



Neutral Citation Number: [2020] EWHC 3271 (Ch)

Case No: HC-2015-004200

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY TRUSTS AND PROBATE (ChD)

7 Rolls Building
Fetter Lane
London, EC4A 1NL

4th December 2020

Before :

JUDGE JONATHAN RICHARDS
Sitting as a Deputy Judge of the High Court

Between :

The Trustees of the Nicholas Savage Foundation

- (1) Andrew Iain Tolmie**
- (2) Judith Weingarten**

- and -

- (1) Pia Elizabeth Taylor**
- (2) Dennis Joseph Massey**

Claimants

Defendants

Stephen Moverley Smith QC (instructed by **direct access**) for the **Claimants**
Amy Berry (instructed by **Glanvilles Damant Limited**) for the **Second Defendant**
The **First Defendant** did not appear and was not represented

Hearing dates: 27 November 2020

APPROVED JUDGMENT

Covid-19 Protocol: This judgment is handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10:30 AM on 4th December 2020.

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JUDGE JONATHAN RICHARDS

Judge Jonathan Richards:

1. This is my judgment on the following applications which remained in contention at the hearing on 27 November 2020, the parties having reached agreement on other applications:
 - i) The application of the Second Defendant (“D2”) dated 16 November 2020 for the freezing injunction and ancillary order made by HHJ Cooke on 15 February 2019, as subsequently varied, (the “Freezing Injunction”) to be discharged, insofar as it relates to D2, if necessary against the provision of undertakings to be given by D2.
 - ii) D2’s application dated 16 November 2020 for the Freezing Injunction to be varied to permit him to pay £9,080.16 to American Express to discharge a credit card debt.
 - iii) D2’s application for the Freezing Injunction to be varied to permit the balance of the funds remaining in bank accounts covered by the Freezing Injunction (the “Frozen Accounts”) to be spent on legal advice and assistance.
2. The background to these applications is convoluted. For present purposes, it is sufficient to note that the Claimants assert that the First Defendant (“D1”) misappropriated funds from the Nicholas Savage Foundation. They issued proceedings against her to recover those funds and, on 22 November 2017, obtained judgment in default, together with an amount in respect of costs totalling £7,613,510 (the “Money Judgment”). An application to set aside the Money Judgment was unsuccessful.
3. D1 and D2 married in 2011, having lived together prior to that date. Their financial affairs were intertwined. The Claimants were concerned that assets of D1 that would otherwise be available to meet the Money Judgment might be dissipated. They were also concerned that some of the assets ostensibly owned by D2 were beneficially owned by D1. They therefore sought, and obtained, the Freezing Injunction. Initially that was granted following a without notice application. It was then extended to various return dates to enable the court to consider the application for a freezing order at an on-notice hearing. Some of the initial on-notice hearings were adjourned after making relatively minor variations to the Freezing Injunction. On 26 July 2019, Mark Anderson QC, sitting as a deputy judge of the High Court, ordered that the Freezing Injunction should continue until further order.
4. I will start with D2’s applications set out in paragraph 1(ii) and 1(iii). That will enable me to approach Ms Berry’s submissions, that the Freezing Injunction serves no useful purpose, which she made in support of the application at 1(i), with a full appreciation of the extent to which funds have been permitted to leave the Frozen Accounts.

Payment of the American Express bill

5. Before addressing the detail of the application in relation to the American Express bill, I observe that the Freezing Injunction does not confer on the Claimants any proprietary interest over either Defendant's assets. It does not create security for the Money Judgment which is itself a pure money debt. The purpose of the Freezing Injunction is not to put the Claimants in a better position than any other of the Defendants' creditors. Rather, the purpose of the Freezing Injunction is to protect the Claimants from dissipation of assets.
6. The Freezing Injunction contains an exception permitting the Defendants to withdraw £700 per week in respect of their ordinary living expenses. Mr Moverley Smith did not suggest that this figure represented an immutable hard cap on the amount that could be spent on living expenses. He was right not to do so. As a matter of principle and authority, D2 should be permitted to spend money, on ordinary living expenses, in accordance with the standard of living he maintained before the Freezing Injunction was granted (see for example paragraph [67] of the judgment of Males LJ in *Vneshprombank LLC v Bedzhamov and others* [2019] EWCA Civ 1992). The weekly figure of £700 was simply an estimate of the Defendants' likely living expenses.
7. There was no suggestion that the American Express bill represented expenditure that was inconsistent with D2's former standard of living. Mr Moverley Smith acknowledged that it would be difficult to object to the payment of the American Express bill on the basis of the size of the bill alone. However, he submitted that, since D2 had not paid a costs award made by David Rees QC, sitting as a deputy judge of the High Court on 28 November 2019, any variation of the Freezing Injunction to permit the American Express bill to be paid should be made conditional on D2 first paying the Claimants the amount of their costs.
8. I reject that submission. Imposing the condition for which the Claimants ask would be tantamount to treating the sums sitting in the Frozen Accounts as analogous to security available to the Claimants in priority to other creditors. Mr Moverley Smith submitted that D2 should be expected to honour costs awards made by the court. No doubt that would be true in a perfect world but it is often the case that people cannot pay debts, including debts arising as a consequence of court orders. The Claimants should not be in a better position compared with other creditors simply because they hold a debt arising from a court order and the Freezing Injunction has been made.
9. I will allow D2's application for the American Express bill to be paid.

The legal expenses

10. A trial, which the parties referred to as the "assets trial", has now been fixed for 24 February 2021. That trial will determine the issue of whether, and if so to what extent, assets ostensibly held by D2 are actually beneficially owned by D1, so as to be available to meet the Money Judgment.

11. Ms Cook, D2's solicitor, estimates that D2's likely legal fees from now, up to and including the assets trial, would be somewhere between £50,290 and £53,290 including VAT. There is no suggestion that this estimate is unreasonable. I accept it as a reasonable estimate.
12. Mr Moverley Smith argued that any further permitted expenditure on legal fees should be made conditional on payment of the outstanding costs award. I reject that submission for the same reasons I have given above.
13. While the Claimants are concerned in general terms as to the possibility of "hidden assets" (which I will address in the discussion below), it was not suggested that D2 had any specific other source of funds out of which legal fees could be paid. Accordingly, I consider that D2 should be permitted to withdraw a further amount from the Frozen Accounts to pay reasonable legal fees, such amount not to exceed £53,290 (including VAT).

The application to discharge the Freezing Injunction

14. The evidence set out in D2's 9th Witness Statement was that, as at 24 November 2020, the fund sitting in Frozen Accounts amounted to £46,051.79. The Claimants accept that as an accurate statement of the amount in the bank accounts that they know about. However, they remain concerned about the possibility of "hidden assets".
15. It is common ground that permitted withdrawals from the Frozen Accounts will shortly reduce the figure of £46,051.79 to nil. Without going into the details of the calculation, the combination of Zacaroli J's order of 31 July 2020 permitting a further £12,000 (including VAT) to be spent on legal fees, my decision set out above to permit the American Express Bill to be paid and weekly withdrawals in respect of living expenses will, ignoring any further withdrawals in respect of legal expenses, reduce the fund to £16,458.87 by the time of the assets trial. Therefore, there will by the time of that trial be insufficient money in the fund even to pay D2's reasonable legal fees, still less to leave a balance.
16. With that arithmetic background, Ms Berry submitted that continuing the Freezing Order would involve a disproportionate interference with D2's rights. D2 should, she submitted, be free to pay his modest pension into his own bank account and enjoy the usual rights that individuals have to access their money straightforwardly. She referred to difficulties that D2 had experienced with his banks' failures to take into account variations to the Freezing Injunction that Zacaroli J had made.
17. For the reasons that follow, I do not accept the submission that the Freezing Order should be discharged altogether.
18. The Freezing Injunction was initially made on a without notice basis. However, it has remained in place following several on-notice applications. Neither Defendant has, to date, sought to persuade the court that HHJ Cooke's conclusion, that there was a sufficient risk of dissipation of assets to justify the making of the Freezing Injunction against both Defendants, was wrong at the time the Freezing Order was made. One element of that risk is that the Defendants might dissipate

assets which the Claimants know about. However, if there are other assets, which the Claimants do not know about, the Freezing Injunction also protects against dissipation of those other assets. Paragraphs [27] and [28] of HHJ Cooke's judgment when making the Freezing Injunction demonstrate that he was satisfied that there was a prima facie case that D1 was determined, dishonestly if necessary, to avoid her assets being traced and that there was a good arguable case that D2 was closely implicated in those actions. Of course, HHJ Cooke heard only the Claimants' version of events. However, there have been subsequent on notice hearings at which the Defendants could have sought to persuade the court otherwise.

19. Ms Berry submitted that HHJ Cooke's conclusions were vitiated by material non-disclosure by the Claimants. However, it is simply too late to take such a point now. If D2 wished to make the point that HHJ Cooke had been materially misled that point should have been made at the first on-notice hearing to consider the Freezing Injunction (*Chanel Ltd v F.W Woolworth & Co Ltd* [1981] 1 WLR 485). Ms Berry stressed that no application to discharge the Freezing Injunction had actually been made previously, whether on the grounds of the Claimants' non-disclosure or otherwise. However, that does not answer the point: if the Defendants thought that there had been non-disclosure, they should have made their argument earlier. It follows that I agree with Mr Moverley Smith that a material change in circumstances is needed to support a complete discharge of the Freezing Injunction.
20. I do not accept Ms Berry's submission that the reduction to nil of a known fund of assets is of itself a material change of circumstances if the Claimants continue to have legitimate concerns about the existence of other assets. Clearly, if there were such other assets that were registered in D2's name despite being beneficially owned by D1, and the court discharged the Freezing Injunction insofar as applicable to D2 altogether, D1 would simply be rewarded for her concealment of assets.
21. Ms Berry sought to answer this point by submitting that, by now, there can be no legitimate basis for any concern as to the existence of hidden assets. I accept, of course, that the longer matters go on without additional assets being found, the more likely it becomes that those assets do not exist. However, as matters stand, I am satisfied that the points made in Mr Tolmie's 34th witness statement set out a legitimate basis for concern that there might be hidden assets. In her oral submissions, Ms Berry sought to turn Mr Tolmie's assertions of previous lavish spending by the Defendants against him by arguing that such lavish spending in the past was consistent with a conclusion that the money had now all been spent. Of course, that is a possible conclusion. However, I do not consider that it renders Mr Tolmie's concerns unjustified in circumstances where his review of the Defendants' credit card statements raises a suggestion that they are spending more than their combined pension income. Nor do I accept Ms Berry's submissions that Mr Tolmie's concerns are rendered less reasonable by not being backed up by expert evidence. The Claimants should not be required to incur expense on expert reports to maintain the Freezing Injunction which they have now obtained. Rather, it is for D2 to demonstrate a material change of circumstances and in my judgment he has not done so.

22. The final issue for determination, therefore, is whether I should discharge the Freezing Order as applicable to D2 on terms that D2 provides suitable undertakings. Ordinarily, a court might readily be prepared to assent to such a course as breach of an undertaking given by D2 to the court would attract the same severe sanctions as breach of a Freezing Injunction.
23. However, in this case D2 is hoping that the giving of undertakings will remove some of the difficulties he has experienced with his bank relating to the operation of the Freezing Injunction. Having heard the submissions from counsel on both sides I am not satisfied that those difficulties would be overcome even if D2 were permitted to provide an undertaking in lieu of the Freezing Injunction. It seems to me most likely that a bank put on notice of undertakings given by D2 would wish to ensure that the bank account is not in practice operated in breach of those undertakings. It is perhaps for this reason that Ms Berry suggested, in her oral submissions, that undertakings offered by D2 would not extend to all bank accounts, although they would cover D2's car. The difficulty with this, however, is that if undertakings did not extend to bank accounts or, if they did, the relevant banks did not monitor the accounts to check they were operated in accordance with the undertakings, the Claimants would have less practical protection against dissipation than under the current Freezing Injunction.
24. Moreover, as Mr Moverley Smith submitted, the practical problems that D2 is currently facing with his bank may soon come to an end. As I have observed, once amounts are withdrawn to pay legal fees and the American Express bill, there will no longer be any material balance in those accounts. Moreover, under the terms of Zacaroli J's order of 31 July 2020 D2 is able to withdraw the amount of his pension from the account (in the name of a friend) into which it is paid by means of a debit card. I quite understand D2's wish to revert to a situation in which his own pension is paid into his own account which he can access in the same way as other people access their own assets. However, given the points I have set out above, I consider that the balance comes down in favour of preserving the current status quo, especially with the assets trial being relatively close.
25. I am, to an extent, fortified in this conclusion by the fact that D2 has shown, by arranging for his pension to be paid into a friend's account, that he is prepared act contrary to court orders when it suits him to do so. I would not say this point is determinative: I considered that the Claimants' submissions on this issue overstated the seriousness of D2's breach of that order. However, I considered that D2's submissions understated the significance of the breach and I am left with some residual concern as to whether D2 would honour undertakings that he gave if it did not suit him to do so.

Conclusion

26. My conclusions are set out above. Please could the parties reflect them in the terms of a draft order to be submitted to the court no later than 5pm on 7 December 2020. Please could that order make appropriate provision for costs. My view at this stage is that costs should be reserved to the conclusion of the assets trial, but I will consider any submissions to the contrary that the parties wish to make.