



Neutral Citation Number: [2020] EWHC 1972 (QB)

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

Case No: QB-2019-003298

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 3 July 2020

THE HONOURABLE MRS JUSTICE LAMBERT

B E T W E E N:

NORTH OF ENGLAND COACHWORKS LIMITED

Applicant

and

MOHAMMED ASIF KHAN
LOUISE DANIELLE KHAN
ROBINA AKHTAR

Respondents

MR COHEN QC appeared on behalf of the Applicant
MR BRETT appeared on behalf of the Respondent

Hearing Date: 2 July 2020

JUDGMENT

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MRS JUSTICE LAMBERT:

1. This is an application by Mohammed Khan and Louise Khan for a variation of a freezing order, made on 18 September 2019, to permit them to sell prohibited assets in order to fund legal advice and representation in respect of Mr Khan's forthcoming committal proceedings and in their defence in the underlying litigation. Mr Khan also seeks an order adjourning the committal proceedings which are listed for 24 July 2020 and (although it is not put in this way in the application) a stay of the directions timetable in the committal proceedings generally.

Background

2. The background to the application can be stated shortly. The freezing order was made in the context of proceedings against Mr Khan, Mrs Khan and others by Mr Khan's former employee, North of England Coachworks Limited ("NECL"). Those proceedings allege that Mr Khan defrauded NECL of over £1 million, including a significant sum having been spent by Mr Khan on prostitutes. As part of his Defence in that action, Mr Khan produced a table explaining the various payments which he had made from the NECL account. That table was signed by his solicitor on his behalf and bore a statement of truth. In respect of a large number of payments made to (it is alleged) prostitutes, Mr Khan recorded that the sums were paid either on behalf of NECL or for the benefit of his manager, Mr Warren.
3. Given the existence of relevant documentation and graphic text messages from Mr Khan to the women, committal proceedings were commenced against Mr Khan by NECL alleging dishonesty in his attributing payments made to prostitutes to work related purposes. On 22 May 2020, HHJ Dight CBE granted permission pursuant to CPR 81.18 to commit Mr Khan for contempt, gave directions in the usual way and listed the contempt application to be heard on 24 July 2020. The directions included that Mr Khan should serve points of dispute indicating the grounds on which he resists the application and stating whether he intends to give evidence and if so whether he intends to exercise his privilege against self-incrimination and serving an affidavit evidence. None of these directions have been complied with as, Mr Khan asserts, he has no funds with which to pay for the necessary legal advice.
4. As for the underlying claim against Mr Khan and others, the costs and case management

hearing has been listed by Master Cook to take place in January 2021.

5. I heard Mr and Mrs Khan's application yesterday. In the particular circumstances of this case, I exercised my discretion to permit Mr Brett (Mr Khan's solicitor but without higher rights of audience) to address me on their behalf. Mr Cohen QC appeared on behalf of NECL. I deferred giving judgment until today to ensure that I had considered fully Mr Brett's skeleton argument which had not been included in the papers which I received for the hearing and also to consider properly the two further witness statements (from Mr and Mrs Khan) upon which Mr Brett relied which were not served until 15 minutes before the hearing began.

The Application

6. The freezing order provides in the usual way for Mr and Mrs Khan to spend £500 per week towards ordinary living expenses and a reasonable sum on legal advice and representation. Mr Nicholas Brett of Brett Wilson LLP was instructed on behalf of Mr and Mrs Khan in September 2019. In his witness statement in support of this application of 12 June 2020 Mr Brett stated that "*We have no funds to continue to do any work on behalf of the First and Second Defendants either in preparation for the committal hearing or in connection with the substantive claim. Importantly, the Defendants effectively have no representation at present. We cannot instruct counsel to advise on and manage the claim, there are no funds to prepare for the CCMC and no funds to comply with the directions of HHJ Dight in advance of the committal hearing.*" The application for variation focusses on the sale of three assets: a Rolex watch, a Bentley car and a house in Church Gresley in Derbyshire. Mr Brett set out that Mr Khan and his wife were in debt to his firm in the sum of £6,868.00 and that a further sum of £2,892 plus VAT was unbilled. The proceeds of sale of those three assets were therefore intended to meet both the fees incurred and to fund the Khan's representation going forward.
7. The witness statement of Ms Lucie Byng, a trainee solicitor at Mr Brett's firm, dated 29 June 2020, set out the likely legal fees anticipated. In connection with the committal application, she estimates that the fees, including counsel's fees and VAT, will be £21,600. In respect of the preparation for the CCMC in January 2021, the fees (including counsel) are estimated at £30,000 including VAT.

8. The evidence concerning the value of the assets is set out in various documents.

a) the Rolex watch

9. In his letter of 4 May 2020, Mr Brett stated the value of Mr Khan's interest in the Rolex watch as follows: "*he has approximately £6,500.00 equity in the Rolex which is currently worth £22,000.00 with an outstanding loan of £11,500.00*". I pause to note that either Mr Brett's maths is wrong or there is a typographical error in the letter. However, Ms Byng (in her statement of 29 June 2020) provided very different figures, stating the outstanding loan on the watch to be only £3,005.30 with an estimated value of between £16,000.00 and £16,800 subject to inspection. She stated that this estimated value, valid for seven days, was based upon Mr Khan's enquiries of Watch Finder on 14 May 2020, remarking that should the watch achieve the maximum estimated sale price, then Mr Khan's equity would be £13,794.70.

b) the Bentley car

10. In his letter of 4 May 2020, Mr Brett gave the value of the Bentley car as £76,000.00 with an outstanding loan secured against it of £72,000.00. Ms Byng also gives the value as £76,000.00 based apparently on checking Auto Trader for like models and what she describes as "the achieved sale price of these models". She states that the estimated value as also being based upon Mr Khan's enquiries of his local garage "*We Buy Any Cars For More*" who informed him that £76,000.00 was estimated as the maximum sale price of the vehicle. She thus calculates the equity should the asset be sold for the maximum estimate as £4,300.00.

c) the property in Church Gresley

11. In his letter of 4 May, Mr Brett valued the property at approximately £260,000 of which Mr Khan had equity of £70,000. In Ms Byng's statement of 29 June, the figures are again different. She records an estimate of between £240,000.00 to £270,000.00 with a mortgage redemption figure of £193,051.00. The valuation was said to be based upon Mr Khan's enquiries with a local estate agent and on estimates obtained from various websites. Ms Byng's valuation of the equity is therefore £67,000.00.

The Legal Framework

12. I take the legal framework for this application from the observations of Males J in *Tidewater*

Marine International Inc v Phoenixtide Offshore Nigeria Ltd and others [2015] EWHC 2748.

I summarise the relevant principles below:

i) The starting point is that a freezing order has been made against the defendant; the court has therefore already concluded that, even before the claimant's claim has been established, justice requires that the defendant's freedom to dispose of its own assets as it sees fit should be restrained. However, a freezing order is not intended to provide a claimant with security for its claim but only to prevent the dissipation of assets outside of the ordinary course of business in a way which would render any future judgment unenforceable. While the disposal of assets outside of the ordinary course of business is prohibited as being contrary to the interests of justice, payments in the ordinary course of business are permitted, even if the consequence will be that the defendant's assets are completely depleted before the claimant is able to obtain its judgment. Moreover, so long as the payment is made in good faith, the court does not enquire as to whether it is made in order to discharge a legal obligation or whether it represents good or bad business on the defendant's part.

ii) A defendant is entitled to defend itself and, if necessary, to spend the frozen funds, 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."

iii) Even where the defendant has no other assets, its right to use the frozen funds is only "the ordinary rule" and is therefore capable of being outweighed in an appropriate case by other considerations. Ultimately it is the interests of justice which must be decisive.

iv) Before a variation will be made, the defendant must demonstrate that he has no other assets with which to fund the litigation. There is therefore an onus on the defendant to demonstrate that there are no other assets available which he could use to pay for legal advice and representation in defence of the claim. It is incumbent on a defendant, like any applicant, to put the facts fully and fairly before the court. The burden on the defendant to put the facts before the court is "*the burden of persuasion*" (see: Sir Anthony Clarke MR in *Serious Fraud Office v X* [2005] EWCA Civ 1564 at [35] and [43]). It is for the defendant to satisfy the court that it would be just to permit him to use funds which are identified as being caught by the order. If the court concludes that there is every prospect that the defendant may be able to call

on assets which are not specifically identified in the order, or assets which others will provide for him, the court is not bound to vary the order in the terms sought. It is necessary that the defendant should have this burden in part because it is the defendant, not the claimant who knows the facts and because the court has already concluded that there is a risk of disposal of assets outside the ordinary course of business or it would not have granted the injunction in the first place. The court must undertake a factual inquiry not only concerning the defendant's own assets, but whether there are others who may be willing to assist the defendant to obtain legal advice and representation and, in so doing, the court is entitled in an appropriate case to harbour a "*very healthy scepticism*" about unsupported assertions made by a defendant about the absence of assets.

v) There is always a risk that the judge may get it wrong. However, this is no different from any other situation and the court should not be deterred from making the best assessment it can on the material available. Overall justice is the touchstone. The absence of assets is likely to be decisive, but there are exceptional cases in which this will not follow.

13. Mr Brett drew my attention to *HM Revenue & Customs v Begum* [2010] EWHC 2186 (Ch) and the observations of David Richards J in that case that neither the claimant nor the court should be entitled to control the defendant's choice of solicitors or counsel and the payment of their proper costs or the way in which the case is handled by them. Mr Cohen did not disagree with the accuracy of the statement but reminded me that the first hurdle which must be overcome by the Khans in this case is the burden of persuasion that they have no other sources of potential funding for legal representation. It is upon that first question that Mr Cohen focussed his submissions.

Submissions

14. The starting point for my analysis is the question of whether Mr and Mrs Khan have discharged the burden of persuasion that they have no alternative sources of potential funding for legal representation.
15. In this context, Mr Cohen drew my attention to a number of anomalies and deficiencies in the evidence before me concerning alternative sources of income. For example, in his witness

statement of 12 June 2020 Mr Brett refers to Mr Khan having had the benefit of loans for the purpose of funding legal fees from “family members.” Mr Cohen makes the obvious point that this means that more than one family member must have come to Mr Khan’s financial assistance. In his witness statement of 2 July 2020 however Mr Khan refers to only one family member having made such a contribution, that person being his father in law who, in four instalments, had paid £13,100 towards Mr Brett’s fees. Further, neither Mr Brett nor Mr Khan make any reference to any request for further funding having been made of Mr Khan’s father in law nor otherwise address whether either his father in law or any other family member would be prepared to fund the legal representation by way of a further loan. Mrs Khan’s statement does not help. Although she also refers to her father having made a substantial contribution to the legal bill by way of a loan, she does not state, one way or the other, whether she has sought a further loan from her father and/or whether he might have the means to provide such a loan.

16. Mr Cohen also relies upon a curious statement contained in Mr Brett’s skeleton argument where he refers to “*Mrs Khan purchasing Mr Khan’s share of the matrimonial home*” as one possible solution to the current funding difficulties. However, Mrs Khan’s statement confirms that she appears to have no liquid capital other than her salary from her work with Virgin Media (£2,004 net per month). Although in due course Mrs Khan will have access to a substantial pension fund, there has never been any suggestion that this fund is, or could be, accessible now. As Mr Cohen observed, the possibility of her buying out her husband’s share of the matrimonial home therefore only begs the question of the source of her financial means to take such a step.
17. In addition to the deficiencies in the evidence concerning alternative sources of income, Mr Cohen also submits that Mr and Khan have generally failed to discharge the obligation upon them to place their financial circumstances fairly and squarely before the Court. He submits that the evidence deployed concerning the valuation of the various assets is vague, unsatisfactory and inconsistent. Mr Khan has not provided independent third-party valuations for any of the three assets: all valuations come from Mr Khan himself from his telephone calls or internet research. As Mr Cohen puts it, the only one fact upon which the Court can place any confidence is that the sale of the watch and car would not generate a sufficient sum to fund legal representation (even for the committal hearing) and that without the sale of the

property (which may take months) Mr Khan will be no further forward.

18. Mr Cohen also points out that non means tested public funding is available for Mr Khan for the forthcoming committal application. Mr Brett became aware of the relevant guidance only recently. But, submits Mr Cohen, such information as there is concerning steps taken by Mr Khan to obtain public funding and a solicitor prepared to undertake the case on this basis (which is contained in Mr Brett's skeleton argument) is limited to a statement that "*Mr Khan has telephoned a number of firms, none of whom were prepared to take on the case. Bark & Co indicated to Mr Khan that they would deal with the case on legal aid but only on the condition that he transferred the civil case to that firm as well.*" In a footnote to the skeleton, Mr Brett also reports that that firm had informed Mr Khan that his committal case would only be dealt with by a trainee solicitor. Mr Cohen submits that this information simply begs a series of further questions concerning the firms which were approached and what they were told and what, exactly, their responses were.
19. Mr Brett made a number of clear points. He drew my attention to the delay in this application due to the unreasonable refusal by NECL to agree to the sale of the assets. He further submitted that Mr Cohen had overstated the weight of the burden of persuasion and that I should be satisfied from the material before the Court at the time when the freezing injunction was made augmented by the further evidence from Mr Khan and his wife that there are no other sources of income; that I should bear in mind that the Claimant has no has no proprietary right over the assets which are frozen; that the freezing order provides for the payment of reasonable legal expenses; that there is no urgency in the committal hearing taking place, particularly given that the case management hearing in the underlying action is not due to take place until January 2021; that Mr Khan should not be forced to rely upon legal aid given that there are assets which can be sold to fund private representation and Mr Khan is anxious that he should remain instructed which would not be possible if public funding were to be relied upon.

Decision

20. Having considered the material before me, including the witness statements and the information provided in Mr Brett's skeleton argument and in his submissions, I have no doubt in concluding that Mr and Mrs Khan have failed to discharge the burden of persuasion that

they have no alternative sources of funding. I take into account that it is not a burden which requires the Khans to establish the absence of alternative assets on the balance of probability; nor do I fail to recognise the practical difficulties associated with proving a negative. Even with those points firmly in mind, the Khan's evidence is hopelessly deficient. I do not accept Mr Brett's submission that it should be clear from the terms of the freezing order itself that no other sources of income are available, nor that Mr Cohen has overstated the weight of the burden which Mr and Mrs Khan must discharge. Not only does the evidence and information available fail to persuade me that there are no alternative sources of funding, but in fact it suggests that there is a real prospect of alternative funding, either from a family member, or from family members, in particular, from Mrs Khan herself. After all, if she has the means to purchase his share in the family home (either from her own assets or with the assistance of a further loan from her father) then it follows that she may well be able to finance Mr Khan's representation (and indeed her own).

21. This application therefore falls at the first hurdle. I have not had to bring to the factual inquiry the healthy scepticism referred to by Males J in *Tidewater*. I have decided the issue on a simple and short analysis of the evidence and information presented. Mr and Mrs Khan have failed to adduce credible evidence (or indeed any evidence) that there are no others who may be willing to continue to provide financial assistance. There is information before me that Mrs Khan may have access to a fund which could be used to defray the cost of legal advice and representation.

22. However, I also record that I accept Mr Cohen's submission that the evidence more generally is not cogent. By way of example only, there is no reliable third-party evidence of valuation of the assets: all of the information on values comes via Mr Khan (having looked in Auto Trader or similar or on the internet). The information concerning the extent of the debt secured against the watch has shifted between 4 May 2020 and 29 June 2020 from £11,500 to £3,000. At best, this all suggests a cavalier approach to the application. At worst, a distinct lack of frankness. I also bear in mind that if the application were to be granted then it would inevitably lead to a delay in the committal proceedings of many months whilst the property is sold. Although the application make no reference to the length of the effective stay on proceedings sought, Mr Brett indicated to me that in the first instance it would be three months with a view to the Court being updated on the position at that stage. As he acknowledged,

the sale of the property within three months (unless it was at a “knock-down” price) is unlikely. Even if Mr and Mrs Khan had demonstrated the absence of alternative assets then for the reasons set out above this may be one of those “exceptional cases” referred to by Males J when I may not have, in the interests of justice, granted the application in any event. I need express no final view on that issue however given that my finding on the availability of alternative funding is dispositive of the application,

23. I therefore dismiss this application for permission to sell the three assets. Further, I dismiss the application to adjourn the committal proceedings listed for 24 July 2020. I do not accept that there is no urgency to the proceedings. HHJ Dight listed the hearing at relatively short notice, no doubt recognising that such proceedings should always be dealt with swiftly and urgently: see *Barnet London Borough Council v Hurst: Practice Note* [2002] EWCA Civ 1009. If private funding cannot be obtained for the purpose of representation at that hearing for any reason, then Mr Khan is entitled to public funding and I expect him to make strenuous attempts to obtain representation from one of the excellent firms who undertake publicly funded committal work. It will be a matter for the judge hearing the committal application on 24 July 2020 to case manage that hearing bearing in mind Mr Khan’s delay in complying with Judge Dight’s directions.