HENDERSON CHAMBERS

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Commercial Litigation

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High Court refuses to debar Defendants from defending $14m conspiracy claim

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In *Gupta & Ors v Shah & Ors* [2024] EWHC 1189 (Ch), the High Court considered whether to debar four defendants from defending an unlawful means conspiracy claim and to summarily award the Claimants $14m.

By his judgment given with respect to part of the claim, Sir Anthony Mann had found that D1 and D2 had fraudulently misappropriated $14m and that D3 had received at least £4.4m of that, whilst D4 to D6 had received £100,000 each.

The effect of the judgment was to leave a claim in conspiracy against D3 to D6 for determination at trial, though the Defendants each failed to comply with certain directions. Consequently, the Claimants applied to debar D3 to D6 from defending the claim and for judgment to be entered against them.

Nicholas Thompsell (sitting as a Deputy Judge of the High Court) held that D3 was debarred but D4 to D6 were not. In his judgment he set out important and helpful guidance on how a court will approach a debarring application generally and within the context of a fraud claim.

Arnold Ayoo (instructed by Croft Solicitors) acted for the Fourth Defendant, who was successful in resisting the debarring application.

THE FACTS

1. The Claimants ("Cs") claimed that D1 fraudulently induced them into transferring US$14m ("the Fund") to D2 pursuant to a purported investment scheme and that:

   i. D1's wife, D3, received $9.9m from the Fund and was a constructive trustee insofar as she had the money and a dishonest assistant insofar as she had parted with it. She was also said to be a co-conspirator of D1 (the "conspiracy claim").

   ii. D3 to D6, the children of D1 and D3 ("the Children") were said to be recipients of a relatively small part of the trust funds (c.£100k each) but were also alleged to be co-conspirators.

2. Cs obtained proprietary and freezing injunctions against all of the Defendants. D1 defended the claim on the basis that Cs' money had a criminal or illegal source and therefore he was not liable. D3 claimed to have received the money in the honest belief that it was her husband's money. The Children also claimed to have taken the £100k innocently, and as soon as they found about the alleged fraud, they offered to (and subsequently did) pay the monies into Court.

3. Cs subsequently obtained summary judgment ([2023] EWHC 540 (Ch)):

   i. Against D1/D2 for fraudulent breach of trust - for the full $14m.

   ii. Against D3 for receipt of £4.4m.

   iii. Against the Children for £100,000 each.

4. This left the $14m conspiracy claims outstanding against D3 and the Children ("the Continuing Claims") which were to proceed to trial in June 2024. There were directions given for witness evidence and disclosure. D3 and the Children did not comply with the orders, so Cs sought: (i) an order debarring them from defending the Continuing Claims (effectively striking out their defences) and (ii) judgment for $14m (joint liability as co-conspirators).

THE LAW

5. Judgment was given on the basis of a review of the authorities relating to the imposition of sanctions such as debarring orders, a summary of which is as follows.

6. In *Byers v Ors v Samba Financial Group* [2020] EWHC 853 (Ch), Fancourt J stated:

   i. An order striking out a defence and debarring a defendant from defending (or striking out a claim) is the ultimate sanction that the court can impose for a breach of its order that does not amount to a contempt of court. It therefore must be a sanction of last resort and is likely only to be imposed for a serious and deliberate breach. The sanction must be necessary and proportionate in the circumstances (§120).

   ii. The court must have regard to the circumstances of the individual case and do what is necessary and proportionate to mark the seriousness of the breach of its order in a way that is consistent with the interests of justice and the overriding objective. The seriousness of the breach, the extent to which it is excusable, and the consequences of the breach will be very important factors, but the overriding criterion is the requirement for the sanction to be proportionate and just (§123).

7. Even where a debarring order is made, that does not mean judgment automatically follows. Calver J held in *Al Saud v Gibbs & Sunnydale* [2024] EWHC 123 (Comm) at §7: *"Of course, where a defendant is not permitted to participate in the trial, by reason of an order debarring him from defending a claim, the claimant does not automatically win by default. At the trial, the claimant must satisfy the court that he is entitled to the relief sought. In this case is remains for the Claimant to prove her claim and her entitlement to the damages sought"*.

THE JUDGMENT

8. In the present case, Nicholas Thompsell (sitting as a Deputy Judge of the High Court) held that the Children (D4 to D6) were not debarred from defending the Continuing Claims. Their defences would not be struck out and there would be no $14m judgment against them. D3, however, was debarred from defending the Continuing Claims.

(1) The position of the Children (D4 to D6)

9. Cs claimed that the Children had (as at 26 April 2024):

   i. Made a late payment on account of costs (5 months late);

   ii. Failed to provide standard disclosure by the deadline (29 September 2023);

   iii. Failed to provide witness evidence by the deadline (30 June 2023).

10. Cs said that compliance at this stage would result in the vacation of the trial which was listed for mid-June 2024.

11. The Children argued that it was not proportionate to strike out their defences in circumstances where the merits of the substantive claim were weak. Further:

i. The costs had been paid, so that was no reason to debar them.

ii. The Children were acting as litigants in person at the time of the disclosure deadline and did not realise they had to disclose any further documents. This was because they had already provided extensive and wide-ranging disclosure pursuant to the ancillary disclosure orders made when Cs obtained proprietary/freezing injunctions in 2021; they had already effectively provided all of their bank statements across the period relevant to the alleged fraud as well as all communications between themselves and their family that could be relevant to conspiracy.

iii. D4 and D6 had already provided witness evidence to support their own summary judgment application which dealt with the substance of the claims against them. So they did not (from a litigant in person's perspective) see what other evidence they had to file.

(2) The decision regarding the Children (D4 to D6)

12. The Court accepted the Children's arguments and declined to make a debarring order, instead making an 'unless order' which gave them a further chance to put in disclosure and evidence. This was due to:

i. **Claimant delay:** Cs could have acted much earlier and could have asked for an "unless" order which would have allowed the Children to understand the complaints and correct the defaults. If this had been done in a timely manner, there would have been an opportunity for these matters to be corrected without any threat to the trial timetable.

ii. **Breaches somewhat excusable:** the disclosure and witness evidence defaults were to a certain extent excusable, given that the Defendants did not at the relevant times really grasp the nature of the wider case against them, and were focused instead on explaining their receipt of the £110,000, which they considered they had already done (in disclosure and evidence).

iii. **Strength of the case against them:** It would not be proportionate to strike out their defences even if a strong conspiracy case had been made against them, and it was not proportionate where (as here) there was no evidence, as yet, that any of them received any monies that might be derived from the Claimants in excess of the £110,000 each that they acknowledged receiving. Further, their involvement in the fraud was said to be because of the description of D2 as a "family business". However, the Judge could not see on the present evidence how that mere description equated to participation in the fraud.

(3) The Third Defendant

13. The Judge found that the position of D3 (D1's wife), however, was entirely different:

i. Her breaches were at a very high level of seriousness. She failed to meet substantial costs orders against her and provided no cogent excuse. She also failed to provide witness evidence where it was obvious that she would have matters to disclose beyond those she had already disclosed; she had a strong case to answer, having been intimately involved in the flow of funds and as a director and member of D2 throughout its life and had failed to provide a witness statement addressing all aspects of that case.

ii. The Court accepted that there was little or no excuse for these breaches, which were deliberate. D3 knew that she has a substantial case to answer, having been told by Sir Anthony Mann that she will have "much to deal with", and yet had done almost nothing to explain her involvement beyond the explanations given prior to the 2023 Mann Judgment.

iii. The disclosure that D3 would need to make would be far more extensive than that of the Children. That would add months to the time needed before a fair trial could commence.

KEY TAKEAWAYS

14. The Judgment contains a number of helpful takeaways. Firstly, a debarring order is very much a last resort. Secondly, a party should not wait for breaches to accumulate and then apply for a debarring order (especially where the delay means that there is practically no time for a respondent to remedy the default before trial). Finally, a party who breaches disclosure and evidence orders (without excuse), and also has a weak defence, is at significant risk of being debarred.

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