Neutral Citation Number: [2024] EWHC 1804 (Comm)

Case No: CL-2021-000412

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT

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

Date: 12/07/2024

Before :

THE HONOURABLE MR JUSTICE CALVER

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Between :

INVEST BANK PSC	**Claimant**
- and -	
(1) AHMAD MOHAMMED EL-HUSSEINI **(2) MOHAMMED AHMAD EL-HUSSEINY** **(3) ALEXANDER AHMAD EL-HUSSEINY** **(4) ZIAD AHMAD EL-HUSSEINY** **(5) RAMZY AHMAD EL-HUSSEINY** **(6) JOAN EVA HENRY** **(7) VIRTUE TRUSTEES (SWITZERLAND) A.G.** **(8) GLOBAL GREEN DEVELOPMENT LIMITED**	**Defendant**

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Tim Penny KC, Marc Delehanty and Frederick Wilmot-Smith (instructed by **PCB Byrne LLP**) for the **Claimant**
Niranjan Venkatesan and Constantine Fraser (instructed by **Debenhams Ottaway LLP**) for **Sixth Defendant**

Hearing dates: 02 July 2024 - 26 July 2024

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JUDGMENT

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:00 on Friday 12 July 2024.

Mr Justice Calver :

The Application

1. Invest Bank ("**the Bank**") makes an application for relief from sanctions under CPR 3.9 in respect of a Notice to Prove ("**the Notice**") which was served by it on 14 March 2024 in respect of a document called a "**Divorce Agreement**" between Ahmad El-Husseini (D1) and Joan Eva Henry, D6 ("**Joan**") dated 26 August 2017. The Bank issued the application on 14 June 2024, and it is opposed by Joan.

2. The application originally also covered two further Notices to Prove in respect of an item from Joan's disclosure list entitled '**Divorce Papers'**, which comprises:

    i. A power of attorney in favour of a lawyer, Mr Yusuf Ahmed, to conduct a divorce, signed by Joan and Ahmad and notarized on 30 August 2017; and

    ii. A Lebanese divorce certificate dated 30 August 2017 recording their divorce, signed by Joan and Ahmad and witnessed by the lawyer Mr Yusuf Ahmed.

3. However, in oral argument the Bank abandoned this aspect of its application which concerns the Divorce Papers.

CPR 32.19

4. The first issue is whether an application for relief from sanctions is necessary at all. That depends upon a consideration of CPR 32.19, which provides that:

    "*(1) A party shall be deemed to admit the authenticity of a document disclosed to him under Part 31 (disclosure and inspection of documents) unless he serves notice that he wishes the document to be proved at trial.*

    (2) A notice to prove a document must be served –

        (a) by the latest date for serving witness statements; or

        (b) within 7 days of disclosure of the document, whichever is later"

5. Mr. Frederick Wilmot-Smith, counsel for the Bank, argues that the application for relief from sanctions is in fact unnecessary and was filed "*out of an abundance of caution*". This is because whilst the deadline for service of witness statements was 1 March 2024 (on which date the Bank did not serve any notice to prove in respect of the Divorce Agreement), by order dated 17 May 2024 Bryan J imposed a deadline for service of *supplemental* witness statements of 17 June 2024. On 14 March 2024, the Bank purported to serve notices to prove in respect of the Divorce Agreement (and the Divorce Papers), which Mr. Wilmot Smith submits is prior to "the latest date for serving witness statements", namely 17 June 2024 (being the date for service of supplemental witness statements). The Bank did not make any application for relief from sanctions on 14 March 2024.

6. In other words, the order for the service of supplemental statements on 17 June 2024 means, according to the Bank, that the deadline for serving any Notices to Prove was extended to 17 June 2024, as being the latest date for serving witness statements. Since the Notices were served on 14 March 2024, they are said to be in time and no relief from sanctions is necessary.

7. Whilst CPR 32.19 is poorly worded (and requires consideration by the rules committee), I consider that it simply means "by the latest date for serving the *primary* witness statements", not supplemental witness statements. Were it otherwise, a party would be left in doubt as to which of their documents might ultimately be challenged by a notice to prove, because supplemental witness statements could potentially be ordered to be served at any time up until shortly before trial; and it might be too late at that stage for the recipient of the Notice to Prove to gather the necessary evidence to establish the genuineness of the challenged document(s).

8. The "latest date for serving witness statements" in the present case was 1 March 2024. On 2 March 2024, the Bank was deemed to have admitted the authenticity of the Divorce Agreement (and the Divorce Papers). An admission takes effect when it is made or deemed to have been made. The Bank's admission is not and cannot be withdrawn impliedly by a subsequent direction of the court for supplemental witness statements. The Bank must be deemed to have admitted the authenticity of the Divorce Agreement (and the Divorce Papers) absent a successful application for relief.

9. This construction of CPR 32.19 is reinforced by the Commercial Court Guide, Paragraph E4.1(a) which reads:

> "*Where the authenticity of any document disclosed to a party is not admitted, that party must serve notice that the document must be proved at trial in accordance with rule 32.19. That rule requires notice to be served within 7 days of disclosure of the document or, if later, by the latest date for serving witness statements. The latter time limit will typically apply, unless the document is disclosed late, but as a matter of proper practice notice under rule 32.19 should normally be served well before the deadline for witness statements so that the party required to prove the document can take that into account when considering what witness statement evidence to obtain.*"

10. This emphasises the point that the purpose of the rule is that timely notice is given of any challenge to authenticity so that the party whose document is so challenged can determine what evidence it is necessary to obtain to meet the challenge. If the respondent only has from the time of service of supplemental statements to adduce that evidence it may very well be too late for it to do so.

11. It is interesting to note that a similar point was addressed by Julian Knowles J in *Tuke v JD Classics Ltd* [2018] EWHC 531 (QB). There, the deadline for witness statements to be served was 24 August 2017, which was complied with. Having heard an application for specific disclosure by the claimant on 30 January 2018, Walker J struck out the witness statements served on 24 August 2017 and ordered the parties to produce schedules of facts and matters relied upon, with further witness statements directed at the matters disputed in those schedules be served by 20 February 2018. The claimant served a Notice to Prove on

7 February 2018, which the defendant contended was out of time since it should have been served by 24 August 2017.

12. Relevantly for present purposes, the claimant argued that where more than one round of factual witness statements is contemplated, the "latest date for serving witness statements" for the purposes of CPR 32.19(2)(a) was the date for serving the final round of those witness statements. Furthermore, it was submitted that Walker J's decision to strike out the witness statements and set a fresh deadline for the service of replacement statements had the effect of setting aside the claimant's deemed admission of authenticity. The defendant contended that this was not a case where more than one round of factual witness evidence was contemplated, and in any event the claimant was deemed to have admitted the matter unless and until that admission was withdrawn. The judge (at [108]) agreed with the defendant's construction of CPR 32.19(2)(a) and also rejected the claimant's submission that: "*the decision of Walker J in January 2018 to strike out the bulk of the existing witness statements and to set a fresh deadline for the service of replacement statements had the effect of setting aside the deemed acceptance by the Claimant of the invoices' authenticity which occurred once the date of 24 August 2017 passed*".

13. I agree with this approach and it follows that the Notice in the present case was served out of time. Since the Notice was not served in time, the Bank requires the court to grant an extension of time pursuant to CPR 3.1(2)(a) and relief from sanctions under CPR 3.9 following the three-stage test set out in *Denton v TH White Limited* [2014] 1 WLR 795. The Bank did not issue an application on 14 March 2024 when it served the Notices; instead it belatedly issued such an application on 14 June 2024.

Relief from sanctions

14. Applying *Denton*, the court must first consider the seriousness and significance of the failure to serve the Notices in time. Next, the reason for the failure must be considered. Finally, the court must consider all the circumstances of the case, giving particular weight, in accordance with CPR 3.9, to the need for litigation to be conducted efficiently and at proportionate cost and to enforce compliance with rules, practice directions and orders.

15. Stage 1, then, concerns the seriousness or significance of the breach. The most useful measure of whether a breach is serious or significant, is "*whether or not a breach imperils future hearing dates or otherwise disrupts the conduct of the litigation (including litigation generally)*", although there can still be, depending on the facts, breaches which are serious even if they do not disrupt the conduct of litigation: White Book, paragraph 3.9.4.

16. The Bank's breach or omission is in failing to serve the Notice in time with a delay of almost two weeks. This failure was compounded by the very late service on 14 June of the application for relief from sanctions. It is not suggested that any future hearing dates were imperilled. However, the efficient conduct of the litigation has been adversely affected: the parties were obliged to exchange skeleton arguments in respect of the application on 1 July 2024 at a time when they were making their final preparations for trial; and the Court had to interrupt the giving of the witness evidence in order to address the application on day 6 of the trial.

17. Moreover, in the present case, the nature of the Bank's challenge to the authenticity of the document has not been clearly articulated until very late in the day. It was first articulated in its skeleton argument on this application, dated 1 July 2024, with the trial starting on 2 July 2024. Joan has been deprived of a proper opportunity to adduce further witness evidence to counter the case now advanced. In particular, she may have wished to call as a witness Mr. Chahid El Hachem, the lawyer who witnessed the Divorce Agreement or Mr Yusuf Ahmed, the lawyer who was instrumental in finalising the Divorce Papers.

18. In all the circumstances, I consider the Bank's late service of the Notices to be serious and significant.

19. Stage 2 of *Denton* concerns the reason for the breach of the time limits. In the present case there is no good reason for the failure to serve the Notices in time: the Bank readily admits that this was due to "an oversight".

20. Indeed, almost three months had passed from the date when the Notices were served on 17 March 2024 before the application for relief from sanctions was issued, during which period the Bank must have been aware that such an application was necessary absent any agreement from Joan. Even when this was pointed out by Bryan J at the PTR on 17 May 2024, the application was still not issued until 14 June 2024, less than three weeks before the trial. This long delay is not adequately explained by the Bank's complaint that this "procedural" point was only taken by Joan at the PTR. It follows that when considering all the circumstances of the case, in my view the criticism of the Bank's delay in issuing its application for relief is entirely justified. Stage 2 of the *Denton* test is accordingly easily passed.

21. I move to the 3rd stage of the *Denton* test, namely a consideration of all the circumstances of the case so as to enable the court to deal justly with the application, which requires the court, in particular, to consider the need for litigation to be conducted efficiently and at proportionate cost; the need to enforce compliance with rules and orders; and the effect of the breach in the particular case.

22. In the present case, the Bank's dilatory observance of the rules of court (both as to the time for making notices to prove as well as for applying for relief from sanctions) is a factor to weigh in the balance as to whether to grant relief. Further, if the Bank had issued the application for relief promptly, the matter could have been dealt with earlier, including at the PTR. As it stands, the tight trial timetable has had to be adjusted to accommodate this application. It has caused disruption to trial preparation on Joan's part and on the part of the court. That is itself a factor weighing against granting relief. Furthermore, whilst Joan was aware in generalised terms that the Bank wished to challenge the authenticity of the Divorce Agreement and Divorce Papers when it served the Notices upon her on 14 March 2024, she has been prejudiced in not knowing the precise case now advanced by the Bank which has only been very belatedly articulated. These are all factors which point against the granting of relief.

23. But most fundamentally, as Mr Venkatesan for Joan contends, the principal difficulty with the application for relief is that it serves no useful purpose. A challenge to the authenticity

of a document cannot amount "*to a covert and unpleaded case of forgery*": *Redstone Mortgages Ltd v B Legal Ltd* [2014] EWHC 3398 (Ch), [58] and it is also common ground that the Bank is not making (and cannot make) any allegation that the Divorce Agreement is a forgery or a sham.

24. In *Redstone* the Claimant did not admit the authenticity of a document called the Sher memorandum which contained advice to Redstone concerning a property called "Number 38" and it served a notice to prove on B Legal. There was no positive case advanced that the document was a forgery. Norris J stated as follows:

> "*57. Requiring a party to 'prove' a document means that the party relying upon the document must lead apparently credible evidence of sufficient weight that the document is what it purports to be. The question then is whether (in the light of that evidence and in the absence of any evidence to the contrary effect being adduced by the party challenging the document) the party bearing the burden of proof in the action has established its case on the balance of probabilities. Redstone cannot (by a refusal to admit the authenticity of a document) transfer the overall burden of proof onto B Legal, any more than it could do so simply by refusing to admit a fact.*
>
> *…*
>
> *58. The question is therefore whether any evidence as to the provenance of the document has been produced, and if it has then whether (although not countered by any evidence to the contrary) such evidence is on its face so unsatisfactory as to be incapable of belief. It is vital that the process of challenge is fair. Criticism of the evidence about the authenticity of the document cannot amount to a covert and unpleaded case of forgery. If a case of forgery is to be put then the challenge should be set out fairly and squarely on the pleadings (and appropriate directions can be given). If the charge is that a witness has forged a document (or has been party to the forgery of a document) and the grounds of challenge have not been set out in advance, then if the questions are not objected to the response of the witness to the charge must be assessed taking into account the element of ambush and surprise.*
>
> *…*
>
> *61. … In certain circumstances the Court is entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give. There must however be a case to answer raised by the party asking for the adverse inference to be drawn, some evidence (however weak) adduced by that party on the matter in question, before the court is entitled to draw the desired inference. Here Redstone runs no positive case and has adduced no evidence to raise the case that the Sher Memorandum is inauthentic: it has simply put B Legal to proof of authenticity. So the only question is whether the evidence which B Legal chooses to call is sufficient to throw upon Redstone the burden of adducing evidence (either direct evidence or evidence by inference from other established facts) to prove on the balance of probabilities that advice was not given about the identity of No.38 which would have been given by a reasonably competent solicitor.*"
>
> (emphasis added)

25. In *Eco3 Capital Ltd v Ludsin Overseas Ltd* [2013] EWCA Civ 413, the claimant brought an action for fraudulent misrepresentation arising out of an investment in a property development project. Dr Shadrin, a defendant, disclosed an extract from his diary which

purported to record a note of a telephone conversation on 12 August 2005 in which he told the claimant about one of the features of the proposed investment. The claimant argued that the diary note, even if accurate, was not made on 12 August 2015 but only subsequently and was wrongly dated as 12 August 2015. Jackson LJ held that this constituted an allegation of forgery:

> "*105. … Suppose Doctor Shadrin wrote the note at a later date on two blank pages which just happened to be at the right place in his diary and then dated it 12th August 2005. Strictly speaking, a note misdated in this way is a forgery: see section 9 (1) (g) of the Forgery and Counterfeiting Act 1981. For the purposes of rule 32.19 such a diary note would not be 'authentic'.*"

26. Section 9 of the Forgery and Counterfeiting Act 1981, to which Jackson LJ referred, states that an instrument is false if '*it purports to have been made…on a date on which…it was not in fact made…*'

27. Similarly, in *OCM Maritime Nile LLC v Courage Shipping Co Ltd* [2022] EWHC 476 (Comm), an application for relief from the consequences of failing to serve a Notice to Prove in time was refused in part by Sir Andrew Smith (sitting as a Judge of the High Court) because it would have served no useful purpose. The judge stated at [17] that:

> "*17. The problem is the greater because the point in challenging authenticity can only be to argue that the documents were, and at least the transfer agreement (which is the more significant) was, forged. That is not an allegation that is open to the claimants on the present pleading. There would have to be an amendment. But the case that it is a forgery could only realistically be advanced if [expert evidence] were adduced.*"

28. I consider that this is so in the present case. Mr Wilmot-Smith submits that the Bank can challenge the authenticity of the Divorce Agreement *without* alleging forgery. The distinction he seeks to make is that whilst a positive case of forgery involves an allegation that the document was falsely made or altered, a challenge to authenticity only requires the person relying on the document to prove that the document is what it purports to be.

29. However, as Mr. Niranjan Venkatesan rightly submits, the only purpose of putting Joan to proof of the authenticity of the Divorce Agreement is to allege that the agreement was not created on the date shown on its face. That that is so is confirmed by paragraph 25 of the Bank's skeleton argument in which it states:

> *"The Bank does wish to challenge the date of the Divorce Agreement. The reasons are essentially that if that document was executed much later than the date on its face then it cannot have been executed in the circumstances and with the consequences that D6 contends for."*

30. The problem with this is that the allegation that the Divorce Agreement was not executed on the date which appears on the face of the document (i.e. 26 August 2017) constitutes an allegation of forgery, which is impermissible as it is not pleaded: see *Eco 3 Capital (supra)*. Furthermore, as Norris J rightly stated in *Redstone*, criticism of the evidence about the authenticity of the document cannot amount to a covert and unpleaded case of forgery. That is precisely what the Bank would be doing in this case.

31. The Bank's application accordingly serves no useful purpose because it is precluded from challenging the date of execution of the Divorce Agreement.

32. This conclusion is reinforced by the fact that in paragraph 4 of its Re-Re-Re-Re-Re-Amended Particulars of Claim, the Bank states as follows:

> "*The Sixth Defendant, Joan Eva Henry ("Joan") is a British national. She married Ahmad in or around 1980 and the couple had four sons together (viz., the Sons). A document of the Lebanese Directorate General of Civil Status Records from July 2021, disclosed to the Claimant in these proceedings by Ahmad, records that Joan and Ahmad divorced in August 2017. Nevertheless, it is to be inferred that, irrespective of their formal marital status since August 2017, Ahmad and Joan have remained interested in, and support, each other's social, personal and economic affairs in a manner akin to the way spouses, romantic partners and/or close friends do. In support of this inference, the Claimant relies upon the following facts and matters:*
>
> *4.1 Joan and Ahmad are both currently living at the 'Medstar Building' in Beirut, Lebanon.*
>
> *4.2 Joan referred to Ahmad as "my husband" (and not as her ex-husband) in email correspondence with the Seventh Defendant / Kendris AG in September 2017 and March 2018.*
>
> *4.3 As part of the above referenced correspondence, the Seventh Defendant / Kendris AG (which have close familiarity with the relationship between Ahmad and Joan for the reasons pleaded at paragraphs 5 and 8B below) referred to Ahmad as "your husband".*
>
> *4.4 Joan and Ahmad continue to hold two joint bank accounts with Royal Bank of Scotland.*
>
> *4.5 On 22 June 2017, Ahmad declared before a notary (in connection with the transfer of a property described at paragraph 53A below) that "neither his civil status nor matrimonial regime has been nor is in the process of being changed".*
>
> *4.6 On 3 April 2018, a legal instrument was signed for and on behalf of Ahmad by a French notary representing him (in connection with Ahmad's sale of a property at 81 Quai d'Orsay, Paris, France), in which it was stated that Ahmad is Joan's husband ("époux"), that they were married in 1980 and that that remained the case ("Ce régime matrimonial n'a pas fait l'objet de modification")."*

33. There is no challenge here to the genuineness of the Divorce Agreement; it is not alleged that the Divorce Agreement is a forgery or a sham. Rather, the Bank's pleaded case is that whilst Joan and Ahmed may formally have divorced in August 2017, they continued to behave as though they were married.

34. It follows that Joan has disclosed the Divorce Agreement, the genuineness of which is supported by the Divorce Papers, as well as the Civil Status Register [document I/2462] which states on its face that Joan was divorced on 30th January 2017. The Bank admits the authenticity of these documents. It follows that there is no prospect of the Bank establishing that the evidence concerning the genuineness of the Divorce Agreement is so unsatisfactory as to be incapable of belief, in circumstances where it accepts that it cannot advance a case

that the Divorce Agreement is a forgery or a sham (and so cannot allege that it purports to have been made on a date on which it was not in fact made).

35. Accordingly, I am satisfied that, in the circumstances, it is not appropriate to grant the Bank's application for relief from sanctions.

36. I only wish to add that I am very grateful to Mr. Wilmot-Smith and Mr. Venkatesan for the high quality of their oral submissions on this application which they both had to address in the course of their workload during a heavy commercial court trial.