Neutral Citation Number: [2020] EWHC 328 (Ch)

Case No: BL-2018-002541

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMPANIES COURT

IN THE MATTER OF TONSTATE GROUP LIMITED
AND IN THE MATTER OF TH HOLDINGS LIMITED
AND IN THE MATTER OF THE COMPANIES ACT 2006

7 Rolls Building
Fetter Lane, London
EC4A 1NL

Date: 18 February 2020

Before:

MR JUSTICE ZACAROLI

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Between:

EDWARD WOJAKOVSKI — **Petitioner**

- and -

(1) ARTHUR MATYAS — **Respondents**
(2) RENATE MATYAS
(3) TONSTATE GROUP LIMITED
(4) TH HOLDINGS LIMITED
(5) OVERSEAS HOLDINGS CAPITAL GROUP LIMITED
(6) RACHEL ELIZABETH ROBERTSON
(7) BETCHWORTH CONSULTING LIMITED

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Muhammed Haque QC (instructed by **Candey**) for the **Petitioner**
Mrs Rachel Robertson appeared in person on her own behalf and on behalf of (as sole director of) the Seventh Respondent

Hearing date: 16 January 2020

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE ZACAROLI

Mr Justice Zacaroli :

1. This is an application by the sixth and seventh respondents for security for costs in relation to the unfair prejudice petition under s.994 of the Companies Act 2006 (the "Petition") brought against them (and others) by Edward Wojakovski ("Mr Wojakovski").

2. The sixth respondent ("Mrs Robertson") is the owner and sole director of the seventh respondent, Betchworth Consulting Limited. I will refer to them together as "the Applicants".

3. Mr Wojakovski was represented by leading counsel, Muhammed Haque QC. Mrs Robertson appeared in person, on her own behalf and on behalf of the seventh respondent. She was previously represented by solicitors and counsel and intends to engage legal representatives for the purposes of the trial of the Petition, in the event that it is pursued as against her.

4. The Applicants' application for security for costs was issued in July 2019 but, through no fault of the parties, came on for hearing only on 16 January 2020.

5. The Petition is currently listed for a trial estimated to last two months commencing on 2 June 2020, together with two other actions involving Mr Wojakovski, companies in the Tonstate group and Mr and Mrs Matyas (the first and second respondents to the Petition). The first of those actions (the "Main Action") primarily involves a claim against Mr Wojakovski for improper extractions made by him from the companies that are the claimants to that action. The second action relates to a claim by Mr and Mrs Matyas to recover shares in the Tonstate group previously transferred to Mr Wojakovski.

6. As a result of various orders made at the CMC held on 16 January 2020, however, the trial commencing on 2 June 2020 will be used to determine only certain of the principal issues raised in the three actions (the precise details of which are to be confirmed at a further CMC to be held shortly). The claims as against the Applicants will not be heard at that trial and, depending on its outcome, may never come on for trial. In those circumstances, the Applicants' application for security for costs at this stage relates only to the costs incurred to date. These total approximately £193,000 (or £163,000, depending on the view I take as to a sum of £30,000 already paid by Mr Wojakovski in respect of an earlier costs award in the Applicants' favour but which may have been paid from funds which are the traceable proceeds of property beneficially belonging to the claimants in the Main Action).

7. The application is made under CPR 25.12. The Applicants rely on the grounds set out in CPR 25.13(2)(c) and (g).

CPR 25.13(2)(c)

8. Under this ground, security may be ordered where "the claimant is a company or other body (whether incorporated in or outside Great Britain) and there is reason to believe that it will be unable to pay the defendant's costs if ordered to do so".

9. In my judgment, this has no application to the facts of this case. It applies only where the claimant is an *incorporated* body. It therefore has no application where the claimant is an individual. This is clear from the language of the rule, and is consistent with the long-standing principle that so far as individuals are concerned, impecuniosity is not a ground for ordering security for costs: see *Harris v Wallis* [2006] EWHC 630 (Ch), per Sir Francis Ferris at [19].

CPR 25.13(2)(g)

10. Under this ground, security may be ordered if "the claimant has taken steps in relation to his assets that would make it difficult to enforce an order for costs against him."

11. The principles to be applied under this ground were summarised by Roth J in *Ackerman v Ackerman* [2011] EWHC 2183, at [16], as follows:

> "i) 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: *Chandler v Brown* [2001] CP Rep 103 at [19]-[20];
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> ii) 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: *Aoun v Bahri* [2002] EWHC 29 (Comm), [2002] CLC 776, at [25]-[26];
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> iii) 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: *Dubai Islamic Bank v PSI Energy Holding Co* [2011] EWCA Civ 761 at [26];
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> iv) There is no temporal limitation as to when the steps were taken: they may have been taken before proceedings had been commenced or were in contemplation: *Harris v Wallis* [2006] EWHC 630 (Ch) at [24]-[25];
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> v) However, motive, intention and the time when steps were taken are all relevant to the exercise of the court's discretion: *Aoun v Bahri*, *ibid*; *Harris v Wallis*, *ibid*;
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> vi) In the exercise of its discretion, the court may take into account whether the claimant's want of means has been brought about by any conduct of the defendant: *Sir Lindsay Parkinson & Co v Triplan* [1973] QB 609 per Lord Denning MR at 626; *Spy Academy Ltd v Sakar International Inc* [2009] EWCA Civ 985 at [14];

> vii) Impecuniosity is not a ground for ordering security; on the contrary, security should not be ordered where the court is satisfied that, in all the circumstances, this would probably have the effect of stifling a genuine claim: *Keary Developments Ltd v Tarmac Construction* [1995] 3 All ER 534 at 540, para 6. Thus the court must not order security in a sum which it knows the claimant cannot afford: *Al-Koronky v Time-Life Entertainment* [2006] CP Rep 47 at [25]-[26] (where this was referred to as 'the principle of affordability');
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> viii) The court can order any amount (other than a simply nominal amount) by way of security up to the full amount claimed: it is not bound to order a substantial amount: *Keary* at 540, para 5;
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> ix) 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: *Keary* at 540, para 6. However, the court should evaluate the evidence as regards third party funders with recognition of the difficulty for the claimant in proving a negative: *Brimko Holdings Ltd v Eastman Kodak Co* [2004] EWHC 1343 (Ch) at [12];
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> x) 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: *Al-Koronky* at [27]."

12. The matters relied on by the Applicants in this case are set out at paragraph 13 of a witness statement of Mrs Robertson dated 25 July 2019. In relation to some of these matters, I find that they do not amount to steps taken which would make enforcement of a costs award more difficult:

    i) First, Mr Wojakovski has bank accounts in Israel, Switzerland, France and Singapore. This is of no relevance, in my judgment, there being no evidence as to the contents of those bank accounts or of any transactions involving movement of funds from bank accounts in England to those abroad. The mere holding of bank accounts in foreign jurisdictions does not constitute a step with the consequence of making it more difficult to enforce a costs order.

    ii) Various companies through which Mr Wojakovski received the extractions which are the subject matter of the Main Claim are domiciled in overseas jurisdictions. There is no evidence that these companies hold assets other than the funds received improperly from the Tonstate Group. Insofar as those funds are still held by those companies, then they are the beneficial property of the relevant company in the Tonstate Group and would never have been available to satisfy a costs order in favour of the Applicants. Accordingly, this does not constitute a relevant step for the purposes of sub-paragraph (g).

iii) Mr Wojakovski holds an Israeli passport and a Polish passport. This is irrelevant for the purposes of the test in sub-paragraph (g).

iv) Mr Wojakovski's matrimonial home is registered in his wife's sole name. This is also irrelevant, unless it is said that Mr Wojakovski has no beneficial interest in the home. It is Mr Wojakovski's contention, however, that he has a half share in the home and he has offered an undertaking not to dispose of that half share, which he contends is worth approximately £1.5 million.

13. The Applicants also rely on the fact that Mr Wojakovski has acquired various properties, including two commercial investment properties in Scotland, holiday properties in Bournemouth and France, and valuable art works, which are owned variously by an offshore trust (in the Isle of Man and Jersey) or an offshore company.

14. Mr Wojakovski had, in the context of this application for security for costs, offered alternative security by way of a charge over one or other of these properties. I asked Mr Haque QC whether Mr Wojakovski claimed to be the beneficial owner of such property as was owned by the relevant offshore entity (as opposed, for example, to having an interest only in the shares of the relevant offshore company, or as a member of a class of beneficiaries under an offshore discretionary trust).

15. The distinction is important because if he *is* the beneficial owner of any of the properties then enforcement of any costs award would be relatively straightforward. On the other hand, if he is merely a beneficiary under a discretionary trust in relation to the properties or artwork, or has only an interest in the shares of the relevant offshore company, then this is likely to render enforcement more difficult. Mr Haque, having taken instructions, was unable to provide a clear answer to that question.

16. In the absence of any evidence from Mr Wojakovski contradicting Mrs Robertson's witness statement, and in the absence of a clear answer to the question I posed, I conclude it is more likely than not that Mr Wojakovski has structured his holding of these assets in a way which, in fact, would make it more difficult to enforce a costs award against them.

17. There is no evidence as to when Mr Wojakovski so arranged his affairs. It is more likely, in my view, that he did so some time ago, neither during this litigation nor at a time when it was contemplated. Mr Haque contends that since Mr Wojakovski has always arranged his affairs in this way, he has not "taken steps" to make enforcement more difficult. I reject that submission. As was made clear in *Harris v Wallis* (cited by Roth J in the passage from *Akerman* set out above), there is no temporal limit on the relevant steps. Moreover, as also made clear in the passage from Roth J's judgment in *Akerman*, there is no requirement that the steps were taken with the purpose of making enforcement more difficult.

18. Accordingly, I find that the requirements of CPR 25.13(2)(g) are satisfied. It remains necessary for me to consider whether, pursuant to CPR 25.13(1)(a), "having regard to all the circumstances of the case … it is just to make such an order."

19. The principal submission advanced on behalf of Mr Wojakovski is that his beneficial share of assets within England (which include the family home in London, the holiday home in Bournemouth and his shares in the Tonstate group) is worth considerably more than £1.25 million, so that whatever arrangements he has made for holding other assets is irrelevant: any costs order could easily be met from those assets, and he is prepared to undertake not to deal with his interest in them pending trial.

20. In addition, Mr Haque submitted that Mr Wojakovski's offer not to dispose of these assets (or to charge them in favour of the Applicants) is the best that he can do, given his otherwise impecunious position.

21. So far as the offer to provide security over the known assets in this jurisdiction is concerned (other than shares in the Tonstate group), on the basis of the evidence before the court I am not satisfied that those assets are the unencumbered property of Mr Wojakovski. There is a real risk that they represent the traceable proceeds of the funds extracted from the claimants in the Main Action, and are thus beneficially owned by those claimants. That includes Mr Wojakovski's interest in the former matrimonial home.

22. Mr Wojakovski holds shares in two companies in the Tonstate Group: Tonstate Group Limited ("TGL") and Overseas Holdings Capital Group Limited ("Overseas"). The shares in TGL are the subject matter of Mr and Mrs Matyas' claim for rescission. If successful, that claim would deprive Mr Wojakovski of any interest in the shares in TGL. So far as the shares in Overseas are concerned, in light of my conclusions as to the financial position of the companies in that part of the group in my judgment dated 28 March 2019 ([2019] EWHC 857 (Ch)), there is no certainty that those shares have any significant value.

23. In these circumstances, I am not satisfied that Mr Wojakovski's offer to provide security from his assets in the UK is a sufficient answer to the Applicants' entitlement to security for costs.

24. Apart from these assets, Mr Wojakovski contends that he is unable to provide security. As noted by Roth J in the *Ackerman* case (above), however, the burden is on him 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. There is no sufficient evidence of Wojakovski's financial position to establish that he is *unable* to provide security from his own resources, and no evidence that addresses his ability to raise funds from others.

25. In light of the above, the Applicants undoubtedly face a real prospect that they would be unable to enforce a costs order against Mr Wojakovski. Taking into account all the circumstances, I consider it is just to make an order.

26. The total costs incurred by the Applicants to date are £193,207. Of this sum, Mr Wojakovski has paid £30,000 pursuant to a previous costs order. He indicated to Mrs Robertson, however, that this payment was "contaminated" and "subject to clawback by third party agencies". This gives rise to the clear risk that such payment represents the traceable proceeds of the funds extracted from the Tonstate group companies. Accordingly, I consider that the starting figure, for the purposes of calculating the amount in which security should be ordered, is £193,207.

27. The parties did not address in detail the sum that should be awarded. Subject to any further submissions from them, I propose to order that security be provided in an amount representing 70% of that sum (namely £135,244.90). The amount of security to be ordered is within the discretion of the court. In this case, the relevant costs have all been incurred so that there is no reason to discount the sum claimed by reference to the uncertainty as to the costs that might be incurred. There remains, however, the uncertainty as to the amount of costs that would be recovered upon a detailed assessment at the end of the trial. I consider that a discount of 30% is reasonable in order to reflect the risk that the amount claimed by the Applicants would be reduced on a detailed assessment.

28. I will, however, give the parties an opportunity (in the event that these matters cannot be agreed) to make further submissions, either in writing or at the resumed CMC now listed for early March 2020, in respect of the quantum of the security to be ordered. I will also hear further from the parties as to the form in which, and time within which, security should be provided if, in the interim period, they have been unable to reach agreement on these matters.