IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
INTERIM APPLICATIONS COURT

No. BL-2019-000244

[2019] EWHC 772 (Ch)

Rolls Building
Fetter Lane
London, EC4A 1NL

Wednesday, 13 February 2019

Before:

MR JUSTICE ZACAROLI

(**In Private**)

B E T W E E N :

YUZU HAIR & BEAUTY LIMITED (Dissolved) — Applicant

-v-

AKILAN SELVATHIRAVIAM — Respondent

MR R. BROWN (instructed by Edwards Duthie Solicitors) appeared on behalf of the Applicant.

E X P A R T E J U D G M E N T

MR JUSTICE ZACAROLI:

1 This is an application for the continuation of a freezing order granted (on an application without notice) by Falk J on 30 January 2019, alternatively for the grant of a fresh order on similar terms. The claimant is Yuzu Hair and Beauty Ltd, a company that is in fact dissolved. I will come back to that point in a moment. There is compelling evidence, and there was compelling evidence before Falk J, that the defendant has defrauded the company of something in excess of £300,000. It also appears the defendant, who was the company's accountant, has caused, by his inactions, the company to be struck off. I am satisfied, subject to one point, on the basis of the evidence that was before Falk J and the note of her judgment, that this is a proper case for an injunction to continue hereafter.

2 The one point is whether a company that has been struck off, and thus ceased to exist, can apply for or be granted a freezing order. There is pending an application to restore the company to the register under section 1029 of the Companies Act 2006. The effect of restoration, if granted, would be retrospective. On that basis, Falk J was persuaded (although with no argument to the contrary) that it was proper to make the order on the application of the dissolved company. I should say that the cross-undertaking in damages was offered by Ms Dennis, who is a director and shareholder of the company.

3 It seems to me that there are difficulties with this approach. Whilst it is true that if restored to the register, prior acts, including the commencement of proceedings, can be validated at the moment of restoration, the fact is that the court is aware, at this point in time – when being asked to make or continue the freezing order – that the legal person purporting to make the application does not exist. There is a difference between a court being asked, once a company is restored to the register, to validate steps taken prior to restoration and a court

being asked to make orders on the application of a dissolved company before it has been restored to the register. For one thing, there cannot be certainty that the company will be restored to the register.

4 I consider that there is, however, another route to achieving the same end. That is to make a freezing order in the context of the application by the director and shareholder to restore the company to the register. Those are legal proceedings, the purpose of which is to enable the company to pursue a claim to recover money of which it had been defrauded by the defendant. The power under section 37 of the Senior Courts Act 1981 is wide enough, in my judgment, to justify an order being granted to an applicant in such proceedings in order to freeze the assets of someone against whom the company, when it is restored, would have a claim. An injunction would be justified in those circumstances as protecting the interests of the applicant (the director and shareholder) by preserving the assets of the company it is sought to have restored, thus ensuring that the restoration application achieves its objective.

5 There is an analogy with the position of a petitioning creditor in a company winding up. In *HMRC v Eglinton* [2007] BCC, 78, Briggs J held that the jurisdiction under section 37 was wide enough to permit a petitioning creditor to obtain a freezing injunction against a third-party debtor of the company, i.e. someone against whom the company had a claim. He noted at para.6 of the judgment that this was the first case, so far as he or counsel was aware, in which a petitioner in a creditors' winding up petition had obtained and sought to have continued, in the face of reasoned opposition, freezing orders against persons whose only alleged liabilities were to the company the subject matter of the petition. After a review of the authorities, he concluded at para.12:

> " ... it is now well established that [freezing] orders may also be made against persons in relation to whom the claimant asserts no cause of action

> and seeks no money judgment, but in relation to whom there is an arguable case that assets held in their name or under their control are in truth beneficially owned by the defendant against whom the claim is made ..."

Then he noted at para.15 that a creditors' petition, although often referred to as an enforcement process, does not seek a money judgment.

> "If successful, it merely brings into existence a statutory scheme for the getting in and distribution of the company's assets among its stakeholders, of whom the petitioner is no more than a member of a particular class, namely an unsecured creditor. But in my judgment the particular nature of the relief sought by means of the presentation of a creditors' winding up petition does not disable the petitioner from asserting that it is pursuing a cause of action for the purpose of conferring jurisdiction upon the court to grant appropriate interim relief, whether by way of freezing order or otherwise."

After a review of further authorities, including a decision of the High Court of Australia, in *Cardile v LED Builders PTY Limited* [1999] 198 CLR 380, Briggs J concluded that the jurisdiction in relation to petitioners was not confined to cases where the third party was alleged to hold assets belonging beneficially to the company but included a case where the third party owed money to the company. He concluded as follows at para.41:

> "First, that the time has come for the English Courts to recognise, consistently with the carefully considered conclusion of the High Court of Australia, that the jurisdiction to grant freezing orders against third parties is not rigidly restricted by the *Chabra* requirement to show that, at the time

> when the order is sought, the third party is already holding or in control of assets beneficially owned by the defendant. However attractive that test is as a bright and focused boundary-line, it does not seem to me to accord with the dictates of justice and commonsense. To take a simple example, it would operate so as to distinguish between a case in which the third party misappropriated an asset of the defendant and held on to it and a case in which in otherwise identical circumstances the third party misappropriated the asset and dissipated it. It makes no sense that the first of those third parties should be amenable to the freezing order jurisdiction whereas the second, however separately wealthy, should not. In both cases the defendant or its officeholder would have an equally viable restitutionary personal claim, the frustration of which by yet further asset dissipation by the third party would in turn detract from the efficacy of any order for the winding up or bankruptcy of the defendant and from any prior judgment for which winding up or bankruptcy was a means of enforcement."

In para.43, therefore, he concluded:

> "It follows that with all the misgivings attendant upon the opening of a potential Pandora's box, I reject the submission that the court had no jurisdiction to grant the freezing orders against the respondents in this case, or to continue them pending the appointment of a liquidator of [the defendant]."

6 He went on to hold that that jurisdiction should be exercised only very rarely given there was an alternative route, namely the appointment of provisional liquidators, who could be

charged with preserving the assets of the company pending the making of a winding-up order.

7 Here, however, there is no alternative route. There is no possibility of appointing provisional liquidators in the context of an application to restore the company to the register. It is true that the cause of action continues in existence, but is vested in the Crown as *bona vacantia*. But there is unlikely to be any realistic prospect that the Crown, through the Treasury Solicitor, would take action in the meantime.

8 Mr Brown, who appears for the applicants, expresses misgiving on two levels at this proposed route. The first is that the directors do not have a cause of action against the defendant. The second is that he is concerned if it be suggested that the order of Falk J was wrongly made. He suggests, as an alternative, that I now, today, make an order restoring the company to the register.

9 As to the first misgiving, the *Egleton* jurisdiction is premised on there being no cause of action in the applicant against the defendant, but provides an alternative route by preserving the assets of the company, which is the subject matter of, here, the applicant's claim for restoration, so that the restoration application is not futile. As to the second misgiving, I propose that it is made clear that in granting an injunction today I am not determining that the prior order was made wrongly. I shall order the addition of the director and shareholder as applicant, rather than merely replacing the company, so as to preserve the ability of the applicants to argue that the first order was properly made.

10 So far as the suggestion that the company be restored to the register is concerned, if available this would perhaps be a simpler and shorter way of cutting through the issues.

However, the Treasury Solicitor is entitled to be heard on any application for restoration and is entitled to require that conditions be imposed. He has not yet been served, although I am told that very recently the application has been issued in the Central London County Court. In those circumstances, I am reluctant to restore a company to the register for the purposes of it making substantive applications, including applications I am asked to deal with today, without the Treasury Solicitor's involvement.

11 Accordingly, in the interim, pending the restoration of the company to the register, I conclude that (a) there is jurisdiction to make an order freezing the assets of the defendant on the application of Ms Dennis as director of the company, within the context of the registration application, and (b) that that is the appropriate way to proceed. Mr Brown has told me on instructions that Ms Dennis is content that she be added as an applicant for this purpose.

12 Turning to further applications that are sought today, first, by paras. 5 and 6 of the proposed order, I am asked to make an order requiring instructions to be sent by the defendant to the Nationwide Building Society, requiring them to provide the applicants with details of an account or accounts held by the defendant with it. In accordance with the freezing order, the applicants have notified certain banks, including those that they knew the defendant held accounts with and those with which they did not know, but thought he might, hold accounts. Nationwide falls into that latter category. It responded on 8th February 2019 saying that it had taken the necessary action - that is, one assumes, action to ensure any accounts held by the defendant were properly frozen. The freezing order contains the usual ancillary orders, both informal and formal, for disclosure by the defendant of all of his assets over £1,000. He has failed to comply with those orders at all. The Nationwide account is one which the

applicants did not know about, and so the defendant is in default of the obligation to inform them of its very existence.

13 This application is made under section 39 of the Senior Courts Act. That reads as follows:

> "(1) Where the High Court ... has given or made a judgment or order directing a person to execute any conveyance, contract or other document ... if that person -
>
> (a) neglects or refuses to comply with the judgment or order; or
>
> (b) cannot after reasonable inquiry be found, the court may, on such terms and conditions, if any, as may be just, order that the conveyance, contract or other document shall be executed, or that the negotiable instrument shall be indorsed, by such person as the court may nominate for that purpose."

14 I am satisfied this is an appropriate order to make in the circumstances of this case. The order will provide that the document which the defendant is required to execute may be executed by a Master of the High Court if not done by the defendant within the time permitted in the order.

15 The applicants also seek what they call an order on a passport application. That is an order preventing the defendant from leaving the jurisdiction, and to deliver up any or all passports which he owns. Mr Brown submits that in circumstances like this it very difficult to enforce the elements of a freeing order requiring disclosure. Those orders are themselves well known to be very important in policing the freezing order itself. There is no realistic

opportunity to cross-examine the defendant, given that he has provided no disclosure at all. In any event, he needs to be in the jurisdiction to be cross-examined. The only other realistic tool to enforce compliance is by an application for committal to prison. That possibility too is lost if the defendant leaves the jurisdiction. The jurisdiction for such an order is found in section 37(1) of the Senior Courts Act, which empowers the High Court to grant injunctions "in all cases in which it appears to the court to be just and convenient to do so".

16 Mr Brown has referred me to the decision of the Court of Appeal in *Bayer AG v Winter* [1986] 1 WLR 497. It appears to be the first case in which such an order was made. Fox LJ, at p.502D, said:

> "Bearing in mind we are exercising a jurisdiction which is statutory, and which is expressed in terms of considerable width, it seems to me that the court should not shrink, if it is of opinion that an injunction is necessary for the proper protection of a party to the action, from granting relief, notwithstanding it may, in its terms, be of a novel character.
>
> The position here appears to be this: first, so far as the first defendant is concerned, one asks what harm will this order do him? If he says it will cause him some embarrassment or hardship, he can apply to the High Court forthwith, on evidence, to ask that it be varied or, if necessary, discharged. He has therefore an opportunity, if it imposes hardship on him, of establishing that very quickly before a court.

I turn next to the position from the point of view of the plaintiffs. If the first defendant, on the service of Walton J's order requiring disclosure of the information to which I have referred, declines to give that information, or is not frank in the answers which he gives, then if he leaves the United Kingdom, the plaintiffs are at risk that they will be unable to obtain that information. It appears to be doubtful, at any rate, whether the first defendant has in fact a permanent residence in this country.

In the circumstances which I have mentioned of the first defendant failing to provide answers to the matters referred to in the order of Walton J, or on his failure to be frank in the answers which he gave, it is open to the plaintiffs to seek an order for cross-examination; and the first defendant, if he remains within the jurisdiction, could be compelled to attend for that purpose. If, however, he has left the jurisdiction, then in those circumstances the order would be frustrated.

Therefore it seems to me that the court is faced with a situation in which there is a risk to the plaintiffs that they may not obtain the information ordered to be disclosed, unless the order which is now sought is granted; while, at the same time, any risk of hardship to the first defendant is dealt with by his capacity to apply to a judge to vary or discharge the order.

For the reasons which I have indicated, therefore, I would be prepared to grant the order which counsel for the plaintiffs now seeks; that is to say, an injunction restraining the first defendant from leaving the jurisdiction, and secondly, that he deliver up his passports. The orders are, in my view, in

Jessel MR's words, 'necessary and reasonable orders which are ancillary to the due performance of the Court's functions'. Cumming-Bruce LJ in House of *Spring Gardens Ltd v Waite* (1985) 11 FSR 173 at 183 emphasised the power and duty of the court (in relation to a case where an order had been made that the defendants identify their assets and disclose their whereabouts) to take 'such steps ... as will enable the order to have effect as completely and successfully as the powers of the court can procure'.

The time during which the first of those orders should run should, and counsel for the plaintiffs accepts this, be of very limited duration. It is an interference with the liberty of the subject, so that the period should be no longer than is necessary to enable the plaintiffs to serve the Mareva and Anton Piller orders which they have obtained, and endeavour to obtain from the defendant the information which is referred to in those orders.

Counsel for the plaintiffs therefore propose, and I would accept, that in the first of the proposed orders a period of two days should be inserted, so that it will read: 'The first defendant be restrained until after two days or further order in the meantime ...'

For the reasons which I have indicated, I would allow the appeal and include in the order the two further paragraphs which I have indicated."

17 Mr Brown also cited the decision of *Lexi Holdings v Luqman*[2008] EWHC 2908 (Ch). That is cited merely as an example of a case where an order such as the one sought before me was made in circumstances very closely analogous to the present case.

18 I am satisfied that this is an appropriate case in which such an order should be made. Adopting the arguments presented to me by Mr Brown on behalf of the applicants, that is for the following reasons. Firstly, it is clear on the evidence that the defendant must know about the order. He must have known about it since at least the beginning of February, but he has made no contact at all with the claimants or their solicitors. Secondly, he did not comply on time, or at all, with those parts of the order requiring him to give disclosure of his assets, and he is clearly flouting the order of the court. As I have already mentioned, the orders requiring disclosure are an essential part of a freezing order to ensure that it is complied with and properly policed. Third, the defendant is, on the evidence, clearly hiding assets - the Nationwide Building Society account, for example, is one which he should have disclosed and has not done so. Fourth, it would appear from the negative responses from other banks the claimant has contacted, that the defendant has spirited away money that he previously had, i.e. there is evidence of actual dissipation rather than the mere risk of it. Fifth, there has been no response, let alone any evidence, to the claimant's assertion that the defendant has perpetrated a substantial fraud on the company. Sixth, as Falk J observed, it is legitimate to say one cannot imagine what defence the defendant might be able to advance in this case. Seventh, the defendant has form for fraud, and was indeed sentenced by a criminal court to a 20-month suspended sentence of imprisonment last August in relation to a claim for fraud. Eighth, the defendant might, due to a number of factors, consider that his life in this jurisdiction is no longer tenable. In particular, he has, if he has committed the fraud alleged in this case, breached the terms of his suspended sentence. His wife undoubtedly knows about this claim and the injunction against him, having been served personally with it, and the Bank of Ireland has obtained a possession order over the defendant's home in this jurisdiction. Ninth, there is some evidence that the defendant is in the jurisdiction. The court would not make orders of this kind in vain, so if the defendant

had already fled the jurisdiction, the court would be reluctant to make an order. There is evidence he went to Sri Lanka on 8 January, although the applicants were told that was apparently for a short period of time. There is also some evidence, based on a telephone call being made to his mobile where the ringing tone did not appear to be an international dialling tone, that he may be back in the jurisdiction. I am satisfied that there is not sufficient evidence that he is no longer in the jurisdiction such that it be would inappropriate to make this order. Tenth, the interference with the defendant's liberty will, as is required by the authorities I have referred to, be for as limited a period as possible - that limited period being his compliance with the orders for disclosure.

19 For those reasons, I am content to make that order. It will be limited to the period in which he fails to comply with the disclosure orders, or further order in the meantime. It is of course open to him to return to court to apply to discharge this order.

20 Finally, I am asked to consider the question of costs, i.e. the costs of the application before Falk J and the application before me today. I cannot see any conceivable basis on which the defendant could resist an order for costs. The applicants ask for indemnity costs. I am not, however, persuaded at this stage that the test for indemnity costs is satisfied merely because a claim in fraud is asserted and the defendant has not (as yet) responded. Nevertheless, I conclude that, even on the standard basis, the costs asked for in the schedule with which I have been presented are largely justified. Taking into account the basis of assessment and recognising that a small part of those costs will relate to the claim, not to the applications for the freezing order, I will summarily assess those costs in the sum of £44,000.

CERTIFICATE

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