Neutral Citation Number: [2024] EWHC 2113 (Ch)

Case No: BL-2021-000711

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: 19/8/2024

Before:

MASTER CLARK

- -

Between:

MICHAEL WILSON & PARTNERS, LIMITED **Claimant**

- and -

MICHAEL JOHN SHORT **Defendant**

- -
- -

Michael Wilson (instructed by **Michael Wilson & Partners, Limited)** for the **Claimant**
Robin Howard (instructed by direct access) for the **Defendant**

Hearing date: 16 July 2024

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Approved Judgment

This judgment was handed down remotely at 10.00am on 19 August 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Master Clark:

1. This is my judgment on two applications by the claimant, Michael Wilson & Partners, Limited:
   (1) its application dated 18 August 2023 ("the set aside application")
   (2) its application dated 17 September 2023 ("the stay-lifting application").

Parties and the claim

2. The claimant is a BVI incorporated company of lawyers and business consultants which operates in Kazakhstan, and has offices or presences in neighbouring countries. Mr Michael Wilson (who describes himself as a director and employee of the claimant, more recently as an employee only) has had the conduct of the claim on the claimant's behalf throughout. The defendant, Michael Short, was the moving force of a company called GBM Minerals Engineering Consultants Ltd ("the company"). The claim seeks, amongst other things, a declaration that the defendant is personally liable to the claimant in respect of what are referred to as judgment debts obtained against the company.

Procedural background

3. The claim form was issued on 4 May 2021, and served, with particulars of claim, that day or on 5 May 2021. The acknowledgement of service was filed on 17 May 2021. The Defence was therefore required to be filed by 1 or 2 June 2021: CPR 15.4(1)(b).

4. On 1 June 2021 (and before the time for filing the Defence had expired) the defendant issued an application notice seeking security for costs ("the security application"), and an extension of time for filing and serving the Defence until the security application had been determined.

5. The security application was listed on 23 September 2021. On 7 September 2021, on the claimant's application, I vacated that hearing and gave directions as to evidence. The hearing was relisted for 25 January 2022, then at the claimant's request on 9 February 2022.

6. By a consent order dated 7 October 2021, I extended the time for the claimant to file and serve its evidence to 1 December 2021. This was extended by consent to 17 January 2022 by the order dated 7 December 2021 of Deputy Master Linwood. However, no Defence having been filed, the automatic stay provided for by CPR 15.11 came into effect on 2 December 2021.

7. On 12 January 2022, the claimant filed evidence in the form of a letter of that date from the British Ambassador to Kazakhstan, setting out that Kazakhstan had been in a state

of severe civil unrest since 5 January 2022, and that Mr Wilson had suffered an injury on 30 December 2021, which required an operation and hospitalisation for 7-10 days.

8. On 25 January 2022, I made a consent order vacating the hearing listed on 9 February 2022, and providing for the parties to file, by 1 March 2022, a draft consent order setting the date for the claimant's evidence, or updating the court as to when such an order would be filed.

9. On 3 February 2022, the security application was listed to be heard on 16 June 2022, the claimant not having filed any dates to avoid,. On 11 March 2022, the claimant applied to vacate that hearing. His application was supported by a witness statement stating that shortly before he was due to be hospitalized, he had developed Covid, so that his hospitalisation had been delayed. He was, he said, finally admitted to hospital on 30 January 2022; and would be unable to work normally until about 1 June 2022.

10. The claimant's application was listed before Deputy Master Glover, who adjourned it. It was relisted on to be heard on 1 June 2022.

11. By 27 May 2022, the claimant had still not served any evidence in opposition to the security application. The defendant's solicitors acceded to the claimant's application to adjourn that application in their letter of that date, stating that they wished to avoid having to review that evidence (which could, they said, be voluminous) in the short period before 16 June 2022.

12. A draft consent order (dated 8 June 2022) was filed on 7 June 2022. This provided for the hearing on 16 June 2022 to be vacated, and for the claimant to file and serve its evidence by 12 September 2022. The time estimate for the security application was 2 days.

13. On the same day (7 June 2022) I sent the following directions to the parties:

> "Please provide a brief explanation, by reference to the legal and factual issues arising, as to why the security for costs application is said to require 2 full days of hearing to determine."

14. No response was received to these directions. The draft order remained unapproved and unsealed, and the hearing of the security application unlisted.

15. There was then a further hiatus until 15 May 2023, when the claimant issued an application seeking an order dismissing the security application ("the strike out application"). The only evidence in support of the application was contained in box 10

of the application notice. This was listed to be heard on 16 August 2023 ("the August hearing").

16. At the August hearing, I dismissed the strike out application on two grounds:
    (1) the claim had been stayed by the operation of CPR 15.11;
    (2) there was no evidence as to the claimant's ability to satisfy an order for security for costs.

    I also certified the application as totally without merit. The claimant did not apply to appeal the order of 16 August 2023 ("the August order").

Set aside application

17. The set aside application seeks:

> "Re-open/reconvene hearing due false submissions re stay given no evidence in support, all orders/documents not before the Court, errors of fact/law, documents improperly obtained by D breaches of CPR/Chancery Guide/defamation Mr Wilson/MWP/no CRO in favour Emmott/Sinclair/Sokol et"

18. The grounds of the application were stated in box 10, including that the orders were sought in accordance with the jurisdiction as set out in *Re Barrell Enterprises* [1973] 1 WLR 19 and *Re L-B (Children)(Preliminary Finding: Power to Reverse)* [2013] UKSC 8, [2013] 1 W.L.R. 634.

19. The first hearing of the set aside application was on 3 April 2024. At that hearing, an issue arose as to whether the application had in fact been made before or after the order was perfected by sealing (on 18 August 2023), a point described as "the timing issue". The claimant's position was that the application had been made before the order was sealed, and, on that basis, that the *Barrell* jurisdiction was available to him. In the course of the hearing, he produced an email dated 17 August 2023 to the defendant stating that he had issued the set aside application.

20. My order of 3 April 2024 (dated 8 April 2024 in error) provided for further evidence on the timing issue.

21. After the hearing the following decision came to my attention: *Wilson v Emmott* [2023] EWHC 2415 (KB), in which Saini J ruled that the court has no jurisdiction to reopen under the *Barrell* jurisdiction once a final order had been sealed or perfected, even if the reopening application was made before sealing. Mr Wilson had appeared as the claimant's advocate before Saini J, and thus was fully aware of it, but, in breach of his duty to the court, had failed to draw it to the court's attention.

22. This decision renders the set aside application unarguable, and it is not necessary to consider the grounds relied upon. At the adjourned hearing, Mr Wilson did not seek to rely upon the *Barrell* jurisdiction, despite having maintained the claimant's reliance on it in his witness statement dated 11 July 2024. In any event, as the defendant's counsel submitted, the *Barrell* jurisdiction is not intended to give unsuccessful litigants a second bite before they go to appeal. It is reserved for the sort of circumstance identified in *Re LB (Children)*.

23. Having abandoned its argument based on the *Barrell* jurisdiction, the claimant sought instead to base its application on the court's powers under CPR 3.1(7). This provision is not referred to at all in its application notice, nor did Mr Wilson refer to it at the first hearing, or indeed provide the court with any authorities as to the principles governing it. The claimant is not in my judgment entitled to rely upon it without amending its application notice, which it did not apply to do.

24. In case I am wrong about that, I consider whether the claimant can succeed under CPR 3.1(7). This provides:

> "A power of the court under these Rules to make an order includes a power to vary or revoke the order."

25. The principles applicable to an application to revoke an order pursuant to CPR 3.1(7) are set out *Tibbles v SlG PLC (trading as Asphaltic Roofing Supplies)* [2012] 1 WLR 2591, paras. 39, 41-42 per Rix LJ, cited with approval by the Supreme Court in *Thevarajah v Riordan and others* [2016] 1 WLR 76, paras. 15, 18-19 per Lord Neuberger.

26. So far as relevant to this case, they can be summarised as follows (see [39]):

    (1) CPR r 3.1(7) is apparently broad and unfettered, but considerations of finality, the undesirability of allowing litigants to have two bites at the cherry, and the need to avoid undermining the concept of appeal, all push towards a principled curtailment of an otherwise apparently open discretion.
    (2) It is not possible or desirable to formulate an exhaustive definition of the circumstances in which a principled exercise of the discretion may arise.
    (3) Subject to that, however, the primary circumstances in which the discretion may be appropriately exercised, are normally only where
        (i) there has been a material change of circumstances since the order was made;
        (ii) the facts on which the original decision was made were (innocently or otherwise) misstated;

(iii) there has been a manifest mistake on the part of the judge in the formulation of his order: see *Edwards v Golding* [2007] EWCA Civ 416.

(4) In the case of misstatement, factors going to discretion include:
   (i) whether the misstatement was an omission or a positive misstatement;
   (ii) whether the misstatement concerned argument as distinct from facts;
   (iii) whether the misstatement (or omission) is conscious or unconscious;
   (iv) whether the facts (or arguments) were known or unknown, knowable or unknowable;

(5) However, where the facts or arguments are known or ought to have been known as at the time of the original order, it is unlikely that the order can be revisited, and that must be still more strongly the case where the decision not to mention them is conscious or deliberate.

(6) The successful invocation of the rule is rare: such is the interest of justice in the finality of a court's orders that it ought normally to take something out of the ordinary to lead to variation or revocation of an order, especially in the absence of a change of circumstances in an interlocutory situation.

27. In his oral submissions, Mr Wilson relied upon 2 matters which he submitted were "false submissions" made by the defendant's counsel at the hearing on 16 August 2023:
   (1) the period for filing the Defence had expired;
   (2) the defendant relied upon a civil restraint order when he was not entitled to do so.

28. As to the first matter, CPR 15.11(1) provides:

> "Where—
> (a) at least 6 months have expired since the end of the period for filing a defence specified in rule 15.4;
> (b) no defendant has served or filed an admission or filed a defence or counterclaim; and
> (c) no party has entered or applied for judgment under Part 12 (default judgment), or Part 24 (summary judgment); and
> (d) no defendant has applied to strike out all or part of the claim form or particulars of claim,
> the claim shall be stayed."

29. Mr Wilson submitted the defendant's submission at the August hearing that the time for filing the Defence had expired was false - because the security application seeks an extension of time for the Defence to be filed. Simply setting this proposition out demonstrates its falsity: an application to extend time is not sufficient to prevent time from expiring.

30. In any event, this argument was fully ventilated at the August hearing (of which I was provided with a transcript). The submission that the claim was stayed pursuant to CPR 15.11 was made in the defendant's skeleton argument filed on 15 August for the hearing on 16 August 2023; and was addressed by the claimant's leading counsel at the hearing. He submitted that the stay did not come into effect because at the relevant time there was a pending application (the security application); and that the effect of the security application seeking an extension of time was to "neutralise" the effect of CPR 15.11. I rejected those arguments.

31. It follows that the first ground relied upon by the claimant is unarguable as a basis for setting aside the August order.

32. As to the defendant's counsel's reference to a CRO against Mr Wilson in his claim against Mr Emmott, the transcript shows it was a passing reference, and not part of the defendant's counsel's substantive submissions. The order was not referred to in my judgment, and cannot be said to form part of my reasoning. In any event, the fact that a CRO was made is publicly available:
    (1) there are published lists of civil restraint orders on the gov.uk website;
    (2) members of the public are generally entitled to copies of orders made in public: CPR 5.4C;
    (3) the decision to make the CRO is publicly available: *Wilson v Emmott* [2022] EWHC 2450 (Comm).

    The suggestion by Mr Wilson that the defendant's counsel obtained his knowledge of the CRO by colluding with Mr Emmott was without foundation in the evidence before me, and therefore entirely speculative, and scurrilous.

33. The application to set aside the August order, even on the reformulated grounds, is therefore hopeless, and I shall certify it as totally without merit.

Stay-lifting application

34. CPR 11(2) provides:

> "Any party may apply under Part 23 for the stay to be lifted. The application must include an explanation for the delay in proceeding with or responding to the claim."

35. The second sentence was introduced with effect from October 2022 by amendment[1], expressing a requirement already recognised by the courts in various decisions.

[1] Civil Procedure (Amendment No.2) Rules 2022 (SI 2022/783)

36. In *Football Association Premier League Ltd v O'Donovan* [2017] EWHC 152 (Ch) (in which the defendant did not appear) Chief Master Marsh said:

> "the rule is not intended to place an especially heavy burden on the claimant to discharge before the court will agree to the stay being lifted. In the usual way, the court must weigh the competing interests of the parties in the balance."

37. The authorities were reviewed in *Bank of America Europe v Citta Metropolitana di Milano* [2022] EWHC 1544 (Comm), [2022] 2 C.L.C. 205 on a contested application. The principles to be derived from that case are, in summary:
    (1) The stay imposed by CPR 15.11 is a sanction [16];
    (2) An application to lift the stay is governed by the test in *Denton v TH White Ltd [2014*] EWCA Civ 906; [2014] 1 WLR 3926 ("the *Denton* test") because either
        (i) the stay is imposed for the parties' failure to perform their obligation to help the court further the overriding objective by bringing the case before the court for case management: and is therefore a sanction "imposed for a failure to comply with any rule, practice direction or court order" within the meaning of CPR 3.9; or
        (ii) the circumstances which engage CPR 15.11 are sufficiently close to a breach of a 'rule, practice direction or court order' to justify the court applying the *Denton* test by analogy to applications to lift the stay [22].
    (3) The *Denton* test is sufficiently flexible to take account of those features of CPR 15.11 which distinguish it from the more conventional case where a rule or practice direction requires a party to take a particular step by a particular date and it fails to do so [23];
    (4) These features include the fact that it is a combination of the failure of both parties to take a particular step which brings the automatic stay into operation [23].

38. I turn therefore to the three-stage inquiry set out in *Denton*:
    (1) an assessment of the seriousness and significance of the breach
    (2) considering the reasons why the breach occurred;
    (3) consideration of all of the circumstances of the case.

Seriousness and significance of the breach.

39. In my judgment, the breach was both serious and significant. Over 1 year and 9 months passed between the imposition of the stay and the stay-lifting application. This is a significant period of time, though not at the highest level of seriousness and significance.

Reason for the breach

40. The defendant's counsel criticized the claimant for not providing any explanation for the breach generally, or for its failure to file evidence in opposition to the security application.

41. It is clear, however, that about 6 months of the delay is referable to the various misfortunes that befell Mr Wilson in the first half of 2022.

42. There was, nonetheless, a period from 7 June 2022 to 15 May 2023 when the claimant took no substantive steps to progress the claim. As to this, the claimant relied upon the following events in his claim against Mr Emmott (which I have mentioned above).

43. In that claim, on 9 September 2022, HHJ Pelling QC discharged a worldwide freezing order obtained against the claimant, but stayed the order pending the final determination of any appeal by Mr Emmott. On 29 November 2022, Popplewell LJ refused Mr Emmott's application for permission to appeal, thereby lifting the stay imposed by HHJ Pelling QC. On 5 January 2023, HHJ Pelling QC ordered Mr Emmott to pay the claimant's costs of the freezing order application, with £150,000 to be paid on account.

44. The fact that the claimant was heavily involved in another claim is not of itself, in my judgment, a good reason for not progressing this claim.

45. However, the relevance of the events set out in paragraph 43 above is said to be that they undermine the evidence in support of the security application, which in part, relies upon the existence of the worldwide freezing order. In those circumstances, the appropriate course would have been for the claimant to apply for a stay pursuant to the court's case management powers. This would have enabled the court to decide whether to grant a stay, and, if so, on what terms. It does not justify allowing the automatic stay under CPR 15.11 to continue to have effect.

46. I also note that the draft consent order dated 12 June 2022 and signed by both parties provided for the claimant to file its evidence in answer to the security application by 12 September 2022. This was not done, and the claimant has still not filed any evidence in opposition to the security application.

47. It is clear that the claimant was unaware that the claim had been stayed until shortly before the August hearing, when the defendant first raised the point. *Denton* is unequivocal that a mistake by a legal representative is not a good reason for a breach, although in this case the mistake was shared by both sides.

48. I am not therefore satisfied that the claimant had a good reason for its delay from mid 2022 to September 2023 when it issued the stay lifting application.

All the circumstances of the case

49. As to this part of the *Denton* test, I consider that the following factors are relevant. The first factor is the merits of the claim. The claim seeks to make the defendant personally liable for the debts of the company on the basis of assurances and promises in email correspondence. It is not unanswerable, and faces obvious difficulties, but is not plainly bound to fail. It would be a draconian step to deny the claimant a trial of its claim. Secondly, the defendant does not allege that he would suffer any prejudice if the stay were lifted. Thirdly, the defendant consented to the claimant's various requests for extensions for its evidence; and after June 2022 has taken no steps at all to progress the security application.

50. These considerations are, in my judgment, sufficient to surmount the relatively low threshold for applications of this type. I will therefore lift the stay.