

**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**  
**COMMERCIAL COURT**  
[2017] EWHC 3906 (Comm)

7 Rolls Buildings  
Fetter lane  
London EC4A 1NL

Monday, 6 February 2017

BEFORE:

**HIS HONOUR JUDGE WAKSMAN, QC**

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BETWEEN:

**BATAILLON & ANOR**

Claimants

- and -

**SHONE & ANOR**

Defendants

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MR J MUNRO (instructed by Direct Public Access) appeared on behalf of the Claimants

The Defendants did not appear and were not represented

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**Approved Judgment**

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(Official Shorthand Writers to the Court)

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1. HHJ WAKSMAN QC: The application before me arises out of a claim against the second defendant, Mrs Shone, which was brought by two individuals, Mr Bataillon and Mr Marquaire, who were owed upwards of \$2.5 million as a result of their dealings with Mr Shone, the first defendant.
2. The circumstances leading up to this claim are set out fully in the written judgment which I gave on 20 May 2016. That judgment in effect allowed the claimants' claim against the second defendant for relief pursuant to section 423 of the Insolvency Act 1986 on the basis that there have been transactions at an undervalue as between Mr Shone and Mrs Shone. The assets and their transfers were: first of all, a property in Windsor called Sheet Street; secondly, adjoining flats in Budleigh Salterton in Devon; and thirdly, a substantial property in Windsor known as High Trees; and then various other assets with a lesser value. Mr Shone deserted Mrs Shone and their daughter, Camille, in the unfortunate circumstances also detailed in my judgment. She remained where they had been based in Singapore where Camille was attending a private school.
3. That was the background. Between paragraphs 24 to 27 I gave my general assessment of Mrs Shone as a witness. Mr Shone of course did not appear, and made various attempts to evade paying the debts he owed to the claimants including at one stage purporting to declare himself bankrupt. It is not clear what the present position is, but I noted at paragraph 24 that she was intelligent, sophisticated and articulate, and while I had considerable sympathy for her predicament, I generally did not find her to be a reliable witness. She was prepared to embellish or spin her account to diminish the role of Mr Shone and to have various arguments to say that there were pre-existing oral agreements which would have affected the shares in the property, which I did not find to be established. I gave some examples of the unsatisfactory nature of her evidence at paragraph 25, and it is no need for me to go through the details there. I said that overall her evidence, unless supported by contemporaneous documents, was to be treated with considerable caution.
4. Having gone through all the factual circumstances in the case, I concluded first of all in relation to all of the properties that Mrs Shone had a 50 per cent beneficial interest which was hers in any event, but the transfer of the other part of the beneficial interest so as to give her purportedly the entire legal interest in the properties, said to be effected by her husband or one of the entities he controlled, for example Panamanian companies, were transactions at an undervalue and I did not accept her factual arguments that there had been prior agreements with her husband which could not be effected by section 423. I also found in relation to the more liquid assets that by and large they fell into the same category.
5. Having made those findings, it was then a question for the exercise of my discretion and it is important that I read out my findings there:

“119. Mr Tolson [Mrs Shone's then counsel] submits that I should not in fact make any order under s423, even if the claims thereunder are made out, for the following reasons:

- (1) Mrs Shone is effectively an innocent party, and has got caught up in Mr Shone's illicit activities and moreover was placed in a financially precarious position by him;
- (2) She was not actually complicit in any of Mr Shone's wrongdoing and acted at all times in good faith in reliance upon transfers of assets to her to give her and Camille some security;
- (3) The money she spent was wholly or mainly to pay expenses and liabilities of her or Mr Shone as opposed to extravagant living;
- (4) There was innocent 'change of position' on her part in reliance upon the assets she received;
- (5) At one stage at least, Mr Shone had agreed to give her Budleigh Salterton and Sheet Street and/or she could have had more than a 50% beneficial interest in them anyway as a matter of constructive trust on Stack v Dowden principles.

120. On the other hand Mr Saoul [then counsel for the claimants] submits:

- (1) While she may not have been actually complicit she knew or must have known what was going on with Mr Shone's financial position certainly from early 2014 and she participated in the transfer of High Trees after she became aware of these proceedings;
- (2) She has not always been frank with the Court and was prepared at one point to flout a court order;
- (3) The Claimants are individuals who have lost a great deal of money - it is not as if they are a corporation which can write off the loss in its accounts and there is no prospect of a full recovery against Mr Shone on any view;
- (4) According to Mrs Shone, Mr Shone has other assets in other parts of the world and she has the chance to make some recovery here with the Singapore divorce proceedings.

121. Overall, I think that Mr Saoul's points are more persuasive. The infelicities in Mrs Shone's evidence and her true state of knowledge of what Mr Shone was up to, and when, are all set out above. I do not see this as a case of change of position. Mrs Shone also has the advantage of a finding that she always had a 50% beneficial interest in

Sheet Street and Budleigh Salterton and High Trees anyway. And any arguments about constructive trust are speculative at best. Mrs Shone has also said that she is now working. I am not, in all the circumstances prepared, to make no or no substantial order at all. Indeed I propose to grant the relief sought in respect of the s423 claims which have been made out subject only to making some provision for Camille whom it can truly be said is an innocent victim of all of this. Very much as a fall back position, the Claimants said that they would be prepared to reduce the amount due to them by US\$50,000 in this regard. Camille has another year at school after this academic year and Mrs Shone's intention is to move back here in 2017 because it is too expensive to remain in Singapore. In my view the appropriate figure to retain out of monies otherwise due to the Claimants is £100,000."

6. I then proposed the heads of relief as follows:

"(1) The Claimants will receive 50% of the net equity in High Trees left after its present sale; the net equity is thought to be about £455,000 so 50% is £227,500;

(2) Equally they will receive 50% of the net equity in Sheet Street and Budleigh Salterton after their sales, the net equity is expected to be about £925,000 so 50% is £462,500;

(3) Mrs Shone must pay a further sum of £434,500 in respect of the other claims [the non-property claims], plus interest;

(4) The sum payable of £434,500 will be reduced by £100,000 to £334,500."

7. So there were a number of assumptions that were underlying that. First of all, the £100,000 was to come off the residual debt. It was not to come off the 50 per cent of the net equity in respect of the properties. Secondly, at that stage, looking at the expected net equities, Mrs Shone would have something of the order of just under £700,000, which would be her money, although that £700,000 would then have to be used to pay the residual debt. On the face of it, with that £700,000, she would be able to pay the residual debt with some monies left over, and that was the basis on which I said that that residual debt could be reduced by £100,000. In other words, that would be the money for Camille.

8. All of that was reflected in the order which was made on 27 June and the final form of order was agreed by the parties. A number of points are important. First of all, at paragraph 5 it was anticipated that the properties would be sold by 1 October. That was important because Mrs Shone had made it clear in her evidence that although as it turned out she only had a half-interest, she had been maintaining the outgoings on that property, her husband had disappeared, and indeed on day two she said in relation to High Trees, for example, at page 96 of the transcript:

“I’ve maintained the mortgage and everything else subsequently. I’ve always paid the mortgage.”

9. And so paragraph 5 said that if there was no sale by 1 October, first of all the claimants would have the conduct of the sale, and the second defendant would have liberty to apply to the court for relief concerning the ongoing mortgage payments and the insurance costs relating to the properties concerned, i.e. on the basis that she would now have to keep on making those payments for an extended period of time. Then it was said that:

“In relation to the sale, after the mortgages, the second defendant pays 50 per cent of the net proceeds to the claimants. The second defendant can have the remaining 50 per cent, subject however to paragraph 9.”
10. Before I get there I need to read paragraph 8. Paragraph 8 says, “The residual debt is £376,000”. That is in fact the £334,000 that I was referring to in paragraph 122(4) of my judgment, i.e. the residual debt net of £100,000. The amount had gone up to some extent, so the point is that the parties agreed that in paragraph 8 of my order the net residual amount, which was already taking account of the £100,000, was £376,000, and that was as it were the final amount.
11. Paragraph 9 then secured payment of that amount by saying that unless it had been paid by a particular date (and it was not) then effectively the claimants have a first call over the proceeds of sale of the properties to satisfy that further amount. Then there were costs assessed at £117,000.
12. What has happened since then is this. First of all, the properties concerned sold for considerably less than had been expected, based of course at that stage largely on what Mrs Shone had said since the claimants were at that stage not in control of any of the sales. What it meant was that where High Trees was sold for £1.55 million, it had been thought it might get something like £1.7 million. Secondly, Budleigh Salterton was sold for £565,000 and Sheet Street was sold for £790,000, and again they were considerably less than what the estimates had been given at the time, because the net equity was assumed to be £925,000 but with the considerable mortgages on both of them.
13. What then happened was that on the sale of Sheet Street, where the mortgage outstanding and other costs was something in the region of £400,000 or £431,000, although it was sold for nearly £800,000, Butterfields Bank, which was also the mortgagee on High Trees, took all of the proceeds so that it applied the balance on the outstanding mortgage on High Trees. That is because the mortgage on High Trees and the mortgage on Sheet Street had crossed default clauses, so that if one of the mortgages went into default, the other one did too, and one could apply the proceeds of sale from one property in discharge of the mortgage of the other. Contrary to what Mrs Shone had told the court, the position, it turned out, was that she had been in default of the High Trees mortgage since about February of 2016, sometime before the trial which took place in March 2016. The result of the mortgage going into default and Mrs Shone not seeking to do anything about it is that interest was applied at a default rate and indeed the bank said it was entitled to apply interest at a default rate from October

2015 when the actual term of both mortgages had expired. That by itself led to about another £54,000 worth of interest which had to be paid.

14. There were other costs as well. There were some legal costs. It is said that they were in fact to do with the bank in relation to the freezing order, but that was in the context of Mr Bataillon, who by now had control of the sales, having to make a carve-out in the freezing order in order to stop Butterfield Bank from foreclosing on the properties straight away, which would have thrown everything into jeopardy, and that legal negotiation cost him money and cost the bank money, and the bank have duly charged for it, but the result is that there would be no foreclosure until 31 March 2017. That ought to preserve the position because High Trees has now exchanged and I am told will shortly complete.
15. There is an issue also between the parties as to whether the property at High Trees was in a good state or not, but I do not find it necessary to make any findings as far as that is concerned. But Mrs Shone certainly did herself no favours because at one stage she instructed her solicitor not to exchange contracts on High Trees unless the claimants agreed that £100,000 should on any view be taken out of the proceeds and held to the order of the court. That was an unnecessary demand to make because the likelihood was, as is the case, that this court would be dealing with the matter long before any completion happened, and it could have threatened or jeopardised the entire sale.
16. The other point is that in fact the freezing order required Mrs Shone to explain where monies that she was allowed to spend came from (see paragraph 22(1) and 20(1)) and in fact none of that has happened. She has continued on the basis of money that she has received from her mother and there may be other amounts that she has received, for example a rental deposit. She said in her most recent statement that she moved out of what was described as a luxury accommodation in Sentosa in October 2015, but we have got no more details about that. We do not know how that reduced her outgoings, and it is not something that was covered by her evidence at trial.
17. The result is that whereas it was thought that, looking at it from a net point of view in respect of the properties, both parties would each have had about £700,000 to take away from the properties, leaving aside the other debts that were owed by Mrs Shone, the position now is that each side will have something like £480,000 to take out of the property, so that there is a drop for each of them of some £220,000. That has had a negative effect on both parties. First of all, it means that as far as the properties are concerned very much less can be taken by the claimants out of those properties. I should say that Mr Bataillon (to take him as an example) is in financial difficulties himself. He has lost his job in 2014. He is 49. He hopes to get another job as a fund manager but so far has been unsuccessful in finding a job. He cannot afford to send his three daughters to a private school. They are state educated at the moment.
18. On the other hand, so far as Mrs Shone is concerned, the position is now that the amount of money which she could raise from the sale of the properties would be insufficient to do anything more than simply pay the claimants the sums that they are owed and the costs that they are owed, so that unlike the original order, there was no cushion. If she has £480,000, broadly speaking, the residual debt is about £376,000 but there is interest on that and then there is a costs order on top as well.

19. The first question that I have to deal with is whether I have any jurisdiction to consider varying this order at all. The only basis could be the changed circumstances which altered the assumptions against which I made the order. I am satisfied I do have jurisdiction because the property sales values have radically altered, and I accept that point that if Mrs Shone is to discharge all of her liabilities fully to the claimant, that at least on the face of it, subject to any further assets she might have, there would not be £100,000 left for Camille. I therefore have to exercise my discretion again as far as the £100,000 is concerned.
20. First of all, I accept that there are substantial further costs which need not have arisen because of Mrs Shone's failure to deal with the High Trees default. There would have been a way of dealing with that as this case had dealt with many other interlocutory matters so as to avoid that default interest if only she had said it at the time, and that in itself caused some £54,000, and I am told also there was a default interest on Budleigh Salterton although the evidence on that is not so clear. It was said to be £10,000 but we do not have Mrs Shone's point on that.
21. But secondly, it was not my intention that the £100,000 should come off the top, as it were, for Camille's purposes in any event. As Mr Munro has said in his witness statement, this was not ring-fenced, and the reason it was not ring-fenced was because it seemed to me to be fair that if the claimants got what they were entitled to get by way of their 50 per cent from the properties, which they should have in any event, then there was a certain amount of give in the residual sum and that is where the £100,000 came from. On that footing it could be said that the order should not be varied at all, and if the result is that Mrs Shone has got very much less money to play with then that is the end of that.
22. I am not going to do that because at the end of the day I did still think that some consideration had to be given to Camille, and her position is this. She is finishing off at her private school in Singapore. There are one term's fees left which are £7,700, and she will then be coming and relocating back to England and she will be starting university. Mr Munro says it would cost £20,000 to £25,000 a year to maintain someone at university. I quite agree if one does not take into account the student loans which cover fees and which can cover accommodation as well, and, like many other students, I am afraid, that is what Camille is going to have to look to.
23. Therefore I am prepared to consider leaving some figure for Camille but I am certainly not going to leave £100,000 because the landscape has simply changed for both parties. What I am going to do is to make a carve-out of £30,000 and I am going to discuss with Mr Bataillon and Mr Munro in a moment the mechanics of that, but that is going to pay for the balance of her school fees and some of her relocation expenses and monies which can go forward for her educational purposes, but that is going to be the limit, and that is simply because I need to give what effect I properly can to that part of the judgment where I described her as an innocent victim. Otherwise I have to take into account the way in which Mrs Shone has not helped matters to date and I was not prepared to give any carve-out for Mrs Shone herself.
24. The way of dealing with this in my judgment is to take up the offer made by Mr Munro, which is that the money should be held in some suitable way by the godfather for Camille, and in particular he should be responsible for paying the school fees when he

has received an appropriate invoice from the school. Until that arrangement is put into place, that money will be held out of the proceeds of sale of High Street and otherwise those proceeds of sale are going to be paid in accordance with the order, that is to say, the 50 per cent which is due to the claimant in any event and then so much of the balance, which will probably be all of it apart from the £30,000 is going to go to defray the residual debt to the claimants.