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IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/03/2023

Before :

SENIOR MASTER FONTAINE

Between :

Jonathan Harris Sinclair (Liquidator of Judmick Estates Limited (in creditors' voluntary liquidation))	<u>Claimant</u>
- and -	
Rodney Whiston-Dew (1)	<u>Defendants</u>
Churwitz Stanford AG Holdings Ltd (2)	
-and-	
Virgil Levy (Trustee in Bankruptcy of the First Defendant)	<u>Interested Party</u>

David Middleburgh (Solicitor-Advocate of Setfords Solicitors) for the Claimant
The Defendants did not attend and were not represented
Pinsent Masons LLP Solicitors for the Interested Party

Hearing date: 17 January 2023

Judgment Approved

This judgment was handed down remotely at 10.30am on 23rd March 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

Senior Master Fontaine:

1. This was the hearing of the Claimant's Part 8 claim for a declaration that neither of the First or Second Defendants have any right title or interest in an escrow account held by the Claimant in the sum of £276,377.93, on the grounds that ownership is either vested in the Claimant or has vested in the First Defendant's Trustee in Bankruptcy. I determined the claim in the Claimant's favour at the hearing on 17 January 2023, and this judgment sets out my full reasons for the order I made on that date.
2. The Part 8 claim was supported by a witness statement of the Claimant dated 5 October 2022. Neither Defendant filed or served an acknowledgement of service or any witness statements in response to the claim. Certificates of service have been filed in respect of service of the claim form and witness statement in support.
3. The Claimant is a licenced insolvency practitioner, practising as a sole practitioner in the firm of Sinclair Harris, and brings this claim in his position as liquidator of Judmick Estates limited (in liquidation) ("Judmick").
4. The First Defendant is a former solicitor who was struck off the roll of solicitors, and who was until early December 2022 a serving prisoner in HMP Wayland, following his conviction on 10th November 2017 for his part in a £64 million fraud for which he was sentenced to 10 years in prison. On 13th December 2019 a criminal confiscation order ("CCO") was made against him in the sum of £3,035,192.97.
5. Arrangements were made originally for the First Defendant to attend the hearing remotely by video link from HMP Wayland. However, the court was informed on 3 December 2022 that the First Defendant had been released from prison on or about 2 December 2022, although the non-payment of the confiscation order made it possible under the terms of that order for the Magistrates Court to invoke a default prison sentence. The court was informed that the First Defendant was due to attend an enforcement hearing at Westminster Magistrates Court on 18 January 2023, which had been the date initially identified for the hearing. Accordingly the hearing was listed on 17 January 2023 in person rather than as a remote hearing, so that the First Defendant might attend the hearing if he sought to do so. The Claimant's solicitors arranged for service of the hearing notice on the Defendants. As a precautionary measure, the court also sent the Notice of Hearing to the First Defendant at HMP Wayland.
6. The Second Defendant ("Churwitz") is a company registered in England and Wales under company number 11322827 with its registered office at 85 Great Portland Street, London W1W 7LT.
7. The facts underlying this claim are set out in the witness statement of the Claimant, and they are undisputed by the Defendants who have not engaged with this litigation. I summarise them as follows.
8. The Claimant was approached in 2011 by Judmick's directors to place Judmick in creditors' voluntary liquidation. Judmick owned a plot of land in Birmingham, land on the North Side of Hall Green Rd, Sandwell, West Midlands title number WM 574333

(“the Property”) which was contaminated land. Although the directors had a prospective purchaser for the Property the Claimant did not wish to be appointed liquidator until after the Property was sold because of the potential liability for environmental liabilities. The property was sold for full market value with the consent and cooperation of all relevant parties for a gross sale price of approximately £435,000, and the Claimant was then appointed liquidator.

9. The ultimate holding company of Judmick was Landcom Holdings plc (“Landcom”). The Claimant was subsequently informed by the Crown Prosecution Service (“CPS”) that 60% of the shares in Landcom were owned by a group of shareholders who were being prosecuted for fraud, including the First Defendant. The CPS were content for the Property to be sold but wished to ring fence the net proceeds of sale pending the outcome of the prosecutions, on the grounds that the Property might represent the proceeds of crime. Accordingly, an undertaking was given by the Claimant’s solicitor Mr David Middleburgh of Gallant Macmillan LLP, to the CPS dated 6 June 2011 (“the Undertaking”) to hold the sum of £275,000 plus accrued interest out of the sale proceeds subject to the terms of the Undertaking. The Undertaking was also given to EGC Remco limited, (“EGC”), an Isle of Man company, which had apparently lent the sum of £100,000 pounds to Judmick under the terms of a loan agreement dated 14th November 2006, secured by a charge over the Property dated 23rd February 2007, with interest on the loan 10% per annum. EGC released its charge before completion of the sale, capping its claim at £275,000 (“the Escrow Sum”). The net proceeds of sale amounted to £321,830.34, but the CPS also capped its claim subject to the Undertaking at £275,000.
10. The Undertaking provided that the Escrow Sum be held pending the outcome of the criminal proceedings. The Escrow Sum was placed in a dedicated account at Gallant Macmillan LLP, subsequently transferred to a successor firm Gallant Maxwell Limited, and when that firm was wound up in April 2018, the Escrow Sum was transferred to the Claimant’s firm, Sinclair Harris. The Claimant now holds the Escrow Sum in a separate bank account pursuant to the terms of the Undertaking. The Claimant confirms that at the date of the witness statement he holds the sum of £276,377.93 in escrow subject to the terms of the Undertaking. The Undertaking contemplates the release of the funds either to EGC or to the Crown depending upon the specific conditions outlined in the Undertaking. The relevant terms of the Undertaking, set out in a letter dated 6 June 2011 from Gallant Macmillan LLP are as follows:

“We undertake to hold the net proceeds of sale in our client account in escrow on the following terms:

- 1) the funds will only be released to EGC Remco Limited only earlier of:
 - a. a court order requiring the release of the funds to EGC Remco Limited being an order which is a final order in that it is not capable of being appealed or set aside by any court in England and Wales
PROVIDED THAT EGC Remco Limited hereby agree to give both the Proceeds of Crime Unit of the Crown Prosecution Service and the Restraint and Confiscation Team of HMRC not less than five clear working days notice of any application for such a court order; or
 - b. the final disposal of the criminal proceedings

which are currently pending against Mr Rodney Whiston-Dew:

- i. by way of a dismissal of all charges against Mr Whiston-Dew;
- ii. By way of an acquittal following trial or on appeal; or
- iii. following a conviction if a court does not make any form of compensation order or confiscation order against Mr Whiston-Dew.

- 2) The funds will only be otherwise released from escrow following the making of an order in favour of the Crown being a final order where, in the case of an order that is capable of being appealed or set aside by a court in England and Wales, no appeal or application to set aside has been made within three months of the making of such an order and, in the case of such an appeal or application to satisfied being made within such three month period, if the appeal or application (as the case may be) is dismissed.”

11. Accordingly, the Undertaking could only operate in EGC's favour if the First Defendant was acquitted, or if convicted, if a CCO was not made against him. Neither of those conditions were met as the First Defendant was convicted and a CCO was made against him in the sum of £3,035,192.97. Accordingly, following the First Defendant's conviction and the making of the CCO, EGC's right to claim the Escrow Sum fell away and the only party capable of calling on the Undertaking was the CPS on behalf of the Crown. In any event, EGC was struck off the Isle of Man register and dissolved on 21 March 2013.
12. The Claimant's evidence is that after Judmick went into liquidation he carried out extensive investigations into the purported loan of £100,000 by EGC to Judmick which formed the basis of the Undertaking, and uncovered evidence that led him to take the view that the loan was a sham. In the light of that evidence he considered that the Escrow Sum belonged to Judmick free of any claim by EGC or the First Defendant.
13. The CPS wrote to the Claimant on 27th January 2020 calling on the Undertaking with effect from 20th February 2020, which was when the three month period for appealing against the CCO would expire. The basis for calling on the Undertaking was that the CPS contended that EGC's rights under its charge over the Property, and accordingly over the proceeds of sale, was in law an asset of the First Defendant which could be used, in part, to satisfy the First Defendant's obligations under the CCO. Specifically, the CPS position was that:
 - i) The First Defendant was the ultimate beneficial owner of EGC;
 - ii) EGC was a vehicle of fraud;
 - iii) the Crown was entitled to pierce EGC's corporate veil;

iv) EGC had a proprietary interest in the Escrow Sum under the charge dated 23 February 2007.

14. There was subsequent correspondence between the Claimant and the CPS with regard to the CPS claim. On 24 June 2021 the First Defendant was made bankrupt, which changed the circumstances, in that even if the Escrow Sum belonged to the First Defendant on the basis asserted by the CPS, that asset would vest in his trustee in bankruptcy under section 306 (1) of the Insolvency Act 1986. Initially the Official Receiver was the First Defendant's trustee in bankruptcy, but on 1st December 2021 Mr Virgil Levy ("Mr Levy") was appointed the First Defendant's trustee in bankruptcy following a decision procedure convened under Part 15 of the Insolvency (England and Wales) Rules 2016. Mr Levy and his solicitors, Pinsent Masons LLP, entered into correspondence with the CPS and HMRC which culminated in the CPS releasing the Claimant's solicitor Mr Middleburgh from the Undertaking.
15. There was then a three-way dispute between the Claimant as liquidator of Judmick, the CPS representing the Crown, and Mr Levy as the First Defendant's trustee in bankruptcy, in respect of the Escrow Sum. Mr Sinclair sets out the details of the correspondence between those three parties in his witness statement at paragraphs 22 to 28, but ultimately the parties resolved that issue by agreement on the basis of a split of the Escrow sum 70%/30% as between the First Defendant's bankrupt estate and Judmick respectively.

The History of Related Proceedings between the Defendants

16. In or about July 2021 it appears that the First Defendant took steps through two sets of legal proceedings to recoup funds from the Claimant, apparently during the time when he was imprisoned in HMP Wayland. On 28 July 2021 the Claimant was served with a judgment and a charging order made by the County Court at Norwich in claim number G00NR787 ("the judgment" and the "ICO" respectively). The judgment stated at paragraph 2:
- "On 18 April 2021 Rodney Whiston-Dew agreed to repay to Churwitz Stanford AG Holdings Limited the £1.5 million principle [sic] amount plus interest at 15% which has accrued to an outstanding total balance of £3,777, 739.73 to date, security of the loan agreed to be used for legal funding of various business and personal matters was in the form of an on demand Secured Promissory Note dated 24 April 2011 which is now in default."
17. The Claimant's evidence is that as Churwitz was not incorporated until 23 April 2018 it could not have entered into a promissory note seven years earlier. Further Churwitz's last two years' accounts show a dormant company with no provision for an asset of that magnitude (copies of the incorporation document and the accounts are exhibited). It appeared that the judgment was entered into by consent between the First Defendant and Churwitz and was dated five days after the First Defendant's bankruptcy on 24 June 2021.
18. The ICO purported to charge the asset set out in a schedule, with payment of the judgment secured against the judgment debtor (i.e. the Claimant) as follows:

“Monies held on behalf of EGC Remco (representing a loan made to Judmick Estates) amounting to £321,830.34 held by Jonathan Harris Sinclair of Sinclair Harris, 46 Vivian Ave, Hendon Central, London NW4 3XP”

19. Section 346 (1) of the Insolvency Act 1986 (“the Act”) provides that where the creditor of any person made bankrupt has before the commencement of the bankruptcy issued execution, the creditor cannot retain the benefit of the execution unless the execution was completed before the commencement of the bankruptcy. Section 278 of the Act provides that a bankruptcy commences on the date of the bankruptcy order, in the case of the First Defendant, 24 June 2021. Accordingly, no final charging order could be validly made, as both the ICO and the judgment were dated after the commencement of the bankruptcy.
20. On 7th October 2021 the Claimant was served with an order dated 23 September 2021 issued out of the Queen’s Bench Division of the High Court, under Claim No QB-2021-002387, (“the QB proceedings”) which purported to be an order of Master Sullivan (“the September 2021 Tomlin order”). This purported to be a Tomlin order made by consent, the terms of which were that the Claimant and his solicitor Mr. David Middleburgh were directed to transfer £321,830.34 plus interest to the Second Defendant’s authorised agent EK Webb and Company. Churwitz was described as the claimant and the First Defendant as the defendant in these proceedings, even though no claim had ever been issued, only an application for pre-action disclosure (see Paragraph 22 below). The September 2021 Tomlin order also refers to the First Defendant having allegedly defaulted on repaying a loan of £1.5 million plus interest at 15%, and further default interest at 15% and agreeing to assign his rights in the sum of £321, 830.34. However, as neither the Claimant nor Mr Middleburgh were parties to the proceedings, they were unable to obtain a copy of the court file. It appeared to the Claimant that this was a second collusive attempt on the part of the Defendants to misappropriate the Escrow Sum following the attempt to do so in the Norwich County Court proceedings. Again, the September 2021 Tomlin order appeared to be premised on an agreed assignment of the First Defendant’s purported interest in the Escrow Sum to the Second Defendant on account of the First Defendant’s purported indebtedness to the Churwitz. Again, the September 2021 Tomlin order was made after the First Defendant had been made bankrupt on 24 June 2021. Accordingly, all the First Defendant’s assets had vested in the Official Receiver as his trustee in bankruptcy at that date, including his disputed interest in the Escrow Sum. The Official Receiver wrote to both the First Defendant and Churwitz on 8 October 2021 confirming that the First Defendant had no right to direct a transfer of the Escrow Sum to Churwitz. The First Defendant’s trustee in bankruptcy solicitors, Pinsent Masons, were informed, and confirmed that the Official Receiver had rejected Churwitz’s proof of debt in the bankruptcy, and that such rejection was not appealed within the applicable time limit and there was now no ability to appeal that rejection.
21. On 9 October 2021 a further draft Tomlin Order was submitted in the QB proceedings, again purporting to be by consent, and seeking an order that the Claimant transfer the sum of £321,830.34 plus accrued interest to Churwitz’s authorised agent EK Webb and Company. I declined to make the order sought, as it was drafted in terms such as to arouse suspicion that it was not genuine, not least because it purported to be an order by consent, but there was no consent by the Claimant, nor was he a party to the proceedings.

22. The Claimant's solicitor Mr Middleburgh wrote to the court on 14 October 2021 explaining the background to the QB proceedings and the Norwich County Court proceedings. I investigated the circumstances of the making of the September 2021 Tomlin order. I discovered that no originating process had been issued in this Division but that a purported pre-action disclosure application had been issued on 22 June 2021 with a purported draft consent order annexed, asked to be dealt with without a hearing, as is usual for consent orders. Master Sullivan had rejected the draft consent order and asked for further information to be obtained, but it appeared that in error the court clerk dealing with the matter had sealed the draft consent order provided with the application, contrary to Master Sullivan's instructions.
23. I made an order on 19 October 2021 setting aside the September 2021 Tomlin order, noting that the court had no jurisdiction to make it. I also made an order on 2 December 2021 in the Norwich County Court proceedings, discharging the ICO. I also alerted the designated civil judge for Norwich County Court of the fact that the proceedings issued there appeared to be an attempt to carry out a fraud.
24. The First Defendant applied to set aside my order of 19 October 2021. The application was not supported by a witness statement, but rather by a document described as "an agreed statement of facts". This document was apparently signed by the First Defendant and also signed by him on behalf of Churwitz but did not contain a statement of truth. It attached a bundle of documents in an appendix, again with no statement of truth. The Claimant made a witness statement in opposition to the First Defendant's application on 15 February 2022, which noted the absence of proper evidence, the numerous inconsistencies in and problems with the "agreed statement of facts" and the failure to contain a statement of truth. On 18 February 2022 the First Defendant served a document described as an "amended agreed statement", accompanied by a revised appendix. I determined the First Defendant's application on 23 February 22 and made two orders:
- i) dismissing the First Defendant's application and ordering the First Defendant to pay the Claimant's costs on the indemnity basis summarily assessed in the sum of £5,324.25;
 - ii) discharging the ICO.
- I also held in terms that the First Defendant's application was an abuse of the court's process and a fraud on the court. There was no application for permission to appeal against this order.
25. I have not set out in detail the substantial amount of time which the investigation of the QB proceedings and the Norwich County Court proceedings have incurred, by me, by the designated civil judge at Norwich, and by Master Sullivan, but we concluded that the proceedings issued in both courts were part of a concerted effort by the First Defendant to carry out a fraud. In these circumstances, as I have summarised, and based on the supporting evidence in the exhibit to the Claimant's witness statement, I concluded that neither the First Defendant nor Churwitz had any basis for any claim against the Escrow Sum, the Part 8 claim was granted, and a declaration as sought was made in my order of 17 January 2023.

Related evidence brought to the court's attention

26. The Claimant also adduced evidence of articles published on the internet that alleged that the Claimant and his solicitor had acted fraudulently, had stolen the Escrow Sum and had engaged in criminality. The court was shown copies of the publications that all emanated from "Financial Fraudsters News". The evidence of an internet search of Financial Fraudsters News showed that this organisation has a registered address in the Cayman Islands at Fort Street, Jack and Jill Building, Georgetown, Cayman Islands. This is the same address as that of a company registered in the Cayman Islands also named Churwitz Stanford AG Holdings Ltd, which is the name of the alleged holder of the promissory note from the First Defendant referred to in Paragraphs 16 and 17 above, namely the instrument relied upon to obtain the judgment and the ICO. A search report of that Cayman Islands company states that the company was "Struck off by Registrar" on 31 October 2016, 2 years before Churwitz was incorporated on 23 April 2018.
27. In the circumstances described above, the court was asked to draw an inference that the Defendants, and specifically the First Defendant who appears to be the controlling mind of Churwitz, have some involvement in the online publications from Financial Fraudsters News, and that the First Defendant is also likely to be the controlling mind of Financial Fraudsters News. The Claimant has provided evidence of the professional difficulties that such publications have caused for him, including loss of business and being brought to the attention of his professional organisation, the Insolvency Practitioners Association. The publications have also caused similar professional embarrassment to Mr Middleburgh and his firm. The court was informed that Google has refused to remove these publications from their platform.
28. The likely involvement of the Defendants in such publications are supported by the conclusions that I and other judges have come to that both Defendants have acted fraudulently in both the Norwich County Court proceedings. Further, it is apparent that the fraud sought to be perpetrated was designed to obtain a judgment against the Claimant and his solicitor to enable the First Defendant to obtain funds held as part of the Escrow Sum, to which he had no entitlement. The publications all relate to that issue. I make it clear that there is no evidence before this court that either the Claimant, nor his solicitor Mr Middleburgh, or his firm, Setfords, have acted in any way improperly and I confirm that they have carried out their duties of officers of the court entirely appropriately.