JERSEY / JUDGMENT

S and Company J v T (Matrimonial)

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Matrimonial - application for a worldwide freezing order. [2024]JRC198 Royal Court (Samedi) 27 September 2024 Before : Sir Timothy Le Cocq, Bailiff, and Jurats Opfermann and Entwistle Between S First Plaintiff Company J Second Plaintiff And T Defendant Advocate H. B. Mistry for the First and Second Plaintiffs Advocate S. M. J. Chiddicks for the Defendant.

judgment

the bailiff: 1. By Order of Justice submitted on 15 January 2024, ("S") ("the First Plaintiff") and ("Company J") ("the Second Plaintiff") (collectively "the Plaintiffs") sought a worldwide freezing order against the assets of the First Plaintiff's former husband, ("T") ("the Defendant"). The application for a freezing order was to support an enquiry into damages pursuant to the undertaking in damages given by the Defendant, (where he obtained a worldwide freezing order against the First Plaintiff which has now been discharged) and, secondly, to enforce a number of costs orders that have been made in these long-standing proceedings between the First Plaintiff and the Defendant. 2. In support of the application, the First Plaintiff swore an affidavit dated 12 January 2024 ("The Affidavit). 3. The Bailiff had previously declined to impose the freezing order sought by the Plaintiffs on an ex parte basis and the matter was adjourned to an urgent interpartes hearing in which the Plaintiffs renewed their application for a freezing order. The Plaintiffs were represented by Advocate Mistry, and the Defendant represented by Advocate Chiddicks, appearing in the absence of counsel usually instructed by the Defendant. 4. The application took place on 26 January 2024 and in a brief ex tempore judgment the Court refused the application for a freezing order. We indicated at that time that we would provide some further reasons in due course. These are those reasons. 5. As indicated above, the application for the worldwide freezing order was supported by The Affidavit and also by the submissions of counsel and reference to letters, the contents of which were not appended to an affidavit and therefore which did not form evidence in the strict sense. 6. The Defendant applied for an adjournment of the application on the basis that the Defendant should be represented by the advocate who normally does so. We rejected that application for the reasons set out in the ex tempore judgment mentioned above. 7. By way of brief background, this application was part of an ongoing and apparently acrimonious dispute between the First Plaintiff and the Defendant. What was meant to be the final judgment in the financial proceedings ancillary to their divorce was handed down on 15 January 2019 ("the Final Judgment") pursuant to which the Defendant received substantial assets. Neither the First Plaintiff nor the Defendant appealed that Final Judgment. 8. In 2021, applications were made by the Defendant to attack the Final Judgment on the basis that there had been a material non-disclosure and, in support of that, the Defendant obtained a worldwide

freezing order against the First Plaintiff in May 2021. In November 2021, the Defendant issued a summons to set aside the Final Judgment. 9. In December 2022, the Royal Court refused the Defendant's application to set aside the Final Judgment. It is fair to say that there were a number of interlocutory hearings and there were a number of costs orders made against the Defendant in connection with some of the hearings. We do not need to set these out. They are fully set out in the draft Order of Justice before us. The Order of Justice pleads that the First Plaintiff's legal costs in respect of the various interlocutory matters and indeed the set aside proceedings amount to approximately £1 million. There is, so she argues, a good arguable case to indicate that she is entitled to a substantial sum.

10. The First Plaintiff also claims damages in respect of the Defendant's worldwide freezing order which she estimates in her Order of Justice to be in the region of £11 million.

11. The First Plaintiff points to a number of assets held by the Defendant pursuant to the Final Judgment and alleges that the Defendant has begun to liquidate his assets. She points to the fact that the Defendant has refused to explain what he is doing with his assets and as a result maintains that there is serious risk of dissipation and accordingly seeks the worldwide freezing order.

12. The Affidavit largely supports the terms of the Order of the Justice. The First Plaintiff says, at paragraph 23, with regard to her claim for costs, "My worldwide legal costs stand at circa £808,935.98 and €168,654 of which I have been given judgment of the Jersey costs, which form the most significant of my legal costs given that this is where the litigation was commenced and proceeded".

13. With regard to the claim in damages in respect of the worldwide freezing order, she says at paragraph 29 of The Affidavit: "Given the impact the WWFO had on my ability to conduct business, the loss of reputation, the loss of credit rating, the forced sale of assets at a loss, the defaulting of loans etc, I estimate my damages, inclusive of costs, to be circa £11 million."

14. We pause to observe that with regard to the quantification of the claim in costs, the figures stated do not make any allowance for taxation, nor specify precisely which elements of the "worldwide legal costs" is attributable to which costs order in Jersey. It must be, therefore, that the figure claimed is likely to be an over-estimation of the recoverable costs and that over-estimation may be significant.

15. With regard to the quantification of the claim in damages, it appears to us that this is speculative in the extreme. The affidavit does not condescend into detail as to how this estimation is reached, what the heads of claim would be and why, as a matter of law, they can be claimed. It is impossible for us to say on the information before us what, if anything, may be due under this head of claim.

16. In the First Plaintiff's oral submissions, Advocate Mistry for the First Plaintiff purported to give us more information relating to the injuries suffered by his client and to the various legal steps taken in other jurisdictions, including ("Jurisdiction 1") and ("Jurisdiction 2"). He points out that whereas his client had estimated £11 million in terms of damages, the Order of Justice only seeks to restrain £6 million worth of assets. Advocate Mistry argues that there is a good prima facie case for 50% or more.

17. He refers to the Affidavit which, at paragraph 37, points to almost £5 million worth of assets being sold by the Defendant. The First Plaintiff does not know what happened to them. He had been asking for some considerable period what had happened to the proceeds. We pause here to observe that in the event that the Defendant had been minded to dissipate his assets, he has had more than enough opportunity already to do so, given what appears to be a lengthy history of questions posed by the First Plaintiff.

18. In addition to this lack of response as to the destination of the proceeds of sale of certain assets, in the Affidavit at paragraphs 38 and 39, the First Plaintiff states: "38. I also saw some time in 2022 – 2023 an advert on an agent's website for the sale of the Defendant's residential home, [Property 1], which he had purchased on the 15th November 2019 for the sum of £2,090,000.

39. Excluding the potential sale of [Property 1], in 2021, at the time the Defendant launched the Set-Aside Proceedings and obtained the 2021 Order of Justice, he liquidated circa 60% of his assets. This is very suspicious and concerning from my position."

19. Advocate Mistry also refers to a sequence of correspondence. In November 2023 and subsequently, the Defendant had replied not denying that he had liquidated assets.

20. We make the same observation to the effect that had the Defendant been minded to dissipate his assets, he has had enough opportunity to do so.

21. In response, Advocate Chiddicks observed that his client had not denied that any liquidations had taken place but denied that he had dissipated his assets. He explained what had happened to a number of the assets and indicated that they were not being dissipated. He pointed out that there is no urgency to the current application and that the Plaintiff had approximately three months to present an Order of Justice and claim a freezing order and had simply not done so. An application could have been made in November had the First Plaintiff really been concerned about the risk of dissipation.

22. Advocate Chiddicks refers us to the case of Holyoake and Another v Candy and Others [2017] EWCA Civ 92, in which the following extracts are found: "It was also common ground that the ultimate question the court must ask, in determining whether to grant a conventional freezing order, was whether it is just and convenient to do so. Nor was it in dispute that an applicant for a conventional freezing order or a notification injunction must show a good arguable case on the underlying merits. There was some debate as to what was the correct test to establish that there was a risk of dissipation such as to make it just and convenient to

grant a conventional freezing injunction. However, the threshold in relation to conventional freezing orders is well established. There must be a real risk, judged objectively, that a future judgment would not be met because of unjustifiable dissipation of assets. But it is not every risk of a judgment being unsatisfied which can justify freezing order relief. Solid evidence will be required to support a conclusion that relief is justified, although precisely what this entails in any given case will necessarily vary according to the individual circumstances: see e.g Gee on Commercial Injunctions (6th edition) in particular at 12–032 – 34 and 12–042 and the cases there cited. .....

39. Therefore, in order for the court to grant a notification injunction in the wide terms obtained in the present case, the applicant must, in my judgment show a real risk, supported by solid evidence, that a future judgment would not be met because of unjustifiable dissipation. That test is the same as would be required in order to obtain a conventional freezing order. The reason for this is that a notification injunction in the wide terms of the 8 April and 29 April notification injunctions is in reality merely a modified version of a conventional freezing order, and there is no reason to differ from the approach taken in that context. However, I would add that I consider this to be the preferable conclusion, for three further reasons.

40. First, it is necessary to maintain the close regulation of the availability of injunctions which have the nuclear effect of prohibiting the affected party from dealing with his assets. ..... Issue (ii): Applying the correct test to the evidence available at 7-8 April

49. The next stage of the analysis is to ask whether the evidence available at 7-8 April demonstrated that there was indeed the requisite risk of dissipation. In my judgment the evidence was not sufficient so to demonstrate.

50. There are three points which inform this analysis. First, it is critical to remember that the burden is on the applicant to satisfy the threshold. The court will of course decide on the basis of all the evidence before it. However, in practice, if an applicant has not adduced sufficient evidence, the application will fail. The respondent's evidence will be immaterial – unless, unusually, it lent support to the application.

51. Second, it follows that, unless an applicant has raised a prima facie case to support a freezing order, the respondent is not obliged to provide any explanation or answer any questions posed – and nor can a purported failure to do so be held against the respondent. It is only if the applicant has raised material from which a real risk of dissipation can be inferred, that the respondent will be expected to provide an explanation. Then, in appropriate circumstances, the lack of a satisfactory explanation may give rise to an adverse inference.

52. If authority were needed for this second point, it can be found in The Ninemia. At 1424B-D and 1425D-1426B, the Court of Appeal quoted with broad approval the judgment of Mustill J (as he then was) that: "The less impressive [the defendant's] evidence, the less effective it will be to displace any adverse inferences. But there must be an inference to be displaced, if

the injunction is to stand, and comment on the defendant's evidence must not be taken so far that the burden of proof is unconsciously reversed. ..... [Defendants] have no obligation to disclose their financial affairs, simply to answer a challenge from the [claimants] which is unsupported by solid evidence."

53. In Flightwise Travel Service Ltd v Gill, Neuberger J made the same point: "32. Finally, because the point has been raised, it really should go without saying that it is for the applicant to make out his case to support a freezing order, namely an appropriately strong case against the respondent concerned, and that there is a real risk of dissipation by the respondent. It is not for the respondent to show that a freezing order ought not [to] be granted." .....

56. The first factor was the transfer of Cambridge Terrace from Mr Christian Candy to his wife; this was one of two factors to which the judge attached particular weight in reaching his decision that there was a risk of dissipation. Indeed, this was the sole evidence adduced by the respondents to suggest that Mr Christian Candy personally might dissipate his assets, beyond the fact that the respondents had established a good arguable case in relation to their allegations against the appellants (as to which see below).

57. In my view, whilst prima facie this factor might provide some evidential support to the respondents' contention that there was a risk of dissipation, the strength of that support is minimal:

i) At 7-8 April, the sum of the evidence and inter partes correspondence was that Mr Christian Candy – who, it was common ground, is a very wealthy property developer – had personally contracted to purchase a number of valuable London properties on 30 May 2014. Some of these properties (Cambridge Terrace) were transferred to Mr Christian Candy's wife in September 2014, with a further transfer of one property in February 2015. The other properties were transferred to companies owned beneficially by Mr Christian Candy or CPC. ii) The reason for these transfers was unknown. There was a letter from the appellants' solicitors in September 2015 suggesting that Cambridge Terrace had been purchased with a view to being developed as Mr Christian Candy's family home. Later, in March 2016, the appellants' solicitors wrote to the effect that Mr Christian Candy and his wife had decided to move into another significant property elsewhere in London. This letter stated that Cambridge Terrace would instead become the property of a partnership in which Mr Christian Candy would have the majority interest, to be redeveloped. However, as the judgment notes at paragraph 34, there was no evidence from Mr Christian Candy (or anyone else) on this point, and nor would it explain the transfer of title. iii) The bulk of the transfer to Mrs Emily Candy, in October 2014, occurred at a time when there had not yet been a clear threat to litigate, let alone the prospect of any such threat materialising. The judge summarized the first intimation of what became the present proceedings at paragraph 28 of the judgment, in which he referred to correspondence in May 2014 between solicitors for the respective parties. .....

v) I accept that the transfer of what was obviously a valuable asset is in principle relevant to the question whether there is a risk of dissipation by Mr Christian Candy. The appellants did not dispute that the effect of this transfer is dissipatory, in the sense that it reduced the total value of assets available. vi) However, viewed in its proper context, on the evidence before the court on 8 April the transfer could not have given rise to any realistic concern about a risk of dissipation. In my judgment it is an unsustainable leap of logic to suggest that because an apparently rich man such as Mr Christian Candy makes an unexplained transfer of valuable property to his wife, at a time when it may have been intended to have been a family home, and when there had not yet been any clear threat of litigation (and indeed when matters had apparently been resolved between the parties by settlement), there was a real risk that Mr Christian Candy might divest himself of very considerable assets in such a way that a future judgment would not be met. This is underscored by the fact that the impugned transfer of Cambridge Terrace took place alongside the transfer of related properties in which Mr Christian Candy retained a beneficial interest. vii) In coming to the conclusion that the transfer did suggest a risk of dissipation, the judge in my view erred in placing an unwarranted emphasis on the lack of evidence from the respondents, and specifically the absence of an explanation as to why the transfers to Mrs Candy took place. This effectively shifted the burden of proof from the respondents to the appellants to explain a transfer which did not, on the evidence, call for explanation. In the circumstances of this case, the mere fact that a rich man had transferred a valuable residential property to his wife did not of itself suggest an unjustifiable transfer giving rise to a risk of dissipation."

23. We have set out this extract at some length because it seems to us that these principles and approaches provide useful guidance as to the correct approach in this case. On any analysis, the parties are wealthy and this was a high value divorce. The fact that one party, in this case the Defendant, has admittedly sold or transferred certain assets does not of itself amount to a risk of dissipation sufficient to justify interlocutory relief.

24. Advocate Chiddicks also put before us the judgment of the Court of Appeal between the Defendant (there the appellant) and the First Plaintiff (there the respondent). He points out that the simple assertions of the First Plaintiff in this case cannot be taken at face value. Indeed, the Court of Appeal was critical of her when they said, at paragraph 21(i) of that

judgment:

"First, any reading of the judgments which have been given by the Royal Court over the course of this litigation, demonstrate that unfortunately the respondent's word is not necessarily to be trusted. It is felt it necessary on at least one occasion to frankly disbelieve what the respondent has said in evidence."

25. In a further judgment of the Court of Appeal on 17 July 2023, between the Defendant as appellant and the First Plaintiff as respondent, the Court was considering the First Plaintiff's claim where it is clear that the Court had concerns about the veracity or accuracy of the First Plaintiff's claim. For example, at paragraph 11, the Court said this: "However, the Court does have a number of significant reservations about [S'] claims in relation to her indebtedness,

and the evidence relied on to support them. These reservations are exacerbated by the established unreliability of [S] as a witness in these proceedings to date."

26. The observations by the Court of Appeal are not of course determinative of the current application but they do cause us to seek greater clarity and support of the assertions made in the Affidavit.

27. In the short time available to him, Advocate Chiddicks had prepared an email setting out his concerns relating to claims made by the First Plaintiff in the Order of Justice and the Affidavit in support. These were, in effect, the thrust of his oral submissions before us and we accordingly set them out in extenso. They are: "3. [S], at paragraph 29 of her affidavit dated 12 January 2024, states, in relation to damages, that "Given the impact that the WWFO had on my ability to conduct business, the loss of reputation, the loss of credit rating, the forced sale of assets at a loss, the defaulting of loans etc, I estimate my damages, inclusive of costs to be circa £11 million." In Cornish v Brelade Bay Limited [2019] JRC 091, the learned Commissioner Bailhache accepted that a requirement for a freezing order was that the applicant must provide particulars of their claim. This requirement has not been adhered to and, from what I have seen, there are no particulars in relation to the alleged damages and the claim is susceptible to being struck out. Indeed, Advocate Mistry's skeleton argument at paragraph 22 concedes that "As far as the Damages Claim is concerned, the First Plaintiff's evidence is that damages amount to circa £11 million, which will be particularised part (sic) of the Damages Claim" - accordingly, there are presently no particulars in relation to the damages alleged and this is a requirement in terms of injunction relief.

4. There are no particulars that identify how the £11 million has been reached as a figure and/or how or what sums are alleged to relate to losses in not conducting business, reputation, credit rating, forced sales of assets, and defaults on loans.

5. There are no particulars in relation to what alleged impact the WWFO had on [S's] ability to conduct business and/or how the same is alleged to have caused losses and what those losses are alleged to be. Omitted from [S's] evidence is an account of her ill health which I understand she prayed in aid of during the substantive proceedings brought by [T]. Particularly as her ill health was, I understand, linked to an alcohol dependency. It is clearly relevant for [S] to set out her own incapacity in relation to being able to conduct business when alleging that the WWFO impacted her ability to conduct business.

6. There are no particulars in relation to what alleged impact the WWFO had on [S's] reputation and/or how the same is alleged to have caused losses and what those losses are alleged to be. I do not understand how a WWFO can be said to have any impact on reputation.

7. There are no particulars in relation to what alleged impact the WWFO had on [S's] credit rating and/or how the same is alleged to have caused losses and what those losses are alleged to be. Again, I do not understand how a WWFO can be said to have an impact on someone's credit rating.

8. There are no particulars in relation to what alleged impact the WWFO had in relation to the forced sale of assets and/or how the same is alleged to have caused losses and what those losses are alleged to be. I do not understand how a WWFO can be said to force the sale of assets when it is an order in relation to the preservation of assets.

9. There are no particulars in relation to what alleged impact the WWFO had in relation to defaulting loans and/or how the same is alleged to have caused losses and what those losses are alleged to be.

10. There are references to the WWFO being varied but [S] provides no account of why she did not apply or seek [T's] consent to variations in relation to, for example, the sale of assets and/or defaulting on loans, when she was capable of seeking variations at other times.

11. [S], at paragraphs 45 and 46 of her affidavit dated 12 January 2024, asks the Court to find a real risk of dissipation because [T] has refused to provide information regarding his assets and/or assets that he has realised and suggests that as a result of liquidating or realising assets [T] has the ability to dissipate assets to frustrate orders the Court may make. In Cornish v Brelade Bay Limited [2019] JRC 091, the learned Commission Bailhache at paragraph 40 of his judgment referred to an English Court of Appeal decision of Holyoake and another v Candy and others [2017] EWCA Civ 92 which makes it clear that "An applicant must show a risk of dissipation as opposed to it being merely possible (without more) that the claimant could dissipate ... " There is no evidence (let alone 'solid' evidence - see paragraph 30 of Crociani v Crociani

[2019] JRC 028B) of a risk of dissipation, and the process of realising assets does not amount to such a risk. [T] is a barrister and therefore an officer of the (English) Court.

12. As I understand it [S] has a long history of not disclosing assets within the original ancillary relief proceedings and subsequent proceedings. It beggars belief therefore that she seeks to be critical of and/or rely on [T's] reluctance to provide information (which he does not have to provide and where there is no reason for him to provide it) given her previous conduct, and it raises the issue as to whether she comes with clean hands - as required when seeking equitable remedies, see paragraph 29 of Crociani y Crociani [2019] JRC 028B."

28. Applying the principles that have been referred to above, we did not consider that the Plaintiffs had made out a sufficient case to justify a worldwide freezing order. Even were we to accept at face value the bona fides of the First Plaintiff's claims we note, with regard to the claim in costs, that there has been no allowance made for costs awarded already for the benefit of the Defendant and as indicated above, there is no attempt to justify the headline figures leading to a claim of approximately £1 million in costs. There is no allowance made

for the taxation process and, in our view, the claim may in reality be as little as £200,000 to £300,000 when netted against the appropriate taxation process and the deduction of any costs that may be due to the Defendant. Furthermore, the headline claim in damages is wholly unsupported by detail or evidence and clearly if we are to work on the assumption that that, or even the lesser sum of £6 million, is justified, we would need significantly more information than the First Plaintiff's estimate. We would also need to see an arguable justification in law for the claim.

29. Similarly, returning to the question of a risk of dissipation, the timings in connection with the admitted disposals by the Defendant do not really amount to recent disposals and we do not take the view that there has been any sufficient justification of a risk of dissipation to justify the imposition of the order sought by the Plaintiffs in this case.

30. For these reasons we rejected the application and deferred the question of costs to a subsequent hearing. Authorities Holyoake and Another v Candy and Others [2017] EWCA Civ 92. File and Parties Court of Appeal – 31 January 2023 [unpublished]. T v S (Matrimonial) [2023] JCA 121.

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