IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

FSD CAUSE NO. 268, 269, 270 OF 2021 (IKJ)

IN THE MATTER OF THE COMPANIES ACT (2021 REVISION)

AND IN THE MATTER OF PRINCIPAL INVESTING FUND I LIMITED

AND IN THE MATTER OF LONG VIEW II LIMITED

AND IN THE MATTER OF GLOBAL FIXED INCOME FUND I LIMITED

CREDIT SUISSE LONDON NOMINEES LIMITED

Petitioner

- and -

PRINCIPAL INVESTING FUND I LIMITED
LONG VIEW II LIMITED
GLOBAL FIXED INCOME FUND I LIMITED

First Respondents

- and -

FLOREAT PRINCIPAL INVESTMENT MANAGEMENT LIMITED
LV II INVESTMENT MANAGEMENT LIMITED
FLOREAT INVESTMENT MANAGEMENT LIMITED

Second Respondents

IN CHAMBERS

Appearances:

Mr Stephen Rubin KC and Mr James Collins KC instructed by Mr David Lee and Mr David Lewis-Hall of Appleby (Cayman) Limited for the Petitioner

Mr Michael Bloch KC instructed by Mr Ben Hobden and Mr Alan Quigley of Forbes Hare for the Second Respondents

Before: The Hon. Justice Kawaley

Heard: 11 May 2023

Ruling Delivered: 12 May 2023

INDEX

Abuse of process-intimidation of witness-whether proceedings should be struck-out

SUMMARY RULING ON 2ND RESPONDENTS' STRIKE-OUT SUMMONS

Introductory

1. By Summonses dated 3 May 2023, the 2nd Respondents sought the following relief:

> "*1. An Order:*
> *1.1 Dismissing and/or otherwise disposing of the Petition; and/or*
> *1.2 Striking out the Petition; and/or*
> *1.3 Summarily dismissing the Petition;*
> *Pursuant to Order 18, rule 19(1) and/or Order 14, rule 12 of the Grand Court Rules and / or the Court's inherent jurisdiction.*"

2. I heard full argument yesterday and reserved judgment, indicating that I would signify my decision today in advance of a 2.00pm hearing at which directions would be given for consequential relief. I now signify my decision in summary form and will, if necessary, deliver fuller reasons for this decision later.

The strike-out application

3. The 2nd Respondents at the beginning of the trial were granted leave to pursue a collateral purpose defence which relied on surveillance evidence to be given by two private detectives, X and Y. The application is based on allegations of witness intimidation which arise from the Petitioners' attorneys (in particular a junior associate "A") supplying an article (the "Article") as part of a bundle of documents which would potentially be used for cross-examination of X and Y. The Article described alleged acts of unlawful violence carried out by unnamed members of a British special force in the course of their duties. Y was at the material time a member of the special force

and perceived the article when it was supplied to him as an implied threat that he would be identified to members of a terrorist organization and thus his and his family's life might be placed at risk. He declined to give evidence as a result, albeit that the day before he was due to give evidence, the Petitioners' attorneys had signified that the Article (and other documents included in the initial bundle of cross-examination materials) would not be put to him.

4. In their Skeleton Argument, the 2nd Respondents submitted as follows:

"***The propositions for the Court to decide***

6. On this application, R2s invite the Court to make the following findings.

7. First, so far as concerns the intimidatory behaviour and its effect:

7.1. that the Witness was in fact intimidated by the production of the Article, and the implication that someone was aware of or would assert his involvement in the events which it concerned;

7.2. that the Petitioner must take those affected by intimidation as it finds them, and that it is not open to the Petitioner to argue that its intimidation might have affected other people in the position of those affected by the intimidation differently;

7.3. that, on an application to dismiss proceedings on the grounds of witness intimidation, the Court should be wary of any attempt by the wrongdoer to put the victim on trial; and

7.4. that if, however, R2s might be expected to provide an explanation for the manner in which the intimidation of their witnesses has affected them, R2s have done so.

8. Second, so far as concerns the intention behind producing the Article:

8.1. that the production of the Article was objectively capable of intimidating a person in the position of the Witness;

8.2. that the Court expects its officers to refrain from taking steps that will or may reasonably be expected to intimidate witnesses, not just to refrain from intimidating witnesses intentionally;

8.3. that, accordingly, it is not necessary to establish that anyone on behalf of the Petitioner intended to intimidate the Witness, much less to expose him or his family to a risk of physical harm; and

8.4. that, insofar as necessary, the Petitioner has failed (as it might have been expected to do, from material uniquely within its control) to establish any plausible explanation for producing the Article other than an intention to intimidate.

9. Third, so far as concerns responsibility for the intimidation:

FSD2021-0268 Page 3 of 10 2023-05-12

9.1. that a party is to be treated as responsible for misconduct committed in the course of the proceedings by the lawyers acting for it in those proceedings;

9.2. that the lawyers for whom the party is to be treated as responsible includes all those lawyers whom the party has authorised to act for it;
9.3. that, in any case, Mr [A] *is of a seniority and his involvement in the proceedings is such that the Petitioners are fixed with responsibility for his actions;*

9.4. that, insofar as relevant, the Petitioner has failed (as it might have been expected to do, from material uniquely within its control) to establish a plausible account of how the Article was produced without anyone other than Mr [A] *having been aware of, acquiesced in and/or encouraged, procured or authorised the intimidation.*

10. Fourth, so far as concerns the effect of the intimidatory conduct on the prospects of a fair trial:

10.1. that a fair and satisfactory process is an essential element in a fair and satisfactory trial, and it is therefore not open to the Petitioner to argue that the Witness's evidence would not ultimately have availed R2s;

10.2. that, in any event, there is no basis on which the Court could reach that conclusion;

10.3. that the loss of the Witness is therefore sufficient to make a fair and satisfactory trial impossible;

10.4. that, in any event, a fair and satisfactory trial is impossible without the evidence of the Witness and the ongoing participation of R2s' other witnesses; and

10.5. that R2s have, consequently, been deprived of material opportunity to present their case such that a fair and satisfactory trial is no longer possible.

11. Fifth, that in any case the intimidation of the Witness is a serious form of interference with the judicial process and unconscionable conduct of a kind which deprives the Petitioner of any expectation that the Court might grant equitable relief at its suit."

5. The Court was invited, if it found that intimidation had occurred, to strike-out on one of two alternative grounds:

   (a) as an affront to justice so serious that no need to consider the proportionality of the Court's response arose; or

   (b) on the grounds that the possibility of a fair trial had been compromised to such an extent that striking-out was the only appropriate judicial response to the intimidation which had resulted in a key witness being deterred from giving evidence.

FSD2021-0268 Page 4 of 10 2023-05-12

Summary of Findings

Was the Witness intimidated?

6. I find that:

(a) the production of the Article was objectively capable of intimidating a person in the position of the Witness*;*

(b) the Witness was initially intimidated by the implication that the Petitioners and/or their attorneys had identified him as being involved in alleged military misconduct which, if publicly revealed, could place his and/or his family's life at risk;

(c) I am unable to make any findings as to how enduring the effects of the intimidation are on the Witness in light of the subsequent explanations proffered by the attorneys for the Petitioners about how the Article came to be temporarily deployed. It is noteworthy in this regard that after initially declining to give evidence at trial, the Witness has supplied further Affidavit evidence in support of the 2nd Respondents' strike-out;

(d) the Petitioners' attorneys have supplied an adequate and credible explanation as to how any intimidation of the Witness for which their clients may properly be held responsible can only plausibly have occurred on an accidental basis;

(e) it is understandable that Mr A has not given evidence as to the precise circumstances in which he identified the Article and included it in the bundle of potential cross-examination materials in advance of the Witness giving evidence. He has taken legal advice in this regard. By the 2nd Respondents' own account, he could not have lawfully linked the Article to the Witness;

(f) if (which I consider implausible) Mr A did launch a 'lone wolf' deliberate intimidation 'hit' on the Witness, I would find that the Petitioners were not responsible for such extraordinary actions: see e.g. *Bennett v London Borough of Southwark* [2002] IRLR 407 (per Sedley LJ at paragraph 26);

(g) the suggestion that the Petitioners' attorneys engaged in a deliberate strategy of intimidating the Witness (whether on their clients' instructions or of their own

initiative) is fantastical, having regard to, *inter alia*, (1) the dominant legal culture in the Cayman Islands and (2) the fact that such a strategy was quite obviously more likely to undermine their clients' case rather than to advance it and virtually guaranteed to destroy their own professional reputations;

(h) the suggestion that other witnesses are in any way fearful of Mr Wang appear fanciful on their face in light of (1) credible oral evidence from Mr Pearson that he overhead Mr Hussam Otaibi verbally abusing Mr Wang over the telephone in the summer of 2020, (2) incontrovertible documentary evidence that Mr Hussam Otaibi issued a written warning to Mr Wang about the unpleasant consequences Mr Wang would face if he resorted to litigation, and (3) credible affidavit evidence from the lead partner on the Petitioners' legal team that Mr Wang had no involvement in or knowledge of the deployment of the Article.

7. The Witness was due to give evidence on Monday 1 May 2023. I accept the evidence of the lead partner, David Lee, set out in his Third Affidavit about how the bundle of cross-examination materials was prepared:

(a) Mr A was asked to collate cross-examination materials for inclusion in a pdf file on Friday 28 April 2023 at 11.02 am. Mr Lee had a short discussion with Mr A at Appleby's offices during the Court lunch break and the Article was mentioned. Mr Lee's recollection is that this was stated as being relevant to discrediting the Witness' exaggerated military record and that he did not look at it although Mr A showed him some of the enclosures on Mr A's computer;

(b) Mr A copied Mr Lee with an email sent to Mr David Lewis-Hall attaching a link to the pdf including the Article at 2.37pm when Mr Lee was back at Court. Mr A told Mr Lewis-Hall he had discussed the relevance of the Article with Mr Lee at lunchtime and would explain to Mr Lewis-Hall later. Mr Lewis-Hall forwarded the pdf including the Article to Forbes Hare at 2.53pm;

(c) I accept the evidence set out in the 10th Affidavit of David Lewis-Hall that Mr Lewis-Hall was in Court seated next to Mr Collins KC as junior counsel when he received and forwarded the said pdf without examining its contents.

8. On the afternoon of 1 May 2023, after the implications of the Article were first raised in Chambers, Appleby wrote a letter to Forbes Hare making it clear that the Article would not be relied upon in cross-examination and that no threat had been intended.

Is the intimidation which did occur such an affront to justice as to warrant striking-out on this ground alone?

9. In *Masood v Zahoor (Practice Note)* [2010] 1 WLR 746, Mummery LJ held:

> "*71. In our judgment, this decision is authority for the proposition that, where a claimant is guilty of misconduct in relation to proceedings which is so serious that it would be an affront to the court to permit him to continue to prosecute his claim, then the claim may be struck out for that reason. In the Arrow Nominees case … the misconduct lay in the petitioner's persistent and flagrant fraud whose object was to frustrate a fair trial. The question whether it is appropriate to strike out a claim on this ground will depend on the particular circumstances of the case. It is not necessary for us to express any view as to the kind of circumstances in which (even where the misconduct does not give rise to a real risk that a fair trial will not be possible) the power to strike out for such reasons should be exercised.*" [Emphasis added]

10. The misconduct which I find occurred here was the accidental intimidation of the Witness which occurred through the normally anodyne process of supplying materials likely to be used in cross-examination. This falls far short of an affront to the Court such as would justify striking-out "*for that reason*" alone. The mere fact that the precise circumstances in which the Article was linked to the Witness by Mr A have not been revealed is insufficient to displace the conclusion supported far more clearly by the direct evidence, namely that the Article was deployed:

(a) without the informed approval of the senior litigation team; and

(b) without the knowledge or consent of Appleby's clients.

Is a fair trial still possible without the Witness' oral evidence?

11. In *Arrow Nominees Inc-v- Blackledge* [2001] BCC 591, Chadwick LJ opined as follows:

> "*54…But where a litigant's conduct puts the fairness of the trial in jeopardy, where it is such that any judgment in favour of the litigant would have to be regarded as unsafe, or where it amounts to such an abuse of the process of the court as to render further proceedings unsatisfactory and to prevent the court from doing justice, the court is entitled - indeed, I would hold bound - to refuse to allow that litigant to take further part in the*

proceedings and (where appropriate) to determine the proceedings against him. The reason, as it seems to me, is that it is no part of the court's function to proceed to trial if to do so would give rise to a substantial risk of injustice. The function of the court is to do justice between the parties; not to allow its process to be used as a means of achieving injustice. A litigant who has demonstrated that he is determined to pursue proceedings with the object of preventing a fair trial has forfeited his right to take part in a trial. His object is inimical to the process which he purports to invoke." [Emphasis added]

12. No serious misconduct has occurred in the present case. I find that a fair trial is possible without the Witness' oral evidence. The most significant and controversial part of the surveillance evidence relates to conversations allegedly overheard on 8 and 21 September 2020 in which Mr Wang appeared to be talking to Mr Pearson about Mr Cosimo Borrelli, one of the Joint Provisional Liquidators, a year before he was appointed. Mr X alone gives evidence about the disputed 8 September 2020 overheard phone conversation. Both Mr X and the Witness give evidence about the somewhat more incriminating 21 September 2020 overheard conversation; the note of that conversation was prepared by the Witness. In summary:

    (a) the 2nd Respondents in the absence of the Witness can adduce oral evidence from one witness in support of the collateral purpose defence;

    (b) the Witness' Affidavit evidence can still be read in by way of corroboration of Mr X's oral evidence.

13. Further and in any event, striking-out would be a disproportionate penalty for accidental intimidation in circumstances where the 2nd Respondents have from the beginning of the trial engaged in what can only be viewed as a skilfully executed strategy of disrupting the scheduled course of the trial and preventing the Court from making findings disposing finally of the Petition. The highlights of this strategy are:

    (a) including highly confidential and marginally relevant submissions in their trial Skeleton Argument relying in part on belated disclosed documents obtained from affiliates. This delayed the start of the trial by forcing the Petitioners to file a Confidentiality Summons which the Court had to determine in the first week of the allotted trial instead of hearing witness evidence;

FSD2021-0268 Page 8 of 10 2023-05-12

(b) applying after the commencement of the trial to serve Further and Better Particulars of Defence to belatedly rely upon the surveillance evidence of Mr X and Mr Y (the Witness) despite the surveillance reports purportedly having been prepared (at the earliest) 18 months before the trial. I felt obliged to grant an application which might potentially have been refused in part because of a 'threat' to further disrupt the trial by seeking leave to appeal if the application was refused;

(c) applying to strike-out the Petitions (gratefully seizing upon a *faux pas* on the part of the Petitioners' attorneys in relation to the Article) before the end of the trial on the express basis that "*in the event that the Court…declines to strike out the Petition or dismiss the Petition or otherwise summarily determine the Petition against the Petitioner, then the Second Respondent will oppose the Petition and a winding-up order being made thereon, subject to its right to seek leave to appeal against the decision…*"[1]

14. The way in which the 2nd Respondents have leaped upon the Petitioners' hapless deployment of the Article with thinly-veiled glee betrays a lack of conviction in their belatedly particularised collateral purpose defence. After all, its success depends upon the Court:

(a) disbelieving, *inter alia*, two longstanding officers of the Court, whose stock-in-trade is integrity and transparency[2];

(b) believing the evidence of Mr X and the Witness whose stock in trade (when carrying out surveillance work) inevitably involves subterfuge. Mr X has admitted to destroying the original notes upon which their Affidavits were based, depriving the Petitioners (and the Court) of the ability to forensically verify their authenticity[3]; and

[1] Directions Order dated 5 May 2023, third recital.

[2] I accept entirely Mr Bloch KC's cautionary submission that the Court should beware of applying, in effect, an elitist version of justice in which the status of a witness results in their evidence being accepted without crucial scrutiny.

[3] He apologized to the Court in a subsequent Affidavit after I expressed the provisional view at the hearing when the destruction of the notes was first revealed that this reflected the determination of "someone" that the Court should not be able fairly determine the authenticity of the notes.

(c) (implausibly) find that the sole or predominant purpose of the present Petitions was not to obtain a winding-up.

15. Mr Bloch KC rightly submitted that even litigants with weak cases are entitled to a fair hearing. I agree. But the Court can only deprive a litigant with a strong case of their own fair hearing rights if a fair trial overall is genuinely impossible. The circumstances of the present case are, fairly considered, a world away from such a scenario.

16. In the exercise of my discretion, I decline to strike-out the present proceedings on the grounds that a fair trial was no longer possible for the 2nd Respondents in all the circumstances of the present case.

Conclusion

17. For the above summary reasons, the 2nd Respondents' Strike-out Summonses are dismissed. I shall hear counsel as to costs and consequential relief.

THE HONOURABLE MR JUSTICE IAN RC KAWALEY
JUDGE OF THE GRAND COURT