[2023 Gib LR 620]

FRAGOSO v. GAO

SUPREME COURT (Yeats, J.): August 22nd, 2023

2023/GSC/032

Civil Procedure—civil restraint order—claims or applications without merit—civil restraint order may be made pursuant to CPR r.3.11 and Practice Direction 36 against party who issued claims or made applications totally without merit—not made against party who had issued statutory demands, which are not applications to court

The applicant applied for a civil restraint order.

The respondent had been employed by a company of which the applicant was the Chief Executive Officer. The respondent was summarily dismissed for breach of contract and claimed the company owed him £15,926.61. He served a statutory demand on the company, which the company applied to set aside. The demand was set aside on the basis that there was a substantial dispute as to whether the respondent was owed the amounts claimed. The respondent then served a statutory demand on the applicant in her personal capacity demanding £75,000, which the applicant applied to set aside. The demand was set aside on the basis that there was a clear dispute as to whether any money was owed to the respondent. On that occasion the court said that the respondent was abusing the court's processes by serving statutory demands in circumstances in which it was totally inappropriate to do so.

The applicant applied pursuant to CPR r.3.11 for a civil restraint order preventing the respondent from issuing any further statutory demands and/or any applications under the Insolvency Act against the applicant, the company or related companies.

Paragraph 1 of Practice Direction 3C to the Civil Procedure Rules applied where the court was considering whether to make a civil restraint order—"against a party who has issued claims or made applications which are totally without merit." Paragraph 4.1 provided that a general civil restraint order could be made—"where the party against whom the order is made persists in issuing claims or making applications which are totally without merit, in circumstances where an extended civil restraint order would not be sufficient or appropriate."

The issue for the court was whether issuing "claims" or making "applications" included serving a statutory demand on another person. The applicant submitted that the respondent was triggering the commencement

of proceedings and that no distinction should be drawn between serving a statutory demand and filing proceedings or applications. A person served with a statutory demand was obliged to apply to have it set aside if the debt was disputed.

Held, ruling as follows:

(1) The power to grant a civil restraint order contained in CPR r.3.11 and the Practice Direction did not apply in this case. The respondent had not made any applications to the court. Service of a statutory demand could not be equated to the making of an application. It was an out of court process. Although an alleged debtor might have little choice but to apply to have it set aside, it was the application to set aside the demand that engaged the court's process (paras. 9–11).

(2) Even if the court had an inherent jurisdiction to make a civil restraint order to prevent the respondent from serving statutory demands, or the power to grant some other form of injunctive relief, it would not be appropriate to do so on the facts of this case. The respondent had served two statutory demands. The court did not criticize the respondent for serving the first statutory demand, although it did criticize him for serving the second and said he was abusing the court's processes by serving a demand when it was inappropriate to do so. It was only service of the second demand that would fall within the ambit of being totally without merit. CPR r.3.11 encapsulated the common law position that civil restraint orders could be made when a party had made persistent applications or claims, which were totally without merit. There had not been any such persistent conduct in this case and the requirement was therefore not met (paras. 12–15).

(3) As service of the second statutory demand was an abuse of process, the respondent would be ordered to pay the applicant's costs in applying to set aside the second statutory demand on an indemnity basis (paras. 16–17).

Cases cited:

(1) *Nursing & Midwifery Council* v. *Harrold*, [2015] EWHC 2254 (QB); [2017] IRLR 30, considered.
(2) *Petrochemical Logistics Ltd.*, *In re*, 2017 Gib LR 220, applied.
(3) *R. (Kumar)* v. *Constitutional Affairs Secy.*, [2006] EWCA Civ 990; [2007] 1 W.L.R. 536, followed.
(4) *Webster* v. *Ashcroft*, [2019] EWHC 2174 (Ch), considered.

Legislation construed:

Civil Procedure Rules (S.I. 1998/3132), r.3.11(2): The relevant terms of this provision are set out at para. 6.

G. Huart (instructed by Hassans) for the applicant;
The respondent did not appear.

1 **YEATS, J.:** The applicant, Valli Saritha Fragoso, applies for a civil restraint order ("a CRO") against the respondent, John Gao. The application is made pursuant to Civil Procedure Rules, r.3.11.

2 The background to the application is the following. Mr. Gao was employed by Cobovec Ltd. ("Cobovec") on October 17th, 2022 as a legal and compliance officer. (Ms. Fragoso is Cobovec's Chief Executive Officer.) On January 30th, 2023, Mr. Gao was summarily dismissed for breach of contract. Mr. Gao claimed that, on the termination of his contract, he was owed three months' pay in lieu of notice, holiday pay, and expenses, all of which totalled £15,926.61. As Cobovec refused to pay this, he served a statutory demand on the company on February 9th, 2023. Cobovec immediately applied to set the statutory demand aside. At a hearing on March 10th, 2023, I determined that there was a substantial dispute as to whether Mr. Gao was due the amounts which he was claiming in his statutory demand and as such it had to be set aside. Three days later Mr. Gao served a statutory demand on Ms. Fragoso (in her personal capacity) demanding the sum of £75,000. Ms. Fragoso also immediately applied to have that set aside. For the reasons set out in my judgment dated May 2nd, 2023 I set aside that second statutory demand, again determining that there was a clear dispute as to whether any moneys were owing to Mr. Gao. I then said (2023/GSC/021, at para. 13):

> "Mr. Gao may well have a claim against Cobovec and/or others. If he considers that he has, then he can bring a claim and the court will adjudicate on it. He is abusing the court's processes by serving statutory demands in circumstances where it is totally inappropriate to do so."

3 By application notice dated April 19th, 2022, Ms. Fragoso applied for a *limited* CRO preventing Mr. Gao from issuing any further statutory demands and/or any applications under the Insolvency Act against either Ms. Fragoso, Cobovec or related companies. I heard the application on July 4th, 2023. (At the hearing, Ms. Huart clarified that Ms. Fragoso was in fact seeking a *general* CRO.)

4 Mr. Gao did not attend the hearing. However, Mr. Gao sent an email to the Registry on July 2nd, 2023 enclosing a note with his position. At para. 13 of this note, he sets out his submissions on Ms. Fragoso's application. He says the following:

(i) There is no need for a CRO because he does not intend to make any claim in the Supreme Court as there is now a pending claim before the Employment Tribunal.

(ii) Before the court can consider making a CRO, there must have been "more than two applications" which have been found to be without merit.

(iii) Mr. Gao does not reside in Gibraltar and therefore the court does not have jurisdiction over him.

(iv) Mr. Gao intends to file a personal injury claim against Ms. Fragoso in the United Kingdom.

(v) He is unable to attend the hearing because (a) he is not resident in Gibraltar; and (b) for medical reasons. Hearing the application without him would be a breach of the UK Human Rights Act.

(vi) The court should not hear Ms. Fragoso's application because he has made a complaint against her lawyer to the Legal Services Regulatory Authority.

5 In light of the conclusions that I have reached and which I am setting out in this judgment, it is unnecessary to address the points raised by Mr. Gao, including that of jurisdiction. I will however make the following observation about Mr. Gao's supposed inability to attend the hearing. Mr. Gao had been on notice of the application since April 10th, 2023. It was first listed to April 26th, 2023 but I adjourned the hearing to allow him to instruct solicitors and take legal advice. Mr. Gao produced no evidence as to the steps he had taken in that regard nor indeed any medical evidence that he was unable to attend the hearing. In the circumstances, Mr. Gao can have no complaint that the hearing proceeded in his absence.

6 CPR 3.11(2) provides the statutory footing for the making of a CRO. This simply provides as follows:

"(2) A practice direction may set out—

(a) the circumstances in which the court has the power to make a civil restraint order against a party to proceedings;

(b) the procedure where a party applies for a civil restraint order against another party; and

(c) the consequences of the court making a civil restraint order."

7 Paragraph 1 of Practice Direction 3C to the Civil Procedure Rules then provides as follows:

"**1** This practice direction applies where the court is considering whether to make—

(a) a limited civil restraint order;

(b) an extended civil restraint order; or

(c) a general civil restraint order,

against a party who has issued claims or made applications which are totally without merit."

8 Paragraph 4.1 of the Practice Direction applies to general CROs. It states:

"**4.1** A general civil restraint order may be made by—

(1) a judge of the Court of Appeal;

(2) a judge of the High Court; or

(3) a Designated Civil Judge or their appointed deputy in the County Court,

where the party against whom the order is made persists in issuing claims or making applications which are totally without merit, in circumstances where an extended civil restraint order would not be sufficient or appropriate."

(A general CRO is defined in CPR 2.3. It is an order restraining a party from issuing any claim or making any application in specified courts.)

9 The principal point to consider is whether issuing "claims" or making "applications" for the purposes of paras. 1 and 4.1 of the Practice Direction include serving a statutory demand on another person. Mr. Gao has not issued any claims or made any applications to the court. He has simply served a statutory demand on Cobovec and a second statutory demand on Ms. Fragoso. The effect was that Cobovec and Ms. Fragoso were forced to file their applications.

10 Ms. Huart submitted that Mr. Gao was triggering the commencement of proceedings and that no distinction should be drawn between serving a statutory demand and the filing of proceedings or applications. A person served with a statutory demand is obliged to apply to have it set aside if the debt is disputed. (Unless they do so (or pay up), they are liable to be found to be bankrupt or insolvent.) Ms. Huart referred to *Nursing & Midwifery Council* v. *Harrold* (1) in which the English High Court found that it had an inherent jurisdiction to make a CRO covering proceedings before the Employment Tribunal even though the Civil Procedure Rules did not give it the power to do so.

11 All that may be, but the application presently being made is not made pursuant to the court's inherent jurisdiction. As set out in the application notice, it is being made pursuant to CPR 3.11. Service of a statutory demand cannot be equated to the making of an application. It is an out of court process. I have considered *Webster* v. *Ashcroft* (4) where HHJ Paul Matthews, sitting as a judge of the High Court, was determining whether a person who was the subject of an extended CRO could apply, without the court's permission, to set aside a statutory demand which had been served upon him. In holding that permission was required, the learned judge said the following ([2019] EWHC 2174 (Ch), at para. 16):

"Mr Trevis is of course right to say that in substance the alleged debtor in applying to set aside a statutory demand is responding to an out of court procedure initiated by the alleged creditor. It is a defensive

> move. He is also right to say that it only happens like that because the court rules are so structured. But the whole point about the civil restraint order regime is to prevent the court system being overwhelmed with unmeritorious applications *made to the court*. And I cannot get away from the fact that, in applying to set aside a statutory demand, an alleged debtor is engaging the court process for the first time, rather than responding to the engagement of the court process by someone else." [Emphasis in original.]

I would respectfully agree that serving a statutory demand does not engage the court's process. Whilst an alleged debtor may have little choice, it is the application to set aside the demand that engages the court's process. In my judgment, the power to grant a CRO contained in CPR 3.11 and Practice Direction 3C does not apply to this case. Mr. Gao has not made any applications to the court.

12 Does the court in any event have an inherent jurisdiction to restrain the service of statutory demands when, as is asserted in this case, an alleged creditor has served demands which are totally without merit? Although Ms. Huart made some submissions on this, I would hesitate before deciding the point. In any event, even if the court had the power to make a CRO preventing Mr. Gao from filing statutory demands, or the power to grant some other form of injunctive relief, in my judgment, it would not be appropriate to do so on the facts of this case.

13 Mr. Gao served two statutory demands. One on Cobovec and, when that one was set aside, he served a second demand on Ms. Fragoso. I set aside the first demand because I determined that it was arguable that the debt claimed by Mr. Gao was not due by Cobovec. (The fact that a debt is disputed is a ground for setting aside a statutory demand.) Mr. Gao may have thought he was entitled to serve the demand because he was claiming sums which were arguably due under his contract of employment. In my ruling, I did not criticize Mr. Gao for taking the step that he did. The service of the second demand was a different story. As I said in my judgment of May 2nd, 2023, undeterred by my decision of three days earlier, he served a demand on Ms. Fragoso. He did so knowing full well that Cobovec and Ms. Fragoso were disputing the fact that he was owed any money and that the demand would be challenged. When setting aside the second demand I did criticize Mr. Gao. I said that he was abusing the court's processes by serving a demand where it was inappropriate to do so.

14 Ms. Huart relied on *R. (Kumar)* v. *Constitutional Affairs Secy.* (3) for the proposition that it is not necessary for the court in the first application to have certified that the steps taken by Mr. Gao were totally without merit. The court can do so now. The headnote to the report states as follows ([2007] 1 W.L.R. at 536):

> "When exercising its jurisdiction to make a civil restraint order against a party the court is entitled to take into account any previous claims or applications issued or made by the party which it concludes were totally without merit. Its consideration is not limited to those cases where the court which struck out or dismissed the previous claim or application specified on the face of its order that the claim or application was totally without merit."

I accept that I can carry out the review now. However, it does not seem to me that on the facts I can say that service of the first demand was totally without merit. As I said in my ruling of March 10th, 2023, the threshold to be met by the party seeking to set aside a demand is a low one. I simply found that there was an arguable case that the debt was disputed. Nothing more. What made the second demand totally without merit was that Mr. Gao by then knew what the court's determination had been but persisted in serving a second demand which quite obviously would meet the same fate as the first one. I consider that it is only the service of the second demand which would fall within the ambit of being totally without merit.

15 CPR 3.11 encapsulates the common law position that civil restraint orders may be made when a party has made persistent applications or claims. which are totally without merit. There has not been any such persistent conduct in this case and the requirement is therefore not met.

Costs

16 In my judgment of May 2nd, 2023, I indicated that I wished to hear the parties on whether I should order that Mr. Gao pay Ms. Fragoso's costs, in setting aside the second statutory demand, on an indemnity basis. Ms. Huart referred to *In re Petrochemical Logistics Ltd.* (2), where Jack, J. considered whether an order for payment of costs on an indemnity basis was appropriate when setting aside a statutory demand. He said (2017 Gib LR 220, at para. 15):

> "I then turn to consider costs. The Gibraltarian legislation, as I noted in *In re Mount Grace Ins. Co. Ltd.* . . . (2015 Gib LR 74, at para. 12), is modelled on Australian insolvency legislation. The Australian practice is to examine closely whether the party serving a statutory demand was justified in so doing, and, if not, whether the demand was an abuse of process. If a statutory demand is an abuse, then indemnity costs are frequently awarded. In my judgment, it is appropriate to apply the same approach in Gibraltar."

17 I too will follow that approach. It is clear from what I have already said that service of the second statutory demand was an abuse of process. I will therefore exercise my discretion and order that Mr. Gao pay Ms. Fragoso's costs of the application to set aside that demand on an indemnity basis.

Conclusion

18 The application for a civil restraint order against Mr. Gao is dismissed. Mr. Gao shall however pay Ms. Fragoso's costs in applying to set aside the second statutory demand on an indemnity basis.

Judgment accordingly.
