IN THE SUPREME COURT OF BERMUDA

CIVIL JURISDICTION
1998 NO. 136

MARIA MICELI 1st Plaintiff

LODOVICO FLORIANI 2nd Plaintiff

GIANFRANCO RESCINA 3rd Plaintiff

-v-

HG (BERMUDA) EXEMPTED PARTNERSHIP Defendant

RULING (LEAVE TO AMEND)

Mr. Kevin Taylor, Appleby Hunter Bailhache for the Plaintiff
Mr. Ben Adamson, Conyers Dill & Pearman for the Defendant

Date of hearing: December 6, 2006
Date of Ruling: March 13, 2007

Introductory

1. This Court was asked on January 5, 2006 to determine the following preliminary issue set out in paragraph 2(i) of the Order dated September 9, 2005, herein:

   "*Whether retiring partners are entitled to the return of their Capital Contributions under the Partnership Agreement or only under the Amended Partnership Agreement.*"

2. In an ex tempore Ruling of the same date, I ruled that "*the answer to the preliminary issue is that the entitlement of the retiring partners under the Partnership Agreement is limited to the balance of the Record Accounts.*"

3. The Plaintiffs issued their Specially Indorsed Writ herein on April 29, 1998. The Defendant having either repaid or (in the case of the Third Plaintiff) tendered repayment of the amounts standing due to the Plaintiff in their record accounts, a contractual claim was made for the repayment of their respective capital contributions. The Second and Third Plaintiffs were the active participants on the trial of the preliminary issue.

4. On the hearing of the Defendant's application for the trial of the preliminary issue which I granted on September 9, 2005, Mr. Taylor informed the Court that even if the construction point was resolved against his clients, leave to amend would be sought to advance an estoppel argument. On November 30, 2005, the Plaintiffs issued a Summons seeking leave to amend, and on December 6, 2005 they filed a draft Amended Specially Indorsed Writ. On December 15, 2005, the first return date of the amendment Summons, Simmons J adjourned the application to a date to be fixed, giving directions for the filing of evidence and estimating that the hearing would take ½ day.

5. In compliance with the December 15, 2005 directions, the Defendant filed the Affidavit of Chris R. Matthews sworn on January 3, 2006 in opposition to the application as it related to paragraphs 8-10 of the Statement of Claim. Assuming this was served that day, the Plaintiffs' reply evidence should have been filed on or about January 27, 2006. The reply Affidavit was not sworn until December 1, 2006, some ten months later, but the Affidavit of Roberto Bruno, the Plaintiffs' Italian counsel, exhibited a revised draft Amended Specially Indorsed Writ, which attempted to respond to the Defendant's initial objections.

6. The application for leave to amend was moved by the Third Plaintiff only. I reserved judgment on December 6, 2006 because (a) the background to the action

was not fully apparent, and (b) whether or not the Plaintiffs could obtain any further relief in the action appeared to turn on the application for leave to amend.[1]

Proposed new paragraphs 8-10 of Amended Statement of Claim

7. The crucial amendments are pleaded as follows:

> "*8. In the alternative, if it is determined that the Partnership Agreement does not permit the return of the Capital Contributions, the Third Plaintiff pleads that the Defendant is estopped from arguing that he is not permitted to have his Capital Contributions returned.*
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> *9. By covering letters dated 23 March 1993 and 1 September 1994, the Defendant tendered to the Third Plaintiff the sums of $25,000 and $10,000, respectively, on account of his Capital Contributions. The said tenders were made by way of bank draft. While the Third Plaintiff did not negotiate the $25,000 bank draft, he did negotiate the $10,000 bank draft. Each of the covering letters indicated to the Third Plaintiff that the balance of his capital contributions remained due.*
>
> *10. The tendering of the said drafts by the Defendant, along with the accompanying letters to him indicating that the balance of his Capital Contributions remained due from the Defendant produced an expectation in the Third Plaintiff that he would have his entire Capital Contributions returned and created an estoppel precluding the Defendant from arguing to the contrary".*

8. It is averred that by tendering partial payment of the Plaintiff's Capital Contributions under cover of letters dated March 23, 1993 and September 1, 1994, this created an estoppel precluding the Defendant from arguing that the full capital amounts were not due.

The respective arguments of Counsel

9. Mr. Taylor for the Plaintiff relied firstly on the general principles governing amendment applications, and referred to paragraph 20/8/6 of the 1999 White Book. As estoppel was not a cause of action, no limitation issues arose. As the key letters relied upon had been disclosed at the beginning of the action, the Defendant's complaints about inability to produce other related documents due to a lapse of time had no merit.

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[1] The delay in delivering this Ruling is entirely by accident rather than design. Fortunately, Counsel eventually overcame their reticence, and very properly notified the Registrar that this Ruling was outstanding yesterday.

10. As to the suggestion that a plea of conduct giving rise to an expectation did not in law amount to a tenable basis for an estoppel, the Plaintiff's Counsel relied on the definition of estoppel found in Kerr LJ's Judgment in *The 'August Leonhardt'* [1985] 2 Lloyd's Law Rep 28 at 35.

11. Mr. Adamson vigorously opposed the application for leave to amend on various grounds. Firstly, having regard to the definition of cause of action in paragraph 15/1/2 of the 1999 White Book, the estoppel claim was a "new" claim, were time-barred (Limitation Act 1980, section 37, as read with Spry, '*The Principles of Equitable Remedies*', 6th edition, pages 244-245), and was not substantially based on the same facts initially pleaded: *Hydrocarbons GB-v- Cammell Laird* (1991) 58 BLR 123 at 135-136 (where the new claim was negligent misstatement and the old claim negligence causing physical damage).

12. Secondly, the Defendant's Counsel pointed out that this was an old case, started in 1998 in respect of a 1992 cause of action. Seven years after the action was commenced, an application was filed to plead new facts. The Defence filed on June 24, 1998 had denied that the Plaintiffs were entitled to the return of their Capital Contributions. It was doubtful whether a fair trial was now possible for the Defendant. In its discretion, the Court ought to refuse leave in any event.

13. Thirdly, and in any event, it was submitted that the estoppel claim pleaded was legally flawed because no detrimental reliance was alleged: Furmston, '*The Law of Contract*', 2nd edition, paragraph 2.119. The definition relied upon was said to be merely based on *obiter dicta*

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14. Before the hearing concluded, I indicated to Counsel that the November 22, 2006 Court of Appeal for Bermuda Judgment in *Leamington Reinsurance Co. Ltd. & Avicola Villalobos S.A. –v- Lisa S.A.*[2] has recently dealt with the issue of leave to amend.

[2] Civil Appeal 2006: 10.

Findings: Is the estoppel plea a new claim?

15. It is common ground that any limitation problems may be circumvented, by virtue of Order 20 rule 5 of the Rules of the Supreme Court, if the estoppel plea need not be characterised as a new claim on the grounds that it arises out of substantially the same facts. In *Leamington Reinsurance Co. Ltd. & Avicola Villalobos S.A. –v- Lisa S.A,* Evans JA held that leave to amend could properly be granted because "*the basic facts remain the same, but a different inference may be drawn from them*"[3]. That was a case where the original claim alleged that the plaintiff's property had been misappropriated by the same conspiracy relied upon in the proposed amended pleading. The first version advanced a derivative claim while the second version advanced a personal claim.

16. In the instant case, the estoppel claim is advanced as an alternative claim to the contractual claim and relies on facts not even hinted at in the original pleading because they had no bearing on the contractual claim. There is no question but that the estoppel claim based on the Defendant's actions on March 23, 1993 and September 1, 1994 letters were, when the November 30, 2005 amendment application was filed time-barred, applying the six year limitation period applicable to contract and tort by analogy to the equitable claim pursuant to section 37 of the Limitation Act.

17. On the other hand, the Statement of Claim does presently make reference to the partial payments which were made under cover of the two letters now said to form the basis of an estoppel, and the estoppel claim does arise out of the same broad factual matrix centred around the termination of the Plaintiff's partnership which the originally pleaded case is centred on. Because the claim raises entirely new issues, such as the state of mind of the Defendant's agents and whether the Defendant has acted unconscionably, this case straddles the dividing line between a "*new claim*" and one substantially based on the same facts. Having regard to the

[3] Judgment, paragraph 29.

right of access to the Court under section 6(8) of the Bermuda Constitution and the Overriding Objective in Order 1A of the Rules, I would err in favour of finding, in a borderline case, that the new claim falls within rather than without Order 20 rule 5(5).

18. Nor would I refuse leave to amend solely because this is a very late application, 8 years into the action, with no credible explanation for the delay advanced on oath. The amendment application was filed after the Court had ordered a trial of the construction issue as a preliminary issue and was not supported by an affidavit. The revised draft amended pleading was exhibited to an affidavit which studiously avoided any mention of the delay. The Second Bruno Affidavit takes issue with the prejudice points made by the Defendant by asserting that the estoppel claim, as revised, is based on documents disclosed by the Defendant. This does adroitly meet the defendant's original prejudice complaints. The real question is whether the Plaintiff's claim is sufficiently meritorious to warrant being pursued to trial.

19. The central question is whether the Third Plaintiff has drafted a proposed new claim which is sufficiently arguable that it is not itself liable to be struck-out. From an evidential standpoint, it is not a wholly frivolous claim as both letters appear to suggest that the capital invested will be repaid. The 1993 and 1994 letters[4] both forward cheques in "*partial payment of your capital investment.*" Both letters set out figures purporting to show the balance of the total capital investment as remaining due after the payment in question is made. This arguably constitutes a representation that the total investment was payable, but is it a representation from which equity would not, at least arguably, permit the Defendant to resile from?

20. In my view both parties have advanced somewhat incomplete arguments on the elements required to establish an estoppel. The Plaintiff's pleading incorporates

[4] Although two letters are pleaded in the draft Amended Statement of Claim, there is a second 1994 letter as well.

one element of Kerr LJ's reasoning (action which "*has produced some expectation in the mind of the alleged representee*"), and Mr. Taylor relied on this element of the judgment in *The 'August Leonardt'*. But Kerr LJ goes onto say that the effect of the representation must be such that "*it would thereafter no longer be right to allow the alleged representor to resile by challenging the belief or expectation which he has engendered.*"[5] Mr. Adamson sought to emphasise the importance of the reliance element, missing from the draft amended pleading, yet the extract from *Furmston* which he placed before the Court suggests that reliance, in and of itself, is not decisive:

> "*It is submitted that this, third, requirement is the crucial aspect of the doctrine of promissory estoppel. A representor will only be estopped from enforcing his rights inconsistently with his representation where it would be inequitable for him to do so.*"[6]

21. So the proposed amendment does not adequately plead the estoppel claim in that it fails to allege that the effects of the representation are such that it would be unconscionable or inequitable for the Defendant to rely on its strict legal rights, and fails to particularize a claim which is (a) analogous to a claim for breach of trust or fiduciary duty, and (b) in event a claim which necessarily asserts that the Defendant has acted in bad faith. All such claims ought to be particularized: *Supreme Court Practice* 1999, paragraphs 18/12/14-18/12/15. In shorthand terms though, the proposed pleading does disclose a reasonable cause of action.

Findings: should the Plaintiff be granted leave to amend?

22. In my view the application presently before the Court should be refused but the Plaintiff afforded a further opportunity to particularize the proposed new claim, should he be so advised. It would not be just to deprive the Plaintiff of an opportunity to cure the defectively drafted proposed amendment, if he conceivably can.

[5] [1985] 2 Lloyd's Law Rep, 35.
[6] '*The Law of Contract*' , Second Edition, page 308

23. Having regard to the history of the litigation, the proposed amendment scrapes through the limitation net by the skin of its teeth on the basis that the claim only just may be said to be substantially based on the same facts originally pleaded. It seems implausible, on the face of it, that any such claim will succeed for two reasons.

24. Firstly, the conduct relied upon took place after the Third Plaintiff had left the partnership, on the Plaintiff's own case. It is difficult to see how the position adopted in two or three letters post-partnership would have given rise to circumstances making it unconscionable for the Defendant to depart from the relevant position. Secondly, to the extent that a finding of unconscionability involves an inter-related finding of detrimental reliance, it seems implausible that any such factual finding could ultimately be reached since between 1998 and 2005, the Plaintiff did not even rely on the estoppel in the present proceedings.

25. In my December 8, 2006 Ruling in *Brown & Brown-v- Piques & Piques,* Supreme Court of Bermuda Civil Jurisdiction 1990: 441, I noted as follows: "*Where a party advances a new claim and abandons a previous claim, leave to amend to assert the new claim will ordinarily be granted only on payment of the costs to the date of the amendment: Supreme Court Practice 1999, Volume 1, paragraph 20/8/28…*"[7]

26. Subject to hearing Counsel, if necessary, as to costs, I would consider it appropriate in principle to order the Plaintiff to pay the costs of the action to date as a condition for granting leave to amend, assuming an adequately particularized estoppel claim can be advanced in an application which may hereafter be made.

27. The estoppel claim should have been pleaded in reply to the Defence in 1998: Order 18 rule (8)(1). If the Plaintiff's fair trial rights are to be given precedence

[7]At paragraph 7.

over the prejudice occasioned by the unexplained delay, there must be a meaningful remedy for the Defendant in terms of costs.

Summary

28. The application for leave to amend in terms of the draft Amended Statement of Claim presently before the Court is dismissed on the sole ground that the estoppel claim is inadequately pleaded. However, the Third Plaintiff is at liberty to file a fresh application further particularizing the unconscionable conduct on the Defendant's part which forms the basis of the new claim. My provisional view is that even if the new claim can be adequately particularized and leave to amend properly granted, the Defendant ought to be awarded the costs of the action to date in any event. The new claim should have been pleaded by way of Reply nearly nine years ago[8], and was first raised in 2005 shortly before the contractual construction issue was resolved against the Plaintiff as a preliminary issue.

29. Subject to hearing Counsel, I would award the costs of the present application to the Defendant.

Dated this 13th day of March, 2007

KAWALEY, J.

[8] The Plaintiff's contractual construction claim was denied in the original Defence dated June 24, 1998.