



Neutral Citation Number: [2023] EWHC 1147 (Admin)

Case No: DTA 45 of 1998

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

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

Date: 18/05/2023

Before :

MR JUSTICE ANDREW BAKER

Between :

**THE MINISTRY OF JUSTICE OF THE
KINGDOM OF THE NETHERLANDS**

Claimant

- and -

HUSEYIN BAYBASIN

Defendant

- and -

CHRISTINE BARTLETT

Applicant

**(as enforcement receiver in respect
of Mehmet Baybasin)**

- and -

CROWN PROSECUTION SERVICE

Interested

**(as prosecuting authority in respect
of Mehmet Baybasin)**

Party

Richard Saynor (instructed by **W Legal Ltd**) for the **Defendant**

Gary Pons for the **Applicant**

John McNamara for the **Interested Party**

The Claimant did not appear and was not represented

Hearing date: 11 May 2023

Approved Judgment

This is a reserved judgment to which CPR PD 40E has applied.
Copies of this version as handed down may be treated as authentic and
this judgment will be published via the National Archive.

Mr Justice Andrew Baker :

Introduction

1. This short judgment concerns an Order of Kerr J dated 15 December 2022 varying an Order of Sedley J (as he was then) dated 8 April 1998 ('the 1998 Order'). Kerr J's Order was made, *ex parte* and without a hearing, upon an Application Notice dated 14 December 2022 issued by Christine Bartlett of HS Alpha Ltd, trading as Richard Long & Co.
2. The claimant in these High Court proceedings is the Dutch Government (Ministry of Justice), acting (at all events hitherto) by the Crown Prosecution Service ('CPS') as its agent. The defendant Huseyin Baybasin ('Huseyin') is the oldest of four brothers. One of his younger brothers is Mehmet Baybasin ('Mehmet').
3. The proceedings came before me on 11 May 2023, to consider an application by Huseyin seeking (primarily) the setting aside of Kerr J's Order.
4. At the hearing, Huseyin was represented by solicitors and counsel, and also attended, with my permission, via video link from the Netherlands. The claimant was not represented. In the heading to this judgment, I have taken care to define the other parties who were represented not only by name but also by the capacity in which they appeared. That is because:
 - (i) Ms Bartlett made her application in December 2022, and appeared by counsel before me, acting as the enforcement receiver in respect of Mehmet appointed by Order of the Crown Court at Liverpool. She is also the receiver currently appointed pursuant to the 1998 Order. But in making the December 2022 application and in appearing by counsel before me, Ms Bartlett was not acting in that capacity.
 - (ii) As well as being the claimant's agent in these High Court proceedings, the CPS is the prosecuting authority in respect of Mehmet in the Crown Court. In appearing by counsel before me, the CPS acted in that latter capacity and not on behalf of the claimant, taking a position (*viz.* that Kerr J's Order should not be disturbed) directly contrary to that of the claimant, to the extent it has stated a position (*viz.* that the 1998 Order should not be varied as ordered by Kerr J).

Background

5. Huseyin is serving a life sentence in the Netherlands following his conviction there for conspiracy to murder and export controlled drugs. Mehmet is serving a 30-year sentence here following his conviction in the Crown Court at Liverpool in respect of drug trafficking.
6. On 8 April 1998, the CPS, as agent of and acting for and on behalf of the claimant, sought and was granted the 1998 Order under s.26 of the Drug Trafficking Act 1994 ('DTA'), as applied in respect of Dutch criminal proceedings by the Drug Trafficking Act 1994 (Designated Countries and Territories) Order 1996 ('the 1996 Order').

7. The 1998 Order prohibited any disposal of or dealing with *inter alia* a house in Edgware ('the House') and appointed Sara Dayman of BDO Stoy Hayward (as they were then) as receiver (the 'High Court Receiver') to take possession of and manage all of Huseyin's realisable property. The House was and remains in the registered legal ownership of Huseyin's youngest brother (not Mehmet). So far as material, the Dutch claim as presented to the court by the CPS was that the House was beneficially wholly owned by Huseyin. The making of the 1998 Order did not require or involve a final determination of that claim, only the acceptance by the court that it was sufficiently arguable to justify the grant of a restraint order in respect of the House.
8. The 1998 Order provided, and provides still today, that the CPS (by its Central Confiscation Branch) is the legal representative of the claimant in these proceedings. Furthermore, the 1998 Order was sought and obtained pursuant to a Dutch request for assistance under the 1990 Strasbourg Convention on Laundering, Search, Seizure and the Proceeds from Crime, a Council of Europe Treaty (CETS 141). By Article 7 of the 1996 Order, that request "*shall, unless the contrary is shown, be deemed to constitute the authority of [the Netherlands] for the Crown Prosecution Service ... to act on its behalf in any proceedings in the High Court under section 40 of the Act [i.e. the DTA] or any other provision of the Act as applied by article 3(2) of this Order.*" No attempt was made to show me on the present hearing that the agency *prima facie* created by Article 7 either did not come into existence or was at any point terminated.
9. The CPS's role as legal representative of the claimant is not just stated in terms in the 1998 Order. It is also given effect by extensive reference to the CPS in the operative provisions of that Order. Thus:
 - (i) the CPS had carriage of the terms on which the High Court Receiver was appointed;
 - (ii) the High Court Receiver was given power to discharge the CPS's legal costs from receivership assets;
 - (iii) the High Court Receiver was entitled to draw remuneration and cover disbursements from receivership assets every two months, based on the approval of accounts by the CPS;
 - (iv) the CPS was given leave to serve documents out of the jurisdiction at such addresses in the Netherlands as the CPS deemed appropriate for bringing the documents to Huseyin's attention;
 - (v) the CPS gave the undertakings required, which were stated to be given on behalf of the claimant but which all required the CPS itself to take the specified steps – to serve documents, to give a copy of the Order to anyone notified of it, and to pay certain third party costs that might be incurred as a result of the Order;
 - (vi) any application to vary or discharge the Order was to be made on notice to the CPS as agent of the claimant;
 - (vii) the CPS was given power to agree a variation of the Order with Huseyin, any such variation to be in writing and signed by Huseyin and a representative of the CPS.

10. Richard Long of Richard Long & Co became the High Court Receiver under a variation of the 1998 Order sought and obtained by the CPS as agent for the claimant in 2012. By a further variation in August 2021, again sought and obtained by the CPS as agent for the claimant, Mr Long was replaced as the High Court Receiver, following his retirement from practice, by Ms Bartlett.
11. Meanwhile, in Crown Court proceedings under the Proceeds of Crime Act 2002, pursued by the CPS as the prosecuting authority in respect of Mehmet and not as agent of or purporting to represent the claimant:
 - (i) on 23 December 2014, a confiscation order was made requiring Mehmet to pay an available amount assessed at £334,393.13. Almost all of that (£333,750) was the value of what was, in the opinion of the Crown Court, Mehmet's 25% beneficial ownership share in the House; and
 - (ii) the CPS subsequently applied to the Crown Court for an enforcement receiver to be appointed over Mehmet's assets to enforce that order. HHJ Aubrey QC (as he was) heard that application on 18 December 2017 and 18-21 June 2018. There was witness evidence from Huseyin, Mehmet, and others. Judgment was handed down on 16 July 2018.
12. The judge concluded that the House was held for the four Baybasin brothers in equal shares. On that basis, by Order made on 1 August 2018 but not drawn up and sealed until January 2021, the judge declared that Mehmet had a 25% beneficial interest in the House and appointed Mr Long as enforcement receiver to take possession of, or otherwise deal with, all of Mehmet's assets, including but not limited to his (as the judge had found it to be) 25% interest in the House (the 'Enforcement Receiver').
13. Huseyin applied to the Court of Appeal (Criminal Division) for leave to appeal against that receivership decision. The application was refused on 11 February 2022: see [2022] EWCA Crim 357 (Macur LJ, Thirlwall LJ and Pepperall J).
14. By Order of HHJ Aubrey QC in the Crown Court dated 8 June 2022, upon Ms Bartlett's request by a witness statement dated 31 May 2022, Ms Bartlett replaced Mr Long as the Enforcement Receiver.
15. One issue that may now arise is the effect of HHJ Aubrey QC's declaration of Mehmet's interest and/or of the Court of Appeal's refusal of leave to appeal, in particular whether the claimant is thereby, or for some other reason, bound to accept (i) that Mehmet has a 25% share of the House, and if so either (ii) that Huseyin has at most a 75% share of the House or (iii) that Huseyin has only a 25% share of the House, or in any event is precluded from contending in this court that Huseyin is the 100% beneficial owner of the House.
16. On the face of things, the claimant's case, advanced on its behalf to this court by the CPS, that Huseyin beneficially owns the House outright, conflicts with the CPS's case, advanced in the Crown Court as prosecutor of Mehmet, that the House is owned, in equity, by the four brothers equally, so that Mehmet in particular owns a 25% share. The CPS should have considered, and needs now to consider as a matter of some urgency, how, if at all, it can properly manage its separate, and seemingly conflicting,

interests as prosecutor of Mehmet in the Crown Court confiscation proceedings and as agent and legal representative of the claimant in these High Court proceedings.

17. In the absence of contrary instructions (from the claimant), and subject to dealing appropriately with any difficulty of lack of instructions, if it arose, the CPS's duty as the agent and legal representative of the claimant, it might be thought, would be to resist any variation of the 1998 Order that could prevent 100% of the realisable value of the House being available for future enforcement action by or on behalf of the claimant, upon its proving to the court at that time (if it can) that Huseyin is the outright beneficial owner.

December 2022

18. By her Application Notice dated 14 December 2022 in these proceedings, then, Ms Bartlett, acting as the Enforcement Receiver, sought a variation of the 1998 Order to allow her, in that capacity (i.e. as Enforcement Receiver) to sell the House. Albeit acknowledging that I have the benefit of hindsight, it is not obvious to me that that was the right application for Ms Bartlett to pursue rather than that she should have sought, more neutrally, the direction of the court upon how to proceed, given the potential at least for the enforcement receivership to conflict with the claimant's interests.
19. However that may be, I have no doubt at all that the application should have been for a hearing on proper notice to (at least) the claimant, Huseyin, and the CPS (acting as prosecutor of Mehmet). Instead:
 - (i) the Application Notice sought a determination without a hearing;
 - (ii) neither the claimant nor Huseyin was served; and
 - (iii) it is not clear to me whether the CPS (as prosecutor of Mehmet) was served, although if it was, it did not result in proper or sufficient notice being given, since Kerr J granted the application, without a hearing, on 15 December 2022, the day after the Application Notice was issued.
20. In relation to Huseyin, solicitors who had acted for him in the Crown Court were made aware in November 2022 that an application was being prepared, and may have been sent a copy of the Application Notice by email, purportedly by way of service, before Kerr J made his Order. Those solicitors were not instructed in these proceedings, however, and it is not apparent to me that Ms Bartlett had any basis for considering that they were. They responded to her, and notified the court, that they were not so instructed. It is not clear to me whether the notification to the court reached Kerr J either at all, or in any event before he had made his Order.
21. In relation to the claimant, no attempt appears to have been made to serve the Application Notice, which would have required service on the CPS (Central Confiscation Branch) making it clear that it was being served as representative of the claimant, not in the CPS's different interest as prosecutor of Mehmet. Ms Bartlett did make informal attempts to inform the claimant directly of what she was doing, by an email some weeks before she issued her Application Notice indicating that she might make an application. I cannot say that email came to the attention of anyone relevant in

the Netherlands. The claimant's response after the fact, quoted immediately below, suggests not.

22. When Kerr J's Order later came to the attention of the relevant office at the Dutch Ministry of Justice, it generated this response to Ms Bartlett, on 23 December 2022, from (I take it) the official with carriage of the matter:

“Our correspondence has not gone entirely smoothly. It seems to me that some of your most recent letters have unfortunately not reached me. I would kindly ask you to use the following address in the future: [specific email address stated], for which I thank you in advance.

I will explain below what I think the situation is or at least should be.

In 1998, at the request of the Dutch authorities, a Restraint Order was granted from the High Court. [The House], of which Huseyin ... was deemed to be the full owner (see the underlying affidavit), was seized as security for recovery of a Dutch confiscation measure that at the time could be imposed on [him]. As you know, by judgment dated October 30, 2018 ... the Court of Appeal `s-Hertogenbosch imposed confiscation order of € 1.587.470,00 became irrevocable.

*The Dutch Centraal Justitiele Incassobureau (CJIB) is responsible for its collection. The execution of the confiscation order is currently at a standstill (frozen), pending the legal proceedings at the Court of Appeal `s-Hertogenbosch to remit/waive the confiscation order. For this reason, **CJIB has always indicated to the UK that de restraint order should remain in force unchanged, at least as long as the legal procedure is still ongoing.** [emphasis added]*

*[The House] is, as far as is known at this time, the main object of recovery from which the confiscation order could (in the future) be met. **CJIB therefore has the greatest interest in ensuring that the restraint order remains in force unchanged, and in not selling the seized property (and dividing the proceeds among the brothers Baybasin). If the property were to be sold, the result would be that the value of the restraint order would fall sharply (if I understand correctly by 75%). That would make it a lot more difficult for CJIB to collect the confiscation order from Huseyin** [emphasis added]*

An agreement has been made with Huseyin Baybasins (Dutch) lawyer that after the (Dutch) legal proceedings have concluded, it will be examined how payment of the confiscation order can be made, whereby of course the seized property will also be taken into account.

So in short: CJIB wishes to maintain the original Restraint Order and requests that the property at this time is not sold

If I understand correctly, a variation order (dated December 15, 2022) has now been issued. If I need to submit my request(s) to the High Court (in accordance with sub 3 of the Order), could you please provide me with the contact details where I can submit my request. If you need me to explain my request to you in more detail, I would also very much like to hear from you.”

23. I envisage that the application to which that response refers, to remit or waive the Dutch confiscation order, means that even now that order is still “*subject to appeal*” and so cannot be registered so as to be enforced here under s.40 DTA. By s.40(1)(a) registration requires that the court be satisfied that the order “*is in force and not subject to appeal*”. Then by s.40(2) an “*appeal*” for that purpose includes “(a) *any proceedings by way of discharging or setting aside a judgment; and (b) an application for a new trial or stay of execution*”.
24. The Dutch response was copied to the CPS; but it seems the CPS took the view that it did not call for any action on its part to protect the claimant’s interests because it did not amount to a “*formal request from the Dutch Authorities for ... further Mutual Legal Assistance to seek to intervene or apply to set aside any order in relation to [Mehmet’s] confiscation proceedings*”.

March 2023

25. As I understand it, the House has been occupied throughout by members of the Baybasin family, including but it may be not limited to Huseyin’s wife and son. In circumstances that I may be asked to consider in greater detail when it comes to costs, Ms Bartlett applied by Application Notice dated 23 March 2023 for permission to issue a Writ of Possession under CPR 83.13(2), on the basis of Kerr J’s Order and the failure of the occupiers to vacate. That application was granted on the papers by Master Eastman, by Order dated 28 March 2023.

Application to Set Aside

26. By Application Notices dated 17 April 2023, Huseyin applied to set aside Kerr J’s Order and to stay execution of any Writ of Possession until the application to set aside had been determined. Those applications were listed for hearing on 11 May 2023. In the meantime, Ms Bartlett did not seek to execute any Writ of Possession, so the ancillary application to stay execution arises only if I do not now determine the application to set aside.
27. This is a complex matter in which the court should not have been asked to vary the 1998 Order without a hearing, or without due notice by proper service on (at least) (i) Huseyin, (ii) the CPS as agent and legal representative of the claimant, and (iii) separately to (ii), the CPS in its own interest as prosecutor of the confiscation proceedings against Mehmet. The inappropriate procedure adopted leaves me concerned both that Huseyin and (especially) the claimant did not have a proper opportunity to be heard and that a fair presentation was not made of, nor was due consideration given to, their possible interests (again, especially the claimant’s interest) in seeking to argue against the variation sought.
28. In the case of the claimant, that concern is compounded by what seems on its face to have been a failure by the CPS to identify and manage a conflict of interest. I cannot know without hearing from the claimant what its understanding and thinking has been, but I consider there to be a real risk that the claimant may have believed the CPS had carriage of these proceedings in its (the claimant’s) interests, the CPS has not approached the matter in that way, and that may in part explain the claimant’s lack of more active effort to protect its interest.

29. The right course in the circumstances is to set aside Kerr J's Order, and therefore also the Order of Master Eastman and any Writ of Possession that has been issued under that Order, and to give directions for the orderly management and efficient resolution of the issues, procedural and substantive, that need to be resolved. It seems to me those directions need to deal with the following matters, and that the directions should require them to be attended to by the parties in the following order, namely:
- (i) the CPS must consider as its first priority, and as a matter of urgency, whether it is able to continue to act for the claimant in these proceedings, and if so what arrangements need to be put in place for that (including to obtain the claimant's informed consent);
 - (ii) if the CPS cannot continue to act, it will need to seek a variation of the 1998 Order, the terms for which ought if possible to be agreed with the claimant and to include the identification of fresh legal representation to take over from the CPS, which application would serve as the CPS's application to come off the record as acting for the claimant herein;
 - (iii) Ms Bartlett must consider as her first priority, and as a matter of urgency, what, if any, application she wishes to pursue, acting in what capacity, whether by pursuing her December 2022 Application Notice (either as it stands (save now *inter partes* and for oral hearing), or in some amended form) or by withdrawing that Application Notice and issuing a fresh one;
 - (iv) the CPS, as prosecutor of Mehmet, must consider what, if any, application it wishes to pursue, informed by whatever decision Ms Bartlett has reached under (iii) above;
 - (v) the claimant, acting by its legal representative, should be required to set out in writing a concise statement of its stance in response to any application that is to be pursued, following steps (iii) and (iv) above;
 - (vi) there must then be an exchange of factual evidence by witness statement and exhibited documentation, as a composite exercise across all applications being pursued if there be more than one;
 - (vii) there can then be a proper *inter partes* hearing.
30. I add that whilst my directions will set a timetable for matters to be dealt with sequentially in that way, I envisage and expect close and constructive dialogue and cooperation between all parties, commencing immediately following the handing down of this judgment and the finalisation of the Order upon it (if it has not commenced already in light of the case management discussion at the hearing), over what application or applications, to be pursued by which party or parties, will best facilitate the effective and efficient resolution of the substantive issues.
31. There should be a general liberty to apply for further directions, in case of need or in the light of developments hereafter. There should also be a time-limited liberty to the claimant to apply (if so advised) for the directions put in place now to be varied or reconsidered.

32. The question of costs was considered briefly at the end of the hearing. Mr Pons for Ms Bartlett and Mr McNamara for the CPS were content for costs to be reserved. Mr Saynor for Huseyin indicated that he may have an application for at least some costs in any event. It was common cause that any such application could fairly be dealt with by an exchange of written submissions and a ruling on the papers. The Order upon this judgment will set a timetable for that also.