Case No: BL-2020-000589

Neutral Citation Number: [2020] EWHC 1998 (Ch)

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

BUSINESS LIST (ChD)

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

Date: 10/7/2020

Before:

HHJ PARFITT (sitting as a judge of the High Court)

- -

Between:

LEEANNE MANNERING	**Claimant**
- and -	
NICHOLAS GARY COOK	**Defendant**

- -

JUDGMENT

- -

Hearing date: 15 July 2020

Ms Mannering in person

Nicholas Ostrowski (instructed by **Gullands Solicitors**) for the **Defendant**

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be on .

HHJ Parfitt:

Introduction

1. The heart of this dispute is the breakup of the parties' relationship in around 2013. They were together, unmarried, for just over 10 years and had two children. There have already been three trial judgments given in separate actions consequent on that breakup.

2. On 7 April 2020, the Claimant issued this new claim ("the Chancery Claim") in which she seeks damages of £450,000 substantially arising out of allegations about how the Defendant acted as director of a company, in which at one time both parties held one out of two issued shares, called Highscore Scaffolding Limited ("HSL"). The essence of those allegations, as explained to me during the Claimant's oral submissions, was that the Defendant ran substantial parts of the business on a cash in hand basis and so failed to bring monies into HSL which he should have done.

3. On 20 May 2020 the Defendant applied to strike out or dismiss the Chancery Claim on the basis that it was bound to fail and/or was otherwise an abuse of process because in material summary the particulars of claim: (a) are not a "concise statement of the facts on which the claimant relies" (CPR 16.4(1)); (b) disclose no cause of action; (c) disclose no cause of action for which the Claimant would be able to sue; (d) are duplicative of matters already determined against the Claimant in other proceedings.

4. The Defendant also applies for an extended civil restraint order ("ECRO") against the Claimant preventing her from issuing further claims or applications against him without permission.

5. This is my judgment on the Defendant's application of 20 May 2020, following a hearing on 15 July 2020 at which I had the benefit of hearing the Claimant in person and Mr Ostrowski for the Defendant.

6. Also before me on 15 July 2020 were two applications made by the Claimant: one dated 7 April 2020 seeking an interim payment from the Defendant to assist her with the costs of the Chancery Claim ("the Interim Payment Application"); and, one dated 5 May 2020 seeking to set aside a limited civil restraint order made in Maidstone Family Court ("the LCRO Application").

7. I discussed with the parties at the outset what should happen to the Interim Payment Application and the LCRO Application and for the assistance of the Claimant, I repeat the conclusions of those discussions at the outset of this judgment before dealing at more length with the Defendant's application dated 20 May 2020.

The Interim Payment Application

8. So far as is relevant to the present circumstances, the court can only make an interim payment where "it is satisfied, that if the claim went to trial, the claimant would obtain judgment for a substantial amount of money…against the defendant" (CPR 25.7(1)(c)). This is a relatively high hurdle: "<u>would</u> obtain judgment". If the

Defendant's application to dismiss the claim is successful then the Interim Payment Application must fail also.

9. I indicated to the parties that if I were of the view that the claim met the merits threshold for an interim payment, I would give further directions.

10. Since for the reasons set out below I am going to strike out the claim, the Interim Payment Application also falls away.

The LCRO Set-Aside Application

11. On 3 September 2018, HHJ Backhouse made an order that included, at paragraph 3, a limited civil restraint order preventing the Claimant from issuing applications in case numbers MS16P00051 or C00MS557 without her permission. The order was, on its face, made "in the Family Court in Maidstone". Paragraph 3 of the order, however, recites the power being exercised as "pursuant to CPR 3.11 and PD3C".

12. In general the CPR do not apply to family proceedings (CPR 2.1(2)). The Family Proceedings Rules at FPR 4.8 and FPRPD 4B have equivalent provisions as the Civil Procedure Rules which allow for the full range of civil restraint orders in family proceedings. The subject matter of the proceedings in Maidstone concerned a claim under the Children Act 1989 (which could only be tried in the Family Court) and under TOLATA. The claims were case managed and tried together as recommended by Thorpe LJ (W v W [2004] 2 FLR 321 at [5]).

13. For present purposes what matters is that both sets of rules provide that any application to amend or discharge the order (which in substance is what the Claimant is seeking in the LCRO Set-Aside Application) can only be made if permission is first obtained from the judge identified in the order.

14. In this case that is HHJ Backhouse, and so it seems to me that the LCRO Set-Aside Application should either be dismissed under CPRPD 3C paragraph 2.3 or treated as an application for permission and referred to HHJ Backhouse. I suggested the later as more appropriate and neither party disagreed.

15. I suspect the most practical way to achieve this is for me to direct the Claimant to send a copy of her application dated 15 May 2020 to the Central London County Court for the attention of HHJ Backhouse, together with a copy of my order and this judgment.

16. Since the outcome of my judgment is that an ECRO should be made against the Claimant for the reasons set out below, the LCRO (so far as it relates to civil proceedings and not family proceedings) is no longer required, even if it continues in effect now that the TOLATA proceedings are over. HHJ Backhouse can consider whether it can be set aside for the civil proceedings, given the protection to the Defendant and the court given by the ECRO.

Summary of the Parties' Legal Battles to Date

17. There have been three trials between the parties and the Claimant has substantively lost all of them.

The Share Transfer Claim

18. On 18 December 2015, the Claimant issued proceedings against the Defendant and HSL alleging that the Defendant had forged documents in 2007 which led to the Claimant losing her shareholding in HSL. In the claim form, the Claimant sought damages / equitable compensation / account of profits from the Defendant for losses suffered as a result of her not receiving benefits due to her from the First Defendant both prior to her alleged wrongful removal in 2007 and afterwards.

19. In a written judgment of 8 December 2017, Mrs Recorder McGrath, sitting at the County Court in Central London, dismissed the claim. The core of the reasoning for present purposes is that the Judge found in favour of the Defendant that the intention of the parties in 2007 was to transfer the Claimant's share in HSL to the Defendant – there was no fraud. The Claimant's claim for a dividend of £7,500 declared in September 2007 was dismissed on limitation grounds.

20. For reasons that are not clear to me and on which I have not been addressed, it took some 2 years from the date of that judgment being available to Recorder McGrath making her consequential order on 27 November 2019. By that date, the Claimant had made 5 applications to the judge seeking to challenge the outcome and including an application to have the judgment set aside because of fraud. All the Claimant's applications were dismissed.

21. There has been no appeal from Recorder McGrath's judgment or order. The judge refused permission and there has been no attempt to renew an appeal to the High Court. Any appeal, including on the same form an application to extend time, should be made to the Chancery Division.

The TOLATA Claim

22. The parties' family home at the time of the breakup was at 1 Bannister Road, Maidstone ("the Property"). In particulars of claim dated 5 October 2016, the Defendant claimed to be the sole beneficial owner of the Property but recognised that it should remain the home for the parties' children and should not be sold until the youngest child became 18 or finished secondary education ("the TOLATA Claim"). It was the Claimant's case that the Property was jointly owned.

23. On 11 January 2018, DJ Sullivan (as she then was) gave judgment in the TOLATA Claim. The court found in favour of the Defendant that the Property was his. The essential finding was that there was no common intention that the Property should be shared.

24. On 3 September 2018 HHJ Backhouse dismissed the Claimant's application to appeal the TOLATA Claim decision as totally without merit.

The Schedule 1 Claim

25. In May 2016, the Claimant issued a claim for maintenance provision for the parties' children under schedule 1 of the Children Act 1989 ("the Schedule 1 Claim"). The Schedule 1 Claim and the TOLATA Claim proceeded together and were tried together but with the TOLATA judgment being given first.

26. The Schedule 1 Claim judgment was dated 10 April 2018. In it much of the claims made were dismissed but some more limited maintenance provision was made. I note, because it is relevant to the Claimant's characterisation of the general injustice she considers has been done to her, that the gist of the findings made by HHJ Sullivan (as she had by then become, although the decision was made as a district judge) was that (a) the judge did not accept the Defendant's evidence about his resources but (b) the judge rejected the Claimant's evidence about need. It was the latter finding that led to the orders being made in the far more limited sums than those claimed.

27. The order concluding the Schedule 1 Claim provided, among other things, that no further applications could be made by the Claimant for housing provision for the benefit of the children.

28. There has been no appeal from that order.

Costs Consequences

29. As a result of the litigation summarised above, various costs orders have been made against the Claimant in favour of the Defendant. In broad terms, those orders total about £90,000. None of them have been paid and from my understanding of the Claimant's means, it is not likely that payment will be made.

The Claimant's Overall Situation

30. The Claimant and the parties' two children remain living at the Property. It is their home and has been for many years. However, one of the outcomes of the TOLATA proceedings and the Schedule 1 proceedings was the signing of a declaration of trust dated 15 November 2019. The Claimant refused to sign this and it was signed on her behalf by a district judge.

31. Included within the trust document was express confirmation of the consequences of the Defendant not having any beneficial interest in the Property: namely, that by the end of July 2024, the Claimant and the children (who by then will both be adults) must leave the Property and give vacant possession to the Defendant.

32. The Claimant's resources are limited. She is entitled to fee remission. It follows that the consequence of having to leave the Property for her and the children is likely to be devastating. In her written and oral submissions to the court for the purpose of this hearing a recurrent and moving theme was the need to protect her children. This was often linked with a contrast to what is said to be the financial comfort of the Defendant compared to the Claimant's position and that of the children. The Claimant believes that the courts should act to protect the children.

33. The Claimant has relied on a success against the Defendant she had in February / March 2019 regarding the children's child maintenance assessment. The gist of the decision of the First Tier Tribunal was that the Defendant's income for the periods ending 18 October 2016 and 31 January 2018 should be reassessed at substantially higher levels by reallocating benefits he received from HSL as income. I was told by the Claimant that this would open the way to a further Schedule 1 claim based on the Defendant having income in excess of the £3,000 a week CMS cap. The

Defendant tells the court that at present he has limited income and so neither the readjustment of past income or a further claim will be of any practical benefit to the Claimant.

34. I have not heard submissions about the appropriate procedure in the Family Court but I assume that there is nothing preventing the Claimant from making a new application for financial provision for excess maintenance, assuming that such can be done without it needing to be tied to "housing provision" (that being restricted by the order in the Schedule 1 Claim).

35. The Claimant has made some general submissions to the court which I bear in mind throughout. The Claimant is of the view that her status as a litigant in person places her in an impossible bind. She finds that she is criticised for not following rules and is prevented, for example, from obtaining or relying on documents which she says would further her case. On the other hand, the Claimant says, the Defendant, who is represented, is able to ignore the rules about disclosure and the probity of their witnesses without consequence. In addition to this perceived unfairness, the Claimant says that she has been categorised as vexatious and irrational and that such categorisation is itself used as a means of preventing her from being properly heard (I note that Mr Ostrowski's submissions did not take this approach). The essence of both these problems is that the Claimant says she has no effective voice.

36. I bear in mind these concerns on the Claimant's part when addressing the substance of the application.

37. It is not possible (or necessary) for me to understand or determine the appropriateness of everything that has gone before. I have a limited role to play and that is, at first, to look at the Chancery Claim and see if it is one which can properly be brought by the Claimant or whether, as the Defendant alleges, it is an abuse of process.

38. As I explained to the Claimant during the hearing, the answer to this is not dependant on any assessment as between the Claimant and the Defendant as to who is more deserving. Even leaving aside how that would be an impossible task to undertake fairly, the answers to the questions raised by the Defendant about the Chancery Claim do not depend on such general considerations but on hard edged questions about whether or not the law allows such claims as the Claimant wishes to bring and whether the manner in which she has chosen to set them out meets certain basic requirements for procedural fairness. Although these are questions of judgment, they are not questions of discretion in the way that the Claimant categorises them – the Claimant would like the court to recognise the justice of her cause and so enable her to win.

39. Properly understood, the court's role is more limited: it is to apply the relevant procedural and substantive law to the issues arising and determine them fairly as between the parties but being blind to such general characteristics of those parties which are not relevant to that determination.

40. I have also kept in mind CPR 3.1A(2) and the need for the court to have regard to the fact that at least one party is unrepresented when exercising case management powers.

The Chancery Claim – Strike Out

41. CPR 3.4(2) enables the court to "strike out a statement of case if it appears to the court (a) [to] disclose no reasonable grounds for bringing the claim…; (b)…[to be]…an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings…;(c) that there has been a failure to comply with a rule….

42. Mr Ostrowski's skeleton reminds the court that examples of what might fall within that rule are provided by CPR PD3A at paragraph 1.4, including statements of case "which are incoherent and make no sense" and which "do not disclose any legally recognisable cause of action".

43. The Defendant's criticisms of the particulars of claim start with a failure to comply with the requirement to state a "concise statement of the facts" which makes it difficult and potentially expensive to respond to and will make it difficult for any court managing the case to identify what the real issues are.

44. The Claimant has not addressed these criticisms head on but rather points out that she is in person, cannot get legal aid but has made an application for interim costs so that she can instruct lawyers to prepare the claim better. I understand the difficulties and I am prepared to take a benevolent approach to the particulars of claim.

45. Nevertheless, I agree with the Defendant that the particulars of claim fail to achieve the basic objective of providing a concise set of facts which if proven would entitle the Claimant to obtain remedies from the court. The difficulties with the particulars of claim are many but in material summary (and taking a few of many possible illustrative examples):

    a. In general the particulars are an extended narrative in which facts are combined with comment without any focus or discrimination, e.g. from paragraph 84 "…had also written off over £100k in bad debts. I believe they blamed the previous book keeper" or paragraph 67 "I allege approximately 40-45 people assisted the defendant in breach of fiduciary [duty]. These are just people I had an insight into. I am sure there is more.". This approach is neither concise nor limited to a statement of facts.

    b. There are multiple assertions of fraud (against the Defendant and also others) but without any sufficient particulars of how of those allegations are substantiated. This is contrary to CPR PD16 paragraph 8.2 – but also simply unfair to the individuals involved and such unfairness is not excused or balanced by the Claimant's belief that she and her children have been cheated and/or let down.

    c. There are general criticisms of the Defendant's conduct and/or character that cannot be tied to anything that could be relevant to a cause of action: e.g. from paragraph 66 "This [various collections] had developed since 2003 and was just uncontrollable. I was very unhappy but there was no reasoning or love from the defendant" or from paragraph 47 "In hindsight

the defendant was definitely running scared" or from paragraph 39 "The defendant is a man that is similar to a chameleon".

d. Likewise, there are general descriptions of the Claimant that are just characterisations and which do not assist to understand what case it is that is being brought against the Defendant, e.g. from paragraph 64 "I had years of mental gas lighting, and a relationship plagued with issues of resentment from the defendant" or in paragraph 59 "History was repeating itself but by this time I wanted out".

e. There are many references to the Share Transfer Claim and the TOLATA Claim and for the most part, so far as I can tell, all of such references are premised on the Claimant seeking to reopen and go behind the findings in those cases.

f. There are narrative details which can have no possible relevance to any claim: e.g. paragraph 56 "This particular house was a house that my children and I had visited…I drove past it many times as [one of the children] loved it. It was in a valley with a stream and a weir outside."

g. There are numerous references to third parties, many of whom are accused of acting badly in various ways. I do not think it appropriate or necessary to give particular examples in this judgment. At best those examples tend to explain why the Claimant has the views that she has as to the Defendant's and/or third parties' probity but do not come close to setting out any facts which give rise to an identifiable cause of action.

46. Mr Ostrowski relied on *Yu Ting Cleeves v Chancellor, Masters and Scholars of the University of Oxford* [2017] EWHC 702 (QB) Whipple J, at [34] – [35]:

> i) A pleading which is unreasonably vague or incoherent is abusive and likely to obstruct the just disposal of the case. (Towler v Wills [2010] EWHC 1209 (Comm), [16])
>
> ii) One factor for the Court to consider is whether there is a real risk that unnecessary expense will be incurred by the Defendant in preparing to defend allegations which are not pursued, or will be impeded in its defence of allegations which are pursued, or that the Court will not be sure of the case which it must decide. (Towler, [19]).
>
> iii) Another factor for the Court to consider is whether the Defendant will be able to recover its costs, if successful at the end of the day; and if not, whether it may well feel constrained to make some sort of payment into Court, not because the case merits it, but simply as the lesser of two evils and for the avoidance of costs (Cohort Construction (UK) Ltd v M Julius Melchior (A Firm) [2001] CP Rep 23 [20]).

47. I agree that those descriptions are apt to describe the particulars of claim in the present case. From the perspective of a requirement of a concise statement of facts, the particulars of claim is unreasonably vague and incoherent and it will prevent the

just disposal of the case. I am not sure it would be even possible to prepare a proper defence to it but any such defence would take far longer and be far more costly than should be required and it will be impossible for a court to understand what the real issues might be. When I refer to "real issue" I mean those which would determine whether the Claimant is entitled to remedies from the court and what those remedies should be. There is no prospect of the Defendant recovering costs.

48. I strike out the particulars of claim and the claim form on the ground that taken together they impede the "just disposal" of the proceedings (not least because they provide no basis for the case to be understood, defended or tried) and do not comply with the rules regarding statements of case.

49. In addition the claim must also be struck out on the grounds that they seek to reopen matters decided in the Share Transfer Claim & the TOLATA Claim and otherwise set out no cause of action with a reasonable chance of success.

50. The easiest way to approach this, given the problems with the particulars of claim set out above, is to look at a combination of the claim form and the conclusion of the particulars of claim which contains a summary of what the Claimant wants from the court. This exercise ignores the lack of essential facts which might provide some platform for these allegations to be made but my purpose here is rather to address the claims brought at the same level of generality as the Claimant has set them out in the claim and at the back of her particulars of claim.

51. The claim form identifies 5 heads of claim. I take them in order and include my explanation for why there are no reasonable grounds for bringing those claims:

    a. "A right to recover from the family home". This was decided against the Claimant in the TOLATA claim: the court was asked to determine who was the beneficial owner of the Property and decided it was the Defendant. Right or wrong that decision has been made and there is no possibility of a further appeal (the application for permission to appeal was refused).

    b. "Funds misappropriated to assets that can be identified". The Claimant makes no claim about funds which were her property rather than potentially HSL's property. The Claimant explained orally that the gist of her case is that cash payments were not put through the books of HSL. Any such claims would be those of HSL and not the Claimant.

    c. "Funds paid to third parties from diverted company funds". Again any such claims would be those of HSL and not the Claimant.

    d. "Unlawful termination as director of the company". This was addressed in the Share Transfer Claim, where at paragraph 96 the judge held that the Claimant found out about her removal in the summer of 2007 and although she was not happy about finding out about it after the event, would have agreed to it.

    e. Dividends not declared to claimant lawfully. The only dividend possibly payable to the Claimant was one of £7,500 referred to above and which

was determined against the Claimant on limitation grounds in the Share Transfer Claim.

52. Moving to the end of the Particulars of Claim and the summary of claims and taking the same approach as above:

    a. "The defendant in breach of fiduciary duties unjustly enriched himself at the expense of HMRC…and the company…[a list of the Defendant's personal expenditure is then set out]". These are as expressed by the Claimant as not her claims but matters for HMRC or claims that could have been brought by HSL.

    b. "Claims if my shares are transferred back in fraud on appeal". This claim is barred by the Share Transfer Claim judgment from which there is currently no appeal but even if there was, a new claim cannot be brought premised on any such appeal being successful.

    c. A claim for the Property but which is recognised was decided in the TOLATA claim but with the Claimant saying it was not adequately dealt with in the County Court. This claim is barred by the TOLATA claim.

    d. There is then a list of claims which at best might relate to HSL but certainly not the Claimant.

    e. There is then a section headed "Relief Sought". This again refers to the Property, ignoring the finding in the TOLATA claim, and to potential claims arising out of duties owed by the Defendant to HSL but not to the Claimant.

53. In her oral submissions, the Claimant addressed the problems with the particulars of claim appearing to go behind the Share Transfer Claim judgment by telling the court that she would still have a potential claim arising out of the period of time until the summer of 2007 when her share was transferred. It is notable that notwithstanding the width of the claim form in the Share Transfer Claim (which I have quoted above) no such claims were brought in that claim beyond the claim for £7,500 of unpaid dividend. These are potential claims issued more than 13 years after the possible events to which they relate and which could have been (assuming they had any validity) been brought as part of the Share Transfer Claim – which did involve the court looking at the events leading up to 2007.

54. A further problem, underlined by the Supreme Court's decision in Sevilleja v Marex Financial Ltd [2020] UKSC 31, which was handed down on the day of the hearing before me, is that these possible pre April 2007 claims (even assuming there were properly pleadable facts which would support them) would arise from the alleged diverting of cash payments from potential HSL customers away from HSL and into the Defendant's personal resources. Any such claims would be HSL's claims and would not give rise to a personal claim on the part of the Defendant. The Supreme Court, in the majority, indorsed the law as stated in Prudential Assurance v Newman Industries (No 2) [1982] Ch 204, at 222-223: "But what he [the shareholder] cannot do is recover damages merely because the company…has suffered damage. He cannot recover a sum equal to the diminution

in the market value of his shares or equal to the likely diminution in dividend…" (cited in Sevilleja at paragraphs 26 & 97, affirmed at paragraphs 89 and 109). I have underlined that bit which was precisely what the Claimant told me her new claim for the pre-Spring 2007 period was about.

55. The Claimant included in her papers a summary of a Canadian case from the British Columbian Court of Appeal, Valastiak v Valastiak [2010] BCCA 71. The Claimant said if there was a special relationship between herself and the Defendant then she would have a direct claim. The Valastiak case, so far as I can tell from the case summary, would not help the Claimant. The decision appears to be consequential on the finding that a husband held a wife's 50% share in the company through which they managed a restaurant business on a resulting trust for the wife. In the divorce a compensation sum of $30,000 had been made against the husband in respect of the value of that share because of his mismanagement of the business. When the husband declared himself bankrupt under the relevant local legislation that compensation order would not fall within his general creditors if it were incurred while the husband was acting in a fiduciary capacity, which he was because of the resulting trust.

56. This is not authority (so far as it appears) for the different proposition that a shareholder would have a direct claim against a director who misappropriated company funds and any such direct claim measured as a loss of potential dividend income would be contrary to the rule in Prudential.

57. The other "special circumstances" exceptions to the rule are less exceptions than they are particular circumstances where directors have assumed a direct responsibility toward shareholders by, most often, giving advice about particular transactions (see the summary in Sharp v Blank [2015] EWHC 3220 (Ch) at [13] – which appears to be the only English case that mentions Valastiak).

58. The Claimant's case would appear to be that the special circumstances here are that she and the Defendant were in a relationship, had set up home together, had children and were sharing resources for the better fulfilment of their family interest. It seems to me that in essence this is an attempt to reopen the subject matter of the Schedule 1 Claim (or to create a financial remedies type jurisdiction for unmarried couples). What the Claimant wants is a fairer share for herself and her children of the assets of the Defendant. In any event, it is outside the scope of the law so far as a direct claim by a shareholder against a director is concerned.

59. I also note that in the judgment in the Share Transfer Claim, the judge found that there was a degree of sharing of resources between the parties during the relationship although it was not necessary (or on the evidence possible, which is unsurprising given it was more than 10 years previous) to make findings as to the details.

60. I would also strike out the particulars of claim and the claim because they have no reasonable prospect of success both because they appear in large part seek to cut across the judgments already given and so are subject to *res judicata* and cause of action estoppel and because the potential allegations (if different to what has gone before) disclose no reasonable grounds for bringing a claim.

61. In response to seeing this judgment in draft, the Claimant raised the possibility of a derivative claim. Such claims can only be brought by current shareholders or transferees / transmittees (s260 Companies Act 260). It was also suggested I should allow time for an amended particulars of claim. This is often a sensible approach where a claim might be saved by improved particulars but this is not such a case for the reasons I have given when addressing the potential claims that are being made independent of the criticisms of the particulars of claim.

62. The claim and accompanying particulars of claim are totally without merit and I strike them out.

ECRO Application

63. Mr Ostrowski referred me to the summary of relevant principles about the grant of an extended civil restraint order to be found in *Sartipy v Tigris Industries Inc* [2019] EWCA Civ 225 at [29] – [37]:

> 29…In the course of any proceedings one or more applications may be issued. If an earlier claim issued by the person against whom the order is made was, itself, totally without merit and if individual applications made within that claim were also totally without merit, there is no reason why both the claim and individual applications should not be counted for the purpose of considering whether to make an ECRO in the course of a subsequent claim.
>
> 30… Although at least three claims or applications are the minimum required for the making of an ECRO, the question remains whether the party concerned is acting "persistently". That will require an evaluation of the party's overall conduct. It may be easier to conclude that a party is persistently issuing claims or applications which are totally without merit if it seeks repeatedly to re-litigate issues which have been decided than if there are three or more unrelated applications many years apart. The latter situation would not necessarily constitute persistence.
>
> 31…only claims where the party in question is the claimant (or counterclaimant) and only applications where the party in question is the applicant can be counted…
>
> 37…When considering whether to make a restraint order, the court is entitled to take into account any previous claims or applications which it concludes were totally without merit, and is not limited to claims or applications which were so certified at the time; R. (Kumar) v Secretary of State for Constitutional Affairs [2006] EWCA Civ 990; [2007] 1 W.L.R. 536, CA followed.

64. The Defendant says that the threshold criteria of 3 totally without merit applications or claims has been met. I agree by reference to the following:

    a. The Chancery Claim is totally without merit.

b. The 3 applications referred to as being totally without merit in the order of HHJ Backhouse which imposed the LCRO (2 applications and the permission to appeal application).

c. The 2 applications to the High Court, Queen's Bench Division, for committal which were dismissed on the papers by Mr Justice Cavanagh. These were totally without merit because as set out by Cavanagh J in the order refusing permission, they failed to comply with basic procedural requirements and appeared likely to be an "attempt to open up another front in a war of attrition" and/or to "punish or to intimidate lawyers who are acting on behalf of the other party". On all the evidence I have read and having had the benefit of hearing from the Claimant, I agree that Cavanagh J's comments are a good summary of the effect of the intended committal applications.

d. The application of 7 April 2020 was totally without merit (it is inconceivable that such an interim costs order would be made in litigation of this kind even without the underlying claim being hopeless).

65. Mr Ostrowski referred me to other applications, especially all those before Recorder McGrath on 21 November 2019, but I do not know enough about the details of those applications to be certain they were totally without merit and given the number of applications I can be confident about, it is not necessary to go further than I have done. I make no positive findings about any of those applications either – of the 8 made, 2 were withdrawn and 6 dismissed.

66. As is made clear in the extracts from Sartipy what is likely key to the question as to whether a restraint order should be made is unjustified "persistence". In the present case, it is appropriate to consider what the Claimant has done, what her attitude is to what has taken place and what the Claimant is likely to do.

67. My most significant concern on the evidence, is that the Claimant combines feelings of injustice with a determined and fixed belief that she (and by extension the children) are victims of the Defendant's characteristic bad conduct.

68. I have taken additional time to go through the Claimant's various witness statements. For the most part allegations are made without sufficient factual details being provided for the court to be able to address them.

69. However, as illustrative examples, which feed into my assessment of whether the Claimant is likely to persist without justification, I address in the next few paragraphs some of the allegations made. I have made the decision not to identify the third parties in this judgment because it is not fair on them to do so.

70. The Car Valuer In the Schedule 1 proceedings there was an issue about the valuation of a vehicle. For the reasons I have explained above this was irrelevant to the outcome. The Claimant has found an on-line report relating to trading standards convictions going back to 2004 (or earlier). The convictions are long spent and have no relevance to the valuer's ability to produce an expert report (and should not be referred to in evidence). I have read the report and it is unremarkable and its

conclusions reasonably well supported. Nothing said by the Claimant provides any substantial concern that an injustice might have occurred.

71. The Expert Surveyor It is clear from the Schedule 1 judgment that the Claimant contested the single joint expert's evidence at the hearing. She could not afford to have him attend to be cross-examined but she alleged bias and incompetence. The Claimant put forward alternative quotations for the remedial works she considered necessary at the house. The court was not persuaded for the reasons fully explained in the judgment. Now, the Claimant refers to Companies House records for a company of which the surveyor is the director and says he has been "struck off by companies house 4 times". This is not the case. What the Companies House entry shows is that on a number of occasions, since 2013, notice for compulsory striking off of the company have been filed and then suspended but eventually on 26 February 2019 the company was dissolved There is nothing to suggest anything of the slightest relevance to the evidence that the expert gave in his report to the court. At most, the Companies House entries suggest the director is not very good at keeping his Companies House filings up to date.

72. The Claimant also refers to how subsequent events have shown that the house was not "habitable". This also does not help. The court's decisions are made on the evidence that was available. The Claimant says her ability to get better evidence was limited because of financial constraints brought about by the Defendant. This does not undermine the trial being the occasion on which these issues were addressed. I can see from the judgment that the Claimant did what she could. The harsh reality is that on the Judge's findings, it was not enough. These things provide no basis for any challenge to that judgment some 2 years later.

73. I say nothing about whether new Schedule 1 proceedings could be brought based on new facts which have happened since the judgment. That is a matter for the Family Court (potentially) and not this one.

74. The Defendant's email of 12.9.13 The Claimant took me to this email during the hearing. It is an exchange between the Defendant and the Claimant. It is from the time when they were breaking up. I understand from the Claimant that it was she who wanted to bring the relationship to an end. The Claimant submitted to me that the Defendant said he would lose the company if she "grasses him up to the taxman". In so far as the email had any relevance to the claims brought then it could have been deployed (and perhaps was) but the email exchange shows the Claimant stating an intention to "fight till I die" to keep the children and the Defendant saying that it would be better to cooperate rather than fight and end up with nothing. It is not an unfamiliar exchange in relationship breakups. It provides no substantial platform to launch new claims or new applications.

75. The CMS decision I have summarised this above. The Claimant relies on it as evidence of fraud that would directly undermine the evidence in the Share Transfer Claim. This is wrong. The decision is no evidence of fraud, only evidence of income being understated for CMS purposes. The particular accounting choices identified (e.g. the company being used to pay for joint litigation and dividends being taken while wages are kept low and other expenses being taken through the company which should be treated as personal income) are not unusual or indicative

of fraud. The need to correct for CMS purposes does not equal any evidence of fraud – not for the years for which the corrections have been made and not for other unrelated years.

76. These particular examples are illustrative of a general theme in the Claimant's documents that she sees any person who is thought to be an obstacle to her pursuit of what she wants through the court process as prejudiced, biased or dishonest. As Mr Ostrowski identified, the persons tarred by the Claimant in this way include, the Maidstone judges, those acting for the Defendant (both solicitors and barristers) and the experts.

77. I recognise that it is difficult for the Claimant, in the position that she described to me, and believing, as she does, in the justice of her cause, to meet nothing but obstacles but standing back my assessment of the overall situation is that the Claimant has been the losing party in litigation, conducted much as litigation is often conducted and importantly with no substantial evidence which would support continued attempts to challenge the decisions which have been made or make further claims.

78. In reply Mr Ostrowski clarified that the order sought by the Defendant against the Claimant would not restrict her from (i) attempting to pursue the setting aside of the LCRO in Maidstone or (ii) making an out of time application to appeal the Share Transfer Claim decision.

79. On balance, I do think an ECRO is justified and I will make one subject to the exceptions identified.

80. My starting point is that the parties' relationship ended more than 7 years ago and the Claimant is still trying to open up past history, notwithstanding the three trials which have already taken place. The Chancery Claim is totally without merit and has been brought in such a way as to generate maximum prejudice to the Defendant and potentially third parties by making serious allegations about matters long ago but without either objective evidence or due cause to make them. Its wide ranging and unfocused narrative is in contrast to the more defined claims brought by the Claimant in the Share Transfer Claim (with legal representation at the outset but not at the trial) and the Schedule 1 Claim.

81. The outcome of the three trials that have taken place to date has been unsuccessful but the Claimant does not accept those outcomes and has sought in the Chancery Claim to reopen matters that have been decided against her. This is the type of persistence identified in Sartipy as justifying a ECRO (I do not consider that the Claimant's persistence is at the level demonstrated on the facts in Sartipy but the question is sufficient unjustified persistence to warrant the imposition of the restraint). It is this new claim which has tipped the balance against the Claimant.

82. It is also a feature of the Claimant's litigation conduct, demonstrated by the raft of applications (8 in total but 2 not pursued) before Recorder McGrath, the 2 committal applications and the 2 applications brought before me, to issue multiple applications with considerable overlap between them which quickly become expensive and confusing to deal with. Again, I appreciate that it is difficult to be a

litigant in person but these problems are particular to the Claimant rather than a general feature of those without representation using the courts.

83. The Claimant's pursuit of the Defendant is causing costs to him which he has no chance of recovering. There is a waste of energy and resources (of all kinds – financial, time and emotional) on both sides.

84. I know the Claimant will see this as a false equivalence and that I am wrong to overlook the comparative stability of the Defendant's situation relative to the precariousness of the Claimant and the children but my focus is on the parties' engagement with each other through the court process and the extent to which the overriding objective requires the Claimant's right of access to the court to be controlled and supervised. In my view that time has been reached.

85. There are two aspects of the evidence which I have given me some pause. The first is that the Claimant's ability to get advice appears to be restricted to an extent by the LCRO (there is an email which says the RCJ advice centre will not assist where there is a CRO in place) and that the Claimant has respected the LCRO (recognising that she should take steps to set it aside). On balance, however, I do not think these factors outweigh the other aspects that point to the need for an ECRO to be made.

86. I will grant the ECRO sought but the order will make clear that it does not extend to family proceedings and that it excludes any application to have the LCRO set aside.

87. As I said I would do at the end of the hearing, I have included within the draft of this judgment circulated to the parties proposed orders and preliminary observations about costs.

Conclusion

88. The Chancery Claim will be struck out and I will make an ECRO against the Claimant.

HHJ Parfitt