



Neutral Citation Number:[2021] EWHC 1995 (Ch)

Case No: BL-2018-000544

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

7 Rolls Building
Fetter Lane, London
EC4A 1L

Date: 15TH July 2021

Before :

MR JUSTICE ZACAROLI

Between :

- (1) TONSTATE GROUP LIMITED
- (2) TONSTATE EDINBURGH LIMITED
- (3) DAN-TON INVESTMENTS LIMITED
- (4) ARTHUR MATYAS

Claimants

-and-

- (1) EDWARD WOJAKOVSKI
& 11 others

Defendants

-and-

- (1) RAYDENS LIMITED (trading as Rayden Solicitors)
- (2) KEIDAN HARRISON LLP

Additional Defendants

Andrew Fulton QC (instructed by **Rechtschaffen Law**) for the **Claimants**
Andrew Dinsmore (instructed by **Keidan Harrison LLP**) for **Keidan Harrison LLP**
Leonora Sagan (instructed by **Rayden Solicitors**) for **Raydens Limited**
Mr Wojakovski appeared in person

Hearing date: 8TH July 2021

APPROVED JUDGMENT

COVID-19: This judgment was handed down remotely by circulation to the parties' representatives by email. It will also be released for publication on BAILII and other websites. The date and time for hand-down is deemed to be NB 10.30 am on 15TH July 2021.

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MR JUSTICE ZACAROLI

Mr Justice Zacaroli:

1. This judgment deals with the costs of an application for disclosure which was determined in April 2021. The background is set out at section 2 (paragraphs 71 to 117) of the judgment I delivered on 30 April 2021 ([2021] EWHC 1122 (Ch) - the “Main Judgment”).
2. By the application, the claimants sought disclosure from Mr Wojakovski and (to the extent not provided by him) from two firms of solicitors instructed by him in other proceedings, Raydens Limited (“Raydens”) and Keidan Harrison LLP (“KH”). The disclosure sought was of information and documents relating to the funding of those solicitors. This costs application is made only against Raydens and KH.
3. The application as against Raydens and KH was made on two bases. First, it was contended that Mr Wojakovski was in breach of the obligation contained in a freezing order made by Falk J on 27 August 2020 (the “WFO”) to inform the claimants as to the source of money used to pay legal expenses, before spending such money. Both firms of solicitors were themselves said to be complicit in breaching the WFO, and in contempt of court, because they were aware of the terms of the WFO but had accepted payment in respect of Mr Wojakovski’s legal fees from third party funders knowing that no prior notice had been given by Mr Wojakovski. Second, disclosure was sought under section 37 of the Senior Courts Act 1981, ancillary to the WFO.
4. In the Main Judgment, on the assumption (which the claimants were prepared to make) that the funds had come from genuine third parties, I rejected the contention that there had been a breach of the WFO. KH did not oppose an order under section 37 (but needed the protection of a court order because of confidentiality concerns), so an order was made against KH by consent. In contrast, since I determined that Raydens had, by the time of the hearing, provided all the information and documents in their possession, I made no order against them.
5. All parties agree that costs should be assessed on the indemnity basis but are otherwise as far apart as they can be. The claimants contend that Raydens and KH should be jointly and severally liable for the whole of their costs of the application, and the costs of making two subsequent without notice applications to obtain further disclosure from two banks. Each of Raydens and KH contend that the claimants should pay the whole of their costs of the application.
6. At first glance, the costs consequences of the order made giving effect to that judgment, as between the claimants and the two firms of solicitors, ought to be straightforward. On the only point of substance that was in issue on the application as between the claimants and the two firms (the point as to the breach of the WFO) the claimants lost. Costs normally follow the event. In this case that would mean the claimants being liable to pay Raydens’ and KH’s costs of the application.

7. In some cases, even though a respondent to an application consents to an order being made, the applicant might be entitled to at least part of their costs on the basis that it was only the issue of the application which prompted the respondent to provide the disclosure sought. That is not the case here, where there was no prior warning to either of Raydens or KH that an application would be made against them. In relation to Raydens, they had in fact provided information immediately upon being asked to do so, long before the application was issued.
8. The claimants contend – as against Raydens – that they should be entitled to their costs of the application at least until 9 April 2021 (by which time most of the costs of the application had been incurred), because it was only then that Raydens provided details and documents relating to funding provided to them by a Mr Marx. Mr Marx had in fact paid £25,000 to Raydens on 1 March 2021, but no mention of this was made in Raydens’ letter to the claimants’ solicitors just two days later on 3 March 2021.
9. When Raydens did reveal those details, a month later, the claimants, having offered a drop-hands settlement of the application which Raydens had accepted, withdrew from that offer, complaining that Raydens had deliberately concealed Mr Marx’s funding.
10. This was an issue raised at the hearing of the disclosure application, but not then pursued by the claimants on the basis that it was not relevant to the issues that needed to be determined. In fact, Mr Fulton said at that hearing that the question of concealment would only be relevant on the question of costs, if the court accepted the claimants’ arguments that disclosure should be ordered on the basis of there having been a breach of the WFO.
11. On that basis, since I rejected the claimants’ arguments on that point, it ought logically to follow that the claimants would not now be pursuing the concealment point. Mr Fulton frankly accepted, however, that he had mis-spoken on the last occasion, and that he had not intended to qualify the circumstances in which the concealment point might be relevant in relation to costs.
12. I accept that what was said at the last hearing does not preclude the claimants raising the concealment point in relation to costs. But I reject the contention that Raydens deliberately concealed matters relating to Mr Marx and that it was therefore necessary to pursue the application against them to obtain disclosure of such matters.
13. On the face of it, it was perhaps surprising that Raydens did not, in their letter of 3 March 2021, make reference to the fact that they had received funding from Mr Marx, if only “for completeness” as they did on 9 April 2021. I accept, however, as Ms Sagan submitted, that the context in which the 3 March letter was written is sufficient to negate an inference that there was any deliberate concealment of Mr Marx’s involvement. First, and most importantly, to Raydens’ knowledge at the time, the fact that Mr Marx was funding Mr Wojakowski’s legal fees was well known to the claimants, because

Mr Marx (who knows both Mr Wojakovski and Mr Matyas personally) had told Mr Matyas on 21 February 2021 that he intended to do so. Mr Marx provided a witness statement to that effect. Mr Matyas also provided a witness statement in which he accepts that Mr Marx had told him that he wanted to help Mr Wojakovski with his legal fees.

14. Mr Fulton submitted that it is not enough that the claimants were aware, generally, that Mr Marx had decided to assist Mr Wojakovski with his legal fees, because they sought full details and documents. It is important to note, however, that Raydens' letter of 3 March was part of a chain of correspondence relating to funding provided in November 2020 by a company called Intelligent Legal Solutions Limited ("Intelligent Legal") to Raydens in the context of the claimants' contention that this was not genuine third party funding. Specifically, it was a response to Rechtschaffen Law's letter of 25 February 2021 which raised a series of issues relating to Intelligent Legal's funding and repeated the contention that there was reason to suspect that Mr Wojakovski was using third parties as a screen. In that context, and remembering that Raydens' position (which I held to be correct) was that funds paid by a third party to them for Mr Wojakovski's legal fees were not within the notification provisions in the WFO, I do not find it suspicious, or indicative of concealment, that the 3 March letter did not refer to funding received from a personal friend of both Mr Wojakovski and Mr Matyas, when that fact was already known to everyone.
15. Mr Fulton further submitted that the claimants had been provided with conflicting information as to the source of Raydens' funding (as between what Mr Marx had told Mr Matyas and Raydens' own statement that they had received £15,000 from Intelligent Legal). Raydens ought, therefore, to have informed them of Mr Marx's funding as soon as they themselves became aware of it. I do not find anything inconsistent, however, in the claimants being informed of two different sources of funding: the funds from Intelligent Legal that Raydens told the claimants about pre-dated Raydens' letter to the claimants of 2 December 2020. Mr Matyas was told of Mr Marx's intention to fund Mr Wojakovski's ongoing matrimonial proceedings (prospectively) in February 2021. More importantly, nothing in this leads me to infer that Raydens knew that the claimants were acting under any misapprehension, which they chose to perpetuate by refraining from informing them about Mr Marx's funding.
16. Secondly, if Raydens had deliberately concealed that information, it makes no sense that at the point when the claimants offer a drop-hands settlement (which Raydens accept) they would then voluntarily provide the very information they had sought to conceal.
17. So far as KH is concerned, as I have noted, their position was that there was no breach of the WFO and that so far as further disclosure was sought under section 37, they could not consent to it but would not oppose it. The claimants contend that KH should nevertheless pay the costs of the application because of their unreasonable stance in declining the claimants' offer of a drop-hands

settlement and fighting on (at a cost to KH of over £30,000) simply to recover £2,250 worth of fees.

18. I reject this for three reasons. First, the point cuts both ways: if it was unreasonable for KH to resist an application in order to recover such a small amount, then it could be said to be equally unreasonable for the claimants to pursue an application for the same reason.
19. Second, KH suggested in advance of the hearing of the application that, since the only question was their entitlement to a relatively small amount of costs, this could be dealt with shortly and without the need to engage Counsel. The claimants rejected that, and continued to assert that they were entitled to disclosure on the basis of a breach of the WFO. Their reason for doing so was, as Mr Fulton indicated during this costs hearing, so that they could recover the costs of the disclosure application against the solicitors. This was largely driven (as suggested in the claimants' skeleton for the disclosure application) by the contention that the costs of extracting information as to funding must be borne by *someone* and as Mr Wojakovski was in no position to pay, the costs were more fairly borne by the solicitors who had benefitted from the funding. The need to find someone to pay the costs because the principal respondent is not good for the money is not a reasonable basis for making a costs order against the solicitors. Having pursued the application for that reason, and on a legal basis which failed, it hardly lies in the mouth of the claimants to contend that it was unreasonable for KH to resist.
20. Third, by basing the application on the argument that there had been a breach of the WFO, there was much more at stake for KH than merely the outstanding costs. It gave rise to serious reputational issues. KH was justified (irrespective of the amount of money at stake) in defending the application for that reason.
21. I have addressed so far those matters that were in play at the time of the hearing of the application. On the basis of those matters, I see no reason to depart from the usual principle that costs follow the event, such that the claimants should pay Raydens' and KH's costs of the application. The claimants now rely, however, on what has emerged through orders subsequently made without notice by Trower J on 15 and 22 June.

Subsequent orders

22. Based on the information provided by Raydens and Mr Wojakovski, in June 2021 the claimants sought disclosure from two UK banks (Barclays and Santander).
23. From Raydens, the claimants had received a statement for a 3-day period from 26 to 28 November 2020 for an account (ending 8605) identifying a debit of £15,000 in favour of Raydens. This was an account of Intelligent Legal.
24. From Mr Wojakovski, the claimants had received statements for the 8605 account for a longer period, from 1 October 2020, which identified a payment to KH of £4,800 on 12 January 2021, and statements for an account with

Santander for a related company, Intelligent Languages Limited (“Intelligent Languages”), numbered 1461, from which a further payment, of £7,000, to KH was made on 10 May 2021.

25. As a result of Trower J’s order on 15 June 2021, Santander provided further statements from accounts 8605 and 1461, which revealed (1) two transfers from Mr Wojakowski to account 8605 on 10 July 2020 and (2) a transfer of £15,000 from Intelligent Legal to Intelligent Languages on 11 August 2020.
26. On the back of this information, the claimants contend (in outline) as follows:
 - (1) It is clear that, contrary to the assertions of Mr Wojakowski, Raydens and KH, the funds ostensibly provided by Intelligent Legal and Intelligent Languages to pay the fees of both Raydens and KH were funds that had originally been provided by Mr Wojakowski;
 - (2) KH and Raydens breached their duties to carry out sufficient inquiries (as mandated by anti-money laundering (“AML”) and know-your-customer requirements) into the source of the funds they received from Intelligent Legal/Languages;
 - (3) Had the solicitors carried out sufficient inquiries, there would have been no need for the disclosure application, and there would have been no need for the further applications against the banks so, for that reason, Raydens and KH must bear the costs of the disclosure application, and the further applications against the banks; and
 - (4) Independently of any causation issue, the (mis)conduct of the two firms was so great that I should exercise the broad discretion as to the costs by ordering the two firms to pay the costs of the application and/or to deny them any of the costs which they seek.
27. As against Raydens, the claimants additionally rely on their alleged misconduct in facilitating a breach of my order of 14 May 2021, in receiving funds from Mr Marx, paid to them on 19 May 2021, without the claimants having been informed in advance of that payment by Mr Wojakowski.
28. These constitute further serious allegations against two firms of solicitors. They were strenuously denied by both firms. As Mr Dinsmore stressed, this is not a regulatory hearing to determine the solicitors’ compliance with regulatory requirements, it is a costs hearing. As such, the procedural steps that would have been undertaken in a regulatory enquiry have not occurred, and it would in any event be wrong to escalate what should be a relatively short consequential application into substantial satellite litigation.
29. Given the seriousness of the allegations, I address the substance of them below at [35] to [41]. Even if, however I had been satisfied that either firm had failed to comply with regulatory requirements, I would not have concluded that they should for that reason be liable for the costs of the disclosure application.

30. The first basis on which the claimants contend such misconduct is relevant is that it *caused* the application to be made and pursued to a full hearing. Had the solicitors obtained statements for the accounts of Intelligent Legal and Intelligent Languages back to July 2020, they would (it is said) have discovered that the funds paid by those companies to the solicitors represented funds of Mr Wojakowski. They would have been bound to reveal that to the claimants. Had they done so, there would have been no need for the application against any of KH, Raydens and Santander.
31. So far as the disclosure application is concerned, the problem with this argument is that there was in any event no need for the application because (1) Raydens had voluntarily supplied all the information they had and (2) KH made it clear that they would not oppose an application based on section 37 or the Norwich Pharmacal jurisdiction, but simply needed the protection of a court order to satisfy confidentiality concerns. The fact (as Mr Fulton pointed out) that there would have to have been a hearing of the application as against Mr Wojakowski, and that the application against the solicitors was only a fall-back, so that they would be required to provide information to the extent that Mr Wojakowski did not, is irrelevant. The question on this application relates solely to the costs of the application as against the solicitors. The application was pursued (as I have noted above) against the solicitors on the basis of an allegation that the solicitors were complicit in a breach of the WFO, which I rejected, and for a purpose, to ensure that *someone* paid the costs of an application to obtain information from Mr Wojakowski, which I have held to be a bad one.
32. It is also important to bear in mind that the application against the solicitors was to obtain whatever information they had, so that the claimants could use that information to make further enquiries, including against other third parties. The claimants were not entitled to require the solicitors themselves to make enquiries of third parties so as to assist the claimants. Nor is it suggested that the solicitors owed any duty to the claimants in connection with their AML inquiries.
33. The claimants are on stronger ground in suggesting a purely causal link between the information which the solicitors would have revealed, had they dug deeper into the Intelligent Legal/Languages account statements, and the applications before Trower J against the banks. I do not see any basis, however, on which the costs of those applications can be laid at the door of the solicitors. Neither firm was a party to or involved in any way in those applications and, as I have noted, even assuming that the solicitors ought to have done more by way of due diligence for AML purposes, they did not owe any duty in that regard to the claimants. Accordingly, there would be nothing on which to found a claim that the expense which the claimants were caused to incur in the applications against the banks could be recovered from the solicitors.
34. As to the claimants' contention that any misconduct would be relevant to the exercise of discretion, while I accept that the discretion as to costs is a broad one, I do not think that such failing in their regulatory obligations (had I found

any) would have been any justification to reach a different conclusion as to the costs of the disclosure application to that I have indicated above.

35. On the basis of the evidence that has been adduced on this application, I am in any event not satisfied that the allegations of regulatory failings are made out.
36. So far as Raydens are concerned, while they were provided with evidence of the bank statement from which the payment of £15,000 to them was made, it is true that they did not seek copies of further bank statements so as to identify the ultimate source of those funds. As Ms Sagan pointed out, however, Raydens had written confirmation from Mr Rugova (of Intelligent Legal) that the funds had not come from Mr Wojakovski. It further appears that the AML regulations on which the claimants rely do not apply to funding provided to solicitors for the purposes of litigation work. Moreover, Raydens were entirely open with the claimants as to what they had done, and had obtained, through their AML inquiries, well in advance of the disclosure hearing in April.
37. The other point taken against Raydens is their alleged complicity in a breach of the order of 14 May 2021. That order required Mr Wojakovski to notify the claimants *before* any third party paid a sum in respect of Mr Wojakovski's legal expenses. On 19 May 2021, Mr Marx paid nearly £40,000 to Raydens. There is no indication that Raydens were made aware that the payment was to be made, before it was made. They could not, therefore, have checked with Mr Wojakovski, before the payment was made, that he had complied with the obligation to give the claimants prior notice. The next day, Mr Wojakovski disclosed the fact of the payment to the claimants (in his affidavit dated 20 May 2021). Raydens saw that affidavit at the time.
38. The claimants contend that Raydens ought to have reached an arrangement with Mr Marx – once the order of 14 May 2021 had been made, which required him not to pay any sum to Raydens without first having ensured that he or Mr Wojakovski had notified the claimants of the intended payment. That might well have been a sensible arrangement to make, but it does not follow that because Raydens did not do so, they are therefore complicit in causing a breach of the order by the fact that Mr Marx, without prior warning to them, paid them a sum of money in respect of Mr Wojakovski's fees. It certainly does not warrant, in my view, reversing the conclusion reached upon exercising discretion as to the costs of the earlier application.
39. As for KH, the claimants' particular complaint is that KH's own evidence was that they had carried out AML checks in accordance with the regulations they exhibited in evidence (so that even though it did not necessarily apply to litigation funding, they had followed it). KH did, however, seek further information from Intelligent Legal beyond the statement of the relevant bank account identifying the payment out. They in fact had bank statements going back to 1 October 2020 (that is, four months prior to the payment of £4,800 made to KH in January 2021). Those statements showed considerable activity on the account, although it is true to say that the activity almost entirely consisted of payments *out* of the account. KH also enquired of Intelligent

Legal as to the source of the starting balance (of just over £60,000) in October 2020 and received the answer (as I read the response from Intelligent Legal) that it was the result of consultancy work. KH continued to interrogate the operation of the account relating to the period *after* they had received payment and were satisfied that it was used for apparently proper business purposes.

40. The claimants rely on the very recently disclosed information from KH that the letter it received from Intelligent Legal in February 2021 had been drafted by them and was in the same terms as another letter from Mr Wojakovski's brother confirming the source of the funding he had provided. It was KH's evidence, however, that these letters were simply a part of KH's systems for ensuring they had written confirmation from the funders as to what they had been told. The mere fact that KH drafted the letters is not sufficient reason to infer misconduct on the part of KH (certainly not without the proper processes that would be involved in a regulatory complaint).
41. Moreover, as Mr Dinsmore submitted, whatever the bank statements might reveal about Mr Wojakovski's lack of compliance with court orders (about which, since Mr Wojakovski is not a party to this costs application, I say nothing), they are far from establishing that the funds paid to the two firms of solicitors represented either Mr Wojakovski's funds or the proceeds of crime. There were many intervening payments in and out of both accounts 8605 and 1461 between the payment of Mr Wojakovski's funds into account 8605 and the payments out from each account to the solicitors. While the fact that Mr Wojakovski had paid £50,000 to Intelligent Legal in July 2020 clearly raises important questions, it does not necessarily lead to the conclusion that the solicitors were being funded by Mr Wojakovski, and certainly does not establish that they were being funded with the proceeds of unlawful extractions from the Tonstate group companies.

Conclusion as to liability for costs

42. For the reasons set out above, I conclude that the claimants must pay the costs of Raydens and of KH of and occasioned by the disclosure application.

Basis of assessment

43. As I have noted above, each of the parties contended that their costs should be assessed on the indemnity basis. Although this was not separately addressed by the claimants, I take it that they resist the application that they should pay Raydens' and KH's costs on the indemnity basis.
44. In my judgment, nevertheless, those costs should indeed be assessed on the indemnity basis.
45. The question is whether, looking at the case as a whole, including the nature of the allegations which the claimants made, but failed on, the case is out of the norm in such a way as to make it just to order costs on the indemnity basis: see, for example, *The Brilliant Virtuoso* [2019] EWHC 3300 (Comm), at [3], [7] and [11].

46. The claimants chose to base their application for disclosure on the highly contentious basis that Raydens and KH were knowingly complicit in a breach of the WFO. This raised potentially very serious reputational issues for both firms. They pursued the application on that basis, notwithstanding that Raydens had provided the information sought from them, and that KH did not oppose an order for further disclosure pursuant to the jurisdiction under section 37. I consider that the pursuit of that application solely to make the solicitors liable for costs which could not be recovered from Mr Wojakovski was in itself unreasonable.
47. As I pointed out in the Main Judgment, the claimants took an aggressive approach to the application against the solicitors. That included allegations (which I have in this judgment rejected) of deliberate concealment by Raydens.
48. Taking all the circumstances of the application into account, I consider that it was sufficiently out of the norm to make it just to award costs on the indemnity basis.
49. I have been provided with schedules of costs for each of the parties, and the parties are content that I assess the costs summarily on the basis of those schedules. Raydens' costs were £30,372.50 (inclusive of VAT); KH's costs were £35,438.50; and the claimants' costs were £67,202.50.
50. In the absence of any objection being taken by any party to a particular item in the costs bills of any other party, and in circumstances where (1) the solicitors were justified in taking the disclosure application seriously in view of the nature of the allegations made against them and (2) the claimants' costs bill was double that of the costs bill of each of the firms of solicitors, I am satisfied that the amounts claimed by Raydens and KH are reasonable in amount and reasonably incurred. Accordingly, I will order that the costs of Raydens are summarily assessed in the amount of £30,372.50 and the costs of KH are summarily assessed in the amount of £35,438.50.
51. Mr Wojakovski requested that the claimants be ordered to pay him approximately £5,000 for the costs he incurred in preparing the affidavit which he was ordered to provide by my Order of 14 May 2021. I do not see any basis on which he is entitled to those costs. He is not in the same position as a third party who is ordered to provide information under section 37. On the contrary, the Order was made against him as a result of his refusal to provide the information in response to the claimants' prior requests.