Paul Staines v Martin Richard Walsh, Justin Howard

HC02C01057

High Court of Justice Chancery Division

10 June 2003

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2003 WL 21554792

Before: The Honourable Mr Justice Laddie

Tuesday 10th June, 2003

Representation

Mr S Edwards (instructed by Messrs Sprecher Grier Halberstam) appeared on behalf of the Claimant.

Miss M Smith (instructed by Messrs Richards Butler) appeared on behalf of the First Defendant.

JUDGMENT

Mr Justice Laddie:

1. I have before me today an application made by the claimant, Paul Staines, for the increase of the financial level of freezing orders made in his favour against Martin Richard Walsh, the first defendant in these proceedings. On this application Mr Staines is represented by Mr Edwards and Mr Walsh is represented by Miss Smith.

2. The dispute between the parties arises out of equity trading in the period before the recent bull market crashed and concerns, amongst other things, the sharing of expenses and profits between them, it being said on behalf of Mr Staines that there was a contractual relationship with Mr Walsh under which he is owed a significant sum of money, as I will explain in a moment. The indebtedness is disputed not only as to amount but as to whether or not there was ever a contractual relationship between Mr Staines and Mr Walsh. That is a matter which I do not need to concern myself with at the moment.

3. It appears that Mr Staines started demanding payment of sums from Mr Walsh in the first half of 2001. He said that he was owed somewhere in the region of £180,000 and on 23 April an application was made, without notice, before Rimer J. for a freezing order. As is usual on such applications, it was incumbent upon the claimant to show the court that he had a strong case, that there was a significant risk that the defendant would dissipate assets if notice was given to him of the proceedings and that the freezing order, if granted, should be accompanied by a cross-undertaking in damages which was of value, in the sense that the claimant had sufficient assets to back it up. These were all matters addressed in the evidence filed on behalf of the claimant for the hearing before Rimer J.

4. Rimer J. made an order in the claimant's favour capped at £180,000. In support of the application, the claimant disclosed his financial position to the court. He stated that he owned a flat valued at £750,000 and that he had an outstanding mortgage liability in respect of it of £350,000, thus leaving him with some £400,000 of assets to support the cross-undertaking in damages. That order lasted over 1 May 2002 when it came back before me and was renewed.

5. The current application, dated 19 May 2003, is to increase the level of the assets frozen from £180,000 to £370,000. In support of that Mr Staines has put in further evidence of various

transactions which he says have come to light in the recent past and which show that Mr Walsh's indebtedness to him is in the larger sum that I have indicated.

6. I should make it clear that Mr Walsh disputes furiously that he is indebted to Mr Staines at all. He says that there was no contractual relationship between him and Mr Staines. Mr Walsh is clearly an astute operator in the financial market and has a number of companies through which he conducts business. He says that any relationship with Mr Staines was through one of his companies. Furthermore, he says that whoever the proper parties were to the contractual relationship with Mr Staines, there is no indebtedness at all. In strident terms he has said that this claim is a sham. Of course, Mr Walsh's views were not before the court at the time that the freezing orders were made in April and May of last year.

7. The year that has passed since those freezing orders were made has not been without incident. From the very outset, besides challenging Mr Staines' claims, the solicitors acting on behalf of Mr Walsh have challenged Mr Staines' financial worth, and therefore his ability to adequately cover the cross-undertaking in damages. That challenge, which has been regularly maintained and forcefully stated on behalf of Mr Walsh, took a number of forms. First, it was said that Mr Staines had given the court an inaccurate assessment of the value of his flat, that the flat was not worth £750,000 but, on a more balanced valuation, was worth £620,000. Second, it was said that Mr Staines had failed to disclose to the court that he had a very substantial outstanding tax liability because he had paid no tax on very substantial earnings for some three or four years. Third, it was said that Mr Walsh had reason to believe that Mr Staines' property had been re-mortgaged and that therefore the equity in that flat was not the £400,000 that Rimer J. and I had been told was the case in the spring of 2002 but was much smaller.

8. In addition to this, those acting on behalf of Mr Walsh objected strenuously to the way in which the freezing order was being used. There were two premises in England which were alleged to be owned indirectly by Mr Walsh and against which the order was used to prevent their disposal. One was office accommodation which is valued in the region of £2 million and the other is a flat in, I believe, Jermyn Street which has a value of somewhere in the region of £750,000. Eventually the sale of the commercial premises was allowed to proceed after a great deal of pressing from Mr Walsh's solicitors but the position in relation to the Jermyn Street flat is that inhibitions have been placed on the register and, notwithstanding all requests from Mr Walsh's solicitors, they have not been removed.

9. On at least one, and perhaps two, occasions during the course of the correspondence between Mr Walsh's solicitors and Mr Staines' solicitors, Mr Staines' solicitors said that the objections to the freezing order and, in particular, its use to prevent further dealings in the Jermyn Street property, could all be met if Mr Walsh paid £180,000 into court. Mr Walsh paid £180,001 into court and, at that stage, Mr Staines asked for the limit on the freezing order to be increased to £370,000.

10. Miss Smith argues that there is no justification for raising the limit. Her client does not intend to remove the £180,001 from court. It is fair to say that he had an application on foot to discharge the Mareva on the basis of failing to make full and frank disclosure. But Miss Smith argues that there is no basis upon which to raise the sums covered to £370,000 and she continues to raise objections to the claimant's financial position.

11. The basis for raising the £180,000 to £370,000 may be stated as follows. First, Mr Staines says that there are three transactions which have come to light which, when added together, demonstrate that Mr Walsh owes Mr Staines far more than had been put forward in April and May of 2002. Those additional claims are said to arise out of three transactions. The first was called the Aragon account; the second was called the Tellis trade; and the third was referred to as the Equant trade. One only has to read the evidence filed in relation to these three matters to realise that there is something very odd about them.

12. As far as the Aragon account is concerned, it is completely unsupported by any documentary material and the best that Mr Staines could do in justifying it was set out in the evidence of the fifth witness statement of his solicitor, Mr Judge, which includes the following statement at paragraph 17:

> "However, he [that is Mr Staines] does believe that some trades have been omitted. Again I would repeat that the easiest way of dealing with this would be for the defendants to produce the two relevant statements which could not be very numerous to allow a short account to be taken. The claimant estimates that the unpaid monies due to him under this account are probably in the region of £10,000"

13. I asked Mr Edwards whether this sort of evidence could possibly justify the inclusion of an amount of £10,000 in a freezing order. He very fairly said that it was perhaps too ephemeral to stand on its own. This alleged account is dated back to April of last year; in other words, it was current at the time that the application was made before Rimer J. and before me. No explanation has been given for why this matter was not raised before either of us at that time.

14. The Tellis trade relates to the attribution of certain losses as between the claimant and Mr Walsh's brother. It is said that 85 per cent of the loss on a particular trade was attributed to Mr Staines when it should not have been and that therefore this money, the money which the 85 per cent of the loss represents, is really owing to him.

15. This relates to a transaction in the year 2000. There are no documents to support the claimant's assertion that the 85:15 split was wrong and no complaints in writing. Once again, in assessing whether this is likely to be a bona fide claim, it should be borne in mind that, if genuine, it must have been a bona fide claim well before the application for the freezing order was made and yet it was not mentioned until, as a result of Mr Walsh's payment into court, Mr Staines wished to increase the level of the order. Once again, there is no explanation for why this additional sum was not mentioned to Rimer J. or me two years later when the application for a freezing order was sought.

16. The third matter is the Equant trade. Once again, this is very old. It is said on behalf of Mr Staines that some €50,000 profit was made on a trade and that he should have received the whole or part of that profit. The trade itself took place on 3 December 1999. All the same criticisms which I have made in relation to the two other matters can be made in relation to this as well. No explanation has been given for why this indebtedness, if it is a true indebtedness, has not been the subject of anything in writing and, most surprisingly, no explanation has been given for why this matter was not put before Rimer J. or me in the spring of last year. If, as Mr Staines now says, this is a clear indebtedness from Mr Walsh to him, one would have expected it to have been added to the bill put before the court in the spring and used to justify an increased financial limit in the order. The absence of this material from the matters put before the court at that time cries out for explanation but there is none.

17. Mr Edwards, very fairly, after discussing the defects of these three heads of claim with me, withdrew the application to increase the freezing order insofar as it related to each of those items. However, he says that his client still wants an additional £30,000 in respect of, not only orders for costs which have already been made, but future costs up to, as I understand it, the trial.

18. As far as costs are concerned, there have been a number of interlocutory applications. Mr Walsh has fought hard against Mr Staines' action: he has disputed the jurisdiction of the court, which he was entitled to do; he has disputed that the proceedings were properly served on him, which he was entitled to do; he has put in a defence which disputes the claim, which he is entitled to do. Some of the interlocutory applications he has lost, one at least he has won and costs orders have been made.

19. Insofar as cost orders have been made against Mr Walsh, they have sometimes included orders for payment on accounts. Each of those orders when made against Mr Walsh has been met. So far he has paid some £22,000 by way of costs on the basis of such orders on account.

20. I do not feel that I am in a position at the moment to decide whether anything further is outstanding in favour of Mr Staines in relation to the cost orders which have been made to date or at least anything that will be outstanding after the cost orders made against Mr Staines are taken into account.

21. As to the future, having now seen much more material than was before the court in April and May last year, it is not possible, with confidence, to predict what is going to happen in this action.

22. In my view, it would be inappropriate to raise the level from £180,000, whether to £210,000 or anything else. There are a number of other matters which make it quite inappropriate to give Mr Staines the relief he seeks today.

23. First I can deal with the question of costs which I have touched upon already. As Miss Smith has pointed out, the freezing orders made never sought protection in respect of costs. All that was sought was protection in respect of alleged indebtedness under the disputed contract. She says this application is an attempted second bite of the cherry. She has taken me through the figures and has shown that it is now possible to see that the account which formed the cornerstone of the original application appeared to show an indebtedness of about £144,000.

24. She says there is nothing which would justify the court in now adding to the freezing order in respect of items of mainly future indebtedness when that was not done before Rimer J. or before me last year. Were this another case I am not sure that that would be a good point but since, in my view, Mr Staines' application to extend the limit of the freezing order is ill founded, it is not necessary for me to decide this point finally on this application.

25. Second, Miss Smith says that, when one looks again at the evidence, there is nothing to support the crucial assertion which has to be made by a claimant that there is a significant risk of dissipation of assets. Indeed, when one looks at Mr Staines' affidavit of 23 April of last year, the only evidence on this topic is to be found in paragraph 21 which reads as follows:

> "I last spoke to Mr Walsh, the first-named defendant, in August 2001. I said that I had waited long enough for my money. He said words to the effect that all the money was in off-shore companies and that he was now in Bangkok, implying that I would have difficulty obtaining any money from him if he did not pay voluntarily"

26. Mr Edwards relies upon that and upon the fact, as is undoubtedly true, that not only is Mr Walsh frequently out of the country but that he operates through a number of off-shore companies and therefore dissipation would be easy.

27. To some extent, the court's attitude towards defendants depends upon looking at the totality of the picture put before them. A defendant who is clearly defrauding a claimant in a manner which is plain to see even on an ex parte application is more likely to be feared to be willing to dissipate assets than one against whom a more feeble claim has been raised.

28. It is not necessary to go back now and revisit the overall picture as it was in the spring of last year. As of now, there is nothing to suggest that Mr Walsh will refuse to comply with a court order made against him, whether in damages or costs. Indeed, as I have already mentioned, as far as costs orders have been concerned, he has promptly paid all costs orders made against him.

29. Looked at as of now, and bearing in mind what appear to me to be certain weaknesses, certainly in the additional materials which Mr Staines relies upon, I think Miss Smith is right in saying that there is no credible evidence for reasonable fear that Mr Walsh will dissipate assets so as to avoid any judgment debt. That would be an additional reason for not extending the Mareva order.

30. In my view, by far and away the most important ground for not extending the Mareva order concerns the issue of the cross-undertaking in damages. I have already mentioned that last year Mr Staines told the court that his net worth in the form of equity of his flat was in the region of £400,000 and that looked like an adequate protection for the £180,000 which was to be the subject of the freezing order. It is clearly true that Mr Staines did not disclose to the court that he has an unsettled tax liability.

31. His accountants now say that this tax liability is somewhere in the region of £23,000. That is arrived at by only looking at unpaid tax in respect of two years' earnings when Mr Staines was earning very little. Of more significance is the fact that it assumes that Mr Staines is entitled to claim non-residency for tax purposes in respect of two years when he earned a very substantial sum indeed.

32. The precise level of Mr Staines' tax liability of course is not a matter that can be determined now but it is worth mentioning that Miss Smith points to material which suggests that the claim to non-residency for tax purposes is unjustified. If that is true, it may well be that Mr Staines' tax liabilities will be very substantial indeed and, indeed, larger even than his claimed equity as of the spring of last year. For present purposes, all I need to say is that the court was not told that there was an outstanding and substantial tax liability when Mr Staines sought the original freezing order. It should have been.

33. Second, I have mentioned the dispute as to the value of Mr Staines' flat. This is not a matter which I think can be resolved at this stage and I do not intend to address the matter further, save to say this: that on one of the currently responsible and reasonable estimates given for the value of that flat, Mr Staines' equity would have been £100,000 less than he stated to the court. As I say, I cannot resolve this issue and, for present purposes, I will assume that the statement of the value of £750,000 was reasonable when it was made.

34. The third matter is of very great concern. As I have stated already, from the outset Mr Walsh's solicitors have pressed Mr Staines' solicitors on the question of re-mortgaging of the property. The question of Mr Staines' financial position was not only raised in his evidence in support of the freezing order but was raised again by him in the fourth witness statement sworn by him on 13 January of this year. I will come to the contents of that witness statement in a moment. First, I must deal with a matter of principle.

35. I have mentioned already that when a party applies for a freezing order one of the requirements is that he must address the issue of the cross-undertaking in damages and his ability to service that cross-undertaking in damages. For that reason, save in the most exceptional cases, a claimant must put in a statement indicating his wealth or, at least, indicating that he has sufficient adequately to cover the cross-undertaking. When a freezing order is made it will continue to run until such time as it expires or is removed by order of the court. So long as it runs, the potential loss to the defendant will continue to mount.

36. The cross-undertaking in damages of course not only runs for the duration of the freezing order itself but it can be brought into operation after the freezing order expires. In other words, it continues indefinitely. Certainly, so long as the freezing order is in force, it appears to me that there is a continuing obligation on a claimant, not only to be willing to honour the cross-undertaking in damages, but to draw at least the defendant's attention to any material change for the worse in his financial position. If, for example, a claimant obtains a freezing order on the basis that he has £500,000 worth of assets and those assets disappear in large part, in my view it is inherent in the freezing order jurisdiction that he must disclose that change in position to the defendant who can then, no doubt after taking legal advice, either seek a voluntary removal or reduction in the freezing order or go to court to seek such a removal or reduction.

37. In this case, it appears that in August of last year, that is only three months after the freezing order was made, just as Mr Walsh had suspected and as he had asked his solicitors to put to Mr Staines, Mr Staines re-mortgaged his flat. As at that date, the amount outstanding on the mortgage rose to something like £630,000. Of course, if the valuation of the flat is not £750,000 but is £620,000, this would have left Mr Staines with negative equity, without taking into account the fact that he may well owe the Inland Revenue a substantial sum for unpaid tax.

38. Notwithstanding the constant and forceful requests for disclosure of his current financial position made by Mr Walsh's solicitors, Mr Staines did not disclose that he had re-mortgaged the flat. Indeed, in the fourth witness statement which I have referred to above, he addressed the question of his assets as of January of this year. He deals with the question of his mortgage and he says this:

> "At the time of the hearing on April 23rd 2002 I estimated my mortgage at £350,000. The mortgage balance as at 23rd July 2002 was £363,000, a difference of 3.7 per cent. I apologise to the court for my inaccuracy"

39. He then concludes his witness statement with the following:

> "It is quite clear therefore that I have more than enough unencumbered funds in order to give a valid undertaking as to damages"

40. Taken as a matter of pure grammar, the discussion of the statement relating to his mortgage was accurate; that is to say that, as of 23 April 2002, he had a mortgage of £350,000. However, in my view, the whole of this evidence is grossly misleading. The apology for being 3.7 per cent inaccurate was misleading because by the time of this witness statement, in January of this year, Mr Staines knew that his mortgage was not £363,000 but it was near £650,000.

41. Furthermore, any doubt as to whether or not this was meant to be a merely historic statement is put to rest by the concluding sentence, namely Mr Staines' assertion that he has more than enough unencumbered funds in order to give a valid undertaking as to damages. In my view, Miss Smith is right when she says that Mr Staines has hidden his severely changed financial position.

42. Mr Edwards argues that although that witness statement was inappropriately drafted and that the language perhaps was unfortunate, the matter was made clear when another witness statement by a Miss Ahmed, an assistant solicitor in the firm acting on behalf of Mr Staines, was sworn in mid-March.

That witness statement contains at its very end a brief paragraph which reads as follows:

> "The mortgage redemption figure for the property is £636,262.24 as of 13th March 2003. A copy of the redemption statement for the property is located pages 2–6 of Exhibit RA2"

43. Even that does not explain that the re-mortgaging took place in August of the previous year, over six months earlier. No explanation has been given for why Mr Staines did not come clean on this matter earlier. The matter does not end there.

44. Shortly before this application came on, it was disclosed that a substantial part of the sum raised by the re-mortgaging had been placed with Mr Staines' solicitors. During the course of the hearing today I asked Mr Edwards how much was still there, it having been said that some was there in part to meet Mr Staines' obligation to pay costs to his own legal team.

45. Mr Edwards disclosed, as I understand for the first time, on instructions — and I should make it clear I have no reason to believe at all that Mr Edwards was aware of this before the commencement of this hearing today — that there was no money left with the solicitors. Of the £300,000 which had been raised by re-mortgaging, only £120,000 remains. It is not now with the solicitors but is held in a variety of accounts.

46. In my view, it would be wholly inappropriate to extend, in any way, the freezing order which was made last year. Had there been before me an application to discharge that order even at this stage, I would have given it serious consideration. However Miss Smith, on behalf of her client, has made it clear that her client does not intend to withdraw from court the £180,001 that he has paid in. The result is that the existing freezing order has expired by virtue of the payment in of that amount.

47. For these reasons I will dismiss Mr Staines' application.