Neutral Citation Number: [2024] EWHC 725 (Ch D)

No. BL-2024-000401

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

Friday, 22 March 2024
7 Rolls Buildings
London EC4A 1NL

Before
MR NICHOLAS THOMPSELL sitting
as a Deputy Judge of the High Court

BETWEEN:

(1) KIERAN GALLAHUE
(in his personal capacity and as co-trustee with Mary Gallahue of the Kieran and Mary Ellen Gallahue Revocable Family Trust and the Gallahue Irrevocable Trust)
(2) MARY GALLAHUE
(as co-trustee with Kieran Gallahue of the Kieran and Mary Ellen Gallahue Revocable Family Trust and the Gallahue Irrevocable Trust)
(3) OLIVER COX
(4) RACHAEL COX
(5) OLIVER COX LIMITED
(6) KARL DEVINE
(7) MICHAEL MOORE
(8) VANESSA MOORE
(9) RICHARD JACKSON
(10) WARREN TAYLOR
(11) KAWT INVESTMENTS LTD
(12) ROBERT O'DONOGHUE
(13) ANNA ALLINGTON
(as executor of the Estate of Christopher Allington (Deceased))
(14) ALAN HOWARD
(15) BENJAMIN COLLINS
(16) MARK WEBSTER
(17) ROSS HILL
(18) NICK DAVIS
(19) EGCB HOLDINGS LTD
(20) DCMS HOLDINGS LTD

Claimants / Applicants

– and –

AKHILESH SHAILENDRA TRIPATHI

First Defendant / Respondent

– and –

SILVIE KENT

Second Defendant

Mr Duncan Matthews KC and Mr Matthew Chan (Instructed by **Proskauer Rose (UK) LLP**) appeared on behalf of the Applicants

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JUDGMENT

MR NICHOLAS THOMPSELL:

(1) BACKGROUND

1. This judgment relates to the Claimants' without-notice application for relief:

    a. pursuant to Section 37.1 of the Senior Courts Act 1981 and/or CPR rules 25.1. (1)(f) and (g); and

    b. pursuant to Section 37.1 of the Senior Courts Act 1981 and/or CPR rule 25.1. (1)(c)(1), for a proprietary injunction to restrain Mr Tripathi dealing with the proceeds of sale of certain shares, or assets which represent their traceable substitutes.

2. The application has been made in support of the Claimants' claims, set out in Particulars of Claim. These claims may be summarised as follows. I stress that that in setting these out, I'm setting out the Claimants' case, rather than any findings of the court.

3. At the material time the second defendant, Ms Kent, was the registered owner of 92,800 shares in the capital of a company called Signifier Medical Technologies Limited, which I will refer to as "**the Company**".

4. The Company was cofounded by Mr Tripathi. It operates a business selling medical devices or a medical device which uses electrotherapy to treat sleep apnoea and other related conditions. Until 11 August 2023, Mr Tripathi was its Chief Executive Officer.

5. It is understood that Mr Tripathi worked closely with Mr Kent, who is a close relative of Ms Kent and that this was the reason for her originally having the shares.

6. The Claimants purchased 31,931 of these shares in 2020 for a total sum of $2,945,643.75 and a further 6,724 of these shares in 2021 for a total sum of $1,345,300.

7. In doing so, the Claimants relied on representations made, the Claimants say, by Mr Tripathi. Various representations were made at various times, sometimes directly to the Claimants and sometimes to persons acting on their behalf who passed these on to the relevant Claimant.

8. The various representations (express and/or implied) relied on have been itemised by the Claimants but for the present purposes it is enough that I summarise the overall purport of these representations. This was that Ms Kent was the legal and beneficial owner of the shares being sold and wished to sell them for personal reasons and that she would receive the proceeds of the share sales for her own use.

9. The Claimants each say that they were induced to purchase the shares on the basis of these representations.

10. Very recently, on 23 February 2024, the Claimants uncovered, through material obtained from Barclays Bank, that Mr Tripathi had been the ultimate recipient of almost all the proceeds of these sales of shares. These proceeds had been received by the Company from the Claimants. They were transferred to Ms Kent and then onwards transferred to Mr Tripathi. These onward payments mostly bearing the description of "gift". I was taken through the bank statements relied upon to support the Claimant's case with regard, which appear persuasive on this point.

11. The Claimants argue that this is most likely explicable on the grounds that Mr Tripathi was in fact the beneficial owner of the shares.

12. In any event, the Claimants say they were misled as to the reasons for the sale and as to the intended beneficiary of the proceeds.

13. The Claimants further say that had they not been misled in this way they would have been concerned, in particular if they had known that Mr Tripathi was seeking to reduce his beneficial holdings, or even if a cofounder such as Ms Kent (who, the Claimants contained were likely to have knowledge of the Company and its prospects through Mr Kent) was seeking to reduce her position, that this would have caused them concern and they would not have purchased the shares.

14. On that basis that the Claimants allege that the sale of these shares was procured by Mr Tripathi's deceit or at the very least his negligence. They claim that Mr Tripathi was acting as Ms Kent's agent and this would have the result that both he and Ms Kent are liable for these misrepresentations. However, as Mr Tripathi himself has received almost all the sale proceeds and Ms Kent is believed to be out of the jurisdiction and her assets are not known, this application is being pursued against Mr Tripathi only.

15. On 13 March 2024, the Claimants rescinded (or at the very least purportedly rescinded) the agreements which underlie the share sale on the grounds of the alleged misrepresentations. They now seek, amongst other things, the restitution of the consideration paid for the shares which they allege are subject to a constructive trust and/or damages for deceit or negligent misstatement and/or damages to compensate them for further investments made into the Company, which they say they would not have made but for the deceit.

16. The Claimants understand that between July and December 2021 Ms Kent sold a total of 42,684 shares to the Claimants and others for a total sum of $8,536,800.

17. After the share sale in 2020, a number of the Claimants invested in a round of debt financing known as the Series D fundraise. The fundraise was structured by way of convertible notes which were to automatically convert into shares in the Company on the basis of a valuation of $160 million. The Series D fundraise provided $35 million of cash for the Company.

18. It was not long after the Series D fund raise that Mr Tripathi promoted the second, further tranche of sale of Ms Kent's shares, again making similar representations, which Claimants say were false.

19. On 28 June 2023 Mr Gallahue, the first of the Claimants, made a further investment of $1 million into the Company as part of a Series E round of fund-raising that was required because the Company needed significant investment to continue in business at that time.

20. The Claimants allege that they would not have participated in the Series D fundraising or the Series E fundraising had it not been for the false representations that had been made to them in relation to the sale of Ms Kent's shares. Accordingly, they are also looking for relief in relation to those subscriptions.

21. The Claimants' Particulars of Claim presently seek restitution and/or damages in the amount of $12,886,743.75. The sterling equivalent of this sum has been estimated by the Claimants as being £10,122,646.48 as at 18 March 2024.

22. The Claimants seek to freeze substantial funds and obtain a proprietary injunction to preserve the proceeds of the sale shares against Mr Tripathi. In these circumstances they seek this injunctive relief on a without-notice basis and ask that the court should sit in private in hearing this matter. I have agreed that both points are appropriate in the circumstances.

23. The court has sat in private pursuant to CPR rule 39.2.(3)(a) on the basis that publicity would defeat the object of the hearing. It is also appropriate for this hearing to have been made without notice because there is a real risk that giving notice to Mr Tripathi might defeat the purpose of the orders sought.

24. A consequence of the application being made without notice is that the Claimants owe the court a duty of full and frank disclosure and fair presentation. I am satisfied that the Claimants have done their utmost to meet those requirements and in considering whether to make the order sought I have considered fully the points that they have raised in that regard.

(2) LEGAL PRINCIPLES

25. The court's powers to grant an injunction is contained in Section 37.1 of the Senior Courts Act. The power may be exercised where it is just and convenient to do so.

26. Lord Leggatt in *Convoy v Broad Idea* [2023] A.C. 389 at [101], summarised what an applicant for a freezing order must show (as part of demonstrating that it would be just and convenient to grant the relief sought). He summarised this as being:

    a. that there is a good arguable case on the merits;

    b. that there is a real risk of dissipation, judged objectively, that a future judgment would not be met because of an unjustified dissipation of assets; and

    c. there are grounds for believing the respondent has assets against which a judgment could be enforced.

27. Further, in order to justify a worldwide injunction, there must be grounds for believing that there are insufficient assets within the jurisdiction to satisfy the claim and there may be further assets outside the jurisdiction (See *Derby & Co v Weldon (Nos 3 and 4)* [1990] Ch 65 at [79], per Lord Donaldson).

(3) IS THERE A GOOD ARGUABLE CASE?

28. As regards good arguable case, I am entirely satisfied by the evidence that has been put before me that the Claimants' case that the sales of Ms Kent's shares were induced by misrepresentation is a good arguable case.

29. The Claimants have demonstrated a very strong case that that almost all the money that was paid for the shares was transferred to Mr Tripathi. It is very difficult to see how this could have happened unless the representations complained of were false. The Claimants have each said that they were induced by these representations to purchase the shares and it is entirely credible that this was the case.

30. I have found the Claimants' case that they were also relying on allegedly false representations in applying for the Series D and in particular the Series E fund-raisings less persuasive, particularly in relation to the Series E fund-raising which occurred something like two years after the last of the relevant representations.

31. As far as I can tell, it is not specifically pleaded that the investment in these later tranches was made in reliance on the alleged misrepresentations or that the representations were made for the purpose of inducing these investments. The Claimants have averred only that they would not have invested further in the Company had they known these representations were false. This is a slightly different matter, as this might mean they would not have invested had they known that Mr Tripathi had lied to them, rather that they were relying on these representations as such. Also, it is less credible in relation to the Series E fund-raising, which was some two years after the last of these misrepresentations, that they were still relying on those representations or indeed that the representations had been made for the purpose of inducing this further subscription.

32. In *Unitel SA v Unitel International Holdings BV* [2023] EWHC 3231 (Comm), Bright J explained that there are two possible approaches in relation to the good arguable case requirement.

33. One, older authority, *Ninemia Maritime Corp v Trave Schiffahrtsgesellschaft GmbH (The 'Niedersachsen') [1983] 2 Lloyd's Rep 600, at 605*, suggested the test as being

> "… one which is more than barely capable of serious argument, but not necessarily one which the judge considers would have a better than 50 per cent chance of success.".

34. Some more recent authorities had suggested that the effect of the Court of Appeal's decision in *Lakatamia Shipping Company Ltd v Morimoto* [2019] 2 All ER (Comm) 359 ("*Lakatamia*") at [38] was to align the good arguable test case with that applied in

the context of jurisdiction. The relevant test as regards jurisdictional gateways was set out in *Brownlie v Four Seasons Holding Inc* [2018] WLR192 at [7]. It is that:

> "(i) that the claimant must supply a plausible evidential basis for the application of a relevant jurisdictional gateway;
>
> (ii) that if there is an issue of fact about it,, or some other reason for doubting whether it applies, the court must also take a view on the material available, if it can reliably do so; but
>
> (iii) the nature of the issue and the limitations of the material may be such that no reliable assessment can be made, in which case there is a good arguable case for the application of the gateway if there is a plausible albeit contested evidential basis for it.".

35. In *Unitel*, Bright J was more persuaded by the older test (see paragraph 36), but he observed that the law is in need of clarification. In the event, he found that both tests were satisfied on the facts before him.

36. The Claimant here has submitted that both tests for a good arguable case are easily met in the present case.

37. I agree that this is true in relation to the case relating to the sale of Ms Kent's shares

38. The pleaded case in relation to the Series D investment is less strong in my view but given the proximity of the representations to the fund-raising is still sufficiently strong to form part of a good arguable case.

39. However, as regards the Series E investment I think it is much less clear that there was reliance, and in the absence of reliance being specifically pleaded or expressly evidenced, I am not, at present, satisfied that the test of good arguable case is met on either of the explanations given in *Unitel*.

40. For this reason, I will not, in calculating the quantum for a freezing order, take into account the potential damages in relation to the Series E investment.

41. I am very aware that there has not been the chance for that point to be fully argued before me today and certainly there has been very limited argument on the relevant test to be applied. Taking the balance of understanding I have today, I do not think it is safe for me to include the damages in relation to the Series E investment in my judgment, but the the result of the order I am going to make is that there will be a return date very soon and the Claimant will be able to revisit this issue on that occasion, as will the First Defendant.

(4) IS THERE A REAL RISK OF DISSIPATION?

42. I am satisfied that there is a real risk of dissipation having had regard to the summary of what this means given by Popplewell J in *Fundo Soberano de Angola v Dos Santos [2018]* EWHC 2199 (Comm) at [86] and endorsed by the Court of Appeal in

Lakatamia, save that the words in principle 4 in Popplewell J's explanation "*are likely to be dissipated*" were substituted with the phrase "*may be dissipated*".

43. In this case, a real risk of dissipation is demonstrated, amongst other things, by the following matters:

44. Firstly, the facts of the claim which, if established, demonstrate a propensity on the part of Mr Tripathi to act in a dishonest manner and this is amplified by other claims made by other claimants in other actions to a similar effect.

45. Secondly, further evidence of dishonesty in that in response to letters before action sent by Claimants in another matter Mr Tripathi's lawyers, Mishcon de Reya, stated in letters dated 6 October 2023 that:

> "[Mr Tripathi] has not benefited directly or indirectly from the sale of these shares."

46. This now appears to be untrue and the Claimants have a good case that it must have been known by Mr Tripathi to be untrue at the time he told his lawyers to make such a statement.

47. Thirdly, by the fact that Mr Tripathi is known to have operated via a BVI company in relation to his indirect ownership of a property at 74 Chester Square, London, SW1. This may be thought to show a willingness and ability to use offshore structures to hold assets and to conceal the true beneficial ownership of those assets.

(5) ARE THERE ASSETS ON WHICH AN ORDER COULD BITE?

48. For my consideration of whether there are assets on which an order might bite, the Claimant has referred me to the test set out by Longmore LJ in *Ras al Kaimah Investment Authority v Bestford* [2018] 1WLR 1099 at paragraph 39.

> "A test of likelihood on its own is inappropriate; the right test must be either a "good arguable case" or "grounds for belief.".

49. Applying such a test that, I consider that the Claimant has good arguable case and good grounds for belief that Mr Tripathi does assets that would be caught by the order sought.

50. First, Mr Tripathi appears to have received substantial sums deriving from the share sales. Whilst it is not known whether he still holds those monies, it is likely he will hold the benefit of those monies at least to some extent and in some manner.

51. Secondly, Mr Tripathi appears to own shares in JJE Properties, a BVI-registered entity holding the property in Chester Square. Although the Claimant cannot know at present whether these shares are encumbered or whether JJE itself has debts and if so of what amount, it seems likely that there is value there. As the property as held through an offshore company a worldwide freezing order is necessary to secure the availability whatever net value is available in relation to this property to meet any judgment made against Mr Tripathi.

52. Thirdly, there is a property registered in Mr Tripathi's name at 13 Sharose Court, Markyate, St Albans, which he is recorded as having acquired for £349,995 in April 2015.

53. Fourthly, Mr Tripathi appears to be within a class of beneficiaries of a trust in Jersey, although details about his entitlement is not at present known.

54. Fifthly, Mr Tripathi invested two tranches of $2.5 million in the Company in February and September 2023. Whilst the source of these funds is unclear who (and on the Claimants' case this investment may now be worthless), this does form a basis for inferring that Mr Tripathi may have substantial liquid assets.

55. Taking all this together, I am satisfied that there is a basis for saying that Mr Tripathi does have assets both within and without the jurisdiction that might be dissipated and this is the order on which it is appropriate to grant a worldwide freezing order.

56. As I have noted above, I should not make a *worldwide* freezing order if I consider that there are sufficient assets within the jurisdiction to meet the Claimants' claims, but on the evidence before the court at present I do not think that it is likely that Mr Tripathi's assets within the United Kingdom amount to anything like the sum claimed (even excluding the sum claimed in respect of the Series E investment.

(6) IS THE PROPOSED WFO JUST AND CONVENIENT?

57. In all cases, the court has to consider whether it is just and convenient for the order to be granted. The Claimants quite properly drew my attention to *Holyoake v Candy* [2018] CH 297 where at paragraph 45 Gloster LJ stated:

> "The conclusion that all variants of freezing order must satisfy the same threshold in relation to risk of dissipation should not be taken to suggest that parties need only contemplate the most onerous form of freezing order under what would be a misapprehension that the intrusiveness of the relief is immaterial. On the contrary, the intrusiveness of the relief will be a highly relevant factor when considering the overall justice and convenience of granting the proposed injunction. Hence, even if there is solid evidence of real risk of unjustifiable dissipation, an applicant should consider what form of relief a court is likely to accept as just and convenient in all the circumstances, including the scope of exceptions to the prohibition on dispositions.".

58. The Claimant has submitted that the following factors point in favour of the order that they seek.

59. First that the claims against Mr Tripathi are prima facie strong and on any view substantial.

60. Secondly, there is no obvious innocent explanation why Mr Tripathi received the sale proceeds. That, I think, is an instance of the first point rather than a self-standing point.

61. Thirdly, the claim has been brought promptly and in circumstances where the Claimants only found out about the information allowing them to advance the claim on 23 February 2024.

62. I agree in the round that these points, taken with the real risk of dissipation that I have found, do point towards making an order but I still need to consider the overall effect of the order. Here I find it persuasive in favour of making the order that the order does include the usual exceptions allowing payments to be made for living expenses and for payment of reasonable legal fees, substantially mitigating the potential harm to the First Defendant.

63. I need also to consider the fact that a worldwide freezing order has already been made by Jarman J in relation to an action against Mr Tripathi made by other shareholders in STC. There is no principle that the existence of a prior freezing order precludes making a further freezing order as stated in *Unitel* at [103]:

> "It would be a material fact and consideration must be given to the additional burden placed on a defendant by a fresh freezing order.".

64. In *Unitel*, despite the existence of prior freezing orders, Bright J went on to grant the Claimants the relief they sought and his explanation for this is included at paragraphs [104] to [107].

65. The Claimants have submitted that materially the same considerations apply in this case and support the making of the freezing order that they are seeking. In this regard, they point out that the Claimants currently have no information regarding Mr Tripathi's assets or where they are located. Further they argue that, although Mr Tripathi will no doubt incur further costs in compliance with the order, any injustice is met by the cross-undertaking in damages offered and an order for costs if it transpires that the injunction was granted. Most importantly they argue that, it is not clear to the Claimants how secure the worldwide freezing order made by Jarman J is. It was issued in different proceedings and the Claimants have no control over whether or when it may be discharged.

66. Having regard to those points I do consider it is just and equitable to make a worldwide freezing order in the broadly the form suggested. We will turn, later, to the precise wording of the order claimed but broadly I am satisfied with it.

(7) IS A PROPRIETORY ORDER APPROPRIATE?

67. I should, however, mention the second element of relief sought in these proceedings, that the order they seek also includes a proprietary injunction.

68. I have found that the Claimants have an arguable case that the share sale agreements were induced by Mr Tripathi's fraudulent misrepresentations. Assuming this is correct, the Claimants were entitled to and did rescind those agreements by a letter sent to Ms Kent on 13 March 2024. The Claimants say they are ready and willing to hand back their shares to Ms Kent and claim that they are entitled to restitution of the proceeds of the share sales.

69. This, if established, and I have found that there is a good arguable case that it may be established, would give rise to a constructive trust on the part of Mr Tripathi who, as far as we are aware, is the last holder of those proceeds for the Claimants' benefit. The Claimants submit they have sufficient title to allow them to trace these proceeds to any further person who is holding them.

70. The basis for such a constructive trust was explained by Rimer J in *Shalson v Russo* [2003] EWHC 1637 (Ch) at paragraph 122:

> "Rescission is an act of the parties which, when validly effected, entitles the party rescinding to be put in the position he would have been in if no contract had been entered into in the first place. It involves a giving and taking back on both sides. If it is necessary to have recourse to an action in order to implement the rescission, the court will make such orders as are necessary to put both contracting parties into the position they were in before the contract was made. There is, however, also a line of authority supporting the proposition that, upon rescission of a contract for fraudulent misrepresentation, the beneficial title which passed to the representor under the contract revests in the representee. The representee then enjoys a sufficient proprietary title to enable him to trace, follow and recover what, by virtue of such revesting, can be regarded as having always been in equity his own property. This may be an essential means of achieving a proper restoration of the original position if the representor has in the meantime parted with the property and is ostensibly a man of straw unable to satisfy the court's orders for restoration of the original position.".

71. I consider that that the same basis is likely to apply here.

72. Because of this alleged constructive trust, the Claimants seek a proprietary injunction as part of the order. In an application for a proprietary injunction the court is required to apply the principles set out by Lord Diplock in the well-known case of *American Cyanamid*, see *Madoff Securities v Raven* [2012] 2 EWHC 1637 (Ch) at [128].

73. The Claimants must therefore show that there is:

    a. A serious issue to be tried as to whether it has a proprietary interest in the asset;

    b. that the balance of convenience favours the grant of an injunction; and

    c. it is just and convenient to grant the injunction.

74. The Claimants have referred me to comments in *Civil Fraud: Law, Practice & Procedure* (First Edition) at [28-206] that it is likely that a claimant with a properly arguable claim to a proprietary interest in particular property will be able to persuade

the court that damages would not be an adequate remedy should the property be dealt with pending trial and the balance of convenience will generally favour him.

75. I agree that in this case each of the requirements of *American Cyanamid* is made out.

76. First, there is a serious issue to be tried. In the light of what I have already said, I think it is clear that there is a serious issue to be tried as to whether or not the Claimants have a proprietary interest in the proceeds of the share sales.

77. Secondly, balance of convenience and whether an order would be just and convenient. Since there is a serious issue as to whether the Claimants hold a proprietary interest in the sale proceeds, the balance of convenience is, in my view, in favour of the injunctive relief. It is just and convenient for such relief to be granted "to hold the ring", as the saying goes while the ownership of the relevant assets is established.

78. In considering the balance of convenience, it is also worth noting that there is little prejudice to Mr Tripathi given that the sale proceeds themselves and his other assets are anyway caught by the freezing injunction, if granted.

79. For these reasons I agree with the elements of the draft order requiring a proprietary injunction.

(8) CONCLUSION

80. I confirm, therefore that subject to finalising some elements of the wording in relation to the draft order that is before me, and subject to the reservation I have made above relating to damages relating to the Series E subscription, I am content that I should make the order sought, which, subject to some amendments made to suit the circumstances follows the usual mandated form.

81. Of course, I am aware that I have heard only one side of the story, but I will order, as is usual, a return date in the very near future at which the First Defendant will have an opportunity to argue as to the appropriateness of the order.