Neutral Citation Number: [2019] EWHC 1135 (Comm)

Case No: CL-2015-000687

**IN THE HIGH COURT OF JUSTICE**
**BUSINESS & PROPERTY COURTS OF ENGLAND & WALES**
**COMMERCIAL COURT (QBD)**

Royal Courts of Justice
The Rolls Building
7 Rolls Buildings
London, EC4A 1NL

Date: Tuesday, 16th April 2019

**Before**:

**SIR ROSS CRANSTON**
**(Sitting as a Judge of the High Court)**

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**Between:**

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|---|---|
| **(1) SHEIKH MOHAMED BIN ISSA AL JABER**<br>**(2) MBI & PARTNERS U.K. LIMITED**<br>***(claim discontinued)*** | **Claimants** |
| **- and -** | |
| **(1) SHEIKH WALID BIN IBRAHIM AL IBRAHIM**<br>**(2) SHEIKH MAJID BIN IBRAHIM AL IBRAHIM**<br>***(not served in these proceedings, instead pursued in Claim No CL-2019-000009)*** | **Defendants** |

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**MR. STEPHEN NATHAN QC and MR. DANIEL CASHMAN** (instructed by **Zaiwalla & Co.**) appeared for the **Claimants.**

**MR. STEVEN THOMPSON QC and MR. MATTHEW WATSON** (instructed by **Enyo Law LLP**) appeared for the **First Defendant**.

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# Approved Judgment

Transcript of the Stenographic Notes of Marten Walsh Cherer Ltd.,
1st Floor Quality House, 6-9 Quality Court, Chancery Lane, London WC2A 1HP.
Telephone No: 020 7067 2900. Fax Number 020 7831 6864
e-mail: info@martenwalshcherer.com

**SIR ROSS CRANSTON:**

1. Earlier, I ruled in this application for inspection that paragraph 21 of PD51U of the CPR should apply. It came into force at the start of the year. Mr. Thompson QC for the first defendant submitted that I should apply CPR 31.14(1)(a) and (b). He submitted that the application having been made in December should come under the old, the latter rule. At that point, he submitted, rights had in effect crystallised. As he put it, the first defendant had a vested right to proceed under the previous procedure.

2. In my view, it is more appropriate to characterise the right the first defendant had, as did Mr. Nathan QC, as an inchoate right, which is crystallised on an order of the court. In any event, there are three reasons, in my view, why PD51U should apply. First, there are the words of the Practice Direction themselves, in particular paragraphs 1.2, 1.7 and 1.9. These give a strong indication that PD51U should apply as from the commencement date, 1st January of this year.

3. Secondly, there is the judgment in *UTB v Sheffield United Limited* [2019] EWHC 914 (Ch) where the Chancellor, at paragraphs 16-18, gave a strong steer, if not more, that PD51U applies to all proceedings in the Business and Property Courts as from the commencement date. Mr. Thompson sought to distinguish the case, but in my view it is an *a fortiori* case.

4. The third reason is policy. PD51U is a pilot. A pilot is most likely to produce results, either positive or negative, if all proceedings from the commencement date fall within its ambit.

5. For those reasons, I made the ruling I did.

6. Let me then revert to the last bracket of requests. Requests 7, 8, 9 and 11 involve applications to inspect documents relating to payment transfers on the date in question, namely, the date that the US$30 million was transferred, or in the case of request 11, relating to comparable payments in the preceding week.

7. These requests arise because of what Mr. Brook said in his various witness statements, as a principal actor in the claimant's business. The so-called payment lists to which request 8 applies are those prepared by the claimant, which were then handed to Mr. Brook for execution. There appeared to be some conflict in the evidence as to how the payments were executed. On the one hand, Mr. Brook said that he would fax the payment request to HSBC; on this day, it was said that they were physically handed over, and that was certainly said to be the case in relation to the payment order for the US$30 million.

8. Mr. Nathan QC made various objections to these requests. First, he said that within PD51U, paragraph 21, these documents had not been mentioned; rather, they were part of the narrative being given by Mr. Brook as to how he went about the claimant's business. In my view, these references, contained in the witness statement, are at least allusions to documents. Consequently, the rule in my view applies.

9. Mr. Nathan's second argument was that it was not proportionate to order production of these documents. There was the very long lapse of time. There had been searches undertaken by Mr. Brook already. He had found the payment order in relation to the

US$30 million, but he had not been able to find anything more. In fact, when he searched his filing cabinets again, they contained nothing falling within the ambit of these requests.

10. To my mind, these four requests ought to be granted. They fall within paragraph 21. It is reasonable and proportionate for the requests to be granted.

11. There are then the requests in relation to the computer records and Mr. Brook's laptop. Again, there is some evidence as to what has occurred. Apparently in the early 2000s the IT system at the claimant's companies was changed, unsurprisingly in this day of rapid technological change. It is said that there might be some archiving of the relevant records, including in relation to Mr. Brook's laptop. But Mr Brook has said that he no longer has the laptop and does not know where it is. The archiving is a possibility only. To my mind, given this background it would not be reasonable or proportionate to grant the request in relation to the material falling within requests 10 and 13 and I refuse them.

12. Finally, there is a request in relation to Mr. Brook's notebooks. Mr. Brook consulted these notebooks in the course of the hearing before Burton J in 2016. Mr. Nathan points to Mr. Brook's evidence that he had searched for a notebook covering the relevant period but had not found it.

13. To my mind, the notebooks of December 2001 and January 2002 can be easily produced if they exist. It is a reasonable and proportionate request in relation to the notebooks and it should be granted.

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Neutral Citation Number: [2019] EWHC 1136 (Comm)

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**IN THE HIGH COURT OF JUSTICE**
**BUSINESS & PROPERTY COURTS OF ENGLAND & WALES**
**COMMERCIAL COURT (QBD)**

Royal Courts of Justice
The Rolls Building
7 Rolls Buildings
London, EC4A 1NL

Date: Wednesday, 17th April 2019

**Before**:

**SIR ROSS CRANSTON**
**(sitting as a Judge of the High Court)**

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**Between:**

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| **(1) SHEIKH MOHAMED BIN ISSA AL JABER**<br>**(2) MBI & PARTNERS U.K. LIMITED**<br>***(claim discontinued)*** | **Claimants** |
| **- and -** | |
| **(1) SHEIKH WALID BIN IBRAHIM AL IBRAHIM**<br>**(2) SHEIKH MAJID BIN IBRAHIM AL IBRAHIM**<br>***(not served in these proceedings, instead pursued in Claim No CL-2019-000009)*** | **Defendants** |

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**MR. STEPHEN NATHAN QC and MR. DANIEL CASHMAN** (instructed by **Zaiwalla & Co.**) appeared for the **Claimants.**

**MR. STEVEN THOMPSON QC and MR. MATTHEW WATSON** (instructed by **Enyo Law LLP**) appeared for the **First Defendant**.

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# Approved Judgment

Transcript of the Stenographic Notes of Marten Walsh Cherer Ltd.,
1st Floor Quality House, 6-9 Quality Court, Chancery Lane, London WC2A 1HP.
Telephone No: 020 7067 2900. Fax Number 020 7831 6864
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**SIR ROSS CRANSTON:**

1. This is the first defendant's application for security for costs in the sum of £300,000 up to the first CMC. Background to this litigation is set out in the opening paragraphs of Burton J's judgment at [2016] EWHC (Comm).

2. The application is advanced on one ground, CPR 25.13(2)(g), which reads:

> "The claimant has taken steps in relation to his assets that would make it difficult to enforce an order for costs against him."

3. Under CPR 25.13, an order can be made if that condition, subparagraph (g) applies, and the court is satisfied that in all the circumstances it is just to make the order.

4. In *Ackerman v Ackerman* [2011] EWHC 2183 (Ch) Roth J helpfully synthesised the general principles governing the making of an order under subparagraph (g). These are set out in paragraph 16 of the judgment:

> "i) The requirement is that the claimant has taken in relation to his assets steps which, if he loses the case and a costs order is made against him, will make that order difficult to enforce. It is not sufficient that the claimant has engaged in other conduct that may be dishonest or reprehensible: *Chandler v Brown* [2001] CP Rep 103 at [19]-[20];
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> ii) The test in that regard is objective: it is not concerned with the claimant's motivation but with the effect of steps which he has taken in relation to his assets: *Aoun v Bahri* [2002] EWHC 29 (Comm), [2002] CLC 776, at [25]-[26];
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> iii) If it is reasonable to infer on all the evidence that a claimant has undisclosed assets, then his failure to disclose them could itself, although it might not necessarily, lead to the inference that he had put them out of reach of his creditors, including a potential creditor for costs: *Dubai Islamic Bank v PSI Energy Holding Co* [2011] EWCA Civ 761 at [26];
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> iv) There is no temporal limitation as to when the steps were taken: they may have been taken before proceedings had been commenced or were in contemplation: *Harris v Wallis* [2006] EWHC 630 (Ch) at [24]-[25];
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> v) However, motive, intention and the time when steps were taken are all relevant to the exercise of the court's discretion: *Aoun v Bahri*, ibid; *Harris v Wallis*, ibid;
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> vi) In the exercise of its discretion, the court may take into account whether the claimant's want of means has been brought about by any conduct of the defendant: *Sir Lindsay Parkinson & Co v Triplan* [1973] QB 609 per Lord Denning MR at 626;

> *Spy Academy Ltd v Sakar International Inc* [2009] EWCA Civ 985 at [14];
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> vii) Impecuniosity is not a ground for ordering security; on the contrary, security should not be ordered where the court is satisfied that, in all the circumstances, this would probably have the effect of stifling a genuine claim: *Keary Developments Ltd v Tarmac Construction* [1995] 3 All ER 534 at 540, para 6. Thus the court must not order security in a sum which it knows the claimant cannot afford: *Al-Koronky v Time-Life Entertainment* [2006] CP Rep 47 at [25]-[26] (where this was referred to as 'the principle of affordability');
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> viii) The court can order any amount (other than a simply nominal amount) by way of security up to the full amount claimed: it is not bound to order a substantial amount: *Keary* at 540, para 5;
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> ix) The burden is on the claimant to show that he is unable to provide security not only from his own resources but by way of raising the amount needed from others who could assist him in pursuing his claim, such as relatives and friends: *Keary* at 540, para 6. However, the court should evaluate the evidence as regards third party funders with recognition of the difficulty for the claimant in proving a negative: *Brimko Holdings Ltd v Eastman Kodak Co* [2004] EWHC 1343 (Ch) at [12];
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> x) When a party seeks to ensure that any security that may be required is within his resources, he must be full and candid as to his means: the court should scrutinise what it is told with a critical eye and may draw adverse inferences from any unexplained gaps in the evidence: *Al-Koronky* at [27]."

5. Mr. Thompson QC for the first defendant advanced a number of arguments in favour of the application. First, he pointed to the complex nature of the claimant's corporate interests. In his submission, it was self-evident that the claimant had arranged his affairs, or at least that the corporate structures were arranged in such a way, to make it difficult for anyone to obtain money from him. In other words, he had taken the requisite steps as required by the subparagraph.

6. Mr Thompson highlighted a number of points: first, that at the outset of the litigation, the claimant claimed beneficial ownership of MBI & Partners UK Limited, but later retracted that statement; secondly, the existence of BVI and Channel Island companies, which had not been properly explained; thirdly, the claimant's acceptance that he had disposed of assets to his children since the litigation began. In relation to that third point, Mr. Thompson underlined that this was said to be in the interests of estate planning, but that was not fully explained.

7. As I observed in the course of the argument, and as Mr. Thompson himself accepted, the use of these types of corporate arrangements by the very wealthy, with the use of BVI and Channel Island companies, is not unusual.

8. In this case, the claimant has given some explanation of the position, albeit that it has not been as speedy as it should have been. He has explained, for example, that he is the sole beneficial owner of Jadawel International Incorporated, the BVI company which owns the company with the property in Wigmore Street, London. He has also provided an explanation in relation to MBI International Group UK Holdings Limited, in which the ownership of the shares has been transferred to the children.

9. To my mind, it is not possible to draw the requisite inference mentioned by Tomlinson LJ at paragraph 26 of the *Dubai Islamic* case, referred to in Roth J's synthesis. As to the transfer of assets to his adult children, to my mind, again, given the practices of the wealthy, there is no basis for a conclusion that the claimant has taken the steps in relation to his assets as required by subparagraph (g).

10. Mr. Thompson's second point related to a series of cases in which the claimant's companies (and the claimant himself) have been involved and which supported the argument in relation to a predisposition, as it were, on the claimant's part to make enforcement action against him difficult. The analysis started with two freezing orders against the hotel company in which the claimant has an interest, [2007] EWHC 3622 (TCC) and [2010] EWHC 763 (TCC). In those cases, Ramsey J and Coulson J made freezing orders.

11. There was then a case [2011] EWHC 2866 (Comm) in which *Standard Bank* had claimed against the claimant on a guarantee and Burton J had said that the defence which the claimant had advanced was hopeless.

12. Further there was a case in which an ex-employee had successfully obtained default judgment and in which MBI & Partners UK Limited sought to set aside that default judgment on the basis of an allegation of fraud. In the course of her judgment, [2016] EWHC 441 (QB) Cox J characterised one aspect of the behaviour of MBI & Partners UK Limited as an abuse of process.

13. There were further cases involving the claimant personally, one a claim by a liquidator from the BVI at [2017] EWHC 3678 (Ch) and another at [2018] EWHC 3038 (Ch), in which the deputy judge, Professor Sarah Worthington QC characterised his application for a worldwide freezing injunction *ex parte* as involving a serious, substantial and culpable material non-disclosure.

14. Mr. Nathan QC for the claimant submitted that none of those findings or the comments in them were admissible on the basis of the rule in *Hollington v Hewthorn* [1943] QB. He took me to the recent application of that case in *Rogers v Hoyle* [2015] QB and underlined the passage in the judgment of Christopher Clarke LJ, at paragraph 39.

15. To my mind, that rule, while it applies to fact-finding by judges during the course of trial, would not apply in this sort of situation, at an interim stage, where one is making decisions about the application of rules of court. In any event, however lamentable the behaviour of the claimant in some of those cases, and however much he may have pushed the boundaries, in some cases exceeded them (as Cox J found), this does not assist in the application of CPR 25.13(2)(g).

16. The fact that, in the past, enforcement proceedings have been difficult does not assist with the issue as to whether the claimant has taken the steps in relation to his assets and whether those steps would make it difficult to enforce an order of costs against him. As the authorities establish, this is a backward looking provision. Park J in *Chandler v Brown* pointed out in [2001] CP Rep at 103 the word "would" in the rule cannot be used as a springboard for an argument that the paragraph can be used in relation to steps which the claimant had not taken, but which, if he did take them before judgment with costs given against him, would make it difficult to enforce a costs order.

17. That leaves the issue of whether the property which the claimant has advanced is more than sufficient to meet any order for costs which may be made against him. In that regard, Mr. Thompson criticised the evidence which the claimant had adduced in relation to that property. First, as regards the property in North London, in Winnington Road; he submitted that the valuation dated May 2014 was now five years old, and was inconsistent with the evidence from the website, Zoopla, which the claimant had himself referred to. Those factors were to be coupled with the flimsy evidence from the private bank as to the value of the security it held over the property. It was quite uncertain, submitted Mr. Thompson, whether the equity which the claimant is said to have in that property is, in fact, there.

18. Moreover, the evidence in relation to the properties in Paris and Portugal is either unclear or has been produced so late as to be impossible for the first defendant properly to assess it. In relation to the Paris property, for example, the documents have been produced in French, without a translation, at a very late stage, and those documents which had been produced in translation did not show clearly enough whether the property was, in fact, worth what the claimant contended.

19. In my view, the property in Winnington Road is, by itself, sufficient. It is an asset in this jurisdiction, easy to enforce against. In fact, there have been charges taken against that property by others in the past. In as much as I need to refer to other properties, there is the property in Paris. However vague or late the information is, it seems that the claimant has a substantial equity holding in that very valuable asset.

20. In the result, I refuse the application.

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