IN THE ROYAL COURT OF JUSTICE
KINGS BENCH DIVISION

Case No. KB-2022-004473

Neutral Citation Number: [2024] EWHC 1872 (KB)

Courtroom No. 13

Strand
London
WC2A 2LL

Friday, 7th June 2024

Before:
THE HONOURABLE MRS JUSTICE HILL DBE

B E T W E E N:

ASHRAFUL ALAM KHOKAN

Claimant

and

JAWAD HOSSAIN NIRJHOR

Defendant

MR ADRIAN DAVIES appeared on behalf of the Claimant
MR RUSSELL WILCOX appeared on behalf of the Defendant

JUDGMENT
(Approved)

MRS JUSTICE HILL DBE:

Introduction

1. This is my judgment on two applications.

2. The first is the Defendant's application dated 18 March 2024. This application relates in part to an immediate costs order made by Senior Master Cook on 21 February 2024, ordering the Claimant to pay the Defendant £20,646.58 in costs. The Defendant seeks an order that unless those costs are paid, the Claimant's claim will be struck out. The application also seeks security for costs primarily in the sum of £80,000, alternatively in the sum of £26,000, to reflect the costs of enforcing the costs order in the USA. The Defendant seeks an order that the claim is stayed until the security is given.

3. The second application is the Claimant's cross-application dated 8 May 2024. Initially, the application had sought an extension of time to pay the costs until 31 July 2024 and relief from sanctions. However, by correspondence dated 28 May 2024 the Claimant indicated an intention to amend the application notice to read as follows, "Additionally or alternatively to stay execution of the Senior Master's order of 21 February 2024". The White Book makes clear that the court's power to amend a statement of case or to grant permission for that does not extend to an application notice, but there is a general power under CPR 3.1(2)(m) to do so because there is a power therein to "take any other step or make any other order for the purpose of managing a case and furthering the overriding objective". The Defendant did not oppose the Claimant amending the application notice in this way and I, therefore, permit the amendment under CPR 3.1(2)(m).

4. The Defendant's application is supported by three witness statements from the Defendant's solicitor, Ushrat Sultana, dated 18 March 2024 and 24 and 30 May 2024. The Claimant has supported his application with two witness statements from himself dated 7 and 29 May 2024. I have been provided with a lengthy hearing bundle and a supplementary bundle containing the trial witness statements, which I have considered. I have been greatly assisted by the written and oral submissions from both counsel.

The factual background

5. This is a defamation claim that is currently listed for trial over five days commencing on 1 July 2024. The Claimant is a journalist of Bangladeshi origin living in the United States of America. He previously served as the Prime Minister of Bangladesh's Deputy Press Secretary from 2013 to 2022. The Defendant is an investigative journalist and editor-in-charge of corruptioninmedia.com, described as a non-profit outlet based in London, which investigates and reports upon corruption amongst Bangladeshi journalists and media organisations.

6. The claim relates to the publication by the Defendant on 8 March 2022 on three separate

social media platforms of a video entitled "Gujob Khokan", meaning "Speculative Khokan". It is claimed that in their ordinary and natural meaning, each of the videos bore, and was understood to bear, a series of imputations about the Claimant that were defamatory, primarily as follows: (a) the Claimant was the mastermind behind the killing of a senior journalist on 4 September 2018, who was killed because he was having an affair with the Claimant's wife; and that the Claimant then tried to cover up the death; (b) the Claimant, through nepotism rather than merit, obtained a high-ranking position within the Prime Minister's Office in Bangladesh and subsequently abused his position by engaging in a slew of serious criminal activities, including embezzlement, extortion and corruption; and as a consequence he was removed from his position and forced to leave the country; and (c) the Claimant is a womaniser with an addiction to alcohol who had engaged in a large number of extra-marital affairs.

7. The Defendant relies heavily on two reports into the Claimant's conduct, said to have been produced by the Bangladesh National Security Intelligence Agency. Relying on the matters in those reports the Defendant pleads substantive defences of truth and public interest. He also raises limitation and puts the Claimant to proof as to serious harm, including as to the extent of publication within this jurisdiction.

8. The Defendant contends that the meaning advanced by the Claimant of the videos must be qualified in various respects. The meaning of the video and whether it was defamatory of the Claimant are therefore also issues for trial, Master Brown having decided on 2 November that a preliminary issue trial was not appropriate in this case. The trial judge will also need to determine what, if any, remedy the Claimant is entitled to if his claim succeeds.

The procedural history

9. The claim was issued on 15 November 2022.

10. On 11 January 2023, an application was made by the Claimant for default judgment, or in the alternative, summary determination, under the Defamation Act 1996, section 8. The application was heard by HHJ Lewis, sitting as a judge of the High Court, on 11 May 2023. The Defendant attended the hearing in person and handed copies of the reports on which he said he wanted to rely to both the judge and the Claimant's representatives. The judge refused the Claimant's application. He ordered the Defendant to pay the Claimant's costs of and occasioned by the application, including the Claimant's costs of the hearing of the application, to be assessed on a standard basis if not agreed.

11. It is to some degree relevant to later events that as page 12A of the transcript makes clear, HHJ Lewis specifically warned the Claimant that the application under section 8 did not comply with the essential requirements for a summary determination application, as set out in Practice Direction 53B, paragraph 7.1.

12. The matter came before the Senior Master on 21 February 2024, because the Claimant made a further application for summary disposal and/or summary judgment as well as for certain disclosure orders. The Claimant's application was heard by the Senior Master alongside an application by the Defendant to make minor amendments to the Defence. It was this hearing that led to the costs order in issue. The Claimant was represented at the hearing by

Mr Wakil Ahmed of Amanah Solicitors, his solicitor from the outset of proceedings.

13. The Senior Master dismissed the Claimant's application. The Defendant's application was granted. The transcript of the hearing before the Senior Master is not available, but it is clear from paragraph 8 of Ushrat Sultana's 24 May 2024 statement, which has not been challenged, that the Senior Master was roundly critical of the Claimant's conduct in a range of ways.

14. The Claimant's application was plainly considered unmeritorious other than in one respect. I am told that this was because the Defendant's solicitor had misunderstood a certain part of the disclosure obligations in relation to journalistic sources and that this was to be remedied. I am told that this was not a point that had been taken by the Claimant, but emerged in the course of exchanges with the Senior Master.

15. In light of the criticisms of the Claimant, despite specific representations by his solicitor at the hearing that the payment of the costs should be delayed until conclusion of the proceedings, so that they could, if necessary, be partially or wholly set off against the costs order awarded against the Defendant by HHJ Lewis, the Senior Master made the following order: that the Claimant should pay 80% of the Defendant's costs in relation to the Claimant's application, and 100% of his costs in relation to the Defendant's application, on an indemnity basis. The respective sums were summarily assessed as £18,102.08 and £2,544.50, giving a total of £20,646.58.

16. These reflected a calculation made from the sums drawn on the Defendant's cost schedules. In other words, the Senior Master made no deduction to reflect the possibility that on detailed assessment, even on an indemnity cost basis, the Defendant would not have recovered all the costs. Mr Wilcox, on behalf of the Defendant, contended that this further reflected the Senior Master's disapproval of the Claimant's conduct.

17. The Senior Master ordered that the sums be paid by 4pm on 7 March 2024. It is accepted that these sums have not been paid and therefore that the Claimant is in breach of the order. Mr Davies, counsel for the Claimant at the hearing before me today, but not before the Senior Master, pragmatically accepted that it was clear that the Senior Master had been critical of his client's conduct.

The legal principles

(i): Variation to orders and unless orders

18. Under CPR 3.1(2)(a) the court has power to extend or shorten time for compliance with an order; and under CPR 3.1(7) the court has power to vary or revoke an order.

19. The Defendant places significant reliance on the judgment of Sir Richard Field, sitting as a Deputy Judge of the High Court, in *Michael Wilson & Partners v Sinclair* [2017] EWHC 2424 (Comm); [2017] 5 Costs LR 877.

20. At [23], the Deputy Judge referred to *Crystal Decisions UK Limited v Vedatech Corp* [2006] EWHC 3500 (Ch) as one of the authorities on the approach to be taken where cost orders are not paid by parties to ongoing litigation. In *Crystal Decisions* at [10], Patten J had observed that parties faced with opponents who are "not resident within the jurisdiction, and have no assets here" are "likely" to find the usual remedies to enforce a judgment for costs, such as seeking an order for payment and a charging order against any known assets or proceedings for contempt "to be of limited value". At [16], Patten J had said as follows:

> "In any event I take the view that orders of the court, even in relation to interim costs, require to be complied with and that, unless there is some overwhelming consideration falling within Article 6 [ECHR] that compels the court to take a different view, the normal consequence of a failure to comply with such an order, is that the court, in order to protect its own procedure, should make compliance with that order a condition of the party in question being able to continue with the litigation".

21. At [24], the Deputy Judge noted that in dismissing Vedatech's application for permission to appeal the unless order granted by Patten J, Chadwick LJ, with whom Laws LJ agreed, said as follows:

> "But thirdly – and, to my mind, most importantly - the court's ability to make interlocutory costs orders is a sanction which is available to it in order to encourage responsible litigation. The court marks what it regards as an irresponsible application by an immediate order for the payment of costs. That is intended to bring home to a party - when considering whether to make an application - that an unsuccessful application may carry a price which will have to be paid at once. If the court is not in a position to enforce immediate interlocutory orders for the payment of costs which it was thought right to make, then the force of that sanction is seriously undermined. It is important that, in cases where the court thinks it right to make an order for immediate payment on an interlocutory application, that it does have the power - and can exercise the power - to ensure that order is met. For the reasons which Patten J explained, the only effective sanction in a case of this nature is to require payment of interlocutory costs as the price of being allowed to continue to contest the proceedings. Unless the party against whom an order is made is prepared to, or can be compelled to, comply with, that order, the order might just as well not be made".

22. At [25], he noted that in respect of [16] of Patten J's judgment quoted above, Chadwick LJ said:

> "For my part, I would hold that - whether or not a statement in such general terms can be supported – the proposition can be supported in a case (such as the present) where there is no other effective way of ensuring that the interim costs order is satisfied. That, of course, is always subject to what the judge referred to as the overwhelming consideration falling within Article 6: that orders requiring payment of costs as a condition of proceeding with litigation are not made in circumstances where to enforce such an order would drive a party from access to justice. But, for the reasons that the

judge explained and to which I have already referred, this was not such a case".

23. The Deputy Judge referred to further authorities on the approach the court should take when dealing with an application that a party to ongoing litigation should be debarred from continuing to participate in the litigation by reason of having failed to pay an order for costs made in the course of the proceedings. At [29], he distilled the relevant principles as follows:

> "(1) The imposition of a sanction for non-payment of a costs order involves the exercise of a discretion pursuant to the Court's inherent jurisdiction.
>
> (2) The Court should keep carefully in mind the policy behind the imposition of costs orders made payable within a specified period of time before the end of the litigation, namely, that they serve to discourage irresponsible interlocutory applications or resistance to successful interlocutory applications.
>
> (3) Consideration must be given to all the relevant circumstances including: (a) the potential applicability of Article 6 ECHR; (b) the availability of alternative means of enforcing the costs order through the different mechanisms of execution; (c) whether the court making the costs order did so notwithstanding a submission that it was inappropriate to make a costs order payable before the conclusion of the proceedings in question; and where no such submission was made whether it ought to have been made or there is no good reason for it not having been made.
>
> (4) A submission by the party in default that he lacks the means to pay and that therefore a debarring order would be a denial of justice and/or in breach of Article 6 of ECHR should be supported by detailed, cogent and proper evidence which gives full and frank disclosure of the witness's financial position including his or her prospects of raising the necessary funds where his or her cash resources are insufficient to meet the liability.
>
> (5) Where the defaulting party appears to have no or markedly insufficient assets in the jurisdiction and has not adduced proper and sufficient evidence of impecuniosity, the court ought generally to require payment of the costs order as the price for being allowed to continue to contest the proceedings unless there are strong reasons for not so ordering.
>
> (6) If the court decides that a debarring order should be made, the order ought to be an unless order except where there are strong reasons for imposing an immediate order".

(ii): Relief from sanctions

24. CPR 3.9 provides:

> (1) On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order, the court will consider all the circumstances of the case, so as to enable it to deal justly with the application, including the need –
>
> (a) for litigation to be conducted efficiently and at proportionate cost; and
>
> (b) to enforce compliance with rules, practice directions and orders.

25. As is well known, in *Denton & Ors v TH White Ltd & Ors* [2014]1 WLR 3926 the Court of Appeal set out a three-stage test applicable when determining an application for relief from sanctions. Mr Davies, on behalf of the Claimant, contended that he does not require relief from sanctions because the Senior Master's order does not impose any such sanction. However, in my judgment, that is a distinction without a difference. This is because, although CPR 3.12A expressly confirms the court's power to extend time limits even after they have expired, in such cases the court will decide what, if any, extension of time to allow in accordance with the *Denton* principles. That much is clear from the *R and Hysaj & Ors (On the Application of) v Secretary of State for the Home Department* [2015] 1 WLR 2472.

26. Even if it can be said that this principle only applies to mandatory orders, there is a good argument for treating the Senior Master's order as such an order, especially given the context in which it was made and the indemnity basis on which it was made. Further, *Aramco Trading Fujairah FZE v Gulf Petrochem FZC* [2021] EWHC 2650 (Comm) at 22 suggests that it is prudent to consider the broad *Denton* principles in the alternative in this context in any event.

(iii): Security for costs

27. CPR 25.12(1) enables a defendant to any claim to apply for his costs of the proceedings. Under CPR 25.12(3) where the court makes an order for security for costs, it will (a) determine the amount of security; and (b) direct (i) the manner in which; and (ii) the time within which the security must be given.

28. CPR 25.13(1) provides that the court may make an order for security for costs under rule 25.12 if (a) it is satisfied, having regard to all the circumstances of the case, that it is just to make such an order; and (b) one or more of the conditions in paragraph (2) applies, or an enactment permits the court to require security for costs.

29. The Defendant here relies on the following two conditions from paragraph 2: (a) that the Claimant is "(i) resident out of the jurisdiction; but (ii) not resident in a State bound by the 2005 Hague Convention, as defined in section 1(3) of the Civil Jurisdiction and Judgments Act 1982"; and (g) that the Claimant has "taken steps in relation to his assets that would make it difficult to enforce an order for costs against him".

30. Once satisfied that one or more of the relevant conditions in CPR 25.13(2) is met, the court must then determine whether or not, having regard to all of the circumstances of the case, it is just to order security*, Infinity Distribution Ltd (in Administration) v Khan Partnership LLP* [2021] EWCA Civ 565.

31. The White Book, para. 25.3.1 explains that if the effect of an order for security would be to prevent the respondent to an application from continuing with the claim, security should not be ordered. The burden lies on the respondent to show, on the balance of probabilities, that the claim would be stifled: *Goldtrail Travel Ltd v Aydin* [2017] UKSC 7; [2017] 1 WLR 3014 at [12], [15] and [23]. To discharge that burden the respondent will need to show that he cannot provide security and cannot obtain appropriate assistance to do so. The court will expect there to be full and frank disclosure.

32. As to condition (a), relating to Claimants resident out of the jurisdiction, the court will normally determine whether or not to exercise its discretion to order security for costs on grounds relating to obstacles to or the burden of enforcement of a subsequent order for costs in the context of the particular foreign claimant or country concerned: see the judgment of the Court of Appeal in *Nasser v United Bank of Kuwait [*2002] 1 WLR 1868 [61-63].

33. In *Danilina v Chernukhin* [2018] EWCA Civ 1802 Hamblen LJ at [51] gave detailed guidance as to security for costs in this context.

34. To make such an order the court must be satisfied that the claimant is resident (i) out of the jurisdiction and (ii) in a non-Convention state; and that having regard to all the circumstances of the case, it is just to make such an order.

35. In order for the court to be satisfied that it is just to make the order the court has to ensure that its discretion is being exercised in a non-discriminatory manner for the purposes of Articles 6 and 14 of the ECHR. This requires "objectively justified grounds relating to obstacles to or the burden of enforcement in the context of the particular foreign claimant or country concerned". Such grounds exist where there is a "real risk" of "substantial obstacles to enforcement" or of an additional burden in terms of cost or delay. *Danilina* at [52](1) and [58] makes clear that the test is a "real risk" not a "likelihood" and thus, as Mr Wilcox rightly contended, something far less than a finding to the balance of probabilities.

36. The order for security should generally be tailored to cater for the relevant risk. Where the risk is of non-enforcement, security should usually be ordered by reference to the costs of the proceedings. Where the risk is limited to additional costs or delay, security should usually be ordered by reference to that extra burden of enforcement.

37. The White Book para. 25.13.1 makes clear that the merits of the underlying claim have limited relevance.

38. Further guidance in circumstances such as the present is to be drawn from the relevant paragraphs of *Nasser* as endorsed by *Danilina*.

39. Of particular relevance is the observation in *Nasser* at [62] that the justification for the discretion under Part 25.13(2)(a) and (b) and 25.15(1) in relation to individuals and companies ordinarily resident abroad is as follows: "….in some, it may well be many, cases

there are likely to be substantial obstacles to or a substantial extra burden (e.g. of costs or delay) in enforcing an English judgment, significantly greater than there would be as regards a party resident in England or in a Brussels or Lugano state".

40. In *Nasser*, consideration was given to a claimant resident in Milwaukee. At [66] it was held that although there was no express suggestion in the evidence that the defendants would face any extra burden in taking any such enforcement action against the claimant for costs, the court could "infer without more" that (i) the respondents would have to bring an action on any English judgment for costs, before proceeding to any enforcement steps that United States law or the law of Wisconsin permits; (ii) it was likely that the respondents would have to investigate whether the claimant's impecuniosity was as real and great as she had asserted, a task which was likely to be more expensive to undertake abroad than it would be if she was resident in the United Kingdom or a Brussels/Lugano state; (iii) the course of the litigation to date suggested that the claimant was a determined litigant who could be relied upon by one means or another to take every conceivable step she could to defend what she asserted to be her rights, but whose very lack of means to fund the appropriate conduct of litigation appeared prone to add to the difficulty faced by the defendants; and (iv) there would be likely to be delay in enforcement, by reason of each of the first three points.

41. Viewing the matter both in the light of these factors and as a matter of general common-sense, the Court considered that it could "infer that steps taken to enforce any English judgment for costs in the United States would thus be likely to involve a significantly greater burden in terms of costs and delay than enforcement of a costs order made against an unsuccessful domestic or Brussels/Lugano claimant or appellant".

42. At [67] the Court emphasised that the risk against which the defendants were entitled to protection was "not that the claimant will not have the assets to pay the costs, and not that the law of her state of residence will not recognise and enforce any judgment against her for costs". Rather, it was that "the steps taken to enforce any such judgment in the United States will involve an extra burden in terms of costs and delay, compared with any equivalent steps that could be taken here or in any other Brussels/Lugano state".

43. Finally, at [64], the Court confirmed that if security is granted on the grounds that enforcement will be burdensome, the amount ordered should be by reference to the extra burden of enforcement.

44. As to condition (g), relating to steps taken in relation to assets, the purpose of the condition is to prevent injustice to a defendant where the assets available to enforce any order for costs they obtain have been or are being put beyond the reach of enforcement: the White Book notes at 25.13.16.

45. The principles to be applied under this ground, drawn from various authorities, were summarised by Roth J in *Ackerman v Ackerman* [2011] EWHC 2183 (Ch) at [16]. This guidance has been cited with approval in a number of more recent cases: *Kolyada v Yurov* [2014] EWHC 2575 (Comm), [27], Al *Jaber v Al Ibrahim* [2019] EWHC 1136 (Comm) at [4] and *Re Tonstate Group Ltd* [2020] EWHC 328 (Ch) at [11].

46. The following aspects of Roth J's guidance are particularly relied on by the Defendant here.

47. First, the requirement is that the claimant has taken in relation to his assets steps which, if he loses the case and a costs order is made against him, will make that order difficult to enforce. It is not sufficient that the claimant has engaged in other conduct that may be dishonest or reprehensible. The test in that regard is objective: it is not concerned with the claimant's motivation but with the effect of steps which he has taken in relation to his assets.

48. Second, if it is reasonable to infer on all the evidence that a claimant has undisclosed assets, then his failure to disclose them could itself, although it might not necessarily, lead to the inference that he had put them out of reach of his creditors, including a potential creditor for costs.

49. Third, the burden is on the claimant to show that he is unable to provide security not only from his own resources but by way of raising the amount needed from others who could assist him in pursuing his claim, such as relatives and friends.

50. Fourth, when a party seeks to ensure that any security that may be required is within his resources, he must be full and candid as to his means: the court should scrutinise what it is told with a critical eye and may draw adverse inferences from any unexplained gaps in the evidence.

51. In *Dubai Islamic Bank PJSC v PSI Energy Holding Co BSC* [2011] EWCA Civ 761, an order under r.25.13(2)(g) was made in respect of an appeal where the appellant denied owning substantial assets and sought to explain his expensive lifestyle by saying that he was receiving loans from family, family affiliated companies and third parties: in the circumstances of the case the court felt able to draw a double inference, as to the existence of assets and also as to steps taken to hinder enforcement. At [29], the evidential requirements on an individual opposing an application for security for costs were reiterated.

The evidence on the applications

52. Ms Sultana's evidence, in particular paragraphs 19-30 of her 18 March 2024 statement, makes clear that she made significant efforts to chase the Claimant for payment of the monies owed under Senior Master Cook's order, both before and after 7 March 2024. The Claimant, in response, again raised the issue of set-off. He was reminded that the detailed assessment and set-off issues had both been canvassed before the Senior Master and rejected.

53. It was not until 18 March 2024, and so after the deadline set by the Senior Master of 7 March 2024, that the Claimant proposed that there would be an extension of time for compliance with the order until 31 July 2024. That is some weeks after the listing of the trial. The Defendant, perhaps understandably, made clear that that would not be acceptable.

54. The Defendant had previously raised the possibility of applying for security for costs but had not made such an application. The Defendant now considered, with good reason, that there was evidence that the Claimant was willing to ignore court orders in relation to costs, and so made this application. As I have indicated, this application was made on 18 March 2024. Further details of the rationale for the decision are set out in Ms Sultana's evidence.

She also sets out in detail, in particular at pages 30, 162, 187 and 189 of the bundle, the additional burdens that would be faced if it was necessary to commence enforcement against the Claimant in the United States.

55. The Defendant sought to have the application heard by a Master, but it appears that that was not possible. It was placed before Steyn J, and on 22 April 2024, she ordered that if the Claimant wished to file evidence in response to the application, he do so by 10 May 2024. It was in the course of that process that the Claimant made the application that is before me today.

56. I agree with Mr Wilcox that it is noteworthy that notwithstanding the date for compliance specified in the order (7 March 2024), and the making and issuing of the Defendant's application (18 and 31 March 2024), no action was taken by the Claimant until 8 May 2024 when the counter-application was issued. This was, in effect, the first time that there was any real acknowledgement that he was in breach of the order. It is right to note that the matter has not been able to be listed before a judge until today, but it does appear from the correspondence that part of the reason for that was a significant number of dates to avoid that were provided by the Claimant's team.

57. I have reviewed the Claimant's evidence in response of the application and in support of his own application, in particular the documentation that is set out and appended to his witness statements, with care. I accept the Defendant's submission that there are a number of concerning aspects to this evidence.

58. First, the Claimant has chosen to disclose very limited information in relation to his assets. Indeed, as is rightly highlighted, he does not positively assert that he has disclosed the full extent of his assets, nor has he given any justification for failing to do so.

59. Second, the bank statements he has provided from Webster Bank in relation to what is said to be his main bank account do not show evidence of ordinary income and expenditure. They are also limited to a period of three months when often one would expect to see a longer period of time evidenced by bank statements. It was only after being pressed by the Defendant that he acknowledged that there was another bank account, he said, jointly held with his wife. He said she did not grant permission to disclose the bank statements from that statement such that he could not disclose them. Putting aside the interesting legal question of whether the Claimant was correct to suggest that he would have no power to disclose statements of a bank account of which he is a joint owner, the point that is made persuasively by Mr Wilcox is that there is simply no evidence from the Claimant's wife that she has refused to allow him to do so.

60. Third, the Claimant has referenced in his evidence outstanding liabilities to his solicitors. He has said in his witness statement, dated 29 May 2024 at paragraph 13, that he still owes his solicitors over £30,000 in unpaid legal fees, which he intends to settle as soon as possible. However, there is no evidence from his solicitor to corroborate that assertion.

61. Fourth, he has said that he is about to instruct counsel for the trial, but he does not currently have the funds to cover such an instruction. This suggests that he does have additional funds over and above those disclosed, but that he is prioritising instructing his own counsel

over paying the costs owed to the Defendant. He has also instructed counsel for today's hearing, having previously been represented by his solicitor, at not inconsiderable cost.

62. Fifth, the Claimant claims to have cash flow difficulties, but this assertion is rendered problematic given the evidence about his lavish lifestyle. I was taken to several documents showing the Claimant apparently in possession of a very expensive watch, trying on clothes in designer shops, regularly travelling first class and things of that nature. There has been no clear denial of those assertions: the Claimant has simply asserted that photographs of him wearing items such as the watch do not necessarily imply he owns them. The watch allegation had also been put to the Claimant by a news agency, but he did not respond to it.

63. Sixth, the Claimant has provided evidence of supposed assets, which he says he has an interest in and will become liquid at the end of July 2024 which, overall, do not assist him.

64. I was taken to the evidence that the Claimant has provided in the form of a letter dated 7 May 2024 purporting to be from the President of Yahan Property Incorporated. This suggests that the Claimant has been involved in a project, as a director, for what are described as "luxurious homes". It is said in the letter that as a working partner in the project after selling the homes he will receive $30,000. "I hope I can sell those homes", says the writer of the letter, "before August 2024, and you will get your total amount of committed money".

65. However There is simply no clear evidence of the provenance of the letter and no detail given of the transactions to which it is said to relate. It is perhaps curious feature of the letter that the figure of $30,000 is just sufficient to set off the costs order. It is implicit in the letter that the Claimant has somehow been involved in what appears to be a luxurious real estate venture, which might suggest that he has significant amounts of disposable capital.

66. I was also taken to evidence in relation to some work that it is said that the Claimant has done while working for Property Inc and Channel i. This material, again, is in the form of a single letter dated 7 May 2024. This letter purports to be from the Head of Business Development at Channel i. It is said that he has been involved with that company as "advisor in the Creative Planning and Marketing Department". The letter states that because of the pandemic, the company has over $200,000 "stuck" in the advertising market. It continues: "We are trying to recover these dues from the market gradually. We are almost close to the light. We hope you'll get the rest of the current dues of $24,500 around 20 July". Earlier in the letter it is said that "a confirmation has been given from our channel provider that we will get our dues on 15 July 2024".

67. Again, the criticisms advanced of the quality of this evidence by the Defendant were, in my judgment, merited. Most significantly in relation to this particular letter, the Defendant made contact with contacts at Channel i, in particular a Mr Shykh Seraj, Director and the Head of News of the channel. In a recorded conversation, which was been transcribed, he stated that the Claimant is simply not an advisor for the channel in the manner suggested. That documentation throws further doubt on the reliability of this letter.

68. The Defendant contended that this evidence clearly suggests that the Claimant is being evasive, possibly even untruthful, in relation to his assets and is taking or has taken steps to

conceal the extent of his assets and at the very least, as I have said, is being evasive about them. Having scrutinised the evidence, for the reasons I have given, I consider that submission is entirely sound. Indeed, in submissions before me today, Mr Davies on the Claimant's behalf accepted that there were difficulties with this evidence as to his means.

The Defendant's submissions

69. Mr Wilcox argued that an unless order should be made in relation to the Senior Master's cost order in light of the following factors:

(i) The Claimant's deliberate non-compliance with the order;

(ii) The delay in responding to the non-compliance and the failure to make an application within the deadline or indeed promptly thereafter;

(iii) The lack of evidence that the Claimant planned to undertake any action in relation to the order until forced to do so by the Defendant;

(iv) The Claimant's inappropriate and arguably abusive attempts – in purportedly seeking to delay payment until 31 July 2024 and to set off the sums owing against the earlier costs order made by HHJ Lewis - to re-open matters which were argued before the Senior Master and rejected;

(v) The fact that the evidence that the Claimant lacks the funds to comply with the order promptly is "inadequate and highly suspect";

(vi) The suggestion that he does have additional funds that are not being disclosed; and

(vii) The behaviour of the Claimant overall in relation to the underlying claim: in bringing the 31 January 2024 application that went before the Senior Master, his conduct in relation to and at the hearing, and the suggestion that his conduct of the claim and the bringing of the claim has all the hallmarks of a Strategic Lawsuit Against Public Participation (a "SLAPP"), as canvased in Ms Sultana's 14 February 2024 witness statement.

70. He took issue with several points made by the Claimant in his evidence, contending that:

(i) Reliance on the merits of the underlying claim are largely irrelevant to this issue;

(ii) The suggestion by the Claimant that his present financial pressures have been caused by the Defendant was not substantiated; and

(iii) The Claimant's criticisms of the timing of the Defendant's application were unmerited: as soon as it was clear that the Claimant was evading compliance with Senior Master Cook's order, the application was made.

71. Mr Wilcox placed substantial reliance on the passages from *Michael Wilson* to which I have

referred. He reiterated the policy behind the imposition of immediate costs orders, as emphasised in *Michael Wilson* at [29](2). He argued that all three of the potentially relevant circumstances set out in [29](3) were relevant. In particular, there was limited availability of alternative means of enforcing the costs order through the different mechanisms of execution; and the court making the costs order (Senior Master Cook) did so notwithstanding a submission that it was inappropriate to make a costs order payable before the conclusion of the proceedings in question.

72. He emphasised the passages in the case law to the effect that unless there is an overwhelming consideration falling within Article 6, the normal consequence of a failure to comply with such an interlocutory costs order is that compliance with it is a condition of continuing with the litigation: see *Crystal Decisions* at [16] and *Michael Wilson* at [29](5) and [6].

73. As to the Defendant's application for security for costs, Mr Wilcox argued that the conditions in both CPR 25.13(2)(a) and (g) were met and there was a clear case for the court to exercise its discretion to make a security for costs order.

74. As to (a), it was accepted that the Claimant is resident (i) out of the jurisdiction and (ii) in a non-Convention state. Mr Wilcox contended that having regard to all the circumstances of the case, it would be just to make such an order. There was persuasive and clear evidence of substantial obstacles or substantial extra burdens in enforcing the costs against the Claimant in the US. As to (g), it was reasonable to infer the Claimant has undisclosed assets; that he has not been candid or possibly more about the extent of his assets. There was no real evidence of impecuniosity and wholly inadequate evidence in support of his cash flow problems. He had failed to show that he is unable to provide the security sought, and again, he referred to the conduct of the Claimant and the suggestion that this claim bears some or all of the hallmarks of a SLAPP.

The Claimant's submissions

75. Mr Davies' very clear and pragmatic submissions in response contended that the Defendant's position is odd, at one stage saying that the Claimant appears to be a man of vast wealth, but then expressing concerns about recoverability or enforcement of any costs order. He contended that it is not the usual practice of the court to make an unless order unless there has been an attempt to enforce it, which plainly has not yet taken place in this case.

76. He argued that the Defendant should have asked Senior Master Cook for an order in the manner now sought. It was said in written submissions that it was wrong for Ms Sultana's witness evidence to only provide details of the costs for which security for costs was sought in her 30 May 2024 statement. This did not provide the Claimant with sufficient opportunity to meet it. Mr Davies argued that the Defendant has not sought expedition of the application.

77. He placed particular reliance on the case of *Vedatech Corporation v Crystal Decisions (UK)*

Ltd & Anor [2002] EWCA Civ 356, especially what was said by Ward LJ at [20], and Longmore LJ at [25] and [26]. In that case, it was held that an order for security for costs in the form made in that case was oppressive given the proximity of trial. There is a factual distinction between that case and this, in that here, the application for security for costs is put on the basis that the claim is stayed not struck out if the security for costs is not given. However, the unless order sought in relation to Senior Master Cook's order is what is described as a self-executing order, in that if it is not paid then the claim will be struck out. On that basis Mr Davies contended that *Vedatech* was relevant to both the Defendant's applications.

78. The principal point advanced on the Claimant's behalf was that if such a self-executing order was made in this case, it would achieve a strike out of his claim very proximate to trial and mean that it was not possible to have a trial of the merits. These are proceedings that involve very serious allegations about the Claimant that have been made by the Defendant. It was said that there is a risk that people who do not understand the English legal process in full would regard a striking out of the claim as a vindication of the Defendant's position and that that would be most unfair.

79. Mr Davies cited passages from Spencer Bower and Handley, *Res Judicata*, suggesting that this court could revisit the costs orders that have already been made.

80. Finally, he pointed to the fact that the Defendant does have some measure of security for costs in the form of HHJ Lewis's order.

Analysis and conclusion

81. In my judgment, the Defendant has made out a very clear case for the unless order sought, based on the principles summarised in *Michael Wilson.*

82. The central principle to be drawn from the authorities is to the effect that I would need to be satisfied that an overwhelming Article 6 consideration was present to compel me to take a different view from the normal consequence of a failure to comply with an immediate costs order, which is that compliance is a condition of being able to continue with the litigation. It is a fact that we are now some weeks from trial, but that does not, in my judgment, lead me to depart from that central principle. I say this bearing in mind the detailed criticisms I have made of the Claimant's evidence as to his finances.

83. There are some similarities between the *Vedatech* case relied on by the Claimant and this case, but there are also some factual distinctions between the two, not least that in *Vedatech* some money had already been paid and much larger sums were an issue. Ultimately, however, each application of this nature is fact-sensitive. The balancing exercise in this case could well properly be tipped in a different direction and in my judgment it is.

84. There was an interesting debate between the parties as to the extent to which I could revisit the costs orders that have already been made. I have significant reservations about whether

it would be proper to do so, not least because it is clear from the transcript of the hearing before HHJ Lewis that he did not feel able to summarily assess the costs, and that the Senior Master did feel able to do so. As a highly experienced Master, he heard argument as to whether to order immediate payment of those costs or not, and felt it appropriate to do so.

85. As to the argument that the Defendant should have asked Senior Master Cook for an order in the terms that are now sought, without any evidence that the Claimant was not going to pay this costs order, such an order would not have been likely to find favour.

86. The Claimant argued that the time for payment of the costs order made by Senior Master Cook has not long passed. It has, in the context of this litigation, clearly passed and there has been delay by the Claimant in addressing it.

87. The Claimant's criticisms of the timing of the Defendant's application and the hearing are not, in my judgment, fair. The application was made as soon as the Claimant's lack of compliance was identified. There was clearly an attempt to place the matter before a Master and one of the reasons for delay has been difficulties with dates to avoid on the Claimant's side.

88. For these reasons I consider it appropriate, despite the very skilful submissions from Mr Davies, to make the unless order sought by the Defendant. I therefore order that unless the Claimant pays £20,646.58 by a date in the very near future, his claim will be struck out, and in due course I will hear submissions as to what that date should be, but plainly given the proximity of trial, it will need to be soon.

89. As to the application for security for the costs, again I do not consider the criticisms of the Defendant's conduct justified. It is clear that in Ms Sultana's 18 March 2024 statement she gave a broad estimate of the figures needed for security for costs and they were corroborated by the evidence that was provided from a New York attorney in her later witness statement. The Claimant has therefore had since 18 March 2024 to obtain any evidence he wished to provide as to the level of costs of enforcement if it was to be his position that the figures given by the Defendant were wrong. He has not done so.

90. I am persuaded that the Claimant should provide security for the costs for the reasons given by the Defendant. The detailed submissions I have summarised entirely satisfy me that the relevant tests are met; that both conditions (a) and (g) are satisfied, and that in all the circumstances, it is just to make the order. Again I emphasise the deficiencies in the Claimant's evidence as to his finances.

91. There was a lack of clarity in the paperwork as to exactly what figure was sought for security for costs. In summary, the higher figure was sought to cater for the possibility of a "repugnancy" argument in the American enforcement proceedings. There was an interesting legal dispute between the parties as what that this means and whether it applies here. In my judgment it is not sufficiently clear that the repugnancy issue does apply.

92. In in those circumstances it seems to me inappropriate to order the higher figure for security

for costs that the Defendant sought. Rather, in my judgment, it is appropriate to limit this to lower figure sought, namely £26,000. Again I will hear submissions as to when that should be paid by.

93. That is my judgment on all of the applications before me.

Transcript of a recording by Acolad UK Ltd
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Acolad UK Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.