



Neutral Citation Number: [2020] EWHC 2079 (Comm)

Case No: CL-2017-000323

**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**  
**COMMERCIAL COURT**

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

Date: 28 July 2020

Before :

**Mr Justice Foxton**

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Between :

**Serious Fraud Office & Anor**  
**- and -**  
**LCL & Ors**

**Claimant**

**Defendant**

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**Mr Kennedy Talbot QC for The Serious Fraud Office)**  
**Mr David Rosen (solicitor-advocate of David Rosen & Co) for Ms Sinead Irving**  
**Hearing dates: 28<sup>th</sup> July 2020**

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**RULING**

**Mr Justice Foxton**  
(3.47 pm)

**Tuesday, 28 July 2020**

**Ruling by MR JUSTICE FOXTON**

1. This is a ruling on an application made by the Serious Fraud Office to vary an existing restraint order so that it has the effect of prohibiting Ms Sinead Irving and her mother, Catherine Irving, from dealing with their interest in two properties, a flat in Montagu Square in Ms Sinead Irving's name, and a house in Rickmansworth held in joint names (“the Irving Properties”).
2. The background to the application is a confiscation order made in the Crown Court against Dr Smith on 13 November 2017, and a restraint order made subsequently under Section 77 of the Criminal Justice Act 1988 on 20 May 2005.
3. It is the Serious Fraud Office's case that Dr Smith procured the transfer of assets beneficially held by him to a Marshall Islands company called SMA Investments Limited and thereafter to another company called LCL. I should make it clear that the status and interest in those assets is hotly in dispute. However those assets have already been subject to two variations to the restraint order on the basis that they arguably constitute the Realisable Property of Dr Smith for the purposes of the 1988 Act.
4. On 23 May 2016, Mr Justice Popplewell restrained SMA from dealing with those assets, and on 30 November 2016 Mr Justice Ouseley restrained LCL from dealing with those assets.
5. However, it is clear that there are a number of other parties who claim an interest traceable to the assets over which restraint orders have already been made, by which I mean traceable as a matter of fact. The legal position remains hotly disputed.
6. It is against that background that the Serious Fraud Office seeks to extend the restraint order to cover the Irving Properties, which it is common ground were acquired with the applications of monies which derived from LCL and which were in turn derived from other assets which have been subject to prior restraint orders.
7. The court has jurisdiction under Section 77(1) of the Criminal Justice Act 1988 to restrain any person from dealing with realisable property, which is property in which a person against whom a confiscation order has been made has an interest (“a Relevant Person”), or in relation to which a Relevant Person has a right, and also property held by another person to whom the Relevant Person has made a gift. Under the statute, a gift is defined to include transactions at a significant undervalue.
8. Guidance is given to the court as to how to exercise its powers under Section 82. They are to be exercised with a view to allowing third parties to retain or recover the value of their interests, but otherwise for the purpose of seeking to ensure the satisfaction of the confiscation order.
9. A significant feature of restraint orders, in contrast to a conventional freezing injunction, is that the enforcement of the confiscation order against property which is subject to a restraint order has priority over the claims of unsecured creditors in the event that there is a subsequent bankruptcy on the part of the respondent: see section 84 of the 1988 Act.
10. Logically the first issue which arises is whether there is a good arguable case that the Irving Properties are realisable assets for the purpose of the Criminal Justice Act. I can deal with that shortly because Mr Rosen, who acted for Ms Irving, did not, at this stage, seek to take issue with the arguability of that part of the SFO's case, albeit he made it clear it would be hotly contested in due course.
11. I would note that there have already been prior independent determinations that the funds from which these acquisitions were ultimately derived represented realisable property, by Mr

Justice Popplewell twice and Mr Justice Ouseley, and there is a good arguable case that the Irving Properties are traceable back to the same monies.

12. The issue of whether Ms Irving gave value for the payments received to her is a question of fact which I anticipate will be hotly disputed and one which can only be decided at trial. It is certainly arguable that the amounts paid to her, or their proceeds, are amounts either held on trust for Dr Smith such that he has an interest in them, or were paid to her at a substantial undervalue and therefore constitute a gift for the purposes of the 1988 Act.
13. I am also satisfied that there is objective evidence which gives rise to a real risk of dissipation in a relevant sense, such that the enforcement of the confiscation order might be frustrated if no order is made.
14. There have already been findings by Mr Justice Cooke and Mr Justice Popplewell that Dr Smith presents a risk of dissipation of assets over which he has control or influence, and that has been the basis of certain prior orders made in this litigation.
15. It is clear that Dr Smith and Ms Irving have had a long working relationship, as a result of which she was closely involved in the litigation against the Ruhan entities. She assumed a position as a director of 18 companies in the aftermath of that litigation, and there are indications, at least, that the close connections have continued for the purposes of the current litigation.
16. Against the background of the extensive interaction between Dr Smith and Ms Irving and her long history of working for him and acting in relation to companies with which he is connected, there is to my mind an objective risk that Ms Irving may either hold the Irving properties subject to Dr Smith's instructions, or at least be susceptible to his influence in relation to her dealings with them.
17. There is also, to my mind, an objective risk of bankruptcy here. There are a number of companies over which it is arguable that Dr Smith has had control which have been placed in administration or wound up. They include four companies of which Ms Irving became a director.
18. Dr Cochrane, Dr Smith's ex-wife, with whom Ms Irving also had extensive interactions, is in the Jersey equivalent of bankruptcy, and there is evidence, which I accept may very well be disputed, and as to the ultimate truth of which I make no findings, that Dr Smith may previously have informed another party that Dr Cochrane would make herself bankrupt to avoid a \$70 million liability.
19. Another company of which Ms Irving was a director, Pro Vinci, was liquidated after a £7 million arbitration award was made against it. Andiamo, which took over the business of Pro Vinci, and of which Ms Irving was a director, later went into liquidation itself.
20. All of that suggests an objective risk of bankruptcy either as a means of obstructing enforcement or simply as a consequence of financial pressure.
21. As I may have mentioned, in relation to Montagu Square, the Joint Liquidators have the benefit of undertakings in BVI litigation, which Mr Rosen points out have not been breached (on the evidence before the court), and his submission is, as he put it, "If it ain't broke, don't fix it": the system has worked well and there is no need to move to another one.
22. However those undertakings are, I am told, likely to be released now that the BVI proceedings are to be discontinued as part of the settlement between the Settlement Parties, and in any event they do not achieve the advantages in the event of bankruptcy which a restraint order under the CJA is intended to give.
23. Of course, in conventional civil litigation, if I may so put it, an undertaking has the same status as an injunction; a party who gives an undertaking and fails to comply with it is in contempt of court, and a third party who knowingly facilitates the breach of an undertaking will be guilty of aiding and abetting that contempt. But it will not give any of the benefits

which a restraint order would give in the event of bankruptcy. Further, I am unable to form a view in this case as to the efficacy of the contempt sanction because I do not know Ms Irving's whereabouts, merely that she has recently been in Spain for a substantial period.

24. Mr Rosen also points to the lengthy period of time during which the SFO have been aware of the potential claim that it says it has in relation to the Irving Properties and that it has done nothing about it in that time.
25. So far as the risk of bankruptcy is concerned, the lapse of time does not answer a risk which is one which is likely to grow more acute over time.
26. Further, the settlement reached between the Settlement Parties, the consequential falling away in due course of the BVI litigation and the fact that the Irving Properties have achieved a much more prominent place in the litigation following the IUA Claims order I made this morning, both make this an appropriate occasion for the SFO to revisit the issue as to whether an adequate level of protection is in place and increase the risk of dissipation and of bankruptcy given that a lengthy trial is now going to take place in January of next year concerning the ownership of the Irving Properties.
27. Mr Rosen also submitted that the powers under the Criminal Justice Act should not be used for the benefit of other private claimants, but only the SFO. He submitted that as a matter of my discretion I should refuse relief in this case because of the benefit the other Settlement Parties may derive from the order.
28. However, the application is brought by the SFO pursuant to its powers. There is no evidence before me which would allow me to conclude that the order exceeds that which the SFO properly believes is necessary to protect its legitimate interests. The fact that other parties who claim a proprietary interest in the Irving properties may themselves benefit cannot of itself render the SFO's application abusive, nor provide a reason to refuse relief if the statutory conditions are met.
29. In any event, a party who has an existing proprietary interest in the Irving Properties is going to rank above unsecured creditors in any bankruptcy in any event, whether a restraint order is made or not.
30. In addition to the bankruptcy protection, on the evidence the SFO restraint order, and indeed the application for one, enables a restriction to be filed on the Land Registry, something which could not happen if there was simply an undertaking to the court. A restriction reduces the risk of innocent third parties acquiring an interest in the Irving Properties without notice, or transactions taking place which might impede efforts to realise the Irving Properties in the event that the SFO is able to make good its claim to them.
31. Further, given the undertakings to which the Irving Properties have hitherto been subject, and which Ms Irving has indicated she would be willing to give and which Ms Catherine Irving may be willing to give, it is difficult to see how a restraint order would cause significant additional prejudice to the respondents.
32. Mr Rosen submitted such an order might well worry a bank, leading it to take adverse steps in relation to Ms Irving's bank account. But in circumstances in which, to be effective, any undertaking would, in my view, have to be notified to the bank with an explanation of the circumstances in which it had been obtained, I cannot at the moment see how a restraint order would give rise to any greater risk of adverse steps being taken by a bank than the granting of an ordinary injunction or accepting an undertaking in lieu, both of which the SFO would plainly be entitled to notify to the bank.
33. In those circumstances I am satisfied that it is appropriate to make the order in the terms sought, subject to this. I am conscious that Ms Catherine Irving, even on the SFO's case, has an interest in the Moor Lane property which is not alleged to constitute realisable property under the Criminal Justice Act. The issue of how best to accommodate Mrs Catherine

Irving's legitimate third party interest with the need to preserve assets to ensure any confiscation order can be met is one best approached as and when an occasion arises when Mrs Catherine Irving wishes to deal with her interest. What I am therefore going to require is that the order makes express provision for Mrs Catherine Irving having liberty to apply in relation to that interest and the court can then deal with any questions which arise on the facts of the particular circumstances at that time.