First ever search order against a third party granted: the *Chabra* moment for search orders

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Amongst the wide array of tools available in the English Courts for intended and actual claimants are what have been described as the law's two nuclear weapons, freezing injunctions and search orders. Since the seminal case of *Chabra*, Courts have been willing to grant freezing orders not just against defendants, but against third parties against whom no claim is advanced but who appear to hold assets on behalf of the defendant. Yet in the quarter of a century since *Chabra*, and until very recently, no case seems to have tried to use the search order jurisdiction in a similar way. The matter of *Abela and others v Baadarani (Third Party: Fakih)* [2017] EWHC 269 (Ch) has now achieved that.

The background to the case is as follows. In 2009, the Claimants commenced proceedings against Mr Baadarani and another defendant. There then followed a jurisdictional challenge by Mr Baadarani, culminating in what is the leading case regarding alternative service out of the jurisdiction (*Abela and others v Baadarani* [2013] UKSC 44). Following the Supreme Court's rejection of Mr Baadarani's jurisdictional challenge, the matter then proceeded until, in June 2015, judgment was entered against Mr Baadarani in a sum of over US$20 million following his failure to comply with a number of unless orders.

In the meantime, and whilst the proceedings were ongoing, the Claimants had undertaken an oral examination of Mr Baadarani following costs orders against him as a result of his failed jurisdictional challenge. This process resulted in an order that Mr Baadarani provide further disclosure to the Claimants and, following a committal hearing at which he was found guilty of contempt, an order to produce certain documents. Amongst those documents was a schedule of his assets and liabilities provided to the National Bank of Kuwait ("NBK") in connection with the re-mortgage of property in London. Mr Baadarani disclosed a purported copy of that document in September 2015.

In early 2016, having obtained a worldwide freezing order against Mr Baadarani the day before, the Claimants obtained a number of third party disclosure orders, including against NBK and the Respondents to the Search Order obtained shortly after. In response to the disclosure orders, NBK provided considerably more documents than the Respondents had, and the disclosure that was provided suggested that the Respondents had conspired with Mr Baadarani to backdate the asset statement. This was in fact created in 2015 and backdated to 2013.

As a result, the Claimants successfully applied on a without notice basis for a search order against the Respondents for relevant documents in their possession. That application was granted by Mr Justice Warren on 21 April 2016 (*Abela and others v Baadarani (Third Party: Fakih)* [2016] EWHC 971 (Ch)). One of the two bases upon which the application was put (upon which Mr Justice Warren's judgment was based) was the judgment obtained by the Claimants. It was the Claimants' position that section 7 of the Civil Procedure Act, which put on a statutory footing the practice of the Court to grant *Anton Piller* orders, did not limit the persons who might be made respondents to such an order and, like *Chabra* some 25 years earlier, could be granted against parties against whom no cause of action was being pursued. In this case, the Claimants were principally pursuing the search order to identify, preserve and enforce against assets of Mr Baadarani.

At a hearing in February 2017, the Respondents unsuccessfully sought to challenge the Court's jurisdiction to grant the relief obtained by the Claimants on two bases.

The first was that, after judgment had been obtained against Mr Baadarani, there were no existing or proposed proceedings against him, that being the gateway pursuant to which search order relief could

be granted. Mr Justice Nugee had *"no hesitation in rejecting"* this submission, and accepted that there was nothing in the legislation that began to suggest an intention to cut down the availability of search order relief after judgment had been obtained.

The second was that there was no authority that suggested that a search order against a third party could be granted in the absence of an actual or intended third party disclosure order. Where such an order had been granted, so the Respondents argued, a search order had to track that disclosure order insofar when ordering the classes of documentation required to be delivered up by search order respondents. Since the search order was wider in scope than the prior disclosure order against the Respondents, it was said by them that the search order should be set aside in part. This submission was also rejected by the Court, which found it *"quite unnecessary to require the court to go through the ritual of making an otherwise unnecessary third party disclosure order as a precursor to making a search order"*.

The Court's decision is to be welcomed as confirming the existence of yet another tool in the litigator's armoury.

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