

Neutral Citation Number: [2010] EWHC 1449 (Ch)

Case No: HC08C00833

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/06/2010

Before :

MR JUSTICE NORRIS

Between :

The Law Society of England and Wales

Claimant

- and -

(18) Habitable Concepts Limited

Defendants

(25) Mr Onyekechi Onuiri

Michael McLaren QC and Fenner Moeran (instructed by **Devonshires**) for the Claimant
The Defendants did not appear

Hearing dates: 6 and 7 May 2010

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic

Mr Justice Norris.....21 June 2010

Mr Justice Norris :

1. Vincent Okey Udah was a solicitor practising as Okey Udah & Co (“the Practice”). The Law Society intervened in the Practice on 10 January 2008. It discovered that the Practice had (over a very short period) been involved in large-scale mortgage fraud.
2. The fraud was of the simplest kind. The Practice represented that it was acting on behalf of intending purchasers or remortgagors. The transactions were not genuine. Mortgage applications were submitted by a broker, and the Practice was retained to act for the lender. The Practice completed the requisite mortgage conveyancing forms and in due course received the mortgage advance. It appropriated the advance. The evidence establishes that between 23 October 2007 and 27 November 2007 the Practice collected in 27 mortgage advances totalling £5,779,166 from lenders, none of which was applied in completion of the transaction in respect of which the advance had been made. By 27 November 2007 the client account of the Practice contained only £135,277. Mr Okey Udah fled and has never been located.
3. The ground for the intervention was that stated in paragraph 1 of Schedule 1 to the Solicitors Act 1974 (“the 1974 Act”). Paragraph 6(1) of Schedule 1 to the 1974 Act empowers the Law Society to pass a resolution that any sums of money (and the right to recover or receive them) to which the paragraph applies should vest in the Society. Where the ground for intervention is (as here) that stated in paragraph 1 of the Schedule, the vesting resolution under paragraph 6(1) relates to all sums of money held by or on behalf of the solicitor in connection with his practice.
4. The Society passed the relevant resolution on 10 January 2008. In that right the Society commenced proceedings to recover money paid into the client account of the Practice by the lenders and then paid out. It is proved that between 6 November 2007 and 27 November 2007 £4,698,484 was paid out of the client account of the Practice.
5. The matter before me is the trial of the Society’s claim against Habitable Concepts Ltd (“Habitable”) and its sole shareholder and director Mr. Onyekechi Onuiri (“Mr Onuiri”). The case against them is:
 - (a) that on 22 November 2007 the Practice paid £450,150 out of its client account to Habitable;
 - (b) that that payment was made out of money received from mortgage advances;
 - (c) that those monies were held by the Practice on trust for the lenders whose advances funded the payment;
 - (d) that in receiving those monies Habitable was knowingly receiving payments made in breach of trust;

- (e) alternatively that in receiving those monies Habitable was dishonestly assisting the Practice in a breach of trust;
 - (f) that in consequence Habitable is liable to account as constructive trustee of the monies so received and the Society is entitled to trace in equity into any identifiable proceeds of the payment;
 - (g) That in addition the Society can pursue against Habitable a claim for money had and received and can also seek damages for conspiracy;
 - (h) That the circumstances are such that the Court can pierce the corporate veil of Habitable and grant direct personal judgment against Mr Onuri (or alternatively that Mr Onuri himself dishonestly assisted in a breach of trust).
6. Habitable and Mr Onuri served a Defence. This admitted receipt of £450,150 from the Practice; it did not admit that the payment had been made fraudulently or in breach of trust or in breach of fiduciary duty; and it denied that either Habitable or Mr Onuri knew or ought to have known that it was such.
7. The positive case which they set up was that Habitable and Mr Onuri believed that the payment had been made on behalf of a client of the Practice called Mr Franklin Peters, and was received in good faith, without dishonesty and for good consideration. Furthermore, part of the sum received had been paid over to third parties in accordance with the instructions of Mr Peters; and the balance had been utilised in the ordinary course of Habitable's business. It was accordingly said that neither Habitable nor Mr Onuri could make restitution because of their respective changes of position.
8. The Defence incorporated by reference certain details set out in an affidavit ("the Affidavit") sworn by Mr Onuri on 3 June 2008. This was a disclosure affidavit required to be made under the terms of a freezing order granted on 21 May 2008. Neither Habitable nor Mr Onuri filed any further evidence. Mr Onuri indicated in a letter dated 26 February 2010 an intention to do so: but on 25 March 2010 said in an e-mail that he intended to rely only on the Affidavit as his witness statement. Neither was represented at trial: and Mr Onuri did not attend to be cross-examined on the Affidavit. Although it was not possible for the Society's solicitors to speak with him (because his mobile phone was always turned off) in the period leading up to trial Mr Onuri was sent by post and by e-mail the hearing papers and was constantly updated as to the trial date and venue. Requests for a response from him went unanswered. I treat his non-attendance at trial as a deliberate choice.
9. In these circumstances it was for the Society to prove its case. I could have left matters simply there. But with the assistance of Mr McLaren QC and Mr Moeran I have considered the contentions advanced by Habitable and

by Mr Onuri, even though unsupported by evidence at trial, before eventually reaching my conclusions upon the Society's case.

10. I have accepted evidence that £5.7 million of mortgage advances were paid into the client account of the Practice. There can be no doubt that money held in the client account of the Practice was held on trust in accordance with the Solicitors Accounts Rules 1998. So much is admitted in paragraph 6 of the Defence.
11. It is admitted that out of the Practice client account £450,150 was paid to Habitable. There is implicit in the pleaded assertion that Habitable received the money at the direction of Mr Peters an admission that neither Habitable itself nor Mr Onuri was a client of the Practice and entitled to receive this money in its or his own right. Nothing in the documents of the Practice has been discovered by the Society that would justify a payment out of client account to Mr Peters. An examination of the bank account of the Practice demonstrates that, even on the most favourable analysis, at least 94% of the payments out of the client account must have been the proceeds of mortgage fraud. Although Habitable do not admit this to be so, I find on the balance of probabilities that the payment made to Habitable was a payment wrongfully made out of the client account and made in breach of trust.
12. Because the payment was made out of the client account in breach of trust the Practice would have had (and the Society now has vested in it) the right to recover this money. But a wrongful recipient of trust property is not without more under a personal liability to restore the benefit received: Lewin on Trusts (18th edition) paragraph 42-02. The burden lies on the Society to make good one of the recognised causes of action.
13. The Society alleges (and must prove) knowing receipt by Habitable making it accountable in equity. I have already held that the £450,150 was money that was subject to a trust. It is admitted that it was transferred to Habitable. I have already held that the transfer was in breach of trust. According to the summary of the constituent elements of the cause of action approved in BCCI v Akindele [2001] Ch 437 it remains for the Society to prove
 - (a) that the receipt by Habitable was beneficial; and
 - (b) that Habitable received the payment with the requisite knowledge.

As is so often the case, direct evidence of these matters is not available to the Society; the real issue is what inferences might properly be drawn from the proved facts.

14. Habitable is not a bank, or an investment institution, or a currency dealer or a money transfer agent; it does not operate a client account or act as an intermediary. It was at the material time a supplier of design and bespoke high-value furniture from a showroom in Kingston-upon-Thames; and it operated a standard business bank account. Any receipt into that bank

account must in those circumstances *prima facie* be a beneficial receipt. Paragraph 18.4 of the Defence read together with the parts of the Affidavit incorporated into the pleading effectively admit beneficial receipt of the monies by asserting that the payment was due under a contract. (The Affidavit goes on to assert cancellation of the contract and beneficial retention of only £164,345: but this subsequent dealing cannot alter the character of the original receipt, which was undoubtedly for the use of Habitable and not for or on behalf of anyone else.) I find that the payments made by the Practice in breach of trust were received beneficially by Habitable.

15. The question then is: what was Habitable's state of knowledge? Habitable is a legal person: the relevant knowledge is that of its human agent. The sole director and shareholder at the relevant time was Mr Oniiri, and it is his knowledge that his material. The requisite knowledge is that stated in Akindele (*supra*) at p 448 viz. that it "must be such as to make it unconscionable for him to retain the benefit of the receipt". To what circumstances can the Society point to make good its need to prove that it is unconscionable for Habitable to retain the money? The Society must adduce some evidence to establish its case: it cannot simply point to the inadequacy of Habitable's Defence.
16. Habitable was a furniture supply company. As 23 October 2007 it was in severe trading difficulties with all but the very smallest debits on its bank account being refused clearance. The infrequent credits to its account were generally of about £2,000 and barely sufficient to cover outgoings. Then on 21 November 2007 it received a credit of £12,394: and on 22 November 2007 the credit of £450,150 with the narrative "Okey Udah & Co". There was no commercial relationship between the Practice and Habitable to which such a payment was referable. Nothing in the documents of the Practice suggests that this credit was ever explained by the Practice to Habitable: and nothing in the documents of the Practice suggests that Habitable made enquiry of the Practice as to the reason for the credit. The unexplained nature of the bank credit and its sheer scale would call for enquiry to be made by anyone who wished to deal with the credit with a clear conscience. The next day Habitable (a) used £20,000 (at least part of which must have derived from the credit of £450,150) to make a payment to a currency exchange service; and (b) drew £25,000 in cash from a branch in NW6 in £50 and £20 notes (the whole of which must have derived from the credit). Three days later a further £20,000 in cash was drawn from the Kingston-upon-Thames branch. This must also have been derived from the credit. Three days later £75,938.26 was paid to a garage in Germany. This must again have derived from the credit. A failure to make any enquiry of the Practice before dealing in this way with the monies received raises an inference of guilty knowledge which puts upon Habitable the burden of explanation.
17. Habitable has not attended to give evidence at trial. It has not discharged this burden. It has pleaded a case (by reference to the Affidavit produced for the purposes of disclosure). No order was made permitting evidence at

trial to be given by affidavit, and no one from Habitable has attended the trial to confirm the contents of the Affidavit (if treated in lieu of a witness statement) or to be cross examined upon it. I have nonetheless reviewed the pleaded case and the Affidavit for the purposes of considering whether I can be confident in drawing an inference of guilty knowledge: or whether I should take some other procedural step in view of Habitable's failure to attend trial.

18. In brief the case advanced by Habitable is that in October 2007 it was introduced to a Mr Franklin Peters as a potential customer: Mr Peters was himself an intermediary acting on behalf of a client in Nigeria who was fitting out some apartments in Abuja. Mr Onuiri met with Mr Peters who said that the budget was £500,000, and is said to have provided sketch plans to facilitate the production of detailed design drawings and writings. Habitable's pricing came out at £469,973 which Mr Onuiri discounted by 4.21% to arrive at £450,150. The whole of this was paid in advance on 22 November 2007. Within a week the contract was cancelled. It was agreed that Habitable could keep a 30% cancellation fee (far in excess of its standard terms), and that it did not have to return the balance, but would retain it and deal with it at the direction of Mr Peters. The payment to the garage in Germany was the first of those instructions. The payments to the currency exchange services were in respect of anticipated European purchases. The cash payments were for loan repayments or general expenditure or conversion into foreign currency to pay foreign suppliers. Scrutiny of the documents supplied in connection with this account discloses that they do not appear to support it.
19. The inherently implausible nature of the pleaded defence is such as to cry out for the testing of any evidence in support by cross-examination. In the absence of such at trial I will accept the Society's case. I accordingly find and hold that Habitable knowingly received money paid by the Practice in breach of trust. It must account as constructive trustee for the money so received: and the Society can trace into the proceeds of the payment so far as they are now ascertainable.
20. I turn to consider whether the same remedy lies against Mr Onuiri. The Society submits that it is entitled to pierce the corporate veil. This course is appropriate only where there are special circumstances which indicate that the company is a mere façade concealing the true facts: per Lord Keith of Kinkel in Woolfson v Strathclyde Regional Council (1978) SC (HL) 90 at 96. The judgment of Munby J in Ben Hashem v Al Shayif [2009] 1FLR 115 contains at paragraphs [158] to [185] a convenient survey of the principles and of their recent application. I am guided by the principles there collected. In essence they require control of Habitable by Mr Onuiri and (in relation to the relevant transaction out of which liability arises) the use by Mr Onuiri of Habitable as a façade or device to facilitate or conceal his own wrongdoing. I hold that on the proper application of those principles Mr Onuiri is not to be made personally liable for Habitable's knowing receipt.

21. The relevant wrongdoing is the knowing receipt of a payment made by the Practice in breach of trust. The receipt was by Habitable. The Society's argument must be that receipt by Habitable was a façade or device to facilitate or conceal receipt by Mr Onuiri (in the way that receipt by Burnstead concealed receipt by Mr Dalby of the proceeds of his misfeasance as the director of ACP in Gencor [2000] 2 BCLC 2000, or the receipt by Infocom concealed receipt by Mr Smallbone of the proceeds of his misfeasance as a director of Trustor in Trustor AB [2001] 1 WLR 1177).
22. The ultimate beneficiary of the payments out of the Habitable bank account cannot be established by the Society. I do not consider that I can properly infer from the proved facts that it must have been Mr Onuiri. (Indeed that has not been the Society's pleaded case: see the answer given on 18 August 2008 to Request 32 raised by these defendants.) There is a real possibility that some of the payments were made to discharge liabilities of Habitable for which Mr Onuiri bore no personal responsibility. Receipt by Habitable would in those circumstances not be a deceptive mask to hide receipt by Mr Onuiri but a genuine means of funding Habitable's liabilities (albeit wrongfully). Of course, on its face the whole arrangement seems deeply suspect: but suspicion is not a substitute for proof. I do not consider that I should press the principle of piercing the corporate veil beyond its proper bounds: particularly when there is an alternative.
23. That alternative is to consider whether Mr Onuiri, although he did not receive property paid in breach of trust, nonetheless dishonestly assisted in a breach of trust. I have already held that the £450,150 paid by the Practice into Habitable's account was trust money paid out in breach of trust. Habitable was at the time under the control of Mr Onuiri. It must have been his decision to provide Habitable's banking details directly or indirectly to the Practice and his decision to retain the credit in Habitable's account (rather than to return it). That undoubtedly assisted the Practice to commit its breach of trust. The essential question is whether he acted dishonestly in doing so.
24. According to Barlow Clowes International Ltd v Eurotrust International Limited [2006] 1WLR 1476 at paragraph [15], what has to be established is that Mr Onuiri's knowledge about the payment by the Practice had to be such as to render his participation contrary to normal and acceptable standards of honest conduct. This involves looking at his state of knowledge; and then measuring his conduct in the light of that knowledge by reference to the objective standards of honest conduct.
25. As to knowledge, it is sufficient for Mr Onuiri to know that the money received by Habitable was not at the free disposal of the Practice: see per Lord Millett in Twinsectra Ltd v Yardley [2002] 2 AC 164 at paragraph [135]. This is established by the admitted receipt from the Practice and by the narrative appearing alongside the credit in Habitable's bank statement: and also from the absence of any commercial relationship between the Practice and Habitable that would justify the payment.

26. The question then is whether a finding of dishonesty may properly be made. I have set out in paragraph 16 above the facts which lead to a justifiable inference of guilty knowledge (for the purposes of the test of unconscionability) and which cast the burden of explanation upon Habitable. The knowledge of Habitable was the knowledge of Mr Onuiri. The question is whether those facts also lead to a justifiable inference of dishonesty on the part of Mr Onuiri. In my judgment they do. He had provided Habitable's banking details to the Practice to facilitate the payment. He knew that the money which subsequently entered Habitable's account was not at the free disposal of the Practice. He knew that there was no commercial relationship between the Practice and Habitable that would warrant the payment. He had received no explanation from the Practice as to why payment was received. He made no enquiry of the Practice as to why the payment was received. He chose to deal with it for the benefit of Habitable and in a manner which so far as he knew was not authorised. Such conduct would be contrary to normally acceptable standards of honest conduct. Absent any explanation from him, the proper inference is that he was assisting the Practice to dispose of money which did not belong to it in an unauthorised manner.
27. Although in his Defence Mr Onuiri pleads that there was a justification for his conduct, he has not attended trial to give evidence in support of his case, to tender the Affidavit provided by way of disclosure as his evidence at trial, and to be cross examined upon it. He has not discharged the evidential burden. So on the totality of the evidence adduced at trial (by way of proven fact and proper inference from those facts) I conclude that he dishonestly assisted in a breach of trust by the Practice.
28. This conclusion is reinforced by the terms of Mr Onuiri's own pleading. Paragraph 11 of the Defence says that the reason for the payment is to be found in the Affidavit. I have already summarised the reasons and indicated that they did not cause me to doubt the soundness of the inferences I was prepared to draw from approved facts. In the present context I find paragraph 4.5 of the Affidavit illuminating. In it Mr Onuiri records an awareness of what he describes as "the fact that Nigerians have a reputation in business of doing things unlawfully" and that "with this in mind and given the amount involved [he] said that [he] did not want any "dodgy money"..". If this was his admitted state of mind I consider that the conclusion I am prepared to draw from other material is even more soundly based.
29. I accordingly find and hold that Mr Onuiri dishonestly assisted in a breach of trust by the Practice and is liable to account as constructive trustee for the £450,150 which was the subject of the relevant bank credit.
30. Both Habitable and Mr Onuiri are liable to account as constructive trustees for the sum of £450,150. That sum will bear compound interest in equity with half-yearly rests. Subject to any submissions made on handing down judgment, the period will commence on 23 November 2007 and continue until repayment is made. The rate will be 5%.

31. These conclusions render it unnecessary to examine the common law claims for money had and received or for damages for conspiracy.
32. I have considered the proper exercise of my jurisdiction in relation to the cost of this action. In particular I have considered whether there is anything in the constitution of the action or the nature of the claim advanced by the Society or in its conduct of the case which should cause me to depart from the general rule set out in CPR 44.3(2). I have concluded that there is not. I will therefore order Habitable and Mr Onuri to pay the Society's costs of this action (save insofar as already provided for and save in so far as they relate to defendants who were not served or against whom proceedings have been discontinued).

Mr Justice Norris.....21 June 2010.