

Judgment 10/2012

**Ikea Limited, Ikea Wholesale Limited v
A & L Hauxwell-Smith – The Royal Court
- Civil Action File No 509
- 14th March 2012**

Application for repayment of funds and the return of security for costs granted. Application by respondents for a summary determination of damages – dismissed.

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

The 14th day of March, 2012 before John Russell Finch Esquire, Judge of the Royal Court; sitting alone

In the matter of:

IKEA LIMITED	
IKEA WHOLESALE LIMITED	
	(The Applicants)
v.	
ADAM HAUXWELL-SMITH	
	(First Respondent)
LEISA HAUXWELL-SMITH	
	(Second Respondent)
COLLAS DAY (now Collas Crill)	
	(“Collas Crill”)
NAT WEST	
	(“NatWest”)
ROYAL BANK OF SCOTLAND	
	(“RBS”)

ON THE APPLICATIONS of the Applicants dated the 25th June 2010, for payment of funds and strike out of an action by the Respondents, and of the Respondents dated 1st April 2011, for a summary determination of damages, in the terms attached hereto;

WHEREAS THE COURT on the 7th February 2012, having heard Advocate J. P Greenfield, Counsel for the Applicants and the Respondents in person respectively thereon, RESERVED JUDGMENT;

THE COURT this day handed down Judgment in the terms attached hereto and

1. GRANTED the Applicants' application and ordered the repayment of funds and the return of the security for costs,
2. REFUSED the Respondents' application, and
3. RESERVED costs, and ORDERED that the parties shall lodge any submissions on costs within seven days of the date of this judgment.

S M D ROSS
Her Majesty's Deputy Greffier

**Amended Approved Text
16.03.2012**

**IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY
(ORDINARY DIVISION)**

Between:

**IKEA LIMITED
IKEA WHOLESALE LIMITED**

Applicants

-v-

ADAM HAUXWELL-SMITH

First Respondent

LEISA HAUXWELL-SMITH

Second Respondent

**COLLAS DAY
(now Collas Crill)**

“Collas Crill”

NATWEST

“Nat West”

ROYAL BANK OF SCOTLAND

“RBS”

Case heard on: 7th February, 2012

Decision handed down: 14th March, 2012

Before: John Russell FINCH Esquire, Judge of the Royal Court

Advocate for the Applicants: J P Greenfield

Mr & Mrs Hauxwell-Smith in person (assisted by Mr M Frankland, English Solicitor, as McKenzie Friend)

The Other Respondents did not appear and were not represented.

Cases referred to in Judgment:

Barclays Private Bank & Trust Limited v Maria Grima [2003] JRC 212;

Cheltenham & Gloucester Building Society v Ricketts [1993] 1 WLR 1545;

Financeira Avenida v Shiblaq (2009) (unreported);

Goldman Sachs International v Lyons (1995) Times, 28 February;

Hutchinson & Others v Spread Trustee Company [2011] UKPC 13;

Lunn Poly and Another v Liverpool and London Properties Limited and Another [2006] EWCA 430;

Paragon Finance plc v DB Thakerer & Co [1999] 1 All ER 400.

JUDGMENT

Background

1. This is a case of long-standing, see the chronology at divider B of the Applicant's (hereafter "A") bundle. It started in Guernsey with injunctions in 2000, and there have been criminal and civil proceedings in England and linked proceedings in Liechtenstein. The last-named matter dealt with £12.7 million recovered by A. In view of the antiquity of the case, I will endeavour to keep what could be a long story reasonably short. The first application before the Royal Court is A's of 25th June, 2010. It comprises 1-8 in paragraphs. Paragraphs 1, 2, 3 and 4 relate to the discharge of the Orders made in 2000 and 2001, which are now redundant and on which there was no dispute. Hence, by agreement, these freezing orders were discharged at the oral hearing on 7th February 2012. That leaves paragraphs 5, 6, 7 and 8. In summary they refer to two specific amounts of £56,000 plus interest and £90,000 held by NatWest and Collas Day (now Collas Crill) Advocates respectively in accordance with the original freezing orders, and it is sought by A that these be paid to them. Paragraph 5 refers to an action by the Respondents (hereafter "R") in relation to the Collas Day funds, and it is asked by A that that be struck out. Paragraph 8 seeks the return of A's original security for costs. The second matter originates from R. Mr and Mrs Hauxwell-Smith seek a summary determination of damages based on the customary undertaking given by A in obtaining the freezing orders in the sum of £12.7 million. The wording is pretty standard, so that A would:

"Abide by any order which the Court may make as to damages, in case the Court may hereafter be of opinion that [R] have suffered any damages by reason of this Order which [A] ought to pay".

To complete this preliminary view of the case I should add that the issues are between A and R, Collas Day, NatWest and RBS, who are named Respondents, take no part in this case and will abide by the Court's ruling.

2. I held a directions hearing on 6th April, 2011 and separated the two issues. Mrs Hauxwell-Smith was present at that hearing. She and her husband, who is in reality the main protagonist, were present at the full oral hearing. R was assisted by an English solicitor, Mr Frankland, who acted as a McKenzie Friend, despite modestly disclaiming expertise in civil matters – he is a noted criminal fraud specialist. I record my gratitude for his courtesy and frequent advice to R. It was helpful to have him present. A was represented by the very experienced Advocate J P Greenfield. I also thank Advocate Greenfield for his painstaking and careful presentation of the case and fairness to R. Mr Hauxwell-Smith did most of the talking and was a fluent, able and courteous litigant; Mrs Hauxwell-Smith contributed from time to time and also impressed with her intelligent manner. Whatever decision the Court comes to (and again noting the real help given by Mr Frankland) both litigants in person were models of civility. Advocate Greenfield helpfully ensured that not only (as one would expect) were A's arguments and documents fully prepared in binders, but assembled R's paperwork, which was voluminous, in binders in a sensible order so that it was accessible to everyone. Even so, important documentation from R came in late in the day, including an affidavit from Mr Frankland which Advocate Greenfield very fairly had no objection to being considered - even though it came the day before the hearing.
3. At the directions hearing on 6th April, 2011 I made some usual orders for the case to proceed. R were ordered to serve an affidavit, skeleton argument and chronology in support of their application for damages by 4.00 pm on 4th May 2011. This was not achieved. A served their documents timeously, but there was no response from R by 1st June, 2011, as ordered. However, on 27th July 2011, R served two affidavits, but no skeleton and no chronology. Even making allowance for R's apparent lack of legal representation this tardiness and

associated non-compliance helped no-one, including R themselves. It made the task of picking out the most germane and relevant parts of their case more difficult.

Basic Facts

4. As in any case where the S.F.O. conducted the prosecution, the underlying facts are both serious and complex. A full picture from A's point of view is found in the fourth affidavit of Mr Barlow, which seeks to consolidate the issues. In outline it seems to me that the most basic facts can be summarized as follows:
 - (i) there were serious procurement irregularities involving both Mr and Mrs Hauxwell-Smith over the period 1998-2000. The victim was IKEA. Large sums were paid over as a result of these activities through a web of entities. The bulk ended up in Liechtenstein. The Guernsey proceedings began in 2000 to obtain disclosure as to the flow of monies. Civil proceedings also were begun in Liechtenstein and England;
 - (ii) the English civil proceedings, understandably, were stayed pending the resolution of the S.F.O. case. Before this was concluded, A was able to trace £12.7 million in Liechtenstein. This amounted to some 80% of the total claim. It was held by a series of companies incorporated in BVI, the Bahamas and Belize. Two Liechtenstein Directors, the Hoops, agreed to return the £12.7 million to IKEA, with judicial sanction. The Court's order is to be found in A's documentation. No blame has been attached to the Hoops;
 - (iii) Mr Hauxwell-Smith eventually pleaded "Guilty" to 18 counts of corruption – i.e., bribing senior managers of IKEA. He received 3 years imprisonment on 11th October 2007, later reduced to 2 on appeal. The managers were also sentenced, but proceedings were discontinued against Mrs Hauxwell-Smith. It will be necessary to look at this again in due course;
 - (iv) on the 24th June 2010, IKEA discontinued the English civil proceedings and filed an application to do the same in Guernsey on the next day. The view taken by A was that they had, in effect got back as much as they were going to get and that they did not want to incur further substantial costs;
 - (v) the two amounts of money which A seeks to recover are, it is alleged, plainly the proceeds of the procurement irregularities, see especially paragraphs 39-46 and 47-52 of Mr Barlow's fourth affidavit. In essence A alleges these amounts are subject to a constructive trust (see especially paragraphs 14-19 of A's main skeleton argument);
 - (vi) in relation to R's claim for damages A submits the Guernsey orders were properly obtained and strongly relies on R's conduct including Mr Hauxwell-Smith's mitigation before sentencing. A also refers to various legal principles relevant to the payment of damages when freezing orders are discharged;
 - (vii) on behalf of R it was submitted with some emphasis, that any finding of fraud was "totally resisted". Mr Hauxwell-Smith had been sentenced for corruption, not fraud. The application was not for R to receive the frozen monies personally, anything obtained would go towards the legal aid costs etc. In short, A failed to establish any fraud in the S.F.O. prosecution and cannot even do so now to the civil standard. A's rejoinder refers to the constructive trust point made in their main skeleton argument. R's position was to seek "*formal pleaded proceedings*" by IKEA and related disclosure. (At the directions hearings I had, as indicated, ordered affidavits and skeleton arguments, in view of the nature of the dispute and in order to achieve a speedy resolution in this very protracted saga).

Constructive Trust?

5. A claims that they are the beneficiaries under constructive trusts in respect of the sums held by NatWest and Collas Crill. Hence they have a right to the return of that property. To put it rather shortly: where acts lead to profit and are illegal under established legal principle, equity puts any property acquired thereby into a constructive trust. A constructive trust is frequently based on disloyalty or unconscionable conduct. The courts therefore use the concept to compel the person who has obtained the property to transfer it to the applicant or Plaintiff. Unconscionable conduct can be seen as where someone takes unconscionable advantage of another person. All this is important because it demonstrates that it is not necessary to have a specific allegation of fraud to bring about a constructive trust. This is consistent with the observations of Millett LJ in Paragon Finance plc v DB Thakerer & Co [1999] 1 All ER 400, especially at 410 (at 16 of A's bundle). Thus the word "unconscionable" refers to conduct which does not conform to the dictates of conscience and as a result of which it would be unjust to allow the perpetrator of the conduct to benefit.
6. There is no need to go further into the concept of constructive trusts. When applied to the background facts in this case it suffices to say that A submits that both the NatWest and Collas Crill funds are subject to constructive trusts affording A full rights as sole beneficiary. Receipt of these amounts by entities controlled by R was unconscionable, within the meaning given above. The factual bases of the claim to the funds are found in Mr Barlow's fourth affidavit (as cited at paragraph 4(2) above). The riposte by Mr Hauxwell-Smith is that he pleaded guilty to 18 counts of corruption and none of fraud, but this is not especially convincing in this context. The important point is that Mr Hauxwell-Smith bribed senior staff at IKEA and R's companies, such as Godfrey & Warner obtained monies from IKEA in an unconscionable way. Nothing put forward in writing or in oral submissions by either of the Hauxwell-Smith affects this proposition. The provenance of the Collas Crill amount is slightly more involved than that of the NatWest amount. It represents part of the proceeds of sale of a Guernsey property, La Fontaine Farm, which was purchased using monies obtained from IKEA, again, as the affidavit of Mr Barlow shows, in an unconscionable manner. On the sale, part of the proceeds went to Liechtenstein and the remainder, the subject of the application, remained in Guernsey. A claims entitlement in the circumstances to follow the monies.
7. The long history of these various proceedings demonstrate that there has been no application on behalf of R in respect of the NatWest funds, but one in 2003 for the Collas Crill amount, which was never pursued. It is no longer extant. It is only right that R's main submission is dealt with specifically. It is accepted that there was no finding of criminal fraud as one would understand it in the English Crown Court. 18 Counts of bribery/corruption are, however, still highly discreditable and a custodial sentence was upheld. For the avoidance of doubt, in these proceedings no finding of fraud is made, nor is it necessary to make it. In order to find a constructive trust there needs to be unconscionable conduct, as defined earlier. This is a civil law concept; it does not have to be made to the same evidential standard as in a criminal prosecution and it suffices for the purposes of the present case. To put it very plainly so that Mr Hauxwell-Smith understands it, no finding of fraud is made in this matter, certainly not to the criminal standard, and it is not necessary to make such a finding. The decision is based upon the law on constructive trusts. For the sake of completeness it should be added that A's submission to the effect that this is an English trust is accepted (see paragraph 15 of the main skeleton) and if that view is technically wrong and a Guernsey trust exists, the same principles apply (and see also Hutchinson and Others v Spread Trustee Company [2011] UK PC 13 in this context).

Application for Summary Determination of Damages

8. R's argument here was harder to follow as the relevant elements had to be picked out of the various affidavits, and, as indicated, the skeleton argument did not materialize. Although the

Court was concerned with a far greater sum (£12.7 million) in this part of the case, much more than the two frozen amounts, it can be dealt with without undue length. The customary undertaking as to damages was set out at paragraph 1 above. The basic principles to consider in this type of case are set out clearly in the English Court of Appeal decision Cheltenham & Gloucester Building Society v Ricketts [1993] 1 WLR 1545 and lucidly applied in the Royal Court of Jersey in Barclays Private Bank & Trust Limited v Maria Grima [2003] JRC 212 (enclosures 21 and 8 in A's main bundle respectively). In the former case, Peter Gibson LJ, at 1555-A said:

“The undertaking is given to the Court and not the respondent, who can ask the Court to enforce it but has no right to its enforcement nor any right to damages until the discretion is exercised in his favour and damages are awarded”.

Peter Gibson LJ then quotes a passage from the judgment of Lloyd LJ in Financiera Avenida v Shiblaq (unreported, 7 November 2009) with approval, part of which reads:

“.....The first question is whether the undertaking ought to be enforced at all. This depends on the circumstances in which the injunction was obtained, the success or otherwise of the plaintiff at the trial, the subsequent conduct of the defendant and all the other circumstances of the case. It is essentially a matter of discretion”.

A case also cited in the Jersey decision and of value in the present matter is Goldman Sachs International v Lyons (1995) Times, 28 February. There, Hobhouse LJ stated, when referring to a discontinued injunction:

“The party discontinuing had to provide some justification for the discontinuation. All that had to be shown was that the circumstances were such as to raise questions whether it was equitable that the undertaking be enforced”.

And:

“This was not a case where the Mareva had been improperly obtained as maintained. It had been granted on proper and cogent grounds”.

And finally:

“The plaintiffs were justified in continuing this action and were only discontinuing it because it was clear the action could not usefully be continued”.

9. The Action was discontinued in the light of the evident inability of R to make any further payments to IKEA. It is noted that the claim was for £15.6 million, £12.7 million (over 80%) was recovered from Liechtenstein, the local Court endorsing the recovery. In all the circumstances it is very difficult to argue, in the context of a serious, wide-ranging financial criminal enquiry, that the orders were wrongfully obtained. Indeed it seems to me a classic case of its type. Mr Hauxwell-Smith relied upon the recovery of the £12.7 million mitigation in the Crown Court. The judge alluded to this in sentencing. The prosecution did not seek a confiscation/compensation order. In the circumstances I am wholly unable to find that the discontinuance of the civil action was other than justifiable and therefore the legal authorities stack up in A's favour. Another factor is R's conduct. Advocate Greenfield placed emphasis upon the fact that 10 years has elapsed without R taking a single step to obtain the monies; it follows that they recognised the “realities of the situation” as it was put in argument. These funds have the same provenance and were recovered under the sanction of the competent foreign court. It would not have been particularly difficult for R to take steps much earlier on.
10. If the view is taken, contrary to what is set out above, that the original orders should not have been obtained, then the claim for damages should fail to take off on the grounds set out in the

cases referred to. The cases, and others not cited, are plain authority for the proposition that recovery is not permitted when the claiming party has acted inequitably or unreasonably; see e.g. Lunn Poly and Another v Liverpool and Lancashire Properties Limited and Another [2006] EWCA 430 (at enclosure 12 of A’s main bundle), paragraphs 42 and 43 of Neuberger LJ’s judgment. It boils down, if it can be put somewhat simplistically perhaps, to “*inequitable conduct*” being shown. This is the situation here, considering the mitigation in the criminal case, the lawful recovery of the assets in Liechtenstein and the delay in taking action for around a decade. In considering the Liechtenstein case it suffices not only to repeat that the recovery was lawful and agreed by the competent Court, but that the Hoops, directors of the various companies involved, acted in accordance with their duties as directors and have never been pursued by R. There are two matters arising which need to be dealt with. Firstly, R draws attention to the sentencing remarks in which the possibility that Mr Hauxwell-Smith might recover some part of the money within the next six months (transcript, page 360-A) is mentioned. But Mr Hauxwell-Smith did not do so. Secondly, any criticism of what took place in Liechtenstein is met both by the, and this is again repeated, Court order and the existence of a lawyer representing R’s interests (Dr Abfalterer). I have listened carefully to everything both Mr and Mrs Hauxwell-Smith have said about the case and considered the materials produced, however incomplete. Their submissions do not accord with the overall history of this matter and I find they do not avail them.

11. As indicated at paragraph 7 above, I do not, nor am I able to make any finding of fraud against R. This part of the case exercised Mr Hauxwell-Smith considerably in his oral submissions and I repeat it here. My decision is founded upon the law relating to constructive trusts as I have seen it, and the general principles of equity. It would be inequitable or “unconscionable” to allow R to recover anything in this matter for the reasons set out. A’s application therefore succeed; R’s do not and I would ask for a draft Act of Court, please, to reflect that. The security for costs may be returned in all the circumstances as well.

Costs

12. Reserved. If either party has submissions they should be e-mailed or posted to the Deputy-Greffier within seven days from the date of this judgment please.

J R Finch
Judge of the Royal Court

14th March 2012