



Neutral Citation Number: [2019] EWHC 995 (QB)

Case No: CL-2017-000717

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/04/2019

Before :

MASTER COOK

Between :

STATE BANK OF INDIA & OTHERS	<u>Claimant</u>
- and -	
(1) DR VIJAY MALLYA	
(2) LADYWALK LLP	
(3) ROSE CAPITAL VENTURES LIMITED	
(4) ORANGE INDIA HOLDINGS S.A.R.L.	<u>Defendants</u>
-and-	
ICICI BANK UK PLC	<u>Third Party</u>

Nigel Tozzi QC (instructed by TLT LLP) for the Claimant
John Brisby QC and Alexander Cook (instructed by DWF LLP) for the First Defendant

Hearing date: 3 April 2019

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MASTER COOK

MASTER COOK:

1. This is the hearing of the Claimants' application for a Third-Party Debt Order [TPDO]. The interim order was made by Master Kay QC on 14 January 2019 and in the usual way the Interim Third-Party Debt Order [ITPDO] was made on paper and without notice to the Defendants or the Third Party.
2. The ITPDO was served on the Third Party on 17 January 2019 and had the effect of attaching £258,559.79 that was in the First Defendant's account with the Third Party.
3. The judgment debtor Dr Mallya owes the Claimants more than £1.142 billion arising from proceedings in the Bangalore Debt Recovery Tribunal against Kingfisher Airlines and others by way of a judgment dated 19 January 2017. The judgment was registered in this jurisdiction under the Foreign Judgments (Reciprocal Enforcement) Act 1933 by Picken J on 24 November 2017. On the same day Picken J granted a worldwide freezing order [WWFO].
4. Dr Mallya's applications to set aside the orders made by Picken J and for a stay of the judgment were refused by Mr Andrew Henshaw QC sitting as a judge of the High Court on 8 May 2018, see *State Bank of India v Mallya* [2018] EWHC 1084 (Comm). Dr Mallya was refused permission to appeal against this decision by Flaux LJ on 24 July 2018.
5. On 11 September 2018 the Claimants presented a bankruptcy petition against Dr Mallya. Dr Mallya has filed a notice of opposition to the petition relying upon a variety of grounds including assertions that the judgment debt is secured, that the judgment creditor has failed to state the value of its security, that there is a reasonable prospect of payment of the petition debt within a reasonable period and that the petition debt is subject to collective insolvency proceedings in India. I am told that it is unlikely the petition, which has now been transferred to the High Court, will come on for hearing before December 2019.
6. On 19 February 2019 Dr Mallya made an application pursuant to section 285 (2) of the Insolvency Act 1986 for a stay of all enforcement proceedings which have been commenced since the presentation of the Bankruptcy Petition. This application will be heard by a Judge of the Commercial Court on 22 May 2019.
7. On behalf of Dr Mallya, Mr Brisby QC put forward four grounds of opposition to making the ITPDO final;
 - i) having started bankruptcy proceedings based on the judgment debt of £1.142 billion it is (and was) not open to the Claimants to seek to pursue a TPDO as this is fundamentally inconsistent with the policy of the bankruptcy regime, which is to ensure the assets of a bankrupt are distributed *pari passu* among all unsecured creditors,
 - ii) the application for a TPDO is oppressive in that the ITPDO freezes only £258,559.79, a very small proportion of the judgment debt, in circumstances where the Claimants have effective security over assets worth £1.6 billion,

- iii) the application for an ITPDO was a deliberate ploy on the part of the Claimants to thwart Dr Mayalla's ability to meet his ordinary living and reasonable legal expenses permitted under the terms of the WWFO,
 - iv) there had been a failure on the part of the Claimants to make full and frank disclosure when applying without notice for the ITPDO of the matters set out at (i) to (iii) above such that the ITPDO should be set aside.
8. In the circumstances there are two issues for the Court. Firstly, should the ITPDO be set aside by reason of the alleged non-disclosure? If not, secondly, should the ITPDO be made final?
9. What is the nature of the duty of disclosure in an application for an ITPDO? In *Merchant International Company v Natsionalna Aktsionerna Naftogaz Ukrainy* [2014] EWHC 391 (Comm) Blair J said;

“68. No authority was cited to me on the duty of disclosure in the specific context of a without notice application for a third party debt order. Naftogaz submits that the same principles apply as apply in the case of applications for freezing orders, which has been the subject of much case law. Whilst accepting that there is a duty of disclosure, MIC submitted that the duty was a lesser one, and relied (if necessary) on the cases which show that a freezing order which has been discharged on non-disclosure grounds may, in some circumstances, be re-imposed where the interests of justice require it.

69. In my view, some force is given to Naftogaz's submission by the fact that the effect of an interim third party debt order is to freeze the debt in question (for example, money in the judgment debtor's bank account) up to the amount of the judgment debt. In that respect, it is not unlike a freezing order, though it is directed at the third party not the judgment debtor. There, however, the similarity ends. Whereas a freezing order is exceptional relief, even where the claimant has obtained judgment, the third party debt order procedure is a long established and routine way to attach debts owed to the judgment debtor by a third party. I can see no reason to import the case-law applying to disclosure in the case of freezing orders, and no authority has been cited to me that requires it.

70. On the other hand, the importance of accurate evidence on a without notice application is undoubted, as is the duty of disclosure on such an application (see for example *Ghafoor v Cliff* [2006] 1 WLR 3020 at [46], David Richards J, in the context of without notice applications for the grant of administration). As Hobhouse J put it in a well known passage in *The "Jay Bola"* [1992] 2 Lloyd's Rep 62 at 67, there is a duty of disclosure on all ex parte applications, but the extent of the duty and the gravity of any lack of frankness will depend in any given case on the character of the application. Applying that

approach, where the consequences of an interim third party debt order are potentially serious, and the grounds for making an order debateable, the duty of full and frank disclosure will be commensurately higher.

71. Independent of any issue of non-disclosure, the question whether an interim order should be made final is one for the discretion of the court. This is established in many cases, including *Roberts Petroleum Ltd v Kenny*, cited above. It was held at [1982] 1WLR 301 at 307 that in exercising its discretion, the court must take into account all the relevant circumstances whether they arose before or after the interim order, and should exercise its discretion equitably having regard to the interests of all parties involved. The principles are well summarised in the White Book at CPR 73.4.5. Where no complicating factor exists, such as the effect of an order on other creditors, or the possibility that an order may require the third party to pay twice, there is usually no reason not to make the interim order final, and indeed normally there is no dispute.”

10. In *BCS Corporate Acceptances Ltd v Terry* [2018] EWHC 2349 (QB) Morris J adopted the reasoning of Blair J:

“As to the first question, the existence, and extent, of a duty of disclosure in the context of a without notice application for an interim third party debt order was considered in *Merchant International*, supra, at §§68-71. Blair J held, on the one hand, that there is no reason to import the case-law applying to disclosure in the case of freezing orders, since the latter is "exceptional relief" whilst a third party debt order is long established and routine. On the other hand, the importance of accurate evidence and the duty of disclosure on a without notice application is undoubted. The extent of the duty and the gravity of the lack of frankness depends on the character of the application. Where, as in that case, the consequences of an interim third party debt order are potentially serious and the grounds for making an order debateable, the duty of full and frank disclosure will be commensurately higher. It is to be noted however that in that case Blair J was considering the question in the course of the inter partes hearing to decide whether the interim order should be made final. He concluded on the facts there that the claimants' failings were not such as to warrant discharge for non-disclosure. Rather he would in any event have declined, in the exercise of the final hearing discretion, to make the final third party debt order. For the reasons given by Blair J, I consider that there is a duty upon the applicant for an interim third party debt order to provide accurate evidence and that there is a duty of disclosure.”

11. Thus, there is a duty on the applicant for a TPDO to provide accurate evidence and there is a duty of disclosure. The scope of duty of disclosure will depend upon the

circumstances of the application with greater disclosure being required where the grounds for making an order are debatable or the consequences of making an order may be severe.

12. CPR 72.3 (2) requires the application notice for a TPDO to contain the information set out in PD 72. CPR 72.4 (1) provides that an application for a TPDO will initially be dealt with by a judge without a hearing. PD72 paragraph 1.2 provides that the notice of application must contain the following information:

- “(1) the name and address of the judgment debtor;
- (2) details of the judgment or order sought to be enforced;
- (3) the amount of money remaining due under the judgment or order;
- (4) if the judgment debt is payable by instalments, the amount of any instalments which have fallen due and remain unpaid;
- (5) the name and address of the third party;
- (6) if the third party is a bank or building society—
 - (a) its name and the address of the branch at which the judgment debtor’s account is believed to be held; and
 - (b) the account number; or, if the judgment creditor does not know all or part of this information, that fact;
- (7) confirmation that to the best of the judgment creditor’s knowledge or belief the third party—
 - (a) is within the jurisdiction; and
 - (b) owes money to or holds money to the credit of the judgment debtor;
- (8) if the judgment creditor knows or believes that any person other than the judgment debtor has any claim to the money owed by the third party—
 - (a) his name and (if known) his address; and
 - (b) such information as is known to the judgment creditor about his claim;
- (9) details of any other applications for third party debt orders issued by the judgment creditor in respect of the same judgment debt; and
- (10) the sources or grounds of the judgment creditor’s knowledge or belief of the matters referred to in (7), (8) and (9).”

13. PD 72 paragraph 1.3 provides:

“The court will not grant speculative applications for third party debt orders, and will only make an interim third party debt order against a bank or building society if the judgment creditor’s application notice contains evidence to substantiate his belief that the judgment debtor has an account with the bank or building society in question.”

14. It is common ground that the Claimants’ application complied with the provisions of CPR 72.3 (2) and the associated Practice Direction.

15. I do not accept Mr Brisby QC’s submission that the existence of the bankruptcy proceedings is fatal to the Claimants’ application. In my judgment the fact of the bankruptcy petition is a matter which is relevant to the Court’s discretion to make the ITPDO final. In this case the grounds for making an ITPDO were strong. There was an undisputed and unpaid judgment for a substantial sum, of money and a stay had been refused. In other words, it was not material for the Court to know of the bankruptcy petition at this stage of the process.

16. In the case of *Sandu v Sidu* [2011] EWHC 3675 (Ch), Registrar Derrett’s decision to continue an interim charging order to a date after the hearing of a potential bankruptcy hearing was upheld on appeal by Vos J (as he then was):

“What she had to do was to exercise her discretion as to whether to make a charging order final when she knew that a bankruptcy was imminent and she knew that a bankruptcy notice had been served and she knew that a petition was likely to be presented, as indeed it was. It is not imperative and it is not mandatory for the Registrar in that position to refuse to make an interim charging order final. She has to weigh up the various factors and consider the interests of unsecured creditors together with the interests of the judgment debtor and the judgment creditor. But in order to succeed on an appeal from the Registrar’s exercise of such discretion, it is necessary to show that there is a real likelihood that the Registrar exercised her discretion on the wrong principles.”

17. In the case of personal bankruptcy, the bankruptcy commences on the making of the bankruptcy order and there is no relation back to the date of the petition. Section 346 (1) of the Insolvency Act 1986 provides;

“Subject to section 285 in Chapter II (restriction on proceedings and remedies) and to the following provisions of this section, where the creditor of any person who is adjudged bankrupt has, before the commencement of the bankruptcy—

(a) issued execution against the goods or land of that person,
or

(b) attached a debt due to that person from another person,

that creditor is not entitled, as against the official receiver or trustee of the bankrupt's estate, to retain the benefit of the execution or attachment, or any sums paid to avoid it, unless the execution or attachment was completed, or the sums were paid, before the commencement of the bankruptcy.”

18. In my judgment the proper time to consider the issue of existing bankruptcy proceedings in the case of a TPDO is on further consideration of the application under CPR 72.8. For the reasons given by Blair J in *Merchant* it would be wrong to import the case-law applying to disclosure in the case of freezing orders. To do otherwise would be to turn an established routine paper process into something far more elaborate. There has been a failure to disclose the existence the bankruptcy proceedings at the outset of the application however I am not satisfied that the failure was material to the Court's consideration of the ITPDO.
19. For similar reasons I reject Mr Brisby QC's submissions concerning the failure to disclose the WWFO or the settlement offer (made by a co-debtor) relied upon by Dr Mallya to support his contention that there is effective security of £1.6 billion in the context of the paper application for an ITPDO. I also take into account the fact that Dr Mallya has not made any application for a hardship order under CPR 72.7.
20. I now turn to the further consideration of the application. In exercising my discretion under CPR 72.8, it is common ground that I must apply the principles set out in *Roberts Petroleum Ltd v Bernard Kenny Ltd* [1982] 1 WLR 301 (CA)

“(1) The question whether a charging order nisi should be made absolute is one for the discretion of the court.

(2) The burden of showing cause why a charging order nisi should not be made absolute is on the judgment debtor.

(3) For the purpose of the exercise of the court's discretion there is, in general at any rate, no material difference between the making absolute of a charging order nisi on the one hand and a garnishee order nisi on the other.

(4) In exercising its discretion the court has both the right and the duty to take into account all the circumstances of any particular case, whether such circumstances arose before or after the making of the order nisi.

(5) The court should so exercise its discretion as to do equity, so far as possible, to all the various parties involved, that is to say, the judgment creditor, the judgment debtor, and all other unsecured creditors.

(6) The following combination of circumstances, if proved to the satisfaction of the court, will generally justify the court in exercising its discretion by refusing to make the order absolute:
(i) the fact that the judgment debtor is insolvent; and (ii) the fact

that a scheme of arrangement has been set on foot by the main body of creditors and has a reasonable prospect of succeeding.

(7) In the absence of the combination of circumstances referred to in (6) above, the court will generally be justified in exercising its discretion by making the order absolute.”

21. As I have already said, on further consideration of the application under CPR 72.8, it is plainly a relevant consideration that there are bankruptcy proceedings underway. The hearing of the petition will not take place for at least eight months. In the circumstances Mr Tozzi QC urged me to make the ITPDO final. He referred me to section 346 of the Insolvency Act 1986, which provides that a creditor who completes their enforcement prior to a bankruptcy order being made is entitled to retain the benefit of that enforcement. He pointed to the fact that the sum of £258,559.79 which has been caught by the ITPDO is a very small proportion of the £1.142 billion judgment and made the point that the potential prejudice to other creditors would be minimal in the circumstances.
22. It is also a relevant consideration that Dr Mallya is opposing the bankruptcy petition. I have set out the basis of Dr Mallya’s opposition at paragraph 5 above. The evidence before me does not allow me to make any firm conclusions about the merits of his grounds of opposition and the issues of whether there is any form of binding settlement agreement in India or whether the judgment debt is effectively secured by the attachments made in India must be left to the hearing of the bankruptcy petition. I accept the submission of Mr Tozzi QC that there are a great many errors and omissions in the second witness statement of Mr Isaacs which have been identified and addressed in paragraphs 16 to 20 of Mr Gair’s fifth witness statement. What I can conclude is that there is currently one supporting creditor and there are likely to be other creditors not least Dr Mallya’s previous solicitors and HMRC. It is not possible for me to put an accurate figure on the value of the claims of the unsecured creditors, but they are an important consideration in the exercise of my discretion and are more than minimal sums.
23. I reject the proposition that the application for a TPDO was a deliberate ploy to thwart Dr Mallya’s ability to meet his ordinary living expenses and reasonable legal expenses which are permitted under the terms of the WWFO. I have already made reference to the fact that there has been no application for a hardship order. The relevant context here is that Dr Mallya is in a post judgment scenario where the Claimants are attempting to enforce their judgment and discover the true extent of his assets. I note that Dr Mallya has made no voluntary payment to date and has failed to pay the costs order against him made in August 2018 while continuing to incur substantial legal costs in opposing the Claimants’ efforts to enforce their judgment. As Morris J said in *BCS Corporate Acceptances* at para 84;

“If the Defendant’s submission here was correct, then a third party debt order could never be made where there is a freezing injunction with standard permission. A freezing injunction does not stop or prevent enforcement of a judgment; it is there as an aid to enforcement. Regardless of the terms of a freezing injunction, once a judgment has been entered, the judgment creditor is entitled to take steps to enforce that judgment. If

enforcement threatens to deprive the judgment creditor to fund an appeal or more generally to continue litigation, then an appropriate remedy is to seek a stay of the execution of the judgment or to obtain third party funding.”

24. In the circumstances I have concluded that the ITPDO should remain in force and that the application for a final order should be adjourned until after the hearing of the bankruptcy petition. I would be grateful if counsel could draw up the appropriate form of order.