TRANSCRIPT OF PROCEEDINGS

Ref. BL-2019-001664

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Rolls Building
Fetter Lane

Before MR JUSTICE MARCUS SMITH

IN THE MATTER OF

MOZAFARIAN JEWELLERS LLC (Claimant)

-v-

DESIGNED BY JOSH LTD (Defendant)

MR A BUTLER QC appeared on behalf of the Claimant
MR A CLUTTERBUCK QC appeared on behalf of the Defendant

JUDGMENT
25th SEPTEMBER 2019
(FOR APPROVAL)

WARNING: reporting restrictions may apply to the contents transcribed in this document, particularly if the case concerned a sexual offence or involved a child. Reporting restrictions prohibit the publication of the applicable information to the public or any section of the public, in writing, in a broadcast or by means of the internet, including social media. Anyone who receives a copy of this transcript is responsible in law for making sure that applicable restrictions are not breached. A person who breaches a reporting restriction is liable to a fine and/or imprisonment. For guidance on whether reporting restrictions apply, and to what information, ask at the court office or take legal advice.

MR JUSTICE MARCUS SMITH:

1. I have before me a dispute between Mozafarian Jewellers LLC as Claimant and Designed by Josh Limited as Defendant. The claim form in these proceedings has already been issued and was issued on the 10th of September 2019. The brief details of the claim seeking damages for breach of contract and procurement of breach of contract and/or declaratory relief and injunctive relief. Particulars of claim have been drafted and exist in draft form but have not yet been served. It is quite clear from the submissions that I have heard that these particulars of claim are a work in progress and it is fair to say that a significant part of the breach of contract cause of action that is advanced by Mozafarian Jewellers LLC has been expanded in the helpful written submissions that I received from their counsel, Mr Butler QC, earlier today.

2. I bear in mind that the lateness of this reformulation, whilst understandable given the fast moving nature of this case, is something that has affected Mr Clutterbuck who appeared for Designed by Josh Limited in his ability to respond. Mr Clutterbuck laboured under two disadvantages which I do consider it appropriate to bear into account in this application. First is the lateness in its own right; secondly, the fact that the point has been framed – and I mean this as no criticism – in a somewhat (inaudible) fashion, it appears, of argument in Mr Butler's written submissions rather than by way of a further evolved draft of the particulars of claim.

3. Be that as it may, the essence of the dispute between the parties is that in or about April 2019 Designed by Josh Limited ("the Defendant") approached Mozafarian Jewellers LLC ("the Claimant") with a view to a collaboration or a guide which was to be, or was at least to be described as the world's most expensive dress, and the object of the collaboration was that the Defendant's designer would design the dress and that the Claimant would supply and fit certain precious jewels to the bustier of the dress in accordance with that design.

4. There were, unsurprisingly, a number of initial discussions which arose between the parties, which proceeded positively. They proceeded sufficiently positively that a memorandum of understanding was signed which is not in itself a contract, but which indicated the line of thinking of both parties. There was at the end of the day no formal contract concluded, but I anticipate that there was a contract between the parties perceived on that basis simply because there was a significant part performance by the Defendant in

that the sum of no less than £1 million was paid by the Defendant to the Claimant, into its account with Mashreq Bank in Dubai.

5. Thereafter, I am sorry to say, things did not go well. There quite clearly has emerged a dispute between the parties, raising a number of significant and highly contentious factual issues. It would be entirely inappropriate for me to venture into any kind of articulation of those disputes; I do not need to do so for the purposes of this application. Suffice it to say that it is the Defendant's case that the Claimant acted in breach of the agreement between them and failed altogether to provide the parts of the dress that the Claimant was contracted to provide. So disappointing was the performance on the part of the Claimant that the contract had to be repudiated and a different jeweller instructed so that the dress could be paraded at the London Fashion Week that has just passed. That is, in a nutshell, the Defendant's case.

6. The Claimant's case, as one might expect, is the precise converse. The Claimant contends that the Defendant has made a series of unreasonable and rude demands of it. It has done its best to comply with those and has been performing the contract, according to it, properly and well, and has incurred significant expense in that regard, so what one has is effectively a claim which has been commenced by the Claimant against the Defendant for breach of contract and for damages and what one can anticipate is that there will be some counterclaim where the Defendant seeks recovery of some or all of the £1 million that was paid over. I articulate this by way of background and I hope that I have done so in neutral terms. That was certainly my intention and I have no desire to express one way or the other as regards the underlying dispute where right lies.

7. What has happened since the dispute emerged is that there has been placed on the account of the Claimant an informal freeze. First of all, I should be clear that when I refer to the account of the Claimant, that itself is a factual statement that has evolved over time. It appears that the Claimant has in fact at least two accounts, the account with Mashreq Bank and the account with another financial institution, containing admittedly a very small credit balance.

8. The account with Mashreq Bank might properly described as one account or three accounts. What is clear is that there are certainly three sub-accounts dealing with three different currencies but quite how the bank regards the operation of those accounts, whether they are seen as one or whether they are seen as three, is something on which I have insufficient evidence and which frankly, for the purposes of today's application, does

not matter. What does matter is that those accounts or that account, however one chooses to describe it, has been frozen.

9. Again, there has been significant development in the facts or evidence so far as that freeze is concerned. Initially it was said to me in evidence that the entire account was frozen in the sense that no payments could be made under any circumstances out of the account. It is now clear from the evidence that I have seen that the bank's position is that a freeze, such as it exists, is limited to the £1 million that was paid over by the Defendant to the Claimant.

10. I turn then to the hard question which is the nature of the freeze in question. There is no order, at least none that I am aware of, enjoining Mashreq from obeying its customer's payment instructions in relation to an account in credit, but the fact is that the bank is, in the limited way I have described, declining to execute those payments.

11. I have been shown the terms and the conditions of Mashreq Bank, in particular clause 19. That clause expressed the customer's, that is to say the Claimant's, agreement and acknowledgement that the bank has a right to restrict, curtail, suspend or cancel the operation of any and all accounts of the customer or the provision by the bank of any or all types of banking services and facilities to the customer, and/or to freeze or decline any amount of transfer the said account of the customer in its sole and unfettered discretion and without being obliged to give any prior notice or reason whatsoever if the bank has reasonable grounds to suspect that a transaction related to fraud and/or money laundering activity, including any (inaudible) from any party whatsoever, occurs or has occurred or if a customer breaches the bank's policy or for any other reason deemed by the bank in its unfettered sole discretion and unrestricted by the decision of the Governor of the Central Bank, the public prosecution, (inaudible) court. The clause goes on to say that:

> "The customer further agrees that in the exercise of such right the bank shall not incur any liability for any such costs, losses, damages … disruption or inconvenience which may be caused to the customer directly or indirectly."

It will readily be understood that this clause, acknowledging that this clause arising out of that relationship in a foreign jurisdiction, is very widely drafted in terms of the bank's ability to refuse to make payments.

12. Moving to an anterior point, I ask myself why is it that the Mashreq Bank has frozen the account in the manner that the Claimant says it has. The Claimant, in the evidence adduced by it, makes no bones about it. The Claimant says that the reason for the freezing is entirely due to the conduct of the Defendant, in that the Defendant has communicated to its paying bank, Santander, that there has been an irregular transaction that is independent of the £1 million and that Santander has inferentially communicated that on to Mashreq Bank. There is before me such evidence as the Claimant has been able to pull together as to what it believes the Defendant, through its officers and agents, has told the banks and also certain police forces. That evidence has given rise to this application which is, in short, an application for interlocutory relief regarding the freezing or unfreezing of the Mashreq Bank account.

13. What is sought in the draft order that is before me is three forms of relief. First, an order is sought that the Defendant shall forthwith supply the Claimant with information sought by it in an email from its solicitor regarding, first, the person at Kent Police to whom the Defendant has allegedly made complaint about the Claimant, or, if different, the person who has been given responsibility for investigating any such complaint, and secondly, the person at Santander Bank Plc to whom the Defendant has allegedly made complaint about the Claimant which has led to the blocking of the Claimant's bank account at Mashreq Bank, together with the name and contact details of any person at any other law enforcement agency to whom the Defendant has made a complaint about the Claimant, so what is sought, in short, here, is information regarding the complaints that it is said the Defendant has made to its bank and to other agencies. The second paragraph requires the Defendant forthwith to give the Claimant disclosure and inspection of any document relating to the complaint to any of the bodies identified in the first form of relief, so that is in parallel with the provision of information, it requires the provision of underlying documentation going to the same end. Then, third: "The Defendant shall forthwith use best endeavours to procure the lifting of the block on the bank account referred to in paragraph 1.2 above, including by giving written instructions to Santander Bank Plc to that effect. Such instructions to enclose a copy of this order and on giving such instructions shall furnish a copy thereof to the Claimant's solicitors". So here is an obligation on the part of the Defendant, so ordered, to use its best endeavours to cause the freeze to be lifted.

14. I will have to return to the form of relief that is sought, but I make at this early stage in my ruling two preliminary observations. First of all, all three forms of relief sought are

mandatory. These are not instances where it is sought to enjoin the Defendant from doing something, these are all instances where the Defendant is required to do something. It has rightly been pointed out that this court requires a higher degree of assurance in the case of mandatory injunctions than in the case of prohibitive injunctions where these are sought on an interlocutory basis.

15. The second point that I make by way of preliminary observation is that points 1 and 2, the provision of information as to whom complaint has been made and provision of underlying documentation in regard to such complaints are actually requests for disclosure or the provision of information on an interlocutory basis. There is therefore an overlap between this application which is for interlocutory relief pending trial and what might more naturally be said to be the nature of these applications, namely application for early, albeit not pre-issue, disclosure.

16. I turn then to the more specific causes of action that are alleged by the Claimant against the Defendant, which are said to give rise to the present applications as I have described them. The causes of action pleaded are as follows: First, it is said that there has been a procurement of a breach of contract by the Defendant. The contract, the breach of which has been procured, is the contract as between Mashreq Bank and the Claimant. I have some considerable difficulty with this plea. It seems to me that it is very difficult, aside from all of the other difficulties that exist in pleading this cause of action, to say that there has actually been a breach of contract on the part of Mashreq Bank that has been procured by the Defendant. I am going to make clear my assumptions in terms of what has been said to Mashreq by the defendant through Santander Bank because that, as it seems to me, is important to considering the question of serious arguability.

17. I have before me a detailed statement by a director of the Defendant, Joanna Birchjones. The statement is a detailed one running to some 61 paragraphs and a number of pages. Most of the statement describes in considerable and clear detail the reputation that the Defendant says it has in terms of design and the relations, and how those relations broke down, with the Claimant. This material goes on for a number of pages until one comes to the real essence of the dispute which is what happened to the Claimant's bank account, so we have a situation in paragraph 46 of this statement that the Defendant forms the view that the Claimant was not performing any part of the arrangement or would ever do so in time for the 14 September 2019 deadline which was the time of the fashion show. It goes on to say that it formed the view the Claimant's position was in effect a pretence

and it had no intention of producing the jewellery part of the dress. As a result, so it is said, a new design had to be constructed and a further payment of £1 million was made to the new jeweller.

18. Now, it seems to me on the evidence as it stands at the moment, this is not a case of trickery or fraud; the £1 million, it seems to me is very clear from the evidence was voluntarily paid over by the Defendant to the Claimant. It therefore seems to me that it is something of a stretch, to put it no higher than that, to say that this is a case of dishonesty. However, that is what the Defendant appears to have told its bank, Santander. I will read, as it is important that they go into the record, paragraphs 47 to 51 of the statement:

> "47. As stated the Defendant formed the view that it was in effect being cheated by the Claimant. It wanted and still wants its £1 million back.
> 48. On the basis that it considers that it was tricked into paying the £1 million, it reported the payment to its bank, Santander.
> 49. Santander suggested that we report the matter to Action Fraud, the centralised police fraud reporting service, which we did.
> 50. I know nothing about what steps Santander may have taken.
> 51. The Defendant has had no contact whatsoever with the Claimant's bank in the UAE, Mashreq Bank. (Inaudible) recover its £1 million still does."

19. This is a staccato explanation of what has gone on. On the one hand I can understand why such a staccato explanation has been given. Were the Defendant to stoop to detailed particularity, that would in effect give Mr Butler what is client is seeking without him necessarily succeeding on this application. On the other hand, it does seem to me that the statement at paragraph 48 – I will repeat it: "On the basis that it considered that it was tricked into paying the £1 million, it reported the payment to its bank, Santander" – is a statement that cannot, on the facts as I understand them to be and indeed as they appear from the defendant's own evidence, be something that is remotely sustainable. As I noted earlier on, the payment of £1 million occurred when relations were

still sweet as between the Claimant and the Defendant and to say that there was a trick inducing the payment of £1 million is entirely exaggeration and wrong.

20. The question then is whether this sort of communication, which I am prepared to treat as inaccurate, to Santander Bank, constitutes material sufficient to render the causes of action alleged by the Claimant to be sufficiently seriously arguable so as to satisfy the first stage of the American Cyanamid test. For the reasons that I gave it seems to me that it is not possible to say that there is a serious issue to be tried in relation to the procurement of a breach of contract plan. My reason for saying that is simply this. Even assuming that English law applies to the court of procuring a breach of contract, the terms of the contract between the Claimant and Mashreq Bank are such that the bank is, on the face of it, acting entirely properly, or at least acting entirely not in breach of contract, by refusing to make the payments. As I noted earlier, clause 19 of the contract is widely drawn, even to the extent that it makes reference to the bank acting reasonably, and it does so only in part of this clause. I do not consider that I can infer, even to the low standard of a serious issue to be tried, that Mashreq Bank has acted unreasonably. The fact is it will have received a communication from Santander Bank along the lines of what Santander was itself told by its client, and has acted, in response, accordingly. I do not consider that is seriously to be said that that is an unreasonable course of action. It may well be that the Defendant's communication to Santander was unreasonable, but that is an altogether different question.

21. The second cause of action relied on is one of malicious falsehood. There, as Mr Butler for the Claimant quite rightly says, the claim has not been pleaded and is only tentatively advanced because of the very high threshold that needs to be established in terms of the case that has to be advanced. I am prepared, for the sake of argument, to assume, given the findings that I have made in relation to the witness statement of Ms Birchjones, that it is possible properly to frame a plea of malicious falsehood, albeit that one has not so been framed to date. I am also prepared to find that there is on that matter a serious issue to be tried.

22. I turn to the third way in which the claim is put and that involves going back to the agreement that existed as between the Claimant and the Defendant. What Mr Butler says in his written submissions is that there was an express, alternatively an implied, term that the Defendant would not countermand or deprive the Claimant of the benefit of the £1 million payment that it had received. It is not possible to refer to any articulated form of pleading, but the point is clear. What is being said is that that which the Defendant

voluntarily gave – by "gave" I mean in confident expectation of a return, according to the memorandum of understanding – to the Claimant is something that could not properly be undone by subsequent actions by the Defendant, and that if such subsequent actions are undertaken that in itself constitutes a breach of contract. It seems to me that this too is a cause of action giving rise to a serious issue to be tried. I have reached that conclusion with a degree of hesitation.

23. The reason I reach that conclusion with a degree of hesitation is because it has not clearly been articulated before this court and Mr Clutterbuck has not has the opportunity to articulate in a greater detail his contention that such a cause of action is not simply not giving rise to a serious issue to be tried but is in fact unarguable. Had I been of the view that this was a case where the later stages of American Cyanamid were satisfied, then it seems to me the appropriate course would have been to adjourn yet again this application so that the matter could be pleaded out in greater detail and so that Mr Clutterbuck would have a chance to respond. However, as is well-known, the American Cyanamid test involves as a first step determining whether there is a serious issue to be tried.

24. Thereafter one must consider the question of whether damages, at the end of the day, will be an adequate recompense to the applicant seeking interlocutory relief and, as part of the balancing exercise on the other side, one must ask oneself that, if interim relief is granted the extent to which should it prove at trial that the injunction on an interim basis was wrongly granted, the respondent in the application will properly be compensated in damages pursuant to the undertaking to hold the respondent (inaudible) which almost every applicant on interim injunction is required to provide as a price for obtaining injunctive relief.

25. Here, as it seems to me, it is very difficult to discern a clear balance of convenience, if I may call it that, in favour of the Claimant. The reason I say that are several. First, although I accept that the freeze on the Mashreq account exists, I am not prepared to accept that the freeze is as prejudicial to the Claimant as has been suggested. The reason I say that is because the freeze, on the Claimant's own case, is a limited one, limited to the £1 million itself. Any balances over and above that amount will, on the evidence before me, be available to be paid away in the course of its business by the Claimant. Equally it is important to note that the Claimant has a second bank account which although it has a limited balance can, no doubt, be used to conduct the Claimant's business.

26. It did occur to me that the prejudice to the Claimant might be more extensive than this in that the Claimant would be deprived of the ability to use the £1 million that prima facie, given the agreement between the parties and the payment itself, it ought to have the use of. I am satisfied that that is not a prejudice in this case to the Claimant. The reason I say that is because the Claimant has made the open offer to transfer, if the Defendant will assist it in making the transfer, the £1 million into a solicitor's account in this jurisdiction, or indeed into court. It therefore follows that the evidence that the Claimant has adduced as to its financial standing is one that is highly credible because the Claimant is voluntarily agreeing to put beyond its immediate use this sum of money. That is a telling point on two levels. First, helpfully for the Claimant, it is telling to show that the Claimant is a bona fide business drawn into a dispute that it regrets but must fight. Unfortunately, the second point goes rather against the Claimant in that it shows that the £1 million frozen is not actually damaging the business of the Claimant because the Claimant has, as I have described, voluntarily offered to divest itself.

27. I am also not satisfied that the reputational risks of non-payment by Mashreq Bank are significant. The reasons I am not satisfied is because, as I have explained, the freeze by Mashreq Bank is limited and provided the account is operated in credit above £1 million, to use the sterling denomination, the business can function. Of course, the Claimant must ensure that the business operates in this way and that payments away are not made so as to reduce the balance, but that is something which any real and competently run business can achieve and it seems to me that any prejudice, if any, that arises out of this, is limited, if existing at all, so it seems to me that although I have considerable sympathy in the fact that through the back door the Claimant's ability to access its account has been restricted, the prejudice is by no means as great as has been contended before me today.

28. On the other hand, I must have regard to the prejudice against the Defendant were I to make the orders sought. I turn to the draft order setting out the orders sought. It will be recalled that there are three limbs to the order. First, the provision of information as to who has been contacted by the Defendant in regard to what I found on the material before me is an allegation of fraud or theft. Secondly, the disclosure and inspection of any documents relating to that. It seems to me that neither of these two forms of interlocutory relief can in any way be seen as having sufficient nexus to unfreezing the account. What they do do is they provide, if the documents go the way I am inferring they do, additional ammunition for the Claimant to (inaudible) its case against the Defendant. In short, I am

concluding that these two applications are actually applications which are final in nature, which go to disclosure and further particularisation of a claim, or a defence to a claim, rather than going to interlocutory relief of the sort before me now. It seems to me that I should not in any way pre-judge an application for disclosure (inaudible) but I should simply say that I am not prepared to entertain today an application for early disclosure, if I may call it that, when it is not properly framed. I say nothing about whether the court can or cannot make such an order in the future.

29. That means the third form of relief, namely that the Defendant shall use its best endeavours to procure the lifting of the block, including giving written instructions to Santander Bank Plc to that effect. I must say, I have considerable sympathy with the Claimant in regard to this third limb, but it seems to me that here too the balance of convenience is against the Claimant and in favour of the Defendant. The reason I say that is several. First, as I have indicated, this is a course of conduct which is not enjoining the Defendant but requiring it to do something. I appreciate that it is framed as a best endeavours obligation but nevertheless, given the way banks respond to allegations of theft or fraud, it seems to me that this is quite potentially requiring the Defendant to do something which it simply cannot deliver.

30. Equally, and this is no criticism of the drafting of the order, it seems to me that the nature of the mandatory obligation sought as against the Defendant is one that would be extremely hard for the court to police. We are here in the realms of Chinese whispers, where something that has been said by the Defendant to Santander and Santander has had something to Mashreq. It seems to me that the proper course is for the difficulty to be addressed at the other end, namely as against Mashreq Bank by the Claimant, and that it would be an imposition that this court should not venture into to require the Defendant to seek to rectify, by way of mandatory order, not voluntarily, that which has been put in play.

31. Those two points simply go to the third point which is that this court does need to be persuaded that the higher standard for a mandatory injunction must be faced. It was said by Mr Clutterbuck that I would have had to have a high degree of assurance as to success at trial in order to justify making an order which he characterised as a final order, now. I am not sure whether the characterisation of this as a final order is right but the point that this is a mandatory order that this court should scrutinise with particular care is correct. For all those reasons therefore, I also refuse to make the third form of order sought because

it seems to me that the prejudice to the Defendant outweighs the prejudice to the Claimant when one conducts the competing balancing exercise and American Cyanamid, so for those reasons I refuse the application that has been made.

We hereby certify that the above is an accurate and complete record of the proceedings or part thereof.