Neutral Citation Number: [2021] EWHC 976 (Ch)

Case No: BL-2018-00413

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY APPEALS CAUSE LIST

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

Date: 21/04/2021

Before :

MR DAVID HALPERN QC SITTING AS A DEPUTY HIGH COURT JUDGE

- -

Between :

(1) SEAMAS DALY	**Claimants**
(2) PHOTO IMAGES LIMITED	
- and -	
(1) THOMAS GERRARD RYAN	**Defendants**
(2) RYAN CORPORATOIN (UK) LIMITED	

- -
- -

James Gardner (instructed by **Mishcon de Reya LLP**) for the **Claimant**
Mr Ryan appeared in person

Hearing date: 20 April 2021

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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.

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be 21 April 2021 at 10.30am.

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MR DAVID HALPERN QC SITTING AS A DEPUTY HIGH COURT JUDGE

Mr David Halpern QC :

1. The Claimants, Mr Daly and his company, Photo Images Ltd, are applying for a condition to be attached to a permission to appeal granted to the Defendants, Mr Ryan and Ryan Corporation (UK) Ltd ("**RCUL**"). This would require payment of the amounts due under two costs order as a condition of being permitted to pursue the appeal. (I shall refer compendiously to the Claimants as "**Daly**" and to the Defendants as "**Ryan**", and I shall refer to the condition sought to be imposed as "**the Condition**".)

2. Mr James Gardner appeared for Daly, instructed by Mishcon de Reya LLP ("**MdR**"). Mr Ryan is a litigant in person, assisted by his McKenzie friend Mr Stephen Galpin. RCUL was struck off the Register for failing to file annual returns but was restored at Daly's instigation in order to make it a defendant to these proceedings. RCUL is not trading and there is no evidence that it has any assets.

3. Mr Galpin sought permission to address me on behalf of Mr Ryan. Having considered the Practice Note on *McKenzie Friends: Civil and Family Court* [2010] 1 WLR 1881, and in the absence of any opposition from Mr Gardner, I agreed to permit this. My reasons for doing so are as follows, on the basis of what I was told: (i) Mr Ryan is a sick man with a serious heart condition who takes medication which makes it difficult for him to concentrate; (ii) Mr Galpin is a trusted friend, who is not being paid for assisting Mr Ryan; and (iii) Mr Galpin is a Justice of the Peace.

4. The hearing was conducted remotely via Microsoft Teams.

The facts

5. The factual background, and in particular the procedural history, is complicated, but fortunately I am able to summarise it briefly so far as relevant to this application. This is because I am not concerned with the merits of the underlying proceedings, nor with the merits of the forthcoming appeal, but solely with the question whether the Condition should be imposed on the pursuit of that appeal.

6. Daly sued Ryan for damages for deceit, "unlawful means" conspiracy and breach of contract in relation to various property transactions in which they were involved. One of the allegations of deceit was that Mr Ryan had claimed to be extremely wealthy and creditworthy.

7. Daly were dissatisfied with Ryan's Defence and served a Part 18 Request. On 17 April 2019 Deputy Master Rhys ordered Ryan to reply to that Request. Daly were dissatisfied with the reply and applied to Master Shuman, who made an "unless" order on 12 September 2019, requiring Ryan to provide a further and better reply, verified by a statement of truth, and ordering Ryan to pay costs of £19,323.60 ("**the First Costs Order**").

8. Ryan failed to comply with this "unless" order and Daly applied under CPR rule 3.5 for judgment on their claim. On 6 March 2020 Deputy Master Arkush granted judgment without a hearing, requiring Mr Ryan to pay a sum in excess of €1.7 million and RCUL to pay a sum in excess of €6.8 million, plus costs to be assessed.

9. Ryan applied to set aside the judgment but failed to serve any evidence in support, which failure led Master Shuman to dismiss Ryan's application on 27 April 2020 without a hearing. On 5 May 2020 she amended her order so as to give Ryan the opportunity to apply to set it aside. Ryan duly applied and there was a hearing before Master Shuman. By her order of 14 July 2020 she dismissed Ryan's application and ordered them to pay costs of £14,400 ("**the Second Costs Order**").

10. Ryan applied for permission to appeal against the order of 14 July 2020. On 4 December 2020 Michael Green J made an order without a hearing, granting Ryan permission to appeal and giving Daly liberty to apply under CPR rule 52.18(1)(c) for a condition to be imposed on the bringing of the appeal.

11. Daly have applied for a condition to be attached requiring payment of the sums due under the First and Second Costs Orders as a condition of Ryan pursuing the appeal. It is this application for the Condition on which I now give judgment.

The basis of Daly's application

12. Daly ask the court to impose the Condition for three reasons:

    i) That Daly are likely to face difficulties in enforcing these Costs Orders, given that Mr Ryan has a history of flouting his obligations to pay creditors and of obstructing satisfaction of his debts;

    ii) (In the case of the First Costs Order alone) that a debarring order would have been made if the first-instance proceedings had been ongoing; and

    iii) That Ryan have failed to give full and frank disclosure of their financial position, and hence have failed to establish that the appeal would be stifled by the Condition.

    I shall consider each of these submissions in turn.

(1) Likely difficulties in enforcement

13. The test to be applied was summarised by Christopher Clarke LJ in *Merchant International Company Limited v Natsionalna Aktsionerna Kompaniia Naftogaz Ukrainy* [2016] EWCA Civ 710 at [37] and [40] as follows:

> "(a) The essential question is whether or not there is a compelling reason to make payment in of the judgment sum, plus costs and interest (or some part thereof) a condition for further pursuit of the appeal – hereafter "a security payment order";

(b) Whether there is a compelling reason is a value judgment to be made on the particular facts of the case under consideration;

(c) The fact that a judgment has been entered against the appellant and no stay has been sought or granted does not mean that, as a matter of course, compliance with the judgment should be made a condition of appeal nor does it, alone, afford a compelling reason for a payment order;

(d) On the contrary the power in CPR 52.9 [the predecessor to the current 52.18] was not designed to be no more than an alternative means of securing enforcement and is only to be exercised with caution;

(e) Whilst every case depends on its particular facts the court is likely to find there to be a compelling reason to make a security payment order which has that effect if the judgment debtor has in the past (*Dumford Trading*) or is likely in the future (*Wittman*) to take steps to denude itself of assets or to put its assets beyond the reach of normal enforcement processes;

(f) There may be a compelling reason to make a security order even if it is not established that the appellant has acted as in (e) above. This may be the case if there are considerable practical difficulties in effecting execution."

14. In *Merchant International*, as in a number of the reported cases, the party against whom the order was sought was a foreign corporation with no assets within the jurisdiction. However, it is clear from the authorities that conditions may also be imposed on an individual person resident within the jurisdiction, if a compelling reason is shown (*Pourghazi v. Kamyab* [2015] EWCA Civ 562).

15. Pursuant to his duty to the court to refer to any matters of fact or law on which Ryan would have relied, if they had had the benefit of legal representation, Mr Gardner referred me to a dictum of Potter LJ in *Bell Electric Ltd v. Aweco Appliance Systems GmbH* [2003] 1 All ER 344 at [26], who added "*by way of a footnote*" that the court would be "*most unlikely*" to regard the failure of an unsuccessful defendant, resident with the jurisdiction, to pay the judgment sum or costs as a compelling reason, unless he had demonstrated an intention to ignore court orders. This dictum was quoted in full by Christopher Clarke LJ in *Merchant International* at [30]. I agree with Mr Gardner that the test which I have set out at paragraph 13 above was formulated with that dictum in mind and accordingly supersedes it, insofar as the dictum is inconsistent with that test.

16. I also bear in mind that the court will not impose conditions where the effect of doing so will be to stifle an appeal. For the reasons given below, Ryan have not satisfied me that this is such a case.

17. The principal evidence on which Daly rely is Mr Ryan's approach to judgments in Ireland in favour of the Irish Revenue:

i) In his Supplementary Witness Statement dated 25 March 2021, Mr Ryan admitted that the Irish tax authorities obtained a judgment against him in Eire for £4 million.

ii) In that same statement, he said: "*I lost any wealth I had in Eire progressively since the crash in 2010. As the consequences of that crash caught up in mid-decade, I moved to England to make a fresh start*." Mr Gardner observed that this could only be viewed as a cynical attempt to avoid liability.

iii) Mr Ryan lived in rented accommodation at 25 Gilbert Street, Mayfair, London W1 until he was evicted in 2019 for non-payment of rent. Despite requests from MdR, he did not explain how he had been able to afford to pay the rent. All he would say is that the flat was very small. It was only at the hearing that Mr Galpin told me that the rent was paid by Mr Ryan's friend, Mr John McAlvoy, but I have seen no written evidence to that effect, still less any evidence verified by a statement of truth.

iv) It also appears that Mr Ryan was living in Switzerland in 2015. On 23 July 2015 Mr Ryan swore an affidavit in proceedings in Eire brought by a Mr Joseph Dunne in which he gave his address as 9 Chemin des Picottes, CH-1217 Meryrin, Switzerland. Mr Ryan's explanation (through Mr Galpin) was that this was merely an address used by RCUL, but that is not what the affidavit says.

v) Mr Ryan accepted in his Supplementary Witness Statement that the judgment debt to the Irish tax authorities has not been paid. I am satisfied that the evidence set out above indicates an attempt to evade enforcement by leaving Eire. I am also satisfied that he appears to have had the resources to pay rent on properties in Switzerland and Mayfair and that he has not adequately explained the source of that money and why it could not have been used towards satisfaction of his Irish debts.

18. Very little was said at the hearing about RCUL. Mr Galpin argued that MdR ought to know more about it than Mr Ryan does, since it was MdR who caused it to be restored to the Register. Mr Galpin asked me to infer that RCUL is a worthless shell, since otherwise Mr Ryan would not have allowed it to be struck off. I reach no conclusion on that point, save to say that I decide this application principally by reference to the effect of the proposed Condition on Mr Ryan, not on RUCL, since I have seen no evidence that RCUL wishes to pursue the appeal.

19. A number of other debts were also relied on by Mr Gardner, but I will not go through the details of these, as they were little more than a makeweight.

20. In the circumstances I am satisfied that there is reason to think that Ryan will take steps to ensure that Daly are unable to enforce the Costs Orders. In

reaching this conclusion I have also taken into account the matters considered at paragraphs 30 to 35 below.

(2) <u>There are good grounds for a debarring order</u>

21. Mr Gardner submits that, if the first-instance proceedings had been ongoing, a debarring order would have been made in relation to the First Costs Order. The test to be applied was recently summarised by Saini J in *Siddiqi v. Aidinantz* [2020] EWCH 699 (QB) at [30]:

> "(i) The ultimate aim of the Court is to identify the just order from a case management perspective, bearing in mind the overriding objective.
>
> (ii) In approaching that task, the "working" or "default rule" is that a litigant should not be able to continue with his or her claim without satisfying an existing and non-appealed final costs order, and the court should impose a condition requiring compliance.
>
> (iii) However, if a claimant can show his or her Article 6 rights will be interfered with by such a condition (because they cannot pay, and a genuine claim will therefore be stifled) that is a material, but not conclusive, consideration pointing against such a condition.
>
> (iv) Finally, the Court must take into account all other circumstances of the case, including the procedural behaviour of the defaulting party in deciding on the just order to make."

22. The reference to "*final order*" is to an order which has not been appealed and in respect of which the defaulting party is unable to appeal (e.g. because he is out of time). It is for this reason that Mr Gardner confines his submission under this head to the First Costs Order, which was never appealed. As I understand it, this is a fall-back ground which is not needed if I am with him on his first ground for seeking the Condition.

23. The default position is that a debarring order should be made unless there is good reason not to do so. In the present case there is no good reason to the contrary, assuming that Mr Ryan is unable to satisfy me that the imposition of the Condition would stifle his appeal (which I deal with below). To the contrary, even after making allowance for the difficulties faced by Mr Ryan as a litigant in person, the way in which he has conducted his defence to the proceedings is a further factor against him (Saini J's point (iv)), but I need not expand on that point, given that Ryan have not satisfied me that there is any reason to depart from the default position.

24. Mr Gardner was unable to show me any previous authority in which a condition had been imposed under CPR 52.18(1)(c) in circumstances where the underlying litigation was no longer ongoing. However, I am satisfied on the facts of this case that this is an appropriate case for imposing the Condition in respect of the First Costs Order. The rationale given by Saini J is equally applicable in the current situation, given that the purpose of Ryan's appeal is

to seek to revive the litigation, in the course of which the First Costs Order was made.

25. The test for making a debarring order was summarised in broadly similar terms by Sir Richard Field in *Michael Wilson & Partners Ltd v. Sinclair* [2017] EWHC 2424 (Comm) at [29]. He said:

> "(1) The imposition of a sanction for non-payment of a costs order involves the exercise of a discretion pursuant to the court's inherent jurisdiction.
>
> (2) The court should keep carefully in mind the policy behind the imposition of costs orders made payable within a specified period of time before the end of the litigation, namely, that they serve to discourage irresponsible interlocutory applications or resistance to successful interlocutory applications.
>
> (3) Consideration must be given to all the relevant circumstances including: (a) the potential applicability of Article 6 ECHR; (b) the availability of alternative means of enforcing the costs order through the different mechanisms of execution; (c) whether the court making the costs order did so notwithstanding a submission that it was inappropriate to make a costs order payable before the conclusion of the proceedings in question; and where no such submission was made whether it ought to have been made or there is no good reason for it not having been made.
>
> (4) A submission by the party in default that he lacks the means to pay and that therefore a debarring order would be a denial of justice and/or in breach of Article 6 of ECHR should be supported by detailed, cogent and proper evidence which gives full and frank disclosure of the witness's financial position including his or her prospects of raising the necessary funds where his or her cash resources are insufficient to meet the liability.
>
> (5) Where the defaulting party appears to have no or markedly insufficient assets in the jurisdiction and has not adduced proper and sufficient evidence of impecuniosity, the court ought generally to require payment of the costs order as the price for being allowed to continue to contest the proceedings unless there are strong reasons for not so ordering.
>
> (6) If the court decides that a debarring order should be made, the order ought to be an unless order except where there are strong reasons for imposing an immediate order."

26. It is not necessary for me to decide between these two formulations of the test, because in my judgment both are satisfied in the present case. As regards the additional points raised by Sir Richard Field at sub-paragraph (3):

i) I consider Article 6 in the next section of this judgment.

ii) I see no reason why Daly should be confined to the normal methods of execution, given that Master Shuman considered it appropriate to make an immediate costs order, and given that Mr Ryan did not apply for permission to appeal the First Costs Order;

iii) When making the First Costs Order Master Shuman considered, and rejected, a submission that the order should not be immediate; and

iv) Mr Ryan has been involved in sufficient litigation to know that there are likely to be adverse consequences if he loses an application; indeed, at the hearing in April 2019 Deputy Master Rhys expressly warned him of this likelihood.

(3) Failure to give full and frank disclosure of Ryan's financial position

27. Mr Gardner relies on this ground for two purposes: firstly as an answer to Ryan's contention that the Condition would stifle Ryan's appeal and hence breach its Article 6 right, and secondly as further evidence of the difficulty of enforcing the Costs Orders.

28. In *Goldtrail Travel Ltd v Onur Air Taşimacilik AŞ* [2017] 1 WLR 3014 Lord Wilson JSC said at [12]:

> "To stifle an appeal is to prevent an appellant from bringing it or continuing it. If an appellant has permission to bring an appeal, it is wrong to impose a condition which has the effect of preventing him from bringing it or continuing it. … Application of article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms … yields the same conclusion. The article does not require a member state to institute a court of appeal but, if it does so, it must ensure that litigants in that court enjoy its fundamental guarantees …. There will seldom be a 'fair hearing' within article 6 if a court which has permitted a litigant to bring an appeal then, by indirect means, does not permit him to bring it."

29. He then set out the following test at [15] to [17]:

> "There is no doubt – indeed it is agreed – that, if the proposed condition is otherwise appropriate, the objection that it would stifle the continuation of the appeal represents a contention which needs to be established by the appellant and indeed, although it is hypothetical, to be established on the balance of probabilities: for the respondent to the appeal can hardly be expected to establish matters relating to the reality of the appellant's financial situation of which he probably knows little.
>
> But, for all practical purposes, courts can proceed on the basis that, were it to be established that it would probably stifle the appeal, the condition should not be imposed.
>
> It is clear that, even when the appellant appears to have no realisable assets of its own with which to satisfy it, a condition for payment will not

> stifle its appeal if it can raise the required sum. As Brandon LJ said in the Court of Appeal in the *Yorke Motors* case (unreported) 5 June 1981, cited with approval by Lord Diplock [1982] 1 WLR 444, 449: 'The fact that the man has no capital of his own does not mean that he cannot raise any capital; he may have friends, he may have business associates, he may have relatives, all of whom can help him in his hour of need.'"

30. Mr Ryan relies on the fact that he is on Universal Credit and asserts that this is evidence that he has no property, savings, business or employment. On 5 June 2020 MdR wrote to Mr Ryan questioning this assertion. The letter asked how he could afford the rent of his flat in Mayfair and invited him to provide a witness statement detailing all his assets and income. MdR's requests for Mr Ryan to provide evidence, verified with a statement of truth, have continued throughout the litigation.

31. On 24 February 2021 Mr Ryan made a witness statement in which he reiterated that he was on Universal Credit, living in a one-room emergency accommodation since his eviction from his flat in Mayfair, and that he had no assets of any kind. However, the only documents which he attached were documents from the local Council showing that he was in receipt of Housing Benefit and Universal Credit and had been assessed as a "Priority" case for rehousing, and a letter from Barts Health NHS Trust setting out his serious health issues.

32. On 15 March 2021 MdR wrote to him saying that he had simply made assertions in his witness statement, without producing evidence in support. In particular:

    i) MdR referred to his Reply to the Part 18 Request in which he had said as follows:

        a) In answer to a question as to his estimated wealth in February 2010, he said: "*At purchase of asset value 5-6 million, hugely inflated to around 150,000 million due to the temporary and outrageous inflationary effect on the property market at that time*"; and

        b) In answer to a question as to whether he had made a false statement in saying in a letter that he had been dealing with real estate projects in excess of £100 million, he said: "*As you can see from my statement of wealth given in answer to question above, at the height of the market my assets were around that figure and so it could be said on that basis the figure is not unreasonable*". This appears to be an assertion that he once had assets of £100 million.

    In the light of these answers, MdR asked what had happened to his assets since 2010.

ii) MdR referred to 10 bank accounts on which they had obtained information (none had been disclosed by Mr Ryan) and asked for bank statements from 2010 to the present day;

iii) MdR referred to a family trust from which Mr Ryan had said he had received a benefit and asked for details; and

iv) MdR repeated their request that he explain where he obtained the money to rent the Mayfair flat.

33. Mr Ryan responded by filing his Supplementary Witness Statement on 25 March 2021. He made a number of generalised statements but provided no further documents. In particular:

i) He confirmed the existence of the 10 bank accounts referred to by MdR but said that they were all closed between 4 and 11 years ago, save for his current account with Lloyds which had a nil balance. He explained that all bank statements were lost when his home and office in Eire were repossessed. He did not whether he had made any attempt to obtain statements from the banks in question, nor from his former accountants or solicitors (Mr Galpin told me that Noel Smith and Partners had acted for Ryan in Eire for part of the time); nor did he volunteer details of any further bank accounts.

ii) He said that his family Trust provided him with around £4 million in 2004-5, but the Trust was outside his control. I assume that he means by this that he was a discretionary beneficiary. Mr Galpin added that Mr Ryan was unable to see or disclose the Trust Deed or any trust documents, but I do not accept that as a matter of law: *Schmidt v. Rosewood Trust Ltd* [2003 2 AC 709.

iii) He provided no evidence as to how he had been able to pay the rent until 2019, but Mr Galpin stated for the first time in the course of the hearing that Mr Ryan's friend, Mr John McAlvoy had helped him.

34. Mr Galpin said that the Court should accept that Mr Ryan was clearly impecunious, because this was proved by his being in receipt of Universal Credit and being evicted from his Mayfair flat for non-payment of rent. In my judgment, whilst this might be sufficient in some contexts, it is plainly not sufficient in the present case where (i) the claim against Ryan is based in part on his assertions of great wealth, (ii) he has been in receipt of considerable sums (e.g. £4 million from the family Trust), (iii) the proceedings allege that Ryan have received substantial sums from Daly for which they have failed to account and (iv) there is evidence of an ability to spend money (e.g. on rent of properties in Mayfair and Switzerland) at a time when Mr Ryan was pleading poverty.

35. I also bear in mind that the burden on Ryan is not just to prove that he does not have the money, but also that he cannot obtain it from other sources. I would therefore have expected full disclosure in order to show why, by way of

example, Ryan could not obtain any further help from the family Trust or from Mr McAlvoy.

36. Mr Galpin asked me to allow Mr Ryan a degree of latitude because he is a litigant in person. I bear in mind the words of Lord Sumption in *Barton v. Wright Hassall LLP* [2018] 1 WLR 1119 at [18]:

> "In current circumstances any court will appreciate that litigating in person is not always a matter of choice. At a time when the availability of legal aid and conditional fee agreements have been restricted, some litigants may have little option but to represent themselves. Their lack of representation will often justify making allowances in making case management decisions and in conducting hearings. But it will not usually justify applying to litigants in person a lower standard of compliance with rules or orders of the court. The overriding objective requires the courts so far as practicable to enforce compliance with the rules: CPR rule 1.1(1)(f). The rules do not in any relevant respect distinguish between represented and unrepresented parties. In applications under CPR 3.9 for relief from sanctions, it is now well established that the fact that the applicant was unrepresented at the relevant time is not in itself a reason not to enforce rules of court against him …. At best, it may affect the issue "at the margin" … which I take to mean that it may increase the weight to be given to some other, more directly relevant factor."

37. Applying this to the present case, I was prepared to allow Mr Ryan a degree of latitude at the hearing (e.g. by allowing Mr Galpin to speak on his behalf), but it would be manifestly unfair to Daly if I allowed this to be a reason for Ryan's inability to satisfy me that the imposition of the Condition would stifle their appeal.

38. In the circumstances I am very far from being satisfied that Ryan have produced cogent evidence that the imposition of the Condition would stifle the appeal. I also accept Mr Gardner's submission that this evidence is further evidence of Mr Ryan concealing his assets.

39. I also bear in mind that the Condition is limited to two comparatively modest Costs Orders and does not extend to the judgment debts, let alone the entire costs of the proceedings.

Disposition

40. For these reasons, I impose the Condition sought by Daly. Mr Galpin said that it would make no difference to Mr Ryan whether the Condition required payment of the two Costs orders within 14 days or a longer period. I will impose an order requiring payment of the First and Second Costs Orders within 14 days.

41. I will hear the parties in relation to costs and any consequential matters.