Neutral Citation Number: [2023] EWHC 2041 (Ch)

Case No: BL-2021-000987

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/08/2023

Before :

LOUISE HUTTON KC
Sitting as a Deputy Judge of the High Court

- -

Between :

UBS SWITZERLAND AG	**Claimant/ Respondent**
- and -	
MR ANIL KUMAR	**Defendant/ Applicant**

- -
- -

Siward Atkins KC (appearing pro bono through Advocate) for the **Applicant**
Michael Ryan (instructed by **Reed Smith LLP**) for the **Respondent**

Hearing dates: 20 July 2023

- -

Approved Judgment

This judgment was handed down remotely at 10.00am on 04 August 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

LOUISE HUTTON KC SITTING AS A DEPUTY JUDGE OF THE HIGH COURT

Louise Hutton KC :

1. In these proceedings, the Claimant ("UBS") brings claims against the Defendant ("Mr Kumar"). UBS claims as assignee of Vincom Commodities Limited ("Vincom"), a company which was placed into compulsory liquidation on 24 January 2018. Mr Kumar was a director of Vincom and it is alleged that he acted in breach of duty to Vincom (a) in causing or allowing it to enter into various transactions with companies under the control of his family members which caused the company losses of about US$7.7 million and (b) in paying away sums totalling US$5.6 million after the presentation of the winding up petition to a company controlled and partially owned by Mr Kumar's brother.

2. A worldwide freezing order was made against Mr Kumar at a without notice hearing on 4 November 2022 and it was continued on 17 November 2022 (the "WFO"). The courts of the Dubai International Financial Centre ("DIFC") made a freezing order on 4 January 2023 preventing the removal of Mr Kumar's assets up to the value of £12.27 million from the UAE, and UBS has also obtained conservatory relief in onshore UAE.

3. By this application Mr Kumar seeks a variation of the terms of the WFO to permit him:

    i) To sell two properties in Dubai, namely a property known as Unit 603 BD Grande Building, Downtown, Burj ("BD Grande") and a property known as Marina Pinnacle, Unit 5103 Marina, Dubai ("Pinnacle"), and

    ii) To pay the proceeds of sale into a savings account he holds in England with National Westminster Bank (the "NatWest Account").

4. Mr Kumar says that he will use the proceeds of sale paid into the NatWest Account to fund his legal expenses (as permitted by the terms of the WFO). He says that the variation is necessary because he currently has no funds available to fund his defence. His former solicitors, Edwin Coe LLP, have come off the record because Mr Kumar cannot (he says) pay their existing invoices and he was assisted in preparing for, and was represented at, this hearing by counsel acting pro bono.

5. UBS opposes the application, saying:

    i) It is reasonably to be inferred that Mr Kumar has access to other assets or sources of funding that could be used to fund his defence;

    ii) The burden is on Mr Kumar to demonstrate that he does not have access to other assets or sources of funding, whether his own or funding from third parties; he has failed to do so; and/or

    iii) Mr Kumar has misled UBS, its solicitors Reed Smith and his own previous solicitors Edwin Coe, and the lack of any explanation for that conduct, and his continuing failure to be candid in his evidence or provide corroborating evidence for his assertions means that it is neither just nor convenient to grant the relief sought.

The law

6. Mr Atkins KC, appearing for Mr Kumar, said that there was no dispute between the parties on the relevant principles and he stated that he did not dispute the relevant legal principles set out in UBS's skeleton. Having heard Mr Atkins' submissions, Mr Ryan, appearing for UBS, did not accept that that was the case. There was undoubtedly a difference between the parties as to the approach the court should take to this application, albeit that there was broad agreement between them as to the principles they said should be applied.

7. Mr Atkins did not dispute, indeed it was the starting point for Mr Kumar's application, that although a respondent to a freezing injunction is permitted to spend a reasonable amount on legal fees, pursuant to the standard form exception which is included in the WFO in this case, if a respondent wishes to liquidate assets, this is a dealing with property which is prohibited by the standard form freezing injunction (and the WFO in this case) without the consent of the applicant or the permission of the court, even if the respondent wishes to use the proceeds to fund legal expenses: see *Fathollahipour v Aliabadibenisi* [2014] EWHC 2120 (QB) per Phillips J (as he then was) at [3]-[4].

8. Mr Atkins also accepted that the principles that apply to an application such as this are those set out in Nugee J's judgment in *JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev* [2015] EWHC 3263 (Ch) at [37] as follows (with references to the authorities cited removed):

> "*(1) The starting point is that a freezing order has been made against the defendant. Otherwise the question of use of frozen funds to pay legal expenses could not arise. This means that the court has already concluded that, even before the claimant's claim has been established, justice requires that the defendant's freedom to dispose of its own assets as it sees fit should be restrained.*
>
> *"(2) A freezing order is not intended to provide a claimant with security for its claim, but only to prevent the dissipation of assets outside of the ordinary course of business in a way which would render any future judgment unenforceable.*
>
> *"(3) In order to be allowed to spend frozen moneys, the defendant must show that he has no other assets which he can use.*
>
> *"(4) The ordinary rule is that subject to the defendant demonstrating that he has no other assets he will be allowed to resort to the frozen funds in order to finance his defence, but this may be outweighed by other considerations in an appropriate case.*
>
> *"(5) The burden of demonstrating […] the absence of other assets lies on the defendant.*
>
> *"(6) Because the court has already been satisfied of a risk of dissipation judges are entitled, on an application to vary, to have a healthy scepticism about assertions made by the applicant, particularly when the applicant, or those to whom his evidence or contentions relate, have been less than frank in dealing with the court or the claimant.*
>
> *"(7) The ultimate test is what is just and convenient in accordance with s.37(1) of the Senior Courts Act 1981.*"

9. It is clear from the summary of the relevant principles set out in *Pugachev* (above) that the burden of demonstrating the absence of other assets lies on the defendant. The question of where the burden falls may be important in cases of this type. In *Tidewater Marine International Inc v Phoenixtide Offshore Nigeria Limited* [2015] EWHC 2748 (Comm), Males J (as he then was), decided against the defendants on that basis. At [49] he said:

"*... There is no positive evidence of any other sources of funds available to them outside Nigeria* [it had been said, and accepted, that the defendants in that case could not use the funds they had in Nigeria to pay their legal expenses]. *If the burden lay on Tidewater to prove positively the existence of some other source of funds, it would be unable to do so. However, as already explained, that is not an unusual situation and the burden of persuasion lies on the Respondents. In my judgment they have failed to discharge that burden …*".

10. It was also made clear in *Tidewater* that:

    i) the court should take into account not only what other assets the defendant has, but "*whether there are others who may be willing to assist the defendant to obtain legal advice and representation*" (at [42]; see also [44]); and

    ii) at [39], citing *Halifax plc v Chandler* [2001] EWCA Civ 1750 at [27] per Clarke LJ, "*… it is incumbent on a defendant, like any applicant, to put the facts fully and fairly before the court*".

11. Mr Atkins, for Mr Kumar, said that the court's approach of "*healthy scepticism*" had to take into account the principle set out in the following summary advanced by counsel, and approved by Rimer LJ, in *Coyne v DRC Distribution* [2008] EWCA Civ 488 at [58]:

"*it is well-settled practice that if a court finds itself faced with conflicting statements on affidavit evidence, it is usually in no position to resolve them, and to make findings as to the disputed facts, without first having the benefit of the cross-examination of the witnesses. Nor will it ordinarily attempt to do so. The basic principle is that, until there has been such cross-examination, it is ordinarily not possible for the court to disbelieve the word of the witness in his affidavit and it will not do so. This is not an inflexible principle: it may in certain circumstances be open to the court to reject an untested piece of such evidence on the basis that it is manifestly incredible, either because it is inherently so or because it is shown to be so by other facts that are admitted or by reliable documents.*"

12. As Mr Ryan submitted, on an application like this the court is not asked to make a final finding of fact. The court is exercising a discretion at an interlocutory stage. Males J said in *Tidewater* at [44]:

"*It is inherent in this approach that, because the court is dealing with risks and prospects rather than certainties, and is doing so at an interlocutory stage, there is a real risk that the court, even doing the best it can on the material available, may reach what is in fact a wrong conclusion. It may conclude that a defendant has failed to adduce credible evidence that it has no other available assets and has therefore failed to discharge the burden of persuasion even if, in fact, the defendant has no other assets.*

It may conclude that there is a reasonable prospect that a defendant's friends or associates will rally to his support, but that prospect may not materialise. In such circumstances the court will refuse to allow the frozen funds to be used, even if that means that in fact the defendant is left unable to pay for legal representation to defend the claim. However, this is no different from any other situation in which there is a risk that the court may make a mistaken interlocutory assessment, for example when it concludes that an order for security for costs will not stifle a claim. It should not deter the court from making the best assessment it can on the material available and imposing on the defendant the burden of persuasion for the valid reasons identified above."

13. The burden of persuasion is on Mr Kumar. It is clear from the authorities cited above that it is not enough for him to say that he has filed evidence saying he has no other assets and that UBS does not have credible evidence of the existence of any other particular assets. The question is whether Mr Kumar's evidence is, in all the circumstances, sufficient to discharge the burden that is placed on him in making this application to satisfy the court that there are no other assets available to fund his defence.

14. It is only if that burden is discharged that he can seek to rely on the "ordinary rule" set out in *Pugachev*, because, as there set out, "*The ordinary rule is that subject to the defendant demonstrating that he has no other assets he will be allowed to resort to the frozen funds in order to finance his defence…*" (emphasis added).

The evidence as to assets in summary

15. Mr Atkins summarised Mr Kumar's evidence as being -

    i) He has no assets of his own other than those which have been disclosed; and

    ii) Whatever the wealth of his wider family was or is, he has no access to it.

16. The asset disclosure provided by Mr Kumar on 11 November 2022 in compliance with the WFO showed assets totalling just under £1m, as follows:

    i) Three Dubai properties with a combined realisable value of approximately £870,000;

    ii) One UAE shareholding estimated to be worth less than £10,000; and

    iii) Four bank accounts totalling approximately £123,000.

17. Since the WFO was made, almost all the cash available to Mr Kumar has been spent on living expenses and legal expenses.

18. Mr Kumar says that he lives on his current salary of £36,000 per year.

The issues raised by UBS in relation to Mr Kumar's asset position

19. UBS contend that Mr Kumar's asserted asset position is inconsistent with the evidence. The matters it relied on in this respect were put under the following headings by Mr Ryan:

i) Previous statements of personal and family wealth;

ii) Evidence of continuing family wealth;

iii) Mr Kumar's lifestyle;

iv) Request to increase living expenses to £6,000 per week;

v) Request for approval of expenses for Dubai trip;

vi) Use of premier banking services;

vii) WM Fees;

viii) The debit to the ENDB Account.

Previous statements of personal and family wealth

20. UBS exhibited an emailed attendance note and a report of a meeting between UBS personnel and Mr Kumar in October 2013 when Vincom started its banking relationship with UBS. Neither of those documents are necessarily reliable documents to establish in any detail the holding structure of the Company or other assets in which Mr Kumar or his family held interests. However, they do show that Mr Kumar presented himself and his family as having considerable wealth, as a result in part of family trusts. The note records:

"*Short summary of Anil Kumar and his family:*

Company

- *Started Ransat Group 1995*
- *Operates in 15 countries*
- *Total workforce is 6,500 employees*
- *group turnover $500m*
- *Deals in Copper, Aluminium, Zinc, Nichel [sic], Lead and Tin*
- *He also owns 75% of Copper Mine in Russia which is valued at $3bn. 25% of the mine is owned by the Russian government*

Personal & Family

- *Anil owns the business through his family trust. Anil 60%, Wife 30% and Daughter 10%*
- *on his daughter Shraya turning 22 in November 2013 she will be entitled to a lump sum of £10m*

- *Descends from the Royal Family of Sikar in Rajasthan … The original trust was settled by Anil's Grand Father (the ruler of Sikar. The current trust was set up by his father …*"

21. The fuller report of the same meeting recorded that, "*Vincom was created in 2005 … The BOs are Mr. Anil Kumar (Chairman) and his family (wife 30% and daughter 10%) through Verus Crown Trent Limited, a family trust domiciled in Jersey, Channel Islands. On Mr. Kumar's daughter Shraya turning 22 in November 2013, she will be entitled to a lump sum of £10m …*".

22. UBS also exhibited an email from Mr Kumar dated 2 December 2015 to UBS sending a copy of a letter he said he had sent to "*the trust*" further to the call they had had the previous day as "*evidence that I have requested the additional funds to tide over the crisis created by UBS by their abrupt and timely action. This request is based on the current situation of the company as on 30th November 2015*". The attached letter is dated 30 December 2015 but that appears to be a mistake for 30 November 2015. It was sent from Mr Kumar on Vincom headed paper. It is said to be sent by hand and is addressed to "*The Trustees, RPRN Family Trust*" with no further identification of the trustees or their address. The contents of the letter were as follows:

"*Further to my presentation on the current business status of the company, I am requesting for a 12 Month short term loan of USD 5 million or a capital Injection of the similar amount or whatever amount you deem fit. I do understand that the commodity index is down due to cheaper commodity prices therefore the capital requirement should not increase but due to some unexpected pull back by Trade finance provider, we are in a tight cash flow situation leading to this requirement. As explained we are facing some huge claim too due to this pull back. We have taken up the matter very strongly with this provider and holding them responsible for their action but we have not reached any conclusion as yet.*

I understand that there is a quarterly meeting of the Trust advisors on 30th December 2015 and I would request you to place this request on the agenda for the meeting. I am prepared to come again on the date and make a presentation of my case in front of the full Quorum.

I really appreciate the time give to me by the advisors and am at short notice availability for in person meeting again, if required."

23. In its latest witness statement filed on this application, UBS exhibited more recent documents relating to a family trust. First an internal UBS email dated 7 January 2016 reporting on a meeting with Mr Kumar the previous day. That email includes "*the Family Trust confirmed to support Vincom by granting a short term loan if needs be … Mr Kumar again mentioned that the Bank doesn't have to fear to lose [sic] any money with him. We have [to] understand that the other businesses he and his Family are running are far bigger than the one of Vincom and it wouldn't make sense to jeopardise his reputation … Mr Kumar will ask the Trust if their commitment can be formalized in written [sic] at our request.*" The Note also reports a meeting with Mr Amar of UBS's London wealth management team in which Mr Amar said that he had introduced Mr Kumar "*to a Swiss Trustee based in ZH, who should look after Mr Kumar's assets once they will become available from the Family Trust. It is possible that part of them will be transferred out still this year*".

24. UBS also exhibited an email exchange from August 2016 between Mr Kumar and M. Briguet of UBS in which M. Briguet asked Mr Kumar to obtain a loan from "*the Family Trust*" in order to support Vincom. Mr Kumar's reply on 17 August 2016 included the statement (with emphasis from the original), "*Let it be clear that I DID ask my Trust for help but they turned down the request. What goes between us is nothing to do with you and you are not privileged to the details of the discussion. Constructive meeting it was indeed as it was pointed out to me that Vincom was in good shape and it was the fault of UBS by pulling all the line without even an Hour notice thus landing the company's business in serious situation. I hope I have clarified this as I will not discuss this any longer nor will I entertain any communication on this*".

25. There appear from these records to have been references to two different trusts: one involving Verus Crown Trent Limited through which Mr Kumar, his wife and daughter owned Vincom, and the second seems to have been a family trust holding other assets from which Mr Kumar sought a loan to support Vincom, and from which UBS understood Mr Kumar was expecting to receive assets. The letter of November 2015 shows that that trust was called the RPRN Family Trust (the "Family Trust").

26. Mr Kumar's evidence in relation to those trusts for the purpose of this hearing is limited. He says, in his 4th witness statement, that he does "*not have full information about my family members' wealth and so I am not in a position to comment on whether this evidence is accurate. But what I can say is that I do not have access to my family members' assets … I do not see the relevance of what may have been said 10 years ago about my family's wealth. It was not available to me then and it is not available to me now. I am not a beneficiary of the family trust mentioned in CW5 I had no beneficial interest in the trust. I did ask my father for payment from the Trust, but he said no and I informed the bank. Both my parents are dead now*". In his 5th witness statement, he says he has no recollection of the meeting on 6 January 2016 and that he is "*not the source of what is said to have been contained in the report or in any of the other of the Claimant's internal records on the matters addressed in*" the relevant paragraph of Mr Weller's 6th witness statement (which seems to be a reference to the paragraph referring to the meeting which mentioned assets of Mr Kumar's becoming available from the Family Trust).

27. In all the circumstances, there does not appear to be any reason to believe that the trust structure through which Vincom was held, involving Verus Crown Trent Limited, now (following the liquidation of Vincom) holds any valuable assets.

28. The position in relation to the Family Trust is less clear. While the documentary evidence exhibited by UBS does not show that Mr Kumar has a beneficial interest in the Family Trust and UBS's notes of meetings may not be accurate descriptions of the trust structures referred to, Mr Kumar's own letter of November 2015 and his email of 17 August 2016 show that he was clearly in a position to ask the Trustees of the Family Trust for a loan, albeit that in the event his request was refused.

29. Mr Atkins says that the request shows only that the company was in a position to ask for a loan and that that request was rejected. It is correct that the request in November 2015 was made by Mr Kumar on behalf of Vincom rather than on his own behalf. However, the evidence is that Vincom was wholly owned by Mr Kumar, his wife and daughter and it seems more likely that the request was considered because it was made by Mr Kumar than because it was made for Vincom. Mr Atkins said on instructions that

Mr Kumar does not know who the trustees of the Family Trust now are, or who the beneficiaries are, and reiterated Mr Kumar's evidence that he is not a beneficiary.

30. It is not enough that in asking the court to grant this application, Mr Kumar should say he does not see the relevance of information about the Family Trust. Although the notes made by UBS personnel of the meetings Mr Kumar had with UBS in October 2013 and January 2016 may not contain accurate descriptions of the structures through which Mr Kumar and his family held their assets, it is clear Mr Kumar intended to give UBS the impression that he had sufficient connection with the Family Trust that its existence should be taken into account in considering his financial position. Mr Kumar also referred to it in his email of 17 August 2016 as "*my Trust*". As Mr Ryan pointed out in his skeleton argument, that email suggests not that Mr Kumar would in no circumstances receive any funds from the trust, but that the Trustees decided on that occasion not to provide funding which they considered UBS should provide. Further, although Mr Kumar says he does not know who the current trustees of the Family Trust are, the documents show that he previously knew their address and identity sufficiently to enable him to arrange the delivery of a request for funds to them by hand. In the absence of any full explanation from Mr Kumar of his relationship with the Family Trust and the basis on which he previously told UBS it was relevant to his personal wealth and sought a loan from the trustees, the court cannot be satisfied for the purpose of this application that the Family Trust is not an available source of funding for Mr Kumar's legal expenses.

Evidence of continuing family wealth

31. UBS further relies on the fact that Mr Kumar's daughter is wealthy and it appears that his wider family may also be wealthy, but that does not in itself mean that that wealth is available to Mr Kumar to fund his legal expenses. Mr Atkins said on instructions that Ms Kumar was not willing to help her father by paying his legal expenses: she wants nothing to do with this litigation and that is why there is no evidence from her on the application. Mr Atkins also pointed out that there is no suggestion, let alone evidence, that Ms Kumar is under any obligation to assist her father, and that Mr Kumar's instructions were that it would go against the grain for any father to ask his daughter for assistance. Certainly taken by itself, there is not enough in this point (the wealth of Mr Kumar's daughter) to undermine Mr Kumar's evidence.

32. Leaving aside the evidence relating to the Family Trust, the limited evidence relating to the wealth of Mr Kumar's wider family does not undermine Mr Kumar's evidence.

Mr Kumar's lifestyle

33. UBS further relies on the fact that the evidence adduced by UBS in support of the application for the WFO indicated that Mr Kumar had an expensive lifestyle. UBS points out that he was living at an address in London between Marylebone and Hyde Park, he drove a Lexus with personalised number plates and dined in London restaurants and, on that basis, the living expenses exception in the WFO was set at £4,000 a week. I note that the asset disclosure subsequently given by Mr Kumar included a 2002 Lexus, said to be worth less than £10,000.

34. Mr Kumar's evidence at this hearing was that he is not supported by his daughter or wider family and that he receives a salary from Ransat Ceramics Ltd of £36,000 gross per year before what he describes as "*modest bonuses*".

35. The only other income that has been disclosed is rental income of approximately £1,900 per month from Pinnacle, one of the Dubai properties, but it is said that this is not enough to discharge the mortgage payments on that property.

Request to increase living expenses to £6,000 per week

36. On 11 November 2022, Edwin Coe sought agreement to vary the living expenses exception to £6,000 a week. Edwin Coe's letter of 11 November stated, "*The monthly mortgage payments for Pinnacle are not covered by the rent, and our client must discharge the difference of AED 3,500 himself. Although our client has noted the weekly living allowance exception at paragraph 9(a) of the injunction order, this is insufficient and your clients are invited to agree to £6,000 per week*". The letter did not explain the source of the funds to meet those expenses.

37. Reed Smith (the solicitors for UBS) asked for information as to Mr Kumar's income, his monthly outgoings and the source of funds for those living expenses. Edwin Coe's response, on 15 November 2022, was that Mr Kumar would not "*incur the expense of debating the difference in the weekly living exception, and he withdraws the suggestion that there should be an increased allowance to £6,000*". That does at least suggest that the request was not pursued because Mr Kumar did not want to get into debating his sources of income and his monthly outgoings. However, it is also possible that, in circumstances where the request had been made soon after the WFO was made, it had initially seemed attractive to Mr Kumar to seek an increase in the exception if one was available but that, once Reed Smith requested details of income versus expenditure, it became clear there was little point because his funds would not be sufficient. Mr Kumar says (at paragraph 8(b) of his 4th witness statement) that at that time the request seemed reasonable because he had the profit from the sale of the Marina Vista property in Dubai in his bank account.

38. This account is not in itself difficult to accept. It is not unlikely that, in those circumstances, an increased living expenses exception would have seemed potentially helpful at the time of the request albeit that in reality, on Mr Kumar's evidence, monthly expenditure at that level would not have been possible because the proceeds of the sale of Marina Vista were quickly used up in payment of legal expenses. That is consistent with what Mr Kumar said in his 2nd witness statement at paragraph 18: "*My living expenses were being funded from my earnings and what was left of the NatWest Savings account. I had been waiting for the sale of Vista to continue to fund my lifestyle, but as mentioned in this statement, now I must also use those profits to fund my legal expenses*".

39. I take into account that the parties subsequently agreed to reduce the living expenses exception to £2,500/month.

Request for approval of expenses for Dubai trip

40. UBS also relies on the fact that Mr Kumar asked UBS to consent to a variation of the WFO to pay the costs of an expensive trip to Dubai in January 2023 which Mr Kumar

said was necessary in order to deal with bank account issues there. The primary point being made about the trip is that it was very expensive: originally estimated to cost £7,500 and subsequently £11,000. It is said by UBS that the expense of this trip is inconsistent with what Mr Kumar says now about his lack of means.

41. Mr Kumar says (in summary) that it is very expensive to travel to Dubai in January but that he believed he had to make the trip in order to ensure the safe transfer of the funds from his RAK bank account which was being closed, rather than risk a closing cheque being sent and lost in transit.

42. The costs of the trip which Mr Kumar was seeking are surprisingly high. Given a salary of £36,000 per year, a trip costing £11,000 seems an entirely disproportionate expense. Mr Kumar's explanation that Dubai is an expensive place to have to go at that time of year may be correct, but the fact that he proposed to spend £8,000 on business class flights to Dubai in February 2023 is difficult to reconcile with him having no other assets beyond his £36,000 income and the assets disclosed (as set out above) pursuant to the WFO.

Use of premier banking services

43. The facts that the RAK account was a premier bank account (known as an "Elite" account) and that the ENDB accounts held by Mr Kumar were with ENDB's private banking arm do not take the question whether Mr Kumar now has assets beyond those disclosed in his asset disclosure much further. It would not be surprising if, on the basis of the assets he originally held, he had had "premier" and/or private bank accounts.

WM Fees

44. The bank statements provided by Mr Kumar via Edwin Coe on 23 May 2023 for the previously undisclosed ENDB bank account show debits for "WM Fees". The bank statements that have been disclosed show those debits starting on 30 November 2022 following a credit to the account of AED 1,000 on 29 November 2022 (before which the account had had a zero balance), and then charged as follows:

    30 November 2022: two debits of AED 667.50 (the balance being reduced to zero on that day) – described as "WM Fees Q2 2022"

    16 February 2023: debit of AED 2,100 – described as "WM Fees Q3 2022"

    16 February 2023: two debits totalling AED 1,432.50 – described as "WM Fees Q2 2022"

    14 March 2023: two debits totalling AED 2,100 – described as "WM Fees Q4 2022".

45. WM fees of AED 2,100 per quarter in respect of Q2, Q3 and Q4 2022 were therefore applied to Mr Kumar's ENDB account in November 2022, February 2023 and March 2023.

46. Reed Smith asked for an explanation of these charges as soon as it received copies of the ENDB bank statements on 23 May 2023. Edwin Coe initially replied to say that Mr Kumar did not know what these fees were but that "*from the account statements enclosed, the charges applied to this account have no bearing on the existence of*

'wealth' in this account". Following a further request from Reed Smith saying that Mr Kumar could ask ENDB for information, Edwin Coe said on 5 June 2023 that Mr Kumar would provide information in his affidavit. The affidavit of 13 June 2023 did not refer to the WM fees. Reed Smith asked again for an explanation on 26 June 2023. In his 4th WS, Mr Kumar said that the WM fees were "*a quarterly fee which ENDB charges for not maintaining the minimum balance on the account. This practice is widely adopted in UAE. When the account had no money in it, they did not debit the fees. However, once the money came in from my RAK account, the charged the backlog of fees. They did not continue to apply the fees going forward because now the minimum balance was in there and the same was true when my colleagues made small payments into the account in November 2022. It is clear on the face of the documents (…) that they were fees referable to previous quarters. They are not evidence of any undisclosed wealth*".

47. UBS then, by its own researches, found an ENDB "*Schedule of Fees and Charges on Portfolio Accounts*" which states that ENDB charges an annual "*Wealth Management Fee*" of 0.53% which is "*[c]alculated daily based on the portfolio value and charged in arrears on a quarterly basis*". The WM fee is described as a "*[f]ee for advice and reporting on non-discretionary portfolios includes access to investment strategy publications, valuation and portfolio administration costs. A minimum fee of AED 2,100 is charged per CIF per quarter*". UBS points out that it is that minimum fee of AED 2,100 which is being charged to Mr Kumar's ENDB account per quarter. At the hearing of this application, Mr Atkins accepted that wealth management fees were separate to the fees charged for the maintenance of a balance and that wealth management fees were being charged in the sum of AED 2,100 per quarter. It is entirely possible that Mr Kumar's erroneous statements in his 4th witness statement about these fees were the result of error but it is (at least) unfortunate that Mr Kumar did not himself obtain the correct information from ENDB or publicly available sources and that the true position only emerged because UBS tracked down the relevant information itself.

48. What remains unclear is whether the wealth management fees are charged in respect of facilities which are available to Mr Kumar and which are not being used (as seems possible), or whether they are charged in respect of an existing or recently held portfolio of assets. Mr Weller, giving evidence on behalf of UBS, in his 5th witness statement, fairly states that those instructing him consider that the payment of those fees "*may be indicative*" of Mr Kumar "*having (or at least having in the recent past) an underlying portfolio of assets with ENDB*". If the wealth management fees are being charged in respect of current investments held by Mr Kumar then, as set out in Mr Weller's sixth witness statement, they reflect the fact that Mr Kumar has a portfolio invested with ENDB which is worth up to AED 396,226.42 (approx. US$107,000) or up to AED 1,584,905 (approx. US$431,490).

49. I raised with Mr Ryan the question whether it is likely the bank would have waited to take those fees from any cash paid into an overdrawn current account if it in fact currently held and managed a portfolio of assets for Mr Kumar. Mr Ryan pointed out that it might depend what the underlying assets were and whether they generated cash from which fees could be taken. The fact that there remain unanswered questions in respect of these fees – in particular, whether they were charged for a recent or current portfolio of assets or whether they were charged for facilities available to Mr Kumar but which were not being used – in circumstances where Mr Kumar himself did not

correctly identify what the wealth management fees were, is something which must be taken into account in considering whether Mr Kumar has discharged the burden on him of demonstrating that there are no assets available from which his legal fees can be met.

The debit to the ENDB account

50. As at 1 May 2023, the balance on Mr Kumar's ENDB AED account appears to have been AED 120,670.69 (approximately £26,547). On 24 May 2023 there was a debit of that entire cash balance. On 26 May 2023, the balance on the account was recorded as in debit in the sum of AED 54,935,925.68. The sum of those two debits appears to be the total sum referred to in the WFO and the DIFC Order. It appears from these figures that the debits were made as the result of UBS obtaining a "Writ of Immediate Execution" in the DIFC and that being applied to Mr Kumar's ENDB AED account. The existence of this debit does not therefore seem to me to support UBS's argument that Mr Kumar has not discharged the burden of showing he has no assets available to pay his legal expenses.

Conclusion on absence of other assets

51. The authorities set out above describe say that the court is entitled to approach the defendant's evidence on an application like this with "*a healthy scepticism*", because the court has already found there to be a risk the respondent will dissipate assets.

52. Although some of the evidence UBS relies on is not necessarily inconsistent with the position presented by Mr Kumar, i.e. that he had some significant assets when the WFO was granted, albeit that they are being quickly depleted (which could explain the initial request for a higher living expenses exception, when the proceeds of the sale of the Marina Vista property were in his bank account), I accept UBS's argument that there are real difficulties with parts of Mr Kumar's evidence.

53. In particular, as set out above:

    i) It is very difficult to see a request in February 2023 to spend £8,000 on business class flights to Dubai as consistent with Mr Kumar having only the assets disclosed by him pursuant to the WFO and an income of £36,000 per year; and

    ii) The documentary evidence of what Mr Kumar previously told UBS about the Family Trust as relevant to his own personal wealth means that on this application, a full explanation of Mr Kumar's interest in or relationship with that trust is required. His evidence that he does not know relevant details and that the Family Trust is not relevant to the application is, in the circumstances, inadequate.

54. Taken together, these two matters leave the impression that Mr Kumar is likely to have access to other sources of funding to meet his legal expenses. That impression is compounded by the unanswered questions about the wealth management fees being taken from Mr Kumar's ENDB account. In combination, the various points UBS makes in relation to Mr Kumar's evidence and the evidence it has provided, indicate that Mr Kumar believes he can afford a lifestyle substantially more expensive than that which could be maintained on an income of £36,000. In light of the evidence referring to the Family Trust, I accept that the evidence overall indicates that Mr Kumar is more likely

than not to have access to other sources of funds (whether belonging to him or to third parties). He has therefore failed to discharge the burden of demonstrating that there are no other sources of funds available to him to pay his legal expenses.

55. In particular, in these circumstances, Mr Kumar has not done enough to show that the Family Trust which he previously said UBS should have regard to in considering his personal wealth, would not make funds available to fund his defence. Mr Kumar knew the identity of the trustees in 2015 (at least sufficiently to have a letter hand delivered to them) but says he does not now know who the trustees are. Mr Kumar was able to approach the trustees for funding in 2015. It does not make sense that Mr Kumar referred to the trust as "*my Trust*" in August 2016 but that he now says he is not a beneficiary of the trust and had no beneficial interest in it at the time and that the Family Trust is therefore irrelevant to whether there are sources of funds from which he could pay his legal expenses. The situation calls for explanation and Mr Kumar's statement that he does not see the relevance of what UBS recorded him saying about the Family Trust 10 years ago is, in the circumstances, inadequate (see the obligation on an applicant to "*put the facts fully and fairly before the court*", as set out in *Halifax v Chandler*, cited in *Tidewater*, above).

Other matters relied on by UBS

56. UBS relied in on a number of other matters in relation to the evidence filed by Mr Kumar on lack of other assets, including the fact that he did not disclose the existence of the ENDB account (a matter which Mr Kumar admitted and apologised for in his second affidavit). Given that I have found, without having regard to those matters, that Mr Kumar has not discharged the burden placed on him of demonstrating that he does not have access to other sources of funds to pay his legal expenses, I do not consider those matters further in this judgment.

57. UBS also contended that it is able to demonstrate sufficient misconduct on the part of Mr Kumar that his application for a variation should in any event be dismissed on that independent ground, on the basis it is in those circumstances neither just nor convenient to grant the relief sought. As I have in any event decided that the application should not be granted, it is not necessary to consider this argument in detail but I would not have considered that any conduct for which Mr Kumar can be criticised at this stage of the proceedings is sufficiently serious to amount to an independent basis for refusing the relief sought. *Tidewater* was, as Mr Atkins submitted and as Males J emphasised at [59] in making his decision, "*in several respects an exceptional case*". Not only had the defendants in that case already been found to be in continuing contempt of court but it was only because of that contempt that the proceedings in which the application to vary the WFO was made were necessary. The situation here is not comparable.

Conclusion on application to vary the WFO

58. Mr Kumar's application for a variation of the WFO is dismissed on the basis that, in all the circumstances, Mr Kumar has not discharged the burden of satisfying the court that there is no other available source of funds to pay his legal expenses.

Amendments to the trial timetable

59. My understanding is that Mr Kumar in any event seeks amendments to the timetable to trial given the time that has been lost to date in preparing for trial. In the circumstances, it is appropriate to order those amendments to the timetable. UBS accepted at the hearing that the dates proposed by Mr Kumar did not jeopardise the trial window.