

Neutral citation number: [2020] EWHC 848 (Ch)

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN MANCHESTER
INSOLVENCY AND COMPANIES LIST (ChD)

Case No: CR-2020-MAN-000128

Courtroom No. 42

Manchester Civil Justice Centre
1 Bridge Street West
Manchester
M60 9DJ

Tuesday, 10th March 2020

IN THE MATTER OF CLOUD EMPLOYEE LIMITED (NO. 09039315)
AND IN THE MATTER OF THE COMPANIES ACT 2006

Before:
HIS HONOUR JUDGE HODGE QC
Sitting as a Judge of the High Court

B E T W E E N:

SEBASTIAN OLAF HALL

Petitioner/Applicant

and

(1) NICHOLAS HARGREAVES
(2) CLOUD EMPLOYEE LIMITED

Respondents

MS KELLY PENNIFER appeared on behalf of the Petitioner/Applicant
MR MARTIN BUDWORTH appeared on behalf of the First Respondent
NO ATTENDANCE by or on behalf of the Second Respondent

APPROVED JUDGMENT
(Approved on 7 April 2020 without reference to any papers)

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HHJ HODGE QC:

1. This is my extemporary judgment on the return day of two orders that were made on a without notice basis in favour of the petitioner, Mr Sebastian Hall, against the first respondent, Mr Nicholas Hargreaves, in the context of an unfair prejudice petition presented in relation to Cloud Employee Limited under Section 994 of the Companies Act 2006 under case number CR-2020-MAN-000128. At this hearing, Ms Kelly Pennifer (of counsel) appears for the petitioner (as she did at the two earlier hearings) and on this occasion Mr Martin Budworth (also of counsel) appears for the first respondent. The second respondent, the company, naturally has played no part in the proceedings.
2. The first of the orders in question was made by me on 5 February 2020. There is a transcript, approved by me, of the judgment which I delivered on that day. That order granted both prohibitive and mandatory injunctive relief intended to preserve company assets and business pending the hearing of the unfair prejudice petition. It provided for a return date today. On 10 February 2020 the petitioner issued an application notice seeking the continuation of the relief that I had granted.
3. The second order was made by His Honour Judge Halliwell on 14 February 2020. There is a solicitor's note of that hearing which incorporates notes of the two judgments that Judge Halliwell delivered on that day. On that day, Judge Halliwell granted a freezing injunction in relation both to assets of the company and also the personal assets of the first respondent, although limited to assets within this jurisdiction and to the sum of £500,000, which was rather less than the petitioner had been seeking. The return date of that freezing injunction again is today; and by an application notice issued by the petitioner on 20 February the petitioner seeks the continuation of that freezing relief. Ms Pennifer has indicated that at the return day the petitioner would, in fact, be seeking to extend the scope of that freezing relief so that it applies both on a world-wide basis and in a sum considerably greater than the £500,000 limit provided for in Judge Halliwell's order.
4. Therefore, this is the return day of those two injunctions. However, upon service of the orders and proceedings on the respondent, he has issued applications to set aside those orders on the grounds of material misstatements and/or non-compliance with the duty of full and frank disclosure on the part of the petitioner at each of the two hearings.
5. There is now a mass of written evidence before the court that, as of yesterday, comprised almost 1,500 pages in four lever-arch files, but a third witness statement of the petitioner,

Mr Hall, was handed to me about five minutes before coming into court; that was a witness statement made yesterday, 9 March 2020, and it comprises some 14 pages and exhibits an additional 48 pages of documents. Yesterday I had received written skeleton arguments from Ms Pennifer and Mr Budworth; but because I was sitting delivering judgment on another matter yesterday until late in the afternoon, I had no real opportunity to undertake any pre-reading yesterday.

6. Ms Pennifer had indicated in her skeleton that an hour-and-a-half should be allowed for pre-reading. I, in fact, undertook almost two-and-a-half hour's pre-reading between 8am and 10.30am this morning, but, by the end of it, I felt that I had only really scratched the surface. It seemed to me to be clear that a full day's pre-reading would really be required, and that the hearing would properly extend to some two days, including judgment, if all the matters were to be fully, and fairly, ventilated. As a result, and after a short adjournment to allow counsel to consider their respective positions, Ms Pennifer indicated that she had made an open offer to the first respondent for the orders to continue until the matter could come back before the court with adequate time, with the freezing injunction continuing in the meantime but, as to the first respondent personally, only in relation to his real property assets within this jurisdiction, comprising a residential property in Battersea and a possible further residential property in the County of Lancaster. That proposal has not commended itself to the first respondent. Mr Budworth indicated that he would wish to apply to discharge the personal element of the freezing injunction against his client, with the other matters being stood over to be argued fully, and on the basis that any judgment today should in no way pre-judge the outcome either of the first respondent's applications to discharge the freezing order and other injunctive relief, or the applications by the petitioner to continue such relief, and any possible further application that might be made to extend the relief both on a worldwide basis and in terms of the amount, as intimated by Ms Pennifer. This judgment, therefore, is confined simply to holding the ring until the matter can come back before the court for a full and proper hearing at which all the arguments can be fully, and properly, considered.
7. Mr Budworth essentially advances three bases upon which the existing freezing relief against his client should be discharged. The first is that the way in which the application was presented, in particular to me, but which then fed into the approach before Judge Halliwell, is such as to require a discharge of the injunction. Essentially his complaint is that on the first respondent's case reliance was placed upon emails that had

been obtained in breach of the first respondent's reasonable expectations of a right to privacy, and in a way which infringed his confidential information. Whatever arguments might be presented in relation to the merits of those contentions, Mr Budworth submits that the court was not given the benefit of the contrary arguments, as is required by the case law authority that Mr Budworth has assembled in the early part of his written skeleton argument. On that basis, Mr Budworth submits that the petitioner should not be entitled to maintain the injunctions that have been obtained without notice to his client.

8. The second ground on which Mr Budworth seeks a discharge is that when one looks at the unfair prejudice petition, it seeks relief in the alternative. It seeks a buy-out of the petitioner's shares in the company in which he has an equal, substantial, but minority shareholding with the first respondent. In the alternative, he seeks a winding-up of the company on the just and equitable ground. Mr Budworth points to the failure of the petition to make it clear that the primary relief sought is a buy-out order. Each alternative form of relief is sought in the alternative, without any expression of preference between them on the part of the petitioner. Mr Budworth says that the first respondent is prepared to accede to the making of a winding-up order on the just and equitable ground. That would leave the ensuing insolvency office-holder free to pursue such claims on behalf of the company as he or she may see fit in the course of the winding-up, including any claims arising out of the first respondent's alleged breaches of fiduciary duty. As a result, Mr Budworth submits that there is no basis for the continuation of a freezing injunction, because there is no personal monetary liability on the part of the first respondent, at the instance of the petitioner, against which the petitioner can reasonably apprehend a real risk of dissipation of personal assets on the part of the first respondent.
9. Mr Budworth's third basis for challenging the continuation of the relief is that the allegations of possible dishonesty levelled against him by the petitioner do not provide solid evidence of a real risk that he would dissipate his assets. I have been taken to a considerable number of relevant references in both Volumes 1 and 2 of *Civil Procedure* to the principles governing the grant of freezing injunctions; and I have also been taken to a considerable amount of case law authority.
10. I propose to consider the three bases upon which Mr Budworth mounts his application in the same order as they were taken by Ms Pennifer in her response to Mr Budworth's submissions.
11. As far as the way in which the petition is put is concerned, Ms Pennifer submits that relief is

sought in the alternative, and the petitioner's primary remedy is a buy-out order. She also points out that a winding-up order on the just and equitable ground is a matter for the discretion of the court and is not something which the parties can dictate to the court about. It involves a consideration of the interests of all of the company's shareholders, the company's creditors, and the likely consequences of the making of a winding-up order, together with many other factors. It is not simply in the gift of the first respondent to agree to the company being wound-up. She also makes the point that even if the company were to be wound-up, that would not prevent the court granting relief to the petitioner on his petition. She points out that a share buy-out order could still be made if the company were in liquidation. What the petitioner is seeking to guard himself against is that the first respondent will make himself asset-free, so as to make it more difficult for the petitioner to enforce the payment provisions of any buy-out order that might be made against him.

12. I accept those submissions. As a result, I reject the submissions of Mr Budworth that for the petitioner to pursue the petition in the light of the first respondent's acceptance that the company should be wound-up on the just and equitable ground means that it is simply "not worth the candle" for the petitioner to be pursuing this petition. Mr Budworth says that the petitioner must take the first respondent as he finds him; but that does not mean that if the grant of freezing relief is otherwise appropriate, it should not be granted so as to leave the first respondent, in terms of assets, as he now is, rather than as he might be if he were to do as the petitioner fears and set about divesting himself of his assets. Therefore, I would reject the second of Mr Budworth's grounds of objection to the continuation of the freezing injunction.
13. As far as Mr Budworth's criticisms of the way in which the matter was presented before me, and which then fed into the way in which the matter was viewed by Judge Halliwell, I would not accept Mr Budworth's criticisms of the way in which the matter was presented to me. It is true that I was not referred to the leading Court of Appeal decision in the case of *Imerman v Tchenguiz* [2010] EWCA Civ 908, reported at [2011] 2 WLR 592. However, I was taken to the case of *Jones v University of Warwick* [2003] EWCA Civ 151, reported at [2003] 1 WLR 954. It was that authority which was treated by Lord Neuberger MR in *Imerman v Tchenguiz*, at paragraphs 170 and 171, as setting out the proper approach to the exclusion of admissible evidence. I am not satisfied that, had I been taken to *Imerman v Tchenguiz*, it would have in any way affected my decision.
14. Ms Pennifer has taken me through paragraphs 43-49 of the first respondent's skeleton

argument in which the consequences of a failure to give full and frank disclosure were addressed by Mr Budworth. Mr Budworth submits that the court should discharge an injunction if there has been a breach of the duties owed to the court on the hearing of a without notice application because such serves the twofold purpose of both depriving the applicant of the litigation advantage improperly obtained and deterring other court users from offending the policy behind the full and frank disclosure rule. However, as Ms Pennifer points out, that requires there to have been a substantial breach of the relevant duty, or a deliberate non-disclosure or misrepresentation.

15. Mr Budworth placed emphasis upon observations of Flaux J in the case of *Boreh v Republic of Djibouti & Ors* [2015] EWHC 769 (Comm), reported at [2015] 2 All ER (Comm) 669, at paragraphs 229-230, adopting earlier observations of Mr Geoffrey Vos QC (as he then was) in the case of *St Merryn Meat Ltd v Hawkins* [2001] CPR 116. However, that was a case where there had been the obtaining of evidence of fraud by the bugging of the defendant's phone which had not been disclosed to the court on an *ex parte* application. The observations proceeded on the basis that bad faith on the part of the claimants, had been established.
16. I am satisfied that in such a case the injunction should be discharged as a result of the unlawfully obtained evidence, even though the defendants had admitted fraud, and even though a remedy in damages would be impossible if they had dissipated their assets. However, that is not this case. I am not satisfied that any bad faith, or deliberate and material non-disclosure, on the part of the petitioner has been made out, at least for the purposes of today's hearing.
17. I was taken by Ms Pennifer at length through the relevant chronology of events, as set out at paragraph 10 of her written skeleton argument, and I was taken to the underlying documentary materials. I accept Ms Pennifer's submission that the first respondent could properly have entertained no reasonable expectation of privacy in relation to the emails that were put before me, which in many cases involve the use of the company's own email accounts, and which concerned the company's own business. As Ms Pennifer said, the first respondent may have wanted to keep all this material secret from the petitioner, but he had no reasonable expectation of privacy. As far as any expectation of confidence is concerned, any confidence is properly that of the company, and not the first respondent; but, in any event, there is no confidence in iniquity.
18. I accept Ms Pennifer's submissions that the *Imerman v Tchenguiz* case is very different

from the present case on its facts. There, there had been a wholesale downloading and copying of private and confidential documents belonging to the husband; and they had been downloaded because there was a fear that the husband might fail to disclose, and might conceal, details of his financial status and the location of his assets. However, at that time the husband had been accused of no legal wrong: there was no current allegation of wrongdoing against the husband, there was simply a fear that he might fail to disclose his assets in the future. The context of that case was an application for the private and confidential documents to be delivered up to the husband. Here, the issue is as to the admissibility of the documents that have been obtained. As to that, I was taken to the relevant authority by Ms Pennifer.

19. I am in no position to decide today the merits of the allegations by the first respondent that the petitioner unlawfully accessed his emails; that is a matter that can only be decided at trial and thus, on the authorities, is not an appropriate basis for an application to discharge the injunction on an interim basis. The reality is that, however they have been obtained, the petitioner has emails that make it clear that the first respondent has engaged in a concerted and carefully planned course of conduct, in conjunction with others, directed to divesting the company of its money and business, knowing that such was in breach of his duties as a director, as evidenced by a reference to the likelihood of legal proceedings in one of the emails that was placed before the court.
20. In the course of so doing, the first respondent has deliberately misled the petitioner, and also clients of the company. There is no denial by the first respondent that he is engaged in the conduct alleged against him; his only explanation is to be found at paragraphs 119-121 of his first witness statement. I accept Ms Pennifer's submission that that explanation is difficult to reconcile with the chronology of events, and what they reveal about the full extent of the first respondent's activities. It is clear from his own documents that he has sought to conceal what he was up to, and that he has also sought to destroy relevant evidence, and to fabricate evidence in support of his position in these proceedings. He has also presented invoices for monies which would appear properly to be payable to the company. In those circumstances, had the position being presented to me in the way in which it has been presented to me by Mr Budworth, I am satisfied that it would have made no difference to the outcome. Therefore, I would reject the first basis of Mr Budworth's challenge to the continuation of the freezing injunction.
21. That then leaves me with the third, and final, ground of challenge. Mr Budworth took me to

a number of authorities governing the grant and continuation of freezing relief. It is, however, sufficient, I think, to refer to the relevant principles as they are set out in *Civil Procedure*. Ms Pennifer took me to the passages in the well-known commentary at paragraph 25.1.25.6 of Volume 1, emphasising the need for an applicant to depose to objective facts from which it may be inferred that the respondent is likely to move assets or to dissipate them, indicating the need for the applicant to show a real risk, supported by solid evidence, that a future judgment will not be met because of an unjustifiable disposition of assets. Ms Pennifer reminded me of the typical factors which may be relevant to the question of whether there is a risk of dissipation in a particular case, set out in the fourth full paragraph under that paragraph number.

22. She also took me to Volume 2, to the commentary in the final full paragraph of paragraph 15-23 (at page 2942) and also the commentary at paragraph 15-69 (at pages 2979 and 2980). In the latter paragraph, it is said, in summary, that to demonstrate a sufficient risk of dissipation, a claimant must establish: (1) that there is a real risk that a judgment or award will go unsatisfied as a result of unjustified dealings with the defendant's assets; (2) that the risk can be demonstrated with solid evidence: mere interference or generalised assertion is not sufficient; (3) that the evidence, upon scrutiny, shows that the dishonesty in question justifies the conclusion that assets are likely to be dissipated: mere allegations that a defendant has been dishonest are insufficient; (4) the relevant enquiry is whether there is a current risk of dissipation: past events may be evidentially relevant but only if they demonstrate a current risk of dissipation of assets now held; and (5) the following are important considerations: (a) the nature, location and liquidity of the defendant's assets; (b) whether or to what extent the assets already secured are incapable of being dealt with; and (c) the defendant's behaviour in response to the claim or anticipated claim.
23. In his brief reply, Mr Budworth emphasised the requirement identified in the commentary for the dishonesty asserted to be clearly and closely proximate to the proceedings before the court.
24. In my judgement, the requirements set out in the authorities and the commentary are made out here. I am satisfied that the dishonest conduct that, on the evidence, has been asserted against the first respondent, and which gives rise to a good arguable case of dishonesty, also establishes a real risk of dissipation of assets. The first respondent has been prepared to appropriate company monies to his own control, and to appropriate the company's business and creditors to his own corporate creatures, in such a way as to seek to deprive the

company of its business and commercial connections. In the course of doing so, he has taken active, and concerted and considered, steps to conceal what he was up to. I am satisfied that all of that gives rise to solid grounds for fearing that there is a real and substantial risk that he will seek to make himself judgement-proof, so as to prevent the working out of any buy-out order that might be made against him in favour of the petitioner.

25. Ms Pennifer has made it clear that she does not seek any extension of the freezing injunction today. I am satisfied that the existing freezing injunction should continue until the matter can come back for a full, and proper, consideration of the four applications that are presently before the court and any further applications that may be launched. I am conscious that, in the intervening period, the petitioner may seek to extend the scope of the freezing injunction, and that the first respondent may make some admissible offer in relation to the unfair prejudice petition in accordance with the principles in *O'Neill v Phillips* [1999] UKHL 24; that is a matter for the future.
26. I am satisfied that to hold the ring until the further hearing that is required, the existing orders should continue although it would not be appropriate, in view of the discharge applications, to set any further date, for the time being, for the provision of information. The information provided has not yet been supplied; if that amounts to a contempt then so be it. However, it does not seem to me that I should set any further date for the provision of information, although I have not heard any submissions on that. Therefore, that concludes this extemporary judgment.

End of Judgment

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