Neutral Citation Number: [2018] EWHC 2260 (Ch)

Case No: CR-2018-002932

BUSINESS & PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY DIVISION
AND
INSOLVENCY AND COMPANIES LIST (ChD)

The Rolls Building
7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Date: Monday, 30th July 2018

Before:

SARAH WORTHINGTON QC(Hon)
(sitting as a deputy High Court judge)

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Between:

ADETUTU O. ODUTOLA	**Respondent/ Petitioner**
- and -	
- and –	
(1) JOANNA HART	
(2) HAZEL TAYLOR	
(3) VICTORIA BALL	
(4) IAN SPENCER	
(5) CREMORNE MANSIONS RESIDENTS ASSOCIATION LIMITED	**Applicants/ Respondents**

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APPROVED JUDGMENT
(Re: Civil Restraint Order)

THE PETITIONER appeared **In Person**
MR. JAMES SMITHDALE of **Quinn Emanuel and Sullivan LLP** for the **Applicants/Respondents**

MS. SARAH WORTHINGTON QC(Hon):

Background

1. The Applicants in these proceedings were the Respondents to an unfair prejudice petition (the Petition) dated 9th April 2018 brought by the Petitioner pursuant to the Companies Act 2006 section 994. The Petitioner is the former Director and former Company Secretary of Cremorne Mansions Residents Association Limited ("the Company"), a company that manages Cremorne Mansions ("the Building"). The Petitioner is a current shareholder in the Company by virtue of her ownership of a flat in the Building. She appeared in this application as a litigant in person.

2. The first, second and third Respondents also own property in the Building, along with other residents not party to this Petition. These three Respondents are current Directors of the Company and also shareholders. The fourth Respondent is a former Director and former shareholder of the Company but has not owned property in the Building since 2013. I refer to the parties throughout simply as "the Respondents" and "the Petitioner".

3. Last Friday, 27th July 2018, I gave judgment in favour of the Respondents in their application to have the unfair prejudice Petition struck out pursuant to CPR Rule 3.4(2)(a): see [2018] EWHC 2259 (Ch). I held that the Petition, on its face, disclosed no reasonable grounds for bringing a claim in unfair prejudice, and in particular was an example of a petition alleging a set of facts which, even if true (which the Respondents deny), were facts that were inherently insufficient to support a successful claim in unfair prejudice under the Companies Act 2006 section 994.

4. Further, after the scrutiny required by CPR rule 3.4(6)(a), I held the Petition to be "totally without merit", being a Petition that was bound to fail, given my categorisation of the alleged facts, even assuming those facts to be true.

5. Having classified the petition as being "totally without merit", I am now required by CPR rule 3.4(6)(b) to consider whether it is appropriate to make a civil restraint order ("CRO"). Civil restraint orders come in three varieties (limited, extended and general), and Mr. Smithdale for the Respondents urged me to order either an extended or a general CRO.

Procedural issues

6. The possible order of a CRO raised the question of notice to the Petitioner. Although the court can order a CRO on its own initiative, that is rare. Alternatively, a party to proceedings may apply for any type of CRO, but the application must be made using the Part 23 procedure unless the court otherwise directs, and the application must specify which type of civil restrain order is sought: Practice Directions 3CPD 5.1 and 5.2.

7. No formal application notice was filed by the Respondents in this respect at the time of their initial application because the issue was not then material. It was only after 22nd June 2018, when Morgan J dismissed the Petitioner's separate injunction application (described in my earlier judgment), certifying that application as being "totally without merit" and ordering a limited CRO, that the theoretical possibility of an extended or general CRO arose. Four days later (i.e. over four weeks prior to last Friday's hearing), the Respondents put the Petitioner on notice of their intention to apply for an Extended or a General CRO by letter dated 26 June 2018.

8. The White Book, para 3.11.1, and *Connah v Plymouth Hospitals NHS Trust* [2006] EWCA Civ 1616 indicate that an extended CRO should usually be made on notice to the person affected being given sufficient time to prepare her defence. Given the Court's reasoning, the same must necessarily be true of a general CRO.

9. In the circumstances, I agreed last Friday to accede to the Respondents' request pursuant to CPR rule 3.1(2)(m) for permission to amend their Part 23 application notice dated 23rd May 2018 and thereby additionally to seek a general CRO or, alternatively, an extended CRO against the Petitioner pursuant to CPR rule 3.1(1) and Practice Direction 3C. I reached that conclusion on the basis that for all practical purposes the necessary notice to the Petitioner had been given so as to ensure that she had sufficient time to prepare her defence, notwithstanding the absence of a formal application notice. In addition, the Petitioner's own documentation filed in advance of the hearing of this application and her oral submissions on Friday morning indicated that she had prepared her submissions in contemplation of the possibility of the order of a general or extended CRO being considered.

The law on CROs

10. The relevant legal principles relating to the order of an extended or a general CRO are not in dispute. Nevertheless, I have found their application to the facts in the current context difficult.

11. The rules provide that an extended CRO cannot be made unless the Respondent is "a party who has persistently issued claims or made applications" deemed to be totally without merit: Practice Direction 3C paragraph 3.1. A general CRO

cannot be made unless the Respondent is a party who "persists in issuing claims or making applications which are totally without merit, in circumstances where an extended civil restraint order would not be sufficient or appropriate": Practice Direction 3C paragraph 4.1.

12. Three unmeritorious claims or applications have been described as the bare minimum needed to constitute persistence in relation to an extended CRO: White Book paragraph 3.11.1; and *In the Matter of Ludlam (a bankrupt)* [2009] EWHC 2067. (Ch).

13. CPR rule 3.1(1) puts on a statutory basis the court's inherent jurisdiction to prevent abuse of process as explained by the Court of Appeal in *Bhamjee v. Forsdick* [2003] EWCA Civ 1113. The jurisdiction is intended to protect potentially affected parties from the worry and expense of unwarranted litigation, and also to protect the scarce resources of the judicial system from unwarranted diversion from their primary goal of affording justice without unreasonable delay to those who have genuine grievances. A CRO does not extinguish a litigant's right to access the courts; it merely regulates the process by which access is obtained, and it does so only in a way that is deemed a proportionate response to the identified abuse, whether existing or threatened. This variation in the procedure required for access to the courts is not a denial of the human rights of the person subjected to the order, either generally or under Article 6 of the ECHR, notwithstanding that such orders have also often been described as "draconian".

Discussion

14. It is this balancing exercise to determine a proportionate response which is difficult. The characteristics of earlier claims that have been deemed "totally without merit" give some indication of the potential nature of the threatened abuse; so too do the sheer number of prior applications deemed "totally without merit". The Civil Procedure Rules indicate there must be a persistent practice of such applications before a court will intervene with a CRO.

15. So far as the application before me last Friday required me to consider the Petition for unfair prejudice, I was content to base my conclusions on the fact that the Petition alleged a set of facts which, even if true (which the Respondents deny), were facts that were inherently insufficient to support a successful claim in unfair prejudice under the Companies Act 2006 section 994.

16. However, the characteristics of the Petition itself may indicate the likelihood of future threats of abuse sufficient to merit a protective CRO. This Petition ran to 67 pages and contained an exceedingly large and wide-ranging number of alleged facts, events or circumstances suggested to constitute unfair prejudice. Most of the alleged facts were patently nothing to do with the conduct of the affairs of the Company, which might then need to be judged as unfairly prejudicial or not. They should not have been included in the 67-page Petition. The consequence, however, for both the Respondents to the Petition and for a court deciding the case, is that these very many facts needed to be considered one by one and their significance determined. That adds flavour to the nature of the Petition that is not necessarily captured by the bald description that it is "bound to fail" and should thus be certified as totally without merit.

17. Moreover, the following particular features are noteworthy:

(i) to the rather limited extent that the various facts alleged by the Petitioner did concern the actual conduct of the affairs of the Company, the alleged conduct was all conduct specifically permitted by the Companies Act 2006 or the Company's own Articles of Association, and, even if evidently prejudicial to the Petitioner herself, the Petition did not provide any evidence to suggest any unfairness.

(ii) to the extent that the facts alleged by the Petitioner concerned the threat of future problems in the conduct of the affairs of the Company by the first three Respondents as its new Directors, this could not at law found a complaint of unfair prejudice before the anticipated failures materialised. But in advancing such an argument, the Petitioner relied on the character of the first three Respondents and their alleged "connection" with the fourth Respondent, without providing any specific proof of a connection, nor any specific instances of such connections having a detrimental impact on the Petitioner. The same is true of the allegation that the fourth Respondent was a shadow Director of the Company: the allegation was not supported by any factual evidence, nor any evidence of prejudice or detriment. The extended concerns expressed by the Petitioner amounted only to vague and unsubstantiated assertions of risks in the way the Company might in future be managed.

(iii) to the extent that the facts alleged by the Petitioner concerned wrongs committed against the Company by any of the Respondents or any other parties not before the court, those remedies are for the Company, not for the Petitioner personally. These wrongs included alleged breaches of lease terms; concerns about repair of roofing; alleged fraudulent insurance claims; and abuse by

various contractors to the Company. These facts, even if true, could not support an unfair prejudice petition, and indeed were all wrongs that took place while the Petitioner herself was a Director of the Company and its effective CEO. Nevertheless, the Petitioner provided lengthy detail of the wrongdoers' failings.

(iv) to the extent that the Petition contains extended allegations of wrongs committed by parties not even before the court, and requests for specific orders against those parties, the claims are inappropriate and bound to fail. The Petitioner, as a qualified solicitor, might have been expected to appreciate this, even though her expertise is not in company law generally. In particular, the Petition alleged fraudulent trading by companies said to be associated with the fourth Respondent, allegations that Mr. Godwin was implicated in a matter involving Financial Services Market irregularities, and the allegations that Mr. Godwin, along with the fourth Respondent, was harassing the Petitioner. All those facts, even if true, were facts that could not possibly constitute "conduct of the affairs of the Company" and so could not support the Petitioner's claim in unfair prejudice.

18. This rather scattergun approach to presenting a claim is excessively burdensome on the court processes and on the five named Respondents, and affords a detriment out of all proportion to any possible corresponding benefit to the Petitioner.

19. In addition, last Friday I noted that various facts alleged by the Petitioner in her Petition and in her oral submissions were unsupported by evidence and were, in my view, inherently implausible. That characterisation was not material to my conclusion on legal grounds alone that the Petition was bound to fail.

Nevertheless, this characterisation has some relevance when considering the scale of threatened abuse and whether a CRO is warranted.

20. In the category of alleged facts unsupported by evidence and inherently implausible I give three particular illustrations. First, the Petitioner seems convinced that the Company meeting of 26th September 2017 that removed her as a Director and Company Secretary did not take place. She is perhaps of the same view in relation to other meetings. The Petitioner based that conclusion on the fact that minutes of the meeting had not been circulated electronically after the meeting, as had been her practice, and that she allegedly did not discover that she had been dismissed from her roles until several months later. She postulated that the copies of minutes handed up to the court last Friday were forgeries created some time between the adjourned hearing on 16th July 2018 and last Friday. She maintained this position in the face of her knowledge of the registered changes of office-holders at Companies House and the statutory declarations by the shareholders present at that meeting.

21. Secondly, and central to the unfair prejudice Petition, was the allegation that the first three Respondents were "connected" to the fourth Respondent through some financial means. The Petitioner persisted in this allegation despite the express denial of such a connection by the first to the fourth Respondents and the signed declaration by all members of the Company except the Petitioner asserting that they have no financial connection with the fourth Respondent, that they believe the Company to be well run by the current Directors, and that they consider the Petitioner to be disrupting the proper management of the Company's affairs. The Petitioner suggested in her oral submissions that the

court needed to consider whether the Company's members might have been induced to sign such a declaration because of blackmail by the fourth Respondent, given his electronic surveillance activities and his ability to obtain information about the members. No evidence at all was offered in support of this rather astonishing suggestion, and the Respondents present in court last Friday, who might have taken the opportunity to escape from such alleged duress, made no comment.

22. Thirdly, the Petitioner is convinced that the fourth Respondent is engaged in various illegal activities alleged to be material to the Petition. These include cyber-crime activities; interception of telephone calls and e-mails of both the Petitioner and other members of the Company; the alteration of the Petitioner's e-mails through cyber-crime; using illegal surveillance to obtain details of the Petitioner's solicitors and then dissuading them from acting for her; using similar surveillance activities for criminal purposes including thwarting the operation of the rule of law with enforcement agencies including the NCA; acting along with Mr. Godwin in purporting to be members of the Security Services and contacting the hospital to provide instructions for the Petitioner to be misdiagnosed; also contacting the Petitioner's GP seeking to influence his medical decisions in respect of the Petitioner by some sort of duress; having the Petitioner's letters to the National Crime Authority intercepted. Substantially similar facts were raised by the Petitioner in her separate injunction application, noted earlier, which was dismissed by Morgan J as not being rooted in any evidence, and certified by that court as being wholly without merit.

23. I make these points at some length, because it is one thing to put forward facts that are then judged to be legally irrelevant to the particular claim being advanced. Such a claim may then fairly be held to be wholly without merit. But where the alleged facts are not only adjudged legally irrelevant, but also as unsupported by evidence and inherently implausible, that is another sort of failure. And persistence in pursuing alleged facts before this court, without evidence and in the face of indications of their futility – whether by way of signed declarations to the contrary so far as any alleged connection with the fourth Respondent is concerned, or dismissal of the injunction application in relation to allegations of harassment – adds weight to the perceived risk of further abuses of process.

24. On that basis, an award of a CRO might seem appropriate as a proportionate response to the risks to respondents to any future litigation and to the preservation of limited court resources. Further, I accept Mr. Smithdale's submission that if an appropriately protective CRO were to be granted, then it would need to be a general CRO, even if its ambit were confined in some of the ways suggested in oral argument. It seems impossible to draft an extended CRO that would be adequate to meet the threat of further scattergun claims being made, based on the many and varied allegations raised in the current Petition. This is especially so given that the Petitioner has already pursued a failed harassment claim (currently under appeal) and has indicated that she plans further claims or applications (including employment claims) involving substantially similar allegations of fact as raised in the Petition.

25. In *R (on the Application of Kumar) v. The Secretary of State for Constitutional Affairs* [2006] EWCA Civ 990, at [60], the Court of Appeal indicated that the power to make general restraint orders described in the Practice Direction 3C paragraph 4 is apt to cover a situation in which a litigant adopts

> "a scattergun approach to litigation on a number of different grievances without necessarily exhibiting such an obsessive approach to a single topic that an extended CRO can appropriately be made against him/her".

26. In short, I can see the arguments in favour of ordering a general CRO given the very particular nature of the patently wasteful expenditure of both the Respondents' and the court's resources in addressing this Petition, and the strong indications from the Petitioner that this is not the end of the road.

27. On the other hand, a general CRO cannot be ordered unless the Petitioner is a party who "*persists in issuing claims or making applications which are totally without merit*, in circumstances where an extended civil restraint order would not be sufficient or appropriate" (PD 3C, para 4.1, emphasis added); and an extended CRO cannot be ordered unless the Petitioner is a party who has "*persistently issued claims or made applications which are totally without merit*" (3C PD para 3.1, emphasis added). Three unmeritorious claims or applications have been described as the bare minimum needed to constitute persistence in relation to an extended CRO: White Book, para 3.11.1; *In the matter of Ludlam (a bankrupt)* [2009] EWHC 2067 (Ch). The same, or maybe an even higher threshold, would seem to be necessary before ordering a general CRO, given its still greater interference with the Petitioner's otherwise uninhibited right of access to the courts.

28. As matters stand, I have judged this unfair prejudice Petition to be totally without merit. Morgan J has judged the injunction application note earlier as being totally without merit. Morgan J also ordered a limited CRO, seemingly on the basis that in his view the summons application dismissed by Carr J was totally without merit, even though it had not been certified as such by Carr J himself. On one view it might thus be said that three claims advanced by the Petitioner in the past few months have all been regarded in one way or another as being totally without merit. Mr Smithdale referred me to *Kumar* (cited earlier) by way of reassurance that this is an acceptable way of counting up the three petitions judged as totally without merit.

29. However, I am not entirely comfortable including the dismissal by Carr J amongst that number of totally without merit applications for the purposes of meeting the threshold required to order an extended CRO, never mind a general CRO. Indeed, independently of the bald numbers, I am not completely persuaded that the outcome of the summons and injunction applications, together with my conclusions on the unfair prejudice Petition, amount to sufficient evidence that the Petitioner can be described as a party who "*persistently* issued claims" (Practice Direction 3C paragraph 3.1) or "*persists* in issuing claims" (Practice Direction 3C paragraph 4.1) that are completely without merit. Thus, with some reluctance, I find that the necessary quality of persistence has not been satisfactorily made out.

Conclusion

30. Accordingly, and solely on the basis of the borderline nature of the proof of persistence, I decline to order either a general CRO or an extended CRO against

the Petitioner. In the current circumstances, I find that making such an order would not quite meet the test of being a proportionate response to the threatened risk of abuse of process.

31. However, I reach this conclusion with the greatest hesitation, being alert to the very real risk that there may be a repeat waste of Respondents' and court resources. I regard the Respondents' application for an extended or general CRO as very properly and soundly made. I hope the Petitioner accepts this outcome as generous to her, and responds by taking due note of the futility and costliness to her, and to others, of advancing claims that are bound to fail. I would expect that if there are repeat endeavours in the same vein, a future court will not be so accommodating.

32. I thank the parties for their submissions and I compliment Ms. Odutola on the conduct of her case.

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