TRANSCRIPT OF PROCEEDINGS

Ref. BL-2018-000544
BL-2018-002541
BL-2019-000304

IN THE BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)
[2019] EWHC 2902 (Ch)

Before THE HONOURABLE MR JUSTICE ZACAROLI

IN THE MATTER OF **Claim No. BL-2018-000544**

(1) TONSTATE GROUP LIMITED
(2) TONSTATE EDINBURGH LIMITED
(3) DAN-TON INVESTMENTS LIMITED
(4) ARTHUR MATYAS

Claimants

- and -

(1) EDWARD WOJAKOVSKI
(2) TH HOLDINGS LIMITED
(3) TONSTATE METROPOLE HOTELS LIMITED
(4) SUMMERHILL CARDIFF LIMITED
(5) TONSTATE (BOURNEMOUTH) LIMITED
(6) TONSTATE (RETAIL) LIMITED
(7) TONSTATE (ST ANDREW'S SQUARE) LIMITED
(8) TONSTATE (STAPLE INN) LIMITED
(9) TONSTATE (YEOVIL LEISURE) LIMITED
(10) GLASGOW AIRPORT HOTEL HOLDINGS LIMITED
(11) OVERSEAS HOLDINGS CAPITAL GROUP LIMITED
(12) FIRSTSTAR LIMITED **Defendants**

Claim No. BL-2018-002541

EDWARD WOJAKOVSKI

Petitioner

- and -

(1) ARTHUR MATYAS
(2) RENATE MATYAS
(3) TONSTATE GROUP LIMITED
(4) TH HOLDINGS LIMITED
(5) OVERSEAS HOLDINGS CAPITAL GROUP LIMITED
(6) RACHEL ELIZABETH ROBERTSON
(7) BETCHWORTH CONSULTING LIMITED

Respondents

Claim No. BL-2019-000304

(1) ARTHUR MATYAS
(2) RENATE MATYAS

Claimants

- and -

EDWARD WOJAKOVSKI

Defendant

MR A FULTON & MR S GOODMAN appeared on behalf of the Claimants

MR M HAQUE QC appeared on behalf of the First Defendant, Mr Edward Wojakovski

JUDGMENT
3rd OCTOBER 2019
(FOR APPROVAL)

MR JUSTICE ZACAROLI:

1. At a CMC in this matter, on 28th of March 2019, essentially in response to an application for an interim account made by the claimants against the defendant, Mr Wojakovski, I ordered that the matter be resolved by production of schedules, by both the claimants and the defendant. In particular, Mr Wojakovski was ordered to complete schedules in forms produced to the court in draft in response to the claimants' schedules, in which he was required to identify which of the various payments alleged to have been misappropriated by him he admitted or denied, giving reasons for his denial and giving particulars relating to his allegation that the payments were authorised or known about. That order required him to do so by 23rd of May 2019.

2. At that time, Mr Wojakovski had the benefit of assistance from solicitors and leading and junior counsel. He had already been in possession of Quickbook records, and solicitors' ledgers relevant to the payments since 6th March of this year. The details of the payments had also been set out in a report from Alvarez & Marsal, a copy of which had been in his possession for well over a year. Much of the information relating to the purpose and fact of the payments would be within his control, since the payments were to companies controlled by him. It is also his case that he has always been under an obligation eventually to account to the claimant in respect of all payments made, whether those payments were to the claimant or to him. If that is correct, then it is surprising to say the least that he is unable to give particulars of the payments alleged to have been made by him to his own companies.

3. The procedure for the service of schedules was essentially agreed to by his counsel. On 22nd May 2019, Mr Wojakovski served notice of a change of solicitors, dispensing with the services of his solicitors and counsel, and thereafter acting in person. Three days later, he failed to comply with the order. At the resumed CMC on 24th May, Mr Wojakovski sought further time to comply. He said he had had difficulty in complying due to his lack of access to the claimant's offices.

4. It is important to note that his solicitors had never sought further information, or indicated they could not complete the schedules in the time available, prior to them being discharged three days before the deadline for compliance. Nor had his counsel suggested at the March CMC that Mr Wojakovski could not comply without access to documents. Nevertheless, at the May CMC, I made an order giving Mr Wojakovski further time. The task was now to be staggered so that he had to provide responses for the "extraction schedule" by 21st June, with responses to the "personal property schedule" being delayed until a further four weeks after that.

5. In response to Mr Wojakovski's request for documents, the claimants voluntarily provided him with a USB stick, said to contain all hard copy documents located at the offices of the claimants, subject only to those which were privileged or personal. On 21st June, Mr Wojakovski sent a five-page email to the claimants, purporting to comply with the order in respect of the extraction documents. It is accepted by his counsel that this is inadequate and did not comply with the order. No application was made for an extension of time within which to comply until one was made orally at the start of the hearing today. On 9th July, the claimants issued an application for an unless order, i.e. that his defence to the claim be struck out unless he complied within 14 days with the obligation to provide the schedule in response to the extraction payments.

6. For various reasons, including counsel and court availability, the application could not come on for hearing until today, 3rd October. It is now more than six months after the making of the original order. There are, in essence, two issues between the parties: the length of time for a further extension, it being agreed that a further extension is necessary; and whether that order should be on an unless basis. Mr Wojakovski, through his counsel, Mr Haque QC, relies on a number of factors in support of both a longer period of time, and in opposition to an unless order.

7. The first point is that Mr Wojakovski was a litigant in person for a substantial part of the period, having instructed new solicitors only last week. I regard this as being of little weight in the circumstances. Mr Wojakovski had the benefit of solicitors and leading counsel, as I said, at the time the schedules were ordered, and for all but three days of the six-week period he was given to comply with the order. Even when he ceased to have legal representation, the task of completing the schedules was not one which required specialist legal knowledge, but a martialling of the facts. He is and was an experienced businessman, and it is him, not any solicitors, who would be required to provide the factual answers. He

was granted considerable indulgence by the court when he first failed to comply, by being granted the further extensions of four and eight weeks respectively.

8. Further, Mr Wojakovski chose to dispense with the services of his former solicitors. He claimed this was because he could not afford them, however he has produced no evidence to justify that claim, or to explain why it is that he was able to afford solicitors again in the last week. I do not need to find, as the claimants suggest, that his decision to become a litigant in person was tactically motivated, but if Mr Wojakovski wishes to plead special leniency because he was unable to instruct lawyers for want of funds, it is for him to make good that claim on the basis of evidence, and he has not done so.

9. The second factor relied upon by Mr Haque is the inadequate provision of documents. His complaint is that the documents Mr Wojakovski needs in order to complete the schedule have been provided to him in an unreadable form. The USB stick I mentioned earlier is said to contain well over half a million documents in an un-indexed fashion. I do not accept that this excuses his failure to comply with the order. As I said, when the order was made there was no suggestion from Mr Wojakovski's counsel that he needed any further disclosure in order to comply. He already had accounting documents and solicitors' completion files. No request was made by him or on his behalf for documents in order to comply throughout the period when solicitors were acting for him. In circumstances where the payments were made to his own companies, he does not need the claimants' documents in order to admit or deny which payments were received, or to explain the purpose of those payments.

10. Moreover, the documents were provided by the claimants, not in response to any order of the court relating to compliance with the schedules, but in order to avoid the disruption which the claimants contended occurred if and when Mr Wojakovski attended their offices. Because Mr Wojakovski wanted access to all hard copy documents, they gave him copies of all hard copy documents located in their offices. If the complaint is he wanted physical copies, rather than a USB stick, it has always been open to him to obtain physical copies, either by himself arranging for the documents on the USB stick to be printed or through the offer the claimants made to provide copies, provided he paid for them. As with the alleged inability to instruct solicitors, if he claims indulgence on the basis that he cannot afford to pay for this, it is up to him to produce evidence to justify that claim, which he has not done.

11. Certain of Mr Haque's objections, for example in relation to the uncertainty about the extent to which privilege has been claimed, proceed in my judgment on the false premise that

these documents were supplied in purported compliance with a disclosure obligation under the CPR. They were clearly not.

12. A further factor relied on in writing, but not pressed particularly during argument, was the denial of access to the offices of the claimants. The answer would, in any event, be similar to the answer to the previous objection: it was not claimed by him or on his behalf that access was required in order to complete the schedules when the order was made, or at any time when he had solicitors acting for him, and the disclosure by way of provision of the USB stick is of all the documents that he would have seen had he had access to the offices.

13. Fourth, Mr Wojakovski says that in July and August he was diverted from the task of completing the schedules, or complying with the orders, by attempts to mediate. I do not find this is a sufficient justification for non-compliance either. First, that is because such attempts post-dated the making of the application for an unless order on the 9th of July, and do not begin to justify the failure prior to that. Second, the idea of mediation was in the air for only a couple of weeks, at most, at the end of July. The first time that the suggestion was made that there should be a stay of proceedings pending a mediation was on 25th July, when Mr Mathias indicated, via the offices of a mediator previously used by the parties, that cessation of legal proceedings pending mediation would be required as a condition of proceeding.

14. Mr Wojakovski replied, saying that a standstill till the end of August would be declared, "by agreement to this note." It is true that on 26th July, Rabbi Levin, the previous mediator, said that Mr Mathias' solicitor had said the proposal did not sound unreasonable. Within days, however, on 29th July, the claimants' solicitors wrote, dropping the idea of mediation, and saying, "no agreement to mediate, or to enter into a standstill." Thereafter, nothing said by or on behalf of the claimants indicated they were prepared to mediate or that the action, or steps in it, should be stayed in the meantime.

15. Moreover, I consider that it is in any event unreasonable simply to abandon compliance with an order of the court because a party hopes he might be able to settle the action. Even if I accepted Mr Haque's submission that it is not unreasonable for a party not to engage replacement solicitors while mediation is planned, and understandable why he did not seek to engage with the unless order or compliance with the original order in the meantime, that takes up at most only a few weeks, and still leaves a period of more than four months in which his non-compliance is unexplained.

16. Mr Haque suggests that Mr Wojakovski has complied with the order to the best of his ability. I reject that contention. The email of 21st June is woefully inadequate, and there has

been no attempt at all to comply with the personal payment schedule requirement. This is not adequately explained by the factors relied on.

17. The final point is the relevance of the compliance to the trial itself. Is there a risk to the trial date, for example? The conduct to date suggests there is such a risk, unless Mr Wojakovski complies with the order as soon as possible. It is now 18 months since the action began, and Mr Wojakovski's case on the essential claim is still inadequately pleaded. Mr Haque says that we are effectively starting afresh, and solicitors should be given proper time to approach the task, without the addition of an unless order. I reject this submission, which has an air of unreality about it given we are six months from the making of the order. It is true, of course, that Candey, the solicitors, are starting from scratch, but it is Mr Wojakovski that is the party in default, not them.

18. Taking account of all these factors, the conclusion I have reached is as follows. In relation to timing, I need to balance, on the one hand, the need for proper compliance, particularly as it is now proposed by Candey that they will go through the numerous documents provided by the claimants in order to assist them in producing as full a response as possible from the schedules. On the other hand, I need to take account of the risk to the trial date of a long delay. In balancing these factors, I am prepared to extend time for compliance with both schedules by a period of four weeks from today, but I am going to order it on an unless basis.

19. Ultimately, Mr Wojakovski's repeated failure to comply, without reasonable justification, leads me to the conclusion that it is entirely appropriate to make this further extension on the basis of an unless order. In particular, I consider that an unless order is required in order to focus Mr Wojakovski's attention on compliance. The order will therefore be a further extension of four weeks, in absence of compliance with which the defence will be struck out.

20. In this regard, I have taken into account the submissions of Mr Haque that the form of the order for striking out should be limited to those parts of the schedule with which Mr Wojakovski does not comply. As against this, however, as Mr Fulton points out, it is not unusual for the court to order, in the event of non-compliance with an order relating to part only of a claim, that the defence as a whole be struck out. The proper course, it seems to me, in agreement with Mr Fulton, is that it remains open to the defaulting party to seek to persuade the court on an application for relief from sanctions, that in the circumstances then existing some lesser sanction should be imposed.

(There followed further proceedings)

21. I am asked to summarily assess the costs of this application.

22. The first question is as to the appropriate basis of assessment. I consider that, given that this is a case of woeful failure to comply with an order of the court, now extending over some six months, notwithstanding the fact that Mr Wojakovski was for some months within that period a self-represented litigant, the appropriate basis of assessment is the indemnity basis.

23. The cost schedule does not contain the level of detailed breakdown which would normally be seen in relation to work on specific documents or other matters. I am also concerned in a case where there has been a change of solicitors and counsel between the application being launched and it being heard that there is a greater risk of duplication than would otherwise exist. For those reasons, I am not prepared to summarily assess the costs on the basis of this schedule.

24. I am required by the rules, however, to consider an application for an interim payment. Mr Haque urges on me that I should make no interim payment at all, because of the inadequacies in the schedule and the risk of duplication, to which I have already referred. I do not accept that. It seems to me I am obliged to arrive at a figure which I am confident, on the basis of the application as a whole, is a sum which will be awarded on the final assessment.

25. Taking into account the inadequacies I have mentioned, I am satisfied that the sum of 50% of the sum claimed is a sum which will be awarded on detailed assessment. That is 50% of the figure here presented as the non-VAT figure. I do not have a breakdown of what aspects of VAT would be payable to Mr Mathias as opposed to the company, it being accepted that the company itself is not able to recover the VAT element. I will therefore adopt the non-VAT figure appearing on the schedule, being £99,279.6, and award 50% of that as a payment on account, which I will round up to £50,000.

(There followed further proceedings)

We hereby certify that the above is an accurate and complete record of the proceedings or part thereof.