



Neutral Citation Number: [2024] EWHC 457 (Ch)

Case No:CR 2023-003582

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

INSOLVENCY AND COMPANIES COURT (ChD)

IN THE MATTER OF COME ON LIMITED (Company no.05626659), MANFUKU LONDON LTD (Company no.05517761) AND COCORO RESTAURANT LIMITED (Company No.08048017)

AND IN THE MATTER OF THE COMPANIES ACT 2006

Rolls Building
London
EC4A 1NL

Date: 8 March 2024

BEFORE DEPUTY INSOLVENCY AND COMPANIES JUDGE RAQUEL AGNELLO
KC

BETWEEN:

HIDEKO SUZUI

Claimant

and

KAYOKO SUZUI

Defendant

Mr Gideon Roseman (instructed by Mills Chody) for the **Applicant**
Mr Michael Phillis (instructed by Fushman Brad Stone) for the Defendant

Hearing date: 30 November 2023

JUDGMENT

1. This is an application for costs in relation to an application issued by the Claimant dated 4 July 2023 pursuant to section 388(1)(b) Companies Act 2006 and/or the common law seeking copies and/or inspection of certain books and records of three companies, being Come On Limited, Manfuku London Limited and Cocoro Restaurant Limited ('the Companies'). The Claimant sought an order that either (a) the Defendant provides copies the bank statements for all bank accounts that are used by any of the Companies for the period 1 January 2015 to date ("the Relevant Period"); all books of account and management accounts produced during the Relevant Period; cheque stubs for the Relevant Period; all contracts the Companies or any of them have entered into during the Relevant Period; and all tax returns filed by the Companies during the Relevant Period or alternatively (b) the Defendant permits the Claimant (or her duly appointed agents) to inspect the said documents and take copies of the same.
2. Prior to the issue of proceedings, the Defendant had agreed to provide the documentation but, thereafter, she filed an acknowledgement of service stating she would oppose the claim. Thereafter the Defendant provided the relevant documentation, but refused to be liable for any part of the Claimant's costs. By order dated 10 October 2023, Deputy ICC Judge Parfitt directed that the issue as to costs be listed to be heard at a later date. He also gave some directions relation to providing the Claimant with an opportunity to respond to evidence filed on the day of that hearing by the Defendant. The hearing before me is that hearing.
3. I have before me the helpful skeletons from Mr Gideon Roseman on behalf of the Claimant and Mr Michael Phillis on behalf of the Defendant. The Claimant and Defendant are sisters who are the equal shareholders and the only directors of the three companies. The companies operate Japanese restaurants around London. It appears from the evidence filed in support of the application by the Claimant that the

Defendant was at all material times responsible for the administrative side of the business of the Companies, including dealing with contractual matters, employees, suppliers and accountancy.

4. From the evidence filed, there appears that the Claimant has raised the issue of not being kept informed of certain issues relating to the companies. Effectively, as submitted by Mr Roseman being 'kept in the dark' as regards financial matters concerning the companies. Mr Roseman referred me to letter dated 13 August 2019 written by the Claimant's previous solicitors seeking copies from the Defendant of the Companies' bank statements and access to online banking facilities. The reply in an email dated 2 September 2019 was a refusal by the Defendant on the grounds that the Claimant was 'forgetful and poses a security risk'.
5. In December 2019, the Claimant instructed accountants to assist her and by an email dated 16 December 2019, TBW, the accountants, requested that the Defendant agree to them inspecting the books and records. Thereafter, on 16 January 2020, a meeting took place during which, according to TBW, it inspected the books and records of the 4 Cocoro restaurants for the 12 months to 31 October 2019. There followed further correspondence from TBW to Leaden Hall Financial Management Limited (LFM), instructed by the companies and the Defendant. On 12 February 2020, a meeting took place between TBW, LFM, the Claimant and the Defendant. The minutes of that meeting confirm that there was an absence of up to date management accounts.
6. On 17 February 2020, TBW wrote to LFM requesting the financial statements for the companies for the last three financial years together with the following supporting documents to those accounts and;
 - (i) detailed operating statement;
 - (ii) Bank account reconciliation;;
 - (iii) cash account reconciliation and treatment
 - (iv) lead schedules supporting each balance sheet items;
 - (v) detailed analyse of director shareholders loan current account;

- (vi) directors remuneration and relevant PAYE records;
- (vii) details of intercompany loans;
- (viii) details of related party transactions;
- (ix) corporation tax computations;
- (x) copy of VAT returns for quarter ended 31 January 2020;
- (xi) PAYE records for three months to 31 January 2020;
- (xii) list of creditors as at 31 January 2020; and
- (xiii) sales and payment summary supplied for preparation of January 2020 VAT return.

7. Subsequent emails sent by TBW dated 26 February 2 March, 5 March, 12 March and 13 March 2020 requesting the information set out above. There is no evidence that the requested information as set out above had already been provided to the Claimant. The evidence filed on behalf of the Claimant shows a demands made by LFM for a payment from the Claimant and that the failure to provide the documents was blamed on Covid. By e-mail dated the 17th of April 2020 TBW asked if LFM was now in a position to provide the documentation sought. Thereafter, Messrs Mills Chody, solicitors for the Claimant, wrote by letter dated 7 April 2021 to the Defendant and requested that the Defendant provide:-

- (i) the Companies' bank statements for the period 2013 to date;
- (ii) full audited accounts for the Companies since 7 April 2015;
- (iii) any profit and loss accounts since 7 April 2015; and
- (iv) details of loans taken by the Companies.

8. By letter dated 21 April 2021, the Defendant replied as follows:-

"Unfortunately, much of the claims you make in your letter and spurious [sic].

I do not propose to go into them at this stage save to say your client has been provided with the information she has requested...

In December 2019 she appointed TBW ... to carry out a review. Their representative, Mr Renold Tang attended our Accountant's office to inspect the books and records on 20 Jan 2020. Full access to the company's financial affairs was provided to Mr Tang."

9. Mr Roseman submitted that it is clear that the documentation which had been produced related to the period of 12 months to 31 October 2019 and that this was not the entirety of the documents which had been requested by the Claimant and those representing her. During 2023, prior to the issue of proceedings, further requests were made. By letter dated 16 March 2023, the Claimant sought the following documentation:

- (i) the Companies' bank statements for the period 1 January 2015 to date;
- (ii) all books of account and management accounts for the said period;
- (iii) cheque stubs for the said period;
- (iv) all contracts entered into by the Companies during the said period; and
- (v) tax returns for the said period.

10. By email dated 28 March 2023, the Defendant replied confirming that she would collate the documents sought on her return from Japan and asked for patience in the interim. However by an email dated 14 May 2023, the Defendant changed her mind and refused to provide the documentation sought unless the Claimant made payments to the Companies. Her email stated:-

*"thank you for your mail
as i request to you you took all cash sales to keep with you since 2018
could you return to the company bank please
same time i will give you all documents which you requested"*

11. Thereafter, the Claimant's solicitors sent a further letter dated 21 June 2023 requesting the documentation and enclosing with that letter a draft of the witness statement of Mr Johal which was to be relied upon in proposed proceedings. That letter did not produce the desired response and these proceedings were issued on 4 July 2023. The defendant

filed an acknowledgement of service dated 19 July 2023 which confirmed she was intending to contest the claim by reason of (1) the period of time the Claimant was requesting the documentation was unreasonable as the period exceeded the time period set by HMRC and the time the companies bankers retain records, and (2) the Claimant had made previous requests for the records for the period 1st January 2015 to 4 July 2023 in 2019 and 2020.

12. The initial hearing of the claim listed on the 21 August 2023 was then vacated. Thereafter, the Defendant provided the entirety of the documents requested in the Claimant's claim with some of those documents being provided in August 2023 and further documentation being provided in late September 2023 including hard copies of some of the bank statements which have not been available in electronic format. Accordingly, Mr Roseman submits that costs should follow the event. The Defendant effectively conceded the entirety of the Claimant's claim and also it is clear that at the date that the claim form was issued, there were documents which had been requested which had not been produced.
13. Mr Phillis on behalf of the Defendant accepts that not all the documents had been produced by the time of the issue of the claim. He submits that nearly all of them had been available to the Claimant prior to the issue of the Claim. Ultimately before me he accepted that there were documents which had not been produced before the issue of the Claim, but sought to assert that these were small in volume. He also sought to argue that as the Court had a discretion in determining whether to make the order sought pursuant to section 388 CA 2006, an order would not have been made in this case due, to what he submitted, was the Claimant's intention as a director to abuse the confidence reposed in her a director. He submitted that the Claim was unmeritorious.
14. He relied on events which occurred after the production of the documents and information at the end of September 2023 after the relevant documentation had been provided by the Defendant to the Claimant. Effectively, Mr Phillis relied upon what the Defendant asserted was the alleged theft by the Claimant having transferred in early October 2023, the sum of £159,000 of the companies' money to her personal bank

account and a further £290,000 to Kawaii Property Limited, a company incorporated by the Claimant in late August 2023. These issues were set out in the evidence filed on the day of the hearing on 10 October 2023. He asserts that no lawful excuse has been provided for the transfers by either the Claimant or her solicitors. Directions were provided in the order dated 10 October 2023. That order does not seek to provide for cross-examination of any of the makers of witness statements. No such direction, it appears, was sought and no such direction either sought at any stage subsequent to the order of 10 October 2023.

15. The Claimant filed evidence in reply dated 14 November 2023 to what are in my judgment, very serious allegations of dishonesty and theft. In that witness statement, the Claimant denies that she stole the money as alleged but stated that she transferred the money in order to protect it as she had been informed that the Defendant and staff members were stealing from the companies and that she wanted to protect and preserve the companies' money. She stated that she would be sending the money to her solicitors to hold until the dispute was resolved.

16. In my judgment, I am unable to make any findings relating to these serious allegations. The law in this area is clear in that I am unable to dismiss the evidence in a witness statement unless I find it wholly incredible. (see for example the case of *Long v Farrer & Co [2004] EWHC 1774 (Ch)*) That is clearly not the case here and despite Mr Phillis submitting strongly before me that the documents were used immediately after being provided to steal money, the Claimant denies this and has provided an explanation. It is not an explanation that I consider I am able to dismiss and that would not be in the overriding interest of justice. Moreover, as I have noted above, neither party sought any directions for cross-examination, which they could have done. So I am left with a witness statement which makes serious allegations that are denied in another witness statement. Mr Phillis' submission in relation to the unlawful conduct of the Claimant being a ground for refusing her the order for costs she seeks is premised, in my judgment, on effectively on me reaching a decision on the evidence before me. For the reason set out above, it is not appropriate to make such a determination on the basis of considering in some way a

value judgment on the strength of what is set out. Accordingly, whilst I have considered the witness statements, I make no findings in relation to the facts set out therein for the purposes of the application for costs before. I note from what I have set out above, that the Defendant had earlier made allegations relating to the issue of whether the Claimant owed sums to the Companies. This was also refuted by the Claimant.

17. As I have set out above, there is no dispute that there were documents which had not been provided by the time that the Claim was issued. I do not accept that in some way I should assess the number or value of those documents in determining the costs issue. I have dealt above in my summary that requests were made and there was a failure to provide the documents. Only after the proceedings were issued was there compliance by the provision of what had not been provided beforehand. Additionally, whilst Mr Phillis submits that due to the conduct of the Claimant, the court would not have exercised its discretion in favour of making the order, I do not accept that would have been the case. Firstly, as I have set out above, there is a serious conflict in the evidence before me and it is inappropriate for me to seek to go behind the veracity of either of those witness statements. Secondly, whilst there is some conflict in the evidence relating to what was offered to be supplied, it is clear that requests had been made for some time covering a lengthy period of time and that as at the time that the Claim Form was issued and served, there were outstanding requests which, in my judgment, the Claimant was entitled to pursue. In my judgment, the Claimant would have succeeded in obtaining an order. The evidence is clear that there was a refusal to produce the documents sought and in my judgment, had I exercised my discretion, I would have made the order. The Defendant was refused access to the records. The correspondence makes it clear that the Claimant's request for access to the records was neither unreasonable or excessive bearing in mind her position as an officer and the various disputes as between the parties. It is not, in my judgment, a defence to allege that the Claimant must repay money before she could be provided with documents.

18. As both parties have submitted, the issue of costs is a matter for my discretion. In determining the order which I make, I have taken into account the factors set out in CPR 44.2. I have set out above the history in summary above of requests made, that some

documents were provided, that a final opportunity to provide the documents before issue of the Claim Form was provided and that there was then a refusal to provide the documents. I have taken into account that based on the evidence, I consider I would have made the order sought. The conflict in the evidence relating to the serious allegation of theft is not something I can take account in circumstances where it is challenged and there is no direction for cross-examination.

19. Taking into account all the above, I consider that costs should follow the event. The Defendant had ample opportunity to provide the documents before the issue of the proceedings. In fact at one stage she said she would do so then changed her mind. What was being sought was neither onerous or in some way unnecessary and those documents seem to have been relatively easily produced after the claim form was issued and served. I do not consider that this is a case where there should be a reduction in the costs awarded based upon the fact that some of the documents had been provided before the proceedings were issued. However I am not prepared to make the costs order on an indemnity basis. It seems to me that on the facts of this case, the standard order for costs is appropriate. Whilst the defendant originally contested the application, she produced the documents relatively shortly thereafter before a court hearing, once she has legal advice.

20. That leaves the costs of the costs issue before me. I will deal with that when I hand down this judgment in so far as necessary, but I should say, subject to any points either party seeks to make, that I can see no reason why the costs of the hearing before me do not follow the event and would be minded to have awarded the Claimant her costs of and occasioned by the hearing before me. It may be that this non binding indication assists the parties in agreeing an order. However, I have not heard the parties on the issue so neither party should take this as being the order in the event that either party seeks to argue the costs issue before me at the time of hand down of the judgment. The costs are sent for detailed assessment on the standard basis unless they are agreed.