

NEUTRAL CITATION NUMBER [2008] EWHC 1649 (QB)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Case no. 7MA91099

Royal Courts of Justice
Strand
London
WC2A 2LL

24th June 2008

Before:

SIR CHARLES GRAY

DAVID MOND
HODGSONS CHARTERED ACCOUNTANTS
CLEARDEBT LTD

v

SEAN MASON
TOBIAS GOODEN
UK BANKRUPTCY LTD

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Official Court Reporters
Cliffords Inn, Fetter Lane, London EC4A 1LD

JUDGMENT
(Approved)

SIR CHARLES GRAY

1. In this action there are three claimants and now four defendants. The Claimants are respectively Mr David Mond, who is himself a chartered accountant; Hodgsons Chartered Accountants, which is a firm of accountants and Clear Debt Ltd, which is a firm or a company which was launched by Mr Mond and the firm Hodgsons in 2005 as a web-based debt advice service designed, as it is put in the amended particulars of claim, 'to provide the best value for money individual voluntary arrangement (IVA) for consumer debtors'.
2. The defendants are firstly Mr Sean Mason who is and was at all material times one of the directors of a company called UK Bankruptcy Ltd. which is the fourth defendant in the action. Mr Mason is said to be a business associate of the second defendant, Mr Shane Mulroy, who is said to be company secretary of a company called Best Shop Ltd. The only other defendant is Mr Tobias Gooden, who is also a director of UK Bankruptcy Ltd. to which I will refer hereafter as "UKB". Those are the parties.
3. Mr Justin Rushbrooke represents all of the claimants. Mr Justin Shale represents the first defendant, Mr Mason, and after some initial hesitation I think took the position that he also represents the fourth defendant UKB. He does not act for Mr Mulroy, the second defendant. Mr Mulroy has been present throughout and has represented himself and indeed has made brief but effective submissions to me this morning. The third defendant is also unrepresented and has played no part in today's proceedings.
4. There are two applications before the court. The first is to continue a freezing order which was granted on a without notice hearing by Mr Justice Irwin on

20th June 2008. The second application is to continue an interlocutory injunction also granted by Mr Justice Irwin on that date prohibiting the defendants from further publishing certain statements which are alleged to be defamatory of one or more of the claimants or alternatively are said to constitute the tort of obtaining money by unlawful means.

5. The background facts can be summarised fairly shortly. There exists what I am told is an unincorporated association which names itself the IVA Council which I will call "IVAC". IVAC is an important entity for the purposes of the present application because, as I will elaborate in due course, it is an important part of the claimant's argument that IVAC is in truth a marketing tool or front for what are said to be the fraudulent and dishonest activities of the first, third, and fourth defendants.
6. The defendants through Mr Shale say of IVAC that it is a firm run by a Mr William Lindley, who is neither present nor any part of the proceedings but who is said to employ the second defendant, Mr Mulroy. According to Mr Shale, IVAC is concerned that many people enter into IVAs when they would be better off becoming bankrupt; better off in particular because of the level of fees habitually charged, according to the defendants, for IVAs. It is the defendants' case that UKB is recommended clients by people who are said in Mr Shale's skeleton argument to include IVAC but which I believe to have come from IVAC solely in order that they may be advised as to whether bankruptcy is a more suitable option for them than entering into or remaining in an IVA. If they decide that bankruptcy is the right course for them these 'clients', as they are described, are offered the service by UKB of arranging for those clients to be made bankrupt or put into bankruptcy for what is described

as being a 'reasonable fee'.

7. It is necessary for me to say a little more about IVAC. IVAC is said by the claimants to be run by the Mr Lindley to whom I have already referred. He is said to now reside in Spain. I am told by Mr Rushbrooke that he has been notified of the order which has been made, albeit not made against him as yet.
8. It is common ground that in order to be entitled to a freezing order the claimants must demonstrate amongst other things that they have a good arguable case as that term has been explained in Ninemia Maritime Corporation v Trave 1983 1WLR 1412. I have indicated the two causes of action which are relied on by the claimants here. One of the allegedly libellous publication complained of by the claimant is a document which emanates from UKB and is a customer services pack which according to the evidence was circulated by UKB to clients referred to it by IVAC. I will quote some examples of the allegedly defamatory passages to be found in that letter. Under the rubric "Letter of Engagement" one finds these words: 'Having reviewed your case it is quite clear that you should never have been sold an IVA in the first place. You have been badly misadvised by [your IVA advisor]. Your circumstances make it obvious that you are best served by entering into the protection of a bankruptcy order'. There is then a list of the services which UKB says it will perform. Those services include liaising with and protecting the debtor from his IVA company. It also includes a reference to 'our legal department preventing anyone from harassing the debtor' and to the debtor being "coached" so as to be fully prepared for his interview with the Official Receiver. One then finds set out the payments which UKB seeks from the debtor. They total £1150 payable instages.

9. There is then a paragraph headed 'IVA misselling explanation'. There are in this section further references to the misselling of IVAs by IVA providers. The letter goes out of its way to assert that UKB is not in any way associated with IVAC. It continues. 'Secondly IVAC are not a registered company and do not charge for their advice. They are a consumer action group staffed by volunteers who have all themselves been the victims of IVA misselling. Their sole purpose is to alert those who may have been missold an IVA to that fact. Considering the volume of clients that they refer to us who have quite clearly not received the correct insolvency advice. In our opinion they are doing a great job and clearly have the interests of IVA misselling victims at heart'. The letter concludes with these words: 'UK Bankruptcy Ltd. has been leading the charge in the fight against IVA misselling and will continue to assist victims of this appalling scandal until such time as this sharp practice is finally stamped out and the IVA factories responsible are shut down'.
10. The evidence from the defendants' side is that only 26 individuals whose IVA provider was Clear Debt Ltd. have received letters of that kind from UKB. Moreover the defendants assert that only two of those 26 individuals followed the recommendation of IVAC to go into bankruptcy.
11. It is further the case that the letter from which I have just extensively quoted bears striking similarities to documents emanating from IVAC which are to be found in the bundle before the court. The first is a letter is written to a Mr Abbate whose insolvency provider was Clear Debt Ltd. That letter includes the following assertions: firstly that IVAC has noted 'a pattern of inconsistencies that may indicate that you have been the victim of misselling by Clear Debt Ltd.'; secondly, 'that IVAC is a non-profit making organisation set up to

monitor the IVA industry in response to the allegations of so-called IVA factories repeated misselling'; thirdly 'that IVAC is preparing a class action lawsuit on behalf of victims of IVA misselling' and fourthly 'that IVAC will undertake a free and comprehensive audit of the IVA and determine the suitability of the debtor for a refund'. At the foot of the letter, which purports to have been signed by Mr Jonathan Baker who is said to be a chief adjudicator for IVAC, there is a postscript in bold which I shall quote in full:

'Urgent. To allow us to complete your refund assessment you must call the helpline above and leave a daytime and an evening telephone number. Please quote your reference number at the top of the page. No action can be taken on your behalf until you have called the number above. A member of our action team will contact you within seven days of you leaving your details'. Important, do not contact the IP or make any further payments until your case has been reviewed.'

It is right to add that subsequently that letter from IVAC was somewhat modified, as can be seen from a letter to a Mrs Peterson dated 26th March 2008 signed by Mr Mulroy as an IVAC officer.

12. The central issue on the present application appears to me to be this: can the claimants demonstrate that there is at least a good arguable case that the first and/or the fourth defendant, that is to say Mr Mason and/or UKB, are responsible for the publication case and contents of the letters purportedly sent out by IVAC? It is, as I have already indicated, the claimants' case, as advanced by Mr Rushbrooke, that IVAC is simply a front for Mr Mason and UKB, the company of which he is a director. If those defendants have no connection with or responsibility for the letters sent out by IVAC the case for granting the claimant's freezing relief -- relief by way of freezing order -- would be substantially weakened if not unsustainable.

13. The defendants' case is that neither Mr Mason nor UKB has any responsibility for or connection with the circular letters sent out by IVAC. Mr Shale on behalf of those defendants contends that IVAC is a separate and distinct entity. He contends that UKB is a separate company which has recommended clients from people including IVAC and gives them advice as to whether bankruptcy is a suitable option. In other words, according to the defendants, there is an arms' length relationship between them and IVAC. Mr Shale argues that on the evidence the involvement of UKB with IVAC is limited. He accepts that some start up finance was provided by UKB to IVAC and that referral fees are paid to IVAC by UKB. He agrees that there are other connections but he contends that the claimants are unable to demonstrate a good arguable case that either Mr Mason or UKB was involved in the publication of the alleged defamatory statements.
14. The case, unusually for an application for a freezing order, has been pleaded out at some length. There are now re-amended Particulars of Claim. More importantly for present purposes, there have been two replies to Part 18 Requests for Information served on behalf of the claimants. I will quote some of the information provided. Mr Mason in his first reply says that the person who trades as IVAC is Mr Mulroy. Mr Mason accepts he is the managing director and a shareholder of UKB. In answer to a request for all information in his possession as to the name, address and telephone number of Mr Mulroy, Mr Mason replies by giving an address in Bournemouth, an e-mail address and a telephone number to which I will have to revert. There are passing references in this document to Mr William Lindley who is simply described as being an associate of Mr Mulroy; and an e-mail address is provided for him

also. Later in this document one finds this further reference to Mr Lindley:

'In or about September 2006 William Lindley approached the defendant' (that is Mr Mason) 'in respect of a marketing plan he was launching into the insolvency market. He offered an exclusive arrangement for UKB to benefit from a lead source of individuals who were interested in discussing bankruptcy as a debt solution. UKB had no involvement with IVAC prior to the agreement being made'.

There is then a reference to the initial moneys paid to IVAC having totalled between and £2000 and £3000. It is also said by Mr Mason that UKB pays for the leads it is given. Mr Mason describes IVAC as 'a lead generation business that supplies leads to UKB for an agreed cost'.

15. There is also an amended reply to the claimants' Part 18 Request. As it appears to me, there are significant discrepancies between the two documents. In the first place one finds at the outset an averment that the persons who trade as IVAC are both Mr Lindley and Mr Mulroy. There is then a reference to an agreement dated 8th January 2008 which is said to have superseded an earlier agreement of 1st November 2007. The essence of the later agreement is said to be that UKB provides professional services to clients introduced by IVAC and for that introduction UKB pays IVAC £350 per introduction.
16. In this further Part 18 reply biographical information is provided about Mr Lindley. He is said to be ' a business associate of the defendant Mr Mason and has been for a number of years. The defendant has known Mr Lindley for some 20 years and over this period of time the defendant and Mr Lindley have had several business relationships. Mr Lindley worked in Asia for eight years, returning to the UK in 2005. During Mr Lindley's time in Asia the defendant and Mr Lindley had occasional contact but no personal relationship. Upon Mr Lindley's return to the UK in 2005 Mr Lindley began working for the

defendant as a business development management for UKB. In January 2006 he was registered as a director of UKB. He held this directorship until August 2006 when Mr Lindley left the employ of UKB to pursue other avenues'. It is however averred that Mr Mulroy holds power of attorney to deal with documentation for and on behalf of Mr Lindley when he is out of the UK.

17. Mr Mason says that Mr Lindley became aware of the potential misselling of IVAs and in or around September 2007 approached him at UKB to explain the idea of IVAC. Thereafter it was agreed by UKB that initial set-up costs by way of sponsorship documented by a formal written agreement would be entered into. Later in this further document further information is given about the way in which IVAC and UKB cooperate with one another. Information is also provided as to the financing of IVAC; it appears that the initial loan to IVAC by UKB was around £25,000. These monies were said to have been used by Mr Lindley to fund the establishment of IVAC, including the cost computer infrastructure hardware, rental of offices, telephone answering service and domain name costs. Mr Mason continues to maintain that he has not participated in the earnings of IVAC. It gives an explanation about the telephone number which IVAC uses. I will return to that. Exhibited to that Part 18 document is the agreement of 8th January 2008 to which I have already referred. It appears to me that there is a great deal of new information in the second part 18 answer in particular relating to the relationship between IVAC and UKB which is central to the issues which arose on this application.

[The court adjourned and reconvened]

SIR CHARLES GRAY QC:

18. Before I adjourned I had summarised the defendants' case saying that the first and the fourth defendants are not responsible for what was published by IVAC. I turn now to summarise the claimants' case for saying that IVAC is a front for the fourth and first defendants such as to render those defendants responsible for the actions of not only IVAC but also UKB.
19. Mr Rushbrooke's argument is that the inference is irresistible that, far from being independent and distinct from UKB and Mr Mason, IVAC is in reality a front. The claimants' case is developed in an affidavit sworn on behalf of the claimants by Mr Mond, the first claimant, at paragraphs eight to 11. He there explains that it is his view that IVAC is running what might fairly be described as a large scale scam. He says that it obtains the details of clients of the claimant company as well as other insolvency practitioners by trawling the electronic individual insolvency register of persons entering into IVAs. They are vulnerable people. They are persuaded by unsolicited letters to cease paying into their IVAs and to go bankrupt instead. The sequence, according to Mr Mond, is that IVAC persuades a recipient to leave a message on what is described as a 'helpline'. Thereafter UKB processes the respondent's inquiry, claiming to have had the case referred to it by the IVA. The intention and on a number of occasions the actuality is that UKB then signs up the indigent debtors requiring them to complete a standing order for payments totalling £1050. That is the sense in which, according to Mr Mond, IVAC is correctly described "as lead generation business" for UKB.
20. Mr Rushbrooke, developing his argument that IVAC is a front, makes the

following amongst other points: he draws attention to the historic link between Mr Mason and Mr Lindley. He relies on the fact that it was UKB which provided the so-called “virtual office” for the use of IVAC, as well as the domain name which had been acquired by UKB but which was in effect assigned to IVAC. Reliance is also placed on the telephone number and messaging service which was purchased by Mr Mason for the use, so it appears, of IVAC. Mr Rushbrooke maintains that there are demonstrably false statements made in the various letters sent out by IVAC made with the intention of benefiting UKB financially. It is not necessary for me to refer to all these alleged falsehoods; it will suffice if I mention the reference to a 'pattern of inconsistencies' said to have been detected by IVAC and later by UKB in circumstances where it would not have been possible for either IVAC or UKB to obtain access to information which would have revealed such a pattern if indeed it had existed. Mr Rushbrooke relies further on what he says is the utterly false statement that IVAC is a non profit making organisation. The evidence is that IVAC received from UKB substantial sums ostensibly by way of loan in order to set up IVAC and thereafter a handsome payment for every debtor who IVAC managed to catch in its net and to refer on to UKB. Other falsehoods include references to IVAC preparing a class action lawsuit in circumstances where the evidence suggests that no such thing is happening. Objection is also taken to “IVA factories” which are said to offer debtors IVAs only and not offer the alternative choice of going bankrupt. The fees said to be charged by companies like Clear Debt Ltd. are inflated and false on the claimants' argument. It is said that IVAC audits IVAs when, according to the claimants, it does no such thing. Finally Mr Rushbrooke submits that the

figure of £1, 700,000 given in UKB's accounts for debtors indicates that far more than 26 debtors will have been referred by IVAC to UKB. A final and, to my mind, cogent point made by Mr Rushbrooke is to ask for whose benefit was IVAC set up. What is the point of having a separate organisation to carry out activities which on the face of them could perfectly well have been carried out by UKB itself

21. I have weighed up the parties' respective arguments and have arrived at the clear conclusion that, for the reasons advanced by Mr Rushbrooke, a good arguable case is made out that the first and fourth defendants are responsible for the actions of IVAC, including the sending of the letters to which I have made reference.
22. It does not of course follow from that conclusion that there is a good arguable case for the granting of interlocutory relief, whether in the form of a freezing injunction or in the form of an injunction preventing the publication of the statements identified in the reamended particulars of claim. There are other conditions which must be satisfied by the claimants before the freezing order can be continued. Mr Shale summarises these conditions as being a cause of action justiciable in England and Wales; the existence of assets of the defendant within the jurisdiction and a real risk of the removal or disposal of those assets.
23. Mr Shale accepts the existence of a cause of action justiciable within this jurisdiction and the existence of assets of the defendant within the jurisdiction there is no issue. What he strongly maintains is that the evidence in the case does not establish a real risk of dissipation. In support of that contention Mr Shale has referred me to a number of authorities firstly *Thane Investments Ltd.*

v Tomlinson [2003] EWCA Civ 1272 in which case the Court of Appeal emphasised that there must be 'solid evidence to the court of the likelihood of dissipation'. Peter Gibson LJ commented: 'counsel submitted that it has now become the practice for parties to bring ex parte applications seeking a freezing order by pointing to some dishonesty that is sufficient to enable this court to make a freezing order. I have to say that if that is that has become the practice then the practice should be reconsidered. It is appropriate in each case for the court to scrutinize with care whether what is alleged to have been dishonesty of the person against whom the order is sought in itself really justifies the inference that the person has assets which he is likely to dissipate unless restricted'. Mr Shale also relies on *Renewable Power and Light v Lewis and Colvin* [2008] EWCH 1058 which warns against courts exercising a jurisdiction to impose freezing orders as a way of providing security for a claimant's costs. Finally he relies on *Derby and Co. Ltd. v Weldon* [1990] Ch 65 at pages 76 to 77 to the effect that 'it is not the purpose of a freezing order to prevent a defendant carrying on business in the ordinary way or if an individual living his life normally dependent [inaudible] determination [inaudible] to impede him in any way in defending himself against the claim'.

24. In answer to these arguments Mr Rushbrooke counters by making the following submissions: firstly that the first and fourth defendants have not in complied with the orders already made in that they have not, as ordered by Irwin J, provided details of their assets. Mr Rushbrooke relies on the attempts made by the first defendant and through him by the fourth defendant to obscure what he suggests is the real relationship between IVAC and UKB and Mr Mason. I have already quoted and need not repeat the passages in both the

first and the second Part 18 responses. He contends that there has been dishonesty on the part of both the first and fourth defendants not only in the fourth defendant's letters but also in the letters sent out by IVAC which was in effect being used as a vehicle by the first and fourth defendants. Reliance in this connection is also placed on the remarkable figures to be found in UKB's accounts mentioned earlier in this judgment.

25. In support of his contention that no freezing order should be made, Mr Shale relies principally on what he submits is the absence of evidence of an intent to dissipate. Mr Rushbrooke submits, in my judgment rightly, that it is not necessary in order for a claimant to obtain a freezing injunction to establish an intention on the part of the defendant to dissipate assets. He relies on a passage from Mr Steven Gee's book "Commercial Injunction" at paragraph 12.032 to 033, citing the cases to which I have already referred. The test is 'whether, on the assumption that the plaintiffs have shown a good arguable case, the court concludes on the whole of the evidence then before it that the refusal of a Mareva injunction' (that is to say a freezing injunction) 'would involve a real risk that a judgment or award in favour of the plaintiffs would remain unsatisfied'. Paragraph 12.040 reads as follows: 'Good grounds for alleging that the defendant has been dishonest is relevant. Dishonesty is not essential for the exercise of the jurisdiction. There is no need to show an intention to dissipate assets but if there is a good arguable case in support of an allegation that the defendant has acted fraudulently or dishonestly (e.g. being implicated in an ingenious scheme for the misappropriation of funds belonging to the claimant) or within an unacceptably low standard of commercial morality giving rise to a feeling of uneasiness about the defendant, then it is often

unnecessary for there to be any further specific evidence on risk of dissipation for the court to be entitled to take the view that there is sufficient risk to justify granting (freezing) relief.”

26. It will be apparent from what I have already said in relation to the connections between the first and fourth defendants on the one hand and IVAC on the other hand that I take the view for the purposes of the present application that there is evidence that they have been acting in what is a commercially dubious scheme. There has been less candour than one would expect from parties to litigation in the way in which the case has been developed on behalf of the defendants. Information about IVAC has been slow in arriving, as indeed has information about the relationship between Mr Mason and Mr Lindley and the close connections of the latter, at one time at least, with UKB. I am in no doubt that the condition which requires a claimant seeking a freezing order to establish a risk of a dissipation of the assets is clearly made out on the evidence.

27. It follows that I am satisfied that this is the proper case in which I should continue the freezing order which has been made. There has been some discussion about whether the figure of £100,000 is justifiable. It has to be said that that is a relatively modest sum so far as freezing injunctions generally go and I am well satisfied that it is not inappropriate as a figure and for the amount of the freezing order in the circumstances of the present case.

28. I turn now to deal with the application of the defendants to discharge the injunction restraining them from further publishing what are alleged to be either defamatory or false and known to be false so as to give rise to a cause of action for obtaining moneys by unlawful means. In my judgment the

position as to the grant of interlocutory injunctions in libel actions such as this partly is, remains as set out in the judgment in *Bonnard -v- Perryman* [1891] 2 Ch 269. The passage is too familiar to need to be quoted in this judgment. It is quoted at paragraph 25.6 of the current edition of *Gatley*. It is worth noting that the editors of *Gatley* take the view that the position remains that 'where the defendant contends that the words complained of are true in the sense that he will plead and seek at trial to prove the defence of justification, the court will not grant an interim injunction unless exceptionally the court is satisfied that such a defence is one that cannot succeed'. It seems that that approach has survived the passage of the Human Rights Act: see section 12(4).

29. I was referred in the course of argument to a decision of Eady J in *Sunderland Housing Company and another v Baines and others* [2006] EWHC 359. Having read that judgment it appears to me that Eady J accepted, as one would expect, the authority of *Bonnard -v- Perryman*. He did, however, add the gloss that it seemed to him to be right for a defendant seeking to resist an injunction to identify the defamatory meaning or meanings which he intends to justify and to verify the statement of truth that he believes in the truth of the words in that meaning or meanings. Mr Rushbrooke is right when he points out that the defendants in the present case have not complied with that indication.
30. However, it is necessary, as it appears to me, to stand back and look at the case as it were in the round. There are clear indications, although I accept not statements of intent, as to what the 1st and 4th defendants' case will be at trial as to what they were saying and as to the basis upon which they were saying it.
31. But quite apart from that I have got to bear in mind that there are issues as to

the responsibility of the first and fourth defendants for what was published ostensibly by IVAC. There is a possibility that the defendants will seek to rely on some other substantive defence such as qualified privilege. Over and above that there is the point made by Mr Shale that this is unlikely to prove to be a large damages case. That seems to me to be a consideration militating to some extent against the continuation of injunctive relief pending trial. Finally I think there is some force in the point made by Mr Shale that if the injunction were to be continued in its present form there would or might be problems for UKB in dealing with clients referred to it.

32. In all those circumstances I do not think it would be right for the court to take the somewhat exceptional course of continuing the injunction in defamation.
33. That leaves the alternative basis on which Mr Rushbrooke seeks to sustain the injunctive relief, namely the cause of action for causing damage by unlawful means. He referred me to the recent House of Lords decision in *OBG*, a case which on its facts is very far removed from the present one. But there does appear to me to be a valid objection taken by Mr Shale to basing an injunction on this relatively novel cause of action. He poses the question what are the unlawful means asserted by the claimants. The answer is that they consist in the statements made by either IVAC on behalf of the defendants or by the fourth defendant itself. Mr Shale points out that these statements are closely allied to the statements of which the claimants complain as being libels on them. Mr Rushbrooke responds that the statements in question are false but not defamatory. The distinction sought to be drawn by Mr Rushbrooke appears to me to be a narrow one. I fear that the salutary rule against granting interlocutory injunctions against publishing defamatory statements will be

readily capable of being circumvented if injunctions were to come to be granted on the footing of the cause of action causing damage by unlawful means. I therefore have decided that the injunctions granted by Irwin J restraining further publication should be discharged. That does not, I add, prevent the claimants, if so advised, from returning to court and seeking to reimpose those injunctions if circumstances so require.

34. I come finally to the position in relation to Mr Mulroy and Mr Gooden about whom I have not said very much so far in this judgment. I will deal with Mr Gooden first. He is established by the evidence as being one of the directors of UKB. He therefore seems to me to be in exactly the same position as Mr Mason. Accordingly I direct that the freezing order should continue in relation to him and that there should be no continuation of the injunction against publishing statements against him for the reasons I have already given.
35. I finally come to Mr Mulroy who, as I say, is present in court and has made submissions. He is in fact in breach, as I believe he accepts, of the order that he should disclose his assets. What he has done is to make a witness statement in which he says that he is out of a job and has a bank account with very little money in it. It seems to me in those circumstances and Mr Rushbrooke didn't really dissent from this view, that there would be no real purpose in continuing the injunction, the freezing injunction as against Mr Mulroy. In his case I discharge the injunction.
