

# TURNING A BLIND EYE – COURT CONSIDERS KNOWING DECEIT AND DISHONEST ASSISTANCE CLAIMS

---

## FRAUD AND FINANCIAL CRIME

In this publication we look at the recent case of *Glen Dimplex Home Appliances Ltd v Smith and others* [2011] EWHC 3392 (Comm) in which the Court considered applications for summary judgment by a claimant employer in relation to claims for knowing receipt and dishonest assistance against members of a fraudulent former employee's family.

### THE FRAUD

The first defendant, Mrs Smith, worked for the claimant company, Glen Dimplex Home Appliance Ltd (Dimplex), as a Purchase Ledger Supervisor. Mrs Smith's husband had also worked for Dimplex, but he had retired after suffering a serious back injury at work. Following his accident Mr Smith brought a claim against Dimplex which was settled for approximately £230,000. Mr Smith also received a small annual pension from his former employer.

Two months after Mr Smith's retirement, Mrs Smith began manipulating Dimplex's BACS payments due to suppliers in order to fraudulently divert funds into her and her husband's joint bank account and an account in her own name. Mrs Smith attempted to conceal her actions by falsifying creditor listings and forging bank statements. She also arranged for large payments to be made to the bank accounts of her daughter, Mrs Lewis. The stolen money was used on a number of significant capital purchases, including a number of properties, one of which was purchased in Mr and Mrs Lewis' names (the Property). Mrs Smith's fraud was discovered a few years later and she was summarily dismissed. When her fraud was uncovered Mrs Smith fled to Edinburgh and upon her return home she wrote a note to Mr Smith and Mrs Lewis stating that she had stolen the money and that she had misled her family into believing that it had come from Mr Smith's settlement payment. In June 2011, Mrs Smith submitted to judgment for £2.8m, plus costs.

### KNOWING RECEIPT AND DISHONEST ASSISTANCE – THE CLAIMS

Dimplex, thereafter, issued proceedings against Mr Smith, Mr and Mrs Lewis, and various other family members. It brought claims of knowing receipt and dishonest assistance against Mr Smith and Mrs Lewis asserting that:

1. they had dishonestly assisted Mrs Smith to breach her fiduciary duties and to breach the constructive trust by allowing their bank accounts to be used to receive and retain the monies paid into those accounts and to pay monies out; and
2. they had received funds belonging to Dimplex into their bank accounts knowing that they belonged to Dimplex and/or they were transferred in breach of fiduciary duty.

Dimplex further claimed that Mr Smith and Mrs Lewis had been unjustly enriched and were liable to repay the money, and that they had unlawfully conspired to injure Dimplex. It also brought a tracing claim against Mr and Mrs Lewis in relation to the Property. Dimplex submitted that the Property had been purchased using money that had been misappropriated by Mrs Smith from it and, therefore, the Property was held on constructive trust for it. Dimplex applied for summary judgment in relation to the dishonest assistance and knowing receipt claims, as well as the tracing claim.

### WE WERE DUPED – THE DEFENCES

Both Mr Smith and Mrs Lewis maintained that they, like Dimplex, had been duped by Mrs Smith and that they had not known that the monies had been stolen. Indeed, Mr Smith maintained that he had only become aware of the fraud when a search order was executed at their home. He submitted that he thought that they were "cash rich" after downsizing their home and from his settlement payment, and that he was ignorant of the couples' financial position because after his retirement he had handed control of their finances to his wife. Mrs Lewis argued that she was led to believe that Mr Smith's compensation had been settled for more than £1m, and that the gifts she had received from Mrs Smith had come out of that money. Furthermore that she and her husband had given good consideration for the monies received for the Property by agreeing to sell another property to Mrs Smith.

### A FAILURE TO ASK OBVIOUS QUESTIONS – THE DECISION

HHJ Hirst QC gave summary judgment against Mr Smith but not against Mrs Lewis. In reaching his conclusions he held that it was settled law that:

- ◆ a deliberate closing of eyes and a deliberate failure to ask obvious questions for fear of what might be learned amounted to dishonesty;
- ◆ that, unlike dishonest assistance, a claim for knowing receipt did not require proof of dishonesty, but did require proof of sufficient knowledge of the breach of trust or fraud that it would be unconscionable for the defendant to keep the money;
- ◆ that the standard of proof that the claimant needed to meet in both cases was the civil standard, namely on a balance of probabilities; and
- ◆ that summary judgment was possible in fraud cases, but that it should only be used where it was plain and obvious that there had been dishonesty.

With regard to Mrs Lewis, HHJ Hirst QC held that she had a great deal to answer for, and not least the sheer scale of the monies that she had received and the contents of her bank statements. However, it was possible that she may not have known the true state of her parents' financial affairs and may have been misled by her mother as to the extent of the compensation received by her father. It was, therefore, not sufficiently established that Mrs Lewis knew that the money she received was the result of Mrs Smith's fraud and, therefore the claims against Mrs Lewis would have to go to trial.

HHJ Hirst QC thought that the position of Mr Smith was different, holding that he must have, at the very least, strongly suspected that Mrs Smith was stealing from Dimplex and that he had deliberately not asked obvious questions for fear of what he might learn. He could not have failed to notice the level of Mrs Smith's spending or indeed his own spending. HHJ Hirst QC thought that it was no exaggeration to say that the couple had gone on a spending spree, which had even preceded Mr Smith's settlement.

HHJ Hirst did not give much weight to Mr Smith's claim that Mrs Smith's written note corroborated his argument that he had been duped. He found that the note had been written by a very dishonest woman who had known that the game was up and had every incentive to try and protect her husband and family. Further, Mr Smith may well have handed over control of their finances to his wife, but he had still managed to spend over £400,000 in six years and he could not have been unaware of the dramatic improvement in their general standard of living. Mr Smith's contentions, therefore, went beyond the limits of credibility and in those circumstances it was appropriate to enter summary judgment on the dishonest assistance/knowing receipt claims against him, because he had no realistic prospect of defending the claims.

Summary judgment was also granted in the tracing claim. Mr and Mrs Lewis had no defence to the claim as there was not the slightest evidence to support their assertion that good consideration had been given for the money received from Mrs Smith for the Property. Therefore, HHJ Hirst QC declared that the Property had been bought with funds stolen by Mrs Smith from Dimplex, and that it was, accordingly held on trust for Dimplex.

#### COMMENT

Although the fraud perpetrated by Mrs Smith was not overly sophisticated, the case does provide a useful reminder of the principles of dishonest assistance and knowing receipt claims, namely:

1. the success of such claims will depend upon establishing, on the balance of probabilities, that the defendant knew that the money received was the result of a breach of trust or fraud; and
2. that proof of dishonesty is not necessary to prove knowing receipt, rather all that is required is proof of sufficient knowledge that there had been a breach of trust so that it would be unconscionable for the defendant to keep the money.

The case also reiterates the position that the Court will not give any credence to a defence based on ignorance; turning a blind eye to the obvious by remaining silent and deliberately failing to ask obvious questions will amount to dishonesty. Finally the case also provides a helpful guide to summary judgment applications in fraud cases. The judge was clear that whilst it is possible in such cases, summary judgment should only be granted where it is plain and obvious that there has been dishonesty (as with Mr Smith), and that even where there are serious doubts about a defence (as with Mrs Lewis) the issues should still be determined at a trial.

#### CONTACT DETAILS

If you would like further information or specific advice please contact:

**BARRY DONNELLY**  
DD: +44 (0)20 7849 2950  
barry.donnelly@macfarlanes.com

**CHARLES LLOYD**  
DD: +44 (0)20 7849 2338  
charles.lloyd@macfarlanes.com

**MATT MCCAHEARTY**  
DD: +44 (0)20 7849 2659  
matt.mccahearty@macfarlanes.com

**IAIN MACKIE**  
DD: +44 (0)20 7849 2299  
iain.mackie@macfarlanes.com

**DAN LAVENDER**  
DD: +44 (0)20 7849 2606  
dan.lavender@macfarlanes.com

**MARCH 2012**

**MACFARLANES LLP**  
**20 CURSITOR STREET LONDON EC4A 1LT**

T: +44 (0)20 7831 9222 F: +44 (0)20 7831 9607 DX 138 Chancery Lane [www.macfarlanes.com](http://www.macfarlanes.com)

This note is intended to provide general information about some recent and anticipated developments which may be of interest. It is not intended to be comprehensive nor to provide any specific legal advice and should not be acted or relied upon as doing so. Professional advice appropriate to the specific situation should always be obtained.

Macfarlanes LLP is a limited liability partnership registered in England with number OC334406. Its registered office and principal place of business are at 20 Cursitor Street, London EC4A 1LT. The firm is not authorised under the Financial Services and Markets Act 2000, but is able in certain circumstances to offer a limited range of investment services to clients because it is authorised and regulated by the Solicitors Regulation Authority. It can provide these investment services if they are an incidental part of the professional services it has been engaged to provide. © Macfarlanes March 2012