

JERSEY / JUDGMENT

Thadani -v -Thadani and UBS AG [2010] JRC 139 (27 July 2010)

[2010] JRC 139

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judgment

Commissioner: 1. On 6 th July, 2010, the Court ordered that the defendant pay the plaintiff's costs in these proceedings on an indemnity basis with the injunctions remaining on until those costs are paid in full and we now set out our reasons. The matter, being concerned in part with the maintenance or otherwise of injunctions, was heard before the Inferior Number. 2. In 2005 matrimonial litigation ensued between the parties in the Family Division of the High Court. During the course of those proceedings the plaintiff became aware of undisclosed assets of the defendant in Jersey, namely an account in the name of Blarsmy Marketing Limited ("BML") with UBS AG. The defendant denied beneficial ownership of BML. 3. On 24 th February, 2006, the plaintiff obtained from the High Court a world-wide freezing order against the defendant. Injunctions in this jurisdiction were obtained ex parte on 3 rd March, 2006, in support of the world-wide freezing order, injunctioning the account of BML with UBS AG. The account of BML held securities valued at £1.6M. The Jersey proceedings were adjourned sine die with the injunctions remaining in place. 4. Following a five day hearing in October 2006 the High Court ruled that the defendant was the beneficial owner of BML. The High Court found that the defendant had been evasive and untruthful and but for the plaintiff and her solicitor's persistence, the full information about BML would not have come out:- "The case would have proceeded with denials and vague representations about the beneficial ownership of BML; and probably with no knowledge of the account ..." (Paragraph 34 (iii)). 5. It transpired that on the day the plaintiff obtained her world-wide freezing order, the defendant had gone to UBS in Jersey to instruct them to pay away \$1M (paragraph 32(u) and (v)). The bank refused to comply with the instruction because of the defendant's denial in the English proceedings (contrary to the records of UBS) that he was the beneficial owner of BML. 6. The plaintiff was awarded her costs in the High Court proceedings on the indemnity basis. Bodey J said this at paragraph 87:- "This was a case where I found that there was an attempt to obfuscate the situation. I found that the husband did lie in his Rule 2.63 replies. I consider that does ratchet up the case to a different level from the norm.... I make the order for indemnity costs." 7. Payments totalling some £900,000 were paid out of the BML account in part satisfaction of the defendant's liability to the plaintiff in the matrimonial proceedings. In the full ancillary relief judgment of Bowman J dated 3 rd August, 2007, she said this at paragraphs 32 and 33:- "32. Again, throughout the pre-trial disclosure the husband has

consistently declined to answer any but rudimentary questions about his assets and resources. In live evidence, he was obstructive and unhelpful. His testimony was contradictory and at times he frequently responded to awkward questions with a shrug or fell back on saying he just did not know why something had happened. 33. In all the circumstances, I am now wholly satisfied that I should treat everything that he tells me with extreme caution, that he is not a witness on whom I can rely and that Mr Justice Bodey reached absolutely the right conclusion about him in November 2006. The wife by comparison seemed a straightforward witness. In some respects, she was quite generous to the husband. She has clearly had to think hard about her future and the future of the three children. Her plans changed somewhat over the last two years, unsurprisingly in my view given how the litigation proceeded, but I accept her evidence about it. Where there is a conflict between the parties as to their recollections of fact, I generally prefer the evidence of the wife." 8. In her conclusions, she went on to say at paragraph 86:- "86. The husband has striven during the matrimonial litigation, as I find, to obfuscate his financial position, cloud issues and keep assets out of the picture. Had he been able to, he would have moved the UBS Jersey money out of sight of the court before the wife could freeze it and indeed he tried to do so, but just a little bit too late. 87. In my judgment, this is a case to which the principles described in J-v-J and Baker and other more recent cases apply. I am not satisfied that the husband has in fact fully disclosed his assets now, but how much more he has I cannot say. If he thinks I am being too generous to the wife in my award, he has only himself to blame for not making full and proper disclosure of his means and resources." 9. The defendant's conduct is more particularised in the affidavit of Eileen Meredith Pembridge, the plaintiff's English solicitor, dated 17 th June, 2010, which has appended to it the relevant correspondence which we have considered and from which it is clear:- (i) that the defendant refused to entertain the plaintiff's attempts from 2008 to 2010 to agree to a variation of the Jersey injunction; (ii) the defendant has been both unreasonable and personally offensive in particular towards Eileen Pembridge. 10. It was discovered that the defendant had concealed from the plaintiff monies he had received in respect of a number of company bonds. At a further High Court hearing in April 2010 the plaintiff was awarded USD 215,163 as her share of those assets. The defendant was also ordered to pay the plaintiff's costs on an indemnity basis. At paragraph 61 of Bodey J's judgment of 28 th April, 2010, she said this:- "The husband's answers in cross-examination showed an unwillingness to confront the manifest strength of counsel's questions and a determination to hide behind denial and evasion." 11. The defendant defaulted in paying the amounts due under this order and was committed to HM Pentonville Prison on 17 th June, 2010, which order was suspended until 24 th June, 2010, and was to become effective if he had not made payment by that date. Payment was subsequently made by the defendant to avoid his imprisonment. 12. On 4 th June, 2010, as a result of a representation brought by the defendant, the Jersey injunctions were by consent released, save to the extent of £60,000 and a date fixed for the hearing of the plaintiff's application for costs. She sought her costs in the Jersey proceedings on the indemnity basis with the injunctions to remain on until those costs were paid. 13. The defendant presented us with a written "Rebuttal to the skeleton argument of the plaintiff" in which he raised a number of points, but in summary:- (i) The Jersey injunction was unjustified as the plaintiff's claims in the matrimonial proceedings were more than secured by other assets. This constituted the

defendant's principal submission. (ii) No costs should be awarded in favour of the plaintiff - on the contrary, the defendant should have his costs on the indemnity basis and the injunctions over BML should be lifted. (iii) The invoices submitted by Carey Olsen in relation to the Jersey proceedings were a sham. (iv) Bowman J had refused to award the costs of the Jersey proceedings as she had no jurisdiction. (v) No "sustenance" had been paid out of the BML account and this in order to stifle the defendant's existence. (vi) BML is not a party to the proceedings either in Jersey or in the UK. (vii) Prior to his own representation in June 2010, the defendant had not litigated in Jersey and therefore his conduct in Jersey was exemplary. By agreeing to vary the Mareva on 18 th June, 2010, the plaintiff had conceded that she was in the wrong and was therefore the loser in Jersey. (viii) The plaintiff had embarked upon the proceedings in Jersey on an improper purpose and had conducted the Jersey litigation with bad faith, by way of a personal vendetta and in an oppressive manner. 14. The defendant further filed a statement signed by him on 29 th June, 2010, which he read to us and which is in the following terms:- "1. I am the defendant herein. The plaintiff through her solicitors, namely Carey Olsen of Jersey obtained mirror freezing order injunctive relief against me in these proceedings. 3. As pleaded in my further representations I submit that the Jersey proceedings should be dismissed and costs awarded in my favour on indemnity basis. 4. There have never been any pleadings in Jersey as I have previously written and attached to my further representations referred to above is my schedule demonstrating that the plaintiff's position was already over securitised before these proceedings and that consequently these proceedings were unnecessary and wasteful on costs. 5. The holder of the UBS AG account whose assets were frozen namely Blarsmy Marketing Limited has suffered considerable circa £550,000 losses as a result of the freezing relief granted to the plaintiff about which it intends to take issue at the appropriate juncture. 6. There was absolutely no need for the plaintiff to proceed on a 'belt and braces' basis in respect of securitisation and I ask that the Court to:- (a) Dismiss the remaining £60,000 freezing order; and (b) Award me the costs of these proceedings on an indemnity basis. Further I confirm that Blarsmy Marketing Limited has never been a party to proceedings in Jersey or the UK and I understand that the plaintiff has been advised by her own solicitors that the costs of these proceedings are preliminary, wasteful, unrecoverable and not enforceable. I also draw the Court's attention that the order of 07 03 2006 repeated on 18 06 2010 that all the costs of Mourant /UBS are payable by the plaintiff. Further there have never been any orders against Blarsmy Marketing Limited in relation to these matters." 15. In terms of the principles to be applied when awarding indemnity costs, Mr Buckley referred us to the decision of the Court of Appeal in Dickson-v-Jefferson Seal Limited

[1998] JLR 47 and the more recent decision of Page, Commissioner in Pell Frischmann Engineering Limited-v-Bow Valley Iran Limited

[2007] JLR 479 in which he said this at paragraph 25:- "At the risk of oversimplifying matters, the result of these English authorities may be said to be this: that the circumstances in which an award of indemnity costs may, as a matter of discretion, be ordered are less restrictive than they used to be; there must, ex hypothesi , still be something to take the case out of the ordinary, but the range of potentially relevant considerations as described by Millett, J (later Lord Millett) in Macmillan Inc -v-Bishopsgate Inv Trust (11) is considerable and

need not involve any finding of a lack of moral probity; the test, in a word, is unreasonableness; the purpose of such an award is to achieve a fairer result for the party in whose favour it is made than would be the case if he were only able to recover costs on the standard basis; in the end, it is a question of what would be fair and reasonable in all the circumstances." 16. In terms of the defendant's principal submission, the Jersey proceedings are ancillary to those of the English proceedings and we accepted Mr Buckley's submission that we should give substantial weight to the findings of the High Court in those proceedings. There can be no doubt from those findings that the defendant is the beneficial owner of BML and that the plaintiff was fully justified in obtaining and thereafter maintaining the injunctions over its account at UBS. The High Court found the defendant to be evasive and untruthful to an extent that save for the perseverance of the plaintiff and her advisers in injunctioning the account in Jersey, a serious injustice to the plaintiff might have ensued. Such conduct can only be met with an order for indemnity costs, consistent with the costs order made by the High Court. Matrimonial proceedings are inherently stressful for the parties involved but are rendered immeasurably more so when one party seeks to evade and obfuscate as has the defendant. 17. In relation to the issue of "sustenance", the English freezing order, mirrored in Jersey, contains an exception that the defendant may spend £300 per week towards ordinary living expenses, and may also disburse a reasonable sum on legal advice and representation. This matter was raised before the High Court in April 2010 and Bodey J said this at paragraphs 20 and 21:- "20. The freezing order made by Mr Justice Ryder on the 14th May, 2006, (since continued by my order of October 2006 and other orders) contains an exception that the husband may spend £300 a week towards ordinary living expenses and may also disburse a reasonable sum on legal advice and representation. His complaint is that the wife's solicitors have been refusing to permit such withdrawals. The wife's solicitors deny this. 21. I got the clear impression from the husband during this hearing that his difficulty is, if anything, with his bank; and nothing has been drawn to my attention to show that the wife's solicitors have been unreasonable or obstructive in respect of the husband being able to withdraw monies as permitted by the freezing orders. In my view, the existing orders are clear, standard and need no clarification." 18. In our view there was no merit and/or relevance in the defendant's remaining contentions and we therefore awarded the plaintiff her costs on the indemnity basis up to and including the hearing before us. There was no evidence to support the allegation that the invoices of Carey Olsen were a sham and in any event the amounts payable thereunder will fall to be assessed on taxation. The fact that Bowman J. refused to award the costs of the Jersey proceedings has no bearing on the exercise of our discretion. It is trite law that no foreign court has jurisdiction to award costs in proceedings in this Court. It is true that BML is not a party to the proceedings but it is an asset of the defendant and it is right in our view that it should remain injunctioned pending payment of the costs we have ordered the defendant to pay. Finally and as made clear above we did not accept the defendant's submissions both as to his conduct and that of the plaintiff. 19. We declined to entertain a late application by Mr Buckley, made in reply, that the injunction should be increased to £80,000 on the grounds that £60,000 was not now

under his calculations sufficient to cover the costs being sought, but as stated above, being satisfied pursuant to the findings of the High Court that the defendant was the beneficial owner of BML, we maintained the injunction in the sum of £60,000 pending payment in full of the plaintiff's costs as assessed. 20. The costs of UBS are covered by the plaintiff's undertaking contained within the Order of Justice but we noted that sums paid by her pursuant thereto in respect of the costs of UBS up to and including the date of the hearing before us were recoverable from the defendant under the order for costs we had made in her favour. Authorities Dixon-v-Jefferson Seal Limited

(1998) JLR 47 . Pell Frischmann Engineering Limited-v-Bow Valley Iran Limited

(2007) JLR 479 . Page Last Updated: 02 Aug 2016 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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