Case No: BL-2020-000952

Neutral Citation Number: [2022] EWHC 363 (Ch)

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
BUSINESS & PROPERTY COURTS

The Rolls Building
7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Wednesday 18 January 2022

BEFORE:

MR JUSTICE LEECH

BETWEEN:

AL-NAJJAR & OTHERS

Claimants

- and -

MAJEED & ANOTHER

Defendants

MR S HORNETT appeared on behalf of the Claimants

The Defendants did not attend and were not represented

APPROVED JUDGMENT

Digital Transcription by Epiq Europe Ltd,
Unit 1 Blenheim Court, Beaufort Business Park, Bristol, BS32 4NE
Web: www.epiqglobal.com/en-gb/ Email: civil@epiqglobal.co.uk
(Official Shorthand Writers to the Court)

1. MR JUSTICE LEECH: By Application Notice dated 5 January 2022 the Claimants apply for an order that the Defence be struck out and the Defendants debarred from defending the claim unless they comply with the order of Master Pester dated 1 October 2021. The application is made under CPR Part 3.4(2)(c) and it is supported by the second witness statement of Mr Gareth Williams of Charles Russell Speechlys ("**CRS**"), the Claimants' solicitor ("**Williams 2**"). It is his evidence that there has been a history of default and a failure to comply with court orders by the Defendants. He summarised that history in paragraph 6.1 to 6.13 of Williams 2 and Mr Hornett, who appears for the Claimants on this application, took me through the most significant breaches, to which I will return.

Background

2. This application takes place at the PTR of this claim. The trial is listed for hearing with a ten-day trial estimate in a window starting on 7 February and ending on 25 February. It follows that the trial may come on in two to three weeks' time. Normally one would expect both parties to appear at the PTR but the Defendants have not appeared before me this morning at the PTR and have not appeared at the hearing of this application. The first question which I must decide, therefore, is whether to proceed with the application in the absence of the Defendants.

3. The hearing of the application was listed as a hybrid hearing and on 13 January 2022 the Defendants were informed of the hearing and then communicated with CRS. On 16 January 2022 they wrote to the Court in an email timed at 23.11 which showed clearly that they understood both that the application was listed at the PTR and, secondly, that it would be heard and determined this morning. On 17 January 2022 Mr Saunders of Charles Russell Speechlys wrote to the defendants by email sending them the link for the hybrid hearing for the hearing this morning. Finally, immediately before I heard this application the usher called on the case both inside and outside court and the Defendants were not present. In those circumstances, I am satisfied that the Defendants were aware of the application and that it was to be heard this morning. I am also satisfied that they have been served with sufficient time to enable them to respond. I therefore proceed with this application in their absence.

4. I turn, therefore, to the substantive application. The claimants rely upon three categories of breach of the Orders made by Master Pester on 1 October 2021 in support of their application: Firstly, there was a failure to comply to provide further information; secondly, there was a failure to provide specific disclosure; and, thirdly, there was a failure to comply with the extended directions for trial and to serve substantive witness statements on or before 3 December 2022. At paragraph 6 of the Order, the Master also required the Defendants to make payments on account of an outstanding costs order.

5. On 11 August 2021 Master Pester had already made an order for specific disclosure (for three categories of documents and a witness statement providing detailed information in relation to, amongst other things, the provision of information in relation to certain bank accounts. Moreover, that order was endorsed with a penal notice. In paragraph 6 the Master also directed that the Court would give further consideration to the Claimants' specific disclosure application on 1 October and ordered the Defendants pay the costs on an indemnity basis. So, the defendants have had two opportunities to comply and provide proper disclosure in relation to this action and have complied with neither. I will return to the significance of those breaches below.

The Test

6. Given this history of default Mr Hornett submits I should make an order debarring the defendants from defending without first making an "unless order" which would give the Defendants a final opportunity to comply and spell out the consequences if they failed to do so. There is no doubt that the court has jurisdiction to make such an order without making an unless order, and he cited two authorities to me in support of that proposition. The first was the decision of the Court of Appeal in *Arrow Nominees Inc v Blackledge* [2000] 2 BCLC 167 (which pre-dated the introduction of the CPR) in which Chadwick LJ stated as follows (at [54]):

> "It would be open to this Court to allow the appeal against the judge's refusal to strike out the petition on that ground alone. But, for my part, I would allow that appeal on a second, and additional, ground. I adopt, as a general principle, the observations of Millett J in *Logicrose Ltd v Southend United Football Club Ltd* (The Times, 5 March 1988) that the object of the rules as to discovery is

> to secure the fair trial of the action in accordance with the due process of the court; and that, accordingly, a party is not to be deprived of his right to a proper trial as a penalty for disobedience of those rules -- even if such disobedience amounts to contempt for or defiance of the court -- if that object is ultimately secured, by (for example) the late production of a document which has been withheld. But where a litigant's conduct puts the fairness of the trial in jeopardy, where it is such that any judgment in favour of the litigant would have to be regarded as unsafe, or where it amounts to such an abuse of the process of the court as to render further proceedings unsatisfactory and to prevent the court from doing justice, the court is entitled -- indeed, I would hold bound -- to refuse to allow that litigant to take further part in the proceedings and (where appropriate) to determine the proceedings against him. The reason, as it seems to me, is that it is no part of the court's function to proceed to trial if to do so would give rise to a substantial risk of injustice. The function of the court is to do justice between the parties; not to allow its process to be used as a means of achieving injustice. A litigant who has demonstrated that he is determined to pursue proceedings with the object of preventing a fair trial has forfeited his right to take part in a trial. His object is inimical to the process which he purports to invoke."

7. It is clear from *Arrow Nominees*, therefore, that the Court has power to debar a defendant from defending a claim at trial even where no unless order has been made. But the bar is a high one, and I remind myself that such an order is justified only where the fairness of the trial is put in jeopardy (and I return to that test below). The decision in *Arrow Nominees* was applied by Christopher Clarke J (as he then was) in *JSC BTA Bank v Ablyazov & Ors* [2010] EWHC 2219 (QB): see, in particular, [31] and [32]. The judge then stated this at [38]:

> "In my judgment, if the court makes an order for disclosure of information or documents it is entitled, in the event of non-compliance, to order that if such non-compliance is persisted in the claimant will be at liberty to enter judgment. Were it otherwise, in many cases the order would be without effect. The making of such an order is of course a discretionary exercise. It is necessary in a case such as this, where there is a challenge to the jurisdiction and to the making of a freezing order, carefully to consider whether or not it is right to require the immediate production of information given the prospect that the court may later hold that jurisdiction should not have been exercised or that the freezing order should not have been made."

8. Mr Hornett also relied on the decision in *Badyal v Badyal* [2019] EWHC 2679 (Ch), where Zacaroli J applied both of those decisions and in which Mr Hornett himself appeared for the Claimants in very similar circumstances. The relevance of the decision is that the Defendants were accounting parties, there was a claim for an account and the question which Zacaroli J had to decide was whether in fact to give the defendants one last chance to comply with the orders before debarring them from defending.

9. Finally, Mr Hornett referred me to the decision of Sharp J (as she then was) in *Hayden v Charlton* [2010] EWHC 3144 (QB), a case in which the judge struck out the Claimant's claim for libel. In that case Sharp J identified the following factors at [75] as being material to the decision whether to make an immediate debarring order:

> "In my view, the following factors are of particular importance in this case. First, (as I find) there has been a deliberate and wholesale non-compliance with the rules and orders of the court by the claimants, amounting to a total disregard of the court's orders. Second, the claimant's conduct of the litigation and their breaches of the case management directions of the court are contrary to the overriding objective, and have resulted in a serious delay to the progress of the actions. They are barely further forward than they were in December last year. As a result, the trial window has been lost … Third, there has been no proper explanation for these failures, which in my view, as a matter of reality, remain unexplained. Fourth, the history of this litigation: the most recent failures follow a pre-existing pattern for the claimants' conduct of the litigation of delay, defaults and disobedience to court orders. Fifth, the claimants made no attempt to respond to these applications, save for the last minute appearance by Mr Starte … Sixth, the significant prejudicial and oppressive effect that the claimants' conduct of the litigation has had on the defendants, who as litigants in person have been placed in the position where it is they who have had to struggle to progress the actions brought against them."

10. *Hayden v Charlton* is of some interest because Sharp J tested the position by considering both whether it would be a breach of the Claimant's Article 6 rights to strike out the claim or to debar the claim from proceeding, and against the rules for giving relief against sanctions. Mr Hornett urged on me that the case I should adopt should be to consider whether, in fact, if the defendants now applied for relief against sanctions I would grant it in those circumstances. He reminded me of the test in

Denton and submitted that if I applied that test now there is no doubt that the defendants would fail to satisfy it. Against, those authorities I turn to consider whether this is an appropriate case for debarring the Defendants from defending the proceedings.

Application

(1) The Significance of the Breaches

11. Mr Hornett relied on the significance of the breaches of the Order. I deal first with the order to provide Further Information: see paragraph 3 of the Order. Mr Hornett took me through the pleadings and showed me the significance of the Further Information. In particular, he took me to the Particulars of Claim, paragraph 60 of the Particulars of Claim in which the Claimants had pleaded a detailed and fully particularised case setting out the accounting information which the Defendants had failed to provide. He then showed me the Defence, paragraphs 105 and 106 in which the Defendants had pleaded a portmanteau defence by reference to information in Schedule B. The Defendants failed to annexe or provide Schedule B but when they were challenged, they claimed that the reference to Schedule B was no more than a mistake.

12. I am satisfied that the Defendants have failed to plead to the core allegations in the case and, combined both with the failure to give disclosure and the failure to serve substantive witness statements addressing the issues, it is almost impossible for the Claimants to understand the case which they have to meet at trial. Moreover, because the Defendants are accounting parties, there is significant prejudice to the Claimants. It is for the Defendants, as the accounting parties, to plead and prove what they have done with the money, and presumptions are made against them if they fail to do so. An accounting party who fails to provide that information is not only in breach of the rules of pleading but also of his or her substantive obligations as a fiduciary.

13. Secondly, Mr Hornett took me through the orders for disclosure which were made by Master Pester. He took me through each of the orders carefully and for the purposes of this judgment I give only one by example. Mr Hornett took me to the disclosure which the Claimants originally sought and obtained from Master Pester under the Order dated

11 August 2021 in relation to a company called DX14(?), which was admitted by the Defendants to be a partnership company. He then took me to the First Defendant's response in paragraph 7 of his second witness statement and to the relevant extracts from Williams 2. In particular, the Defendants failed to disclose any bank statements in relation to the company's bank account even though the only bank statements in evidence showed that they were all sent to the Defendants' own address. Mr Hornett described this as characteristic of this litigation. He submitted, and I accept, that the Defendants have failed to produce documents even where they have been sent to their own address and provide no explanation for what has become of them or why they are unable to produce them.

14. I am satisfied that the breach of paragraph 3(d) of the Order dated 11 August 2021 and paragraph 1 of the order dated 11 October 2021 are very serious. I am also satisfied that the other breaches of those Orders which the Defendants committed in relation to a company called DX9 and development properties in Harrow Road and Chippenham Mews are equally serious and significant. Finally, I am satisfied that the failure to provide disclosure in relation to the trust properties is equally significant. After taking me through the relevant material, Mr Hornett submitted that the Defendants were responsible for a deliberate obfuscation of the disclosure process and of the material upon which the Claimants needed to rely in order to prove their case and to establish the scope of the Defendants' accounting obligations. I accept that characterisation. I am satisfied that the Defendants could have, but have failed, to make disclosure and that it has been deliberate.

(2) Reasons for the Breach

15. I am satisfied, therefore, on the first limb of the *Denton* test that the Defendants have committed serious and significant breaches of Court orders. I am also satisfied that they have failed to give a good reason for those breaches. The only reason which they have given in their email dated 16 January 2022 is that they have no funds available to fight the litigation. Mr Hornett submitted, and I accept, that it is never an excuse for a litigant to refuse to comply with orders of the court for this reason. But if I had been satisfied that, as litigants in person, they had done their honest best to comply with the

orders, I would have given them some latitude. But in the present case there has been a wholesale failure to comply with Court orders and no proper explanation.

(3) The Circumstances of the Case

16. Thirdly, Mr Hornett relied upon a number of other factors under the third limb of *Denton*. First, he relied upon the history of default. For instance, there has been at least one unless order made on 23 March 2021 and the Defendants failed to comply with it. Secondly, he relied on the history before proceedings were instituted when the Defendants failed to comply with their substantive obligations to account or to provide any explanations at all in advance in the litigation. Thirdly and finally, his principal submission was that the failure to provide disclosure and witness statements would have an unfair effect on the trial. It means that the Claimants will be unable to investigate and verify the use to which their money was put and even if the Defendants now comply with these orders and come up with explanations, there will be insufficient time both to interrogate them or indeed to test their evidence fully at trial.

17. In summary, Mr Hornett submitted that the inevitable effect of the Defendants' breaches of the Order will be that there will either have to be an adjournment of the trial or the Claimants will be unfairly prejudiced. I accept that submission. In a case of this kind, where the Defendants are accounting parties and it is their obligation to put before the Claimants and before the court a true and proper account of their dealings with the funds of the partnership and there is bound to be prejudice if they fail to comply with those obligations right up until the eve of the trial itself. In my judgment, it will jeopardise a fair trial of the action as Chadwick LJ described in *Arrow Nominees*.

18. I have considered carefully whether to give the defendants one last chance to comply with the orders. I had in mind perhaps seven days or fourteen days at most. But Mr Hornett has satisfied me that a further extension is unlikely to have any effect on the Defendants. First, it is not something which they asked for or offered to comply with in their email dated 16 January 2022 and they are not before me to provide an explanation today. Secondly, and most importantly, it is more likely to lead to yet further satellite litigation and inevitably to an adjournment of the trial. We have only three weeks until

trial, and even if I made an unless order for compliance within seven days and the Defendants now purport to comply with it or fail to comply with and apply for relief against sanctions, this is likely either to jeopardise the trial date or a fair trial of the action.

19. Finally, it seems to me that, in considering whether to debar the defendants now, I should consider the overriding objective of dealing fairly with the parties and at proportionate cost. It seems to me that the overriding objective is met in the present case by debarring the Defendants immediately. The parties have never been on an equal footing, the Defendants have all the relevant information and, by withholding disclosure and failing to comply with the orders of the Court, they are effectively preventing the Claimants from bringing their case or reaching a just outcome at trial. Likewise, if I give them further time, there will be prejudice to other litigants who come before the court if the trial has to be adjourned. The Defendants have had more than sufficient time to comply with their obligations and I am satisfied that their time is up and I should give them no further time, even for a very short period.

Disposal

20. For all these reasons, therefore, I accede to Mr Hornett's application and I strike out the defence and debar the Defendants from further defending the action. I will hear from Mr Hornett on the precise consequences of that decision now.

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

Unit 1 Blenheim Court, Beaufort Business Park, Bristol BS32 4NE
Email: civil@epiqglobal.co.uk