[2019] SC (Bda) 41 Div (12 July 2019)

In The Supreme Court of Bermuda

DIVORCE JURISDICTION

2012: No. 096

BETWEEN:

W.E.R.

Petitioner

-and-

C.L.M.R.

Respondent

Before: **Hon. Chief Justice Hargun**

Appearances: **Ms Jackie MacLellan, MacLellan & Associates, for the Petitioner**
Mr Cameron Hill, Westwater Hill & Co., for the Respondent

Date of Hearing: **26 June 2019**

Date of Reasons: **12 July 2019**

REASONS FOR RULING

Ex parte worldwide freezing injunction in matrimonial proceedings; the scope of duty of full and fair disclosure on the ex parte application; consequences of failure to provide full and fair disclosure

Introduction

1. On 26 June 2019, the Respondent wife, made an ex parte application, without notice, seeking a freezing order restraining the Petitioner husband, from removing his assets from Bermuda, up to a total value of $25 million and also sought leave of the Court to apply the order in the State of New York in the United States of America.

2. The application was made in support of a substantive application by which the Respondent sought to set aside the Consent Order entered into between the parties on 7 December 2012, whereby the parties agreed to resolve, on a clean break basis, their respective claims for ancillary relief. In summary, the Petitioner agreed to pay to the Respondent by way of lump sum provision the sum of $1,200,000 and to allow the Respondent to retain the benefit of the former matrimonial home purchased with the financial resources of the Petitioner and valued at around $1,600,000. These payments to the Respondent represented approximately one third of the total financial resources available to the Petitioner, as disclosed by him at that time. It is said on behalf of the Respondent, that investigations carried out on behalf of the Respondent demonstrate that the Petitioner, at the time of the Consent Order, was worth many tens of millions of dollars and the Respondent asserts in her sworn affidavit that, "*it is my belief that in obtaining my signature on the Consent Order I became the victim of a very large miscarriage of justice*".

3. At the conclusion of the ex parte hearing, I granted the order sought by Mr Hill on behalf of the Respondent but limited the amount restrained to $5 million.

4. On 26 June 2019, I heard the application by the Petitioner seeking to set aside the ex parte Order on a number of grounds, including failure to give full and fair disclosure at the ex parte hearing and the use of confidential documents belonging to the Petitioner allegedly stolen by the Respondent from the Petitioner's dwelling. At the conclusion of the hearing, I discharged the ex parte Order and stated that I will set out my reasons for my decision in writing.

Duty of full and fair disclosure

5. Counsel for both parties accepted that a party applying for an ex parte Order seeking to freeze the assets of the other party owes to the Court a duty of full and frank disclosure. This obligation applies equally in the context of ex parte applications made in matrimonial proceedings. The scope of this duty of candour is set out in the judgment of Mostyn J. in *ND v KP* [2011] EWHC 457 [13]

(relying on the analysis of Mr Alan Boyle QC in *Arena Corporation v Schroder* [2003] EWHC 1089 (Ch.)):

> *"13. If you do move the Court ex parte then you are fixed with a high duty of candour. This is established in many cases. I cite, for example, R v. The Kensington Tax Commissioners ex parte Princess Edmond de Polignac [1917] 1 KB 486; Bank Mellat v. Nikpour [1985] FSR 87; Lloyds Bowmaker v. Britannia Arrow Holdings [1988] 1 WLR 1337; Brink's Mat Ltd v Elcombe [1988] 1 WLR 1350 and Behbehani and others v. Salem and others [1989] 1 WLR 723. I do not need to delve into the dicta in those cases as fortunately the entire jurisprudence in this field has been analysed and summarised by Mr. Alan Boyle QC in a magisterial judgment, Arena Corporation v. Schroeder [2003] EWHC 1089 (Ch). The deputy judge set out the principles on the law distilled from the cases to which I have referred in these terms:*
>
> *"213. On the basis of the foregoing review of the authorities, I would summarise the main principles which should guide the court in the exercise of its discretion as follows:*
>
> > *(1) If the court finds that there have been breaches of the duty of full and fair disclosure on the ex parte application, the general rule is that it should discharge the order obtained in breach and refuse to renew the order until trial.*
> >
> > *(2) Notwithstanding that general rule, the court has jurisdiction to continue or re-grant the order.*
> >
> > *(3) That jurisdiction should be exercised sparingly, and should take account of the need to protect the administration of justice and uphold the public interest in requiring full and fair disclosure.*

(4) The court should assess the degree and extent of the culpability with regard to non-disclosure. It is relevant that the breach was innocent, but there is no general rule that an innocent breach will not attract the sanction of discharge of the order. Equally, there is no general rule that a deliberate breach will attract that sanction.

(5) The court should assess the importance and significance to the outcome of the application for an injunction of the matters which were not disclosed to the court. In making this assessment, the fact that the judge might have made the order anyway is of little if any importance.

(6) The court can weigh the merits of the plaintiff's claim, but should not conduct a simple balancing exercise in which the strength of the plaintiff's case is allowed to undermine the policy objective of the principle.

(7) The application of the principle should not be carried to extreme lengths or be allowed to become the instrument of injustice.

(8) The jurisdiction is penal in nature and the court should therefore have regard to the proportionality between the punishment and the offence.

(9) There are no hard and fast rules as to whether the discretion to continue or re-grant the order should be exercised, and the court should take into account all relevant circumstances.

214. This summary is set out here as a convenient reminder of the main points set out in the authorities, and is not

> *intended to be a definitive statement of the applicable legal principles. The court has a single discretion, which is to be exercised in accordance with all the circumstances of the case, taking account of and giving such weight to the various factors identified in the cases as it considers appropriate."*

Failure to provide full and fair disclosure

6. At the inter partes hearing I set aside the ex parte Order made on 29 May 2019 on the principal ground that there was a wholesale failure to comply with the duty of full and fair disclosure at the ex parte hearing. My reasons for setting aside the ex parte Order are as follows.

7. First, the Respondent relied heavily on the supposed fact that the Petitioner was leaving Bermuda on a permanent basis. At paragraph 148 of her affidavit, the Respondent asserted that she was "*making this application on an urgent basis because I now know that the Petitioner is planning on leaving Bermuda and has made substantial progress in his plans and appears intent on going through with the move"* In the written submissions made on behalf of the Respondent it was submitted that once the Petitioner is outside of Bermuda it will become extremely difficult to enforce any order made.

8. However, the Respondent and her counsel failed to point out to the Court that the Petitioner had kept the Respondent fully informed of his plans to leave Bermuda and that this was on a temporary basis. It now transpires that the Petitioner never mentioned or indicated that he was leaving Bermuda on a permanent basis. In an email sent by the Petitioner to the Respondent on 13 March 2019 he advised:

> *"As [the daughter] has probably told you, we gave up the lease on a cottage at Cavello Bay.*
>
> *…*

Although we love it, we feel that going forward, Somerset is too far out there as a home for [the daughter] as she enters her teen years. She will be going out more and more, and the drive is just too inconvenient for everyone.

I do not know if we will find a place by June 1st. It is really discouraging to visit Property Skipper and see a few rentals available, and what you get for your money, <u>especially in the central parishes, which is where we hope to live</u>."[Emphasis added].

9. The suggestion that the Petitioner was leaving the Island permanently was used as a ground for justifying making the application on an ex parte basis and in particular as evidence supporting that, unless restrained the Petitioner was liable to dissipate the assets. However, this assertion was without any factual basis and had the Court appreciated the real position, the Court would not have made the ex parte Order.

10. Secondly in his written submissions, Mr Hill submitted that the evidence of the Respondent is clear and unambiguous in that there was no meaningful disclosure by the Petitioner to the Respondent or her attorney and there was no disclosure to the Court. Mr Hill submitted that the only disclosure that took place between the parties is contained in a single letter written on behalf of the Petitioner by Ms Lomas, his then attorney,

11. At the inter partes hearing it became abundantly clear that the suggestion that the entirety of the disclosure made by the Petitioner consisted of a single letter from the Petitioner's attorney was unsustainable and the Respondent, who attended the ex parte hearing, must have known that that was incorrect. It is the evidence of the Petitioner that he explained in great detail to the Respondent what his assets were at the time of the divorce. He says that the Petitioner and the Respondent sat together and accessed all his accounts, brokerage accounts and tax returns online. The asset values were given to the cent as detailed in his attorney's letter to the Respondent and attorneys. He says that there was no way to manipulate these numbers as they were viewed by the parties in real time. This evidence by the Petitioner is supported by an email sent by the Respondent to her attorney on 9

May 2012, in which the Respondent advises her attorney of a meeting with the Petitioner as follows:

> "*Our meeting went very well and was very civilised. So far so good!*
> *He went through his bank portfolio with me online (cash, stocks, bonds).*
> *He was willing to explain each thing in detail, but I haven't put all of my notes together yet.*
> *Here is a brief summary as of today-it fluctuates with the markets of course:*
> *$6, 851, 000-Liquid assets*
> *$8, 951, 000-Net worth."*

12. The email of 9 May 2012 was clearly relevant and material evidence as it was clearly contradictory to the assertion that the financial disclosure made by the Petitioner consisted of a single letter from his attorney. Furthermore, it was consistent with the financial disclosure made by the Petitioner's attorney in correspondence to the Respondent's attorney. It is regrettable that the Court's attention was not drawn to this email and the disclosure made to the Respondent in terms of taking the Respondent through the Petitioner's portfolio and the offer to explain to her any aspect in detail.

13. It is noteworthy that during the divorce proceedings the Respondent was represented by Mrs Georgia Marshall, a pre-eminent specialist in her field. Mr Hill accepted that there was no indication that Mrs Marshall queried the disclosure made by the Petitioner or sought any further and better particulars in relation to the financial disclosure made in correspondence by Ms Lomas. It appears that Mrs Marshall accepted that the Petitioner had made full and frank disclosure and this is reflected in the preamble to the Consent Order signed by Mrs Marshall on behalf of the Respondent. There is no evidence indicating that Mrs Marshall considered at the time or now thinks that the disclosure made by the Petitioner was in any way inadequate.

14. Furthermore, it appeared at the inter partes hearing that the parties had in fact entered into a Prenuptial Agreement executed by them on 3 June 1999. In that

agreement the Petitioner sets out in detail his assets as they existed on that date. Again, this was clearly a relevant document which should have been disclosed in the context of the assertion strongly made by Mr Hill (in the presence of the Respondent at the ex parte hearing) that the only disclosure made by the Petitioner was a single letter from his attorney. The Prenuptial Agreement is also relevant in the context of the Respondent's assertion made in her affidavit that "*in obtaining my signature on the Consent Order I became the victim of a very large miscarriage of justice"*. Had the Prenuptial Agreement been disclosed to the Court, as it should have been, the Court would have seen that the Consent Order agreed to by the Respondent gave her, by way of ancillary relief, a sum far greater then she would have received under the Prenuptial Agreement.

15. It is regrettable that the Prenuptial Agreement was not disclosed to the Court as the document was clearly relevant to the issues which the Court had to decide. No explanation has been provided to the Court for this serious failure of the duty of full and fair disclosure. The Court notes that that Mr Hill represented to the Court that he was unaware of the existence of the Prenuptial Agreement.

16. Thirdly, in paragraph 82 of her affidavit the Respondent states that;

> *"I was aware that several Holdings were in the stock market beyond the Berkshire Hathaway stock. I had no idea what was actually in there. All I knew was that we owned a large home in Santa Fe, New Mexico which was our main residence for 11 years, a 62 foot offshore motor yacht which was kept in Fort Lauderdale... a big beautiful home on harbour in Newport, Rhode Island (which we sold by the Bermuda), and a lake property (20 acres on an 80 acre island, plus shore property on the mainland) in Ely, Minnesota where we would spend a few months in the summer each year with the children".*

17. The assertions made in this paragraph are misleading in the context of an ex parte injunction freezing the assets of the Petitioner. The Respondent must have known that the 62 foot offshore motor yacht referred to was in fact sold in 2011. She must also have known that the Santa Fe home was sold in 2010. The fact that the

Petitioner no longer owned these assets was material and should have been disclosed. She acknowledges that the Newport home was sold in order to purchase the Bermuda home in which she now resides.

18. In passing, the Court notes that the Respondent's case relating to the Petitioner's wealth, as set out in her affidavit, is largely based on the assumption that the Petitioner continues to own the Berkshire Hathaway stock. The evidence filed by the Petitioner shows that he indeed owned Berkshire Hathaway stock which was disclosed to the Petitioner in the Prenuptial Agreement but that stock had to be sold in 2010 having regard to the cash flow difficulties experienced by the Petitioner. The Petitioner maintains that the Respondent must have been aware that the Berkshire Hathaway shares had been sold in 2010 otherwise they would have been disclosed in the disclosure made by him at the time of his divorce in 2012.

19. The picture painted by Mr Hill relating to the financial resources enjoyed by the Petitioner is diametrically opposed to the compelling evidence given by the Petitioner. Mr Hill submitted that the Petitioner lives an extremely international lifestyle and has the ability to place his assets beyond the reach of this Court. According to Mr Hill, the Petitioner is a sophisticated investor, who has connections in numerous jurisdictions around the world, as well as access to housing. Mr Hill submits that the Petitioner's failure to disclose what may amount to a sizeable fortune, possibly in many tens of billions of dollars, at the time of the divorce is ample evidence for the suggestion that he may seek to avoid the consequences of an order based on the entirety of his assets base.

20. In response to the affidavit evidence of the Respondent and Mr Hill's written submissions, the Petitioner points out:

    (i) He no longer has any accounts at Granaway Investments either in Bermuda or outside Bermuda as this account was closed approximately five years ago.

(ii) He no longer has any accounts at JPMorgan Private Bank or JPMorgan Brokerage in Bermuda outside of Bermuda as this account was closed approximately six years ago.

(iii) He no longer has any accounts at UBS Private Bank and/or UBS Brokerage and/or UBS Investment Bank in or outside of Bermuda as this account was closed four years ago.

(iv) He no longer has any account with Merrill Lynch Private or Brokerage or Investment Bank in Bermuda or outside of Bermuda and he has not had this account for approximately 10 years.

(v) He no longer has any accounts with Axiom Brokerage in or out of Bermuda as this account was closed approximately six years ago.

(vi) He no longer has his original Berkshire Hathaway shares.

(vii) His brother, does not manage any investment, custodial and discretionary accounts on his behalf nor are they linked financially in any way, whatsoever, and have not been for many years.

21. The Petitioner points out that he was forced to leave JPMorgan Private Bank because his net worth did not meet their minimum requirements of $5 million. The Petitioner moved to UBS but as his net worth continued to decline, he was forced to leave their private bank also.

22. The Petitioner challenges the Respondent's assertion that he leads a lavish lifestyle. He points out that since the divorce, for the last eight years he has lived in a small cottage on Cavello Bay with rent of $5,500 per month. His car was a six year old Hyundai Accent which he bought for approximately $26,000 and sold for $11,000 prior to his trip to Europe. The boat, which he owns, is a used 1982 centre console that he purchased for $18,000 in 2013. He has not flown business class in many years except with an occasional mileage reward. His evidence is that he travels with his current wife; they almost always stay in an inexpensive

Airbnb rental accommodation. The Petitioner states that his net worth is barely 10% of the $25 million sought to be frozen by the Respondent in the ex parte application.

23. Fourthly, as evidence of the Petitioner's propensity to dissipate his assets, Mr Hill relied upon the fact that the Petitioner had failed to pay maintenance for the child in an amount of $1500 per quarter. However, the Respondent failed to disclose to the Court that this issue had been canvassed in the pre-litigation correspondence between the current attorneys acting for the parties. In this regard on 17 April 2018, Mr Hill wrote an eight-page letter to the Petitioner setting out this claim for maintenance under the existing Consent Order and seeking further full and frank disclosure in aid of a future application to vary the Consent Order.

24. There was a response to Mr Hill's letter from the Petitioner's new attorneys, MacLellan & Associates dated 11 May 2018. This letter confirmed that the Petitioner had made full and frank financial disclosure to the Respondent during the negotiations leading up to the Consent Order. The letter also pointed out that the settlement reached was more advantageous to the Respondent then what she would have received under the Prenuptial Agreement which was executed prior to the marriage. In relation to the maintenance payments, the letter pointed out that the Petitioner had stopped making the $1500 quarterly payments to the Respondent two years ago and it was the Petitioner's understanding that this was done with the consent of the Respondent.

25. The letter from MacLellan & Associates was clearly relevant as it set out the position of the Petitioner in relation to the critical issues before the Court. In particular it set out the Petitioner's position that (i) he was not in breach of the Consent Order in relation to maintenance as payments had ceased with the agreement of the Respondent; (ii) the Petitioner had provided full and frank disclosure at the time of the Consent Order; and (iii) the parties had entered into a Prenuptial Agreement prior to the marriage and the Consent Order was far more advantageous to the Respondent then what she would have received under the Prenuptial Agreement. It is regrettable that neither the letter from Mr Hill dated 17 April 2018 nor the response from MacLellan & Associates dated 11 May 2018

was disclosed to the Court, as it should have been, at the hearing of the ex parte application on 29 May 2019. The Court records Mr Hill's representation that to the best of his recollection he had not seen the letter from MacLellan & Associates dated 11 May 2018.

26. Fifthly, whilst the Respondent mentions in her affidavit that she has been able to remarry, she failed to advise the Court that her husband is the general manager at a local company and that they both live in the home which the Petitioner provided to the Respondent and their daughter by way of the divorce settlement, free and clear from any debt. The home in which they live is now worth in the region of $2 million. The Petitioner believes that the Respondent's husband's income to be at least between $130,000 and $150,000, making her annual household income close to $200,000.

27. It was principally for these reasons that the Court set aside the ex parte Order made on 29 May 2019. The Court took the view that there had been a wholesale failure to comply with the duty of full and fair disclosure and in those circumstances, the appropriate remedy was to set aside the ex parte Order. Given the extent of the failure to comply with this duty, the Court did not consider it appropriate to re-grant the order. In any event having regard to the facts as disclosed at the inter partes hearing, this is not a case where the Court would grant a freezing injunction in all the circumstances.

28. Finally, the Respondent has elected not to respond to the allegation that some of the material deployed in support of the ex parte application for the freezing injunction was confidential material belonging to the Petitioner which had been stolen by the Respondent. Having regard to my findings and Order in relation to the issue of failure to comply with the duty of full and fair disclosure, it is unnecessary to consider this ground in any detail. However, for sake of completeness, I should add that if it was necessary to decide this issue I would also have discharged the ex parte Order on this ground in accordance with the principles set out in *Tchenguiz v Imerman* [2010] EWCA 908.

29. This case illustrates the very heavy duty a party and her counsel assume when proceeding with an ex parte injunction freezing the accounts of the other party. A failure to comply with the duty of candour will ordinarily result in the ex parte Order being set aside with costs awarded, potentially on an indemnity basis, against the party seeking the ex parte relief. Failure on the part of counsel to ensure full and fair disclosure potentially exposes the counsel to a wasted costs order made against him. The most damaging aspect of ex parte relief in the matrimonial context is that it has the potential to damage already frayed relationship between the parties beyond repair. In the circumstances, counsel instructed to seek such relief shoulder the heavy responsibility of ensuring that such an application is really necessary and ensuring that full and fair disclosure is made to the Court.

30. I will now hear the Petitioner's application that the Respondent be ordered to pay the Petitioner's costs on an indemnity basis. I understand that the Petitioner no longer pursues a wasted costs Order against Mr Hill.

Dated 12 July 2019

NARINDER K HARGUN
CHIEF JUSTICE