IN THE HIGH COURT OF JUSTICE **Claim no. HC-2016-003195**
CHANCERY DIVISION

Neutral Citation No: [2019] EWHC 2487 (Ch)

Before

Mr Peter Knox Q.C.
(sitting as Deputy Judge of the High Court)

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Between :

DANIEL THOMAS BRIAN HORLER

Claimant

- and -

DAVID RUBIN (1)
DAVID RUBIN & PARTNERS (a firm) (2)
DAVID RUBIN & COMPANY (a firm) (3)

Defendants

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MR TIMOTHY BECKER acting on direct access instructions for the **Claimant**
MR DAVID MOHYUDDIN Q.C. (instructed by BLM) for the **Defendants**

Hearing date: 25 July 2019

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Judgment on Costs and Stay[1]

1. On the afternoon of 25 July 2019, I handed down judgment in this matter, and dismissed Mr Horler's claim that the finding made by His Honour Judge Raynor Q.C. in his judgment given on 11 February 2011, that Mr Horler had given Mr Hogg a proxy to vote on his behalf at a creditors' meeting on 8 March 2001, had been obtained by fraud. On the contrary, I held that Mr Horler had given Mr Hogg a proxy, albeit not in a form which complied with the Insolvency Rules 1986. That, however, was no basis for a finding of fraud.

[1] **This version of the judgment makes certain typographical corrections to the judgment of 23 September 2019 in the light of editorial comments subsequently received from counsel in the course of drawing up the order.**

2. In doing so I observed, in paragraph 205 of the judgment, that in the previous proceedings the Court of Appeal, according to the defendants' solicitors' note of the hearing, had been told by their counsel Mr Robert Hantusch that the evidence at the trial before His Honour Judge Raynor Q.C. had been that *"the proxy form would have been produced and verified"*. But Mr Horler had not presented his case in these subsequent proceedings on the basis that the Court of Appeal had in this respect been misled by the defendants, and even if he had, it would not have been for me to make a decision on the point.

3. In handing down the draft judgment on the morning of Tuesday 23 July 2019, I directed that written submissions on consequential matters be provided by 4.30 pm on Wednesday 24 July 2019. By that time, I received a draft order from the defendants seeking an order that their costs be assessed on the standard basis with a payment on account of £120,000, but nothing from Mr Horler. Although I extended the time for him to provide written submissions to 6.30 pm, none were provided before the hearing at 2 pm on Thursday 25 July, and no indication was given as to what his position was going to be, in particular on the question of costs or a stay.

4. At the hearing, however, Mr Becker made oral submissions on both these questions. Essentially, his position was that, in the light of my findings and my observation in paragraph 205 of the judgment, Mr Horler proposed to make an application to the Court of Appeal under CPR rule 52.30 to re-open its judgment in the previous proceedings. The basis of the application would be that the Court of Appeal's judgment proceeded upon the mistaken premise, as advanced by Mr Hantusch, that Mr Hogg had been given a proxy which complied with the 1986 Rules, when in fact, given my findings in these proceedings, this was not the case. Therefore, he contended, I should defer making a decision on costs until the outcome of that proposed application; alternatively, I should order a stay of execution on any costs order pending its outcome. Mr Becker also made submissions on costs in the event that I was minded not to defer consideration of the issue.

5. Mr Mohyuddin Q.C., understandably, opposed the introduction of these arguments, because he had not been given notice of them; alternatively, he submitted that he should be allowed to supplement his oral submissions by written argument, with the opportunity for Mr Horler to make written submissions in reply. With reluctance, I accepted, given the importance of the issues, that Mr Becker should be allowed to make his submissions, and so I acceded to Mr Mohyuddin Q.C.'s alternative submission, which Mr Becker did not oppose. This was on terms that the costs of those written submissions be borne in any event by Mr Horler. Accordingly, I made an order to this effect, pursuant to which Mr Mohyuddin Q.C. provided written submissions on 8 August 2019, and Mr Becker on 19 August 2019. In Mr Becker's case, this was one working day after the time provided for in the order, but his submissions explained the reason for delay, which I accept, and I accordingly take them into account in the further judgment. Mr Mohyuddin Q.C. very properly did not oppose such an extension.

6. When I considered the parties' submissions on 2 September 2019, it occurred to me that neither of them had directed my attention to or considered the relevant rules in the CPR governing the grant of a stay (i.e. rules 83.7(1) and (4) and 3.1(2)) or the Court of Appeal's decision on the interrelationship between them in *Michael Wilson*

& Partners Limited v. Sinclair (no. 2) [2017] 1 W.L.R. 3069. Accordingly, by note of the same date, I invited them to make brief submissions on these rules and this authority by 9 September 2019. At the request of both parties (whose counsel were on holiday) I extended this date to 16 September 2019. The parties duly provided their submissions by this date.

7. It is to be noted that at the handing down hearing, I rejected an application by Mr Horler for permission to appeal, and that he has not in the meantime renewed any such application to the Court of Appeal. Nor, so far as I am aware, has he yet made his proposed application to that court under CPR 52.30.

Costs

Should an order be made now?

8. As I have indicated, Mr Becker's main submission is that I should defer consideration of the question of costs until the determination of Mr Horler's proposed application to the Court of Appeal under CPR rule 52.30. The argument goes that if it turns out that the Court of Appeal was materially misled by the defendants in the previous proceedings, albeit innocently (there is no suggestion that Mr Hantusch was acting in anything other than good faith), then the need for these proceedings and the costs incurred in them by the defendants would not have arisen. Therefore, if that turns out to be the case, Mr Horler should not have to pay the defendants' costs of these proceedings, because on a proper view it could be said that they had been caused by the defendants' misleading conduct in the former proceedings. Alternatively, an allowance should be given against any costs order.

9. Mr Mohyuddin Q.C. resisted this. His first argument was that even if the Court of Appeal were to uphold Mr Horler's proposed application under CPR rule 52.30 and to go on to reverse its order in the previous proceedings, this could not have any effect on a costs order made in these proceedings. His second argument was that the proposed application to the Court of Appeal had no merit. His third argument was that in any event it would be wrong to defer making a costs order now pending the proposed application to the Court of Appeal: I should deal with the position as it now stands.

10. I do not accept the first argument, because it seems to me to be premature at this stage to second-guess what the position might be, and all the possible arguments that would arise on it, if Mr Horler does make his proposed application under CPR rule 52.30 and it succeeds.

11. As to the second argument, I do not think it appropriate to express any views either way on the potential merits of the proposed application, because it is clear from CPR rule 52.30(8) and paragraph 7.1 of the Practice Direction 52A that it is for the Court of Appeal alone to decide upon its merits. The only thing which I would observe, as the finder of fact in these proceedings, is that the argument advanced in paragraph 26.8.1 of Mr Mohyuddin Q.C.'s written submission of 8 August 2019, that Mr Berry might have used a form complying with the Insolvency Rules 1986 (if it was he who gave the proxy to Mr Hogg) was not advanced at the hearing either in cross-examination or in argument. Further, it is unrealistic to suppose that Mr Berry would have gone to the trouble of digging up a compliant proxy form, but then have exercised the choice given by that form by leaving in the words in square brackets

against the side note *"Please delete the words in brackets if the proxy-holder is only to vote as directed i.e. he has no discretion"*. (See appendix 2 of the judgment for the form.) There is no basis for supposing that Mr Horler would have given Mr Berry express instructions to give an unlimited proxy, or for supposing that Mr Berry would have given one without such express instructions.

12. However I do accept Mr Mohyuddin Q.C.'s third argument. The defendants have succeeded in these proceedings, and they are entitled in the usual way to have the question of costs determined now, along with a payment on account and subsequent detailed assessment. Whatever the merits of the proposed application under CPR rule 52.30, they do not justify departing from this. If the application is made and succeeds, Mr Horler may well be able to make an application to this (lower) court for the order to be revisited under CPR rule 3.1(7) on the footing that there will have been a change in circumstances, even though the costs order is a final order. (See the cases at paragraph 3.1.17.2 of the 2019 White Book.) I should emphasise that even if he were to make such an application, it would be an entirely open question as to whether it should succeed, in particular in the light of Mr Mohyuddin Q.C.'s first argument and any other arguments the defendants may wish to make.

13. Mr Becker submitted that I should add a "liberty to apply" provision to the costs order to allow for the possibility of its being revisited after a successful application to the Court of Appeal, but I see no reason to do this. Although paragraph 1602 of the 2015 edition Halsbury's Laws of England, Civil Procedure volume 12A, 2015 edition (drawn to my attention by Mr Mohyuddin Q.C.) says that in a final order this can be done *"where the necessity for subsequent application is foreseen"*, the cases relied upon for the proposition *(Kavan v. Crawford* (1877) 6 Ch. D. 29 and *Pawley v. Pawley* [1905] 1 Ch. 593) are cases where the final order required further working out by subsequent orders. That is different from this case, where what is potentially foreseen (according to Mr Horler) is an application to reverse the order in the light of further litigation in a different albeit related action. Further, as noted in paragraph 3.1.17.3 of the 2019 White Book, it is difficult to see how a "liberty to apply" provision would justify a subsequent variation in the absence of a change of circumstances or misstatement of fact; and its absence would not preclude an application under CPR rule 3.1(7). Accordingly, I decline to insert a provision for "liberty to apply" in the order.

Should Mr Horler bear all the costs of these proceedings?

14. Mr Mohyuddin Q.C. submits that as the defendants succeeded, they should have their costs of the proceedings, to be subject to detailed assessment on the standard basis if not agreed.

15. Mr Becker resists this.

16. First, he says that the defendants should have disclosed Mr Simon Plant's typed and handwritten notes, which corroborated Mr Rubin's typed note of the 8 March 2001 meeting, either before the institution of these proceedings, or in their defence served on 20 April 2017, or upon disclosure, which took place in February 2018. Instead, the typed notes were not served until 15 November 2018, as an exhibit to Mr Rubin's witness statement, and the handwritten notes were not served until 25 March 2019 pursuant to my order of 11 March 2019. Had they been served when they should

have been, says Mr Becker, then a reasonable lawyer would have given different advice to Mr Horler about the merits of his claim, and so Mr Horler would have been able to avoid the costs risk of making or continuing the claim. Therefore, he contends, the defendants should be deprived of their costs until these notes were disclosed (whether 25 March 2019, or at least 15 November 2018).

17. I reject this argument. First, the notes were not determinative of the case, but simply provided further support for Mr Rubin's evidence in addition to all the other matters mentioned in my judgment (in particular, the unlikelihood of Mr Rubin deliberately falsifying the 8 March 2001 minute, given that he sent it out to Mr Anderson and Mr Berry on Mr Horler's behalf only a few days later on 12 March 2001). Second, there is no suggestion that Mr Plant's notes were deliberately withheld in order to gain some tactical advantage, and I accept Mr Mohyuddin Q.C.'s explanation that the reason that the notes were not disclosed earlier was that they were not in the defendants' or their solicitors possession, but in that of CMS Cameron McKenna Nabarro Olswang LLP.

18. Third and in any event, I do not accept that earlier disclosure of the notes, whether typed or handwritten, would have made any difference to Mr Horler's decision to begin or to continue these proceedings. As I have found in paragraphs 163 and 164 of my judgment, he had unfortunately become obsessed by the case and blinkered, and even after disclosure of Mr Plant's typed notes, his case was that the notes recorded Mr Hogg as his proxy only because this is what Mr Rubin must have told Mr Plant. I have no doubt but that he would have maintained this explanation whenever the typed or handwritten notes had been disclosed. The question of what a reasonable lawyer would have advised Mr Horler, therefore, is irrelevant. I should add that I see no basis for holding that the "reasonable lawyer" test is the correct test in law in considering how a party would have behaved in the context of costs when a complaint is made about late disclosure, nor has Mr Becker drawn my attention to any such authority: the correct test is, how would the party in question have behaved.

19. Accordingly, in my judgment the defendants should have their costs from the beginning of the proceedings, subject only to any costs orders that have already been made against them.

20. Next, Mr Becker suggested that Mr Horler should not bear the costs of the further oral hearing that took place on 13 June 2019, because one of the reasons for that hearing was the need to consider argument on Mr Plant's handwritten notes which were disclosed only after the main trial hearing.

21. However, I reject this. First, although Mr Horler suggested in court at the handing down that he had previously asked for specific disclosure of the handwritten notes, I was not shown any correspondence to this effect either at the handing down, or in the course of the later written submissions. There was therefore fault, or possible fault, on both sides: the defendants' in failing to disclose these earlier (assuming that they were within their control), Mr Horler's in failing to ask for them earlier. Second and in any event, that hearing was necessary to deal with the other issues then considered, two of which were raised by Mr Horler only after the hearing (i.e. his request to put in a statement from Mr Berry and his request to put further documents into evidence); one of which could have been raised by Mr Horler in the course of the main hearing

(i.e. questions arising out of the defendants' May 1999 proxy forms); and the last of which (the effect of the Supreme Court's decision in *Takhar v. Gracefield*) arose only after the main hearing. This hearing, therefore, would probably have had to take place in any event, even if Mr Plant's handwritten notes had been disclosed earlier.

22. Accordingly, Mr Horler must pay the defendants' costs of all these proceedings to be assessed on the standard basis.

23. Finally, I would like to add one point which may need to be considered on an assessment, which is that I agree with Mr Becker's submission that there was an element of overkill in Mr Mohyuddin Q.C.'s written submissions of 9 August 2019, which extended to 24 pages double spaced, helpful though they were. One understands the defendants' anxiety to obtain an immediate order for costs and to enforce it, but I am concerned that some of the points made were unnecessary (i.e., that I should not grant a declaration on the proxy point, which Mr Becker had abandoned at the oral hearing on 25 July 2019) and others (paragraphs 37 to 54) developed at more length than was in the circumstances required, without reference to rule 83.7(4).

Payment on account

24. Mr Mohyuddin Q.C. sought a payment on account in the sum of £120,000, on the basis that the defendants' budget for £101,395 estimated future costs had been approved at the costs management conference, by when they had already incurred another £49,000 odd. Mr Becker did not resist this, and I accordingly order that Mr Horler must make a payment on account of the defendants' costs in the sum of £120,000.

The application for a stay

25. Mr Horler seeks a stay of execution until the Court of Appeal rules upon his proposed application for permission under CPR rule 52.30, on the grounds that he is impecunious, and that unless a stay is granted the defendants will enforce their costs judgment, in particular by bankrupting him, and thereby stifle his application. Alternatively, he asks for a stay of execution until 31 October 2019 to enable him to make his application to the Court of Appeal and to give the Court of Appeal sufficient time to consider it.

26. CPR rules 83.7(1) and (4) provide that:

> "(1) At the time that a judgment or order for payment of money is made or granted, or at any time thereafter, the debtor or other party liable to execution of a writ of control or a warrant may apply to the court for a stay of execution…..
>
> (4) If the court is satisfied that –
>
> (a) there are special circumstances which render it inexpedient to enforce the judgment or order; or
> (b) the applicant is unable from any reason to pay the money,

> then ….. the court may by order stay the execution of the judgment or order, either absolutely or for such period and subject to such conditions as the court thinks fit."

27. CPR rule 3.1(2) provides:

> "Except where these Rules provide otherwise, the court may –
> …….
> (f) stay the whole or part of any proceedings or judgment either generally or until a specified date or event."

28. The interrelationship between CPR rules 83.7 and 3.1(2)(f) was clarified by the Court of Appeal in *Michael Wilson & Partners Ltd v. Sinclair (no. 2)* [2017] 1 WLR 3069. The court held, disagreeing with the Master and the Judge, that in the case of a money judgment, CPR rule 83.7 is the governing provision to which rule 3.1(2)(f) is subject, and it applies both (a) to an application for a stay made before as well as after execution has been issued and (b) to an application to prevent execution by, for example, a bankruptcy petition, as well as to execution by warrant or writ of control. (See paragraphs 16 and 18 of the judgment.)

29. Accordingly, in order for a discretion to grant a stay to arise, Mr Horler must establish either (a) that there are *"special circumstances"* which render it inexpedient to enforce the costs order I am making, or (b) that he will be unable to pay the payment on account I have ordered of £120,000 and any costs assessed on the detailed assessment.

30. Mr Becker relies upon the proposed application to the Court of Appeal under CPR rule 52.30 as a *"special circumstance"*. However, I reject this. The premise of rule 84.7(4)(a), as is clear from the contrast with rule 84.7(4)(b), is that the party who is obliged to pay is able to do so, and therefore the mere fact that he may in due course obtain further sums from other sources does not without more amount to a special circumstance. Likewise, the mere fact that the source from which he may obtain those further funds is the person to whom, under the court's order, he must currently make payment, does not without more amount to a *"special circumstance"*. Thus, in the *Michael Wilson* case (supra), as Mr Mohyhuddin Q.C. points out, the mere fact that the defendant, who was under an order to pay a Bahamian costs order which had been registered in England, had a possible cross-claim under an undertaking in damages was evidently not regarded by the Court of Appeal as a special circumstance in itself (see paragraph 38). In my judgment, something more must be shown, for instance, that if Mr Horler paid the sums ordered, but then succeeded in his application to the Court of Appeal, he would have difficulty in recovering them. But there is no suggestion here that this might turn out to be the case, because it is common ground that the defendants are represented by insurers.

31. As to the second limb, Mr Becker has asserted that Mr Horler is an impecunious pensioner and will not be in a position to pay the £120,000 payment on account which I have ordered. Given the evidence at this trial and in the previous proceedings, I have no reason to disbelieve this. However, even now, after I pointed out CPR rule 83 in my note of 2 September 2019, Mr Horler has not issued an application notice or

submitted any witness statement in support, as required by rule 83.7(6). This is unsatisfactory, and of itself would be sufficient to disentitle Mr Horler to anything more than, at most, a stay of a few days to enable him to make his proposed application to the Court of Appeal, accompanied by an application for a stay supported by evidence.

32. However, there is in my judgment a more important reason why a longer stay than this would be inappropriate. As I have said, it is for the Court of Appeal alone to decide upon the merits of his proposed application, and therefore the Court of Appeal is the correct court for deciding the related question of whether a stay should be granted. The most it would be appropriate for me to do in this court would be to grant a stay or, which comes to the same thing, to extend time for payment, for a few days to enable Mr Horler to get his application in to the Court of Appeal, if he proposes to make one, before execution can take place. The position is analogous in that respect to the position when a judge refuses to grant permission to appeal. From that point on, it is for the Court of Appeal to decide upon any question of a stay pending determination of the renewed application for permission to appeal, and the most the appellant can reasonably expect from the lower court is an extension of time to enable him to make his application to the Court of Appeal before execution takes place.

33. Accordingly, I shall extend the time for payment of £120,000 from Monday 7 October 2019 (the usual date by when payment must be made, under CPR 40.11) to Friday 11 October 2011. Mr Becker has informed the court that it is hoped that Mr Matthew Collings Q.C., who drafted the particulars of claim in these proceedings, will assist on the application, and that he will be back in the country by the end of this month, and so this should give Mr Horler more than sufficient time to make his proposed application for permission and a stay before execution can take place. I accept that the effect of this is to require Mr Horler to make an urgent application to the Court of Appeal to consider a stay, but he has only himself or his advisers to blame for this, because it is now almost two months since judgment was handed down and he could have made his proposed application long ago so as to avoid the need to act in a rush. Counsel's convenience cannot justify giving an extension of time that would deprive the defendants of the ability to enforce their judgment beyond more than a few days at most.

34. Accordingly, I will order that the payment on account is to be made by 11 October 2019, but save to that limited extent, I dismiss Mr Horler's application for a stay of execution. I would be grateful if the parties could draw up an order reflecting the terms of this judgment.

Peter Knox Q.C.
23 September 2019
(Corrected 7 October 2019)