

Neutral Citation Number: [2016] EWHC 2135 (CH)

Case No: HC-2015-001925

**IN THE HIGH COURT OF JUSTICE**  
**CHANCERY DIVISION**

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

Date: Thursday, 21 July 2016

BEFORE:

**Mr Clive Freedman QC**  
**sitting as a Deputy Judge of the High Court**

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BETWEEN:

**UPL DEUTSCHLAND LIMITED** Claimant

-and-

**AGCHEMACCESS LIMITED & ORS** Defendants

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8th Floor, 165 Fleet Street, London EC4A2DY Tel No: 020 7404 1400 Fax No: 02074041424  
Web: [www.DTIGlobal.com](http://www.DTIGlobal.com) Email: TTP@dtiglobal.eu  
(Official Shorthand Writers to the Court)  
WordWave International Ltd trading as DTI

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**MR DAVID LOWE** appeared on behalf of the Claimant

**MR SIMON DAVENPORT QC** appeared on behalf of the Defendants

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**JUDGMENT** (As Approved)

1. Mr CLIVE FREEDMAN QC: This is an ex tempore judgment in relation to the question of costs. It arises out of a notice of application dated 22 April 2016. The application is that of the Claimants against the First Defendant, AgChemAccess Limited ("ACA"), and the Third Defendant, Mr Gooch, (together "the Defendants"), that they provide certain documents and information relating to their assets. It is ancillary to and arose out of a freezing order which had been made against them on 18 May 2015. The application is supported by Mr Jeremy Hertzog's second witness statement, which is dated 21 April 2016, in which he sets out the basis upon which the documents and the information are sought. In response to that witness statement there is the fourth witness statement of Mr Nicholas Gooch on 13 July 2016 and the third witness statement of Mr Jeremy Hertzog dated 19 July served in response thereto.
2. The parties have come to terms in order to dispose of this application but they have been unable to agree the question of costs. Accordingly this matter comes before the Court in circumstances which are not unfamiliar, namely where the application has been sorted but the parties are unable to agree about costs and the Court is then asked to decide the costs.
3. The Claimants say that repeated attempts were made to obtain the relevant documents and information in correspondence. It refers to assurances about the supply of information that it says were not honoured; it refers to impasses being reached in circumstances where no response was forthcoming, and it refers to lack of assistance and engagement from the Defendants as necessitating the application.
4. The Defendants say that Mr Gooch has been at all times co-operative; that he has not been given a full and proper opportunity to comply; that, if the application had not been issued, substantially the information and documents which it has agreed to provide would have been agreed to be provided in any event.
5. The Claimants are represented by Mr Lowe of counsel, who says that the Claimants should have their costs. He says, first of all, they have been successful in their application, having obtained the majority of the relief which they seek. Secondly, they say that the conduct of the Defendants when delaying was without excuse following the issue of the application until shortly before the hearing and is another reason why the Court ought to impose a costs order against the Defendants.
6. The Defendants say that the usual order in a case like this is costs in the case, and in particularly the circumstances of this case there is no reason to depart from that. Following the short adjournment, Mr Davenport, QC, who appears on behalf of the defendants, submitted that, while costs in the case should be the order, the Defendants should have the costs of today in order to reflect that the Claimants should have agreed to costs in the case being the appropriate order.

7. Mr Lowe reminds the Court of the relevant provisions in the White Book as regards the court's discretion as to costs, which are well known, and in particular that under CPR 44.2, under the heading "The Court's Discretion as to Costs", at CPR 44.2(1) the court has discretion as to whether costs are payable by one party to another, the amount of those costs and when they are to be paid, and:

"(2) If the court decides to make an order about costs-

(a) the general rule

is that the

unsuccessful

party will be

ordered to pay

the costs of the

successful party;

but

(b) the court may

make a different

order. [...]

(4) In deciding what order (if any) to make about costs, the court will have regard to all the circumstances, including

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(a) the conduct of all the parties;

(b) whether a party has succeeded on part of its case, even if that party has not been wholly successful; and

(c) any admissible offer to settle made by a party which is drawn to the court's attention, and which is not an offer to which costs consequences under Part 36 apply."

At (5) the conduct of the parties includes various matters, including -

"(b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;

(c) the manner in which a party has pursued or defended its case or a particular allegation or issue."

8. In relation to the delay that is complained of in respect of this matter, the Claimants make a complaint about the Defendants not engaging after the time of the application. Reference was made to the Practice Direction 23A about evidence and in particular paragraph 9.4:

"Where a respondent to an application wishes to rely on evidence which has not yet been served he should serve it as soon as possible and in any event in accordance with any directions the court may have given."

9. I first of all consider the question about which party has been successful in this matter and how that should be reflected, if at all, in relation to the order for costs. The difficulty here is that where a defendant has acceded to the relief sought it does not follow that if it had been contested the Court would have necessarily found for the Claimants. I do bear in mind as a starting point that the fact that a party accedes to relief is an indicator that that application was justified and would have succeeded, but it is no more than a useful starting point. There are reasons in an interlocutory application why a party might accede to relief, not least to save costs or to be seen as reasonable and co-operative. One also has to be wary about providing obstacles to compromise so that nobody would accede to an application because the court would infer success from the capitulation.
10. That sentiment is reflected in the recent case of **Hospital Metalcraft Ltd v Optimus British Hospital Metalcraft Ltd and ors** [2015] EWHC 3093, where Rose J was commenting on a case to which I will refer later in this judgment, **Picnic At Ascot Inc v Derigs & Ors** [2001] FSR 2 at page 8. In the **Hospital Metalcraft** case, at paragraph 13, Rose J referred to Neuberger J's judgment in **Picnic at Ascot**, that the court can take into account the conduct of the parties for whom costs are sought in failing to give undertakings in due time. She went on to say:

"I accept the important point that the judge made that one must not penalise parties who initially say that they are going to contest an application and then capitulate. Such an approach would encourage parties to continue fighting even if they expect to lose if they would expect, at the end of the fight, the costs to be reserved but regard themselves as being at greater risk of having to pay the other side's costs if they give undertakings in advance of the hearing."

11. I note, however, that Neuberger J in the **Picnic at Ascot** case itself did make an order that part of the costs be reserved and the costs of the hearing for the Claimants in any event.
12. A particular concern in relation to evaluating whether a party has been successful is the difficulty at an interlocutory application to examine whether the fact that the relief has been acceded to shows that the relief would necessarily have been granted. There is a particular case management issue that arises in relation to that. The difficulty is one of

proportionality and the allocation of court time. If it were necessary to analyse that in great detail, then the danger would be that one would effectively have to have heard the entirety of the application in order to decide what would have occurred.

13. It seems to me that one of the matters that I am entitled to take into account is that the Court is entitled to have a rather broad-brush view in relation to the issue of success without having to look at every nook and cranny of the nature of the case and of where the merits lie. With this in mind, I looked at the various heads of relief sought and then to that which has been provided.
14. The first concerns the disclosure of the ACA bank statements in the weeks commencing 4 April 2016, 11 April and 18 April. I note that the bank statements for the weeks commencing 11 April and 18 April had been provided. As regards 4 April, that has not been provided and by paragraph 1A of the draft consent order it is to be provided. It is also to be noted that in the draft consent order at paragraph 7 there is a declaration as to the meaning and effect of paragraph 17B of the freezing order. The reason for that was that there was some question as to the precise meaning of it and whether that which was embraced would have included the bank statements in respect of the week up to 4 April 2016. It seems to me that the order was not drafted as clearly as might have been the case. If I had had to resolve the construction point I might well have found in favour of the Claimants in that regard, but I do not attach any substantial criticism for the Defendants for finding it obtuse and I bear in mind that it has now been clarified.
15. The second part of the consent order concerns bank statements for various accounts held with HSBC for the period 25 June 2015 to 18 July 2016. These were not provided for in the original freezing injunctions and therefore it is a disclosure which is additional to that. The way in which Mr Lowe puts it is that these bank statements are sought in the spirit of the order and are analogous to those which are provided in the existing schedules to the freezing injunction.
16. The matter is dealt with in Mr Hertzog's second statement at paragraphs 59 to 64. Mr Hertzog recognises that these are matters to be added to the schedule to the freezing order and did not form an original part of the order. He then, at paragraph 63, says that the Claimants are concerned that Mr Gooch may have been using funds in his personal HSBC accounts to finance his ordinary living and other expenses and doing so in breach of the freezing order. At paragraph 64 he says:

"The Claimants therefore make this application to obtain disclosure of bank statements relating to the HSBC accounts from the date of the Freezing Order to date. Disclosure of the bank statements will enable the Claimants to assess what dealings and disposals have been and are being carried out in relation to those accounts, and whether there has been a material breach of the Freezing Order."

17. I will return to that, having looked at the other parts of the draft consent order which refer to bank statements. Paragraph 1C refers to any documents in the power, possession, custody or control of the respondents relating to "why the accounts listed at schedule 1 to this order have continued to operate, notwithstanding the freezing order, including without limitation the correspondence with the relevant banks".
18. At paragraph 4 it provided that the Third Defendant shall "by Friday, 5 August 2016 provide a full account of how the accounts listed at schedule 1 of the order have continued to operate notwithstanding the freezing order", including an explanation of all contact between him and the banks with which the relevant accounts are held, and also to have an irrevocable consent to the banks on behalf of himself and the companies holding those accounts, for the Claimants to write to and be told by the banks with which those accounts are held the reasons why those accounts have continued to operate notwithstanding the freezing order, "which consent shall include allowing the banks to provide copies to the Claimants of any correspondence it has sent or received relevant to this issue".
19. It also provided in respect of Santander, in paragraph 5, that the Third Defendant shall by way of a letter to the claimants and Santander provide consent for them to be able to provide bank statements in respect of a Santander account
20. In this regard the evidence of Mr Hertzog goes on, at paragraphs 65 to 67, to deal with these matters. He says in particular, at paragraph 66.2, in respect of the Santander account that there are concerns about the Freezing Order having apparently been operated without restriction, and "it is appropriate for the respondents to provide current bank statements for this account to verify that it has indeed remained frozen"
21. In respect of the bank accounts generally and explaining the orders that are sought, at paragraph 67 Mr Hertzog says the following:

"In the light of the above issues, the Claimants are also justifiably concerned that the Respondents may own or control other bank accounts which are continuing to operate without the Claimants' knowledge and despite the Freezing Order. The Claimants therefore seek disclosure of documents and correspondence relating to how the above HSBC, RBS and Santander accounts have been able to continue to operate, as well as disclosure of documents relating to the continued operation of any other bank accounts owned or controlled by the Respondents which are not listed in Schedule C or D of the Freezing Order."

22. This evidence is to be seen in the context of the second witness statement of Mr Hertzog as a whole and in particular I refer by way of example, albeit that I take into account the entirety of the evidence, to paragraph 9, where he says:

"...there has been a recent spate of issues which indicate that the Respondents may not be complying with the Freezing Order in other respects. Tellingly, in the 11 months since the Freezing Order has been in place Mr Gooch has never disclosed the source of funds he uses to pay for his ordinary living expenses. I believe this is illustrative of the Respondents' unsatisfactory approach to complying with the terms of the Freezing Order."

23. At paragraph 31 he states that, against the background, recent issues have come to light which indicate that "the freezing order may not have been and/or may not be being complied with by the Respondents in other respects".
24. In connection with an area which I will refer to in more detail, there is a concern, arising out of these citations, as to the particular reasons why the orders are sought insofar as they are sought because there is a belief that there are other aspects which have not been identified which should be identified, that is a legitimate use of the disclosure jurisdiction or the power of the court to order disclosures ancillary to freezing orders. However, as was recognised in argument, generally the practice of the Court is not to make an order for the purpose of investigating whether an injunction has been broken and if so to supply material for contempt proceedings. If this matter had been contested in relation to the orders of the kind that I have referred to, there would have had to have been a protracted debate as to which of those two reasons was the operative and dominant reason. Was it that the Claimants were seeking information in order to find out if there were other assets not disclosed, or was it that the Claimants were seeking information in relation to the possibility of contempt proceedings? The language of Mr Hertzog is not sufficiently precise here; and, had there been a contested application, there would have been scope for argument as to which of the two it was and whether in fact it was impermissible. That has particular resonance because of matters to which I shall return in relation to Central Properties and HMRC.
25. Further, it could have been questioned as to whether the scope of the orders was broader than would have been reasonably or necessarily required. The fact that the Defendants have acceded to these matters does not mean that the application would necessarily have succeeded and, if it would have succeeded, that it would have succeeded in its full ambit. Therefore, given that this matter has not been the subject of a contested hearing, I am unable to form a view as to whether that part of the application would have succeeded and whether it would have succeeded in full. I also should say that in no sense do I make a finding the other way, and I do not indicate that it would have not succeeded or that in any way there was anything that was improper in relation to the application; it is simply that at this interim stage it is not as obvious as was suggested that the fact that the orders are embodied in the consent order means that the application has succeeded.
26. That becomes particularly relevant when one looks at the related matters which have not succeeded in the sense that they have been withdrawn by the Claimants, albeit after the provision of further information by the Defendants. There are two matters in particular. One relates to Central Properties UK Ltd and that is the subject of evidence

at paragraphs 44 to 53 in the second statement of l'v1r Hertzog. I do not propose to lengthen this judgment by going into any details as to what occurred, but it concerns certain transactions that took place prior to the making of the order and to a matter which arose on the day after the order. Those matters indicated, according to l'v1r Forest, that Mr Gooch may have divested himself of shares in Central Properties following the date of the freezing order, contrary to its terms. He then says that there were concerns that this matter had not been satisfactorily addressed. At the end of that section of his witness statement, he said at paragraph 52:

"In the light of the above issues and the highly unusual nature of the steps taken by Mr Gooch, the Claimants are justifiably concerned that Mr Gooch has deliberately diluted his interest in Central Properties following the execution of the Freezing Order by transferring 50 per cent of the share capital of that company to a third party in breach of the freezing order."

Paragraph 53:

"The Claimants therefore make this application to obtain disclosure of information and documentation from Mr Gooch relating to his share capital in Central Properties in order to clarify whether there has been any breach of the Freezing Order."

27. Put that way, that matter appears to fall on the wrong side of the line; not looking to identify assets not disclosed, but looking to obtain information in support of a committal application. This matter has not been pursued because subsequently Mr Forest provided a witness statement which satisfied the Claimants that there was no point in pursuing this matter at this stage, subject to the fact that it has liberty to apply to restore these matters at a later stage if appropriate. However, on the basis of the evidence as it stands there is a serious risk that the Claimants would have failed had they pursued that application, even before Mr Forest's statement, simply because of the evidence at paragraphs 52 and 53. I bear in mind Mr Lowe's statement to the effect that he would have recast the nature of the application in his advocacy and he would have contended that it would have had a prospect of success because it was seeking to identify that the assets that are referred to there were assets that might have been the subject of a sham transaction and might have come within the scope of the freezing injunction.
28. It seems to me, in all the circumstances, that this shows the difficulties of looking at a matter simply for the purpose of costs when what one can say is that the issues are far from straightforward as to whether that application was in the first instance an appropriate application to make. Again, I do not say that it was not appropriate. I simply say that on the basis of the information before me I cannot say whether it would have succeeded or it would not, and that is irrespective of the evidence which emerged after the issue of the application.



29. Similar observations apply in respect of Mr Gooch's HMRC liability. What was being suggested was that because there were large sums of money that were being paid to the Revenue there was a suspicion that there were breaches of the injunction. That was described in the evidence at paragraph 58 as follows:

"In the light of the unexplained circumstances of Mr Gooch's significant personal HMRC liability, the Claimants are justifiably concerned. The Claimants therefore make this application to obtain disclosure of information and documentation from Mr Gooch relating to his HMRC liability in order to clarify whether there has been any breach of the Freezing Order. As set out below, we also seek an Order that he provide details of the sums he has spent on ordinary living expenses since the date of the order together with corroborative disclosure."

30. That seems to me to meet the same problems and has the same response of Mr Lowe. The problem is that what is expressed is that there is an intent to see whether there has been a contempt of court. Mr Lowe says that the matter would have been reformulated in argument so as to concentrate on whether there were assets. Again one can see the battleground if the matter had been fought. The Claimants in fact abandoned this part of the application because of information which it subsequently received, but it seems to me in the circumstances that I cannot say, had the matter been dealt with at the time that this application had been issued before that information had been provided, that it would necessarily have succeeded.
31. I then return to the parts of the order which is to be made. Paragraph 3 refers to ordinary living expenses. I have been shown various correspondence where the Claimants were pressing for the provision of information as to the source of living expenses and there were certain answers that were given, but it seems that the position is still unsatisfactory as regards whether the information had been provided, and to the extent that that information had not been provided it was appropriate to seek an order that the information already ordered in paragraphs 8(1) and 9 of the original Freezing Order should be provided about ordinary living expenses. Nonetheless, the information that is now sought goes beyond the relatively narrow wording of the standard order and is seeking information about the particular payments and the changes in either income or expenses during the period. It seems to me that a party could have challenged that. Again, all I can say is that, whilst there has been some success in relation to the ordinary living expenses, I cannot form a view, if the matter had been contested, as to whether the Court would have been prepared to make an order in the terms which the parties have agreed.
32. Similar observations apply in relation to paragraph 6 of the order, which concerns the statement of assets where there was information that should have been provided about the value of the assets. I was shown correspondence where information was promised by the Defendants as regards the value and it had not been provided. The information that is now to be provided as regards the value, it could be argued, goes beyond that which was in the original order and, whilst the Claimants have been successful in respect of that part of the order, it is possible that the order as it is drafted goes beyond

that which the Claimants would have obtained.

33. I should add the Defendants agreed to matters that go beyond that which the order originally contended and have done so no doubt for very good reasons, having been advised through his counsel and solicitors; no doubt he will have taken into account that it may be in his interests to be co-operative and open in their approach to the provision of information and documents. Nothing in this judgment is in any way to suggest, having not taken arguments that might have been available to them, that the Defendants were doing anything that was in any way beyond what was tactically required. It seems to the Court easy to imagine that there were very sensible reasons for that level of co-operation.
34. Paragraph 7 of the draft order is dealing with matters of detail that are not arising out of the application, save for the declaratory relief to which I referred above.
35. It therefore seems to me, in the light of all that, that I cannot accede to the submission that there has been a successful party here. I do not find that I am able upon hearing this matter, having regard to some of the matters that I have referred to, to find that one party was successful and the other party was unsuccessful or that the Claimants were successful in relation to the majority of the matters. It seems to me more nuanced and not such that I should find the kind of success that then gives rise to the starting point in the rule in CPR 44.2.
36. I then move on from there to look at matters relating to conduct. It seems to me here in relation to conduct that the court cannot at this interim hearing make a finding of the kind that the Defendants invite me to make, which is that the Claimants have somehow jumped the gun or been oppressive, let alone that had they not issued the application, the information would have been provided by now. A particular difficulty that the Court has when faced with an enormous amount of correspondence is to understand all of the nuances and battles that go on in these correspondence. Absent some crisp point by either side, it was not possible to form a view that was in any way critical of the Claimants.
37. Similarly, when the Claimants make observations about the way in which the Defendants have behaved, it seems to me that I am unable to make findings in relation to that, save only for those matters where the Defendants should have complied as regards the source of living expenses, the value of the properties and the earlier provision of certain bank statements that came within the order. But this is a matter which has a history of over a year. It seems to me, first of all, that I am unable to dissect the correspondence and, secondly, that that is not a proportionate inquiry that could have been made at this interim period.
38. I have in mind also that it is possible that when the documents are provided different matters may then arise and there may be a different perspective, but neither party invited me to reserve the costs to some later date, and, in those circumstances, I cannot guess what would be in the documents.
39. Also in relation to conduct, there is the question of the delay of the Defendants in the period between being served with the order and this hearing. The particular delay referred to is that, the application having being listed on 22 April 2016, the Claimants heard almost nothing for a period of two-and-a-half months. I was shown some correspondence showing that mainly the Defendants were not

engaging with any of the matters in the application. On 6 July the Claimants pressed the Defendants to find out what was happening and the evidence in response was only received on 13 July. Thereafter, the parties corresponded and were able to enter into agreement, but the Claimants are right to be critical of the Defendants in failing to engage. There is no explanation in the evidence as to why that was, and it seems to me that the evidence of Mr Gooch should have come much earlier than it did. Having said that, I have come to the view that there was no prejudice caused by that delay. I did consider whether there should be something in my order that would in some way reflect criticism of the delay, but in the end I have come to the view that there would still have been this argument about costs. I asked Mr Lowe in respect of that and he very fairly and realistically conceded that there would still have been the argument as to whether the Claimants should have the costs or whether it should be costs in the case. He says obviously the issue about the conduct in relation to the delay would not be there but the other issues would have been there. It seems to me, taking into account these matters in relation to conduct, that they do not in the end alter the decision which I am about to make.

40. The Defendants then made the belated argument that they should have the costs in respect of today because the Claimants should have recognised that the order that would be made was costs in the case. Here I do reflect the Court's criticism in relation to the delay on the part of the Defendants. That seems to me to be an entirely unrealistic submission because of the lateness of the Defendants in providing evidence and formulating their position and therefore not giving the Claimants the opportunity to consider that and to see whether they should accede to it. Furthermore, the point itself was very late in the day and only raised in the oral hearing, and contradicting that which is already in the witness statement.
41. In relation to the law, I was referred to the **Picnic at Ascot** case to which I have already referred. I bear in mind that that case was a case about the balance of convenience. This is not a case about the balance of convenience; it is a case about disclosure of documents and the provision of information, and so different considerations come into play. In the **Picnic at Ascot** case there was consideration of a delay of a similar order to this case, where there was a last minute capitulation. There are, however, distinguishing features between that case and this case, not least because in the **Picnic at Ascot** case issue had been joined, whereas in this case issue had not been joined. What happened was that when it came to the belated evidence, and immediately thereafter, the Defendants acceded to many of the matters that have been sought, and, in the end, the parties were able to come to agreement. Secondly, the culpability about delay may have been greater in **Picnic at Ascot** because in that case there was listed a full blown hearing, contesting an interlocutory injunction, for a period of a day-and-a-half and it is probable that the issues were much more substantial than the issues that I have been dealing with in this case.
42. It seems to me in those circumstances I am unable to form a view that one party or other has been successful in this application, and also forming the view that I can only form certain limited findings about conduct of the kind that I have identified. Bearing in mind what I have also said in relation to the limitations of a court which deals with the issue of costs without having adjudicated upon the issues between the parties, it seems to me that in all the circumstances the appropriate order is costs in the case and I make that order.