

**EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS**

**IN THE HIGH COURT OF JUSTICE
(COMMERCIAL DIVISION)**

**CLAIM NO. BVIHC (COM) 2017/0145
BETWEEN**

JODI PATT

Claimant

And

**(1) LEMONTREE LEAVES LIMITED
(2) MR DAVID MARKUS
(acting by the representative of the Estate of David Markus, Yael Markus)
Defendants**

AND BETWEEN:

**PAUL PRETLOVE
(in his capacity as an Interim receiver of
Lemontree Leaves Limited and Astoria Investments Limited)**

Applicant

And

**(1) LEMONTREE LEAVES LIMITED
(2) ASTORIA INVESTMENTS LIMITED
(3) MR DAVID MARKUS
(acting by the representative of the Estate of David Markus, Yael Markus)
Respondents**

Appearances:

Ms. Patt appeared in person, assisted by Mr. Joshua Eliovich, an Israeli attorney
Mr. Giles Richardson, with him David Harby of Collas Crill for Yael Markus
Mr. Adrian Francis and Ms. Akisha Adonis of Maples & Calder for Mr. Pretlove

2022 February 21
March 8

JUDGMENT

- [1] **JACK, J [Ag.]:** There are two applications before me. The first in time is an application dated 17th July 2019 by the interim receiver appointed by this Court, Mr. Pretlove, to discharge his appointment as interim receiver of Lemontree Leaves Ltd (“Lemontree”) and Astoria Investments Ltd (“Astoria”). The second is an application dated 30th September 2020 by Yael Markus also to discharge the receiverships and for an inquiry as to damages in respect of the cross-undertaking given in respect of Lemontree by Ms. Patt when she obtained the interim receivership order.
- [2] At the outset of the hearing Ms. Patt applied for an adjournment. For the reasons which I gave in an oral judgment, I refused her application. After her previous BVI lawyers, Hatstone, had come off the record in 2020, she had not given another address for service within the jurisdiction. The notification of the hearing was properly given within the jurisdiction at Hatstone’s offices. Indeed she had also been served with all the documents in Israel as well.
- [3] The substantive proceedings were commenced on 19th May 2017 by Ms. Patt against David Markus (“Mr. Markus”). A colleague of Mr. Pretlove was appointed as interim receiver of Lemontree and Astoria on Ms. Patt’s application. As is usual she agreed with him to pay his fees. Mr. Pretlove was subsequently appointed in place of the earlier receiver. Ms. Patt is an Israeli attorney, although she is a transactional lawyer rather than a litigator. She and Mr. Markus at one stage cohabitated. There is an issue as to the precise legal status of the relationship between Ms. Patt and Mr. Markus, but I do not need to determine this. At any rate the relationship ended, she says due to his violence to her.
- [4] Lemontree was originally wholly owned by Mr. Markus. In circumstances which were in dispute Ms. Patt claimed to be entitled beneficially to half the shares. Lemontree in turn held shares in Astoria, which was entitled to rental income from property situate in Israel. Mr. Markus died by his own hand on 4th June 2018. The current action was stayed by order of 26th June 2018.

- [5] The issues in the current action as to the ownership of the Lemontree shares were the subject of a separate action in Israel between Ms. Patt on the one hand and the estate of Mr. Markus on the other. This resulted in a judgment being delivered by the Tel Aviv District Court on 11th November 2021. The judgment was adverse to Ms. Patt and held that all the shares in Lemontree were held beneficially for the estate. Ms. Patt says that that judgment is under appeal and that the Supreme Court of Israel is very likely to overturn it. There is no evidence filed to support that assertion. I am of course in no position to assess the prospects of success of an appeal in an Israeli court, but the judgment is a careful and detailed assessment of the evidence given by each side. There is nothing which springs to the eye as being obviously appealable. It was for Ms. Patt to adduce evidence that the appeal has good prospects of success and she has not done so.
- [6] Ms. Patt lays particular weight, both before me and in relation to the appeal in Israel against the Tel Aviv judgment, on what she describes as, a judgment of the District Court in Haifa. This document is given in an action commenced by Mr. Markus' father-in-law, Mr. Lieberman, against his son-in-law. Mr. Lieberman was claiming shares in Astoria. After Mr. Markus' death, his three children took over the conduct of the action on behalf of his estate. On 31st March 2019, Mr. Lieberman and his grandchildren reached a settlement. Half the shares in Astoria were acknowledged to be Mr. Lieberman's. Various other matters were agreed. All financial claims were dropped. Ms. Patt sought to be added as a party to the Haifa proceedings, but the Court refused on the basis that it was too late for her to become a defendant. Her rights were preserved.
- [7] It can be seen that this "judgment" is more in the way of a consent order than any judicial determination of facts. Moreover, I fail to see how a determination of ownership of the shares in Astoria means that the Tel Aviv judgment's determination of the ownership of the shares in Lemontree is wrong. It is irrelevant as a matter of law to the ownership of the Lemontree shares. Nor can any factual inferences sensibly be drawn: the settlement is readily explained by neither the grandfather nor his grandchildren wanting to sue each other.

[8] When this matter was called on, Ms. Patt appeared in person. With her was her Israeli attorney, Mr. Eliovich. He addressed me briefly, but, since he was not admitted to the BVI bar, I had to refuse him any right of audience. Ms. Patt had not put in any evidence in answer to the two applications. Nonetheless, I heard *de bene esse* what she had to say about the facts (even though these had not been put in an affidavit) and the Haifa judgment (which had not been exhibited either).

[9] Mr. Richardson, for the estate, submitted as follows in his skeleton argument:

“7. The claim is sparsely pleaded. In essence, however, it is a claim that when Mr. Markus transferred the Shares, which had previously been registered in his sole name, into the joint names of himself and Ms. Patt on 8 December 2015, he intended to make a gift of 50% of the beneficial interest therein to her. It is then alleged that he subsequently acted inconsistently with that joint beneficial ownership from May 2017.

8. The principal relief sought appears to be rectification of Lemontree’s share register, “*to reflect that the Claimant and Markus jointly own legal and beneficial ownership of the entire share capital of [Lemontree]*” and an account of profits, although reference is also made to the Court’s unfair prejudice jurisdiction.

9. That claim was and is a bad one. As set out below, contemporaneous evidence in the form of communications to and from Ms. Patt herself makes it very clear that Mr. Markus did not intend to gift any beneficial interest in the Shares to Ms. Patt in 2015: she was, as well as being in a relationship with him at the time, the intended executrix of his estate and his lawyer advising him on estate planning matters in favour of his three children. And it was in that context that he made the transfer of legal title (only) into his and Ms. Patt’s joint names.

10. Moreover, the very issues that Ms. Patt raises in her claim in this jurisdiction have now been tried before the District Court of Tel Aviv in Israel. After a full trial, in which Ms. Patt and others were subject to cross-examination, that Court has found her claim that Mr. Markus intended to and did confer a beneficial interest in the Shares to be a bad one, and that Ms. Patt was an unsatisfactory witness...

11. Critically, Ms. Patt failed to disclose any of the key contemporaneous materials which undermined her claim — including that which was a key element in the reasoning of the Tel Aviv court — on her *ex parte* application for the receivership order over Lemontree. This is a particularly stark and

egregious instance of what can only be deliberate, non-innocent non-disclosure by Ms. Patt.

12. When Mr Mackellar then sought the receivership order in relation to Astoria shortly thereafter, again that material was not placed before Court.

13. Yael [Markus'] application [on behalf of the estate] is that Ms. Patt's non-disclosure was wholly improper and ought to lead to the discharge of both receivership orders for such non-disclosure, the Astoria one being fruit of the poisoned tree: that is, being an order ancillary to and dependent on the legitimacy of the Lemontree receivership order which ought to stand or fall with it. Yael [Markus] then seeks an inquiry into the damage suffered by the companies as a result of the receiverships, pursuant to the undertaking in damages given by Ms. Patt in the Lemontree receivership order."

[10] The following is relied on to show material nondisclosure:

"The first key contemporaneous document is an email from Mr William Burnell of Harneys (copying in Mr Henry Mander of Harneys) to Ms Patt herself dated 10 November 2015. This captures, with absolute clarity, what was truly happening in the period before the registration of the Shares moved from Mr. Markus' sole name to his and Ms. Patt's joint names:

'Dear Jodi [i.e. Ms Patt]

It was a pleasure to speak to you last week ...

Background

I understand that you are Mr Markus' advisor and the executrix of his Israeli Will. Mr Markus is the sole director and shareholder of a BVI company called Lemontree ... [which is] the sole director and shareholder of another BVI company called Astoria ... Astoria owns real estate in Israel ... with a combined value of approximately US\$3m...

Aims

Mr Markus would like to create a structure which will avoid the need to obtain a BVI grant of representation when he dies before the Lemon[tree] and Astoria shares can be transferred to the next owner(s). This outcome can be achieved in a number of ways but a BVI trust would offer the most comprehensive and sophisticated solution.

...

Structure

We discussed a number of potential structures under which Mr Markus would transfer the Lemon[tree] shares to a BVI trust and you were particularly interested to know if a structure could be created under which the shares will pass to you when Mr Markus dies for you to distribute according to the terms of Mr Markus's Israeli Will. You mentioned that, under Israeli law, your appointment as Mr Markus's executrix means you must distribute any property you receive as a result of his death according to the terms of his Will, regardless of the fact that it may not have been paid to you in your capacity as his executrix.

However, as a matter of BVI law, if we create a trust which terminates on Mr Markus's death with the trust assets (Lemon[tree] shares) being paid to you at that time then the shares will belong to you "absolutely" – ie outright and free of trust. Consequently, under BVI law you will be entitled to keep the shares for yourself and there will be no requirement for you to distribute them according to the terms of Mr Markus's Israeli Will. Moreover, given that the shares are BVI assets it will be very difficult (and probably impossible) for Mr Markus's heirs to enforce the obligations placed on you by Israeli law which are outlined above. As such, in order to ensure that Mr Markus and his heirs are properly protected it is probably inadvisable for the shares to pass to you when he dies.

Trust terms

Based on my comments above, I believe that the best approach will be for the trust to be discretionary, meaning that the trustee will hold the Lemon[tree] shares on trust for a class of beneficiaries, which could include the individuals who will benefit under Mr Markus' Israeli Will...'

Having learnt, therefore, that if the Shares were left to her on the terms of a trust, Mr. Markus' heirs would struggle to reclaim them once he died, Ms. Patt did not explore the idea of a discretionary trust of which his children, rather than her, were beneficiaries any further. Instead, she arranged for Mr. Markus to transfer the Shares into their joint names.

Thus, by email dated 7 December 2015 and timed at 09:01, she wrote to Mr. Markus by email. The subject heading, which is in Hebrew, reads 'Send it to me' and the text she set out is the text of an email she suggests Mr. Markus send back to her, which reads:

'Dear Jodi

Please arrange to have yourself added as a joint shareholder to all of my shares in LemonTreeLeaves, and prepare an agreement according to which you have all voting rights and that you will act in the shares on behalf of my heirs, as executor of my will.'

Thereafter, by email timed at 09:13 the same day, Mr. Markus sent her an email with exactly that text, which she forwarded to Mr. Simon Hudd of Harneys, Lemontree's registered agents in the BVI, at 09:36, under cover of an email asking:

'Could you please see David's letter below, and prepare the paperwork to add me to the shares. Would you like me to prepare a shareholder's agreement or do you have something fairly standard that could be used?

Time is of the essence in the registration, and if you have less time for the agreement, I can prepare it over here.'

Then, just six minutes later, Ms. Patt emailed Mr. Hudd again saying: 'David just asked that I write the agreement in Hebrew, so I'll take care of the agreement. Please just prepare the papers for adding me to the shares.'

In reality, no agreement in Hebrew seems to have been drafted by Ms. Patt. But the registration of the Shares into joint names did take place, with Lemontree's share register being adjusted on 8 December 2015 to record a joint holding of the Shares in the names of Mr. Markus and Ms. Patt.

Thereafter, she has used the fact of that registration to run the entirely false claim that Mr. Markus was gifting her a 50% beneficial interest in the Shares. That claim is wholly undermined by her own email exchanges with Harneys and with Mr. Markus. None of these critical documents appeared in the evidence before the Court on either *ex parte* application for the receivership orders; nor was any reference made to them at the hearings themselves."

[11] In my judgment, this was a bad case of non-disclosure. In **Great Panorama International Ltd v Qin Hui and others**,¹ I set the duties of an applicant for *ex parte* relief out as follows:

¹ [2020] ECSCJ No 278, BVIHC (COM) 2019/0180 (determined 13th August 2020).

"[70] A party's duty making an *ex parte* application is well-established. The *locus classicus* is the judgment of Ralph Gibson LJ in **Brink's Mat Ltd v Elcombe**.²

"(1) The duty of the applicant is to make 'a full and fair disclosure of all the material facts.'

(2) The material facts are those which it is material for the judge to know in dealing with the application as made: materiality is to be decided by the court and not by the assessment of the applicant or his legal advisers.

(3) The applicant must make proper inquiries before making the application. The duty of disclosure therefore applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made such inquiries.

(4) The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including (a) the nature of the case which the applicant is making when he makes the application; and (b) the order for which application is made and the probable effect of the order on the defendant: see, for example, the examination by Scott J³ of the possible effect of an **Anton Piller** order; and (c) the degree of legitimate urgency and the time available for the making of inquiries.

(5) If material non-disclosure is established the court will be 'astute to ensure that a plaintiff who obtains [an *ex parte* injunction] without full disclosure... is deprived of any advantage he may have derived by that breach of duty.'

(6) Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to the issues which were to be decided by the judge on the application. The answer to the question whether the non-disclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was not perceived, is an important consideration but not decisive by reason of the duty on the applicant to make all proper inquiries and to give careful consideration to the case being presented.

² [1988] 1 WLR 1350 at p 1356, citations omitted.

³ *Columbia Picture Industries Inc. v Robinson* [1987] Ch 38.

(7) Finally, it 'is not for every omission that the injunction will be automatically discharged. A *locus poenitentiae* may sometimes be afforded.' The court has a discretion, notwithstanding proof of material non-disclosure which justifies or requires the immediate discharge of the *ex parte* order, nevertheless to continue the order, or to make a new order on terms

'when the whole of the facts, including that of the original non-disclosure, are before [the court, it] may well grant... a second injunction if the original non-disclosure was innocent and if an injunction could properly be granted even had the facts been disclosed.'"

[71] This was approved by our Court of Appeal in **Enzo Addari v Edy Gay Addari**⁴ and most recently in **Paraskevaides and another v Citco Trust Corp and others**,⁵ where Carrington JA said:

[31] ...The onus is on an applicant for *ex parte* relief to comply with the obligation to make full and frank disclosure as *ex parte* applications are, generally speaking, inconsistent with the adversarial nature of court proceedings under our system of law which usually permits a respondent to be heard before an order is made against them. The key elements are that the duty is not only to disclose what the party or their legal advisers considers to be material but what one reasonably should expect a court to consider to be material in the exercise of its discretion whether to grant the order being sought. This requires not only objective consideration of the matters that the party puts before the court, but also an active duty to make proper inquiries so as to determine whether there is other material that may [be] available for him to place before the court on the application. This is because even an innocent non-disclosure on account of a party not being aware of the fact or not realizing its materiality may be a factor against him whereas a deliberate non-disclosure will always be a factor against him.

[32] A distinction may perhaps be made here between material that is known and material that ought to have been known by an applicant. The extent of the obligation differs between the two categories of material. With respect to the former, the duty appears understandably to be more absolute. Whereas for the latter, the duty is to make proper inquiries as to the existence of further material facts. The extent of this obligation to make such inquiries is dependent on all the circumstances including the nature of the

⁴ [2005] ECSCJ No 46, Civil Appeal No 2 of 2005 (determined 27th June 2005).

⁵ [2021] ECSCJ No 107, BVIHCMAP 2018/0046 (determined 30th March 2020). The citation given for Addari in Paraskevaides is to a later appeal in the same case, but the judgment in the previous footnote is the one intended.

case being advanced, the order being sought, the effects of such an order, if granted, on both the applicant and potential respondent and the interplay between the degree of urgency of the application and the time available for making such inquiries.

[33] Once it has been established that there has been non-disclosure of a material fact, and the duty is in relation to facts, the Court must ensure that the party who failed to disclose is stripped of any advantage that he gained from that breach of his duty. This may not always result in the discharge of the ex parte order but, even if it does, the Court may nevertheless grant a fresh order if the non-disclosure was innocent only and the balance of convenience in light of all the material facts of which the court is aware demands that a new injunction should be granted. However, the consequences of non-disclosure are not necessarily as severe if the court finds that the non-disclosure relates to a fact that is of lesser importance to the issues to be determined in order to grant the relief being sought.”

[12] In my judgment the non-disclosures are sufficient to discharge the interim receivership. This is not a case in which it is appropriate in my judgment to reimpose the receivership order after its discharge. As I have said, it is a bad case of non-disclosure.

[13] Further, and as a separate ground for discharging the order, the underlying merits have now been determined by the Tel Aviv judgment. That gives rise to an estoppel *per rem judicatam*. Ms. Patt says that that judgment is under appeal. However, there is no evidence that an appeal stays the first instance decision. Neither Ms. Patt nor Mr. Eliovich (whom I would have been entitled to hear on this issue, since Israeli law is his expertise) asserted that there is any provision of Israeli law corresponding to § 705 of the German Civil Procedure Code (*Zivilprozessordnung*), which provides that a judgment is not finally legally binding whilst it is under appeal. At present, Ms. Patt does not in my judgment have an arguable case on which the interim receivership order could be made.

[14] The estate has shown a *prima facie* case that it has suffered loss caused by the making of the interim receivership order. In my judgment it is appropriate to cause

an inquiry to be made into the losses suffered by Lemontree which Ms. Patt ought to pay under her cross-undertaking. (No cross-undertaking was given by Ms. Patt in respect of Astoria.)

[15] As to the interim receiver's application, Ms. Patt has not put him in funds. On 10th May 2018, a Rabbinical Court in Israel issued an order permitting Mr. Markus' attorney "to collect... [Astoria's]... rent funds and deposit them in a trust account, managed by Mr. Markus' and Mrs. Liberman-Markus' attorneys as trustees..." The trustees were not allowed to transfer any funds from the trust account, without an order of the Rabbinical Court. This effectively stymied the receivers' ability to get in the monies owed to Astoria, which was the only source of income for Astoria and Lemontree.

[16] Mr. Francis for the interim receivers submits that it is appropriate to discharge the interim receiver and grant a release: **Inland Revenue Commissioners v Hoogstraten**.⁶ I agree. The underlying claim is bad. Even if it were not bad, the grounds on which the interim receiver was appointed, namely the behaviour of Mr. Markus, has fallen away following his death. Ms. Patt has not put the interim receiver in funds to safeguard the rent monies owed to Astoria.

[17] The interim receiver is entitled to his costs and fees from Ms. Patt. However, he does not seek an immediate enforceable order in that regard, but without prejudice to his right to make a claim, if, for example, Ms. Patt brings any claims against him.

⁶ [1984] 3 All ER 25.

[18] Accordingly, I grant both applications.

Adrian Jack
Commercial Court Judge [Ag.]

By the Court

Registrar