Neutral Citation Number: [2024] EWHC 1196 (Ch)

Case No: BL-2018-000544

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

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

Date: 20/05/2024

Before :

MR JUSTICE ADAM JOHNSON

- -

Between :

(1) TONSTATE GROUP LIMITED (in liquidation)
(2) TONSTATE EDINBURGH LIMITED (in liquidation)
(3) DAN-TON INVESTMENTS LIMITED (in liquidation)
(4) ARTHUR MATYAS **Claimants**

- and -

(1) GIL WOJAKOWSKI
(2) FIELDFISHER LLP **Respondents**

- -
- -

Andrew Fulton KC (instructed by **Rechtschaffen Law**) for the **Claimants**
Matthew Parker KC (instructed by **Fieldfisher LLP**) for the **Second Respondent**

Hearing date: 26 April 2024

- -

Approved Judgment

This judgment was handed down remotely at 10am on Monday 20 May 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

Mr Justice Adam Johnson:

Introduction & Background

1. This Judgment deals with a short but important question about costs.

2. Fieldfisher LLP ("*Fieldfisher*") acted for Mr Gil Wojakowski ("*Gil*") in connection with an application before me on 10 April 2024, seeking Bankers Trust relief. My Judgment on the application is at [2024] EWHC 975 (Ch). As will be apparent from that Judgment, Gil objected to the idea that the Court had jurisdiction over him. After I determined, part way through the hearing, that in my view the Court had at least personal jurisdiction over Gil, he instructed his legal team to withdraw, for fear that by remaining an active participant in the hearing, he might enter a submission which would then affect his ability to object to enforcement of any Judgment or Order in Israel, where he is resident. His legal team informed the Court that that was Gil's position, and accordingly played no further role in the application. At the end of the hearing, having heard further submissions from the Claimants/Applicants, I stated that I would make the Order they sought against Gil. I was also asked to make an Order dispensing with personal service of the Order and permitting service via Fieldfisher. I indicated I would do so.

3. In between the end of the hearing on Wednesday 10 April, and the point late in the afternoon of the following day, 11 April, when a sealed copy of the Order was ready for service, Gil sent to the Claimants' solicitor a Notice of Change, saying that Fieldfisher had ceased to act for him and that he was now acting in person. He gave an address for service in Israel. That was on the morning of Thursday, 11 April at approximately 10.26am.

4. This chain of events has given rise to an issue about the validity of the service of my Order, via service on Fieldfisher, later in the evening of the same day, Thursday, 11 April. The position the Claimants have taken is that such service was valid, because the Notice of Change served by Gil was deficient and thus ineffective to remove Fieldfisher from the record as a party authorised to accept service on behalf of Gil within the jurisdiction. The Claimants' argument relies on a combination of CPR, rule 6.23(1) and CPR 42.2(3). The gist of the point is that CPR, rule 6.23(1) requires "*a party to proceedings*" to give an address for service which must be in the United Kingdom – either the address of a solicitor, or a place of residence or business, or some other UK address. So – the argument runs – when CPR 42.2(3) says that any Notice of Change must state the party's new address for service, that must also mean another address in the UK; and if a non-UK address is given, then the Notice of Change is defective, and the solicitor's address remains a valid address for service unless and until the solicitor makes an application under CPR, rule 42.3 that he has ceased to act (or as it is usually said, has "*come of the record*"). There is some support for the argument in the decision of Chief Master Marsh, in Ashley v. Jimenez [2019] EWHC 1806 (Ch). (I should point out that here, Fieldfisher did apply to come off the record, but that was only by their later application dated 23 April 2024, which I granted by Order dated 25 April).

5. As I will explain further, the issue of service has yet to be determined, but the immediate costs question comes about in the following way.

6. After receiving Gil's Notice of Change referred to above, the Claimants' solicitor, Mr Rechtschaffen, replied by email to Gil early in the afternoon of 11 April, making (in effect) the argument above, to the effect that the Notice of Change was invalid. That correspondence was not copied to Fieldfisher, and so they were not aware of it, or of the argument Mr Rechtschaffen was relying on, when they sent an email to the Court (more precisely, to my clerk), on the morning of the following day, Friday 12 April, saying they were no longer on the record "*as of yesterday morning*", and so were not authorised to accept service of documents on Gil's behalf. The implication was that the attempted service on them the previous evening was ineffective.

7. Mr Rechtschaffen replied to Fieldfisher by letter almost immediately, setting out for them the gist of the argument I have referred to. In an email to Fieldfisher timed at 13.53 on Friday 12 April, Mr Rechtschaffen then also said that unless they could show that the Claimants were wrong in their interpretation of the rules, then they (Fieldfisher) should promptly write to the Court and "*withdraw your challenge to the effectiveness of service … and apologise for the inconvenience*".

8. That is how matters stood going into the weekend, but on the following Monday morning, 15 April, the Claimants issued an Application Notice, seeking "*A declaration the Gil Wojakowski was validly served with the 10 April 2024 order of Adam Johnson J by the Claimants serving a copy on Fieldfisher LLP*". The Claimants named as Respondents to that Order both Gil *and* Fieldfisher. As far as Fieldfisher are concerned, the Application Notice said the following:

> *"The Claimants seek an Order that Mr Wojakowski and Fieldfisher be jointly and severally liable for the costs of the present application, to be assessed if not agreed. Even if Mr Wojakowski (who as an Israeli lawyer is presumably unfamiliar with the CPR) did not understand the need to supply a new address for service within the jurisdiction, Fieldfisher should have been aware of this requirement. In circumstances where Mr Wojakowski is resident in Israel and refuses to recognise the English Court's jurisdiction over him, it would be unfair for the Claimants to be left out of pocket by reason of Fieldfisher's failure to interpret and apply the rules correctly. Fieldfisher should plainly have accepted the service upon them as valid."*

9. The Application Notice requested that the matter be dealt with without a hearing, but on 16 April I directed an oral hearing, which was later scheduled for Friday, 26 April, with a time estimate of 1 hour.

10. On Thursday, 18 April Mr Rechtschaffen wrote to Fieldfisher saying that the basis for seeking costs against them was that they had maintained a position in correspondence, including in correspondence with the Court (see above at [6]), which was "*plainly wrong*". He went on though to say that the Claimants would not seek any adverse costs Order against Fieldfisher, "*provided you now acknowledge your error and consent to the making of a declaration as to the validity of service …*".

11. Fieldfisher replied on Saturday, 20 April, by email from the relevant partner Ms Sanghi, in which she said that based on the points Mr Rechtschaffen had raised as to

the effectiveness of the Notice of Change, which were "*belatedly brought to our attention by your firm*" (a reference to the fact that Mr Rechtschaffen's original email of 11 April was sent to Gil only), Fieldfisher's "*present view*" was that "*the Notice of Change is likely to be considered defective"*. But Ms Sanghi went on to say there was no basis for the Claimants to seek costs against Fieldfisher, and invited them to withdraw their application immediately.

12. The reply from Mr Rechtschaffen sent the same day pressed for a response to the Claimants' proposal, i.e., that Fieldfisher consent to the making of a declaration as to the validity of service. But in response on Monday, 22 April, Ms Sanghi said that since Fieldfisher were no longer instructed, it was not appropriate for them to comment on whether the method of service on Gil was effective or not. She said, *"[t]hat is a matter for Mr Wojakowski himself*", and so Fieldfisher were not in any position to accept the "*offer*" in Mr Rechtschaffen's email of 18 April.

13. In the end, by the time of the hearing on 26 April, the Claimants had dropped the idea of claiming any costs from Fieldfisher. Late in the evening of Wednesday, 24 April, Mr Rechtshcaffen wrote to say, "*After further consideration, we decided to pursue the cost of the application only from Mr Wojakowski*".

14. By then, however, Fieldfisher had already incurred costs. They had substantially completed work on a witness statement, and had instructed counsel. They therefore asked the Claimants to agree to pay those costs, which they calculated to be some £74,997.00. In response, Mr Rechtschaffen said the Claimants had no intention of paying nearly £75,000 for a one hour hearing on a short point of clarification, and that the Claimants would never have sought costs against Fieldfisher in the first place if they had not sent their original email to the Court on 12 April (above at [6]), relying on what they now appeared to accept was a defective Notice of Change.

15. That is how matters stood at the hearing on 26 April. As I have noted above, that was scheduled as a 1 hour hearing to deal with the question of the validity of service on Gil, via Fieldfisher. In the event, that issue was not resolved, because I was not satisfied, on the basis of the limited submissions made, that Gil in fact remained a "*party to proceedings*" after the hearing before me on 10 April, within the meaning of that phrase in CPR, rule 6.23(1), and so continued to be obliged to maintain an address for service in the United Kingdom via his solicitors or otherwise. That was in light of his instructions to his legal team during the hearing on 10 April to stand down (see above, and see my Judgment at [2024] EWHC 975 (Ch), at [12]). To be clear, I did not resolve the point against the Claimants, but neither did I resolve it in their favour. There was insufficient time to deal fully with the question of service, and so it was adjourned. But Fieldfisher's application for its costs was fully argued, and that is the point I now need to resolve.

Discussion and Conclusions

16. I have come to the view that Fieldfisher should be entitled to recover their costs. My reasons are as follows.

17. The main point is that I am persuaded by Mr Parker KC's submission that there was no proper justification for adding Fieldfisher as a separate Respondent to the application issued on Monday, 15 April.

18. The argument of Mr Fulton KC, for the Claimants, was that Fieldfisher's addition was justified, because as officers of the Court they were bound to correct what the Claimants said was the "*plainly wrong*" impression created by their email to the Court (i.e., my clerk) on the morning of 12 April (see above at [6]). Mr Fulton's point was that, Fieldfisher having failed to correct their own inaccurate statement, it was justifiable to bring them before the Court in order for the position to be formally corrected.

19. I would make a number of points about this.

20. To start with, it will be clear from what I have said already that I do not regard the question of service as an entirely straightforward one. There is an argument still to be had about whether Fieldfisher continued to be in a position to accept service on behalf of Gil during the evening of 11 April. It may well turn out that they did, in light of the terms of the Order made on 10 April. But the point they were being pressed on in correspondence was not so much about the effect of that Order, but about the effectiveness of the Notice of Change served by Gil on the morning of 11 April, and whether Gil was obliged to maintain an address for service within the jurisdiction. As I have said already, I do not find that an entirely easy question, because the obligation only bites on a "*party to proceedings*" (CPR, rule 6.23(1)), and there is an issue whether Gil remained a "*party to proceedings*" after he instructed his legal team to withdraw. Although I note that Fieldfisher themselves, in their later email of 20 April (see above at [11]), said their "*present view*" was that Gil's Notice of Change was "*likely to be considered defective*", I am not myself persuaded that the point is completely clear cut. I therefore do not think it was unreasonable for Fieldfisher, in their initial email to the Court of 12 April, to have said what they said; and likewise, do not think it was reasonable to press them to agree that their initial view was "*plainly wrong*", because I do not think it was. In my opinion, the contrary view is plainly arguable.

21. One can then ask about the utility of adding Fieldfisher as a Respondent in its own right, to the 15 April application. I do not see there was any real utility in doing so. Perhaps there might have been, had they in fact sought to advance a position which was "*plainly wrong*" and therefore misleading, but that is not this case. Instead, there is a point which is arguable and open to interpretation. In such circumstances, I do not see there was any utility in seeking to add Fieldfisher as a separate party, because there was nothing they could say in relation to that argument which was likely to be useful or necessary for the Court to hear. Whatever its impact on the technicalities of service, it seems to me quite clear that from the point of Gil's Notice of Change on 11 April if not before, he had terminated any authority on the part of Fieldfisher to speak on his behalf. Thus, they could not advance arguments, or make concessions, which would be binding on him. There was therefore no point in joining them, because they could say nothing which would have any effect vis-à-vis Gil. An expression of their own views on the proper interpretation of CPR, rules 6.23(1) and 42.2(3) would be (and in fact is) of academic interest only.

22. One can see the substance of what the Claimants were trying to achieve from the emails from their solicitor dated 18 and 20 April, referenced above at [10] and [12]. There, they used the threat of an adverse order for costs in order to seek to persuade Fieldfisher to *"... consent to the making of a declaration as to the validity of service ...*". In light of what I have said already, it seems to me that this approach was simply

misguided. Fieldfisher were plainly not in a position by that stage to consent to anything on behalf of Gil, least of all a declaration intended to have binding effect on him. I think it was entirely correct of Ms Sanghi in her reply of 22 April to say that it was no longer appropriate for her to comment on whether the method of service via her firm was effective or not. By that stage, that was a matter between the Claimants and Gil, as to which Fieldfisher were not authorised to make any concessions or advance any arguments. Ms Sanghi was thus right to say she could not accept the Claimants' "*offer*".

23. In all those circumstances, it seems to me correct that Fieldfisher should have an order for their costs. The premise for seeking to join them as a party, namely that they were "*plainly wrong*" in the position adopted in their email to the Court of 12 April, and that it would be "*unfair for the Claimants to be left out of pocket by reason of Fieldfisher's failure to interpret and apply the rules correctly*" (see the quotation from the Application Notice at [8] above), has not been made out. This was close to an allegation of misconduct, of a type which would warrant the making of a wasted costs Order, and in my view Fieldfisher were entitled to resist it vigorously and to do so by instructing counsel and filing evidence, which is what they did. Neither was it appropriate for the Claimants to attempt to press Fieldfisher to consent to a declaration, which they were not in a position to give, as the price for avoiding an adverse costs Order of their own. In my view Fieldfisher were therefore justified in continuing to prepare to fight the Claimants' application until the evening of 24 April (when the Claimants made it clear they would not in fact seek any costs from Fieldfisher), and thereafter were justified in seeking to recover from the Claimants the costs they had already incurred, including by appearing at the hearing before me on 26 April to argue the point.

24. I will therefore make an Order for costs in favour of Fieldfisher. A statement of costs has been served, which I have mentioned gives a headline figure of roughly £75,000 (comprising costs of £62,497.50 plus VAT of £12,499.50, giving a total of £74,997.00).

25. Mr Fulton has criticised this as too high. I agree it is a large figure, for what was intended to be a short application. I think some deductions are appropriate, notwithstanding the importance of the issues to Fieldfisher. The "*Schedule of work done on documents*" shows a total of 22 hours spent by 3 fee earners in preparing a witness statement for Ms Sanghi. Although useful, this was largely a narrative on the correspondence with the relevant correspondence exhibited, and could have been much shorter. I think an allowance should be made for that. More generally, the involvement of three fee earners (Partner, Senior Associate and Junior Associate) is likely to have led to duplication. There is also the question of the overall proportionality of the amount claimed.

26. Taking account of all those factors, what I propose to do is make an Order for recovery of £45,000 plus VAT if applicable. I should be grateful if the parties would draw up an appropriate form of Order accordingly.