

Kea Investments Ltd v Eric John Watson

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| Jurisdiction: | Jersey |
| Judge: | J. A. Clyde-Smith OBE., Jurats Ramsden, Austin-Vautier |
| Judgment Date: | 28 April 2021 |
| Neutral Citation: | [2021] JRC 124 |
| Court: | Royal Court |

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Text

[2021] JRC 124

ROYAL COURT

(Samedi)

Before:

J. A. Clyde-Smith OBE., Commissioner and Jurats Ramsden and Austin-Vautier

Between
Kea Investments Limited
Plaintiff
and
Eric John Watson
First Defendant

and

William Gerald Gibson
Second Defendant

and

VG Trustee Limited (in its capacity as trustee of the Kowhai, Glacier and Libra Trusts)
First Party Cited

and

Chanin Holdings Limited
Second Party Cited

and

Lucas Eric Henrekson Watson (by his guardian *ad litem*, Advocate Paul Nicholls)
First Intervener

and

Leon Eric Henrekson Watson (by his guardian *ad litem* Advocate Paul Nicholls)
Second Intervener

and

Aidan Brian Henrekson Watson (by his guardian *ad litem*, Advocate Paul Nicholls)
Third Intervener

Advocate S. J. Williams for the Plaintiff

Advocate F. J. Littler for the First and Second Parties Cited

Advocate N. B. R. Mière for the Interveners

Authorities

Kea Investments v Watson and Ors [\[2021\] JRC 009](#).

Judgments (Reciprocal Enforcement) (Jersey) Law 1960.

Representation of Rawlinson & Hunter Trustees SA re Z Trusts [\[2019\] JCA 106](#).

In Re ZII Trust [\[2015\] \(2\) JLR 108](#).

Companies.

THE COMMISSIONER:

- 1 On 15th April 2021, the Court extended the *arrêt entre mains*, granted by the Court in favour of the Plaintiff (“Kea”) on 19th January 2021, over additional loans made by the First

Defendant (“Eric Watson”) that had come to light, but in so doing, declined the request of the Interveners to make orders effectively preventing Kea from enforcing certain of them.

- 2 The background is set out in the Court's judgment of 19th January 2021 (*Kea Investments Limited v Watson and Ors* [\[2021\] JRC 009](#)), but in brief summary:

(i) At the suit of Kea, Eric Watson is an adjudicated fraudster in and contemnor of the courts of England and Wales. Kea has the benefit of an English judgment including a declaration of entitlement to equitable compensation in a maximum sum of approximately £43.5 million and interim payment orders of £25,259,986.49 together with £3,837,356.57 in costs. This is supported by post-judgment asset disclosure orders and notification undertakings relating to dealings with his world-wide assets (wheresoever held) in excess of £100,000. On 11th September 2019, Kea registered the interim payment order together with the order for costs in Jersey under the Judgments (Reciprocal Enforcement) (Jersey) Law 1960.

(ii) Evidence adduced by Kea shows that despite considerable efforts at enforcement, a significant proportion of the Jersey judgment debt remains outstanding, and Kea maintains that there is a strong basis for saying that Eric Watson is engaged in an unlawful conspiracy with the Second Defendant (“William Gibson”), his right-hand man, to defeat his creditors, in particular, Kea.

(iii) Eric Watson had established three Jersey proper law discretionary trusts, namely the Kowhai, Glacier and Libra trusts, of which the First Party Cited (“VG”) is trustee and of which Eric Watson and his children and remoter issue are within the beneficial class.

(iv) Kea sought confirmation of on an *arrêt* over the rights of Eric Watson as a beneficiary of the three trusts and of an *arrêt entre mains* over five Jersey law loans made by Eric Watson to the trusts and a company underlying one of the trusts.

(v) The Court declined to confirm the *arrêt* over Eric Watson's interests in the three trusts for reasons set out in the judgment of the 19th January 2021, but confirmed the *arrêt entre mains* over the five Jersey law loans, over which there was no issue. The Act of Court of 19th January 2021 listed the loans over which the *arrêt entre mains* had been confirmed in a schedule to the Act. The Court also made orders against VG for disclosure of the terms of the seized loans and for disclosure of Eric Watson's world-wide assets.

(vi) Following the provision of disclosure by VG, it became apparent to Kea that Eric Watson's original disclosure in the English proceedings had been inadequate in the context of the trusts. There were discrepancies between what had been disclosed and the records of VG in relation to the amounts due and their repayment terms. Furthermore, there were additional loans due to Eric Watson from VG as trustee of the trusts which had not previously been revealed to Kea.

(vii) Accordingly, Kea brought an *inter partes* application to distrain upon the additional loans which were understood to be due to Eric Watson from VG by way of a further *arrêt entre mains*.

(viii) There was no dispute as to the existence of these additional loans and no issue as to the extension of the *arrêt entre mains* over them. The Court therefore gave leave to Kea to amend its Order of Justice to substitute a new schedule setting out the full list of the loans distrained upon for the schedule attached to the Act of the 19th January 2021.

- 3 An issue arose, however, because Advocate Nicholls, who is the guardian *ad litem* for the Interveners who are the minor children of Eric Watson, had written to the Court on 14th April 2021 enclosing an unsworn affidavit from Eric Watson's eldest adult son, Samuel Watson, and setting out the orders which he said he would be content for the Court to make. He agreed with the substitution of the new schedule of loans, but in relation to four on demand loans due by VG, as trustee of the Kowhai Trust, to Eric Watson totalling £31,064.29 ("the Four Loans"), he sought the following orders:

(i) That no demand for repayment of the Four Loans could be made by Kea without the prior leave of the Court;

(ii) Within 7 days, he would procure payment of the sum of £31,064.29 into Court in respect of the Four Loans, such monies to be retained in Court pending agreement between Kea, VG and himself or further order of the Court.

In view of the discrete nature of the matters which concerned him, he did not file a skeleton argument for the purposes of the hearing.

- 4 The reason for seeking these restrictions on the ability of Kea to call in the Four Loans is contained in the unsworn affidavit of Samuel Watson. In summary:

(i) Of the three trusts established by his father, the Kowhai Trust was the only one to hold any potentially significant asset, namely an interest held through an intermediate company in a limited partnership ("the LLP") that in November 2016 Eric Watson had apparently valued at \$15.9 million. Samuel Watson's expectation was that the current value of this interest was likely to be lower than this, but he estimated the interest of the Kowhai Trust to be in the low millions of pounds. It would take some time for that interest to be realised and in the meantime it produced no income.

(ii) His only interest was to protect the interests of the Interveners, and it was not in their interests for the Kowhai Trust to be rendered insolvent by the calling in of the Four Loans.

(iii) He proposed therefore to pay off the Four Loans with monies borrowed from Winters Recruitment Solutions LLP, an apparently English limited liability partnership,

under the terms of an agreement dated 8th April 2021, which was exhibited to his affidavit duly executed. We note from the terms of the agreement that the loan was to be interest free, and repayable in two years' time in the sum of £98,000, a 300% uplift, failing which payment the lender would receive 50% of Samuel Watson's "Software and Technical Solution" which will be held in a new company to be formed. He confirmed that the source of these funds had no connection with his father.

- 5 Advocate Mière, representing Advocate Nicholls, submitted that as the confirmation of the *arrêt entre mains* was a discretionary remedy, the Court had a discretion to restrict the ability of Kea to enforce the Four Loans so that, in the interests of the Interveners as beneficiaries, the insolvency of the Kowhai Trust could be avoided by Samuel Watson paying off the Four Loans on behalf of VG. He complained that Kea was wilfully refusing to engage in the proposals put forward by the guardian in order that it could get its hands on the assets of the Kowhai Trust. The purpose of the restrictions being sought was to safeguard the interests of the Interveners as minor beneficiaries of the Kowhai Trust.
- 6 Advocate Mière acknowledged that Kea may not accept repayment of these loans from Samuel Watson and suggested an alternative mechanism whereby the benefit of the order for costs made against Kea in favour of Advocate Nicholls at the last hearing (likely to be more than the amount due under the Four Loans) could be exchanged by Advocate Nicholls for the amounts due under the Four Loans. The amount of those costs had not been agreed and were the subject of taxation, which could take a considerable period of time to be completed.
- 7 The accounts of the Kowhai Trust show that it is already insolvent on both the balance sheet and cashflow test. The accounts attribute a limited value to the investment in the LLP and so whilst it was possible that the Kowhai Trust was balance sheet solvent, it was clear that it had been cashflow insolvent for some time. The liabilities comprised:
 - (i) outstanding fees and expenses due to VG;
 - (ii) loans payable to two other trusts which we assume to be connected to Eric Watson; and
 - (iii) loans payable to Eric Watson. In addition to the Four Loans, there was a substantial loan due to him of US\$350,397.78 purportedly due on 31st March 2027 (also subject to the *arrêt entre mains* but on the face of it not yet demandable).
- 8 Advocate Williams submitted that it would be wrong for the Court to impose any restrictions over Kea's rights in respect of the Four Loans for a number of reasons, of which we would highlight the following:

- (i) Kea wanted nothing to do with the proposals being put forward on behalf of the

Interveners.

(ii) The affidavit of Samuel Watson was unsworn and therefore of no evidential value. The affidavit showed him as being of no fixed abode.

(iii) Samuel Watson was known to Kea as he had been involved previously in the cycling of his father's funds in alleged breach of the notification orders and had an involvement in the businesses of Eric Watson's right-hand man William Gibson.

(iv) It is not clear where the proposed funds to pay off the Four Loans would come from and there was a concern on Kea's part that they may derive ultimately from Eric Watson. It is not clear whether acceptance of those funds by Kea would meet the regulatory requirements, but in any event, Kea could not be forced to accept those funds, just as VG could not be forced to accept funds as an addition to the trust fund.

(v) The repayment of loans due to Kea alone would constitute a preferential payment that was susceptible to being avoided. Furthermore, the equitable rights of VG as trustee took priority over the rights of Kea and the other claimants to the assets of the Kowhai Trust – see the *Representation of Rawlinson & Hunter Trustees SA re Z Trusts* [\[2019\] JCA 106](#).

(vi) The Kowhai Trust was insolvent on the cashflow test and should now be administered on the basis that it was insolvent with the creditors rather than the beneficiaries being regarded as the persons with an economic interest in it – see *In Re ZII Trust* [\[2015\] \(2\) JLR 108](#).

(vii) Having confirmed the *arrêt entre mains*, in large part on 19th January 2021, it was wrong for the Court to seek to restrict the rights of Kea, a substantial judgment creditor, in the enforcement of the Four Loans in whatever manner it saw fit.

Decision

- 9 The Court agreed with Advocate Williams that it would be wrong for the Court to impose any restrictions over Kea's rights in respect of the Four Loans for the reasons he put forward.
- 10 These were proposals which could not be imposed upon Kea or upon VG and in any event, the Court was uncomfortable with the suggestion that it should accept the payment of monies into Court from Samuel Watson, a man of no fixed abode and the son of Eric Watson, an adjudicated fraudster and contemnor of the courts of England and Wales, and this on the basis of an unsworn affidavit.
- 11 Whilst Advocate Nicholls was acting in accordance with his duties in trying to protect the interests of the Interveners, it was clear that the Kowhai Trust was already insolvent at least on the cashflow test and it was the creditors who arguably had the greater economic interest in its assets, but outwith the context of insolvency, the beneficiaries of the Kowhai

Trust had no right to restrict the ability of third party creditors to call in on demand loans and enforce them against the assets of the trust. It makes no difference that they may be minor beneficiaries.

- 12 If beneficiaries were minded to avoid the insolvency of a trust and to secure the assets held by the trustee for their benefit, they would have to provide sufficient funding to the trustee firstly to meet the sums due to the trustee (which take priority) and then to meet those other debts that were due i.e. to bring the trust into a solvent state. They would also have to maintain the trust in a solvent state pending the realisation of assets by the trustee. To seek to avoid the consequences of insolvency by paying off one creditor in priority to the trustee was unacceptable.
- 13 Whilst there may be circumstances in which the Court, in its discretion, might restrict the manner in which a judgment creditor seeks to enforce its rights over distrained assets, it was not right to do so in this case. Kea now stood in the shoes of Eric Watson as a creditor of the Kowhai Trust and was entitled to enforce its rights as creditor.
- 14 The Court therefore declined to impose the restrictions upon Kea sought by the Interveners. However, the Interveners had been convened to the hearing and in the Court's view Advocate Nicholls was acting properly and in accordance with his duties as Guardian ad litem in requesting these restrictions. We therefore ordered that his costs, and those of VG and the Second Party Cited, of and incidental to the application should be paid by Kea on the standard basis to be taxed if not agreed. We also ordered Eric Watson to pay the costs of Kea of and incidental to the application on the indemnity basis to be taxed if not agreed.