Neutral Citation Number: [2023] EWHC 2247 (Ch)

No: CR-2019-006796

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURT OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST

IN THE MATTER OF FX SOLUTIONS LTD (IN LIQUIDATION)
IN THE MATTER OF GLOBALFX.COM LTD (IN LIQUIDATION)
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

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

Date: 14 September 2023

Before:

Deputy ICC Judge Baister

Between :

SEAN RICHARD ORMSBY LINDSAY	**Applicant**
- and -	
(1) PENNY O'LOUGHNANE	**Respondents**
(2) JARED MICHAEL O'LOUGHLANE	

Mr Brian Hurst (instructed by **direct access**) for the **Applicant**
The Respondents appeared **in person**

Hearing date: 7 September 2023

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Approved Judgment

This judgment was handed down remotely on 14 September 2023 by prior circulation to the parties or their representatives by email and subsequent release to the National Archives

Deputy ICC Judge Baister:

1. By application issued on 11 October 2019 the applicant seeks relief against the respondents under s 212 Insolvency Act 1986 for misfeasance relating to their conduct as directors of FX Solutions Ltd ("FXS") and GlobalFX Solutions Ltd ("GFX"). The applicant brings these proceedings as a creditor because the liquidator is unable or unwilling to bring them. The full scope of the relief sought and the basis on which it is sought are set out in detailed amended particulars of claim running to 93 paragraphs. Both respondents have filed and served detailed but separate amended points of defence. The pleadings are now closed, and, as far as I can see, the application is now ready to be tried.

2. Very little need be said by way of background. FXS and GFX provided foreign exchange services. They failed as a result of inability to satisfy the claims of their customers, which led to their going into administration on 18 September 2008 and later into liquidation. Both respondents were subsequently disqualified as directors as a result of disqualification undertakings accepted on 13 April 2011 under the Company Directors Disqualification Act 1986.

3. These are not the only proceedings arising out of the collapse of FXS and GFX. Apart from the disqualification proceedings, the applicant, a customer, brought proceedings against the second respondent in deceit which culminated in a judgment of Flaux J, as he then was, of 18 March 2020, *Lindsay v O'Loughnane* [2010] EWHC 529 (QB). The applicant was largely successful. Flaux J's order appears in the bundles. My understanding is that sums due as a result of it remain unsatisfied.

4. By application in these proceedings issued on 21 July 2021, the applicant applies for summary judgment under three heads of claim. He seeks judgment for restitution of (a) £715,162 said to be due from the second respondent on the footing that that sum is payable by him, having been extracted from the company by way of an illegal director's loan account in his name; (b) £324,521.75 said to have been unlawfully transferred from an FXS Barclays Bank client account (number 70146811) to Ashley Perkins, solicitors, and used to purchase a property for the respondents, Beacon Hill, Westerham, Kent; and (c) £102,300 paid out of an HSBC client account (number 22148951) operated by GFX to the first respondent's step-father, James French.

5. CPR Part 24.2 provides that:

> "The court may give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if—
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> (a) it considers that—
>
> (i) that claimant has no real prospect of succeeding on the claim or issue; or
>
> (ii) that defendant has no real prospect of successfully defending the claim or issue; and
>
> (b) there is no other compelling reason why the case or issue should be disposed of at a trial."

Mr Hurst relies on authority too, but I think the CPR provision suffices for present purposes. Mr Hurst says that the test is satisfied in respect of all three claims in relation to which summary judgment is sought. The respondents resist the application.

6. As to the application relating to the illegal loan account, Mr Hurst relies first and foremost on a passage from the judgment of Flaux J in *Lindsay v O'Loughnane*:

> "38. Mr Frenkel said in his supplementary report:
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> > 'By the creation of this journal entry, referencing it to a company that was dormant, the defendant effectively solved two problems at one stroke. The overdrawn directors' loan account which was both illegal and carried significant adverse tax consequences was eliminated and secondly the disparity between the trade creditors and bank balances effectively disappeared … No-one outside of the Companies would be able to identify that there was anything amiss given the way that the information was presented in the reported accounts as at 31 July 2005.'
>
> 39. I accept that analysis, about which Mr Frenkel was not cross-examined. In his supplementary witness statement, the defendant sought to rely on the letter from Mr Grant of Mack Business Services Ltd to HM Revenue & Customs of August 28, 2007 which stated: "The accounts to 31 July 2005 recently submitted indicate that all Directors loans existing the previous year had been repaid". Although the defendant refused to accept in cross-examination that Mr Grant must have checked the contents of the letter with him before it was sent out, it seems to me it was a critical letter and it is inconceivable that the defendant was not consulted. The letter is very carefully worded and does not say in terms that the directors' loans had been repaid. In my judgment, the true position is that as at July 31, 2005, there remained nearly £700,000 of directors' loans to the defendant outstanding and this sum had not been repaid by the time that Mr Barnett discovered the hole.

7. Some context is needed. Mr Frenkel was the applicant's expert. The part of the report to which Flaux J was referring concerned an explanation put forward by the second respondent (the defendant in those proceedings) in defence of the contention that the loan account was illegal. The detail of the point does not matter. What does matter is Flaux J's acceptance of Mr Frenkel's analysis, which, as can be seen, included the conclusion that "[t]he overdrawn directors' loan account…was…illegal." Mr Hurst submits that the second respondent cannot go behind that finding in these proceedings, and I agree. Apart from that, Mr Hurst relies on note 10 to FXS's accounts for the period ended 31 July 2004 recording that the director's loan as it then stood was illegal under the Companies Act 1985.

8. The second respondent resists the application on the basis that the money was repaid. Although his amended points of defence make reference to "repatriating" the loan account and purport to say that Flaux J was wrong in the conclusion he reached, they

do not in terms challenge the illegality of the loan, nor can he now be heard to say the sum was "repatriated," as to which in any event there is no real evidence. The second respondent's submissions at the hearing did not add to the foregoing.

9. In those circumstances, I hold that the test for summary judgment has been satisfied and I grant summary judgment (against the second respondent only) in favour of the applicant.

10. Before turning to the two remaining heads of claim I need to say something about the duties to which the applicant says the companies and the respondents, as directors, were subject at the material times, including their duty to creditors (to the extent it applied). I do so because the status of the respondents as trustees is a major feature of the applicant's case. In fact, as appears below, I think other factors play at least as important a part for the purposes of this application.

11. FXS operated a client account held at Barclays Bank. It contracted with foreign exchange customers on the basis that it operated such an account. I need not review the applicable terms and conditions as they are set out in Flaux J's judgment at paragraph 20. The company was the real trustee, but the respondents were its directors at the material times. During the time they acted as directors, they were responsible for seeing that the company complied with its obligations to hold customer monies on trust. The applicant contends that both respondents were directors of the companies at all material times. The second respondent does not contest this, but in paragraph 3 of her amended points of defence the first avers that she was a director of FXS from 1 April 2002 to 2 November and from 28 November 2005 to 13 April 2013; and of GFX from 14 May 2004. After the hearing, but before judgment was handed down, the first respondent produced documents showing that she was appointed a director of FXS on 14 December 2005 and resigned on 13 April 2011. I accept that for present purposes and that the first respondent took something of a back seat after the birth of her first child. While they were directors, the respondents owed duties to FXS. Those included the statutory duties set out in ss 171-177 Companies Act 2006, namely to act within their powers, to promote the success of the company, to exercise independent judgment, to exercise reasonable care, skill and diligence, to avoid conflicts of interest, not to accept benefits from third parties, and to declare any interest they had in any proposed transaction or arrangement. Those duties are, generally speaking, owed to the company where it is solvent, but to creditors where the directors knew or ought to have known that the company was insolvent or bordering on insolvency. That is, I accept, a broad brush description of what has come to be called "the creditor duty," but a sophisticated examination is unnecessary in the simple circumstances of the application I have to consider, not least for reasons that will become apparent when I deal with the two remaining issues, to which I now turn.

12. On 30 August 2006, so at a time when the first respondent was a director, as was the second, £324,521.75 was transferred by CHAPS from FXS's Barclays client account to Ashley Perkins, a firm of solicitors, for use in the purchase of Beacon Hill, Westerham Kent. A document headed "Legal charge and consent to mortgage" dated 30 August 2006 records the respondents to be the borrowers; the TR1 shows that the respondents were the transferees.

13. The respondents do not suggest any basis on which they were entitled to use what must have been trust money (on either or both of the bases that it was client money or

company money). Their case is that the money extracted from the company was replaced by a payment to the company of £337,650 on 1 September 2006. The source of that sum is said to have been a Mr Richard Leahy. The respondents say that by 1 September 2006 they had sold a property, South Lodge, to Mr Leahy (although it was to remain in their names), and the payment made reflected that. The first respondent's case is that she was not involved in the dealings with Mr Leahy, which were conducted by her husband. Her understanding was that South Lodge, which was in fact owned by the respondents, was to be transferred into Mr Leahy's name "in the not too distant future." In the meantime, she understood that Mr Leahy was to become responsible for the mortgage payments due for South Lodge.

14. The problem the respondents face is that there is no evidence, beyond bare assertion, of Mr Leahy's ever having had an interest in South Lodge. In 2007 it was the respondents who instructed solicitors, Bevan Kidwell (who the applicant claims had acted for Mr Leahy in the past), to remortgage South Lodge. That is inconsistent with Mr Leahy's having earlier acquired some interest in it. Ms Haynes of that firm has admitted, it seems, that that there are no documents evidencing the purchase of South Lodge by Mr Leahy or even of an intention to do so; everything was done on the basis of trust.

15. The account into which the "Leahy payment" was made was overdrawn at the time the payment was made, another factor on which Mr Hurst relies.

16. I view with considerable scepticism the first respondent's contention that she had no idea about the source of funding for the purchase of Beacon Hill. She was a director of FXS at the time and was under an obligation to acquaint herself with how it was using its or other people's money, particularly where the transaction involved a conflict of interest (use of what was almost certainly trust money to purchase a property in which she was to have a personal interest). It is inconceivable that she was wholly ignorant of how the purchase of Beacon Hill was being funded. It was to be her property as well as the second respondent's.

17. The court is entitled to reject evidence that is manifestly incredible, but it must exercise caution before doing so. It is trite to note that, in the absence of cross-examination, the court will be slow to reject written evidence as untrue unless it can be said to be wholly incredible. I think this is a case in which, by a whisker, I should decline to take that view. Whilst there is a great deal about the respondents' case that points that way (the absence of documentary evidence or anything from Mr Leahy), there is the tentative connection with Mr Leahy through the use of solicitors also instructed by him from time to time, it seems, and the fact of a payment on some basis or other, apparently coming from or attributed to him.

18. In his skeleton argument Mr Hurst draws attention to Flaux J's assessment of the second respondent's evidence at trial. Flaux J said:

> "16. The contrast between the claimant and the defendant as witnesses could not be greater. The defendant's demeanour in the witness box was arrogant and shameless, in the sense that he was prepared to lie and did lie about the essential issues in the case. He lied about the extent to which he was aware of the hole in FX's accounts and appreciated the company was insolvent, seeking to blame Mr Barnett for never having provided a clear

> explanation of the hole. The truth is that he was well aware of the hole having improperly used client moneys from the trading account over some considerable period of time and permitted his friend Mr Leahy to do so, effectively using it as a personal bank account."

There is more. In my view, however, damning though Flaux J's findings are, I cannot simply adopt them for the purpose of this application. First, they go to the credibility of the second respondent, not the first; secondly, they were made after a trial that involved oral evidence; and finally, the court must always guard against the assumption that a party who lies about some things must necessarily be lying about other things. I do not think an earlier adverse finding on credibility after trial can displace the need for care where the evidence under consideration in a different context has not been tested in cross-examination.

19. Nor, I think, can I discount the possibility that a proper examination of the facts at trial might provide an answer to Mr Hurst's compelling propositions of law as to the ineffectiveness of repayment of any sum due into an overdrawn account. He may be right as a matter of law, but the law needs to be informed by and applied in the light of all the relevant facts.

20. In the circumstances I decline to make the primary order the applicant seeks. In my view the right course is to make the alternative order urged on me, a conditional order, directing payment into court under CPR 24.6.2, 24.6.6 and 24PD.5.1(4) and 5.2. That order should bite against both respondents, not just the second. The first respondent was a director at the relevant times and cannot escape the responsibilities that came with that simply by distancing herself from knowledge of what her husband was doing. It was for her to find out.

21. I turn finally to the payment to Mr French.

22. On 14 July 2008, £102,300 was paid from GFX's HSBC account 22148951 to the first respondent's step-father James French. The applicant says that the HSBC account, like FSX's Barclays' account, was a client account. The respondents say it was not. In support of that they rely on a letter from a Mr Weedon of HSBC to Victoria Burrows written in connection with the disqualification proceedings to which I have already referred. Mr Hurst took me to a number of HSBC documents indicating that HSBC thought of the account as a client account, even if it was not so designated on its face. For what it is worth, I think on balance it probably was a client account on which money was, or ought to have been, held on trust. I say that because GFX and FXS did the same business, so it is logical to assume that they conducted their business along the same or similar lines. The HSBC account served the same purpose as the Barclays account. There is also considerable force in Mr Hurst's submission that the two companies contracted with customers on much the same terms. Mr Hurst submits that if the HSBC account was a client account there can be no defence to the applicant's claim: quite simply the respondents used client money for personal benefit by making payment to Mr French.

23. The first respondent distances herself from this claim by saying that she was not involved in it: it was a transaction involving the second respondent and Mr French, not her.

24. The second respondent says that the transfer was a proper one, representing personal money paid into the account from the sale of property in Dubai which was then used to repay money due to Mr French as a result of the deal. In his points of defence he pleads that Mr French had invested in a third of a property which he (the second respondent) owned in Dubai. He says, "There was no formal arrangement for this deal it was a deal done with family, The properties were purchased in 2003 and were financed in Dubai." He goes on to say that he sold the particular property, and that on 7 July 2008 $850,000 was paid into GFX. He then executed an internal trade of dollars to sterling to reflect what Mr French was owed: his one third share of the proceeds of sale of the property less some expenses.

25. Mr Hurst complains about the lack of supporting documentation and the lack of evidence from Mr French who he says was never a customer of FXS or GFX. There is strength in the last point, less in the first: the second respondent is frank in his defence about the informality of the arrangement with a family member; and only lawyers believe that deals of this kind must be false because there is no paperwork but, equally, know full well that it happens all the time in the real world. Mr French may well have become a customer by reason of a one-off transaction. I cannot be sure.

26. The question to which all this gives rise, irrespective of the nature of the account concerned, is whether the payment to Mr French was gratuitous or in some other way improper, or just another currency transaction involving, as it happened, a family member. This is, it seems to me, precisely a question that, in the absence of conclusive or very compelling evidence one way or another, documentary or otherwise, cannot be resolved without oral evidence at trial. I therefore dismiss this part of the applicant's application and give the respondents leave to defend.