Case No: HC09C01992

Neutral Citation Number: [2017] EWHC 258 (Ch)
IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 21 February 2017

Before :

MR JUSTICE ARNOLD

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Between :

JANAN GEORGE HARB	**Claimant**
- and -	
HRH PRINCE ABDUL AZIZ BIN FAHD BIN ABDUL AZIZ	**Defendant**

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- -

Ian Clarke QC (instructed by **Hughmans**) for the **Claimant**
Ian Mill QC and **Shaheed Fatima QC** (instructed by **Howard Kennedy LLP**) for the **Defendant**

Hearing date: 6 February 2017

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Judgment

MR JUSTICE ARNOLD :

Introduction

1. There are two applications before the Court:

   i) an application by the Claimant ("Mrs Harb") for directions for the re-trial of her claim against the Defendant ("the Prince"); and

   ii) an application by the Prince for an order that, unless Mrs Harb complies with an order made by the Court of Appeal to pay the Prince £250,000 as an interim payment in respect of costs within 14 days, her claim be struck out alternatively stayed.

Background

2. Mrs Harb was born in 1947. Her claim in these proceedings arises out of an alleged oral agreement between herself and the Prince in June 2003 whereby the Prince agreed to pay Mrs Harb £12 million and to procure the transfer to her of two properties in Cheyne Walk. The Prince denies that he made any such agreement. In the alternative the Prince contends that any agreement was made on behalf of his father, the late King Fahd, and was not binding upon the Prince.

3. On 1 May 2008 Mrs Harb was declared bankrupt with creditors exceeding £3 million.

4. The claim was initially brought by Mrs Harb's trustee in bankruptcy shortly before the expiry of the limitation period in June 2009, but in June 2010 the trustee obtained permission to discontinue. Following hearings before Kevin Prosser QC sitting as a Deputy High Court Judge and the Court of Appeal in 2011, the notice of discontinuance was set aside. In August 2012 the trustee assigned the cause of action to Mrs Harb for £1,000.

5. The Prince then pursued an application originally made in January 2010 to strike out the claim on the ground of state immunity, but that application was unsuccessful before both Rose J and the Court of Appeal: see *Harb v Aziz* [2015] EWCA Civ 481, [2016] Ch 308.

6. The claim was tried by Peter Smith J over seven days in July 2015. On 3 November 2015 he handed down judgment ([2015] EWHC 3155 (Ch)) finding in favour of Mrs Harb. By his order of the same date, Peter Smith J entered judgment for Mrs Harb in the sum of £15.45 million including interest and granted specific performance of the agreement to transfer the two properties.

7. The Prince appealed on a number of different grounds. Four of these related to the substance of the judgment, while the fifth raised an allegation of apparent bias on the part of the judge. The Court of Appeal rejected the fifth ground of appeal, but allowed the appeal on grounds one to four: see *Harb v Aziz* [2016] EWCA Civ 556, [2016] 3 FCR 194. The Court of Appeal did not feel able to say that the judge should have found that there was no agreement or that any agreement was not binding upon the Prince, but it concluded at [48] that "the deficiencies in the judgment are so serious

that it cannot be allowed to stand and … the matter must be remitted to the High Court for re-trial".

8. By its order dated 16 June 2016 (sealed 5 July 2016) the Court of Appeal ordered Mrs Harb to pay 75% of the Prince's costs of the appeal to be subject to detailed assessment on the standard basis if not agreed and to make a payment of £250,000 on account of those costs within 28 days. This order was stayed pending any application to the Supreme Court.

9. Mrs Harb applied to the Supreme Court for permission to appeal. That application was dismissed on 21 December 2016.

10. On 11 January 2017 Mrs Harb applied for directions for the re-trial of her claim. On 30 January 2017 the Prince applied for an order in the terms set out above.

11. Mrs Harb has not paid any part of the £250,000 she was ordered to pay on account. Her evidence is that she is unable to do so. I shall consider that evidence in more detail below.

The Prince's application

12. It is common ground that Mrs Harb is in breach of the Court of Appeal's order requiring her to pay the Prince £250,000 on account of costs. In those circumstances, the Prince contends that the court should either make an order striking out Mrs Harb's claim unless she pays that sum within 14 days or make an order staying her claim until she has paid that sum. Mrs Harb does not dispute that the Court has power to make such orders. Mrs Harb says that she is unable to pay that sum, and therefore no such order should be made because it would stifle her claim and thus amount to a disproportionate interference with her right of access to the court under Article 6(1) of the European Convention on Human Rights.

13. Counsel for the Prince relied not only upon the fact that Mrs Harb had failed to comply with the Court of Appeal's order, but also the circumstances in which that order came to be made. As is usual, when the Court of Appeal sent the parties its judgment in draft, it invited them to file written submissions as to consequential orders, and in particular costs. In the written submissions filed on behalf of Mrs Harb, it was stated that:

> "… any order for payment [on account] will be beyond Mrs Harb's means and resources, with the result that she will be unable to make any such payment. If the Court is minded to make such an order, Mrs Harb would ask for a further 48 hours to file evidence confirming her own lack of assets with which to meet any order and her inability to borrow or secure an advance sufficient to do the same."

14. The Court of Appeal made the order for the payment on account without affording Mrs Harb further time in which to file evidence of her lack of means as she had requested. It did not give any reasons for proceeding in that way. I agree with counsel for the Prince that it may be inferred that the Court of Appeal did not consider that Mrs Harb's alleged lack of means was a reason not to make the order. I do not accept

his submission that it is incumbent on Mrs Harb to apply to the Court of Appeal for an extension of time or for relief from sanctions. The Court of Appeal's order does not provide for any sanction for non-payment, nor is any sanction implied. Nor do I accept the submission that, in the absence of any such application by Mrs Harb, the Court of Appeal's order supports the making of the order which the Prince now seeks. The Court of Appeal was not concerned with the question of what the consequences should be if Mrs Harb failed to comply with its order, and in particular what the consequences should be having regard to her Article 6(1) rights. That is a matter for this Court to consider for the first time in the light of the evidence and submissions directed to it.

15. I did not understand counsel for Mrs Harb to dispute that the onus lay upon her to establish that she was unable to pay the sum of £250,000. Counsel for the Prince submitted that Mrs Harb's evidence did not demonstrate this. I must therefore consider that evidence. In her second witness statement, Mrs Harb states that:

    i) She was made bankrupt on 1 May 2008 as noted above.

    ii) She has no assets other than (a) her cause of action against the Prince and (b) the right to receive 30% of the net profits of a film based on a memoir she has published, but the film has yet to be made.

    iii) She received an upfront payment of £170,000 under the film agreement in early 2015, but that money has been spent on legal costs and other expenses. She has given further details of these payments in her third witness statement.

    iv) She lives in a flat which belongs to her daughter.

    v) Her only income is her state pension.

    vi) None of her family are willing or able to lend her any money.

    vii) Her solicitors and counsel at trial acted on a basis which meant that there was no immediate obligation to make payment and are continuing to act on that basis. She has explained in her third witness statement that she paid her lawyers the (unrecovered) costs of resisting the Prince's state immunity application, while at trial they acted pursuant to the terms of an agreement under which she is only required to pay them if she wins the action. In the Court of Appeal and Supreme Court she retained them on an ordinary fee-paying basis, but they recognise that she cannot pay them at present and therefore have extended her credit.

16. In addition, counsel for Mrs Harb informed me on instructions that Mrs Harb's book had only sold a few copies and hence Mrs Harb had not received any money from that source.

17. In my judgment Mrs Harb's evidence does establish that she is unable to pay £250,000 from her own resources. It also establishes that she is unable to borrow from members of her family. What it does not do explicitly is state that she is unable to borrow from any other source. Counsel for Mrs Harb confirmed on instructions that this was the case, however. Furthermore, he pointed out that the list of creditors from

Mrs Harb's bankruptcy includes large sums owed not only to relatives, but also to individuals described as "private lenders", including £500,000 owned to a Foad Zayyat and £215,000 owed to a Dr M. Kargin. Accordingly, it is credible that Mrs Harb is now unable to borrow from such sources.

18. Accordingly, I accept that, if an order of the kind sought by the Prince is made, Mrs Harb will be unable to comply with it, with the result that her claim will be either struck out or stayed indefinitely. I turn therefore to consider whether such an order would contravene Mrs Harb's Article 6(1) rights.

19. In support of the submission that it would, counsel for Mrs Harb relied upon the judgment of the Privy Council delivered by Lord Hope of Craighead in *Ford v Labrador* [2003] UKPC 41, [2003] 1 WLR 2082. In that judgment Lord Hope considered the decisions of the European Court of Human Rights in *Tolstoy Miloslavsky v United Kingdom* (1995) 20 EHRR 442 and *Kreuz v Poland* (2001) 11 BHRC 456:

> "18. In the *Tolstoy Miloslavsky* case the applicant had been required by the Court of Appeal to pay £124,900 as security for the respondent's costs in the appeal as a condition of his appeal being heard by that court. The European Court observed, in paragraph 59, that it followed from established case law that article 6(1) did not guarantee a right of appeal. In paragraph 61 it also noted it was not disputed that the security for costs order pursued the legitimate aim of protecting the respondent from being faced with an irrecoverable bill for legal costs if the applicant was unsuccessful in his appeal. In these circumstances it was held that the order did not impair the very essence of the applicant's right of access to the court, bearing in mind that the applicant had already enjoyed full access to the court in the proceedings at first instance: see paragraphs 62 and 63. This reasoning indicates that a more lenient approach requires to be taken where the court is considering whether to make a security for costs order, or to order the payment of the other side's costs, as a condition of proceeding at first instance. That is the situation in the present case, as the merits of the petitioner's claim have not yet been determined by any court.
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> …
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> 20. In *Kreuz v Poland* it was held that the requirement to pay fees to civil courts in connection with claims they are asked to determine could not in itself be regarded as a restriction on the right of access to a court that was incompatible with article 6(1): paragraph 60. But the court went on in the same paragraph to reiterate that the amount of the fee assessed in the light of the particular circumstances of a given case, including the applicant's ability to pay them, and the phase of the proceedings at which that restriction has been imposed are factors which are material in determining whether or not a person enjoyed his right of access. The amount of the fee

> actually charged was held to be excessive having regard to the applicant's means. It resulted in his desisting from his claim and in his case never being heard by a court. The court said, in paragraph 66, that this, in its opinion, impaired the very essence of the applicant's right of access."

20. Lord Hope went on to hold that an order staying the action until the claimant had paid the defendant the sum of £8,752 in costs was a breach of the claimant's rights under section 8(8) of the Gibraltar Constitution Order, corresponding to Article 6(1), for reasons he expressed at [21] as follows:

> "The petitioner, who was appearing before the court as a litigant in person, was not asked whether she had the means to pay that amount. Moreover she was being compelled, as a condition of taking any further steps in the Supreme Court, to waive her objection to the fact that the amount stated in the bill of costs, which she disputed, had been approved in her absence. No mention was made of the petitioner's right of access to the court of first instance for the determination of that part of her claim which had been allowed to stand or of the fact that, if the costs were not paid, that part of the claim would be incapable of being determined by any court. These aspects of the matter appear to have been left out of account entirely. Their Lordships are in no doubt that the effect of the order was to impair the petitioner's right of access to the court under section 8(8) of the Constitution Order. In their opinion it impaired the very essence of her right of access."

21. Although not referred to in *Ford v Labrador*, Lord Hope's reasoning is supported by the decision of the European Court of Human Rights in *Aït-Mouhoub v France* (2000) 30 EHRR 382, in which the applicant had been ordered to pay the sum of FF80,000 into court as security for the costs of a criminal complaint against two gendarmes in circumstances where the applicant had no financial resources whatsoever. The Court held that the applicant's right of access to a court under Article 6(1) had been infringed for the following reasons (references omitted):

> "52. As to the merits, [the Court] reiterates that the 'right to a court', of which the right of access constitutes one aspect … is not absolute but may be subject to limitations permitted by implication. However, these limitations must not restrict or reduce a person's access in such a way or to such an extent that the very essence of the right is impaired, and they will not be compatible with Article 6(1) if they do not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved ... Furthermore, the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective. This is particularly so of the right of access to the courts in view of the prominent place held in a democratic society by the right to a fair trial ….

…

> 57. It is not for the Court to assess the merits of the complaint lodged by the applicant with the appropriate judge. It considers, however, that the setting of such a large sum by the senior investigating judge was disproportionate seeing that Mr Aït-Mouhoub „, had no financial resources whatsoever. Requiring the applicant to pay such a large sum amounted in practice to depriving him of his recourse before the investigating judge."

22. Since then, in the related context of the payment of court fees, the Court has held in *Podbielski v Poland* [2005] ECHR 543:

> "63. The Court has accepted that in some cases, especially where the limitations in question related to the conditions of admissibility of an appeal, or where the interests of justice required that the applicant, in connection with his appeal, provide security for costs to be incurred by the other party to the proceedings, various limitations, including financial ones, may be placed on his or her access to a 'court' or 'tribunal'. However, such limitations must pursue a legitimate aim and there must be a reasonable relationship of proportionality between the means employed and the legitimate aim sought to be achieved (ibid.)
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> 64. The requirement to pay fees to civil courts in connection with claims, or appeals, they are asked to determine cannot be regarded as a restriction on the right of access to a court that is incompatible per se with Article 6 § 1 of the Convention. However, the amount of the fees assessed in the light of the particular circumstances of a given case, including the applicant's ability to pay them, and the phase of the proceedings at which that restriction has been imposed are factors which are material in determining whether or not a person enjoyed his right of access and had 'a ... hearing by [a] tribunal' (see *Kreuz (no. 1)* and *Tolstoy-Miloslavsky*, cited above."

Similar statements were made in *FC Mretebi v Georgia* (2010) 50 EHRR 31 at [41].

23. In the present case, the effect of the Court of Appeal's decision to allow the Prince's appeal to the extent of ordering a re-trial is that Mrs Harb has not yet had a determination of her claim at first instance. It is as if there had been no trial before Peter Smith J. Moreover, the Court of Appeal did not make that decision as a result of any fault on the part of Mrs Harb, but due to the deficiencies in Peter Smith J's judgment. Although the Court of Appeal noted that there were various problems with the evidence Mrs Harb gave before Peter Smith J, it did not conclude that these meant that she could not succeed in her claim.

24. It follows that, given that Mrs Harb cannot pay the sum of £250,000, the effect of making either of the orders sought by the Prince would be to prevent Mrs Harb from obtaining a proper determination of her claim at first instance.

25. I do not underestimate the significance to the Prince of the fact that he has not been paid the sum of £250,000 which the Court of Appeal required Mrs Harb to pay in consequence of her unsuccessful opposition to the Prince's appeal. I do not regard it as relevant, as counsel for Mrs Harb submitted, that the Prince is a very wealthy man. The fact remains that the Prince is out of pocket for his costs of the appeal and has not received even the amount ordered to be paid on account. On the other hand, it should be borne in mind that, as Millett LJ observed in a different context in *Metalloy Supplies Ltd v MS (UK) Ltd* [1997] 1 WLR 1613 at 1619, "[i]t is not an abuse of the process of the court or in any way improper or unreasonable for an impecunious plaintiff to bring proceedings which are otherwise proper and bona fide while lacking the means to pay the defendant's costs if they should fail".

26. In my judgment, an order of either of the kinds sought by the Prince would pursue a legitimate aim, namely to ensure that the Prince receives at least some recompense for the money he expended on his successful appeal, but it would represent a disproportionate interference with Mrs Harb's right of access to a court under Article 6(1) because it would impair the very essence of that right.

Mrs Harb's application

27. By her application Mrs Harb seeks directions for the re-trial of her claim. All that is required is that the matter be listed for trial. The Prince contends that Mrs Harb should not be heard by the Court since she is in contempt of court as a result of her failure to comply with the Court of Appeal's order.

28. In *JSC BTA Bank v Ablyazov* [2012] EWCA Civ 639 Moore-Bick LJ said:

> "26. … This establishes that the question whether to decline to hear a contemnor, a course which will almost invariably lead to his appeal or application being dismissed, is to be determined by reference to how, in the circumstances of the individual case, the interests of justice will best be served. That is how the principle was formulated by Lord Bingham in *Arab Monetary Fund v Hashim*, reflecting the judgment of Denning L.J. in *Hadkinson v Hadkinson*. When deciding that question one factor the court must bear in mind is that, as Denning L.J. observed, it is a strong thing for a court to refuse to hear a party and is only to be justified by grave considerations of public policy. …
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> 28. … I do not accept, therefore, that any refusal to hear a contemnor would inevitably involve a breach of article 6 , but I do accept that the circumstances in which such a course would be justified are likely to arise very rarely. The mere fact that the applicant is in contempt is not, in my view, sufficient justification."

29. These observations were cited by approval by Tomlinson LJ, with whom Christopher Clarke LJ agreed, at a later stage of the same proceedings [2015] EWCA Civ 70 at [17]. Tomlinson LJ added at [20]:

> "It may be that it is not only where the contempt impedes the course of justice in the cause that the court will decline to hear a contemnor, but the lack of connection between the contempt and the subject matter of the application on which the contemnor wishes to be heard is plainly a powerful factor to be taken into account."

30. Mrs Harb's breach of the Court of Appeal's order is an involuntary one. Even if that technically amounts to a contempt of court, it is not one which impedes the course of justice in these proceedings. In those circumstances I regard the suggestion that the Court should decline to hear Mrs Harb's application as a remarkable one. Non-payment of interim costs orders by litigants is, regrettably, a very common occurrence. If it amounted to a contempt of court which justified courts in not hearing the defaulting parties, many litigants would be shut out from pursuing or defending claims even in the absence of any substantive order to that effect. In my view that cannot be right. Accordingly, I shall not decline to hear Mrs Harb's application

31. Otherwise than on the ground of Mrs Harb's alleged contempt, the Prince does not oppose her application.

Conclusion

32. The Prince's application is dismissed. I shall list the matter for trial as requested by Mrs Harb.