

IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO: FSD 1 OF 2020 (IKJ)

IN THE MATTER OF A DEBTOR
AND
IN THE MATTER OF THE BANKRUPTCY LAW (1997 REVISION)
IN COURT

Appearances: Mr. Colin McKie QC, Ms. Allegra Crawford, and Mr. Adrian Davey of Maples and Calder for the Trustee in Bankruptcy of the Debtor (the “Trustee”)
Mr. Tom Lowe QC of counsel and Mr. David Lewis-Hall of Priestleys for the 1st Defendant

Before: The Hon. Justice Kawaley

Heard: 3 April 2020

Date of decision: 3 April 2020

Draft Reasons Circulated: 5 May 2020

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HEADNOTE

Freezing Injunction - application by defendant to increase amount of her permitted ordinary living expenses - governing legal principles - approach to the evidence - relevance of lifestyle to which defendant was accustomed prior to litigation

Introductory

1. The Plaintiff is the Trustee in Bankruptcy of the 1st Defendant's husband. A Freezing Injunction was granted against, *inter alia*, the 1st Defendant on January 8, 2020 following an ex parte hearing. It was amended various times thereafter and continued on March 20, 2020. The Order initially provided as follows:

“17. This order does not prohibit the Respondent from spending US\$1,000 a week towards their ordinary living expenses and also a reasonable sum on legal advice and representation. But before spending any money the Respondent must tell the Applicant's legal representatives where the money is to come from.”

2. By consent on February 10, 2020 the weekly amount of US\$1,000 was increased to US\$5,000 per week. On or about March 25, 2020, a Consent Order for Directions was made in relation to, *inter alia*, what was referred to as the “Living Expenses Application”. That application was heard on April 3, 2020 via videoconference. It was based on the key premise that prior to the present proceedings arising out of her husband's bankruptcy, she and the young child of the family were wholly dependent on his financial support. It was argued that because of his present impecuniosity, she was now wholly dependent on her own resources and was legally entitled to maintain the lifestyle to which she had been accustomed.
3. The 1st Defendant accordingly sought to increase the upper limit of her permitted living expenses under the Freezing Injunction to US\$10,000 per week. For summary reasons delivered orally at the conclusion of the hearing on April 3, 2020, I further amended the Freezing Injunction to permit the 1st Defendant to spend US\$ 7,500 in respect of ordinary legal expenses. I indicated that I would give further reasons if required.
4. In the event the Plaintiff's attorneys notified that Court that counsel were agreed that it would be beneficial to the profession for written reasons to be given on the variation of living expenses principles adopted by the Court in granting the 1st Defendant's application. These are the legal reasons for that decision, with the factual matrix only being addressed in outline terms on the basis that by reference to my oral reasons the detailed factual basis of the decision is sufficiently understood.

The factual matrix in outline

5. Interlocutory fact-finding based on ‘disputed’ affidavit evidence is more of an art than a science. In *Al-Naimi-v-Islamic Press Agency Inc.* [2000] EWCA Civ 17, an arbitration stay application, Chadwick LJ opined as follows:



“I agree with Lord Justice Waller that it would be a rare case in which it could be appropriate for the court to resolve issues of fact on written evidence alone unless invited to take that course by both parties; although I would not rule out the possibility that such a case might arise. I agree, also, that the court must be entitled to decline an invitation (although made with the support of both parties) to embark on the task of resolving issues of fact without the advantage of oral evidence in a case where it thinks oral evidence is necessary. But, where both parties ask the court to decide the issue in a summary way, the court should, I think, meet that request if it properly can.”¹

6. In the present case it was common ground that that I should summarily decide whether or not the Living Expenses Application should be granted and, if so, to what extent. On the other hand, I was not explicitly requested to resolve disputed facts. Rather, the Plaintiff’s counsel encouraged me to approach the 1st Defendant’s evidence with scepticism while the 1st Defendant’s counsel cautioned me not to reject aspects of her evidence which were not positively challenged. In effect, I was required to critically assess the affidavit evidence and to make such factual findings as I considered appropriate having regards to the legal principles governing interim freezing orders. The distinctive legal context of freezing orders apart, I regarded the forensic task as somewhat similar to the assessment of a maintenance pending suit award.
7. The Plaintiff’s counsel invited the Court to take the following broad factual considerations into account:
 - (a) although it appeared that the Debtor now had no assets in his own name, it was plausible that he had access to hidden resources upon which the 1st Defendant could draw;
 - (b) having regard to the large sums the Debtor had apparently dissipated, it was concerning that the 1st Defendant had disclosed a comparatively small amount of assets. She should not be rewarded for failing to comply with her discovery obligations under the Freezing Order;
 - (c) her evidence should be carefully scrutinised, for instance it appeared that the school fees she claimed as an expense had already been met for the present academic year.

¹ The quoted passage appears on the penultimate and last pages of the un-paginated online transcript.



8. The 1st Defendant's counsel invited the Court to take the following considerations into account:
- (a) despite vigorous commercial intelligence efforts, the Plaintiff and/or the Debtor's judgment creditor had failed to identify any hidden assets controlled by the Debtor;
 - (b) the 1st Defendant had given extensive discovery of her personal assets and, going beyond her strict disclosure obligations, had also disclosed substantial assets in trusts she had an interest in;
 - (c) the 1st Defendant's Living Expenses Application was advanced not just for her own personal benefit but also for her child who had special needs and attended a specialist boarding school². Moreover, it was clear (and not seriously disputed) that prior to his bankruptcy, she and the Debtor had enjoyed a very high standard of living indeed.
9. I reached the following conclusions on these general factual issues, applying the legal principles explained below:
- (a) while it was easy to speculate that the Debtor had hidden some assets, there was no evidential basis for reaching such a formal finding;
 - (b) the 1st Defendant had given extensive discovery of assets legally owned by her including substantial trust assets in which she had an equitable interest. This further weakened any potential inference that assets were being concealed;
 - (c) the 1st Defendant's prior lifestyle had indeed been of the high-end variety. The needs of her child ought properly to be taken into account. Her claim to be permitted to spend \$10,000 per week nonetheless, at first blush, seemed excessive and to warrant close scrutiny;
 - (d) it was understandable that the 1st Defendant could produce no evidence of certain past expenses, such as travel, as it seemed likely that the Debtor would previously have paid. On the other hand, some expenses claimed were unmeritorious and had to be rejected.

² For these reasons I consider it appropriate that the present judgment be anonymized.



The relevant provisions of the Freezing Order

10. The primary provisions of the Freezing Order were the following:

“5. Until the return date or further order of the Court,—

5.1 The First Defendant must not remove from the Cayman Islands any of [her] assets which are in Cayman Islands up to the value of CAN\$20 million;

...

5.4 Each Respondent must not in any way dispose of, deal with or diminish the value of any of their assets whether they are in or outside the Cayman Islands up to the same value...

17A. This order does not prevent the First Defendant from spending US\$5,000 a week towards her ordinary living expenses... But before spending any money, the Respondent must tell the Applicant's legal representatives where the money is to come from...

This order does not prohibit the First Defendant from spending a lump sum of US\$16,000 towards her incurred, but not paid, ordinary living expenses.”

11. This was on its face a non-proprietary Freezing Order which restricted the rights of the Defendants to *“deal with or diminish the value of any of their assets”*.

Governing legal principles

12. Mr. Lowe QC firstly relied upon the foundational principle that regard had to be had to the fact that the Freezing Order was intrusive in that its effect was to interfere with the 1st Defendant's dealings with her own money. Reference was made to the judgment of Neuberger J (as he then was) in *Cantor Index Ltd-v-Lister*, HC 01C02867, Judgment dated November 22, 2001 (unreported)³ where he observed (at page 27):

“A Freezing Order has grave consequences on a defendant's freedom of action

³ Only the unreported transcript was placed before the Court. The decision is elusively reported at [2002] CP Rep 25.



and his ability to spend what is prima facie his own money...”

13. However, primary reliance was placed on *Venshprom Bank LLC-v-Bedzhamov* [2019] EWCA Civ 1992. The factual matrix of that cases was summarised in the leading judgment delivered by Males LJ as follows:

“1. A freezing order against an individual defendant will invariably provide that it ‘does not prohibit the Respondent from spending £x a week towards his [or her] ordinary living expenses’. But some defendants have living expenses which by any normal standards are quite extraordinary.

2. Georgy Bedzhamov is one such. He is currently permitted to spend £80,000 per month on his living expenses, but contends on this appeal that this figure should be increased to £310,000 per month and that he should in addition be permitted to pay a substantial advance on the rent of a luxury flat in Mayfair. Mr Bedzhamov (who is the first defendant in this action and the appellant on this appeal) maintains that the money which he wishes to spend is his money as there is no proprietary claim against him and he should therefore be free to spend it as he wishes; that expenditure on this lavish scale is necessary to enable him to maintain the standard of living which he enjoyed before the imposition of the freezing order; and that to compel him to reduce that standard of living would be contrary to the principles which govern the making of such orders. He accepts that as his available liquid assets are reduced by such expenditure, and if he is unable to obtain new sources of income, a time may come when he will be forced to reduce his level of spending, but says that this should be his decision and is not something which should be forced upon him by the court now.”

14. Mr. Lowe QC commended to the Court the governing principles which were summarised by Males LJ as follows:

“68. That follows, in my judgment, from the well established principles which apply to freezing orders which, so far as relevant, I would summarise as follows :

(1) The purpose of the freezing order jurisdiction is not to provide a claimant with security but to prevent a defendant from taking steps outside the ordinary course which will have the effect of rendering any judgment unenforceable; subject to this, a defendant should be entitled to do as he wishes with his own money . Just as the court will not inquire whether a proposed business expenditure is reasonable or



prudent, so long as it is made in good faith, nor is it the business of the court to tell a defendant who has funds available that he cannot spend them on his ordinary living expenses in same way as he has genuinely been accustomed to do before the making of the order.

(2) A defendant who has only limited funds available, such that he will or may be unable to sustain his previous level of expenditure on living expenses, will have some hard decisions to make as to how and when to reduce his spending. But these are decisions for the defendant and not for the court.

(3) It is particularly important to ensure that a freezing order does not operate oppressively. The consequences for a defendant against whom an order is made are often severe and can be crippling. That is one reason why the claimant's undertaking in damages is so critical. An order which has the immediate effect of preventing a defendant from spending what he has been accustomed to spend on what are for him his ordinary living expenses creates a particularly acute danger of oppression, not least because of the effect it may have not only on the defendant himself but on members of his family for whom he is responsible.

(4) Conversely, the court must be alert to the danger that a defendant will seek to maximise the amount which he is permitted to spend, for example to ensure that as much as possible is kept out of the claimant's hands in the event that a judgment is ultimately obtained, and will therefore exaggerate what he has been spending on living expenses. That would be a form of dissipation of assets which it is appropriate to prevent.

(5) That danger can be avoided, however, by the exercise of a healthy scepticism about a defendant's assertions as to the nature and amount of his pre-freezing order expenditure. When appropriate, the court will require convincing support for such assertions. The more extravagant the expenditure, particularly if it appears reckless when seen in the light of the resources available to a defendant, the more sceptical the court is entitled to be. That applies with even greater force if there is reason to doubt the veracity of the defendant's asset disclosure or if his credibility is otherwise open to question, but this should not be viewed as a justification for embarking on extensive investigation of the merits of



the underlying dispute or other issues of credibility which can only be resolved at trial. The questions remain questions of fact: what has the defendant been accustomed to spend and what was his actual past standard of living?

(6) It may also be appropriate, particularly in a case where there are serious doubts about a defendant's ability to continue to spend money on his living expenses at the same rate as he has been doing in the past, to "ring fence" significant items of expenditure so as to ensure that, while the defendant is permitted to incur them if he wishes, he cannot spend the money on something else, at any rate without further permission from the court."

15. Mr. McKie QC accepted that the principles summarised in sub-paragraphs (1)-(3) were applicable. However, he emphasised the importance in the present case of the cautionary remarks set out in sub-paragraphs (4) and (5). In this regard, he referred the Court to the following observations of Sir Geoffrey Vos (Chancellor):

"100. I would first wish to emphasise the fourth and fifth statements of principle suggested by Males LJ at paragraph 68 of his judgment. In a case of this kind, there is a real possibility that a defendant will seek to exaggerate his existing standard of living and his ordinary living expenses prior to the WFO, in order to obtain an order that allows him, in effect, to dissipate his assets prior to judgment. Indeed, in this case, the judge found at paragraph 31 that the defendant's attempt to conceal his identity from an officer of the court was a serious matter that caused him to be cautious about accepting his evidence at face value."

16. Important practical guidance was provided in other portions of this decision. Firstly, the evidence to be analysed on a comparatively summary basis is evidence of past ordinary expenditure which is capable of being readily demonstrated. The Court is not required to undertake a more elaborate inquiry as to what future expenditure is likely to be. In this respect, Males LJ observed:

"70. As explained above, to make an assessment of what the defendant's ordinary living expenses will be in the future is a different kind of exercise from determining what they were before the making of the freezing order. It would introduce, in my judgment, potential complexities which are not well suited to the practical circumstances in which applications for freezing orders and to vary such orders tend to be made.



At the ex parte stage the applicant will have to propose to the judge a figure for ordinary living expenses which reflects what is known or can reasonably be ascertained about the defendant's actual lifestyle, but it would not be sensible or practicable to expect the claimant or the court to speculate about what the defendant's expenses will be in the future as the action progresses. If the defendant wishes to say that the figure ordered is too low, an application to vary can be made, perhaps at short notice, in which the court can consider the evidence about the defendant's actual past expenditure. But unnecessary complexity (and therefore cost and delay) is introduced if it is necessary also to reach conclusions about what future expenditure is likely to be. That would require the court to consider such matters as how the defendant's expenditure on living expenses may be affected by the future course of the action, the extent to which available funds may be consumed by legal fees, and what business ventures the defendant may have or claim to have in prospect. The result would be that what should be a straightforward application will become a battle of assertion and counter-assertion about what are necessarily uncertain future events. All this would have to be dealt with at an interlocutory stage on evidence which is necessarily incomplete and untested."

17. As regards how the Court should proceed if there was no reliable evidence of what past ordinary living expenses had been, the approach to be adopted was as follows:

"85. In these circumstances, and with the exception of the three items to which I have referred, the judge had very little reliable evidence as to the level of pre-freezing order living expenses. As he said, he was not required to accept Mr. Bedzhamov's assertions at face value. He therefore had no real alternative but to do his best to select what he regarded as an appropriate figure."

18. The practical result was that the Court of Appeal increased the living expenses allowance by 50%. As regards the claimant's suggestion that there were hidden assets, Males LJ adopted the following approach, declining to speculate:

"87. A theme of Mr. Tager's submissions for VPB was that, if Mr. Bedzhamov was indeed spending at the rate at which he claimed, he must have further undisclosed assets hidden away. That is a claim commonly made by claimants in freezing order cases, for understandable reasons, and may sometimes have force. If it were so, it would be wrong to allow the frozen funds to be depleted by the payment of extravagant living expenses, while hidden funds remain available to Mr. Bedzhamov."



88. In the present case, however, while the possibility cannot be excluded, there is no evidence to support that claim, and the fact that Mr. Bedzhamov's papers and computers have been seized, but no evidence of hidden assets has come to light, makes it relatively unlikely. Accordingly I would put no weight on this possibility in determining an appropriate figure for living expenses."

19. I accordingly approached the 1st Defendant's application to increase the allowance made for her ordinary living expenses by the Freezing Order having regard to the following main principles:

- (a) the appropriate ordinary living expenses allowance should be determined by reference to the defendant's actual ordinary level of expenditure before the Freezing Order was made, no matter how extravagant it might appear to be;
- (b) the possibility that the amount of expenditure contended for might be exaggerated in order to reduce the assets available to meet any future judgment must be borne in mind;
- (c) in the absence of reliable evidence as to the relevant expenses, the Court must do its best to arrive at an appropriate figure; and
- (d) in the absence of some tangible reason to believe that the defendant has hidden assets, the Court should not speculate that such concealment has occurred.

Summary

20. For the above reasons, I granted in part the 1st Defendant's application for uplift in her weekly ordinary living expenses 'allowance' under the relevant provisions of the Freezing Injunction.



**THE HONOURABLE MR JUSTICE IAN RC KAWALEY
JUDGE OF THE GRAND COURT**

