IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

CAUSE NO: FSD 227 OF 2018 (IKJ)

BETWEEN:

FORTUNATE DRIFT LIMITED

Plaintiff

AND

CANTERBURY SECURITIES, LTD.

Defendant

IN CHAMBERS

Appearances:

Ms Katie Pearson, Claritas Legal Limited, for the Plaintiff

Mr Ben Tonner KC and Ms Sally Bowler, McGrath Tonner, for the Defendant

Before: The Hon. Justice Kawaley

Heard: On the papers

Ruling Delivered: 25 September 2023

INDEX

Application to vary inter partes order-jurisdiction-extension of time-unless order-Grand Court Rules Order 3 rule 5

RULING

Background

1. The Plaintiff issued a Summons dated 25 August 2023 seeking an Order in the following principal terms:

   > "*1. Within 3 days of this Order being made the Defendant shall pay the sum of US$15,801,626.72 (being the value of the Treasury Bill) into an interest-bearing bank account held with a first-class bank in the Cayman Islands in the name of McGrath Tonner (the Frozen Sum).*"

2. That relief was sought because, while contesting an application to freeze the Treasury Bill the Defendant indicated it would hold as security for the Plaintiff's Judgment dated 17 August 2023 herein (which was granted on 17 August 2023-the "Further Freezing Order"), the Defendant sold that asset and replaced it with a less liquid asset of uncertain value. The primary relief sought in relation to the Plaintiff's 25 August 2023 Summons was, unsurprisingly, granted on 7 September 2023 (the "Restraining Order"). On any objective analysis of the history of the Defendant's response to the earlier 16 June 2023 Information Order, the Plaintiff's 25 August 2023 Summons had strong prospects of success. In essence, between 16 June 2023 and 7 September 2023, the Defendant had failed without any reasonable explanation to comply with the Information Order and had invited the Court to modify the terms of the Order which had been made.

3. The application for the Restraining Order was only opposed on the grounds that it ought not to be granted at all; no challenge was made to the reasonableness of the proposed 3 day time limit for compliance at all. It is entirely understandable that the precise parameters of the time limit were overlooked by counsel (as it was by the Court), bearing in mind that the application was dealt with on the papers. I would have raised the issue of time for compliance at an oral hearing because in addition to granting an Order in terms of paragraph 1 of the 25 August 2023 Summons, the following Order was also made:

"*5… The Defendant is permitted to sell any assets which replaced the Treasury Bill in order to provide the Frozen Sum but is otherwise not permitted to deal with those assets in any way inconsistent with the terms of the 17 August 2023 Order.*"

4. In granting the Restraining Order, I found that I was required to assume (1) that the Canadian Escrow funds were not in an account under the Defendant's sole control and (2) that the Restraining Order was necessary because the Preference Shares which were said to have replaced the Treasury Bill were less easily liquidated than that asset. It logically followed that the Defendant should be granted a reasonable amount of time to liquidate the assets it was holding in compliance with the Further Freezing Order in order to comply with the Restraining Order. These were the proceeds of sale of a Treasury Bill worth US$15 million.

5. It was against this background that the Defendant issued a Summons dated 12 September 2023 (the "Defendant's Variation Summons").

The Defendant's Variation Summons

6. The Defendant's Variation Summons sought to vary the Restraining Order in the following most significant respects:

"*1. Within 14 days of this Order being made the Defendant shall transfer the legal title in the Class B Preferred Shares (as defined in the Ninth Affidavit of Erin Winczura) ('the Shares') to McGrath Tonner attorneys.*

2. Within 24 hours of legal title in the Shares being transferred by the Defendant to McGrath Tonner attorneys, the Defendant shall provide the Plaintiff with a screenshot or certificate confirming that the registered custodian of the Shares is a Class A Cayman Islands bank. That screenshot or certificate shall reveal the name and address of the bank as well as any account number to which the Shares are held or registered, and their current market value…"

7. This was, quite patently, in substance an application inviting the Court to effectively set aside the Restraining Order, granted following a contested hearing, and make an entirely different Order. Paragraph 2 of the Summons sought an extension of time for complying with the Restraining Order until the determination of the Summons or further Order of the Court.

8. The Summons was supported by the Tenth Winczura Affidavit. This advanced a coherent account of why it would be commercially impossible to sell the assets underlying the Class B Preference Shares within the time fixed for so doing by the Restraining Order. However, rather than proposing an appropriate extension of time, the deponent proposed that "*the order be varied so as to permit the shares, rather than the cash, to be transferred so as to afford Canterbury the opportunity to comply with the spirit of the Restraining Order whilst preserving the value of the assets.*" I communicated the following initial directions via email through my Personal Assistant on 18 September 2023:

> "*1. The Judge grants an extension of time for compliance with the Restraining Order until determination of the 12 September 2023 Summons or further Order.*
>
> *2. His provisional view is that an application to vary the Order reached following an inter partes hearing can only validly be advanced based on a material change of circumstances. No such change of circumstances appears to have occurred. The variation application appears liable to be summarily dismissed.*
>
> *3. On the other hand, the Court has a more generous discretion to extend the time for compliance with the Restraining Order according to its existing terms under GCR Order 3 rule 5, on a conditional or unconditional basis. The Judge's provisional view is that an application to extend the time for compliance to facilitate a sale of the underlying assets or a short-term borrowing against the underlying assets could properly be favourably considered by the Court on pragmatic grounds if the extension sought was appropriately short.*
>
> *4. The Judge accordingly invites the parties to seek to agree the terms of an extension of time for compliance or, in default of agreement, to formulate and forward competing proposals to the Court by close of business 20 September 2023.*"

9. The Defendant steadfastly determined to proceed with its application to vary the Restraining Order. On 20 September 2023 it filed its 'Defence Submission on Court's Preliminary View' and its proposed draft Order; the Plaintiff filed its Written Submissions and proposed form of Order, which sought compliance within 3 days in default of which the Defendant would be debarred from further participation in these proceeding. The following day, the parties confirmed they were content for the Court to determine the Defendant's Summons on the papers.

Jurisdiction to vary an inter partes order

10. The Defendant's Submission primarily addressed why its variation proposal would be in the Plaintiff's best commercial interest, pivotally that a forced sale would reduce the available assets against which it could enforce its Judgment. The jurisdiction question raised by the Court was dealt with summarily in the following terms:

> "*16.Canterbury notes the Court's preliminary view that an order will not ordinarily be revisited without a change in circumstances, but it is further submitted that such a rule of practice should be an agent of justice, not an impediment to it. Canterbury's variation proposal is fair and reasonable; it guarantees the preservation of value, rather than risking the destruction of it.*"

11. Mr Tonner KC's attractively expressed submission fails to engage directly with my provisional view on the jurisdiction to vary *inter partes* orders by misstating the provisional view expressed. I suggested that "*an application to vary the Order reached following an inter partes hearing* <u>*can only validly be advanced*</u> *based on a material change of circumstances*" [emphasis added]. However, this can fairly be viewed as a positive submission that the true legal position is that the Court can vary an *inter partes* order whenever it would further the ends of justice. I firmly reject that submission as an accurate formulation of the governing principles. However, I would in any event equally firmly reject the notion that the variation sought here would facilitate rather than impede the ends of justice.

12. In *ArcelorMittal North America Holdings Inc –v- Essar Global Holdings Limited* [2019(2) CILR 673], I described the applicable principles on setting aside or varying interim orders as follows:

> "*64 The plaintiff relied upon* Tibbles *v.* SIG plc *(8) as formulating the appropriate test for setting aside interim orders. There, the approach to setting aside interlocutory orders*

was expressed in broad terms in relation to the very broadly drafted CPR 3.1(7). The English jurisprudence on an initially problematic new rule is in general terms unhelpful in the Cayman Islands as it relates to a broad discretion 'to vary or revoke' orders which has no counterpart in this court's Rules. Nonetheless it is instructive (and in line with the approach of Smellie, J. (as he then was) in Kirkconnell *v.* Cook-Bodden *(3)) that Rix, L.J. noted in* Tibbles *([2012] 1 W.L.R. 2591, at para. 40):*

'40. The revisiting of orders is commonplace where the judge includes a 'Liberty to apply' in his order. That is no doubt an express recognition of the possible need to revisit an order in an ongoing situation: but the question may be raised whether it is indispensable."

65 In my judgment, this court has a flexible jurisdiction to vary interlocutory orders to respond to material changes of circumstances or misrepresentations (and possibly mistakes which cannot be cured under the slip rule as well), particularly in relation to what may broadly be termed 'case management orders' or 'procedural orders' but also in relation to 'continuing' orders which are made expressly or impliedly subject to 'liberty to apply.' Then Smellie, J.'s adoption of a more flexible approach to procedural orders in Kirkconnell *v.* Cook-Bodden*, in the pre-CPR era, may well to some extent have been consistent with existing practice; but it also anticipated future developments. The distinction between the reviewability of substantive and procedural orders has far greater import today when this court is positively required to 'further the overriding objective by actively managing proceedings' (GCR, preamble, para. 4.1). However, there is no correspondingly flexible jurisdiction to revisit the substantive merits of those parts of an interlocutory order which are neither procedural in nature nor expressly or impliedly subject to a liberty to apply clause. Exceptional circumstances would be required to justify revoking or setting aside an* inter partes *interlocutory order altogether in circumstances where it is not spent.*"

13. In that case, an application to set aside was refused. It is noteworthy that Sir Bernard Rix LJ (as he then was) in *Tibbles* v. *SIG plc* [2012] 1 W.L.R. 2591, at para. 40 regarded the inclusion of "*liberty to apply*" as an indicator that an interlocutory order might be more amenable to ongoing review. There is no such provision in the Restraining Order. More recently in *Re Global Cord Blood Corporation*, FSD 108/2021 (IKJ), Judgment dated 8 September 2023, I considered the jurisdiction to set aside or vary an *inter partes* interlocutory order after hearing full argument (at paragraphs

13-19). In that case I did revisit and substantially varied an interlocutory order made on an *inter partes* basis on the grounds that (a) certain evidence had been materially misstated and (b) there had been a material change of circumstances. The most pithy distillation of the relevant principles which I accepted in *Re Global Cord Blood* is that found in '*Gee on Injunctions*', 7th edition (at paragraph 21-059):

> "*Where there is an interim order made after a hearing on the merits inter partes, the court will not entertain an application to set aside that order or part of it or which is inconsistent with that order, unless there has been a material change of circumstances, or the judge on the original application had been misled in a material respect, or if there has been a manifest mistake, or the applicant becoming aware of facts which he did not know and could not reasonably have discovered at the time of the first hearing. This prevents relitigation of the same application.*" [Emphasis added]

14. I reaffirm these well settled principles. The Defendant's application to vary the Restraining Order by effectively setting aside its primary terms and replacing them with something entirely new must be refused because no recognised grounds for even entertaining the application have been made out. Without any suggestion of a material change of circumstances since 7 September 2023 nor any contention that the facts upon which the Plaintiff relied were materially misstated so that the Court was misled, the Defendant's application was based on the following broad argument:

> "*6. In these submissions, Canterbury will outline its reasons for believing that Canterbury's proposed variation achieves the Plaintiff's purported goal, whereas the Plaintiff's insistence on forcing a sale of the Class B Shares ('Shares') defeats that goal since it would serve to eviscerate the value of an asset against which it could otherwise enforce, should it prevail, later in these proceedings. This being the case, Canterbury has reason to be concerned that the Plaintiff's primary motivation is not to prevent dissipation of assets, but rather its focus is to debar Canterbury from advancing a positive case in the remainder of these proceedings*."

15. It is contended that the Plaintiff/Judgment Creditor will not benefit from the relief it seeks (cash security) if a forced sale is required so the relief is only being sought to prevent the Defendant from participating in the remainder of the proceedings (presumably through the debarring order the Plaintiff seeks). This argument is superficially appealing but does not withstand closer scrutiny. It is entirely plausible that the Plaintiff would like to proceed to the Relief Hearing without opposition

from the Defendant, due to it being held in contempt. It does seem somewhat odd that the Plaintiff is not at this stage positively seeking to ensure that a sale of the relevant assets maximises the cash returns, but the Defendant has declined to engage in discussions about what an appropriate sale period might be. But, on the assumption that a 'fire sale' had to be conducted for the Defendant to comply with the Order of this Court, the Defendant would not be debarred because it would have complied with this Court's Order. The only valid point which emerges from what appears to be a fundamentally sound commercial analysis is that the time for complying with the Order should be extended, a point to which I will return near the end of this Judgment.

16. Two further extracts from the Defendant's Submission help to illustrate how far the present application is from entering legally cognizable variation or set-aside territory:

> "*13.Canterbury would respectfully submit that the 7 September Order was not appropriate since Canterbury's actions in transferring the Treasury Bill into the Shares was not an act that was designed to, or had the effect of dissipating assets. Canterbury was entitled to swap one asset for another, in circumstances where there was no order prohibiting it from dealing with its own property, and where the draft order requested by FDL (since 9 August 2023) explicitly contemplated that Canterbury might do so and provided for such a scenario.*
>
> *14.It is Canterbury's position that there no act of dissipation that merited the 7 September Order being made. Canterbury is not attempting to go behind the 7 September Order, but it does submit that it is permissible and legitimate for Canterbury to propose a practical and reasonable alternative formulation of the 7 September Order that prevents dissipation of assets and allows Canterbury to give substantial compliance.*"

17. Two entirely inconsistent points are advanced: (1) "*the 7 September Order was not appropriate*"; and (2) "*Canterbury is not attempting to go behind the 7 September Order*". The 14 September 2023 Reasons for Decision explains why I considered it to be appropriate to grant the Restraining Order. The further case as to why the Order ought not to have been made does not establish or even suggest that I was fundamentally mistaken or misled in any material way. This is because:

(a) in the pre-judgment injunction context, "*dissipation means putting the assets out of reach of a judgment whether by concealment or transfer*"[1] ;

(b) the law only frowns on "*unjustified dissipation*"[2], and litigants are free to dispose of their property in the ordinary course of business unless restrained by the Court. However, disposing of a substantial liquid asset which has been offered as security for a pending judgment (1) on the eve of delivery of a final judgment and freezing order and (2) while contesting an application to freeze that specific asset could not be further removed from a transaction in the ordinary course of business and had the unarguable effect of putting that specific asset beyond the reach of the Further Freezing Order;

(c) any suggestion that substituting the Class B Shares for the Treasury Bill was not an act of dissipation in commercial terms borders on farcical since, by the Defendant's own account, the Treasury Bill was sold with little apparent difficulty for full value and the replacement assets cannot be easily sold;

(d) the law on interim injunctive relief would have to be rewritten if respondents to *inter partes* freezing applications were free to dispose of the assets sought to be frozen before the Court restrained them from doing so. The need for applicants to demonstrate a "risk of dissipation" necessarily assumes the hypothetical average respondent will not defeat the efficacy of an *ex parte* or *inter partes* order by disposing of any material assets before the inunction order is actually made.

18. I accordingly find that I have no jurisdiction to revisit the merits of the Restraining Order.

19. I now consider briefly the alternative case in the event that I am held to be wrong in my analysis of the jurisdictional position. If I had an unfettered discretion to revisit my decision to grant the Restraining Order in the interests of justice, I would summarily conclude that it is inconsistent with the interests of justice to reward a litigant which has abused the processes of the Court in the manner which has occurred in this case by granting them the very relief their abuse of process was clearly designed to achieve.

---

[1] Per Haddon-Cave LJ in *Lakatamia Shipping Company Limited-v-Morimoto* [2019] EWCA Civ 2203, at paragraph 34(1).

[2] Ibid, paragraph 34(7)

Appropriate form of Order

The main arguments and the issues

20. The Plaintiff submitted that, *inter alia*, "*CSL is in contempt of Court and must purge its contempt*". This and other submissions failed to take into account the extension of time which I granted on 15 September 2023 and was possibly drafted before then. In response to the Court's provisional views that an extension of time for compliance should be given, Ms Pearson submitted, *inter alia*:

    (1) any extension of time should be short (3 days) since the Defendant has represented to the Court that it has sufficient funds at Canadian Escrow to make the cash payment;

    (2) there was no sufficient evidence before the Court that a sale would adversely affect the share price;

    (3) the Defendant was likely simply advancing a strategy of delay as was pursued in relation to the Information Order;

    (4) a debarring order should be made preventing the Defendant from further participating in the proceedings unless and until it complies with the Restraining Order.

21. These were on any view 'hardball' submissions, although the most mild-mannered claimant's ire would be provoked by the Defendant's strategy of refusing to countenance that any application it makes might properly be refused. As regards the present application, the Defendant has sought a variation without proffering any alternative case on an extension of time should that application be refused steadfastly declining to accept the Court's invitation to make proposals as to an appropriate extension of time. Courts, however, are not easily discombobulated. Judges must strive to respond to inconvenient approaches to litigation with the equanimity of a 'Chatbot'.

22. The starting point, as often is the case, is the evidence. As regards the Plaintiff's two main factual bases for seeking a short extension of time:

    (1) I granted the Restraining Order based on the assumption that the Defendant did not in fact have access to the supposed Canadian Escrow funds. It would be inconsistent with the fundamental underpinning of the Order to assess the time for compliance with it on the contrary basis that the funds do in fact exist;

(2) in the 10th Winczura Affidavit, the following crucial averments are made: "*If that sale is forced to proceed urgently, Canterbury will be unable to realise a sale price anywhere close to the value of the frozen sum. Selling the Shares in circumstances amounting to a fire sale will result in substantial loss of value which will be to the significant detriment of the Defendant and the Plaintiff*" (paragraph 13). I granted the Restraining Order in part based on the premise that substituting the Shares for the Treasury Bill was a serious act of dissipation because it substituted what appeared to be an illiquid asset of uncertain value for a liquid asset of reliable value. The Defendant's latest evidence vindicates those findings and is (albeit without particulars of the underlying assets) consistent with common sense and the consensus of the experts at trial that a fire sale of the YRIV shares diminished their value. The Defendant's evidence does implicitly make the case for extending the time for compliance with the Restraining Order which it does not explicitly advance.

23. In light of these findings, it is immaterial what the motivations may be for the Defendant's advancing the Variation Summons in the way it has done. An extension of time is required, to maximise the return from the sale the Defendant needs to carry out in order to comply with the Restraining Order. The Defendant, perhaps because it has one eye on an appeal against the Restraining Order, has chosen not to assist the Court to fix a time which it will later be unable to characterise as unreasonable. This compels the Court to adopt a rough and ready approach, with one eye on the need to ensure reasonably prompt compliance with the Order and the other eye on the reality that the jurisdiction to extend time under GCR Order 3 is a continuing one. GCR Order 3 rule 5 provides:

> "***Extension, etc. of time (O.3, r.5)***
> *5. (1) The Court may, on such terms as it thinks just, by order extend or abridge the period within which a person is required or authorised by these Rules, or by any judgment, order or direction, to do any act in any proceedings.*
> *(2) The Court may extend any such period as is referred to in paragraph (1) although the application for extension is not made until after the expiration of that period.*

The appropriate extension of time for compliance with the Restraining Order

24. In carrying out this assessment, I feel entitled to place some reliance on the evidence which emerged at trial. In the 17 August 2023 trial Judgment, I recorded the following findings about the Defendant's rushed sale of the YRIV shares:

> "*94…I accept Dr Keysser's opinion that the large number of shares sold by CSL contributed to some extent to the rapid drop which followed; even Mr Palzer agreed. But I also ultimately agree with Mr Palzer's assessment that there was a real risk to the collateral and that CSL executed its crisis-sale strategy well.*"

25. It accordingly seems reasonable to assume that, as Ms Winczura avers in her 10th Affidavit, a 'fire sale' of a large quantity of any stock would depress the value of that stock to some extent. However, it also seems reasonable to assume that the Defendant has the market skills required to effectively sell a substantial volume of shares reasonably quickly for a reasonable return. Doing my best without a firm evidential foundation, I find that 14 days from the date the Order giving effect to this Judgment is sealed is an appropriate time for compliance.

Unless Order

26. At first blush the Plaintiff's request for an 'unless order' appeared compelling. It is important to have regard to the usual practice in this regard. When is it appropriate to make an 'unless order'? In *Oak Cash & Carry-v- British Gas Trading Limited* [2016] EWCA Civ 153, Jackson LJ stated:

> "*38. An 'unless' order, however, does not stand on its own. The court usually only makes an unless order against a party which is already in breach. The unless order gives that party additional time for compliance with the original obligation and specifies an automatic sanction in default of compliance. It is not possible to look at an unless order in isolation. A party who fails to comply with an unless order is normally in breach of an original order or rule as well as the unless order.*"

27. The Restraining Order was granted on Thursday 7 September 2023 and sealed on the same date with a penal notice attached. It required compliance within "*3 days of this Order being made*" (paragraph 1). As the third day was a Sunday, compliance was required by Monday 11 September 2023. The Variation Summons dated 12 September 2023 (sealed on 13 September 2023) was filed

when the Defendant was in breach of the Restraining Order, but sought an extension of time for compliance until the determination of the Summons. The 10th Winczura Affidavit was sworn on 14 September 2023, and I granted the extension sought on the same date (15 September 2023) that the application was placed before me. This was, viewed in isolation, not a serious breach of the Order.

28. It is impossible not to take into account the Defendant's history of non-compliance with previous Orders, and I have no doubt that these are matters which can potentially be taken into account. This wider context clearly warrants an 'unless order'.

29. However, the form of forbearance order the Plaintiff seeks (debarring participation "*unless and until*" compliance occurs) would potentially disrupt the procedural schedule for the Relief Hearing for no corresponding procedural benefit. It would prevent the Defendant from participating during a compliance period which could well end with compliance. The proposed wording may well have made sense if I had accepted the Plaintiff's far shorter compliance period of three days.

Conclusion

30. Subject to hearing counsel if required, I grant an Order in substantially the following terms with a penal notice attached:

> "*1. Paragraph 1 of the Restraining Order is amended so that the time for compliance by the Defendant is extended until 14 days from the date of this Order.*
>
> *2. All other terms of the Restraining Order remain in full force and effect.*
>
> *3. Unless the Defendant complies with the Restraining Order to the Court's satisfaction the Defendant shall be debarred from filing any further Summonses, applications or evidence in these proceedings until further Order.*
>
> *4. The 12 September Summons is otherwise dismissed.*

5. *For the avoidance of doubt, the costs of the present application shall be payable pursuant to paragraph 7 of the Restraining Order*."

____

THE HONOURABLE MR JUSTICE IAN RC KAWALEY
JUDGE OF THE GRAND COURT