bankruptcy proceedings are ongoing.
>
> The grant is only available to businesses who have qualified for small business rate relief (RV under £15000), or for the retail, hospitality or leisure grant (£15000 RV to £51000 RV), and the business must be occupied and financially viable as at the 31st Dec 2019; business falling outside of the definition in the guidance, or specifically excluded by the guidance are not eligible."

28. Although the letter did not use the phrase, it was common ground that this was a determination by the Council that the Claimant was an undertaking in distress and therefore ineligible for a grant.

29. As Ms Thorp explains at [19] of her witness statement the Council had earlier refused the Claimant a grant on other grounds. However, I need not go into in detail about the decision, because it has now fallen away. Following that first refusal the Claimant made a fresh application, and the letter of 23 May 2020 I have quoted was a new decision by the Council on the Claimant's second grant application. It is common ground that the issue before me on this application is whether the Council was right to refuse the Claimant a grant for the reasons it gave on that second occasion.

Submissions

The Claimant's case

30. The Claimant submits that the Council erred in determining that he was an undertaking in distress and refusing the grant on that basis. He accepts (Skeleton Argument, [51]) that bankruptcy proceedings against an individual are collective insolvency proceedings for the purposes of Article 2(18)(c) of the GBER. However, he points out that as at 31 December 2019, although there was a statutory demand against him, and his attempt to set aside the statutory demand and liability order had failed, there were no bankruptcy proceedings in existence against him. He emphasises that the Council was wrong to say that there were (and, as I have said, Ms Thorp has acknowledged this error).

31. Although he accepts in his Skeleton Argument at [52] that bankruptcy proceedings could have been commenced by the Council (subject to procedural requirements being met) because of the statutory demand: see s 268(1) of the Insolvency Act 1986 (IA 1986), proceedings had not commenced, nor had he been made bankrupt, and so he said he fell outside the definition of an undertaking in distress in Article 2(18)(c) of the GBER and [87(c)] of the Guidance. His simple point is that for him to have fallen within Article 2(18)(c) bankruptcy proceedings needed to have commenced by presentation of a bankruptcy petition by the Council. That is the essential argument made in [65]-[66] and [71] of his Skeleton Argument and emphasised by Mr Ahmed in his oral submissions on behalf of the Claimant.

32. Mr Hussain also told me that he was challenging the rateable value of some of his premises. However, that is not something which is capable of affecting the issues before me, which concern the material before the Council as described in the evidence when it took its decision in May 2020 to refuse the Claimant a grant, and the legal correctness of that decision.

The Defendant's case

33. In response, the kernel of the Defendant's submissions was that the making of a statutory demand pursuant to s 268 of the IA 1986 was sufficient to bring the Claimant within the scope of Article 2(18)(c), because it was then open to the Council to commence bankruptcy proceedings against the Claimant, he having failed to satisfy it.

34. Mr Reay for the Council said it was sufficient for an individual to be an undertaking in difficulty if that person was in the position where a statutory demand had been made and not satisfied, and the conditions precedent for the presentation of a bankruptcy petition were fulfilled. That individual would then fulfil the criteria under English domestic law for being placed in collective insolvency proceedings at the request of his creditors, and thus would fall within Article 2(18)(c) as undertaking which 'fulfilled the criteria under its domestic law for being placed in collective insolvency proceedings at the request of its creditors'. He said that the Claimant was, at 31 December 2019, in such a position for all of the reasons given in Ms Thorp's evidence and in particular his failure to have the statutory demand set aside, or to satisfy it.

Discussion

35. Neither side was able to refer me any authority directly on the meaning of Article 2(18)(c), and so the issue before me appears to be one of first impression. The closest case was *Nerea SpA v Regione Marche* [2018] 1 CMLR 22, to which both sides made reference. The CJEU was asked by a referring Italian court whether there was a distinction between proceedings opened by the authorities, and proceedings

commenced by the undertaking itself for the purposes of the GBER, and it determined that there was not. It held (at [26]) that it is for a national court to determine whether there the conditions for being subject to a collective insolvency proceeding are established according to its national law. The decision did not concern the interpretation of Article 2(18)(c) and whether it required bankruptcy proceedings actually to be in existence before an undertaking could be regarded as being in difficulty.

36. It seems to me that the starting point is a careful consideration of the wording of Article 2(18)(c). It draws a specific distinction between (emphasis added):

    a. on the one hand, the position where an undertaking '*is subject to* collective insolvency proceedings'; and,

    b. secondly, the situation where the undertaking '*fulfils the criteria under its domestic law for being placed* in collective insolvency proceedings at the request of its creditors'.

37. It specifically does not require a bankruptcy order to have been made.

38. I consider it clear that the first part of Article 2(18)(c) refers to the situation where collective insolvency proceedings have actually commenced. That is what I consider the words 'is subject to' mean in this context. The second part I consider refers to the situation where the statutory conditions under domestic law for the bringing of collective insolvency proceedings by creditors are fulfilled, but such proceedings have not (yet) commenced. That is what the words 'fulfils the criteria under domestic law for being placed in collective insolvency proceedings' mean. Those words – in particular 'for being placed' - look to the future and to proceedings which have not yet commenced, but could commence because domestic law criteria are satisfied (and, if necessary, the fulfilment of any ancillary procedural criteria such as an application for bankruptcy having to be in a particular form).

39. With that construction in mind, I turn to the question whether the Claimant qualified as an undertaking in distress as at 31 December 2019. As to that, for essentially the reasons given by Ms Thorp and by Mr Reay, and for the following reasons, I consider that he was.

40. Section 267 of the IA 1986 sets out the grounds for a creditor's position. By s 267(1) a creditor's petition must be in respect of one or more debts owed by the debtor, and the petitioning creditor or each of the petitioning creditors must be a person to whom the debt or (as the case may be) at least one of the debts is owed. Section 267(2) then sets out further conditions, including that the amount of the debt, or the aggregate amount of the debts, is equal to or exceeds the bankruptcy level (£5000) (s 267(2)(a)); the debt, or each of the debts, is a debt which the debtor appears either to be unable to pay or to have no reasonable prospect of being able to pay (s 267(2)(c)); and there is no outstanding application to set aside a statutory demand served (under section 268 below) in respect of the debt or any of the debts.

41. Section 268 defines 'inability to pay'. In essence, it requires the debtor to have been served with a statutory demand requiring payment which has remained unsatisfied for

three weeks, or a statutory demand served on the debtor requiring him to show there is reasonable prospect of him paying, but again he has failed to do so within three weeks.

42. Thus, if there is any unsatisfied statutory demand for at least £5000 within the terms of s 268 then a bankruptcy petition can be presented to the court and the debtor is an undertaking that 'fulfils the criteria under domestic law for being placed in collective insolvency proceedings'.

43. It follows that in my judgment the Council was right to conclude that the Claimant was an undertaking in distress within Article 2(18)(c) of the GBER because a statutory demand for more than £5000 had been served upon him which had not been set aside and had not been satisfied within three weeks, as Ms Thorp set out in her evidence. He was therefore liable to be made subject to bankruptcy proceedings at the Council's election and these, as I have said, were agreed to be collective insolvency proceedings for the purposes of the GBER. The fact that the Council would have to satisfy a number of procedural rules in order to commence the proceedings, eg, about what the petition must contain, and to explain the delay in lodging the petition more than four months after the statutory demand (a point Mr Reay reminded me of, and see Chapter 2 of Part 10 of the Insolvency Rules 2016 (SI 2016/1024)) does not, in my judgment prevent the Claimant having the status of an undertaking in distress at the relevant date.

44. This construction of Article 2(18)(c) is consistent, in my judgment, with other prescribed definitions of 'undertakings in difficulty' in Article 2(18). That is because most, if not all, of those definitions refer to an entity's status, and do not require legal proceedings to have been instituted before the undertaking is one 'in difficulty'. So, for example, Article 2(18)(a) provides that a limited liability company (subject to exceptions) is an undertaking in difficulty if more than half of its subscribed share capital has disappeared as a result of accumulated losses.

45. Taking a step back, by failing to satisfy the statutory demand against him, according to English law, in particular s 268 of the IA 2016, it is taken to be proved that the Claimant is unable to pay the significant debt which he owes to the Council. Taking a commonsense view of when an undertaking is 'in difficulty', an inability to pay such a debt surely satisfies such a description, irrespective of whether bankruptcy proceedings have actually commenced.

46. It follows this application for judicial review is dismissed.