Case No.: CH-2020-000068

Neutral Citation Number: [2020] EWHC 3934 (Ch)
IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY APPEALS (ChD)

Rolls Building
7 Rolls Buildings
Fetter Lane
London
EC4A 1NL

Date: 16/12/2020

BEFORE:

THE HON. MR. JUSTICE FANCOURT

BETWEEN:

DARREN JAMES POPELY

Appellant

- and -

(1) POPLAR ESTATES LIMITED
(2) RONALD POPELY
(3) JANE POPELY
(4) HARRY POPELY
(5) PAUL DUTHIE

Respondents

Legal Representation:
Mr Timothy Evans (Counsel) appeared on behalf of the **Appellant**
Mr Christopher Boardman QC (Counsel) appeared on behalf of the **Second to Fifth Respondents**

Hearing date: 16 December 2020

- -

Approved Judgment

Mr Justice Fancourt:

1. This is an appeal against an order of Deputy Insolvency and Companies Court Judge Barnett on 31 January 2020 insofar as he granted an application by the Respondents for security for costs to be provided by the Appellant in the sum of £30,000. The Appellant is the Petitioner in the underlying proceedings. I granted permission to appeal on 9 June 2020.

2. The Respondents were seeking security for costs on four grounds in Rule 25.13 of the Civil Procedure Rules, namely paragraph (a) the Claimant was resident out of the jurisdiction but not in a Brussels or Lugano state, (d) the Claimant had changed his address since the claim was commenced with a view to evading the consequences of the litigation, (e) the Claimant failed to give his address in the claim form or gave an incorrect address in that form, and (g) the Claimant has taken steps in relation to his assets that would make it difficult to enforce an order for costs against him.

3. The claim is a petition for relief under s.996 Companies Act 2006. The First Respondent to the petition is a company called Poplar Estates Limited and in that company the Appellant has a 20% shareholding.

4. Directions for statements of case were made in the Companies Court as long ago as June 2017. On 10 May 2019 the Appellant was ordered to serve a revised amended petition and directions were given for consequential amendments to statements of case. The revised amended petition was sealed on 17 June 2019 and it is in relation to that document that the question of the Appellant's address arises.

5. The application for security for costs and disclosure of the Appellant's address was issued on 6 August 2019 and it was directed to be heard over a full day on 31 January 2020.

6. The facts that were established at the hearing before the Judge were, essentially, these: that the Appellant had sold his Kent house, that he owned jointly with his wife, in May 2018 for in the region of £1.4 million and in place of that the wife became an assured shorthold tenant of a property in Sevenoaks at a relatively modest rent; the wife also owned, prior to that time, a house in Florida and some of the proceeds of sale were used to buy a bigger house in Florida for the Appellant and his wife, but it was registered in the wife's name; some of the chattels from the house in Kent were moved to Florida.

7. Significant proceeds of the sale were alleged by the Appellant to have been spent, though no detail about that was provided in the evidence. The proceeds spent evidently amounted to about £270,000 because, at the date of the hearing, only about £130,000 of the Appellant's share of the net proceeds of sale were retained in the Appellant's English bank account.

8. The Judge found that there was an attempt to conceal the fact of the sale of the house in Kent and the transfer of a significant part of the Appellant's assets that had previously been in that house to Florida, and an attempt to conceal both the fact that

he had moved to Florida and his address there, and his new address in Kent. There is no challenge on this appeal to the Judge's conclusion that the Appellant resided in Florida or to his factual conclusions, so it is accepted that ground (a) was made out.

9. The Judge did not find that the address was changed with a view to evading the consequences of the litigation, but he did find that the Appellant gave an incorrect address in the amended petition and that he has taken steps in relation to his assets that would make it difficult to enforce an order for costs against him. The last point was conceded by the Appellant before the Judge for the first time at about 3.30pm during the hearing on the basis that £270,000 was accepted to have been disposed of. Grounds (e) and (g) were therefore proved, or admitted, but ground (d) was not proved.

10. It was therefore on that basis clear that the steps taken would hinder enforcement of an order for costs in favour of the Respondents at the end of the trial, since all that is left in England is the funds in the bank account that the Appellant principally wants and intends to use to fund his legal costs.

11. So far as ground (e) is concerned, there is a discrete ground of appeal. The Appellant says the Judge was wrong in law to reach the conclusion that he did, since ground (e) can only apply in relation to the address originally given on the claim form. I do not see why that should be so. The rule does not say so. A change of address during the course of a claim, where the address is wrongly stated, could be highly material in relation to any question of security for costs.

12. I do not have to consider the case where there is a failure to update the original address where it changes during the course of a claim because in this case the Appellant did update his address, but he gave a wrong address in doing so. No explanation of that was given in evidence by the Appellant. In my judgment, the Judge was right to reach the conclusion that ground (e) was satisfied.

13. I turn to the principal ground of appeal, which is that the Judge failed to consider whether, and gave no reasons why, it was just in all the circumstances to make an order for security for costs. The Judge dealt expressly with the two main arguments on discretion that were advanced at the hearing by the Appellant, namely that ordering security for costs would stifle the litigation, and that the court should take into account Costs Orders and other assets that the Appellant said that he had in his favour.

14. At the time of the hearing, the Appellant relied on his shareholding in the company as an asset but no complaint is made of the fact the Judge did not mention that specifically in his judgment and, indeed, today it was contended that it might have little value in any event if the Appellant were to lose the underlying litigation.

15. Mr Evans on behalf of the Appellant submits that it was incumbent on the Judge, having found three gateways to making an order for security for costs, to explain in relation to each of them separately why the facts were such that it was just to exercise his discretion in favour of awarding security for costs. Today, Mr Evans advanced detailed argument by reference to authority about what it is under each of grounds (a) and (g) that an applicant was required to prove, or a judge was required to be satisfied about, before he could consider an award of security to be just.

16. The Judge gave an ex tempore judgment at the end of a long day. I am told that he started to give judgment at about 5.30pm. The Judge himself alluded to this in his judgment. He said that for that reason it was not as full a judgment as he would like it to be. It is evident from the judgment and the transcript that the majority of argument during the day had been about whether any ground for security for costs was established. It was only at 3.30pm that there was a concession that one of the grounds at least, ground (g), was established. Up until that point all four of the grounds had been in issue.

17. What was said by Mr Evans at that stage, according to the transcript, which is an imperfect transcript recording inaudible words at various points, is as follows:

> "*So what I cannot say, I do not think, is that (g) is not a gateway. What I do say is that it is an extraordinary gateway, where it is not (inaudible), where the asset that was sold was sold partly to buy another property in England but mostly to fund the (inaudible) in Australia which is not the situation of course. Here the asset was sold to fund his legal costs and his ordinary living costs, so to use that as a gateway for My Lord seeking an order for security for costs would, in my submission, be a very odd thing to do and it is not the right way to go about it. Is that (inaudible) and as a discretionary factor, it is a gateway that should be ignored.*"

18. Mr Evans submitted, as a matter of discretion, that gateway (g) should not be relied upon because the Appellant sold the property in order to realise funds for living and legal costs. However, no legal argument was deployed about whether it was proper or improper to take account of such matters, and in any event what was said at that point did not cover the question of the dissipation of the £270,000 subsequently to the sale, but only the reason for the sale itself. In any event, the Judge would then have been aware, at 3.30pm for the first time, that the application would turn on exercise of discretion.

19. Nevertheless, the remaining grounds, hotly contested, remained potentially material and the Judge devoted most of the time in his judgment to the question of whether grounds (a), (d) and (e) were established. In so doing, he dealt with and made some factual findings about the residence of the Appellant, the transfer of assets to Florida and the spending of money. In [14] of his judgment he said:

> "*When the property was sold for £1.4 million, a £600,000 loan was repaid, £400,000 of the balance was given to the Petitioner's wife, said to be her share of the equity, and the Petitioner retained the balance of about £400,000, of which I am told there is presently £130,000 left in a Lloyds bank account within the jurisdiction, although I have seen no evidence of that beyond the uncorroborated statement of the Petitioner.*"

20. In [15] he said:

> "*My view is that he clearly has moved his residence to Florida. There are several indicators of this. First, I was taken to an exchange of emails between the Petitioner, his wife and a removal company called*

> *Britannia, which clearly show Britannia were retained following the sale of Littlecourt to remove chattels for shipping. Those emails are redacted in part but it is obvious that the intent was to move at least some of the chattels of Littlecourt to Florida and Mr Evans wisely did not seek to argue otherwise.*"

21. The view that the Judge came to was contrary to the evidence that the Appellant had given in his witness statement about whether he resided in Florida. [16] and [17] are then in the following terms:

> "*As to why those emails were redacted in part, Mr Boardman says that it is clear that the intent was to attempt to conceal the fact that there was a change of residence to the US. Mr Evans says that there was certainly an attempt to conceal the new US address, but that was simply because of threats that had been made by the Respondents or parties related to the Respondents which were causing grave upset to the Petitioner's wife.*
>
> *It seems to me that there was, plainly, an attempt to conceal the fact that Littlecourt was being sold and a significant part of the Littlecourt assets were being transferred to Florida.*"

22. Once the Judge had given his conclusions on the disputed grounds for security for costs, he turned to ground (g) and his judgment from [26] - [29] reads as follows:

> "*Mr Evans accepted that this gateway is engaged and that therefore the only question is one of my discretion. In that respect he seeks to make the point that an order for security would stifle the litigation. In fact, the position of the Petitioner is somewhat wider than that. It is not just this litigation with which the Petitioner is engaged. The point, as Mr Evans started to put, but I think perhaps shrunk back a little from, was that the stifling might not be only of this litigation but of other litigation.*
>
> *Put another way, if security is granted it might mean that the Petitioner would have to make choices about how he allocated his assets in funding legal costs. However, all of this is rather theoretical. As Mr Boardman says, a party that seeks to resist an order for security for costs by virtue of impecuniosity should make full and frank disclosure of their assets, see M V Yorke Motors v Edwards at page 845 of the White Book. The evidence here as to the Petitioner's assets is thin to say the least.*
>
> *He has embarked upon what even his own counsel accepts is complex and expensive litigation. It seems to me that if he wishes to do so then he has to accept that if a gateway is engaged he has to be ready to meet the costs of any litigation should he ultimately be unsuccessful. Mr Evans sought to persuade me that in considering my discretion I should also have regard to the fact that the Petitioner has the benefit of other orders for costs in his favour in other litigation which, whether by reasons of set-off or otherwise, he has been unable to collect upon.*

> *However, it seems to me that first of all those are not matters which I should take into consideration but rather, reverting to my first point, I do not have full and frank disclosure of his assets which would enable me to judge any question of ability to pay. I also have regard to the fact that, at the moment anyway, the security being sought is relatively modest. All of those matters being pulled together, I am satisfied that this is a case in which I should grant the security for costs being sought.*"

23. It is not in my view credible that the Judge forgot to exercise a discretion having regard to all the relevant factors in the case, or that he did not apply the appropriate test of whether it is just to order security for costs. That he did so is clear from the fact that he assessed the two arguments on which the Appellant relied as going to discretion, namely the stifling of the litigation and the existence of other assets. He also said expressly that all of those matters being pulled together satisfied him that this was a case in which he should grant security for costs.

24. Mr Evans criticised the Judge for not dealing with each of the gateways, or grounds, individually and explaining what in law he had to consider and what conclusions, in fact, he reached. The suggestion that he should do so was not put to him in argument at the hearing, either in the skeleton argument or orally at the hearing itself. It is correct that Mr Evans, in dealing with ground (a), did submit there had to be evidence of a difficulty or additional cost in enforcing a judgment in Florida, but there was no developed argument that the way in which the discretion could be exercised was constrained by authority. Instead, as the transcript shows, Mr Evans relied on other factors going to discretion.

25. Similarly in relation to ground (g), a possible argument was no more than hinted at in the course of the oral submissions of Mr Evans and by no means developed. It is significant in any event, in my judgment, that the Judge had found that not one but three separate grounds under Rule 25.13 had been made out for ordering security for costs.

26. I do not accept the argument, if it was relied upon, that the existence of the grounds themselves has no significance on the exercise of discretion. For example, had the Judge found (which he did not on the facts of this case) that the Appellant had changed his address with a view to evading the consequences of the litigation, that would have had a significant bearing on how his discretion should be exercised.

27. In the course of deciding what grounds did exist, the Judge concluded that the Appellant had moved to reside out of the jurisdiction, had moved substantial chattels there, had attempted to conceal that fact, had given an incorrect address, had taken steps in relation to his assets that would make it difficult to enforce an order against him, including spending, apparently, £270,000 in a year and a half, without any adequate explanation, and that he had not made full and frank disclosure of his assets. All of those things, in my judgment, cumulatively, were a significant step in the direction of exercising his discretion in favour of granting security. Of course, he had to consider such other factors as were pressed upon him in argument, and he had to exercise an overall discretion, but it is evident that he did so by rejecting the particular arguments on discretion that were advanced by Mr Evans. It is not a ground of appeal

in this case that the Judge failed to address the arguments that were raised by the Appellant, only that he did not give sufficient reasons.

28. I consider that sufficient reasons were given for the Appellant to understand why the Judge had ordered him to give security for costs. The starting point was the grounds themselves that were established, in particular ground (g). The next reasons were the findings of fact that the Judge had made, summarised above. I have referred to [14] - [17] of his judgment, which amounted to a finding that the Appellant was deliberately taking steps that would have the effect of making it more difficult for the Respondent to execute Costs Orders against him.

29. What had happened was that all or most of the Appellant's assets had been put beyond the Respondents' reach, or will have been by the time that the money standing in the bank account has been spent on the Appellant's costs. It is clear that the Judge approached the exercise of his discretion globally. His use of the expression "all of those matters being pulled together" clearly, in my judgment, indicates the existence of the three grounds for security and the factual findings that he had made in that regard, not just the reasons for rejecting the arguments on stifling the claim and the existence of other assets.

30. There was no argument advanced to the Judge that he was required to consider other matters. It is also material that only £30,000 by way of security for costs was being sought, a very small sum in the context of the likely costs that will be incurred in the underlying petition. The Judge himself referred to the fact that the security was relatively modest at [28] of his judgment. That is material because it may be said to be improbable that an extra £300,000 would have to be spent to enforce a judgment in Florida, as compared with England, but an extra £30,000 is not improbable.

31. Similarly, the idea that all of the £270,000 that was spent in 18 months, down to the last £30,000, was spent on legal costs and subsistence in that relatively short period appears seems highly unlikely, whereas the chances of none of it having been spent in that way is extremely remote. I think the Judge was not compelled to address, of his own motion, arguments that might have been made on the facts against exercising a discretion in favour of granting security but which were not developed or advanced.

32. In these circumstances, the reasons that the Judge did give for rejecting the Appellant's arguments why, as a matter of discretion, security should not be ordered can be seen to be sufficient reasons, even though briefly given late in the afternoon.

33. A judge's presentation of his reasons in a short ex tempore judgment will inevitably depend on the way in which the argument before him was presented. If in relation to security for costs the main argument is about the existence of grounds for ordering security, as was clearly the case here, a judge is not obliged to identify and address himself every point that may go to the exercise of his discretion. He can properly confine himself to the arguments that were put before him and then form a global view as to whether it is just to order security for costs and, if so, in what amount. He is not required to do so independently for each ground established.

34. As I have said, it is not a ground of appeal that the Judge failed to deal with particular arguments that were advanced. The only ground of appeal is that insufficient reasons were given. Whether they were sufficient or not depends on context. I can well see, in

other cases, where the real argument was not about whether grounds existed but how the discretion should be exercised on the particular facts of the case, something much fuller in terms of reasons is likely to be required, to explain why particular arguments were rejected or accepted, but this was certainly not that case.

35. For the reasons that I have given I therefore dismiss the appeal.

This Transcript has been approved by the Judge.

The Transcription Agency hereby certifies that the above is an accurate and complete recording of the proceedings or part thereof.

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