Case No: A3/2004/0746

Neutral Citation Number: [2004] EWCA Civ 1599
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM the Queen's Bench Division (Commercial Court)
Mr Justice Lightman
[2004] EWHC 592 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Thursday, 2 December 2004

Before :

THE LORD CHIEF JUSTICE OF ENGLAND AND WALES

LORD JUSTICE CLARKE
and
LORD JUSTICE RIX

- -

Between :

Ernst Kastner	**Appellant**
- and -	
(1) Marc Jason **(2) Davis Sherman** **(3) Brigitte Sherman**	**Respondent**

- -

(Transcript of the Handed Down Judgment of
Smith Bernal Wordwave Limited, 190 Fleet Street
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Official Shorthand Writers to the Court)

- -

Jonathan Seitler QC (instructed by Dechert LLP) for the Appellant
Mr David Lonsdale (instructed by **Mills & Reeve**) for the Respondant

- -

Judgment

Lord Justice Rix:

1. This appeal is about a freezing order made by arbitrators. The order restrained the respondent in the arbitration from disposing of his home without the arbitrators' written consent. With the arbitrators' permission the claimant used the order as the basis for applying for a caution to be entered against the home in the Land Registry. The respondent promised the arbitrators that he would abide by the order, but he did not. He sold his home and decamped to the United States. Unfortunately, the purchasers' solicitor did not notice the caution, otherwise the sale would never have gone ahead. It is taken for granted that the solicitors were negligent. The purchasers were innocent of any complicity in these events. In due course a final award was made against the respondent for £237,224.50. Appropriately enough, the award was in fraud. When the purchasers sought, after some delay, to register the acquisition of their home, the caution came to light and the parties have been engulfed in litigation.

2. Does the claimant, here the appellant, have a remedy? On his behalf, Mr Jonathan Seitler QC recognises that the case is not straightforward, but submits that the law should provide one. Mr Seitler also accepts that the freezing order by itself operated only in personam and gave no security interest in the property itself. However, he submits that the effect of the respondent's promise to abide by the arbitrators' order was to give rise to a proprietary estoppel, itself amounting to a constructive trust, in respect of the home, binding on the respondent's conscience, and that this equity was in turn binding on the purchasers by reason of the constructive notice constituted by the registered caution. The court, it is said, can give effect to that equity by requiring the home to be sold.

3. The matter is complicated by the fact that the arbitration took place under Jewish and not English law.

The facts

4. I can take the facts from the clear and helpful findings in the judgment below of Mr Justice Lightman.

5. The claimant in the arbitration is Mr Ernst Kastner. His respondent in the arbitration was Mr Marc Jason. Mr Jason is also a party to these proceedings but has taken no part in them. Mr Kastner invested in Mr Jason's business, and later sought to recover his investment in an arbitration before the Beth Din (literally,

the House of Justice) of the Federation of Synogogues, a court of Jewish law. As strictly orthodox Jews it was Mr Kastner's and Mr Jason's duty under Jewish law to have their disputes resolved by a Jewish court and not to have recourse to the secular courts of this country. So, on 13 November 2001 they entered into a written arbitration agreement under which they agreed to refer their disputes to the arbitration of the Beth Din –

> "for determination by way of *Din Torah* [the law of the Pentateuch] according to the rules of procedure customarily employed in arbitrations before the *Beth Din*, and according to principles of *halachah* [the code of Jewish law] and/or general principles of equity customarily employed in arbitrations before the *Beth Din*."

The parties agreed to accept and perform the Beth Din's award.

6. Mr Kastner complained that his investment in Mr Jason's business had been procured by fraud. On 27 December 2001 the Beth Din made an award in Mr Jason's favour on the basis that no fraud had been established. However, on 25 February 2002 Mr Kastner applied to reopen the award on the basis of fresh evidence and on 27 February the Beth Din acceded to this application. On both of those days the Beth Din made a freezing order (or what in English law used to be called a *Mareva* injunction) designed to ensure that Mr Jason's sole substantial asset should remain available for enforcement should Mr Kastner's claim ultimately succeed. The order of 25 February 2002 was as follows:

> "Mr Jason is to refrain from selling his house on Holmdale Gardens until he has received written permission to do so from the Beth Din."

The order of 27 February 2002 was in these terms:

> "On the application of Mr Kastner and pursuant to the powers invested in the Beth Din by virtue of Section 48 of the Arbitration Act 1996, the Beth Din hereby orders Mr Marc Jason to refrain from taking any steps altering the status quo regarding ownership of the property…until written permission is given by the Beth Din."

7. On 1 March 2002 Mr Kastner made an application to the Land Registry to register a caution against dealings with the home. The application was made on a prescribed form "CT2" under which Mr Kastner, as the "cautioner", made a statutory declaration that he was "interested in the property" in question and went on to describe the nature of that interest by reciting the terms of the Beth Din's two orders in his favour. The caution was registered on 5 March.

8. On the previous day, 4 March, the parties had appeared before the Beth Din. On that day Mr Jason had confirmed to the Beth Din that he would abide by the order made against him on 27 February. There was apparently discussion about the caution for which Mr Kastner had applied. It may be that Mr Jason had suggested that he would exercise asserted rights under the Land Registry Act 1925 to have the caution removed (see Mr Jason's letter to the Beth Din dated 22 May 2002), but in the end Mr Jason acknowledged that he would not do so. As the Beth Din said, in a letter to the Registry dated 14 November 2002, "Following the order made by the Beth Din on 27th February, the Beth Din allowed the Claimant to register a caution in his name against the title of the Respondent's Property."

9. On 11 April 2002 in flagrant breach of the Beth Din's order and of his agreement to comply with it Mr Jason sold his home to Mr and Mrs Sherman, the respondents to this appeal. The Shermans' solicitor, Mr Brian Gordon of Farmer Millar Rabin Gordon, inexplicably failed, when he carried out his Land Registry search, to read the caution. Accordingly, in total ignorance of the caution, but with constructive notice of it, the Shermans proceeded to complete the purchase on 20 May 2002. They paid the full purchase price and Mr Jason executed the transfer to them of the home. The Shermans financed the purchase in part with a mortgage from HSBC. The balance of the purchase price, after two prior mortgages were discharged, was paid to Mr Jason. By a letter dated 22 May but in fact sent on 5 June 2002 Mr Jason informed the Beth Din of the sale. However, Mr Kastner does not appear to have learned of the sale until 28 October 2002, by which time Mr Jason had emigrated to the USA.

10. On 12 November 2002 the Beth Din made an award in favour of Mr Kastner in which Mr Jason was found to have been fraudulent and to have made secret profits. On 26 March 2003 a further award quantified damages payable to Mr Kastner in the sum of £237,224.50.

11. In the meantime the Shermans as proprietors and HSBC as mortgagee applied to the Land Registry on 23 October 2002 for registration of their title. On 13 January 2003 the assistant Land Registrar replied refusing their application on the ground of Mr Kastner's caution. In the absence of any further action on their part at that time the application was cancelled.

12. On 2 April 2003 Mr Kastner commenced proceedings against Mr Jason (the "Kastner action") to enforce the final arbitration award of the Beth Din as a judgment of the court. Having obtained an order giving him leave to enforce the award, on 7 May 2003 he obtained an interim charging order over the home. On 11 July 2003 the Shermans (a) applied to be joined to the Kastner action for the purpose of seeking the discharge of that interim charging order; and (b) commenced their own action (the "Sherman action") to vacate Mr Kastner's caution and to have their claim to be entitled to register their title as proprietors of the home recognised. The two actions were consolidated and the issues were tried by Lightman J on 30 January 2004.

13. It was only at a late stage of the submissions before the judge that Mr Seitler made an application on behalf of Mr Kastner to adjourn the proceedings to enable evidence on Jewish law to be prepared. The immediate catalyst appears to have been the realisation that there was a danger that English law by itself would not support, in the absence of an express agreement by the parties, the grant of a freezing order by the Beth Din as a provisional measure in the arbitral proceedings before it: see section 39(4) of the Arbitration Act 1996, discussed below. Moreover, whereas English law considered that a freezing order acted only in personam, Mr Seitler wished to argue on behalf of Mr Kastner that the effect of the Beth Din's order under Jewish law was to give Mr Kastner an interest in the home itself.

The Arbitration Act 1996

14. The Beth Din considered that they were acting under section 48 of the Arbitration Act 1996, to which they made specific reference in their order of 27 February 2002. Section 48(5) does indeed state that the arbitral tribunal "has the same powers as the court…to order a party to do or refrain from doing anything". However, Lightman J held that section 48 (in error referred to in his judgment as section 49) only deals with final awards and was therefore inapplicable to the Beth Din's orders, which he described as provisional awards. For these purposes he considered that section 39, on which Mr Seitler relied in the alternative, was the applicable section. Section 39 provides:

> "(1) The parties are free to agree that the tribunal shall have the power to order on a provisional basis any relief which it would have power to grant in a final award.
>
> (2) This includes, for instance, making –
>
> (a) a provisional order for the payment of money or the disposition of property as between the parties, or

(b) an order to make an interim payment on account of the costs of the arbitration.

(3) Any such order shall be subject to the tribunal's final adjudication; and the tribunal's final award, on the merits or as to costs, shall take account of any such order.

(4) Unless the parties agree to confer such power on the tribunal, the tribunal has no such power."

15. The judge therefore held that, in the absence of parties agreeing to confer such power on arbitrators, there would normally be no jurisdiction in an arbitration held under English law for the arbitrators to make a freezing order at an interim stage prior to a final award. In the instant case, however, Mr Kastner and Mr Jason had agreed that the Beth Din should apply Jewish procedural and substantive law. If therefore Jewish law permitted a Jewish court to grant an interim freezing order, then the arbitration agreement vested the Beth Din in this case with the necessary jurisdiction.

16. On this appeal no issue was raised with respect to this analysis. It would seem that, despite the broad wording of section 48(5), most commentators agree that section 48 should be confined to final awards and to substantive remedies on the merits: see *Mustill & Boyd*, *Commercial Arbitration*, 2001 Companion, at 330/1; *Gee*, *Commercial Injunctions*, 5th ed, 2004, at paras 6.045/047; *Russell on Arbitration*, 22nd ed, 2003, at para 6-130; *Harris, Planterose & Tecks, The Arbitration Act 1996*, 2nd ed, 2000, at para [48E]. There is, however, no unanimity regarding section 39. *Mustill & Boyd* consider that section 39(1) confers no power on arbitrators to make a freezing order even with the parties' agreement, because (a) there is no power to do so under section 48 and (b) section 39(1) only relates to power to order on a provisional basis "any relief which it would have power to grant in a final award": see at 315. *Harris, Planterose & Tecks* (at paras [39E] to [39H]) do not discuss the case of a freezing order specifically. *Russell* (at para 6-130) would seem to allow that the parties could agree under section 39(1) to give arbitrators power to make a freezing order. *Gee* (at paras 6.045/047) argues that the better view is that such a right exists under section 38(1) rather than section 39(1): section 38(1), under the section heading "General powers exercisable by the tribunal" states that the parties are "free to agree on the powers exercisable by the arbitral tribunal for the purposes of and in relation to the proceedings".

17. In the *Report on The Arbitration Bill*, February 1996, of the Departmental Advisory Committee on Arbitration Law, chaired by Lord Justice Saville as he then was, the following is said under the heading of para 39 (at paras 201/203):

> "201…Furthermore, as can be demonstrated by the abundance of court cases dealing with this subject (in the context of applications for summary judgment, interim payments, Mareva injunctions and the like) enormous care has to be taken to avoid turning what can be a useful judicial tool into an instrument of injustice. We should add that we received responses from a number of practising arbitrators to the effect that they would be unhappy with such powers, and saw no need for them. We should note in passing that the July 1995 draft would arguably (and inadvertently) have allowed arbitrators to order ex parte Mareva or even Anton Piller relief. These draconian powers are best left to be applied by the Courts, and the provisions of the Bill with respect to such powers have been adjusted accordingly.
>
> 202. There is a sharp distinction to be drawn between making provisional or temporary arrangements, which are subject to reversal when the underlying merits are finally decided by the tribunal; and dealing severally with different issues or questions at different times and in different awards, which we cover in clause 47. It is for this reason that in this provision we draw attention to that Clause.
>
> 203. These considerations have led us firmly to conclude that it would only be desirable to give arbitral tribunals power to make such provisional orders where the parties have so agreed. Such agreements, of course, will have to be drafted with some care for the reasons we have stated. Subject to the safeguards of the parties' agreement and the arbitrators' duties (Clause 33), we envisage that this enlargement of the traditional jurisdiction of arbitrators could serve a very useful purpose, for example in trades and industries where cash flow is of particular importance."

18. It is relevant to point out that clause 44, headed "Court powers exercisable in support of arbitral proceedings", makes express provision, subject to contrary agreement, for the courts to have for the purposes of and in relation to arbitral proceedings the same powers of making (procedural) orders as it has for the purposes of and in relation to proceedings. Such orders include (section 44(2)(e)) "the granting of an interim injunction or the appointment of a receiver". On one view, para 201 of the DAC Report is suggesting confining the making of such orders, which would include freezing orders, to the courts. On another view, para

203 of the DAC Report would permit arbitrators to make such orders provided there was agreement to that effect by the parties.

19. I mention these matters, although they are not the direct subject matter of any issue in this appeal, for two reasons. The first is that these are important topics for arbitration in general, and, speaking for myself, I would not want it to be assumed that this court has taken any particular view with regard to them. They have simply not been in issue on this appeal. The second, however, is that, on the reasoning of the judge, which in this context has not been disputed, if it had not been for the parties' agreement as to the adoption of Jewish procedural and substantive law, there would have been no power under English law for the Beth Din to have granted a freezing order at all. This is, as it seems to me, relevant when one comes to consider what might be the effect of Mr Jason's promise to comply with the Beth Din's order of 27 February 2002.

Jewish law regarding freezing orders

20. The judge found that Jewish law had its own freezing order but that it operated only in personam and did not amount to a property or security right in the asset concerned. Subject to an argument that the judge should have admitted further evidence concerning the circumstances of making the order of 27 February 2002, the judge's findings on Jewish law are not challenged, but are common ground on this appeal.

21. Thus the judge heard evidence on Jewish law from experts called by Mr Kastner and the Shermans respectively: from Rabbi Lieberman, rabbi of Edgware Adath Yisroel congregation, and from Dayan Ehrentreu, senior judge of the London Beth Din (the Court of the Chief Rabbi, a different court from the Beth Din of the Federation of Synogogues to which Mr Kastner and Mr Jason referred their dispute). They agreed that ancient Jewish legal sources (cited by the judge) support the grant of an *ikul* or injunction analogous to English law's freezing order and that the Beth Din in this case therefore had jurisdiction to make its orders of February 2002. A breach of such an ikul may be viewed very seriously and can give rise to the imposition of severe personal sanctions against the party in breach.

22. A second question of Jewish law, however, was whether the Beth Din's orders conferred on Mr Kastner any proprietary interest in the home in the nature of a charge or lien. The experts on this issue were not in agreement, and the judge preferred the evidence of Dayan Ehrentreu that the orders operated in personam only and not by way of a security or proprietary interest. A third question was

whether, following the Beth Din's final award, that award retrospectively created a lien or charge over the home in favour of Mr Kastner. In this respect again, the judge preferred the evidence of Dayan Ehrentreu to the effect that it did not. None of this is of any controversy on this appeal.

23. Nevertheless, Mr Kastner does submit that the judge erred in not permitting him to raise, by means of his second witness statement, further evidence regarding the circumstances in which the Beth Din came to make its orders and permit the caution to be registered. This evidence was, as the judge said, intended to bolster the case that Mr Kastner wanted to make on Jewish law. It was served on 9 February 2004, following the adjournment to permit evidence on Jewish law to be obtained and on the same day that the proceedings returned to the judge for further directions relating to that expert evidence. Although Mr Seitler did not add to his written submissions at the oral hearing of this appeal, he had there contended that the judge had been wrong to regard the new evidence as going materially beyond that contained in Mr Kastner's first statement. However, I would regard the essence of the judge's reasons for refusing to admit the new statement as being unassailable. He pointed out that it had already been an indulgence to Mr Kastner to permit him at a late stage to obtain expert evidence on Jewish law and that it would be unfair and unjust on the Shermans to grant him still further latitude, which would involve a further adjournment to investigate and answer the new allegations made. This was a matter of case management which was well within the province of the judge's discretion and I can see no ground on which it would be right for this court to interfere with the judge's decision.

Jewish law and English law

24. It seems to me that the foundation of Mr Kastner's case in Jewish law presents a formidable difficulty in his path on this appeal. Having failed before the judge to establish a view of Jewish law which would support a property or security interest in the home itself, he is now compelled to resort to principles of English law to make good that deficiency. In effect he has to accept that under Jewish law the orders of the Beth Din gave him no more than an in personam remedy against Mr Jason: but he wishes to say that on that basis English law would nevertheless recognise an interest in land such as would support a caution at the Land Registry or some other remedy binding not only on Mr Jason but also on the Shermans. He does so, moreover, from a situation where he raises no challenge to the judge's view that, outside the parties' agreement to resort exclusively to Jewish law, the Beth Din simply had no power under English law, to be found in the Arbitration Act 1996, to make the orders which they made. That is, as it seems to me, a formal bar at the very threshold of his argument. There is also the more fact sensitive point that if he had wished to say, as he now does, that the combination of the Beth Din's orders and Mr Jason's promise to abide by them amounted to a proprietary estoppel or constructive trust or a special agreement to charge the home with the ultimate liability of Mr Jason under a final monetary award, then it

was his responsibility to make good that case or a suitably analogous one under Jewish law.

25. Mr Seitler addressed no submissions to the court as to why in such circumstances English law should, even if it could, go beyond the limitations, as for present purposes we must view them, of Jewish law. Of course, against the background of Mr Jason's fraudulent conduct and contumelious disobedience of the Beth Din's orders as well as of the constructive notice afforded to the Shermans by the caution and of their own solicitor's negligence, Mr Seitler's general, clear-eyed and candid plea was that he was looking for a legal peg on which to hang the remedy to which Mr Kastner should in justice be entitled. On this basis, he approached the matter as though the Beth Din's orders and Mr Jason's promise to abide by them were the orders of or an undertaking given to an English court. I will consider those submissions below. My present concern, however, is by what means one proceeds from Jewish law, which ex hypothesi gives no remedy *in rem*, to English law which it is asserted does.

26. If the orders in question were those of a foreign court, then the relevant rules would, I suppose, be those of the English law of conflict of laws relating to the recognition or enforcement of foreign judgments. Where English or foreign arbitration awards are concerned, the normal process would involve an application to the court for leave to enforce the award as a judgment of the English court (see section 66 of the Arbitration Act 1996). There are special provisions relation to the recognition and enforcement of Geneva Convention and New York Convention awards (sections 99ff). Alternatively, an application could be made under section 44 of the 1996 Act to the court for it to exercise its own powers in support of arbitral proceedings, at any rate if the arbitral tribunal has no relevant power or is unable for the time being to act effectively (section 44(5)). Thus, on the current hypothesis that an English arbitration conducted under Jewish law could not grant interim relief other than in personam, an application might have been made, if that was permissible in such circumstances under Jewish law, to the court to exercise its powers under English law. Similarly, application can be made to the English court for its aid at an interim stage in support of foreign proceedings: see section 25 of the Civil Jurisdiction and Judgments Act 1982 and the Civil Jurisdiction and Judgments Act 1982 (Interim Relief) Order 1997 (SI 1997 No 302). None of these remedies, however, are invoked or relevant in the present case.

27. Indeed, as I understand Mr Seitler's position, he accepts that in English law, as was found by the judge to be the position in Jewish law, an ordinary freezing order would not entitle a party in whose favour it was granted to say that he had a property or security interest in the respondent's assets in question: see *Cretanor Maritime Co v. Irish Marine Management Ltd* [1978] 1 WLR 966, *Flightline Ltd v. Edwards* [2003] EWCA Civ 63, [2003] 1 WLR 1200. He also accepted that, whatever may be the remedies for contempt of court, that remained the case even

where notice of a freezing order is given to a third party. There is also authority to the effect that the same rule applies where a freezing order fixes on a single specified asset and even where that asset is an interest in land: see *Stockler v. Fourways Estates Ltd* [1984] 1 WLR 25. What Mr Seitler relies on as making the critical difference in the present case, however, is Mr Jason's promise to abide by the orders of the Beth Din. It is this which he submits takes this case out of the ordinary run of a standard freezing order and entitles him to submit that there was a proprietary estoppel or constructive trust or an agreement to charge the home with the obligation to meet any final award in Mr Kastner's favour.

28. In these circumstances, Mr Seitler seeks, I think, to escape the difficulties of Jewish law completely. I say "I think", for these matters were not canvassed expressly. Since he does not rely directly on the Beth Din's ikul, but on Mr Jason's promise, he would perhaps say that he is not embarrassed by the absence of the Beth Din's power to make any interim order in English law, and he perhaps is to be regarded as asking this court to regard Mr Jason's promise as though it was an English law promise; or, even if it were a Jewish law promise, as having the effect that it would have in English law on the presumption that English law is the same as foreign law in the absence of any evidence to the contrary.

29. There were no formal pleadings below, and the matter proceeded by reference to witness statements and skeleton arguments, and then, at a later stage, by reference to expert reports on Jewish law. Mr Kastner's witness statement is, appropriately, merely a record of the evidence which he wished to give, amongst that the evidence that Mr Jason "confirmed, before the three arbitrators, the registrar of the Beth Din, my lawyer and me, that he would abide by the Orders". Mr Seitler's skeleton (dated 26 January 2004) for the original hearing before the judge relied primarily on the argument that Mr Jason's sale of his home was a fraud on Mr Kastner and that equity will not allow a statute (the Land Registry Act 1925) to be used as an instrument of fraud; and secondly on Mr Jason's undertaking to abide by the orders of the Beth Din as giving rise to a proprietary estoppel or constructive trust. He made those submissions free of any reference to Jewish law, but he went on in his skeleton to submit that the Beth Din had power to make its orders under section 48 of the 1996 Act and that it must be assumed that it had exercised its powers under Jewish law correctly (citing the maxim *omnia praesumuntur rite esse acta*). On behalf of the Shermans, Mr David Lonsdale's skeleton submitted, first, that there was no power under the 1996 Act to make a freezing order, secondly, that a freezing order did not create an interest in land, and thirdly that it was impermissible to invite the court to accept propositions of Jewish law unsupported by expert evidence.

30. Those submissions effectively drove Mr Seitler to seek to support his case as a matter of Jewish law. The expert reports on Jewish law were served seriatim rather than exchanged. On behalf of Mr Kastner, first Rabbi Lieberman made his report dated 9 February 2004. In it he said that he had been asked to give his

opinion on four questions: (1) whether the Beth Din had jurisdiction under Jewish law to make its orders; (2) what sanction was available in Jewish law for a breach of those orders; (3) what was the effect in Jewish law of the Beth Din's orders "and/or Marc Jason's agreement to be bound by them…?"; and (4) as to the obligation under Jewish law for Jewish people to have their disputes determined by a Beth Din rather than by secular courts. As to question (3), Rabbi Lieberman did not found upon Mr Jason's agreement to be bound as a separate source of the creation of a property or security interest in the home, but rather referred to it (merely) as supporting the inference that the requirements for creating such an interest (in Jewish law, a *shibud* or mortgage), namely public knowledge of the identification of an asset as the source, and thus the mortgaged source, of an obligation to repay, had been met.

31. In response, Dayan Ehrentreu approached the same four questions. I have already stated that Dayan Ehrentreu's views as to the critical question (3) were that the ikul did not operate *in rem* but only *in personam*. He also stated (at para 5 of his report) that "The fact that Mr Jason agreed to abide by the terms of the ikul did not create a proprietary interest in Mr Jason's property."

32. For the purposes of the adjourned hearing Mr Seitler drafted two further skeleton arguments, one "in relation to expert evidence" and the other, the more substantial of the two, containing a recast of his submissions in general. In the former, he submitted that the significance of the expert evidence was that it showed that the effect of Jewish law was to create a mortgage over Mr Jason's home and this assisted the inference that the purpose of the ikul was to ensure that the home itself would be the source of payment of Mr Jason's ultimate debt to Mr Kastner. In the latter, he founded himself on Jewish law and in particular on Rabbi Lieberman's expert report; but he also went on to make submissions about English law and English authorities. However, his starting point always remained the ikul and Mr Jason's agreement to its imposition (at para 2). In response Mr Lonsdale also put in a further skeleton in which he submitted that if Dayan Ehrentreu's views were preferred, then no interest in land had been created; but that even if Rabbi Lieberman's views were preferred, Jewish law laid no claim to bind any third persons such as the Shermans who had not themselves agreed to be bound by Jewish law.

33. In the event, Lightman J preferred the views, where they differed, of Dayan Ehrentreu. As a result, Mr Kastner's case in Jewish law, including his reliance in that regard on Mr Jason's agreement to abide by the Beth Din's orders, failed. It seems to me that in these circumstances English law cannot give to Mr Kastner an independent remedy against the Shermans, if at all, unless at the very least it is submitted and established that English law will provide a remedy in equity, ie *in rem*, against third parties with constructive notice of breach of a freezing order which does not itself create any property or security interest. However, Mr Seitler does not make that submission. He accepts that he must show an interest in the

home, by way of proprietary estoppel, constructive trust or charge, and he seeks to do so under English law, not Jewish law. In my judgment, however, he cannot do that. Even if he were able, against the background of this litigation, to rely on the presumption that foreign law is the same as English law in the absence of evidence to the contrary, in this case there is evidence to the contrary, which has been accepted by the court below and is not in this court the subject of challenge.

34. It seems to me that for these reasons alone this appeal must fail, however much one might excoriate the fraud of Mr Jason and regret the possible absence of a remedy for Mr Kastner.

35. In the court below, Lightman J, having rejected Mr Kastner's case under Jewish law, went on, in an obiter portion of his judgment, to consider the position if he had held that Jewish law did give to Mr Kastner a charge or lien binding on the Shermans. Even so, he concluded that English law would have given Mr Kastner no remedy. He gave two reasons. The first was that the Beth Din was not requested and thus was not authorised to make a declaration that the home was subject to a charge. The second was that the Shermans were not parties to the arbitration and thus, although as it happened also orthodox Jews, could not be bound since they had not agreed to be bound by Jewish law.

36. These matters were not canvassed before us. I would be reluctant to think that, if the Beth Din's orders had created a property or security interest under Jewish law, that could not be given effect under English law.

37. Nevertheless, for the reasons stated above, in my judgment English law cannot transmute a Jewish law freezing order which operates only in personam, and continues to do so despite Mr Jason's agreement to comply with it, into a remedy which provides Mr Kastner with an equitable remedy operating as a proprietary or security interest against third parties, even those with constructive notice of the order. On this basis, Mr Kastner's appeal must fail.

English law

38. Since, however, the matters of English law relied on by Mr Seitler in his submissions on behalf of Mr Kastner have been developed by him, I will briefly give my views upon them.

39. The background to Mr Seitler's submissions is the caution which Mr Kastner had entered in the Land Register in respect of Mr Jason's home. This was effected pursuant to section 54 of the Land Registration Act 1925, which provides as follows:

> "(1) Any person interested…howsoever, in any land or charge registered in the name of any other person, may lodge a caution with the registrar to the effect that no dealing with such land or charge on the part of the proprietor is to be registered until notice has been served upon the cautioner…
>
> (2) A caution lodged under this section shall be supported by such evidence as may be prescribed."

40. Mr Seitler accepts that an interest in Mr Jason's home was necessary for the proper lodging of a caution and that Mr Kastner lacked such an interest in the absence of Mr Jason's promise. His fallback submission based upon that promise, albeit expressly accepted as not being his best point, was nevertheless that Mr Kastner's case could be brought within the exceptional situation discussed in but rejected on the facts of *Flightline Ltd v. Edwards* [2003] EWCA Civ 63, [2003] 1 WLR 1200. It was there reaffirmed that a freezing order created no security rights in the absence of express provision and that in order to create such security rights it was necessary to find "that an obligation has been imposed in favour of the creditor to pay the debt out of the fund", to cite the words of Lord Wrenbury in *Palmer v. Carey* [1926] AC 703 (PC) at 707, adopted verbatim by Lord Wilberforce in *Swiss Bank Corpn v. Lloyds Bank Ltd* [1982] AC 584 at 613. If that test was not satisfied on the facts of *Flightline v. Edwards* it is impossible to see how they could be satisfied on the present facts, even if the findings of Jewish law discussed above were ignored. There was nothing about the facts of the present case, as found by the judge, to suggest that the Beth Din's orders were other than the equivalent of an ordinary freezing order, albeit relating to a specific asset. In *Stockler v. Fourways Estates Ltd* [1984] 1 WLR 25 there was an attempt to register a freezing order over land as an order "for the purpose of enforcing a judgment" pursuant to section 6(1) of the Land Charges Act 1972, but it was held that it was no such thing and the registration was vacated. Mr Jason's promise merely reproduced his existing obligation to comply with the Beth Din's order. Mr Seitler alternatively submitted that the interest in land in the present case was Mr Kastner's right not to have the home sold without the authority of the Beth Din: but that, it seems to me, is just another way of saying what a typical freezing order amounts to.

41. Mr Seitler's principal submission, however, was that, even if there was otherwise no interest in land, nevertheless Mr Jason's promise to abide by the Beth Din's orders created a proprietary estoppel or constructive trust binding upon the Shermans, who had constructive notice of the orders by reason of the caution. In support of this submission he relied on *Gillett v. Holt* [2001] Ch 210 and *PW & Co v. Milton Gate Investments Ltd* [2003] EWHC 1994 (Ch), [2004] 2 WLR 443.

42. In *Gillett v. Holt* a landowner had made repeated promises, over decades, in the presence of his family, to his farm manager that the latter would succeed to his farming business including the farmhouse. Unfortunately, relations between landowner and manager ultimately deteriorated, the manager was dismissed, and lifetime dispositions were made to a solicitor and a will drawn up in his favour. The manager sought a remedy in equity based on proprietary estoppel. The facts were extremely strong, both in relation to the assurances on the one side and reliance and detriment on the other (at 234/5). Robert Walker LJ said that these facts provided the manager with "an exceptionally strong claim" on the landowner's conscience (at 234B). In such circumstances it was for the "flexible doctrine" of proprietary estoppel to provide a remedy:

> "…the fundamental principle that equity is concerned to prevent unconscionable conduct permeates all the elements of the doctrine. In the end the court must look at the matter in the round" (at 225D).

43. Equity could fashion a remedy to the circumstances. It would do so by requiring the landowner to convey to the manager the freehold of the farmhouse with sufficient capital (assessed at £100,000) to compensate him for his exclusion from the rest of the farming business (at 235/8).

44. In *Milton Gate* a tenant sought to operate a clause in its lease which permitted it to determine the lease on 12 months notice "subject to any permitted underleases" and to do so without penalty if 75% of the property was underlet for an unexpired term of at least five years. In the event, Neuberger J held that the normal rule that determination of a head lease destroyed any sublease prevailed: although an estoppel by convention could have operated as between landlord and headlessee to prevent the landlord from saying against the head lessee that the subleases failed, and although such an estoppel would normally bind successors in title and sublessees, nevertheless, in circumstances where there had been a mutual resiling from that convention, it was not binding on the sublessees; and the head lessee was thus liable to pay the penalty under the break clause. Mr Seitler relied on the passage in the judgment to the effect that such an estoppel would normally bind respective successors in title. Neuberger J continued (at para 196):

> "If that is correct, then it appears to support the conclusion that a subtenant is also bound, at least provided his subtenancy does not predate the coming into being of the convention. In my judgment, an estoppel, and therefore a convention, which unambiguously relates to the relationship of landlord and tenant, and can only fairly work if it extends to the tenant, will generally do so, particularly if the subtenant had notice of it. In the present case, the convention is very much tied to the landlord and tenant relationship and relates directly to the underleases."

45. In my judgment, however, these citations are a weak basis for Mr Seitler's submission. In *Gillett v. Holt* the landowner's conscience was directly affected, and reliance and detriment were distinctly proved. In the present case, however, the Shermans have made no promise and there is no finding, and there was no investigation, of any detriment or reliance on the part of Mr Kastner. The only "fault" on the part of the Shermans is that the caution on the Register provided them with constructive knowledge of the Beth Din's orders in circumstances where those orders, because they gave rise to no interest in land in themselves, did not entitle Mr Kastner to a caution in the first place. Mr Jason's promise to abide by those orders added nothing essential to his obligation and was in any event implicit in his agreement to arbitrate. Moreover, but for the solicitor's negligence, the Shermans would have known of the caution, invalid as it was, and, on the judge's findings, would never have proceeded with their purchase. Mr Seitler relies on *Milton Gate* as demonstrating that an estoppel may bind a third party: but that was a case in which the sublessees were regarded as being in the same position as successors in title. I do not regard either of these cases as providing a foundation for the submission that the Shermans' conscience was bound in equity by a proprietary estoppel.

46. In these circumstances it is not necessary to consider Mr Lonsdale's submission that in any event Mr Kastner cannot rely on the caution where it was applied for (a) at a time, 1 March 2002, before Mr Jason had promised, on 4 March, to abide by the Beth Din's orders and (b) on a prescribed form (see sections 3(xix) and 54(2) of the Land Registration Act) in which there had been no mention of Mr Jason's promise. Nor is it necessary to consider the submission that Mr Kastner's proper remedy was to apply for an inhibition under section 57 of that Act. It has not been necessary therefore to consider the prescribed conditions under which such an inhibition can be applied for.

47. It seems to me that, albeit Mr Jason's promise did not amount to an obligation to pay any future award out of the proceeds of the sale of his home (*cf Palmer v. Carey* and *Flightline v. Edwards*), nevertheless, to the extent that it might be regarded as a promise to maintain his home as being available for enforcement of

any award against him, it would then resemble a charge. Indeed, that is the effect which Mr Seitler wishes to give it, and the remedy which he seeks to impose pursuant to doctrines of proprietary estoppel or constructive trust. If however Mr Jason's promise had amounted to a charge, it would have had to have been in writing and to have been registered. It should not fare better as a quasi-charge. If it had been a charge, then without registration it would have failed to take priority over the Shermans' interest as purchasers even though they had notice of Mr Jason's promise: see *Midland Bank Trust Co v. Green* [1981] AC 513 at 530.

48. Finally, Mr Seitler submits that the doctrines which he has prayed in aid should be viewed as providing a remedy in this case so as to prevent an unjust lacuna in the law. It would indeed be regrettable if the brazen non-compliance of a party subject to a freezing order could render such an order useless where he sells to a third party purchaser with knowledge of the order. However, it is worth pausing to consider the overall context. It is not suggested that the Shermans were in any way complicit with Mr Jason's fraudulent evasion of the Beth Din's orders. If they had been, then it may be that they would have been subject to the penalties available for contempt of court, as Mr Jason certainly would have been (subject to his flight abroad), if the orders in this case had been made, or reduplicated, in the form of an order of the English court. Those penalties, however, while adding deterrence to the enforcement of the court's orders, provide no compensation to a party injured by the contempt of court. In such circumstances, it is worth recalling that the essential difficulty in this case has been that an interim freezing order, prior to judgment or award, does not provide a security interest. That it does not do so, however, is part of the law's balancing act under which a claimant can invoke the aid of the court before proving his case to judgment but a defendant, prior to judgment, is not yet the proven debtor (or rogue) that the judgment may ultimately demonstrate him to be. Once judgment has been obtained, there is no difficulty in enforcing it by obtaining a charging order over the judgment debtor's property. Moreover, the obtaining of judgment against a defendant without means is not an uncommon disaster, even if it is the purpose of a freezing order to anticipate and prevent the case of the defendant who deliberately makes himself judgment-proof. Nor is it suggested that the Shermans had actual knowledge of the Beth Din's orders. If they had done, it is common ground that they would not have proceeded.

49. Ultimately, therefore, this misfortune has occurred on the particular facts of this case because of the solicitor's negligence. It had been taken as axiomatic before us that the Shermans' solicitor, although owing duties in both contract and tort to his clients, owed no duty of care to Mr Kastner: possibly because of *Customs and Excise Commissioners v. Barclays Bank plc* [2004] EWHC 122 (Comm), [2004] 1 WLR 2027. The Commissioners, in whose favour a freezing order operated, there sued a bank which had notice of the order but had permitted transfers to be made out of accounts designated in the order. However, whether that decision was correct was the subject of an appeal which was heard shortly before the hearing of this appeal. The court of appeal has very recently reversed the first instance decision and held that Barclays Bank did owe a duty of care to the

Commissioners: [2004] EWCA (Civ) 1555 (22 November 2004). We are not, however, here concerned with the ramifications of that decision for this case.

Conclusion

50. In sum, this appeal, which arises out of an arbitration conducted under substantive and procedural Jewish law, must fail on the arguments addressed in it as a matter of findings of Jewish law. On those arguments, English law is not relevant for the purpose of discovering a remedy which Jewish law does not provide. That is enough to decide this appeal. However, even if the matter had been looked at as a matter of English law, I am unable to see that the result, on the arguments made, would have been different. This has been an undoubted misfortune for Mr Kastner, but the litigation has been a misfortune for the Shermans too: albeit mitigated, as I understand it, by the concern of the solicitor's insurers, who have taken over the conduct of the Shermans' defence.

Lord Justice Clarke:

51. I agree.

The Lord Chief Justice:

52. I also agree.