Neutral Citation Number: [2023] EWHC 3026 (KB)

Case No: QB- 2020 – 003693

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27 November 2023

Before:

His Honour Judge Bird
(sitting as a Judge of this Court)

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Between:

ALEXANDER ISSAC HAMILTON	**Claimant**
- and -	
(1) MARK COLIN BARROW	**Defendant**
(2) CLAIRE MICHELLE BARROW	
(3) MARTIN WELSH	

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Mr Alexander Hamilton appeared in person
Mr Hugo Page KC on behalf of the **First and Second Defendants**
Mr Martin Welsh appeared in person

Hearing dates: Monday 20 November 2023

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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HIS HONOUR JUDGE BIRD SITTING AS A JUDGE OF THIS COURT

His Honour Judge Bird:

The Application

1. Mr Hamilton has the benefit of a substantial judgment against the Defendants. Judgment was handed down in July this year following a trial. The damages awarded have been paid, but interest and costs orders made in Mr Hamilton's favour have been stayed pending the outcome of an application for permission to appeal.

2. This is an application made by Mr Hamilton for a post judgment freezing order against Mr and Mrs Barrow and for various relief against Mr Welsh. The present application was issued on 16 August 2023.

3. The application for a freezing order is unusual because it is made on notice and at a time when no freezing order is in place.

4. Mr Hamilton acted before me in person as he did throughout the trial of the matter before Mrs Justice May. Mr Welsh also acted in person. Mr Hugo Page KC appeared for Mr and Mrs Barrow.

The Claim

5. Mr Hamilton paid over large sums of money to a "currency club" hoping to take advantage of an apparently excellent opportunity to make gains on speculative currency transactions. He issued his claim on 20 October 2020 seeking damages for fraudulent misrepresentation, breach of contract, breach of trust and conspiracy. The Defendants first had notice of the specific claim on or about 23 July 2020 when a pre-action letter was sent.

6. On 17 July 2023 and following a 5-day trial, Mrs Justice May upheld Mr Hamilton's misrepresentation and breach of contract claims. There were no express findings of dishonesty or fraud against Mr or Mrs Barrow. They were found liable for the fraudulent misrepresentations made by Mr Welsh on the ground that the 3 were in partnership.

7. The Defendants were ordered to pay Mr Hamilton the sum of £566,053.54 plus interest. That sum was paid on time from sums held by Mr and Mrs Barrow's solicitors. The effect of the payment is to discharge the damages liability of all three Defendants. The learned Judge also ordered the Defendants to pay some of the Claimant's costs (excluding the costs of the breach of trust and conspiracy claims) with such costs to be assessed on the standard basis if not agreed. There was also an order for payment of interest, in an agreed sum. Enforcement of the costs and interest orders was stayed for 21 days to allow the Defendants time to lodge an application for permission to appeal with the Court of Appeal. In the event, an application was lodged, and the stay has been extended until such time as the application for permission is

dealt with.

8. The stay remains in place. The outcome of the application for permission to appeal is expected shortly.

The Relevant Procedural Chronology

9. I accept that there was a perceived general risk that a claim would be issued by Mr Hamilton as long ago as 2017 but at that time it was thought that the claim would be directed against Mr Welsh. Mr Hamilton points to messages exchanged by Mr Barrow and Mr Welsh in April 2017 and refers to them as Mr Barrow's "*operating manual…. of how to evade [judgments]*".

10. The evidence is that Mr and Mrs Barrow (and probably Mr Welsh) first became aware of this claim against them in July 2020. At that time Mr and Mrs Barrow were in the process of selling a property in York ("Biba House") and lived in Grand Cayman but had decided to return to live in England. They also owned a property in Cyprus. The evidence is that they decided to sell the Grand Cayman property in May 2020. At the time they wanted to buy another property in York ("Field House").

11. Mr Hamilton applied for a freezing order on 24 July 2020 against the First and Second Defendant. The application was compromised on 21 August 2020 when Mr Justice Johnson accepted undertakings.

12. The primary undertaking was given by the Defendants not to "*remove from England and Wales or in any way dispose of, deal with or diminish the value of their assets identified in paragraph 3 in England and Wales up to the value of £566,053.54*".

13. Biba House (or its proceeds of sale) were identified in paragraph 3 together with relevant bank accounts. The First and Second Defendants undertook to pay the net proceeds of sale (estimated at between £345,000 and £385,000) to their solicitors to be held by then pending the outcome of the trial. The property was sold on 20 November 2020 and the net proceeds duly paid over. The purchase of Field House fell through.

14. The Defendants were free to remove from England and Wales, or otherwise deal with, any assets over that value and were free to dispose or deal with such assets. If the sum of £566,053.54 was secured, the schedule would cease to have effect.

15. The schedule also contained an undertaking not to dispose of a property in Cyprus owned by the First and Second Defendant and to provide a valuation of it to Mr Hamilton. It was provided on 12 November 2020 but not in English. On 7 June 2022, Deputy Master Toogood KC ordered that the First and Second Defendants provide a translation.

16. Mr Hamilton issued his claim on 20 October 2020.

17. A further application for a Freezing Order was made against all three Defendants on 15 August 2022. That application was dismissed by consent on or about 23 November 2022 when the First and Second Defendants undertook to instruct their solicitors to retain the sum of £566,053.54 in their client account pending the outcome of the claim. The application was triggered by the sale of the Grand Cayman property which I refer to below (see paragraph 11 at page 54 of Mr Hamilton's statement of 31 October 2022 and paragraph 2 of his statement of 18 November 2022). At the same time, Mr Hamilton dropped a claim that the sale of the Grand Cayman property was a breach of the undertakings given to Johnson J.

18. In support of the application for a stay on the enforcement of the costs and interest orders, both Mr and Mrs Barrow and Mr Welsh submitted evidence of their means. Mr and Mrs Barrow provided a list to the court when judgment was handed down. They listed a property in Portugal registered in the sole name of Mrs Barrow.

19. Mr Hamilton estimates that, if the matter goes to appeal and he succeeds, he will be entitled to costs (including disbursements and interest and after account is taken of adverse costs orders) of £441,012. Whether that sum is allowed or not is not a matter for me. It is this sum in respect of which Mr Hamilton seeks relief.

Mr and Mrs Barrow's property transactions

20. Mr and Mrs Barrow had use of an apartment in Grand Cayman. The property was owned by a company (Ebor Holdings Limited) of which Mr Barrow was the sole shareholder. It was acquired in or about October 2016, some time before any threat of litigation, and sold for $825,000 on 26 March 2021, around 4 months after the sale of Biba House. The Grand Cayman property is not mentioned in the undertaking accepted by Johnson J.

21. The existence of the property came to the attention of Mr Hamilton because Mr Barrow mentioned it in a witness statement dated 19 May 2022. Mr Hamilton takes exception to the fact that in that witness statement Mr Barrow says that the apartment had been "recently" sold. He believes that to be a deliberately dishonest statement.

22. The proceeds of the Grand Cayman property were used to buy a property in Portugal in which Mr and Mrs Barrow now live. That property (disclosed in the Barrows' asset statement) was acquired in the sole name of Mrs Barrow on 7 December 2021. Mr Hamilton characterises this acquisition (with the proceeds of sale of the Grand Cayman apartment) as "*a paradigm example of unlawful, dishonest litigation dissipation*" and the "*culmination of a dissipation strategy sketched out in facebook messages …in 2017*".

23. Mr Hamilton drew my attention to a certified translation of a deed of acquisition prepared in accordance with Portuguese law. In particular, he pointed out that the deed confirms that Mrs Barrow "*resided*" at Biba House, was married to Mr Barrow "*under the British regime of separation of property*" and intended to live at the property as her "*secondary home*". He has produced evidence from the present owners of Biba House that they have not permitted her to hold herself out as living there.

24. Mr Hamilton accepts he was aware of the acquisition of the Portugal property (but not of the detail) at the hearing before Mrs Justice May on 11 July 2023. He accepts he did not raise the matter with the court.

25. Mr and Mrs Barrow have recently said in evidence that at the time of acquisition they:

> "*decided to put the Portugal property in [Mrs Barrow's] name for personal reasons. At the time of this purchase [they] were considering an amicable separation. The stress of these proceedings was a factor. We decided that [Mrs Barrow] should have the Portugal property as her asset from the marriage, and [Mr Barrow] was to have the sale proceeds of Biba House. Since then we have lost the case before Mrs Justice May and the sale proceeds of Biba House have been paid over to Mr Hamilton in settlement of the principal sum for which we have been found liable*"

Mr Welsh

26. Mrs Justice May records the following in her judgment following trial (at paragraph 21):

> "*When I enquired at the start of his evidence Mr Welsh said that he had invested none of his own capital but had had £180k in profits. Later, in response to cross-examination from Mr Page, he said that he had invested Euros 2,500-3,000. Asked how much total commission he had received or removed from club funds Mr Welsh responded, "roughly $928,000, although some of that may have gone into other people's accounts". It appears that this included an amount of $138,000 taken as a "loan" from funds received by/held in the account of his section; when Mr Welsh took this loan, from which account or whose funds and on what terms remained undisclosed. He said he had used the monies to buy a property in Spain. It seems that Mr Welsh has taken no steps, following the failure of the Club, to repay the loan. Nor did he advance any explanation at trial as to why he has not done so in circumstances where many of the investors in his section, including in particular Mr Hamilton, have lost their entire capital investment*"

27. Mr Hamilton's evidence is that at least some of those funds were his. He goes on to note (at page 36 of his witness statement of 17 August 2023):

> "*D3 and his wife Pamela Welsh applied a material part of these funds to purchase, in joint names, a villa in Spain …. and as D3 informed me in 2016, he and Pamela used other Currency Club "profits" which he was making at the Currency Club, to carry out a major renovation and improvement at this property. [The Spanish property] was sold by D3 and Pamela Welsh in 2018. The sale price has not been disclosed. The whereabouts of the proceeds of the sale of the Calle Flecha 18 have improperly not been disclosed, and there needs to be a full account of the sale proceeds and of the whereabouts of the balance of $980,000, not used to purchase and improve the property in Spain*."

28. Mr Hamilton seeks various orders requiring Mr Welsh to explain what has happened to the money he extracted.

The Law and the arguments

Mr and Mrs Barrow

29. There was no disagreement before me as to the principles I must apply. I am satisfied that those principles are summarised in *Iranian Offshore Engineering and Construction Company v Dean* [2019] EWHC 107 Comm, a decision of Mr Justice Teare. In brief:

> *(1) The claimant must show a real risk, judged objectively, that …. judgment would not be met because of an unjustified dissipation of assets.*
> *In this context, dissipation means putting the assets out of reach of a judgment creditor whether by concealment or transfer.*
> *(2) The risk of dissipation established by solid evidence. Mere inference or*
> *generalised assertion is not sufficient.*
> *(3) The risk of dissipation must be established separately against each*
> *respondent.*
> *(4) It is not enough to establish a sufficient risk of dissipation, merely to*
> *establish a good arguable case that the defendant has been guilty of dishonesty: it is necessary to scrutinise the evidence to see whether the*
> *dishonesty in question points to the conclusion that assets are likely to be*

> *dissipated. It is also necessary to take account of whether there appear at*
> *the interlocutory stage to be properly arguable answers to the allegations of dishonesty.*

30. Mr Hamilton is quite sure that the Defendants, and Mr and Mrs Barrow in particular, are determined to avoid satisfying the judgment.

31. In order to make good his case Mr Hamilton makes a number of further points. I need not list them exhaustively; the following will suffice by way of summary:

    i. Mr and Mrs Barrow wilfully concealed from him and the Court latent defects in the title of the Cyprus property. As I understand it, the concealment was brought about at least in part by the provision of the valuation in Greek.
    ii. The sale of the Grand Cayman property was in breach of the undertakings given to Johnson J on 21 August 2020
    iii. The judgment of May J references "substantial dishonesty" on the part of Mr and Mrs Barrow so that there is not just a risk "but a certainty" of assets being dissipated.
    iv. Mr Barrow has coached others on how to dissipate their assets in order to avoid judgment.
    v. There was misconduct during the trial notably because questions were asked about Mr Hamilton's professional standing.

32. Mr Hamilton also points out that an order in the terms he seeks against Mr and Mrs Barrow will cause them no inconvenience.

Mr Welsh

33. There is no formal application for a freezing order against Mr Welsh. Mr Hamilton is concerned that Mr Welsh has already divested himself of any meaningful assets. His main concern is that Mr Welsh has not explained what has happened to some $980,000 he improperly drew from the currency club (see paragraphs 18 and 20 of Mr Hamilton's skeleton argument).

34. Mr Welsh's submissions were limited. He told me that the Spanish property was sold in 2018 before the proceedings were issued. He told me that the funds he removed were used to pay for accommodation until September 2022 when he bought the home in which he now lives. Further funds were then used to renovate the house.

35. He has produced a witness statement setting out the extent of his assets and liabilities. His main asset is his home which is owned jointly with his wife. He also has substantial liabilities.

36. Mr Welsh is jointly and severally liable with Mr and Mrs Barrow for 85% of Mr Hamilton's costs of the misrepresentation and breach of contract claims.

That order is presently stayed. His liability to pay damages to Mr Hamilton has been satisfied.

Conclusions

Mr and Mrs Barrow

37. I remind myself of the timing of this application. This is not a typical application to extend a prejudgment freezing order after judgment has been entered. Mr and Mrs Barrow have known of the outcome of the judgment for some time. During that time they have taken no steps to divest themselves of any assets. Whilst that conduct is not of itself a matter for positive comment or congratulation, it supports the point made in evidence by Mr and Mrs Barrow on 31 August 2023, that they "*have absolutely no intention of dissipating our assets so as to render any judgment which Mr Hamilton might obtain against us nugatory*".

38. I am not satisfied that Mr Hamilton has established a real risk, judged objectively, that the costs judgment he has will not be met because of an unjustified dissipation of assets.

39. Mr Hamilton's case is that the sale of the property in Grand Cayman and the acquisition of the Portuguese property was itself a dissipation of assets designed to put funds beyond his reach.

40. However, I bear in mind that in this context (as explained by Teare J), "dissipation" means putting the assets out of reach of a judgment creditor. Does the Grand Cayman/Portugal transaction support the conclusion that Mr and Mrs Barrow would "dissipate" their assets? In my judgment it does not.

41. At the time the property was acquired the proceedings were well underway. Each of Mr and Mrs Barrow were defendants and each was at risk of a judgment being entered against them on a joint and several basis. The transaction did not have the effect of putting anything beyond the reach of Mr Hamilton. It maintained the wealth of Mr and Mrs Barrow but simply re-allocated where that wealth resided. In context, the transaction was no more a dissipation than the moving of a sum of money between bank accounts in the same name.

42. If there had been judgment against Mr Barrow but not Mrs Barrow (assuming that was a course open to the trial judge on the pleadings) the position might arguably have been different. But that is not what happened. I must deal with the facts as they are, not as they might have been.

43. Mr Hamilton's further points (see paragraph 32 above) are in my judgment not relevant to this conclusion. As the points have been argued I will, for the purposes of this application, deal with them.

44. I do not accept that there was any deliberate concealment of defects in the title of the Cyprus property. I think it likely that Mr and Mrs Barrow ought to have provided an English translation of the valuation. I note that when ordered to provide a translation, they did so. Failing to provide a translation is not the same as deliberate concealment of its contents. There were other areas in which there was said to be concealment. I reject them.

45. I do not accept that the sale of the Grand Cayman property was, on a sensible reading, in breach of the undertakings given to Johnson J on 21 August 2020. As I understand it, an allegation that there was such a breach and that it amounted to a contempt was dropped by Mr Hamilton.

46. Mr Hamilton accepted in the course of oral submissions that the judgment of May J did not refer to any "substantial dishonesty" on the part of Mr and Mrs Barrow. I note that in deciding how the costs to be paid by the Defendants should be assessed, May J ordered assessment on the standard basis.

47. The Facebook traffic concerning ways to dissipate assets in order to avoid judgment is unattractive, but in my view, it comes nowhere near to establishing that there was a plan in place. Not least because the ploy of moving assets to a limited company was not engaged.

48. I also do not accept that there was misconduct during the trial because questions were asked about Mr Hamilton's professional standing. It was plain to me that this topic was important to Mr Hamilton. I can see why. At the time of the trial it was a matter of public record that Mr Hamilton's striking off the register of solicitors had been overturned. To all intents and purposes Mr Hamilton was fully entitled to be treated as if he had never been struck off. He had disclosed an email which made the position clear, but the email (or its importance) had been overlooked. Mrs Justice May has dealt with this point. She found reference to the striking off unfortunate.

49. Mr Hamilton felt that the explanation given for the purchase of the Portuguese property in Mrs Barrow's sole name (the amicable separation) was unconvincing. I need not (and so do not) make any finding about the reason for the transfer of the property to Mrs Barrow alone. No matter the motivation, the transaction was not a dissipation in the necessary sense.

50. I accept that making an order against Mr and Mrs Barrow as set out in the application would probably not cause any great inconvenience. The absence of inconvenience is not however, on its own and without more, sufficient to persuade me to make an order.

51. For those reasons I refuse to grant the freezing order or any relief against Mr and Mrs Barrow.

Mr Welsh

52. I bear in mind that Mr Welsh has not breached any court order and in particular sums for which he is responsible have been paid. I accept Mr Welsh has not paid any money to Mr Hamilton but the damages for which he is jointly and severally liable have been paid. The time for him to pay any costs to Mr Hamilton has not yet come.

53. I also bear in mind that Mr Welsh has provided some evidence of his means and has given an oral explanation (by way of submission and not on oath) of how the money he acquired from the currency club was spent.

54. I also bear in mind that Mr Hamilton's damages claim has been satisfied and that he has no tracing claim. He appears then to have no tracing remedy or right to follow into the sums received by Mr Welsh. I gained the impression that the request for an account and inquiry and for disclosure were intended to benefit the position of other currency claim members who may have claims to bring.

55. Taking all of these points into account I have come to the conclusion that I ought to make no order against Mr Welsh.

56. If the appeal fails or permission is refused and the stay on costs is lifted, and enforcement proves difficult then it may be appropriate at that stage to consider how enforcement might proceed. Mr Hamilton might then wish to avail himself of the process set out under CPR 71 to obtain information from a judgment debtor. That may be an effective, cheaper and quicker route to pursue.

Final Word

57. Mr Page KC made a number of further submissions. He suggested that Mr Hamilton was debarred from making the application against Mr and Mrs Barrow because the same (or a similar) application relying on the sale of the Cayman property had been made and compromised.

58. I have dealt with the applications on their merits. It seems to me that that is the better way to deal with things. If my refusal to grant relief were however found to be wrong, I would have accepted Mr Page's argument.

59. There has been no material change of circumstance since November 2022 when the Grand Cayman/Portugal transaction was the basis of an application for freezing relief and the application was compromised. I accept Mr Page's submission that the entry of judgment is not a material change. Entering judgment simply means that the arguability threshold need not be addressed. But that threshold would obviously have been passed.

60. The parties should agree the form of an order. If they do so I will hand down this judgment in their absence. If they do not, then I will require attendance.