Neutral Citation Number: [2021] EWHC 1304 (QB)

Case No: QB-2021-001552

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

The Royal Courts of Justice
Strand
London
WC2A 2LL

BEFORE:

THE HONOURABLE MRS JUSTICE TIPPLES

B E T W E E N:

BAY MINING CONSULTANTS LIMITED **CLAIMANT**

- and -

(1) PANKIM KUMAR SHANKERSAI PATEL
(2) PRASLIN PICTURES LIMITED
(3) **DAWN ELIZABETH SHEPPARD** **DEFENDANTS**

Legal Representation
Mr Stephen Hackett (Counsel) on behalf of the Claimant
Mr Patrick Harty (Counsel) on behalf of the First and Third Defendants
The Second Defendant did not appear and was not represented

Judgment

Judgment date: 30 April 2021
(start and end times cannot be noted due to audio format)

Reporting Restrictions Applied: No

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Number of folios in transcript 44
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The Honourable Mrs Justice Tipples:

1. This is an application by a company called Bay Mining Consultants Limited for an interim injunction against the First and Third Defendants, Pankim Kumar Shankersai Patel and Dawn Elizabeth Sheppard. No relief is sought against the Second Defendant, Praslin Pictures Limited.

2. On 26 April 2021 the Claimant issued the claim form. The brief details of claim identify the claim in these terms, first a claim to recover money of the order of £3,000,000 held by the First and Third Defendants on a bare trust for the benefit of the Claimant's predecessor in title and property worth in the region £3,000,000 representing other trust money. Secondly, a claim to enforce loan contracts in the amount of £5,658,916 against the Second Defendant. The Claimant says that it expects to recover more than £100,000 and the total amount claimed in £8,658,916.

3. The statement of truth on the claim form is signed by Mark Barry Slater and that was signed on 26 April 2021. Mr Slater is identified as being a director of the Claimant and he identifies the Claimant's legal representative as Griffin Law Limited.

4. The application notice was also issued on 26 April 2021 by Griffin Law Limited and the order sought from the Court is identified in these terms:

> **"An interim injunction ordering disclosure from the First and Third Defendants and restraining the First Defendant from disposing of certain assets"**

The time estimate for the hearing is identified as an hour and thirty minutes, it is said the hearing needs to be dealt with by a High Court Judge and the information being relied on is said to be in the attached affidavit. The draft order provided with the application notice bears no relation to the standard forms for freezing injunctions set out in CPR Practice Direction 25A.

5. The application is supported by the affidavit of Mark Barry Slater dated also 26 April 2021 which runs to some 12 pages and is accompanied by two exhibits MBS1 and MBS2. Mr Slater starts his affidavit by saying:

> **"I am a director of the Claimant and I am duly authorised to make this affidavit on its behalf. The Claimant is an assignee of a Belize company called MSL Services Limited ("MSL") as discussed in greater detail below. "**

6. There are also particulars of claim which are signed and dated by Mr Slater on 26 April 2021. These are a curious document because they contain no prayer for relief and

during the course of the hearing I asked Mr Hackett, counsel for the Claimant, who prepared them. He said he prepared them, although he not has signed them in the customary way.

7. The application for an injunction was issued and made returnable in court 37, the applications court in the Queen Bench Division, as I have already said, with a time estimate of one and a half hours. It was allocated to me to deal with so that the court 37 judge could deal with other matters today. I had the opportunity to read the papers with some care yesterday. Having done so it struck me that there were a number of immediate problems with the Claimant's application.

8. First of all, service on the First and Third Defendants. Second, the basis of the Claimant's cause of action against the First and Third Defendants for the purpose of seeking orders for disclosure and a freezing injunction. Third, the lack of evidence to support the cross undertaking in damages.

9. At the hearing today the Claimant has been represented by Mr Stephen Hackett of counsel and the First and Third Defendants have been represented by Mr Patrick Harty of counsel. The Claimant's skeleton argument was prepared earlier in the week and is undated. The Defendant's skeleton argument was served this morning and sets out detailed reasons why the Claimant's application should be dismissed. It has provided real assistance to the Court in identifying the problems with the Claimant's application. It also makes a number of points which I identified myself as problems when I was considering the papers yesterday without the benefit of Mr Harty's skeleton.

10. I am going to focus on the main issues in this judgment. The fact is that there are a number of other issues as well, but it seems to me that for the purposes of today's hearing I do not need to descend into detail in respect of all of them.

11. Taking first of all service. The Claimant's evidence of service is contained in the first witness statement of Neil Kelley dated 28 April 2021. Mr Kelley is a solicitor and director of Griffin Law Limited, 60 Churchill Square, West Malling, Kent. That evidence purports to explain the basis upon which the First and Third Defendants have been served. At paragraph 6 of Mr Kelley's witness statement, it explains that on 26 April an email was sent by Nicola Potter, of Griffin Law, to the Defendants using an email address. That email attaches the claim form, particulars of claim, application, supporting affidavit, exhibits, draft order and covering letter and then asserts by this method the proceedings and application were brought to the attention of the Defendants at the earliest possible time. Mr Kelley's statement does not identify the time at which the documents were emailed to the Defendants.

12. Secondly, the witness statement goes on to explain the steps taken by the process server on 27 April 2021 to serve the First and Third Defendants at an address in Epping. Mr Hackett's skeleton argument at paragraph five says this in relation to service:

> **"The claim and the application was emailed to the First Defendant on Monday 26 April, the Claimant's position is that the First and Third Defendants have accordingly had three clear days' notice of the application. The application was also delivered to the Old Vicarage the next day where it was handed to the First Defendant personally and the Third Defendant was stated also to be present, see the evidence of the process service."**

Mr Hackett is therefore clearly informing the Court that the appropriate notice of this application had been given to the Defendants.

13. Mr Hackett's skeleton argument fails to direct the Court to any of the provisions of the Civil Procedure Rules in relation to service by email. If he had done so it would have been plain that the emails sent by Mr Kelley's colleague at Griffin Law to the Defendants on Monday 26 April was ineffective to effect service of the application on the First and Third Defendants by email and the assertion set out at paragraph five of Mr Hackett's skeleton argument is simply wrong. Further, the Defendants have not had three clear days' notice of the application that may have been served on 27 April, which is Tuesday of this week, but whether service on that occasion was effective is not clear on the evidence before me. It is therefore abundantly clear that an application returnable on 30 April, which is today, was on short notice to the Defendants and the application notice contains no application for an abridgement of time or any evidence in support of such an application for an abridgement. The information in paragraph 5 of Mr Hackett's skeleton argument is misleading.

14. Further, and in any event, any application of this nature requires the applicant and his legal representatives to comply with the obligations of full and frank disclosure. There is no section of Mr Hackett's skeleton argument which deals with this and paragraph 5 of his skeleton argument singularly fails to give the Court a true and accurate picture in relation to the service of the application. As is well known, a busy judge in court 37 should be able to rely on an advocate who appears before him or her, particularly when the Defendant has had inadequate notice of an application. Their job as legal representatives is to put all facts and matters before the Court fairly. It is obvious to me that that has not happened in this case in relation to the question of service.

15. Second, I now turn to the cause of action. The Claimant's case is based on an alleged assignment from a Belize company to it, said to have been made by an email dated 23 April 2021, which is last Friday. The Claimant says this amounts to an assignment of an equitable interest under a trust and on that basis the Claimant has standing to pursue the First and Third Defendants and seek injunctive relief. There are, it seems to me, a myriad of points that could be made about the alleged assignment, which is at page 85 of exhibit MBS2 to Mr Slater's witness statement.

16. However, for present purposes it is sufficient to rely on one. The document does not comply with Section 53(1)(c) of the Law of Property Act 1925 and therefore is incapable of disposing of any interest under a trust by MSL Services Limited to the Claimant. This is because it is not signed in writing by the assignor, by MSL Services Limited.

17. When I raised this point with Mr Hackett he was unable to provide any answer to my question or any explanation as to how this could possibly comply with Section 53(1)(c) of the Law of Property Act 1925. Further, even if that document was sufficient to assign any interest to the Claimant, the assignor, MSL Services Limited, should, it seems to me, also be a named as a claimant in this action. However, that is not a point that Mr Hackett has considered.

18. Other points on this document at page 85 of exhibit MBS2 include questions as to what it is actually purporting to assign. In any event in the light of Section 53(1)(c) of the Law of Property Act 1925 Act I do not see that the Claimant has any claim against the First and Third Defendants which could form the basis for the injunctive relief now sought.

19. Third, dealing with the cross undertaking and damages. Assuming I am wrong about my conclusion in relation to the cause of action or my analysis of the legal position, I asked Mr Hackett to direct me to the evidence in support of a cross undertaking in damages. He responded first of all by saying that his client had not agreed to fortify the cross undertaking. That of course is not the point. There is no evidence whatsoever in the papers before me or filed in support of this application to support a cross undertaking in damages. No financial information has been provided about the Claimant at all. There is no basis that the Court will grant any relief sought without such a cross undertaking together with evidence to show that that cross undertaking is meaningful. In my view the Claimant's application for injunctive relief against the First and Third Defendants is hopeless and it is dismissed. Further, I certify the application as being totally without merit.

20. I now deal with the question of costs. The Defendants, represented by Mr Harty, have asked for the Claimant to pay their cost of an occasion by this application to be assessed on the indemnity basis. I have not heard submissions yet from Mr Hackett on cost and it is appropriate I pause now to do so.

(proceedings continue)

21. In relation to the question of cost the Claimant does not oppose the Defendants' application for costs in the light of its application being unsuccessful. I therefore order the Claimant to pay the First and Third Defendants' costs of the application for an injunction dated 26 April 2021.

(proceedings continue)

22. In relation to the question of costs, Mr Harty made an application for costs to be assessed on the indemnity basis. I then enquired of counsel whether a costs schedule had been prepared by the Defendants and one has been prepared. That has just been given to Mr Hackett. Those costs are comparatively modest compared to costs incurred by the Claimant. Nevertheless, it is fair to say of course the Defendants have only been recently instructed.

23. However, I have been greatly assisted today by the attendance of the Defendants at court with their legal representatives. The Defendants are seeking summary assessment, in those circumstances it is not strictly speaking necessary to identify whether costs should be assessed on the standard or indemnity basis. However, to the extent it is relevant, indemnity basis means that on an assessment the Court, if there is any doubt, errs in favour of the receiving party. I am quite satisfied that this is a case where the circumstances do take this matter "outside of the norm" and on looking at the Defendants' cost schedule it seems to me that they should be paid in full by the Claimant. They do not strike me as being in any way unreasonable. I therefore order the Claimant to pay the Defendants' costs in the sum of £14,508 by 4pm on Friday 14 May 2021.

(proceedings continue)

24. The next thing I have to consider are two issues. One is what should happen to this claim and secondly, whether or not the Court should make a Civil Restraint Order.

25. In terms of what should happen to this claim, I am concerned having looked at the papers in some detail yesterday as to whether there is a cause of action at all against any of these Defendants. The Court has power under CPR Part 3.4 (2)(a) to strike out a statement of case if it appears to the court that the statement of case discloses no reasonable grounds for bringing the claim. The court can make an order of its own initiative under CPR Part 3.3.

26. I am prepared to make an order of my own initiative today without giving the Claimant time to deal more fully with the issues that I have raised. In those circumstances I am going to adjourn this matter until 10 o'clock on Friday 14 May 2021, in order to give the opportunity to the Claimant to show cause as to why this claim should not be struck out.

27. That means that if the Claimant wishes to make any application to amend, it can do so and make it returnable at that hearing. If the Claimant does not make any such application it can argue whatever points it thinks fit on that occasion. Likewise if the Defendants maintain this case should be struck out they can make any application they wish to strike the matter out returnable on that date as well.

28. There is also an issue about which is the correct division for the hearing of this claim. The allegations made by the Claimant concern in essence issues of trusts. Having looked at the claim I am concerned it is not a matter to be dealt with by the Queen's Bench Division. However, having considered the matter myself, I am content to continue to deal with the matter until Friday 14 May but it may be, depending on the outcome of that hearing, that if the matter is to proceed (about which I express no view) that it should be transferred to the Chancery Division in accordance with the provisions of transfer in CPR Part 30.

29. If the Court dismisses an application and it considers it totally without merit the court must, at the same time, consider whether it is appropriate to make a civil restraint order (CPR Part 23.12(b)). I do not have a sufficient information before me to decide whether or not a Civil Restraint Order is appropriate. I am aware of the case law which make it clear that it is not possible to make a CRO unless there are at least two orders which have been certified as totally without merit. I do not know whether that is the case, it may well not be the case. In those circumstances I will adjourn consideration of whether or not a Civil Restraint Order is appropriate, again, until 10am on Friday 14 May 2021, so that I can consider the court file.

30. In dealing with that, I am concerned by the issues raised in Mr Harty's skeleton argument concerning Mr Baxendale-Walter, Walker, who is clearly involved in the background to this case, if not the person who is driving it. Mr Baxendale-Walker is of course not represented before me today but it is clear from what I have been told by Mr Hackett of counsel that the Claimant's solicitors are in touch with Mr Baxendale-

Walker and have his email address. I note that Mr Baxendale-Walker was subject to a civil restraint order made by Henry Carr J in 2018.

31. I therefore direct that the Claimant's solicitors must serve the order I make today on Mr Baxendale-Walker by sending it by email to him at the Tower Cross address which is set out at page 85 of exhibit MBS2, and in any other way which they are aware of his address. That of course is so that Mr Baxendale-Walker has the opportunity to attend and be represented at the hearing on 14 May.

32. Mr Slater, who is the deponent to the affidavit, and a director of Bay Mining Consultants should also have the opportunity attend and be represented at the hearing on 14 May 2021.
