Neutral Citation Number: [2022] EWHC 878 (Ch)

Case No: CR-2021-BRS-000104

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BRISTOL
INSOLVENCY AND COMPANIES LIST (ChD)

Bristol Civil Justice Centre
2 Redcliff Street, Bristol, BS1 6GR

Date: 13 April 2022

Before :

HHJ PAUL MATTHEWS
(sitting as a Judge of the High Court)

- -

IN THE MATTER OF 99 HIPPOS LIMITED
AND IN THE MATTER OF THE COMPANIES ACT 2006

Between :

TOSI LIMITED	**Petitioner**
- and -	
1. 99 HIPPOS LIMITED	**Respondents**
2. EMMA LOUISE FAIRCLOUGH	

- -
- -

The Petitioner in person
JMW Solicitors Ltd for the **Respondents**

Application dealt with on paper

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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HHJ Paul Matthews :

Introduction

1. This is an application by notice, dated 22 March 2022, by the petitioner, for an order that the second respondent disclose statements of her personal bank accounts (which are identified) for the period "September 2021 to September 2022 inclusive" [sic]. This is stated to be sought in order to assist in the mediation process provided for in a directions order which I made on 22 February 2022. It arises in the context of an unfair prejudice petition in relation to the affairs of the first respondent, 99 Hippos Ltd ("the company"), presented on 12 November 2021.

2. The company was founded in 2013, with the petitioner then owning all the shares. The sole director of, and shareholder in the petitioner was and is Robert Tillett, who was originally the sole director of the company. In 2016, the petitioner transferred 50% of the shares in the company to the second respondent, who also became a director of the company. Mr Tillett and the second respondent were once in an intimate personal relationship until 2009, and subsequently a non-intimate friendship until 2020, when their relationship broke down. After the breakdown of their relationship, Mr Tillett and the second respondent entered into negotiations to separate their business interests, but these negotiations failed.

3. The second respondent pleads in her points of defence, filed on 24 December 2021, that during the negotiations the parties had effected a practical separation of their business interests. She says that this left her taking sole control of the company and Mr Tillett taking sole control of two other companies (Jusho and Finsbury), although both of them remained directors of all of the companies. The petitioner's reply, filed on 13 January 2022, accepts that the second respondent took over the day-to-day management of the company, and Mr Tillett the day-to-day management of the other companies, but denies that their business interests were separated. Both of them remained both directors and shareholders of all the companies.

Pre-action disclosure

4. Before the petition was presented, the petitioner had applied, by notice dated 8 July 2021, against the second respondent for an order for pre-action disclosure under CPR rule 31.16. The documents sought consisted of the company's bank statements of its accounts with AIB, and payroll records from September 2021 to June 2021. In fact, the payroll records had already been disclosed before the application. This application was originally listed before HHJ Russen QC on 2 August 2021. However, it was subsequently adjourned with the permission of the judge to 9 September 2021.

5. On that date, the judge heard and decided the application after hearing argument from both sides. The petitioner said it intended to bring a derivative claim against the second respondent, and the documents were needed for that purpose. The judge ordered the second respondent to disclose the company's bank statements sought. However, in view of the allegation made by the

second respondent that the petitioner would misuse the bank statements, the judge included a provision in the order that that

> "The documents so disclosed, pending any further order of the court, are only to be used the purposes of investigation, pursuing or compromising the anticipated derivative claim for the benefit of 99 Hippos Ltd".

The petition

6. However, the petitioner did not issue, or seek permission to continue, a derivative claim (under the Companies Act 2006, s 261). Instead, and as already stated, the present unfair prejudice petition was presented, under section 994 of the Companies Act 2006, on 12 November 2021. It alleges (amongst other things) that Mr Tillett has been excluded by the second respondent from any involvement with or access to company records, that the second respondent has been using the company's money to fund her dispute with him, and that the second respondent has incorporated a new company and has been passing the goodwill and reputation of the company to that new company. The documents disclosed in the pre-action disclosure application appear to be relied on in this petition.

7. At first sight, that seems to be a breach of the terms of the order of 9 September 2021. I note that in paragraph 20(6) of her points of defence, the second respondent specifically alleges such a breach. I further note that paragraph 40 of the petitioner's reply does not deny the use of the documents for the purposes of the petition, but seeks to mitigate the position by saying that the result would have been the same if the petitioner's intention had been to present an unfair prejudice petition.

8. Whether that would have been the case or not, I do not know, because I was not the judge concerned. A derivative claim vindicates the company's rights, whereas an unfair prejudice petition vindicates the shareholder's own rights. They are very different. But in any event that is not the point. The terms of the order are clear, and if the petitioner was properly advised it would have sought a variation of the order or the permission of the court before relying on the documents for the purposes of presenting the present petition. Yet, since no application has been made by the second respondent based on the allegation of a breach, I need not deal further with that at this stage.

9. On 18 November 2021, I gave standard directions for this petition. These did not include any direction as to disclosure. Instead, I adjourned the petition to 11 February 2022 for case management. On that date I gave further directions, including in relation to disclosure. Paragraph 9 of my order recorded the parties' agreement to search-based Extended Disclosure under CPR Practice Direction 51U, as set out in the Disclosure Review Document attached to the order. Paragraph 11 stated that the parties had permission to apply in respect of any further order relating to disclosure.

10. In addition, however, paragraph 3 of the order stayed the litigation until 11 May 2022 for ADR. At the same time, paragraph 4 provided that the parties should be at liberty during the stay to apply for an order for limited disclosure

in respect of financial information for the purposes of that ADR. It is pursuant to paragraph 4 that this application is brought by the petitioner. Because an order has already been made for Extended Disclosure, but there is no allegation of any breach of that order (so that paragraph 17 of the Practice Direction might be engaged), what is being sought now is an additional order for disclosure of specific documents. This falls under paragraph 18 of the Practice Direction.

11. Paragraph 18 reads as follows, so far as relevant:

> **"18.1** The court may at any stage make an order that varies an order for Extended Disclosure. This includes making an additional order for disclosure of specific documents or narrow classes of documents relating to a particular Issue for Disclosure.
>
> **18.2** The party applying for an order under paragraph 18.1 must satisfy the court that varying the original order for Extended Disclosure is necessary for the just disposal of the proceedings and is reasonable and proportionate (as defined in paragraph 6.4)."

Misappropriation allegations

12. A specific allegation made in the petition is that the company's bank statements indicate that between 23 and 25 September 2020 the second respondent withdrew a total of £339,993 from the company's Coconut Bank account, which were paid into an account called "Emma Personal". Further allegations are that between October 2020 and September 2021 the second respondent made further payments into that bank account in the gross sum of approximately £809,000, but also that the second respondent made payments into the company's bank account amounting to approximately £782,000.

13. The second respondent's points of defence admit the allegation of the withdrawal of £339,993 from the company's account to her own account. But she pleads that Mr Tillett had in July 2020, being a director of the company and a signatory on its AIB bank account, misappropriated funds paid to the company as part of the coronavirus job retention scheme, and then began systematically emptying the company's bank account whenever payments were received from clients.

14. Accordingly she pleads that she considered that it was in the best interests of the company to keep its money "away from the sight and reach of Mr Tillett", and she opened a separate bank account for the company with Coconut Bank, of which she was the sole signatory. She admits the further allegations of payments from the company's bank account to her personal account, but says that the total sum was £785,349. She also admits the payments from her personal account back to the company's account, but says that the total was £807,312.

Pre-application correspondence, and application evidence

15. Before the petitioner's application was made, there was correspondence between the parties' solicitors about the proposed mediation. In a letter of 28 February 2022 from Mr Libby, he asked for the second respondent's personal bank account statements for the period September 2020 to October 2021 and also for the Coconut Bank statements for the period from September 2021 to date, as well as other documents.

16. By letter dated 16 March 2022, the second respondent's solicitors agreed to disclose the Coconut Bank statements requested, and also the other documents sought (with a temporal limitation on the disclosure of invoices raised by the company). However, they declined to disclose the second respondent's personal bank statements, on the basis that sufficient information could be obtained from the AIB and Coconut Bank statements. There was further correspondence between the parties about the Coconut bank statements on 17 and 21 March 2022, immediately before this present application was issued. In that further exchange of correspondence, the parties maintained their positions.

17. This correspondence is exhibited to a witness statement dated 22 March 2022 from Jason Libby, who is a solicitor and in-house legal counsel of the petitioner, made in support of the petitioner's application. What the petitioner says about the second respondent's personal bank statement is this:

> "8. It is our position that disclosure of these statements is not only proportionate, but essential for the mediation to be a success. They will demonstrate, categorically, whether money taken from 99 Hippos Ltd has been used to fund the [second] Respondent's other business interests. This is clearly not demonstrated in the Coconut Bank Statements that only show the Second Respondent removing large amounts of money from the company bank account.
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> […]
>
> 10. Firstly, the Coconut Bank Accounts will not indicate what happened to the money taken by the [second] Respondent from the 99 Hippos Bank Account. This can only be shown by seeing what happened to the money after it went into the [second] Respondent's personal bank accounts.
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> 11. Secondly, the [second] Respondent is required to produce just 13 months of Bank Statements for at worse [sic], two bank accounts. Given that nearly all banking is now conducted online, the [second] Respondent's will be able to quickly obtain these documents in an electronic format, at no expense, from her online bank account. Obtaining these bank statements should take no more than 15 minutes.
>
> 12. Finally, any unfounded but unsubstantiated allegations as to "*Mr Tillett's behavior*" [sic] is not only inappropriate, but completely irrelevant. We can see absolutely no reason why the bank statements should be redacted. Indeed, the DRD, that was agreed between the parties, and approved by the court on 11 February 2022, does not specify that these bank statements should be redacted. These are personal bank

> accounts and one would not expect them to contain any commercially sensitive information."

18. The second respondent made a witness statement dated 4 April 2022. She refers to paragraph 8 of Mr Libby's witness statement, where he says that the bank statements sought will show whether money taken from the company has been used to fund the second respondent's other business interests. She points out that there is no such allegation made in the petition or in the reply to the points of defence that she has used company monies to fund her other interests. She also refers to the points of defence where they say that "more money was transferred into the company's bank account than I withdrew".

19. She refers in addition to her solicitor's correspondence, in which they explained that it would be too costly and time-consuming to provide the bank statements at this stage, because they would need to be redacted to remove extraneous and purely personal information. They also said that the need for redaction arose from the behaviour of Mr Tillett towards the second respondent and that the Coconut Bank statements (which *would* be provided for the ADR) "contained more than sufficient information".

20. The second respondent went on in her witness statement to explain the references to Mr Tillett's behaviour. These include allegations of rude and aggressive behaviour and the use of abusive language, as well as physical assault. She says that her "personal bank statements contain sensitive and confidential information regarding my day-to-day life (including my relationship with my fiancé and our wedding plans) … ". I emphasise that these are only allegations, and have not been proved. The petitioner denies them.

21. The second respondent's solicitor, Oliver Wright, also made a witness statement dated 4 April 2022. In that witness statement, he points out that, at the case management conference on 11 February 2022, I did not say that there should be no redaction of the bank statements, but instead expressed the view that it was for the parties in the first instance to agree amongst themselves in respect of any such redaction. He repeated what had been said in correspondence, that the exercise of redaction would be costly and time-consuming and that there was not enough time remaining to carry it out and hold a mediation before the stay on proceedings expired.

The issue on the application

22. The question before me is whether it is "necessary for the just disposal of the proceedings and … reasonable and proportionate" to order that the second respondent's personal bank statements be disclosed for the purposes of facilitating a successful mediation between the parties.

23. The first problem with the petitioner's application is that it is put on the basis that the personal bank statements are required in order to show whether or not the company's funds were being used to support the second respondent's other business interests. But there is no issue between the parties as to this. The petition is about matters such as whether Mr Tillett (who is not the petitioner)

has been excluded by the second respondent from the company or its records, whether the second respondent has been using the company's money to fund her dispute with him, and whether the second respondent has been passing the goodwill and reputation of the company to her new company. The second respondent admits the payments from the company's account to her personal account and vice versa (with some dispute about the totals, but that is a matter of arithmetic which can be resolved by reference to the company's bank statements).

24. The second problem with the petitioner's application is that, even if the question whether the company's funds were being used to support other business interests *was* in issue, the company's bank statements from the AIB and the Coconut Bank will show the inflow and outflow of funds between the company and the second respondent. If those statements show funds flowing out from the company to the second respondent's personal account but not flowing back to either of the company's accounts then it will be an obvious inference that the second respondent has disposed of the company's monies in some other way. If, however, the sums flowing out of the company's accounts (including the Coconut Bank account) are matched by funds flowing into one or both those accounts, then the matter will be otherwise.

25. In the circumstances, it is simply not necessary for the just disposal of these proceedings (*ie* by mediation) to order disclosure of the second respondent's personal bank statements at this stage. Nor is it reasonable and proportionate. I know that they appear in the Disclosure Review Document, but that is a matter for the parties. It may be that the personal bank statements will become disclosable later in these proceedings. But I have to decide the present application on the basis of the material put before me.

Redaction

26. If, however, I had decided that it was necessary for the just disposal of the proceedings, and reasonable and proportionate, I would have had to go on to consider whether the bank statements should be redacted as the second respondent would wish. It is not now strictly necessary for me to deal with this point, but it has been argued, and, since it may well arise at a later stage of these proceedings (if not settled), I will state my view.

27. In circumstances where a personal relationship (whether intimate or otherwise) between the effective parties has broken down and ended in acrimony, as appears to be the case here, the court should be very cautious in ordering disclosure of highly personal and possibly sensitive information, such as that contained in a personal bank account statement. The risk that such information will be used for purposes other than those of the proceedings is obviously considerable, notwithstanding the provisions of CPR rule 31.22. The court has a number of possible ways of dealing with such a risk.

28. Where a party is represented by independent solicitors, one possibility would be to direct unredacted disclosure to the solicitors, with redacted disclosure to their client. That way the solicitors can confirm to their client that the redactions are innocuous, or else restore that matter to the court for further

directions. That is not available here, because the petitioner's solicitor is an employee of the petitioner, and therefore any disclosure to the solicitor would be in the control of the petitioner.

29. In the position as it is here, there are really only three possibilities. One is that the second respondent should give unredacted disclosure. The second is that the petitioner should appoint an independent solicitor to deal with this single aspect of disclosure, and the petitioner and the in-house solicitor should have access only to the redacted versions of the statements. The third possibility is that only redacted disclosure be given.

30. In my judgment, if I had to decide this point in the present case, I would not have ordered unredacted disclosure. As I have said, the risk of using personal and sensitive information for collateral purposes is high, and moreover the petitioner on the face of it has already used disclosure for purposes for which it is not to be used. Accordingly, I would have offered the petitioner the second possibility, but, if it refused that possibility, then I would have directed that only redacted disclosure be given.

Conclusion

31. For the reasons given, however, I dismiss the application. If there are any consequential applications, I shall deal with them on paper, in the first instance.

Postscript

32. I originally handed down this decision in the afternoon of 11 April 2022. Because I had dealt with the application on paper, and my decision was short, I did not circulate a draft in advance. However, by letter dated 12 April and sent to me by email that afternoon, Mr Libby, the petitioner's solicitor, pointed out two factual errors in my reasons which he suspected may have affected my decision.

33. The first error was that I said that the intimate personal relationship between Mr Tillett and the second respondent had come to an end only in 2020, whereas he said it had ended in 2009, to be followed by a platonic friendship and business relationship which had ended more recently. The second was that I said that the allegation against the second respondent was that she had transferred money from the AIB Bank account to her personal account and then to the Coconut Bank account, and back again, whereas the petitioner's allegation was that she had transferred money from the Coconut Bank account to her personal account, and back again.

34. Having received this letter, I invited and received written submissions from the second respondent. I have considered both sets of submissions. Having done so, I accept that these errors were made. I have corrected both of them in the text of mu judgment above. However, I do not think that either makes any difference to my decision.

35. The relevance of the first point lies really in the subsidiary point, that is, the assessment of the risk of misuse of the personal information of the second respondent by the petitioner, and thus the need for redaction. It does not go to the main point, which is whether disclosure should be ordered at all. In any event, the risk of misuse may be lessened, but yet not extinguished, by the passage of time between the ending of the intimate relationship and the commencement of litigation. The critical factor here, though, is that the petitioner has shown himself willing to ignore the express obligation to use information disclosed only for the purposes for which it was disclosed. My decision is not altered by the correction of this error.

36. The relevance of the second point lies in the *identity* of the bank with which the company had an account from which funds were withdrawn and paid into the second respondent's own account (and vice versa). But the point I make in reply to that (see [24] above) is that it really does not matter *which* bank the company had its account with. What matters is to know whether the funds flowing out of the company's account (with whichever bank) to the second respondent are matched by funds flowing in, or not. Whether it is the AIB account that they come out of and the Coconut Bank account they go into, or whether they come out of and go back to the latter account really does not matter. My decision is not altered by the correction of this error, either.

37. Accordingly I confirm the decision which I had already reached. The application is dismissed. The second respondent asks that the petitioner be ordered to pay her costs. I invite the petitioner to make any written submission it wishes to on this question by 4 pm tomorrow, 14 April 2022. I will then decide the question, including summary assessment if appropriate.