Neutral Citation Number: [2012] EWHC 525 (Ch)

Case No: 6678 of 2008

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/03/2012

Before :

MR JUSTICE BRIGGS

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Between :

(1) Simon Robert Thomas	**Applicants**
(2) Robert Harry Pick	
(as joint liquidators of GBI Investments Limited)	
- and -	
(1) Boris Jakes	**Respondents**
(2) Juraj Nestarec	

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Mr E Cumming (instructed by **Trowers & Hamlins LLP**) for the **Applicants**
Mr E Davies (instructed by **SNR Denton UK LLP**) for the **Respondents**

Hearing date: 1 March 2012

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JUDGMENT

Mr Justice Briggs :

Introduction

1. This is the second of two applications by the joint liquidators of GBI Investments Limited ("the Company") to commit the respondents Boris Jakes and Juraj Nestarec to prison for contempt of court by reason of their conduct in response to an order made by Warren J on 15 January 2010 on the application of the then provisional liquidator of the company: ("the First Order"). For reasons which will become apparent, I shall refer to the applicants as "the English liquidators".

2. Paragraph 1 of the First Order required the Respondents by 4.30 p.m. on 19 January 2010 to deliver up to the liquidator of the Company 43 bearer shares in GBI Investments CZ a.s. ("the Shares"). Paragraph 2 of the First Order required the respondents by 4.30 p.m. on Thursday 21 January 2010 to deliver to the liquidator of the Company a sum of €3,987,584 described as being held in the accounts of Mookait s.r.o ("the Money").

3. On 29 July 2011 I heard an application by the English liquidators to commit the respondents to prison for breach of those two provisions of the First Order. It was common ground that neither of them had been complied with by the respondents, but that the First Order had not been personally served on either of them. It was therefore necessary for the liquidators to persuade the court to dispense with personal service of the First Order on each of the respondents, pursuant to RSC Ord. 45 r.7(7) which, (as was common ground) required me to be satisfied beyond reasonable doubt that the terms and consequences of non-compliance with the First Order had come sufficiently to each respondent's attention before the deadlines for delivery up of the Shares and the Money had passed.

4. Although I concluded that it was probable that the various attempted methods of non-personal service had achieved that result in relation to both of the respondents, I was not satisfied beyond reasonable doubt, and therefore dismissed the application.

5. The English liquidators applied in the alternative for an order setting fresh deadlines for the delivery up of the Shares, namely by 4.30 pm on 8 August 2011. It had by then become common ground that there was sufficient doubt about the respondents' ability to deliver up the Money to make it inappropriate to do more than order them to use their best endeavours to do so, without setting any deadline. I acceded to that further application and, in addition, ordered that the respondents attend a meeting at the offices of the English liquidators' Slovakian lawyers in Bratislava (where both the respondents resided) on 3 August 2011 to enable personal service to take place.

6. Although they did not attend personally, the respondents went to some lengths, both in written evidence and in submissions from counsel, at the hearing on 29 July to persuade the court that no further deadline should be set for the delivery up of the Shares, upon the basis of an alleged perception on their part that to do so would expose them to criminal penalties in Slovakia by reason of the existence of a parallel liquidation of the company there, the appointment of a local liquidator ("the Slovak liquidator"), and his written demand that the Shares be delivered up to him. It was not suggested that anything other than the respondents' apprehension of exposure to those criminal sanctions stood in the way of their delivering up the Shares to the English

liquidators, nor was it suggested that the First Order could be complied with by delivery of the Shares or the Money to the Slovak liquidator. The evidence relied upon by the respondents, principally an affidavit of Mr Jakes affirmed on 1 July 2011, stated that, as at that date, the Shares were locked in his safe in named corporate offices in Bratislava. Nothing was said on the respondents' behalf at the hearing to suggest that the location of the Shares had since changed.

7. The reasons why, notwithstanding the respondents' opposition, I set a fresh deadline for the delivery up of the Shares are set out in the approved transcript of the extempore judgment which I gave at the end of that hearing. In summary, since the respondents had done nothing to seek a variation of the First Order since, on their own evidence, becoming aware of it in April or May 2010, nor satisfied the court with any expert evidence that their apprehensions about Slovakian criminal sanctions had any substance, it seemed to me that the English liquidators were entitled to the setting of a fresh deadline *ex debito justitiae.* I shall refer to the order which I made on 29 July as "the Second Order".

8. The Shares were not delivered up to the English liquidators by 8 August. Shortly before the expiry of the new deadline for the delivery up, the English liquidators' solicitors were informed by the respondents' English solicitors that, in fact, the Shares had been delivered to the Slovak liquidator on 28 July, the day before the hearing at which the Second Order was made.

9. The English liquidators have, in the event, since obtained the possession of the Shares from the Slovak liquidator. He had been appointed pursuant to local insolvency proceedings brought in respect of the Company by the second respondent in February 2010, which had been brought to an end by an order of the Slovakian Regional Court in November 2010. That order had been suspended pending an appeal to the Slovakian Supreme Court, which had been pending in July 2011, but which was eventually dismissed in January 2012. Any semblance of authority as local liquidator having thus been displaced, the Slovak liquidator duly and properly delivered the Shares to the English liquidators shortly thereafter. The objective of the order for the delivery up of the Shares has thus been achieved, but only after almost two years' delay, and the incurring of very substantial further costs by the English liquidators.

10. In the meantime, there is an issue whether the respondents used best endeavours to bring about the transfer of the Money to the English liquidators which, in the event, I do not have to decide.

11. Long before the delivery up of the Shares by the Slovak liquidator, the English liquidators instituted the present committal application on 15 August 2011, alleging breaches of both the First and Second Orders in relation to the Shares and a breach of the Second Order in relation to the Money. The application to commit in relation to the Money was not pursued, in part because the Penal Notice on the Second Order did not relate to the best endeavours obligation in relation to the Money.

12. Due in part to the late arrival at court of the first respondent, and to an optimistically short time estimate, it proved possible to deal only with the question whether the respondents had committed the alleged contempts, or any of them, although I permitted evidence to be tendered and cross-examination to be conducted in relation to matters relevant to the gravity of any proven contempt, and therefore to the nature

and amount of any appropriate punishment. But nonetheless submissions about punishment have yet to be made.

13. Both the respondents had been ordered to attend for cross-examination on their evidence, in default of which it was not to be relied upon. In the event, Mr Jakes arrived late, but in time for a full cross-examination, with the assistance of an excellent interpreter. Mr Nestarec did not attend (although he was represented by solicitors and counsel), seeking to excuse his absence by the provision of an exiguous certificate of illness. For reasons given in an extempore judgment during the hearing, I concluded that the certificate was an inadequate excuse for his non-attendance and directed that Mr Nestarec's evidence could not be relied upon. No application was sought for an adjournment of the application as against either respondent.

14. Mr Jakes was a thoroughly unsatisfactory witness. He was evasive, and he sought in relation to numerous matters to deny that which he had previously admitted or asserted in earlier affidavits. Although those had been made in English, the most important of them (namely his affidavit of 1 July 2011 to which I have already referred) contained his averment that it had before being affirmed been translated to him orally in Slovak by a native Slovak speaker with fluent English. I am satisfied that Mr Jakes' unfamiliarity with the English language did not stand in the way of a fair cross-examination, nor serve as an excuse or explanation for the general lack of credibility of his evidence.

15. The contempts alleged against the respondents are three in number:

    i) A failure to deliver the Shares to the English liquidators by 8 August 2011, contrary to the Second Order.

    ii) Transferring the Shares to the Slovak liquidator on 28 July 2011, contrary to the First Order.

    iii) Advancing a false case during the hearing on 29 July 2011, to the effect that the Shares were still in Mr Jakes' safe in Bratislava.

    I will deal with each of those alleged contempts in turn. I bear in mind that I must be satisfied beyond reasonable doubt of the factual basis of each allegation. For brevity, I make it clear without further repetition that my conclusions of fact set out below are conclusions which I have reached beyond reasonable doubt.

<u>1: Breach of the Second Order by failure to deliver up the Shares</u>

16. This alleged contempt has not been made out, because I am satisfied (and indeed it was not seriously in dispute) that the respondents had put it out of their power to comply with the Second Order in relation to delivery up of the Shares even before that Order was made, by transferring the Shares to the Slovak liquidator, and thereby abandoning both possession and control of them. A finding of contempt of court requires, at least, that the relevant act or (as here) omission is intentional, and this requirement pre-supposes that the respondent is exercising some choice whether or not to comply.

17. Although it may fairly be said that the respondents had only themselves to blame by giving up possession of, and control over, the Shares immediately prior to the making of the Second Order, without informing the court that they had done so, the fact remains that their subsequent non-delivery of the Shares to the English liquidators was involuntary and not a matter of choice.

2: Breach of the First Order by disposing of the Shares on 28 July.

18. I am satisfied that the Shares were delivered by the respondents to the Slovak liquidator on that date. The implementation of the delivery was carried out by Mr Jakes. They were posted to the Slovak liquidator under cover of a letter dated 28 July signed by Mr Jakes. The content of that letter, coupled with Mr Jakes' oral evidence under cross-examination, convinces me that, when posting the Shares to the Slovak liquidator, he did so both on his own behalf and on behalf of Mr Nestarec.

19. In cross-examination Mr Jakes sought, but wholly unconvincingly, to suggest that, when he posted the Shares to the Slovak liquidator, he regarded himself as complying with the First Order, on the basis that the Slovak liquidator was a liquidator of the Company and would, if appropriate, in due course pass the Shares on to the English liquidators (as, in the event, he later did). The reason why I do not believe that explanation is that in his affidavit sworn on 1 July 2011 Mr Jakes went out of his way to explain, at paragraph 33, that, in his view, compliance with the First Order required him to deliver the Shares to the English liquidators and exposed him to a supposed breach of Slovakian insolvency legislation with criminal consequences. He cannot in the circumstances have believed that posting the Shares to the Slovak liquidator was a means of compliance with the First Order. It clearly was not, and Mr Edward Davies, counsel for the respondents, sensibly did not submit otherwise.

20. Instead, Mr Davies advanced a number of technical reasons why that conduct could not now be the subject of an order for committal. First, he submitted that the question whether the First Order could be enforced by committal had been determined against the applicants by my judgment on 29 July 2011, specifically because I declined to waive the requirement for personal service and concluded that it had not been proved to the requisite standard that the terms of the First Order had come to the respondents' attention by the time of its deadlines for compliance.

21. I disagree. My decision on 29 July 2011 was that the respondents could not then be committed for failure to deliver up the Shares to the English liquidators because, pursuant to RSC Ord.45 r.7(2)(b) the respondents had not been personally served "before the expiration of the time within which [they were] required to do the act" by the First Order nor, by that time, was it proved that they had been notified of it. Rule 7(2)(b) is concerned with the enforcement of mandatory rather than prohibitory orders. Rule 7(2)(a), which applies to the enforcement of an order requiring a person (*inter alia*) to abstain from doing an act, requires only that personal service should have been effective before the carrying out of the prohibited act. Rule 7(6) then permits enforcement by committal of an order requiring a person to abstain from doing an act notwithstanding the absence of personal service if the court is satisfied that, pending such service, the person against whom it has sought to enforce the order had notice of it by some other means.

22. I consider that the First Order plainly required the respondents not, pending delivery of the Shares to the English liquidators (whether before or after the deadline) to deal with them in any other way which would put it out of their power to deliver them thereafter. It was, in that sense, an "order requiring a person to abstain from doing an act" within the meaning of rule 7(6).

23. It is plain that the respondents had been notified of the terms of the First Order long before 28 July 2011. It is accordingly immaterial that, as I decided on 29 July (albeit in ignorance of the disposal of the Shares the day before), the respondents could not then have been committed for a failure to deliver them up.

24. Mr Davies next submitted that there had been a continuous breach of the First Order in respect of the Shares since the expiry of the deadline for their delivery up in early 2010, so that the disposal of the Shares to the Slovak liquidator did not amount to any fresh contempt. Again, I disagree. For as long as the Shares remained in Mr Jakes' safe in Bratislava there remained the real possibility of late compliance by the respondents with their delivery up obligation. Their posting of the Shares to the Slovak liquidator finally put paid to any further possibility of compliance by them with their obligation to deliver the Shares to the English liquidators. It was a deliberate and, I have no doubt, premeditated act designed to put an end to any prospect that the English court might enforce the First Order against them personally. The length and detail of the letter under cover of which the Shares were posted to the Slovak liquidator demonstrates that it was a carefully prepared and deliberate act.

25. For those reasons I conclude that this allegation of contempt is made out against both respondents.

3. Advancing a false case before the court on 29 July 2011

26. The respondents did not attend personally but were represented by solicitors and counsel at the hearing on 29 July 2011. Mr Jakes' affidavit made on 1 July 2011, specifically in opposition to the then pending first application to commit, and therefore for the purposes of being used at that hearing, asserted that the Shares were in his safe in Bratislava.

27. It was clearly implicit in Mr Davies' skeleton argument for the respondents for the hearing on 29 July that the respondents still retained possession, or at least control, of the Shares. This is because, in mitigation of the alleged contempt constituted by failure to deliver them up to the English liquidators, it was submitted that the respondents continued to face serious penalties under Slovakian law if they did so. It was not suggested that they had by then become unable to do so.

28. It is plain (and the contrary has not been suggested), that the respondents' English legal representatives were wholly unaware on 29 July 2011 that the Shares had by then been delivered to the Slovak liquidator. The circumstances in which the court was invited to, and then did, set a fresh deadline for delivery up were such that it was a common understanding of the court and of the parties that the making of such an order would not (as it has turned out to be) be wholly in vain. A false case was therefore presented to the court.

29. The conduct of the respondents alleged in that context to have amounted to a contempt consists of their failure to inform the court, through their legal representatives, of their disposal of the Shares on the day before the hearing. I must be satisfied, if a contempt is to be proved, that this was deliberate in the sense that the respondents appreciated both that their disposal of the Shares would be relevant to the court's decision-making on 29 July and that the court would assume, in the absence of any correction, that the Shares remained under the respondents' control, as had been asserted in Mr Jakes' affidavit made on 1 July. In short, I must be satisfied that there was a deliberate rather than accidental or negligent deception of the court.

30. I am so satisfied. I accept Mr Davies' submission that the respondents may not personally have been notified in sufficient time on 29 July of the application by the English liquidators for the setting of an extended deadline for compliance with the First Order. Nonetheless, I consider that the respondents both appreciated that it would be very relevant to the gravity of the contempt which was alleged against them for the court to know whether the Shares remained in their control, or whether they had been delivered to the Slovak liquidator. It was plain, from the evidence relied upon by the respondents in July 2011, that they sought to impress upon the court their supposedly insoluble predicament of having to choose between the competing claims of different liquidators for delivery of the Shares. They sought to present themselves as innocents caught between opposing forces, and incapable of acceding to the demands of one side without thereby incurring penalties imposed by or at the direction of the other. I am satisfied, notwithstanding Mr Jakes' unconvincing attempts to deny it, that both the respondents were well aware that the purpose of the English liquidators' application to this court in July 2011 was to enforce the order for delivery up by threat of sanctions including possible imprisonment, and that they well understood that, had they instructed their legal representatives to reveal that they had pre-empted the matter on the day prior to the hearing in a manner adverse to the enforcement of the English court's order, they faced a more serious penalty than might otherwise have been imposed.

31. It follows in my judgment that the undoubted deception of the English court which occurred on 29 July was deliberate, on the part of both respondents. It was therefore a contempt.

32. The second and the third of the contempts alleged against the respondents have been proved to the requisite standard. I will therefore hear submissions as to penalty.