Neutral Citation Number: [2021] EWHC 423 (Comm)

Case No: CL-2020-000471

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)

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

Date: Tuesday, 23rd February 2021

Before:

MRS. JUSTICE MOULDER

- -

Between:

LONDON PARTNERS CAPITAL MANAGEMENT LLP	**Claimant/ Applicant**
- and -	
(1) UMUT UTKAN **(2) THOMPSON CROSBY & CO LIMITED** **(3) ALINA ROXANA MOISE**	**Defendants/ Respondents**

- -

MR. ANTHONY PETO QC, **MR. ANDREW SCOTT** and **MR. CARMINE CONTE**
(instructed by **Mishcon de Reya LLP**) for the **Claimant/Applicant**

THE DEFENDANTS / RESPONDENTS did not appear and were not represented

- -

Approved Judgment

Digital Transcription by Marten Walsh Cherer Ltd.,
2nd Floor, Quality House, 6-9 Quality Court, Chancery Lane, London WC2A 1HP.
Telephone No: 020 7067 2900. DX 410 LDE
Email: info@martenwalshcherer.com
Web: www.martenwalshcherer.com

MRS. JUSTICE MOULDER:

1. This is the court's ruling on an application by the claimant, London Partners Capital Management LLP, dated 15th February 2021, for an order that the court makes a search, electronic imaging and provision of information order against the defendants, pursuant to section 7 of the Civil Procedure Act 1997, CPR 25.1 (1)(h) and/or section 37 of the Senior Courts Act 1981. The application was made without notice pursuant to paragraph F.2(1)(b) of the Commercial Court Guide on the basis that providing the defendants with notice of the application would or might defeat the object of the relief sought.

2. The court has determined to hear the application in private pursuant to CPR 39.2(3)(a) as publicity would defeat the object of the application and the court has concluded that it is necessary to sit in private to secure the proper administration of justice. Once the hearing on the return date has occurred, the judgement will be published in the usual way.

3. The application was heard remotely by virtue of the current pandemic, but the hearing has been transcribed and a transcribed account of the hearing will be made available to the defendants.

4. The court has had the benefit of oral and written submissions of Mr. Peto QC and notes the matters brought to the court's attention by way of full and frank disclosure as set out in the affidavit of Kasra Nouroozi-Shambayati, a partner in Mishcon de Reya, acting for the claimant.

5. In terms of evidence, the court has the first affidavit of Kasra Nouroozi-Shambayati dated 15th February 2021 and a second affidavit dated 21st February 2021.

6. I summarise the background to these proceedings very briefly and only to the extent necessary for the purpose of considering the application. The origins of the claim relate to the management of moneys by LPCM, a limited partnership, for Credins Bank pursuant to a Investment Advisory and Safekeeping Agreement. At the relevant time in 2017 the first defendant, Dr. Utkan, was the *de facto* CEO of LPCM. It is alleged that Dr. Utkan accessed the relevant accounts and, instead of buying certain Government bonds as instructed, transferred funds out of the accounts to accounts of himself and Pergamon, a company owned and controlled by Dr. Utkan. The amounts involved were some €74.5 million and $82.6 million.

7. Dr Utkan asserted to Credins at the time that the had purchased the bonds and provided confirmations which the claimant says were forged. His dealings are alleged to have involved breach of the fiduciary duties owed by the first defendant to LPCM and Credins. The second defendant, Thompson Crosby, was a member of LPCM and it is alleged that the knowledge of Dr. Utkan is to be attributed to the second defendant.

8. In September 2019 new management took over LPCM. A Settlement Agreement was subsequently entered into in October 2019 pursuant to which the first and second defendants agreed to transfer assets with a total value of some €130.9 million. These assets comprised securities then said to be with the State Bank of Mauritius (the "SBM Securities") and shares in three SPVs (the "Transfer Shares"). The value of these securities was some €45 million.

9. During late 2019 it appeared from correspondence with the defendants solicitors, Byrne and Partners, that steps were being taken by the defendants to transfer the SBM Securities to the claimant's nominee. However, the transfer did not take place and in December 2019 Byrne and Partners sent two letters to the claimants stating that SBM did not in fact hold the SPM Securities and that statements provided which purported to show the securities held in the accounts of SBM/Credins Bank and a conversation previously reported by Byrne and Partners with a purported representative of SBM should not be relied upon. The previous documents and alleged conversation thus appear to have been fabricated.

10. Credins has assigned to LPCM its claims against the first and second defendants. There has been a partial recovery in this case. In March 2020 LPCM recovered the Transfer Shares worth about €86 million leaving some €60 million outstanding.

11. Dealing with the procedural history, a worldwide freezing order was made against the first and second defendants, following an ex *parte* application, by the order of Foxton J dated 30th July 2020. It was subsequently continued at the return date and varied. It is now in the form ordered by Andrew Baker J following a hearing in October 2020. At the hearing before Andrew Baker J, an application was made by the claimant for further disclosure to comply with the terms of the worldwide freezing order, including the provision of documents to support specific questions which the claimant said had not been provided, contrary to the terms of the freezing order.

12. Andrew Baker J held the defendants had not complied “in full” with their obligations as regards Asset Disclosure Documents, Tracing Explanation and Tracing Disclosure and he made an order for some of the disclosure sought describing it as "specific and targeted relief." Andrew Baker J also ordered the payment into court of a sum of money of some €60 million from a BVI company, Washburn Limited, which, according to the defendant was said to be held in an account with Maya Bank Plc (and subsequently said to be in an account with a Turkish bank). Such payment has not been made and questions are now raised as to the legitimacy of Maya Bank.

13. The first defendant filed two affidavits in response to the order of Andrew Baker J on 16th and 20th November, 2020.

14. Dr. Utkan's wife, Ms. Moise, was not a party to the worldwide freezing order but has been joined as a defendant in the action on 1st December 2020. The defence was due to be filed on 22nd February 2021, following agreed extensions of time from 28th December 2020. A further extension has now been agreed between the parties to 22nd March 2021. This is said by the defendants to be due to the need to raise funds to meet legal expenses and to the fact that the first defendant had COVID in January.

15. The basis for the order which is now sought is:

    i) as ancillary to the worldwide freezing order to police the order of Foxton J dated 30th July 2020;

    ii) to preserve evidence that is or may be relevant; and

    iii) to preserve trust property.

16. It is clear that the court has jurisdiction to make orders ancillary to the freezing order which are necessary in the view of the court to make the freezing order effective: *JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev* [2016] 1 WLR 160 (CA) at [47].

17. Under Section 7 of the Civil Procedure Act the court may make an order for the purpose of securing the preservation of evidence or the preservation of property. CPR rule 25.1(1)(h) provides that the court may grant an order including a search order under section 7 of the Civil Procedure Act. In *ArcelorMittal v Essar Steel* [2019] 2 All ER (Comm) at [101] the Court said that it saw no reason why a search order could not be ancillary to proceedings in which a freezing order had been granted.

18. In relation to the application for a search order, the case law has consistently stressed that a search order is an exceptional, not a routine order, and one that requires careful justification: see *ArcelorMittal* at [97]. The conditions to be satisfied are, again, as set out in *ArcelorMittal* at [98] to [99]:

    i) there must be a strong *prima facie* case in the civil cause of action;

    ii) a serious danger to the claimant that the order will avoid, the evidence to be preserved must be of major if not critical importance;

    iii) clear evidence that the respondent to the order possesses relevant evidence;

    iv) a real possibility that the evidence will be destroyed if the relief is not given; and,

    v) that the harm to the respondent will not be out of proportion to the legitimate object of the order.

19. It is clear that unless those conditions are satisfied an order should be refused. If they are satisfied, an order may or may not be granted; it remains a matter of discretion. The Court will still have to weigh in the balance the claimant's need for the order against the injustice to the respondent in making the order ex parte without any opportunity for the respondent to be heard.

20. Bearing in mind that a search order is an exceptional order, the court considers, first, the preconditions on the facts of this case. First of all, there must be a strong *prima facie* case of a civil cause of action. I am satisfied that there is a strong *prima facie* case on the evidence before me. There is clear evidence that the first defendant failed to comply with his contractual obligations under the Settlement Deed. He failed to cause the transfer of the securities as required by the Settlement Agreement. It would also appear that there is a strong *prima facie* case that he acted in breach of fiduciary duty in transferring the assets out of the account to his own accounts.

21. The second condition, a serious danger to the claimant that the order will avoid, and the fourth condition, a real possibility of destruction, can be considered together because they are related. It was submitted for the claimant that unless the court takes charge and permits a search of documents, the relevant documents will remain concealed. It is submitted that the documents should have been disclosed and the order now will police and enforce the October order. It was further submitted that the order will identify and preserve valuable assets.

22. As stated in *ArcelorMittal* is that if there is solid evidence of serious wrongdoing that provides a starting point for serious concerns as to the risk of destruction of documents. Here, the nature of the alleged wrongdoing and the apparent breach of the Settlement Deed provides the starting point for serious concern. In this case there is the additional evidence of what occurred in relation to the purported transfer of the SBM Securities. It would appear that false documents were provided and there is evidence of a fictitious conversation. There is, further, the changing account in relation to the Washburn moneys which provides concern.

23. I am satisfied from the evidence that there is a real risk of destruction of documents on the part of the first defendant.

24. In relation to the third defendant, however, Ms. Moise, I am not satisfied that such a risk has been shown. It was submitted that the court should infer such a risk because the third defendant is likely to be directed by her husband or seek to protect him; that there is evidence of transfers of funds having been made to her account; and evidence of a lavish lifestyle. Notwithstanding that, it seems to me that there is no evidence to establish a real risk of destruction or removal of evidence on her part.

25. As to the third condition, the clear evidence that the respondent to the order possesses relevant evidence of major importance, the claimant seeks a search order of the business premises and of the residence of the first defendant. The business is carried on at an address in Millbank in London. The residence of both the first defendant and third defendant is in SW5 in London.

26. It seems to me likely that evidence to support the identification of the assets in accordance with the freezing order are likely to exist at the business premises and are likely to exist in electronic form on laptops and similar devices which are likely to be with the first defendant and, therefore, may be at the residence. I further accept that in a case such as this it could be the case that there are hard copy documents which are also in the possession of the respondent and either at the business premises or the residence.

27. In relation to the other locations referred to in the draft order, I am not satisfied that an order should be made in relation to as yet unidentified locations. In relation to the four storage facilities, in my view the "Safe Store" facility at Tregunter Road should not be the object of the search order. The evidence before me is that this facility contains personal effects and business assets of the third defendant who runs a fashion retail company. Further, in a letter of 15th January 2021, the third defendant offered to provide an inventory. I am not, therefore, satisfied that there is clear evidence that relevant evidence will be held at Safe Store or that a search order is proportionate.

28. As to the remaining three storage facilities, I accept that documents could be held in such facilities in a case such as this but, in the absence of clear evidence I am not persuaded that a search should be ordered prior to the return date. I will however order that the defendants should not attend those facilities in order to preserve the status quo.

29. Turning then to the issue of proportionality, the harm likely to be caused by the execution of the order to the respondent and his business affairs must not be excessive or out of proportion to the legitimate object of the order. The proper function of the

search order is to support the freezing order rather than to provide evidence in support of the wider proceedings.

30. The requirement of proportionality involves the court considering whether there has been any delay and whether what will be achieved by the order can more appropriately be obtained through a less intrusive order which may be less damaging to the defendant: *Gee on Injunctions* paragraph 17-021.

31. As to the issue of delay it was submitted for the claimant that there has been no delay. The first defendant filed his second and third affidavits in November 2020, the claimant's solicitors then wrote to defendants' solicitors asserting that the defendant had not complied with the court orders and setting out the detailed complaints in that regard. It is submitted that the defendants' solicitors "failed to respond." The claimant then changed its instructing solicitors in mid December 2020 and it was submitted that the current solicitors then acted promptly to bring this application. It was submitted that the timing of the application does not affect the likely existence of the materials and cannot affect its necessity or utility.

32. The application for the search order and the complaints about the behaviour of the first defendant, in particular the failings to comply with the order, are against a background that the claimant has been aware since December 2019 about the SBM documents and the other evidence which was apparently false. However, I accept that up until the present the first defendant has been in control of the disclosure process and any delay, therefore, on the part of the claimant in bringing this application is not a factor which leads me to reject the application. If the first defendant still has relevant evidence which should be preserved and which is at risk of destruction, the order can be made. The court does have to consider whether what is sought can be achieved through a less intrusive order and the court has considered whether or not the alternatives such as committal proceedings or an application to cross-examine the first defendant should be regarded as an appropriate alternative.

33. I accept that what is needed to establish compliance with the freezing order is both the provision of information but also the documentation to support the information provided and, in those circumstances, the alternative of committal proceedings or cross-examination are not likely to achieve the desired effect bearing in mind the inherent delay in such proceedings and the risk that documents may be destroyed in the interim.

34. I have considered carefully whether or not the first defendant can be said to be in breach of the Court order from October. I note that he has engaged in the process. He has filed the second and third affidavits in November, and the scope of the alleged failings has not yet been adjudicated upon by the court. I have also considered the evidence, in particular the correspondence between the solicitors in which the defendants' solicitors (a letter of 18th December 2020) said they were waiting for money to be paid to cover their fees in order to finalise the defence, and the fact that the claimant refused to allow potential proprietary assets to be used in order to pay for such legal fees. I have also taken into account the fact that the defendant went into hospital suffering from COVID on 13th January, although he was discharged on 16th January.

35. Weighing these matters, I am persuaded that, subject to considerations discussed in the course of the hearing as to the breadth of the search order, that the Court should make the search order against the first and second defendant. The conditions are satisfied and the court's discretion should, in my view, be exercised in order to preserve the evidence and to maximise the effectiveness of the freezing order.

36. In relation to the third defendant, however, as indicated, I am not persuaded that she should be made a respondent to the search order. I note that amounts have apparently been transferred to her but the case against her is one of receipt of trust assets and, as dealt with above, I am not satisfied that the risk that she herself would destroy evidence is made out.

37. As I indicated in the course of the hearing, I have considered whether or not a hard copy search should be permitted in addition to an imaging order. The claimant drew my attention to the observations of the Court of Appeal in *TBD (Owen Holland) Ltd v Simons* [2020] EWCA Civ 1182 at [180]:

> "If the court is prepared to grant an imaging order, then it should be presumed unless the contrary is shown that a traditional search order is unnecessary. Even if the court is prepared to grant a search order at all, careful consideration should be given as to the scope of the order ...".

38. In this case I have accepted the submission that documents evidencing the assets may well exist in hard copy form given the steps that the first defendant has apparently taken to conceal or mislead over recent months. Accordingly I take the view that it cannot be said that a traditional search order is unnecessary.

39. I have also considered whether or not the claimant should be permitted to inspect the documents or whether this should await the return date. Again, I have had regard to the observations of the Court of Appeal in *TBD (Owen Holland)* at [193]:

> "The basic safeguard required in imaging orders is that, save in exceptional cases, the images should be kept in the safekeeping of the forensic computer expert, and not searched or inspected by anyone, until the return date. If there is to be any departure from this, it will require a very high degree of justification ...".

40. Having considered carefully the scope of the search order, I am not persuaded that this case is one in which an immediate order for inspection is justified. I have considered the submissions of counsel that they need to be able to act quickly to preserve assets and prevent assets being put out of reach. However, it is a balance to be struck and notwithstanding the allegations and the risk which the claimant identifies, given the breadth of the items to be searched for, allowing the claimant to inspect the documents immediately would, in my view, be disproportionate and potentially allow them to see documents beyond that which they are entitled to see.

41. I have, therefore, concluded that I am not willing to make an order on a without notice basis in this case which extends to allowing the claimant to inspect the material which has been imaged. The scope of inspection is a matter which should be argued at the return date.

42. As to the breadth of the order, I have considered in detail in the course of the hearing the wording of the order and do not propose to repeat that now. I would draw attention, however, to the following:

    i) I have excluded the requirement to hand over personal chattels on the basis that they are of relatively low value having regard to the asset disclosure which has been made to date.

    ii) I have provided for all devices which are at the residence to be searched notwithstanding that these may belong legally to the third defendant but the protection, in my view, to the third defendant is that she will be able to attend at the return date and make representations as appropriate if there are any objections in that regard as well as having the usual protections in the course of the search to seek legal advice and to apply to the court.

    iii) I have limited the period for which the computers or other devices can be removed from the premise to allow for imaging. This is to limit, so far as possible, any damage to the legitimate business interests of the defendants.

    iv) I have had regard to the current pandemic and there are measures included within the order which are intended to provide an appropriate measure of protection for the defendants. They also have the general right to apply to the court should there be any particular concerns in that regard.

43. On that basis I am, therefore, satisfied that it is appropriate and proportionate and in the interests of justice to make the order sought on the terms I discussed in the course of the hearing this morning.

- - - - - - - - -