Neutral Citation Number: [2023] EWHC 189 (Comm)

Case No: CL-2023-000005

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
COMMERCIAL COURT (KBD)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 03/02/2023

Before :

MR JUSTICE FOXTON

- -

Between :

	CRO	**Claimant/ Applicant**
	- and -	
	(1) REC **(2) RUI**	**Defendants/ Respondents**

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James Sheehan and Mubarak Waseem (instructed by **Hogan Lovells International LLP)** for **the Applicant**
David Peters (instructed by **Kobre & Kim (UK) LLP**) for **the Respondent**

Hearing date: 27 January 2023

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HONOURABLE MR JUSTICE FOXTON

This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be Friday 03 February 2023 at 10:00am.

The Honourable Mr Justice Foxton:

1. The standard form freezing order in Annex 11 of the Commercial Court Guide (11th Edition), and that at Annex A to Practice Direction 25A, both provide:

   > "This order does not prohibit the Respondent from spending £ a week towards its, her or his ordinary living expenses and also £ [or a reasonable sum] on legal advice and representation. [But before spending any money the Respondent must tell the Applicant's legal representatives where the money is to come from.]"

2. The issue which arises in this case is whether, when the reasonable sum wording is used, together with the proviso in square brackets at the end ("the Source Proviso"), the effect of the order is to require the respondent to identify not only the source from which the funds used to meet legal expenses originate, but also the amounts so spent.

3. Mr Sheehan, for the applicant, argues that this is the case, suggesting that this conclusion follows:

   i) from language used;

   ii) when regard is had to the purpose of the provisions; and

   iii) as a matter of authority.

4. For the reasons which I set out below, I agree with Mr Peters that Mr Sheehan's arguments on i) and, to the extent it matters, ii) are wrong, as is the authority he relies on at iii), and that the standard form wording with the Source Proviso does not have the effect for which Mr Sheehan contends.

The language used

5. As noted in Gee, *Commercial Injunctions* (7th), [4-001]:

   > "There is a general principle that an order must be expressed in unambiguous language so that the defendant knows exactly what is forbidden or required by the order. Contempt proceedings will not succeed when the order is unclear or ambiguous. The principle applies to all injunctions. This is a matter of fairness to the person enjoined. It goes not only to the drafting of an injunction when in principle the decision has been made to grant it, but also to the decision itself on whether to grant an injunction or specific performance. The degree of certainty required should be considered with the possibility of contempt proceedings in mind and whether the injunction would be enforceable in such proceedings. An injunction should not be granted in terms which leave it to be argued out in contempt proceedings what it does and does not require."

6. Approached with that interpretative imperative in mind, it is, to my mind, clear that the standard form freezing order which includes the Source Proviso does not order the respondent to disclose to the claimant the amount it is spending on legal expenses, because it does not expressly say so.

7. Recognising the impossibility of contending, in the present context, that such an obligation is implicit (*Re Jones* [2013] EWHC 2579 (Fam); [2014] 1 FLR 852, [21]), Mr Sheehan argued that this conclusion followed from (and was "inherent in") the wording of the Source Proviso with its reference to the obligation to state "where the money is to come from", which it was said required the amount of money to be identified as well. As to this:

    i) It would follow from this argument that if the Source Proviso is not included, there is no such obligation. On its face, however, the purpose of the Source Proviso is not intended to create an obligation which would not otherwise exist to disclose the amount being spent on legal expenses, but to impose an obligation to identify the sources of assets being used to meet legal expenses.

    ii) It would also follow that where legal expenses are capped at a figure (as the standard form wording provides for), and the Source Proviso is included, the respondent would, by reason of the language used, be obliged to disclose the amounts being applied on legal expenses from time-to-time, even though the amount of spending on legal expenses had been capped.

8. Further, as Mr Peters noted, the standard form order and Source Proviso, if they had the effect for which Mr Sheehan contends, are entirely silent on whether there is an obligation to disclose the amount being transferred to the solicitors as a payment on account of legal fees or (as Mr Sheehan submitted) only amounts consumed as the funds were applied. However:

    i) It is the source from which funds are paid into the solicitors' client account which will be of interest to the applicant, and the order to identify the source from which the funds come is one which arises when the transfer into the solicitors' client account takes place. Identification of the client account as the immediate source when funds are drawn-down from that account to meet legal fees would be wholly uninformative.

    ii) The requirement for which Mr Sheehan contends – an obligation on the respondent's part to notify, on each occasion on which funds are applied to discharge a solicitors' bill, how much is being paid – would be highly invasive, and could only be imposed by express language.

The purpose of the wording

9. Absent language of the requisite clarity, I do not believe that Mr Sheehan's appeal to the purpose of these parts of the freezing order can take matters any further. The role for a purposive construction of freezing orders is necessarily a much more limited one that when construing contracts, and the mere fact that a particular construction would make the order more efficacious for the party who obtains it can have little, if any, weight.

10. In any event, I am unable to accept Mr Sheehan's argument even on its own terms:

    i) The argument was to the effect that the obligation to notify the amount of the payment was necessary to enable the applicant to ensure that only a reasonable sum was spent, and to keep track on the extent to which disclosed assets are being reduced.

ii) However, that is clearly not the purpose of the Source Proviso, which is not a concomitant of the decision to permit the respondent to spend "a reasonable amount" on living expenses rather than up to a capped figure (and which might, therefore, not be included in a freezing order with a "reasonable amount" formulation, and which might be included in a freezing order which uses a "capped figure" formulation).

iii) Rather the obvious reasons why the court may include a requirement that the respondent identify the source from which legal expenses are being funded are (a) to ensure that the source is from assets disclosed in accordance with the respondent's disclosure obligation; and (b) (particularly if the freezing order is a worldwide freezing order) to put the applicant in a position to take steps if it becomes apparent that the respondent is using assets which would otherwise be more amenable to execution to meet its legal fees, while leaving assets which it would be more difficult to enforce against untouched (cf. *A v C* [1981] QB 961 and the subsequent case law).

iv) It is difficult, in any event, to see how mere knowledge of the amount of legal expenses would provide any basis for the applicant to determine the reasonableness of the amount being spent without having at least some idea of the range of legal activities on which it was being spent. However, Mr Sheehan (rightly) did not suggest that the disclosure obligation for which he contended stretched this far.

11. I accept that a limit of "reasonable expenses" is intended to provide at least some control on the extent to which assets which would otherwise be available to satisfy a judgment are consumed in litigation. As David Richards J noted in *HMRC v Begum* [2010] EWHC 2186 (Ch), [36]:

> "The possibility remains that through expenditure on legal costs which may on later examination appear to have been larger than was really warranted by the claim, the available assets of the defendant are depleted to the prejudice of the successful claimant in a way which is not justified."

12. Ferris J in *Cala Cristal SA v Al Borno* (9 February 1994 unreported) stated:

> "Prima facie, the defendant ought to be allowed to choose the legal representatives he thinks best qualified to present his case and to pay to those legal representatives such charges as may be properly be payable as a matter of contract between himself and his representatives. It does not, it seems to me, lie in the mouth of a plaintiff to say that the defendant ought to have gone to a cheaper firm of solicitors, or one that which would have spent fewer hours in his case, or to have conducted his case in some other way. At any rate, in my view, the plaintiffs ought not to be allowed to maintain that except in the most extreme and extravagant circumstances, of which it seems to me none are apparent in this case."

13. However, the control is undoubtedly "light-touch" in nature, and there are means of giving it some "teeth" without creating the disclosure obligation for which Mr Sheehan contends:

i) In ongoing litigation, the claimant will be able to form a view as to whether the legal resources being deployed against it involve extravagant expenditure, and there are

various occasions in litigation in this jurisdiction in which the costs being spent by a counterparty may become apparent: in costs budgeting where applicable, in costs schedules for contested hearings, in any security for costs application and in answering question 9 of the PTR checklist.

ii) Further, the solicitor receiving the legal expenses and who is aware of the terms of the order will provide some form of check. As Neuberger J noted in *Anglo-Eastern Trust Ltd v Kermanshahehi* [2002] EWHC 2938, [57]:

> "It seems to me that if the defendant was entitled to use the property to fund the litigation then the protection which the law should afford to any litigant, namely that his solicitors cannot charge for unnecessary work and cannot charge unreasonably highly should be the limit of the protection afforded to the claimants as well."

iii) In the second *Kermanshahehi* decision ([2002] EWHC 3152), [10]-[11], Neuberger J explained:

> "10 … Furthermore, the solicitor is an officer of the court, and should know that the defendant can only be required to pay reasonable costs and any order made today will reflect that. Indeed, Mr Richard Slade of Bracher Rawlins, the defendant's solicitors, accept that.
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> 11. If a solicitor, acting for a defendant who is subject to a freezing order which only allows him to spend money on "reasonable" legal costs can be shown knowingly to have permitted his client to pay costs which were plainly not reasonable, then it seems to me that as a matter of principle the solicitor would probably be in contempt of court. He would have been a party, and knowingly a party, to an arrangement with his client which has put his client in breach of the court order."

14. Mr Sheehan submitted that if the solicitor receiving the payment constituted a sufficient mechanism of control, that would also be a sufficient means of ensuring that funds were being applied from a disclosed source, and yet this does not obviate the need for the Sources Proviso in an appropriate case. However, as noted at [10(iii)] above, the Source Proviso also provides protection against the preferential consumption of assets which can more readily be enforced against. In any event, requiring the respondent to disclose its consumption of legal expenses as litigation progresses would be very invasive. In *Anglo-Eastern Trust Ltd v Kermanshahehi* [2002] EWHC 3152, [10], Neuberger J noted that "it is undesirable for the claimant or the court in the course of hostile litigation, to take up time and to invade the relationship between the defendant and his solicitor, by enquiring about, or challenging, save where it is necessary, the costs that the defendant is incurring. It would be unfair on the defendant to put him in the position of having a solicitor who is looking over his shoulder and worrying all the time about how much is being spent."

Authority

15. Finally, Mr Sheehan relied on *Cantor Index Ltd v Lister* [2002] CP Rep 25. In that case, in what appears to be an ex tempore judgment, Neuberger J addressed a number of issues relating to the legal expenses proviso, including the following:

> "The second sub-issue is whether the reference to legal expenses in paragraph 3(1) of the
> Freezing Order covers legal expenditure in connection with other cases, and not only the case in which the Freezing Order is made. To an ordinary reader of the order as a matter of impression, it seems to me that paragraph 3(1) would strike him as referring simply to the legal costs of the proceedings in which the order is made. However, on closer consideration, I have reached the conclusion what the words do apply to legal costs in other proceedings. First, like the more limited meaning may accord with one's first impression, so to read the words of paragraph 3(1) involves implying something into those words, whereas it can be said that the wider construction does not. Secondly,
> it would be rather hard on a defendant if a standard form Freezing Order prevented absolutely a defendant spending any money on legal expenses in connection with other
> proceedings. It seems to me if one considers the effect and purpose of a Freezing Order,
> that would be a surprising and potentially unfair result. Thirdly, it is not as if this means
> that the claimant has no protection. Before any money can be spent on legal expenses the claimant has to be told where the money is coming from, and it seems to me inherent
> in that requirement that the claimant has to know how much is involved. If the claimant
> has grounds for concern, then of course he can apply to the court."

16. It will be apparent that the first stage in Neuberger J's analysis was that the reference to "legal expenses" in the standard form was not limited to legal expenses in the litigation commenced by the claimant or in relation to that dispute. I am (respectfully) unable to agree that this is the usual effect of this provision. The principal purpose of the legal expenses proviso is almost invariably characterised as a means of ensuring that the respondent can meet the expenses of the proceedings in which the claimant seeks judgment (including ancillary proceedings), rather than providing a means of accessing legal advice or conducting litigation generally. Thus, in *Tidewater Marine International Inc v Phoenixtide Nigeria Limited* [2015] EWHC 2748 (Comm), [36], Males J observed:

> "A further principle is that a defendant is entitled to defend itself and, if necessary, to spend the frozen funds, which are after all its own money, on legal advice and representation in order to do so. This is recognised by the standard wording of the usual freezing order, although the defendant's right to spend its own money on legal advice and representation is limited to expenditure of 'a reasonable sum'."

To similar effect, Sir Thomas Bingham MR in *Sundt Wrigley Co Ltd v Wrigley* (unreported, 23 June 1995) stated that "in the *Mareva* case, since the money is the defendant's subject to his demonstrating that he has no other assets with which to fund the litigation, the

ordinary rule is that he should have resort to the frozen funds in order to finance his defence." Gee, *Commercial Injunctions*, [21-039] is less definitive, observing of the legal expenses exception:

> "What this covers is a matter of interpretation taking into account all the terms of the order including other exceptions and the surrounding circumstances when the order was made. This includes legal advice and representation for the purpose of defending the proceedings in which the order has been made. If advice is needed from abroad for the purpose of conducting the English proceedings, this is covered by the gateway".

However, his primary focus is on the legal expenses of the dispute with the applicant.

17. That is not to say that a freezing order using the standard wording will preclude a respondent from incurring legal expenses in other matters. It may well fall within the ordinary course of business scenario (indeed litigation by a trading entity arising from its business ordinarily will), and the obtaining of legal advice similarly. Certain types of legal expense -for example conveyancing fees or the costs of making a will – may well fall within the "living expenses" proviso. If there is any doubt, a court will readily grant a variation to make the position clear.

18. However, I doubt very much that a party making a without notice application for a freezing order, and a judge in making such an order, in a case in which a cap is imposed on legal expenses has ever approached the fixing of that cap on any basis other than by reference to the estimated costs of the litigation at hand. Certainly I have no experience of that exercise being conducted on the basis of a survey of all the contexts in which the respondent might seek advice from lawyers or become involved in litigation in order to fix any global legal expenses cap at a realistic level. Nor do I accept that such cap would operate as a cap on all legal expenses of whatever kind and whatever their subject-matter (which would appear to be the consequence of this interpretation).

19. If the legal expenses proviso had the effect which Neuberger J suggested, then it might be said that, in respect of other litigation, the claimant would have no visibility of the amounts being spent (cf [11]-[12] above), and that this provided some support for the view that there was an obligation on the respondent's part to disclose the amount of its legal expenses. Even on that basis, however (which, for the reasons I have given, I do not accept), I am not persuaded that there is any sufficient basis for reading an obligation of this kind into the standard wording with the Sources Proviso. The requisite language is simply not there (and, for what it is worth, there is no strong purposive justification for such an interpretation either).

Conclusion

20. For these reasons, I find that the freezing order in this case does not oblige the Respondents to notify the Applicant of the amount they spend on legal expenses in this case.

21. It only remains for me to thank Mr Sheehan and Mr Peters for their excellent (and commendably concise) arguments.