Neutral Citation Number: **[2021] EWHC 2756 (QB)**

Case No: QA-2021-000056

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15.10.2021

Before :

MR JUSTICE RITCHIE

- -

Between :

SQUARE DEVELOPMENTS RICHMOND LTD	**Claimants/ Respondents**
- and -	
SIMON BLAKEBROUGH (1) **ROQUEBROOK RESIDENTIAL LTD (2)** **ROQUEBROOK LTD (3)**	**Defendants/ Appellants**

Alexander Hill-Smith (instructed by Makwana Solicitors) for the Claimants/Respondents
Marc Glover (instructed by Ince Gordon Dadds LLP) for the Defendants/Appellants

Hearing dates: 11 October 2021

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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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Mr Justice Ritchie:

The Parties

[1] The Claimant is a company which provided various loans to the three Defendants.

[2] The first Defendant (D1) is an individual, the second Defendant and the third Defendant are companies in which D1 was either a shareholder or director or both.

Appeal documents

[3] I have read the appeal bundle filed and an authorities bundle provided today by Defence counsel. There was no application made to adduce new evidence.

The Appeal

[4] Before me is an application for permission to appeal made by the first Defendant and the second Defendant. The third Defendant company (D3) is in liquidation. I have seen no evidence that it has been dissolved.

[5] The decision appealed against was made on the 18th of February 2021 by Master Dagnall. He gave an extempore judgment. He provided permission for the Defendants to rely on two late served witness statements dated the 28th of January 2021 and the 3rd of February 2021. He varied earlier interim payment orders so that all 3 Defendants were required to pay £80,000 into court by the 12th of March 2021 and in default the defence and counterclaim of the Defendants was struck out. He varied the previous order so that the full sums which were to be paid into court were instead to be paid to the Claimant, payment to be made to the solicitors for the Claimant who in turn shall pay the sums into court. He also ordered that the Defendants should pay the Claimants costs on account of £25,500 by the 26th of February 2021.

[6] The 1st and 2nd Defendants appealed on 5.3.2021. They did not appeal paragraphs 1 and 2 of the order. They do appeal paragraphs 3 and 5.

[7] Permission to appeal was refused by Mrs Justice May on the 16th of June 2021. She noted that the Defendant had not resisted the original interim payment order on the grounds of impecuniosity, she considered that the Master had not erred in the exercise of his discretion. She considered that the Master had taken into account the evidence of Mr Britton. She considered he was entitled to conclude that the family trust may fund the Defendants defence. She considered that the imposed sanction of £80,000 under an unless order was proportionate. She considered the costs were rightly awarded to follow the event in the exercise of the Master's discretion.

The Summary of claim and Defence

[8] By the claim form, issued in August 2018, the Claimant sought approximately £2.7 million from the three Defendants variously. In the original particulars of claim the Claimant based its claim on a settlement deed dated the 28th of July 2018 by which the first to 3rd Defendants agreed to pay £1.75 million to the Claimant by the 26th of July 2018 and £950,000 by the 28th of September 2018. There were other terms.

[9] The Defendants defended alleging duress as a defence to the validity of the settlement agreement amongst other matters.

[10] By an amended claim dated the 24th of July 2020 the Claimant added alternative claims. In summary the amendment consisted of assertions that if the settlement deed is to be set aside then the Claimant relies on two loan agreements and two personal guarantees. The first loan agreement was signed on the 19th of January 2016 backed up by a personal guarantee from the first Defendant, and related to a loan provided by the Claimant to the first and second Defendants of £750,000 expressly to be repaid by a fixed date of the 18th of July 2017. An additional fee of £450,000 and interest of 60% per annum was to be paid. The Claimant asserted that the Defendants had not paid back any of the loans other than £10,000.

[11] In the amended claim the Claimant asserted that the Claimant and the second Defendant entered a second loan agreement dated the 22nd of February 2016 under which the Claimant loaned £300,000 to the second Defendant with a personal guarantee from the first Defendant. This was to be repaid on the fixed date of the 28th of January 2017 and a redemption fee of £180,000 was charged with default interest of 60% per annum. Other terms were also pleaded.

[12] In their amended defence dated 27th April 2020 (this has not been redated properly so the dates are unclear) in summary the Defendants asserted that both loan agreements and both guarantees were shams. They were fraudulent documents executed by the Claimant and the Defendants to persuade third party funders to contribute some of the loans provided by the Claimant to the Defendants. In addition the Defendants alleged misrepresentation, estoppel, collateral agreement, rectification and unconscionable bargain. Three of those are equitable remedies. Two are contractual defences.

[13] In broad summary the Defendants asserted that the first loan agreement was a sham executed under economic duress by the Defendants. The economic duress was that the Claimants required the loan documentation to be signed before releasing the monies at a time when the Defendants had contracted to buy a school development to be turned into residential properties, and were due to complete. They also alleged that the Claimant made representations and signed a side letter. The representations were to the effect that the loan documents were a sham and would never be relied on and that instead the loans would be repaid on sale of the redeveloped school at any time in future.

[14] The Defendants also asserted that the second loan agreement related to the development of two hotels in Malta and likewise the Defendants only signed the second loan agreement and the personal guarantee backing it up under economic duress because they were close to the completion of the purchase. They were likewise fraudulent shams. Stopping there an objective observer might wonder why the Defendants entered and second loan agreement after the alleged first economic duress the month before.

[15] Finally the Defendants asserted that the settlement agreement from July of 2018 was entered under duress by way of implied or expressed threats of violence.

Chronology of action

[16] The Claimant applied on the 29th of March 2019 for an order that the Defendants make interim payments to the Claimant. I have not seen a copy of that application.

[17] The application was heard by Master Dagnall on the 21st of July 2020 and he ordered the first and second Defendants to make: (1) an interim payment of £750,000 by the 14th of August 2020. The interim payment would to be made into court rather than to the Claimant. By the second paragraph he ordered the first and third Defendants to pay an additional £300,000 into court. He awarded costs to be paid by the Defendants to the Claimants in the sum of £11,500 less a set off of £3000 resulting in a payment balance of £8,500 from the Defendants to the Claimant.

[18] Those interim payments were not made into court although the costs were paid. So on the 27th of August 2020 the Claimant applied for an order that unless the Defendants did pay the interim payments previously ordered the Claimant would be at liberty to enter judgment.

[19] In support of their defence to their application the Defendants put in a witness statement from Mr Blakebrough dated the 8th of December 2020. He informed the court that the third Defendant went into liquidation in July 2020 and he asserted that the first and second Defendants had insufficient funds although they had paid the costs order. He set out the Defendants' case on their impecuniosity. He informed the court that the school project had been funded by a first line lenders called Close brothers and Rubicon Capital. Their lending was secured on the properties. He informed the court that most of the school properties had been sold but asserted that there was a loss when taking into account the costs and the loans provided for those developments. He gave evidence of a subsidiary company owned by the second Defendant that had carried out developments at "Firs Avenue" which he asserted also made a loss. He disclosed to the court that he was a beneficiary of "the Marlborough trust" as was his wife and as were others. He swore the trust was run by John Britton and was set up in Gibraltar. He asserted that the trust was unwilling to pay the interim payments or to support the litigation. He set out that he was married with two children and owned no property in the United Kingdom and lived in rented accommodation. He accepted he was a director of various companies and a shareholder of various companies which developed properties in England and elsewhere.

[20] The hearing of the application for an unless order came before Master Dagnall and he delivered judgment on the 12th of February 2021. By the time of the hearing the Defendants had put in two further witness statements from Mr Blakebrough and a statement from Mr Britton. Master Dagnall noted in his judgment that the original interim payment orders which were to be paid into court were not appealed. He explained that he had made the original interim payment orders on the basis of the case of *British & Commonwealth v Quadrex Holdings [1989] 3 WLR 723* and that he was satisfied that the Claimant would obtain a substantial amount of money at trial and called the defence "at best shadowy". He noted that there was no assertion of impecuniosity made at the hearing of the original application for an interim payment in July of 2020.

[21] He then went on in his judgment to deal with the assertion of impecuniosity. He referred to CPR rule 3.1 and rule 3.4 and considered his case management powers thereunder. He referred to the overriding objective. He took into account the late served evidence from Mr Blakebrough in two long witness statements and considered there was no good reason for their lateness. He considered that there were various

principles to be applied when impecuniosity was relied on by a party. He summarised those as:

1. The need for full and frank disclosure by the party asserting impecuniosity.
2. The burden of proof being on the asserting party.
3. Where the asserting party does not have assets in the jurisdiction and hasn't given proper evidence of impecuniosity, the court will generally require payment of the ordered sum as the price of allowing the party to continue.

He took into account the Defendant's Article 6 rights relating to a fair trial. He also took into account the case of *Apollo Ventures v Manchanda (2020) EWHC 2206 (comm),* in which Mr Christopher Hancock QC sitting as a deputy High Court Judge noted that impecuniosity is a ground for refusing security for costs orders. He ruled that this was so because it would stifle the asserting parties ability to exercise his or her Article 6 rights. However, in that case there were also dicta setting out the courts approach where the asserting party failed to prove that it could not look to others to fund its claim. I shall return to this later.

[22] Master Dagnall considered that the Claimant's evidence blew holes in the Defendants' evidence about Mr Blakebrough's assets and indeed undermined Mr Blakebrough's first two witness statements by showing up inconsistencies therein. The Master noted that Mr Britton refused to give the court details of the trust, of which he was the chairman, which the Master thought was surprising considering that the first Defendant was a beneficiary under the trust. He asked how would the beneficiary know his entitlement under a trust without being entitled to that information? The Master noted that the first Defendant and Mr Britton and the trust were involved in multiple property development ventures together, whether as directors, shareholders, lenders or otherwise.

[23] He considered that if the Defendant was made bankrupt by failing to comply with the court orders in this case that would be an embarrassment to the trust, that first Defendant might not be able to be a company director any longer and that would be an inducement for the trust to provide the necessary support for the first Defendant and second Defendant to fulfil their defences should they wish to do so.

[24] The Master noted that it seemed to him that the first Defendant and Mr Britton had set matters up so that the first Defendant lacked any assets in the United Kingdom and so that any personal guarantees given by the first Defendant were worthless. He noted the first Defendant was in effect saying he was a man of straw, despite the fact that he was a property developer involved in multiple continuing property developments. The Master expressly doubted the accuracy of the first Defendant's evidence. The Master noted that the trust, which was involved in a Romanian company by way of ownership or lending, had not prevented a £100,000 loan being made by the Romanian company to the first Defendant. He noted that no documents had been provided to the court in relation to that funding.

[25] The Master also noted that the first Defendant asserted he had no interest in the Malta property development despite arranging and receiving £300,000 by way of the loan from the Claimants to fund that project. No documents relating to that project had been provided to the Master.

[26] The Master also questioned the disparity between the accounts of a company called Skilbeck limited, showing £5 million of stock and compared that with the evidence before him that suggested that the development had not gone ahead.

[27] The Master concluded that there was a real likelihood that the trust would support the first Defendant to defend the trial [Para 78]. He also found it was unlikely that the trust would support the first Defendant as to a million pounds but might do so as to between £150,000 and £200,000 pounds.

CPR 52.6

[28] Under CPR rule 52.6 (1) permission to appeal may be given only where this court considers that the appeal would have a real prospect of success or there is some other compelling reason for the appeal to be heard. I take into account the authorities on how that test is applied which are *Swain v Hillman (2001) 1 ALL ER 91,* a Court of Appeal decision in which in summary the court ruled that the prospects have to be realistic as opposed to fanciful. I also take into account *Tanfern ltd v Cameron-MacDonald (2000) 1 WLR 1311,* in which the court ruled that the appellant did not have to prove a greater than 50% prospect of succeeding.

[29] Is there some other good reason to grant the appeal if the Defendants do not have a realistic prospect of success.

The Facts and Evidence

[30] **Agreed facts** It seems to me that the most relevant fact is that the original application for an interim payment succeeded, the Defendants did not argue impecuniosity at that time which was July 2020 and the Defendants did not appeal that order.

[31] There is no assertion the Defendants that their alleged current impecuniosity arose since July 2020 in any of the witness statements.

[32] The Defendants do not appeal the variation of the interim payment order transferring the payments to the Claimant.

Evidence and findings of facts

[33] Because this is an application for permission to appeal I make no findings of fact and simply review the findings of fact made by the Master in relation to the evidence put before him. In particular I note that the Master let in 2 long affidavits from the first Defendant which were served late.

[34] The Master was not satisfied as a matter of fact that the Defendants had satisfied the criteria in law for impecuniosity or the burden of proof, particularly in relation to funding by associates.

Fresh Evidence

[35] The Appellants slipped fresh evidence from Mr Britton into the appeal bundle and made no application to have it admitted in evidence for the appeal. I have read the witness statement from Mr Britton dated 11.3.2021. Under CPR 52.21.(2) I do not give permission for this to be in evidence on this permission application. In any event the evidence is really what Mr Britton said to the Master resaid in arrears. It does not fulfil the *Ladd v Marshall* requirements.

Grounds of Appeal

[36] No appeal is made from the paragraphs of the order converting the payments into court into interim payments to the Claimant.

[37] In his submissions before me Mr Glover majored on two issues relating to the £80,000 payment in order. He submitted that when the Master made the order to pay sums into court it was in effect a security for costs order disguised under CPR rule 3. He asserted that the Master had used CPR rule 3 without proper reference to the case law governing orders for security for costs and he referred to a small bundle of cases which were not before the Master. The cases relied on were *Olatawura v Abiloye (2002) EWCA civ 998;* and *CIBC v Mellon Trust Co (2002) EWCA civ 1688;* and *Ali v Hudson (2003) EWCA civ 1793;* and *Huscroft v P&O Ferries (2010) EWCA civ 1483.*

[38] The Defendants argued that security for costs should not be awarded under CPR rule 3 to circumvent the principles set up in CPR rule 25. The Defendants asserted that there was no history of repeated failures to comply with court orders and therefore the power in CPR rule 3 was not triggered. Further the Defendants asserted that they had won the major parts of the Claimant's application for an unless order because the Master had not made an unless order attaching 2 the interim payments amounting to more than a million pounds. Instead he had only converted those from orders to pay in, to orders to pay the Claimant. He asserted that the Master had made a disguised security for costs order for the Defendants to pay £80,000 into court and an unless order. He submitted that the sum was calculated by reference to rough figures as to the Claimant's future costs. It was pressed upon me that it was only in an exceptional case that an order for security for costs would be allowed to stifle the asserting party's ability to pursue its case.

[39] The Claimant's counsel attended the application for permission to appeal, although there was no requirement to do so. Mr. Hill-Smith submitted the Defendants were in breach of the interim payments order. He submitted that they had failed to prove impecuniosity to the standard required and he noted that the burden of proof was on the Defendants to produce cogent evidence and to do so by with full and frank disclosure. He relied on the cases provided to the Court below which he handed up.

The Conclusions

[40] I do not consider that the first or second Defendants have realistic prospects of success in this appeal for the following reasons.

[41] The Defendants' defences have been found by the Master to be shadowy. There is no appeal against that finding.

[42] The Defendants have paid their own lawyers to attend a lot of hearings, draft a lot of papers and no doubt to give advice.

[43] The Defendants were ordered to make payments into court in sums which combine to total more than a million pounds. They did not appeal that decision. Nor did they provide evidence on the interim payment applications that they could not afford those

sums. It seems to me that these are powerful agreed facts which undermine the currently asserted position.

[44] If the Defendants had been impecunious at the time when the interim payment orders were made then they should have raised that properly in evidence before the Master. They did not. If they wished to appeal the Master's interim payment order they should have done so. They did not.

[45] It was only when the Claimants came to seek to enforce the interim payment order and even then only a few months after the notice of application that the Defendants started to assert impecuniosity as a ground for defending the application for unless orders.

[46] The Master was entitled to approach the analysis of the impecuniosity issue in the way he did.

[47] He admitted all of the evidence, albeit some of which was late served, from the Defendants. He analysed the shadowy defences of the Defendants.

[48] He noted the unimpressive web of structures between companies and trusts which allowed the first Defendant to be an effective man of straw to his creditors, whilst at the same time offering personal guarantees and carrying out substantial multi million pound property developments in England and Europe.

[49] The Master identified his imposed disadvantage in not being allowed to understand the size or structure of the family trust of which the first Defendant is a beneficiary. The trust is based in Gibraltar and on the evidence of Mr Britton will not disclose details to the court. The Master came to what seems to me to be a perfectly proper decision that full and frank disclosure had not been provided to him.

[50] I take into account the CPR guidance given in PD52A at paragraph 4.6 in relation to the high threshold for appeals on case management decisions including security for costs decisions. I take into account that for all questions of fact any appeal from the Master's decisions requires a higher threshold for permission.

[51] I take into account that the Orders for interim payments to the Claimant of over £1 million are not appealed.

[52] I consider that the case management practice after an order for interim payments of over £1 million has been made (the sums to be paid into court) and which is not appealed is the same as, but in a different context to, those applying before any judgment or order in such terms.

[53] This factual matrix was reinforced when the original order was converted to an interim payment for over £1 million to the Claimant. This was again reinforced when the order was not appealed.

[54] The case law cited by Mr Glover for the Defendants, which governs security for costs applications generally, still applies of course but the facts have changed. By reference to the 2 factors in paragraph 24 of the judgment of Simon Brown LJ in *Olatawura v*

Abiloye (2002) EWCA civ 998: (a) the Defendants conduct has been: to fail to comply with the interim payment order and to fail to assert impecuniosity at the hearing when that order was made and to decide not to appeal the order; (b) the apparent lack of strength of the Defendants case: it was found to be and is, in my judgment, shadowy.

[55] Looking at CPR Rule 25.13 and the notes at 25.13.13, the 7 factors set out in the notes are addressed by the Master in his judgment albeit without specific reference to that rule. So (1) and (2): the Defendants' case is shadowy, (3) the Defendants signed a settlement agreement admitting the sums (albeit that they say they did so under duress). (4) The Defendants have failed to comply with an interim payments order. (5) The Defendants do not assert oppression, they assert impecuniosity. (6) The Defendants' asserted impecuniosity has not been brought about by the Claimant. (7) The application was made very timely by the Claimant.

[56] Dealing with the grounds of appeal:

- Ground 1a: the Master considered the written evidence of John Britton in his judgment and found it unimpressive. This was a finding of fact he was entitled to make. Any challenge to findings of fact have to pass a high threshold test, see *Grizzly Business v Stena Drilling [2017] EWCA civ civ 94 at 39-40.*
- Ground 1b: the Master was entitled to consider the evidence of the previous loan of £100,000 provided to the first Defendant through a Romanian company in which the trust had interests and that was relevant to his discretion. Likewise when taking into account the potential effects of bankruptcy on the probability or possibility of the provision of funding to the Defendants by others.
- Ground 1c: the Master was within the scope of his discretion when considering the possibility/probability of the Defendants obtaining funding from others for the sums ordered.
- Ground 2a: this does not appear to be a specific ground of appeal but rather foundation for ground 2b.
- Ground 2b: the Master did not accede to the Claimant's application to permit the Claimant to enter judgment as a result of the Defendants outstanding failure to comply with the unappealed interim payments into court. He was entitled to exercise his discretion over his case management powers and his powers under CRP 25 to make an order for a further payment into court for a much smaller sum with an unless order attached, having taken into account the Defendants' breaches of his earlier orders, shadowy defence, and the failure to discharge the burden of proof on impecuniosity.
- Ground 3a: the Master was within the scope of his discretion in relation to costs. The Claimant had sought an unless order and obtained one. The Defendant had sought to avoid an unless order and failed to do so.

[57] **Order**
Permission to appeal refused.

[58] **Costs**
I take into account CPR rule 52 PD clause 8.1(d). I consider it just in all the circumstance to order the 1st and 2nd Defendants to pay the Claimant/Respondent's costs of the permission hearing to be assessed on the standard basis if not agreed.

Ritchie J