IN THE HIGH COURT OF JUSTICE
BUSINESS & PROPERTY COURTS OF ENGLAND & WALES
COMMERCIAL COURT (QBD)
[2022] EWHC 1051 (Comm)

No. CL-2020-000184

The Rolls Building
7 Rolls Buildings
Fetter Lane
Holborn
London, EC4A 1NL

Tuesday, 12 April 2022

Before:

HIS HONOUR JUDGE PELLING QC
(Sitting as a judge of the High Court)

B E T W E E N :

WILMINGTON TRUST, NATIONAL ASSOCIATION — Claimant

- and -

MR HSIN CHI SU
(AKA MR NOBU SU / MR NOBU MORIMOTO /
MR NOBUYOSHI MORIMOTO / MR SU HSIN-CHI)

Defendant

MR S. ATRILL (instructed by Mishcon de Reya) appeared on behalf of the Claimant.

THE DEFENDANT appeared in Person.

J U D G M E N T

JUDGE PELLING:

1 This is the hearing of an application made by Mr Su, the principal defendant in these proceedings, for an order adjourning an application that I heard to a conclusion over two days last week. At the end of the two-day hearing the case was adjourned so that I could deliver judgment today, having had the opportunity over the weekend to read the voluminous materials that had been filed in these proceedings. Over the weekend Mr Su had prepared an application which, on its face, was an application to set aside the claimant's application and, although it does not say so in terms, for an order that this action simply proceed to trial.

2 The application has been made orally by Mr Su for a period of the better part of an hour this afternoon, half a day having been set aside for the delivery of the substantive judgment in circumstances where Mr Su is currently detained at HM Prison Belmarsh, where he is serving a term of imprisonment for contempt in failing to comply with certain provisions in a worldwide freezing order.

3 The application by the claimant is for summary judgment on its claim to enforce, at common law, a judgment obtained from the United States District Court in Texas and for a direction, either dismissing or staying the defendant's counterclaim, on the basis that either the court does not have jurisdiction to entertain it or the court, if it has jurisdiction, should nonetheless stay the proceedings on the basis it should not hear it and, in any event, because the plainly more appropriate forum for the determination of the counterclaim is the United States of America.

4 Mr Su's application made this afternoon was with great respect to him confused, but in the end appears to consist of the six points that were identified by Mr Atrill in his reply submissions. The general thrust of what is being said, or appears to be what is being said, is that this was a situation where, because the defendant was imprisoned in HM Prison Belmarsh he was unable to get access or, at any rate, timeous access to the materials to enable him to defend this application. This is not a point which was made at the outset of the hearing last week, where no application for an adjournment by reference to this point was made.

5 At a very late stage in these proceedings, the defendant filed his first and second witness statements, which are now part of the evidence in this case. One of the points which was made on this afternoon's application, is that on a proper reading of CPR.58.13 the claimant was required to respond to those witness statements, and therefore the application should be adjourned so as to enable to claimants to comply with what Mr Su submitted was their mandatory obligation to respond.

6 This point is plainly unarguable on the face of the rule. Put very simply, CPR 58.13 is concerned with how evidence in answer and reply to applications to the commercial court should be dealt with. It sets out various time limits which apply to the filing of evidence, depending on whether the application is due to be heard at an oral hearing fixed to last longer than half a day. The provision that Mr Su relies on is CPR 58.13.1(3), which says:

> "The general requirement is that, unless the court orders otherwise … evidence in reply must be filed and served within seven days of the service of evidence in answer… "

He relies also on CPR 58.13(2), which extends the period of time referred to in para.13.1(3) from seven to fourteen days. He says there is, therefore, an obligation on the part of the claimant to file evidence in reply to the two witness statements that he has filed in the substantive proceedings, and that these proceedings must be adjourned in order to enable the claimant to comply with that obligation.

7 This is misconceived because the rule is permissory not obligatory - that is to say, it does not impose an obligation to file evidence in reply but if such evidence is to be filed and served, then it must be filed and served within seven days or, alternatively, fourteen days of the service of the evidence in answer, and the contrary is not arguable, and therefore that point of itself is wrong and bound to fail.

8 The more general issues that arise concern what Mr Su says are failings in the way in which material has been delivered to him, concerning which he makes complaint. The first point concerns bundles. He maintains that he was supplied with a bundle on the morning of the hearing or, perhaps, the second morning of the hearing which were missing certain (as he would have it) critical pages. Mr Atrill submits that this is misconceived. A copy of the relevant bundle was sent to HM Prison Belmarsh for the attention of the defendant on 31 March; that pursuant to an order made in these proceedings by Andrew Baker J, a further bundle was sent by the court also on or about 31 March to HM Prison Belmarsh, in the hope that that might ensure the bundle got to the defendant more quickly.

9 On the first morning of the hearing, a third bundle was produced and provided to the defendant. This included, in the authorities bundle, some additional authorities not originally included. The assumption had been that at the end of the first day of the hearing, the bundles that had been supplied that morning to the defendant would accompany him back to Belmarsh so that to the extent that he wished to do so, he could work on the bundles overnight. In the result, however, that did not happen or, if it happened, the bundles that he took back to Belmarsh did not come back with him to the court on day 2. Accordingly, on Day Two of the hearing, 7 April, a fourth bundle was provided by the claimant to the defendant.

10 Here I need to take a step backwards. As will be apparent from the judgment I gave on the first day of the hearing of the application, an application was made by the lawyers representing Lakatamia Shipping Inc in another action against the defendant. The application was for access to all the documents in the application for the purpose of enabling them to decide, I think, whether to intervene in these proceedings, or to see if there was perhaps anything in the material which would assist them in the other proceedings. In the result, I made an order directing that the claimant, in these proceedings, should supply to Lakatamia's lawyers a restricted bundle of material consisting broadly speaking of the evidence in support of the application that I have to determine. In order to comply immediately with that order the solicitors who act for the claimant, Mishcon de Reya, filleted the material from a spare bundle that was present in court. The bundle that was then handed to the defendant on the morning of the second day of the hearing (Mr Atrill tells me) was the bundle that had been filleted and, therefore, omitted from it copies of the material that had been delivered to the Lakatamia lawyers.

11 Mr Atrill submits that this is of no practical significance because that which had been removed from the files was not referred to either by Mr Su in the course of the submissions that he made on Day Two, or in the reply submissions that Mr Atrill made on that day either. In those circumstances, Mr Atrill submits that the complaints made concerning the bundles are without foundation and should be rejected. I accept that submission subject to

this: That there must be a witness statement filed and served by Mr Atrill's instructing solicitors, confirming the facts and matters which I have referred to and which are based on the submissions which Mr Atrill made.

12 The next issue concerns the transcript, and was that the transcript complained contained errors that had to be corrected by the defendant. The submission which was made by Mr Atrill and was not, I think, engaged with at all by Mr Su in reply, was that the corrections made were obvious typographical errors; such as one sees in transcripts every day of the working week, and/or were comments by Mr Su in apparent answer to arguments that had been advanced, orally, by Mr Atrill in the course of the submissions. In my judgment, none of that justifies adjourning this application for a period of three months either.

13 The next point relied upon concerns authorities. The complaint that Mr Su makes is that the bundle of authorities, which he was supplied with, did not contain four authorities; only three of which, I think, in the end were referred to. They are the *Maronia v. Larmer*, the two *Owens Bank* cases, and the *House of Spring Gardens* case. The *House of Spring Gardens* case certainly, and I think at least one of the *Owens Bank* cases, were not referred to in detail in the course of submissions but were included in the bundle, submits Mr Atrill, because they are referred to in the authority he did refer to, being a judgment of Andrew Henshaw J setting out the principles that apply to applications such as that made by the claimant that I have to determine.

14 So far as the *Maronia* case is concerned, that was referred to at some length in the course of the argument by Mr Atrill. However, in my judgment it takes nobody anywhere on the facts of this case. This is an application to enforce a judgment of a foreign court at common law. The *Maronia* case was concerned with a different enforcement regime which involved, at least in part, different principles. Furthermore, the facts of that case were materially different to the facts of the present case. As I endeavoured to explain to Mr Su in the course of the argument, the only authorities relevant on an application of the sort I have to determine, are authorities which establish the general principles which have to be applied by a court in resolving an application of this sort, with all other issues being fact sensitive in nature and therefore ones which are not resolved by reference to authority but by submissions and judgments based on the evidence that is available. Thus it is, it seems to me, the point made concerning *Maronia* takes nobody anywhere because it is materially different factually and legally. The *House of Spring Gardens* case was not referred to at all. If, and insofar as, the *Owens* cases were referred to, they were referred to in passing by reference to the summaries of those cases contained in the judgment of Henshaw J (in the authorities) that, principally, the claimant has relied upon as establishing the principles or summarising the principles that have to be applied on an application of this sort.

15 The final complaint, I think, was that there had been inserted in the authorities bundle a copy of the US Procedural Code relating to how interest is to be dealt with on judgments entered by US courts. That was inserted, says Mr Atrill, in case there was an issue as to whether or not it was appropriate for compound interest to be awarded, or whether compound interest was something which might engage the public policy provisions which relate to whether judgments should be enforced at common law. In the end no submissions were made to that effect by Mr Su, and therefore this document was never referred to at all.

16 There is then a complaint about some documents prepared in relation to the case, this being the claimant's skeleton argument and a complaint about chronologies. So far as the skeleton argument is concerned, there is a complaint from Mr Su that the copy, or a copy, that he was supplied with had pages missing. In the course of the argument he supplied me a bundle

where he maintains demonstrated that the relevant pages were missing. When I flicked through the document there was a gap between pages 15 and 21, but if one moved further on into that bundle then the supposedly missing pages were clipped to the back of that bundle. Therefore I am entirely unclear, as a matter of evidence, as to whether and if so, what pages were missing from the skeleton. The real point, however, is that this was an application which was heard orally over a period of two days. Much of the time, perhaps most of the hearing was taken up with oral submissions made by Mr Su. There is no evidence that Mr Su was in any way prejudiced by the alleged absence of the pages from the copy of the skeleton he received. If and to the extent he could demonstrate that there were issues that he failed to address, because he was misled by the absence of the pages, then it was for him to identify what those points were; to identify, in summary form, what submissions he wished to make on those points and if and to the extent he felt unable to make them orally in sufficient detail today, then his application should have been for a short adjournment in order to enable those submissions to be put in writing. None of that was done, and in those circumstances, as it seems to me, this point goes nowhere either.

17 The next points concern chronologies. In accordance with usual practice, the claimant prepared a chronology for use at the application hearing. At the start of the hearing of the application last week, Mr Su complained that the chronology relied upon by the claimants did not incorporate the material that he had asked to be incorporated, nor was a copy of the chronology he had prepared been included within the bundle. That, as it seemed to me, was potentially a fair point for him to make. Therefore, I did the following things: First of all, I asked for a copy of his chronology and one was supplied. Secondly, I asked Mr Atrill to ensure that if and insofar as the chronology he relied upon did not contain relevant entries from the defendant's schedule, then he was to make clear in the course of his oral submissions by interpolation what was missing, and where it should be inserted. Thirdly, I invited Mr Su to make submissions in any event by reference to his chronology. There is no prejudice or difficulty caused by the issue of which he makes complaint. It was addressed in the course of the hearing. Again, no application was made for an adjournment at the start of the hearing by reference to this point.

18 Two points remain. The first concerns the order previously made in this case. Mr Su maintains that an order had been made by Moulder J in these proceedings which directed that the hearing of this application take place on the two days last week that I heard it so as to enable material to be obtained from the United States and put before the court, which it was said would demonstrate at least a realistically arguable case on fraud or bad faith in respect of the claimant's activities in this case. Mr Atrill submits, and on the basis of what he tells me I am prepared to accept, that there was no relevant order made by Moulder J in these proceedings. The only order made in the recent past by Moulder J was an order made in the *Lakatamia* case, which was concerned with an application by Mr Su to purge his contempt, and therefore obtain his early release from prison. That application failed on the merits. It has no impact upon the issues that I have to determine.

19 Mr Su was unclear as to what materials there were in the United States that might be relevant to these proceedings. A letter was included in the supplemental bundle at the request of Mr Su dated 20 January 2022, which was a letter addressed to the New York State Department of Financial Services in which he said, "*The reason I write this letter is for the following two questions to be answered if possible in the consent order …* ". What consent order was being referred to is entirely unclear, and my attention has not been drawn to it. There are then set out two questions that I need not take up time describing. The fact of the matter is that on the material available to me, it is not at all clear what any of this is meant to contribute to the issues that arise in this case.

20 In summary, therefore, and dealing with the issues that arise on this application, Mr Atrill submitted that there was no obligation on the part of the claimants to reply to the two witness statements that had been filed by Mr Su. I accept that submission for the reasons that have already been given. To the extent it was suggested that there should be some form of disclosure, it was entirely unclear what that would go to, other than errors of fact or law made by the American court in the underlying proceedings, which Mr Atrill submits would be immaterial to an application at common law to enforce the judgment. I do not propose to rule on that definitively in this judgment, because that in part is the subject of the judgment on the substance of the application, to which I must turn later. Suffice it to say that Mr Su has not identified material that could realistically arguably be relevant to the substantive issues that I have to decide.

21 The third point that Mr Su made, and which Mr Atrill answered, concerns a point which he has made in the substantive proceedings already concerning the set-off of profits. The short point about this case is that there were a number of one-ship companies owned or controlled by Mr Su, each with the name Whale in the corporation name. Each of the corporations had a letter in front of the word Whale so as to differentiate one from the other. The point which is made by Mr Su is that E Whale borrowed money to build a ship. The ship was sold in or by order of the US Bankruptcy Court in proceedings which took place in the United States, and to which I have to refer in more detail in the substantive judgment. The result of that sale was there was a profit, so Mr Su says, of some $67 million which he maintains should have been set off as a matter of contractual provision, in relation to the deficit sums raised by the sale of ships owned by the other Whale companies including, in particular, the Whale companies with which these proceedings are concerned.

22 Mr Atrill submitted, and I accept that this point is one which is one which can, could and perhaps even at this late stage should be addressed to the American court. This issue was the subject of submissions made at length by Mr Su in the substantive application, as part of his grounds for seeking to impeach the judgments that the claimants seek to enforce, and in those circumstances this point is not available as a ground for an application for an adjournment. The point which Mr Atrill makes is that this is a point basically of assertion with no evidence available to support it.

23 There were then three other points made, which I can deal with very quickly. First of all, Mr Su submitted that two Russians who Mr Su named were critically important to the outcome of this case. Mr Atrill says that those are irrelevant, and the relevance of those names is unexplained. I agree with this last point.

24 Secondly, it was suggested that there were bank records in Taiwan which Mr Su might be able to get access to as and when he is released from prison in this country. But again, it was not entirely clear what these documents were meant to go to, other than perhaps to demonstrate the making of the profits and the failure to account for the profits made from the sale of the ship owned by E Whale. I have already addressed that issue.

25 Furthermore, if and to the extent there is material which supports that proposition, and which would enable Mr Su to impeach the judgments made in the United States courts in the context of enforcement proceedings in this country if and to the extent the substantive application is lost by him and this material is found and has an impact, then it will be open to him to apply for permission to appeal by reference to evidence which was not available to this court, or perhaps to set aside on the basis that the material should have been made available but was not. What is entirely inappropriate is that I should be asked to adjourn this

application after it has been fully argued on the basis that Mr Su might be able to locate some documents that might be relevant as and when he is released from prison, in circumstances where the application is one which has been listed for hearing for weeks if not months, where no application for adjournment was made before the hearing commenced, on the basis of material that could be but was not presently available to Mr Su. And in those circumstances it seems to me wrong that the application having been heard on its merits over two days, an application should be made at this stage for an adjournment for a period of three months or more, which is how in the end Mr Su formulated his application.

26 Finally, he said he wanted access to original contracts, by which he meant the facility agreements and personal guarantees that are relevant to these present proceedings. However, again, no explanation has been given as to why access to the original contracts is going to make any difference, and again access to such material was not mande at any stage prior to the application I am now hearing made after argument had been completed and the application listed for judgment.

27 I am bound to look with some scepticism at an application to adjourn the hearing of a summary judgment application, after the submissions in relation to it have been completed, made in the period between completion of the evidence and the delivery of the judgment,. Any application for an adjournment in order to obtain access to material which was likely to have an impact on the outcome is an application which could and should have been made at or well before the hearing, if it was to be made at all. No such application was made. Mr Su has not identified what documents he seeks or for what purpose that is material. The other grounds he relied on were unarguable. In those circumstances, I consider that the application to adjourn should fail.

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