Neutral Citation Number: [2024] EWHC 1583 (Ch)

Case No: BL-2021-001132

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: 1/7/2024

Before:

MASTER CLARK

- -

Between:

DORSET LIMITED	**Claimant**
- and -	
PANAGIOTIS TRIANTAFYLLIDIS	**Defendant**

- -
- -

Matthew Hardwick KC (instructed by **Squire Patton Boggs (UK) LLP)** for the **Claimant**
Justin Higgo KC (instructed by **Wallace LLP**) for the **Defendant**

Hearing dates: 16 November 2023, 5 June 2024

- -

Approved Judgment

This judgment was handed down remotely at 10am on 1 July 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

Master Clark:

1. This is my judgment on the claimant's application dated 19 June 2023 for summary judgment, following hearings on 16 November 2023 and 5 June 2024. As will be seen the only remaining issue is as to the costs of the application.

Parties and the claim

2. The claimant is an investment company incorporated in the Marshall Islands. The particulars of claim alleges that it is owned and controlled through a series of companies and trusts of which Ms Flora Katsaounis is an object; though there was no documentary evidence as to this before the Court.

3. The defendant is a private individual who at the relevant times was in a personal/romantic relationship with Eugenie Coumantaros, the sister of Mrs Katsaounis.

4. The claim concerns 293,800 shares in Trax Limited, a private company incorporated in the Cayman Islands, which are currently valued at about US $24 million. Those shares were acquired by an exchange in January 2018 for 2,938 shares in a subsidiary company, Trax Technology Solutions PTE. For present purposes, there is no material distinction between the two sets of shares, and I refer to both as "the Shares".

5. It is common ground that the defendant holds the Shares on trust for the claimant.

6. The trust was created in the following circumstances. On 14 December 2014:
   (1) the claimant paid the defendant US $2.6 million;
   (2) the defendant and the claimant signed a letter of that date ("the December 2014 agreement") in which he agreed to hold the Shares on behalf of the claimant.

7. The defendant's case is that he agreed to acquire and hold the Shares in his name at the request of Ms Coumantaros, whom he understood was a beneficiary of the trusts that own the claimant. On his case, the arrangement was entered into because the opportunity to acquire the Shares was only open to existing shareholders, the defendant being one; and to enable Ms Coumantaros to take advantage of his "pothen esxes" and Greek taxpayer status.

8. The claimant's case in the particulars of claim, the reply and defence to counterclaim and the claimant's evidence confine themselves to the current position as to its beneficial ownership. The claimant does not assert that Ms Katsaounis was its ultimate beneficial owner at the date of the December 2014 agreement, nor that Ms Coumantaros was not. In particular, paragraph 8.1 of the reply only alleges that the terms of the trusts upon which the claimant contends it is held are irrelevant to (i) the relationship between the claimant and the defendant; and/or (ii) the duties owned by the defendant to the claimant. Similarly, paragraph 8.2 merely does not admit that the defendant ever understood that the claimant was the "nominee" of Ms Coumantaros as alleged.

9. On 20 September 2016, the defendant and Ms Coumantaros entered into a handwritten agreement ("the handwritten agreement") that, amongst other things, identified the Shares as being held for Ms Coumantaros, personally. The defendant's evidence is that he understood this as formalising the arrangement between them as to the Shares. However, Ms Coumantaros' evidence by affidavit dated 16 July 2021 is that she is not a beneficiary of the trusts that own or control the claimant – although she does not say that she was not a beneficiary in December 2014 or September 2016.

10. The claim issued on 14 July 2021 seeks, among other things:
    (1) a mandatory injunction requiring the defendant to transfer the Shares to the claimant;
    (2) equitable compensation for breach of trust and/or breach of fiduciary duty.

11. It is also common ground:
    (1) The defendant is entitled to an indemnity for all costs reasonably and properly incurred by him as trustee: section 31, Trustee Act 2000; *Lewin on Trusts* at 19-044(3);
    (2) The defendant has a lien on the trust assets (the Shares) to the extent of that indemnity, including:
        (i) his costs of defending the breach of trust/fiduciary duty claims:
        (ii) taxes payable in Switzerland in respect of both holding and transferring the Shares.

Application

12. The application notice seeks summary judgment in respect of the claim to a mandatory injunction to transfer the Shares, on the basis that the claimant pays into a ring-fenced client account of its solicitors a sum comprising:
    (1) £200,000 representing the defendant's legal costs of the claim – this had increased to £250,000 by the date of the first hearing;
    (2) the equivalent of CHF50,000, representing the defendant's liability for Swiss taxes, including any gift tax.

13. The overarching issue in the application was whether the sum proposed to be paid was sufficient to meet the defendant's entitlement to be indemnified.

Costs of the claim

14. The sum offered by the claimant in the application notice was not sufficient to meet the defendant's costs of the claim. It was only in respect of his costs up and including the CCMC.

15. In their letter dated 22 May 2023, the claimant's solicitors offered £200,000 in respect of the defendant's costs as sufficient to entitle it to transfer of the Shares "with our client being responsible for no further liabilities".

16. Unsurprisingly, the defendant was not willing to transfer the Shares on that basis. On 26 May 2023, his solicitors wrote suggesting that the amount to be held in escrow as regards his costs was agreed to be increased, after the CCMC, to the value of his approved costs budget. This suggestion was not taken up, nor was it ever responded to.

17. At the first hearing, the claimant, in its oral submissions (but not its skeleton argument) conceded the principle that the defendant was entitled to protection in respect of his future costs. However, its primary position that the court should nonetheless order the immediate transfer of the Shares, and that the defendant could obtain protection by applying for security for costs once his budgeted costs had been managed by the court.

18. I rejected that submission, taking the view that the ability to apply for the court to exercise its discretion to provide security was an inadequate substitute for the defendant's lien on the Shares.

19. I proposed an order providing for:
    (1) costs management of the defendant's costs – the value of the claim being greater than £10 million; and
    (2) payment of the defendant's costs up to the CCMC immediately; and
    (3) payment of the defendant's approved budgeted costs within 28 days of their being approved at the CCMC, and, if not paid, then the claim to be dismissed.

20. After a short adjournment to discuss the proposal, the parties concurred in it.

Gift tax

21. The only remaining issue was whether the claimant was required to provide security to any Swiss gift tax payable by the defendant. This arose in the following circumstances.

22. On 6 December 2020, Ms Coumantaros sent the defendant an email in which she provided the defendant with advice she had received from both Greek and Swiss lawyers on the tax implications of the arrangement governed by the Handwritten Agreement. The Swiss lawyer was Bernard Vischer, a partner in the firm of Schellenberg Wittmer Ltd ("SW"), now instructed by the claimant. This advice included that she and the defendant should take certain steps to portray their prior relationship as "romantic" and not "business" to ensure that "both the Swiss and Greek

tax authorities would recognise the arrangement as "fiduciary"….[and] not trigger gift tax" ("the December 2020 email").

23. On 7 July 2021, SW provided the claimant with an opinion in letter form ("the SW advice") on various questions relating to gift tax in respect of a transfer of the Shares from the defendant to the claimant.

24. The SW advice is lengthy and detailed. Its effect can be summarised as follows:
    (1) If gift tax were payable, the applicable rate would be 25%;
    (2) The donee is the person primarily liable for gift tax, but the donor is jointly and severally liable with the donee;
    (3) If the transfer of the Shares to the claimant were pursuant to the obligations under the December 2014 agreement, it would not be regarded as a gift by the Swiss cantonal tax authorities and gift tax would not be levied;
    (4) If gift tax were sought to be imposed, the claimant would be in a position to challenge it;
    (5) If the true position were that the Shares are returnable to Mrs Coumantaros or as she directs, under the handwritten agreement, then gift tax might be levied on the transfer of the Shares to the claimant.

25. As to (5), the claimant's solicitors asked the following question:

> "If the true position were as [the defendant] alleges it to be that the assets or monies are returnable to [Ms Coumantaros] or as she directs under the handwritten agreement, is there an issue in the fact that [Ms Coumantaros] in fact is not the beneficial owner of [the claimant] which contributed the original investment monies, so that the ultimate return of the monies is to, or at the direction of, [Ms Coumantaros], who is a third party in relation to [the claimant]. Does this mean that gift tax might or would be payable and, if so, on what assumptions would it be payable?

to which SW's response was:

> "The transfer of [the Shares] and/or the payment of sums of money by [the defendant] to [the claimant] and/or [Ms Coumantaros] should be consistent with the legal ownership of the claim against [the defendant] underlying such transfer and payment. **Otherwise, gift tax might be levied.**"
> (emphasis added)

26. The claim was commenced 7 days later, on 14 July 2021, relying on the December 2014 agreement.

27. On 2 June 2022, Trax Limited consented to the transfer of the Shares (a necessary condition for their transfer); and the claimant notified the defendant of this on 13 June 2022.

28. In his Defence dated 4 August 2022, at para 15, the defendant set out his entitlement to reimbursement and/or an indemnity in respect of Swiss taxes, both incurred and future in relation to his holding of the Shares. This resulted in a request for further information ("RFI") by letter dated 9 August 2022 as to the specific types of taxation payable or paid.

29. The defendant's reply on 14 September 2022 included:

> "the reference to "future taxes" is intended to be without limitation and will, for the avoidance of doubt, include any taxation [the defendant] is held liable for in relation to his holding of [the Shares] including if the beneficiary (as identified by the Swiss tax authorities) fails to meet any gift tax liability that may arise "

30. The claimant's response by its solicitors' letter dated 26 September 2022 was to provide the defendant's solicitors with the SW advice, and to ask them how the defendant had characterised his ownership of the Shares in his filings to the Swiss tax authorities.

31. The defendant's solicitors' reply on 4 October 2022 was that it was

> "obvious from the nature of the claim that [the defendant] is making that he has declared [the Shares], which are registered in his name, in his Swiss tax returns, and that he is claiming a proportion of the costs of the advice and fees he has incurred in submitting these returns accurately."

32. This produced a further RFI date 10 October 2022 asking the defendant to identify all facts and matters relied upon as the basis that:

> "future liabilities to Swiss gift tax will (or may) constitute expenses properly incurred by the Defendant in connection with the performance of his duties and the exercise of his powers and discretions as trustee on behalf of the Dorset Shares"

33. The defendant's solicitors' reply in their letter dated 28 October 2022 referred to him communicating with the Swiss tax authorities to achieve greater clarity as to the sums payable. The letter asked the claimant to provide a comprehensive indemnity, with a personal guarantee, to cover the defendant for any future costs and expenses arising out of his trusteeship.

34. The letter referred to the defendant liaising with his tax advisers to minimise the potential tax consequences for him, the claimant and/or the claimant's beneficiaries as regards any transfer; and concluded:

> "it is not impossible that the Swiss tax authorities may levy additional taxes on our client as a result of the transfer."

35. The letter also set out that the defendant had always believed that he was holding the Shares for the ultimate benefit of Ms Coumantaros.

36. The claimant's solicitors' reply of 2 November 2022 referred back again to the SW Advice that a transfer pursuant to the 2014 agreement would not be regarded as a donation, so that no gift tax would be levied on it.

37. On 15 November 2022, the defendant served a further witness statement. This set out the basis on which he had calculated the wealth tax claimed as part of his costs and expenses in his Defence and Counterclaim. He conceded that those calculations were "completely wrong"; and that accountancy fees had not been properly claimed. He referred to instructing a Swiss law firm Blum & Grob ("B&G") in 2021 in connection with the claimant's claim to the Shares, and how to deal with the attendant tax issues that might arise. The witness statement does not however refer to gift tax at all.

38. This was followed on 19 December 2022 by an (agreed) Amended Defence and Counterclaim making the corrections pre-figured in the witness statement. The defendant's solicitors' letter dated 19 December 2022 accompanying it stated:

> "Given the amount of future liabilities is inherently unknown (for example future tax liabilities arising out of the manner he has been holding the Dorset Shares for your client), the simplest way to give comfort that our client will be able to recover any monies owed to him under the indemnity is the personal guarantee our client has previously requested."

39. The claimant's solicitors in their letter of 23 May 2023 rejected that request to provide a personal guarantee as completely unreasonable and unjustified. They repeated their request for the defendant to identify future Swiss taxes and their amount; and reiterated that the claimant was not willing to be responsible for future liabilities. The defendant's solicitors' reply of 26 May 2023 refers to an "additional Swiss tax liability as a result of the transfer", but does not articulate how this could arise. The claimant's response on 15 June 2023 (which is described as "final") was to increase the amount to be paid for Swiss taxes to CHF 50,000 (about £44,000).

40. The defendant did not accept this offer, stating in his solicitors' letter of 19 June 2023:

> "Our client is entitled to be confident that he will not be exposed to any risk of personal liability by releasing the trust property. Our client is concerned that his potential liability could be much higher than CHF 50,000. In particular, this is because he understands that, albeit the risk may be small, he cannot accurately forecast how the Swiss tax authorities may treat the transfer of the Dorset Shares and/or the value they will place on them. In the event that the Swiss tax authorities do deem that gift tax is payable and the transferee fails to pay that tax liability, our client will be exposed, and that liability would likely be much higher than the CHF 50,000 offered.
>
> In circumstances in which any future liability is entirely unknown, the only sensible way forward is for your client to give the requested indemnity backed by an appropriate personal guarantee, so that any indemnity may properly be enforceable. If your client considers any risks of liability on our client to be fanciful, it should have no issue providing the indemnity and personal guarantee and we do not understand why this should be in any way controversial."

41. The claimant's application was issued on the same day.

42. The defendant's evidence in opposition to the application (Josephine Mathew's witness statement dated 15 August 2023) exhibited a letter of advice dated 14 August 2023 from Dr Natalie Peter of B&G ("the B&G advice"). This set out the factual basis on which the advice is sought namely:

> "I write in relation to the 293,800 shares in Trax Limited which in 2014 you agreed to acquire and hold in your name at the request of your then girlfriend, Ms Eugenie Coumantaros, who you understood was a beneficiary of the trust that owns Dorset Limited (Dorset, and the Dorset Shares). I understand that Dorset has applied to the English court for the Dorset Shares to be transferred to it."

and then advised that:

(1) the defendant had always been and remained the legal owner of the Shares, and had therefore correctly declared them in his tax returns;
(2) whilst she considered the risk to be small, there was a possibility that the cantonal tax authorities might deem a transfer of the Shares as triggering a liability for gift tax under Swiss law;
(3) the donee of the transfer would bear primary responsibility for the payment of such liability;
(4) if the donee did not discharge that liability, payment could be sought from the defendant;
(5) gift tax is assessed at 25% of the value of the gift.

43. This letter is not a full explanation of how gift tax could arise. The reasons for its conclusions are unarticulated either by reference to the relevant facts or law – it simply

states a conclusion. It also does not engage with the SW advice, even though the defendant had had this for over 2 years.

44. This was the state of the evidence at the first hearing.

45. At the first hearing, I suggested that the parties approach the Swiss tax authorities to obtain clarification as to whether gift tax would be levied on a transfer of the Shares. The parties then sought an adjournment to consider this and other ways of resolving the application without a further hearing.

46. SW then wrote to B&G suggesting a joint approach to the Swiss authorities enclosing a draft letter. This omitted any reference to the defendant's understanding at the time the December 2014 agreement was entered into and to the handwritten agreement – set out at paragraphs 7 and 9 above. B&G were unwilling to approach the Swiss authorities on this basis. Ultimately, it was agreed that SW would approach them unilaterally for a ruling. On 22 May 2024, the Swiss authorities returned SW's letter marked "Bon Pour Accord", which all parties agree is confirmation that gift tax will not be levied on a transfer of the Shares by the defendant to the claimant.

47. There remains therefore no issue as to the basis on which the Shares should be transferred.

48. As to costs, each side invited me to consider the merits of their positions on the application, and submitted that they should be regarded as the successful party.

Legal principles

Summary judgment

49. CPR 24.2 provides, so far as relevant:

> "The court may give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if –
> (a) it considers that –
> …
> (ii) that defendant has no real prospect of successfully defending the claim or issue; and
> (b) there is no other compelling reason why the case or issue should be disposed of at a trial."

50. The principles to be applied on applications for summary judgment are well established. They were summarised by Lewison J, as he then was, in *Easyair Ltd v Opal Telecom Limited* [2009] EWHC 339 (Ch), and approved in several appellate

authorities. It is unnecessary to set them out here. The burden of proof is on the applicant to show that the conditions in CPR 24.2 are satisfied.

Trustee's right to an indemnity

51. As noted above, the defendant's entitlement to an indemnity was common ground.

52. The claimant relied upon *Wester v Borland* [2007] EWHC 2484 (Ch) in which Norris J stated that:

> "13. …a burden must lie upon a trustee to demonstrate that there are substantial grounds upon which to exercise the lien and that he has taken all reasonable steps to ascertain his liability.
>
> …
>
> 16. It is not enough for a trustee to say "There may be some tax liability, but I do not know what it is. I am not going to enquire what it is and I shall simply retain the entirety of the fund in my hands without further enquiry."

53. In *Wester*, the judge was critical of the defendant trustee's delay of 5 years in ascertaining the tax position (under New Zealand law); and held that he should have submitted to an account at the commencement of the claim. This did not, however, preclude the judge from going on however to consider whether the trustee would be exposed to a claim in the circumstances of that case.

54. At paragraph 13 he directed himself:

> "For present purposes, I would adopt the rule, without having heard argument upon it, that it is for the beneficiary to present facts and circumstances to the court that are sufficiently compelling to persuade the court that it is **beyond reasonable doubt** that the risk to which the trustee adverts is not one which will bring liability home to him." (emphasis added)

55. The judge considered the two possible routes to liability, and concluded that the factual circumstances for liability were "absent", and "entirely lacking". Accordingly, he held that insofar as the Defendant asserted that the existence of the potential tax liabilities entitled him to resist an order for a declaration and an account, and the payment over of the sum found due on the taking of the account, that defence had "no real substance" [21].

56. Similarly, in *Concord Trust v The Law Debenture Trust Corpn* [2005] UKHL 27, [2005] 1 WLR 1591 at [34], Lord Scott stated:

> "the trustee cannot reasonably insist on an indemnity unless the risk is **more than a merely fanciful one**"
> (emphasis added)

57. The effect of these and other authorities cited in paragraph 19-044(3) of *Lewin* is summarised in that paragraph:

> "A trustee may retain trust assets or income until he has been indemnified, both as regards present liabilities, to the extent needed for the purpose, and, in general, as regards contingent or future liabilities for which he may become accountable, to the extent required to meet the worst case on the basis of **reasonable but not fanciful assumptions**."
> (emphasis added)

Issues in the application

58. In this framework, the issues in the application were whether on the evidence before the court the claimant had established that the defendant had
    (1) no real prospect of showing that the claimant's proposals in respect of his budgeted costs of the claim were insufficient to satisfy his indemnity;
    (2) no real prospect of showing a risk that he would have to pay Swiss gift tax on a transfer of the Shares.

Costs

59. The court's decision as to costs is a discretionary one. However, the general rule is that the unsuccessful party pays the successful party's costs: CPR 44.2(2)(a). The court retains a discretion to make a "different order": CPR 44.2(2)(a).

60. CPR 44.2(4) directs the court to have regard to all the circumstances, including, so far as relevant:

> "(a) the conduct of all the parties;
>
> (b) whether a party has succeeded on part of its case, even if that party has not been wholly successful;"

61. CPR 44.2(5) provides that the conduct of the parties includes –

> "(a) conduct before, as well as during, the proceedings …;
>
> (b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;
>
> (c) the manner in which a party has pursued or defended its case or a particular allegation or issue;"

62. I start by considering the success of each party in relation to the two issues identified above.

Provision for the defendant's future costs of the claim

63. In my judgment, the defendant was the successful party on this issue. The claimant referred to the defendant's future costs as being a "moving target", which they were unable to meet. However, they did not respond to the defendant's solicitors' letter of 28 October 2022 (see para 33 above) suggesting payment of his budgeted costs once approved. Although the claimant's counsel submitted that the claimant's refusal to provide for future liabilities was directed only at future tax liabilities, in my judgment it was not confined in that way. The offers made by the claimant were global offers in respect of all sums in respect of which the defendant was entitled to an indemnity.

64. The defendant was therefore entitled to resist the application on the basis that his entitlement to an indemnity in respect of his future costs of the claim had not been met.

Gift tax

65. I start by considering the position on the evidence available at the first hearing.

66. By way of background, as noted above, it was common ground between the parties' Swiss lawyers that:
    (1) although the primary liability to pay any gift tax would be the claimant's, the defendant would be liable if the claimant did not pay;
    (2) the applicable rate of gift tax would be 25%, making the sum due about US$6 million.

67. In my judgment, the claimant did not succeed in establishing that the defendant had no real prospect of showing a real risk that gift tax would be payable on the transfer, for the following reasons.

68. First, the claimant's Swiss lawyers themselves acknowledged (in the SW advice) the possibility that gift tax might be levied if the handwritten agreement accurately recorded the position as to beneficial entitlement to the Shares.

69. Secondly, the same lawyers, SW, had advised Ms Coumantaros that the handwritten agreement did not satisfy the legislative conditions for being a fiduciary agreement for income and wealth tax purposes; and that, although the agreement *should* be accepted as a fiduciary agreement for gift tax purposes, there were uncertainties arising from the wording of the last paragraph which "seems to contradict the existence of a fiduciary relationship".

70. Thirdly, the defendant's own lawyer, B&G, advised that there was a risk, albeit a very small one that gift tax would be levied. Whilst the basis of this conclusion was not expressly set out, both the factual basis and legal basis were or should have been apparent to the claimant from its own advice from SW.

71. Thus, although the B&G advice does not respond on a paragraph by paragraph basis to the SW advice, it does identify the primary fact which gives rise to the risk that gift tax might be levied, namely, (as the defendant understood) that at the date of the December 2014 agreement (and at the date of the handwritten agreement), Ms Coumantaros was a beneficiary of the trust that owns the claimant. This was in my judgment sufficient to justify the conclusion that there is a real risk that the transfer of the Shares would be treated as a gift (by Ms Coumantaros).

72. Fourthly, notwithstanding the fact that the primary liability for any gift tax would be the claimant's, it was unwilling to put forward any person with assets in the jurisdiction to provide a personal guarantee for the liability. This indicates that the claimant considered that the risk was sufficiently real not to wish to run it.

73. I turn to consider the effect of the Swiss cantonal authorities having confirmed that gift tax will not be payable, removing the risk. This does not show that the risk was not real, only that it did not eventuate. This is particularly so when the ruling from the Swiss tax authorities was sought on a particular factual basis, which on the defendant's case was incomplete and disputed. If the ruling had been sought on the basis of B&G's draft letter, there is at least a risk of a different outcome. There was also a risk that the tax authorities would not have been content to accept the factual position put forward by SW, and would have looked behind it and made further inquiries, which again gives rise to the risk of a different outcome.

74. I therefore consider the defendant to be the successful party on the part of the application concerning gift tax.

75. I have considered whether to make a different order from the usual order that the unsuccessful party pay the successful party's costs because of the defendant's conduct, namely:
    (1) his failure over a lengthy period properly to particularise the basis on which gift tax might arise;
    (2) his overstatement by a substantial factor the amount of his Swiss tax liabilities, ultimately resulting in a corrective amendment to his Defence and Counterclaim.

76. These factors are however, in my judgment, outweighed by the following:
    (1) Notwithstanding the defendant's failure to particularise how gift tax could be levied, as concluded above, the claimant was or should have been aware from its own expert evidence as the possible legal and factual basis of gift tax arising – particularly when the claimant has not pleaded its case as to its ultimate beneficial owner as at the date of the December 2014 agreement or the handwritten agreement;
    (2) The claimant, as the person with primary liability for any gift tax which might be payable, could have asked the defendant to jointly approach the Swiss tax authorities, or could have approached them unilaterally, as it ultimately did. If it had done so, then the position would have been clarified at an earlier stage.
    (3) Having concluded and informed the defendant that there was no real risk of gift tax being levied, I consider that the claimant acted unreasonably in not putting forward a person with assets in the jurisdiction to give the defendant a personal guarantee in respect of that liability. Why, one asks rhetorically if the claimant was not willing to take the risk of the gift tax liability, did it require the defendant to do so without any means of recovery if the risk eventuated?

Conclusion

77. For the reasons set out above, therefore, I will order the claimant to pay the defendant's costs of the application.