Case No: CL/2015/000846

Neutral Citation Number: [2016] EWHC 3820 (comm)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

The Rolls Building
7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Thursday, 24 November 2016

BEFORE:

HIS HONOUR JUDGE WAKSMAN, QC

BETWEEN:

BM BANK JSC

Claimant

- and -

CHERNYAKOV & ORS

Defendants

MR P HEAD (instructed by PCB) appeared on behalf of the Claimant

MR S SIBBEL (instructed by Grosvenor Law) appeared on behalf of the Defendants

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APPROVED UDGMENT

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HHJ WAKSMAN QC:

1. I am now dealing with the second application which has foreshadowed in my earlier judgment and is made pursuant to CPR 72.7. It is convenient to quote that at the outset. It says:

> "(1) If –
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> (a) a judgment debtor is an individual [as is the case here];
>
> (b) he is prevented from withdrawing money from his account with a bank or building society as a result of an interim third party debt order; and
>
> (c) he or his family is suffering hardship in meeting ordinary living expenses as a result,
>
> the court may, on an application by the judgment debtor, make an order permitting the bank or building society to make a payment or payments out of the account ('a hardship payment order')."

2. That is described as a hardship payment order and the Rule itself is entitled "Arrangements for debtors in hardship". Subparagraph (2) deals with the mode of application, and subparagraph (4) says that any such application must include detailed evidence to explain why the judgment debtor needs the payment of the amount requested and verified by a statement of truth, and so on. It is worth reading the short note to the Rule:

> "Hardship payment orders
>
> Hardship payment orders are an innovation of the CPR. The service of an interim third party debt order on a bank or building society has the effect of freezing the account. The third party bank or building society cannot pay any of the judgment debtor's cheques or allow him to withdraw cash without authority of the court. Clearly this is capable of working hardship to the judgment debtor, if for example, he is unable to pay his mortgage or rent or buy food for himself and his family. There will be inevitably some time delay prior to service of the interim third party debt order and the hearing to decide whether it should be made final. The third party is entitled to at least 21 days' notice but in practice may receive much more. The new provision for a hardship payment order seeks to strike a balance between the rights of the judgment creditor and the rights of the judgment debtor and enables the judgment debtor to apply to the court for specified payments to be made to him notwithstanding that the account has been frozen by the interim third party debt order."

3. There are some background matters which I should recite at this stage. First of all, the hearing of the application for a final order will take place in a little over two weeks' time on

12 December. Secondly, it is common ground that the first defendant has access to a different bank account known as the RAK bank account which has to his credit something in the order of £59,000. According to paragraph 33 of Ms McKinney's fifth witness statement there are a credit and a debit card used in relation to that account. The debit card can make retail payments of £1,000 per day but not cash withdrawals. However, the credit card can be used to withdraw cash of up to £7,000 per month and transactions totalling £30,000 to £35,000 per month can be paid with that card. That means in practice that money is freely available from that account up to around £59,000.

4. Finally, I should say a little more about the detail of the expenses which Mr Sibbel says fall within the definition of ordinary living expenses which should be paid otherwise there is hardship. They are as follows: £7,900 in respect of the salary of the first defendant's nanny; £8,120 in respect of payments for the first defendant's maternity nurse; £8,000 in respect of the invoice to the second defendant's obstetrician; and then we have another £40,000 or so in respect of five different assistants or employees of the first defendant which I am told include drivers and the captain of the first defendant's yacht. There are then two reimbursement payments totalling £6,000. We then have legal expenses which have fallen due which amount to the £190,000 in respect of the first defendant's solicitors, who have obviously been content to provide legal services to the first defendant without having payment up front. Finally, there are the business expenses in relation to the first defendant's yacht, and that as I understand it are the berthing fees without payment of which the yacht is liable to be seized.

5. Mr Head for the claimant takes a threshold point, which is to say that Altus is not a bank or building society, and since it is accepted that CPR 72.7 can only apply to a bank or a building society, the claim here fails *in limine*. A bank or building society is defined at 72.12 to include any person carrying on a business in the course of which he lawfully accepts deposits in the United Kingdom. One reason for that definition apart from 72.7 is 72.6, which imposes specific obligations on banks and building societies served with interim third party orders to identify and to search for all accounts and disclose to the court particular sums of money held by the judgment debtor, and all of that is set out in some detail in subparagraphs (2) and (3). Subparagraph (4) then provides residually that any third party other than a bank or building society must notify the court if they claim not to owe any money to the judgment debtor and not to owe an amount less than that specified in the order.

6. Mr Sibbel says that this is a bank or a building society and he relies on the following matters. First of all, he refers to the fifth witness statement of Ms McKinney where she says in paragraph 38 that the only suitable account for the first defendant's immediate use is the Altus account and says that there are bank cards at Altus. Mr Sibbel also refers to what is said on Altus's website, "This is a boutique investment management firm". It says that it is regulated by the FCA and has additional permission to hold client funds so that "This allows us to operate our Cash Management Platform for our clients and to act as Custodian, as an ancillary service to our main Investment Management offerings". It is also authorised as a money remittance firm, and using the client accounts with a variety of counterparty banks onshore and offshore, they can hold funds for clients, make payments, place deposits and effect foreign exchange on their behalf. It is an FCA CASS firm and therefore says that the structure, "drawing on the expertise and infrastructure of the best providers in the financial services industry … allows clients to diversify their assets amongst various global financial institutions".

7. I see all of that. It does not say that it is a licenced deposit taker and it does not say that it falls within section 6 of the Banking Act, which is the point which is referred to at 72.1(2). The fact that it allows incidental payments from the funds which are held there pending particular investments does not seem to me to alter the position.

8. Mr Sibbel also makes the point, correctly, that the application for an interim payment order says at paragraph 3 that the third party is a bank or building society but then also ticks the box saying that it is not a bank or building society. What we do know from the correspondence with Altus is that on a letter dated yesterday Altus has stated that in relation to this matter and pursuant to the provisions of CPR 72.6(4) they confirm that Mr Chernyakov is a client and holds a personal investment account, the value of which is unsurprisingly less than the judgment sum. Mr Sibbel says that may be what Altus say but it is not necessarily the correct position. It is not suggested that Altus is anything other than a reputable organisation and it surely knows whether it falls within the formal definition of bank or building society or something which is outside of it. I take the view that it is not a bank or building society and for that reason alone this claim must fail *in limine*.

9. However, in case I am wrong about that, I go on to consider the further points. This requires some analysis of the wording of 72.7 itself. First of all, it is plain that the court must exercise a discretion here. There is not an automatic right even if the defendant were to establish that there would be the requisite hardship. It is still a matter for the court itself. Secondly, that is a discretion which must be exercised by reference to the scope of the CPR. It is not necessarily the same discretion that is exercised by reference to the living expenses carve-out in respect of a worldwide freezing order. It is true that living expenses or ordinary living expenses are often used in the same context but that does not mean that the approach is the same. The reason for that is obvious and that is because of the references in the title and in the individual wording of and the notes to this provision, namely hardship.

10. If one reads the provision as a whole it is plain what it is aimed at. It is aimed at circumstances where there are bank or building society accounts which are used for regular day-to-day payments of the defendant or their family and in circumstances where without being able to meet the claimed living expenses there would be hardship. I do not accept that suffering hardship simply means that they are not able to pay some expenses. In my judgment it clearly means that they would suffer hardship in the event that those particular living expenses could not be paid and that is the obvious meaning behind the third sentence in 72.7(1), which is that this provision was capable of working hardship to the judgment debtor if they are unable to pay a mortgage or rent or buy food for their family. Those particular examples are of course not exhaustive and in an appropriate case there might be some other form of expenses, but it is a very good indicator as to the typical scope of this provision in my judgment. Therefore first of all I am not bound by the court's approach to living expenses for the purpose of the making and continuation of the freezing orders.

11. Secondly, not being so constrained I must apply this provision within the scope of the words and the very important additional word "hardship" which I have referred to. What that means in my judgment is that this is not a provision which is designed to provide a carve-out from expenses which one might describe as luxuries. Furthermore, the question of hardship cannot be decided unless it is known what other resources may be available to the judgment debtor. If for example something which could be regarded as ordinary living expense can be defrayed elsewhere then by definition not using this account to pay them will not result in any hardship. That is all I need to say by way of the scope of this provision.

12. I then turn to deal with the expenses claimed. First of all, I see no reason at all to consider legal expenses as living expenses. It is noteworthy to this extent that in the freezing order context legal expenses are considered differently. I think that that has some resonance here because one does not have legal expenses necessary to incur in order to live. One incurs legal expenses typically and certainly in this case to maintain or continue litigation. For that reason alone legal expenses must fall outside of this provision.

13. Secondly, the reason why these legal expenses appear to have been run up is because the solicitors have allowed them to run up without taking any security or advance payment. That of course is their choice. But if that is the position then the first defendant has been running that risk for some time of having a payment call in respect of it.

14. Finally, to the extent that there is going to be a final hearing on this matter within a couple of weeks after which the hardship payment regime goes entirely, there is no evidence before me that the solicitors are going to pull the plug, but if they do, that is because of the arrangements which the defendant has entered into with them in any event and I do not regard that as living expenses or, if I did, as hardship.

15. So far as the yacht payments are concerned, while Mr Sibbel courageously said that this was still to be regarded as part of the application, it is I am afraid a ridiculous submission. Any court being asked to make a hardship payment on the basis that it is berthing fees for a luxury yacht would have no difficulty in rejecting it without more, and so do I.

16. Then we come to the living expenses themselves. It might be thought to be churlish to deny the first defendant expenses in relation to the nanny, maternity nurse and obstetrician, although may people may not be in the position of having the private services of three such persons to attend their pregnancy. On the other hand, there is £59,000 available and I see no reason why that money should not be used and I have no doubt that cash withdrawals can be used to deal with it or they can be dealt with in some other way to pay those particular bills and I do not regard their non-payment from this account as a matter of hardship.

17. One then comes to the payments to all the assistants and employees that have been referred to here. While I can well understand that if those employees or assistants are due their wages and their wages have not been paid, that is undoubtedly a hardship or may be a hardship to them but it is not a hardship to the first defendant or his family, which is what the Rule provides, and therefore there is no relevant hardship there.

18. So far as the fifth category is concerned, they are third party debts. I do not consider that they amount to living expenses in any event, and I should have added that I do not see how payment to parties such as the boat captain and driver can be regarded as ordinary living expenses but even if they can there is no hardship. To the extent that it is really necessary for the first defendant to make certain payments which might otherwise cause him difficulty (I do not say hardship), in the interim period between now and 12 December he has £59,000 available and that is what he should use.

19. That is my judgment on this application.

WordWave International Ltd trading as DTI hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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This transcript has been approved by the Judge