Neutral Citation Number: [2020] EWHC 1804 (Ch)

Case No: BL-2019-000609

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 09/07/2020

Before :

MR DAVID HALPERN QC SITTING AS A DEPUTY HIGH COURT JUDGE

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Between :

KILIMANJARO AM LIMITED	**Claimant**
- and -	
(1) MANN MADE CORPORATE SERVICES (UK) LIMITED **(2) MARK CUNDY** **(3) DAVID CATHERSIDES** **(4) RIZWAN HUSSAIN** **(5) ALFRED OLUTAYO OYEKOYA** **(6) RAJNISH KALIA**	**Defendants**

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Mr Antonio Bueno QC (instructed by **Mishcon de Reya**) for the **1st to 3rd Defendants**
The **4th Defendant** in person
The **5th Defendant** did not attend and was not represented.

Hearing date: 7 July 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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MR DAVID HALPERN QC SITTING AS A DEPUTY HIGH COURT JUDGE

Mr David Halpern QC :

1. This is my judgment on the application by the First to Third Defendants ("**the Applicants**") for general civil restraint orders ("**GCROs**") against the Fourth Defendant, Rizwan Hussain, and the Fifth Defendant, Alfred Olutayo Oyekoya (together, "**the Respondents**"). Mr Antonio Bueno QC appeared for the Applicants at the hearing, which was conducted via Skype. Mr Hussain appeared in person. Mr Oyekoya did not appear, but Mr Hussain told me that he spoke for both of them.

2. On 10 May 2019 I struck out the claim brought in the name of the Claimant company ("**the Company**") against the First to Third Defendants on the ground that Mr Oyekoya and Kilimanjaro Capital Management Ltd, who purported to be the directors of the Claimant, were not genuinely directors, that their purported appointments were the result of fraud and forgeries, and accordingly that the proceedings had been brought in the name of the Company without authority. I certified that the claim had been brought totally without merit and I directed that a copy of that judgment be forwarded to the Crown Prosecution Service or any other body with responsibility in relation to offences of perverting the course of justice.

   I subsequently joined the Respondents into the proceedings in order for applications to be made against them for non-party costs orders and for CROs. At the hearing of the application on 1 May 2020 I made non-party costs orders against the Respondents, as well as the Sixth Defendant, on the ground that they had caused or facilitated the bringing or maintaining of the proceedings, knowing that the directors of the company had not authorised those proceedings and in reliance on forged documents. I said:

   > "The basis of the application against Mr Hussain is that he was responsible for bringing the proceedings in the name of the Claimant, assisted by Mr Oyekoya, and that he thereafter controlled the proceedings. I am satisfied that this is established. Mr Hussain claimed to have been appointed as a director and to have resigned just before he was made bankrupt, but his appointment was based on forged documents, as I found in my previous judgment. I also found that he was the ultimate beneficial owner of the Claimant. At the hearing before me on 9 May 2019 Mr Hussain said in cross-examination: "I think in terms of a personal interest, I am the founder and I would confirm that I am the driver behind this.""

3. I ordered payment of £200,000 plus VAT by 21 May 2020 on account of the Applicants' costs. Mr Hussain has confirmed to me that no payment has been made in respect of this sum.

4. I did not make GCROs on 1 May 2020, because the Applicants had failed to specify in their application what form of CRO was sought, but I gave permission to amend the application in order to seek GCROs and to re-serve it by 4pm on 4 May 2020. The Applicants' solicitors did not fact file their amended application on the CE-file until 16:06 (six minutes late) and did not serve it on the Respondents until 21:11 on 4 May.

5. The Respondents submitted in their joint skeleton argument that the delay in serving the amended application constituted a breach to which a sanction attached. They said:

> "In summary the Court should not allow such flagrant abuses and disregards of the Court's process and generosity to go unnoticed and for this reason alone should summarily dismiss the CRO Application. The failures and defects were persistent, numerous and deliberate, and generally showed a lack of respect to the Court process and, moreover, are telling as to the seriousness of the application and its merits when there appears to be only a half-hearted and desultory pursuit of the CRO Application by the Applicants."

6. Mr Bueno submitted, and I agree, that my Order of 1 May imposed no sanction for failure to serve by 4pm on 4 May. Despite the hyperbole in the Respondents' skeleton argument, Mr Hussain accepted in his oral submissions that this was the case. Accordingly, CPR r. 3.9 is not engaged. Had there been a sanction, I would have granted relief on the grounds that the breach was not serious or significant and that it had caused no prejudice to the Respondents. To the contrary, if the Respondents had persisted in the approach taken in their skeleton argument, they would have been seeking to take opportunistic advantage of a minor delay. Nevertheless, I must also record that Mr Frost's witness statement of 2 July, explaining the delay, does not disclose any good reason for the delay and accordingly I disallow the costs of making that witness statement.

7. I must also note that the Respondents failed to exchange their skeleton argument with the Applicants' solicitors, Mishcon de Reya, despite repeated requests to do so. This flouting of the rules by the Respondents is unacceptable. It is clear from their skeleton argument that they are personally skilled in litigation or at least have access to skilled advice, despite being litigants in person. In any event, the Civil Procedure Rules apply to litigants in person as much as to other litigants: *Barton v. Wright Hassall LLP* [2018] 1 WLR 1119 at [18].

8. The power to make a CRO is set out in CPR rule 3.11 and Practice Direction 3C. Paragraph 4.1 of PD 3C states that a GCRO order may be made "where the party against whom the order is made persists in issuing claims or making applications which are totally without merit, in circumstances where an extended civil restraint order would not be sufficient or appropriate".

9. Mr Bueno referred me to the Court of Appeal's decision in *Sartipy v. Tigris Industries Inc* [2019] 1 WLR 5892. This was an appeal in respect of an extended CRO ("**ECRO**"), but the following passages are equally relevant to a GCRO:

> "27. A claim or application is totally without merit if it is bound to fail in the sense that there is no rational basis on which it could succeed …. It need not be abusive, made in bad faith, or supported by false evidence or documents in order to be totally without merit, but if it is, that will reinforce the case for a civil restraint order.

28. In *CFC 26 Ltd v Brown Shipley & Co Ltd* Newey J considered what was meant by "persistently" in the phrase "a party has persistently issued claims or made applications which are totally without merit" in paragraph 3.1 of Practice Direction 3C. He held, in agreement with previous first instance authority, that "persistence" in this context requires at least three such claims or applications. I respectfully agree. I would add some further points by way of clarification.

29. First, "claim" refers to the proceedings begun by the issue of a claim form. In the course of those proceedings one or more applications may be issued. If the claim itself is totally without merit and if individual applications are also totally without merit, there is no reason why both the claim and individual applications should not be counted for the purpose of considering whether to make an ECRO.

30. Second, although at least three claims or applications are the minimum required for the making of an ECRO, the question remains whether the party concerned is acting "persistently". That will require an evaluation of the party's overall conduct. It may be easier to conclude that a party is persistently issuing claims or applications which are totally without merit if it seeks repeatedly to re-litigate issues which have been decided than if there are three or more unrelated applications many years apart. The latter situation would not necessarily constitute persistence.

31. Third, only claims or applications where the party in question is the claimant (or counterclaimant) or applicant can be counted (although this includes a totally without merit application by the defendant in the proceedings). A defendant or respondent may behave badly, for example by telling lies in his or her evidence, producing fraudulent documents or putting forward defences in bad faith. However, that does not constitute issuing claims or making applications for the purpose of considering whether to make an ECRO. Nevertheless such conduct is not irrelevant as it is likely to cast light on the party's overall conduct and to demonstrate, provided that the necessary persistence can be demonstrated by reference to other claims or applications, that an ECRO or even a general civil restraint order, is necessary.

32. Fourth, as Newey J also held in *CFC 26 Ltd*, the term "a party [who] has … issued" such claims or applications refers not only to the named party but also to someone who is not a named party but is nevertheless the "real" party who has issued a claim or made an application. Again, I respectfully agree. Although "the real party" is not a concept expressly found in the Civil Procedure Rules, it is a concept which has been deployed from time to time, for example in the context of funding proceedings …, while security for costs may be ordered against a claimant who "is acting as a nominal claimant" (CPR 25.13(1)(f)). It is unnecessary to explore in this appeal the limits of the "real party" concept, but it must extend to a person who is controlling the conduct of the proceedings and who has a significant interest in their outcome.

…

> 37. Seventh, when considering whether to make a restraint order, the court is entitled to take into account any previous claims or applications which it concludes were totally without merit, and is not limited to claims or applications so certified at the time, albeit that in such cases the court will need to ensure that it knows sufficient about the previous claim or application in question …."

10. I draw the following conclusions from that judgment which are relevant to the application before me:

    i) There must be at least three applications or proceedings which are totally without merit ("**TWM**");

    ii) If a TWM application is made in the course of TWM proceedings, both may count towards the requisite minimum;

    iii) It is not necessary for the judge to certify at the time of the hearing of an application that it is TWM, provided that the judge hearing the CRO application is satisfied that it was TWM;

    iv) It is not simply a matter of counting numbers of TWM applications or proceedings, but also of forming an evaluation of the parties overall conduct;

    v) Reprehensible behaviour by a party which does not amount to a TWM application may nevertheless be relevant in the evaluation of that party's overall conduct; and

    vi) A CRO may be made against a party who is not named as a claimant but is the "real party" behind the proceedings.

11. For the reasons given in my judgments of 10 May 2019 and 1 May 2020, which should be treated as incorporated into this judgment, I am satisfied that the claim was brought TWM and that the Respondents are the "real parties" who fraudulently caused the proceedings to be started and continued in the name of the Company. (I say nothing about the Sixth Defendant, because no CRO is sought against him.) These proceedings are at the most serious end of the spectrum of TWM proceedings, since they were not merely bound to fail, once the truth emerged, but were based on fraud and forgery.

12. The hearing before me on 9 May 2019 was preceded by four hearings before Mann J on 20, 21, 26 and 29 March 2019, at which an application was made in the name of the Company for injunctive relief against the current Applicants. I described these hearings in paragraphs 9 to 12 of my judgment of 10 May 2019. Mann J was, of course, unaware of the evidence which was put before me on 9 May 2019, but by the time of the fourth hearing he had become concerned that there appeared to be a real possibility that he had been misled by non-disclosure. In his oral submissions Mr Hussain conceded that, if Mann J had known what the court knew by 9 May 2019, he might well have certified that the application to him was TWM. In my judgment

there is no doubt but that Mann J would have struck out the proceedings, had he seen the evidence which I saw.

13. Following my judgment of 10 May 2019 Mr Hussain applied to the Court of Appeal for a stay of execution. The application was refused on paper by Lewison LJ on 22 November 2019. He said:

> "By a deed dated 7 June 2019 as part of a compromise agreement Mr Hussain undertook unconditionally to discontinue his appeal. The further prosecution of this appeal is in direct breach of that undertaking [and] is an abuse of the process of this court. That is a sufficient ground for refusing permission to appeal. The remainder of this order does not detract from that fundamental point."

Although Lewison LJ did not expressly certify that the application was TWM, he said that it was an abuse of process. That is sufficient to satisfy the test set out in *Sartipy* at [27] (see paragraph 9 above).

14. Mr Oyekoya applied for permission to appeal against my order of 1 May 2020 and for a stay of execution. The application was refused on paper on 17 June 2020 by Arnold LJ, who expressly certified that it was TWM.

15. Mr Hussain addressed me very briefly. He confirmed to me that his submissions were set out in the Respondents' skeleton argument and that he had very little to add. In their skeleton argument the Respondents said:

> "The CRO Application is bound to fail and is wholly misconceived, totally without merit and would serve no useful purpose when:
>
> a. the threshold test for even a limited civil restraint order was only just met after the CRO Application was filed, and approx. 3 weeks before this hearing, when the PTA application of the 1 May Order was refused by the Court of Appeal on paper;
>
> b. the original claim was struck out over a year ago and the Claimant was put into liquidation in 2019;
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> c. the Applicants all have the benefit of a robust deed of indemnity dated 7 July 2020 which prohibits any action, suit or other proceedings in any jurisdiction being commenced against the Applicants;
>
> d. the Fifth Defendant is presently an undischarged bankrupt in England & Wales, making any potential claims, applications or proceedings by him virtually impossible. The Fourth Defendant was an undischarged bankrupt in England & Wales and has only very recently been discharged;
>
> e. to the best of the knowledge of the Defendant, and as the learned Judge rightly acknowledged in §[14] of the Judgement of 1 May 2020, no grounds have been advanced for the CRO Application. The only purported evidence in support of the CRO Application is, at its highest, woefully weak and simply amounts to a desperate (and unsuccessful) attempt to concoct some coherence for a CRO. It

would be appear that the sole basis for the CRO Application by the Applicants are the cacophony of unrelated proceedings adumbrated in the Schedule in the Seventh Witness Statement of David Cathersides dated 28 April where Mr Cathersides has deliberately not verified it with a Statement of Truth and where the vast majority of the proceedings Mr Cathersides refers to do not involve him. In any event, Hussain7 at §[10] deals with these proceedings or purported proceedings, but in summary, out of the 11 alleged proceedings: 1 does not exist, 1 was in an entirely different jurisdiction, 1 intimately involved the Applicants, and 8 did not directly involve the Defendants as parties. Moreover, none of them are marked as being 'totally without merit'."

16. My findings on these submissions are as follows:

a) Mr Hussain confirmed at the hearing that withdrew submission (a) in the light of *Sartipy*.

b) As I said in my judgment of 1 May 2020, the liquidation of the Company is of no relevance to the current applications, which raise issues solely as between the Applicants and the Respondents.

c) At the oral hearing Mr Hussain conceded that Mr Bueno "had a point" when he submitted that the deed of indemnity executed by the Respondents was commercially worthless, since Mr Oyekoya was an undischarged bankrupt, whilst Mr Hussain had only recently been discharged from bankruptcy and owed £200,000 pursuant to my order of 1 May 2020, in addition to other liabilities. I also note that Mr Bueno told me (and I accept) Mr Hussain, far from accepting that the deed of indemnity was "robust", submitted to Lewison LJ that it had been procured by undue influence.

d) The bankruptcy of both Respondents has not prevented them from making TWM applications and it did not prevent Mr Hussain from orchestrating the current proceedings using Mr Oyekoya as his willing agent. In any event, Mr Hussain has now been discharged from bankruptcy.

e) I did not say in my judgment that no grounds had been advanced for the CRO application; what I said was that the Applicants had failed to specify what kind of CRO was sought. Mr Hussain has referred airily to the evidence of Mr Cathersides being "at its highest, woefully weak", but it is significant that Mr Hussain chooses to express himself in generalities and does not give any evidence to rebut the specific allegations against him. What Mr Hussain describes as a "cacophony of unrelated proceedings" is strong evidence that the Respondents' abusive conduct has been replicated in a number of proceedings. I refer to this evidence in paragraphs 18 to 20 below. I must also correct a further untruth in the Respondent's skeleton argument: Mr Cathersides's seventh witness statement dated 28 April 2020 was in fact signed with a statement of truth, contrary to the Respondents' assertion.

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17. Mr Oyekoya's 10th witness statement of 2 July 2020 echoes the Respondents' skeleton argument by adopting lofty tone but steering well clear of any engagement with Mr Cathersides's evidence. He said:

> "The Amended Application is patently inappropriate, totally without merit, and would serve no useful purpose apart from furthering the ulterior motives of the First, Second and Third Defendants. The Court should not lend itself to any part of this and submissions accordingly will be made at the hearing. I would respectfully invite the Court to dismiss the Amended Application and, in the circumstances, mark it as being "totally without merit"."

18. I shall refer briefly to three of the proceedings referred to by Mr Cathersides in his seventh witness statement. The first is *Fairhold Securitisation Ltd v. Clifden IOM No.1 Ltd*, a decision of HHJ Kramer dated 10 August 2018. At paragraph [18] the judge found that Mr Hussain was "the guiding light in Clifden. The main statements in this case come from him. He has been the principal actor in the events which give rise to the application". The judge concluded:

> "on the balance of probabilities, I find that the consents were handed to Mr Hussain in escrow. They were not be used without the express consent of their authors. Such express consent was not given. Neither was any implicit consent given. We therefore have an appointment by somebody who had no power to appoint and administrators who did not consent to act. So the appointment was totally flawed and therefore the appointment is void and of no effect."

Accordingly this was another occasion on which Mr Hussain had operated behind the scenes to procure wrongful acts in the name of a company. Messrs Cathersides and Cundy also feature in the judgment. Mr Hussain submitted to me that HHJ Kramer was as critical of them as he was of Mr Hussain. Without knowing considerably more about the proceedings, it is not clear to me what involvement they had in those proceedings. However what is clear is that costs were ordered on the indemnity basis against Mr Hussain and there were no costs orders against Messrs Cathersides or Cundy.

19. The second is *Business Mortgage Finance 6 plc v. Greencoat Investments Ltd* [2019] EWHC 2128 (Ch), in which the claimant company issued various classes of note. The defendant company purported to be a note-holder but Zacaroli J held that it was not, and that Mr Oyekoya had wrongfully held himself out as a director, and also receiver, of the claimant. Mr Hussain did not purport to be a director, but was clearly involved behind the scenes, since Zacaroli J included him, as well as Mr Oyekoya, within the ambit of an injunction to restrain the defendant from holding itself out as a note-holder. The *modus operandi* in that case appears to have been similar to that used in the present case.

20. The third is *Business Mortgage Finance 6 plc v. Roundstone Technologies Ltd* [2019] EWHC 2917 (Ch), another case arising out of the purported appointment of Mr Oyekoya as a receiver of the claimant company. Nugee J held that he had not been so

appointed. There was passing reference to Mr Hussain, but the judge did not need to reach any conclusion as to the extent of his involvement.

21. It is clear from the foregoing that the minimum requirement of three TWM applications or proceedings has been satisfied, viz (i) the proceedings themselves, (ii) the application before Mann J which was heard on four occasions and (iii) the applications to the Court of Appeal decided: (a) by Lewison LJ (in respect of Mr Hussain) and (b) by Arnold LJ (in respect of Mr Oyekoya). I am satisfied that the Respondents have persistently brought proceedings and applications which are TWM.

22. The burden is on the Applicants to satisfy the court that it is necessary to make a GCRO because "an extended civil restraint order would not be sufficient or appropriate". In *R (Kumar) v Secretary of State for Constitutional Affairs* [2007] 1 WLR 536 at [60] the Court of Appeal said that the language:

> "… is apt to cover a situation in which one of these litigants adopts a scattergun approach to litigation on a number of different grievances without necessarily exhibiting such an obsessive approach to a single topic that an extended civil restraint order can appropriately be made against him/her."

The main difference between the two forms of CRO is that an ECRO is limited to claims and applications "concerning any matter involving or relating to or touching upon or leading to the proceedings in which the order is made", whilst a GCRO extends to any proceedings in the High Court or County Court.

23. The Respondents stated in their skeleton argument that "the sorry affair with respect to the Claimant and the original claim is plainly at an end now and, therefore, the circumstances which generated the claim could not be said to be continuing in any shape, whatsoever." In my judgment, the forgery, which they refer to with great delicacy as a "sorry affair", shows a willingness to deceive the court in wholesale fashion. The entirety of the current proceedings depended upon the court being deceived by fraud and forgery. The evidence of Mr Cathersides shows that Mr Hussain and Mr Oyekoya are serial litigators who have been involved, either directly or indirectly, in numerous other proceedings in which they have committed abuses of process. Although Mr Hussain has been the prime mover behind the current proceedings, Mr Oyekoya has been his willing accomplice. The Respondents' conduct in the current application, both in withholding their skeleton until the start of the hearing and in giving a distorted and untrue account of the facts in their skeleton argument, is further evidence of their tactics.

24. The court must protect the integrity of its own process and must also protect future would-be defendants from similar abusive conduct. The imposition of GCROs will not, of course, prevent the Respondents from commencing proceedings or making applications if they are able to satisfy a judge that it is proper to do so. I therefore make GCROs against both Respondents. I will now hear the parties in relation to costs and other consequential matters.