

Judgment 20/2011

**HSBC Trustee (Guernsey) Limited (as Trustee of
the Glencoe Investments Trust) v Kings
(Civil Action File 1143) – Royal Court –
8th July 2011**

Trusts – application by the Trustees for rectification of a previous share transfer. Order applied for granted.

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

The 8th day of July 2011 before Richard Southwell, QC, Esquire, Lieutenant Bailiff, sitting alone

HSBC TRUSTEE (GUERNSEY) LIMITED (the “Applicant”)

(AS TRUSTEE OF THE GLENCOE INVESTMENTS TRUST)

-V-

DAVID CUNNINGHAM KING

LADINA JEAN WYLDE KING

TRACEY WARDLE KING

LAUREN CUNNINGHAM KING

CRAIG ANDERSON KING

ROSS WYLDE KING (an Infant)

(the “Respondents”)

Whereas on the 8th day of July 2011 the Lieutenant Bailiff considered an application on behalf of HSBC Trustee (Guernsey) Limited (“the Applicant”) (as Trustee of the Glencoe Investments Trust) (“Glencoe”) for leave to use the Trust Fund of Glencoe (including any moneys beneficially owned by any company directly or indirectly owned by the Trustee as part of the Trust Fund) to finance all of the costs properly and reasonably incurred in the pursuance of an application before the Courts in the Republic of South Africa for the rectification of the share register of Micromega Holdings Limited (“Micromega”) to show Rossenfeld Holdings Limited (“Rossenfeld”) as the owner of shares (totalling

52,801,921 shares) of the said Micromega which were transferred away from the said Rossenfeld on 15 May 2002;

And whereas Lieutenant Bailiff Southwell, heard thereon Advocate C.H. Edwards, Counsel for the Applicant, and Advocate N.J. Barnes, Counsel for the First Respondent, and ordered that:

1. The Applicant be given leave to use the Trust Fund of Glencoe (which term for these purposes includes any monies beneficially owned by any company directly or indirectly owned by the Applicant as part of the Trust Fund) (the “**Trust Fund**”) to finance all of the costs properly and reasonably incurred in the pursuance of the application, before the courts in South Africa, for the rectification of the share register of Micromega Holdings Limited, to show Rossenfeld Holdings Limited as the owner of certain shares that were transferred on 15 May 2002;
2. The Applicant may pay the costs of this Application out of the Trust Fund on an indemnity basis.
3. There be liberty to the trustee and all or any of the beneficiaries to apply for relief concerning the subject matter of this order.

The Lieutenant Bailiff this day handed down the reasons for the said orders in the terms attached hereto.

A J NICOLLE
Her Majesty’s Deputy Greffier

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

ORDINARY DIVISION

**HSBC TRUSTEE (GUERNSEY) LIMITED
(AS TRUSTEE OF THE GLENCOE INVESTMENTS TRUST)**

(Applicant)

-v-

**DAVID CUNNINGHAM KING
LADINA JEAN WYLDE KING
TRACEY WARDLE KING
LAUREN CUNNINGHAM KING
CRAIG ANDERSON KING
ROSS WYLDE KING (an Infant)**

(Respondents)

Judgment handed down: 8th July 2011

Before Lieutenant Bailiff Richard Southwell QC

JUDGMENT

1. The background relating to the Glencoe Investments Trust (“Glencoe”), the trustee HSBC (Guernsey) Limited (“the Trustee”), the beneficiaries including in particular Mr David King, and the legal principles relating to a trustee’s Beddoes application for the directions of the Royal Court, were set out by me in a judgment in July 2009 and subsequent judgments, and I do not here repeat what was there set out.
2. This is an application by the Trustee for leave to use the Trust Fund of Glencoe (including any moneys beneficially owned by any company directly or indirectly owned by the Trustee as part of the Trust Fund) to finance all of the costs properly and reasonably incurred in the pursuance of an application before the South African Courts for the rectification of the share register of Micromega Holdings Limited (“Micromega”) to show Rossenfeld Holdings Limited (“Rossenfeld”) as the owner of shares (totalling 52,801,921 shares) of Micromega which were transferred away from Rossenfeld on 15 May 2002. Rossenfeld is a BVI company which at all material times has been wholly owned by Glencoe through another company.
3. The facts appearing from the Fourth Affidavit of Mr C S Stewart, an in-house legal adviser to the Trustee, sworn on 19 April 2011, and from other correspondence can be summarised as follows:
 - (1) On 20 August 1999 the directors of Rossenfeld (who were corporate nominees of the Trustee’s predecessor) resolved to grant a limited power of attorney to Mr

King to permit him to act on behalf of Rossenfeld in the acquisition by Rossenfeld of a controlling interest in Micromega (then called Legacy Ventures Limited), and such a limited power of attorney was granted to Mr King.

- (2) The purchase was funded by a loan from Ben Nevis Holdings Limited (“Ben Nevis”), an asset holding company wholly owned by Glencoe and the parent company of Rossenfeld at that time.
- (3) In April and October 2001 there were sent to a predecessor of the Trustee three share certificates in the name of Rossenfeld (in the case of the greater part of the shares by Mr King himself) for shares totalling 52,801,921 shares of Micromega (which by then was called Financing Insourcing Specialists Limited). So at that stage in September 2001 it was clear that all these shares were owned by Rossenfeld. On 14 December 2001 the Company’s name was changed to that of Micromega.
- (4) On 28 May 2002 the predecessor of the Trustee sent the three share certificates to Mr King, requesting him to obtain new share certificates on behalf of the predecessor of the Trustee reflecting the change in name to Micromega. (It appears that in the letter the number of shares was under-stated by 200,000.) A further chasing letter was sent on 16 June 2003. The share certificates were never sent by Mr King to the predecessor or to the Trustee.
- (5) In fact, before either of the letters referred to in (4) above were sent, it appears that on 15 May 52,801,921 shares of Micromega were purportedly transferred from Rossenfeld to a Turks and Caicos Islands company, Drenk Services Limited (“Drenk”), the transfer form being apparently signed by Mr King on behalf of Rossenfeld though no authority had been given to Mr King for that purpose. Those shares totalling 52,801,921 shares were recorded (before the transfer) in Bank of Bermuda’s account 7059652 as being held by Rossenfeld, and as having at 31 March 2002 a value of £3,267,066.06.
- (6) A memorandum from a Mr Morris of Micromega to Mr King dated 16 May 2002 recorded that after close of trade on 15 May 2002 Rossenfeld sold their shareholding in Micromega.
- (7) Mr Stewart in his affidavit at paragraph 21 notes that the consideration for the transfer of the shares in Micromega to Drenk was stated on the transfer form as being South African Rand 1.00 per share – i.e. a total of Rand 52,801,921; and that Micromega shares were trading on the following days at the following prices:

14 May 2002	Rand 2.70 per share
15 May 2002	Rand 1.00 per share
16 May 2002	Rand 2.00 per share

- (8) Mr Stewart also notes that the Trustee has no record of any payment having been made by Drenk to Rossenfeld or Glencoe.
- (9) The financial statements of Micromega are stated by Mr Stewart to show that Drenk held all these shares until the financial year 2007.
- (10) Share transfer forms (undated) appear to show that (in about 2007) the total of 52,801,921 Micromega shares were transferred to four companies in the United Arab Emirates as follows:

Company	Number of shares	Consideration
Insight Communications Ltd	16,876,000	Rand 1.00
Robel Management Ltd	9,000,000	Rand 1.00
Insight Corp	12,625,921	Rand 1.00
Alpha Management Ltd	14,300,000	Rand 1.00
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	52,801,921	Rand 4.00
	<hr style="border-top: 3px double black;"/>	

Assuming that these transfers correctly represent the position, it appears that 52,801,921 shares of Micromega were sold for the purely nominal consideration of only Rand 4.00. This is in contrast to the value in March 2002 of the Rand equivalent of £3,267,066.06 (see (5) above). Mr Stewart’s evidence is that in 2007 the average price of Micromega shares was Rand 3.12 per share, so that in 2007 the average value of the shares transferred for Rand 4.00 was in fact Rand 164,741,993.52.

- (11) On 27 July 2009 Ozannes for the Trustee wrote to HM Procureur and to solicitors for the South African National Prosecuting Authority seeking their consents under the Restraint Order of this Court to enable the Trustee to pursue litigation for the purpose of recovering these Micromega shares for Glencoe. These consents were given on 29 July 2009.
- (12) On 24 February 2010 the Trustee wrote to Mr King asking for information concerning the transfer to Drenk and thereafter to the UWE companies, and indicating the Trustee’s intention that Rossenfeld should bring proceedings to secure control of the shares. Mr King has so far made no response to that letter.
- (13) On 7 April 2010 the Trustee wrote to the other beneficiaries asking for any representations they might wish to make concerning the proposed proceedings to be taken by the Trustee in relation to the Micromega shares. No response has been received from any of the beneficiaries.

- (14) On 27 January 2011 Mourant Ozannes for the Trustee wrote to Advocate Bell of Collas Day acting for Mrs King stating (inter alia)

“My client is now at the stage of looking to take action. It notes that, more recently, Mrs King has expressed an interest in relation to the concerns of the trustee that Mr King has appropriated assets. It is therefore prepared to give Mrs King a further period of 14 days in which to express her view before it resolves what action to take. I would be grateful if Mrs King could respond, via yourself, within that time.”

There has been no response to that letter.

4. It is in the light of those circumstances that Advocate Christopher Edwards of Mourant Ozannes for the Trustee submitted to this Court that it is appropriate for this Court to grant the application summarised in paragraph 2 above. I asked Mr Edwards to explain the delays which have occurred in the Trustee proceeding with this matter. It appears that at least some of the delays have been attributable to the Trustee’s full involvement in the tax appeal and the “piercing the veil” action in South Africa to which I referred in paragraph 2 (2) and (3) of my judgment of July 2009, in both of which the Trustee was unsuccessful. Nevertheless I conclude that there has been too much delay by the Trustee in dealing with the issues concerning the Micromega shares.
5. Advocate Nicholas Barnes appeared for Mr King. He indicated that Mr King had not yet been able to provide Mr Barnes with detailed instructions, and further time would be needed for that. Also, Mr King would need to obtain approval from HM Procureur for funding from the trust fund for his legal advice and representation in this matter, which approval is presently being sought. Mr Barnes accordingly submitted that this matter should be adjourned for a minimum of three weeks to enable HM Procureur’s approval and detailed instructions of Mr King to be obtained. He accepted that three weeks would be the minimum, and that it might take a longer period before he could be ready.
6. Mr Barnes also indicated that there might be an error on the Trustee’s part in that the shares might be held by a consortium called “Rossenfeld Consortium” which involves entities or individuals other than Rossenfeld itself. Having regard to the documents exhibited to Mr Stewart’s affidavit, I conclude that this is a proposition which is unlikely to be made out on the facts: the documents show shareholdings in the name of only Rossenfeld itself, and no such allegation has been made by Mr King at any previous stage, though he has had ample opportunity to respond to the correspondence from the Trustee. I note also that Mr King has had sufficient notice of the present application to be able to put Mr Barnes in a position to deal with it by the time of the hearing.
7. In my judgment too much time has been allowed by the Trustee to elapse before dealing effectively with the issues concerning the Micromega shares, which shares (on the face of the documents) appear clearly to have been the property of Rossenfeld and to have been removed from Rossenfeld through the actions of Mr King without the Trustee’s authority, and to have had a value in the equivalent of some millions of pounds sterling. In the absence of any positive case presented by Mr King showing that the position as set out in the Trustee’s evidence may be incorrect (which he has had a long period to consider and present to the Trustee) I am satisfied that it is incumbent on the Trustee now to take the necessary steps to establish Rossenfeld’s ownership of the shares with all reasonable speed. Since the position of

Mr King can be protected by giving him liberty to apply to this Court as indicated below, I do not accede to Mr Barnes' application for this matter to be adjourned. It is right for this Court to give the Trustee the leave it seeks to bring proceedings in South African, and to express the hope that the question of Rossenfeld's ownership of the Micromega shares can be resolved in the South African Courts as soon as practicable. Accordingly this Court will make the order as sought by the Trustee.

8. However, in recognition of the difficulties which Mr Barnes has had in obtaining proper instructions and the need to secure funding for this purpose, the Court will add to the order as sought an additional paragraph (3) as follows:

“(3) there be liberty to the Trustee and to all or any of the beneficiaries to apply to this Court for relief in respect of the subject-matter of this order.”

So, if Mr King receives consent for funds to be released for this purpose, and Mr Barnes is able to be given full instructions, it will be open to Mr King (if so advised by Mr Barnes) to apply for a further order in this matter, and even an order setting aside this present order. But I emphasise the need for a cogent case to be made out in support of any such application for a further order.

9. I should also say that the order sought for the Trustee's costs of this present application to be paid out of the Glencoe Trust Fund on an indemnity basis is to be included.
10. Finally, I add that both Advocates mentioned in their submissions a renewed application by the beneficiaries for the retirement of the Trustee as the trustee of Glencoe and its replacement by another trustee, an application which will be resisted by HM Procureur, and on which the Trustee will adopt a neutral stance. In my judgment neither the existence of this renewed application nor its outcome should be allowed to interfere in any way in the taking of timely steps in the South African Courts to sort out Rossenfeld's ownership of the Micromega shares. If the Trustee were in the end to be replaced, the new trustee would have the same duty to pursue such proceedings in South Africa.
11. Accordingly the order applied for is to be made, subject to the addition of the paragraph (3) set out above.