Case No: BL-2018-001814

IN THE HIGH COURT OF JUSTICE

CHANCERY DIVISION

Neutral Citation Number: [2018] EWHC 3038 (Ch)

7 Rolls Building

Fetter Lane, London EC4A 1NL

Date: 2 November 2018

Before:

Deputy High Court Judge Sarah Worthington QC(Hon)

Between:

Sheikh Mohamed Bin Issa Al-Jaber (1)	**Claimants**
MBI & Partners UK Limited (2)	
JJW Hotels & Resorts Limited (3)	
- and -	
Amjad Elias Salfiti (1)	**Defendants**
Basem Bosheh (2)	

APPROVED JUDGMENT

William McCormick QC and Marc Brittain (Instructed by Hoffman-Bokaei-Moghimi Solicitors) for the Claimants

Olivier Kalfon and Zac Sammour (Instructed by John Street Solicitors**)** for the First Defendant

Alexander Cook and Guy Olliff-Cooper (Instructed by CANDEY Limited) for the Second Defendant

Hearing date: 25 October 2018

Sarah Worthington QC(Hon) sitting as a Deputy High Court Judge:

1. This case involves allegations of fraud made against a UK solicitor and a Palestinian lender. At an ex parte hearing on 10 September 2018, two orders were made by Mr Justice Arnold ("the Judge"). The first was a worldwide freezing order ("the Freezing Order") in respect of assets of the two Defendants, Mr Salfiti and Mr Bosheh, limited to £3.5 million. The second was an order restraining the two Defendants from appointing a receiver over property at 2 Winnington Road, London ("the Receiver Order"). This hearing is the adjourned return date for these two Orders.

2. The First Claimant (C1) is Sheikh Mohamed, an international businessman operating in the hotel and leisure sectors, and widely regarded as extremely wealthy. He is the *de facto* controller of MBI and JJW, those companies being the Second and Third Claimants (assuming there has been an order permitting the joining of these two parties to the action). Since the Second and Third Claimants play no role in this judgment, I will by way of shorthand refer to Sheikh Mohamed simply as "the Claimant" or as C1.

3. The First Defendant (D1), Mr Salfiti, is a UK solicitor. He advised Sheikh Mohamed and was the head of MBI's legal department until his dismissal in August this year. He had been a director of MBI and of JJW between 2014 and 2016.

4. The Second Defendant (D2), Mr Bosheh, is a money-changer in Ramallah, Palestine, and also works as a gold and jewellery merchant. His affidavit discloses that he has assets in Palestine worth over £10 million.

5. The Claim advanced before the Judge was that the Defendants had defrauded the Claimant, Sheikh Mohamed by (a) arranging very expensive loans that the Claimant

did not need, including the loan under which Mr Bosheh's power to appoint an LPA receiver arises ("the Main Loan"); (b) setting up these loans as being on their face between Sheikh Mohamed and Mr Bosheh, whereas in fact the true beneficiary under them was Mr Salfiti; and (c) arranging for Mr Salfiti or Mr Bosheh to be paid approximately £3 million more than they should have been paid, even assuming all the loans were genuine.

6. At the time he obtained these orders from the Judge, Sheikh Mohamed told the court that he was the beneficial owner of MBI Holdings, a group that includes MBI and JJW, thus implying that he was entitled to pursue the underlying claims those companies might have; that he had never met Mr Bosheh and was not sure he existed, and that if he did exist, he was conspiring in some undefined way with Mr Salfiti to defraud the Claimant; that the Claimant's companies were not in financial difficulties, given the Claimant's enormous wealth; that the Claimant never agreed to loans at over 12 per cent interest; and that he had not signed the Main Loan agreement, and his apparent signature on that agreement may have been forged or cut and pasted by the Defendants from another document without the Claimant's consent.

7. The Attendance Note taken by the Claimant's solicitors at the hearing before the Judge indicates the issues that the Judge considered material in making the Orders granted. The Attendance Note is brief, but the issues specified as important were that:

(i) D1 arranged loans on behalf of companies that were C1's companies;

(ii) the lender in these loan transactions was purportedly D2, but C1 was not sure that D2 existed, and even if he did exist, C1's evidence was that he believed that the loans were entered into to defraud C1 and his companies;

(iii) the forensic accounts showed that £3 million had been misappropriated in any event; and

(iv) C1's signature on the Main Loan was on a page separate from any text of the Main Loan agreement itself.

In addition to these features relating to the prima facie case, the risk of dissipation of the Defendants' assets was, in the Judge's view, shown to exist because of (i) the prima facie case of dishonesty against D1 as shown by the forensic report, and (ii) bank statements which showed that Defendants' funds had been transferred to the USA and to Palestine. The Judge did not specify whether D1 or D2 had made these transfers.

Subsequent evidence put to this court by the Defendants indicated that the funds that had been transferred to the USA and Palestine had been transferred by D2 and not by D1 some time before these present claims were in issue, and both were transfers relating to the acquisition by D2 of properties in Palestine. The Claimant did not seek to challenge that account of the facts.

8. In the time since the Judge granted those Orders, the Claimant's position as stated to the Judge has altered. He no longer suggests that he is the beneficial owner of MBI and JJW, or that he did not sign the Main Loan agreement, or that D2 does not exist. He now says either that he was not aware of the terms of what he was signing, or that he trusted D1 and simply signed whatever D1 asked him to sign.

9. In those circumstances, the Defendants ask that both of these Orders be discharged and not continued because (a) of the serious and substantial breaches by the Claimant of the duty of full and frank disclosure, (b) the Claimant has not established a sufficient risk of dissipation against either Defendant, and (c) there is no good

arguable case against the Defendants.

10. The law is not in dispute.

Preliminary matters

11. There are a number of preliminary matters. The first concerns evidence. After the Judge's ex parte Orders, the Defendants filed evidence, the Claimants filed further evidence, and the Defendants filed further evidence in response to that. C1 took issue with the admission of this final bundle of Defendants' evidence, labelled "Evidence in Response" and consisting of three affidavits, one in draft form. I see force in C1's argument that none of the agreed orders provided for a further bite of the cherry in the service of evidence. As matters have emerged, however, the Defendants' inability to rely on this further evidence does not compromise the determination of this application.

12. Secondly, C1 took issue with D2's affidavits, considering that since D2 was not a native English speaker, and given the style of his affidavits, they may be inadmissible since they did not on their face comply with the Practice Direction to the Civil Procedure Rules Part 32 at paragraph 7.1. However, the Claimants expressed themselves content if D2's solicitors, through counsel, made an appropriate representation in open court. That was done, seemingly to the satisfaction of the Claimants.

13. Thirdly, C1 suggested he had not been given the necessary notice that the Defendants would be seeking to set aside the two Orders on the serious grounds of material non-disclosure, with the notice required being such notice as would enable C1 to respond appropriately to the allegations: see *Bracken Partners Ltd v Gutteridge*

(unreported, 17 December 2001). However, the evidence is to the contrary. There is no need for a formal application stating this ground, and fair warning was given to C1 by the Defendants in a series of documents beginning with the admittedly nonspecific challenge indicated in the consent order of 5 October 2018, but then further articulated in some detail in the evidence that was filed by the Defendants following those Orders, and finally in their skeleton argument.

14. In that context, C1 also suggested that the Defendants would necessarily be pursuing this assertion of material non-disclosure by way of conducting a mini-trial in advance of the full trial. I find to the contrary, however, as the evidence relied upon was not substantially contested. Indeed, much of it came from C1's own evidence. The Defendants' claims thus did not fall outside the limiting 'no mini-trial' principles set out in the unreported case of *Crown Resources AG v Vinogradsky* (unreported, 15 June 2001), itself cited in *Kazakhstan Kagazy plc v Baglan Abdullahyeviz Zhunus* [2014] EWCA Civ 381.

Material non-disclosure

15. The obligations on the Claimant in this context are not in dispute. The Claimant owed a duty to the court to disclose to it at the ex parte hearing "all the material facts" (*Brink's Mat Ltd v Elcombe* [1988] 1 WLR 1350 at 1356) or all the matters relevant to the exercise of the court's discretion: see Donaldson LJ in *Bank Mellat v Nikpour* [1985] FSR 87 at 92, referring to "the fullest and frankest disclosure".

16. The requirement is not simply to include the relevant detail amongst all the documents that are put before the judge, but also to identify very specifically the crucial points for *and against* the application being made: *Siporex Trade SA v Comdel*

Commodities Ltd [1986] 2 Lloyd's Rep 428 at 437.

17. That duty bound both the Claimant and his legal representatives. They had a duty to draw to the court's attention the weaknesses in the Claimant's case and make sure that the Judge knew what might have been said by the Defendants had they been present at the application: see Cooke J in *Alliance Bank JSC v Baglan Abdullahyeviz Zhunus* [2015] EWHC, 714 at [66]; and Popplewell J in *Fundo Soberano De Angola v Jose Filomeno Dos Santos* [2018] EWHC 2199 (Comm) at [50]-[53].

18. On the face of the documentation presented in the ex parte application, there is no evident effort to comply with these duties. Neither C1's affidavit nor the skeleton argument used at the ex parte hearing contained sections dedicated to the issue of full and frank disclosure. The Attendance Note produced by C1's solicitors contains nothing to suggest that the issue was explored in oral submission.

19. In the result, it would seem clear that there was material non-disclosure and an unfair presentation of the Claimant's case in a number of key respects. This is especially so when the issues that were not disclosed are set against the issues the Judge clearly regarded as material in reaching his conclusions (see above at para 7). The truth of these now-revised facts (being facts that were not presented to the Judge) was not seriously contested before me. I set out the crucial elements.

20. First, the Claimant is not, as it turns out, the beneficial owner of C2 or C3. These two companies are legally and beneficially owned by his children. He is, it is said, the *de facto* controller, but the claim that has to be made out from that starting point is very different from the claim that can more straightforwardly be made out by a legal and beneficial owner. The Judge was thus left with one impression when he should have been left with quite a different one. That impression was reinforced in oral

submissions to the Judge, and it is not sufficient that the truth was evident, buried in Mr Brook's statement that was included in Sheikh Mohamed's exhibits.

21. Secondly, it was alleged that the Claimant would not knowingly have entered into loans at interest rates over 12 per cent. The implication is that any such loans organised by D1 were likely to have been organised without C1's knowledge or consent. C1 says in his affidavit that he would not have agreed to the Main Loan because of the high rate of interest payable on it. But, to the contrary, on the evidence presented in this court, C1 is heavily indebted in at least some areas of his business, and has a reasonable history of borrowing money on short-term loan at very high interest rates. In that light, the loans provided by D2 to the Claimant would have appeared, or could have appeared, as part of the routine way the Claimant conducted his business.

22. Thirdly, the suggestion made to the Judge was that the Claimant did not sign the Main Loan. The Claimant's case initially, and importantly the basis on which the Orders were originally granted, was that he did not believe that he had signed the Main Loan. He said that insofar as the signature that appears on the Main Loan is genuine, it must have been substituted from another document. The evidence now suggests the contrary is a possibility. The signature appears to be witnessed by parties aligned with C1, and emails reinforce the conclusion that C1 did indeed sign this agreement. In any event, C1 himself is now not pressing this point, and all the knowledge that might have led him to that conclusion is within his own domain and always was. The Claimant was under a duty to check assertions being made, and when the truth emerged, to bring that realisation to the court's attention: see Burton J in *Network Telecom (Europe) Limited v Telephone Systems International* [2004] 1 All ER 418 at

[72].

23. C1 now suggests that although he signed the Main Loan facility, he only did this because he trusted D1 implicitly, and D1 abused his trust in getting him to sign documents that he knew that the Claimant would not question, and that the Claimant was not aware of how disadvantageous these terms were. But this is quite a different claim, and it too would have needed to be presented with appropriate acknowledgment of the fact that the Defendants would self-evidently have counter-arguments that they could put.

24. Fourthly, D2's identity as the true counterparty to these loans was questioned, and it was suggested that D2 did not or might not exist. This assertion adds to the flavour of fraud in the presentation of the case to the Judge. Now, however, C1 has rowed back from the suggestion that D2 might not exist and that D1 had either created or otherwise stolen his identity. This was, however, an important part of the case presented to the Judge at the ex parte hearing, and formed a central plank in the general allegations of fraud made against D1.

25. The evidence that led to the Claimant's change of stance on this issue is all evidence residing in C1's hands, including email evidence of his direct communications with D2, and evidence that D2 and not D1 received the loan repayments that C1 made. None of this evidence appeared in affidavits, notwithstanding the duty to investigate prior to an ex parte hearing.

26. In addition, the solicitor with conduct of this case on behalf of the Claimant is Mr Deen. It was not contested in court that Mr Deen had, it appeared, acted for and indeed borrowed money from D2. He ought therefore to have been aware of the existence of D2 and that his business was that of a money-lender. Nevertheless

Mr Deen signed the statement of truth of the particulars of claim which suggested the opposite.

27. Fifthly, the case presented to the Judge was that, even if the loans were all genuine, it was nevertheless the case that D2 or, through him, D1, had been overpaid to the extent of approximately £3 million. In the hearing before me, this assertion was shown as unlikely to be true, or at least as able to be seriously contested. The figure of a £3 million overpayment was based on the Claimants' evidence provided in the Frenkel Report. The fundamental premise of the overpayment claim was that all the loans advanced by D2 to C1 were subject to an interest rate of 12 per cent per annum: that was the express basis on which Mr Frenkel's Report was made. However, it is clear on the face of many of these loan agreements between D2 and C1 that they provide for substantially higher rates of interest than this. On that corrected basis, it may be the case that the overpayment is the other way, with C1 owing money to D2. The Frenkel Report is not comprehensive and it was based on assumptions that might readily be challenged. None of that was presented to the Judge.

28. Sixthly, the context of D2's dismissal from his role as the head of C2's legal department was presented to the Judge as a "with cause" dismissal for financial irregularities, whereas the dismissal, it appears, was contested, with cross-claims in unpaid salary amounting to £1 million also claimed. The outcome of this employment dispute is at large, with no details before the court, but at the very least, it might be said that a disputed dismissal puts the issue of D1's dishonesty as contested, and that may have given the Judge pause in assessing the prima facie case, and also in assessing the risk of dissipation of assets by D1. The relevant knowledge was readily available to the Claimant.

29. Seventhly, and finally, there is the issue of cross-undertakings. The now accepted position in relation to various of the issues above that touch on the value of assets within C1's legal or beneficial ownership may well have been significant in the Judge's assessment of C1's cross-undertaking in damages. That cross-undertaking appears to have been accepted with minimal, if any, enquiry into C1's financial affairs. There may well have been such an enquiry had the court not been led to believe that C1 was the ultimate owner of a valuable group of companies.

30. Those seven points are serious illustrations of what ought to have been avoidable non-disclosure or avoidable one-sidedness in presenting the prima facie case to the Judge. These matters appear on their face to constitute material non-disclosure, given their likely impact on the exercise of the Judge's discretion in granting the Orders.

31. The Claimant's failure to provide full and frank disclosure was wholesale and extends to matters pertaining to whether or not he had a good arguable case and to the risk of dissipation. The matters he neglected to raise went directly to the key issues that the Judge himself identified as material to the Judge's exercise of his discretion to grant the Orders. The Claimant omitted to emphasise matters contained in his own evidence which ran contrary to his case and failed to raise important points which would have emerged on reasonable investigation. The result was that the ex parte evidence was presented in a way that was unacceptably one-sided.

32. The Claimant makes the point that none of this was done deliberately. Even if that is so, however, it is irrelevant. The duty exists, and it is breached by the mere fact of non-disclosure of matters that are material and ought reasonably to have been identified after due investigation.

Consequences of non-disclosure

33. The factors relevant to a determination of the consequences of material non-disclosure are well-known. See, for example, *Dar Al Arkan Real Estate Development Company v Majid Al-Sayed Bader Hashim Al Refai* [2012] EWHC 3539 (Comm) at [148]-[149]. Similarly, see Popplewell J in *Fundo Soberano De Angola v Jose Filomeno Dos Santos* [2018] EWHC 2199 (Comm) at [82]:

> "Ultimately the question is one of the interests of justice. The court will take into account the importance of the matters which were not disclosed, the nature and degree of culpability, and the adverse consequences to a claimant of losing protection against a risk of dissipation of assets. It is not sufficient to justify regranting the order that it would be justified had the material matters been disclosed and a fair presentation made because one important factor in weighing the interests of justice is the penal element of the sanction, which it is in the public interest to apply in order to promote the efficacy of the rule by encouraging others to comply. In *Banco Turco Romana v Cortuk* [2018] EWHC 662 (Comm) I expressed it in this way: '… It is a duty owed to the court which exists in order to ensure the integrity of the court's process…'"

34. Such is the importance of the duty of full and frank disclosure that, in the event of a substantial breach, the court will strongly incline towards setting its order aside, and not renewing it, so as to deprive the defaulting party of any advantage that the order may have given him: see *Millhouse Capital UK Ltd v Sibir Energy Plc* [2008] EWHC 2614 (Ch) at [104].

35. Applying these principles to the present facts, the irresistible conclusion is that the non-disclosure breaches described earlier are so serious, substantial and culpable (not

necessarily in the sense of a deliberate breach, but certainly in the sense of an evident failure to make reasonable inquiries) as to clearly warrant discharging the two Orders and not granting fresh relief, irrespective of the other grounds of challenge advanced by the Defendants.

36. Even if that had not been the case, however, I would in any event have concluded on other grounds that the two Orders ought not to be continued. In now considering those other grounds, I take each of the Orders separately. Given my findings on material non-disclosure, these further matters can be dealt with more briefly.

The Freezing Order

37. The Claimants bear the burden of making good their claim to have this Order continued or re-granted. To do that they are required to prove a good arguable case and a risk of unjustified dissipation in circumstances such that the balance of convenience justifies making the Order.

38. The test of a good arguable case in relation to freezing injunctions is not the usual test of a serious question to be tried that ordinarily applies in relation to general injunction cases. A stronger case must be shown. See *Metropolitan Housing Trust v Taylor* [2015] EWHC 2897 (Ch) at [21].

39. According to the Particulars of Claim, the essential elements of the Claimants' remaining claim against the two Defendants appear to be as follows:

(i) C1 was not involved in or aware of the day-to-day financial affairs of any of the companies he controlled. D1 managed the financial affairs of those companies and C1 took D1 at his word whenever he told him that one of the companies was facing cash flow problems.

(ii) D1 arranged for loans to address these alleged cash flow problems. These loans were unnecessary and overly expensive. In addition, the Claimants may be maintaining their claim that D1 lied to C1 by representing that the loans were between C1 and D2, when in fact D1 had assumed the identity of D2, or was in some sort of conspiracy with him, and D1 was the true beneficiary of the loans or somehow stood to benefit from them.

(iii) In any event, D1 arranged for payments to be made to D2 which exceeded the amounts due under the loan agreements, even assuming all these agreements to have been perfectly valid and proper.

40. Some elements of this remaining claim are already contradicted by the contemporaneous documents put in evidence by way of exhibits to D1's Second Affidavit. These documents suggest that C1 was aware of his cash flow difficulties; that he was informed of these difficulties by his accounts department and not by D1 alone; and that he was closely involved in managing the companies' response to those difficulties. Other parts of the remaining claim rest on assertion. C1 has not endeavoured to add substance to those assertions (eg assertions of conspiracy), either in affidavit evidence or through counsel. In these circumstances the conclusion must be that C1 has not discharged the onus of showing a good arguable case concerning what remains of the underlying claim.

41. In addition to showing a good arguable case, the Claimants are required to show that there is a real risk of unjustified dissipation of the Defendants' assets. There must be solid evidence of the likelihood of dissipation: see *Holyoake v Candy* [2018] Ch 297. That evidence must deal with each defendant separately. Where dishonesty is alleged, the court should carefully scrutinise whether the conduct in question really

justifies the inference that the defendant has assets which he is likely to dissipate unless restricted. It is not an automatic consequence of the underlying claim being one of dishonesty. See *Thane Investments Limited v Tomlinson* [2003] EWCA Civ 1272 at [21] and [28].

42. In the ex parte hearing before the Judge, counsel for C1 summarised the essential grounds for asserting a risk of dissipation as being (i) "There is a serious allegation of dishonesty. There is at least a prima facie case that the Ds have misappropriated at least £3M belonging to the Companies/C" and (ii) "Furthermore, the various original RBS statements show money being transferred out of the jurisdiction in any event".

43. The first part of that assertion falls away, given the evidence presented in the context of non-disclosure. As to the second part, the focus appears to be entirely on two payments made by D2 in August 2016 an April 2017. Since neither payment was made by D1, these payments have no relevance to the alleged risk of dissipation by D1. As to D2, the two payments were historical transfers supporting purchases of real estate in Palestine (see above, para 7), and it is not apparent on their face why they suggest a risk of unjustified dissipation.

44. No further argument was advanced in this court as to why these payments or any other particular features of the case indicated a risk of unjustified dissipation by either Defendant. The evidence would seem to be to the contrary. Although the Orders were sought ex parte on 10 September 2018, a claim form dated 13 August 2018 was served by the Claimant on the Defendants on 30 August 2018. The Defendants were therefore aware of the claims against them, and also of the threatened injunction, several days before the injunction was ordered. No evidence was advanced to suggest that the Defendants took any steps to dissipate their assets in the light of that notice.

Mere assertion that there is a risk of unjustified dissipation will not do.

45. Because the Claimant has not made out either a prima facie case in respect of the underlying claim or a risk of unjustified dissipation of assets, it is unnecessary to consider the balance of convenience. The Claimant has not made out a case for having the Freezing Order maintained or re-granted.

The Receiver Order

46. The Receiver Order prevents the appointment by the Defendants of an LPA receiver over the Claimant's house. Given the way the Claimants' case was put to the Judge, there was at that stage doubt as to whether the Main Loan and its associated security was valid at all, whether it was indeed D2's document, and whether D1 was impersonating or otherwise appropriating D2's identity or colluding with D2. In those circumstances there may well have been good reason to enjoin the enforcement of any security interest that either D2 or perhaps D1 might be claiming. But a number of elements of those allegations concerning the security interest have now been relinquished by the Claimant, and those assertions that might still remain have not been pursued further in this court with evidence provided in support. The Claimant has thus not advanced sufficient evidence as to why this Order should continue or be re-granted. I hold that this Order too should be discharged and not re-granted.

Conclusion

47. For the reasons given, I hold that both Orders should be discharged against both Defendants, and that neither Order should be continued in any form.