Neutral Citation Number: [2014] EWHC 3800 (Ch)

Case No: HC11C03600

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

7 Rolls Building
Fetter Lane,
London
EC4A 1NL

Monday, 6 October 2014

BEFORE:

MR JUSTICE DAVID RICHARDS

BETWEEN:

(1) ANAMI HOLDINGS
(2) CLARK HILL LTD

Claimants/Respondents

- and -

PRITPAL GILL

Defendant/Appellant

MR C JOSEPH (instructed by Direct Access) appeared on behalf of the Claimant

MR A KHAN (instructed by Magwells Solicitors) appeared on behalf of the Defendant

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Approved Judgment

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1. MR JUSTICE DAVID RICHARDS: This is an application made by the claimants, two companies which, as I understand it, are owned and controlled by members of the Hare family. Pritpal Singh Gill is the defendant. These proceedings have a lengthy and somewhat chequered history, which I need outline only very briefly. The proceedings were issued in 2011. The claimants alleged that Mr Gill had, in effect, defrauded them of some £8 million, and a freezing order was obtained on an application without notice in the autumn of 2011. Within a month or so, that freezing order was discharged in circumstances which I need not go into now.

2. In the course of the present year, the Claimants learned that a company owned and controlled by Mr Gill had obtained an arbitration award in its favour for a sum of some $6 million, and it appears that some $2 million is credited to an account in the name of a company which Mr Gill has accepted he owns, that account being with a bank in Abu Dhabi. In possession of this information the claimants applied, in July 2014, for a new freezing order, which was granted on a without notice application by Roth J on 11 July 2014.

3. The matter came back before the court on 17 July 2014 when both parties were present or represented. The matter was listed before Arnold J, but by then terms of settlement had been agreed between the parties, and Arnold J was invited, and did, make an order by consent.

4. It is necessary for me to refer to the terms of that order. It recites that the Claimants and the Defendant have agreed to the terms set out in an attached schedule. It further recites that the parties have entered into a confidential agreement called the Settlement Agreement, which is in evidence before me.

5. The consent order provided:

> "1. There be monetary Judgment for the claimant for all of the sums claimed in the action, interest and costs in the sum set forth in the schedule to this Order.
> 2. That the Freezing Injunction dated 11th July 2014 shall continue until further Order but subject to the terms of this Order and the Settlement Agreement.
> 3. Enforcement of the Judgment be stayed on the terms set forth in the Settlement Agreement.
> 4. That the Freezing Order made by the Honourable Mr Justice Roth on 11th July 2014 be varied to the extent of permitting the defendant to comply with the terms of this order, the Schedule thereto and the Settlement Agreement.
> 5. That all further proceedings of this claim be stayed save for the purpose save for the purpose of bearing such terms into effect and for discharging the Freezing Injunction.
> 6. That the Defendant procure a Second legal Charge in favour of the Claimants or their Nominee over the property situated at 74 Parkstone Avenue, Hornchurch, Essex RM11 3LS registered at HM Land Registry under title number [EGL91246] ('the Property') to secure the sums due under this Order and its Schedule and that the Claimants be permitted to apply for Registration of the same.

7. For the purpose of enforcing the terms of this Order or any other matter related thereto the parties shall have liberty to apply.
8. There be no Order as to Costs."

6. The schedule first of all recited that the defendant warranted that he had:

> "...the authority and right to enter in the Settlement Agreement on the terms therein set out and to provide the security therein described."

7. It further recites a warranty and representation to the claimants that he may recover sums under the award. It then states:

> "In full and final settlement of the Claimants' claim, interest and costs and any counterclaims that the Defendant may have the parties agree as follows:
>
> (1) The Defendant agrees to pay to the claimants the total sum of £2,500,000.00 ("the Settlement Sum") by 4pm on 17th July 2017.
> (2) The Defendant agrees to pay to the claimants 50% of any sum received by him or on his behalf relating to or arising out of the Award as and when such sums are received or on his behalf, such payments to be credited towards the Settlement Sum.
> (3) The Defendant agrees to:
>
> i. To use his best endeavours to forthwith secure a Second Charge in favour of the Claimants in respect of sums due under this order, over the property [The property is the same property as that referred to in paragraph 6 of the order], and to deliver to the Claimants Deeds of Waiver and Deeds of Occupation from the Occupiers of the Property (in the forms set out in the confidential agreement to inform the claimant), of those best endeavours.
>
> ii. As soon as the Second Charge...have been registered... and the Deeds of Waiver and Deeds of Occupation... provided to the Claimants; procure that the Bank of Ireland's legal charge in relation to the property is reduced to the extent of the credit balance in account 620502135 at the National Bank of Abu Dhabi, and in any event within 7 days of the Second Charge being Registered.
>
> iii. Procure by no later than the 5th November 2014 that all sums outstanding to the Bank of Ireland are paid in full so that the Second Charge referred at i) above becomes a first legal charge against the Property as security for the full amount due under this Order and Schedule in favour of the Claimants or their Nominee.

> iv. Provide the Claimants with all information and documentation relating to the Award and to keep the Claimants informed and advised of all matters and events now and in the future relating to the Award.
>
> 4. The Defendant agrees that if he fails to pay the Settlement Sum, procure the First Legal Charge referred to above in paragraph 3(iii) or abide by the terms of the confidential agreement the Claimants will be entitled to enforce the Judgment against him.
>
> 5. The Claimants agree to comply with the terms of the Settlement Agreement and accordingly to seek the discharge of the Freezing Injunction upon the receipt by them of the First Legal Charge against the property."

8. There is also, as I have mentioned, in evidence the Settlement Agreement, and I will refer to certain provisions of that agreement as they arise.

9. The present application was issued on 29 August 2014 and served on the defendant on or shortly after that date. It seeks a number of orders. The orders sought are set out in a schedule to the application notice. First, an order is sought for the stay of the enforcement of the judgment for £2.5 million to be lifted. Secondly, an order that the funds standing to the credit of the account in Abu Dhabi be transferred to an alternative account. Thirdly, that the defendant take all necessary steps needed to execute a second legal charge over the property. Fourthly, that the defendant swear and serve on the claimants an affidavit containing certain information as follows: (a) his assets worldwide and including a copy of a bank statement relating to the account with a bank in Abu Dhabi; (b) setting out details of his liabilities, with the supporting documentation; (c) stating whether, since the order made by Roth J, he has spent monies on ordinary living expenses and/or legal advice and representation and, if so, identifying that expenditure and identifying the source of the money for the expenditure; (d) in relation to the arbitration award to which I have referred, giving various information and details; (e) stating precisely the steps he had taken to procure a second legal charge over the property. It is not necessary to refer to the other proposed orders, since they have not formed any part of the application before me today.

10. The return date for this application was given on issue as 6 October, that is to say today. Regrettably no evidence in support of this application was served by the Claimants on the defendant until 2 October, that is Thursday of last week. The witness statement in support of the application was made on 1 October.

11. Neither party had any legal representation until Friday of last week. On Friday Mr Charles Joseph was instructed on behalf of the Claimants, and Mr Arfan Khan was instructed on behalf of the defendant: Mr Joseph by Direct Access, Mr Khan through solicitors. I am greatly indebted to both of them for having worked extremely hard in the very short time available, including over the weekend, to prepare Skeleton Arguments, which in one case reached me over the weekend and in the other this morning and having, so far as each of them has been able, got on top of the fairly voluminous evidence. The timetable for the service of evidence on this application necessarily has meant the defendant has not had an opportunity of responding to it, and

that is a matter which must weigh very heavily with me in deciding what, if any, order to make on today's application. Nonetheless Mr Joseph has been anxious to proceed with his application, and I have thought it right to hear it on the basis that there may be aspects of the orders sought which should be granted at this stage.

12. Having been instructed, Mr Joseph refined the orders being sought by the Claimants and provided with his Skeleton Argument a draft order. It is to that that I will turn in considering the relief which is sought. Much, though not all, of the orders which he seeks are reflected to a lesser or greater extent in the schedule to the application notice dated 29 August 2014. Paragraph 1 of the draft order seeks judgment for the claimants in the sum of £2.5 million. Mr Joseph put the case for this, in opening this application, on the terms of paragraph 4 of the schedule to the consent order made by Arnold J.

13. I should, I think, mention at this stage, and I should perhaps have mentioned it a moment earlier, that the defendant maintains that his agreement to the consent order and to the Settlement Agreement reached concurrently with it was procured, he says, by duress or undue influence. His counsel tells me that the defendant has issued proceedings under CPR Part 7, seeking to set aside, on those and perhaps other grounds, the consent order and an earlier settlement reached in 2012. I have been shown Draft Particulars of Claim. I cannot possibly assess at this very preliminary stage, or even pre-preliminary stage, the merits of such claim and of course the claimants had no opportunity to deal with the allegations, which have yet to be made in any Statement of Case endorsed with a Statement of Truth. The fact remains today that there is an existing consent order of the court and I can, as I see it, only proceed on the basis that it is a binding order.

14. Going back, then, to paragraph 1 of the draft order provided by Mr Joseph, it seeks judgment for £2.5 million on the basis, as he put it in opening, of paragraph 4 of the schedule. I have earlier set out paragraph 4. What is said on behalf of the claimants is that by the terms of paragraph 4 they are entitled to enforce the judgment for that sum on the grounds that the defendant has failed to procure "the first legal charge referred to above in paragraph 3(iii)". Paragraph 3(iii), which again I have earlier cited, requires the defendant to procure, by no later than 5 November 2014, that all sums outstanding to the Bank of Ireland are paid in full, so that the second charge referred to at 3(i) becomes a first legal charge against the property. Paragraph 3(i) is the paragraph which requires the defendant to use his best endeavours forthwith to procure a second charge in favour of the claimants over the property.

15. The difficulty with the claimants' case under paragraph 4 is that it clearly entitles the claimants to enforce the judgment only if there is a failure to procure the first legal charge referred to in paragraph 3(ii). That obligation must be performed by no later than 5 November 2014, in other words almost a month from today. Mr Joseph says that paragraph 3(iii) is dependent on performance by the defendant of his obligation to use best endeavours to procure a second charge over the property. That is true, but the event which entitles the claimants under paragraph 4 to enforce the judgment is not a failure to use best endeavours to procure a second charge, but a failure to procure by 5 November that the second charge becomes a first legal charge. It may or may not be the case that the defendant is now in breach of his obligations under paragraph 3(i) of the schedule, but that is not the event which paragraph 4 provides as entitling the

claimants to enforce judgment. It accordingly seems to me that, put on this basis, the application for judgment for £2.5 million is misplaced and premature.

16. In reply Mr Joseph sought to rely on provisions in the Settlement Agreement, referring to the provision in paragraph 4 of the schedule that the claimant is entitled to enforce the judgment if the defendant fails to abide by the terms of the Settlement Agreement. In particular, Mr Joseph relied on clause 2.13, which he said required the defendant immediately following execution of the agreement to transfer or use best endeavours to transfer funds to England from the Abu Dhabi bank account. I will not set out the clause in full, but it seems to me clear that the obligation to make that transfer is itself dependent upon the registration of the second charge over the property and the provision of deeds of waiver and deeds of occupation.

17. Reference was made also to clause 2.15, by which the defendant agreed to use his best endeavours to procure a second charge over the property, and it has been pointed out to me that in the Agreement, and indeed in the schedule, the defendant represented and warranted that he had the authority and right not only to enter into the Settlement Agreement but also to provide the security which is there described.

18. I consider that it is at this point that the failure to provide any evidence other than that provided on Thursday of last week comes to have considerable significance. The case being made on behalf of the Claimants was being developed by Mr Joseph on his feet in the course of the hearing. This does not seem to me to be a satisfactory way of proceeding, and in any event depends on showing that the defendant has not used his best endeavours to procure the creation of the second charge. Whether or not he has used his best endeavours for that purpose must, in my view, be a matter on which he is entitled to give evidence, and it therefore seems to me that it would be wrong either to give judgment as requested on this basis or to make the order sought in paragraph 3 of Mr Joseph's draft for the execution of a second charge before the defendant has had an opportunity to respond to the evidence in support of this application.

19. Accordingly, so far as today is concerned, I decline to enter judgment in favour of the claimants and I decline to make an order for the execution of the second charge.

20. Paragraph 2 of the order provides, and this echoes I think what was in the draft order annexed to the application, that the defendants should forthwith transfer or cause to be transferred the credit balance on the account at the National Bank for Abu Dhabi to an account in the UK. That will have the benefit, from the Claimant's point of view, of bringing those sums clearly within the jurisdiction of this court and thereby better securing the freezing order.

21. In this respect Mr Khan, on behalf of the defendant, who made clear that in the circumstances in which he had been instructed and on the basis of the evidence for the claimant being provided late, he was able to make only limited submissions, referred to paragraph 5 of the order of Arnold J. I should mention here that the assets of the company which is the holder of the account in Abu Dhabi are expressly subject to the freezing order made by Roth J on 11 July 2014. Paragraph 6(b) deals with those assets. On 10 September 2014, on a without notice application, Rose J ordered the production of bank statements relating to those funds and specifically enjoined the respondent from transferring or disposing of those funds. So there is no question but that the

funds in that account are subject to the freezing order, but Arnold J's order contains, as I have recited in paragraph 5, a stay of all further proceedings in this claim save for the purpose of "carrying such terms into effect" and for discharging the freezing injunction. The "such terms" referred to in paragraph 5 are those identified in paragraph 4 of the order, that is to say "the terms of this order, the schedule thereto and the settlement agreement".

22. Mr Joseph, in support of this order, relied again on Clause 2.13 of the Settlement Agreement, but as I have already said, I do not think that that clause imposes an obligation on the defendant to remit the funds in the Abu Dhabi account until after the second charge has been registered. I do not therefore think that this order is one which falls within the rubric of carrying the terms of the Settlement Agreement or indeed the order or schedule into effect. In truth, I think it is intended to be a strengthening of the freezing order. It is by no means an unreasonable strengthening of the freezing order, and if these proceedings were continuing in the ordinary way without there having been any settlement, the court might well be minded to make the order sought. But, at present, I do not see how the application for this order comes within the saving part of the stay of the proceedings. It is to be remembered that the stay of the proceedings is an integral part of the consent order on which the claimants rely.

23. Paragraph 4 would require the defendant to swear an affidavit giving various categories of information. While the stay presents a problem as regards this order, there are difficulties in the further categories of information sought by the Claimants. Paragraph 4(a) would require the defendant once again to set out his worldwide assets and also to provide a copy of a bank statement showing the balance on the Abu Dhabi bank account immediately prior to the transfer (which I have said I will not order) as well as further details about Berkeley Global Commodities. I do not think there is any merit in a further affidavit of assets, and I do not think that the provision of the further information relating to Berkeley Global Commodities is either necessary or, more to the point, permissible in view of the stay of the proceedings.

24. Paragraph 4(b) would require the defendant to set out "details of all his liabilities along with supporting documentation". As I mentioned to Mr Joseph, this would be a most unusual provision to include in a freezing order, and it is to be noted that it was not included in the original freezing order, which was granted largely on standard terms. I can see no basis for requiring this information, quite apart from the effect of a stay.

25. Paragraph 4(c) is in these terms:

> "...stating whether, since the Order of Mr Justice Roth on 11th July 2014, the defendant has spent sums on ordinary living expenses and/or legal advice and representation and if so identifying that expenditure in relation to each category and identifying the source of the money for that expenditure along with supporting documentation"

This is a matter which is addressed in the earlier orders of this court. The order of Roth J provided in paragraph 10, again in standard form, that the order did not prohibit

the defendant from spending £2,500 towards his ordinary living expenses and also a reasonable sum on legal advice and representation. The paragraph continues:

> "But before spending any money the Respondent [that is the defendant] must notify the Applicant in writing where the money is to come from."

There was a failure on the part of the defendant to comply with the terms of the freezing order in that he did not provide the affidavit of assets or provide the information as to his assets as required by paragraphs 8 and 9, nor has he notified the claimants in writing of where any money spent on ordinary living expenses and legal advice and representation has come from. That complete failure to comply with the terms of the order led to the issue also on 29 August 2014 of an application by the claimants for the committal of the defendant for his failure to comply with paragraphs 8 and 9. That matter came before Sales J on 4 September 2014. It was then ordered by consent that the respondent should, by 4pm on 8 September, provide the applicants with the information set out in paragraphs 8 and 9 of Roth J's order both as at 14 July 2014 and as at the latest 8 September 2014, and also that by 4pm on 9 September 2014 he should swear and serve on the applicants an affidavit confirming that information and:

> "...setting out any expenditure pursuant to paragraph 10 of the order of Roth J, namely reasonable living expenses and legal advice and representation, and stating the source of the money used on such expenditure."

26. There is some dispute between the parties as to whether the defendant strictly complied with the time limits set out in particular in paragraph 1, but it is not in dispute that on 9 September the defendant served an affidavit, which set out what he said were his assets. I should say in this respect, although it is not directly relevant to the present application, that the Claimants maintain that that affidavit failed to give full disclosure and they propose to give evidence on that and to rely on that in the committal application issued on 29 August. They do not, of course, rely on that as itself being a contempt for which the defendant should be committed, but they rely on it by way of answer to Mr Gill's, the defendant's, case that he has in effect complied, albeit late, with paragraphs 8 and 9 of the order of Roth J.

27. The affidavit provided by the defendant did not, however, comply fully with paragraph 2 of the order of Sales J, because it did not set out the sums spent on reasonable living expenses and legal advice and representation, and it did not state the source of the money used for such expenditure. The defendant has said that all sums paid by way of living expenses and legal advice have been funded by borrowing, and therefore he has not expended any of his own funds. If indeed he has borrowed money for those purposes, then I do not accept his analysis that he has not spent his own funds. Once he borrows monies, the borrowed monies become his. But in any event, as it seems to me, there has not been compliance with that part of the order of Sales J, nor indeed, it would appear, with paragraph 10 of the order of Roth J. I see no reason therefore why, although he has not served any evidence on this application, he should not be required to swear and serve an affidavit setting out the matters contained in paragraph 4(c) of the draft order produced by Mr Joseph.

28. Subparagraphs (d) and (e) of paragraph 4 relate to the arbitration award and require the provision of various information in relation to it. They also require information to be provided relating to a company called Marston Equities Ltd and the production of witness statements made by the defendant in proceedings where Marston Equities Ltd was a party. It would further require the provision of an irrevocable letter of authority to a QC, who as I understand it has previously acted for or assisted the defendant, requiring the provision of information. In this respect, the Claimants rely on paragraph 3(iv) of the schedule to the consent order made by Arnold J, which required the defendant to provide the claimants with all information and documentation relating to the award, and to keep the claimants informed and advised of events now and in the future relating to the award. The orders sought by the claimants seem to me to go somewhat wider than that. Reference was also made by Mr Joseph to clause 2.19 of the Settlement Agreement, which is a provision that 50% of the award as received by the defendant on his behalf was to be paid to the claimants. That explains why the provision of information relating to the award is important. My view at the moment is that, although it may well be that, after the defendant has had an opportunity to answer the claimants' evidence, these are orders which to a greater or lesser extent may properly be made, I do not think it would be appropriate to make them at this hearing for the reasons previously given.

29. Paragraph 4(f) would require the defendant to state the steps he has taken to procure a second legal charge. This, it seems to me, is something which should be decided after there had been evidence in answer to the present application.

30. The remaining subparagraphs would require the defendant to say whether he is interested and, if so, to what extent in various assets. These include assets which the claimants say are owned beneficially by the defendant and they provide some or all of the examples which they propose to give of the ways in which the defendant has been in breach of the order that he give information concerning his assets. As it seems to me, the onus is on the Claimants to prove that the defendant is in breach of that order, and the defendant cannot be required to prove or disprove the alleged breach. Accordingly those are not orders that I would, in any event, make.

31. The upshot, therefore, is that I am prepared to make at this stage only one order, which is that the defendant shall give the information set out in paragraph 4(c) of Mr Joseph's draft order relating to his expenditure on ordinary living expenses and legal advice and representation. In all other respects I decline to make any orders as sought today.

32. In the course of my judgment I have indicated that there are some orders which I do not myself consider that the claimants are in any event entitled to, and there are others which should be the subject of argument only after the defendant has had an opportunity of responding to the claimant's evidence.