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IN THE HIGH COURT OF JUSTICE  
QUEEN'S BENCH DIVISION

No. IHQ18/0494

Royal Courts of Justice

Tuesday 13 November 2018

[2018] EWHC 3796 (QB)

Before:

MR JUSTICE MALES

B E T W E E N :

O'HARA

Claimant

- and -

PAUL MARKHAM

Defendant

\_\_\_\_\_  
MS DAISY BROWN appeared on behalf of the Claimant.

MR MICHAEL HARTMAN appeared on behalf of the Defendant.  
\_\_\_\_\_

**J U D G M E N T**

MR JUSTICE MALES:

- 1 The applications before me arise out of a judgment that was delivered as long ago as December 2009 following a two-week trial before HHJ Raynor QC sitting as a judge of the Chancery Division: *Karsten v Markham* [2009] EWHC 3658 (Ch). The claimant, Moira O'Hara, was then known as Moira Karsten, her married name. She has since reverted to her maiden name. The defendant is Mr Paul Markham.
- 2 The proceedings were concerned with ownership of a property which it was determined was held on trust for the claimant. The order made by the judge dated 17 December 2009 made a declaration that the defendant had since October 2000 held the property, which was a reference to 2 Codrington Mews, London, W11, on trust for the claimant subject to the interests of Nationwide Building Society as mortgagee and the defendant's trustee in bankruptcy. In addition, the defendant was ordered to pay the claimant the sum of £860,000 plus interest at the rate of 8 percent, the judgment rate. Although the judgment actually refers to the sum of £850,000, it is common ground that that is a slip and that the true figure was £860,000. The defendant was also ordered to pay the claimant's costs to be assessed on the indemnity basis although, in the event, that assessment did not take place.
- 3 The present applications are, first, by the defendant for an account to be ordered the purpose of which is said to be to enable him to know what sum is now due under that judgment. He claims various credits ought to be allowed to him against that judgment sum the result of which, he says, would be, in fact, to extinguish his liability and leave a net sum owing to him from the claimant, although any claim for any such sum, even if the premises were correct, would be long since time barred. The claimant, on the other hand, resists that application on its merits but also applies to have the application struck out as an abuse of process.

4 It is quite clear that the defendant has no intention of paying anything to the claimant. There are, for example, costs orders which have been ignored which have been made over the years as well as the judgment sum itself. The only money which the claimant has received is pursuant to execution on a property owned by the defendant in France. It is therefore somewhat ironic that the defendant should bring this application out of curiosity to know how much he owes when he clearly has no intention of paying whatever the sum is.

5 The credits which the defendant claims relate mainly to furnishings, works of art, and other chattels which he says were left in the possession of the claimant of which she has had the benefit, either by continuing to enjoy them or disposing of them, and he puts the value of those items at a sum of between £800,000 and £900,000. It was realistically accepted by Mr Michael Hartman for the defendant in the course of his reply that unless that valuation, or something like it, can be made good, then this application would be without real point. I will come to some of the detail but I have to say that I regard that valuation as entirely fanciful. It is a valuation put forward by the defendant who has been found in the proceedings before HHJ Raynor QC to be a confidence trickster and a liar. It appears to be based on unsupported assertions by him as to items which were left with the claimant. The valuations on which he relies, to the extent that they have any support other than the defendant's own say so, appear to consist of valuations of an inventory prepared by him as distinct from a valuation by an expert who has actually seen and valued the items himself. For example, one of the valuations relied upon is by a Mr Andrew Webb who may well have relevant expertise but who says in one letter, dated 2 June 2009, that, "Following instructions from Mr Paul Markham, I have valued his inventory for 2 Codrington Mews as follows" and he then gives some figures. It appears, therefore, that he was working on the basis of an inventory document produced by the defendant rather than the items themselves. Mr Hartman said that it may be that he had a photograph of the items. Even that, I am afraid, is complete speculation.

- 6 So it is hard to regard the valuation as a serious one on which to bring this application. Nevertheless, I should say something more about the circumstances in which it arises. The underlying claim was by the claimant for recovery of loans made by her to the defendant totalling £1.125 million which were made over a period of years. The claim also was for a declaration that the property known as 2 Codrington Mews was held on trust for the claimant.
- 7 The defence put forward by the defendant was that the sums in question were not loans but payments for jobs that he had done for her, but he also stated in the course of defending the claim that he had transferred all his property and chattels to a man called Julian Kingsbury on 18 April 1997 to hold on trust for his sons. This was referred to in the proceedings as “the Kingsbury trust”. The chattels for which the defendant now seeks an account are included within schedules which were put forward in the proceedings as being assets comprised within the Kingsbury trust and therefore assets which, at that time, the defendant was asserting were not in his beneficial ownership but were part of that trust.
- 8 Mr Kingsbury issued his own proceedings to recover those chattels but although the two claims were listed to be case managed and heard together, his claim was struck out for failure to provide security for costs. Nevertheless, Judge Raynor QC had to determine whether the Kingsbury trust was a genuine trust. For the reasons given in his judgment, he held that it was a sham and invention by the defendant. He described the defendant, having seen and heard him give evidence, as a completely unreliable witness whose evidence he would not be prepared to accept on any matter in dispute without incontrovertible corroborative evidence. At a later point in his judgment, he described him as an effective confidence trickster who had deceived the claimant. I should add that the judge also rejected the defendant’s evidence about the circumstances in which he had signed the trust deed making over the Codrington Mews property to be held on trust for the claimant.

- 9 The claimant's position in the proceedings was that she accepted that she held a number of items which she believed belonged to the defendant but she did not know what exactly these were. It was very difficult or impossible to match them to the defendant's schedules. She had no knowledge of what their value was and the defendant was welcome to remove them.
- 10 In the result, the claimant was held to be entitled to the recovery of the loan sums totalling £1.125 million although there would be deducted from that the agreed value of 2 Codrington Mews at the time that the trust arose in the claimant's favour less the estimated value of the mortgage of £195,000 and the trustee in bankruptcy's fees. That led to the judgment figure of £860,000 together with interest.
- 11 Following the judgment, the judge made a freezing order against the defendant which provided that he was not to remove from England and Wales or in any way dispose of or diminish the value of his assets worldwide up to a figure of £1.5 million. There was also the usual order for provision of information but the defendant did not comply with that. It is obvious that the purpose of that freezing order was to assist the claimant in the execution of the judgment. It restrained the defendant from dealing with what were said to be his assets. It obviously did not prevent the claimant from taking steps to enforce the judgment including steps against assets referred to in the order.
- 12 The claimant did take two steps to enforce the order. The first was to obtain a Writ of Fi Fa in relation to chattels in her possession. Those were ordered to be sold by the High Court Enforcement Office although it proved to be difficult to sell them. Some went to an auction house which could not sell them due to what were said to be their poor quality and which appears to have disposed of them. However, an order was made permitting sale of other items. The defendant was present and opposed an order permitting sale of items to the claimant but, in the end, his arguments were rejected and the items in question were sold by the High Court Enforcement Office to the claimant for the sum of £6,000. No higher offer

was received from anyone. I see no reason to doubt that appropriate procedures were followed in order to obtain the best price which was obtainable for them. Certainly, the defendant was unable to identify any purchaser prepared to pay more. The result therefore was that the assets which were subject to that procedure became the property of the claimant. The sum of £6,000 was transferred by the High Court Enforcement Office to the defendant's trustee in bankruptcy. That occurred because those items had been purchased by the defendant prior to his bankruptcy in 1997.

- 13 The other step taken by the claimant for enforcement of the judgment was to apply to the court in Paris for the seizure and sale of a flat owned by the defendant at 6 Rue St Louis in Paris and that led to the sale of the flat through the French court procedures. Again, the defendant participated in those proceedings and resisted the order for sale. He had the opportunity to find a buyer for the flat but failed to do so and the flat was sold under a judicial sale with the claimant receiving net proceeds in the sum of £663,890.98 on 11 September 2014.
- 14 The defendant had been restrained by the freezing order from disposing of the contents of that flat but in clear breach of the order and also in breach of the seizure order of the Paris High Court, he removed the contents of the Paris flat prior to their sale. He was prosecuted in France for that and was ordered to pay the claimant €190,000 by way of damages and also €1,090 in costs. He has not paid those sums. In addition, the claimant took contempt proceedings against the defendant in this jurisdiction but although some orders were made against him, in the end the claimant decided that to proceed further was, in effect, throwing good money after bad. The net proceeds of the Paris flat is the only sum which the claimant has received pursuant to the judgment. The current sum outstanding on the judgment debt is over £1 million with interest continuing to accrue.

- 15 The defendant's case is that a number of credits ought to be permitted to him against that outstanding liability. First, he says that the rent payable when Codrington Mews was let out after the creation of the trust in favour of the claimant ought to be credited to him. At an earlier stage of these proceedings, it was conceded on his behalf that this was a bad point since the rents were received at a time when the claimant was the beneficial owner of the property. He accepted at that time that that was sufficient to satisfy him that he was not entitled to those rents. Subsequently, he has sought permission to withdraw that concession but, in my judgment, the concession plainly was rightly made.
- 16 Next, he seeks a credit because the actual sum paid in redemption of the mortgage on Codrington Mews and by way of the fees of the trustee or the sums owing to the trustee in bankruptcy were less than the amount provided for and contemplated by the judgment. In relation to the mortgage redemption figure, what was contemplated was that the figure which the claimant would be required to pay to the mortgagee would be £195,000 whereas, in the event, it was £145,000. Therefore, says the defendant, he should be credited, in effect, with having discharged his liability under the judgment to the extent of the difference, that is to say £50,000. A similar point arises in relation to the sums due by way of fees to the trustee in bankruptcy.
- 17 However, it is absolutely clear from the discussion which is recorded following the delivery of the judgment that the figures in question were agreed figures. That is to say it was agreed that these figures should stand and go into the calculation of the judgment sum regardless of whatever the actual redemption figure might turn out to be. Likewise, with the fees of the trustee in bankruptcy. That was an agreement which the parties were entitled to make in order to arrive at a quantified figure. If the figure proved to be less than that, that is a risk that the defendant took. If the figure had been higher, that was a risk which the claimant took. There is no basis here for the judgment figure to be adjusted or for a credit to be

applied based on what the figures eventually turned out to be. The order made quite clearly reflects the intention of the parties and the judge at the time of the judgment.

18 Next, it is said that the sale of the Paris flat, pursuant to the order of the Paris court, was at an undervalue and may have been to a purchaser associated with the claimant's French solicitor. In my judgment, there is no basis here for any adjustment. The flat was sold by appropriate enforcement procedures by order of the French court. There is no material before me to suggest that proper procedures were not followed or that it would have been possible to find buyers prepared to pay more. Indeed, the defendant had the opportunity, as I have said, to find a buyer but failed to do so. In those circumstances, a sale effectively by public auction is the best possible evidence of the value of the flat at the time. There is therefore no basis for saying that the defendant is entitled to any credit based on the flat having been sold at an undervalue. Nor is there anything in the suggestion that the purchaser may have been somebody with whom the claimant's French solicitor was associated. The defendant says he would like to know to whom the flat was sold. That is, in my judgment, neither nor there so far as the judgment sum is concerned.

19 Next, the defendant says that there was a costs order made in his favour in one of the many proceedings which has followed the delivery of the judgment. He refers to a costs award in the sum of some £31,700. However, he has been unable to produce any such order. I am told by Ms Daisy Brown for the claimant who has appeared for the claimant throughout, and I have no reason to doubt, that no such order was ever made. What happened, apparently, is that Briggs J made an order that the claimant should pay costs of the defendant in bankruptcy proceedings which the claimant brought against the defendant. There was an application for a review of that order but no costs were ever assessed and that is where the matter rests. There is, therefore, simply no costs order in favour of the defendant for which he could claim credit. Even if there were, there are multiple orders against the defendant for costs which he has ignored.



- 20 That deals with, as it were, the minor points leaving aside, for the moment, the question of the chattels. Before I return to that, I should refer to the points made by Ms Brown under the heading of “Abuse of process”. She points out, correctly, that the stance now taken by the defendant is diametrically opposed to that taken by him in the two-week trial before Judge Raynor QC during which time he was disclaiming any ownership of the contents of the property and was insisting that the beneficial owner was Mr Kingsbury. There is therefore something unattractive about the point being made subsequently when there was extensive consideration of the ownership of such chattels in those proceedings.
- 21 She goes further, however. In proceedings in 2012 in which the defendant sought variation and suspension of the judgment by HHJ Raynor, the defendant made a witness statement claiming that the judgment debt was satisfied by, among other things, the antiques and works of art and furniture in the claimant’s possession which are essentially the same as the subject of the present application before me. He put a figure there of a sum sufficient to extinguish the judgment debt. The application was dismissed by Floyd J as being without merit as it appeared to be seeking to raise a counterclaim or set off not raised at trial, which was then over two years ago. Floyd J ruled that if the application was to be pursued, it was to be made on proper notice to the claimant.
- 22 There were further proceedings in 2014 the precise nature of which is not clear but which were founded on a claim by the defendant that the judgment debt was, in effect, satisfied by the credits to which I have referred and the value of the chattels in the defendant’s possession. That claim was struck out by Master McCloud as being an abuse of the court’s process.
- 23 In the result then, here we are again several further years down the line and the defendant is still seeking to rely on the claimant’s possession of these chattels as a basis on which his liability under the judgment should be or may be extinguished. As time goes by, it is

increasingly difficult to match the assertions in the various schedules and inventories which have been produced to any clear evidence of what is supposed to have been in the claimant's possession at any time. In addition to the repeated nature of these claims, it is right to say that the defendant has made unattractive assertions and threats as to the dishonesty of the claimant and the exposure to which she will be subject as a result. For example, in February 2012, in what appears to be a witness statement although it is not apparent precisely for what purposes it was produced, he referred to informing the senior partner of the firm of solicitors at which the claimant is a partner of "proven facts of dishonesty and fraud" by the claimant in her various proceedings against him and referring to taking "the necessary steps for Mrs O'Hara-Karsten to be disbarred and imprisonment for fraud". Two years later, in 2014, in an email to the claimant, he threatened her with:

“...devastating and traumatic effects on both your personal and professional lives from which you will not recover in years to come.”

24 That was a threat made both to her and to the senior partner of her firm. It referred to her "systematic acts of dishonesty and fraud" which he threatened to have exposed in the media. These messages point strongly, in my judgment, to a conclusion that the current proceedings are part of a course of conduct intended to harass the claimant. That is combined with the fact that the defendant himself, who has been found to be a fraudster and a liar and who is clearly also a contemnor, refuses to give his own address, maintains that he has no assets or income, and is therefore, in effect, threatening the claimant with substantial legal expenditure if the account which he seeks is ordered with no possibility of any recovery by her if her position is found to be vindicated. There has been, for example, no offer of security for the claimant's costs of any proceedings for an account. As a result, the claimant would be required to be expend legal costs in dealing with these claims with no possibility of recovering them. Indeed, her attempts to enforce the judgment sum, which now stands,

as I have said, at over £1 million, have, save in that one limited respect, related to the Paris flat proved unsuccessful.

25 It is, in these circumstances, hard to imagine an applicant for the equitable relief of an account coming to court with less clean hands. For these various reasons, I conclude that the current application is an abuse of process and should be struck out. I go on, however, to say that just as I have dealt with the merits of what I have referred to as the lesser points, I see no substance in the complaints which the defendant makes relating to the value of the contents. The claimant is entitled to possession of the items purchased by her pursuant to the High Court enforcement procedures. The claimant has gone to some trouble to give the best information that she can relating to the items which the defendant has put on his various schedules and inventories, and it is difficult to see how she could do better than she has.

26 The defendant submits that there is evidence that she has in her possession items which are not part of the sale pursuant to the High Court enforcement proceedings. That arises out of photographs of the interior of properties owned by the claimant which are for sale which are said to show items which belonged and still belong to the defendant. However, there is, in my judgment, no clear evidence that the items shown in the photographs are items which were not included within the order for sale made by the High Court. Although there is some scope for speculation and argument about that, the position is not sufficiently clear to justify the ordering of an account in circumstances such as those which I have described. That is even leaving on one side the question of the legal basis for any order for an account.

27 I was referred by Mr Hartman to a passage in **Snell's Equity** at paragraph 20-015 which, under the heading "The right to an account", says this:

“Before a party can be ordered to account, liability to account must be established. This liability arises immediately out of the defendant's receipt of property in an accountable capacity. The basis of the duty to account is

the fiduciary relationship. The claimant has the onus of proving that the defendant has received property into their control in circumstances sufficient to import an equitable obligation to handle a property for the benefit of another. The liability to account does not depend on the defendant having mishandled the property or otherwise breached their trust.”

28 There is in the present case, and despite Mr Hartman’s submission to the contrary, no basis here for finding any fiduciary relationship between the claimant and the defendant. If there is any relationship at all, it is a relationship of bailment in which there are perfectly good, or there were perfectly good, common law remedies available to the defendant. There is, in any event, no evidence to discharge the onus of proof that the claimant has received property into her control of anything like the value which would be required to give any point to an order for an account. Indeed, many of the items in the defendant’s schedules appear to be described in very vague terms such that it may be that they are only of very trivial value even if some others may have some greater value.

29 Accordingly, although I think the right order is to dismiss this application as being an abuse of process, I would in any event have dismissed it on its merits.

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Official Court Reporters and Audio Transcribers  
5 New Street Square, London EC4A 3BF  
Tel: 020 7831 5627 Fax: 020 7831 7737  
civil@opus2.digital*

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