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Case No: CL-2017-000323; (formerly CJA No 73 of 2005)

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)

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

Date: 7th December 2017

Before :

Mr Justice Popplewell

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In the Matter of Gerald Smith

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Sebastian Kokelaar (instructed by **Richard Slade & Co LLP)** for the **Phoenix & Minardi**
Dominic Kendrick QC & Tim Akkouh (Byrne & Partners LLP) For Harbour II
Martin Pascoe QC & Rupert Hamilton (Holman Fenwick Willan LLP) For Joint Liquidators
Ian Gatt QC & Sean Upson (Stewarts Law LLP) For Stewarts Law
Kennedy Talbot QC & James Mather (SFO) For SFO
Tony Beswetherick (Stephenson Harwood LLP) For Receivers)
Dr Gerald Smith in person

Hearing dates: 6th – 7th December 2017

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APPROVED RULINGS

Mr Justice Popplewell Thursday, 7th December 2017

Ruling by MR JUSTICE POPPLEWELL

1. I am being asked on this application to extend the scope of a restraint order and the appointment of receivers to shares held principally in the name of Litigation Capital Limited, but also in some instances in the names of Dr Cochrane and/or Dawna Stickler and/or GAC Holdings. I have already held that I have jurisdiction to make the order sought, both under section 37 of the Senior Courts Act 1981 and under sections 77 and 80 of the Criminal Justice Act 1988 and I have already held that the SFO has, for the purposes of this application, established a good arguable case that the property in question constitutes realisable property of Dr Smith within the meaning of that expression under the 1988 Act.
2. The question now arises as to whether the Court should exercise its discretion to make the receivership order and if so on what terms. There are, as it seems to me, three important considerations.
3. The first is the extent to which the receivership order is necessary or desirable to preserve the property and its value so that to the greatest extent possible (a) the property or its proceeds may be applied in discharge of the confiscation order, if it be established that the property or its proceeds are realisable property of Dr Smith within the meaning of the Act, or (b) that the property or its proceeds are available to be paid to any other person who is held to be entitled to it. The Court must have regard to both those considerations under section 82(2) and 82(4) of the Act.
4. The second consideration is the extent to which the costs of the receivership will eat into the property so as to diminish or extinguish the value which is available for one or other of the two purposes which I have identified.

5. The third consideration is the extent to which such costs and expenses may ultimately be borne by an innocent third party out of property to which it is entitled being realised and used to meet those costs.

6. As to the first consideration, there is in my view a compelling case for making a receivership order. The property owned by LCL, which is a company itself owned by Dr Smith's brother, is, on the evidence, managed by Andiamo, the office services company run by Dawna Stickler for Dr Cochrane and her interests. There is good reason to suppose that she will be managing those assets pursuant to the instructions of Dr Smith, or at least in accordance with his wishes, by reason of the history of the Orb litigation and the findings that have been made as to her role and the role of Dr Smith within that litigation.

7. For reasons I have explained in previous judgments that I have given, Dr Smith, Ms Stickler and Dr Cochrane are not to be trusted. There is a serious risk, indeed a severe risk that in the absence of a receivership order the assets and/or their proceeds may be dissipated, or concealed, or reduced in value so as to be unavailable in whole or in part to meet the confiscation order if and when it be determined that those assets constitute the realisable property of Dr Smith.

8. In the end, no one sought to maintain their opposition to the making of a receivership order, save Dr Smith, and Dr Smith's objections were largely born of concerns that the receivership costs should only impinge on the extent to which the property discharges the confiscation order to the least extent possible, which is a concern which is addressed under the second and third considerations.

9. As to the second consideration, the value of the property is not capable of any very precise estimate. It is known or believed that the companies own real property, which in my judgment of 15 April 2016 I estimated to be worth about £37 million on the evidence then available. That includes the Steephill property in which Dr Cochrane resides in Jersey which in that judgment was valued at £12 million. That falls within the scope of the receivership order because the

property is owned by a company whose shares which are brought within the scope of the receivership, but there is some considerable measure of security already in relation to the property itself by virtue of the fact that the Viscount of Jersey is the administrator of the property under the terms and effect of a Jersey saisie judiciaire.

10. In addition there is Canadian property, part of which has been developed, while I am told is worth about 9 million Canadian dollars, of which half is mortgaged and half is unencumbered equity.

11. In addition, it may be that there are other assets owned by the companies of which the SFO and the enforcement receivers are currently unaware.

12. As far as the costs are concerned, the enforcement receivers have said that they are unable to give any real forecast or estimate of the costs and expenses involved in the receivership until steps have been taken to seek to get in the assets and it becomes apparent what steps are appropriate. They have identified their charging rates. Although Mr Gatt QC on behalf of Stewarts Law criticised the enforcement receivers for having failed to make an estimate, I regard that criticism as unjustified.

13. But however that may be, it was recognised by Mr Talbot QC on behalf of the SFO that there is a real prospect that the costs and expenses of the receivership will be substantial and therefore a real prospect that those substantial costs will eat into the value of the property which is the subject matter of the receivership to a substantial extent.

14. In ***the matter of Robert Capewell v Commissioners HM Customs and Excise and others*** [2004] EWCA Civ 1628, the Court of Appeal set out, in an appendix to the judgment, guidelines as to what should be disclosed to the Court when considering a receivership order and matters that should be dealt with in a receivership order. The SFO and the enforcement receivers have complied with those guidelines.

15. Pausing there, therefore, the compelling case for protecting and preserving the property and its proceeds outweighs the disadvantage that the costs of the process of protection and preservation may diminish, or even possibly extinguish, assets which are ultimately available to meet and satisfy the confiscation order.

16. What then of the third consideration, which is directed at protecting the position of innocent third parties should it be established following resolution of what is currently disputed, that those third parties are in fact entitled to the property and that the property is not available to meet the confiscation order?

17. On behalf of Stewarts Law Mr Gatt argues that the position of that firm, and indeed of all other parties who dispute that the property constitutes the realisable property of Dr Smith and lay claim to being entitled to it, should be protected by a *Piggott* condition. The effect of the condition which he seeks to have inserted into the order is one to preserve the ability of the Court hereafter to make an order that the SFO should be responsible for bearing the receivers' costs if it should subsequently be decided that property which the receivers have incurred costs in preserving and realising, and from which they have remunerated themselves, does not constitute the realisable property of Dr Smith.

18. The power to impose a condition of the kind sought has been confirmed in two cases. In the case of ***In re Piggott*** [2010] EWCA Civ 285, Lord Justice Rix said at paragraph 54 :

"In any event, and despite the decision in Capewell, it may be possible, as my Lord, Lord Justice Wilson remarked in the course of argument, in an appropriate case, for a management receivership order to be made subject to a special term that, if it should be shown in due course that property subject to the order is after all not "realisable property" but wholly in the legal and beneficial ownership of a third party, then the costs of the management receivership should be borne, not by the property, but, in the absence of any other source, by the RCPO. It seems to me to be at any rate arguable

that such a special term could be imposed by the court pursuant to section 77(8), which provides that a management receiver may be appointed "subject to such exceptions and conditions as may be specified by the court". After all, section 88(2) of the CJA 1988 provides for a statutory long-stop so that –

> "Any amount due in respect of the remuneration and expenses of a receiver so appointed shall, if no sum is available to be supplied in payment of it under section 81(5) above, be paid by the prosecutor or, in a case where proceedings for an offence to which this Part of this Act applies are not instituted, by the person on whose application the receiver was appointed."

19. In Barnes v Eastenders Cash & Carry PLC and others [2015] 1 AC 1, Lord Toulson, with whose judgment all four other members of the Supreme Court agreed, said at paragraph 124:

"It is important to remember that under section 49(9) a receivership order may be made subject to such conditions and exceptions as the court specifies. The conditions attached to receivership orders appear to have become largely standard, but the making of a receivership order should never be a rubber stamping exercise. The court has a responsibility to consider what conditions it should contain. In *In re Piggott* [2010] EWCA Civ 285, para 54, Rix LJ referred to a suggestion made by Wilson LJ in the course of argument that in an appropriate case a management receivership order might be made subject to a special term that, if it should be shown in due course that the property subject to the order was not "realisable property" of the defendant but wholly in the legal and beneficial ownership of a third party, then the costs of the management receivership should be borne, not by the property, but, in the absence of any other source, by the prosecutor. I attach as an appendix to this judgment a possible form of "Piggott condition", for which I am grateful to Lord Wilson. In my view there may indeed be cases in which such a condition would be appropriate, particularly cases in which the court can see the possibility that

payment of the receiver's expenses and remuneration out of the relevant assets might infringe a person's A1P1 rights.”

"APPENDIX.

THE PIGGOTT CONDITION.

Order made under s 49(2)(d) of POCA and Crim.PR 60.6(5)

"(1) Subject to the condition set out in (2) below, the receiver shall, in relation to any property to which the above receivership order is expressed to apply, have powers to realise so much of it as is necessary to meet his or her remuneration and expenses and to recover them out of the proceeds of its realisation.

Order made under s 49(9) of POCA

(2) The condition referred to in (1) above is that, in the event that it is hereafter determined, whether on appeal or by way of application for variation or discharge of this order, that any property to which the above receivership order is expressed to apply is not arguably held by the defendant and so should not have been made subject to the above receivership order, the powers in (1) above shall not extend to such property and, to the extent that in consequence the said powers do not enable the receiver to recover his remuneration and expenses in full or in part, the applicant for this order do pay him in respect of them."

20. Lord Hughes, who as well as agreeing with Lord Toulson gave an additional judgment, said at paragraph 131:

"I respectfully endorse Lord Toulson’s remarks at para 122. Restraint (and occasionally receivership) orders may be very valuable in promoting the aims of POCA, which may otherwise all too easily be evaded by alleged offenders once they know that they are under investigation. But such orders are also capable of causing considerable loss to the holders of assets. Applicant prosecutors, and judges asked to make such orders, need to think

constructively and critically about what is being alleged and who is said to be a party to it, and also about the balance between the benefits and the costs of the orders sought."

21. ***Barnes v Eastenders*** was a case in which a restraint order and management receivership order had been made under section 48 of the Proceeds of Crime Act 2002, which is the equivalent successor to the provisions under which orders are being made in this case, under the Criminal Justice Act 1988. The order in that case was made ex parte and extended to assets of companies other than the defendant. The order was quashed on appeal on grounds that there had not been established even an arguable case that the assets of the companies were the realisable property of the defendant. The receivers then sought an order that they could draw their remuneration from the assets of the companies. The decision of the Supreme Court was that the receivers were entitled to their remuneration, but that the CPS should bear the costs because otherwise the companies would be deprived of their property rights in breach of Article 1, Protocol 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms. The basis for the decision was that the restraint and receivership order was a disproportionate interference with such rights, in circumstances where there had been not even a good arguable case at the time the order was made that the assets were the realisable property of the defendant.
22. Although the decision was not concerned with whether a *Piggott* condition should be inserted in a receivership order at the time the order was made, it gives guidance as to the circumstances in which a court may order a prosecutor ultimately to bear the costs of the receivership, if it extends to property which is not realisable property of the defendant.
23. Lord Hughes said, at paragraph 130:

"Other cases of assets which turn out to belong to third parties must be decided on their own facts. If the original order was made when there was indeed a good arguable case for believing that the defendant under investigation had an interest in them, then the fact that it later turns out that he had none will not normally mean that the usual route for a receiver to recover his

expenses is disproportionate to the legitimate aim of confiscation legislation to preserve assets which may be needed to satisfy a confiscation order if conviction ensues. If an order was thus made, it does not seem likely that its subsequent setting aside on grounds such as that ownership turns out to be other than it appeared, or that the expense of receivership is not, on closer inspection, justified, would lead to a finding of disproportion. Underhill J's remarks about the closeness of the connection between the defendant and the third party are, on proper analysis, not independent tests of when an order can be made but reflect a factor which may well be highly relevant to whether there is a good arguable case for believing that the assets are ones in which the defendant has an interest."

24. That case was different from the current one in that there was no good arguable case at the ex parte stage that the property was realisable property of the defendant and the receivership order should never have been sought or made in respect of such property, whereas I have concluded that there is a good arguable case that the property is realisable property of Dr Smith and that a receivership order over the assets should be made, notwithstanding the dispute over whether such property in fact belongs to others and is outside the scope of the confiscation order.

25. Nevertheless, the case is authority for the proposition that the Court may order the prosecutor, in this case the SFO, rather than the receivership assets to bear the costs of the receivership and that it will likely do so if the receivership order is a breach of a third party property owner's Article 1, Protocol 1 rights.

26. There are two important points to note about the condition which Stewarts Law seek in this case. First, it has no bearing on whether the receivers themselves will be remunerated for their work or recover their expenses. It merely seeks to regulate who should ultimately bear those costs. The receivers will be entitled, under the terms of the order, to draw their remuneration and expenses from the receivership property and should the receivership property prove insufficient, it is the SFO who are responsible, as a matter of law, for those expenses under what Lord Justice

Longmore described in the ***Piggott*** case as "the long-stop provision", namely section 88(2) of the Criminal Justice Act 1988.

27. The second important point to note is that the condition which Stewarts Law seek to impose is not in the form suggested by Lord Justice Longmore in the ***Piggott*** case itself, or indeed that which is in the appendix to the judgments in ***Barnes v Eastenders***. It is not seeking a determination now that if it is ultimately shown that the property is not the realisable property of Dr Smith, the costs of the receivership should be borne by the SFO rather than the property. The condition which it is sought to insert is merely that that question should be kept open for determination at a later date, in other words to leave open the possibility that the Court might hereafter determine that that would be the just order if and when it had resolved the disputed issues against the SFO.

28. The question for me, therefore, is not whether on the material before me I should order the SFO to bear the costs, if its good arguable case proves to be unfounded, but whether there is a real prospect that the Court might do so in those circumstances. I have concluded that there is a real prospect of such a determination for a number of reasons.

29. First, the SFO have met the threshold of good arguable case, but its case that the assets are the realisable property of Dr Smith is by no means straightforward. The merits threshold of a good arguable case does not import having to show a probability of succeeding of greater than 50 per cent. On the present material the Court can already see that there are cogent contrary arguments, some of which have been advanced in some detail by other parties, and there is therefore a real prospect that others will establish property rights in the receivership assets and that they will not be available to meet the confiscation order.

30. Indeed, in this case Phoenix and Minardi have only conceded the existence of a good arguable case, for the purposes of this application only, under reservation of a right to argue hereafter that no good arguable case can be established, a reservation which the SFO were content should be

permitted. There therefore remains a possibility, at least, that the Court might conclude at some later stage not merely that the SFO's claim that the assets are available to meet the confiscation order is unfounded, but that there is in fact no good arguable case to that effect.

31. Secondly, the legislative steer in section 82 of the Act requires the Court to give priority to the property rights of innocent third parties, in priority to those of the prosecutor, in seeking to enforce the confiscation order. Section 82(2) is expressed to be "subject to" section 82(4). Those subsections were not under consideration in ***Barnes v Eastenders***, which was concerned with an order made under the subsequent POCA legislation.

32. Thirdly, the Court will be better placed to determine this issue when it has decided the disputed property rights issues. By that stage the Court will have focused on the strengths and weaknesses of the SFO's claim and will be able to judge the extent to which it was reasonable for the SFO to advance the claim, even though on the hypothesis here being considered, the SFO's claim will have failed. The Court will be in a position to judge whether the rival property claims by one or more of the other parties, which on this hypothesis will have succeeded, are claims which should have been recognised and accepted at some earlier stage by the SFO and, if so, when.

33. Fourth, the facts of this case are unusual. The claim by Stewarts Law, for example, to the property is brought on the grounds, amongst others, that it was that firm's work, for which it now seeks its remuneration, which has identified and preserved the property which is the subject matter of the receivership order. Stewarts Law argue that the SFO initially did not accept that the property was realisable property, then pursued but gave up on an attempt to enforce or preserve against it, leaving Stewarts Law to incur the fees necessary for the recovery and preservation of the assets. Stewarts Law argues that in wanting to take those assets without prioritising the fees of Stewarts Law incurred in preserving and recovering the property, the SFO wants to have its meal without paying for it. If those arguments be good and if their claim to the

property is made good on that basis, then it is not beyond argument that the order would have been a disproportionate interference with Article 1, Protocol 1 property rights.

34. Fifth, in the particular circumstances of this case, in which the issues are complex, the modified *Piggott* condition sought serves a useful purpose in adding some small measure of protection for those who may prove to be entitled to property in priority to the SFO, even if the Court does not ultimately make an order in those circumstances that the SFO should bear the receivership costs. The mere possibility of such an order being made will incentivise the SFO to have its application determined as swiftly and efficiently as possible and to exercise such influence as it has over the enforcement receivers to keep the costs to a minimum. The possibility of net pain rather than net gain is one which the SFO should at least have to contemplate in the same way as others, who are interested parties and are disputing the property rights in what they say are their assets, have to contemplate in the conduct of the application and in relation to the restriction of the enforcement receivers' remuneration and expenses to a minimum and proportionate level.

35. Lastly, it does not seem to me that the public law function which is being exercised by the SFO should be a bar to the modified *Piggott* condition which is being contemplated. ***Barnes v Eastenders*** recognises that prosecutors may be required in some circumstances to bear the costs, if the contest is between them and innocent third parties. The immunity which a prosecutor enjoys under order Rule 115(4) of the Rules of the Supreme Court from having to give a cross-undertaking for a restraint order applies only in respect of covering losses suffered by a defendant; it does not extend to losses which may be suffered by third parties.

36. For those reasons I am Persuaded to include the modified *Piggott* condition which is sought, and if it is included, then the third of the considerations which I have identified is in my view satisfactorily addressed, such that it is just and convenient to make the order as a whole in those terms.