



Neutral citation number: [2019] EWHC 3613 (Ch)

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS IN MANCHESTER

BUSINESS LIST (ChD)

Claim No: C31MA037

Manchester Civil Justice Centre

1 Bridge Street West

Manchester M60 9DJ

Tuesday 26 November 2019

IN THE MATTER OF THE MAHER 1997 DISCRETIONARY SETTLEMENT

Before:

HIS HONOUR JUDGE HODGE QC

Sitting as a Judge of the High Court

B E T W E E N :

VINCENT MAHER

Claimant

- and -

(1) BRENDAN MAHER

(2) GERARD MAHER

Defendants

MR MARK HARPER QC (instructed by Eversheds Sutherland LLP) appeared on behalf of the Claimant.

MR TOM WEISSELBERG QC (instructed by DAC Beachcroft LLP) appeared on behalf of the Defendants.

A P P R O V E D J U D G M E N T

JUDGE HODGE QC:

1 This is my extemporary judgment on an application by the claimant issued on 3 June 2019 for specific disclosure of personal bank statements of the two defendants in litigation presently pending in Manchester under claim number C31MA037.

2 The claimant is Mr Vincent Maher and the defendants are his two brothers, Mr Brendan Maher and Mr Gerard Maher. The claimant is represented by Mr Mark Harper QC and the defendants are represented by Mr Tom Weisselberg QC. The proceedings were issued by way of a part 8 claim form on 19 September 2016. The proceedings have since been ordered to continue as though commenced by way of part 7 claim.

3 In substance, the claimant, who is (together with the defendants) the trustees of a family discretionary settlement, seeks the removal of the defendants as trustees and also seeks to secure what he says - but the defendants dispute - was an agreement for the sale of a substantial asset of the trust, namely the entire shareholding in a company known as W Maher & Sons Limited, together with its associated and wider corporate group of companies. The claimant was formerly a director of that company but he has ceased to be so and his two brothers, together with their two sons, are now the directors and controllers of the company. The case is presently set down for trial before HHJ Pearce, starting on Monday 13 January 2020, and thus some seven weeks from now, with the Christmas and New Year break intervening.

4 The application notice was, as I have said, issued on 3 June 2019 and was supported by the second witness statement of Mr Mathew William Taylor, a partner in the claimant's solicitors, Eversheds Sutherland, of the same date, together with exhibit MWT2. For reasons that are not immediately apparent, evidence in answer was only served on 28 October 2019 in the

form of the fifth witness statement of Mr Andrew James Martin, a senior associate with DAC Beachcroft, the defendants' solicitors, of the same date, together with exhibit AJM5. Mr Taylor responded to that evidence by his third witness statement dated 8 November 2019, together with exhibit MWT3. He has since supplemented that responsive evidence by a fourth witness statement dated 18 November 2019. Notwithstanding objection from Mr Weisselberg for the defendants, I gave permission at the outset of this hearing for the claimant to rely on that fourth witness statement but, since its contents could have been included within the third witness statement, I specifically disallowed the costs of the fourth witness statement.

5 Both counsel have produced detailed and helpful written skeleton arguments. Mr Harper addressed me in support of the application for about 35 to 40 minutes; Mr Weisselberg then responded for about an hour and ten minutes; and Mr Harper briefly replied for a little over ten minutes.

6 There was no issue between counsel as to the applicable principles and authorities. I was taken to the decision of Mr Edwin Johnson QC in the case of *White Winston Select Asset Funds LLC v Mahon* [2019] EWHC 1014 (Ch), in particular at paras 2 and 8 to 13. That authority establishes that even though standard disclosure was given before the coming into force of Practice Direction 51U: The Disclosure Pilot for Business and Property Courts, nevertheless the provisions of that Practice Direction are applicable to the present application. I have been directed to paras. 6.4, 9.5 and 9.6 and to paras. 17 and 18 of that Practice Direction. Mr Harper also places reliance upon para. 5.4 of Practice Direction 31A.

7 The decision in *White Winston* was applied by Sir Geoffrey Vos, the Chancellor, in the case of *UTB LLC v Sheffield United Ltd* [2019] EWHC 914 (Ch), reported at [2019] Bus LR 1500. I was taken to paras. 18, 24 and 75 to 79 of the Chancellor's decision in that case. I derive

particular assistance from what is said at para. 75, to the effect that the introduction of the Pilot was intended to effect a culture change and is not simply a re-write of CPR Part 31. It operates along different lines, driven by reasonableness and proportionality, with disclosure being directed specifically to defined issues arising in the proceedings. At para. 76 it was emphasised that in deciding whether to allow extended disclosure, the court has to consider whether the application is reasonable and proportionate having regard to the overriding objective. Each of the factors in para. 6.4 of Practice Direction 51U is to be given weight.

8 I also derive particular assistance from para. 78(3) where it was said that para. 7.3 of the Practice Direction emphasises that the issues for disclosure are “only those key issues in dispute” and “does not extend to every issue which is disputed in the statements of case by denial or non-admission”. At para. 79 the point was made that extended disclosure is not “something that should be used as a tactic, let alone a weapon, in hard fought litigation. It is all about the just and proportionate resolution of the real issues in dispute.”

9 Finally, I was taken to the decision of Mr Richard Salter QC in the case of *Ventra Investments Limited v Bank of Scotland Plc* [2019] EWHC 2058 (Comm). I was taken to paras. 34 to 41 of the deputy judge’s decision in that case. I derive particular assistance from para. 37, relating to allegations of fraud and misconduct. I also derive assistance from para. 39 where it was said that the limitation on disclosure to that which, in the particular case in question, is necessary for the just disposal of the proceedings and which is reasonable and proportionate, is not intended to hinder the just resolution of substantial cases such as this by making it more difficult for claimants to get at the central documentary evidence that they need.

10 At para. 40, the deputy judge emphasised that what was required from the parties and the court was a pragmatic, flexible approach to the scope of disclosure, taking into account “all the

circumstances of the case, including the factors set out in para. 6.4 ... and the overriding objective”. The court was required “to strike a practical balance, in order to decide in each particular case what specific reasonable and proportionate additional disclosure (if any) is necessary for the just disposal of the proceedings. In doing so, the court is not required to shut its eyes to the practical realities of the litigation.” I also note that at para. 41, the deputy judge noted that the obligation which a reasonable and proportionate order for extended disclosure can impose on a defendant can often be the only (or only realistic and/or proportionate) means that a claimant may have of obtaining the information and evidence that he needs to plead and to make out his case so that such an order (for extended or additional disclosure) may therefore be the most practical way of dealing with the case justly.

- 11 I bear all of those factors, and the provisions of para. 6.4 of Practice Direction 51U in mind.
- 12 The relevant pleaded issue here is that set out at para. 23(b) of the particulars of claim, under the heading “General Concerns”, that the defendants have used company funds to meet their costs of the proceedings herein. Reliance is placed in that regard on the issues of concern set out in the claimant’s first witness statement at paras. 37.4 through to 37.8. There, reference is made to two specific payments of money to the defendants’ solicitors in the months of May and July 2016, before these proceedings were in fact even commenced. However, I note that in para. 37.4 the claimant refers to his concern for some time that his brothers had been using the company’s money to fund this dispute rather than using their own. Mr Weisselberg is right, however, to say that there is no pleaded allegation of general misuse by the defendants of company monies, still less any allegation that they have been acting in breach of fiduciary duty in paying company monies to themselves for improper purposes.

13 Mr Harper's position is that this is a straightforward disclosure application and that fact should not be obscured by the amount of material that the application has generated, he says primarily as a result of the position adopted by the defendants. The application bundle assembled by the claimant extends to some 810 pages, to which the defendants have added a supplemental bundle extending to some 710 pages, making in excess of 1500 pages of documentation in all.

14 Mr Harper relies, in particular, upon the proposition at para. 5.4 of Practice Direction 31A that:

“If the court concludes that a party from whom specific disclosure is sought has failed adequately to comply with the obligations imposed by an order for disclosure the court will usually make such order as is necessary to ensure that those obligations are properly complied with.”

15 In my judgment, that statement has now been overtaken by the specific provisions of the Disclosure Pilot, with their emphasis upon culture change and reasonableness and proportionality. In my judgment, this present application should be treated as falling under, and governed by, para. 17 of Practice Direction 51U, relating to failure adequately to comply with an order for extended disclosure. The onus is therefore upon the claimant, as applicant, to satisfy the court that making an order for specific disclosure is reasonable and proportionate, as defined in para. 6.4. That involves having regard to the overriding objective, including the specific factors identified at sub-paras. (1) through to (7). Mr Weisselberg addressed all of those factors orally in his submissions. Mr Weisselberg also made eight specific points at paras 18 through to 25 of his written skeleton. Overall, and looking at matters in the round and by reference to the provisions of Practice Direction 51U, paras. 6.4, 17.1 and 17.2, he submits that there is no basis for the court to order the disclosure sought by the claimant.

16 Mr Harper submits that on any analysis, the standard disclosure ordered in this case should have included the statements for the defendants' personal bank accounts because they would show either that the defendants had been making payments to their solicitors for their own legal fees (in which case they are documents supporting the defendants' case) or any payments made into the bank accounts from the company to finance such payments (in which case, again, they should be disclosed because they are adverse documents supportive of the claimant's case). They may also show that the defendants have not made payments to their solicitors from their personal bank accounts, in which case again they should be disclosed as documents adverse to the defendants' case.

17 I am satisfied that, for the reasons that Mr Harper has given, there may have been a failure adequately to comply with the order for standard disclosure. It does seem to me that perusal of the defendants' personal bank statements might show either that the defendants have themselves been funding their solicitors or that they have not been doing so; and to the extent that they have been doing so, the bank statements may show whether there are corresponding entries into the bank accounts which, if tied up with the company's bank statements, may indicate that the company has been making payments to the defendants which have then been used by the defendants in payment of their legal fees. However, a considerable amount of analysis and work will be required to establish whether that is the case.

18 In my judgment, it would not be reasonable and proportionate, given the imminence of the commencement of the trial, to be requiring disclosure of bank statements at this late stage, which may lead to further inquiries which may, or may not, support the pleaded complaint at para. 23(b) that the defendants have used company funds to meet their costs of the proceedings herein, whether directly or indirectly. In my judgment, it would not be reasonable and

proportionate, having regard to the factors in para. 6.4, to order specific disclosure of those bank statements, going back five years to November 2014, at the present point in time given the start of the trial on 13 January, and with the Christmas and New Year holiday intervening. It was made clear in a letter from the defendants' solicitors, written on 30 January 2019, that the bank statements would not be disclosed. Despite that, the claimant waited until 3 June before issuing the present application. Its timing would appear to suggest that it may have been motivated by the imminent hearing of a specific disclosure application issued by the defendants themselves on 29 April 2019. But, be that as it may, if the claimant wanted to pursue the issue of specific disclosure of the bank statements, he should have done so promptly after 30 January 2019.

19 I accept Mr Harper's submission that the claimant cannot be held responsible for the delay in this matter being heard between 3 June and today. That is, in large part, down to the attitude taken by the defendants. But nevertheless, this matter would have come before the court four months ago if the claimant had acted promptly in response to DAC Beachcroft's letter of 30 January.

20 Given the various factors identified by Mr Weisselberg in his oral submissions addressing the para. 6.4 factors, it would not be reasonable and proportionate, having regard to the overriding objective, to require the disclosure of the bank statements at this late stage. This is a claim involving a dispute over the administration of a trust, and not a claim for breaches of fiduciary duty owed by the defendants as directors of the family company. I accept Mr Weisselberg's submission that the court should be wary of setting further hares running so soon before the trial; the proceedings are already sufficiently complex and the court should be wary of making them even more so.

21 I acknowledge the importance of the case to the parties, but that does not require every stone to be turned over, still less for a whole pile of more stones to be imported from a neighbouring quarry. The parties should not be diverted down side tracks to see what use may have been made of company monies. The bank statements certainly exist, although some at least will have to be obtained directly from the defendants' bank. But it seems to me that they are likely to be of limited probative value in supporting, or undermining, the respective cases of the parties. It would be necessary to subject the bank statements to detailed analysis. The fourth witness statement of Mr Taylor indicates that there is likely to have to be an analysis of cash payments, and enquiries as to the purpose for those payments. It may be necessary to obtain bank statements from the company, which the claimant apparently does not have after about February 2017, in order to attempt to match up any payments into the defendants' bank accounts with payments out of the company's bank account. Five years of bank statements would need to be reviewed. They will then need to be appropriately redacted. The extent of the redactions will have to be determined in accordance with para. 16 of the Practice Direction, and then there will be scope for challenge to those redactions. All of that will have to be done in the immediate run-up to trial over the forthcoming seven weeks, interrupted by the Christmas and New Year holiday period.

22 I must bear in mind that the parties are private individuals and that the defendants say that they have been squeezed financially by the claimant's failure to authorise what they say is the proper remuneration that they should have been receiving as company directors. The defendants have also expressed concern about the ability of the claimant to pay any legal costs.

23 Finally, I have to bear in mind that there was a four-month delay before the present application was issued; and, although the claimant cannot be held responsible for the delay since 3 June,

he was entirely responsible for the delay from 30 January to 3 June; and the court cannot ignore the fact that we are now about seven weeks away from the trial. I also cannot ignore the degree of detailed challenge that the claimant was minded to bring to bear in the form of the Scott Schedule that was prepared for the purposes of the now concluded loan litigation. The detailed level of challenge in that litigation augurs ill for the extent of any challenge that may be brought to cash payments into the defendants' bank accounts. It is also relevant to have regard to the fact that, in the case of the second defendant, his bank account is held in the joint names of himself and his wife and, therefore, there is the respect for her private life that also has to be borne in mind.

24 For all of those reasons, therefore, and in the exercise of the court's discretionary case management powers, and in furtherance of the overriding objective, and bearing in mind the factors indicated in para. 6.4 of Practice Direction 51U, and the need for reasonableness and proportionality so shortly before the commencement of the trial, I would dismiss the application.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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