[2020] EWHC 3263 (Ch)

CR 2020 001773

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (ChD)
IN THE MATTER OF TUDOR SMITH INVESTMENTS LIMITED

Royal Courts of Justice
7 The Rolls Building
Fetter Lane
London
EC4A 1NL

Date: 01/12/2020

Before :

ICC JUDGE BARBER

- -

Between :

TUDOR SMITH INVESTMENTS LIMITED

Applicant

- and –

JOSEPH PUTHENCHERBYIL MEDAYIL

Respondent

- -

Bayo Randle (instructed by Richards Solicitors) for the **Applicant**
Robin Kingham (instructed by BDB Pitmans LLP) **fo**r the **Respondent**

Hearing date: 29 September 2020

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Approved Judgment

This judgment was handed down remotely by circulation to the parties' representatives by email. It will also be released for publication on BAILII and other websites. The date and time for hand-down is deemed to be 2 p.m. on 1 December 2020

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ICC Judge Barber

1. This is an application for pre-action disclosure made pursuant to CPR 31.16.

2. The Respondent was a director of the Applicant from 23 January 2012 until 12 July 2019. The Respondent also acted as accountant for the Applicant during this time.

3. By email dated 9 April 2019, solicitors for the Applicant wrote to Gisby Harrison solicitors (then acting for the Respondent) requesting delivery of certain documents believed to be held by the Respondent. No response was given to this request.

4. By letter dated 18 April 2019, accountants for the Applicant wrote to the Respondent personally requesting financial documents believed to be in the Respondent's possession. No response was made that request.

5. In July 2019, the Respondent instructed BDB Pitmans LLP in place of Gisby Harrison. The Applicant's solicitors were aware of this change in representation.

6. No further correspondence was exchanged between the parties before the application was issued on 11 March 2020, some 11 months after the request for the documents had been made.

7. On the same day, solicitors for the Applicant wrote to BDB Pitmans serving the application. This was the first correspondence that BDB Pitmans had received in relation to the request for documents.

8. The application was initially listed for a hearing on 5 May 2020. By order dated 1 May 2020, the hearing was adjourned and the Respondent was required to produce evidence in answer to the application by 19 May 2020, a deadline which was subsequently extended by agreement. In due course a witness statement was prepared by the Respondent's solicitors dated 16 June 2020. This maintained that the application was misconceived, but that, without prejudice to that contention, a reasonable search would be conducted for the requested documents and that any such documents discovered would be disclosed.

9. By letter dated 26 August 2020, BDB Pitmans wrote to the Applicant's solicitors confirming that a search had been undertaken for the relevant documents. Four documents were enclosed. The letter further stated that the other documents sought by the Applicant could not be found. This disclosure was provided without prejudice to the Respondent's position that the application was misconceived. The letter invited the Applicant to consent to the vacation of this hearing. The Applicant did not respond to that invitation.

10. By the time of the hearing before me, no substantive relief was sought. The sole issue was who, if anyone, should bear the costs of the application. Given the nature of the arguments raised, this issue requires consideration of the context in which the application was brought.

Relevant legal principles

11. Insofar as material, Section 33(2) of the Senior Courts Act 1981 (SCA) provides as follows:

> '33. Powers of High Court exercisable before commencement of action
>
> …
>
> (2) On the application, in accordance with rules of court, of a person who appears to the High Court to be likely to be a party to subsequent proceedings in that court the High Court shall, in such circumstances as may be specified in the rules, have power to order a person who appears to the court to be likely to be a party to the proceedings and to be likely to have or to have had in his possession, custody or power any documents which are relevant to an issue arising or likely to arise out of that claim –
>
> (a) to disclose whether those documents are in his possession, custody or power; and
>
> (b) to produce such of those documents as are in his possession, custody or power to the applicant or, on such conditions as may be specified in the order-
>
> (i) to the applicant's legal advisers; or
>
> (ii) to the applicant's legal advisers and any medical or other professional adviser of the applicant; or
>
> (iii) if the applicant has no legal adviser, to any medical or other professional adviser of the applicant.'

12. Insofar as material, CPR 31.16 provides as follows:

> '31.16
>
> (1) This rule applies where an application is made to the court under any Act for disclosure before proceedings have started.
>
> (2) The application must be supported by evidence.
>
> (3) The court may make an order under this rule only where –
>
> (a) the respondent is likely to be a party to subsequent proceedings;
>
> (b) the applicant is also likely to be a party to those proceedings;
>
> (c) if proceedings had started, the respondent's duty by way of standard disclosure, set out in rule 31.6, would extend to the

documents or classes of documents of which the applicant seeks disclosure; and

(d) disclosure before proceedings have started is desirable in order to –

(i) dispose fairly of the anticipated proceedings;

(ii) assist the dispute to be resolved without proceedings; or

(iii) save costs'.

13. In relation to the costs of the application, CPR 46.1 provides (inter alia) as follows:

'46.1

(1) This paragraph applies where a person applies

(a) for an order under-

(i) section 33 of the Senior Courts Act 1981 ….

(2) The general rule is that the court will award the person against whom the order is sought that person's costs-

(a) of the application; and

(b) of complying with any order made on the application.

(3) The court may however make a different order, having regard to all the circumstances, including –

(a) the extent to which it was reasonable for the person against whom the order was sought to oppose the application; and

(b) whether the parties to the application have complied with any relevant pre-action protocol…'

The Applicant's position

14. The Applicant contends that, in the circumstances of this case, the court ought to award the Applicant its costs of the application.

15. By his skeleton argument, Mr Randle contended (in summary):

(1) that it was 'appropriate' for the Applicant to apply for disclosure pursuant to s.33(2) SCA and CPR 31.16 as the information 'was required in order to file complete accounts and to satisfy HMRC and their bank of the Applicant's financial status';

(2) that insofar as there were any irregularities in the accounting documentation (some concerns already having been identified in respect of a balance sheet for the year ending 31 December 2017), the Applicant and the Respondent 'were likely to be parties to that litigation';

(3) that in his capacity as a former director and accountant for the Applicant, the Respondent owed the Applicant fiduciary and other duties, including those under ss171-4 of the Companies Act 2006; and that his failure to deliver up the requested documents, despite earlier requests, was in breach of those duties and caused losses to the Applicant (in the form of financial penalties imposed by HMRC). Against that backdrop, he argued, the Applicant 'would be entitled to bring a claim for breach of those duties and seek recovery of any losses';

(4) that, whilst the Respondent had not pursued any litigation to challenge the ownership of the Applicant, he took issue with the appointment of the current directors, Joe and David Munro and their ownership of the Applicant company. If there was any future litigation regarding the ownership or directorship of the Applicant, it was argued, some of the disclosed documents would be relevant. In this regard reference was made to the fact that the full accounts were signed off by the Respondent's wife (another former director), whilst recording the Respondent, David Munro and Joe Munro as directors.

16. In the light of such 'potential claims', Mr Randle argued, the Respondent 'would have been required to disclose the requested documents pursuant to any order for standard disclosure'.

17. Mr Randle further contended that disclosure at an early stage was desirable in order to dispose fairly of 'the anticipated proceedings' and would also assist 'the disputes' to be resolved without proceedings and would 'save costs'.

18. He accepted that the general rule was that the court would award the person against whom the order is sought the costs of the application and of complying with any order made on the application, but submitted that it was appropriate to make a different order in this case pursuant to CPR 46.1(3). He contended that:

(1) the Respondent's failure to provide the documents despite several requests prior to the application was unreasonable. As the former accountant of the Applicant, the Respondent was obliged to pass on the financial records in his possession upon request from the Applicant (or any agent acting on the Applicant's behalf); and that

(2) it was unreasonable for the Respondent's solicitors to wait until production of their witness statement on 16 June 2020 before confirming the Respondent's agreement to provide the requested documentation. The appropriate action would have been to respond directly to the Applicant, prior to producing any witness statement, confirming its agreement to search for and provide the requested documents. This would have avoided any significant costs being incurred by either party.

The Respondent's position

19. On behalf of the Respondent, Mr Kingham contended that the Respondent should not only have his costs, but should have them on an indemnity basis.

20. He maintained that

(1) the court may only make an order for pre-action disclosure where the following jurisdictional tests are met:

(i) the applicant and the respondent are likely to be parties to subsequent proceedings;

(ii) if proceedings were issued, the respondent's duty by way of standard disclosure would extend to the documents sought; and

(iii) pre-action disclosure is desirable in order to dispose fairly of the anticipated proceedings, assist the dispute to be resolved without proceedings, or save costs;

(2) the application must be supported by evidence demonstrating that the jurisdictional tests have been met (CPR 31.16(2);

(3) even where the jurisdictional tests are met, it remains a matter for the court's discretion as to whether or not to make an order (CPR 31.16(3).

21. In the present case, he submitted that the Applicant's evidence (comprising an undated statement of Mr Begbie) entirely failed to address what proceedings were contemplated. There was merely a bare assertion that 'proceedings had not yet commenced but it is likely that they will be'. There was no explanation given in the evidence as to what those proceedings might be or what cause of action the Applicant might have.

22. Mr Kingham went on to submit that it was highly significant in this context that no pre-action protocol letter had been sent by the Applicant to the Respondent. In the absence of such a letter, and in the absence of any other explanation in the evidence of what the proposed claim might be, there was no basis, he argued, on which it could properly be concluded that proceedings were likely to be issued. He maintained that the application failed on this ground alone.

23. Mr Kingham went on to contend that the Applicant's failure to particularise the nature of the proposed claim against the Respondent made it impossible to determine whether standard disclosure would extend to the documents sought.

24. Mr Kingham further submitted that it was no answer for the Applicant to maintain that on any footing the Respondent was under an obligation to deliver up the documents. Leaving aside caselaw establishing that certain, at least, of the accounting documentation prepared by an accountant in the course of acting for a client remains the property of the accountant and not the client (Chantry Martin (a firm) v Martin (1953) 2 QB 286 at 293), the application was not framed as a claim for delivery up. Similar considerations arose in respect of any attempt to rely upon the Respondent's duties as a director or former director of the Applicant under the Companies Act 2006.

25. Mr Kingham also relied upon the general rule as to costs applicable in applications of this nature: CPR 46.1(2). The starting point was that the Applicant should pay the Respondent's costs of the application and of complying with any order made pursuant to it.

26. Turning next to consider CPR 46.1(3), Mr Kingham submitted:

(1) that the application was misconceived and failed to meet the jurisdictional tests of CPR 31.16. It was therefore reasonable for the Respondent to oppose it;

(2) the Applicant had failed to comply with the Practice Direction – Pre-action Conduct and Protocols. He had not written to the Respondent setting out the basis of the proposed claim. This, he contended, was not merely a technical breach, for the failure to set out the basis of the proposed claim was a matter of substance which went to the merits of the application itself; and

(3) the Respondent had provided disclosure of the documents in his possession on 26 August 2020, sufficiently in advance of the hearing to negate the need for one. At the same time, the Respondent invited the Applicant to consent to vacation of this hearing. The Applicant's failure to engage with this request, he contended, necessitated what would otherwise have been an entirely avoidable hearing, thereby increasing the costs of the application overall.

27. For all of these reasons, Mr Kingham argued that the application was ill-founded and vexatious and that the Respondent should have his costs.

Discussion and conclusions

28. On the submissions which I have heard and the evidence which I have read, I am satisfied that the Applicant should be ordered to pay the Respondent's costs of this application and of giving the disclosure sought.

29. My reasons are as follows. The 'general rule' on any application brought under s.33 SCA 1981 and CPR 31.16 is that the court will award the person against whom the order is sought that person's costs of the application and of complying with any order made on the application: CPR 46.1(2). The court may, however, make a different order.

30. In considering whether or not to make a different order, the court must have regard to all the circumstances, including (a) the extent to which it was reasonable to oppose the application and (b) whether the parties to the application have complied with pre-action protocols: CPR 46.1(3).

31. In this case it was entirely reasonable for the Respondent to oppose the application. The evidence filed by the Applicant in support of its application did not demonstrate that the jurisdictional tests of CPR 31.16 were met. It did not identify, still less particularise, the 'subsequent proceedings' relied upon for the purposes of CPR 31.16(3) or what the underlying causes of action would be. Absent any indication of what the proposed claim would be, it was not possible to determine whether standard disclosure would extend to the documents sought.

32. By his skeleton argument exchanged shortly before the hearing and in oral submissions before me, Mr Randle valiantly sought to articulate a selection of possible claims that might in theory be brought. It is clear from the evidence filed however, and from the lack of any pre-action protocol correspondence, that at the time that the application was issued, the Applicant did not trouble itself to identify or expressly to rely upon any particular claim; it simply wanted delivery up of the documents. This was a mis-use of the pre-action disclosure regime. In my judgment the Respondent acted entirely reasonably in opposing the application.

33. I reject the submission that it was unreasonable for the Respondent to run up the expense of filing evidence in opposition to the application when by such evidence he agreed to undertake a reasonable search for the documents sought and to deliver up those found. It was clear from the evidence filed by the Respondent that, at the time of filing, it remained unclear whether his search for the categories of documents demanded would be entirely successful. In my judgment it was reasonable for him to protect his position by filing evidence in opposition to the application in the circumstances of this case.

34. Moreover, on 26 August 2020, when delivering the documents which he had managed to locate, the Respondent very sensibly proposed that the hearing before me be vacated. This proposal was not even given the courtesy of a response. The Respondent had no option in the circumstances but to instruct counsel to attend.

35. For all of these reasons, I am satisfied that the appropriate costs order to make in this case is that the Applicant do pay the Respondent's costs of and occasioned by this application, such costs to include the reasonable costs of locating and delivering up the documents produced on 26 August 2020.

36. On behalf of the Respondent, Mr Kingham submitted that such costs should be awarded on the indemnity basis, highlighting the following factors:

(1) the Applicant's failure to comply with the Practice Direction on pre-action conduct;

(2) the Applicant's actions in requesting the documents in correspondence and then issuing proceedings 11 months later without notice;

(3) the unmeritorious nature of the application, the evidence in support failing to address the requirements of CPR 31.16 properly or at all;

(4) the Applicant's failure to agree to vacate the hearing; and

(5) the Applicant's collateral motive in bringing the application, which he maintained was to put pressure on the Respondent at a time when the parties (or individuals associated with them) are engaged in other litigation.

37. On the evidence before me I am not persuaded that it would be appropriate for me to take into account the fifth factor mentioned. The issue whether the Applicant (or individuals associated with it) had a collateral motive in bringing the application was

disputed and involved issues of fact which, absent cross examination, could not properly be determined on the evidence before me.

38. Having considered all other circumstances of this case however, including factors (1) to (4) highlighted above, I have come to the conclusion that costs should be awarded on the standard basis. Whilst the Applicant's conduct is open to criticism in certain respects, in my judgment the conduct of the Applicant and the circumstances of this case are not sufficient to take the case 'out of the norm' and into the realm of indemnity costs.

39. Accordingly I shall order that the Applicant shall pay the Respondent's costs of and occasioned by this application, such costs to include the reasonable costs of locating and delivering up the documents produced on 26 August 2020, to be the subject of detailed assessment on the standard basis if not agreed.

40. I shall hear any application for interim costs on the handing down of this judgment. In the meantime, counsel should agree and lodge a draft order.

ICC Judge Barber

1 December 2020