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IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND & WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT
[2019] EWHC 3519 (Comm)



No. CL-2010-000804

Rolls Building
Fetter Lane
London, EC4A 1NL

Wednesday, 23 October 2019

Before:

MR JUSTICE ROBIN KNOWLES

B E T W E E N :

MICHAEL WILSON & PARTNERS LIMITED

Claimant

- and -

SOKOL HOLDINGS INCORPORATED & OTHERS

Defendants

MR D. HOLLAND QC (of Counsel) appeared on behalf of the Claimant.

MR P. SHEPHERD QC (of Counsel) appeared on behalf of the Defendants.

J U D G M E N T

MR JUSTICE KNOWLES:

1 The litigation between these parties has a wide compass. I am today concerned only with specific allegations of contempt of court that are made by Mr Emmott against Michael Wilson & Partners Limited (“MWP”). Those allegations are contained in an application notice dated 22 November 2018, as more recently amended following a decision of Jacobs J. An original list of ten allegations of contempt has been increased to fourteen by that amendment.

2 The allegations arise in the context of Freezing Order relief obtained by Mr Emmott against MWP. The original Freezing Order was made by HHJ Mackie QC on 5 December 2014. That original order has seen subsequent amendment. For today’s purposes, the material parts of the Freezing Order relief comprise the following. By para.7 of the order made by HHJ Mackie QC, MWP was subject to the following injunction:

“Until further order of the court [MWP] must not:

- (1) remove from England and Wales any of its assets which are in England and Wales up to the value of £3,909,613 plus \$841,213; or
- (2) in any way dispose of, deal with or diminish the value of any of its assets whether they are in or outside England and Wales up to the same value.”

3 Paragraph 10(1) of the same order provided that if the total value free of charges or other securities of MWP’s assets in England and Wales exceeded the sums just mentioned, MWP might remove any of those assets from England and Wales or might dispose of or deal with them so long as the total unencumbered value of MWP’s assets still in England and Wales remained above the figures just mentioned. The order contained requirements for the provision of information. The order further contained an exception in the following terms at para.13(1):

“This order does not prohibit [MWP] from spending a reasonable sum on legal advice and representation. But before spending any money, [MWP] must tell [Mr Emmott’s] legal representatives where the money is to come from.”

4 Paragraph 13 also contained at that point a provision known as the *Angel Bell* exception, a provision which was later to be the subject of a decision that it should be removed and imposing a stay. Paragraph 13(4) of the order provided that the order itself would cease to have effect if MWP provided security by paying the sums just mentioned into court to be held to the order of the court or made provision for security in that sum by another method agreed with Mr Emmott’s legal representatives.

5 The order was subject to revision by Andrew Smith J and subsequently by Sir Jeremy Cooke. Sir Jeremy Cooke’s order of 13 July 2017 amended the figures to a sum just above £4 million and just above \$1 million. It added the following paragraph:

“For the avoidance of doubt, the provision in para.13(1) permitting [MWP] to spend a reasonable sum on legal advice and representation, shall apply solely to proceedings relating to the enforcement by [Mr Emmott] of the Liability Quantum award and/or order of Burton J of 26 June 2015 (and any appeal from this order) and not otherwise. But before spending any money, [MWP] must inform [Mr Emmott’s] legal representatives where the money is to come from.”

- 6 It was in this order of Sir Jeremy Cooke that the *Angel Bell* exception was deleted. That decision received consideration from the Court of Appeal both at the permission to appeal stage and subsequently before the full court. As I have mentioned, for a period there was a stay. As things stand at the moment, by order of the Court of Appeal that provision remains deleted.
- 7 Mr Shepherd QC for Mr Emmott has taken me to passages in Sir Jeremy Cooke’s judgment, and in the judgment of the full Court of Appeal amongst other sources, in order to provide what he describes as “context”, especially for my consideration of the quality of evidence advanced on this application by Mr Michael Wilson who has given written evidence on behalf of MWP. The Court of Appeal’s judgment as well as that of Sir Jeremy Cooke are highly critical of Mr Wilson. The Court of Appeal’s judgment contains additionally a passage from Peter Jackson LJ in which his Lordship protested at what he described as the “shameful waste of time and money caused by” the “private dispute” between the parties. He concluded his observation with the sentence:
- “This pathological litigation has already consumed far too great a share of the court’s resources and if it continues judges will doubtless be astute to allow the parties only an appropriate allotment of court time.”
- 8 Essentially, in the fourteen alleged instances of alleged contempt, there is a criticism from Mr Emmott in connection with payments alleged to have been made by MWP or liabilities alleged to have been incurred by MWP. It was an overarching submission of Mr Shepherd QC that if there were, on the face of things, clear breaches of the court’s order, then the burden would shift to MWP to explain the position, especially where information was in the sole knowledge of MWP in the particular instance.
- 9 Mr Shepherd QC continued that the court, in his submission, should not be bound to accept what he described as “bald assertions” from Mr Wilson when there, as he put it, must be material to support the assertions if they were true. He added that the present was a case in which inferences could be drawn against Mr Wilson and MWP where appropriate.
- 10 I turn to the fourteen instances. The first ten (that is, those which were in the unamended application) involve allegations of failure on MWP’s part to give notice where money came from in the context of para.13(1) which I have quoted above. The allegation, as it is put, of a breach of para.13(1) is a peculiar way of framing the matter because essentially para.13(1) is a permission. The matter is not put as one of a breach of the order leaving it for MWP to say: “but we had permission”. Instead the matter is put by Mr Emmott in the way it is.
- 11 Mr Emmott’s allegations had an unpromising start because it is now accepted by him, in the case of the first six instances of alleged failure to give notice, that notice was in fact given.

It is no small matter to embark on allegations of contempt when the foundation of that allegation is answered, as it is in the present case, by the existence of an email notification in six instances that was received by or on behalf of Mr Emmott from MWP, but I move on.

- 12 So far as allegations 7, 9 and 10 are concerned, the payments there made or liabilities there incurred, whilst being for legal services are, submits Mr Holland QC for MWP, concerned with overseas proceedings rather than these current proceedings and are not themselves concerned with enforcement of this court's judgment. In that respect, argues Mr Holland QC, s.13 is not engaged whatever else may be engaged. From the understanding that I had on this application by reference to the material that is available, there is force in the points that Mr Holland QC makes.
- 13 It may well be that a challenge to those payments - if payments they were - could be framed as a breach of the injunction overall, but that is not how they are put. The essence of Mr Emmott's challenge was expressly described by Mr Shepherd QC as the failure to give notice where the money came from where one was concerned with payments for legal advice and representation.
- 14 Mr Shepherd QC's argument for Mr Emmott also involved the proposition that if in these respects (that is allegations 7, 9 and 10) there was not payment but instead an incurring of liability for legal advice and representation, then that was the same for the purpose of para.13(1). His argument was that a Freezing Order has to be construed in accordance with the ordinary rules of construction and with regard to the underlying purpose of Freezing Order relief. In that context, incurring a liability was just as detrimental, as he put it, as making a payment.
- 15 In the present case and looking at the use of para.13(1), and viewing this in the context of allegations of contempt, I prefer the view that the provision in referencing "spending a reasonable sum" and "spending any money" and "where the money is to come from" was referring not to the incurring of liability but to the payment of money. Before I move on, the most important question in relation to allegations 7 to 10 is, in truth, the question: was the money used the money of MWP when money was, in fact, used? There is another overarching question to which I will return, but at this point I emphasise that the materiality of the issue is whether the money used - if money was used - was that of MWP.
- 16 Before I turn to allegations 11 to 14, I wish to make one observation about allegation 7. I choose that instance, but the point has a wider resonance. That allegation concerned the instruction of solicitors and counsel in New Zealand and their provision of legal advice or representation at a hearing in New Zealand on 15 March 2017. The counterpart to MWP at that hearing was Mr Emmott. Mr Emmott clearly knew in March 2017 that lawyers had been retained by MWP. He also knew that he had not received notification of where money came from to pay those lawyers if they were paid rather than simply a liability incurred. On the material before me, he did not ask for that information even if it was MWP's obligation to give it to him.
- 17 In response to my question, and I am grateful to Mr Shepherd QC for his response, the first point at which a request for information about sources of money to pay for representation was made was in September 2018. I reference this instance because it shows to my mind that Mr Emmott's concern in relation to these alleged contempts is not of the highest order. If this really mattered to him, he had the obvious opportunity to ask the question at the time.

- 18 I will turn to allegations 11 to 14. Here, payments are alleged to have been made and are not tied to an allegation of breach of para.13(1). As I understand it, it is admitted that payment was made in relation to allegations 11, 12 and 14. It is not accepted on the part of MWP that the payments, though made, were made using the money of MWP. One of the payments is arguably within the period in which a stay of the deletion of the *Angel Bell* exception was in operation. It will be apparent that the most material question in this bracket of payments is whether money used was that of MWP. Thus, in relation to both the outstanding matters within allegations 1 to 10 and the matters within allegations 11 to 14, that question of whether MWP's money was used is of common importance.
- 19 What I have in answer to that question is, on Mr Emmott's side, challenge in the form of scepticism, inference and argument. The scepticism includes an invitation that I should not accept what I have on the part of MWP from Mr Wilson which is evidence that the money used in each case was from a source other than MWP. The challenge to that evidence given by Mr Wilson includes the challenge that Mr Wilson does not bring forward documentation which, it is suggested, must be available to him to show that what he is saying is true; to show, as (it is said) he knows, that on his evidence the source was from one place or another but not from MWP.
- 20 I have mentioned that there was an overarching point as well. The overarching point is that the answers given by MWP to Mr Emmott's allegations include the answer that at all material times - all times material to these allegations - MWP's assets were greater than the level frozen. The obvious point runs that if they were greater than the level frozen, MWP was free to use them if they were not caught by the order.
- 21 In, if I may say so, a helpfully realistic position from Mr Holland QC on the part of MWP, there is some acceptance on MWP's part that if that is the contention it is going to make, it has to a degree to bring forward evidence to support it, but of course the submission is that that is what Mr Wilson has done.
- 22 Mr Shepherd takes a number of lines of attack to this. I shall mention the most prominent. He drew my attention to a notice dated 14 November 2014 on the headed paper of Kaz Holdings Incorporated and addressed to MWP which he said supported the submission that all of the assets of MWP were, from the date of that document (14 November 2014) at least, charged or transferred to Kaz Holdings Incorporated in the context of security arrangements supporting a loan agreement. The document does include the phrase highlighted by Mr Shepherd QC that "the legal title in the charge assets" is "vested in ourselves", a reference to Kaz Holdings Incorporated.
- 23 Clearly, central to the question that is material for the present application is, however, whether net of loan liabilities there remained equity in the overall basket of assets available to MWP. I am not prepared to conclude on the basis of that document that it shows sufficient for the purpose of this hearing that MWP had no assets at the material time.
- 24 Reference is also made to documentation that takes the form of draft financial statements for the year ended 2015. That is some time ago but evidence from Mr Wilson seeks to explain why it is that those are, as things stand, the most recent financial statements and what work is in hand to address the financial statements for subsequent years.
- 25 Mr Shepherd QC launches a powerful forensic attack on those draft financial statements. There is reference in them to assets in the form of litigation with a figure of \$41 million

attached. Mr Shepherd describes that as a complete fiction. Mr Shepherd says that the financial statements mask what he says is the true position which is that MWP is and was massively insolvent.

- 26 Even if there was real doubt over the \$41 million figure, and even if there is a question about the solvency of MWP, that is not strictly the issue on this application. The issue on this application is concerned with the asset position of MWP. Reference can usefully be made, and was, to the treatment of this subject in the Supreme Court in *JSC BTA Bank v Ablyazov* [2015] UKSC 64, and particularly at paras. [21] to [34]. Even if Mr Shepherd QC makes large dents in the credibility of the financial statements, what matters in the present case is whether MWP had asset headroom above the figures that are the subject of the Freezing Order.
- 27 There is this point too, which is that in relation to the security to which I have referred, it is Mr Emmott's position that the security is false. The point is also thrown back to Mr Emmott by Mr Holland QC that Mr Emmott's position before the court has been, or at least has included the proposition that, the present is a case in which Mr Emmott is saying that MWP will not pay rather than cannot pay. That position is one that is not consistent with the level of asset deficiency that Mr Emmott would ask the court to accept on this hearing.
- 28 Alongside the already voluminous - I might say excessively voluminous - material filed on this application, in the course of the hearing I was shown by Mr Holland QC, without ultimately objection from Mr Shepherd QC, a seventh affidavit of Mr Wilson made yesterday. Doing the best I can to absorb it in the last-minute circumstances, it suggests that Ernst & Young LLP are close to the point of signing an unqualified audit opinion in relation to the financial statements to which I have referred.
- 29 It seems to me that is an aspect that could make the world of difference in relation to these financial statements. Take, for example, Mr Shepherd's attack on the \$41 million figure for litigation, the financial statements may not say much beyond overall or policy matters in that regard, but the presence of an audit opinion (if one was forthcoming) would or might suggest the existence of underlying audit working papers to support that aspect of the accounts.
- 30 Once again, I emphasise that for present purposes it is not necessary to show that the accounts are, in their particulars, right. It is necessarily instead to see if a conclusion had been drawn about the presence of headroom above the figures currently within the freezing injunction.
- 31 Of course, Mr Shepherd QC for Mr Emmott emphasises that these draft financial statements are very historic; they are from 2015, and that is obviously the case. However, on their face they indicate very large headroom. It is not the case that it is suggested that there have been events in the years to follow that would utterly destroy the picture that prevailed in 2015, if indeed those financial statements were, or were sufficiently, accurate at that point.
- 32 I stand back and draw attention to the point that what is missing in this matter today for the purpose of the allegations that are made are two things, first, underlying documentation to support Mr Wilson's point that other people's money was used and, secondly, the said-to-be imminent (and indeed 31 October is the date indicated) audit opinion from Ernst & Young. This being a matter where the question is one of alleged contempt of court in proceedings

initiated by Mr Emmott, it is for the court to ask itself what course it considers appropriate when the allegation is that its orders have been breached. I have reached the view in the present case that the court should require the provision of the information that is not present.

- 33 As the court wishes to know, more reliably than is presently available, whether its orders have or have not been transgressed, and the information that it has mentioned is the information that is most of assistance to the court for the court to be able, as is sometimes put, to police its orders, in those circumstances I propose to make an order requiring MWP by Mr Wilson to produce the information that I have indicated. I will hear submissions as to what an appropriate timeframe is.
- 34 In the event that it is to be said in any respect that the information is not available, then I will wish a full and frank explanation for that lack of availability in the particular respect where it is suggested. I consider also that the approach that I take in the present case is one that is both proportionate to matters as they stand in this particular case and ultimately an approach that is fairest to Mr Emmott as well. Mr Emmott has, in my assessment, a legitimate interest in the questions that I have indicated the court wishes to know the answers to.
- 35 As I have indicated in the course of argument, in the event that information that is provided pursuant to my order on this occasion needs some form of protection for confidentiality, or in relation to the guarding against collateral use, then Mr Holland QC can ask for that to the extent necessary on behalf of MWP.
- 36 In the course of his reply, Mr Shepherd QC requested permission to amend the amended application bringing forward the fourteen alleged contempts. I refuse that application as it is made, with respect, far too late especially in the context of allegations of contempt.
- 37 I will, with the assistance of counsel, shortly turn to the question of what happens in relation to a very recent set of allegations of contempt launched by MWP against Mr Emmott. When I deal with that, I will very much have in mind, quite apart from questions of merits and proportionality, that the preparation of the current materials before the court on today's application (and by this I do not mean the skeleton arguments) has been massively short of the requirements made by the Commercial Court Guide and has exhibited a complete absence of cooperation between the parties. In one stage of exchange, Mr Shepherd QC indicated to me that a level of cooperation was not available in this case. I understood what he meant when he made that observation, but I know that all in the court will understand my response which is that cooperation is not optional; the Commercial Court requires it and the Commercial Court Guide makes that clear.
- 38 For the reasons that I have endeavoured to give, I shall not make orders on the application at this point. The application will be stood over for a period to allow the introduction of the information that I have indicated. At that point, I will assess the information with the assistance, of course, of the parties as necessary, and one way or another I will take the current application to a conclusion. That will not involve any ability for re-argument of what has already been put before the court.
- 39 In the event that the information satisfies me that Mr Wilson was right when he said someone else's money was used and shows me that Ernst & Young are prepared to give an unqualified audit opinion to the 2015 financial statements, then I indicate I shall conclude the contempt applications by making no order against MWP. I give that indication in the

interests of the parties having transparency and certainty. There may be details that suggest a more intricate future path, but I hope it is helpful and proportionate in the present case for me to give the indication I have done, and with that I will conclude.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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**** This transcript has been approved by the Judge ****