Neutral Citation Number: [2018] EWHC 3437 (Ch)

No. CH-2017-000154

IN THE HIGH COURT OF JUSTICE

CHANCERY DIVISION

Rolls Building

Thursday, 12 April 2018

Before:

THE HONOURABLE MR JUSTICE BARLING

B E T W E E N :

ISAAC SARAYIAH — Appellant

- and -

ROYAL AND SUN ALLIANCE & Ors.
Respondents

THE APPELLANT appeared in Person.

MR T. ASQUITH (instructed by DWF LLP) appeared on behalf of the Respondents.

J U D G M E N T

(This transcript has been prepared without the aid of documentation)

MR JUSTICE BARLING:

Introduction

1 This is an appeal by Mr Isaac Sarayiah against the order of HH Judge Freeland QC, sitting at the County Court of Central London dated 25 May 2017, dismissing the appellant's application for a disclosure order against a third party, namely, RSA PLC. The application was pursuant to CPR 31.17 and 18. The learned judge recorded that the application was totally without merit and ordered the appellant to pay RSA PLC's costs of the application, which he summarily assessed in the sum of £4,000. The appellant appeals all the aspects of that order, pursuant to permission granted by Arnold J.

2 Before me the appellant has represented himself, and has done so very ably. The respondent, RSA, is represented by Mr Asquith of counsel.

Background

3 It is necessary to set out part of the unfortunate history of this matter in order to explain how we have arrived at this point.

4 The matter arises in the context of a claim by the appellant against Pamela and Camilla Sarayiah, the appellant's sisters. The claim is brought under s.3 of the Protection from Harassment Act 1997, pursuant to which the appellant seeks injunctive relief and damages.

5 As the learned judge set out in his admirably succinct judgment, the appellant contends that his two sisters (defendants to the main claim) have embarked on a course of conduct of harassment against him since about July 2014. It is not necessary for me to go into the details of the claim itself save perhaps to say that one of the allegations contained in the Particulars of Claim, at paragraph 24, is that in November 2015 the defendants removed the appellant as an interested party on the building and contents policy held with More Than Insurance, which is an associated company of the respondent to the appeal. He alleges in that paragraph that the defendants did this between 13 and 18 November 2015, and that as a result, if any damage were to occur to the house, such as a broken window, water damage from a leak, a blown down fence or tiles due to extreme winds, or damage to or loss of contents in a burglary, etc, he would not be able to make a claim, and would suffer considerably.

6 The reference in the Particulars of Claim to the appellant being removed as an interested party is allied to the subject matter of the application made to HH Judge Freeland QC, because what the appellant was seeking in his application for a disclosure order was a tape recording. This recording was admittedly in the possession of, and had been made by, the respondent. It was the recording of a telephone conversation between a representative of the respondent and one of the defendants in 2015. The appellant maintains that it is disclosable as relevant to the claim for harassment which he is making against the defendants.

7 The appellant states that for approximately 12 months leading up to the hearing before the learned judge, he had been in communication with the respondent seeking a copy of the tape recording of the conversation. Although summarising quite considerably, I believe it is fair to say that the respondent's approach to the several requests made by the appellant was as follows: the respondent was not in a position to provide him with a copy of the tape recording because (1) the appellant was not an executor of his mother's will (her executors being the defendants), and (2) on the face of it the insurance policy was taken out by his

mother (although the appellant states, and it is not disputed, that in fact he organised it for her). Further reasons were given, including that it would be wrong to do so in the light of data protection legislation. These responses to the appellant's requests were, in the main, provided through the respondent's solicitors.

8 I believe it is accepted that the respondent did not indicate that it would be happy to provide the recording if the defendants, who were the executors, requested it. The respondent did not at any stage suggest to the appellant that the appropriate course was for him to make an application under CPR 31.12 against the defendants. That is not perhaps surprising, as it was not the duty of the respondent's solicitors to give the appellant legal advice. However, in the course of the correspondence the appellant indicated that, if he did not receive cooperation, he would make an application for third party disclosure of the tape in question. In that correspondence he made reference to a *Norwich Pharmacal* application. Ultimately, as I have said, the application that he made in March 2017 was pursuant to CPR 31.17 rather than a *Norwich Pharmacal* application.

9 By way of further background, I should say that the appellant also made a request to his sisters, the defendants. However, there had been a complete breakdown of relationships, and they took the view throughout that they were not prepared to assist him in obtaining the tape recording.

10 There is another matter, upon which Mr Asquith placed considerable reliance. In about October 2016, well before the application came before the learned judge, there had been an exchange of requests for disclosure and disclosure lists by the parties. In the appellant's disclosure list, he referred to documents which exist or may exist and which may be relevant to issues in the case, including "copy of phone conversation between Camilla Sarayiah (believed to be Camilla) and More Than Insurance between 13 November and 20 November 2015". He also referred to copies of all correspondence and notes of communications between the defendants and the respondent insurance company. In relation to the "copy of phone conversation", under the rubric "Where it may be found", the appellant stated "on More Than Insurance systems".

11 In the defendants' disclosure report or list of documents, under the rubric "I have control of the documents numbered and listed here but I object to you inspecting them", there is a reference to "Copy of phone conversation between defendants and More Than" (the word "Insurance" is missing); and "Copies of correspondence between defendants and More Than Insurance between 13 November 2015 and 20 November 2015." In a later passage in the document it is stated: "I object to you inspecting these documents because:". The explanation given is that it "relates to an estate matter and is irrelevant for disclosure in this harassment case." Then this appears: "CS's statement also explains conversations in essence. No recording exists in defendants' possession." That document is dated 25 November 2016. I will endeavour to explain the relevance of it in due course.

The hearing in the court below

12 The matter now under appeal came on, as I have said, before HH Judge Freeland QC on 25 May 2017. Then, too, the respondent appeared through Mr Asquith, and the appellant appeared in person and without representation. The defendants were unrepresented but present in person. As I understand it, they took part in the hearing to some extent.

13 The approach of the respondent at that hearing is summarised in Mr Asquith's skeleton argument. The position it took was one of active opposition to an order against the

respondent. Mr Asquith had contended that the appellant's application should be refused with costs in favour of the respondent. He accepted that the defendants had control over the documents being sought; he made reference to the disclosure lists which I have just mentioned; and he stated that the defendants considered the documents to be irrelevant to the claim. The respondent further submitted that, even if that was wrong, the application was misconceived because it should have been brought against the defendants under CPR 31.12 rather than against the respondent under 31.17.

14 The respondent's skeleton went on to state:

> "For the avoidance of doubt, if the defendants provided the requisite consent (in their capacity as executors of their mother's estate) to RSA, RSA would put into the defendants' possession documents to which the defendants were entitled (in their capacity as executors of their mother's estate)."

That somewhat cautious indication does not expressly state that the defendants would be able to have the tape, although, as we shall see, that is what appears ultimately to have happened. It simply states that if the respondent was asked to provide documents to which the defendants were entitled, the respondent would provide them.

15 The main point taken by the third party, RSA, was that the disclosure sought was not necessary for the purposes of CPR 31.17(3)(b) because it could be obtained from the defendants.

The judgment of the court below

16 The judge refused the application. Having set out some of the circumstances which I have just described, and having referred to the argument of the appellant and to his witness statement and submissions, he said:

> "In fact the only application that is before me is pursuant to CPR 31.17 and/or 31.18 and Mr Sarayiah has also referred me to the disclosure [ie the disclosure documents to which I have referred] where the defendants say they have control of the phone conversation between the defendants and More Than Insurance but no recording exists in the defendants' possession."

17 Having then referred to the criteria under CPR 31.17 and 18, and to the respondent's arguments, the Judge recorded the defendants' submission that the application was a fishing exercise, and that the documents were entirely unnecessary for the fair disposal of the action. Then he said this:

> "But [the defendants] have not come to court to deal with an application under CPR 31.12 for specific disclosure and so Mr Sarayiah has proceeded against the Royal and Sun Alliance Insurance PLC and they are represented by counsel….[Mr Asquith] submits that the application is misconceived because if there was any application to be made (see the disclosure lists and documents to which I have referred) it should have been directed against the defendants and if an order had been made against the defendants by the judge, then the documents would have been disclosed in the

> usual way. He submits that instead of being based on CPR 31.17 the application should have been made, if at all, against the defendants pursuant to CPR 31.12 which, of course, provides for the court to make an order for specific disclosure or specific inspection for the reasons therein set out in the Rule. Mr Asquith submits in writing and orally that there was no need to involve RSA in this case…"

18 He then referred to the conditional offer by the respondent mentioned earlier in this judgment, and continued:

> "I am not surprised that he says that. He submits that disclosure is not necessary (see CPR 31.17(3)(b)), because it could be obtained from the defendants and he then makes submissions under the Data Protection Act that submits in sum that the application is misconceived because it is directed to the wrong party. With respect to Mr Sarayiah I entirely agree. This is a misconceived application for the reasons advanced both in writing and orally by Mr Asquith on behalf of the Royal and Sun Alliance Insurance PLC...
>
> The application could and should have been made if at all under 31.12 and it has not been and I would decline to make any order under 31.17 or 31.18. I regard that as the inappropriate route for such an order to be made and I am unpersuaded that I should make any such order and I am quite satisfied that if any order is to be made, then it is to be made pursuant to an alternative application if any such application is to be pursued with appropriate evidence, with the defendants having an opportunity to respond if they wish to do so….
>
> …However, there is in my judgment an important matter of process here. It is not appropriate for an application to be made for disclosure against a person save in the circumstances prescribed by 31.17 and 31.18. Those do not apply in this case and I hold that the application is misconceived and this application will be dismissed."

19 The Judge was invited by Mr Asquith to record, if he considered it appropriate, that the application was "totally without merit". He acceded to the application, repeating:

> "I am quite clear that if any application was to be made it should have been made either under Part 18 or 31.12. It is not appropriate to have made this application. I am afraid I do think it is totally without merit."

Subsequent events

20 The unhappy saga continued. Taking up the suggestion of the Judge, the appellant made an application to the court against the defendants, his sisters, pursuant to CPR 31.12. That came before HH Judge Parfitt in the Central London County Court on 15 September 2017. Again, the defendants were present, as was the appellant, but on this occasion neither Mr Asquith nor his client were present.

21 It appears, from what the appellant says, that both he and the defendants were somewhat surprised to find that HH Judge Parfitt was at first under the impression that he was dealing with an application of some kind by the defendants, instead of an application by the appellant under CPR 31.12. We do not have a copy of a judgment of Judge Parfitt, but his order records:

> "On the claimant's [that is the appellant here] application for disclosure and on the court commenting that a tape recording of a telephone conversation involving the defendants (or either of them) made by and held by a third party insurance company was not in the control of the defendants for the purposes of disclosure, notwithstanding any subject access request rights that the defendants might have made under the Data Protection Act, and on the claimant indicating that he agreed with that summary but was refused disclosure against the third party on the basis that an application for specific disclosure could be made against the defendants for the tape recording, and on the court finding that the relevant tape recording was not in the control of the defendants (or either of them) he ordered that the claimant's application for disclosure should be dismissed."

22 Apparently the hearing took about half an hour. It is not clear why the court made the finding that the relevant tape recording was not in the control of the defendants. The appellant states that, although in the course of that hearing there was some discussion about where the tape recording was, the defendants did not inform the court that the tape recording (or a copy of it) had apparently been in their possession since 31 May 2017 - several months before that hearing.

23 No more than a day or two before today's hearing, Mr Asquith's clients disclosed to the appellant, and to the court, correspondence between the respondent and the defendants immediately following the decision of Judge Freeland in May 2017. This correspondence purports to show that on 26 May 2017 Camilla emailed the solicitors for the respondent and asked them if they would provide a copy of the tape recording of the phone call "that I made to More Than Insurance (RSA) around November 2015 regarding my late mother's original policy (Mrs Hannah Sarayiah)." On 31 May the solicitor responded to her:

> "We have taken instructions from our client who has agreed to provide you with the documents you have requested. Please find enclosed the following …"

Various policy booklets and schedules were identified, and then the solicitor continued:

> "A copy of the call recording will follow by post on a password protected CD."

The CD was sent to Camilla Sarayiah under cover of a letter of the same date, for which she thanked the solicitor.

24 In a letter sent to the defendants dated 4 April 2018 (that is a few days ago) and copied to the court, the solicitors for the respondent state:

> "Given the above it is unclear to us how Judge Parfitt was able to conclude that neither you nor your solicitor was (as at 15 September 2017) in control of the telephone call recording, given that at the time of the hearing it was in the possession and control of one of the defendants (Ms Camilla Sarayiah) and seeks clarification from the defendants."

We do not know what clarification, if any, the defendants have provided.

25 Thus, the appellant, having first applied for disclosure under r.31.17 and been rejected, on the ground that he had an alternative means of obtaining disclosure (CPR 31.12), and having then taken that alternative course, is told that that course, too, does not apply, because the tape recording was not in the control of the defendants. In fact, at the time he appears to have been told this by Judge Parfitt, at the hearing in September 2017, the tape had apparently been in the defendants' possession for several months.

This appeal

26 With that unhappy background, I come to the grounds of appeal. The appellant, with considerable skill, has challenged on a number of grounds the decision of HH Judge Freeland QC to refuse his original application. One of the grounds, which Mr Asquith described as "the meat of the appellant's case", is an assertion that the judge was wrong to find that the defendants were also a source of the information sought, because the defendants did not at that time have the information, ie. the tape recording, in their possession. The appellant also argues that the judge did not address correctly the criteria in CPR 31.17. In that respect he has cited a considerable amount of case law, which has been the subject of argument before me. He further complains that the judge failed to take into account that the appellant had already tried unsuccessfully to persuade the defendants to request the information from the respondent and that the defendants had steadfastly refused, including when the matter was raised again at the hearing before the judge. The appellant also submits that by requiring him to, as he put it, "go around the houses again" by making a further application, this time under CPR 31.12, the judge failed to take proper account of the overriding objective set out in CPR 1, thereby increasing the appellant's costs and the judicial resources required.

27 As an alternative submission, the appellant suggests that if the judge was not going to grant the order sought under 31.17, he ought to have exercised his discretion to abridge time and ought to have heard the application under CPR 31.12 immediately, given that there would be no prejudice to the defendants as all the evidence was identical and the defendants were present at the hearing. That would have precluded the need for a further application and a further hearing. He submits that the judge erred in not taking into account, as a factor in deciding the matter, the appellant's means and his situation, as a litigant in person who is impecunious and on benefits.

28 Those, broadly speaking, are the main points made by the appellant in the appeal.

29 In his able and forceful submissions, Mr Asquith seeks to uphold the learned judge's decision. He contends that, in deciding that the criterion of necessity in CPR 31.17(3)(b) was not satisfied given that the appellant had an alternative means of obtaining the tape recording, namely an order against the defendants under CPR 31.12, he correctly applied CPR 31.17.

30 In the course of his submissions and, indeed, those of the appellant, I have had drawn to my attention several authorities which deal with an application of this kind against a third party. The criteria are relatively well-established. The relevant CPR rule requires the application to be supported by evidence. There was no contention in this court or in the court below that that requirement was not complied with. The rule then goes on to state that the court may make an order under this rule only where (a) the documents of which disclosure is sought are likely to support the case of the applicant or adversely affect the case of one of the other parties to the proceedings. As to that, no real issue was taken by the respondent at the hearing below. For, although the defendants had stated that they regarded the tape recording as irrelevant, the fact remains that it was expressly relied upon by the appellant in the Particulars of Claim. Further, in his evidence he indicates why in his submission the recording supports his case and is adverse to the case of the defendants. The only comment on this point by the judge was: "whether this, namely, the tape recording, is referable in any way to the pleaded causes of action is perhaps a matter of debate but not one upon on which I need to rule today."

31 The real battleground, upon which the matter was ultimately determined, was the next criterion, namely, that the disclosure in question must be necessary in order to dispose fairly of the claim or to save costs. In relation to that, the notes at paragraph 31.17.4 of the current edition of the *White Book* record that the court has a wide discretion but

> "Disclosure is restricted to those cases where it is necessary for one or both of the reasons stated. This is unlikely to be the case where the documents are available from another source… Ordering disclosure against non-parties is the exception rather than the rule … and the jurisdiction should be exercised with caution."

32 The issue of "necessity" has been the subject of a number of decisions. I will refer briefly to some of them. A decision of King J in *Campaign Against Arms Trade v BAE Systems PLC* [2007] EWHC 330 (QB), concerned an application under the *Norwich Pharmacal* jurisdiction rather than CPR 31. At paragraphs 16 and 20 of his judgment, King J said this with respect to the requirement for necessity:

> "This 'necessity' requirement will however vary in its impact according to the circumstances in which the application is being made...
> Miss Montgomery in her skeleton argument, relying on the authority of *Mitsui*, at para. 24, asserts that the test of necessity required for the exercise of the *Norwich Pharmacal* jurisdiction is not met where the applicant has failed to exhaust 'other available avenues' through which the information might be obtained. In my view this is to put the matter too high and to put the discretion of the court into too much of a straitjacket. Of course, as Lightman J. said in the passage cited above, the court must always have in mind the public interest in not involving innocent third parties if this can be avoided and 'a necessity required to justify exercise of this intrusive jurisdiction is the necessity arising from the absence of any other practicable means of obtaining the essential information'. But when determining what is practicable for these purposes the court in my judgment is entitled to have regard to all the circumstances prevailing in the particular case, including for example the size and resources of the applicant as an organisation, and the urgency of its need to obtain the information it requires, and any public interest in it having its need satisfied."

33 One bears in mind that that was a *Norwich Pharmacal* application. In CPR r.31.17 the requirement of necessity is expressly stipulated as a condition of the relief. However, in my view there is no good reason why the substance of what is "necessary" for the purpose of CPR r.31.17 should differ. Therefore, the *dicta* of King J also provide guidance in applying CPR 31.17.

34 Reference was also made to *Mohammed v Secretary of State for Foreign and Commonwealth Affairs* [2008] EWHC 2048, a decision of the Divisional Court where, again, the issue of "necessity" arose in a *Norwich Pharmacal* context. Thomas LJ (as he then was) said at paragraph 94 of the judgment:

> "It seems to us that the observations of Lightman J in *Mitsui* and Langley J in *Nikitin* put an undue constraint upon what is intended to be an exceptional though flexible remedy. The intrusion into the business of others which the exercise of the *Norwich Pharmacal* jurisdiction obviously entails means that a court should not, as Lord Woolf CJ in the *Ashworth Hospital Authority* case made clear, require such information to be provided unless it is necessary. But in our view, there is nothing in any authority which justifies a more stringent requirement than necessity by elevating the test to the information being a missing piece of the jigsaw or to it being a remedy of last resort. We agree in this respect with the views expressed in *Hollander Documentary Evidence*, 9th edition (2006) paragraphs 5-26. Moreover it would be inconsistent with the flexible nature of this remedy to erect artificial barriers of this kind. In our view the approach of King J in *Campaign Against the Arms Trade* case is to be preferred."

35 Finally, in *Omar v Secretary of State for Foreign and Commonwealth Affairs* [2013] EWCA Civ 118, a decision of the Court of Appeal, Maurice Kay LJ, at paragraph 30, once more in the context of the *Norwich Pharmacal* jurisdiction, said:

> "Whilst necessity is sometimes referred to as if it were simply a matter for consideration in the exercise of discretion, in truth it is more than that. It is a test which must be satisfied if *Norwich Pharmacal* relief is to follow. The first sentence in paragraph 57 of Lord Woolf CJ's speech makes that plain. Nevertheless, I agree with the statement of the Divisional Court in the present case … that
>
> > 'the requirement of necessity is a requirement that must be dictated flexibly in the circumstances of each case.'
>
> Moreover, in this context there is no practical or substantial difference between a requirement of 'necessity in the interests of justice' and a test of what is 'just and convenient in the interests of justice' …"

36 Mr Asquith has vigorously submitted that there is no error or omission of any significance in the analysis of the learned judge below. I bear in mind that the hearing below was no doubt relatively brief, and merely one in a lengthy list of cases to be dealt with. However, the judge did not make reference to the flexible nature of the concept of necessity for this

purpose, or to the fact that the precise scope of the concept falls to be determined in the light of the facts of a particular case. Nor, did he refer, expressly at any rate, to the fact that, provided the "necessity" criterion in sub rule (3) of this rule is satisfied having due regard to the flexible nature of the concept understood in the light of all the circumstances, there is an overarching discretion to grant or refuse an order of this kind. One is unable to see from the judgment what, if any, considerations the judge took into account, other than the fact that he considered there was, potentially at any rate, an alternative means of obtaining the information, namely an application against the defendants directly under CPR 31.12.

37 In addition, as discussed in the course of argument, the way in which the learned judge expressed himself in the passages to which I have referred suggest that he considered there was, by reason of that alternative source, if not an absolute bar then an almost insuperable obstacle to granting or even considering on its merits an order against the third party under CPR r.31.17.

38 In these circumstances, notwithstanding Mr Asquith's argument to the contrary, one cannot be satisfied that the judge directed himself to other considerations which were relevant to the criterion of necessity, such as those to which King J referred, including the resources or other circumstances of an applicant for relief. In this case the applicant is an impecunious litigant in person who seeks a document which undoubtedly exists in the possession of the third party, namely the tape recording. It is, moreover, clear that the defendants are unwilling to cooperate with the appellant in obtaining a copy the recording. There is nothing in the judgment to indicate that those factors have been taken into account.

39 The other question which, in my view, ought to have been considered is whether, on the basis of the circumstances known to the judge, the alternative application under CPR 31.12 that he thought provided an appropriate alternative source, thereby precluding an order under CPR 31.17, would itself have been problematical. That raises the further question whether the court would, in the circumstances known to it at the time, have had jurisdiction under CPR 31.12 to make an order against the defendants in respect of the tape recording. The judgment below proceeded on the basis that there is very little, if any, doubt that it would, as Mr Asquith has submitted to be correct.

40 It is accepted, in the light of the authorities and the rule itself, that documents would have to be in the "control" of a litigant in order for an order to be made. It is clear that the defendants would not have had (in the words of CPR 31.8) "physical possession" of the recording. They might only have had, at best, "a right to possession of it". That is one of the three instances where documents are considered by the Rule to be in the "control" of a litigant for this purpose.

41 I was referred by the parties to several authorities on the meaning of "control". In particular, both the appellant and the respondent referred me to a decision of the Court of Appeal, on appeal from Lloyd J (as he then was), in *North Shore Ventures Limited and Anstead Holdings Inc.* [2010] EWHC 2648 (Ch). In that case the Court of Appeal considered the relevant authorities at some length Various *dicta* in those cases were relied upon, including a passage (quoted at paragraph 28 of the Court of Appeal's judgment) from the speech of Lord Diplock (with whom the other members of the Judicial Committee of the House of Lords agreed) in the well-known *Lonrho Limited v Shell Petroleum Co Ltd* [1980] 1 WLR 627 case. At page 635, Lord Diplock said:

> "In the context of the phrase 'possession, custody or power', the expression 'power' must, in my view, mean a presently enforceable legal right to obtain from whoever actually holds the document

> inspection of it without the need to obtain the consent of anyone else."

42 Unsurprisingly the appellant places considerable reliance on that passage, in the light of the respondent's argument that, because the respondent had indicated at the hearing before the judge that it was willing to provide the tape recording to the defendants on their requesting it, that made the question of control for the purposes of CPR 31.12 a non-issue.

43 Also cited by the Court of Appeal, at paragraph 30 of the judgment, was the following statement of Shaw LJ in the *Lonrho* case:

> "In the end I have come to view that a document can be said to be in the power of a party for the purposes of disclosure only if, at the time and in the situation which obtains at the date of discovery, that party is, on the factual realities of the case virtually in possession (as with a one-man company in relation to documents of the company) or otherwise has a present indefeasible legal right to demand possession from the person in whose possession or control it is at that time."

44 The Court of Appeal also referred to the judgment of Floyd J (as he then was) in *Schlumberger Holdings Limited v Electromagnetic Geoservices AS* [2008] EWHC 56 (Pat), where the judge said:

> "I accept that the mere fact that a party to litigation may be able to obtain documents by seeking the consent of a third party will not of its own be sufficient to make that party's documents disclosable by the party to the litigation. They are not within his present or past control precisely because it is conceivable that the third party may refuse to give consent. But what happens where the evidence reveals that the party has already enjoyed, and continues to enjoy, the co-operation and consent of the third party to inspect his documents and take copies and has already produced a list of documents based on the consent that has been given and where there is no reason to suppose that that position may change?"

45 In *North Shore Ventures* (above) monies, allegedly obtained in breach of trust, had been put into a trust by a party, apparently beyond that party's own reach. The alleged trust was held to be a sham, and the question was whether documents were within the party's control within the meaning of CPR 31.8. At paragraph 40 the Court of Appeal said this:

> "If that was the true relationship between the appellants and the trustees, the judge was entitled in my view to regard documents in the physical possession of the trustees relating to the administration of the trust as documents in the appellants' control within the meaning of CPR 31.8. In determining whether documents in the physical possession of a third party are in a litigant's control for the purposes of CPR 31.8, the court must have regard to the true nature of the relationship between the third party and the litigant. The concept of 'right to possession' in CPR 31.8(2)(b) covers a situation where a third party is in possession of documents as agent for a litigant. The same would apply in my view if the true nature of the relationship was that the litigant was to be the puppet master in the

> handling of money entrusted to him for the specific purpose of defeating the claim of a creditor. The situation would be akin to agency. But even if there were on a strict legal view no 'right to possession', for example, because the parties to the arrangement caused the documents to be held in a jurisdiction whose laws would preclude the physical possessor from handing them over to the party at whose behest he was truly acting, it would be open to the English court in such circumstances to find that as a matter of fact the documents were nevertheless within the control of that party within the meaning of CPR 31.8(1). CPR 31.8(2) states that for the purpose of CPR 31.8(1) a party has or has had a document in his control if the case falls within paragraphs (a) to (c). It does not state that a party has or has had a document in his control if but only if the case falls within one of those paragraphs."

46 Mr Asquith relies upon the last two sentences of that quotation as indicating, as it does appear to, that the concept of control is not limited to the three examples given in CPR 31.8, and also as implicitly supporting what he submits to be the judge's finding, that the tape recording was to be regarded as within the control of the defendants and, therefore, that it was not “necessary” to obtain the recording from the third party under CPR 31.17. However, it is not possible to see whether the potential issue of jurisdiction to grant an order against the defendants under CPR 31.12 played any part in the learned judge's decision in the present case.

47 Mr Asquith submits that jurisdiction was not an issue, and he points out that, at the stage where he was dealing with the criterion of necessity, the judge referred to the disclosure lists. However, the disclosure lists do not take the matter very far. A clear distinction is drawn in the defendants' lists between what is said to be "a copy of a phone conversation" (that being the wording used by the appellant in his own list) and what the defendants say later by way of objection: "no recording exists in the defendants' possession". It is not clear to what the defendants intended to refer by "a copy of a phone conversation", which was said to be in their control. It is possible that they had a note of a conversation that Camilla had had with the respondent. Nor is it at all clear that in that phrase they are referring to the tape recording. The doubt is increased by their statement that they have no recording of their own.

48 There is, therefore, nothing to indicate that the learned judge actually directed his mind to the difficulties that the appellant might well encounter if he were to make an alternative application under CPR 31.12 against the defendants. In those circumstances, given that the judge appears to have considered that the very possibility of such an application precluded an application for disclosure against the respondent, I consider that he misdirected himself as to the appropriate approach in an application of this kind, and, in particular, as to how the question of necessity should be approached.

Conclusions

49 In the light of this, and of the other relevant factors which do not appear to have been taken into account, the decision to refuse the application cannot stand, and the appeal should succeed.

50 The question then arises whether I should remit the matter to the court below to reconsider it in accordance with this judgment and the applicable case law, or whether I should consider

it myself, in the interests of saving costs and time. Both parties have indicated that if I were to come to the conclusion that the decision could not stand, I should deal with the application under CPR 31.17 myself rather than remitting it. I propose to accede to that suggestion.

51 Mr Asquith has submitted that, in doing so, I should not take account of what happened after the hearing and decision below. I consider that is right in the circumstances. As already noted, it now appears that, following the determination of the original application, the defendants obtained a copy of the tape recording from the respondent. It is most unfortunate that the defendants did not mention to HH Judge Parfitt that they actually possessed a copy. Of course, the defendants are not now present in court to comment on what actually happened, either with respect to the apparent receipt of a copy, or at that hearing. However, on the face of it, they apparently allowed HH Judge Parfitt to conclude that they did not have access to the recording, and to use that as a reason for refusing the appellant's application under CPR 31.12.

52 I have come to the conclusion, in all the circumstances, that the fact (if it be so) that after the decision below the defendants apparently acquired a copy, cannot of itself preclude the ability of the court now to make an order under CPR 31.17, or determine the way in which the court should exercise its discretion. It would be wholly undesirable and inappropriate, both generally and having regard to the overriding objective, for me to be obliged to refuse the application by reason only of the fact that there may now be jurisdiction to make an order under CPR 31.12. That would result in this issue being further prolonged and would involve further use of finite court time and resources, and, further, stress and expense for the appellant. Nor do I consider that to be the position under CPR 31.17. In all the circumstances, the apparent existence of jurisdiction under CPR 31.12 is not a factor which would, by itself, prevent an order in favour of the appellant under CPR 31.17.

53 In my view the criterion under CPR 31.17(3)(a) is clearly satisfied on the evidence. It is clear in light of the case law that the condition that the documents sought are likely to support the case of the applicant or adversely affect the case of the other party to the proceedings, is to be regarded as a requirement that they *may well* fulfil that role, and not as being in any way a requirement that the balance of probabilities should be satisfied. The material before me indicates that the tape recording is a document relevant to the harassment claim that is being brought by the appellant, and easily satisfies the criterion in question.

54 I turn to the criterion of necessity in CPR 31.17(3) (b), i.e. whether disclosure from the third party is “necessary”, in order to dispose fairly of the claim or to save costs. The appellant contends that the reference to saving costs is relevant here because, if he has to make a yet further application under CPR 31.12, and even if he would be likely do so successfully in view of the situation which has become known to him over the last few days, it would increase his costs, and the stress he has experienced, and would cause further prolonged delay.

55 His reference to saving costs is probably not apposite, as it is not clear to me that the Rule is referring to saving costs in that sense. Therefore, I do not consider it right to rely on the basis that costs may be saved by the order sought.

56 However, I do consider that an order for disclosure against the respondent is necessary to dispose fairly of the claim. As seen, the concept of “necessity” is to be interpreted in a flexible way, in the light of all the circumstances. As indicated earlier, the fact that there may be an alternative remedy is not determinative, particularly when, if required to pursue that remedy, the appellant would have to make a yet further application, in circumstances

where he has already made two unsuccessfully, with considerable resultant delay and cost in progressing the matter, and where the defendants have been uncooperative throughout. His impecuniosity, his status as a litigant in person, and the (still) uncertain outcome of a further application against the defendants, together with further delays and expense, are all factors which support a finding that the order sought is justified as "necessary" under the Rule. I therefore consider that the disclosure in question should not be further delayed. On the somewhat unusual facts of this case, it is clearly necessary and appropriate that the order should now be made against the respondent. In so concluding, I have had regard to the inevitable intrusion into the affairs of the respondent as a non-party. However, there is in fact likely to be little inconvenience or prejudice to the respondent in supplying the recording and other documentary material to the appellant.

57 For those reasons, I consider that the requirements of CPR 31.17 are satisfied, and that I should exercise my discretion in favour of making the order against the respondent. The appeal, therefore, will be allowed and the tape recording and various documents referred to in the application, including correspondence relating to the recording and to the removal of the appellant as an interested party from the scope of the insurance policy, must be disclosed by the respondent to the appellant.

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