IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
CHANCERY DIVISION

No. BL-2020-000565

[2021] EWHC 2389 (Ch)

Rolls Building
Fetter Lane
London, EC4A 1NL

Monday, 9 August 2021

Before:

MS CLARE AMBROSE

(Sitting as a Deputy High Court Judge)

B E T W E E N :

(1) CIRCUMFERENCE INVESTMENTS (EUROPE) LIMITED
(2) CIRCUMFERENCE (LUXEMBOURG) SÀRL
(3) CIRCUMFERENCE HOLDINGS LIMITED — Claimants

- and -

NICHOLAS JAMES MARTIN — Defendant

MR S. MILLS QC and MR Z. KELL appeared on behalf of the Claimants.

MR S. AULD QC appeared on behalf of the Defendant.

J U D G M E N T

(v i a M i c r o s o f t T e a m s)

(Please note this transcript has been prepared without the aid of documentation)

CLARE AMBROSE:

1 This is the hearing of the claimants' application dated 27 July 2021 for an unless order and it flows from a worldwide freezing order granted on 13 July 2021, together with a proprietary injunction prohibiting the defendant dealing with assets allegedly held on trust.

2 A draft order was put forward and the key request made by the claimant was for an order that by 13 August 2021, the defendant provides unredacted true copies of all bank statements; recording all transactions for the accounts set out in the draft order; that the defendant provides a sworn affidavit setting out details of each and every payment made by him or on his behalf by which he spent or dealt with the net sale proceeds in respect of two Luxembourg properties, including bank statements recording such payments; also setting out the location of pieces of art and details of properties in France and Morocco that had been referred to in a statement of wealth given by him to ING Bank; and also providing details of properties in Guernsey and a piece of land in France referred to in his witness statement dated 16 July 2021. Also, that by 13 August 2021, he pays the sum of €751,750 into court, this sum being the difference between €836,715, as the net sale proceeds of three properties sold by the defendant, and €85,000 that he originally stated was a loan he had to repay to his wife's family out of the proceeds of sale of those properties.

3 In addition, the claimants seek an order that the entire net sale proceeds of a further property in Luxembourg ("Property 9") that has been sold be held subject to the proprietary injunction already granted; that in default of any of the provisions above, the defendant's reamended defence be struck out without further order; that the defendant be debarred from defending the claim; and that the claimants be entitled to apply for judgment.

4 Before the court, there is also the defendant's application dated 29 July 2021 seeking an extension of the timetable for service of witness evidence for the trial of this matter fixed for fifteen days at the end of February 2022. He also makes an application dated 3 August 2021 seeking a retrospective extension of time to comply and relief from sanctions in relation to a provision in the freezing order requiring him to provide certificates from three banks.

The factual background

5 The defendant is a British national born in Guernsey. He is a chartered accountant. He also qualified in Luxembourg and is resident there. He owned the share capital of a Luxembourg company called Coficom. The claim that gives rise to the injunctions in dispute concerns a sale and purchase agreement entered on 15 October 2018 between the first claimant and the defendant under which the defendant sold his entire share capital of Coficom and the consideration included shares in the third claimant. The share and purchase agreement is subject to an exclusive jurisdiction clause agreeing on the English courts. The first claimant assigned its rights under the SPA to the second claimant.

6 The claimants claim that they are victims of the defendant's fraudulent misrepresentations and entitled to return of the purchase price and other monies. The underlying claim is worth around £3.4 million. Part of the claim is a proprietary claim that is said to be worth US$1.545 million and the costs budget presently puts the claimants' costs at around £1.9

million. So the claimants say that at least £5.4 million is at stake for them, and the freezing injunction puts the figure at £5.44 million as the sum frozen.

The procedural background

7 These proceedings were started by a claim form issued on 23 March 2020. The case is listed for trial and directions for service of evidence were given on 9 December 2020. I flag up the existence of two sets of other proceedings. First, in Luxembourg a freezing order was granted on 30 April 2020 without notice. On 22 July 2021, the claimants initiated an application for a second freezing order in the Luxembourg courts without notice and a further order was made on 28 July 2021. The Luxembourg orders do not have a proviso for legal expenses and living expenses. That is a matter that has given rise to an issue between the parties before me. It is common ground that the new freezing order made at the end of July 2021 is of wider extent than the previous order and the defendant says it applies to eight banks and twenty-nine notaries.

8 Secondly, a freezing order was granted in November 2020 in the Guernsey courts against the defendant and trustees of a related trust related but this freezing order appears to have limited relevance to the issues before me.

9 So turning to the English freezing order, the background was that up until 11 May 2021, the defendant was represented by Penningtons and leading and junior counsel. Penningtons came off the record at this point but the defendant, in his statement, said that they continued to assist him off the record. The defendant has epilepsy and his evidence is that he is currently looking after his child on a full-time basis due to his wife's ill-health and that he has had to travel to Germany for his child's treatment.

10 The claimants understood in May 2021 that the defendant had ten properties in Europe and three properties overseas. It is common ground that he had a family home in Luxembourg and also a number of investment properties there that were rented out. In June 2021, the claimants discovered that the defendant had transferred three of these properties and asked the defendant for information. At that stage, the defendant did not have solicitors but he had instructed counsel by way of direct access and his counsel, Mr Christopher Snell, wrote on the defendant's behalf (and on instructions) saying that the defendant has sufficient means to meet any judgment. On 21 June 2021, the defendant's counsel wrote on his behalf saying that he continued to own a number of properties which were not presently marketed for sale.

11 On 28 June 2021, the claimants applied for a freezing order on notice and the defendant made an application to adjourn that application and to strike out the claim made by the third claimant. A hearing took place before Meade J of that application to adjourn and the defendant was represented by counsel from the CLIPS *pro bono* list. The defendant told the court through counsel that there were additional properties that he had sold where the property had not yet been registered in the buyer's name and these were additional to the properties that had been raised by the claimants. The judge of his own initiative made an order requiring the defendant to provide to the claimants' solicitors details of any sales of any property or transfers of any interest in any property that he has made in the last three months to include the date upon which the property was sold or transferred, the identity of the transferee, the consideration given, and that any transferee has yet to pay the sale price and the identity of the person to whom the proceeds are payable. Meade J also adjourned the application for the freezing order.

12 On 7 July 2021, the defendant came back with the details of four properties, including his family home, a French property, and two Luxenberg properties. He did not provide clear details of the recipient, simply giving the surname of his wife.

13 The claimants were dissatisfied because they understood was that he had transferred three other Luxenberg properties to his wife on 1 June 2021. At that point, they made a without notice application for a worldwide freezing order and a proprietary injunction on 13 July 2021. The without application was granted by Joanna Smith J and she granted the injunction prohibiting him from dealing with assets held on trust. It was granted up to £5.44 million. The judge was satisfied that the defendant had been in breach of the order of Meade J in not having provided sufficient details of the properties sold or transferred.

14 After that order, the defendant served an affidavit giving a table of ten properties that were stated to have been sold between November 2020 and 18 June 2021. The properties are listed in a table provided in the defendant's witness statement and affidavit of 16 July 2021. The same table is incorporated into his most recent statement served on 5 August 2021. The table shows that ten properties had been sold when he was entering into correspondence on 21 June 2021 to the claimants' solicitors saying that he continued to own properties and that they were not marketed for sale. The total sale value of the ten properties is around €5.4 million.

15 The return date on the freezing order was 20 July 2021. At that hearing, the defendant was represented by Paul Nicholls QC. He maintained that the properties transferred on 1 June where outside the scope of the order of Meade J because there was a pre-sale agreement, a *compromis de vente*, falling outside the three-month period of the order. Bacon J concluded that the defendant had been disingenuous in not disclosing these and in saying that they fell outside the order. She also concluded that there was a serious discrepancy regarding what he had said in relation to the proceeds of sale of properties 4 to 6 on his list, and that there was a sum of €750,000 that was simply unaccounted for. She also took account of his refusal to provide details of transferees and bank accounts but on the disclosure part of the order, she allowed him to redact the identities of the transferees of the properties.

16 On 27 July 2021, the application for the unless order that is before me was made. At this point Penningtons came back on record. They applied for an extension of time to respond to the application and that application was heard by Joanna Smith J. She allowed the adjournment and she also allowed some relief from sanctions on compliance with the order for providing the bank certificates. On 3 August 2021, the defendant actually issued an application making clear his application for such relief from sanctions and that is one of his applications before me.

17 In terms of evidence before me, I have several statements from Mr Turner, who is a director of the third claimant, and also a statement from Charlotte Hoffman. I also have two letters from Linari Law, which is a Luxembourg law firm. From the defendant, I have A statement and affidavit served by him on 16 July, 23 July, 30 July 2021, and his third witness statement on 5 August 2021. He now says there is no discrepancy regarding what happened to the proceeds of the properties 4 to 6, and that €825,000 was mainly used to repay family loans. He provides a schedule that he has made relating to various amounts said to be due to family members. Underlying documents for these transactions are not provided. He says that a substantial sum is due to his father-in-law from 2012 under his marriage settlement. He also says that substantial money was paid back as rent paid by his mother-in-law and he paid rental income due to his wife because she did not receive her share of rental income on

jointly owned properties. He also says he has paid substantial sums for his wife's living expenses based on his marriage contract.

18 These items are substantial. The sums said to have been paid to family members come to €775,000. On top of that, he gives invoices, mainly for legal fees, including Mr Nicholls's invoices and he also says his mother paid Mr Nicholls and he has a liability to reimburse her. The defendant also relies on the statements of Ms Hill, in particular in relation to the application for an extension of time.

19 The claimants' position is that the defendant's explanations and his excuses are not worth the paper they are written on. They say he has misled the court and will continue to do so unless the price of non-compliance is serious. In oral submissions, when it was said by the defendant that there was no suggestion that he acted in bad faith, the claimants made clear that their position is that the defendant has acted in bad faith, that his correspondence shows that he has not acted honestly, and that he has misled the court. They say that the overwhelming evidence shows that the defendant knew that he had failed to give full information in respect of his trust assets and that his evidence regarding the missing proceeds of sale of €836,750 is extraordinary. His explanation as to having spent €825,000 on family loans is simply not credible. He has still not explained the discrepancy that was found by Bacon J in having said that there were family loans of £85,000 and now he has come forward with a series of other liabilities but no underlying documents to support this. The claimants suggest that Bacon J was correct to conclude that the defendant has been thoroughly disingenuous and evasive.

20 On 5 August 2021, in his third statement, the defendant disclosed for the first time that the sum of US$322,000, that was part of the original consideration, was used to discharge a mortgage on Property 4 and this is a property now owned exclusively by his wife and the claimants claim a traceable right into that property. The defendant also explains that Property 9 on his list was acquired using what the claimants say are trust assets because, on 5 August 2021, he disclosed that the purchase of that property in September 2019 was effected using monies transferred into his account by the claimants, and are part of the trust assets, and that this property should now be subject to the propriety trust.

21 The claimants' position is that now is the time to impose a sanction that will be effective. They ask the court to order him to provide this information and to pay the sum of €750,000 into court. This will ensure that he will not benefit from the misleading information he has provided. Unless the sanction is serious, he will not comply. They say that the order is proportionate because it relates to the sum that is missing and the discrepancy that Bacon J identified and has not been explained adequately. They argue that the unless order being sought is the correct and fair price for the defendant to be permitted a further shot at compliance with the court's orders.

22 The defendant's position on the claimants' application is to ask the court to take into account his health and his family considerations. Particular emphasis is placed on the fact that he has been a litigant in person for much of the time when these applications have been made, that he suffers ill-health, his wife also suffers ill-health, and he has had full time care of his daughter. They say that the sale of assets in Luxembourg and France was to facilitate his defence of the proceedings. Mr Auld QC makes clear that the defendant has apologised for the shortcomings in his response to the orders and that the defendant and his legal team have put a huge effort into putting matters right at very short notice in circumstances where the claimants have used invasive remedies and been aggressive both in making their applications and also in their correspondence and the deadlines imposed. They point out

that Joanna Smith J considered that the defendant was entitled to more time and that the deadlines proposed by the claimants were not fair.

23 The defendant says that the effect of the order made recently in Luxembourg prevents him from using assets for living expenses or legal costs and the court should ensure that the claimants incorporate a proviso in the Luxembourg orders to enable fair conduct of his defence. They say the proper purpose of the freezing order is not to prevent a party defending claims but only to ensure the fair and proportionate preservation of freezing of assets. The defendant's position is he has not misled the court at any stage, he has no intention to mislead, and there was, in fact, no discrepancy before Bacon J and he has corrected what he acknowledges was an error. He has accepted that he did not get things right but he has made strenuous efforts to comply with what were very onerous provisions. Where he has failed to get things right, he has apologised and sought to correct the position. He is entitled to deal with his property to provide funds for ordinary living expenses or to pay legal costs. Mr Auld QC emphasised that the defendant has filed a very detailed first statement and that the orders not now sought are punitive and exceptional, and that they are inappropriate and disproportionate.

24 Mr Auld QC says that the issues raised by the claimants were not serious breaches of the orders on the part of the defendant, they are merely issues regarding administrative provisions, and there was no deliberate hiding of assets. It was said that there was no suggestion of bad faith. That was disputed by the claimants. It was a situation, at highest, of a litigant in person who had made mistakes. A breach of the administrative provisions of the freezing order should not lead to an order barring any defence of the claim. That would be effectively striking out the substantive defence and that, he says, would be exceptionally unfair. The defendant's suggestion is that if there is any issue with the information provided, then the correct and proportionate course is to make an order for such information to be provided.

The law

25 CPR Part 3 sets out at 3.1 the court's powers and it gives wide powers including that the court may make an order, subject to conditions. The court may also order a party to pay a sum of money into court if that party has, without good reason, failed to comply with a rule. Paragraph 3.4 provides power to strike out a statement of case, including on grounds of failure to comply with a rule, and paragraph 3.5 allows the court to give judgment without trial after striking out. The *White Book* suggests that these rules enable the court to make a conditional order effectively stating that unless by a certain date a party complies, their statement of case will be struck out.

26 The claimants acknowledge that an unless order where a defence is struck out is a serious sanction, and under English law, this sanction is used sparingly by the court, usually as a last resort where other attempts have failed. They refer to the *Chancery Guide* and *Marcan Shipping v Kefalas* [2007] EWCA Civ 464. They make it clear that before making a conditional order, including an order for striking out a defence, the judge should carefully consider whether the sanction being imposed is appropriate in all the circumstances. It cannot be just used for good housekeeping.

27 Both sides referred me to Gee on *Commercial Injunctions* at #1.053 but acknowledge that an order requiring payment in should be only imposed in extreme circumstances on grounds of previous misconduct, that the court has to bear in mind Article 6(1) rights to a fair trial, and should not prevent a person exercising a properly arguable right. Both parties refer to law

from *Huscroft v P&O Ferries* [2010] EWCA Civ 1483 and *Olatawura v Abiloye* [2002] EWCA Civ 998, making clear that if a court is going to attach a condition to an order, it must identify the purpose of the condition and consider whether it is a proportionate and effective means to achieve the purpose of that condition.

28 There is authority in a *Olatawura v Abiloye* where Simon Brown LJ suggested that a court should be cautious to ensure that an order for security should not deny access to court and said:

> "...a party only becomes amenable to an adverse order for security under rule 3.1(5) ... once he can be seen either to be regularly flouting proper court procedures (which must inevitably inflate the costs of the proceedings) or otherwise to be demonstrating a want of good faith - good faith for this purpose consisting of a will to litigate a genuine claim or defence as economically and expeditiously as reasonably possible in according with the over-riding objective."

29 Here, the order sought is more in the form of a traditional unless order than a conditional order but similar principles apply. The caution expressed in *Markham* and *Olatawura* apply to the type of order that is being sought by the claimants. There is precedent for an unless order being made as a sanction for a failure to comply with the disclosure provisions in a freezing order where the sanction for non-compliance is the claim or defence being struck out. That is seen in *Thevarajah v Riordan* [2016] EWHC 3464.

30 The defendant questioned whether there was jurisdiction for the court to make an order for a payment into court because this was not expressly stated in Part 3. The court's powers under Part 3 are wide and expressly include provision for making an order for payment into court. However, the court's discretion to exercise such a power must be exercised with caution. I take into account the authorities I have recently referred to in relation to and the need to consider whether an unless order would be proportionate, and whether the sanction imposed is appropriate and proportionate.

Conclusions

31 In relation to the defendant's claim for relief from sanctions, this appears to be no longer disputed because the parties have resolved that the relief may be given on undertakings. In relation to the defendant's application for an extension, the claimant was willing to allow an extension until 3 September 2021. The defendant was asking for an extension to 15 October 2021 for service of witness statements. I am not satisfied that the defendant has justified the length of extension requested. It is only suggested that one statement will be served on his behalf and Penningtons have been instructed from the outset. An extension into mid-October would jeopardise the preparations for trial. It would need greater justification than the fact that some of that period in question falls over the holiday period, which seems to be one of the reasons put forward. I allow until 17 September for the statements to be served. That allows some extra time and accounts for holiday commitments but also ensures that the tight trial preparations will not be put in jeopardy.

32 On the claimants' application, I am satisfied that the defendant's response to the order of Meade J was unsatisfactory for the reasons given by Bacon J. The defendant has not shown any fair basis for his failure to include the other six properties that he had sold and was about to transfer. Meade J's order was very clear and it not only referred to sales but also transfers and the defendant should have known the transfers made on 1 June 2021 were

highly relevant. He was either being careless or deliberately being economical with information.

33 The defendant's response to the order of Bacon J and that of Smith J were also unsatisfactory. He had not explained what happened to the trust assets in the sum of US$322,000 until 5 August 2021 in the face of this application. It should not have been necessary for the matter to come back to court a fourth time in order for this information to be provided. The defendant has also failed to give satisfactory information in relation to the chattels referred to in his wealth statement and expressly required under the freezing order. It was very clear what information was requested in relation to these and he has failed without good excuse to provide that information.

34 I take into account that he has been a litigant in person but I also take into account that he is a chartered accountant. He has been assisted by experienced counsel on a direct access basis and he has had a full team assisting him since 27th July 2021. The mere fact that he has been a litigant in person or has had health difficulties does not justify the way he has responded to these orders and the lack of full response given in the face of clear indications from Meade J, Joanna Smith J, and also Bacon J that the court required full information and that discrepancies would not be acceptable.

35 Most significantly, he has not given a satisfactory explanation as to what happened to the €750,000 from the proceeds of sale that cannot be accounted for in terms of legal expenses. Bacon J correctly concluded that he had failed to provide an adequate account of those and the fact that he still has not provided an adequate account suggests that a serious sanction is now appropriate. The breaches cannot be regarded as merely administrative shortcomings. The matters complained of - for instance, the response to Meade J's order, the discrepancies before Bacon J, and the discrepancies regarding information as to the trust assets that only emerged at the end of last week - are significant. There is an urgency in relation to these matters because these properties are being sold now, the funds are being released, and the defendant is not within the jurisdiction. His response has not been satisfactory and a serious sanction is appropriate to ensure that the matter does not have to keep coming back to court and that compliance can be brought to a close. An unless order will give greater certainty as to the outcome if there is not adequate compliance.

36 The defendant's proposal that the court simply make another order for further information to be provided would not adequately address the shortcomings that the court has seen over the various hearings. However, the order for payment into court is not the usual response to unsatisfactory compliance with a freezing order. It has not been shown to be proportionate since if the defendant is right as to how he spent the money from the proceeds of Properties 4 to 6, then it could unfairly stifle the claim and the purpose of a freezing order is not to secure a claim. The authorities suggest that orders for payment in are only to be given in extreme circumstances and here, although the defendant's conduct has been unsatisfactory, that, in itself, would not justify the sanction being sought that the claim be struck out if payment in is not be made. So I do not grant the order for payment in or an unless order requiring that.

37 That brings my judgment to a close.

CERTIFICATE

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This judgment has been approved by the Judge.