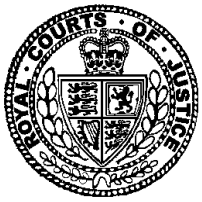

Neutral Citation Number: [2019] EWHC 1763 (Ch)

Case No: BR-2016-000707

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

Rolls Building
Royal Courts of Justice
7 Rolls Buildings
London EC4A 1NL

Date: 8th July 2019

Before :

INSOLVENCY AND COMPANIES COURT JUDGE MULLEN

- -

IN THE MATTER OF PHILIP JOHN LAMBERT

AND IN THE MATTER OF THE INSOLVENCY ACT 1986

Between :

PHILIP JOHN LAMBERT **Applicant**

- and -

(1) FOREST OF DEAN DISTRICT COUNCIL
(2) ANDREW JAMES NICHOLS
(3) JOHN WILLIAM BUTLER **Respondents**

- -

Mr Paul French (instructed directly under the **Public Access Scheme**) for the **Applicant**
Ms Jessica Brooke (instructed by **Wilkin Chapman**) for the **First Respondent**
Mr Jonathan Titmuss (instructed by **Wilkin Chapman**)
for the **Second and Third Respondents**

Hearing date: 9th May 2019

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

ICC JUDGE MULLEN

ICC JUDGE MULLEN :

Introduction

1. This is an application by Mr Philip Lambert to annul the bankruptcy order made against him on 12th September 2016 on a creditor's petition presented on 17th March 2016. The First Respondent to the application ('the Council') was the petitioning creditor and the Second and Third Respondents are the current trustees in bankruptcy appointed to administer Mr Lambert's bankruptcy estate ('the Trustees'). The debts relied upon in the petition are due under liability orders made by the Gloucester Magistrates' Court made between 24th April 2012 and 29th October 2015 on the complaint of the Council. These related to unpaid council tax in respect of several domestic properties and also to non-domestic rates chargeable on a number of properties owned by Mr Lambert at Linear Business Park, Cinderford ('Linear Park'). The total debt set out in the petition was £72,752.73. The Council has now claimed £119,978.95 in Mr Lambert's bankruptcy, the majority of which debt is again based on liability orders obtained in the magistrates' court.

2. This annulment application was filed on 12th November 2018 and is made under section 282(1)(a) of the Insolvency Act 1986 ('the 1986 Act') – that is to say that it is made on the basis that the bankruptcy order ought not to have been made. Mr Lambert contends that neither the liability orders on which the petition was based, nor the statutory demand, nor the petition itself were served upon him. Instead, they were served on an address with which he had no connection, being 20-22, Wenlock Road, London N1 7GU ('the Service Address'). This was a correspondence address given for Mr Lambert on the register maintained at Companies House in his capacity as a director of Paragon House Ltd ('Paragon'). It was also the registered office address of Paragon itself. Paragon was dissolved on 26th April 2016 and Mr Lambert contends that he was not aware of the existence of the liability orders, the bankruptcy proceedings or the bankruptcy order until April 2017 when he applied to renew his car insurance and was told that a bankruptcy order had been made against him. Having obtained the witness statements of the process server who is said to have served the statutory demand and attempted service of the petition ('the Process Server'), he says that these are demonstrably untrue given the nature of the Service Address.

3. The application is opposed by the Council. It does not maintain that the statutory demand or petition were properly served, although it notes that demands were sent to the Service Address before the dissolution of Paragon and the petition was signed for when served by post at that address in accordance with an order for substituted service. It states that its concession in this regard is purely to avoid a prolonged hearing with cross-examination. The more limited scope of its opposition is that the annulment application is an abuse of process. This is the second annulment application that Mr Lambert has made. The first application ('the First Annulment Application') was based on substantively identical grounds but was struck out on 16th February 2018 following Mr Lambert's failure to comply with an unless order requiring him to comply with an order for costs. In any event, the Council says that the court should exercise its discretion to decline to annul the bankruptcy order as the underlying debt is still due and payable and Mr Lambert is insolvent.

The evidence

4. This application is supported by the witness statement of Mr Lambert, dated 12th November 2018. Following issue, Deputy ICC Judge Schaffer directed the filing of evidence in answer by the Council and also a witness statement by the Trustees dealing with:

    4.1. the extent to which Mr Lambert had complied with the provisions of the 1986 Act and the Insolvency Rules 2016;

    4.2. the extent to which his conduct had increased the costs of the bankruptcy;

    4.3. the extent of Mr Lambert's assets and liabilities;

    4.4. the current state of the bankruptcy proceedings and progress made to date;

    4.5. the likely date on which Mr Lambert became aware of the bankruptcy proceedings.

    Mr Lambert was given permission to file and serve any evidence in reply by 4pm on 16th February 2019. Deputy ICC Judge Schaffer also gave directions for all deponents to witness statements to attend for cross-examination, unless excused.

5. Mr Lambert's statement exhibits the two witness statements made by the Process Server, dated 1st February 2016 and 3rd May 2016. The first statement deals with service of the statutory demand. The Process Server states that he attended the Service Address on 10th December 2015 and was unable to obtain a reply. On 11th December 2015 he sent an appointment letter by first-class post to say that he would attend on 21st December 2015, giving his contact details if Mr Lambert wished to arrange an alternative date for service of the statutory demand. He says that he continued to attend the Service Address periodically, without success, until 29th January 2016 when he attended at around 7pm and spoke to a woman who confirmed that Mr Lambert lived there. He therefore posted the statutory demand through the letterbox, addressed to Mr Lambert.

6. In his second witness statement, the Process Server states that he attended the Service Address on 24th March 2016 in order to attempt personal service of the petition. Having failed to obtain a reply, he sent an appointment letter on the following day by first-class post saying that he would attend again on 8th April 2016 for the purposes of attempting service. He again gave his contact details in order to arrange an alternative appointment. Having again failed to elicit a reply on 8th April 2016 he says that he 'continued calling' until he attended in the evening of 27th April 2016 and he spoke to a man at the address who confirmed Mr Lambert lived at the Property.

7. It was on the basis of these statements Mr Registrar Jones made an order on 18th July 2016 for substituted service of the petition by sending it by first-class post and first-class recorded delivery to the Service Address. A different process server made a statement dated 25th August 2016 certifying that service was effected by that method on 16th August 2016. That having been done the petition came on for hearing and the bankruptcy order was made in Mr Lambert's absence.

8. Mr Lambert's position in relation to all of this is that he has never lived at the Service Address and never traded from it. The address is an office occupied by Made Simple Group Ltd ('Made Simple'), a company formation agent. Mr Lambert lives instead in Lower Lydbrook, Gloucester, and this is the address held by the Council for him for the purposes of his council tax liability in respect of that property. His only connection with Made Simple was when he had instructed it in relation to Paragon at a time when they were located at a different address altogether. He exhibits a statement from Mr

Oliver Jackson of Made Simple confirming that it has occupied the Service Address since 2014. It closes at 5.30pm so any attendance at 7pm on 29th January 2016 would have been met with no response. Moreover, there is no letterbox. The company has a dedicated postcode and its post is delivered in bags during the working day. There are a number of photographs that show the Service Address. It is plainly not a residential address. The photographs do seem to show flats on the first floor, above the commercial premises, but, even if this is so, it is not clear if the entrance to those is anywhere near the Service Address.

9. Mr Lambert contends that the Process Server's statements are simply lies insofar as they purport to record attendance at the Service Address. He also disputes the debts on which the petition is founded. Although he has not explained his dispute in any great detail in his evidence, the essence of his case is that the properties at Linear Park are occupied and that it is the occupier, not he, who is liable for tax at the relevant property. He also goes on to explain the circumstances of the First Annulment Application, which I shall come to in due course.

10. The Council's evidence in answer is in the form of a witness statement, dated 8th January 2019, from Mr Thomas Clark, who is employed as the Council's head of revenues and benefits. He sets out the regime relating to the payment of council tax and non-domestic rates and exhibits the liability orders on which the petition was based. He states that, since the making of the bankruptcy order, further debts have accrued such that Mr Lambert was liable for a total debt in the sum of £191,950 at the date of his statement. He explains that Mr Lambert made an application to set aside the liability orders on which the petition was founded in February 2018 but failed to attend the hearing on 26th February 2018. In his absence, Mr Clark contends, the magistrates considered the three-part test set out in *R (on the application of Brighton & Hove City Council) v Brighton & Hove Justices, Michael Hamdan)* [2004] EWHC 1800 (Admin) and formed the view that Mr Lambert had not satisfied any of them. He sets out how the Service Address was identified and the course of the bankruptcy proceedings and the First Annulment Application. The Council's position is that the debts created by the liability orders are still due and owing and the application is abusive in circumstances where the First Annulment Application was struck out and the costs ordered to be paid to the Council were, at the date of the hearing, still outstanding.

11. Mr Clark was the only witness who was not excused from attending for cross-examination. In his oral evidence, he explained that he understood the 'hierarchy of liability' for non-domestic rates and that those rates are levied against the rateable occupier of a property. He said that Mr Lambert had been asked to provide information as to who was in occupation of the Linear Park properties, but had not provided it. He accepted that the Council had Mr Lambert's residential address in Gloucester, and used it for council tax purposes. He said however that departments within the Council did not share information with each other, otherwise than for the purposes of the detection or prevention of crime. This was the reason that enquiries were made to establish an address for Mr Lambert and the Service Address was discovered on the Companies House website. I am satisfied that Mr Clark was a straightforward and honest witness and I have no reason to doubt his evidence.

12. Mr Butler filed a witness statement dated 29th January 2019, which is made on his own behalf and that of Mr Nicholls. He notes that the Trustees are neutral on the question of whether the bankruptcy order should be annulled but they have filed his statement for the assistance of the court pursuant to the direction of Deputy ICC Judge Schaffer. He sets out the Official Receiver's account of his dealings with Mr Lambert and his belated compliance with the Official Receiver's requests for information. This account is taken from an email sent by Ms Anna-Marie Uddin of the Insolvency Service, dated 25th January 2019. It explains that the Official Receiver applied for the public examination of Mr Lambert on 7th March 2017 after a number of appointments were not kept. Mr Lambert contacted another officer of the Insolvency Service, Mr Christopher Finch, on 17th March 2017 and said that he had no link to the address given in the bankruptcy order but that he had the same date of birth as 'the bankrupt' and had owned at least some of the addresses on which the liability orders were founded. The petition was sent to him along with information on annulling the bankruptcy.

13. According to Ms Uddin's email, Mr Lambert attended the Official Receiver's offices on 3rd May 2017 but declined to be interviewed or to sign any documents. He said that he intended to apply to annul the bankruptcy. Mr Lambert then failed to attend further appointments and the adjourned public examination took place on 9th August 2017. At that hearing he undertook to return the standard preliminary information questionnaire. A further appointment was arranged for 2nd October 2017, which Mr Lambert also

failed to attend. He failed to attend a further appointment on 10th October 2017, telling the Official Receiver that he had applied for a stay. He did attend an appointment on 30th October 2017 with a completed questionnaire but he did not stay for an interview nor did he sign any documents. A follow-up email was sent on the same day, with a request for replies the following day. These were not received. The adjourned public examination took place on 1st November 2017 and Mr Lambert undertook to reply to the outstanding queries by 10th November 2017. In the event, the remaining information was provided on 12th December 2017 and the public examination was concluded on 13th December 2017 with the consent of the then trustee, Mr Christopher Garwood ('the Original Trustee'). This is consistent with the account given in the Deputy Official Receiver's report to the Court in January 2018.

14. The Trustees have received six claims in the bankruptcy, totalling £375,905, although they have not yet advertised for claims. Mr Lambert's brother has intimated a significant but unquantified claim. Mr Butler also explains that the Trustees made an application for a receiver to be appointed over the properties at Linear Park as a result of Mr Lambert's failure to provide information as to the occupants of those properties. That application has not been determined as ICC Judge Barber stayed the bankruptcy on 14th December 2018. According to Mr Butler, a lease was granted by Mr Lambert in respect of some of these properties to a company called Parr Management Limited ('Parr') on 15th August 2016. Parr was incorporated on 13th April 2016, just under a month after presentation of the petition, and its director is Ms Iryna Tatarevich, Mr Lambert's domestic partner. The lease is void as a result of section 284 of the 1986 Act as it was entered into after presentation of the petition. An application for a validation order under that section has been struck out as a result of Parr's failure to comply with an order requiring it to disclose who was in occupation of the Linear Park properties. As matters stand, the Trustees simply do not know what rental income might be generated by Linear Park, or what has happened to it.

15. Mr Butler explains that there is some uncertainty as to the value of Linear Park as it is not yet clear who is in occupation of it and on what terms. His agent has suggested that its value may be in the region of £750,000 and it is subject to a mortgage securing about £181,095 due to NatWest Bank. The bank has provided a significantly lower valuation. This is referred to in the Original Trustee's report to the court dated 28th November

2017 in which it was said that the bank was proposing to sell the property pursuant to its charge and had stated that it expected to achieve a sale price of about £275,000. Mr Lambert's residence is thought to be in negative equity and a further residential property, known as Yew Tree Cottage, has equity of about £57,612. It is not clear whether Mr Lambert can be said to be solvent on a balance sheet basis.

16. Mr Lambert made a statement in reply dated 25th April 2019. The Order of Deputy ICC Judge Schaffer had provided for this to be filed and served by 16th February 2019. I declined to admit that statement. I was not satisfied that there was a good reason for it being served over two months after the deadline provided for by Deputy ICC Judge Schaffer and after the further expiry of an agreed deadline. It was said that the delay was as a result of Mr Lambert having to collate certain documents and counsel's pressure of work. In my judgment the failure to file a statement of some 26 pages until shortly before the hearing was serious and those were not good reasons for the failure to comply. Mr Lambert had ample time to prepare and could have applied for an extension, or agreed such an extension with the respondents. Instead, and not for the first time in the history of this matter, he simply chose not to comply with the order of the court.

The course of the bankruptcy proceedings and the First Annulment Application

17. Having obtained liability orders totalling £74,340.17, the Council wrote to Mr Lambert at the Service Address to demand payment of the sums due under those orders. The first of those demands is dated 30th September 2015 and required payment in full or completion of an enclosed financial statement setting out questions as to Mr Lambert's income and expenditure. A letter before action was sent to that address sent on 17th November 2015. Neither of those letters received replies. This was at a time before Paragon was dissolved and its address, and that of Mr Lambert, was shown to be the Service Address. Those letters were not returned.

18. No reply having been received, the Council instructed its solicitors, Wilkin Chapman LLP, to cause a statutory demand to be served on Mr Lambert. I have referred to the Process Server's statements above. The Process Server's statement of 3rd May 2016 led Mr Registrar Jones to make an order for substituted service of the petition (together with the order for substituted service and time extension order) by first-class post and first-class recorded delivery to the Service Address. Those documents were sent to the

Service Address and signed for on 10th August 2016 at 11.27am by 'Ricky'. Mr Lambert did not attend the first hearing of the petition on 12th September 2016 and a bankruptcy order was made.

19. Although Mr Lambert became aware of the bankruptcy in March or April 2017 at the latest, he did not make the First Annulment Application until 24th October 2017. The basis for the application was that the bankruptcy order should not have been made as the petition debt was not due and the statutory demand and petition were not properly served. In other words, the grounds of the First Annulment Application were identical to the instant application. In his statement in support of the First Annulment Application, dated 10th October 2017, Mr Lambert says that that he telephoned the Council on becoming aware of the bankruptcy order and spoke to a man called David who told him that the Service Address had been identified as a place at which Mr Lambert could be contacted as a result of a search of the Companies House website on 14th July 2015. David also confirmed that the Council had Mr Lambert's Lower Lydbrook address for the purposes of Council Tax. He also states that he spoke to Ms Uddin of the Insolvency Service, and she told him that the Council had confirmed that a representative of the Council had tried to visit the Service Address and found that it did not appear to exist as 'the street numbering only went up to number 17.'

20. On the same date Mr Lambert issued an urgent, without notice, application for an order restraining the Original Trustee from dealing with properties that were legally and/or beneficially owned by Mr Lambert immediately before his bankruptcy. An interim injunction was granted by Rose J, as she then was, on the same day, but was discharged by Warren J on 31st October 2017 on the giving of undertakings by the Original Trustee. Warren J dismissed the application to stay Mr Lambert's bankruptcy. He ordered Mr Lambert to pay the Council's costs of the application, summarily assessed in the sum of £806.60, and those of the Original Trustee, summarily assessed in the sum of £5,803.20

21. The First Annulment Application came before Registrar Barber on 29th November 2017. Counsel's note of the hearing suggests that the parties were at least very close to agreement that the bankruptcy order should be annulled and as to who should bear the costs. A consent order was prepared for the hearing which provided that the Council would pay the Official Receiver's costs in their entirety and the Original Trustee's costs

up to 29th May 2017. The hearing was adjourned so that the Original Trustee could satisfy himself as to Mr Lambert's compliance.

22. On 19th December 2017, the First Annulment Application came before Mr Deputy Registrar Barnett. It seems that there was a dispute as to whether an agreement had in fact already been reached as to costs. Mr Lambert contended that it had not. Mr Deputy Registrar Barnett adjourned the application to allow time for agreement as to the payment of costs related to the bankruptcy (or production of evidence by the Council that agreement had been reached) and for payment of the costs that Warren J had ordered Mr Lambert to pay to the Original Trustee.

23. On 17th January 2018 the application came back before Mr Chief Registrar Briggs. The Chief Registrar ordered that, unless Mr Lambert paid the costs ordered by Warren J to be paid to the Council and the Original Trustee by 30th January 2018, the First Annulment Application would be struck out and Mr Lambert would pay the costs of the Council and the Trustee to be assessed if not agreed. The costs not having been paid in accordance with the unless order the application was struck out by the order of Deputy Registrar Jones on 16th February 2018.

24. I should note at this point that the Original Trustee died suddenly and, in February 2018, was replaced by the Trustees.

25. It seems that at some point Mr Lambert applied for permission to appeal the order of Warren J dated 31st October 2017 and that of Mr Deputy Registrar Barnett dated 19th December 2017. The latter application was struck out on 25th April 2018 for failure to comply with an order to file an appeal bundle by 15th February 2018. Permission to appeal the former was refused on 2nd April 2019.

26. The Council obtained a default costs certificate against Mr Lambert in respect of the costs of the First Annulment Application on 31st May 2018. An application to set that aside succeeded but Mr Lambert was ordered to pay £600 in costs. The costs of the First Annulment Application costs were then assessed in the sum of £3,821.50 on 18th December 2018, by which time the instant application had been made. At the time of the hearing before me the costs that Mr Lambert had been ordered to pay were still outstanding.

27. Following the hearing however, I received a letter from Mr Lambert dated 10th May 2019 in which he states that he has paid 'all the costs outstanding to the petitioning creditor being £5228.10 today'. He attached a receipt for a customer deposit at the Gloucester St Oswalds branch of National Westminster Bank plc.

28. On 13th May 2019, he wrote a further letter in which he said:

> 'I have paid all the cost due to the Trustee in Bankruptcy today being £5803.20 representing the costs for 31-10-17 and £200 of the costs of 6-03-18
>
> The Trustee has costs outstanding to me of £3,600 due on 10-05-19 with the order of Insolvency and Companies Court Judge Barber of 14-12-18. This together with the £200 payment of today completes all outstanding amounts due.'

Attached to that letter are two screenshots showing payments to Wilkin Chapman solicitors in those sums. The sort code and account number are the same as those on the deposit slip.

29. Finally, I have received a letter dated 15th May 2019 in which Mr Lambert states that:

> 'The petitioning creditor, Forest of Dean District Council, has issued revised non-domestic rate demands backdated to April 2017 to tenants who occupy units at Linear Park who they now appear to hold liable over myself.'

He exhibits a number of demands, all of which post-date the petition. He also states that he has applied to set aside the post-bankruptcy liability orders.

30. I invited the representatives for the Council and the Trustees to comment on the contents of these letters by email. Both did so on 2nd July 2019. Ms Brooke for the Council has confirmed that it has received £5,228.10 covering:

30.1. the costs of £806.60 ordered by Warren J on 31 October 2017;

30.2. the costs of £600 ordered on 17 July 2018 following Mr Lambert's application to set aside the default costs certificate; and

30.3. the costs of £3,821.50 awarded as a result of the dismissal of the First Annulment Application.

The Council's costs of the petition in the sum of £3,681.30 and costs of £350 ordered on 6th March 2018 in respect of the Bankrupt's application dated 16th February 2018 for a stay of the bankruptcy proceedings remain outstanding. She says that Mr Lambert has not confirmed the source of the funds used to pay the costs and they may be funds that fall within the bankruptcy estate, given the evidence from both the Original Trustee and the Trustees that Mr Lambert has not provided all the information which he is required to provide, in particular as to the occupation of Linear Park and any rental income generated by that property.

31. In respect of the revised non-domestic rates she notes that none of the demands relate to the period covered by liability orders on which the petition was based and Mr Lambert has not provided any evidence to show that he was not liable during that period. The recent demands relate only to a small number of properties that featured in the petition. She says that the Council has had sight of Mr Lambert's latest request to the Magistrates' Court seeking to set aside liability orders and it is apparent that it relates to liability orders made after 12th September 2016 and does not touch upon the orders founding the petition.

32. Mr Titmuss, for the Trustees, has confirmed that they have received sums of £5,830.20 and £200, although no allowance for interest has been made. He says that, despite several requests, Mr Lambert has refused to confirm where the monies came from. The Trustees are also concerned that they may derive from rents received from Linear Park and would thus be assets of the bankruptcy in any event.

33. Mr French, counsel for Mr Lambert, did not reply to those emails, though he acknowledged my request for a response from the Council and the Trustees and was copied in to the replies. He did not say that his client challenged any part of the emails following the circulation of this judgment in draft. He provided a list of possible typographical corrections in the usual way on 5th July 2019. Prior to handing down this judgment however, I discovered from the court's electronic file that a letter, dated 2nd July 2019, had been lodged by Mr Lambert on 3rd July 2019. Mr Lambert states as follows in this letter:

> 'I have today received copy correspondence from both the Trustee and Petitioning creditor in response to the Judges letter of 26-06-19.

> I am aware of several factual inconsistences within both these letters which I would like the opportunity to respond to before he considers the case.
>
> Please would you allow me the opportunity respond by 10-07-19 having had the opportunity to consult with my legal advisers.'

That letter had not been referred to me prior to the circulation of my draft judgment. I have concluded that it is not appropriate to adjourn the handing down of this judgment on the basis of this letter. Mr Lambert does not specify, even in outline, what the 'inconsistencies' are. He does not, in particular, contend that he has, in fact, informed the Trustees or the Council of the source of the monies used to pay the costs and he does not set out what the source of those monies was. I find it surprising that he requests further time to consult his legal advisers when his counsel made no reference to such a request in response to the emails of counsel for the Trustees or the Council or with his proposed list of proposed corrections to the draft judgment. I should say that I make no criticism of Mr French at all. There is nothing to suggest that he was aware of his client's letter. If he was aware of it, I can only infer that he did not think that it had any bearing on the judgment that he had seen in draft. In the absence of any proper indication of what 'inconsistencies' are contained in the Trustees' and Council's emails, and what they might go to, I have decided that it is appropriate to hand down judgment today.

Abuse of process

34. Having summarised the positions of the parties and the evidence, I shall deal with the submission that the current application should not be considered on its merits at all. The Council says that the application is abusive and should be dismissed on that ground alone. Ms Brooke referred me to the decision of the Court of Appeal in *Securum Finance Ltd v Ashton* [2001] Ch 291. In that case, proceedings had been struck out on the grounds of inordinate and inexcusable delay. The claimant then issued a second claim, which included a claim that had been included in the first set of proceedings, but also a claim that had not and could not, have been brought in those earlier proceedings. Chadwick LJ said at paragraph 34:

> 'For my part, I think that the time has come for this court to hold that the 'change of culture' which has taken place in the last three years—and, in particular, the advent of the Civil Procedure Rules—has led to a position in which it is no longer open to a litigant whose action has

> been struck out on the grounds of inordinate and inexcusable delay to rely on the principle that a second action commenced within the limitation period will not be struck out save in exceptional cases. The position, now, is that the court must address the application to strike out the second action with the overriding objective of the Civil Procedure Rules in mind—and must consider whether the claimant's wish to have 'a second bite at the cherry' outweighs the need to allot its own limited resources to other cases. The courts should now follow the guidance given by this court in the *Arbuthnot Latham* case [1998] 1 WLR 1426, 1436-1437:
>
> "The question whether a fresh action can be commenced will then be a matter for the discretion of the court when considering any application to strike out that action, and any excuse given for the misconduct of the previous action: see *Janov v Morris* [1981] 1 WLR 1389. The position is the same as it is under the first limb of *Birkett v James*. In exercising its discretion as to whether to strike out the second action, that court should start with the assumption that if a party has had one action struck out for abuse of process some special reason has to be identified to justify a second action being allowed to proceed."'

35. I was also referred to *Aktas v Adepta* [2010] EWCA Civ 1170 in which the Court of Appeal considered a second action pursued following the striking-out of a first action due to the failure to serve a claim form in time. Rix LJ, with whom Longmore and Atkins LJJ agreed, said at paragraph 90:

> 'A mere negligent failure to serve a claim form in time for the purposes of CPR 7.5/6 is not an abuse of process. It has never been held to be in any of the many cases cited to this court, nor in my judgment should it be described as such, nor as being tantamount to such. I say a "mere" negligent failure to serve in time in order to distinguish the typical case of such failure to be found in these appeals and many other cases in the reports from any more serious disregard of the rules; but not in order to be in any way dismissive of the proper strictness with which a failure to serve in time, without good reason for doing so, is and has been rigorously dealt with by the courts, whether under the CPR or under the previous regime of the RSC. However, all the cases make clear that for a matter to be an abuse of process, something more than a single negligent oversight in timely service is required: the various expressions which have been used are inordinate and inexcusable delay, intentional and contumelious default, or at least wholesale disregard of the rules.'

36. Mr French points out that this is not a case where Mr Lambert is seeking to relitigate a case decided on its merits. He referred me to the speech of Lord Millett in *Johnson v Gore Wood* [2002] 2 AC 1, 59 where he said as follows:

> 'It is one thing to refuse to allow a party to relitigate a question which has already been decided; it is quite another to deny him the

> opportunity of litigating for the first time a question which has not previously been adjudicated upon. This latter (though not the former) is *prima facie* a denial of the citizen's right of access to the court conferred by the common law and guaranteed by article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (1953). While, therefore, the doctrine of *res judicata* in all its branches may properly be regarded as a rule of substantive law, applicable in all save exceptional circumstances, the doctrine now under consideration can be no more than a procedural rule based on the need to protect the process of the court from abuse and the defendant from oppression.'

He took me to a number of cases – *Thames Investment and Securities Ltd v Benjamin* [1984] 1 WLR 1381, *Society of Lloyd's v Jaffray* [1999] CLC 713 and *Sinclair v British Telecommunications plc* [2001] 1 WLR 38 – in which the court stayed further proceedings until obligations under earlier actions had been complied with, rather than striking them out. In *Society of Lloyd's v Jaffray*, Colman J said, at 720:

> 'The underlying purpose of such stay orders is to reflect the fact that there has been a needless duplication of proceedings directed to the determination of the same or substantially the same issues. There has thus been a misuse of the court's procedure. In many cases this may fall short of an abuse of process or vexatiousness, such as would justify striking out the second set of proceedings. Moreover, the circumstances may not be such as to give rise to an issue estoppel which could be the basis for an application to strike out the second set of proceedings. Nevertheless, the conceptual justification for these orders is clearly to discourage unnecessary procedural duplication. They reflect a much wider and well-established approach manifested in germane principles, such as the *nemo debit bis vexare* rule, issue estoppel and *Henderson v Henderson* (1843) 3 Hare 100; 67 ER 313'

37. This is not a case in which the First Annulment Application was, in itself, abusive. Nor is it a case in which Mr Lambert is seeking to relitigate issues which have been decided, or which should have been included in an earlier application. Nonetheless, in my judgment this application is an abuse of process, which should be dismissed on that basis alone.

38. The change of litigation culture introduced by the Civil Procedure Rules, referred to by Lord Woolf in *Securum*, and changes to those Rules, with the emphasis on compliance with the court's directions, introduced following Jackson LJ's recommendations for reform are relevant here. Paragraph 1.1(2) of the Rules, as amended, now provides that the court's overriding objective of dealing with matters justly and at proportionate cost includes:

> '(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases; and
>
> (f) enforcing compliance with rules, practice directions and orders.'

Parties to litigation are under a duty to help the court to further the overriding objective.

39. Where a party has been subject to a sanction, such as the striking out of their case, relief from that sanction is obtained by an application under Rule 3.9, which provides as follows:

> '(1) On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order, the court will consider all the circumstances of the case, so as to enable it to deal justly with the application, including the need –
>
> (a) for litigation to be conducted efficiently and at proportionate cost; and
>
> (b) to enforce compliance with rules, practice directions and orders.
>
> (2) An application for relief must be supported by evidence.'

As set out in *Denton v. TH White Ltd* [2014] EWCA Civ 906, the court has to approach this exercise in three stages: (i) it must identify and assess the seriousness and significance of the failure to comply with any rule, practice direction or court order which engages rule 3.9(1); (ii) it must then consider why the default occurred; (iii) it must evaluate all the circumstances of the case, so as to enable the court to deal justly with the application including the factors in sub-paragraphs (a) and (b).

40. Mr Lambert bypassed that exercise by issuing a fresh application that was in all material respects identical to the first, without having complied with the obligation that the court had specified as a condition of proceeding with the annulment. That in itself appears me to be an abuse of the processes of the court. Were I to approach this application as if it had included an application for relief from sanction I would refuse it. The failure to comply with the unless order was serious. There is no good reason for Mr Lambert not to have complied with it. Although he paid the outstanding costs after the hearing before me, no reason has been given as to why he could not have paid them sooner. The fact that he sought permission to appeal the order of Warren J giving rise to the costs liability is not a good reason. The order was not stayed and the costs were

not paid even after the dismissal of the permission application. Considering all the circumstances of the case would militate against relief from sanction so as to allow Mr Lambert to pursue an annulment application. The following matters are significant –

40.1. The First Annulment Application was itself made late. Mr Lambert was aware of the bankruptcy by April 2017 at the latest but did not make an application until 24th October 2017.

40.2. During the course of the First Annulment Application, Mr Lambert made an unsuccessful application for a stay and simply disregarded court orders requiring him to pay the costs occasioned by it. He did not pay the costs ordered by Warren J within 14 days. He did not pay them following the adjournment of the hearing before Mr Deputy Registrar Barnett on 19th December 2017, which hearing was adjourned in part to provide time for the Original Trustee's costs to be paid. He did not pay them following the making of an unless order by Chief Registrar Briggs on 17th January 2018. He did not pay them after his application for permission to appeal the order of Warren J had been dismissed.

40.3. He did not respond to the commencement of detailed assessment proceedings by the Council leading to it obtaining a default costs certificate against him on 31st May 2018. This led to further court time being wasted by an application to set that certificate aside and further costs orders, which Mr Lambert did not pay.

40.4. This application was made some two years after the bankruptcy, one year after the First Annulment Application and nearly eight months after that application was struck out. No new material facts have come to light which might justify that delay. In his evidence in the First Annulment Application Mr Lambert made it clear that he had established that the Council had obtained the Service Address from Companies House despite having his home address and had seen the seen the Process Server's statements. Costs have been incurred in the administration of his bankruptcy estate as a result.

40.5. Even in this application, Mr Lambert failed to comply with the directions of the court. He sought to adduce a witness statement more than two months after the deadline for doing so imposed by Deputy ICC Judge Schaffer had passed.

40.6. There is a plain background of a failure to cooperate with his trustees so as to enable them to identify the extent of his bankruptcy estate. The fact that Mr Lambert has not identified the source of the funds used to pay the respondents' costs, despite requests, gives me no confidence that the costs orders have been paid from monies to which Mr Lambert is beneficially entitled, rather than monies that fall within his bankruptcy estate in any event.

41. It seems to me that those factors, taken with Mr Lambert's attempt to circumvent the relief from sanction regime, also demonstrate a wholesale disregard for the orders of the Court and the procedures it has in place for dealing with cases justly and at proportionate cost. His disregard of the court's orders led to the striking out of the First Annulment Application. His disregard for the court's procedures is evidenced by the fact that he has made this application without paying the costs which led to the striking out of the prior application, putting the parties to expense and using court time in hearing what is now a contested application. That is not a proper use of the court's procedures. The proper course would have been to apply for relief from sanction promptly after the first application was struck out, which might have had the effect of restoring a largely uncontested application. It is not appropriate for me to take the alternative course of staying the application pending payment of outstanding costs liabilities in circumstances where the source of funds remains unknown and there is a real question as to whether they are monies within the bankruptcy estate.

42. I would dismiss the application on that ground alone.

Annulment

43. If I am wrong about that, I must consider the merits of the application to annul on the ground that the order ought not to have been made. The jurisdiction is set out in section 282 of the 1986 Act, which provides, insofar as it is material:

> (1) The court may annul a bankruptcy order if it at any time appears to the court—

> (a) that, on any grounds existing at the time the order was made, the order ought not to have been made…

The court retains a discretion as to whether to annul even if the order ought not to have been made (save in cases where there was no jurisdiction to entertain the bankruptcy proceedings at all).

44. It is extremely concerning that the Process Server's evidence in relation to the service of both the statutory demand and the attempted service of the petition appear to be at odds with the appearance of the Service Address. The account given by Mr Jackson of Made Simple as to the opening hours of the Service Address has not been challenged. It appears most unlikely that the Process Server could have spoken to anyone at the Service Address who would have confirmed that Mr Lambert lived there. I cannot on the evidence before me conclude whether the Process Server was mistaken or is simply being untruthful. For the purposes of this application, however, I will accept Mr Lambert's case at its highest and treat the Process Server's evidence as having been deliberately untruthful and that proper steps to bring the statutory demand to Mr Lambert's attention were not undertaken by the Council's agent. The statutory demand was not served and it follows that a petition should not have been presented and the bankruptcy order should not have been made. That engages my discretion to annul the bankruptcy order. In circumstances where the procedural steps leading to the making of a bankruptcy order are tainted with dishonesty, there must be a strong presumption in favour of annulling the order. In the exercise of my discretion, however, I decline to do so.

45. The first ground for that decision is that the petition debt was, and remains, indisputably due and owing. The petition was founded on statutory debts and, to explain that, I should briefly refer to the legislation concerning liability orders. The making of liability orders in respect of council tax is dealt with by regulation 34 of the Council Tax (Administration and Enforcement) Regulations 1992. This provides, insofar as is material:

> (1) If an amount which has fallen due under paragraph (3) or (4) of regulation 23 (including those paragraphs as applied as mentioned in regulation 28A(2)) is wholly or partly unpaid, or (in a case where a final notice is required under regulation 33) the amount stated in the final notice is wholly or partly unpaid at the expiry of the period of 7 days beginning with the day on which the notice was issued, the

> billing authority may, in accordance with paragraph (2), apply to a magistrates' court for an order against the person by whom it is payable.
>
> (2) The application is to be instituted by making complaint to a justice of the peace, and requesting the issue of a summons directed to that person to appear before the court to show why he has not paid the sum which is outstanding.
>
> …
>
> (6) The court shall make the order if it is satisfied that the sum has become payable by the defendant and has not been paid.
>
> (7) An order made pursuant to paragraph (6) shall be made in respect of an amount equal to the aggregate of-
>
> (a) the sum payable, and
>
> (b) a sum of an amount equal to the costs reasonably incurred by the applicant in obtaining the order.'

The effect of such an order for the purposes of bankruptcy proceedings is set out at regulation 49 as follows, again insofar as is material:

> '(1) Where a liability order has been made and the debtor against whom it was made is an individual, the amount due shall be deemed to be a debt for the purposes of section 267 of the Insolvency Act 1986 (grounds of creditor's petition).
>
> …
>
> (3) For the purposes of this regulation the amount due is an amount equal to any outstanding sum which is or forms part of the amount in respect of which the liability order was made.'

The equivalent provisions in relation to non-domestic rates are set out in regulations 12(5) and regulation 18 of the Non-Domestic Rating (Collection and Enforcement) (Local Lists) Regulations 1989. These are in substantively identical terms.

46. In *Yang v Official Receiver* [2017] EWCA Civ 1465 Gloster LJ considered the 1992 Regulations as follows:

> "55 In my judgment, the only sensible interpretation of section 282(1)(a) of the IA86 is that contended for by the local authority: namely that regulation 49(1) of the CTR deems the liability orders to constitute a legally enforceable debt, regardless of the underlying factual position relating to the relevant property, unless and until the liability order is set aside under the specific statutory procedure laid

> down for doing so. Dictates of certainty and expediency require that a bankruptcy court should not go behind the liability orders, except in the event of fraud or some miscarriage of justice. At the date that the BO was made, the liability orders remained in place and had not been set aside; the effect of regulation 49(1) of the CTR was therefore statutorily to deem them as constituting a legally enforceable debt from the time they were made until the time they were set aside. The fact that the liability orders were subsequently set aside was not a ground "existing at the time the [BO] was made", as required by section 282(1)(a) of the IA86. It was only later, in August 2012, when the liability orders were in fact set aside, that the debt ceased to exist. Thus, even if all the underlying facts in relation to the property had been known at the time that the BO was made, the court would none the less have been entitled to make a bankruptcy order. (Of course, whether it would have done so, as opposed to adjourning the petition to enable the applicant to have obtained an order setting aside the liability orders, is irrelevant.)
>
> …
>
> 58 My conclusion is supported by various authorities: see *Muir Hunter*, vol 1, para 3-310.1 (references as at 29 March 2017). The finality of liability orders is a point also made by Mummery LJ in *Bolsover District Council v Dennis Rye Ltd [2009] 4 All ER 1140*, para 5:
>
> "liability orders are orders of the court like ordinary civil judgments. If a winding up petition is based on such orders *the court will seldom look into them, or go behind them*, in the absence of fraud, or in the absence of jurisdiction in the court that made the orders, or 'some other truly compelling circumstance'." (Emphasis supplied.)"

47. The effect of making a liability order, whether under the 1989 Regulations or the 1992 Regulations, is thus to create a statutory debt that may found a bankruptcy petition. The court will not look behind a statutory debt or a court order unless there is collusion, fraud or a miscarriage of justice. A miscarriage of justice in this context requires evidence:

> 'from which it can conclude that had there been a properly conducted judicial process it would have found, or very likely would have found, that nothing was in fact due to the claimant'

(per Etherton J, as he then was, in *Dawodu v American Express Bank* [2001] BPIR 983). In my judgment there has been no miscarriage of justice here. First, Mr Lambert has produced no evidence from which it could be concluded that he had a prospect of persuading the Magistrates' Court that he did not in fact owe any council tax or non-domestic rates to the Council for the relevant period. Indeed his reluctance to provide details of the persons in occupation of his various properties tends to suggest that he is

unable to produce such evidence. Secondly, although on the face of it service of the applications for the liability orders was also effected at the Service Address (although some of them appear to have been served at addresses with which Mr Lambert does not dispute he was associated) he has in fact had the opportunity to set them aside. He failed to attend the hearing of that application. His evidence is that he was advised that he did not have locus to pursue the application. It is of course right that the making of a bankruptcy order divested him of his interest in relation to the liability orders but he did not attempt to persuade the justices of his locus and nor did he make any attempt to ask the Original Trustee or the current Trustees for consent to him seeking to set aside the liability orders on behalf of the bankruptcy estate. As Ms Brooke notes, in *Yang*, the bankrupt successfully set aside the liability orders during the currency of her bankruptcy (that fact is perhaps more evident from the judgment of His Honour Judge Hodge QC at [2013] EWHC 3577 (Ch), paragraph 4, than it is from the judgment of the Court of Appeal). He has made a further application to set aside liability orders obtained against him, but these do not relate to the petition debt. The debt remains due and owing and has not been paid. Nor have any of the other liability orders which have underpinned the Council's claims in the bankruptcy been discharged.

48. It is clear that the liability orders on which the petition was founded are unassailable, even if Mr Lambert were able to produce some evidence that someone else was in occupation of the properties at the time. In *R (on the application of Brighton & Hove City Council) v Brighton & Hove Justices, Michael Hamdan)* [2004] EWHC 1800 (Admin) Stanley Burton J noted that magistrates had an inherent jurisdiction to set aside liability orders (referring to *Liverpool City Council v Pleroma Distribution Ltd* [2002] EWHC 2467 (Admin)). He stated at paragraph 31:

> '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.'

And he went on to say:

> '32. The authority for condition (a) is paragraph 10 of the judgment of Maurice Kay J in *Pleroma* . In most cases, it must be shown that the liability order was unlawful or made in excess of jurisdiction or in ignorance of a significant fact concerning their procedure (such as an application for an adjournment) of which the justices should have been aware. However, the procedural mishap may not be the fault of the court or of the local authority: Maurice Kay J gave the example of a traffic accident that, unknown to the magistrates' court, prevents the defendant from attending at the hearing. But a failure of the defendant to attend when he knows that there will be a hearing will not of itself satisfy this requirement. Thus a failure of the defendant to attend the hearing because he assumes, without good reason, that the local authority will not seek an order, or because he is absent abroad, will not of itself satisfy this requirement. A defendant who will be unable to attend a hearing because of his absence abroad may request an adjournment in writing, or instruct a solicitor to appear on his behalf; but if he does nothing, he is not entitled to an order of the magistrates to set aside a liability order made against him.
>
> 33. Requirement (b) follows as a matter of principle, applicable to all challenges to administrative and judicial decisions. If promptness were unnecessary, a defendant could circumvent the requirements of CPR Part 54.5 by applying to the justices for relief instead of to the Administrative Court. In this context, where the defendant is not required to do more than to write a letter stating why he seeks to re-open the decision to make a liability order, promptness normally requires action within days or at most a very few weeks, not months, and certainly not as much as a year. It is to be noted that the jurisdiction to reopen a liability order will be unavailable to a defendant who delays in circumstances in which he has notice that an order may have been made, although he has not received a copy or been informed that an order has been made.'

It seems to me inconceivable that an application in respect of the petition debt would be permitted now. Not only would the application be made some three years after Mr Lambert became aware of the orders but it would be made over a year after he failed to attend the hearing of an application to set them aside, which application was not itself 'prompt'. Nor would the fact that Mr Lambert had been under a disability as a result of his bankruptcy provide justification for the delay. That disability was caused by his own failure to comply with the orders of the court.

49. The petition debt is thus due, as are the debts due under the liability orders for which the Council have proved in the bankruptcy. There is no evidence that those debts can be paid and I cannot be satisfied as to Mr Lambert's solvency. Ms Brooke drew my attention to *Askew v Peter Dominic Ltd* [1997] BPIR 163, in which the Court of Appeal

considered an annulment application in the context of a bankruptcy order made on a statutory demand and petition which were 'sheer nonsense'. The judge at first instance had nonetheless exercised his discretion against annulling the bankruptcy order on the grounds that the bankrupt was indebted to the petitioner. She would have no defence to a claim brought for the debt. The only effect of annulling the bankruptcy would be to compel the petitioner to issue a fresh statutory demand and petition. Again, in *Omokwe v HFC Bank Ltd* [2007] BPIR 1157 the court considered an application to annul a bankruptcy order on the basis that the bankrupt had not been served with the statutory demand or bankruptcy petition. In dismissing the application, the Chief Registrar commented that, even if he had accepted the bankrupt's evidence regarding service, he would have dismissed the application in the exercise of his discretion on the basis that there was no evidence of any defence to the petition.

50. That is precisely the position here. Were I to annul the bankruptcy order, it is very likely that the petition would fall to be dismissed for want of proper service of the statutory demand and the Council would be entitled to present a further statutory demand and petition. The debt due to the Council, at least to the extent set out in the petition, would be indisputable. No suggestion has been made that Mr Lambert would or could pay that debt and a further bankruptcy order would be inevitable.

51. While I have considered whether the serious concerns over the truthfulness of the Process Server's statement should lead me to annul the bankruptcy order even if it means that the Council will need to go through the bankruptcy process again, though this time on an indisputably proper procedural basis, I do not think it would be right to do so. *Artman v Artman* [1996] BPIR 511 was another case in which the likelihood that if the bankruptcy were annulled the bankrupt would soon be made bankrupt again weighed against the annulling the bankruptcy order. Moreover, Robert Walker J (as he then was) said that he was 'strongly disposed' against annulment for reasons including strong *prima facie* evidence that the bankrupt had concealed assets from his trustee. That is of weight here. There remains a significant doubt as to the extent of the bankrupt's estate and a background of non-cooperation with his trustees, in particular as to the occupants of Linear Park and the income from the properties therein. Where there has been cooperation it has been delayed and has increased the costs of administering the estate. It would not be right, in my view, to hamper further the

Trustees' investigation of the extent of Mr Lambert's estate and get it in for the benefit of creditors with the benefit of the 1986 Act's provisions for avoiding dispositions made after the presentation of the petition and its machinery for adjusting prior transactions.

52. I will therefore dismiss the application.