Neutral Citation Number: [2020] EWHC 1242 (QB)

Case No: QB-2018-000250

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18th May 2020

Before :
MR JUSTICE HILLIARD

- - - - - - - - - - - - - - - - - - - -

Between :

National Crime Agency	**Respondent/ Claimant**
- and –	
1. Richard Joseph Leahy **2. Mortimer Property Investments Limited** **3. Eldergrand Limited** **4. Mortimer Commercial Investments Limited** **5. Mortimer Holdings Limited** **6. Itradent Limited** **7. PLI UK Limited** **8. Capital House Bradbourne Limited** **9. Hassock Wood Limited** **10. Future House Limited** **11. Mortimer House Limited** **12. Caxton Street North Limited** **13. Mortimer Solutions Limited**	**Applicants/ Defendants**

- - - - - - - - - - - - - - - - - - - -

Mr Andrew Sutcliffe QC and Mr Alexander Cook (instructed by **National Crime Agency**) for the **Respondent**
Mr Tim Owen QC and Mr Edward Craven (instructed by **Stokoe Partnership Solicitors**) for the **Applicants**

Hearing date: 29th April 2020

- - - - - - - - - - - - - - - - - - - -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

....

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 10:00am on 18 May 2020.

MR JUSTICE HILLIARD:

1. The underlying claim in this case is for a Civil Recovery Order ("CRO") under sections 243 and 266 of the Proceeds of Crime Act 2002 ("POCA") in respect of 43 real properties, together with rental income derived from them. The case for the National Crime Agency ("NCA") is that the properties and the profits derived from them are, or represent, property obtained through unlawful conduct. The claim is opposed by all the defendants. The first defendant, Mr Richard Leahy, owns and controls the various corporate vehicles which make up the second to the eleventh and thirteenth defendants ("the Leahy defendants"). The twelfth defendant, Caxton Street North Limited ("CSNL"), is an entity in which Mr Leahy is said to hold a one-third share.

2. On 31st March 2017, prior to the commencement of the claim, the NCA obtained a Property Freezing Order ("PFO"), pursuant to section 245A of POCA. I shall only deal with the main points of the history. The PFO originally covered 44 real properties. The NCA no longer seeks a CRO in respect of one property which has been released from the PFO. The NCA has also agreed to the release of two other properties (the CSNL properties) from the PFO. The PFO now covers 41 of the 43 properties which are the subject of the claim.

3. An application is now made by the Leahy defendants to discharge the PFO. In addition, there are a number of case management matters that I am required to resolve.

<u>Application to set aside Property Freezing Order</u>

4. Section 245A of POCA confers the jurisdiction to make a PFO. The court may make such an order if it is satisfied that there is a good arguable case that the property in question is or includes recoverable property, or is associated property. Subject to exclusions, the order prohibits any person to whose property the order applies from dealing with it in any way.

5. The NCA's case is that Mr Leahy has been involved in unlawful conduct including drug trafficking, fraud, money laundering and tax evasion which has facilitated the acquisition of the properties. It is said that he did not have access to sufficient legitimate funds to have acquired them, and that he has since raised finance which can be proved to be the proceeds of fraud or dishonesty. As a result, it is alleged that finance obtained against the properties and rental income or re-sale have been used on occasions to purchase further properties and so to expand Mr Leahy's property portfolio. In opposition, Mr Leahy disputes that property or finance has been obtained using the proceeds of crime and he says that all the transactions have been lawful. In particular, he says that he received loans or gifts from family and friends which were used on occasions to fund acquisitions.

6. By section 245B of POCA, the court "may at any time vary or set aside a Property Freezing Order." Mr Owen QC has contended that the Leahy defendants are suffering significant and escalating detriment as a consequence of the continued "freezing" of the properties. I have had regard to all the matters which have been urged upon me, but in particular, it is said that as a consequence of the PFO, financial institutions which had previously provided the Leahy defendants with mortgages and credit

facilities have terminated their relationships; as a result, the Leahy defendants have been forced to take out costly bridging loans to replace some of the mortgages and loans secured against the properties, costing at least £22,000 more each month. All this is on top of the very significant legal costs that Mr Leahy has incurred as a result of the claim. It has been explained that more generally, disruption has been caused to Mr Leahy's property business as a result of restrictions imposed by the PFO. It is said that contractors and suppliers have, for example, terminated relationships owing to Mr Leahy's inability to make payments as they fell due; there have been difficulties in obtaining funds to cover overheads, and significant time and resources have been expended in ensuring compliance with the requirements of the PFO. And there has been an impact upon Mr Leahy's personal and family life.

7. I acknowledge the burdens that a PFO of this kind will impose, all of course compounded by the public health crisis that we are facing. It is not easy to attribute precise proportions to the difficulties caused by the civil recovery claim on the one hand, and to the PFO on the other. Some of the difficulties may well have been contributed to by the very fact of the claim alone.

8. Against the background of those difficulties, Mr Leahy has offered to pay into court a sum of money in exchange for the release of the properties from the PFO. That sum of money has been calculated on the basis of an independent professional valuation of the properties conducted in April 2019 by Savills in accordance with the Royal Institute of Chartered Surveyors 'Red Book', and then adjusted for factors occurring between April 2019 and now. I accept that the Red Book valuation is a careful and thorough process, although there is of course an exercise of judgment involved in any valuation. Mr Leahy is content for there to be a condition that he establishes the lawful provenance of the monies to be paid into court. He is also prepared to pay into court a sum of money equivalent to the difference between the valuations estimated now and any greater sale price achieved in respect of any particular property if sold before the end of the proceedings, and to pay in any rental payments received in the same period.

9. Mr Owen QC relies on the fact that the NCA agreed to the release of the two CSNL properties. He says that this is inconsistent with the NCA's stance as regards the present application and that the distinctions suggested by the NCA to account for its different position now do not withstand scrutiny.

10. Mr Sutcliffe QC for the NCA argues that this application is, to use his phrase, "a non-starter*"*. It is agreed that the effect of granting the application would be to cap the claim at the amount of money paid into court. Mr Sutcliffe QC says that in the event of an increase in property prices over time, Mr Leahy would be able to continue to benefit from property which the NCA would have established was the proceeds of crime, in the event that their claim was successful. The longer he held the properties, the greater the benefit might be. Mr Sutcliffe QC points out that there were only two CNSL properties, as opposed to 41 here. He explains that the NCA agreed the valuations for the two properties which they do not for the 41. He says that the NCA were entitled to release the two properties without then being obliged to agree to this proposal. Mr Sutcliffe QC also says that a fuller picture of Mr Leahy's business activities shows that he has not been forced to take out bridging finance and that he could have adopted other solutions to pay down existing debt. Finally, he does not accept that the valuation put on the portfolio can safely be relied upon.

11. It is convenient to start by considering the nature of the exercise which I have to conduct at this stage. Mr Owen QC referred me to Director of the Assets Recovery Agency v Kean [2007] EWHC 112 (Admin) where, at paragraph 31, Stanley Burnton J (as he then was) said this:

> "I do not accept that, on an application under section 245B to vary or to discharge a property freezing order so as to exclude from it identified property, it is necessary for the applicant to prove on the balance of probabilities that that property is neither recoverable property nor associated property. Section 245B(1) confers a general discretion on the Court to vary or to set aside the order. In my judgment, that discretion is to be exercised on familiar grounds applicable to interlocutory injunction including non-disclosure, although the exercise of that discretion will be affected by the fact that the ARA is a public authority exercising its functions in the public interest: see Jennings v CPS [2005] EWCA Civ 746…"

Mr Owen QC says that the "familiar grounds" include "the balance of convenience" and he referred to Donmar Productions Limited v Bart [1967] 1 WLR 740, decided 8 years before American Cyanamid Co. v Ethicon Ltd [1975] AC 396. In Donmar Productions Limited, Ungeod-Thomas J (quoting from Halsbury's Laws of England) referred to the obligation to consider:

> "the balance of convenience to the parties and the nature of the injury which the defendant, on the one hand, would suffer if the injunction was granted and he should ultimately turn out to be right, and that which the plaintiff, on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right."

He continued:

> "The burden of proof that the inconvenience which the plaintiff will suffer by the refusal of the injunction is greater than that which the defendant will suffer, if it is granted, lies on the plaintiff."

12. Mr Sutcliffe QC, whilst acknowledging that I have the discretion conferred by section 245B, argues that it is not to be exercised in the same way as it would be in respect of a freezing injunction in commercial litigation and says that it is not appropriate to apply a balance of convenience test in circumstances such as these. He contends that granting the application would mean that the statutory function of POCA was either not fulfilled or was completely undermined. He says that far from taking out of circulation property which had been obtained from the proceeds of crime, the result could be that Mr Leahy would have secured the release of such property by putting up a sum of money to stand in lieu of it.

13. For present purposes, and without deciding the point, I am content to deal with the matter on a balance of convenience basis and upon an assessment of where that lies. I have reached a clear conclusion about it.

14. The fact that the NCA agreed to take the CSNL properties out of the order does not oblige them to agree to the present proposal. I do not overlook that they were prepared to do so on the basis of a judgment they made about the two properties, but it is now a matter for me to decide whether some or all of a further 41 properties should be taken out of scope.

15. The PFO in this case was granted three years ago and if it continues, it will be in existence until a trial which will not start until the middle of 2021 at the earliest. It is not suggested that the requirement of a good arguable case that the property in question was obtained by unlawful conduct is not met, but it is underlined that Mr Leahy's affairs will have been constrained for a considerable period of time if the PFO continues in force. The order has caused financial and personal difficulties for him. I do, however, have regard in making my decision to Mr Leahy's broader financial position and to the way the PFO has been operated in this case.

16. I do not of course have a complete picture of Mr Leahy's business interests although I am satisfied that they must be substantial for him to be in a position to be able to raise over £1 million in cash, (£1,028,878), which is the sum he intends to borrow and pay into court if this application is granted. He has also paid over £1/2 million thus far in legal costs. I accept that as the NCA argues, there do appear to be other sums of money available to him to pay down some at least of the debts which are currently the subject of bridging finance if Mr Leahy chose to do so. The evidence also demonstrates that Mr Leahy has used bridging finance in the past as an alternative to mainstream lending – for example, in 2013 for four years in respect of properties in Malham Road; in respect of a property in Hartsmead Road which is not covered by the PFO; and in respect of 1 Ruskin Walk where a bridging loan has been secured on the property for the last four years.

17. Any PFO is intrusive and restrictive. This PFO has been varied on a number of occasions to accommodate requests by the Leahy defendants so as to help Mr Leahy operate his business. For example, by 14th July 2017 the PFO no longer imposed any restrictions on the operation of bank accounts which had originally been subject to it; properties have been removed from the PFO, and Mr Leahy is now able to sell any of the properties subject to the PFO, if required for the purpose of repaying an outstanding secured loan.

18. I also attach weight to section 283 of POCA which provides that if in due course the court does not decide that property subject to a PFO was recoverable or associated property, the person whose property it is may make an application for compensation where loss has been suffered as a result of the order. In addition to this safeguard for Mr Leahy, I have also taken account of the points made by Mr Sutcliffe QC about the potential consequences, if the NCA were ultimately successful, of effectively capping the claim at a valuation today and of a future increase in value of unlawfully acquired property, from which Mr Leahy would be at liberty to profit if the PFO ceased to apply to the properties. In my judgment, that would be a very significant burden for the NCA.

19. The NCA and Mr Leahy are far from agreed about the value of the properties but I will set out the basis for Mr Leahy's figures. The Red Book valuations were arrived at in April 2019 and amounted to £16,480,000. That figure is then reduced by 10% to reflect evidence which is said to indicate the likely fall in property values between

April and September 2019. This leaves £14,832,000. Debt (including some early redemption charges) of £13,803,031 or thereabouts is then deducted, leaving £1,029,969. It is proposed to pay into court £1,028,878. For present purposes, the difference between these last two figures is immaterial. The outbreak of Covid-19 has also to be considered. Mr Owen QC says that the amount that would be paid in substantially exceeds the total net equity in the properties at the present time, although I think that is likely to be over optimistic.

20. I have taken account of the fact that a valuation is always a matter of judgment rather than of precision. Different perspectives may have a bearing on the matter. One example makes the point. 19 Park Avenue was purchased for £1.9 million in 2013. In 2018, in a drive-by exercise, Savills valued it at £2 million. The Red Book valuation was £1.4 million in April 2019, although that is a much more thorough process than a drive-by valuation. The Nationwide house price calculator suggests that the value would have increased from £1.9 million to £2.36 million or so, as Ms Poots of the NCA points out. That of course is not a measure specific to this particular property.

21. In fact, the evidence from Savills does not establish a 10% decrease in value for all the properties between April and September 2019, and I do not think that it can be correct to reduce the values by early redemption charges when the loans may not in fact be redeemed.

22. Where real property is concerned at the present time, a valuation is particularly susceptible to uncertainty, however carefully arrived at. At some point in the future, the discovery of a vaccine or effective treatment for Covid-19 could make good whatever has been lost. Here, the uncertainty applies to 41 properties. The NCA have not obtained valuations of their own but I accept that with so many properties, even small deviations from the predicted values could have a very significant impact on the overall value of a mixed portfolio of commercial and residential property in South London. Most important of all, however, is the prospect of an increase in value over time with the possible consequences I have already set out if the NCA are successful.

23. I must take an overall view of the position and of the arguments placed before me on both sides. Having done so, I am satisfied that the balance of convenience is substantially in favour of continuing the PFO, and the application to discharge it must be refused.

24. During the hearing, I asked for a list of the properties subject to the PFO where a loan in place would come to an end in the near future. I wanted to get a feel for the extent to which new and more expensive borrowing might be required. I have been provided with material from Mr Leahy and Ms O'Neill of the NCA after the hearing. Mr Leahy provided a list of 25 properties where he says mortgages or loans have either expired or are due to expire, or will switch from a low fixed rate to a higher rate within the next 2 years. It appears therefore that of 41 properties, 16 do not fall into these categories. And although Mr Leahy says that a switch from low fixed to variable rate is likely to amount to a doubling of the rate, I have no evidence for that from the lenders or that they would not re-finance on a new fixed rate. Without it, I do not think that these are conclusions I can draw.

25. In his new statement, Mr Leahy went further and invited me to consider allowing 14 properties to be taken out of the PFO if I was not prepared to lift the order altogether.

He says that 14 properties are subject to the most expensive and financially burdensome bridging loans. This possible refinement has come at a very late stage although it does confirm that the effects of the PFO are not uniform. However, even as regards the 14 properties, I am satisfied that weighing the factors I have already referred to still means that the balance is firmly in favour of retaining them within the PFO.

Case management issues

26. The claim in this case is brought by the NCA under CPR Part 8. Mr Owen QC says that the general approach to disclosure under the Part 8 procedure is inappropriate and unsatisfactory for contested civil recovery proceedings. He submits that the NCA should be required to provide standard disclosure in accordance with CPR 31.6. He drew my attention to SOCA v Pelekanos [2009] EWHC 2307 where Hamblen J (as he then was) said at paragraph 3…

> "Any disputed recovery order is likely to involve substantial issues of fact which makes the Part 8 procedure inappropriate. Whilst the Court may order the case to proceed under Part 7, in the present case funding difficulties meant that Mr Pelekanos was never in a position to make that application and the matter has come on for hearing under Part 8. The consequence has been that there has been no disclosure by SOCA, but merely the exhibiting of documents upon which they rely to their witness statements. In a case involving disputed allegations of fraud and other criminal conduct this is unsatisfactory."

27. Mr Owen QC relies in this context upon the very large amount of material which the NCA has gathered in the course of a long investigation and upon the extensive nature of the enquiries they have made. He argues that Mr Leahy is unable to make specific requests for disclosure when he does not know what material the NCA has. He says that requiring the NCA to engage in a reasonable search for material which falls within the scope of CPR 31.6 would not be a disproportionate exercise and in any event, he argues that fairness between the parties demands it, particularly where such serious allegations are made.

28. As Mr Sutcliffe QC pointed out, there have been very extensive pleadings in this case. The Points of Claim and accompanying Schedules run to 183 pages. The Leahy defendants' Points of Defence run to 195 pages. The NCA's Reply is 47 pages long. I am in no doubt therefore that the issues have been properly identified and, as Mr Sutcliffe QC has said, the Leahy defendants already have access to a significant volume of documentation. In general terms, I think it is also correct to say that a very large part of the case concerns Mr Leahy's own affairs with which he will have been involved himself. Some documentation will never have existed because Mr Leahy has explained that for some transactions, loans and gifts from family and friends were never recorded in writing. I accept of course that these matters go back a long way in time and that the NCA investigations led them, for example, to conduct interviews with other people. The fact that the NCA has a lot of material is not a reason for adopting a procedure which could jeopardise the fairness of proceedings. However, I am satisfied that in all of the circumstances of this particular case, an order which allows for specific disclosure upon request, following the simultaneous exchange of

evidence, is the fair and proportionate order to make. Mr Sutcliffe QC indicated that a request could be made, for example, in terms of a request for all documents which relate to a particular issue. He added that the NCA investigators have a duty to disclose documents which are adverse to the NCA's case. Even without that last factor, I am satisfied that the order that I have indicated is the appropriate one.

29. The only point that the 12th defendant sought to advance as regards this hearing was that there should be an order for the sequential exchange of witness statements. As I have said, evidence is to be exchanged simultaneously.

30. Finally, costs budgeting. The court has a discretion to make an order requiring the parties to file and exchange costs budgets in any case where the parties are not required to do so by CPR r3.12 and 3.13 and Practice Direction 3E, paragraph 2(a). In this regard, Practice Direction 3E provides that: "An order for the provision of costs budgets with a view to a costs management order being made may be particularly appropriate in the following cases:…(e) any Part 8 claims or applications involving a substantial dispute of fact and/or likely to require oral evidence and/or extensive disclosure." In my judgment, the present Part 8 proceedings involve substantial disputes of fact and are likely to require oral evidence. The extent of the disclosure will depend upon the requests made.

31. As CPR r3.12(2) states: "The purpose of costs management is that the court should manage both the steps to be taken and the costs to be incurred by the parties to any proceedings so as to further the overriding objective." The NCA point out that costs budgeting is not mandatory in this case and say that there is no imperative to protect the defendants from the NCA running up disproportionate costs. It is true that their costs will be significantly lower than Mr Leahy's. That said, the NCA has not calculated its costs to date and I think that the complexity of the case is such that the defendants do have a legitimate interest in requiring the NCA to keep its costs within proportionate limits. I do not think that an order for costs budgeting need delay the case or result in undue expense.

32. I would be grateful if the parties could draw up an order which reflects the decisions I have made. Submissions about costs can be made in writing, if and in so far as costs are not agreed, and any issues as to costs will be determined without a hearing, unless I consider that one is necessary.