

**IN THE HIGH COURT OF JUSTICE**

**QUEEN'S BENCH DIVISION**

**BRISTOL DISTRICT REGISTRY**

**(APPEALS)**

**ON APPEAL FROM THE COUNTY COURT AT BRISTOL**

**(HIS HONOUR JUDGE DENYER QC)**

**Claim Number B01BS589**

**B E T W E E N**

**JOHN MAURICE KIRK BVSc**

**Appellant**

– and –

**JEFFREY MATTHEWS**

**Respondent**

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**GROUNDS OF APPEAL**

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1. The learned Judge erred in law in denying the Appellant natural justice and the right to be properly heard by not adjourning the hearing on 10<sup>th</sup> July 2015 to a further date to enable the Appellant to file evidence in response to the Respondent's Witness Statement, served on the Appellant for the 1<sup>st</sup> time, at the entrance to the court by his counsel who informed him, "you may want to have a look at this".
2. The Appellant was therefore ambushed by the service of the Respondent's Witness Statement and had no prior opportunity to read it or to respond to it either orally or in writing with a response Witness Statement accordingly and the Appellant so informed the learned Judge that he hadn't had time to read the Respondent's Witness Statement accordingly.

3. The learned Judge further erred in law in then making specific findings of fact relating to the Respondent's Witness Statement that the Appellant had previously lied to the court when making his application for the Interim Freezing Order against the Respondent on 24<sup>th</sup> June 2015 and that had the learned Judge known this he wouldn't have made the Freezing Order in the first place.
4. Again, if it was the learned Judge's intention to make such specific findings of fact regarding the Respondent's Witness Statement he should have afforded the Appellant the opportunity of filing a response Witness Statement and as is clearly necessary to have ordered live evidence to be given with cross examination of both the Appellant and the Respondent before making determinations of hotly contested issues and facts thereby.
5. It is in any event unlawful for a court to make findings of fact on Witness statements and documents that are contentious and in dispute without live evidence and cross-examination of witnesses being afforded to each of the respective parties thereby.
6. In any event the learned Judge further erred in law in proceeding to make specific determinations of fact in relation to the Respondent's Witness Statement without hearing live evidence in order to determine the contested facts and assertions made by the Respondent in his Witness Statement accordingly.
7. The learned Judge wrongly failed to take into account the contents of the Respondent's Witness Statement which in its face appeared to be an admission as to the majority of the Appellant's claim against the Respondent, the Respondent having given the excuse that he was simply hanging on to the money as a result of allegations he made that he had entered into an agreement with the Appellant to facilitate the Appellant avoiding liability to pay a Proceeds of Crime Order, (in fact the Appellant isn't subject to such an order or ever has been).

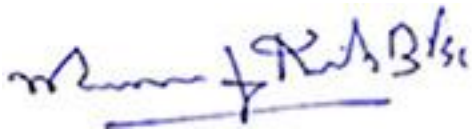
8. The Respondent in fact made no attempt in his Witness Statement to lawfully justify why he wasn't paying the Appellant his money, the inference to be drawn being that the Respondent intended to permanently deprive him of it and thereby unjustifiably enrich himself at the Appellant's expense.
9. The learned Judge further wrongly failed to take into account the contents of the Respondent's Witness Statement which on its own admission was tantamount to an admission of unlawful and dishonest conduct and further an admission to a conspiracy to defraud relating to the alleged Proceeds of Crime Order (The Appellant totally denies making any such suggestion to the Respondent in any event, and there being in place no such current Order under the Proceeds of Crime Act in respect of the Appellant.)
10. In addition, the learned Judge wrongly took into account in the exercise of his discretion and wrongly made a finding of fact that the Appellant had concealed from the court on 24<sup>th</sup> July 2015 the fact that there was a charge on his property at 49 Tynewydd Road Barry CF62 8AZ.
11. This was a completely wrong finding of fact, as the Appellant had exhibited to his 2<sup>nd</sup> Affidavit sworn on 17<sup>th</sup> June 2015 and filed with the court on the directions of the 1<sup>st</sup> learned Judge who had considered his Without Notice application the full print out of the record held at the Land Registry regarding 49 Tynewydd Road Barry CF62 8AZ, Title Number WA589437, which on page 2 showed the details of the minor charging order at Cardiff County Court regarding J A Hughes & Co. Solicitors.
12. In any event, the issue of the interim charging order was totally irrelevant regarding any remaining equity in 49 Tynewydd Road Barry CF62 8AZ, as the charge was for around £1000 approximately, and the remaining unencumbered equity in the property was around £140,000.
13. The learned Judge also failed to take into account the fact that the Appellant had further exhibited to his 2<sup>nd</sup> Affidavit details of a further property of his at Cardiff property which had no charges on it at all, which by itself gave plenty of security for any possible damages regarding the undertaking to pay any damages arising from the making of the Interim Freezing Order.

14. The learned Judge thereby had no factual basis for arriving at his conclusion that the Appellant had previously lied and misled the court in the evidence that had been filed in support of his Without Notice Application heard before the same learned Judge on 24<sup>th</sup> June 2015.
15. Further, the learned Judge further took into account that the Appellant hadn't written to the Defendant a Pre Action Protocol letter, when in fact no such Pre Action Protocol letter is currently provided for in the CPR Pre Action Conduct and Protocols.
16. A letter before Claim would have in any event been totally irrelevant in the circumstances of the present case, as the Appellant had set out the facts relating to his various visits to the Respondent who had totally ignored all of his requests for payment of the money and had shut the door in his face, indicating to the Appellant that the Respondent had no intention whatsoever to return his money thereby, thereby giving rise to suspicion that the Respondent was dishonest with the risk that he would dissipate any known assets.
17. The learned Judge further erred in law in holding that the Appellant hadn't referred specifically as to what the additional payments for £9,000 were concerned with, when he had in fact referred to the cheques that the Respondent obtained from the car dealer at the Appellant's Cardiff property at paragraphs 10 and 11 of his 2<sup>nd</sup> Affidavit thereby and had exhibited the photocopies of the cheques accordingly.
18. In all of the circumstances of the case, the findings of the learned Judge and the exercise of his discretion in discharging the Interim Freezing Order was "Wednesbury" unreasonable and/or perverse and/or irrational and/or unlawful and one which no reasonable Judge properly directing himself on the evidence before him could have arrived at.
19. Further or in the alternative, the court appears to have condoned the Respondent's fraud and thefts perpetrated by the Respondent against the Appellant.

20. Further, the learned Judge further erred in law and/or in the exercise of his discretion in purporting to summarily assess the Respondent's costs when the Respondent's legal advisers had completely failed to serve a "Written Statement" of the costs in form N260 at least 24 hours beforehand, or even at the hearing before the learned Judge in complete breach of CPR Part 46.6(1)(a) and 44PD.8(1)(a) and 9.5(2) and (4)(b).

21. Further, the learned Judge failed to take into account the failures of the Respondent's legal advisers as required by 44PD.9.6.

Signed

A handwritten signature in blue ink, appearing to read "Maurice John Kirk BVS c", written over a horizontal line.

**MAURICE JOHN KIRK BVSc**