[2021] EWHC 1607 (QB)

QB-2021-001552

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand
London
WC2A 2LL

BEFORE:

THE HONOURABLE MRS JUSTICE TIPPLES

B E T W E E N:

BAY MINING CONSULTANTS LIMITED **CLAIMANT**

- and -

(1) PANKIM KUMAR SHANKERSAI PATEL
- and -
(2) PRASLIN PICTURES LTD
- and -
(3) DAWN ELIZABETH SHEPPARD **DEFENDANTS**

Legal Representation
The Claimant did not appear and was not represented.
The Defendants were represented by **Mr Patrick Harty**.

Other persons in attendance & representation
Mark Barry Slater (director of the Claimant) represented by **Mr Ben Channer**.
Paul Baxendale (referred to in Claimant's evidence) represented by **Mr Adam Richardson**

Judgment

Judgment date: 14 May 2021
(start and end times cannot be noted due to audio format)

The Honourable Mrs Justice Tipples:

1. On 30 April 2021 I dismissed as totally without merit the Claimant's *ex parte* application against the First and Third Defendants for, amongst other things, disclosure of bank statements, a freezing injunction of bank accounts and a so-called interim proprietary injunction of a freehold property in Epping called The Old Vicarage and a maisonette at the same address.

2. The Claimant's claim and the application for the injunction were based on a so-called assignment which maintained that the Claimant, Bay Mining Consultants Limited, had standing to bring the claim as an assignee of a Belize company called MSL Services Limited. The brief details of claim in the claim form said this:

> "1. A claim to recover money of the order of £3 million held by the First and Third Defendants on bare trust for the benefit of the Claimant's predecessor in title and property worth in the region of £3 million representing other trust money.
>
> 2. A claim to enforce loan contracts in the amount of £5,658,916 against the Second Defendant."

3. The evidence in support of the injunction application was set out in the witness statement of Mark Barry Slater ("**Mr Slater**") dated 26 April 2021. That statement explained that the business of MSL Services Limited, defined in Mr Slater's witness statement as "MSL", had been conducted by a succession of companies over the years since 1994 and that MSL's business had been primarily the production, sale and marketing of wealth and lawful tax planning structures to English resident individuals.

4. Mr Slater's witness statement continued by explaining that MSL is entitled to fees for the services described in respect of its business. MSL does not maintain a bank account in England & Wales instead it directs that its clients pay the fees due to other entities. Generally it is advisors and business introducers who receive that money on its behalf and apply it to its direction.

5. Mr Slater further explained that MSL's case is that such a recipient of funds is a bare trustee of the funds for the benefit of MSL. MSL refers to such individuals as "fiduciaries" and, in view of what he says, their fiduciary obligations are as a bare trustee. Mr Slater explained at paragraph 11 of his witness statement that he understood from MSL that the First Defendant first offered the service of acting as a

fiduciary to MSL in 2006 and since that date has purported to provide fiduciary services to MSL.

6. He explained that the Claimant's case is that Mr Patel had in total over £11 million of MSL monies transferred to him as a fiduciary. He then referred to correspondence between the First Defendant and HM Revenue and Customs.

7. Then at paragraph 14 of his witness statement Mr Slater said this and I quote:

> "Mr Patel disclosed the HMRC correspondence to one of MSL's advisors called Paul Baxendale. Mr Baxendale is himself a tax advisor and it appears "in communications between the two referred to below" that Mr Patel hoped that Mr Baxendale could assist him in responding to HMRC and/or refer him to someone who could."

8. The witness statement continued by explaining that the correspondence described as the HMRC correspondence had caused MSL concern and then said:

> "That MSL could not understand why Mr Patel would not simply have told HMRC that he was holding the MSL money as fiduciary when he was asked in January 2020 or again in January 2021. It appeared to suggest the possibility that Mr Patel had applied the MSL money for his own purposes and inconsistent with his status as a bare trustee of the money."

9. Mr Slater then sets out in his witness statement some communications between Paul Baxendale ("**Mr Baxendale**"), who is described as MSL's agent, and the First Defendant. Paragraph 16 of his witness statement says this:

> "On 25 March 2021 MSL's agent Mr Baxendale accordingly demanded of Mr Patel [that is the First Defendant] by electronic message payment of the MSL money to a different entity nominated by MSL. Mr Patel refused to pay over the money as requested by responding to the message "oh fuck off and help me." It seems to me that the reference to "help me" was a request for assistance in respect of HMRC's investigation. In any event Mr Patel did not pay over the money."

10. Paragraph 17 of Mr Slater's witness statement then continues by explaining that also on 25 March 2021 Mr Baxendale emailed Mr Patel a document entitled "fiduciary declaration" for Mr Patel's signature. That document is set out in Mr Slater's witness statement. Mr Slater explains that the First Defendant, Mr Patel, subsequently signed and returned the fiduciary declaration on 31 March 2021 and then makes this observation:

> "I cannot therefore see how Mr Patel can deny that he was holding this money as a fiduciary (indeed so far as I am aware he never has denied it - he has simply refused to hand it over)."

11. Paragraph 19 of Mr Slater's witness statement then says that, on 31 March 2021, following the delivery and signature of the fiduciary declaration, Mr Patel was sent a text by Mr Baxendale which said this (and is exhibited at page 44):

> "So now you can make arrangements to return the £11.5 million and for Praslin [which is the Second Defendant] to repay the £5.6 million."

12. It is then said that the First Defendant replied to that text on 1 April 2021 and refused to hand the MSL money over.

13. So that is the background regarding Mr Slater's witness statement which explains the context in which the claim was issued. However, I note from paragraph 19 of MR Slater's witness statement, which refers to the text by Mr Baxendale asking for money to be repaid, that it is that demand, and that money, which forms the basis of this claim.

14. On 30 April 2021 although the injunction application had been made on short notice the First and Third Defendants were, in the time available, able to instruct solicitors and Counsel, who represented them at the hearing. Mr Harty of Counsel attended and produced a skeleton argument in opposition to the application. That skeleton argument also drew the Court's attention to the fact that Mr Baxendale (who he referred to as Mr Baxendale-Walker), who had been referred to extensively in Mr Slater's witness statement, had an extensive history of proceedings before the High Court and had in the past been made subject to a Civil Restraint Order and was bankrupt. Further, Mr Harty argued that it was Mr Baxendale-Walker who was in reality the person behind these proceedings and the application against his client.

15. In any event, in the light of the matters drawn to my attention by Mr Harty, I decided to adjourn the issue of whether it would be appropriate to make a Civil Restraint Order against the Claimant or indeed Mr Slater (as a director of the Claimant) or Mr Baxendale (as person closely connected with the issue of the claim) until today. This was set out at paragraph 5 of the Order made on 30 April 2021. I did so in order that I could, amongst other things, consider the CE file (and this was recorded at paragraph 4 of the Order).

16. At the same time, having considered the claim form and the particulars of claim, I directed the Claimant to show cause at today's hearing as to why the Court should not, of its own initiative under CPR 3.3(1) strike out the claim and the particulars of claim dated 26 April 2021 under CPR 3.4(2) as (a) disclosing no reasonable grounds for bringing the claim; and/or (b) being an abuse of the Court's process or otherwise likely to obstruct the just disposal of the proceedings.

17. The directions made on 30 April 2021 also set out that:

> "Any application by (a) the Claimant to amend its Claim or its Particulars of Claim; and/or (b) the Defendants and/or the Second Defendant to strike out the Claim and/or the Particulars of Claim, shall be issued by 4pm on Monday 10 May 2021 and be made returnable at the hearing [on Friday 14 May 2021]."

18. I should also add this. The recitals to the Order made on 30 April 2021 recorded that it appeared from the evidence that "Paul Baxendale is closely connected with the issue of the Claim [form issued on 26 April 2021] and the Application [made by application notice dated 26 April 2021]". Directions were then given for the Claimant's solicitors (who had Mr Baxendale's email address, and which was also apparent from the documents filed by the Claimant with the application dated 26 April 2021) to serve the Order on Mr Baxendale so that "he may attend and be represented at the hearing [on

14 May 2021] and make submissions as to whether any order referred to in paragraph 5 above should be made". An order was made in like terms in relation to the service of the Order on Mr Slater.

19. Mr Baxendale and Mr Slater had permission to apply in respect of paragraph 5 of the Order: paragraph 9. This was because I made the Order on 30 April 2021 in circumstances where they were not present or represented, and this paragraph was included so that they could make whatever application they thought fit in relation to the Order made on 30 April.

20. Before me today the parties are represented as follows. Mr Slater is represented by Mr Channer of Counsel who is instructed by Morrisons Solicitors LLP.

21. Mr Baxendale is represented by Mr Richardson who is instructed on a direct access basis. All the Defendants are represented by Mr Harty who is instructed by Bark & Co. For reasons I will explain in a moment the Claimant is not represented before me today and does not appear.

22. On 6 May 2021 the Claimant served notice of discontinuance of this claim against all the Defendants. That of course leads to the position set out at CPR Part 38.5 which is that discontinuance against any Defendant "takes effect at the date when the Notice of Discontinuance is served." Therefore, these proceedings were discontinued against all the Defendants on 6 May 2021. Having served a notice of discontinuance, the provisions of CPR Part 38.6 apply which provides that:

> "unless the Court orders otherwise, a Claimant who discontinues is liable for the costs which a Defendant against whom the Claimant discontinues incurred on or before the date on which the Notice of Discontinuance was served on the Defendant."

23. The other consequence of notice of discontinuance in relation to the fact of this case is that the direction I made on 30 April 2021 requiring the Claimant to show cause at today's hearing in relation to the basis of the claim has entirely fallen away. However, the point as to whether it is appropriate to make any form of Civil Restraint Order is still remains outstanding.

24. It is well established that, in considering whether to make a Civil Restraint Order, and if so what form of order to make, there are three questions for the Court.

    a) Whether the litigant has persisted on any issued claims or made applications which are totally without merit ("**the threshold issue**").

    b) Whether an objective assessment of the risk which the litigant poses, demonstrates that he will if unrestrained, issue further claims or make further applications which are an abuse of the Court's process ("**the exercise of discretion**"); and

    c) What order, if any, it is just and proportionate to make to address the risk identified ("**the appropriate order**").

25. The position here is that one has to first of all identify who the litigant is. The Claimant, as I said at the start of this judgment, is called Bay Mining Consultants Limited. Mr Slater is a director of the Claimant, and Mr Baxendale appears to be closely connected

with the issue of the claim. The Court does have jurisdiction to make Civil Restraint Orders against parties who are not named as the claimant to the proceedings but that jurisdiction is, of course, limited. Most recently, in *Sartipy v Tigris Industries Inc* [2019] 1WLR 5892 the Court of Appeal explained that the jurisdiction to make a Civil Restraint Order extends to "the real party" to a claim: see paragraph [32]. In particular, Males LJ explained that, although it was unnecessary in that case to explore the limits of the real party concept, "it must extend to a person who is controlling the conduct of the proceedings and who has a significant interest in the outcome."

26. Mr Channer and Mr Richardson also referred me to a case called *Churchill Limited v The Open College Network South Eastern Region Limited* [2018] EWHC 1691 (QB), Nicklin J. In that case Nicklin J also discussed the issue of jurisdiction to make Civil Restraint Orders against non-parties. He considered the case-law and, on the basis of authority, said he was satisfied that, where the third party against whom the Civil Restraint Order is sought is found to be "the driving force" behind the litigation (which is found to be totally without merit), the Court has jurisdiction to join the third party to the proceedings in order to make a Civil Restraint Order against him or her.

27. So, in relation to Mr Slater and Mr Baxendale, I cannot make a Civil Restraint Order against them unless I am satisfied that the criteria set out either in *Sartipy* or *Churchill* are satisfied.

28. The Defendants have not made their own application for a Civil Restraint Order against the Claimant or against Mr Slater or Mr Baxendale. Rather, they have attended today in order to assist the Court in relation to the position.

29. The Claimant is not represented. Mr Slater submits that the Court does not have any jurisdiction to make a Civil Restraint Order against him. First of all, the criteria set out in the *Churchill* case are not satisfied and in any event the threshold issue is not satisfied. This is a case in which there is only one order which has been made totally without merit, which concerned Mr Slater. That was the Order I made on 30 April 2021, which has given rise to this hearing.

30. Mr Baxendale's position put forward by Mr Richardson is that he has only just received the evidence in this case. He received it yesterday afternoon from the Defendants' solicitor. Notwithstanding that, he submits that there is no jurisdiction to make an order against his client but, if he is wrong about that, then his client has proffered an undertaking to the Court. However, if the Court is minded to go beyond the terms of that undertaking, then Mr Richardson seeks an adjournment in order to have a proper opportunity to consider the material before the Court on 30 April 2021.

31. On the basis of the material before me it seems that the Court cannot make a Civil Restraint Order against the Claimant. There is only one totally without merit order which is the Order I made on 30 April 2021. So, having considered the CE-file, the threshold for making a Civil Restraint Order is not passed.

32. Again, in relation to Mr Slater's position I do not need to make any finding as to whether or not he was the driving force behind this litigation because it seems to me there is not sufficient material upon which to make a Civil Restraint Order in the context of this case, and it is not appropriate to make any order against him.

33. The position in relation to Mr Baxendale seems to me to be as follows. The evidence which was put before the Court on 30 April 2021 shows that there is or may be a prima facie case that Mr Baxendale is a person who is the real party behind these proceedings. However, it seems to me that it is not necessary for me to make any finding or determination in relation to that today.

34. Further, Mr Baxendale has been subject to at least one Civil Restraint Order, most recently an order which was made by Mr Justice Henry Carr on 25 April 2018, which has since expired. Again, although I do not need to decide this point, it seems to me that it is not appropriate to take into account orders concerning Mr Baxendale (or Mr Baxendale-Walker) which were certified as totally without merit and pre-date the order of Mr Justice Henry Carr. The relevant consideration for the Court today is to look at what the position is after that order was made and, in that regard, all the Court is aware of is the order that I made on 30 April 2021. In these circumstances, notwithstanding the extensive litigation history to which my attention has been referred, I am not satisfied it is appropriate for the Court to make a Civil Restraint Order against Mr Baxendale today on the evidence which is before me, and there is no need for me to do so.

35. However, another point which has come to my attention on considering the Court file is that on 11 March 2020 Judge Mullen sitting in the Business and Property Courts made a Bankruptcy Restrictions Order against Mr Baxendale-Walker. That order is for a period of ten years and expires on 9 March 2030.

36. The schedule to that order sets out the restrictions imposed by the Bankruptcy Court on Mr Baxendale-Walker and at paragraph 33(c) includes this:

> "You must not act as a director of a company or directly or indirectly take part or be concerned with its promotion, formation or management or act as a member of a limited liability partnership or directly or indirectly take part or be concerned in its promotion, formation or management unless you are granted permission by the Court to do so (Section 11 Company Directors Disqualification Act 1985; limited liability partnerships regulations 2001). If you act in breach of this prohibition you commit a criminal offence and will also be personally responsible for any of the debts of the company or limited liability partnership in question."

37. It is obviously not for me to make any findings today in relation to the terms of that order and I do not do so in relation to the facts of this case or whether or not that order may or may not have breached. I make it quite clear that I express no views about that at all.

38. However, it does seem to me that these proceedings and the evidence put before the Court in them should be referred to the Official Receiver, as Mr Baxendale's Trustee in Bankruptcy, to consider what if anything should be done about them. It will then be for Mr Baxendale to respond to whatever issues are raised via the Official Receiver.

39. I asked Mr Richardson what his position was in relation to my suggestion that this case should be referred to the Official Receiver. His response was that the terms of the Bankruptcy Restrictions Order was only drawn to his attention yesterday when it was circulated to the parties by my Clerk. He said he had no instructions in relation to this matter and was unable to make any representations in respect of it.

40. It seems to me this is entirely a matter for the Court. I am going to direct that the materials put before the Court in relation to this claim be referred to the Official Receiver who can take such steps as he or she thinks fit. I do not know whether the Official Receiver is or is not Mr Baxendale-Walker's trustee in bankruptcy at the moment but I will contact the Bankruptcy Court in order to find out who in fact is the trustee in bankruptcy, and arrange for the papers to be sent to the Official Receiver (or trustee in bankruptcy, if different).

41. I therefore make no further order in relation to this claim other than directing that it be referred to the Official Receiver and I also need to hear submissions from Mr Harty in relation to the questions of costs which concern the Claimant and I will deal with that after this ruling.

42. The last point I should mention is that Mr Richardson on behalf of Mr Baxendale has made an application that his client's costs of attending today be paid out of central funds. Alternatively that they be paid by the Defendants. That application is made on the basis that the Court has directed Mr Baxendale to attend at the Court today.

43. The order that was made on 30 April 2021 was in fact an order which gave Mr Baxendale the opportunity to attend and be represented and to inform him of the issue the Court was considering. It was not in fact a mandatory order directing him to attend. Obviously though it was in his interests to attend to make representations to the Court and I am grateful to Mr Richardson for attending today.

44. In relation to the application for costs out of central funds, I asked Mr Richardson to direct me to the jurisdiction to make such an order. Mr Richardson directed me to Section 51(3) of the Senior Courts Act 1981 and maintains that, that was where the jurisdiction was founded. He did not refer me to any other provisions.

45. His application was that the costs should be paid out of central funds. Central funds are of course money provided by Parliament out of which may be paid the costs of Defendants in criminal cases in respect of which a "Defendant's Costs Order" has been made. Central funds of course are not funds which are available for orders to be made in civil cases and Mr Harty referred me to a case called *Ford v CPS* [1992] 1 WLR 407 which he said is an authority saying that such costs orders cannot be made in civil proceedings.

46. Mr Richardson was not able to direct me to any rule or authority which permits costs orders to be made out of central funds in civil cases. Further, I am not satisfied that the jurisdiction under Section 51(3) entitles such a costs order to be made. I therefore refuse Mr Richardson's application that his client's costs of attending today are paid out of central funds.

47. In relation to the application he made that the Defendants should pay his client's costs, which was essentially made on the basis that the Defendants' submissions sought to persuade the Court to make a Civil Restraint Order, rather than assisting the court. I also refuse that application. Mr Harty's skeleton argument sets out information which is of assistance, and has been of assistance to the Court, in deciding what to do in relation to this adjourned hearing. I refuse to make any order for costs against the Defendants in respect of Mr Baxendale's attendance today. That application is dismissed.

(proceedings continue)

48. I now have before me an application made by the Defendant for summary assessment of the costs they have incurred in these proceedings up to and including the service of the Notice of Discontinuance, which I understand was served on 6 May 2021.

49. The Claimant is not represented before me because, as I understand it, they have decided not to attend and also Griffin Law Limited who were representing them, have also come off the record. In any event I note in relation to Mr Slater, a director of the Claimant who was represented at an earlier part of this hearing today, his solicitors are present in the Court during his hearing as are his Counsel but, as I say, the Claimant has not been represented.

50. The rules provide, as is set out under CPR Part 38.5(1), that discontinuance against any Defendant takes effect on the date when notice of discontinuance is served on him under Rule 38.3(1). CPR Part 38.5(3) provides: "However, this does not affect proceedings to deal with any question of costs." Liability of costs is then dealt with under CPR Part 38.6(1) which provides:

> "Unless the court orders otherwise, a claimant who discontinues is liable for the costs which a defendant against whom the claimant discontinued incurred on or before the date on which the notice of discontinuance was served on the defendant."

The procedure for assessing costs is set out in CPR Part 44.6 which provides that "Where the court orders a party to pay costs to another party (other than fixed costs) it may either (a) make a summary assessment of costs; or (b) order detailed assessment of the costs by a costs officer, unless any rule, practice direction or other enactment provides otherwise".

51. Mr Harty, on behalf of the Defendant submits that the Court therefore has jurisdiction to make a summary assessment of the costs at today's hearing. The situation in this case is slightly curious because ordinarily when a notice of discontinuance has been served there is no court hearing. The matter is dealt with administratively. The situation here is curious because this matter came before me on 30 April 2021 when an application was made for an injunction which I dismissed and certified as totally without merit. I then adjourned for hearing today, the issue as to whether it was appropriate to make any form of Civil Restraint Order. That hearing has taken place earlier this morning. However, earlier on 6 May 2021, as I have said these proceedings were discontinued.

52. The Defendants are therefore in the position that they knew there was going to be a hearing today and inevitably would have done some preparation towards that because one of the orders I made on 30 April 2021 was that it was for the Claimants to show cause whether or not the claim should be struck out, and also I directed that if the Claimants were going to amend the application and claim form or the Defendants were going to strike anything out then that had to be made returnable for today's hearing.

53. In any event, in terms of the cost schedule put before me I have been taken through that by Mr Harty and I made it quite clear to him that, as the Claimant was not

represented, I wanted to be shown matters such as whether the hourly rates fell within the guidance, and also have the various aspects of the costs schedule explained to me.

54. Mr Harty has taken me through that and I have looked at for example the guidance about hourly rates. I note that Mr Majid is a Grade A fee earner his rate is £350 plus VAT which is less than that in the guidance for Grade A fee earners which is guidance from 2010, and again there is a Grade B fee earner at £300 plus VAT which is marginally more, but again the date of the standard rates goes back to 2010.

55. In relation to the attendances, I have been taken through those and Mr Harty on instructions, has explained that in fact what is claimed does not relate to today's hearing or attendance at today's hearing, but is the work which is done on this matter following the last hearing and that was obviously done in anticipation that the Defendant may need to take steps for today's hearing.

56. Having been taken through the costs schedule and the explanations provided by Mr Harty, it seems to me that the Defendants are entitled to recover these costs and I shall assess them in the sums claimed which is £13,194, and I order that those costs be paid by the Claimant within 14 days of today's hearing which is Friday 28 May.
