

IN THE QUEEN'S BENCH DIVISION
MERCANTILE COURT
[2017] EWHC 3907 (Comm)

Rolls Building
7 Rolls Buildings
Fetter Lane
London
EC4A 1NL

Thursday, 18th June 2015

BEFORE:

HIS HONOUR JUDGE WAKSMAN QC

BETWEEN:

BATTAILON

Claimant/Respondent

- and -

SHONE

Defendants/Appellants

MR SHONE appeared in person

MR WOODHOUSE appeared on behalf of the Defendants

Judgment
(Approved)

(Transcript of DTI Global
A DTI Global Company
165 Fleet Street, London EC4A 2DY
Tel No: 020 7404 1400,
Official Shorthand Writers to the Court)

1. HIS HONOUR JUDGE WAKSMAN QC: There are two applications before me. The first is to continue a freezing order granted against two respondents, Mr Shone and Mrs Shone, and today concerns the continuation of that injunction against Mrs Shone. The second application is a very much more recent one, effectively made on Tuesday of this week, today being Thursday, to seek the discharge of that injunction against her on the ground of material non-disclosure at the time when the injunction was granted without notice on 12 February.
2. It is accepted by counsel for the second respondent that if that application does not lead to the discharge of the injunction there is no objection or challenge to the continuation of the injunction against her, i.e. it is not said that there is in any event no good arguable case against her, at least in one respect, which is enough for present purposes; and it is not said that there is no risk of dissipation of the relevant assets. It is also agreed that if I find that there was material non-disclosure which is then in my discretion as to what to do about it, and in particular whether to discharge the injunction or not. Finally, it is not suggested that any material non-disclosure was deliberate.
3. The background is as follows. The substantive claim is against the first respondent, Mr Shone, for breaching a settlement agreement made on 14 and 20 February 2014. The total claim is in the region of US\$1.7m. It arises out of concerns on the part of the claimants, who had invested monies in funds or schemes operated by Mr Shone, who lived principally in Singapore, at least until recently, and operated around the world, sometimes through offshore companies, for example located in Panama. For the most part Mr Shone has played little part in these proceedings. Following the grant of the injunction on 12 February he filed a late and probably inadequate statement of assets. He has not filed a defence. There is no basis for not continuing the injunction against him and an application for summary judgment on the claim against him is going to be heard in July.
4. Mrs Shone, the second respondent, is not a defendant to the substantive claim, but the injunction was sought and obtained against her on the following basis. At a time when the first defendant, Mr Shone, was engaged in transactions which concerned the claimants, being third party dealings with the funds to which they had contributed in late 2013 and later, in the first part of 2014, by which time this claim had been intimated, Mr Shone transferred, it would seem, almost all of his known assets to Mrs Shone.
5. The fact of the transfer and her present ownership and control of those assets is not in dispute, at least for present purposes, nor is it in dispute that on the face of it there was no consideration given for them. The assets transferred were two properties in England in late 2013, one known as Sheep Street and another one in Budleigh Salterton in Devon. They were transferred out of the Panamanian Foundations, which were expressed to be their owners, to Mrs Shone. There was a collection of cars sold in February 2014 where the proceeds went to her. That was two days after the making of the agreements on which the claimants sue. There is then a much more substantial property which had been bought jointly in late 2013 called High Trees in Windsor worth apparently about £2,000,000, now in the name of Mrs Shone solely. A property in Kuala Lumpur called 1KL was sought to be transferred in April 2014 but it could not be done, but at the time she wanted that to be done expeditiously. Proceeds of a life policy were transferred to her on about 7 April 2014 and all or most of pension funds in Singapore were transferred in June 2014. There was then also some transfers of salary in May 2013 and there was

a transfer of another property or funds to someone called Veronica Taverner, who, it seems is common ground, is the present partner of Mr Shone and, according to Mrs Shone, she discovered that they were having a relationship as long ago as late 2012.

6. The injunction against Mrs Shone was sought on the basis that there had been no consideration and that she was in reality simply Mr Shone's nominee in the sense that he still retained the true beneficial interest in and/or control over the assets and and/or under section 423 of the Insolvency Act on the basis that he was putting those assets beyond his creditors. It is acceptable (a) that it is the transferor's state of mind which is relevant for that claim, and (b) that even if there were other concurrent reasons for the transfer, for example safeguarding the transferor's family, that would be irrelevant if there remained the objective of putting the assets beyond for creditors as well.
7. On 29 May Ms Shone filed evidence in response to the application for the continuation of the injunction and gave her version of events in relation to the asset transfer, essentially saying that she took these transfers at different times to safeguard her interests or those of her family. There are certain problems with that evidence to which I will refer later on, although as I say that evidence is not relied upon to say that the claimants have no good arguable case against them; it is accepted that they do, at least in the context of the section of 423 claim. But at the time of filing that evidence there was no application to discharge the injunction on the grounds of non-disclosure.
8. Mr Winter, the solicitor for the claimants, made a witness statement or an affirmation responding to Mrs Shone's affirmation because, among other things, she had said that the property at High Trees had been paid for with cash, and yet there was a contemporaneous email which suggested that she was asserting to Mr Shone that what there were was not cash but very many debts and he pointed that out as a difficulty for her evidence in that respect. Once he exhibited that email, which had not been exhibited before, her solicitors then asked what other emails there were that the claimant had. It is common ground that the claimant had had access to the email account of Mr Shone over the period of July 2013 to July 2014 and there are, it would seem, apart from those disclosed, either 38 or 39 further emails which were passing between them and which had not been disclosed.
9. All of that then led to the witness statement of Ms Delgado acting for Mrs Shone and that witness statement exhibits a total of 55 emails running from September 2013 to about May 2014. It is not necessary to read any of them in detail. They are all, broadly speaking, of the same kind. They reveal in no uncertain terms that the marriage was in a bad way. Secondly, that Mr Shone was away from Mrs Shone and her daughter for long periods of time and that there was little contact, certainly in terms of substantial email contact, though there were manifestly telephone conversations. Thirdly, that Mrs Shone, while keeping the correspondence going, was complaining to Mr Shone not only about his behaviour and about his relationship with Ms Taverner but also that there were financial difficulties, that he was spending his time and money on Ms Taverner and not on herself and disclosing that it would appear that he had now decamped to Budleigh.
10. What there was not in any of those emails was any significant discussion explaining the basis on which any of the challenged asset transfers had been made or throwing light on that issue, which of course is at the core of these claims. But nonetheless, Mrs Shone says that all of those emails could and should have been disclosed because it showed a

different picture and perhaps cast a different light. If there was a sustained period of matrimonial difficulties it could be said to run counter to the notion at least of her as a nominee, though it would not cast any really different light on the section 423 claim which is, as I have said, the one on which Mrs Shone says there is a good arguable case; and so it is said that that constituted material non-disclosure and that the injunction should be discharged.

11. In order to assess that argument I need first of all to look at what disclosure about the marital difficulties was made. The first and substantial piece of evidence in that regard was from Mr Battailon, one of the two claimant investors, and his affidavit was sworn on 3 February in support of the making of the injunction. He says that his solicitors had been informed that their understanding was that Mr and Mrs Shone had separated. He did not know whether that was correct and, if correct, the reason for it, but it might be connected with a lady named Veronica Taverner, a resident of Indonesia with whom it appears Mr Shone has a relationship; and then it says “see an email from Mrs Shone to Mr Shone partially regarding an email who may be Ms Taverner”.
12. It is worth looking at that email at this point. It is dated 8 October. It is from Mrs Shone. She says she has not had anything from Budleigh, which is obviously where it is now thought that Mr Shone was. Was he lying about a transfer? Had the money already been used as a deposit for land? “It is an extremely worrying indication of his state of mind and enormous debts and commitments here.” It makes references to Ms Taverner and goes into some detail about that, which it is not necessary for me to read, save to say that she considers that her husband in the way that he had been behaving was severely misguided, to say the very least; that she complains about lack of money going into High Trees whereas money was going into Budleigh. She makes reference to her daughter. That is very much the tone and the content of the many emails which are now exhibited to Ms Delgado’s witness statement.
13. Then Mr Battailon continues in paragraph 20 to say that there was a draft employment agreement for an executive assistant in the name of Ms Taverner. At paragraph 74 Mr Battailon explains how it is that he got access to Mr Shone’s emails and he makes it plain that he got his entire email folder for the period 15 July 2013 to 15 July 2014 as a result of being given it by someone called Mr Agawal. The context of that is in preceding paragraphs; it is not necessary for me to read that now.
14. He returns to the subject of Ms Taverner in paragraph 101 by saying that he was making payments not only to Mrs Shone but to her as well and in paragraph 103 that Ms Taverner was receiving monies from Charter One Bank, another entity connected with Mr Shone, and that she had an account in this jurisdiction. Paragraph 106 deals with service issues referring to the fact that it was highly likely that Mr Shone had left Singapore and that he had gone to Budleigh; all of that of course giving weight to the notion that in the light of his now present relationship with Ms Taverner he had indeed left Singapore and gone to Budleigh, and if that is right, as night follows day, he is obviously to some very significant extent now separated from Mrs Shone.
15. At paragraph 120 Mr Battailon makes this comment, that as was evident regarding even a cursory view regarding the above evidence Mrs Shone has been a very active party in assisting Mr Shone’s dissipation of assets in order to frustrate his creditors. She has received most of the assets. It is important to look at that comment in context. It is in

the context of drawing the threads together from the previous evidence, which showed the extensive scope of the property and asset transfers from Mr Shone to Mrs Shone. As it is common ground that she has received those assets, she was obviously active in one sense, because if she had been entirely passive it is not possible for most of those transfers to have taken place, and that, in my judgment, is the proper interpretation to be placed on that paragraph.

16. In addition, it is plain from the evidence which was filed at the time that there was a sense in which Mrs Shone appears to have been taking an initiative in relation to these transactions herself, and it is set out at paragraph 121, where she had been asked by the bank, who had supplied the mortgage for High Trees when it was in joint names as to why it was to go into single names and she said "It was tax!", and when she filed her own evidence it was stated that this was only a flippant remark. However, that has transpired not to be the whole story because she later told Mr Shone that he should tell the lender that tax was the reason for transferring High Trees into her sole name. So if it was flippant it was flippancy which was sustained over a period and transformed into instruction. There is certainly nothing wrong in describing that as an active step on her part.
17. Mr Battailon's affidavit, as it should, then has a discrete section on full and frank disclosure. It begins at paragraph 136 and then at paragraph 143 there begins a specific section on arguments likely to be raised to be raised by Mrs Shone, which goes on for two full pages. It says in paragraph 144 "it might be said that she does not hold any of them as a nominee because instead there was a presumption of advancement or that they were not there to defeat creditors because there was a tax purpose," but he points that out and says nonetheless there is a good arguable case.
18. Paragraph 145:

"Further, Mrs Shone may rely upon her marriage to Mr Shone as in some way legitimising what has happened. For example, she may say that Mr Shone actioned these transactions in order in some way to preserve their marriage, such that there was some consideration. I note only that there are no emails suggesting that any property transfers were being undertaken with this objective in mind and that remains the case with the 55 emails now disclosed. For comparison, in late 2013, prior to the acquisition of the property, there are emails which suggest a period of difficulties with their marriage; tab 13, for example [which I read above], but Mrs Shone instructed Mr Adlestone to make sure High Trees would be in joint names. Mr Shone did not immediately transfer in High Trees following the acquisition. Alternatively, Mrs Shone may say that the fact that she and Mr Shone may have separated is evident or consistent with the fact that assets being transferred to her are hers alone. However, much of this is unknown at this stage and I would simply say that I believe there to be a more than respectable argument that Mrs Shone holds the relevant for her husband at least in part, alternatively these transactions were carried out with a view to frustrating creditors."

19. He also draws the court's attention to the fact that the transfer of the Sheep Street and Budleigh Salterton properties had been done in October 2013, prior to the discovery of the related party transactions, and that that might be a reason why those assets should not be subject to the injunction. He ventures however the possibility that Mr Shone may have done so because he already was concerned about what might happen in terms of repercussions and also there was a pattern of dissipation.
20. All that throws into very clear relief, in my judgment, the notion that the fact that the separation or marital difficulties could give rise to arguments from Mrs Shone, the scope of which would yet have to be determined.
21. A point is taken within paragraph 145. Paragraph 145 makes plain that there are emails which suggest a period of difficulties, and then one is given an example. Mr Woodhouse says that that is perhaps a little bit diluted because in truth this period ran not just in October but ran through to 2014. But I do not think there is much in that argument. We know now that the claimants essentially have the run of emails through to about February 2014. There was one in 2014 but the later ones, according to Mr Winter's most recent affirmation, were not seen by them. What is plain, and it is fortified by the disclosure of the fact that there was that year's worth of emails which was available to the claimant, is the fact that the one exhibited was an example and there were emails, and in any event that must be obvious. It is very difficult to see why the email that was disclosed was a one-off. Its tone clearly suggests a period of difficulties and some longstanding problems, so there would expect there to be more than just that one and that this was not something which was, as it were, a flash in the pan.
22. So that is a disclosure from Mr Battailon. There is also reference by Mr Cox, a solicitor with the claimant's solicitors, at paragraph 20. His affidavit says that Mrs Shone may seek to rely on her marriage to Mr Shone is in some way explained in the transfers but there is at least a good arguable case that the transfers were superficial. He comes back to that point later on in paragraph 34, noting she may have separated but saying it is not a divorce and it is not an intervening event which would affect her right to pursue her for those assets. Paragraph 54 states that it appeared that Mr Shone had moved to Budleigh, whereas in paragraph 60 Mrs Shone was currently resident in Singapore, and there were more references to Indonesia by Mr Cox in another affidavit dealing with the question of service in Indonesia.
23. One then turns to the very full skeleton argument which was filed for the without notice application which is at divider 17 of file 1. 19.7 explains, as I have already referred to, how it is that Mr Battailon had access to the emails. At paragraph 21.8 it referred to some shareholdings and income to Mrs Shone; and then at 21.10 "there was no obvious rationale for this flurry of activity. The timing suggested a deliberate attempt to put assets beyond the reach of the creditors". That of course would be deliberate from the point of view of Mr Shone and that is what is necessary, although it might be conceivable that Mr Shone was wishing to gift assets to his wife in the light of a serious illness that would not be consistent with the explanation that Mrs Shone had given for her transfer of High Trees into her name, namely as tax, and that seems to me to be a proper point to make. There was nothing in the documents available to show the transfers were part of legitimate estate planning or marital arrangements, and indeed that is true again, I stress, in the recent collection of emails.

24. All the matters then got to be read in the context of what was then put by counsel in his section dealing with the question of full and frank disclosure. Paragraph 41 again makes the point: “Mrs Shone might assert that all the assets were owned by her beneficially, relying on a presumption of advancement.” “She could also say,” he says in paragraph 42, “it is all connected with estate planning, perhaps a gift to save the marriage or some kind of separation agreement such that the transfers were not a sham.” He says that that would need to be convincing to justify it; it might arise on the return date.
25. Then finally in paragraph 44, “that the court was not aware of any direct evidence that Mr Shone was controlling the assets now in her name, i.e. in the sense of pulling the strings”. That is true for the entire email run but makes the point that one does not know what documents after that period might reveal.
26. So the point is clearly raised, in my judgment, and that is against the background of one sample email showing the extent of the marital difficulties having been disclosed. While the full flavour of the marital difficulties might be given more intensely if all the emails had gone in, it does not, in my judgment, affect the fundamental point, especially as none of the full selection of emails talks about the disputed property transactions as being done by Mr Shone for her benefit or in the light of the gift or anything of that kind.
27. That is the skeleton argument; then the hearing itself, which was not a formality as far as the claimants were concerned, and one can see that by reference to the fact that the hearing took over two hours and counsel was clear that the judge needed to be taken through a large amount of materials and certain points should be emphasised. Paragraphs 47 to 49 show that counsel orally took the judge to the point that there were difficulties in the marriage before the transfer concerned and again refer to tab 13 but said that would not undermine the 4.24 claim, and there was a lack of legitimate explanation. So the point is made again in the oral hearing.
28. In the context it is important to show what Mrs Shone’s own case is about this, especially where she is not contending that there is no good arguable case. She puts in an email, for example, which is at divider 9 in her own evidence where she is telling her husband what he must do in order to effect the transfer of a property, although for the most part she had said that she was simply doing these things, as it were, off her own bat and to protect herself. There is very little on her own evidence as to what his involvement is, though the truth is that in order to effect these transfers he must have been involved. An example of that is given; it is summarised helpfully in Mr Sewell’s skeleton argument at 20.3 in relation to the sale of the classic car collection, and she got all of the proceeds of sale. She says that there was no objection on her part to this, but the documents show that she was suggesting that at the time the idea to sell them was a joint one and refers to an email saying “Michael and I are wondering the best way to sell the Aston,” although in her own evidence she says this was entirely her own idea. That is just one example of a difficulty in her evidence, but it is very difficult to see how the collection of emails to which I have referred and which are at the heart of this application, even if disclosed, could have led anyone to think that her case was really being advanced and that is the case that she is now putting forward.
29. It said that the emails do not show her as complicit. This is really Mr Woodhouse’s main point. There is maybe no direct evidence of complicity, but the fact is that through this

difficult period Mr and Mrs Shone were obviously dealing with each other; they had to be, because he is the transferor and she is the transferee, and in that sense it would be accurate to say she was complicit. She could not have been wholly passive, and some of the emails I have referred to show that she was not, so as to end up with these assets.

30. So that is the incontrovertible fact, whatever the state of the marriage. The only question is, why? Possibly it could be said that there was some sort of settlement or gift, and that possibility had been raised, not that there is really any evidence of it produced even now. Mr Winter gave an explanation as to why, in any event, all of these documents were not disclosed. He said it would be disproportionate to burden the court with all those emails, and while I accept it would have given, as I say, a rather more intense or graphic flavour of the marital difficulties, because there would be 40 of them and not one or two, but in the context the reluctance to put all of them before the court is understandable and fundamentally it would not have made any difference.
31. For all those reasons I am quite satisfied that there was no material non-disclosure in relation to those emails. Even if there had been, this would have been an obvious case for me to exercise my discretion not to discharge the injunction for three principal reasons: any non-disclosure was not deliberate; secondly, there is no challenge otherwise to the continuation of this injunction, whether by reference to a lack of good arguable case or by reference to a risk of dissipation; and, thirdly, Mrs Shone's own evidence in some important respects raises more questions than it answers. I will now hear counsel on any consequential matters.
32. One of the things which will come out today's order which I am going to ask counsel to agree and submit to the court is that there will be a directions hearing in the claims against the second respondent, Mrs Shone, at 2pm on Friday, 24 July.
33. I think in principle the claimants must be entitled to their costs of the application to continue the injunction against Mrs Shone and to resist, as they have done successfully, her application to discharge for non-disclosure. That is a matter of principle. There may be some costs that have to be removed that deal with discrete points which were fairly and properly raised in the usual way on the question of living expenses and the like, but I can deal with those afterwards. It is plain from the position at least adopted today that had it not been for this very late application to discharge for non-disclosure there would have been no opposition to the continuation of this injunction, but this was only made clear at a very late stage and the claimants were entitled to, and indeed duty bound, to be prepared to justify the continuation of this injunction on whatever basis they might have to. Mr Woodhouse says that issues of complicity and the like will still have to be determined. I agree about that, but that is not really the point. This was a very discrete and quite a narrow application, as he accepts, on non-disclosure and either it succeeds or it does not, and it has not, and I see no reason why costs should not follow the event. It is right that at an earlier stage, and there were at least some costs warnings, Mrs Shone's solicitors could have said that without prejudice to anything, and they reserve their rights fully, they will allow the injunction to continue, but they did not do that. If they wanted it to be clear on the record what her evidence was going to be over the periods in question of the transactions questions, then as Mr Sewell says it was entirely open to them to lodge a witness statement and not ask the claimants to deal with it or respond to it but simply have it there and still offer to agree to be bound by continued injunction.

34. For all those reasons the claimants should have their costs. The order I make, subject to any further order, will be that there is an interim payment on account of costs of £20,000 to be paid by 4pm, Thursday 9 July.