Neutral Citation Number: [2021] EWHC 2537 (Ch)

Case No: E30MA106

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN MANCHESTER
BUSINESS LIST (ChD)

Civil Justice Centre,
Bridge Street West,
Manchester
M60 9DJ

Date: 21 September 2021

Before :

MR JUSTICE SNOWDEN
(Vice-Chancellor of the County Palatine of Lancaster)

- -

Between :

PHARMAGONA LIMITED

Claimant / Appellant

- and –

(1) MR SAYED MOSTAFA TAHERI
(2) MRS BAHEREH MOHAMMADI

Defendants / Respondents

- -

Geraint Jones QC for the **Claimant**
Peter Gilmour for the **Defendants**

Hearing date: 21 May 2021

- -

Approved Judgment

COVID-19: This judgment was handed down remotely by circulation to the parties' representatives by email. It will also be released for publication on BAILII and other websites. The date and time for hand-down is deemed to be 10.30 a.m. on Tuesday 21 September 2021.

MR JUSTICE SNOWDEN

MR JUSTICE SNOWDEN :

Introduction and relevant background

1. This is an application for the reconsideration of an order of HHJ Stephen Davies dated 27 July 2020 in which he struck out what was described as an unissued application by the Claimant dated 15 July 2020 seeking to commit each of the Defendants to prison for contempt of court. In substance, I am asked to decide *de novo* whether to give permission for the unissued application to be sealed and issued.

2. The alleged contempt is said to be a breach of a freezing order granted by the court on 9 February 2018. It provided in standard form that the Defendants should not remove from the jurisdiction or in any way dispose of, deal with or diminish the value of any of their assets in England and Wales up to the value of £500,000.

3. The freezing injunction was granted in these proceedings in which the Claimant alleged that the Defendants, who were employees of the Claimant, engaged in fraudulent activities involving fictitious invoices in order to misappropriate the Claimant's funds. The Defendants denied liability, claimed to be whistle-blowers and contended that the transactions were initiated by the Claimant's director in connection with the illegal export of goods to Iran.

4. The Claimant obtained an unless order for disclosure of certain documents by the Defendants on 11 December 2019. When that was not complied with, the Claimant sought judgment on the claim. That was granted in the sum of £454,112.58 by HHJ Halliwell on 17 January 2020. An application for permission to appeal against that judgment was refused by the Court of Appeal on 24 August 2020.

5. After the judgment had been obtained, the Claimant discovered that unilateral notices had been registered against the title to the Defendants' property in Stockport by two individuals, a Mr. Orang and a Dr. Aminnaji. Proceedings ensued, and the explanation for those notices was given in witness statements dated 4 March 2020 from each of the First Defendant, Mr. Orang and Dr. Aminnaji.

6. In essence what was said in those statements was that Mr. Orang and Dr. Aminnaji were friends of the Defendants and, in or about July 2019, the Defendants approached them and told them that monies were needed urgently by members of the Defendants' family in Iran. It was said that, out of friendship, Mr. Orang and Dr. Aminnaji then borrowed £20,000 and £14,900 respectively from two different financial institutions and executed loan agreements with the Defendants dated 30 and 31 July 2019. Those loan agreements recorded that loans had been paid to the Defendants in those amounts and that the Defendants promised to repay the loans with interest. Each of the loan agreements was in materially identical form and included a term that the loan had been made to the Defendants "due to their unforeseen circumstances with their family in Iran".

7. It is not suggested by the Claimant that the monies borrowed by the Defendants were used for anything else or that the loan agreements were a sham.

8. The evidence was to the effect that the loans were not repaid by the Defendants as agreed, and as a result Mr. Orang and Dr. Aminnaji registered the unilateral notices

against the Defendants' property with a view to taking security for repayment of the loans.

9. After a hearing, the unilateral notices were ordered to be vacated by HHJ Hodge QC on 6 March 2020.

10. The contention of the Claimant is that, after borrowing monies from Mr. Orang and Dr. Aminnaji, when the Defendants paid the monies to their family members in Iran, at a time when their assets in England and Wales did not exceed £500,000, this was a breach of the freezing order.

11. The evidence placed before HHJ Hodge QC in March 2020 was silent on the question of precisely how the monies in question were transferred to the Defendants and thence to Iran. However, according to evidence recently filed by the First Defendant in opposition to this application, the monies in question were remitted directly by Mr. Orang and Dr. Aminnaji to Iran and did not pass through the Defendants' hands.

12. In the course of his submissions, Mr. Gilmour for the Defendants submitted that the monies were transferred using the 'Hawala' system. He described this as essentially an informal method of transferring money through a series of mutual credits and debits arranged by intermediaries for the benefit of Iranians living overseas. He submitted that the Hawala system does not involve any funds actually changing hands.

13. There was, however, no documentary evidence in any of the witness statements showing how, or more particularly from whom, the monies were in fact remitted to Iran, nor was there was any evidence before me about the operation of the Hawala system.

14. As I have indicated, after the application for committal was issued, it was struck out by HHJ Davies of his own motion. After stating that the court could exercise such power where such applications are brought otherwise than for legitimate motives of seeking enforcement of an injunction or bringing to the court's attention a serious rather than a purely technical contempt, HHJ Davies gave his reasons in writing as follows,

> "2. [T]aking the Claimant's case and evidence at its highest, the most that can be said is that at a time when he was subject to a freezing injunction the First Defendant borrowed £34,900 from two friends, which they obtained through loans from reputable financial institutions, which he used to pay to one or more of his family members resident in Iran who were in need of funds. The Claimant does not suggest, and has no evidential basis for suggesting, that the First Defendant was anything other than a conduit for these funds or that this was intended or operated as an illegitimate attempt to evade the freezing order by dissipating or concealing or disposing of monies which in reality belonged to the defendants so as to frustrate enforcement of any judgment. In the circumstances, whilst I am prepared to accept that it is at least arguable that such conduct amounts to a breach of the freezing injunction, in that as a matter of law the £34,[900] came under the ownership of the First Defendant when it passed through his hands, such breach is of the most technical kind and

> it is highly unlikely that any court would, on those facts, impose any penalty, let alone a custodial penalty.
>
> 3. Moreover, the context in which this application is made is one of long-running and personally bitter litigation between the parties. The Claimant, in particular its controlling mind Dr Firoozabadi, is undoubtedly motivated by personal animus against the First Defendant. There have been any number of applications and counter-applications during the course of this litigation, as well as two abortive trials, where the immediate reason for the first abortive trial was that the Claimant had received monies which came from an account which the Defendants were permitted to use to fund their defence at trial and where the Claimant (at the very least – as I found) ought to have come clean about what it knew or had reason to believe was the source of the funds and the Defendants' entitlement to use such funds to fund their defence. The Claimant has now obtained a judgment in default which (subject to the outcome of the application for permission to appeal and of any appeal, should permission be granted) will debar the Defendants from defending the case.
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> 4. In the circumstances I am satisfied that this is a vindictive application which is not brought for legitimate aims but solely with the intention of harassing the First Defendant and, in consequence, amounts to an abuse of process. Further or alternatively it is not in accordance with the overriding objective to allow further court time and judicial resource to be taken up by an application of such nature brought in such circumstances."

15. The Claimant sought to appeal against that ruling, but permission was refused by the Court of Appeal on 15 January 2021 on the basis that the appropriate course was for an application to vary or set aside the order to be heard, rather than an appeal. That is the hearing which took place before me.

16. I should also add in relation to the background to this application that after the decision of HHJ Davies, the Defendants were each made bankrupt on their own petition.

The relevant legal test

17. In Sectorguard plc v Dienne plc [2009] EWHC 2693 (Ch) Briggs J stated as follows at [44] to [47]:

> "44. It is now well established, in the light of the new culture introduced by the CPR , and in particular with the requirements of proportionality referred to in CPR 1.1(2) as part of the overriding objective, that it is an abuse of process to pursue litigation where the value to the litigant of a successful outcome is so small as to make the exercise pointless, viewed against the expenditure of court time and the parties' time and money engaged by the undertaking...

> 45. The concept that the disproportionate pursuit of pointless litigation is an abuse takes on added force in connection with committal applications. Such proceedings are a typical form of satellite litigation, and not infrequently give rise to a risk of the application of the parties' and the court's time and resources otherwise than for the purpose of the fair, expeditious and economic determination of the underlying dispute, and therefore contrary to the overriding objective as set out in CPR 1.1 . The court's case management powers are to be exercised so as to give effect to the overriding objective and, by CPR 1.4(2)(h) the court is required to consider whether the likely benefit of taking a particular step justifies the cost of taking it…
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> …
>
> 47. Committal proceedings are an appropriate way, albeit as a last resort, of seeking to obtain the compliance by a party with the court's order (including undertakings contained in orders), and they are also an appropriate means of bringing to the court's attention serious rather than technical, still less involuntary, breaches of them. In my judgment the court should, in the exercise of its case management powers be astute to detect cases in which contempt proceedings are not being pursued for those legitimate ends. Indications that contempt proceedings are not so being pursued include applications relating to purely technical contempt, applications not directed at the obtaining of compliance with the order in question, and applications which, on the face of the documentary evidence, have no real prospect of success. Committal proceedings of that type are properly to be regarded as an abuse of process, and the court should lose no time in putting an end to them, so that the parties may concentrate their time and resources on the resolution of the underlying dispute between them."

18. That summary was approved by Hamblen J in PJSC VAB v Maksimov [2014] EWHC 4370 and by Marcus Smith J in Absolute Living v DS7 [2018] EWHC 1717. I also agree with it.

19. In the course of argument, Mr Jones QC for the Claimant and Mr Gilmour for the Defendants each indicated that they accepted that the summary given by Briggs J accurately reflected the current state of the law. They also agreed that, conceptually, it followed that there were three bases upon which the current application could fail.

20. First, the application could fail if there was no reasonable prospect of the Claimant proving its allegations of contempt if the matter is allowed to proceed, for example because there is no reasonable prospect of proving a breach of the freezing order. Second, even if there was a reasonable prospect of proving a breach, the application could fail if I concluded that any breach was of a purely technical (rather than a serious) nature. Third, even if there was a reasonable prospect of the Claimant proving a serious breach, the application could fail if I concluded that it had been brought for an improper purpose.

Discussion

21. On behalf of the Defendants, Mr Gilmour first submitted that I had no evidential basis upon which to conclude that the loan monies ever passed into the hands of the Defendants, such that the Claimant's allegations of contempt had no realistic prospect of success. In support of this argument, he referred to the recent evidence of the First Defendant to this effect, which comprised a single sentence of a witness statement unsupported by any contemporaneous (or, indeed, any) documents.

22. Mr Gilmour also invited me to take judicial notice of the Hawala system, the existence and operation of which was not in evidence, but which Mr Gilmour submitted was common knowledge amongst Iranians living overseas. The thrust of this submission was that the way in which the Hawala system operates – which, as I have said, is through an informal system of mutual debits and credits – meant that it was inherently likely that no monies ever passed through the hands of the Defendants.

23. I do not accept Mr Gilmour's submission and I decline to take judicial notice of the matters to which he referred.

24. For present purposes, it is not necessary for me to be satisfied that the monies did, in fact, pass through the hands of the Defendants. It is only necessary for me to be satisfied that there is a realistic prospect that the Claimant will be able to establish that the monies did so pass. As to this, the recital to each loan agreement, signed by the Defendants, states that the Defendants were borrowing monies from Mr. Orang and Dr. Aminaji. Nothing in those loan agreements (or in any other contemporaneous document to which I have been referred) suggests that this meant anything other than that the Defendants would, at some point, be paid the loan monies in the usual way. On that basis alone, there is, it seems to me, at least a realistic prospect that the Claimant could demonstrate that the Defendants had the monies in their hands at some point in time.

25. In addition, the operation and ubiquity of the Hawala system is not, it seems to me, a fact which is so notorious that I should accept it without further inquiry, and I was not shown any evidence about it that would allow me to take judicial notice in the way Mr Gilmour invited me to do so.

26. In any event, I do not consider that either of those matters are necessary to dispose of this case. That is because even if the monies lent did pass through the hands of the Defendants, I agree with HHJ Davies' view that, on the evidence, the First Defendant was in essence merely a conduit for the monies to be passed from Mr. Orang and Dr. Aminnaji to the Defendants' relatives in Iran, and that in these circumstances there was no intention on the part of the Defendants to dissipate monies that beneficially belonged to them.

27. As I have indicated above, the Claimant does not appear to contend that the monies were borrowed for any purpose other than remission to Iran as the evidence of the Defendants states, and it was not suggested that the purpose was otherwise, or that the loan agreements were a sham. The loan agreements referred in terms to the need for monies to be sent to Iran, and the evidence is that Mr. Orang and Dr. Aminnaji lent money for that purpose. It is, I consider, an appropriate inference that, given the terms of the loan agreements, it was never intended that the monies advanced should be at the free disposal of the Defendants or could have been used by them for other purposes.

28. But if that is so, then the facts either do not give rise to a breach of the order at all, or as HHJ Davies found, disclose only a breach of the most technical type. It is axiomatic that a freezing injunction only applies to assets owned by a defendant that would be available to satisfy a judgment against him. If the monies loaned to the Defendants were not at their free disposal but were loaned for the specific purpose of being remitted to Iran, it is perfectly arguable as a matter of law that they would not be caught by the freezing injunction at all. And even if conceptually at the free disposal of the Defendants because of the absence of express restrictions on use, there is no allegation or evidence to suggest that the Defendants ever thought or intended to use the monies that they had borrowed for their own benefit.

29. I do not accept Mr Jones QC's submission that, if I found that any breach was merely a technical breach, I should nonetheless permit the committal proceedings to continue as a way of demonstrating to the Defendants that court orders must be obeyed.

30. It seems to me that this course of action would serve no real purpose. As Mr Jones QC accepted, the range of sanctions available to the court for what is, *ex hypothesi*, a merely technical breach is likely to be very limited indeed. Moreover, this is not a case in which there is said to be any ongoing breach of a court order such that committal proceedings would serve the practical purpose of encouraging a defaulting party to comply with its obligations: the alleged breach in the instant case has already happened. I therefore see no practical utility in, nor principled basis for, the course urged upon me by Mr Jones QC.

31. During my exchanges with Mr Jones QC in oral argument, a further reason emerged which persuades me that the conclusion reached by HHJ Davies was correct, but which did not form (and, indeed, could not have formed) part of his reasoning. As I am considering the matter *de novo*, it is appropriate that I explain why this represents an independent basis upon which to reach the same conclusion, and in any event buttresses the conclusion HHJ Davies reached and with which I agree.

32. As I have said, after the date on which the matter came before HHJ Davies, each Defendant was made bankrupt upon their own petition and a trustee in bankruptcy was appointed to administer their estates. Immediately upon the appointment of the trustee taking effect, the Defendants' respective estates vested in the trustee: see section 306 of the Insolvency Act 1986. It appears to me that the bankruptcies of the Defendants have obvious relevance for the freezing order made against them.

33. The purpose of a freezing order is, typically, to preserve the assets of a defendant to ensure that those assets can be used to satisfy any judgment obtained by a claimant. However, the effect of the bankruptcies was, *prima facie*, to take out of the Defendants' hands all of the assets formerly belonging to them and to vest those assets in the hands of their trustee for the benefit of their creditors generally. Accordingly, from the date of the appointment of the trustee, there were no assets at the free disposal of the Defendants upon which the freezing order could any longer be said to bite. It therefore seems to me that it would not be appropriate for the Claimant to be permitted to pursue a contempt application for the purposes (as it would see it) of bringing home to the Defendants the continued importance of complying with the freezing order.

34. In written submissions, Mr. Jones QC appeared to anticipate this issue. He submitted that, notwithstanding the appointment of a trustee in bankruptcy, it was important to the

Claimant that there should be no dissipation of the Defendants' assets. This was, he submitted, because the Claimant is by far the largest unsecured creditor in the Defendants' respective estates, and therefore it has an interest in the trustee maximising the collecting in and realisation of the Defendants' assets.

35. I do not accept Mr Jones QC's arguments. The purpose of the freezing order is, as I have said, to preserve the assets of a defendant to ensure that a claimant is able to enforce any judgment it obtains. However, since the appointment of the trustee in bankruptcy, the person with the real and proximate interest in the Defendants' estates is not the Claimant, which is merely one creditor in the bankruptcy, but the trustee who is tasked with acting in the interests of creditors generally in what are collective bankruptcy proceedings. As I indicated in Re Maud [2016] 2175 (Ch) at [77),

> "77. Bankruptcy has frequently been referred to as a "class remedy". In modern parlance, it is a "collective insolvency proceeding" or a process for collective enforcement of debts. The purpose of the collective proceeding is for the property of an individual who is unable to pay his debts to be realised under the control of an independent trustee, and, after payment of any debts or liabilities having priority, for the remaining monies to be distributed *pari passu* to the debtor's unsecured creditors. The ordinary rights of action of individual creditors against the debtor are curtailed accordingly."

36. Accordingly, if and to the extent that the trustee believes that some other application is necessary to preserve the value of the Defendants' bankruptcy estates, it is a matter for the trustee to seek the appropriate relief on behalf of creditors. As a creditor, it is open to the Claimant to request that the trustee takes a particular course of action and to put the trustee in funds if it is deemed necessary, appropriate and in the interests of creditors generally. However, it is not, it seems to me, appropriate that the Claimant should be entitled to use contempt proceedings as a means of enforcement of a freezing order, the continued utility or appropriateness of which must be in some doubt given the intervention of the bankruptcy proceedings.

37. Given that view, it is not necessary for me to reach any conclusions about the purpose for which the Claimant wishes to bring contempt proceedings against the Defendants. Nonetheless, I bear in mind the findings of HHJ Davies, who plainly had more immediate experience of the litigation between the parties, to the effect that the Claimant seeks to bring the application vindictively, without a legitimate aim, and solely with the intention of harassing the First Defendant. If that were right, it simply reinforces the view that after the intervention of the bankruptcy and the involvement of the trustee, as an independent insolvency officeholder, it is through that route that the assets of the Defendants should most appropriately be preserved for the benefit of their creditors generally.

38. For the foregoing reasons, I agree with HHJ Davies that, on the basis of the limited allegations of contempt and the even more limited evidence adduced by the Claimant, any breach would, at most, amount to a technical breach of the freezing injunction and that it would not be appropriate for contempt proceedings to be brought on that basis.

Conclusion

39. I therefore refuse permission for the Claimant's contempt application to be sealed and issued.