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IN THE HIGH COURT OF JUSTICE

CJA/102/2010

QUEEN'S BENCH DIVISION

ADMINISTRATIVE COURT

[2019] EWHC 2574 (Admin)

Royal Courts of Justice

Thursday, 4 July 2019

Before:

MRS JUSTICE FARBEY DBE

B E T W E E N :

IN THE MATTER OF HERBERT CHARLES AUSTIN

Defendant

- and -

IN THE MATTER OF DENNIS O'KEEFE

Third Interested Party/Applicant

MR M NEWBOLD (instructed by Crown Prosecution Service, Proceeds of Crime) appeared on behalf of the Claimant.

THE DEFENDANT did not attend and was not represented.

THE THIRD INTERESTED PARTY/APPLICANT appeared in Person.

J U D G M E N T

MRS JUSTICE FARBEY:

1 This is an interim application in ongoing receivership proceedings for recovery of assets that are the subject of a confiscation order in the Crown Court. The applicant, who was not the defendant in the criminal proceedings, applies for the discharge or variation of a restraint order made by the High Court as long ago as 2010. The property restrained by the order includes the applicant's home in London N14 ("the N14 property"). The applicant seeks to vary the order so that he may instruct solicitors and counsel to advise and appear for him in the extant proceedings. He asks the court to release funds from the restraint order in full or in part to allow him to pay legal expenses by way of a loan to be secured by way of a charge on the N14 property.

2 The applicant appeared before me in person and Mr Newbold appeared on behalf of the Crown. None of the other parties in the ongoing proceedings appeared or were represented. The applicant has the benefit of helpful written submissions from Stokoe Partnership Solicitors. I am grateful to the solicitors for providing those submissions pro bono.

The Facts

3 On 21 October 2011, in the Crown Court at Winchester, Mr Herbert Austin ("the defendant") was convicted of conspiracy to conceal and conspiracy to convert criminal property arising from the disposal of \$15.5 million stolen from Commerzbank in 2000. He was subsequently sentenced to 5 years 248 days' imprisonment. On 14 September 2010 Mr Justice Blake had made a restraint order prohibiting the disposal of the defendant's assets. On 27 October 2011 he varied the order so as to restrain the N14 property. The property is registered in the applicant's name. It was purchased on 25 April 2001 for £155,000 and has since then been the applicant's home.

4 It is the Crown's case that money which originated as the proceeds of theft from Commerzbank was laundered through a series of companies, including Equity Holdings & Investments Ltd ("EHIL"). Real property was bought and sold using money transferred from accounts held in the name of EHIL. The N14 property was funded using monies transferred by EHIL using stolen funds which the defendant was convicted of laundering, such that the defendant and not the applicant was the sole beneficial owner. In the alternative, the Crown contend that the transfers from EHIL represent tainted gifts made by the defendant. They are transfers made after the date of commission of the offences and there is no evidence that the applicant provided any consideration for the transfer to him of the N14 property. While there is reference to a mortgage in documents held on a conveyancing file, there is no mortgage deed or associated documentation which would support a conclusion that this was the reason for the transfer.

5 Returning to the chronology, on 1 March 2013 the restraint order was further varied by Mr Justice Cranston but the variation did not affect the N14 property. On 11 January 2016 the Hon. Recorder of Winchester made a confiscation order in the sum of £4,752,449.27 to be paid within 12 months. Among the realisable assets subject to the order was the N14 property which was valued at £343,364. The judge dealt with the N14 property at paragraphs 75 to 76 of his written confiscation judgment. He held that it had been purchased using stolen monies. There was no evidence that the applicant had put any money into it or that he was anything but a nominee holding the property to the order of others, such that it was an available asset to the defendant.

6 A detailed account of the funding of the N14 property is contained in a witness statement of Ian Sutton of the National Crime Agency on behalf of the Crown Prosecution Service

("CPS"). It suffices to note that the applicant vigorously disputes what the judge and the CPS say about it.

7 On 27 April 2018 the CPS applied to the High Court for the appointment of a receiver to realise assets to satisfy the confiscation order. The applicant was joined as one of 10 interested parties. The CPS position is that the appointment of a receiver would allow ownership of various assets falling within the confiscation order to be litigated. The applicant wishes to instruct solicitors and counsel to appear on his behalf at a contested hearing in order to argue that he is entitled to keep the N14 property because he is the legal and beneficial owner. For this purpose his solicitors applied to the Legal Aid Agency ("LAA") for exceptional case funding under section 10(2) of the Legal Aid, Sentencing and Punishment of Offenders Act 2012. By a letter dated 13 July 2018, his application was refused. The LAA took the view that the value of the N14 property should be included in the assessment of the applicant's disposable capital. By including the N14 property in that calculation, the applicant's total disposable capital rendered him financially ineligible for legal aid.

8 The applicant's solicitors sought a review of the LAA decision. By letter dated 6 September 2018, the LAA adhered to its decision. However, the LAA referred the solicitors to Regulation 43 of the Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013 (as amended) which provides the LAA with a discretion to disregard restrained assets:

"(1) Where an application is made for legal representation or family help (higher), in calculating the disposable capital of the individual, any capital resource may be disregarded where -

(a) the individual is restrained from dealing with that resource by order of the court;

(b) the individual has requested the court which made the order to release all or part of that resource for use in connection with the proceedings to which the application relates; and

(c) that request has been refused."

9 The review letter stated:

"I have seen no evidence that you have complied with all elements of Regulation 43, in particular you do not appear to have requested the Court to vary the Restraint Order or release part of the resource concerned, nor is it clear that such request has been refused by the Court."

10 The letter advised that the applicant's solicitors would need to provide a copy of their request to the court to seek a variation of the order together with a copy of the judge's decision to refuse the request.

11 At a directions hearing on 4 December 2018 Mr Justice Dove appointed a receiver in relation to a limited number of the restrained assets. The remaining assets which include the N14 property will be the subject of a contested application in accordance with the directions of Mr Justice Dove. The applicant now seeks a variation or discharge of the restraint order insofar as it relates to the N14 property in order to allow him to fund legal representation in the receivership proceedings. In the alternative, he seeks a judgment from this court so that

he may request that the LAA exercise its discretion under regulation 43 in a fresh application for legal aid.

Legal Framework

- 12 In this case the provisions of the Criminal Justice Act 1988 apply, not the Proceeds of Crime Act 2002, because the defendant's offences were committed before 24 March 2003 which was the date on which the latter Act came into force. Section 77(1) and (2) of the Criminal Justice Act 1988 gives a power to the High Court to make a restraint order prohibiting any person from dealing with any realisable property, subject to such conditions and exceptions as may be specified in the order. A restraint order may make such provision as the court thinks fit for living expenses and legal expenses. By virtue of Section 77(7) an application for the discharge or variation of a restraint order may be made by any person affected by it. Section 82 of the Criminal Justice Act 1988 states:

"(1) This section applies to powers conferred on the High Court by sections 77 to 81.

(2) Subject to the following provisions of this section, the powers shall be exercised with a view to making available for satisfying the confiscation order or, as the case may be, any confiscation order that may be made in the defendant's case the value for the time being of realisable property held by any person by the realisation of such property.

(3) In the case of realisable property held by a person to whom the defendant has directly or indirectly made a gift caught by this Part of this Act the powers shall be exercised with a view to realising no more than the value for the time being of the gift.

(4) The powers shall be exercised with a view to allowing any person other than the defendant or the recipient of any such gift to retain or recover the value of any property held by him.

(5) ...

(6) In exercising those powers, no account shall be taken of any obligations of the defendant or of the recipient of any such gift which conflict with the obligation to satisfy the confiscation order."

- 13 Section 82 contains what has been referred to in the case law as "the legislative steer" to be applied by the court in considering applications such as the present one.
- 14 In *Re S* [2010] EWHC 917 Admin, Sir Michael Harrison, sitting as a Deputy High Court Judge, considered the application of a third party to release funds from a restraint order in a situation where, as in the present case, there were no outstanding appeals either against conviction or against the confiscation order. He observed at paragraph 26 that matters had "moved on from the pre-judgment stage to the post-judgment stage when funds are restrained to enable execution to take place". He held that in these circumstances the legislative steer in section 82 "assumes much greater importance". There would have to be "very strong reasons" to permit release of funds to a third party in that post-confiscation situation. He held that the legislative steer should prevail and that the application should be refused.

- 15 In *Re S*, Sir Michael Harrison applied the earlier judgment of Mr Justice Collins in *Re D* [2006] EWHC 1519 Admin which also concerned an application by a third party who asserted an interest in property which was the subject of a restraint order and who sought to receive funding from that property for legal fees. Mr Justice Collins held:

"5 The court is enjoined to ensure so far as possible (a) that the property is retained and its full value is available in order to meet the confiscation; and (b) that anyone who has an interest in the property is able to have the opportunity to establish the existence of that interest. Mr Bodnar, as I understand the argument, submits that that extends in an appropriate case to ensuring that the third party has legal representation, and the only way in which that can be achieved in certain circumstances is to provide him with monies available from the proceeds of the property, the subject of the restraint order, and in which he is asserting an interest. That seems to me to be a quite hopeless submission.

6 The powers must be exercised to ensure that the third parties have a proper opportunity of pursuing their claim. That they will do in the way any litigation is to be pursued. If they have the means, then they will have to pay for it. If they do not have sufficient means, then they may apply for public funding. What they cannot do is obtain funding from the property which they are asserting they have an interest in when the interest is being disputed."

The Parties' Submissions

- 16 In his oral submissions the applicant directed me to and supplemented the written submissions made by his solicitors as well as his witness statement dated 22 November 2018. He told me that he has no funds which could be deployed for legal representation if at least some funds are not released from the N14 property. He emphasised that he has at no stage had the opportunity to put his side of the case to a court in relation to the purchase of his home. The property is where he has lived since 2001. It is not fair or just that his home has been restrained for so many years. Faced with the loss of his home, the receivership application may have very serious consequences for him. Were he to have legal representation, all these points could be made on his behalf.
- 17 The applicant submitted that the receivership proceedings are complex and would involve detailed consideration of substantial evidence which would present steep hurdles for a litigant in person. He further submitted that as a matter of fairness he should not be required to re-apply for legal aid, a process which in itself may be complex, uncertain and of quite some duration. He emphasised the inequality of arms between a litigant in person and a public authority which holds much information that would be relevant to the receivership application. He had received nothing by way of disclosure to date.
- 18 The written representations on his behalf also submit that evidence exists to demonstrate that at least £175,000 of legitimate funds were deployed in two transfers for the purchase of the N14 property and that those legitimate funds can be traced to the applicant. I am, therefore, asked to consider a more limited variation up to the value of these identified transfers.
- 19 Mr Newbold submitted that the question for the court (as expressed in *Re S*) is whether there are "very strong reasons" for the N14 property - which is the subject of the receivership application - to be used to fund legal representation. Otherwise the defendant's assets will

be used to fund the third party's legal fees rather than to satisfy the confiscation order as anticipated by section 82(2) of the 1988 Act.

- 20 Mr Newbold emphasised that the applicant's eligibility for public funding would fall to be reconsidered in light of any adverse decision of this court. It would appear that if the application for variation in relation to the N14 property were to fail, the value of the property would fall to be discounted by the LAA under regulation 43. It cannot presently be said that the LAA would then be bound to grant legal aid as that decision would rest on up-to-date evidence and would include a merits test. However, the LAA would be likely to take a different view of the applicant's disposable capital, and any future refusal could be challenged in this court on the usual public law grounds.

Analysis and Conclusion

Statutory Construction

- 21 In my judgment I should follow the approach of *Re D* as considered in *Re S*. The applicant's written representations refer to factual differences between *Re S* and the present case. In *Re S*, the third party was the defendant's former wife and she did not apply for legal aid. I do not think that those factual differences make a material difference. Both *Re D* and *Re S* are concerned with the position of third parties. In both cases the court was influenced by Parliament's anticipation that confiscation orders should be satisfied. On this approach the starting point under section 82 is the preservation of those assets which are scheduled in the confiscation order. On the evidence before me there are no very good reasons for displacing the legislative steer that Parliament has given. The fact that the property in question is the applicant's home was not decisive in *Re S* and should not be decisive here; otherwise the very assets that have been restrained for the purposes of satisfying the confiscation order made by the Crown Court would be depleted and the statutory objective of section 82(2) would be undermined.
- 22 The applicant submits that public funds from legal aid should not be used where private funds could be released. I do not agree. It is clear from the Legal Aid Regulations that the first port of call is this court but that if an application in this court is refused the LAA are permitted to discount the relevant property. It is not the function of this court to interfere with the way in which the Regulations operate. Nor do I regard the discretionary nature of the LAA scheme as a factor to dislodge the statutory steer. There is nothing to suggest that the proper application of the criteria for legal aid will lead to an unfair outcome for this applicant. In any future application the LAA can be made aware of my judgment and will be bound by the Regulations and by general public law principles to consider it.

Human Rights Act 1998

- 23 Neither *Re D* nor *Re S* consider the effects of the Human Rights Act 1998. The applicant has lived in his home since 2001. He is the registered owner. He has not had an opportunity over the very long life of the restraint order to appear in court to put his arguments for releasing the property from restraint. His human rights may potentially be engaged, in particular the right to respect for his home (Article 8 of the European Convention on Human Rights) and fair trial rights (Article 6 of the Convention) which include a public hearing within a reasonable time.
- 24 I have considered whether the legislative steer must be adapted to meet the requirements of the Human Rights Act. Mr Newbold pointed out that both *Re D* and *Re S* post-date the Act and *Re S* concerned the third party's home. That may be so, but it does not appear that human rights arguments were considered in either case.

25 However, the LAA is a public authority and so bound to consider the applicant's human rights. The applicant can re-apply for exceptional case funding which may be granted in cases where it is necessary to provide legal aid because failure to do so would be a breach of the individual's Convention rights within the meaning of the Human Rights Act 1998. In short, the purpose of exceptional case funding is to ensure that an individual has funding to protect his human rights.

26 As for the delay which will inevitably be occasioned during the course of an application for legal aid, the solicitors will be able to make representations for expeditious consideration on the grounds that proceedings are in existence and directions are in force. The LAA will at the least be under a general public law duty to reach a fresh decision within a reasonable time and any Article 6 considerations can be considered. The statutory scheme for legal aid means that the applicant ought not to be prevented from presenting any meritorious case to the court. The scheme makes adequate provision for him to present to the LAA any human rights factors that arise.

Other cases

27 I am aware that the CPS has agreed to orders for release of funds for legal fees in other cases in the main litigation, including in relation to the applicant's sister. Those cases involve different factual circumstances and for that reason are not comparable.

A Lesser Amount

28 In relation to £175,000 which is said to be indisputably not laundered, the Crown does not accept that these funds should fall outside the confiscation proceedings, and it will be a matter for the judge who hears the receivership application to reach a decision about that. At this stage, in my judgement, the legislative steer must prevail. There is no principled reason at this stage to ring-fence the sum of £175,000.

Conclusion

29 For these reasons, this application is dismissed. I have not needed to consider the Crown's alternative submission that in exercising my discretion I should consider the merits of the applicant's claim to keep the N14 property. It is not obvious that the legislative steer implies that the court should consider the merits of the claim, particularly in a case that concerns something as important as the applicant's home. In the absence of full human rights arguments from the Crown, I would not have been inclined to accept this alternative submission.

Postscript

30 While it is not the function of this court to consider matters which fall within the discretion of the LAA, I would venture to express the hope that any fresh application would be considered speedily.

MRS JUSTICE FARBEY: Mr O'Keefe, I am going to turn to you in a moment but I am going to ask Mr Newbold a number of things. I am minded, Mr Newbold, to order a transcript at public expense to be expedited.

MR NEWBOLD: Yes. Certainly Mr O'Keefe had raised that with me beforehand.

MRS JUSTICE FARBEY: Basically, Mr O'Keefe, I am going to order that there should be a transcript for which you do not have to pay. I am also going to order that that transcript is expedited on the basis that you need to see it so you can make your legal aid application as soon as possible.

MR O'KEEFE: Okay.

MRS JUSTICE FARBEY: There is no application for costs by the Crown at this stage, is there?

MR NEWBOLD: No.

MRS JUSTICE FARBEY: Shall I make no order for costs or shall I say costs reserved. I think I am minded to say costs reserved.

MR NEWBOLD: Yes.

MRS JUSTICE FARBEY: Mr O'Keefe, what I am going to do is even though you have lost the application - and sometimes people have to pay if they do not succeed in an application - because this is part of a bigger picture, I am going to do what is called reserve the costs. That means whoever considers the receivership application down the line will consider the costs of today.

MR O'KEEFE: Okay.

MRS JUSTICE FARBEY: They will have a better picture about who is the ultimate winner and who is the ultimate loser at that stage. I am going to ask Mr Newbold to draw up the order and circulate it to Stokoe for their consideration.

MR NEWBOLD: Of course.

MRS JUSTICE FARBEY: I hope they will be willing to do another thing pro bono - to look at the order. But obviously I will be the one who approves it. There are only two other things, Mr Newbold, which I want to consider. First, the directions set by Mr Justice Dove. I cannot see that there is a sealed version of the order but they are in full swing. I think the CPS need to consider whether the court ought to be alerted to the fact that we have probably a legal aid application that needs to be processed and how that is going to affect the timetable of the main proceedings.

MR NEWBOLD: Certainly, as far as those directions are concerned, there has not been compliance with them on a number of sides. I think there will need to be a reset of the directions in any event. It is just whether your Ladyship would wish to consider that today.

MRS JUSTICE FARBEY: No. We only have Mr O'Keefe here. We do not have anybody else here. Can I leave it in your hands to make progress with that and also if there is a directions hearing soon to make sure that the court knows the position in regard to today?

MR NEWBOLD: Yes.

MRS JUSTICE FARBEY: Mr O'Keefe, what I am basically saying is this. Mr Justice Dove set a timetable for the case in December. But you need, in my view, to be given an opportunity to apply for legal aid with a copy of my judgment. What I am asking is that the Crown, who are represented as opposed to you who are not, should try and sort that out, if I can put it in that way. I do not think there is anything else that I need to deal with.

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This transcript has been approved by the Judge