Neutral Citation Number: [2020] EW Misc 11 (CC)

Case No: G00BS732

IN THE COUNTY COURT AT BRISTOL

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

Date: 14/07/2020

Before :

HHJ PAUL MATTHEWS

- -

Between :

DAVID SMITH **Applicant**

- and -

REYNOLDS PORTER CHAMBERLAIN LLP **Respondent**

- -
- -

The applicant in person
Scarlett Milligan (instructed by **Reynolds Porter Chamberlain LLP**) for the **Respondent**

Hearing date: 22 June 2020

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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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Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to BAILII on the date shown at 12:00 noon.

HHJ Paul Matthews :

1. On 1 May 2020 the applicant applied, by way of application notice in form N244 for pre-action disclosure against the respondent under CPR rule 31.16. The application was supported by a witness statement of the applicant dated 29 April 2020 and opposed by a witness statement of Jonathan Wyles (of counsel with the respondent) dated 15 June 2020. The applicant made a second witness statement dated 18 June 2020, responding to that of Mr Wyles. The hearing of the application was listed for 22 June 2020, to take place by telephone conference call, given the Covid-19 pandemic. The application notice sought an order:

> "that the Defendant disclose the documents which are or have been in his control pursuant to CPR 31.16. Because the documents electronic or otherwise holds evidence that furthers the Applicant's claim in the interests of the administration of justice and/or in the consequence of CPR 1.1 the overriding objective."

2. The applicant's short first witness statement, made in support of the application, said (omitting irrelevant material):

> "3. I make this witness statement in support of my application for an order for this Court for pre-action disclosure of the electronic records, documents or otherwise held on specific computer hard drives and portable data storage devices controlled by the Defendant which would provide information and clarity in order to narrow the legal issues pursuant to this course of action and in the interests of the administration of justice pursuant to CPR 31.16.
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> […]
>
> "5. Following recent private fraud investigations involving proceeding brought against the Assignor following the sale/purchase and transfer of ownership to its current owners not linked in any capacity to the former Gaddafi regime an based on the tracing and origin of the funds used to purchase 7 Winnington Rd, Hampstead Garden Suburb, London, N20 0UA (the Property) which established that despite a member of the Gaddafi family being the former beneficial owner of the Assignor funds used to purchase the Property were in fact part of a private agreement with commercial interests who provided 100% funding for the Property to be purchased by the Assignor in return for what turned out to be a contractual arrangement that broke down. As a result on 1 May 2011 the Assignor former beneficiary's interests were assigned to third parties to settle the matter.
>
> 6. On 1 December 2012 court documents which included a witness statement were drafted for use at the Commercial Court as evidence signed by a statement of truth than, essentially the witness statement confirmed by high level Libyan officials that a link did not exist to establish that funds belonging to the State of Libya had been used for the purchase of the Property, this witness statement was never submitted to the Commercial Court.

7. On 1 December 2012 identical court documents which now included particulars of claim were for use at the Commercial Court as evidence signed by a statement of truth by Mohammed Shaban on behalf of the State of Libya in the right-hand corner or footer area of each page of the witness statement the name Reynolds Porter Chamberlain LLP was omitted, on this occasion the PoC stated that the funds provided for the purchase of the Property did come from funds belonging to Libya and stated until further disclose brief particulars would be given the PoC was relied on by the then Justice Popplewell in his judgment made on 9 March 2012.

8. On 9 March 2012, RPC appeared to have submitted documents in the form of a draft order amongst other things to the Commercial Court in which the recitals of the draft order where approved verbatim and accepted and sealed by the Commercial Court evidenced by the name Reynolds Porter Chamberlain LLP and the address of Tower Bridge House, St Katherine's Way, London, E1W 1AA on the submitted documents similar to other documents within the material proceedings. …

9. On 14 April 2020 the Defendant's managing partner on behalf of the Defendant was served with a pre-action letter to enter into alternative dispute resolution and avoid the need for court action the Defendant was duly given 14 days to reply and to date the Defendant has failed to respond to the pre-action letter. …

[…]

11. In the consequence of CPR part 31, I submit this application for disclosure of documents electronic or otherwise relied upon by the Defendant that resulted in significant financial loss following the conclusion of an investigation by myself and Tuscany Trust Holdings Trustees (the Trust) of the material facts of the relevant proceedings that resulted in the Assignor's assets being found to have been defrauded in proceedings at the Commercial Court following an order that relied on and acted on submissions made by the Defendant who appeared to have not been on record as acting in those proceedings for parties involved, investigations have indicated that the Defendant was on record as acting. I assert that in the absence of an oversight or error by court staff I now seek clarification as to the factual position of the Defendant.

12. I assert that the absence of the Defendant had having warranty of authority to draft and submit documents in the relevant proceedings the Defendant's conduct amounted to a wilful breach of the Solicitor's Code of Conduct by recklessly making false representations that the Defendant had warranty of authority in those proceedings to draft and submit documents within those proceedings.

13. I will rely on negligent breach of a duty of care, deceit and fraudulent misrepresentation founded in dishonesty as a cause of action in any future proceedings. I therefore seek disclosure in order to obtain sight of vital assert vital evidence and would therefore be able to narrow the evidence prior to my seeking

> relief form the courts on the substantive grounds I intends to rely on pursuant to CPR 31.16.
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> 14. I believe if an order is granted it will provide further additional information that will form the basis for the Defendant's abject failure to engage in pre-action conduct in accordance with Paragraph 6 (c) of the Practice Direction – Pre-Action Conduct (PDPAC) of the CPR.
>
> 15. As a result of the Defendant failing to respond to an offer of alternative dispute resolution (ADR) and who were clearly aware that this matter could be the subject of further legal action and that the Defendant would be liable to pay any additional costs arising in those proceedings.
>
> 16. I respectfully invite the court to order that the Defendant do pay the costs of this application summarily assessed at £3621.54."

(I should say that I have attempted to reproduce exactly what is written in the application notice and the witness statement.)

3. Mr Wyles' witness statement refers to a claim brought by the State of Libya in 2011-12 to recover the property referred to in paragraph 5 of the applicant's witness statement, in which the respondent acted for the State of Libya. The property was registered in the name of Capitana Seas Ltd, a BVI company then owned by the son of the late dictator of Libya, Colonel Muammar Qqdhafi. The claim was successful, and an order made by Popplewell J on 9 March 2012. In May 2015 a Leslie Gayle-Childs applied to set this order aside. Knowles J refused this application on 5 August 2015 without calling upon counsel for the State of Libya. Mr Gayle-Childs has apparently had more than one General Civil Restraint Order made against him. Subsequently further applications were made (separately) by a Mr Barabutu and a Mr Sanderson to overturn the order of 9 December 2012. Both were struck out.

4. I heard this application for pre-action disclosure on 22 June 2020. As set out below, only the respondent participated in the hearing, though the applicant had emailed a skeleton argument to the court the day before. At the hearing (which lasted about 35 minutes) despite the absence of the applicant I went into the merits of the application. My short extempore judgment has not been transcribed, but it went through the requirements for an application for pre-action disclosure (as set out in CPR r 31.16) and then applied them to the facts of this case as they appeared to be. In particular, I held that the evidence was incomprehensible, that any underlying claim appeared to be statute barred, that the application appeared to be a collateral attack on earlier decisions of Popplewell J in 2012 and Knowles J in 2015, and that the position of the applicant was opaque, not only as to his identity but also as to his title to sue at all.

5. In addition, I also referred to the applicant's second witness statement in support of his application, which (remarkably) said:

> "21. I assert that the need for any further disclosure is no longer required."

This was amplified in his skeleton argument as follows:

> "14. The Claimant hereby asserts that the need for any further disclosure is no longer required as the High Court has confirmed that the Defendant did not have at any stage of the relevant proceedings any such warranty of authority.
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> […]
>
> 21. I respectfully invite the court to dismiss the application following the High Court confirmation of the Defendant not acting."

So far as I can see, there is no explanation of the so-called "High Court confirmation", where it is to be found and what it consists of.

6. The result of all this was that I decided to dismiss the application as totally without merit, and to order the applicant to pay the respondent's costs. Although I was asked by the respondent to make a civil restraint order against the applicant there and then, I said I would only do so after reading any written submissions that the parties wished to make to me on this matter.

7. The next day, however, I was informed that the applicant *had* instructed counsel (through direct access) and that he and counsel had been waiting to be joined to the telephone hearing, but that this had not happened. By this time, I had drafted an order to give effect to my decision, but it had not yet been sealed. I put that on hold while I looked into the matter. Having done that, my clerk sent the following message and directions to the parties on 29 June 2020:

> "The claimant's application issued on 1 May 2020 for pre-action disclosure under CPR rule 31.16 against the defendant was listed for hearing at 15:00 on Monday, 22 June 2020. The notice of hearing was sent out on 4 June 2020. It made clear that this hearing would be by telephone, using the BT Meet Me conference facilities. It directed the parties to supply to the court no later than two clear days before the hearing current contact details i.e. landline, mobile telephone number and/or email address. It stated that failure to provide this information might result in the case proceeding in the party's absence or being adjourned with an order for costs against the party.
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> The application notice was supported by a first witness statement of the claimant, dated 29 April 2020, and accompanied by a draft order. On 16 June 2020 at 07:55 a witness statement in response by Jonathan Wyles dated 15 June 2020 on behalf of the defendant was filed at court by email. On 18 June at 1719 a second witness statement of the claimant, dated that day, was filed. A skeleton argument on behalf of the defendant was filed at court by email at 09:23 on Friday, 19 June 2020. A skeleton argument on behalf of the claimant was filed at court by email at 22:40 on Sunday 21 June 2020. All of these documents bore the correct claim number, and, by the time of the hearing at 15:00 on 22 June 2020 I had received and read all of them.
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> The hearing information sheet provided to me on the morning of 22 June 2020 showed that details of defendant's counsel and solicitor were provided, but that apparently nothing had been provided in relation to the claimant. I asked

court staff to contact the claimant urgently to ask for a telephone number. Three emails were sent (at 09:31, 10:44 and 10:46) to the claimant at davidsmith@tuscanytrustholdingstrustees.com , which was the email address used to send the skeleton argument the day before. No reply was received.

The hearing took place by telephone at 1500, but without the participation of the claimant, as I had no telephone number on which to call him. Having read all the documents, including skeleton argument, I dealt with the application, listened to the arguments put forward on behalf of the defendant, and dismissed the application with costs. The defendant invited me to make a civil restraint order against the claimant. I said that I would wish to hear anything which the claimant wanted to say before I made a decision on that, and invited written submissions from the defendant to which the claimant could reply if so advised.

The claimant telephoned the court on Tuesday morning, to say that he had not heard anything about the hearing the day before, and asking to be updated. He left an email address on which to be contacted. This was not the email address on which he had sent the skeleton argument, but a slightly different one: davidsmith@tuscanytrustholdings.trust.com. Also on Tuesday morning, a firm called Nathan Paralegals forwarded to the court a message from the clerk to Dirk Van Heck of Quartz Barristers in Nottingham (emailed to the court on Friday 19 June 2020 at 14:42) to say that Mr Van Heck was instructed by the claimant for the hearing on Monday and gave telephone details for counsel and for the claimant.

Unfortunately, this email did not give the name of the case, but did give an incorrect case number, G00BS090. This case number refers to a case called *Robinson v Shaban and the State of Libya*. This was also a pre-action disclosure case, which had been previously transferred by consent to the High Court in London by DJ Watkins.

Needless to say, I did not receive this email in time for the hearing. Had I done so, I would have contacted counsel and the claimant so that they were on the call. It is a pity that the claimant did not respond to any of the three emails sent to him that morning. But we are where we are. As it happens, the order from the hearing, although drafted, has not yet been sealed. It is therefore possible for the court simply to hold a further hearing, at which the claimant and the defendant may be heard, before the court reaches a final decision. It is not necessary first for any application to be made for the order to be set aside because there is as yet no order. However, before I take this course, I invite the parties to make any written submissions to the court (copied to the other side) which they wish, by 16:00 on Tuesday, 30 June 2020, with any comments in reply to the court (similarly copied) by 16:00 on Thursday, 2 July 2020. I will then decide what to do."

8. In the meantime, on 24 June 2020 the respondent sent to the court written submissions on its behalf in support of an application for a civil restraint order against the applicant. On 26 June 2020, the applicant sent to the court a third witness statement

dated the same day, (inter alia) replying to the respondent's submissions. On 30 June 2020, both sides sent me written submissions in relation to the question whether there should be a rehearing, and on 2 July 2020 they sent me written submissions in reply to each other. I have considered all these documents.

9. In his third witness statement dated 26 June 2020, the applicant attempted to adduce further evidence in relation to the claimed assignment of rights to the applicant. In my judgment it is too late for that. The situation is analogous to that which obtains in relation to an appeal, where the ordinary rule is that fresh evidence will not be admitted on appeal in the absence of special grounds. None are shown here. The issue now is whether the absence of the applicant or his counsel at the hearing justifies the application's being relisted. In relation to this issue, the applicant said that his "not being allowed to make … representations under the circumstances has resulted in injustice and a failure of the good administration and a of justice." He went on to assert that "any further punitive orders sought such as a General Civil Restraint Order is dismissed, and the order made is set aside and the matter is relisted to be heard."

10. However, in his written submissions a few days later on 30 June 2020 the applicant said this:

> "15. In light of my personal findings I am satisfied despite the Defendant not disclosing that it had never obtained any lawful warranty of authority to act for any party in the relevant proceedings in what amounts to an abuse the court process and an act corrosive of the civil justice process.
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> 16. In the consequence of the above, further disclosure from the Defendant is no longer required, I am fully aware of the time constraints that the judicial system and in particular the civil justice area following the pandemic and I would fully agree to this matter being discontinued and any further hearing on this matter vacated with each party on responsible for its own costs."

11. The respondent's submissions of the same date argued that I had been correct to proceed in the applicant's absence under CPR rule 23.11. This rule provides as follows:

> "(1) Where the applicant or any respondent fails to attend the hearing of an application, the court may proceed in his absence.
>
> (2) Where –
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> (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."

12. The reasons given were that the applicant had not complied with the direction to provide the court with contact details two clear days before the hearing, that counsel's clerk had provided the wrong case number, neither the applicants nor the clerk contacted the court to confirm receipt of contact details, the court attempted several times to contact the applicant by email on the morning of the hearing (which was to begin at 3 pm) but received no reply, and I had received the witness statement and

skeleton argument of the applicant, which I had already read in advance of the hearing.

13. The respondent also argued that there was no good reason why the application should be relisted for hearing. It submitted that the applicant could have done more to ensure that the necessary contact details were received by the court. It also pointed out that the applicant himself had stated in his evidence and in his skeleton argument that disclosure was no longer required and the court should dismiss the application. So the only possible point of relisting the matter could be to re-argue the question of costs. The respondent said this would be disproportionate.

14. Thirdly, the respondent argued that the application had no merits, and that this should be taken into consideration in considering whether to relist the case. It referred to the decision of Swift J sitting in the Administrative Court on 4 June 2020 in *Agba v Luton Borough Council*. In that case an appeal was dismissed (by Choudhry J) in the absence of the appellant, after the court considered that it was appropriate to proceed in her absence. She thereafter applied promptly to set aside the order made on the basis that she had felt unwell on the day of the hearing and had followed government guidance on Covid-19 to self isolate. Even though there was a good reason for her absence, the court held that there was no reasonable prospect the question before the court would be answered any other way at a restored hearing, and dismissed the application.

15. If the court tested the present application by reference to the "real prospect of success" test for summary judgment, then (said the respondent) then the applicant would be unable to meet it. The respondent referred to the points which I made in my extempore judgment on 22 June 2020 (at [3]-[4]) above). It submitted that the position would not be improved by having a hearing, as the applicant's counsel could not give evidence. Even if the hearing were confined to revisiting the question of costs, there would be no reasonable prospect of the applicant's succeeding, as the default position in relation to the costs of pre-action disclosure applications was that the applicant pays the respondent's costs: see CPR 46.1(2).

16. In my judgment, the respondent is right. The application was hopeless from the start, given the difficulties with the evidence, and in particular the lack of any evidence showing the applicant's title to sue, the limitation problems of any underlying cause of action and the public policy interest in not permitting collateral attacks on earlier decisions. In addition to that, the applicant's approach on his own documents filed before the hearing was to assert that there was no longer a need for any substantive relief on the application.

17. Moreover, there has been no explanation whatever as to (i) why contact details were not supplied at least two clear days before the hearing, so that they could be passed to the appropriate court staff and then to the judge, (ii) why the applicant's counsel's clerk did not contact the court to make sure that the details had been received, and (iii) why the applicant did not respond to any of the three emails sent to him by the court (at the email address he had used the day before to send the skeleton argument to the court) on the morning of the hearing. In these circumstances, any attempt to justify a rehearing of this application must fail.

18. If the applicant's position is that his application should be dismissed but that some different order should be made as to costs, then in my judgment he has not made this claim out. I will therefore direct that my draft order prepared after the hearing on 22 June 2020 be sealed, albeit with minor amendments to reflect this reconsideration of the position. The order refers to filing submissions in relation to the question of a civil restraint order. I have retained these paragraphs although they have now been complied with, and the court will now have to consider whether a civil restraint order should be made.