Judgement Approved by the court for handing down

Neutral Citation Number: [2020] EWHC 2463 (Ch) BL-2020-001343

Case No: BL-2020-001343

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

Royal Courts of justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 7 September 2020

Before:

Mr Justice Meade

Between:

(1) LONDON CAPITAL & FINANCE PLC (IN ADMINISTRATION) **(2) FINBARR O'CONNELL, ADAM STEPHENS, HENRY SHINNERS, COLIN HARDMAN AND GEOFFREY ROWLEY (JOINT ADMINISTRATORS OF LONDON CAPITAL & FINANCE PLC (IN ADMINISTRATION))** **(3) LONDON OIL & GAS LIMITED (IN ADMINISTRATION)** **(4) FINBARR O'CONNELL, ADAM STEPHENS, COLIN HARDMAN AND LANE BEDNASH (JOINT ADMINISTRATORS OF LONDON OIL & GAS LIMITED (IN ADMINISTRATION))**	**Claimants**
- and -	
(1) MICHAEL ANDREW THOMSON **(2) SIMON HUME-KENDALL** **(3) ELTEN BARKER** **(4) SPENCER GOLDING** **(5) HELEN HUME-KENDALL**	Defendants

Stephen Robins, Matthew Abraham and Andrew Shaw (instructed by **Mishcon de Reya LLP)** for the **Claimants**

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Amit Gupta for the **First Respondent**
Caley Wright for the **Second and Fifth Respondents**
Tim Owen QC for the **Third Respondent**
Charles Béar QC, Laura John and Karl Anderson for the **Fourth Respondent**
Penelope Small and Catherine Collins for the **Serious Fraud Office**

Hearing dates: **7th September 2020**

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Covid-19 Protocol: This judgment was handed down by the judges remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 17.09.2020 at 12pm.

Mr Justice Meade **Monday, 7 September 2020**
(**5:25** pm)

Judgment by **MR JUSTICE MEADE**

1. This is the return date for a series of worldwide freezing orders and many matters have had to be considered. The one to which this judgment relates is whether the freezing order should be continued against the third and fourth respondents.

1. On 24 August 2020 Mr Edwin Johnson QC, sitting as a deputy judge of the High Court, ex parte, without notice, made a series of freezing orders in these proceedings against five respondents.

2. The proceedings are described in general terms which are adequate for the purposes of this judgment in the opening paragraphs of his judgment.

3. At the hearing before me today, a number of the respondents accepted, pragmatically speaking, that the worldwide freezing orders should continue. In doing so, they made it clear that they were not accepting any of the allegations against them and that they reserved the right, in due course, to dispute everything, to dispute whether the claimants have an arguable case on the merits and to dispute whether, on the facts, there is any risk of dissipation.

4. But the third and fourth respondents were not content to take that course.

5. The feature of these proceedings that distinguish them and lead to the points I have to decide is that there are already Criminal Restraint Orders under the Proceeds of Crime Act 2002 made by HHJ Taylor sitting at Southwark Crown Court in March 2019 against the respondents ("the CROs"), the respondents to this application today.

6. Accordingly, the third and fourth respondents submit that there is no risk of dissipation because the existence of the CROs mean that they are unable to dissipate the assets anyway.

7. Their position was argued by Mr Béar QC (leading Ms Laura John) appearing for the fourth respondent, Mr Golding; and his position was adopted by Mr Owen QC, for the third respondent.

8. I am grateful to all counsel for their submissions, which have had to be compressed somewhat because, although this hearing was originally estimated for a day, in the event only half a day was available, although this hearing has now stretched on until half past 5.

9. The nature of Mr Béar's submissions were these: first of all, he submitted that although it might be pragmatic, it would be wrong, in principle, for this court to continue the worldwide freezing order against his client without further scrutiny simply on the basis that it had been made by the Deputy Judge; that it was for the claimant to justify the continuation of the order effectively; and that it was not necessary for him to apply on behalf of his client to set the order aside.

10. I accepted these submissions, which I think are plainly right, and therefore although the time for the hearing was somewhat compressed, I felt it was important to give Mr Béar the opportunity to make all the submissions that he wanted about whether the worldwide freezing order should continue.

11. It was submitted by Mr Robins for the claimants that it was not the claimants' position that the worldwide freezing order should simply continue without scrutiny, but rather that he had already made the submissions that he wanted to make on behalf of the claimants in writing in his detailed skeleton argument and indeed supplemental skeleton argument.

12. I did not feel there was anything complacent about the claimants' position. They came to court fully prepared to justify the continuance of the worldwide freezing orders. However, because they had put in such full written submissions, I did not call on Mr Robins to open the application to continue orally, but rather I gave Mr Béar the opportunity first to express his opposition to the claimants' application for continuation.

13. Pragmatically, and I am sure rightly, Mr Béar did not submit for today's purposes that there was not a reasonably arguable case, although he does not admit that there is. And nor did he make any submission in answer to what I would call the factual question of whether the nature of the alleged dishonest acts by the third and fourth respondents gave rise to a reasonably sufficient inference that they might try to dissipate their assets if not restrained by the court.

14. He focused his submissions, I think very sensibly, on the interaction between the civil worldwide freezing order and the CROs that have already been made in the criminal proceedings which are described in detail in the parties' skeletons.

15. The interaction between worldwide freezing orders and CROs have been considered on a number of occasions by the civil courts. Reference was made by Mr Robins in his written statement to the judgment of King J in *Cancer Research UK Limited v Morris* [2018] EWHC 2678; to the judgment of Mann J in *Faya v Butt* [2010] EWHC 3461 Ch; and to the judgment of HHJ Pelling in *HMRC v Ben Nevis Holdings* [2012] EWHC 1807 Ch.

16. In each of these judgments there are statements, in broad terms, by the judges who considered the matter that there is "a fundamental difference", to use the words of King J in *Cancer Research*, between criminal proceedings of this type and worldwide freezing orders. I refer to his judgment; to the judgment of Mann J at [22] to [25]; and the judgment of HHJ Pelling at paragraphs [73] to [74].

17. On their face, these contain broad statements of principle that the existence of a CRO does not stand in the way of the grant of a worldwide freezing order or, in itself, remove the risk of dissipation of assets by a defendant who is the subject of it.

18. Mr Béar's submissions were as follows: first of all, he submits that all of those judgments came before the entry into force of sections 58 and 69 of the Proceeds of Crime Act 2002 (April 2014 and June 2015 respectively) and therefore did not proceed on the basis of an interaction between the criminal regime and the civil regime.

19. Although it is true that, obviously, those sections were not considered in terms by the judges who heard those cases, I nonetheless am sure that they had very strongly in mind that there was such a relationship; but, in any event, I do not accept any argument, if it was made -- in fact, I am not sure it was -- that either section 58 or section 69 provides that the existence of a CRO has an impact on the appropriateness or otherwise of a worldwide freezing order to be made on application to the High Court.

20. But that was not the end or even the central thrust, I think, of Mr Béar's submissions. He made the further submission that these cases must turn on their facts; and that it may well be, in a particular case, that a CRO has been granted which does, in fact, mean that there is no risk of dissipation and, as a result, no worldwide freezing order should be made in the High Court.

21. He pointed out that in *Cancer Research v Morris* at the time of King J's judgment there was, in fact, no CRO in existence; to the fact that in *Faya v Butt*, when Mann J considered the case, there was a very significant disconnect between the CRO, which related to quite different matters, and the fraud alleged as the basis for the worldwide freezing order; and he pointed to the time line in the *HMRC v Ben Nevis* case considered by HHJ Pelling.

22. As a matter of theory, I can accept that it might be possible, in the right circumstances, and with careful liaison and preparation, that a CRO might be so watertight and so cogent that it removes the need for a worldwide freezing order. But the statements of principle by the judges in the cases that I have identified make clear that, for pragmatic and systemic reasons, this will be very unlikely at best.

23. For example, as HHJ Pelling said:

> "I do not consider that the Restraint Order is something that can or should operate so as to preclude the grant of a freezing order. The key point is that the Restraint Order is an Order that was sought by the competent prosecuting authority in the UK in aid of the competent prosecuting authority in RSA. That authority is a different organisation ... and neither ... are parties to the Crown Court litigation. Thus they have no control over or interest in the outcome of those proceedings. The reality is that control of those proceedings rests in the hands of the prosecuting authorities. ... It is entirely unpredictable what steps might be taken in relation to the Restraint Order in the future and by whom."

24. Similarly, Mann J said:

> "If [the CRO] were to go and there were to be nothing else in place then the claimant would not have any protection. The CRO is in no way geared or intended to protect the interests of the claimant liquidator in the present proceedings and his own rights and his own interest in getting his own order which he controls. The liquidator is, in my view, entitled, subject to his otherwise being entitled to the order, to his own order which he controls and to bring about a situation which is not vulnerable to change of mind by a party to other proceedings or indeed by the court if the court were to come to the conclusion that the criminal restraint order ought to be there."

25. So although, as I say, I accept at least, for the purposes of this judgment, that in theory there might be a CRO so arranged that there is no risk of dissipation justifying a worldwide freezing order, I think it would be a very unusual case.

26. It is perhaps a tenable view of the above authorities that as a matter of principle a CRO can *never* stand in the way of the grant or continuance of a worldwide freezing order, but I do not find it necessary to decide that, because on the facts of this case, which I will now turn to consider, the CROs are not an adequate or complete substitute.

27. In this case, there is no provision which would ensure that if the CROs were to be discharged or varied the claimants would find out or find out in enough time to apply for a worldwide freezing order. It may be that right now, today, that is relatively unlikely, since the SFO proceedings are at a stage where they have quite a long way to run, but the issue is that neither I nor the claimants have visibility of what might happen to the SFO proceedings. This is no criticism of the SFO, but there is no reason to suppose that in the time for which the worldwide freezing order might be in force there would not be a variation of the CRO or the prosecution or investigation might cease for some reason. And there are specific reasons to consider that this could happen.

28. Two matters illustrate this. First of all, it is not in dispute, in circumstances set out in paragraph 23 of the annex to the claimants' supplemental skeleton, that Mr Golding applied to discharge the restraint orders. Neither Mr Golding, nor the SFO, it is common ground, told the claimants about the application -- I am not suggesting that they had to -- or the appeal against the dismissal of the application. In fact the claimants found out by chance, as is related by Mr Hardman in paragraph 642 of his affidavit in support of the worldwide freezing order.

29. It is conceivable that these problems could be patched up by some sort of undertaking to keep the claimants informed of the criminal proceedings and the SFO's investigation, but that would be a piecemeal approach which I think would be vulnerable to failure. Certainly, as matters stand before me today, there is nothing remotely to suggest a rigorous regime would ensure that that would happen. The inherent difficulty in doing this, if it is ever to be possible, is one of the reasons underlying the judgments to which I have referred above.

30. The second incident which illustrates the position is that there was an issue raised at the hearing of the application for the worldwide freezing order before the deputy judge about the sale of a helicopter engineered, it is alleged, by Mr Golding.

31. I need not go into the detail of this. As it turns out, and as the claimants now accept, the SFO, in fact, consented to the sale of the helicopter. Mr Robins suggested that they had insufficient information about the sale and, in particular, about the fact that it may have been sold, it has been suggested -- and I make no finding -- at an undervalue.

32. This illustrates, to my mind, that decisions taken by the SFO, no doubt in good faith, to permit dealings by the respondents in disputed assets could affect and undermine the position of the claimants, without the claimants being aware of them, in circumstances where a worldwide freezing order would have prevented those dealings.

33. Given that the authorities I have cited identify that the SFO, for quite understandable reasons, have different interests from the civil claimants that, to my mind, is important.

34. I ask myself what level of risk is represented by the current circumstances. I consider that it is very difficult to put a number on it. I cannot put a percentage on it, but, in my view, the risk is real and non-trivial; and although it may be relatively slight right now, that could change at any time without the claimants being in a position to address it, as matters stand.

35. In my view, I have to consider the position as it is right now, but also during the likely lifetime of the worldwide freezing order. In my view, looking at the facts as a whole, there is an appreciable risk, such that I think there is an adequate risk of dissipation of assets if there is no worldwide freezing order that something like that could happen.

36. For those reasons, I decided to continue the worldwide freezing order against the third and fourth respondents.

37. That concludes my reasons. I will continue the orders against the third and fourth respondents.