Neutral Citation Number: **[2024] EWHC 2100 (Comm)**

Case No: **CL-2024-000432**

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: **5 August 2024**

Before :

HHJ Pelling KC

- -

Between :

CHINA EVERGRANDE GROUP (IN LIQUIDATION)	**Claimant**
- and -	
DING YU MEI	**Respondent**

- -
- -

Ceclia Rooney (instructed by **Mishcon de Reya**) for the **Claimant**
John Brisby KC and Tom Gentleman (instructed by **Hogan Lovells**) for the **Respondent**

Hearing dates: **5th August 2024**

- -

JUDGMENT 1

HHJ Pelling KC **Monday, 5 August 2024**
(**15:40** pm)

Judgment by **HHJ PELLING KC**

1. This is an application made on short notice for the variation of a proprietary freezing order and worldwide freezing order made by me on 30 July 2024 pursuant to s.25 of the Civil Jurisdiction and Judgments Act in aid of index proceedings before the Courts of Hong Kong that have been brought against the defendant amongst others. The application is by the defendant and is for an order that para.18 of the order that I made on 30 July be varied so as to add at the end of that paragraph the words:

> "Notwithstanding what is said above, the respondent may spend a reasonable sum of money on legal advice and representation and up to £20,000 per month on ordinary living expenses incurred through, to, and including the return date. The claimant hereby waives any right to the claim that any such funds are or are derived from dividend assets and so were expended in breach of this order."

There was also an application for an extension of time in which to comply with para.11.1 of the order, which provided for the initial disclosure of asset information. That has been compromised by agreement between the parties and I need to say no more about it.

2. The circumstances which give rise to the application and the nature of the claim which is being made by the claimant against the defendant are set out in the judgment that I delivered on 30 July, a transcript of which is, I think, now available to the parties. In essence, however, the claimant alleges that the primary wrongdoers - which include the former husband of the defendant, to whom she was married at the time of the events with which the index claim (before the courts of Hong Kong) is concerned - had control of the claimant which then operated in the Hong Kong and mainland Chinese property market, and that they instigated the fraudulent exaggerations made to the financial statements of the company that were the basis for the declaration of massive dividends, of which the defendant and her then husband were the major

recipients. The sum of some $350m odd is alleged to have been paid to the defendant as a result. The index claim by the claimants against the defendant in the index proceedings is to recover the dividends paid to her on the basis that the claimant retains a proprietary interest in them, having regard to the fraudulent exaggeration of the financial statements which were authorised by the primary wrongdoers in breach of their respective fiduciary duties or, alternatively, a claim in unconscionable receipt. The first claim is the proprietary claim. The second claim is the personal claim. The first claim is the subject of the proprietary order that I made. The second claim is the subject of the worldwide freezing order which is not relevant to the current application.

3. The variation that is sought by the defendant is to the proprietary order and is designed to facilitate expenditure from sums which the claimant claims to be its money by the defendant legal costs in obtaining advice and representation in connection with this claim and on living expenses. The relevant principles which apply to an application of this sort are not in dispute. They were summarised in the judgment of Nugee J, as he then was, in Kea Investments Ltd v Watson & Ors. [2020] EWHC 472 (Ch) at para.22, where identified four questions that had to be answered before an application of this sort could proceed on its merits.

4. Before turning to those questions, I should note that the only evidence filed in support of this application is what set out in part C of the application notice by which this application is made. That does not contain any detailed evidence concerning estimates of the legal costs which will be incurred between now and the end of August in relation to the issues which primarily concern the claimant - namely the disclosure of information concerning assets – or more generally in relation to these proceedings, nor is has any attempt been made to break down the

detail of the claim for living expenses. For the reasons I now explain that is fatal to this application other than to the extent consented to by the claimant.

5. The point which I made in the course of the argument and which I understand to be common ground is that the principles which apply both the availability of funds by way of exception to a non-proprietary freezing order for expenditure on legal fees and living expenses are completely different to those which apply where the order that has been made is a proprietary order. Although I was prepared inferentially to accept as reasonable living expenses a sum of £20,000 per month for the purposes of the worldwide freezing order, that was not something I either accepted or was even invited to accept in relation to the proprietary order, because of course the proprietary order made no provision for the expenditure of money from what is called in these proceedings the dividend proceedings. It is not something I could begin to consider in relation to this application without detailed evidence as to the defendant's actual living expenses.

6. I included within the order I made originally some information provision requirements. Those requirements moved in a series of three stages, being first a non-sworn disclosure of assets which was originally required to be dealt with earlier this week, but is now agreed to be dealt with by 16.00 on Friday of this week,. The second stage, which was to come 14 days later, was that there was to be an affidavit sworn by the defendant which confirmed the contents of the original disclosure as true or otherwise dealt with the disclosure of assets. The third stage, which is to take place at the end of August, required the swearing of an affidavit which dealt with the historical dealings in the proprietary assets in aid of the tracing exercise that the claimant wishes to undertake and with which the proprietary order is concerned.

7. The primary focus of attention has been on the cost of complying with the information disclosure provisions although the defendant seeks permission to expended money the subject of the proprietary order on her legal costs generally in connection with this claim as well as living expenses. The position adopted by the defendant is that she should be permitted to expend unlimited sums on legal costs with no cap imposed because the amount of the cap which it would be appropriate or reasonable to impose is unknown and, on Mr Brisby KC's submission, unknowable at any rate at this stage in the exercise. This is entirely unprincipled and is the result of no attempt having been made to estimate the likely costs that will be incurred in addressing the information provision requirements of my last order or in assisting the defendant down to the first return date fixed by my last order. The defendant is willing to cap her living expenses claim at the sum fixed for the purposes of the worldwide freezing order.

8. The position adopted by the claimant was for pragmatic reasons to consent to the expenditure from the sums the subject of the proprietary order ("Dividend Sums") (a) a reasonable but uncapped sum on legal costs generally to be incurred through to and including 4 p.m. this coming Friday, 9 August, which would therefore include not merely complying with the obligation to give disclosure of assets by 9 August, but also advice and representation in relation to this claim on issues other than the disclosure of assets; and (b) the expenditure of up to £350,000 on legal advice and representation, limited to compliance by the defendant with paras.12 and 13 of the order I made on 30 July was limited to the period between this coming Friday and 4 p.m. on 27 August 2024.

9. I invited Ms Rooney, who appears on behalf the claimant, to take instructions as to whether or not the tethering of the £350,000 of expenditure could be removed or at least watered down in order to facilitate legal advice and representation in the period down to the end of August being primarily on complying with paras.12 and 13 of the order, but also permitting

expenditure in relation to legal advice and representation concerning other issues to do with this case. On instructions she was willing to agree to that proposal as a compromise of the application, but Mr Brisby rejected that suggestion. It follows that the issues that are before me are whether or not I should make an order in the terms sought in the application notice, or whether I should make an order in the terms that were formally conceded by the claimant prior to the start of the hearing that there should be a qualification added at the end of para.18 of 30 July order which provides:

the defendant may spend:

1) a reasonable sum of money on legal advice and representation incurred through to and including 4 p.m. on 9 August 2024; and

2) up to £350,000 on legal advice and representation provided in respect of her compliance with paras.12 and 13 of the order through to 4 p.m. on 27 August 2024,

with the claimant waiving any right to claim that such funds are or are derived from dividend sums, a concession which is necessary in order to enable the solicitors to whom the funds will be paid to act safely in the knowledge that there would be no subsequent attempt to reclaim funds expended on legal costs. It is common ground that if I were to make the order sought by either the claimant or the defendant, I should accept an undertaking by the defendant that:

> "In the event it is ultimately determined that any expenditure by the respondent pursuant to para.18 of the order was made from or otherwise by using dividend assets, and that she has other assets which are not dividend assets, non-dividend assets, the respondent undertakes to transfer into the bank account out of which such expenditure was made funds of an equivalent value, which are or are derived from non-dividend assets to the extent that any such assets exist and may be identified amongst the respondent's assets. For the avoidance of doubt, nothing in this undertaking should be read as confirming whether or not the respondent has any non-dividend assets."

10. The position of the claimant is that it has no evidence of any non-dividend assets available to the defendant and, as things stand, the defendant's evidence in support of this application is entirely silent on that issue. Therefore, Ms Rooney submitted that I should proceed on the basis that that undertaking is of limited or no value in the circumstances.

11. Turning then to the present application, as I have already mentioned, there are four questions which need to be answered before an application of this sort can be resolved on a contested basis. I inquired of Ms Rooney, in the course of her submissions, whether she accepted that the same basic approach applies both to legal to living expenses. She maintained that, of the authorities, there was one which suggested, at least implicitly, that that was correct, but the others did not deal expressly with the issue and, therefore, she was prepared to proceed with the application today on the basis that the same principles apply to both elements of the application without committing herself to accepting that concession should apply on any subsequent occasion. I proceed on that basis.

12. The principles that are identified in in Kea Investments Ltd v Watson & Ors. [2020] EWHC 472 (Ch) the authority I referred to earlier, at para.22, come to this:

> "…the principles are as follows:
>
> 1) Since the basis of a proprietary claim is that the particular asset in question is said to belong to the claimant, the question is not whether the defendant which should be able to use his own assets, but whether he should be permitted to use assets which may turn out to be the claimants. There is therefore no presumption in favour of his being able to do so.
>
> 2) There are four questions which fall to be answered… The first is whether the claimant has an arguable proprietary claim to the money.
>
> 3) The second is whether the defendant has arguable grounds for claiming the money himself. As Millet LJ said in the Ostrich Farming Corporation Limited v Ketchell… 'no man has a right to use somebody else's money for the purpose of defending himself against legal proceedings.'

4) The third is whether the defendant has shown that he has no other funds available to him for this purpose.

5) But even if the defendant gets over this hurdle, then the court has a discretion… See Sundt v Wrigley where Sir Thomas Bingham, Master of the Rolls, referred to the court having to make a '…careful and anxious judgment… as to whether the injustice of permitting the use of the funds held by the defendant is outweighed by the possible injustice to the defendant if he is denied the opportunity of advancing what may in course turn out to be a successful defence'…"

13. The issue as to which of these questions is the first question to be determined is one which, in the end turns on the evidence that is currently available. Mr Brisby, on behalf of the defendant, made the point that various authorities included within the bundle all concerned cases which were much further along the procedural timeline than this one. I agree. Mr Brisby's submission was that where the case is a so recently commenced as this one, it will be appropriate to permit expenditure out of the proprietary funds otherwise frozen on an unlimited basis because until that expenditure has been undertaken, it would not be possible to arrive at a conclusion concerning whether or not the first and second questions can be safely answered in order to allow the relevant tests to be proceeded with.

14. Ms Rooney's submission was that the questions could be asked in whatever order was appropriate, having regard to the particular factual circumstances facing the court, but the key questions that had to be answered were the second and third, namely whether the defendant has arguable grounds for claiming the money him/her/itself, and whether the defendant has shown that there are no other funds available to him for this purpose.

15. I agree with Ms Rooney's submission and reject those of Mr Brisby. In my judgment Mr Brisby’s approach would defeat the purpose of adopting the calibrated approach that the authorities suggest should be adopted and for that reason is wrong in principle. There is nothing

in the authorities that I have been shown which suggests these questions must be asked in the order Nugee J summarised them, though the order in which they were summarised by him was appropriate to the case he was resolving. In a case such as this, as it seems to me, the question which has to be asked is, first of all, whether the claimant has demonstrated that it has an arguable proprietary claim to the money. I have already concluded in determining the application on 30 July that the claimant has an arguable proprietary claim to the money. Mr Brisby has argued, in the course of this application, that the claim is a weak one because the claim concerns dividends, and there is, in effect, a contractual entitlement to dividends where those have been allotted by the company concerned, and therefore any claim would require, as he put it, guilty knowledge, and therefore a prima facie case as to the defendant having the necessary guilty knowledge, before the claimant could succeed. That was an issue that I considered, albeit in passing, on 30 July in relation to the unconscionable receipt claim. If knowledge is relevant to the proprietary claim then the same evidence and the same conclusions would apply. The material that was available to me on the 30 July has not been altered by the evidence filed in support of today's application and on that basis the claimant has an the arguable proprietary claim to the dividend sums whether or not guilty knowledge is a relevant consideration.

16. The next question which arises, therefore, is whether or not the defendant has arguable grounds for claiming the money herself, and the third question is whether or not the defendant has shown that she has no other funds available to her for the purposes of dealing with the application. As it seems to me, both these issues are evidence-based issues. Ms Rooney submits, and I agree, that the onus falls on the defendant to show she has no other assets from which to fund these expenses. The point she makes is that this stage is a threshold requirement for the party seeking to draw on proprietary funds since, if other funds are available, a defendant will

not be permitted to draw on what are alleged to be proprietary funds. I agree. Ms Rooney submits that in the absence of evidence which deals with that critical question, then it is wrong in principle to proceed to decide whether or not proprietary sums should be expended. I agree with and accept that submission Unless and until there is evidence dealing with the non-proprietary asset question, the application cannot sensibly proceed any further other than by agreement. If there are non-dividend assets available to the defendant, then the defendant is under an obligation to use those funds in order to fund her defence. If the position is that she has no non-proprietary assets available to her, that is something exclusively within her knowledge and requires evidence. It is not something a court can assume, because of the point made in the Ostrich Farming case that no one has a right to use somebody else's money for the purpose of defending legal proceedings.

17. In those circumstances, Ms Rooney submits that is really a complete answer to the application and, with respect, I agree. Therefore, and in those circumstances, it is entirely inappropriate that I should make any order other than that which the claimant is prepared to concede on the pragmatic grounds identified in the submissions. I do not accept, and indeed Mrs Rooney did not submit, that this in some way precludes the defendant from returning to court when the appropriate evidence is to hand, and that might be as soon as after 4 p.m. this coming Friday.

18. Therefore, what I propose to do, in order to avoid any arguments as to whether or not a change of circumstance must be shown, I will simply adjourn the application, which the defendant has made whilst, at the same time, making the order proposed by Ms Rooney in relation to the expenditure of money on legal expenses. It will be open to the defendant to restore the application if necessary on short notice and on an urgent basis as and when advised to do so.

19. The next question which arises concerns living expenses. As I have already explained, the only evidence in support of the application is the evidence contained in Part C of the application notice. That contains no detailed evidence concerning living expenses, so it does not enable a court to arrive at a conclusion as to what is reasonable in the circumstances. The only reference, as far as I can see, that might be passingly relevant to an issue of this sort is the assertion referred to in para.12, but maybe also elsewhere, that Mrs Ding has obligations in relation to the living expenses not merely of herself but her children. This requires evidence before a court can get to the point of deciding whether or not any part of the alleged proprietary funds should be permitted to be used for the living expenses of the defendant and her dependents. Even if one gets to the point of deciding that the defendant has demonstrated that she does not have access to funds other than the dividend funds, that means only that the court can then embark on the process of arriving at a careful and anxious judgment that balances the injustice of permitting the use of funds held by the defendant, which the claimant claims are to be its funds, against the possible injustice to the defendant if the defendant is denied the opportunity of expending those funds.

20. As to the quality of the evidence required, the relevant material by definition, can only be within the knowledge of the defendant, and therefore the principles which have been emphasised in any number of Court of Appeal and Supreme Court cases over the years in relation, for example, to stifling defences to security for cost applications are likely to apply with equal force here. The obligation on the defendant is to disclose, on a comprehensive and full and frank basis, all evidence relevant to the question of whether or not she has access to funds other than the proprietary claim funds and that is likely to include not only funds to which she has access but funds available to others that she is able to access.

21. In those circumstances, my conclusions are that there will be an amendment to the order in the terms conceded by the claimants prior to the start of this hearing but not otherwise. The application will otherwise be adjourned with liberty to restore and I will hear submissions as to whether or not it is appropriate at this stage to give directions concerning the filing of further evidence in support of a further application for variation.