Neutral Citation Number: [2020] EWHC 698 (Comm)

Case No: CL-2013-000683

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

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

Date: 25 March 2020

Before :

MR JUSTICE ANDREW BAKER

- -

Between :

KAZAKHSTAN KAGAZY PLC and others	**Claimants**
- and -	
BAGLAN ABDULLAYEVICH ZHUNUS and others	**Defendants**
HARBOUR FUND III LP	**Additional Party**
COOPERTON MANAGEMENT LIMITED and others	**Charging Order Respondents**

- -

Robert Howe QC and Daniel Saoul QC (instructed by **Hogan Lovells International LLP**) for the **Claimants**
Dominic Chambers QC and Joe-Han Ho (instructed directly) for the **Charging Order Respondents**
The **Defendants** and **Additional Party** did not appear and were not represented

Hearing date: 20 March 2020

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Covid-19 Protocol:
This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 10.15 am on 25 March 2020.

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MR JUSTICE ANDREW BAKER

Mr Justice Andrew Baker :

Introduction

1. I handed down judgment on 30 January 2020 on cross-applications by the claimants (i.e. the first to fourth claimants, the only active claimants), for judgment against the charging order respondents on the basis that their Points of Defence stood struck out as a result of failure to comply with some of the requirements of an unless order, and by those respondents, for relief from sanctions: [2020] EWHC 128 (Comm). This judgment assumes familiarity with that judgment and uses its terminology.

2. The Burlington Place respondents and Dencora now apply pursuant to CPR 3.1(7) for reconsideration of the result obtained. They also seek specific disclosure of certain documents so they might be considered within the application for reconsideration. CPR 3.1(7) provides that the court's power to make orders includes power to vary or revoke orders previously made. As confirmed by the Court of Appeal in *Tibbles v SIG plc* [2012] EWCA Civ 518, [2012] 1 WLR 2591, CPR 3.1(7) does not give litigants a general liberty to have two bites at the cherry, arguing, losing, then re-arguing any given application. Normally it will only be appropriate to consider exercising a discretion to reconsider an order made after a contested *inter partes* process where (i) there has been a material change of circumstance since the order was made, (ii) the facts on which the decision to make that order was based were misstated to the court (innocently or otherwise), or (iii) there is a manifest mistake in the formulation of the order. There is no suggestion in the present case that the normal rule should not apply, or that there is any mistake (manifest or otherwise) in the formulation of the order I made upon my January judgment.

3. The present applications all concern an application made by the claimants in the District Court of Nicosia under an Application Form dated 17 April 2019, to obtain *Norwich Pharmacal* type relief from various entities involved prior to Mr Georghiou in the administration of one or more of the Settlements ("the Nicosia Application"), granted by order issued on 24 April 2019 ("the Nicosia Order"), drawn up and served on the defendants to it ("the Nicosia Defendants") on 3 May 2019. The Nicosia Order provided that the Nicosia Defendants were to treat "*the Application dated 17.4.19 and this Order or their contents and/or provisions as confidential*" and to refrain from "*disclosing the existence of the Application dated 17.4.19 and/or this Order or any of their contents or provisions to any person*", all except for the purpose of obtaining legal advice and until the application (i.e. the Nicosia Application) was finally determined.

4. The CPR 3.1(7) application, by Application Notice dated 4 February 2020, seeks the revocation or variation, in part, of my order dated 30 January 2020 and the orders of Cockerill J, DBE, and Jacobs J dated 24 May 2019 and 28 June 2019 respectively, so far as they concerned the requirements imposed on the Burlington Place respondents and Dencora to provide further information of their case, the failure to comply with which led to my refusal of permission for their November 2019 Further Information responses and my refusal of relief from sanctions in respect of the striking out of the primary pleaded allegations to which they related. The basis for the application is that, knowing now of the Nicosia Application and Nicosia Order (of which the respondents became aware, it is said, on 31 January 2020), the court can say that:

i) it was misled by the claimants by statements by their solicitors said to be to the effect that "*the claimants had neither sought nor obtained any potentially relevant 'gagging orders' in Cyprus against the former trustees*", statements the Nicosia Application and Order are said to falsify;

ii) the Nicosia Order "*had the effect of abruptly halting the cooperation which had hitherto been given by the Former Trustees to the Respondents …*" because "*prior to about mid-April 2019 [Mr Georghiou] had had a good working relationship with the Former Trustees who had been cooperative and had provided him with information and documents in relation to the Trusts …, but … after mid-April 2019 all cooperation abruptly ceased and the Former Trustees cut off all communication with [Mr Georghiou] about the Trusts*"; and

iii) that explains why "*the Former Trustees refused, despite repeated requests, to provide information to the Respondents to enable the Respondents to answer the RFIs and so comply with the Cockerill and Jacobs Orders.*"

5. Because that application and argument involve a consideration of the meaning and effect of the Nicosia Order, I granted on the papers, upon terms agreed between the parties, permission for expert evidence as to Cypriot law and practice. The respondents served expert evidence from Yiannis Karamanolis and the claimants served expert evidence from Alexandros Gavrielides.

6. The first specific disclosure application, by Application Notice dated 10 February 2020, seeks disclosure under CPR 31.12 of the Application Form, affidavit in support and exhibits thereto, by reference to which the Nicosia Order came to be made. I pass over the fact that CPR 31.12 does not apply in the Commercial Court during the period of the Disclosure Pilot under CPR PD51U. The application asserts that provision of a copy of those documents (which it is common ground exist) is necessary for the fair and just determination of the CPR 3.1(7) application.

7. The second specific disclosure application, by Application Notice dated 9 March 2020, seeks disclosure under CPR 31.14 of those same documents, on the basis that they are referred to in a witness statement from Richard Lewis of Hogan Lovells, the claimants' solicitors, dated 6 March 2020 served in response to the CPR 3.1(7) and CPR 31.12 applications. I pass over the fact that CPR 31.14 likewise does not apply here during the Disclosure Pilot. In my judgment, this last application is misconceived. It cannot be right that referring to documents in evidence resisting an application under CPR 31.12 renders that resistance futile; likewise describing the documents, as to an extent Mr Lewis did, so as to give the court information about them (without disclosing their contents) to assist it with the CPR 31.12 application.

8. The CPR 3.1(7) application and both specific disclosure applications were listed to be heard, reserved to me, on 20 March 2020. Sadly, Mr Chambers QC became very unwell in the day or two prior to the hearing, with the symptoms of Covid-19, and I acceded to a request by Mr Ho for the hearing to be vacated. In doing so, I invited the parties to consider whether, each side having filed extensive evidence and detailed, 25-page skeleton arguments, they might be content to dispense with oral argument. Both sides confirmed that they were content, so I considered the applications on the papers and concluded that they all failed and should be dismissed. I made an Order to that effect on 23 March 2020. This judgment now sets out the reasons for my conclusions.

Misstatement?

9. The alleged misstatement to the court is to the effect that the claimants had neither sought nor obtained any 'potentially relevant' order, language taken not directly from what was said by the claimants' solicitors but from my judgment, [2020] EWHC 128 (Comm) at [45]. In the judgment, I said this:

> "44. The reason given in the July responses why the relevant allegations were not being withdrawn was the suggestion (I am bound to find, on the (absence of) evidence before me, a phantom suggestion) that the claimants were by 'gagging orders' preventing the provision of information that would allow substantive responses to be given. Thus, both sections of the Burlington Place respondents' responses concluded with the assertion that "*The Respondents expect evidence to arise once the Claimants' position vis-à-vis the existence of gagging orders is clarified. Pending such clarification, it would [be] contrary to the interests of justice that the Respondents withdraw parts of the pleading.*" (my emphasis).
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> 45. The claimants' position was clarified by letter from Allen & Overy dated 25 July 2019. It was and is that the claimants have neither sought nor obtained any potentially relevant order and that to the best of the claimants' knowledge and belief no other party has done so either. There is a real sense in which the original default was thus compounded, not remedied, by the eventual particularisation of the allegations in November 2019. On the logic of the July responses as served, and given the position adopted before Jacobs J when the Unless Order was made, there being no foundation for the 'gagging order' suggestion and in any event the claimants' position as to that having been clarified promptly, the allegations in question should have been withdrawn.
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> 46. Even then, strictly, relief from sanctions would have been required, to undo the automatic striking out of the respective respondents' entire Points of Defence and extend time by the necessary week or so for the withdrawing of the allegations that had not been particularised. …"

(That concerned the Burlington Place respondents, but the position relating to Dencora was materially the same: see at [48]-[49].)

10. As I think is clear from the above, what I meant by a 'potentially relevant' order was an order that prevented provision to the respective respondents of information that would allow substantive responses to be given to the RFIs that they had, in substance, failed to answer. Such an order would have been *potentially* relevant (since it would meet the description of a 'gagging order' given by the respondents in their July 2019 Further Information responses), but to be *actually* relevant the respondents would still have needed to show that it was the reason why they were neither giving substantive responses nor withdrawing the inadequately particularised primary allegations. To the extent that the argument for the respondents' CPR 3.1(7) application at times assumed or asserted that any order restricting to any extent the freedom of some third party to provide information or documents to Mr Georghiou would have been 'potentially relevant' in the sense I had in mind, it misread my January judgment and is wrong.

11. The claimants are said to have misstated the position by what Allen & Overy said in their letter dated 25 July 2019 (which was repeated by them in a letter dated 23 August

2019 and reconfirmed by a statement from Mr Lewis of Hogan Lovells that was part of the evidence on the cross-applications before me in January). The August letter and Mr Lewis' statement indeed did no more than repeat or reconfirm the July letter. The Nicosia Order predated all three and is the only basis suggested for saying that what Allen & Overy said and repeated (and Mr Lewis reconfirmed) was not true. So the case for there having been some misstatement of the position stands or falls with Allen & Overy's July letter, to which there was a little history in the correspondence that it is necessary to relate to put it in its context.

12. By letter dated 20 June 2019 the respondents' then solicitors, Candey, wrote to Allen & Overy, asking: "*Is Allen & Overy LLP or Harbour Fund III LP aware of any order in any jurisdiction the effect of which is to limit any person or entity from communicating with our clients or their representatives?*" Allen & Overy replied the next day: "*As to your own query of us in relation to gagging orders, it is not our practice to comment on the existence or otherwise of gagging provisions for obvious reasons.*"

13. Thus, Allen & Overy pointedly neither confirmed nor denied the possible existence in one or more jurisdictions of an order or orders limiting one or more third parties from communicating with the respondents or those acting for them (which would of course include Mr Georghiou). The only sensible conclusion the respondents could have drawn from that, if Candey otherwise had (on Mr Georghiou's instructions) reason to think such an order did exist, is that indeed there might be such an order and Allen & Overy would know of it if there were.

14. By this time, of course, the respondents had failed to provide substantive responses to the relevant RFIs in April and June 2019 and were approaching the hearing before Jacobs J on 28 June at which the Unless Order was made. Jacobs J was not told of any concern that a 'gagging order' existed material to the respondents' ability to provide proper responses. There was no suggestion, let alone evidence, of cooperation from Mr Georghiou's predecessors in the administration of the Settlements, up to and beyond the CMC on 4 April 2019 that I conducted and at which the Further Information was first ordered, that had latterly ceased (abruptly or otherwise).

15. By letter dated 11 July 2019, after the Unless Order had been made but before its deadline to particularise or withdraw the allegations in question, Candey wrote again to Allen & Overy, this time asking of the claimants whether:

> "*1. they have attempted to obtain orders, in any jurisdiction, prohibiting any person or entity, including PWC (Cyprus) and/or AJK Group, from communicating with the Respondents or their representatives.*
>
> *2. any such orders, or orders to like effect, have been obtained by them and/or, to the best of their knowledge and belief, any other party.*"

16. PwC (Cyprus) and AJK (former trustees) were both Nicosia Defendants. To answer those questions unconditionally with a 'No' would not have been accurate, therefore. Candey's letter asked for a response by 25 July 2019, and that is what they received, by Allen & Overy's July letter. That was of course *after* the Unless Order deadline, an extraordinary deadline to set if it was thought the respondents might be being hampered, in respect of particularising their allegations, by the existence of some 'gagging order'.

17. Allen & Overy's July letter, then, repeated that "*it is not our practice to comment on the existence or otherwise of gagging provisions for obvious reasons*", but continued:

> "*Without prejudice to that position, in order to bring this correspondence to an end, we confirm that:*
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> 1. *the Claimants have not obtained (nor sought to obtain) orders in any jurisdiction prohibiting the former trustees of, or advisors to, the Respondents (or the trusts that hold them), including PWC (Cyprus) and/or AJK Group (the **Advisors**), from providing to the Respondents or their representatives information and/or documents that were obtained or generated by the Advisors whilst offering services to or on behalf of the Respondents; and*
>
> 2. *to the best of the Claimants' knowledge and belief, no such orders have been sought or obtained by any other party.*"

18. The respondents' complaint concerns exclusively the first of those further answers. They say it is falsified by the Nicosia Application and Nicosia Order, about which, it is common ground, the claimants and Allen & Overy were aware. (That is not the same thing as saying they were aware that Allen & Overy's answer was false, if it was, as that would involve additionally their understanding of the effect of the Nicosia Order.)

19. It is important first, again, to note what Allen & Overy pointedly did *not* do, namely answer Candey's two questions with an unconditional 'No'. Thus, Candey were not told that the claimants had not attempted to obtain an order in any jurisdiction prohibiting any third party (including PwC (Cyprus) or AJK) from communicating with the respondents or their representatives. Candy and the respondents could only sensibly have concluded from Allen & Overy's response that, except for orders of the particular kind described in that response, the claimants indeed may well have sought or obtained orders of some kind that prohibited former trustees or advisors from communicating with or assisting the respondents or their current representatives to at least some extent or on at least some matters. Certainly, that is how I took it when considering the letter for the purpose of the cross-applications I dealt with in January. That is to say, whilst strictly speaking Allen & Overy said nothing about any other kind of order, it seemed to me unlikely they would have written such a carefully crafted response if, to their and their clients' knowledge, no such order existed or had been sought.

20. The misstatement allegation, therefore, comes down to whether the Nicosia Order prohibited the Nicosia Defendants from providing to the respondents or those representing them in July 2019 "*information and/or documents that were obtained or generated by [them] whilst offering services to or on behalf of the Respondents*". In my judgment, it did not and so there was no misstatement:

    i) I quoted the operative language of the Nicosia Order in paragraph 3 above. Thus, the Nicosia Order prohibited the Nicosia Defendants from disclosing to anyone whilst the Nicosia Application was pending for final determination *inter partes* (except for the purpose of obtaining legal advice):

        a) the existence of the Nicosia Application;

        b) the "*contents or provisions*" of the Nicosia Application;

c) the existence of the Nicosia Order; or

d) the "*contents or provisions*" of the Nicosia Order.

ii) None of (a), (c) and (d) above was or included information or a document generated by the Nicosia Defendants whilst providing services to or on behalf of any of the respondents.

iii) The premise of the respondents' argument, then, is that the Nicosia Application (or to use the exact turn of phrase from the Nicosia Order, "*the Application dated 17.4.19*") includes the affidavit filed in support (and its exhibits). On that premise, it is said that the prohibition on disclosing the "*contents or provisions*" of the Nicosia Applications prohibited the Nicosia Defendants from giving to, for example, the respondents, their solicitors or Mr Georghiou, information known to them from or a document generated during their time as trustees or advisors to the Settlements, if that information was also contained in the affidavit or that document was exhibited to it.

iv) I am not satisfied that the respondents are right as to the premise. It is seemingly supported Mr Karamanolis' opinion, but his opinion depends upon what seems to me a false logic that because the relevant procedural form in Cyprus (Form 45) requires the applicant to set out the facts on the Form or in an accompanying affidavit, that means that any such affidavit is part of "*the Application dated [Date of Form 45]*", and the precedents he cites appear to suggest that the affidavit in support is treated as separate.

v) I am satisfied that the respondents are wrong as to the conclusion. If a Nicosia Defendant had given (say) Mr Georghiou or Candey information, or a copy document, being information or a document known to or in the hands of that Defendant from its time as a trustee or advisor to one of the Settlements, that could obviously be done without revealing the existence of the Nicosia Application, without mentioning the Nicosia Order, without hinting at the fact that (if this were the position) that information or document had been referred to or exhibited in an affidavit in Cyprus. In short, and with respect to the seemingly contrary view of Mr Karamanolis, in my judgment that would not even arguably involve revealing the 'contents or provisions' of the affidavit. I prefer and accept the view of Mr Gavrielides, whose conclusion was as follows:

> "*It is clear, in my view:*
>
> *(i) that the [Nicosia Order], as worded, does not prevent the former trustees from disclosing any and all information about the Trusts to the current trustees,*
>
> *and*
>
> *(ii) that there is nothing in the wording of the [Nicosia Order] which even remotely suggests that the court intended to prevent the former trustees from disclosing such information to the current trustees.*"

vi) Mr Karamanolis also suggested (although his evidence was not entirely consistent on this) that as a matter of practice parties in the position of the Nicosia Defendants, served with the Nicosia Order, would be likely to refrain from engaging in any communication at all with the respondents or anyone representing or acting for them. I prefer Mr Gavrielides' view that "*the correct advice would be … that the Order … does not prevent the "gagged parties" from disclosing the contents of the affidavit filed in support of the application or of the exhibits attached thereto, except to the extent that such disclosure would itself reveal the existence, content and/or provisions of the Order itself or the application document*"; and there is no real reason to suppose that parties would not act in accordance with such advice if given. But in any event this is a different point going only to the possible credibility of an argument that, although the Nicosia Order did not contain a prohibition of the kind referred to in Allen & Overy's July letter, it nonetheless in fact caused correspondents who would or might otherwise have assisted the respondents to provide compliant Further Information responses to refuse that assistance. In other words, it would not show that there was any misstatement, as alleged by the respondents.

21. The founding premise for the CPR 3.1(7) application is therefore not made out. There was no misstatement of the factual position to the court. The respondents' discovery of the Nicosia Order the day after I gave judgment and made my order upon it is not a material change of circumstance. It means only that they became aware just after I had disposed of the cross-applications dealt with by that judgment of something that was not material to that disposal.

22. It should be apparent from the above that whether the Allen & Overy letter misstated the position does not require consideration of the affidavit (or its exhibits) filed by the claimants in support of the Nicosia Application. The conclusion (sufficient for the CPR 3.1(7) application to fail) that there was no misstatement did not require disclosure of that affidavit or those exhibits. The only basis for the application for specific disclosure, wrongly made under CPR 31.12, is a contrary contention that a just determination of the CPR 3.1(7) application did require that disclosure. It therefore also fails.

Relevance?

23. If it had been clear that the Nicosia Application and/or the Nicosia Order falsified what Allen & Overy had said, and Mr Lewis had repeated in evidence for the January hearing, then I might have taken longer over Mr Chambers QC's submission, citing *Vernon v Bosley (No.2)* [1999] QB 18, that the court should see the present applications as simply, or primarily, "*designed to assist the Court to determine whether it has been misled by Mr Lewis and, if it has, to enable the appropriate remedial action to be taken*" on the basis that the Court "*should not countenance the possibility that it has been misled by a … solicitor … without investigating and determining whether it has indeed been misled.*"

24. I do not think *Vernon v Bosley* is authority for that proposition, as it was a case in which the misleading presentation of the claimant's condition was obviously material to the damages award secured upon a lengthy personal injury trial. On no view, in the present case, and knowing of the Nicosia Application and Nicosia Order, could it be said to be obvious that what Allen & Overy had said was not correct, and there is no basis in my judgment for supposing that it was not thought by Allen & Overy or Mr Lewis to be

correct. In this instance, therefore, I do not accept that there is any need for the court to investigate further how any misstatement came about except if it was material to the disposal of the cross-applications in January.

25. It was not material to that disposal, however, even if (contrary to my primary conclusion) there was a misstatement at all. There is no direct evidence from Mr Georghiou, and no documentary evidence at all, to support the suggestion reportedly given to Mr Chambers QC by Mr Georghiou that "*prior to about mid-April 2019, he [Mr Georghiou] had a good working relationship with the Former Trustees who had been co-operative and had provided him with information and documents in relation to the Trusts … but … after mid-April 2019 all cooperation abruptly ceased and the Former Trustees cut off all communication with him about the Trusts …*". It is quite remarkable, were that true, that Mr Georghiou made no mention of it in three witness statements and an affidavit of his since mid-April 2019, including his witness statement in support of the application for relief from sanctions that I dismissed, so far as relevant, in January.

26. The previous evidence on the respondents' behalf, and the documentary record such as has been provided, in fact suggests very strongly that: (i) there was a handover to Mr Georghiou when he took over as administrator of the Settlements long before any of the events at hand; (ii) thereafter, he had no substantial contact with his predecessors (and one of the case management issues, in connection with disclosure at least, was concern that he was not making a serious enough effort in that regard); (iii) just before the CMC on 4 April 2019, and then under the case management directions made at that hearing, Mr Georghiou did make contact at all events with AJK, who responded on 18 April 2019 to confirm that they had disengaged entirely as of 12 September 2018 and would not engage in any further correspondence; (iv) that was a week or so before the Nicosia Order had been made and just over two weeks before it was served on AJK.

27. Further, as I emphasised at the outset, even if there was a 'gagging order' of the kind that Allen & Overy's July 2019 letter said did not exist and had not been sought, that would only have been *potentially* relevant to my consideration of the matter in January. The essential gist of the 'gagging order' suggestion, as deployed on 19 July 2019 to purport to excuse the respondents' defiance of the Unless Order, was that they thought there might be such an order preventing them from giving proper particulars. But that was just never the position. The Nicosia Order was never a reason why the respondents did not provide particulars or, though they were not doing so, chose not to withdraw the inadequately particularised allegations.

28. The high point of the respondents' case therefore would be that an inaccurate understanding on Allen & Overy's part of the meaning and effect in law of the Nicosia Order led them not to disclose the existence of an order that did not prevent the provision of proper particulars (if the respondents wanted to provide them) and did not cause any third party not to co-operate with the respondents in relation to their possible provision of particulars. In that light, the Nicosia Order was in fact irrelevant to the respondents' pleading defaults and I am quite clear it would have had no impact on my assessment of the cross-applications in January.