



HIGH COURT ISSUES BARRING ORDER UNDER CPR 19.8A AND FINDS RULE EXTENDS TO CONSTRUCTIVE TRUSTS

In a recent High Court case, HFW (and a number of other firms) acted on behalf of a group of applicants who were successful in persuading the court to utilise its CPR powers to actively manage complex fraud and insolvency litigation.

The case stems from a fraud committed in 2002 by a twice-convicted fraudster, which led to the bitterly contested *Orb and ors v Ruhan* litigation (settled in 2016). The hearing itself was the latest in a series of case management conferences aimed at managing ongoing litigation between numerous parties with competing claims to the same group of assets, which came to be disputed following the settlement of the *Orb* litigation.

Amongst other things, the applicants (including the Serious Fraud Office) applied to:

1. expand the scope of the proceedings to include an additional set of assets to which they asserted proprietary and tracing claims;
2. add additional parties who were believed to own these additional assets;
3. direct any parties with a claim to these additional assets to serve statements of case setting out their claim;
4. order the applicants to advertise the proceedings in relation to these additional assets; and
5. set a period for the submission of claims by third parties in relation to the additional assets, and prevent any claims after that period without the express permission of the court.

In his subsequent order, Foxton J made numerous procedural points that were of wider significance to the conduct of complex litigation.

1. Advertising and barring order

Arguably, the most significant part of the judgment was Foxton J's decision to grant the applicants' barring and advertising order. In effect, this created a period within which any further claims to the additional assets had to be brought, bringing much needed clarity to this aspect of the litigation.

In reaching his conclusion, Foxton J considered the scope and application of CPR 19.8A, which grants courts the power to make orders binding on entities who are not party to the litigation. Such orders can only be made in respect of property which is subject to a trust. In deciding a novel point of law, Foxton J found that CPR 19.8A extends to constructive trusts.

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Having recognised that: i) beneficial interests in the additional assets were claimed by numerous parties; and ii) the additional assets were owned by parties other than those making these claims, Foxton J decided that the additional assets could constitute property that is subject to a trust and granted the order. He also cited the benefits of determining, once, and for all, the beneficial ownership of these assets.

The order required the parties to advertise the ongoing proceedings as well as the period within which any claims could be brought without the express permission of the Court. It has now been advertised on HFW's website (www.hfw.com/Court-Ordered-Notice-In-the-matter-of-Gerald-Martin-Smith-CL-2017-000323).

2. Service of Application by email

Foxton J confirmed that the applicants had, through the use of email, validly served the application. Amongst other matters influencing his decision, he cited a history of service of the documents via email between the parties and, importantly, the appropriateness of electronic communication during the Covid-19 pandemic.

3. Adjournment due to Covid-19

Amongst other arguments raised in favour of adjourning the application, a number of opposing parties based outside of the jurisdiction argued that their inability to travel to the UK (as a result of the Covid-19 pandemic) should have resulted an adjournment of the application. Foxton J was unconvinced by this argument. As the hearing was carried out remotely (on Skype for Business), his view was that the parties' location was not a relevant factor in determining whether the application should be adjourned.

4. The addition of further parties

Foxton J considered the Court's power to join additional parties to the litigation under CPR 19.2(2)(b). Under this rule, parties can be joined to proceedings if there is an issue that concerns the potential new party and the existing party that is connected to the matters in dispute. The new parties in question here were the owners of the additional assets that the applicants were seeking to add to the scope of the proceedings.

In coming to his conclusion that the parties should be added, Foxton J was persuaded both by the arguments of utility advanced by the applicants, but also by Section 80(8) of the Criminal Justice Act 1988 which requires that any person having an interest in property be given a reasonable opportunity to make representations to a court.

Conclusion

The barring order is significant as it demonstrates that CPR 19.8A (which is now confirmed to extend to constructive trusts) can be an effective tool for parties seeking to bring much needed clarity to litigation that involves the risk of an indeterminate number of future claims being brought in respect of a set of disputed assets. It has particular relevance to large-scale fraud matters.

The Serious Fraud Office and another v Litigation Capital Ltd and others [2020] EWHC 1280 (Comm) (20 May 2020) (Foxton J).

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