Neutral Citation Number: 2015 EWHC 830 (Comm)

Case No: 2012-1414

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

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

Date: 20 March 2015

Before :

Mr Justice Cooke

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Between :

(1) Orb A.R.L.	**Claimant**
(2) Roger Taylor	
(3) Nicholas Thomas	
- and -	
(1) Andrew Joseph Ruhan	**Defendant**

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James Drake QC, Paul Greenwood and Nicholas Gibson (instructed by **Stewarts Law**) for the **Claimants, the Fifth Party and the Seventh Party**
Tim Jenns (instructed by **Memery Crystal**) for the **Defendant**

Hearing dates: 19-20 March 2015

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APPROVED RULING

Mr Justice Cooke Friday, 20th March 2015
(12.20 pm)

Ruling by MR JUSTICE COOKE

1. MR JUSTICE COOKE: At the time of the hearing before me in February, the position being advanced on behalf of the Orb parties was that the Arena assets were to be ring fenced and that the effect of the undertakings which had already been given prior to that date, on 26 September, together with assurances effective as from 23 September, was that such assets had already been ring fenced. Reference to the transcript for Days 4 and 5 makes those points good.
2. What the court was not told, but is now being told in Dr Cochrane's third witness statement and in the StoneTurn report is that by 24 September a considerable volume of the Arena Trust assets had already been moved, such that they were not within the Arena Trust and had been expended as part of Dr Cochrane's "personal expenditure". The premise therefore upon which the order proceeded and upon which the undertakings which appear in the order were given, was therefore not a correct premise. The order made on 11 February was intended to protect the position pending trial, with schedules of the parties' undertakings to that effect, so that the Arena Trust assets were ring fenced and an order made by this court as to the entitlement of the ultimate beneficial owner would be effective.
3. There was also an order for a limited disclosure by the Orb parties in paragraph 2 in respect of four specific items. The order provided that by 27 February the Orb parties should provide information relating to the £10 million paid to Dr Cochrane on 15 November 2013 by Messrs Cooper and McNally, information as to the cash referred to in schedule 3 of the security deed dated 26 February 2014 and information relating to the proceeds of sale of Global Marine Systems Limited and Cannizaro House Hotel. In each case the information to be given related to the immediate location of those sums when first paid and to the whereabouts of the sums at the date of disclosure of the information under the order.

4. The words used in relation to each of the sub-paragraphs of the order related to a confirmation that sums were held in a particular account, identifying the account and the like, and if there had been any change in that, "where and in what form the difference is now held". That information was not in fact given by 27 February as ordered and an extension was sought for the giving of such information by 13 March of this year, that request being in an application which is before me today. On 16 March Dr Cochrane served her third witness statement and attached to that, or exhibited to that was a report from StoneTurn which amplified a letter of 27 February from StoneTurn in relation to matters raised.

5. In my judgment the report of 16 March by StoneTurn is deficient as a sufficiently independent verification of the matters to which it relates, being based on inadequate inspection of documents and on instructions from the Orb parties. The report refers to three accounts of Dr Cochrane, accounts at Barclays, Lloyds and Coutts, which have existed at one time or another, and to two further accounts, one in the name of Pro Vinci, the company which manages Dr Cochrane's family assets, and Radix which appears to be a parallel company operating in much the same way.

6. Mr Stern in the StoneTurn report sought to deal with matters on a first in first out basis, save in circumstances where the payments in and out, he said, obviously matched one another. He proceeded on the basis of documents and information given to him by Pro Vinci. He was not provided with the relevant books and records of the Arena companies. He said that he understood that full and detailed records of the claimants processed by Pro Vinci were not always maintained and said that there was no contemporaneous record of cash payments that were made on behalf of the Arena businesses as opposed to those that were made for personal reasons, or for the personal debt that accumulated to Dr Cochrane as a result of various transactions. He proceeded on the basis of what Pro Vinci identified as Arena related outflows and those which were identified as not falling into that category. This he applied in relation to

what he described as the account, meaning Dr Cochrane's account, and also the Pro Vinci and Radix accounts. These points appear from paragraph 2.7 to 2.8 and 2.11 to 2.12 of the report.

7. Dr Cochrane's third witness statement and the StoneTurn report were served, as I have said, after close of business on Monday 16 March with a hearing date fixed for 19 March in respect of an application made by Mr Ruhan on 5 March with affidavit evidence served in support. The basis of the application as put was to aid enforcement of both the order to disclose the present whereabouts and amounts of the four items referred to in paragraph 2, sub-sections 1 to 4, and in respect of the undertakings relating to the Arena assets as described in paragraph 3 of schedule 2 to the order, those undertakings being given by the Orb parties.

8. In the evidence in support of the application, the point was made that the Orb parties had not disclosed and could not account for the present whereabouts of some £92 million of cash proceeds in relation to the transactions referred to in paragraph 2, sub-paragraphs 1 to 4 of the order. No single bank account had been disclosed which identified the name of the account, the number of it and the specific bank, nor had any copy bank statement been provided in relation to any of the accounts, though it is the case that a bank statement had been disclosed in the Isle of Man proceedings, which is not before this court.

9. What appeared from the response of Dr Cochrane and the StoneTurn report was that none of the proceeds remained in the accounts where they were first received. The Orb parties have not identified where and in what form the difference between the sums received is now held. Consequently it was said on behalf of Mr Ruhan that it was necessary for the court to make the order which he sought. In short, it was said that the Orb parties simply could not be trusted and that what had emerged was that there had been dissipation of the assets before reaching the Arena settlement and indeed by taking sums out of the Arena settlement.

10. A further statement, Mr Rands' eighth witness statement, was served in response to the evidence of Dr Cochrane after close of business on 18 March. In consequence Mr Drake of Queen's

Counsel, appearing for the Orb parties, said that the Orb parties were in no position to deal with all the points made in what was a long and detailed witness statement and needed time to do so. An adjournment was sought. All of the points made arose from the evidence of Dr Cochrane and StoneTurn, but I was not at all surprised that the Orb parties' lawyers could not deal with the many apparent deficiencies in the evidence which had been adduced, as pointed out by Mr Rands in his eighth witness statement. To have sought to do so on an overnight basis would indeed have been onerous.

11. After hearing some submissions yesterday I indicated that I was not thinking of making the order sought by Mr Ruhan now, but that it was plain to me that it was necessary for the court to know, as well as Mr Ruhan, what had become of the Arena assets and the four specific items set out in paragraph 2, sub-paragraphs 1 to 4 of my earlier order. It was also plain to me that Mr Ruhan was correct in essence in saying that virtually nothing had in fact been revealed as to the present whereabouts of those particular sums. In consequence it appeared to me that the right thing to do was to give the Orb parties the chance to make full and proper disclosure and, in doing so, to deal with the points raised in Mr Rands' eighth witness statement.

12. I said that I was minded to require detailed disclosure of the whereabouts of those paragraph 2 sums received and to go wider than the original order made, because even on the Orb parties' evidence, the following appears:

    (1) There has as yet been no disclosure of the name and number of a single bank account into which any monies have been received or transferred.

    (2) There was an admitted breach of the order in paying some £4 million of proceeds of the GMSL sale and the Cannizaro House sale to Dr Cochrane's account, not an Arena settlement account.

(3) Large deductions were made from the proceeds of the GMSL sale and Cannizaro House before they ever reached Dr Cochrane's account. Some of those on their face, and as supported by the StoneTurn evidence, appear plainly legitimate; others give rise to questions.

(4) It is plain that large sums never made it into the Arena account at all. Apart from I think £1.135 million, none of the proceeds of the GMSL sale or Cannizaro House ever did so.

(5) Only £37 million from the GMSL sale and £4 million from the Cannizaro House sale went to Dr Cochrane's accounts, but nothing is left of the amounts paid in on a first in first out basis, according to StoneTurn.

(6) Dr Cochrane has taken a loan of £15.46 million, on her evidence which is not repayable until 2017, from the Arena Trust assets.

(7) It appears that some £19 million has found its way into a flat purchased in London where Dr Smith lives.

(8) £16.6 million, on the StoneTurn figures and Pro Vinci's evidence, has been taken out of Dr Cochrane's account and used for private purposes. It is said that there are expenses which have been incurred by Dr Cochrane and loans made by her into the Arena Trust but none of that has been documented, or at least StoneTurn have not been shown any documents that cover any such loans at all.

(9) The court has been further misled about the settlement between the Orb parties and Mr Cooper and Mr McNally. It now appears that the £10 million paid by Mr Cooper and McNally was the subject of a further agreement on 16 December 2013 for repayment with a commission of 5 per cent to be paid by the Orb parties to these two individuals on all realised and unrealised assets of the Arena settlement that they handed over to the Orb parties. There is no evidence before the court that any such sums have in fact been paid, but the existence of the agreement is now plain and was not a matter disclosed to the court at the time of the hearings in February.

(10) The excuse or apology offered for breach of the order is in my judgment inadequate and does not cover any matters other than the admitted breach in relation to £4 million, nor explains how it was that the court came to make orders and accept undertakings on the basis of an unfounded premise that the Arena Trust assets remained within the Arena Trust at the relevant time. In my judgment Mr Ruhan's complaint that the Orb parties cannot be trusted is well-founded.

13. The order sought by Mr Ruhan is nonetheless an order that the court would ordinarily only make if there was no other way of protecting Mr Ruhan's claimed proprietary interest and personal claims, (those claims being, as I have held, to constitute a good arguable case) against a real risk of dissipation. I would need to know before making such an order what the effect would be on the companies in question, whether it would trigger loan acceleration provisions and cross default provisions and bring the whole group crashing to the ground and its business activities to a halt, with consequent loss of value to whoever may be shown at the end of the day to be the ultimate beneficial owner. There is evidence before me that cash injections are needed, which would be rendered difficult or impossible if I made the order sought by Mr Ruhan. The fact that companies in the British Virgin Islands are apparently in liquidation, whether put into liquidation for tactical reasons or not, is an additional complication, as is the fact that none of those companies has as yet been served with Mr Ruhan’s application. Furthermore, the considerable expense involved in relation to a complex web of offshore companies is not something that the court would lightly countenance if there remained any other avenue open which sufficiently protected the assets in question.

14. Mr Ruhan's proprietary claim, which, as I say, I have already held to be a good arguable case, to the Arena assets requires that those assets be protected from the depredations of Dr Smith, Dr Cochrane and the Orb parties in the shape of an injunction and orders for further disclosure which I shall make. The form of order will of necessity be a hybrid order because it is not

merely in respect of the personal claim, but also in respect of items which, at least on the evidence currently available to me, indicates that there are sums which should be in the Arena settlement that have been taken out of it, or diverted from it, in such a way as to make a potential tracing or following claim a real possibility in relation to Mr Ruhan's proprietary interest.

15. I have been, quite properly, reminded in the Orb parties' skeleton argument of the various elements which are necessary before the court should grant a freezing order and in particular a worldwide freezing order. The form of order sought emerged after I had indicated that I was not minded to make the order sought by Mr Ruhan and has been the subject of submissions this morning. I have had before me the Orb parties who were able to make any points that they wished to make in relation to the order. The exact details I have yet to hear Mr Jenns about, having heard Mr Drake, and I shall listen to all submissions which fall to be made, particularly in the context of the amount of the freezing order, because it must of course take into account the figures already covered by the undertakings which were scheduled to the earlier order in relation to the proprietary claim.

16. I am entirely satisfied that it is just and convenient for such an order to be made in the circumstances that I have outlined. It is not contended for today's purposes that there is not a real risk of dissipation. I have already found that there is a good arguable case. The Orb parties have been present before me in the context of the application made so that this is not an ex parte application. I particularly bear in mind the points made as to Mr Ruhan's lack of clean hands. This court has already commented on the unreliability of much of the witness evidence put before the court at an earlier stage, but the overriding considerations of justice require that where undertakings have been given on a false basis and where the orders of the court as they exist have not resulted in full protection of the Arena assets for the ultimate beneficial owner, whoever that should turn out to be, the court make further orders that secure that outcome.

17. There are problems because this litigation is hard fought and attritional. The parties are not slow in overstating their case. The parties are not slow to seek any forensic advantage that they think they can take. There is a danger of harassment and the improper use of litigation. These matters are all considerations that I have to bear in mind in the context of any order that I make. The terms of the order that I will make must also be clear so that there is no scope for argument about what it is that the Orb parties must do and so that it is clear whether or not any future breach occurs.
18. Drastic orders are often made in the context of continuing or deliberate or contumelious failure to observe court orders and in circumstances which justify applications for committal for contempt. Subject therefore to being satisfied that the order that I now propose to consider, with counsel's submissions, subject to that providing enough protection for Mr Ruhan, I shall adjourn his application.