Case No: HC07C02718

Neutral Citation Number: [2008] EWHC 2514 (Ch)
IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand
London WC2A 2LL

Thursday, 4 September 2008

BEFORE:

MR MANN QC
(SITTING AS A DEPUTY JUDGE OF THE HIGH COURT)

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BETWEEN:

Claimant

MOHAMMED REZA HAVAI

- and -

Defendant

ABNER SOLLAND & ANOTHER

- - - - - - - - - - - - - - - - - -

MR DAVID LIGHTMAN appeared on behalf of the CLAIMANT

MISS GOLNAZ HAVAI appeared on behalf of the DEFENDANT

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APPROVED JUDGMENT

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THE DEPUTY JUDGE:

1. This matter was last before me on 24 July 2008 when I ordered the claimant to provide security for the costs of the claim in the sum of £140,000, this to be provided either by cash paid to the credit of the claim in the Court Funds Office or by bank guarantee or bond written with a first-class bank, or a combination of both, within 60 days from that date.

2. The precise language of the order was to be agreed between the parties' counsel on the basis I had heard argument on the draft minute of the order annexed to the application and approved it subject to consequential changes necessitated by my order and directions I then gave. These were procedural directions to enable the claimant to apply to the court in the vacation should there be timing or mechanistic difficulties threatening to trigger the default provisions which the claimant could not realistically be expected to overcome within the 60 days allowed. A possible scenario, raised by counsel for the claimant, just as an example, was that he might need to apply for a variation to permit him to provide security by way of a charge over flat 20, Cavendish House, 21 to 24 Wellington Road, London NW8 9SQ.

3. Sadly the parties have not been able to reach agreement, with the inevitable consequence that the matter has had to come back to me at the defendants' behest to resolve the differences between them. I should point out, having made the order and given directions in light of counsel's lengthy oral submissions about them on 24 July, I am not about to make substantive changes to these. It is the language in which the order and my directions are to be couched rather than their substance which I must now resolve.

4. I should rehearse a little of the background to the breakdown in the discussions about the language of the order. As expected, counsel quickly reached agreement on the language during the course of an e-mail exchange attaching a travelling draft later that day. I have seen that draft and the form it took following the claimant's counsel's consideration of it. It reads, so far as material, as follows (I shall in fact read the travelling draft rather than the draft provided by the defendant to the court today, which does not have track changes, so that I can point out the measure of agreement between the parties' counsel after discussion). The body of the order is:

> "1. The claimant do by 4pm on 22 September 2008 provide security for the defendants' costs of these proceedings in the sum of £140,000, either by paying the sum of £140,000 into the Court Funds Office or by way of providing a written guarantee or bond

from a first-class bank."

5. That paragraph should have included the words "or a combination of both". I think they can be added at the end in that form: "...or by way of providing a written guarantee or bond from a first-class bank or by way of a combination of both."

"2. All further proceedings be stayed until such security is given.

"3. The claimant do have liberty to apply on five business days' prior notice in writing to the defendants in relation to the time or mechanism of the provision of the security ordered to be provided by him in paragraph 1 above.

"4. Unless such security is given as ordered or any application pursuant to paragraph 3 is pending as at 4pm on 22 September 2008 [this second clause was introduced by counsel for the claimant and was agreed to by counsel for the defendants]:

(a) the claim is struck out without further order.

(b) on production by the defendants of evidence of default there be judgment for the defendants without further order, with the defendants' costs of and occasioned by the claim to be the subject of detailed assessment on the indemnity basis.

"5. The costs of and occasioned by the security for costs application, such costs to include, for the avoidance of any doubt, (a) the costs of the adjourned hearing on 16 July 2008, (b) the defendants' costs in the case.

"(6) The claimant's application and the defendants' disclosure application be adjourned generally to be heard together. Both applications are certified to be fit for vacation business with a combined time estimate of half a day to a day.

"(7) Within seven days of the security ordered in paragraph (i) being provided [the words in paragraph (i) were introduced by the claimant's counsel] the parties do apply for further directions, any such application certified to be fit for vacation." [Quotation unchecked.]

6. This is all in accordance with my order and the procedural directions which I gave. Unfortunately counsel's agreement is not binding because the claimant's counsel made it clear that he still had to clear the draft with his client, which in the event never happened. This is

because the claimant wishes to vary the very order I made, not just to contest the appropriateness of counsel's procedural language. He wishes to supplement paragraph (i) by adding at the end the words "or a charge over flat 20, Cavendish House, 21 to 24 Wellington Road, London NW8 9SQ". He wishes to remove paragraph (iv)(b) altogether, thereby eliminating the automatic consequences of the strike out. He wishes the words "and occasioned by" in the common form terminology "costs of and occasioned" in paragraph (v) to be removed. None of these, it will be noted, were matters which were within the remit I gave counsel to reach agreement about apropos the language in which the order and my directions were to be couched. Furthermore, the claimant has made no application under the liberty to apply in paragraph (iii).

7. The claimant's reasons, as I understand them, are (1) apropos the charge, that I used words during the course of the submissions about the ambit of the liberty to apply in paragraph (iii) which suggested that any form of security would be acceptable. This is as may be, although the transcript of the day's proceedings does not record that I said anything like this and I certainly do not recall doing so. At all events these words did not form part of my order, nor could they have done, for reasons which I shall advert to later in this judgment. Paragraph 1 of counsel's draft is correct. (2) Apropos paragraph 4(b) that neither the defendants' counsel's skeleton argument nor the application for security for costs itself made it explicit that the defendants would claim all of their costs should security not be given. However, this, apart from the indemnity basis, is a perfectly normal order incorporating a completely normal consequence. It is furthermore not in the least oppressive. It cannot sensibly be argued that it is. I required the liberty to apply in paragraph 3 to be incorporated precisely because I wished to eliminate this as a possibility. I approved paragraph 4(b) with all of this very much in mind and that is the end of the matter. (3) The reason for the objection to the words I have alluded to in paragraph 5 is difficult to grasp and I shall therefore say nothing more about it.

8. In paper communications to me prior to today's hearing both parties have asserted they would be content for me to resolve their differences on paper. I would have done so had I been satisfied that this would have been the end of the matter, but there is a lot at stake in this claim and, right or wrong, grievances run deep. On balance therefore I considered an oral hearing desirable. I have for the purposes of the oral hearing had the additional benefit of a further skeleton argument from the defendants' counsel and a further skeleton argument written succinctly by the claimant's daughter (who will forgive me, I hope, for mispronouncing her name), Miss Golnaz Havai , who is legally qualified.

9. A charge over the flat might be one way of providing security, but a charge is seldom satisfactory for a number of reasons which relate both to sufficiency and enforceability. As a bare minimum the court before ordering security in this form would require a number of conditions to be met, so far as then deemed pertinent.

10. These conditions or minima include (i) a good reason for the proposed variation; (ii) an up to date valuation; (iii) up to date office copies of the entries on the register; (iv) full information about any prior charges including the amounts owing in relation thereto; (v) independent evidence that the registered proprietors have received and fully understood independent legal advice about the intended transaction and the possible consequences should they give a legal charge and that legal charge subsequently be enforced; (vi) the registered proprietors' confirmation that they have not been pressured by the claimant or any third party into agreeing to give a legal charge; (vii) the names of all occupants of flat 20 other than the claimant and the registered proprietors; (viii) confirmation from all named occupants, including the claimant's wife, that they had no interest and would make no claim to an interest of any kind in flat 20; (ix) a viable timeframe for completion within the 60 days or any permitted extension.

11. A witness statement, which I have read *de bene esse* today, signed by Miss Golnaz Havai, provides the court with some information, for example, that there is an Abbey National mortgage (about which the court knew in fact before today's hearing) which is to charge the sum of £235,549. That, I understand, is principal plus rolled up interest. The charge covers the rolled up interest. There is no obligation to pay anything. Payment is deferred *sine die*. The precise details of it are not before the court and would have to be provided in any application.

12. The other information which I have indicated a court would likely require before exercising its discretion in relation to this jurisdiction is not to be found in Miss Havai's witness statement, which, standing alone, is insufficient to satisfy any court that security ought to be allowed on the basis suggested. What in a nutshell the court needs is evidence that the value of the security offered is and will continue in the current financial climate to be acceptable within a reasonable margin and evidence sufficient to assure it that the security offered can and will be expeditiously completed and readily enforceable. The best form of security that can be provided in the present circumstances is a guarantee or bond provided by a first-class bank, which itself would doubtless have to be secured by way of a second charge over the property, but the court would not be concerned with that provided the guarantee is given. That is the best form and would likely satisfy the

requirement without any need for a further application. Security in the form which the claimant wishes it to take will require a further application supported by evidence of the kind and quality that I have indicated.

13. That is not to say that an application will necessarily be granted, indeed far from it. I do not want it to be inferred that, if satisfied, the conditions which I have listed will necessarily satisfy the court that that form of security will be appropriate. The claimant will bear in mind that, for the reasons explained by Longmore LJ in AP (UK) Limited v West Midlands Fire and Civil Defence Authority [2001] EWCA Civ 1917, at paragraph 13, it is seldom that the court will regard a charge over property as acceptable security for costs. Paragraph 13 reads as follows:

> "I turn to the first appeal and deal, first, with the question of principle, namely whether it is appropriate for the claimants to be committed to give security for costs by granting a charge or charges on its real property. The suggestion comes as something of a surprise since, for myself, I have never come across such a suggestion in a commercial or mercantile action. The reason for that must be that in a normal case if real property is sufficiently valuable to stand as security there will be no difficulty in the claimants procuring a bank guarantee for the purpose of security for costs by, if appropriate, granting a charge to the bank. So, one asks, is there any explanation why the bank will not provide a guarantee against one or more charges on the claimants' property in this case? The answer to that question is no, there is not."

14. There is no need for me to read the rest of that, although there are other dicta in that judgment. Of course I hasten to observe that that was a very different case. It was a commercial case. This claim has commercial connotations, but it is essentially of a different character from the type of case that Longmore LJ was considering, with different problems. So there is nothing in principle which disables the court from allowing security in the form which the claimant wishes to provide it, but nevertheless it would be an unusual form of order and the application, if it is to be made for a variation, will have to be well supported by at the very least the kind of evidence that I have suggested should be provided. I give no indications as to whether any court would allow that security even on the basis of that evidence, but that is the way forward, if I may put it that way, in this case if security cannot be provided in the ways allowed already under paragraph (i) of the order.

15. So this should serve as a warning that it is not a foregone conclusion that the court will permit security to be given in this way, even when the evidential hurdles I have mentioned have been overcome. Hence, the need for a good reason for the variation the defendants seek if they are to have any prospect of success on the application under the liberty to apply, should they make one. A good reason might be that it has not proved possible to secure a guarantee and that of course the claimant does not have £140,000 in cash at his disposal.

16. If evidence of the kind I have indicated had been before the court today it might have been possible for me to decide the matter under paragraph 3. It is regrettable in the circumstances that I cannot do so and the order I shall make today is therefore an order in the terms of the order behind tab 13 in the defendants' bundle, with the change to paragraph 1 that I have indicated should be made.