Neutral Citation Number: [2019] EWHC 3142 (Comm)

Case No: CL 2008 000540

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/11/2019

Before :

MR. JUSTICE TEARE

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Between :

IVANHOE MINES LIMITED (FORMERLY IVANHOE NICKEL AND PLATINUM LIMITD)	**Claimant**
- and -	
TONY RICKY GARDNER	**Defendant**

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- -

Ian Higgins (instructed by **White & Case LLP**) for the **Claimant**
Richard B. Ritchie (instructed by **SA Law LLP**) for the **Defendant**

Hearing dates: 8 November 2019

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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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THE HONOURABLE MR JUSTICE TEARE

Mr. Justice Teare :

1. This is an application by the Defendant to set aside an order made by me on 23 November 2018 in the absence of the Defendant. The order was made pursuant to a Tomlin Order dated 7 January 2009. As the latter date indicates this matter has a long history which it is necessary to summarise.

2. On 30 June 2006 the Defendant, Tony Ricky Gardner, agreed to sell the shares in Gardner and Barnard Mining (UK) Limited ("GBUK") to the Claimant, Ivanhoe Nickel and Platinum Limited. GB Mining and Exporation South Africa (Pty) Limited ("GBSA") was a wholly owned subsidiary of GBUK. Under the share sale agreement Mr. Gardner gave a warranty in relation to the tax position of GBUK and GBSA. His address for service was that of his then solicitors, Ewart Price in Welwyn Garden City. He was entitled to change his address for service by providing notice in writing of an address in the UK.

3. In October 2007 a dispute arose relating to the tax liabilities of GBSA. Ivanhoe withheld payment of part of the purchase price and Mr. Gardner commenced arbitration proceedings. That led to a Consent Award dated 10 July 2008 signed by the arbitrator, Michael Tselentis QC, pursuant to which Ivanhoe was obliged to pay the remainder of the purchase price. Clauses 5 and 6 imposed a liability on Mr. Gardner in these terms:

> 6. The claimant [Mr. Gardner] undertakes to pay any tax liability finally determined by a court of competent jurisdiction for the period up to 30 June 2006 in respect of GBUK and GBSA.
>
> 7. The claimant will be entitled to contest any assessment issued by SARS, in the name of GBSA and/or GBUK. The defendant [Ivanhoe] undertakes to provide the claimant with its full and complete cooperation including the provision of all documents reasonably required by the claimant and assistance from defendant's officers and employees.

4. Further disputes arose which led to Ivanhoe commencing proceedings in England. They were the subject of a Tomlin Order dated 7 January 2009. It is necessary to set out its full terms:

> "The Claimant and the Defendant having agreed to the terms set out in the Schedule hereto
>
> BY CONSENT IT IS ORDERED THAT:-
>
> 1. Save as provided for in paragraph 3 below, all further proceedings in this claim be stayed except for the purposes of carrying the terms set out in the Schedule hereto into effect.
>
> 2. It is further ordered that either party may be permitted to apply to the Court to enforce the terms set out in the Schedule without the need to bring a new claim, and it is recorded that the parties have agreed that any claim for breach of the terms

> set out in the Schedule may, unless the Court orders otherwise, be dealt with by way of an application to the Court without the need to start a new claim.
>
> 3. The costs of this claim be paid by the Defendant to the Claimant, to be assessed on the standard basis if not agreed, save that each party shall bear their own costs incurred on or after 6 November 2008.

5. The schedule provided as follows:

> 6. The Claimant will provide the Defendant with copies of all documents relating to the tax affairs of GBUK and GBSA for any period prior to 30 June 2006 received from SARS or sent to SARS by or on behalf of the Claimant. Any such document shall be provided to the Defendant within 7 days of either receipt from SARS of the document or of forwarding to SARS of the document. For the avoidance of doubt, the obligation imposed upon the Claimant in terms of this clause will continue until all tax issues with SARS have been finalised as contemplated in the Consent Award.
>
> 7. Upon the satisfaction in full by the Defendant of his obligations under this Schedule he shall be released from the undertakings provided to the Court in these proceedings on 5 November 2008
>
> 8. For the avoidance of doubt, the respective obligations and liabilities of the Claimant and of the Defendant in respect of the tax affairs of GBUK and GBSA as set in the SSA and the Consent Award shall remain in full force and effect.
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> 9. Claims B and C of the Defendant's claim in the First Arbitration will be automatically withdrawn upon payment of the First Arbitration Costs to Ewart Price and the Claimant's counterclaim in the First Arbitration stands dismissed.
>
> 10. The Claimant and the Defendant agree that the matters set out in this Schedule, including their ongoing obligations as referred to in paragraph 8[1] hereof, are agreed by them in full and final settlement of all claims they may have against each other arising out of or in connection with SSA, the First Arbitration and/or the Consent Award.

6. The South African Revenue Service ("SARS") issued tax assessments in relation to GBSA. Mr Gardner challenged those assessments and appealed, first, to the Pretoria Tax Court and then to the Supreme Court of Appeal of South Africa. He instructed an

[1] The text refers to paragraph 7 but it was common ground that that was an error and that the reference ought to have been to paragraph 8.

attorney, Mr. Wolmarans, and a barrister, Mr. van Breda. On 28 March 2014 the Supreme Court of Appeal upheld the assessments by SARS, save with respect to one issue. Thereafter SARS was to recalculate the tax due in the light of the judgment and to serve a fresh assessment.

7. On 4 March 2015 SARS sent a letter to Mr. van Breda containing the proposed adjustments to the tax due and stated that a notice of assessment would be issued in due course. On 23 March 2015 Mr. van Breda advised SARS that his brief had terminated upon conclusion of the appeal and that he did not know the name and address of the present public officer of GBSA.

8. On 25 May 2015 Mr. Gardner left South Africa for Spain where he has since lived. He did not provide Ivanhoe with a forwarding address.

9. On 6 July 2015 SARS sent an email to Ivanhoe requesting payment of the outstanding assessed tax. The email was copied to a Mr. van Zanten, who had in 2008 been Mr. Gardner's representative on the board of GBSA. On 14 July 2015 Ivanhoe replied to SARS pointing out that the sums due were payable by Mr. Gardner pursuant to the Consent Award and Tomlin Order.

10. On 25 November 2015 Mr. Gardner sent to Ivanhoe, through White and Case, a 4 page letter which is difficult to summarise. No offer to pay the tax claimed was made. Instead it was suggested that the parties meet to discuss "a way to avert GB Mining having to pay any taxes".

11. In 2016 Mr. Gardner commenced proceedings against Ivanhoe in South Africa claiming damages for loss caused by Ivanhoe having disclosed certain matters to SARS. Mr. Gardner appointed Mr. Wolmarans his c/o address in South Africa.

12. On 3 June 2016 SARS requested a copy of the share sale agreement and contact details for Mr. Gardner. Ivanhoe provided the address of Mr. Wolmarans.

13. In June 2017 GBSA received a final demand from SARS. On 20 July 2017 Ivanhoe's South African lawyers, Falcon & Hume, forwarded the demand to Manong Badenhorst Abbott van Tonder, Mr. Gardner's South African lawyers in the 2016 litigation. Six days later, on 26 July 2017 those lawyers came off the record and gave their last known address for Mr. Gardner as "Tewinberry Avenida del Puerto and Hertford Road Hertfordshire England." It appears that Tewinberry was a hotel in Hertfordshire called Tewin Bury Farm Hotel.

14. Mr. Gardner has explained in a witness statement that he "no longer wanted to be embroiled in litigation" and that he "wanted to focus on my health and spending time with my family". He said that he instructed his South African lawyers that "they may not receive any further correspondence for me". He then "terminated the mandate for them to represent" him. He said that he provided the address of the hotel in Hertfordshire because he was "planning to travel to London for an extended stay" to consult a specialist and that he "usually stays at Tewinberry Hotel". The address was given as a forwarding address "for this period". No other forwarding address was provided to Ivanhoe.

15. On 6 September 2018 GBSA was issued with a Final Demand Letter from SARS requiring payment of a sum equivalent to £508,392 as at the date of the Tomlin Application (23 October 2018). On 18 September 2018 GBSA paid that sum to SARS.

16. On 19 October 2018 Ivanhoe wrote to Ewart Price, still on the record following the Tomlin Order, demanding payment of the tax. On the same day Ewart Price replied saying that they had had no contact with Mr. Gardner for a number of years and believed that he resided overseas. They indicated that they would pass the letter to him at his last known address. They said that they did not wish to incur the costs of making an application to be removed from the record. Ivanhoe asked for Mr. Gardner's last known address but received no reply.

17. Thus it was that on 23 October 2018 the Tomlin Application was issued. It was served on Ewart Price the next day. Ewart Price acknowledged receipt but said they no longer acted for Mr. Gardner. Ivanhoe sought an address for Mr. Gardner from Mr. Wolmarans, Ewart Price, an accountancy firm, Lovetts Chartered Accountants, which appeared to be the registered office of a company of which Mr. Gardner was recorded as a director at Companies House, and from the Tewin Bury Farm Hotel in Hertfordshire. None of these efforts bore fruit.

18. On 14 November 2018 Ivanhoe issued, as an alternative to the Tomlin Application, an application to enforce the Consent Award pursuant to s.66 of the Arbitration Act 1996 and sought permission to serve such an order on Ewart Price, the Tewin Bury Farm Hotel and Lovetts Chartered Accountants.

19. On 15 November 2018 Ewart Price informed the Commercial Court that they had no instructions, believed Mr. Gardner to be overseas, had no overseas address for him and had no instructions to accept service. They again said that they did not wish to make an application to come off the record because of the irrecoverable expense of doing so and that they would not be attending the hearing on 23 November 2018.

20. On 23 November 2018 Ivanhoe appeared before me at a hearing which was not attended by Mr. Gardner or by anyone on his behalf. I granted the Tomlin Application and so ordered Mr. Gardner to pay £508,392 and £50,000 in costs. No order was made on the s.66 application, save as to costs. The order was served on Ewart Price together with a note of the hearing. Copies were also sent to Lovetts Chartered Accountants, the Tewin Bury Farm Hotel and No.1 Club Cottage, Burnham Green Road, Welwyn, Hertfordshire, an address previously given in a witness statement of Mr. Gardner dating from 2008.

21. On 20 June 2019, there having been no response by or on behalf of Mr. Gardner, Ivanhoe issued a statutory demand. On 22 June 2019 a process server attended No.1 Club Cottage in Burnham Green where an individual directed the process server to 3 Eaton Way, Borehamwood. But that property was empty and the demand was posted through the letterbox on 8 July 2019.

22. On 21 June 2019 Mr. Gardner's father died. Mr. Gardner came to England on 24 June 2019 and visited the offices of Ewart Price who had prepared his father's will. He then learnt of the existence of this court's order and of the statutory demand.

23. On 12 July 2019 Mr. Gardner issued an application in the Hertford County Court to set aside the statutory demand on the basis, inter alia, that he resided in Spain and that the centre of his main interests was there. In the light of that Ivanhoe withdrew the statutory demand.

24. On 15 July 2019 Mr. Gardner issued the present application to set aside the order of this court made on 23 November 2018.

25. Mr. Gardner's application to set aside that order was made pursuant to CPR 3.1(2)(m), CPR 3.1(7), and CPR 23.11. The most apposite is CPR 23.11 which is in these terms:

> "(1) Where the applicant or any respondent fails to attend the hearing of an application, the court may proceed in his absence.
>
> (2) Where (a) the applicant or any respondent fails to attend the hearing of an application; and (b) the court makes an order at the hearing, the court may, on application or of its own initiative, re-list the application."

26. The notes to the White Book refer to the discretion as being unfettered but also to the jurisdiction to re-list being exercised sparingly (see 23.11.3). There was no dispute at the hearing before me that the court should consider (at least) the following matters: (i) whether the applicant acted promptly when he learnt of the order made against him, (ii) whether he had a good reason for not attending the hearing and (iii) whether he has a reasonable prospect of overturning the order made in November 2018. These are not matters which must be established (cf applications after a trial pursuant to CPR 39.3(5)) but are matters to be weighed in the balance (cf *Forcelux Ltd. v Martyn Ewan Binnie* [2009] EWCA Civ 854 at paragraph 50).

Valid service

27. It is first necessary to consider whether the Tomlin Application was validly served on Mr. Gardner by reason of having been served on Ewart Price. It is clear that it was validly served because Ewart Price remained solicitors on the record. It was submitted by counsel on behalf of Mr. Gardner that once the action ends, the solicitor ceases to be on the record because there is no action for which he can be on the record. But the English action was not ended. It was merely stayed by the Tomlin Order. It was further submitted that in circumstances where the application to enforce the Tomlin Order was issued just over 6 weeks short of 10 years from the date of the Tomlin Order it is both impractical and unrealistic to regard Ewart Price as being still on the record. But in circumstances where the Consent Award and Tomlin Order referred to Mr. Gardner's liability to pay tax due from GBSA, where Mr. Gardner's appeals lasted until 2014 and where the Final Demand was issued by SARS in 2017 it is not impractical and unrealistic to regard Ewart Price as still being on the record in 2018. In any event they remained on the record and had made no application to be removed from the record.

Acting promptly on learning of the court's order

28. On Mr. Gardner's evidence he learnt of the order on 24 June 2019 and issued his application on 15 July 2019. Ivanhoe accepts that if Mr. Gardner only learnt of the order on 24 June 2019 he acted promptly to set aside the order. It is however suggested that

in circumstances where a copy of the order was sent to No. 1 Club Cottage in November 2018, where that was his father's address and where on his own case "my father would have contacted me and informed me that the court papers had been sent to his address" it is likely that Mr. Gardner knew of the order in November 2018. In that event the application made in July 2019 would not have been made promptly.

29. It is, as it seems to me, an unlikely coincidence that Mr. Gardner's father died in June 2019 and that he issued his application in July 2019. It seems to me likely that the application was issued in July 2019 because, having come to this country because of his father's death in June 2019, he had then learnt of the court's order. I therefore accept that Mr. Gardner acted promptly to set aside the order.

Good reason for not attending the hearing in November 2018

30. The mere fact that Mr. Gardner did not know of the Tomlin Application does not by itself establish a *good* reason for not attending the hearing. It is clear from the authorities that it is necessary to investigate why the applicant did not know of the hearing; see *Brazil v Brazil* [2002] EWCA Civ 1135 at paragraphs 12 and 21 (per Mummery LJ) and *Estate Acquisition and Development Ltd. v Wiltshire* [2006] EWCA Civ 533 at paragraph2 21 and 22 (per Dyson LJ).

31. On behalf of Ivanhoe counsel submitted that Mr. Gardner made a deliberate attempt to avoid his obligations and to avoid receiving communications so as to frustrate the litigation process. In support of this serious allegation reference was made in particular to a number of matters. First, after losing in the Supreme Court and knowing that SARS would then recalculate the tax due and serve a fresh assessment Mr. Gardner left South Africa for Spain in May 2015 without informing Ivanhoe, to whom he owed his obligation to pay the tax assessed on GBSA, of his address in Spain. Second, in July 2017 just 6 days after lawyers instructed to act for him in South Africa in other (related) proceedings had received a demand for payment from Ivanhoe they came off the record and were instructed not to receive any further correspondence for him. Third, the only forwarding address he gave at that time was a hotel in England where he would be, it seems, for a limited period. He did not give his address in Spain.

32. On behalf of Mr. Gardner counsel referred me to Mr. Gardner's witness statement in which he said that he truly believed that if Ivanhoe "had wanted to locate me it could have done so. There was nothing to stop them contacting Mr. van Zanten or Ms. Fleming [former officers of GBSA]. Also, when they had to affect personal service on me, they were able to locate my father's address. Had they done this in October 2018 when he was alive, my father would have contacted me and informed me that the court papers had been sent to his address." He said that he "was not hiding".

33. What is striking about Mr. Gardner's conduct is that having expended considerable effort to challenge the assessment of tax (which he had promised to pay) by appealing to the Supreme Court he then, having lost his appeal, expended no effort in contacting Ivanhoe with a view to paying the tax he had agreed to pay. On the contrary, his letter of 25 November 2015 suggested that there was a way in which the tax need not be paid. Then, when his South African lawyers had received a demand for payment of the tax from Ivanhoe, he disinstructed them. It is reasonable to infer from these events that Mr. Gardner was unwilling to pay that which he had promised to pay. It is also reasonable to infer that he wished to make it difficult for Ivanhoe to communicate with him. That

is consistent with the fact that the forwarding address that he gave to his South African lawyers was not his permanent address in Spain but a hotel in England at which he would stay for a limited period. He did not suggest at that time that either former officers of GBSA (Mr. Van Zanten or Ms. Flemming) could receive communications on his behalf or that his father could. In those circumstances his evidence that Ivanhoe should have contacted him through those persons rings hollow, notwithstanding that Ivanhoe were aware of Mr. Van Zanten (when they copied an email to him in July 2015) and of the address at which his father resided (when they sent the 23 November 2018 Order to that address on 26 November 2018, albeit that they were not then aware that this was the address at which his father resided).

34. On the material available to the court on this application I am not persuaded that there was a good reason for Mr. Gardner not attending the hearing in November 2018. On the contrary there is good reason to believe that, having lost the Supreme Court appeal, he did not wish to be contacted about the tax he had promised to pay and hoped that Ivanhoe would be unable to contact him about it. He certainly did not leave in place a mechanism by which, if Ivanhoe wished to enforce the Consent Award or the Tomlin Order, they could notify him of their wish and of any relevant court proceedings (save of course for the fact that Ewart Price remained on the record in England).

A defence with a real prospect of success

35. The first point taken was that the obligation to pay tax was not a term of the Tomlin Order but was in fact a term of the Consent Award. This was indeed a point which had occurred to me during the November 2018 hearing, as the note of the hearing records.

36. The submission made by counsel on behalf of Mr. Gardner was that the obligation referred to under clause 8 was carved out of clause 10. In other words, clause 8 was an exception to clause 10. Thus it was said that the payment obligation referred to in clause 8 arose under the Consent Award. It was not imposed anew by clause 10.

37. The submission made by counsel on behalf of Ivanhoe was that the obligation to pay tax was imposed by both the Consent Award and by the Tomlin Order. In any event the point went nowhere because, if it were correct that the obligation arose only under the Consent Award, then an order enforcing the award as a judgment would have been made pursuant to section 66 of the Arbitration Act 1996.

38. The role of the schedule to the Tomlin Order is to set out the terms upon which the parties have settled their dispute and which may be enforced without the need to bring a new claim; see the terms of the Tomlin Order itself and in particular the opening sentence and orders 1 and 2. One would therefore expect that the terms in the schedule were to be enforceable in the manner contemplated by the Tomlin Order.

39. The schedule provided by clause 1 that the Claimant, Ivanhoe, was to pay to its solicitors “the First Arbitration Costs”. When they had done so the Defendant, Mr. Gardner, was, by clause 3, to provide certain documents to the Claimant and take certain further steps, all of which were designed (I was told) to enable the Defendant to relinquish control of GBUK and GBSA. When that had been done the Claimant’s solicitor was to pay the First Arbitration costs to the Defendant pursuant to clause 3.

40. Clause 4 of the schedule provided for the Defendant to pay the "legal costs" of the proceedings and of "the South African proceedings" to the Claimant.

41. Clauses 6 and 8 concern the tax affairs of the two companies. Clause 6 obliged Ivanhoe to send to Mr. Gardner correspondence with SARS relating to those tax affairs. Clause 8 made clear that the respective obligations of Ivanhoe and the Mr. Gardner in respect of those tax affairs set out in the Consent Award remain in full force and effect. Clause 7 does not in terms mention those tax affairs and it is not known to what "the undertakings" referred. Counsel for Mr. Gardner suggested that they must have been given by him at an interlocutory stage of the proceedings and were probably designed to preserve the *status quo* regarding the two companies pending final resolution of the case. If so then Mr. Gardner was to be released from those undertakings once he had complied with "his obligations under this Schedule". It was suggested that "his obligations under the Schedule" cannot have included the obligation to pay tax because, if it did, the undertakings would remain in existence until that tax had been paid which cannot have been the intention of the parties.

42. The natural construction of clause 10, in my judgment, is that "the ongoing obligations" in clause 8 are part of the full and final settlement of the claims which the parties may have against each other. The suggestion that the obligations in clause 8 are carved out from the settlement in clause 10 appears to me to me to be contrary to the language of clause 10. Clause 10 purports to include, not exclude, the obligations in clause 8.

43. I was not persuaded that the argument based upon clause 7 had any real force. First, it depended upon an assumption as to the Defendant's "undertakings". But even if that assumption were correct they would remain in force so long as the Defendant's obligations under "this Schedule" (which must include those under clause 4 to pay certain legal costs) remained unsatisfied. That being so there was no reason why "his obligations under this Schedule" should not include those under clause 8 just as they included those under clause 4.

44. In my judgment the natural construction of the Tomlin Order and the Schedule attached is that the obligation of the Defendant to pay tax was, by reason of clauses 8 and 10, part of the Tomlin Order so that it could be enforced pursuant to the terms of the Tomlin Order, notwithstanding that it was also an obligation arising under the Consent Award. But even if the obligation arose under the Consent Award only, the point does not assist the Defendant because, in that event, the court would have enforced the obligation under the terms of the Consent Award instead (after making an appropriate order for alternative service).

45. The second point taken was that there had been a breach by Ivanhoe of its obligation to supply documentation received from SARS and that as a result Mr. Gardner lost the opportunity to challenge the assessment to tax. In circumstances where there were arguable criticisms of the assessment that was said to provide a defence to the claim.

46. The response made in oral submissions by counsel on behalf of Ivanhoe was that there was no arguable case that any breach by Ivanhoe caused Mr. Gardner not to challenge the assessment to tax. It was accepted that the revised assessment following the decision of the Supreme Court had not been forwarded to Mr. Gardner and that there was an arguable case that if a challenge had been made it would have been successful.

47. The evidence of Mr. Gardner was that he would have made a challenge; see paragraph 20 of his witness statement. This evidence was said to be unworthy of belief because when a demand for payment had been passed to his lawyers in July 2017 he took no action to challenge the assessment. In response counsel for Mr. Gardner said that his failure to challenge was not instructive; "his inaction was consistent with letting Ivanhoe fall into a pit of their own creation."

48. The court must be careful not to conduct a mini-trial of this issue. Oral evidence from Mr. Gardner would no doubt be given on this issue at trial. Whilst there are reasons for doubting the evidence he has given in his witness statement (and counsel's submission that he let Ivanhoe fall into a pit of its own making is consistent with a deliberate decision not to challenge the assessment which he must have appreciated had been made) it is not possible for the court on this application to say that his evidence is so clearly unworthy of belief that the suggested defence has no real prospect of success at trial. It appears weak and to be on the borderline of what "carries conviction" but I am unable to say at this stage that it has no real prospect of success

49. The third point taken is that Mr. Gardner promised to pay "a tax liability finally determined to be due by a court of competent jurisdiction" and that there had been no such determination. This raises a point of construction, namely, is the assessment made by SARS following the judgment on appeal to the Supreme Court "a tax liability finally determined by a court of competent jurisdiction".

50. It is true that the revised assessment following the decision of the Supreme Court has not been determined to be due by a court of competent jurisdiction but by SARS. However, that is because there has been no appeal against that assessment. In my judgment the Consent Award cannot reasonably have been intended by the parties to entitle Mr. Gardner to avoid liability for tax assessed to be due by the SARS where he had chosen not to appeal against the assessment. The Consent Award can only have been reasonably intended to allow Mr. Gardner to avoid liability where he had appealed an assessment and the decision of the court was awaited. Thus this third suggested defence raises, in effect, the same point as the second suggested defence, namely, was Mr. Gardner in fact deprived of the opportunity to appeal by Ivanhoe's failure, in breach of contract, to send him the revised assessment or did he choose not to appeal against the assessment.

Conclusion

51. The circumstances in which Mr. Gardner asks the court to re-list (and so to re-hear) Ivanhoe's application of November 2018 are therefore these. Mr. Gardner has failed to show that there was a good reason for his not attending the hearing, though he did proceed promptly to set aside the court's order on learning of it. He has identified one ground of defence which, although it cannot be said to lack any real prospect of success, is rather weak. In circumstances where there is good reason to believe that Mr. Gardner did not wish to pay the tax he had agreed to pay and hoped (as proved to be the case) that Ivanhoe would have great difficulty in informing him of any steps they proposed to take to enforce his obligation to pay the tax in question his request that the court should re-list and re-hear the Tomlin Application is certainly unattractive and unappealing. Having regard to the court's limited resources a party who hopes to avoid a court order against him by making it difficult for his creditor to track him down cannot reasonably expect the court, after the court has allocated one hearing to the matter, to

allocate another hearing to the matter at the behest of the party who finds that his attempt at avoiding a court order against him has failed. For these reasons I have decided that it is not fair and just or in accordance with the overriding objective to relist (and to re-hear) this matter.

52. Mr. Gardner's application must therefore be dismissed.