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Neutral Citation Number: [2021] EWHC 809 (Ch)

Claim No: PT-2020-000494

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND & WALES
PROPERTY, TRUSTS AND PROBATE LIST (ChD)

The Rolls Building
7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Date: Thursday, 1 April 2021

Before:

MS. PAT TREACY
(SITTING AS A JUDGE OF THE CHANCERY DIVISION)

Between:

EARL RICHMOND KITOVER

Claimant

- and -

(1) GALMARLEY LIMITED
(trading as Bullionvault.com)
(2) PAUL HALLER

Defendants

MAURICE RIFAT (instructed by **Patron Law**) appeared for the **Claimant**.
OLIVER HYAMS (instructed by **Keystone Law**) appeared for the **First Defendant**.

Hearing date: 16 March 2021

APPROVED JUDGMENT

DEPUTY JUDGE TREACY:

Overview

1. Earl Richmond Kitover (“Mr Kitover”) says that he is the true owner of 3.961kg of gold bullion (the “Bullion”) stored in vaults in Zurich and Singapore. The Bullion is under the effective control of Galmarley Limited (“Bullionvault”) in an account in the name of Mr Paul Haller.
2. Mr Kitover explains that he originally transacted with Bullionvault using false identity documents in the name of Mr Paul Haller (“Mr Haller”). Mr Kitover says that he can show that he and Mr Haller are the same person and asks that the gold bullion should be ordered to be released to him.
3. Bullionvault does not know whether Mr Kitover and Mr Haller are the same person. It has been unable to trace Mr Haller.

Procedural history

4. Bullionvault issued a stakeholder claim on 1 July 2020, under CPR Part 86.
5. The proceedings were listed before Master Teverson on 24 September 2020. The Master decided that the claim was unsuitable for summary determination and ordered that the proceedings should be listed for trial, with Mr Kitover as Claimant, and Bullionvault as a Defendant, and gave case management directions.

Evidence considered

6. The written evidence consists of: two witness statements of Robert Paul Glynne, a director and CEO of Bullionvault, together with various exhibits; and one witness Statement by Mr Kitover, also accompanied by exhibits. Both Mr Glynne and Mr Kitover gave evidence in person.

Background

7. Bullionvault is a gold investment service, which operates an online trading platform. An account can be opened online by uploading identification documents. Once funds are deposited to that account, they can be used to purchase bullion, which Bullionvault will store with a vault operator. These vault operators are third parties.

8. Bullionvault's terms and conditions provide that once funds are applied to purchase bullion the depositor is the bailor. Bullionvault is its agent. The vault operator with which the bullion is stored is the bailee.
9. It is undisputed that the Bullion is stored in vaults in Zurich and Singapore, under the effective control of Bullionvault. It was purchased following the opening of an online account in the name of Mr Haller. The identity of the account holder was validated by the provision of a US passport in that name along with bank documents also in that name, including an account statement from SwissQuote Bank. The purchases were made in tranches over several years.
10. Mr Kitover states that in 2007 he opened a gold account with Bullionvault using Mr Haller's name as the account holding name. To do so he also opened an account with SwissQuote Bank in the same false name and made an initial deposit in March 2007 using a passport as proof of identity. The passport used was, he said, a version of his own passport which had been altered to show the holder as Mr Haller.
11. On 21 May 2018 Bullionvault attempted to contact Mr Haller by email seeking updated proof of identity and proof of address as the passport originally provided to open the Account had expired. On 19 June Mr Kitover visited Bullionvault in London. He met Mr Glynne and one of his colleagues, Ms Vengut. Mr Kitover explained to them what he said had been the use of a false name and forged documents to open the account with Bullionvault. Mr Kitover claimed to be Mr Haller.
12. Bullionvault has subsequently made various attempts to contact or to locate Mr Haller, without success.

The issues

13. The issues identified by Master Teverson for determination are: (i) whether Mr Kitover and Mr Haller are the same person; and (ii) what order, if any, the Court should make in relation to the Bullion and/or the account held with Bullionvault in the name of Mr Haller. The Master decided not to deal with the case by way of summary determination because of concerns about potentially complex issues of illegality.

Preliminary points

(i) Part 86 CPR

14. The parties have agreed that Part 86 is the most appropriate procedural route for this dispute and the BPCs the most appropriate venue. Master Teverson agreed with that view, while giving the direction mentioned above that for the purposes of the trial Mr Kitover should stand as Claimant and Bullionvault as Defendant.

15. The purpose of Part 86 is to allow the Court to deal with applications by persons who are subject to a liability in respect of property to which they do not have a claim.

16. As far as relevant, Part 86 provides:

“86.1

(1) This Part contains rules which apply where—

(a) a person is under a liability in respect of a debt or in respect of any money, goods or chattels; and

(b) competing claims are made or expected to be made against that person in respect of that debt or money or for those goods or chattels by two or more persons.

[...]

86.2

(1) A stakeholder may make an application to the court for a direction as to whom the stakeholder should—

(a) pay a debt or money; or

(b) give any goods or chattels.

(2) Such application must be made to the court in which an existing claim is pending against the stakeholder, or, if no claim is pending, to the court in which the stakeholder might be sued.

[...]”

17. There are two requirements of a Part 86 claim. First, the person making the claim must be a stakeholder; and secondly, competing claims by two or more people must be made, or be expected to be made, against the stakeholder. Bullionvault is a stakeholder within the meaning of Part 86 and when proceedings were commenced, a claim from Mr Kitover was clearly in contemplation. No competing claim has yet been made.

18. Mr Hyams drew my attention to *Global Currency Exchange Network Ltd v Osage 1 Ltd* [2019] EWHC 1375 (Comm). Henshaw J considered whether the application of Part 86 might be precluded if no competing claim had yet been made. He held that it would be unsatisfactory to deny the parties access to the Court under Part 86 purely because no competing claim had crystallised. In the circumstances of that case, other potential procedures would not:

“... resolve the question of where GCEN should pay the Funds. GCEN does not claim to be entitled to the Funds itself, but does not consider that it can safely pay them over to Osage. For the reasons set out earlier in this judgment, I consider GCEN to have coherent reasons for its concerns, and that there are reasonable grounds to believe that once appraised of the facts investors would make claims in respect of the Funds (while emphasising, again, that I make no finding as to whether or not any such claim would necessarily succeed). In these circumstances, I consider that (a) the case does fall within CPR 86, and (b) in any event, apart from CPR 86, GCEN would be entitled to seek the court’s assistance, for example by suing for a declaration that it is obliged to return the funds to the 11 investors who paid the Funds originally.” [94]

19. Here, Bullionvault does not consider it can safely make a distribution to Mr Kitover without the Court’s intervention. If Mr Haller exists, there are reasonable grounds to consider that a claim on his behalf should be expected. There would be inconsistent claims as between the two parties and compliance with the claim of Mr Kitover would expose Bullionvault to the risk of liability to Mr Haller.

20. It is an unusual feature of this case that if Mr Kitover’s evidence is accepted Mr Haller does not exist and no claim from him could then be expected. I do not consider that this means that CPR 86 cannot apply. Bullionvault has explained its concern that a claim may be made. While that view may be thought to be cautious in

the light of the fact that its efforts to locate Mr Haller and to serve him have been unsuccessful, there are coherent reasons for it and it appears to be genuinely held. It is my view that the requirement of CPR Part 86 that “*competing claims are ... expected to be made*” is satisfied. To find otherwise would be to assume the outcome of the proceedings.

(ii) Illegality

21. A second preliminary point is the potential illegality of Mr Kitover’s actions and how, if at all, that affects Mr Kitover’s claim.

22. The leading authority on illegality is the Supreme Court’s judgment in *Patel v Mirza* 2 [2016] UKSC 42. The position is summarised as follows:

“The essential rationale of the illegality doctrine is that it would be contrary to the public interest to enforce a claim if to do so would be harmful to the integrity of the legal system (or, possibly, certain aspects of public morality, the boundaries of which have never been made entirely clear and which do not arise for consideration in this case). In assessing whether the public interest would be harmed in that way, it is necessary a) to consider the underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by denial of the claim, b) to consider any other relevant public policy on which the denial of the claim may have an impact and c) to consider whether denial of the claim would be a proportionate response to the illegality, bearing in mind that punishment is a matter for the criminal courts. Within that framework, various factors may be relevant, but it would be a mistake to suggest that the court is free to decide a case in an undisciplined way. The public interest is best served by a principled and transparent assessment of the considerations identified, rather than the application of a formal approach capable of producing results which may appear arbitrary, unjust or disproportionate.” Per Lord Toulson [120]

23. The parties’ submissions on the nature of the potential transgressions were brief. Those identified included forgery and money laundering. A concern about potential money laundering offences was stated to be at the heart of Bullionvault’s concern about releasing the Bullion to Mr Kitover.

24. Addressing Lord Toulson’s three part approach to the issue, Mr Hyams suggested that to allow Mr Kitover to recover the Bullion in circumstances where he had been involved in forgery and where, as a consequence of his actions, the ultimate source of the money could not be known might undermine the underlying purpose of the laws surrounding financial transactions and encourage others to engage in similar conduct. Mr Hyams noted that no other public policy issue appeared to be engaged and that in all the circumstances a denial of Mr Kitover’s claim, if it were justified, might be regarded as disproportionate.
25. Mr Rifat agreed with the points made by Mr Hyams on the second and third limbs of Lord Toulson’s approach. As to the first limb, he submitted forcefully that the underlying purposes of the money laundering and forgery rules would not be enhanced by the denial of Mr Kitover’s claim, if that claim were otherwise made good.
26. I conclude that while Mr Kitover’s claimed conduct may be illegal, enforcing his claim would not harm the integrity of the legal system. The identification and punishment of illegality is for the criminal justice system or, as noted by Lord Toulson, in some instances statutory regulators:
- “Part of the harmony of the law is its division of responsibility between the criminal and civil courts and tribunals. Punishment for wrongdoing is the responsibility of the criminal courts and, in some instances, statutory regulators. It should also be noted that under the Proceeds of Crime Act 2002 the state has wide powers to confiscate proceeds of crime, whether on a conviction or without a conviction. Punishment is not generally the function of the civil courts, which are concerned with determining private rights and obligations. The broad principle is not in doubt that the public interest requires that the civil courts should not undermine the effectiveness of the criminal law; but nor should they impose what would amount in substance to an additional penalty disproportionate to the nature and seriousness of any wrongdoing.” [108]*
27. Considering the three factors summarised by Lord Toulson in the round I consider that the underlying purposes of the laws relating to money laundering and forgery are unlikely to be enhanced by denying Mr Kitover’s claim, that there is no other relevant

public policy likely to be affected by denying his claim, and that denying his claim (if proven) would not be a proportionate response.

Submissions

28. Given the nature of the case, the submissions of counsel were concise and consisted mainly in drawing out key strands of the evidence.
29. Mr Rifat submitted that there was evidence on which to be sufficiently satisfied that Mr Kitover and Mr Haller are the same person so that Mr Kitover is entitled to the Bullion. He pointed particularly to the fact that Bullionvault's attempts to contact Mr Haller had elicited a response only from Mr Kitover who had responded to Bullionvault's email to Mr Haller of 21 May 2018 by visiting Bullionvault in London the following month.
30. Mr Rifat set significant store by the meeting itself. He submitted that it was inherently unlikely that a fraudster would have taken the steps taken by Mr Kitover in travelling to London to admit to forgery and to opening an account under false pretences using an alias.
31. Mr Rifat relied on the note of the meeting taken by Ms Vengut to show that Mr Kitover produced documents, including his current US passport in the name of Earl Richmond Kitover, an expired passport (the "Kitover Expired Passport") which appeared to be the same as the passport used to open the Bullionvault account other than that the critical details (the name; the passport number; the machine readable numeric code at the foot of the photo page) were different; and it was not signed. While the note is not clear on whether the passport used to open the Bullionvault account (the "Haller Expired Passport") was also presented at the meeting, at the very least a copy of the Haller Expired Passport was subsequently supplied to Bullionvault under cover of a letter from Mr Kitover's solicitors on 6 March 2020 and was exhibited to Mr Kitover's witness statement.
32. The note also records that Mr Kitover produced his social security number and an older document with showing his address as 1744 East 55th Street Chicago, IL, 60615. This is the address held by Bullionvault for Mr Haller and the address under which the SwissQuote linked bank account is held. Finally, the note records that Mr Kitover

produced some SwissQuote bank documents which were ‘validated’ against a SwissQuote account linked account held by Mr Haller in Bullionvault’s records.

33. Mr Rifat submitted, in summary, that Mr Kitover appears to be in possession of documents that an imposter would be unlikely to have and that this was sufficient evidence to satisfy the Court.
34. Mr Hyams made clear that Bullionvault was effectively neutral on the question of identity, but that Bullionvault wished to be sure that if the Bullion were to be made available to Mr Kitover, it was provided on a proper basis. He summarised the reasons for Bullionvault’s original concerns about Mr Kitover’s entitlement to the Bullion including: the fact of admitted falsification of identity and of documents; a number of factual inconsistencies in the letter before action; and significant gaps in the chain of evidence which it should have been easy for Mr Kitover to address. One example of this was whether, and when, Mr Kitover had had plastic surgery, which might explain what seemed to Bullionvault to be a significant change in his appearance between the Kitover Expired Passport / Haller Expired Passport and Mr Kitover’s current passport. Mr Hyams noted that Mr Kitover had not addressed these issues despite requests from Bullionvault’s solicitors, and even though he had been given the opportunity to file further evidence by Master Teverson.

The witness evidence

35. Both Mr Kitover and Mr Glynne gave oral evidence. Mr Glynne’s evidence related mainly to the operation of Bullionvault’s systems and to the meeting in London with Mr Kitover. I found him to be a straightforward and credible witness. Mr Kitover’s evidence was more wide ranging covering a number of aspects relating to specific documents. He seemed uncertain about some factual issues. Mr Kitover’s witness statement refers to his declining health, and this fact, together with some of the technical and timing difficulties involved in taking evidence from a witness in the United States, may have contributed to his difficulties.
36. The main matters covered by the oral evidence which were not evident from the witness statements were the evidence of Mr Kitover that the photographs in the Expired Kitover Passport and the Expired Haller passport were photographs of him. He confirmed that he had had plastic surgery which could explain the difference in

appearance between those photographs and the photograph in his current passport. He could not remember the date of his plastic surgery, but gave evidence that it might have been around the time when his original passport expired and he was applying for his new passport. Mr Kitover also gave evidence that his phone number had been the same throughout the period from the late 1990s to date and that he had inserted that number when originally opening the account in the name of Mr Haller with Bullionvault. During Mr Glynne's testimony, it was established that the Bullionvault account opening process does not require the insertion of a phone number, so this could not assist Mr Kitover.

37. During his oral testimony Mr Kitover referred to other material which he felt could further assist the court including the original email to Mr Haller which had prompted his visit to London.
38. In the circumstances, the hearing was adjourned. The parties were given permission to adduce such further evidence as might assist the Court and to make short submissions on the relevance and value of that evidence.

Further submissions and evidence

39. Mr Rifat's further submissions referred to additional evidence disclosed by Mr Kitover showing a link between Mr Kitover and the address at 1744 E 55 Street Chicago which had been used to open the SwissQuote bank account linked to the Haller account. He also explained further evidence showing Mr Kitover's dealings with the Bullionvault account including in relation to a password used to access the account.
40. Mr Hyams explained that the password mentioned by Mr Rifat, and evidenced in the further disclosure, was not the current password and that it was now impossible to verify whether it was ever correct (or not). He confirmed that Bullionvault had found and disclosed the email chain which led to Mr Kitover's attendance at Bullionvault's London office on 19 June 2018. That email chain suggested that Mr Haller had arranged in advance to visit Bullionvault on that day.

Assessment

41. The burden of proof lies on Mr Kitover. It is for him to produce evidence capable of supporting his assertion that he is Mr Haller. He must do so to the civil standard of proof, namely on the balance of probabilities, meaning that on the evidence it is more likely than not that he is in fact Mr Haller.
42. The resolution of this claim has been more complex than it might have been in part because of the passage of time since the Haller account was opened and the Bullion acquired and in part because of the limited evidence initially provided by Mr Kitover to prove his identity. The latter factor was particularly troubling in circumstances in which Mr Kitover has, by his own admission, at the very least falsified documents.
43. A number of evidential issues were raised during the hearing and in subsequent submissions. The key issues were whether:
 - Mr Kitover could establish a link between himself and the address used to open the Haller Bullionvault account;
 - there was evidence tying Mr Kitover's visit to the Bullionvault offices to the email sent by Bullionvault to Mr Haller;
 - there was evidence to establish that Mr Kitover had had access to the Bullionvault account before 2018; and
 - Mr Kitover had access to original documents which tended to establish that he was unlikely to be an imposter and more likely to be 'Paul Haller'.
44. The evidence on each of these is dealt with briefly below.

The address

45. In his original witness statement, Mr Kitover refers to the fact that the address on a bank statement which was used to provide proof of address for 'Mr Haller' was the office address used by Mr Kitover for 16 years. To support this assertion, he originally exhibited only one copy document, which is said to have been issued by Mr Kitover's bank in 2014. This document was undated and it is unclear for what purpose it was prepared. The bank account number is different from the bank account

number in the US Bank statement dated 2018, attached to the note of the meeting with Bullionvault. This does not provide convincing evidence of a link between Mr Kitover and the 1744 E 55th Street address linked to Mr Haller. However during the adjournment of the trial after the hearing Mr Kitover disclosed a social security benefit statement from 2013 addressed to him at the same address as that given for Mr Haller; and an Inland Revenue Service tax return from 2012 which also bears the same address.

The visit to Bullionvault

46. The meeting between Bullionvault and Mr Kitover, the contemporaneous note of that meeting and the evidence he produced at the meeting tend to support Mr Kitover's account. This was further strengthened by the confirmation that Bullionvault had found the email chain leading up to Mr Kitover's attendance at Bullionvault's London office on 19 June 2018. That email chain suggested that Mr Haller had arranged in advance to visit Bullionvault on that day.

Access to the Bullionvault account

47. Mr Kitover has produced documents including account statements which suggest that he has been able to access the Haller Bullionvault account. He has also produced additional documents which, when reviewed against documents produced by Bullionvault, suggest that he has interacted with that account, for example in order to change the password.

Original documents

48. Mr Kitover is in possession of original documents which link him to Mr Haller, including the Kitover Expired Passport and the Haller Expired Passport. These, together with for example, a screen shot of SwissQuote transaction showing the transfer of the original funds to Bullionvault and the original correspondence from SwissQuote bank on the opening of the linked account, support his version of events.

Conclusion

49. I have considered all the evidence that has now been produced in the round, together with the criticisms made of it by counsel for Bullionvault. On balance, I conclude

that, although the evidential picture is far from complete, it is more likely than not that Mr Kitover's account of events is true and that the evidence establishes, on the balance of probabilities, that he did use a false name to open the Bullionvault account and that Mr Haller is the same person as Mr Kitover.