Neutral Citation Number: [2023] EWHC 605 (Admin)

Case No: CO/2726/2022

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/03/2023

Before :

MR JUSTICE MOSTYN

- -

Between :
FRESH VIEW SWIFT PROPERTIES LIMITED

Claimant

and

WESTMINSTER MAGISTRATES' COURT

Defendant

and

(1) COMMISSIONER OF POLICE OF THE METROPOLIS

(2) FELIX ALLEN ADIEGWU

(3) NKIERUKA GERTRUDE ADIGWE

Interested Parties

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Nicholas Yeo for the claimant (instructed by **Hickman and Rose**)

Kennedy Talbot KC and Ryan Dowding (instructed by in-house legal team) for the first interested party
The other parties neither appeared nor were represented

Hearing date 14 March 2023

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Approved Judgment

Mr Justice Mostyn:

1. On 28 April 2022, District Judge Minhas sitting in Westminster Magistrates' Court ordered the forfeiture of £67,372.51 (and accrued interest) lying in an HSBC account No. 23802671 ("the HSBC account") held in the name of the claimant Fresh View Swift Properties Limited ("the forfeited sum").

2. The claimant seeks judicial review of that decision on three grounds:

> (1) The forfeiture decision was unlawful because the District Judge directed herself that the whole of the proceeds of an unregistered MSB is recoverable property, including customer money remitted through that business. Whereas, she should have directed herself that only the fees paid to such a business are recoverable property.
>
> (a) The sums remitted are not obtained "by or in return for unlawful conduct", (within the meaning of Part 5 and section 242(1) POCA) merely by reason of the MSB not being registered (*ARA v John* [2007] EWHC 360 (QB)) **(Ground 1(a)**)
>
> (b) Sums paid to an MSB for remittal are not (without more) obtained by that MSB but remain the customers money throughout (**Ground 1(b)**).
>
> **Ground 2**
>
> The forfeiture decision was unnecessary and disproportionate under Article 1 of Protocol 1 ECHR within the meaning of the Supreme Court in *R v Waya* [2013] 1 AC 294.

3. The claimant is Fresh View Swift Properties Limited ("Fresh View"). The defendant is the Westminster Magistrates' Court. The first interested party is the Commissioner of the Metropolitan Police ("the Commissioner"). The second interested party is Felix Allen Adiegwu ("Felix A"), the director of Fresh View at the time of the relevant transactions. The third interested party is the sister of Felix A. Mr Christopher Adiegwu is the current director of Fresh View, and spoke for Fresh View at the hearing before the District Judge. Fresh View was not represented by counsel at the hearing before the District Judge.

4. The forfeiture proceedings related to a series of transactions whereby the forfeited sum was "transferred" by the claimant from Nigeria to the UK through an unlicensed MSB operated by Michael Kaleajaiye ("Michael K"). The forfeited sum was part of a larger sum of £149,338 transferred from accounts controlled by Michael K, or paid by him in cash, to the claimant between 18 July 2019 and 18 October 2019.

5. On 4 October 2022 Heather Williams J granted permission on Ground 1(a) and refused permission on Grounds 1(b) and 2. Ground 2 has been orally renewed before me and heard rolled up with Ground 1(a).

6. I am therefore only concerned with Grounds 1(a) and 2.

Ground 1(a)

7. Under Ground 1(a) the question I have to answer is whether the forfeited sum was, as a matter of law, "recoverable property" for the purposes of Part 5 of the Act.

8. Part 5 of the Act is headed "Civil recovery of the proceeds etc. of unlawful conduct". The relevant provisions of Part 5 for the purposes of this case are as follows:

Section 304(1):

> "Property obtained through unlawful conduct is recoverable property…"

Section 242(1):

> "A person obtains property through unlawful conduct … if he obtains property by or in return for the conduct."

Section 241(1):

> "Conduct occurring in any part of the United Kingdom is unlawful conduct if it is unlawful under the criminal law of that part."

Section 241(2):

> "Conduct which:
>
> (a) occurs in a country or territory outside the United Kingdom and is unlawful under the criminal law applying in that country or territory, and
>
> (b) if it occurred in a part of the United Kingdom, would be unlawful under the criminal law of that part,
>
> is also unlawful conduct."

Section 303Z14(4):

> "The court … may order the forfeiture of the money or any part of it if satisfied that the money or part – (a) is recoverable property, …."

Section 305:

> "**Tracing property, etc**
>
> (1) Where property obtained through unlawful conduct ("the original property") is or has been recoverable, property which represents the original property is also recoverable property.
>
> (2) If a person enters into a transaction by which:
>
> (a) he disposes of recoverable property, whether the original property or property which (by virtue of this Chapter) represents the original property, and
>
> (b) he obtains other property in place of it,

> the other property represents the original property.
>
> (3) If a person disposes of recoverable property which represents the original property, the property may be followed into the hands of the person who obtains it (and it continues to represent the original property)."

9. The question I have to answer is, therefore: Was (i) property (ii) obtained (iii) by[1] (iv) conduct which was (v) unlawful?

10. There is no authority that specifically addresses the meaning of these words as they are used in Part 5 of the Act. The decisions of *Director of Assets Recovery Agency v John* [2007] EWHC 360 (QB) and *R (on the application of Campbell) v Bromley Magistrates' Court* [2015] EWHC 3424 are not analogous and do not tell me what these words are to be taken to mean. Further, the authorities on Part 2 of the Act in my judgment do not help to answer the question. Part 2 concerns a completely different scenario – confiscation in criminal proceedings following a conviction – and uses different language and concepts to those in Part 5.

11. In my judgment, the meanings of these words are clear.

12. I address each of the requisite five elements in turn.

    i) **Property.** A forfeiture application under Part 5 of PoCA is an action against the property itself as an *in rem* proceeding.

    Such an application is always against an identified asset in specie. Where it is money in an account, that money must have been previously frozen. Where an order is made, it is against that money in that account. It is not a judgment for a general, liquidated sum.

    Such an *in rem* process was well-described in *United States v. Contorinis* 692 F.3d 136, 146 (2d Cir. 2012), where the civil forfeiture regime is much the same as ours:

    > "In civil forfeiture, the United States brings a civil action against the property itself as an in rem proceeding – 'it is the property which is proceeded against, and . . . held guilty and condemned as though it were conscious instead of inanimate and insentient.' . . ."

    ii) **Obtained.** 'To obtain' means to come into possession of something. The use of the past participle means that in the past someone came into possession of the property. The use of this verb does not carry with it an implication that that person either gained ownership of the property or necessarily derived benefit from it.

[1] There is an alternative prepositional phrase "or in return for" in s.242(1). It is there to cover the situation where a payment is made to someone to perform an unlawful act, like a contract killing. That has nothing to do with this case and I need say no more about it.

In this case it is agreed that there are two possible obtainments:

(a) The placement by, or on behalf of, the claimant into Michael K's Nigerian Bank Account of about 40 million Naira, being the sterling equivalent of £67,372.21;

(b) The placement of the sum £67,372.21 into a UK bank account of Michael K.

At the start of the hearing it was the Commissioner's case that the relevant obtainment was a combination of (a) and (b), although by the conclusion of the hearing it was clear to me that Mr Talbot KC was, correctly, focussing on (b).

iii) **By:** the word "by" when used in a phrase as a preposition, signifies who or what has done something, or how something has been done. To be precise, the word forms a prepositional-adverbial phrase describing how something has happened. Here the happening is the obtainment and the cause is the unlawful conduct.

iv) **Conduct:** the obtaining of the property must have been by a person's conduct. "Conduct" is a noun which means, according to the OED, "the action of conducting or leading … the action of the person or thing that leads". The use of the word "conduct" in s.242 in my judgment therefore requires demonstration of some human action or steps to a particular end.

v) **Unlawful:** the conduct must have been unlawful. Where it occurred in any part of the United Kingdom it is unlawful conduct if it is unlawful under the criminal law of that part. If it occurred overseas it must be contrary to the criminal law of the overseas place and, if it had occurred in a part of the UK, must be contrary to the criminal law of that part. As this is an action *in rem* it does not matter who was guilty of unlawful conduct. The only requirement is that the property was obtained by someone's unlawful conduct.

13. I emphasise, as stated above, that while the words require that the property must have been obtained by the unlawful conduct of an individual they do not require that individual to have owned the property at any point or for that individual to have benefitted from the transaction in any way.

14. In this case, the operation by Michael K of an unlicenced MSB is a criminal offence under Regulation 56(1)(b) and 86(1) of the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 (SI 2017 No. 692) which respectively provide that a person must not act as a MSB unless he or she is registered and that a breach of this registration requirement is a criminal offence.

15. In contrast, there is no formal evidence that the payment by, or on behalf of, the claimant of 40 million Naira to Michael K in Nigeria was a crime in that country (although I can take judicial notice that it may well have been).

16. The payment of £67,372.21 into Michael K's UK bank account was not a crime by anyone, unless it was done by Michael K himself, as a step in acting as an unlicenced MSB.

17. The District Judge made no findings as to the source of the money paid into Michael K's UK bank account, and the case has been argued before me on the agreed premise that the payment was made by an unknown third party, inferentially an associate of Michael K, to whom I shall refer as "Payer X".

18. As the conduct of Payer X in paying the money into Michael K's account was not unlawful, that conduct cannot be a reason for making the money recoverable.

19. However, I have reached the conclusion that Michael K must have engaged in "conduct", as an operator of an unlicenced MSB, to receive that money. That conduct would have been as follows:

    i) he would have offered his services to people or entities in the position of the claimant as an unlicenced MSB;

    ii) in his capacity as an operator of an unlicensed MSB he would have set up at least one bank account to receive money with which to pay to people or entities in the position of the claimant ('the receiving account');

    iii) he would have arranged for funds to be paid by Payer X from its bank account ('the paying account') into the receiving account;

    iv) for that purpose he would have provided the details of the receiving account to Payer X to enable the funds to be transferred to it; and

    v) he would have arranged the date and time of the transfer of funds from the paying account to the receiving account.

20. As explained above, the operation by Michael K of an unlicenced MSB was a criminal offence. The steps taken by him to facilitate the receipt by him of £67,372.21 in his receiving account from the paying account were therefore unlawful steps under the criminal law of all parts of the UK.

21. My essential reasoning is that the transfer of money from Payer X's bank account to Michael K's bank account requires "conduct" by both Payer X as transferor and Michael K as transferee. It is not realistic to view Michael K's receipt of the money as being purely passive.

22. Therefore, for the purposes of the above provisions in the Act, I am satisfied that Michael K **obtained** £67,372.21 **by unlawful conduct**. That sum of £67,372.21 is therefore recoverable property. The sum of £67,372.21 was later paid by Michael K to the claimant. That it might have come from a different fund to that which was paid in by Payer X makes no difference under s305(1). The recoverability of that amount is followed into the hands of the claimant by virtue of s.305(3).

23. £67,372.21 in the HSBC account was duly frozen by an order made on 15 November 2019 in the Bromley Magistrates Court. At the final hearing the District Judge rejected a defence by the claimant under s.308(1) that it had received the money in good faith, having paid full valuable consideration for it, and without notice that it was recoverable property. The District Judge made the additional finding at para 115 of her judgment that the funds transferred to the claimant were intended for use in future unlawful

conduct. The rejection of the claimant's s.308 defence does not fall within these judicial review proceedings.

24. All the statutory requirements were therefore satisfied. Section 303Z14(4) then gives the court a formal discretion whether or not to order forfeiture. It says:

> "The court … may order the forfeiture of the money or any part of it … "

However, in my judgement, findings that lead to the discretion being exerciseable should almost invariably result in the discretion being exercised in favour of forfeiture. In my judgement, the District Judge was therefore right to make the primary decision to order forfeiture of that sum in that account.

25. I dismiss Ground 1(a).

Ground 2.

26. It is accepted by the Commissioner that an order made by the Court pursuant to s.303Z14 of the Act is necessarily an interference with the subject's rights under Article 1, Protocol 1 to the European Convention on Human Rights.

27. Both counsel cited *Boljević v Croatia* [2017] ECHR 10 and *Jahn v Germany* (2006) 2 EHRR 1084. These establish the principle that a measure:

> "must bear a reasonable relationship of proportionality between the means employed by the authorities to achieve that aim and the protection of the claimant's right to the peaceful enjoyment of his possessions."

In the context of forfeiture this means simply that the order must not be a disproportionate response to the unlawful conduct in question. This reflects the core principle at the heart of the social contract between the state and the people that when the state interferes in the life of an individual the means of the interference must in type, scale and duration be no more than is necessary to justify its end. A ubiquitous popular expression of the principle is the maxim that "the punishment must fit the crime", itself the subject of satirical treatment by Gilbert & Sullivan[2]. Therefore, whenever forfeiture is to be ordered, the court should conduct a short disproportionality check before finalising its decision. It would only be justified in interfering with the primary decision where it is clearly satisfied that the proposed forfeiture would be a manifestly disproportionate response to the conduct in question.

28. Mr Yeo argues that the claimant, as a mere customer of the unlicenced MSB, committed no crime in this country and cannot be said to have done anything wrong. It derived no profit from the transaction. In such circumstances he argues that it would be manifestly disproportionate for this sum to be expropriated.

29. Mr Talbot KC makes the following points in response:

[2] "My object all sublime / I shall achieve in time — / To let the punishment fit the crime — / The punishment fit the crime" (The Mikado: Act II).

i) The claimant (or, more relevantly, Felix A and his sister, who controlled Fresh View at the relevant time) well knew that they were using an unlicenced MSB. Further, the District Judge reached the additional conclusion that the funds "transferred" to the claimant were intended for use in future unlawful conduct.

ii) As a result their statutory defence under s.308 was rejected.

iii) The funds were not actually transferred from Nigeria to London. Instead an asset (£67,372.21) was purchased by the claimant from Michael K in London for the consideration of about 40 million Naira paid by the claimant to Michael K in Nigeria. The machinery established by Michael K to achieve that purpose was entirely unlawful.

iv) This was therefore an illegality case through and through. It was not a case where the business was lawful but where the controller of the business engaged in unlawful acts (as in *R v Sale* [2013] EWCA Crim 1306 where the owner and controller of a lawful business paid bribes to secure contracts). In such a case the court can apply the more merciful principle that only the profit element of the recoverable property should be forfeited: *R v Waya* [2013] 1 AC 294 at [34] and *R v Andrewes* [2022] UKSC 24; [2022] 1 WLR 3878 at [37].

v) In sharp contrast, the policy of the legislation in a case of illegality is that the entirety of any property which is recoverable should be forfeited, notwithstanding that the profit element might only be a small fraction of the recoverable sum, or that there may be no profit element at all. It is true that the policy or objective of this genre of legislation was originally expressed to be the extraction from criminals of the "benefit" or "proceeds" of their criminal conduct. But that objective has since been given a pitiless interpretation by the senior judiciary, which is that if the enterprise is criminal then all the money that flowed through it will be recoverable, irrespective of the amount of actual profit (if any) that the operator of the criminal enterprise derives from it: *R v Waya* at [26], *R v Andrewes* at [28(iii)].

vi) This is considered to be a reasonable and proportionate response to meet the high societal need to eradicate the laundering of the proceeds of serious crimes.

vii) This order was not anywhere close to the line of being manifestly disproportionate. On the contrary, the order was a proportionate response to clearly unlawful conduct.

30. I agree with Mr Talbot KC's submissions.

31. The District Judge's conclusion on the question of whether the measure was disproportionate was set out in paragraph 113 of her judgment as follows:

> "There is no dispute that money service businesses are heavily regulated to prevent the movement of funds derived from criminal conduct. This is necessary in any society operating with rule of law. The Defendants' knew they should conduct money transfer business with a regulated and licensed provider. The First and Second Defendant made no proper enquiry whether Mr

> Kaleajaiye was so licensed and the Third Defendant relied entirely on the decision making of the First and Second Defendant. Plainly, this comes at substantial risk to all three Defendants. I have found that were the most simple or basic of internet enquiries made, it would have alerted the Second Defendant that there was an issue with who Mr Kaleajaiye was purporting to be. The reality is, in my view, that Mr Felix Adiewgu was not concerned with such matters as he got his money and had no real interest in where it came from."

32. Like Heather Williams J, I can detect no error of law in the way the District Judge expressed her reasons on the disproportionality issue. She rightly identified that the steps taken by Felix A and his sister to remove money from Nigeria through this unlicenced MSB, in likely breach of that country's exchange controls, came with a substantial risk of disaster. Unfortunately for them, that risk materialised. Mr Yeo rightly and colourfully put it that if you swim with sharks you should not be surprised if you get bitten. He disputed that his clients were swimming with sharks, but it is clear that they were.

33. The forfeiture of the £67,372.21 held in the HSBC account was not manifestly disproportionate. I agree with the inferential finding of the District Judge to that same end.

34. I refuse permission on Ground 2.

35. I record that counsel have argued, in writing and orally, their respective cases persuasively and analytically for which I express my admiration and gratitude.

36. I set out below the Order I have made disposing of this case, which includes my response to the request for clarification of my draft judgment, and my decisions on the applications for permission to appeal and for a leapfrog certificate.

CO/2726/2022

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Before the Honourable Mr Justice Mostyn

B E T W E E N:-

FRESH VIEW SWIFT PROPERTIES LIMITED

Claimant

-v-

WESTMINSTER MAGISTRATES' COURT

Defendant

COMMISSIONER OF POLICE OF THE METROPOLIS

1st Interested Party

FELIX ALLEN ADIEGWU

2nd Interested Party

NKIERUKA GERTRUDE ADIGWE

3rd Interested Party

ORDER

UPON

A. a claim having been issued on 28 July 2022 by the Claimant judicially to review the decision of District Judge Minhas made on 28 April 2022 whereby the said judge forfeited the sum of £67,372.51 (plus interest) held in a bank account of the Claimant, pursuant to s.303Z14 of the Proceeds of Crime Act 2002;

B. the Claimant having been granted permission by Heather Williams J, on 4 October 2022, to proceed with its claim in respect of Ground 1(a) of its grounds for judicial review;

C. the Claimant renewing its application for permission in respect of Ground 2 of the said grounds, but not renewing its application in respect of Ground 1(b);

D. hearing Junior Counsel on behalf of the Claimant (Nicholas Yeo), and Leading and Junior Counsel on behalf of the First Interested Party (Kennedy Talbot KC and Ryan Dowding), and considering the written submissions and hearing bundle filed by both parties;

E. the Court handing down a written judgment on 23 March 2023;

F. the Claimant having sought (i) amplification of the judgment, (ii) permission to appeal and (iii) a certificate under section 12(1) and 12(3)(a) of the Administration Justice Act 1969 ("the consequential applications"); and

G. the Court disposing of the consequential applications for the reasons set out below.

IT IS ORDERED THAT:

1. The renewed application for permission on Ground 2 is refused;

2. The claim for judicial review in respect of Ground 1(a) is dismissed;

3. The application for permission to appeal is dismissed.

4. (With the consent of the parties) the Claimant shall pay the costs of the First Interested Party in the agreed sum of £18,000.

REASONS

Clarification of the judgment

1. A request for clarification of a judgment should not be routine and should only be made to raise with the judge and draw to his attention any material omission in the judgment, any genuine query or ambiguity which arises on the judgment, and any perceived lack of reasons or other perceived deficiency in the judge's reasoning process: (*Re I (Children)* [2019] EWCA Civ 898 at [41].

2. There is no ambiguity or omission in my judgment concerning the additional finding of the District Judge to which I referred at paras 23 and 29(i). It is indisputable that the District Judge made such an additional finding at para 115 of her judgment, and had prefigured that finding at para 114. It is true that she did not deploy that finding to provide the grounds for her disposal, which may suggest a lack of conviction in the finding, or that she felt she was on stronger ground in going down the route to judgment that she did. That shade of equivocality notwithstanding, I was entitled in my judgement to recognise that additional finding.

3. My decision on Ground 2 would have been the same if the District Judge had not made that additional finding. My reference to it was to add confirmatory weight to my essential conclusion that the District Judge's decision was not disproportionate.

Permission to appeal

4. While it is true that there is no authority on the meaning of the words in s. 242, I consider their literal and purposive meanings as laid out by me to be totally clear and thus indisputable. Therefore, I cannot see that there is any real prospect of success on an appeal which challenges the meanings I have laid out. Permission to appeal on that basis is therefore refused.

5. For the reasons set out above, I refuse the claimant permission to appeal my recognition of the additional finding of the District Judge.

6. The decision whether there is some other compelling reason for an appeal against my decision to be heard is not for me to take. Conventionally, the grant of appeal on that alternative basis is invariably made by the appeal court and not the lower court. Permission to appeal on the alternative basis is therefore refused.

Leap- frog certificate

7. S. 15(3) of the Administration of Justice Act 1969 states:

> "Where by virtue of any enactment, apart from the provisions of this Part of this Act, no appeal would lie to the Court of Appeal from the decision of the judge except with the leave of the judge or of the Court of Appeal, no certificate shall be granted under section 12 of this Act in respect of that decision unless it appears to the judge that apart from the provisions of this Part of this Act it would be a proper case for granting such leave."

8. As I have decided that this would not be a proper case for the grant of permission to appeal to the Court of Appeal, no leapfrog certificate can be granted. Even if this were not the case, I would not grant a certificate. Although s.12(3)(a) and (b) furnish separate grounds for granting a certificate it is, to my knowledge, the immutable convention that a certificate is not granted where the issue concerns the construction of a statute unless there is a binding decision of the Court of Appeal on the statutory provision in question with which the High Court judge disagrees.

DATED: 23 MARCH 2023