Neutral Citation Number: [2018] EWHC 3423 (Ch)

Case Number BR 000528 of 2018

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (Ch D)

IN THE MATTER OF PAUL BAXENDALE WALKER (A BANKRUPT)
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

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

Date: 20 December 2018

Before:

DEPUTY INSOLVENCY AND COMPANIES COURT JUDGE AGNELLO QC

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Between:

PAUL BAXENDALE-WALKER
(a Bankrupt)

Applicant

- and –

(1) IRWIN MITCHELL LLP
(2) JOHNSONS SOLICITORS LIMITED
(3) GRIFFIN LAW LIMITED
(4) MISHCON DE REYA LLP
(5) MICHAEL LEEDS AND KEVIN HELLARD
(as Trustees in Bankruptcy of Paul Baxendale-Walker)
(6) HAWK CONSULTANCY LLC

Respondents

- -

Stephen Hackett (instructed by **Candey**) for the **Applicant**
No appearance by the **First, Second, Third, Fourth and Sixth Respondents**
Donald Lilly (instructed by **Norton Rose Fulbright**) for the **Fifth Respondents**

Hearing date: 11 December 2018

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APPROVED JUDGMENT

Introduction

1. This is the judgement arising from an application made by the Fifth Respondents (the Trustees) seeking a limited civil restraint order pursuant to CPR rule 3.11 & 23.12(b). The application arises from the judgment I handed down on 11 December 2018. In that judgment ("the 303 Judgment"), I dismissed the Application dated 24 August 2018 ("the 303 application") of Mr Baxendale-Walker ('the Bankrupt') seeking directions 'in respect of the Trustees in Bankruptcy's requests of Irwin Mitchell LLP, Johnsons Solicitors Limited, Griffin Law Limited and Mishcon de Reya LLP for provision or inspection of the Bankrupt's solicitors clients files'. In dismissing that application, which I held to be hopeless for the reasons set out in that judgment, I stated that the application made was totally without merit. Pursuant to CPR rule 3.3(7) and 23.12, where an application is dismissed and is totally without merit, the Court order must specify the fact that the application was totally without merit and additionally, the Court is required at the same time to consider whether to make a civil restraint order. I should add that although I have used the word 'applied', Mr Lilly on behalf of the Trustees invited me to make the order of my own motion. Whether I would make such an order of my own motion or on the 'application' of the Trustees, Mr Lilly made submissions relating to why such an order should be made and I am grateful for his submissions in this respect.

2. The Trustees now invite me, as a consequence of the findings in that judgment, to make a limited civil restraint order pursuant to CPR 3.11. This application was foreshadowed in the Trustees' skeleton argument filed for the purposes of the 303 application and also set out in the skeleton argument filed on behalf of the Trustees for the hearing on 11 December 2018. The Trustees made their application for a general civil restraint order as set out in 4.1 of PD3C of the CPR, or alternatively, for a limited civil restraint order as set out in 2.1 of PD3C of the CPR.

3. The first issue I need to deal with, before considering the grounds for the application, is whether I have jurisdiction to make a general civil restraint order. Mr Lilly sought to persuade

me that I did have the jurisdiction to make this order despite the very clear wording in the provision. Paragraph 4.1 of PD3C states,

'4.1 A general civil restraint order may be made by-

(1) A judge of the Court of Appeal;

(2) A judge of the High Court; or

(3) A designated Civil Judge or their appointed deputy in the County Court where the party against whom the order is made persists in issuing claims or making applications which are totally without merit, in circumstances where an extended civil restraint order would not be sufficient or appropriate.'

4. Insolvency and Companies Court Judges (ICC Judges) do not fall under any of those categories. Mr Lilly sought to persuade me that I have jurisdiction by reason of the Insolvency Practice Direction which at paragraph 3 places specific restrictions upon the jurisdiction of an ICC Judge, but those restrictions do not include the jurisdiction to make an extended or general civil restraint order. The restrictions relate to applications for committal for contempt of court and applications for search and seizure orders and freezing orders. Mr Lilly referred me to the Chancery Guide updated on 4 September 2018 which provides that Masters are not permitted to grant extended or general civil restraint orders but that no similar caveat exists in relation to ICC Judges.

5. I am not prepared to deal with an application seeking a general civil restraint order. In my judgement, I do not consider that I have the jurisdiction to deal with this. The words contained in PD3C are quite clear as to which Judges have jurisdiction, and in the event I am wrong about that, I would, in the exercise of my case management powers and paragraph 3.5 of the Insolvency Practice Direction, have directed that the matter be heard by a High Court Judge. As is clear from the express wording in 3.1 and 4.1 of PD3C of the CPR, the making of extended and general civil restraint orders are matters of extreme seriousness. Those provisions contain express reference to more senior Judges than ICC Judges. Furthermore, many of the applications and claims which Mr Lilly referred me to relate to High Court actions and it therefore seems appropriate that the application for a general civil restraint

order should be considered and made if appropriate by a High Court Judge. I invited Mr Lilly to effectively take his application to a High Court Judge in so far as he wished to seek a general civil restraint order. After taking instructions, Mr Lilly sought to make an application before me seeking a limited civil restraint order pursuant to 2.1 and it is this application which I now turn to consider.

6. Paragraph 2.1 of PD3C states, 'A limited civil restraint order may be made by a judge of any court where a party has made 2 or more applications which are totally without merit.' Before Mr Lilly took me to the applications which he relied upon for this purpose, I asked him for his submissions relating to whether the reference in paragraph 2.1 to 'applications' meant, 'applications in the proceedings' being in this case the bankruptcy proceedings before me in which the 303 application was made, or meant any applications made in proceedings, including those in other courts.

7. I note that in relation to extended civil restraint orders, paragraph 3.1, the wording is somewhat different. Paragraph 3.1 states,

> "An extended civil restraint order may be made by –
> (1) a judge of the Court of Appeal;
> (2) a judge of the High Court; or
> (3) a Designated Civil Judge or their appointed deputy in the County Court,
> where a party has persistently issued claims or made applications which are totally without merit."

Such an order, which is wider than a limited order, restrains the party from issuing claims or making applications in either any court (if the order is made by a Court of Appeal Judge), in the High Court (if the order is made by a High Court Judge) or in a County Court (if the order is made by a designated Civil Judge in the County Court). The order restrains the party from issuing applications or claims in the relevant court or courts, 'concerning any matter involving or relating or touching upon or leading to the proceedings in which the order is made without first obtaining the permission of a judge identified in the order.'

8. A general civil restraint order may be made where the party against whom the order is made persists in issuing claims or making applications which are totally without merit in

circumstances where an extended civil restraint order would not be sufficient or appropriate. Mr Lilly referred me to the case of *Society of Lloyds v. Noel [2015] 1 WLR 4393*. In that case Mr Justice Lewis was dealing with an application for an extended civil restraint order. At paragraph 37, the Judge considered whether, in relation to an application for an extended civil restraint order, the court is able to have regard only to totally without merit claims and applications made after the expiry of the latest civil restraint orders in that case or whether the court is entitled to look at the entirety of the litigation history to determine whether or not the condition for making an extended civil restraint order is satisfied. In that case, the defendant, Mrs Noel, had made five applications certified as being totally without merit. Then an extended civil restraint order was made against her by Mr Justice Steel for a two year period. After the expiry of that order, Mrs Noel made two further applications both of which were certified as being totally without merit.

9. At paragraph 38, the Judge stated,

> 'In my judgment, a court is entitled to have regard to all the claims or applications made which were totally without merit in deciding whether it has power to make an extended civil restraint order in accordance with paragraph 3.1 of PD3C. The court is not limited to consider solely the claims and applications made since the expiry of the latest extended civil restraint order. I reach that conclusion for the following reasons.
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> 39 First, the language of paragraph 3.1 of PD 3C requires a court to consider whether a party 'has persistently issued claims or made applications which are totally without merit'. There is nothing in the language to indicate that a court is only entitled to look at claims issued or applications made within a particular time-frame, for example, in the period since the expiry of the latest extended civil restraint order. There is nothing in the language of paragraph 3.1 which indicates that a court must leave out of account claims or applications which were totally without merit and which led to the imposition of an earlier extended civil restraint order. There is nothing in the language to suggest that the making of an extended

> civil restraint order, in effect, draws a line drawn under conduct occurring prior to that date or that persistence is only to be assessed by reference to conduct occurring after the expiry of the order. Rather, paragraph 3.1 is describing a state of affairs, namely that a party has persistently issued claims or made applications which are totally without merit. It is not prescribing or requiring that only applications made within a particular time scale, or after a particular date, can be considered in assessing persistence.'

10. The subsequent paragraphs in the Judgment deal with further analysis by the Judge relating to why it effectively makes no sense to restrict that paragraph to those claims or applications made after the expiry of the earlier extended civil restraint order. It is not necessary to set them out in this judgment.

11. Mr Lilly submitted that these passages support his construction that paragraph 2.1 and the reference to 'applications' means any applications and not just those in the proceedings to which the application for a limited civil restraint order is made. Mr Hackett, on behalf of the Bankrupt, in his brief submissions, asserted that 'applications' in paragraph 2.1 meant applications in the bankruptcy proceedings. Neither Counsel was able to provide any further cases to assist me in this matter.

12. In my judgement, the starting point is to consider the entire regime, being the three types of civil restraint orders which can be sought. The first one, being a limited civil restraint order, can be made 'by a judge of any court where a party has made 2 or more applications which are totally without merit.' The effect of the limited civil restraint order made is that 'the party against whom the order is made…will be restrained from making any further applications in the proceedings in which the order is made without first obtaining the permission of a judge identified in the order…'

13. An extended civil restraint order is not restricted to particular proceedings, but clearly is designed, as Mr Justice Lewis in the *Lloyds* case stated, to cover cases where the party has

'persistently issued claims or made applications which are totally without merit'. The effect of an extended civil restraint order is that the party against whom the order is made, '….will be restrained from issuing claims or making applications…..either in any court, the High Court or the County Court ….concerning any matter involving or relating to or touching upon or leading to the proceedings in which the order is made'. This enables the Court to consider issued claims and applications made without limitation. The distinction between extended civil restraint orders and general civil restraint orders is that a general civil restraint order is not confined to or related to particular proceedings and the issues which arise therein, but is effectively a complete restraint on any proceedings, claims or applications in the court or courts to which it applies. As the extended and general restraint orders relate to and affect a party's actions in relation to issuing claims and applications, it is not surprising to find that the Court looks at claims and applications without restriction to the courts in question.

14. In my judgement the limited civil restraint regime requires there to be 2 applications totally without merit in the proceedings. In reaching this conclusion I note the words used, namely, that the relevant order can be made, 'by a judge of any court where a party has made 2 applications which are totally without merit'. The words 'where a party has made 2 or more applications' in my judgement refer back to 'a judge of any court' and require therefore that the 2 applications have been made effectively in that court. This construction is confirmed by the terms of the actual order which would be granted (paragraph 2.2) which makes it clear that the party is restrained from bringing any applications in the proceedings in which the order is made. That would be in the court where those proceedings exist. The aim of the order is to prevent applications in those proceedings being made. There seems little justification in my judgement for limited civil restraint orders to be granted in particular proceedings in reliance upon applications not made in the proceedings which will then be the subject matter of the order if made. The purpose of the order made is to prevent further applications in those proceedings and therefore in my judgement, the Court considers the applications which have been made in those proceedings to date. Mr Lilly's construction, being that I can look at applications made in any court and in any other proceedings or

claims, creates a rather odd scenario where I could look at applications but not issued claims. There is no justification for such a distinction which would arise on his construction.

15. My construction is further fortified by considering the extended and general civil restraint orders regimes. There the Court is considering persistent applications and issued claims and makes orders relating to preventing the issue of claims and applications either in the context of proceedings in a broad sense (extended) or generally. The limited civil restraint order regime looks at applications only and therefore in my judgement must relate to the proceedings which will be the subject matter of the order, if made.

16. Additionally, my construction of the provision is also in line with the history of PD3C which was drafted and published to codify the Court of Appeal's judgment in *Bhamjee v Forsdick* [2003] EWCA Civ 1113, [2004] 1 WLR 88. (To this effect, see the explanatory note to the Civil Procedure (Amendment No 2) Rules 2004 referring to the addition of rule 3.11.) This history of PD3C was also confirmed, for example, in *R (Kumar) v Secretary of State for Constitutional Affairs* [2006] EWCA Civ 990, [2007] 1 WLR 536 at [54], where specific reference was made to limited civil restraint orders.)

17. In *Bhamjee*, the Court of Appeal set out three different types of civil restraint order which came to be reflected in the three different types of order set out in PD3C. Of the type of order that became the "limited civil restraint order", the Court said this at [39]:

> ... it is only apt to prohibit the issue of *further* applications within a single set of proceedings without the permission of a judge. … Normally we would not expect a civil restraint order [of the "limited" kind] to be made until after the litigant has made *a number of applications in a single set of proceedings* all of which have been dismissed because they were totally devoid of merit. …
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> (Emphasis added; other emphasis omitted.)

18. This interpretation was also preferred by Birss J in *Lilley v Euromoney Institutional Investor plc* [2014] EWHC 2364 (Ch), although he did not strictly need to decide the point. Referring to para 2.1 of PD3C, Birss J said this:

> [88] … A point arose in this case whether the requirement for two applications which are totally without merit can only be satisfied by two applications made in the same proceedings in which the limited civil restraint order is to be made. Counsel were not aware of a decision on the point.
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> [89] The way the sub-paragraph in the Practice Direction is expressed is at least capable of being read as not being limited to such a situation and as including a case in which one or both applications which are totally without merit were made in other proceedings. However Mr Hughes pointed out that Court Form N19 (Limited Civil Restraint Order) is clearly written on the basis that the totally without merit applications are in the same proceedings as the one in which Limited CRO is to be made. Mr Hughes also reminded me that in *Bhamjee v Forsdick* [2004] 1 WLR 88, which was the judgment which led to the Practice Direction being drawn up, the Court of Appeal's judgment (paragraph 39) clearly contemplated that what are now called Limited CROs would be made only when the applications made in the same proceedings had been found to be totally without merit.
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> [90] … it seems to me that since the paragraph appears in a context of a set of sub-paragraphs concerned with whether to make a Limited CRO, read in that context and bearing in mind the Practice Direction was produced following *Bhamjee*, there is a strong case that the sub-paragraph requires two applications in the same proceedings, i.e. the proceedings in which the Limited CRO is sought.

19. Accordingly, in my judgement the limited civil restraint order regime requires me to identify two applications made in the proceedings in order to make the order. In the bankruptcy proceedings, there is the 303 application before me so Mr Lilly needs to identify one more application. The bankruptcy commenced with the issue of a bankruptcy petition. Those are the proceedings with the relevant case number 000528 of 2018. Since the issue of the petition, there has been the hearing of the application made by the petitioning creditor seeking the appointment of interim receivers which was determined by the Chief ICC Judge on 16 April 2018. There was no application by the Bankrupt on the hearing of the application to appoint interim receivers and Mr Lilly did not choose to rely on it in any event. The other hearing related to the bankruptcy petition itself when a bankruptcy order was made. Mr Lilly did not rely on any application made at the hearing of the bankruptcy petition which was held by the Judge to have been totally without merit.

20. In those circumstances, this application cannot succeed before me. Accordingly, I do not have to go through the numerous applications referred to me by Mr Lilly which have been made by the Bankrupt in other claims and proceedings and which were held to be totally without merit. These totally without merit applications, along with certain claims which I have noted in the evidence, are well capable of forming the basis for a general civil restraint order in an application before a High Court Judge, but that is not something within my jurisdiction. However, for current purposes, I am not prepared to make a limited civil restraint order pursuant to PD3C and CPR 3.11 & 23.12(b). In so far as I have been invited to make the limited civil restraint order of my own motion, I will not make that order for the reasons set out above.

21. The matter before me proceeded on the basis of Mr Lilly inviting me to make a limited civil restraint order. As I have stated above, I have seen material which is well capable of forming a basis for a general civil restraint order, but despite my invitation that the matter should be referred to the High Court Judge, what actually proceeded before me related only to being invited to make a limited civil restraint order. That is the only type of restraint order which I could have made. Accordingly, I have not been taken to all the material which could be relied upon before a High Court Judge. My observations therefore must not be taken out of context. Before me, Mr Lilly took me to various applications in different proceedings, but I have not sought to deal with them in this judgment because of my findings relating to the restriction in my jurisdiction to make limited civil restraint orders. I have not in those circumstances made a finding that a general civil restraint order would be appropriate in the circumstances, although as I have observed, from what I have seen, there is material which is well capable of forming a basis for such an order. Accordingly, it is a matter for the Trustees as to whether an application is now made to the High Court Judge.

22. I did state when I reserved judgment in this matter that I would seek to hand this judgment down without there being any need for attendance. I would expect the parties to agree the appropriate costs order. I await an order to be drafted by the Trustees' Counsel.

There is liberty to apply back to me in so far as the issue of costs cannot be resolved as between the parties.

Dated