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



No. CR-2017-009616

[2018] EWHC 2244 (Ch)

Rolls Building

Thursday, 25 July 2018

Before:

MS S. WORTHINGTON QC(Hon)
(Sitting as a Deputy Judge of the High Court)

B E T W E E N :

- (1) JOHN EDMUND PAYLOR
(as Trustee in Bankruptcy of Junie Conrad Omari Bowers)
(2) JOHN EDMUND PAYLOR
(as liquidator of Proximity Ventures Limited)
(3) STEPHEN RICHARD PENN
(as liquidator of GFI Consultants Limited)
(4) PROXIMITY VENTURES LIMITED (in liquidation)
(acting through its liquidator John Edmund Paylor)
(5) GFI CONSULTANTS LTD (in liquidation)
(acting through its liquidator Stephen Richard Penn)

Claimants/Respondents

- and -

- (1) JUNIE CONRAD OMARI BOWERS
(2) ANDREW NATHANIEL SKEENE
(3) MICHELLE LOUISE WINDEBANK

Defendants/Applicants

- (4) INTRINSBIT CAPITAL LTD
(5) SERGEY BURAVLEV Non-Cause of Action Defendants

J U D G M E N T

A P P E A R A N C E S

MISS M. SHEKERDEMIAN QC and MR J. BETHELL (instructed by Sprecher Grier Ltd) appeared on behalf of the Claimants/Respondents.

MR M. HARTMAN (instructed under the Direct Access Scheme) appeared on behalf of the Defendants/Applicants.

MR T. MATTHEWSON (instructed by Sprecher Grier Ltd) for the purposes of a potential application involving Sprecher Grier Ltd, and the related costs order.

THE DEPUTY JUDGE:

Introduction

- 1 The matter before the court is an application to discharge, set aside, vary and/or stay worldwide freezing orders (WFOs) obtained by the five Claimants against the three Defendants. These WFOs have been ordered in support of claims that arise from alleged large scale frauds on investors in foreign exchange and teak trading schemes set up and run by two of the Defendants, Mr Bowers and Mr Skeene (the applicants in these proceedings).
- 2 Mr Bowers and Skeene were directors of the two principal corporate investment vehicles, Proximity Ventures Ltd for the forex investment and GFI Consultants Ltd for the teak trading schemes. Both these companies are now insolvent.
- 3 The five Claimants are the trustee in bankruptcy of Mr Bowers, the liquidators of the two insolvent investment vehicles, and the two insolvent companies themselves acting through their liquidators.
- 4 The claims against the two Defendants include claims for fraudulent misappropriation of corporate funds and for fraudulent trading (being claims brought by the liquidators in their own name), and claims for fraudulent breaches of fiduciary duties (being claims brought by the corporate vehicles acting through their liquidators). Mr Paylor is both the trustee in bankruptcy of Mr Bowers and the liquidator of Proximity Ventures Ltd. Mr Penn is the liquidator of GFI Consultants Ltd.
- 5 The background to these claims is set out fully in Mr Paylor's first affidavit dated 13 December 2017. That affidavit suggests that investors had paid at least £34,307,713.31 to the two corporate investment vehicles, and alleges that these payments were made as a result of fraudulent schemes designed to take money from investors for the benefit of the three Defendants personally. The claims in issue in the main proceedings are for the sum of £10,060,435.47.

6 Although Mr Bowers and Mr Skeene are discharged bankrupts, their discharge does not release them from these alleged claims (see the Insolvency Act 1986 s.281(3)). They are also subject to disqualification undertakings not to act as directors for ten years from February 2018, and to SFO investigations that, it is suggested, may have compromised their willingness to provide extended detail in their Defence to the Particulars of Claim in relation to the main claim.

Background to these Proceedings

7 The WFOs in issue in these proceedings were obtained by the five Claimants in December 2017 by order of his honour Judge Pelling QC granted *ex parte*, and were subsequently continued and/or varied at various return dates, most recently in May 2018 by order of his honour Judge Harman. His honour Judge Pelling also granted search orders against the Defendants, judging the *prima facie* case presented by the Claimants as meeting the high hurdle necessary to warrant such orders. The substantive proceedings were commenced by a Part 7 claim issued the day after the sealing of the interim injunctions, on 18 December 2017. Until 7 June 2018, the Defendants took no steps to challenge the WFOs.

8 Formally, this application is brought by Mr Bowers, Mr Skeene and Ms Windebank, the three Defendants to the principal claim. In its terms, however, it seeks relief only in favour of Mr Bowers and Mr Skeene, and counsel for the Defendants confirmed that Ms Windebank is not a party to the application. Accordingly, I shall refer only to Mr Bowers and Mr Skeene in what follows, but by way of shorthand will call the two of them “the Defendants”.

9 The application is supported by an affidavit from Mr Bowers dated 11 June 2018 but is not accompanied by a draft order. On 17 July 2018, after the date for normal service of evidence, Mr Bowers served a second witness statement expanding upon this evidence. Both parties made some reference to this second witness statement, but, other than in

relation to a threatened application for an injunction against Sprecher Grier, noted later, it was not material to the outcome of this application.

- 10 Further affidavits from Mr Paylor and Mr Penn were produced at the start of this hearing addressing various issues raised in Mr Bowers' second witness statement, but for the most part these became immaterial to the present proceedings, for reasons explained below.

This application

- 11 The Defendants' Application Notice particularises the seven orders applied for. I set them out for the record for reasons that become apparent later (changing only the names of the parties to maintain consistent use of the terms Claimants and Defendants): (1) To discharge and/or set aside and/or vary and/or stay the WFOs. (2) To set aside the WFOs because there is insufficient evidence that the Claimants have a good arguable case of fraud sufficient for a WFO and/or the WFO is being used oppressively by the Claimants. (3) To discharge the WFOs on the ground that the Claimants failed to provide full and frank disclosure of the conflict of interest of their solicitor, Sprecher Grier, who is joined in this application (as to which, see below). (4) To vary the WFOs on the grounds that the sums secured are too much or excessive and/or that the Claimants be ordered to permit the Defendants to receive their income from their brokerage business on notice of their dealings, but without any interference by the Claimants with clients. (5) To stay the WFOs so that relevant evidence of the value of the plantations in issue can be obtained from creditable valuers. (6) To set aside or vary the cost orders of 17 May 2018. And, finally, (7) to order costs of this application.
- 12 This assembly of the issues does not follow the structure adopted in written or oral submissions, where the issues were broken down and addressed rather differently, or indeed in some cases not addressed at all. I propose to deal with the issues in the order of their

apparent importance to the Defendants, while ensuring coverage of all the issues in the Application Notice. I do so under six headings.

1. There is no basis for allowing the WFOs to stand

- 13 I begin with an important preliminary point. Both parties are agreed that these proceedings do not constitute a rehearing of the Claimants' application for an injunction such as would be permitted at the return date. At the return date it remains for the Claimants, as applicants for the WFOs, to prove their case if they are to succeed in having their *ex parte* interim injunctions continued. In that context, the Defendants will succeed if they simply raise sufficient doubt as to whether the orders are warranted. But the time has passed for the Defendants to raise matters in a way that merely insists that the Claimants be put to proper proof in advancing their application for an injunction.
- 14 The application now before the court is the Defendants' application, and the Defendants must prove their case. If they wish to show either that there is no *prima facie* case of fraudulent wrongdoing sufficient to support the freezing order or, alternatively, that there are sufficient assets available to support the underlying claim, as might be suggested in their Application Notice (see paragraphs (1) and parts of (2), (4) and (5) of the Application Notice, set out above at paragraph 11), then they must prove those matters on the balance of probabilities.
- 15 On both these matters, little if any hard evidence was presented to the court by the Defendants. In particular, and as considered below, there was nothing in my view that effectively rebutted the evidence to the contrary that had been presented by the Claimants in earlier proceedings (see in particular the Claimants' detailed Particulars of Claim, which had been presented in draft form to his honour Judge Pelling). The Defendants' evidence is considered in some detail in the next section rather than here, but, on the basis of my findings concerning that evidence, I find that the Defendants have not met the necessary

evidential hurdle in showing that the WFOs should be discharged or varied on the basis that there is no *prima facie* case of fraudulent wrongdoing sufficient to support the freezing order or, alternatively, that there are sufficient assets available to support the underlying claim.

- 16 Rather than bearing the onus of proof in the way just noted, counsel for the Defendants suggested that the Defendants merely needed to raise sufficient doubt about the Claimants' case, and, if the Claimants could not then prove to this court to the requisite standard that there was a *prima facie* case of fraudulent wrongdoing sufficient to support the freezing order and that there were insufficient available assets to support the underlying claim, then the Defendants were entitled to have the WFOs set aside or varied. I disagree with this as a matter of law for the reasons given earlier (see paras [13] and [14] above). In any event, were it material I would not have considered the Defendants' evidence, slender as it was, as raising the necessary doubt.

2. Full and frank disclosure

- 17 The Defendants' main submission before the court was that, in obtaining the *ex parte* WFOs, the Claimants failed in their obligation of full and frank disclosure to the court. In particular, it was argued that they should have made it clear to his honour Judge Pelling that there was information that might have suggested to the judge that (a) there was insufficient evidence for a good arguable case of fraud (with the Defendants here seemingly relying primarily on an assertion that the investment arrangements did not constitute "a proper Ponzi scheme" and that the forex investors received £11 million in investment returns); and (b) that the sum secured by the WFOs was excessive (with the Defendants here relying primarily on assertions that the teak plantations were worth more than indicated to the judge).

- 18 No objection was taken to the Defendants putting their case in this way, although it would seem to require a rather generous reading of the Application Notice, since express reference to “full and frank disclosure” appears only in the context of the alleged conflict of interest of the Claimants’ solicitor, Sprecher Grier. Nevertheless, I accept that material nondisclosure in the *ex parte* application is a ground for complaint.
- 19 In pursuing this argument, counsel for the Defendants made it clear that no inference of deliberate or dishonest conduct was being made. What is in issue, therefore, is innocent nondisclosure, if indeed there is nondisclosure at all: see the distinction afforded by Lord Woolf in *Behbehani v Salem* [1989] 1 WLR 723 at p.728.
- 20 The law on full and frank disclosure is not in dispute. Both parties referred me to similar authorities, only a few of which I mention here. The Defendants relied primarily on the very recent and detailed judgment of Cockerill J in *Petroceltic v Archer* [2018] EWHC 671 (Comm), at paras [79]-[85] and [110], and her summary of the particular principles that might be derived from the leading case of *Brink’s Mat Ltd v Elcombe* [1988] 1 WLR 1350 at pp 1356-1357. See too the judgment of Lord Woolf in *Behbehani v Salem*, noted earlier, and that of Alan Boyle QC in *Arena Corporation v Peter Schroeder* [2003] EWHC 1089 Ch 1089 at paras [113]-[118] and [162]-[212].
- 21 From those authorities and others I was referred to, the key principles may be summarised as follows: (1) the duty on an applicant for an *ex parte* order is to make full, fair and accurate disclosure of all material facts, including identifying relevant documents for the judge, taking the judge to particular passages of evidence, and taking appropriate steps to ensure that the judge appreciates the significance of what is being presented; (2) materiality is a matter of law, and material facts are those which the judge would want to know in dealing with the application being made; (3) such material facts include those known to the applicant and any additional facts which would have been known had proper enquiries been

made; (4) the extent of the enquiries required depends on all the circumstances, including the nature of the case, the nature of the order to be made, and the urgency of the matter; and, finally, (5) proof of material nondisclosure cannot be made to depend upon proof of the very facts that are in issue in the action, since then the application to set aside a freezing order would necessarily become a preliminary trial: see Toulson J in *Crown Resources AG v Vinogradsky* (15th June 2001), as adopted by Longmore LJ in *Kazakhstan Kagazy plc v Arip* [2014] EWCA Civ 381 at para [36].

- 22 As noted, the Defendants argued that there was failure to make full and frank disclosure in relation to describing the Defendants as involved in a Ponzi scheme, and in ascribing a value to the teak plantations in Brazil. Plainly, these facts meet the test of materiality, both being matters the judge would want to know about. The issue, therefore, is whether there was material nondisclosure in relation to either matter.
- 23 In describing the Defendants as involved in “a Ponzi or like scheme”, counsel for the Defendants suggested that the explanation given by the Claimants was such that the judge clearly misunderstood the nature of the investment transactions. In particular, the explanation given by the Claimants caused the judge to assume that, to the extent that investment moneys received by the corporate vehicles were not still held by those vehicles, this necessarily implied there was some sort of breach by the Defendants. Defendants’ counsel pointed to me to particular paragraphs in the transcript of the *ex parte* hearings in support of this view. My reading of those paragraphs does not persuade me that is the correct interpretation of the words themselves. Furthermore, the implicit suggestion is that the Claimants persuaded the judge that any corporate investment vehicle, acting properly, would necessarily need to hold all received investment funds in hand, and do nothing with them. That lacks credibility. Were that so, every active investment vehicle, whether solvent or insolvent, would by its very activity deliver proof of a serious breach of duty by its directors.

- 24 Alternatively, Defendants’ counsel suggest that the term “a Ponzi or like scheme” is a misleading misdescription in circumstances where there were repayments to investors of the order of £11 million, and he suggested that these payments to investors had not been brought to the attention of the judge. That latter suggestion is contradicted by the transcript of the *ex parte* hearings (pp 10 and 18-19). Further, I do not regard it as inconsistent with “a Ponzi or like scheme” that some investors are paid what is apparently due to them under the terms of the investment. The essence of a Ponzi scheme is that such apparent successes induce further investments, and the growing funds are then periodically diverted for the benefit of the owners of the corporate vehicle rather than for the benefit of the investors.
- 25 But here the facts are more dramatic than that. Counsel for the Defendants accepts that the £11 million paid to the forex investors was not paid from funds derived from successful forex investments. Instead, the forex vehicle (Proximity) provided £3 million of its funds by way of what were notionally labelled as “loans” to GFI (the teak trading scheme vehicle), and then, when the time came for the Proximity investors to be repaid, these investors were repaid over £11 million sourced from GFI funds. These facts, far from suggesting that either investment vehicle was functioning properly according to its terms, might themselves suggest problems, first in the payments to GFI of Proximity funds and, secondly, in the payment to Proximity of GFI funds.
- 26 In this loose sense of funds being sought from investors and then misappropriated and misused other than in accordance with the terms of the particular investment contracts, but instead for the benefit of the Defendants and their associated companies, the analogy with a Ponzi scheme would not seem inappropriate shorthand.
- 27 Despite this, counsel for the Defendants challenged the Claimants to provide an account of the cash flows from GFI and Proximity that showed something other than payments of money capable of being properly paid. The fact of payments between GFI and Proximity

was not in dispute, although the characterisation may be. However, in the absence of any documentation (and even the Defendants do not seem to have this), what remains are substantial payments both ways with no self-evident explanation that is consistent with proper use of those funds.

28 It is, therefore, not clear what other evidence might have been presented to his honour Judge Pelling by way of full and frank disclosure. Moreover, that evidence, even as described by counsel for the Defendants, suggests that investment funds were not being used according to the terms on which they were received. These are facts his honour Judge Pelling might reasonably take into account in deciding whether there was sufficient evidence to support a *prima facie* case of fraud. But this was far from being the only evidence presented to the judge: see the Claimants' skeleton, the transcript of the hearing, and Mr Paylor's accompanying first affidavit.

29 Given all this evidence, as indicated earlier (para 15, above), I held that the Defendants had failed to prove to the requisite standard that there was no *prima facie* case of fraudulent wrongdoing. Similarly on these facts I also hold that the Defendants have not shown a failure by the Claimants to make full and frank disclosure concerning the allegations of fraudulent wrongdoing.

30 The second element of the Defendants' "full and frank disclosure assertion" is that the Claimants failed in their obligation to make clear to his honour Judge Pelling that there was information to suggest that the sum secured by the WFOs was excessive, because the teak plantations had some significant value (put at £25 million by the Defendants and at £15 million by counsel for the Defendants). Instead, the Claimants' evidence suggested that these were blocks of land with little or no teak on them, perhaps not even appropriately owned or leased by the Defendants or their corporate vehicles, nor subject to necessary licences for felling teak, and thus were worth relatively little (see pp 19-21 of the transcript).

- 31 The inherent and substantial uncertainty in the valuation of the teak plantations, including uncertainty as to land ownership and felling licences, was made clear to his honour Judge Pelling (see the transcript at pp 19-20).
- 32 In addition, the evidence presented to the judge included an 11 page Report by Providentia Capital, commissioned on 24 April 2017, with the work conducted by an expert and supported by some site visits and various satellite imaging. The methodology is explained within the report. The summary of the report is as follows: “It was determined with a high degree of certainty that there currently is no material amount of timber or other valuable crops planted on 76% [76 per cent] of the land area investigated (or seven of the eight parcels investigated). Such determination was not possible on property # 1 [number 1], which corresponds to 24% [24 per cent] of the total acreage, because neither satellite image analysis nor an on-site visit were conducted. This was because property #1 [number 1] is in a remote area that is hard to visit and identify without precise geographic coordinates that were lacking (the properties [sic] address information is insufficient). Thus, all valuations presented in this report assume land value only and no value of the harvestable timber or crops.”
- 33 This Report, by an expert, with qualifications as to its methodology made explicit, would seem to constitute reasonable endeavours by the Claimants to present the judge with full and fair disclosure on the valuation of the teak plantations.
- 34 By contrast, the Defendants suggest that “on reasonable enquiry the plots held and still hold extensive teak plantations” (see the Defendants’ skeleton at para.15.3). In support of this the Defendants point to Exhibit 2 to Mr Bowers’ first witness statement/affidavit in these proceedings, which includes ground level photographs of teak plantations said to be taken in some of the relevant locations, but as yet not supported by any written report to accompany the photographs.

- 35 As indicated earlier (para 15, above), on this evidence I held that the Defendants had not shown on the balance of probabilities that the teak plantations were sufficiently valuable to warrant discharging or varying the WFOs. At the return date, the Defendants might have presented evidence that did no more than cast doubt on the Claimants' evidence, perhaps demonstrating that the order of a freezing injunction was unwarranted (although in my view the evidence now presented does not even go that far).
- 36 On these same facts I also hold that the Defendants have not shown a failure by the Claimants to make full and frank disclosure concerning the valuation of the teak plantations. The facts are to the contrary. In circumstances where the Defendants robustly contest the valuation but can provide no equally robust evidence in support of their claim, there can be no suggestion that reasonable enquiries would have put such evidence in the hands of the Claimants. Accordingly, the Defendants have not made out their claim of failure to make full and frank disclosure.
- 37 By contrast, the Claimants have produced further information to the court for the purposes of this hearing. The fifth affidavit of Mr Paylor has an exhibit giving an estimate of asset value received from Burford Capital, dated 6 July 2018, valuing the Belham Sky Plantation Scheme only (it being one of a number of schemes included in the teak plantation investments), and finding its likely value to be a little over US\$2 million. This would seem to add further support to the Claimants' position, and to my findings that the Defendants have not satisfactorily proved their claimed teak plantation valuations of £15million to £25 million, nor that there has been material non-disclosure or a failure to make full and frank disclosure by the Claimants.
- 38 Given my conclusion that there was no material nondisclosure by the Claimants or other breach of their duty of full and frank disclosure, it is unnecessary for me to consider what consequences might otherwise have followed.

3. Stay of the WFOs until proper valuation of the teak plantations

39 The Defendants' Application Notice requests a stay of the WFOs until proper evidence of the value of certain plantations in Brazil is obtained. This suggestion was not pursued in oral argument. For reasons indicated already, this approach might have succeeded at the return date, but in the present context the Defendants have not presented any material evidence in support of this order beyond that noted earlier (at para [34]), and their application is refused.

4. Oppressive use of the WFOs by the Claimants

40 The Defendants' Application Notice seeks the discharge or variation of the WFOs on the basis that they are being used oppressively by the Claimants and their legal advisers. In particular, the Defendants object to the terms of covering letters from Sprecher Grier accompanying copies of the WFOs sent to banks and other third parties being put on notice of the orders. The Defendants allege that these communications are defamatory and harmful to the Defendants' relationships, and adopt exaggerated and threatening language. By way of illustration I was taken to the letter sent by Sprecher Grier to Mr Bowers' brother-in-law. In my view, that letter adopts perfectly standard, familiar, neutral, factual language, closely mirroring the express terms of the WFOs, and adding riders about legal advice and preserving evidence. I find nothing oppressive in the Claimants' standard enforcement of their WFOs in this manner by their legal advisers.

41 The Defendants' Application Notice also specifically seeks to have the WFOs "varied on grounds that ... the [Claimants] be ordered to permit the [Defendants] to receive their income from their brokerage business on notice of their dealings but without any interference by the [Claimants] with clients". The disputed paragraph in the WFOs is in standard form, permitting the Defendants an "ordinary and proper course of business" exception to the operation of the order, but requiring the Defendants to inform the Claimants

of the proposed disposal and provide some justification that the payments are in the ordinary course of business. Counsel for the Defendants suggested that this term be varied so as to provide explicitly for referral to the court where there is a dispute. I am not persuaded. The terms of the order are clear. If one side considers the other to be in breach of the order, that is the time to come to court and seek a remedy. There is no need for an explicit provision to that effect in the order itself to entitle parties to have access to justice, and accordingly I reject this part of the application. Further, if the suggestion is that the court should be made the first port of call in deciding whether the Defendants can access funds in their accounts, then that too is rejected as a quite inappropriate use of court resources.

42 Finally, the Defendants assert that the effect of the WFOs is that the Defendants' banks will not release funds to them, and thus they are unable to afford to fund their legal defence or indeed their adequate living expenses. Further, they claim that the Claimants' legal advisers are threatening to send copies of the WFOs to the Defendants' business associates. No specific evidence was presented in support of these assertions. As to legal expenses and living expenses, the assertion is inconsistent with the express terms of the order, and thus easily remedied. As to threats to send copies to third parties, the Claimants are legally entitled to give notice to third parties provided they comply fully with the express terms of the order, and an intimation that they may exercise their legal rights to do so is hardly unduly threatening or oppressive, unwelcome though it might be. That is the essential nature of WFOs.

5. Conflicts of interest

43 For the avoidance of doubt, I repeat conclusions reached by this court yesterday on a different issue. The Defendants' Application Notice specifically sought to have the WFOs "discharged on the ground that the [Claimants] failed to provide full and frank disclosure of the conflict of interest of their solicitor Sprecher Grier who is joined in this Application".

On the second day of the hearing, counsel for the Defendants formally informed the court that, on instructions, he was not pursuing this part of the Application based on any possible conflicts associated with the position of Mr Sejas or Mr Penn. Furthermore, he informed the court that the Defendants had also agreed that there would be no subsequent applications in similar terms in relation to the WFOs based on such alleged conflicts. This further concession as to future applications is important, as otherwise I would have insisted on determining the matter conclusively at the hearing on the basis of the extended written arguments provided by the parties, the partial oral argument from the Defendants (albeit faintly pressed), and the detailed written evidence before me.

6. The cost orders of 17 May 2018

44 The Application Notice seeks to set aside or vary the cost orders made on 17 May 2018. In the circumstances, and given the findings above, that application is refused.

Incidental issues

45 I record two further matters for completeness.

46 First, the court considered a threatened injunction against Sprecher Grier Ltd enjoining them from acting for the Claimants. The Defendants' Application Notice asserted that Sprecher Grier "is joined in this application", but sought no specific relief against the firm. The threatened injunction was made explicit only in Mr Bowers' second witness statement dated 17 July 2018. That threatened injunction application was withdrawn by counsel for the Defendants on the first day of this hearing and an order for costs summarily assessed was accordingly made in favour of Sprecher Grier Ltd in the sum of £9,592.50, such sum recognising the work needed to address the serious issues potentially in play and the uncertainty surrounding the terms of their pursuit.

47 Secondly, in the interests of full and frank disclosure the Claimants' recorded, at paras 94 to 97 of their skeleton, the prior involvement of Absolute Recovery Ltd (via a Mr Stephen Jones, who it is not suggested has had substantive involvement in the present claims and is said to have had very limited involvement with the earlier affairs of GFI in 2013). This information was not material to any of my conclusions.

Conclusion

48 In conclusion and for the reasons given, I am not persuaded that any part of the Defendants' application to discharge, set aside, vary or stay the Claimants' WFOs succeeds, and I decline to make any of the orders requested.
