CJA/137/2004

Neutral Citation Number: [2007] EWHC 2025 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2A 2LL

Wednesday, 4th July 2007

B e f o r e:

MR JUSTICE SULLIVAN

Between:

SAFDAR AZAM

Claimant

v

(1) WAHID IQBAL
(2) SARA DAYMAN

Defendants

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(Official Shorthand Writers to the Court)

Mr David Wilby QC and Mr I Pennock (instructed by {"Claimant Solicitor}) appeared on behalf of the **Claimant**
Mr Mark Cunningham QC (instructed by Messrs Pritchard Joyce & Hinds, Beckenham) appeared on behalf of the **Second Defendant**

J U D G M E N T
(As Approved by the Court)

1. MR JUSTICE SULLIVAN:

Introduction

2. In these proceedings the claimant seeks a declaration that the second defendant holds £12,000 which the claimant paid to the first defendant in his capacity as a hawaladar on trust for the claimant. The claim raises two issues: firstly, did the first defendant hold this £12,000 on trust for the claimant; and secondly, if the answer to that question is yes, is the trust enforceable against the second defendant?

Factual background

3. The factual background, which is not in dispute, is as follows. Under the trading name "Madina Travel" the first defendant ran a number of businesses. One of those businesses was known as Madina Express. Madina Express was a Hawala or money transfer facility. Although the first defendant did not participate in these proceedings, he described the operation of Madina Express in a "business model" sent to the second defendant in October 2004. A customer, such as the claimant, who wished to transfer funds to another country would first agree an exchange rate and then pay the amount to be transferred in sterling to Madina Express. The customer would also pay a fee of £5 to Madina Express. The customer would be given a receipt showing (*inter alia*) the customer's name and address, the agreed exchange rate, the amount of foreign currency to be supplied and details of the payee and method of payment abroad. In the claimant's case, having agreed an exchange rate of 105.75 rupees to the pound, he paid £12,000 to the first defendant, who agreed to pay 1,269,000 rupees to the claimant's sister's bank account in Pakistan. The claimant intended that the money would be used by his sister to pay for medical treatment for their mother.

4. On a daily basis, the first defendant paid all the money received from the customers of Madina Express into a Barclays Bank sterling account. The sterling in the Barclays Bank account was then exchanged into a United States dollar account "when market rates are favourable ... We check the daily exchange rate ... Whenever a favourable rate appears on Teletext we ring the Barclays International Payments Centre and give our instructions to purchase the dollars over the phone."

5. The dollars were purchased in tranches of $100,000, $105,000 or $150,000 at a time. What the hawaladar then does with the tranches of dollars in his United States dollar account is described by Dr Ballard, a Consultant Anthropologist, who prepared a report and gave evidence on behalf of the claimant:

> "He is then in a position to participate in the brokering of a back-to-bank Hawala deal. Once such a deal is agreed upon he can then transfer his now consolidated and US Dollar denominated tranche of value by TT to whatever destination the Hawaladar with whom he has brokered the deal may specify (most often 1 account held in a major bank on Wall Street), in exchange for a similar tranche of value denominated in Rupees, delivered to his agent in Pakistan (or indeed in any currency and country that he may choose to specify)."

6. In his oral evidence, Dr Ballard explained that the chain of deals or "swaps" whereby the value represented by a tranche of US Dollars is eventually converted into a tranche of rupees of the same value, for distribution to a number of different recipients in Pakistan, may well be very complex indeed and involve a number of back-to-back deals between a number of hawaladars in different countries spread across the globe. Despite the apparent complexity of the process, speed is of the essence in the Hawala value transfer system. A customer such as the claimant handing over his sterling in the United Kingdom expects that within 48 hours or so the equivalent value in rupees will be deposited in the account in Pakistan nominated by him.

7. Looking in more detail at what occurred in the present case, on 18th September 2004 the claimant gave the first defendant a banker's draft for £12,000 in favour of Madina Express. He was given a receipt which showed (*inter alia*) the agreed exchange rate of 105.75 rupees to the pound, and the amount of rupees, 1,269,000, to be credited to his sister's account in Pakistan. The payment in was entered in Madina Express's cash book. On the following Monday, 20th September, the £12,000 was consolidated with other sums that had been paid into Madina Express by other customers and formed part of a total payment of £64,355 into the Madina Express Barclays sterling account.

8. The Madina Express books were kept separately from those of the first defendant's other businesses. There were only two Madina Express accounts, the Barclays sterling account and the US Dollar account. All payments in and out were entered into the cash book. It is clear from the entries in the cash book that the payments in by customers were used, not merely to purchase tranches of US Dollars (via the Barclays sterling account), they were also used to discharge the office expenses (and it would appear, other expenses) of Madina Express.

9. On 21st September 2004 the entire contents of Madina's sterling account, including the consolidated sum of £64,355, were transferred to the US Dollar account leaving the sterling account overdrawn in the sum of £9,388.33, and a credit balance of $207,844.7 in the US Dollar account.

10. Two days later, on 23rd September 2004, the second defendant was appointed as the Receiver and Manager over the assets and property of the first defendant under the terms of a restraint and receivership order made by Ouseley J under the Criminal Justice Act 1988 and the Drug Trafficking Act 1994. The first defendant was prosecuted for money laundering, but all of the charges against him were dismissed on 28th July 2006.

11. In December 2004 the claimant completed a questionnaire supplied by the second defendant in response to a telephone call from the claimant, saying that he had paid the first defendant £12,000 on 18th September so that monies could be sent to his mother in Pakistan. In a letter written on her behalf on 13th December 2004 the second defendant said that the account into which the monies were paid was overdrawn as at the date of her appointment, and that by reference to the case of W (The Times, 15th November 1990) no payment could be made to the claimant.

12. The claimant persisted in his attempts to recover the £12,000, and on 24th May 2005 his solicitors wrote to the second defendant saying (*inter alia*):

> "We believe that our Client has demonstrated to yourselves that the monies which were held on trust by Wahid Iqbal and Madina Express were monies from legitimate sources and from his own bank account, the Halifax."

13. Correspondence followed in which the second defendant continued to deny the existence of a trust and the claimant's solicitors continued to press for particulars of the accounts and how much was in them when the receivership commenced. Eventually, the claimant applied on 14th June 2006 for a variation of the restraint order "to return my £12,000 held by the Receiver." On 7th August 2006, unknown to the claimant, the restraint and receivership orders were discharged by Langstaff J.

14. The claimant's application to vary the (by then discharged) restraint order came before Pitchford J on 11th October 2006. He ordered that the claimant's claim that the £12,000 had been held by the first defendant on trust for a specific purpose, namely the onward transmission of the equivalent value in rupees to Pakistan and, that purpose having failed in consequence of the making of the restraint order, that there was a resulting trust which entitled the claimant to follow the money into the hands of the second defendant, should be dealt with as a Part 8 claim.

The decision in Re H

15. In Re H [2003] EWHC 3551 (Admin) dated 7th October 2003, Moses J (as he then was) had to determine as a preliminary issue whether sums held by the receiver (Mrs Sara Dayman, the second defendant in the present case) were held on trust for those individuals who had paid money to Mr Hussain, a hawaladar, to secure that rupee equivalents of the sums paid by them would be deposited in accounts in Pakistan. On behalf of Mr Hussain two reports were exhibited from Dr Ballard. Moses J said in paragraph 9 of his judgment that resolution of the issue — whether the sums deposited with Mr Hussain were impressed with a trust — depended on an analysis of the Hawala banking system. It is necessary to place inverted commas around the word "banking" because it is the central plank of the claimant's case that the Hawala system is not to be equated with banking and is instead a money (or more accurately a value) transfer business.

16. Moses J described the Hawala system, as described by Dr Ballard and the receiver, in paragraph 11 of his judgment. Apart from the fact that the first defendant in the present case charged his customers a flat rate fee of £5, and it seems that Mr Hussain did not charge such a fee, it is common ground that there is no material distinction between the system operated by Mr Hussain in Re H and the system operated by the first defendant in the present case, and that both are fairly representative of the Hawala system generally.

17. Having cited a number of passages from Dr Ballard's reports, Moses J said in paragraphs 15-22 of his judgment:

> "15. Dr Ballard describes the system as analogous to commercial banking, saying at paragraph 9.3.4:
>
> 'From this perspective hawala money transmitters can be seen to be

in the same position as [a] commercial banker who receives a payment from a client (and not infrequently from his client's agents) asking for funds to be taken from one account and transferred into account number such and such in the name of so and so in such and such a branch of a such and such a bank on the far side of the world.'

The contention that the claimants might have a propriety claim in the light of those facts, which I have briefly identified, seems to me completely without foundation.

16. Let me stress the following facts. Firstly, Mr Akhtar Hussain was not required to use the money either deposited by a wholesaler lower down the chain than him or by an individual client in any particular way. His obligation was to make available an agreed number of, for example, Pakistani rupees in Pakistan. That was the limit of his obligation. By buying and selling Pakistan rupees at different and more favourable exchange rates he was able to conduct his business at a profit. The claimants would not have known the extent of his profit, nor would they have had any right to know since, after all, this is a cut-throat, highly competitive business and it would be important for Mr Akhtar Hussain to be able to keep to himself the rate of his turn and how he was able to make it.

17. The timing of his foreign currency purchases would be to suit his own interests and to obtain the most favourable interest rates; and it appears that on occasions his brother would distribute funds to intended recipients well before he had received any money from Mr Akhtar Hussain. Thus there was no identifiable link between the particular money paid over by a particular claimant and the funds available for collection and distributed in Pakistan.

18. Mr Hussain was not contractually obliged to and did not operate any kind of segregated account or accounts for the monies received by him from the claimants. They were paid into the sterling account, mixed with his own money and used from time to time entirely legitimately, as it seems to me, for his own purposes. ...

19. That outline of the facts and the salient features of the system, as I have said, is totally inconsistent with any trust. A number of authorities have been referred to me by Mr Cullen, who appears for the Receiver. The well-known passage in Foley v Hill (1848) 2 HL 28 at 35 is far more analogous in its description of a bank and the bank's relationship with the customer to the hawala system than that of any trust. The Lord Chancellor said at page 35 (page 1005 of the report):

'Money, when paid into a bank, ceases altogether to be the money of the principal ...; it is then the money of the banker, who is bound to return an equivalent by paying a similar sum to that deposited with

him when he has asked for it.'

In the instant case the obligation is, as I have described it, to make available for collection money in a foreign country.

20. The consideration of money being impressed with a trust or in Re Goldcorp Exchange Ltd [1995] 1 AC 74 was considered by the Privy Council in relation to bullion. The Board expressed its opinion in relation to propriety interest derived from a purchase price as follows, at page 100:

'The first argument posits that the purchase monies were from the outset impressed with a trust in favour of the payers. That a sum of money paid by the purchaser under a contract for the sale of goods is capable in principle of being the subject of a trust in the hands of the vendor is clear. For this purpose it is necessary to show either a mutual intention that the monies should not fall within the general fund of the company's assets but should be applied for a special designated purpose, or that having originally been paid over without restriction the recipient has later constituted himself a trustee of the money: see Quistclose Investments Ltd v Rolls Razor Ltd (In liquidation) [1970] AC 567, [1970] AC 567, 581-2.'

Later, the Board said:

'There was nothing in the express agreement to require, and nothing in their Lordships' view can be implied, which constrained in any way the company's freedom to spend the purchase money as it chose, or to establish the stock from any source and with any funds as it thought fit.'

As Dr Ballard's report makes clear, that is exactly true of the money left with Mr Akhtar Hussain in operating the Hawala system.

21. In Paragon Finance PLC v DB Thakerer & Co [1999] 1 All ER 400, May LJ (at page 416) considered the case of Nelson v Rye, the case of the solo musician who appointed the defendant manager to collect his fees and royalty and pay him annually in relation to a case concerning mortgage lenders and borrowers in relation to purchase and mortgage of a number of flats. Millett LJ (as he then was) said of the manager of Nelson and Rye as follows:

'Whether he was in fact a trustee of the money may be open to doubt. Unless I have misunderstood the facts or they were very unusual it would appear that the defendant was entitled to pay receipts into his own account, mix them with his own money, use them for his own cash-flow, deduct his own commission, and account for the balance to the plaintiff only at the end of the year. It is fundamental to the existence of a trust that the trustee is bound to keep the trust property separate from his own and apply it exclusively for the

benefit of his beneficiary. Any right on the part of the defendant to mix the money which he received with his own and use it for his own cash flow would be inconsistent with the existence of a trust. So would a liability to account annually, for a trustee is obliged to account to his beneficiary and pay over the trust property on demand.'

This brief citation of the principles, pursuant to which a trust may be identified, demonstrate how far removed any suggestion can be that the money which Mr Akhtar received in return for the obligation to make available for collection Pakistan rupees is impressed with a trust. The money was mixed with his own. He was free to deal with it how he wished. His only obligation, as I have said, was to make available an agreed sum for collection in a foreign currency.

22. In those circumstances, and having regard to the features of the system which I have already identified, not least of which was the fact that there was no obligation to transfer any particular sum of money to any particular person, and indeed the opportunity to own a turn by varying exchange rates demonstrates to my complete satisfaction that none of the claimants could possibly have had any priority interest in any of those sums."

18. It might be thought that this decision provided a clear and comprehensive answer to the issues raised in the present case, the only possible distinction between the two Hawala businesses being the £5 fee charged by the first defendant to his customers in the present case. This is a distinction without a difference since Dr Ballard, rightly in my view, described the £5 fee as "clearly derisory, and stated that hawaladars:

"are able to charge such a minimal fee in the expectation that their skill in manipulating the logistical process of value transmission — precisely the task which their customers engage them to undertake — will allow them to generate profits along the way. Gaining access to the most advantageous conversion rate over and above that which they have offered to their customers is the principal basis on which they do so."

19. In his oral evidence Dr Ballard described the £5 fee as a "loss leader", and explained that having consolidated many smaller sums into much larger tranches of currency, hawaladars were able to make their "turn" both by "bulk buying" of tranches of US Dollars when rates were favourable and then by "bulk swapping" those tranches in return for tranches of other currencies.

Submissions and conclusions

20. On behalf of the claimant, Mr Wilby QC submitted that the decision in Re H was wrong. Mr Hussain's customers were not represented before Moses J. Mr Hussain, who had been convicted of conspiracy to launder the proceeds of drug trafficking and sentenced to 12 years' imprisonment, understandably adopted a neutral attitude, so the submission made on behalf of the receiver that there was no trust was unopposed. In these circumstances he submitted that the decision should not even be regarded as persuasive.

21. In his report prepared on behalf of the claimant, Dr Ballard (who did not appear before Moses J and was not aware that his reports had been referred to until after the event) provided a commentary, from his perspective as an anthropologist, on the reasoning of Moses J. Dr Ballard had changed or, as he preferred to put it, "sharpened up" his view as to the essential characteristics of the Hawala system and no longer thought that the analogy with banking was appropriate. Hawaladars were engaged in a highly specialised value transfer business. In a nutshell, it was submitted on behalf of the claimant that Moses J had failed to appreciate the distinction between the conventional banking relationship between a bank and its depositor customer, as described in Foley v Hill, and the Hawala system where, against a background of mutual trust, the customer gives the hawaladar a specific sum of money for a specific purpose: to transfer the equivalent value into a nominated account in another country within a very short timescale.

22. In Foley v Hill the Lord Chancellor said, immediately after the passage cited by Moses J in paragraph 19 of his judgment:

"The money paid into the banker's, is money known by the principal to be placed there for the purpose of being under the control of the banker; it is then the bankers's money; he is known to deal with it as his own; he makes what profit of it he can, which profit he retains to himself, paying back only the principal, according to the custom of bankers in some places, or the principal and a small rate of interest, according to the custom of bankers in other places. The money placed in the custody of a banker is, to all intents and purposes, the money of the banker, to do with it as he pleases; he is guilty of no breach of trust in employing it; he is not answerable to the principal if he puts it into jeopardy, if he engages in a hazardous speculation; he is not bound to keep it or deal with it as the property of his principal, but he is of course answerable for the amount, because he has contracted, having received that money, to repay to the principal, when demanded, a sum equivalent to that paid into his hands.

That has been the subject in various cases, and that has been established to be the relative situation of banker and customer. That being established to be the relative situations of banker and customer, the banker is not an agent or factor, but he is a debtor."

23. The claimant submits that, by contrast, the money placed in the custody of the hawaladar is not "to all intents and purposes, the money of the hawaladar to do with as he pleases." He is bound to apply the money to a specific purpose, and if that purpose fails, he is bound to return it. Dr Ballard took issue with the statement in paragraph 17 of Moses J's judgment:

"The timing of his foreign currency purchases would be to suit his own interests and to obtain the most favourable interest rates; ..."

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He did so because interest payments are beyond the pale of legitimacy in Islamic law and, in any event, the speed of the transfer (usually within 48 hours) would leave little time for significant interest payments to accrue in any event. While bankers earned interest on monies deposited with them, that was not how hawaladars made their "turn".

24. In my judgment, there is no force in these criticisms of the judgment in Re H. If one substitutes "exchange rates" for "interest rates" in paragraph 17 of the judgment, the underlying point made by Moses J remains good. Just as the banker deals or "trades" with money deposited with him, so the hawaladar trades with the money given to him, making his "turn" by consolidating numerous small sums into much larger ones and then taking advantage of the beneficial exchange rates that are available to those who are able to trade currencies in bulk.

25. Moses J was well aware of the particular characteristics of the Hawala system. His description of the system (apart from the reference to interest in paragraph 17) is not challenged and is also a fair description of the first defendant's activities in the present case. He did not equate the Hawala system with conventional banking. He merely stated that the description of the relationship between banker and customer in Foley v Hill was far more analogous to the relationship between the hawaladar and his customer than that of trustee and beneficiary.

26. When deciding whether the first defendant was free to do with the claimant's £12,000 as he pleased, provided only that 1,269,000 rupees arrived in the claimant's sister's bank account in Pakistan within 48 hours, it is important to remember that Madina Express had only two bank accounts, the Barclays sterling account and the US Dollar account. All of the monies paid into the Hawala business went initially into the sterling account. The monies provided by customers were not merely consolidated into tranches of sterling, they were used to defray the expenses of the business, including office expenses. Mr Wilby submitted that these expenses should be regarded as *de minimis*. I do not agree. It is true that, on the limited information available, the sums involved are very small. That would be consistent with Dr Ballard's evidence that hawaladars flourish because they are able to keep their overheads very low indeed. For example, they employ only the most rudimentary bookkeeping techniques by the standards of a conventional bank. Many of the figures are kept in the hawaladar's own head. However low the overheads, they are still essential for the continued operation of the Hawala business. I therefore agree with the view expressed in the second defendant's witness statement that the claimant's £12,000, along with the payments from all of Madina Express's other customers, were being treated by the first defendant "as part of his ordinary business cash flow." In his witness statement the claimant said:

> "I never intended that the money was to be paid into the general funds of Madina Express ... for use as they wished. I had a specific desire for that money and that was to purchase Pakistani rupees and for them to be delivered and paid into my sister's account in Pakistan."

27. However, as submitted by Mr Cunningham QC on behalf of the second defendant, there is no evidence of a mutual intention to this effect. In particular, there is no suggestion that the first defendant gave the claimant any assurance that he would not treat the £12,000 as part of his ordinary cash flow. Given the nature of his business as a hawaladar, as described above, and the manner in which he made his profits as a businessman, it is safe to assume that, had he been asked for such an assurance, he would have declined to give it. In reality, the claimant was not in the least concerned with how the first defendant dealt with the £12,000, provided only that the end result of the process was that his sister received 1,269,000 rupees in Pakistan within 48 hours. Even if he did not understand the details of the first defendant's business — and it seems reasonable to assume that, in common with other hawaladars, the first defendant kept those details very much to himself — the claimant could not reasonably have believed that the flat rate £5 fee was the sole source of Madina Express's profitability.

28. In these circumstances, I endorse Moses J's view that the Hawala system, as practised both by Mr Hussain in Re H and by the claimant in the present case, is totally inconsistent with the existence of a trust. It is unnecessary to repeat the authorities cited by Moses J, but I should mention Re Chelsea Cloisters Ltd (1980) 41 P&CR 98, which was an additional authority referred to by Mr Cunningham. A company managing a block of flats had got into financial difficulties. Wishing to protect the tenants' deposits, the supervisor of the company opened a separate bank account for their deposits. The company subsequently went into liquidation and the liquidator asked the court for a determination whether the deposits should be divided among the company's creditors, or whether they were held on trust for the tenants. The Court of Appeal held that there was a trust. Lord Denning MR cited Channell J in Henry v Hammond:

> "It is clear that if the terms upon which the person receives the money are that he is bound to keep it separate, either in a bank or elsewhere, and to hand that money so kept as a separate fund to the person entitled to it, then he is a trustee of that money and must hand it over to the person who is his *cestui que trust*."

29. Bridge LJ said that the opening of the separate bank account:

> "... was a practical step, designed to ensure that the deposits would not be spent as part of the company's general cash flow.' That is entirely consistent with an intention to keep these funds from the general funds of the company in order that they should not be swallowed up by the general funds of the company." (page 108)

30. Mr Wilby pointed out that the separate account contained the deposits of a number of tenants. Thus, it was not necessary for the existence of a trust for the claimant's £12,000 to have been kept, on its own, in a separate account apart from the sums paid by the other customers of Madina Express. I agree. In theory, one could envisage a business with a separate account into which all of the customers' payments were made, which account was kept distinct from "the general funds of the company". However, arrangements that might theoretically be possible in the case of a hypothetical business do not overcome the fundamental obstacle to the existence of a trust in this and other Hawala cases: it is inherent in the Hawala system, as described by Dr Ballard, that the sums paid by customers wishing to transfer money are not kept in a separate account distinct from "the general funds of the company". On the contrary, they are "the general funds of the company", out of which business expenses are paid and from

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which the hawaladar makes his profit by manipulating exchange rates at various stages of the transfer process. While it may not be strictly accurate to describe the hawaladar as a banker, as a "value transfer agent" he is a trader (in currency, using his customers' money for the purposes of his trade) and not a trustee of his customers' money. It follows that the second question does not arise and it is unnecessary to consider whether the necessary fiduciary relationship existed between the claimant and the second defendant, and whether the second defendant had notice of the facts which might have given rise to a resulting trust.

31. Before leaving this case I should mention one matter that has caused me concern. Following the judgment of Pitchford J, the second defendant instructed Dr Ballard to prepare a report. The possibility of Dr Ballard being appointed as a joint expert was mooted before Pitchford J. When the second defendant received Dr Ballard's report it contained a lengthy commentary on Moses J's analysis and conclusions in Re H. In summary, Dr Ballard felt that some of his evidence had been misunderstood and did not support the conclusions reached by Moses J. The second defendant asked Dr Ballard to redact large parts of his report, on the basis that in expressing his views about Re H Dr Ballard had exceeded his brief. Dr Ballard, very properly, refused to alter his report, so he was disinstructed by the second defendant. Dr Ballard expressed concern, given his duty to assist the court as an expert, that his views would not be made available to the court and asked if he was free to publish them. The second defendant responded saying that the report was privileged and was not to be disclosed. Dr Ballard did not do so, but he was then requested by the claimant to produce a report. Having been disinstructed by the second defendant, he was free to do so and, unsurprisingly, the report he prepared for the claimant was substantially the same as the undisclosed report he had prepared for the second defendant.

32. In the event, no damage was done. Dr Ballard's views were made available to the court in his report prepared for the claimant. While I respect Dr Ballard's opinions as an anthropologist, as a lawyer I have not been persuaded that his criticisms of the judgment in Re H are sound. It remains the fact, however, that the second defendant's legal advisers sought to suppress a report which they perceived to be contrary to their case. I should stress the fact that Mrs Dayman herself was not responsible for the decision to suppress the report. That decision was taken by her legal advisers. When she prepared her witness statement she envisaged that an expert report on the Hawala system would be produced on her behalf. That decision of her legal advisers was in my view a very serious error of judgment. The second defendant was a court-appointed receiver. Her duty was to assist the court by placing all relevant material, whether helpful or unhelpful to her case, before the court. Even if the view was taken by her legal advisers that much of Dr Ballard's report was not relevant, the proper course, particularly in view of the fact that they must have known that the second defendant would be relying on the correctness of the decision in Re H, would have been to have made the report available to the claimant and the court, albeit with a rider that Dr Ballard's observations in respect of Re H were not accepted by the second defendant as a matter of law. These are not judicial review proceedings in which a public authority is under a duty to "put its cards on the table", But even in private litigation a court-appointed official who is acting on behalf of a public authority, HM Customs and Excise as prosecutor, is under no less a duty. What happened in this case in respect of

Dr Ballard's report must not be allowed to happen again in any proceedings involving a court-appointed receiver. The receiver's case, warts and all should be placed dispassionately before the court.

33. That said, the Part 8 claim is dismissed.

34. MR CUNNINGHAM: My Lord, I was going to ask your Lordship to dismiss the claim. The only matter that I need to address your Lordship on is costs. My Lord, I ask for the second defendant's costs of two matters. One is this Part 8 case. My Lord, I do not know whether your Lordship has the trial bundle, because there are some procedural peculiarities in the genesis of this matter.

35. MR JUSTICE SULLIVAN: I have got large numbers of bundles which I have -- oh no, you mean the trial bundle.

36. MR CUNNINGHAM: The one your Lordship heard last week.

37. MR JUSTICE SULLIVAN: Yes, I thought you were going back to Pitchford J or something like that.

38. MR CUNNINGHAM: My Lord, I am going to show your Lordship Pitchford J in a moment. My Lord, there are two parts of my costs application because there appear to be possibly two separate proceedings, my Lord.

39. MR JUSTICE SULLIVAN: Hold on. Trial bundle. Right, got it.

40. MR CUNNINGHAM: My Lord, if your Lordship could go to tab A, page 3.

41. MR JUSTICE SULLIVAN: Yes.

42. MR CUNNINGHAM: Your Lordship will see this is the Part 8 claim which was directed by Pitchford J.

43. MR JUSTICE SULLIVAN: Yes.

44. MR CUNNINGHAM: And, my Lord, and obviously that is what your Lordship has determined and it is in respect of that I ask for my costs.

45. MR JUSTICE SULLIVAN: Yes.

46. MR CUNNINGHAM: Can I just show your Lordship the claim number, unusually, which is 137 of 2004?

47. MR JUSTICE SULLIVAN: Yes.

48. MR CUNNINGHAM: My Lord, can I take your Lordship back to page 1 of the same file?

49. MR JUSTICE SULLIVAN: Yes, I have that.

50. MR CUNNINGHAM: My Lord, in apparently the same action, undoubtedly the same claim number, is the application by Mr Azam to vary the restraint order.

51. MR JUSTICE SULLIVAN: Yes.

52. MR CUNNINGHAM: My Lord, as a matter of fact, the original claimant in these proceedings, that is number 137 of 2004, was the Customs and Excise. My Lord, it is something of a mystery how Mr Azam has become also a claimant in the same set of proceedings. Be that as it may, that is what has happened. My Lord, the reason for showing your Lordship page 1 is then to show your Lordship pages 41 and 42, which are the end of tab B.

53. MR JUSTICE SULLIVAN: Ah. Now there may be a problem here because, in order to cart papers around for the purpose of preparing judgment, I extensively cannibalised them.

54. MR CUNNINGHAM: My Lord, can I pass you up an uncannibalised version.

55. MR JUSTICE SULLIVAN: Thank you very much. (Handed)

56. MR CUNNINGHAM: This is to show your Lordship the order of Pitchford J made on 11th October.

57. MR JUSTICE SULLIVAN: B41.

58. MR CUNNINGHAM: And 42. It is the last --

59. MR JUSTICE SULLIVAN: Yes, I am there.

60. MR CUNNINGHAM: My Lord, you will see from the heading that it is indeed the order of Pitchford J of 11th October, and your Lordship may recall that the receiver was represented at that hearing which was the application to vary the restraint order.

61. MR JUSTICE SULLIVAN: Yes.

62. MR CUNNINGHAM: My Lord, just over the page, paragraph 2, costs of the current application, which is the application that is at page 1 of the bundle, which I should your Lordship a few moments ago, to be reserved. My Lord, they can only be reserved it seems to us to your Lordship. So, my Lord, the second limb of my costs application relates to those reserved costs.

63. MR JUSTICE SULLIVAN: The reality is that these proceedings began as an application to vary the restraint order and were converted by order of Pitchford J effectively into a Part 8 claim.

64. MR CUNNINGHAM: Yes, my Lord.

65. MR JUSTICE SULLIVAN: So, yes, it is one proceeding, but it is.... Yes, I understand that.

66. MR CUNNINGHAM: One proceeding, two different claimants. My Lord, I am not taking any technical point, all I am asking for is the costs of the application and the hearing in front of Pitchford J and of the proceedings that have eventuated in the trial in front of your Lordship.

67. MR JUSTICE SULLIVAN: Yes. Thank you.

68. What do you want to say about that Mr Pennock?

69. MR PENNOCK: Yes. I would submit that the appropriate order in this case would be no order for costs for these reasons. I do not intend to labour the correspondence with your Lordship, but you will be familiar with the difficulty that the claimant has had in obtaining clear information about this case.

70. Dealing with the two separate costs issues, as my learned friend puts it, for example the application on 11th October, you will recall that it was only at the 11th hour that we were actually told the management restraint order had been discharged some months before. Whatever the reasons for that late notification to us, and I am sure there are some good reasons, that cannot be the claimant's fault and as a result of that it was necessary to effectively adjourn that hearing, give directions for this claim to be transferred to the Part 8 proceedings. But in a nutshell, your Lordship, without labouring the point, you are aware of the difficulties, the obfuscation which the claimant has had to deal with, which has unnecessarily prolonged this litigation and increased costs. In those circumstances, I would ask the court to show its disapproval of the conduct of the case to some extent by making no order as to costs.

71. Unless I can assist you any further on the costs issues, my Lord, those are the submissions on behalf of the claimant.

72. MR JUSTICE SULLIVAN: Thank you.

73. Do you want to respond on that Mr Cunningham?

74. MR CUNNINGHAM: This is ordinary, conventional adversarial litigation. There has been a winner, my client. Costs should follow the event. Can I gild that lily by reminding your Lordship of your own observation in your Lordship's judgment that "it might be thought that Re H provided the answer to this case. Not only might be thought, your Lordship has made it quite plain that H was and is the answer to this case. My Lord, I am not going to go any further than to say it was very unwise indeed for these proceedings to have been brought at all, and the consequences of having brought them must in the normal way be visited on the party who unsuccessfully brought them.

75. MR JUSTICE SULLIVAN: Yes. Thank you.

76. In my judgment, it is right that the claimant should in principle pay the defendant's costs. However, I accept Mr Pennock's submission, not that there should be no order for costs but that something should be done to reflect what I regard as the most unfortunate fact that the claimant was not made aware of the fact that the restraint order had been discharged until a very late stage. I think it is also fair to say that, to put it mildly, certain of the correspondence could have been somewhat more helpful at an earlier stage, although it remains to be seen whether that would have avoided the litigation in any event, since it was persisted with.

77. In my judgment the fair course, and I also bear in mind my observations about Dr Ballard's report, is to make a partial order for costs. The claimant is to pay 75% of the defendant's costs, those costs are to go for detailed assessment unless otherwise agreed.

78. MR PENNOCK: My Lord, may I also ask for a public funding direction in relation to the claimant's costs, for those parts of the claimant's costs which were covered by legal aid.

79. MR JUSTICE SULLIVAN: Yes. Have we got the necessary certificates on file and so forth?

80. MR PENNOCK: I believe the court has, my Lord, yes.

81. MR JUSTICE SULLIVAN: Yes. So there are parts are there, but not....

82. MR PENNOCK: Initially he was funded by legal aid, but that was withdrawn at some point.

83. MR JUSTICE SULLIVAN: Yes. So you are asking for the --

84. MR PENNOCK: For those parts of his costs which were covered by a legal aid certificate to be subject to a public funding assessment, in accordance with paragraph 4 of the....

85. MR JUSTICE SULLIVAN: Well there is to be a public funding assessment in so far as the claimant is publicly funded.

86. MR PENNOCK: Yes. I am obliged, my Lord.

87. MR JUSTICE SULLIVAN: Thank you very much indeed. Any more for any more?

88. MR PENNOCK: There is only one point, my Lord.

89. MR JUSTICE SULLIVAN: Yes, of course.

90. MR PENNOCK: You will be aware that my learned friend in his skeleton argument described this as something of a test case, that, notwithstanding the judgment in Re H, which as your Lordship appreciates was unargued and notwithstanding the very insightful and helpful judgment of your Lordship on this matter today, the claimant would seek permission to appeal to lend the weight of the Court of Appeal to this point, which has previously been the subject of very little (inaudible), particularly upon the issue of trust and whether there is a mutual intention to acquire, or whether the intention alone of the claimant would be sufficient alone to found a resulting trust.

91. MR JUSTICE SULLIVAN: Yes. I do not need to trouble you, thank you Mr Cunningham.

92. Whilst I would readily accept that this is an issue that is of wider interest, affecting as it does the Hawala system generally, in my judgment it would not be right to grant permission to appeal at first instance because my view is not simply my own, effectively it is reinforced by the view of Moses J, and it does seem to me that there is no realistic prospect of success on the facts as disclosed, both in Re H and in this case.

93. So Mr Pennock, if you are able to persuade the Court of Appeal that the issue of principle is so important that, despite the facts, you ought to be granted permission to appeal, well the best of luck to you but I am refusing you.

94. MR PENNOCK: Thank you your Lordship.

95. MR CUNNINGHAM: My Lord, do I need to seek your Lordship's direction for the provision of a transcript of your Lordship's judgment.

96. MR JUSTICE SULLIVAN: Since we have given it in open court there will be a transcript prepared in any event, but if it is necessary, certainly there should be a transcript.

97. MR CUNNINGHAM: I am obliged, my Lord.

98. MR JUSTICE SULLIVAN: I make it clear I am not ordering it at public expense. Sometimes there is a question mark over whether if judgments are given in -- I am not allowed to say "in camera".

99. MR CUNNINGHAM: In private.

100. MR JUSTICE SULLIVAN: In private, they are not automatically transcribed. This one will be transcribed because it is a judgment given in open court, but if you want it you will have to pay for it.

101. MR CUNNINGHAM: Indeed.

102. MR JUSTICE SULLIVAN: Thank you both very much indeed. Do not worry about leaving the court unattended, we will go on to the next matter.
