Neutral Citation Number: [2021] EWHC 3155 (Admin)

Case No: CO/3378/2021

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

Royal Courts of Justice
Strand, London, WC2A 2LL
23rd November 2021

Before :
MR JUSTICE FORDHAM
- -

Between :

DIRECTOR OF PUBLIC PROSECUTIONS	**Applicant**
- and -	
JURIJS BRIEDIS	
VADIMS RESKAJS	**Respondents**

- -
- -

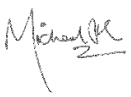
Martin Evans QC and **Tom Rainsbury** (instructed by the Crown Prosecution Service) for the **Applicant**
The **Respondents** did not appear and were not represented

Hearing date: 23/11/21

Judgment as delivered in open court at the hearing
- -

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.



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THE HON. MR JUSTICE FORDHAM

Note: This judgment was produced for the parties, approved by the Judge, after using voice-recognition software during an ex tempore judgment.

MR JUSTICE FORDHAM :

Introduction

1. There are two linked matters which have been listed together before the Court today, pursuant to directions given by McGowan J at a hearing on 20 October 2021.

2. The first matter is an application dated 28 September 2021 and issued on 4 October 2021 by the DPP for a property freezing order ("PFO") pursuant to section 245A of the Proceeds of Crime Act 2002 ("the Act"). Section 245A falls within Part 5 of the Act, which is concerned with "civil recovery" of the "proceeds" of "unlawful conduct". PFOs are one of the species of civil orders which can be made, where justified by reference to the relevant provisions of Part 5, by the High Court. They are governed by section II of the Practice Direction on Civil Recovery Proceedings (White Book Vol.2 Section 3K) ("CRP:PD").

3. The second matter is an application by the Crown Prosecution Service pursuant to section 42(3)(a) of the Act, to discharge "restraint orders" made on 1 August 2019 against the Respondents by the Crown Court, pursuant to section 41 of the Act. Sections 41 and 42 fall within Part 2 of the Act, which is concerned with "confiscation". Section 41 restraint orders are made by the Crown Court, in the context of criminal investigations and criminal proceedings. It is to the Crown Court that a section 42 application for discharge is also to be made. McGowan J directed that the second matter be listed before this Court today. That was so that these linked matters could be dealt with at the same time. Pursuant to section 8 of the Senior Courts Act 1981 the jurisdiction of the Crown Court is exerciseable by a judge of the High Court. For the purposes of today's hearing I am therefore sitting in a dual capacity.

4. One of the links between the two matters is that – as Mr Rainsbury helpfully and properly pointed out today – the continued existence of a criminal restraint order precludes property from being "recoverable" for the purposes of Part 5: see section 308(8). Unless the restraint orders are being discharged, and have been discharged, the PFO could not be granted. Another link between the two matters is that, if the restraint orders are being discharged, the risk of dissipation and associated need for the PFO, which is put forward as part of the justification for making it, arises. I will return to that point at the end.

Notice

5. This was an in-person hearing. One of the reasons for the adjournment granted by McGowan J a month ago was to ensure a proper and effective opportunity for the Respondents to be notified of these matters and able to make any representations to the Court about them. That was in circumstances where the DPP recognised that there was no justification for the PFO application being "made without notice" (s.245A(3)). I am satisfied that adequate notice and opportunity have been given. The papers have been served on the solicitors acting for both Respondents, including the detailed witness statement and exhibits which explain the basis of the application for the PFO sought.

The PFO is not opposed

6. In consequence, the CPS have been able to communicate with the two firms of solicitors who act for the Respondents in these matters. Those solicitors have in turn been able to communicate the position, which is that the PFO in the terms sought is not opposed by either of the Respondents. In the case of the First Respondent, Mr Logan of the CPS emailed the Court yesterday morning following a conversation with Mr Ramdath of Pillai & Jones solicitors, who was cc'd to that email and who had confirmed to Mr Logan that the First Respondent was not opposing the making of the PFO sought. In the case of the Second Respondent, Mr Ogunfolu of Olives Solicitors emailed Mr Logan on 19 November 2021, which email was cc'd to my clerk, confirming that the application for the PFO was not contested. Nor, naturally, is there any resistance on the part of the Respondents to the discharge of the section 41 restraint orders against them. Indeed, acceptance of the appropriateness pursuant to the statutory scheme of the making of the PFO sought carries necessarily within it acceptance that the restraint orders must first be discharged, since as I have explained that is one of the statutory prerequisites.

Hearing in private/anonymity?

7. This hearing was protectively listed using initials, as a precautionary administrative step taken by the listing office. The original versions of the DPP's three draft orders recorded that this Court would be "sitting in private". Clarification during yesterday confirmed that the DPP was not seeking a private hearing nor any order for anonymity, and would take a neutral position were any such application made. I made clear in email communications with all the lawyers during yesterday that I would consider any representations made on the question of a hearing in private or anonymity, were any such representations made. In the event no request or application was made for the hearing to be in private and no request or application was made for any anonymity. I dealt with these matters at the start of the hearing and made and communicated my decision that the hearing should continue in public and without any anonymity order. That is what has happened. I said I would deal with these matters in my judgment as I am now doing.

8. I note that PFOs do not fall within CRP:PD §11.1, which provides that hearings be in private unless the judge directs otherwise. In any event, the issues of private hearings and anonymity fall in my judgment to be addressed in accordance with a principled approach as reflected in the relevant authorities. I recognise the following: that the PFO is an interim order being sought at an early investigative stage so far as civil proceedings are concerned, there being now a civil recovery investigation and no claim yet on foot for a civil "recovery order"; that the threshold for the grant of a PFO is a relatively low one (in essence, a good arguable case that the identified property is or includes property obtained through unlawful conduct or its transactional replacement: ss.245A, 304-305); that the Respondents' Article 8 rights are in play; and that the PFO does not engage the 'higher ranking value' regarding Article 10 and what takes place 'in the criminal courts'. However, I am satisfied that the presumptive starting point is that proceedings should take place in public. Moreover, in my judgment, the public can be expected to understand that simply because an individual has been made the subject of an interim order of this kind that does not justify adverse conclusions about them. The Respondents have had sufficient time to instruct their legal representatives to make any request or application, and to substantiate it with submissions. Were there justification on the facts for them, orders for anonymity – but with the proceedings continuing in

public and a judgment being delivered without the Respondents being named – would have been a more effective and proportionate order than directing a hearing in private. I was assisted by the discussion of the principles, and of the case-law, in the judgment in R (Javadov) v Westminster Magistrates' Court [2021] EWHC 2751 (Admin), especially at §§15-16, 26-30, 46, 51-55, 65 and 70. In all the circumstances, I was and am not satisfied that a hearing in private was necessary, nor that an anonymity order was necessary, in the circumstances of the present case, in relation to either of the two linked matters with which I am dealing.

The PFO application

9. Pursuant to section 245A of the Act, the DPP (as a s.316(1) "enforcement authority") can apply to this Court for a PFO before having started proceedings for a civil recovery order (s.245A(1)). PFOs promote the statutory purpose of enabling recovery in civil proceedings of property which is or represents property obtained through unlawful conduct (s.240(1)). As is required, the PFO sought here specifies and describes the property to which it would apply (s.245A(2)(a)) and it prohibits the Respondents (s.245A(2)(b)) from selling, charging, dealing with or diminishing the value of the listed property except as permitted by the express terms of the order. Provision is made to allow written requests for the release of restrained funds to pay for legal representation (CRP:PD §7A). Provision is also made for persons affected by the order to apply to vary or discharge it on giving notice to the parties (CRP:PD §7.1(2)). I am empowered to make such an order (s.245A(4)) ("the court may make a property freezing order"), provided that statutory conditions are satisfied (ss.245A(5) and (6)). I have to be satisfied, as I am, that there is a "good arguable case" that the property to which the application for the PFO relates is or includes "recoverable property", meaning property obtained through unlawful conduct, to which statutory provisions relating to tracing and mixing are applicable (ss.305 and 306). Although I am satisfied that this is not in play in the present case, if any of the property were not recoverable property the Court would need to be satisfied that it constitutes "associated property" (s.245) and which the DPP has taken all reasonable steps to establish the identity of any persons holding that associated property. The First Respondent is known to be outside the UK but the property is itself not outside the UK or a relevant part of the UK (s.282A). The property is listed in the draft PFO. Its value exceeds the statutory threshold (s.287). It consists of: cash in different currencies; watches; cryptocurrencies of different types (all of these being seized following searches of the Respondents home addresses in the UK in the execution of search warrants in December 2018); also a BMW X5 car of the First Respondent; and about £11,000 as the cash balance of three bank accounts in names said to be aliases of the Second Respondent. As I have explained it is a statutory pre-requisite that the restraint orders would need to be discharged – as I am satisfied it is appropriate that they will be – a matter to which I will return.

10. I am satisfied that cryptocurrency, as cryptoassets, fall within the wide definition of "property" in section 316(4)(c) ("other intangible … property"), especially when viewed in the light of the purpose of these statutory powers. It would be a serious lacuna if cryptoassets fell outside the reach of this statutory scheme. In support of their inclusion, Mr Rainsbury helpfully showed me AA v Persons Unknown [2019] EWHC 3556 (Comm) [2020] 4 WLR 35 where cryptoassets (Bitcoin) were held to constitute "property" at common law. Particularly helpful is §58 of that judgment, a passage citing

§83 of a Legal Statement of the UK Jurisdictional Task Force, referring to "other intangible property" and §61 of the judgment, adopting that Statement. Mr Rainsbury accepted – and I will assume for the present purposes – that "good arguable case" focuses on "recoverable", and that I must be satisfied that this – objectively and legally correctly – is "property", as a prerequisite for being satisfied that the PFO is appropriate. I am so satisfied.

11. The basis on which the DPP contends that the listed items are all "recoverable property" was set out in a helpful and detailed witness statement of the financial investigator working for the eastern region special operations unit, Graham Hughes, which statement and exhibits have been put before the Court as written evidence (CRP:PD §5.4), together with a skeleton argument by leading and junior counsel on behalf of the DPP, and helpful oral submissions today by Mr Rainsbury. In a nutshell, following a criminal police investigation starting in 2017 an evidential picture emerged which involves the Second Respondent having been identified as controlling certain bank accounts, in various names of individuals and entities, into which it is said that various third parties were deceived into transferring substantial sums of money, which sums were then swiftly dissipated by means which included multiple purchases of foreign currency. The First Respondent has been identified as a key associate of the Second Respondent. Passports, identity documents, bank cards and other items have been seized and examined, together with the hardware wallets containing the cryptocurrencies, and various sources of evidence relied on as linking the Respondents to one another and to the alleged unlawful conduct. Reliance is placed on bank account analysis; evidence of the possession of identification documents in names other than their own; use of bank accounts opened with false identities; possession of items (including the BMW car) with values appearing to be incompatible with the Respondents' relatively modest declared earnings arising from their stated occupations; and the absence of any explanation for all these matters when they were interviewed.

12. As Mr Hughes's witness statement puts it: "On the basis of the evidence in relation to the use of bank accounts opened with false identification documents and the items found during a search of the [Respondents'] home addresses" it is believed that the Respondents "committed offences of Fraud by False Representation, possession of articles for use in Fraud and money laundering", and "there would appear to be no reason why they would be in possession of numerous false identification documents other than for the purposes of large-scale fraud".

13. The Respondents through their solicitors, as I have recorded, do not – having received the application and the materials in support of it – oppose the making of the PFO. I am satisfied that the statutory preconditions for the making of such an order are made out by the DPP, on the evidence before the Court, and that the making of the order is justified and appropriate as a matter of judgment and discretion in the exercise of my statutory power, in the public interest and for the promotion of the statutory purpose. I am going to make the PFO in the terms sought. One of the circumstances relied on convincingly as giving rise to a risk of dissipation is the fact that the Part 2 criminal restraint orders, made by the Crown Court in August 2019, cannot properly now be maintained and fall to be discharged. Therein lies one of the important links between the two matters which are before me today. Another, as I explained at the outset, is that unless discharged the restraint orders would operate to preclude the PFO by reason of section 308(8). I am discharging them for reasons which I will now explain.

Discharge of the criminal restraint orders

14. The restraint orders were made by the Crown Court under section 41 of the Act, on the basis that a criminal investigation had been started with regards to offending and there were reasonable grounds to suspect that the alleged offenders (the Respondents) had benefited from criminal conduct (s.40(2)). The position now is that the criminal investigation has been concluded (in June 2021), the case having been adopted (in May 2021) for a civil recovery investigation. The reasons for adopting that course are all addressed in the evidence before the Court. The Respondents were informed (in June 2021) that no further action would be taken against them in the criminal forum. No application was made by them to discharge the restraint orders. But the prosecution wrote to the Crown Court at the end of September 2021 explaining that there would now be an application by the CPS to discharge those restraint orders. As I have explained, that application has now come before me today. The CPS, as the person who had applied for the criminal restraint orders (s.42(3)(a)), has duly applied for their discharge. I am satisfied that discharge is appropriate in the exercise of the Crown Court's power (s.42(5)(a)), and in any event on the mandatory, statutorily-prescribed basis (on which Mr Rainsbury relied as his principal basis for the application) that within a reasonable time criminal proceedings have not started (see s.42(7)(a)). There is, as I have explained, no opposition to discharge. There is no challenge to my jurisdiction to deal with this matter. Accordingly, exercising the jurisdiction of the Crown Court, I will discharge the two restraint orders, and immediately thereafter make the PFO. As I explained at the outset, the former is a precondition to the latter, by reason of section 308(8).

Conclusion

15. It follows that there remains in this case an appropriate interim 'holding order'. The case has become a civil recovery case (Part 5) not a criminal recovery case (Part 2). What was previously a criminal investigation has, since May 2021, become a "civil recovery investigation" (see s.341(2)). The section 41 restraint orders are now discharged. The section 245A PFO is now in place. Pursuant to its terms, and in accordance with CRP:PD §5A, I am specifying that the DPP must, on or before 20 May 2022, either start a claim for a civil recovery order or apply for a continuation of the PFO. The terms of the PFO to which the Respondents agreed, and which I make, record as to costs that "the costs of and occasioned by the application [for a PFO] are reserved".

23.11.21