IN THE SUPREME COURT OF BERMUDA
COMMERCIAL COURT
2008: No. 218

BETWEEN:

REGULA DOBIE

Plaintiff

-v-

INTERINVEST (BERMUDA) LIMITED

First Defendant

-and-

DR. HANS PETER BLACK

Second Defendant

RULING

Date of Hearing: April 21, May 6-7, 2009
Date of Ruling: June 1, 2009

Mr. Jai Pachai, Wakefield Quin, for the Plaintiff
Mr. Paul Harshaw, Harshaw & Co., for the Defendants

Introductory

1. The Plaintiff's Specially Indorsed Writ of Summons was issued on September 24, 2008 and amended on November 12, 2008. The First Defendant was served in Bermuda and duly entered an appearance and, on December 23, 2008, a Defence as well.

2. The Second Defendant was served abroad in Montreal, Quebec, Canada, on December 18, 2008 with the Amended Specially Indorsed Writ, pursuant to this Court's Order of November 27, 2008, which order was served upon him together with the Amended Writ. The Second Defendant was at the very latest required to enter an appearance on or about January 2, 2009. He failed to do so. (He had in fact previously been served with the Specially Indorsed Writ on October 8, 2008 and failed to avail himself of an opportunity to appear within 28 days of that date). On January 16, 2009, Judgment in Default of Defence was entered against him in favour of the Plaintiff for the liquidated amount of 7,305,000 Swiss Francs together with un-liquidated damages to be assessed. The Second Defendant applies by Summons dated February 13, 2009 to set aside this Default Judgment. His application was supported by his own Affidavits sworn on February 5, March 9 and May 1, 2009.

3. The Plaintiff applied for Summary Judgment under Order 14 of the Rules by Summons dated February 19, 2009. Her application is supported by her Second Affidavit sworn on February 16, 2009. She also swore her Third Affidavit on February 16, 2009 in opposition to the Second Defendant's application to set aside. The First Defendant filed no evidence in opposition to the Summary Judgment application. However, a Defence to the Amended Statement of Claim was filed on behalf of the First Defendant on December 23, 2008.

4. The Plaintiff's First Affidavit was sworn on September 24, 2008 in support of her ex parte application of the same date for a mareva injunction and leave to serve out of the jurisdiction against the Second Defendant, an application which I granted on the same date[1]. That injunction (together with the original Specially Indorsed Writ) was served on the Second Defendant on October 8, 2008. That same day the First Defendant's former attorneys (with whom the Defendants' joint counsel was then associated) entered an appearance for the First but not the Second Defendant. The Second Defendant was required to enter an appearance within 28 days of October 8, 2008 when he was initially served with the Writ herein but never did so. After the time for appearing had passed, the Plaintiff apparently elected not to complain of this default but to pursue an application to amend and afford the Second Defendant a second opportunity to enter an appearance to the Specially Indorsed Writ in its Amended form.

The Plaintiff's claims against the Defendants

5. The Plaintiff's claim against the First Defendant is for the repayment of the equivalent of US$ 6 million in Swiss Francs paid to the First Defendant under an Investment Advisory Agreement entered into between the parties dated May 27, 2004 ("the Agreement"). The First Defendant's failure to repay the sums remitted for investment in the Hedge Hog and Conserve Fund Limited ("HHCF") pursuant

[1] The Order was erroneously dated September "23 ", 2008.

to the Plaintiff's May 31, 2007 redemption request is said to constitute a breach of clause 7 of the Agreement.

6. The Plaintiff's main claims against the Second Defendant are damages for fraudulent misrepresentation (alternatively negligent and/or innocent misrepresentation pursuant to statute) and an action for the return of money converted to his own use. It is alleged that the Second Defendant falsely represented to the Plaintiff that the US$6 million she remitted to the First Defendant would be and was invested in the Hedge Hog Fund when in fact he appropriated the money to his own use.

7. The First Defendant's Defence: (a) admits that US$ 6 million was received in its Butterfield Bank account, (b) avers that insufficient instructions accompanied the payments to enable the First Defendant to understand their intended application, (c) avers that the funds were remitted independently of the Agreement, which had been terminated, (d) avers that any redemption right the Plaintiff was entitled to had to be exercised in accordance with HHCF's prospectus by way of direct communications with the Fund's Registrar, and (e) avers that no redemptions are possible at present as notified to HHCF shareholders by letter dated August 20, 2008. Accordingly the First Defendant is not liable for the failure to redeem the Plaintiff's investment.

Factual findings: the reasons for the Second Defendant's failure to enter an appearance within time and the regularity of the Default Judgment

8. The reason posited for the Second Defendant's failure to enter an appearance in time relates to difficulties the Defendants' present attorneys encountered in getting the First Defendant's files transferred after Mr. Harshaw left the employ of the First Defendant's former attorneys at the end of 2008. The Second Defendant says that he instructed Mr. Harshaw to enter an appearance for him on December 22, 2008. Mr. Harshaw believed that a Memorandum of Appearance had been filed but, unexpectedly, the offices of his former employer closed that same day until January 5, 2009. On January 12, 2008 Mr. Harshaw attempted to obtain the First Defendant's file which he did not receive until January 29, 2009 due to a misunderstanding over whether fees were outstanding. The Second Defendant did not learn of the Default Judgment until January 26, 2009 and was not served until the following day.

9. The Plaintiff is not in any position, argument and/or speculation apart, to contradict these aspects of the Second Defendant's evidence. It is true that in October 2008, the First Defendant's former attorneys felt that the Second Defendant required separate representation because of the way the Plaintiff put her case. This may explain why no appearance was entered within 28 days after service as required by the September 24, 2008 Order. But the Plaintiff proffers no explanation as to why she did not enter a Default Judgment against the Second Defendant in November or December as she was entitled to do. Instead she not

only amended the Specially Indorsed Writ, but also obtained a direction that the Second Defendant be permitted to enter an appearance in relation to it as well.

10. The Default Judgment was obtained only 14 days after the extended time for the Second Defendant to enter an appearance at the beginning of January 2009. I accept that until on or about January 26, 2009, the Second Defendant did not realise that he was exposed to a Default Judgment being entered against him. The judgment was obtained due to an administrative error by his former legal representatives in Christmas week 2008 just before a changing of the legal guard took place. The Second Defendant's new attorneys filed the application to set aside just over two weeks after they obtained the file from his former attorneys.

11. It is admittedly curious that the First Defendant's Defence was filed and served on December 23, 2008 when the Second Defendant's Memorandum of Appearance was not filed with the Second Defendant contending that the oversight occurred due to his former attorneys' office being closed for Christmas. But even if the Second Defendant had, as the Plaintiff contends, intended not to contest her claim and then changed his mind, the delay in applying to set aside the Default Judgment was not excessive in any event so that the precise reasons for the default are largely immaterial.

12. The Second Defendant's Summons and supporting Affidavit did not explicitly seek to set aside the Default Judgment on the grounds that it was irregular. Mr. Pachai submitted that it was regular. However, the Judgment on its face is for both (a) a liquidated sum and (b) damages to be assessed. This reflects the fact that the claim is a mixed claim for the purposes of Order 13 rule 5. Whether the Default Judgment was regular will be considered below.

Legal findings: principles applicable to setting aside Default Judgments

13. Mr. Pachai clearly demonstrated that the test for setting aside a default judgment is more onerous from the defendant's perspective than the requirements for obtaining leave to defend under Order 14. My initial assumption, having rarely encountered an application to set aside a default judgment which was vigorously opposed, was that the tests were essentially the same. That said, the Court has an unfettered discretion to set aside either conditionally or unconditionally under the following provisions of the Rules:

> "***13/9 Setting aside judgment***
> *9 The Court may on such terms as it thinks just, set aside or vary any judgment entered in pursuance of this Order.*"

14. Although rigid rules ought not to be laid down as to how the discretion to set aside ought to be exercised, "*a defendant who is asking the Court to exercise its discretion in his favour should show that he has a defence which has a real*

prospect of success": *Alpine Bulk Transport Co. Inc.-v- Saudi Eagle Shipping Co. Inc* [1986] 2 Lloyd's LR 221 at 223. This is the primary consideration, with the reasons for the failure to enter an appearance representing only a subsidiary factor to be taken into account. Where a judgment can be set aside on grounds of an irregularity alone, the merits of the defence becomes a secondary consideration.

15. The Default Judgment in the present case is drafted so far as is material in the following terms:

> "*NO APPEARANCE having been entered by the Second Defendant Dr. Hans Peter Black;*
> *IT IS THIS DAY ADJUDGED that the Second Defendant, Dr. Hans Peter Black, do pay to the Plaintiff the sum of Seven Million, Three Hundred and Five Thousand Swiss Francs (7,305,000) together with damages to be assessed, interest according to law to be assessed and costs of this action to be agreed or taxed.*"

16. Order 13 rule 5 provides in effect that as regards a mixed claim in respect of both liquidated and un-liquidated damages, judgment in default may be entered as regards the liquidated element pursuant to rule 1 and as regards the un-liquidated element pursuant to rule 2. The Plaintiff has simply collapsed Forms 39 and 40 under the Rules into a single form; this may be somewhat unusual but cannot be said to be irregular to any material extent if at all.

17. The Second Defendant's application to set aside the Default Judgment accordingly falls to be considered according to the principles governing setting aside regular judgments where the primary consideration is whether the applicant can make out a defence with real prospects of success.

Findings: exercise of discretion to set aside

18. In paragraph 13 of the First Black Affidavit, the Second Defendant deposes as follows: "*The defence is true. I have done nothing to deceive the Plaintiff. I believe that I have a good prospect of successfully defending this action in accordance with my draft defence*". The draft Defence is broadly consistent with the First defendant's Defence and (a) denies that the US$ 6 million was received by the First Defendant under the Agreement, (b) avers that the remitted monies were received by the First Defendant without prior notice or sufficient instructions for either Defendant to identify their source or the purpose for which the funds were remitted, (c) denies sending the Plaintiff statements purporting to show that her monies had been invested in HHCF yet admits paragraph 10 of the Amended Statement of Claim which states that after July 31, 2006 "[t]*he investment in HHCF remained for the time being*", and (d) avers that the Plaintiff did not follow the appropriate procedure for redeeming shares in HHCF which has now suspended redemptions in any event . However it is not averred that the Plaintiff is an HCCF shareholder.

19. Central to the Plaintiff's case against the Second Defendant is the allegation that he misappropriated her money having represented falsely that it would be invested in HHCF. Central to the Second Defendant's proposed defence is a denial of this core allegation and an averment that the monies were in fact invested as the Plaintiff expected and believed. It is possible that had the draft Defence not been drafted in some haste, and perhaps (as Mr. Harshaw argued but his client did not depose to in any of his three Affidavits) if documents currently held by the Bermuda Police were released, a more convincing Defence could be drafted. But the Second Defendant's evidence in support of his proposed defence requires extremely generous reading to be construed as disclosing a defence with "*real prospects of success*". Nevertheless the Second Defendant in his Third Affidavit, filed after I adjourned the initial hearing to enable him to file further evidence, did exhibit correspondence with the HHCF Custodian and Registrar showing that it has been impossible for him to obtain documentation shedding light on whether the Plaintiff's monies were in fact invested with HHCF to date.

20. The high point of the Plaintiff's evidence is that it appears that the Second Defendant made various representations to her that her money had been invested in HHCF (a Bermuda administered Fund) while it appears highly probable that the monies were remitted to the First Defendant's London account shortly after receipt. The Plaintiff points to the Second Defendant's bare denial that he made these representations and his bare denial that he had any knowledge that the monies received by the First Defendant were intended to be invested in HHCF combined with (a) documentary evidence strongly suggesting that each of the three US$2 million transfers was made pursuant to the written request of the Second Defendant personally and (b) a letter from David Notman (former President of the First Defendant) asserting that he transferred these monies to London shortly after their receipt into the First Defendant's Bermuda account on the oral instructions of the Second Defendant himself.

21. The high point of the Second Defendant's case that it would be unjust for the Default Judgment to stand without a full factual inquiry arises from (a) his denial that he instructed Notman to transfer the monies to London, and (b) the presently unexplained refusal of the Custodian and Registrar of the Fund to respond to the Defendants' attorneys request for clarification as to whether the Plaintiff's monies were in fact invested in HHCF. It is also possible that there may be room for some *de minimis* argument about exchange rates, but having regard to damages to be assessed and interest it seems clear that the Plaintiff is in the round entitled to at least the liquidated Swiss franc figure set out in the Default Judgment.

22. The crucial question which the Plaintiff's evidence does not clearly resolve in her favour is whether or not the Second Defendant has misappropriated her US$6 million or whether it was duly invested with HHCF and there are simply problems with procuring the funds' release. Moreover, even if the Plaintiff's monies were not invested in HHCF as the Second Defendant represented would occur, the

relevant transfers in breach of these representations were directly made by David Notman, not the Second Plaintiff himself. It is theoretically possible that the Second Defendant might be able to prove at trial that any misappropriation was committed not by him but by a third party not before the Court. It seems somewhat implausible however, that having personally requested the transfer of the US$6 million in three tranches and thereafter sent multiple statements to the Plaintiff representing that her monies had been invested as promised, the Second Defendant would have taken no interest in what actually happened to those monies after they entered the First Defendant's account. But the evidence may be viewed as suggesting that HHCF did receive the money, invested it imprudently and is simply having difficulty in liquidating the onwards investment. The Second Defendant's Second Affidavit exhibits an August 20, 1998 letter to shareholders signed by David Notman in his capacity as a director of HHCF (he was also President of the First Defendant) states that "*a significant part of the Fund's portfolio is in a privately held technology company called Wi2Wi, Inc*." the value of which investment is difficult to assess.

23. The Plaintiff's Second Affidavit exhibits draft audited financial statements for HHCF (approved by the Fund's auditors but not by its management) which suggest that the Fund held total assets equivalent to her investment on or about August 31, 2007. It seems probable that the position is as follows: either the Plaintiff was effectively HHCF's only investor or her monies were not all invested in HHCF at all. It is difficult to marry the hypothesis that HHCF had no other ultimate client than the Plaintiff with the representations made by the Second Defendant in response to the Plaintiff's May 31, 2007 redemption request. If she were HHCF's only ultimate beneficial shareholder, there would have been little need to rely on the formal redemption process. Moreover, there is nothing in the notes to the draft audited financial statements which suggests that HHCF had one majority shareholder. The First Defendant is simply described as owning 15.27% of the fund's participating shares. The total assets are valued at $7.7 million as at December 31, 2006. It appears that the Second Defendant sent the Plaintiff statements showing her HHCF investment as September 30, 2006 as worth 8.7 million CHF, well in excess of US$7 million. If these statements were true the Plaintiff would have held more than 90% of the Fund's participating shares, a position which is inconsistent with the ownership structure described by the auditors.

24. Moreover, the position in 2007 (the auditor's letter was signed on August 31, 2007, after the Plaintiff's redemption request) was as follows: "*Subsequent to year end the fund had subscriptions of $3, 989,604, including a subscription in kind of $3,489,604 for an investment in unquoted securities… and redemptions of $3, 547,998.*" This means that nearly 50% of the Fund's value before and after year-end 2006 cannot be attributed to the Plaintiff's funds remitted for investment in HHCF in 2005 cannot be attributed to the Plaintiff's subsisting investment. Because nearly 50% was redeemed in the first half of 2006 otherwise than by the Plaintiff and there was only a roughly equivalent sum by way of fresh

participation. This strongly suggests that either the Plaintiff's monies were not invested in HHCF at all in late 2005 or that only half was invested and the other half misapplied by or with the involvement of the Second Defendant.

25. The Second Defendant's only dispute with the auditors over the accounts which they were willing to sign but the management of HHCF was unwilling to approve appears to be the value placed by the auditors on certain "assets". No dispute seems to exist about the description of the Fund's own share transactions. The draft (but signed) audited 2006 HHCF financial statements indicate that the Fund raised some $1.39 million in 2006 from issuing 192, 605 participating shares and $450,000 from issuing 63, 649 participating shares in 2005. The Plaintiff remitted $4 million for investment in HHCF in November, 2004 and $2 million in September 2005. The Second Defendant sent the Plaintiff multiple statements reference HHCF between 2005 and 2007 referring to an "initial investment" of US$ 4 million and an "additional investment" of US$2 million. These statements obviously referred (or were intended to be read by the Plaintiff as referring) to the November 2004 and September 2005 investment tranches. What is noteworthy is that these statements describe the "additional investment" of US$ 2 million as being for "281,000 shares at 7.10". Yet the HHCF draft and substantially audited financial statements reflect that only 63, 649 shares were issued in calendar year 2005 as a whole. Indeed, the Second Defendant represented to the Plaintiff that she acquired more HHCF shares in 2005 than the auditors state were issued in 2005 and 2006 combined. It seems highly improbable that the September 2005 monies were ever invested in HHCF on behalf of the Plaintiff, and doubtful at best if the November 2004 monies were either.

26. Further, the HHCF financial statements indicate that $5.67 million in participating shares had been issued at year end 2005; the First Defendant's statements sent to the Plaintiff by the Second Defendant suggest she alone held shares worth $6.59 million at the same date. Even allowing for reasonable valuation disputes, the Second Defendant clearly represented that the Plaintiff's US$2 million forwarded in September 2005 had been invested in shares issued in that financial year when the best available evidence from HHCF itself suggests that this cannot be true. It is also noteworthy that David Notman, President of the First Defendant and an officer of HHCF[2], in his July 2, 2008 letter to Wakefield Quin denies knowledge of any investment in HHCF for the benefit of the Plaintiff. It seems wholly unbelievable that if virtually all of HHCF's participating shares had been issued to one of the First Defendant's clients, the common manager of both the First Defendant and HHCF would be unaware of this fact. The evidence clearly shows that the Second Defendant (and not Notman) (a) dealt with the Plaintiff, (b) requested her to remit the funds for investment in HHCF, and (c) sent her statements representing that the US$6 million had been invested in HHCF. Notman's "defence" of having wired the Plaintiff's money to London without realising it was earmarked for investment with HHCF seems *prima facie* believable. The Second Defendant's proposed plea in his draft Defence that he

[2] Mr. Notman apparently left both companies at the end of September, 2008.

had no knowledge of the source of the three $2 million remittances and his denial (Third Affidavit, paragraph 8) of having directed the onwards transfer to London, by way of contrast, seem implausible on their face. It appears that the overseas-based Second Defendant was the Chairman of the first Defendant and David Notman its Bermuda-based operational manager. This suggests that the Second Defendant is (and/or was at all material times) the *de facto* controller of the First Defendant, which lends credence to assertion made in the Notman July 2, 2008 letter to the Plaintiff's attorneys that he (Notman) transferred the US$6 million to London on the Second Defendant's instructions. Having regard to the numerous statements about the value of the Plaintiff's purported shareholding in HHCF which Dr. Black himself seemingly sent to the Plaintiff over some three years, his inability to confirm that the US$ 6 million was in fact so invested in his Third Affidavit is quite astonishing.

27. The Second Defendant's defence in any event, as Mr. Pachai fulsomely pointed out, has little conviction about it having regard to the distinctly unenthusiastic way in which he has participated in the present action. Served with the Specially Indorsed Writ in early October 2008 and ex parte mareva injunction order, he did not (when the First Defendant's attorneys apparently expressed reticence about acting for both Defendants) instruct separate counsel to immediately enter an appearance and apply to set the injunction aside.

28. In these circumstances, the Second Defendant has not met the primary test for setting aside the Default Judgment by demonstrating the existence of a defence with real prospects of success. It would nevertheless be contrary to the interests of justice for the Second Defendant to be denied any opportunity at all to defend a claim involving allegations of fraud (which Mr. Harshaw fairly contended had not been adequately particularised) by declining to set aside the Default Judgment. Also, and no less significantly, it would be impracticable to fairly assess damages for misrepresentation without making formal factual findings as to precisely what acts of misrepresentation occurred. This aspect of the case against the Second Defendant also has considerable overlap with the case against the Second Defendant which also requires damages to be assessed in a manner which is likely to be impacted by factual findings involving the conduct of the Second Defendant acting on the First Defendant's behalf.

29. I would accordingly set aside the Default Judgment on terms that (a) the Second Defendant pays into Court or otherwise secures to the satisfaction of the Plaintiff the sum of US$1 million[3] within 28 days of the date of this Ruling in default of which the Default Judgment shall stand; and (b) the issue of whether or not the Plaintiff is directly or indirectly a participating shareholder of HHCF and, if so, when and on what terms such shareholding was acquired, is tried as a preliminary issue on an expedited basis. I reject Mr. Pachai's submission that he should be required to pay the full amount of US$6 million into Court having regard to (1) my ruling on the Plaintiff's summary judgment application against the First

[3] It may be that this condition will be met by simply keeping the mareva injunction in place.

Defendant, and (2) my desire to avoid any suggestion of impairing the Second Defendant's right of access to the Court, even though the Second Defendant has not to date raised this issue. This issue is likely to be dispositive of the Plaintiff's claim against the Second Defendant and will potentially substantially shorten the enquiry into damages to be paid by the First Defendant flowing from my ruling on the Plaintiff's summary judgment application below. If it appears the Fund's Registrar is unwilling to voluntarily disclose the crucial information about the Plaintiff's status as a shareholder of HHCF to either the Plaintiff's of the Defendants' attorneys, subpoenas can always be sought in relation to the appropriate witnesses and documents. However, it is difficult to imagine what proper legal basis the Registrar could have for refusing to respond to an appropriately specific written enquiry from the Plaintiff's own attorneys as to whether or not she is a shareholder of the Fund and, if so, how many shares she beneficially owns.

Legal and factual findings: the Plaintiff's summary judgment application

Liability

30. The legal principles governing summary judgment applications are uncontroversial. The Plaintiff must support her application by an affidavit deposing that there is no bona fide defence and the Defendant may respond by affidavit or otherwise. Where the summary judgment application is opposed on merits grounds, save in obvious cases the defendant must ordinarily file an affidavit deposing to the merits of the defence. If there is an arguable defence or the Plaintiff's claim is not appropriate to be determined on affidavit evidence alone, then leave to defend ought to be given. Leave may be given conditionally or unconditionally.

31. These principles are derived from the commentary on Order 14 set out in the 1999 White Book to which Mr. Pachai referred. I am also assisted by the principles articulated by Meerabux J in support of his decision to refuse a summary judgment application in *Harold Darrell-v-Hardell Entertainment and the Bank Bermuda* [2002] Bda LR 25 (at pages 3-4), upon which Mr. Harshaw relied. The question to be resolved, using the words of Meerabux J, is whether the First Defendant "*has raised substantial questions to be tried and there is* [a] *dispute as to facts and law which raises a reasonable doubt that the Defendant is entitled to judgment.*" This approach to Order 14 must now be read together with the provisions of Order1A of this Court's Rules, as amended with effect from January 1, 2006. The modern case management duties of the Court include, under Order1A(4)(2)(c):

> "*deciding promptly which issues need full investigation and trial and accordingly disposing summarily of the others…*"

32. In the present case the First Defendant has filed a Defence, and opposes the application on two grounds: (a) the issues are inappropriate for resolution summarily without further enquiry, and (b) there is an arguable Defence. However, no affidavit has been filed in support of the proposition that the Defence is an arguable and/or a *bona fide* one. The Plaintiff's application essentially turns on whether her claim against the First Defendant is not appropriate to be determined on affidavit evidence alone or, alternatively, whether there is some obvious legal or factual issue which ought to be tried.

33. The Plaintiff's claim is a contractual one for the return of money pursuant to the redemption terms of clause 7 of the Agreement. The First Defendant's answer to this claim (based on counsel's argument) appears to be based primarily on the construction of contemporaneous documentation, in particular a letter written by the Plaintiff withdrawing all money save the funds to be invested in HHCF from her investment account on or about July 31, 2006. The Defence makes the bare averment that the US$6 million was not covered by the Agreement without reference to any specific document or oral agreement to this effect. Receipt of the funds is admitted; no admissions are made as to why the funds were received. It is admitted that the Plaintiff's May 31, 2007 handwritten note was received on June 6, 2007; it is averred without specifying a date or mode of communication, that the Plaintiff subsequently "*withdrew her instructions to redeem her investment in HHCF*". Finally, it is averred that the appropriate redemption procedure is that prescribed by the HHCF Prospectus and denied that the first Defendant has made a valid redemption request. No explicit averment is made, however, that the Plaintiff is a shareholder of HHCF entitled to invoke the relevant procedure. Nevertheless it is averred that redemption rights were suspended by notice given to HHCF on August 20, 2009. This is inconsistent with the refusal to admit that the funds were remitted to the First Defendant for the specific purpose of investment in HHCF. However, in paragraph 9 of the Defence it is averred that:

> "*That investment is between the Plaintiff and HHCF in accordance with the Prospectus of HHCF. The First Defendant is not party to that investment.*"

34. In my judgment there is no basis for doubting that the First Defendant received the Plaintiff's US$6 million for the purposes of investment in HHCF under the Agreement. It is common ground that the Agreement was validly entered into between the Plaintiff (referred to therein as the "Client") and the First Defendant (referred to therein as the "Advisor") Clause (1) of the Agreement provides as follows:

> "*The Advisor shall have complete authority in its discretion to authorize, from time to time, the sale of any or all of the securities contained in the Managed Assets…The investment objectives and policies for the Managed Assets, as well as prohibited investments,*

> *shall be as set forth in Schedule A attached hereto, as revised from time to time ("Schedule A")....*"

35. Clause (3) provided that the Managed Assets were to be held by the Custodian specified in Schedule A; the Custodian specified was Maerki Baumann & Co AG, Switzerland ("Maerki Baumann") and the value of the Managed Assets was described as 20 million Swiss francs. Clause (3) authorised the Advisor to instruct the Custodian to pay cash for securities delivered to the Custodian for the Client's account. Clause (4)(a) required the Plaintiff to check one of three boxes to determine the scope of the Advisor's investment discretion. It appears that she opted to give the First Defendant complete latitude in deciding which brokers or dealers to use. However, the Client retained the exclusive right to exercise voting powers in relation to any securities included in the Managed Assets (clause (4)(c)). Clause (7) provided as follows:

> "*The Agreement may be amended by a written instrument signed by both parties. Either party may terminate this Agreement at any time upon prior written notice, which shall be effective when received by the other party at the address set forth in the first paragraph of this Agreement or such other address as may be specified for such purpose on Schedule A. Such termination shall be without the payment of any penalty by and without liability of either party to the other, except that the Client shall be liable for any accrued for* [sic] *unpaid fees due to the Advisor and the Advisor shall be required to refund that portion of any prepaid fees which relates to the period following the termination date.*"

36. It is not disputed (and could not seriously be disputed) that the Plaintiff's right of termination under clause (7) included by necessary implication the right to demand delivery of any assets or the cash value thereof which were held by the First Defendant as part of the Managed Assets which had been purchased but had not yet been placed in the client's account with Maerki Baumann as contemplated by clause (3). It cannot be disputed (or seriously disputed) that the First Defendant received the three US$2 million payments in 2004 and 2005 at the request of the Second Defendant (apparently acting as an agent for the First Defendant) pursuant to the Agreement for the purposes of being invested in HHCF. The wire transfer requests were (a) sent to Maerki Baumann, (b) on the First Defendant's letterhead and (c) were purportedly signed by the Second Defendant in his capacity as Chairman of the First Defendant. Each wire request (made on November 4, 2004, November 11, 2004 and September 1, 2005, respectively) indicated the final deposit account number in the name of the First Defendant "*Ref Hedge Hog & Conserve Fund Ltd.*"

37. In light of these transfer requests, it is impossible to understand the plea that when the monies were received in the First Defendant's bank account, it was impossible to link them to the Plaintiff. Maerki Baumann's own transfer documentation

reflects transfers on November 5, 2004, November 17, 2004 and September 5, 2005 and includes references to HHCF. These "internal" documents correlate to the dates of what appears to be the actual transfers carried out pursuant to those requests based on copies of original bank transfer documents exhibited to the Second Dobie Affidavit. The earliest transfer document is dated November 11, 2004, the next document is dated September 6, 2005 but the first November document appears to be missing. But both of these seemingly independent transfer documents refer to HHCF. It is true that the source of the deposits may not have been apparent to Mr. Notman without enquiry, but the Second Defendant's knowledge that he had requested the transfers may be attributed to the First Defendant.

38. I am therefore satisfied that the First Defendant received US$ 4 in November 2004 and a further US$ 2 million in September 2005 under the Agreement for the specific purpose of investment in HHCF. Had the Agreement been strictly followed, the First Defendant ought to have obtained share certificates either in the Plaintiff's name or the name of a company controlled by her (it appears the HHCF investment was funded by Amina Holdings Ltd.). These certificates ought to have been held by Maerki Baumann as part of the Managed Assets in accordance with clause (3). It is unclear why this did not happen (possibly it was modified as regards the HCCF investment). Be that as it may, the First Defendant (acting through the Second Defendant) merely sent what purported to be statements relating to the HHCF investment, statements which were printed on the First Defendant's letterhead rather than statement emanating from HHCF itself. The statements described the account holder as "Gaya Trading" and until September 2006 referred to both the HHCF investment and the Maerki Baumann investments. The absence of any contemporaneous documentation from the independently administered HHCF evidencing the Plaintiff's investment (and indeed the absence of a positive averment in the Defence that the Plaintiff is a shareholder of HHCF) lends credence to the Plaintiff's parallel case that the Second Defendant misappropriated these funds from the outset.

39. The First Defendant avers, however, that the Agreement was terminated by the Plaintiff altogether leaving the HHCF investment outside of its scope. This averment is not supported by any evidence before the Court. Mr. Harshaw pointed to the Plaintiff's July 31, 2006 letter to the First Defendant which provides as follows:

> "*With reference to the Investment Advisory Agreement dated 27 May 2004 I hereby give notice of withdrawal of the Gaya account with Maerki Baumann & Co…from your mandate.*
>
> *The 'Hedge hog' investment remains and we will be remitting the fee now.*"

40. This letter has only two plausible meanings on its face. Firstly, and most plausibly having regard to the other material before the Court, the Agreement was being terminated as regards the assets held by Maerki Baumann but not as regards the HHCF investment. Alternatively, although this is not obviously supported by any other documentation before the Court, the letter may be read as indicating that the HHCF investment was always outside the scope of the Agreement and was subject to some separate investment agreement. Yet statements were sent by the First Defendant to the Plaintiff for September 30, 2006 through to September 30, 2007 using the same "Gaya Trading" nomenclature which appeared prior to the Plaintiff's July 31, 2006 withdrawal letter. If the HHCF investment was covered by some separate agreement as to fees or otherwise, it is surprising that the First Defendant has not advanced any positive case in this regard, in its Defence or otherwise.

41. As the contemporaneous correspondence between the parties after the Plaintiff's May 31, 2007 redemption request makes it clear that the First Defendant unequivocally admitted that the Plaintiff was entitled to request the return of her investment, there is in my judgment no serious issue to be tried based on hypothetical arguments as to what the precise contractual terms of the investment agreement between the parties were. The important point is simply whether the Plaintiff when issuing the present proceedings had a subsisting right to demand repayment of her investment, or whether (as the Defence alleges) either (a) she had withdrawn any valid redemption request, or (b) her right to redeem was subject to conditions which have not yet been fulfilled. Whether this right arises under clause (7) of the Agreement or under some other express or implied agreement between the parties, the essence of the claim is that the First Defendant is contractually required to repay the monies it agreed to invest in HHCF on her behalf.

42. The bare plea that the Plaintiff withdrew her redemption request is not supported by any evidence sufficient to justify the finding that this is a triable issue. There is, as has been noted already, not even an affidavit deposing to the *bona fides* of the Defence. The evidence suggests that the following communications took place in the immediate aftermath of the Plaintiff's May 31, 2007 redemption request. On June 18, 2007, the Second Defendant apparently acting on behalf of the First Defendant emailed the Plaintiff indicating that because the HHCF investment was with a hedge fund, redemption could only take place in accordance with the Fund's rules and the next redemption date was November 15, 2007 for value December 31, 2007. The Plaintiff responded by email dated July 19, 2007 insisting that under the Agreement she was entitled to redeem at any time under clause (7). In a subsequent email of November 28, 2007, the Plaintiff reiterated her demand for immediate redemption under the Agreement. As Mr. Harshaw rightly submitted, the Plaintiff's protestations of ignorance about the fact that her monies were being invested in a hedge fund do not appear credible in light of the statements she produces representing that she had indeed become a shareholder in the Fund. On the other hand, it seems unlikely that her monies were in fact

invested in HHCF at all or, if they were invested, were invested in a nominee's name. On any basis it seems likely that the Plaintiff never have received copies of the HHCF Prospectus setting out the Fund's redemption terms; accordingly, it is entirely believable that she had no idea what those terms were.

43. On any view the Plaintiff clearly had a right to demand repayment of her investment from the First Defendant when she commenced the present action. If the Plaintiff's primary case is right, the monies were paid to the First Defendant for investment in HHCF and misappropriated by the Second Defendant. The First Defendant is liable to repay the monies under clause (7) of the Agreement. Although clause (7) refers to termination by mutual consent, it seems clear (based on the withdrawal of the Maerki Baumann investment and the First Defendant's own response to the May 31, 2007 redemption request) that unless there was some contractual impediment to redemption to which the Plaintiff had agreed, she was entitled to withdraw her investment at any time. This conclusion accords with common sense and ordinary commercial practice in the investment field. It is impossible to imagine any legal scenario under which an investment company which admittedly received money from a client to invest would not be liable to repay it if the proposed investment never took place and the funds were misappropriated by one of the investment company's officers. It is also supported by the evidence of the Second Defendant in paragraph 8 of his evidence filed on his own behalf, not on behalf of the First Defendant:

> " *8….if the Plaintiff's money is not invested in Hedge Hog and Conserve Fund Limited then it is an asset of the Company which will have to be repaid to Mrs. Dobie by the Company.*"

44. The alternative scenario is substantially based on the First Defendant's own case. If the US$ 6 million received in three equal tranches in November 2004 and September 2005 was indeed invested in HHCF so that the Plaintiff became a participating shareholder, it is correct that the Plaintiff must be deemed to have agreed that redemption would have to have taken place in accordance with the terms on which she acquired her shares. However it is not seriously arguable that this fact would have eliminated any contractual obligation on the First Defendant's part to carry out her instructions to redeem her investment at the earliest possible opportunity. Whether under the Agreement or otherwise, it seems obvious that the First Defendant agreed to deal with HHCF on the Plaintiff's behalf. The First Defendant requested the Plaintiff to forward the monies to its own account, not directly to HHCF. Accordingly, the First Defendant must have been obliged to effect the redemption process on the Plaintiff's behalf.

45. This view is based on the First Defendant's own written representations to the Plaintiff after her May 31, 2007 redemption request. The initial response in the Second Defendant's June 18, 2007 email (from an Interinvest Corp address) was not to refer the Plaintiff to HHCF, but to indicate that redemption would next be possible on November 15, 2007 for value year end 2007. On October 22, 2007,

writing on the First Defendant's letterhead, the Second Defendant wrote the Plaintiff in salient part as follows:

> "*I find it somewhat strange that you now claim you did not know what this investment was about as you started receiving reports on it from us commencing in late 2004….It is our understanding that you wish to redeem these shares at the end of this year which would be the next available redemption date for this fund…*"

46. The First Defendant did not indicate that the Plaintiff had to communicate her redemption request to HHCF's Registrar to enable the redemption to take place. This letter did admittedly contemplate a meeting between the Plaintiff and Dr. Black to discuss the matter further. On November 14, 2007, the First Defendant sent a further letter to the Plaintiff enclosing not redemption forms but "*information for Hedge Hog as of the end of September 2007*". What appears to have been attached was the First Defendant's own statement in relation to the Plaintiff's Gaya Trading account with HHCF showing her investment as a total of 916,000 shares then worth US$ 7,016,560 or 8, 163, 767 Swiss francs. This letter also contemplated a meeting still to take place and did not modify the representations previously made that redemption would be possible on November 15, 2007 (June 18, 2007 letter) for value December 31, 2007 (June 18 and October 22, 2007 letters). The Plaintiff responded to the October 22, 2007 letter by email dated November 22, 2007 as follows:

> " *I received the above on the 12. November and at this time I do not wish to go into details or arguments. I have given you notice under the Gaya terms of contract and I would emphasize that at no time during our encounters did you mention different terms of redemption, not verbally, not in writing, nor by amendment of the Gaya Contract of 2004.*
>
> *I therefore stand by my terms of notice in June, which is the value of my portfolio in $, on receipt of my letter and fax by your Bermuda office*."

47. If redemption was not possible on November 15 for value year end 2007, one would have expected the First Defendant to respond to this late November demand for immediate payment by stating that redemption in a few weeks time was no longer possible. Further evidence that the Plaintiff was not in a position to make the redemption request on a direct basis as suggested in the Defence is found in her email of January 29, 2008 to the Second Defendant requesting HHCF investment documents and redemption information by February 8, 2008. The Second Defendant responded by requesting an in person meeting and the Plaintiff in turn insisted on receiving the requested documents before this meeting took place. Had the Plaintiff already been supplied with these documents to enable her to deal directly with HHCF as the Defence suggests, her request for these documents ought to have been rebuffed on this basis. In fact it appears from the Second Defendant's Third Affidavit filed on his own behalf that the First

Defendant invested in the Fund on behalf of various clients on a nominee basis. On October 9, 2008, the Second Defendant on behalf of the First Defendant wrote Butterfield Fund Services (Bermuda) in relevant part as follows:

> "*...we are particularly concerned over potentially conflicting record-keeping with respect to holdings held in nominee name on behalf of clients involved with the Fund.*"

48. The suggestion that the Plaintiff withdrew her redemption request is simply untenable and there is no evidence before the Court that supports the possibility that redemption was not possible on November 15, 2007 for value year end 2007 as the First Defendant expressly represented that this was possible. Indeed, by letter dated August 20, 2008, HHCF notified shareholders by letter signed by David Notman as Director "*of recent decisions that have been made by the Company including the decision to suspend the determination of net asset value of the Company and commence an orderly liquidation of the assets of the Company.*" This letter (relied upon by the First Defendant (Defence, paragraph 25) supports the First Defendant's plea that redemption cannot now be effected, assuming that the Plaintiff does own virtually all of the participating shares in the Fund because her US$6 million was so invested as the First Defendant avers. But it does not raise a triable issue as to whether or not this suspension of redemptions took place on or before November 15, 2007 at the earliest or on or before December 31, 2007 at the latest when the First Defendant told the Plaintiff redemption would take place. Indeed, the First Defendant does not even aver that redemption was impossible as at year end 2007. On the contrary, in paragraph 26 of its Defence the First Defendant avers as follows:

> "*In the circumstances, the First Defendant, through no fault of its own, is not now and has not been at any time since this writ was issued been in a position to liquidate the Plaintiff's investment in HHCF and return her money to her.*"

49. What the First Defendant has been unable to do since the issue of the present proceedings in September 2008 can hardly be a tenable defence to a breach of conduct claim substantially based on the First Defendant's conduct in 2007, in liability terms at least. The First Defendant does not plead to paragraph 15 of the Amended Points of Claim on the basis that this relates to the Second Defendant alone; in fact it seems clear in light of the evidence (all letters and statements were sent on the First Defendant's letterhead) that the Second Defendant was at all material times acting within his apparent authority as an agent of the First Defendant in communicating with the Plaintiff about her investment. Be that as it may, the Plaintiff's averment that the Second Defendant notified her by email dated April 2, 2008 that redemptions in HHCF had been suspended is not positively challenged by the First Defendant. It is not suggested expressly or impliedly by the First Defendant that redemption was impossible at the end of December 2007 when the Plaintiff was vigorously requesting the liquidation of

her HHCF investment. On the contrary, in refuting the Plaintiff's entitlement to immediate redemption and denying that the Plaintiff had complied with HHCF's redemption procedure, the Defence avers as follows:

> "16. *Further or alternatively, if, which is denied, the Plaintiff gave valid notice to withdraw her investment in HHCF, that notice came on 6 June 2007 at the earliest. The next Redemption Dealing Day was 1 October 2007, pursuant to the terms of the HCCF prospectus.*"

50. Having regard to clear evidence that (a)the First Defendant alone was in a position to assist the Plaintiff to effect the HHCF redemption at the earliest possible opportunity, (b) the First Defendant itself twice told the Plaintiff in writing that redemption would not possible until the end of 2007 at the earliest and (c) the First Defendant adopts the August 20, 2008 HHCF letter as evidence that redemption is not currently possible, the pleas in paragraphs 16 and 26 of the Defence constitute an admission that redemption was possible in late 2007. Accordingly, even if the Plaintiff's monies were invested in HHCF and the First Defendant had agreed with the Plaintiff that redemption was possible in accordance with the Fund's terms, the First Defendant by its own account was in breach of any such agreement by failing to effect the redemption in late 2007 before redemptions were suspended by HHCF in 2008.

Summary of findings on liability

51. For these reasons, I find that the First Defendant has raised no triable issue in respect of the Plaintiff's claim for damages "*for a breach of the said Agreement by failing to return her money as agreed.*" My primary finding is that the monies in question were received by the First Defendant under the Agreement for investment in HHCF and the First Defendant was obliged to return the monies forthwith under clause (7) because they were never invested in HHCF at all.

52. However, alternatively, if the monies were received by the First Defendant and invested in HHCF pursuant to a separate contract the terms of which incorporated the redemption requirements of the Fund as the First Defendant contends, the First Defendant was in breach of such contract in any event by failing to redeem the Plaintiffs' participating shares in HHCF at the earliest possible date after her redemption request of May 31, 2007. This is because it is clear that the Plaintiff did not directly invest with HHCF, but through the First Defendant acting on her behalf. And while the First Defendant has credibly asserted that it is not presently possible for the redemption to take place because HHCF suspended redemptions on a date uncertain before August 20 2008, the First Defendant has (a) admitted in its Defence that redemption was possible on October 1, 2007, and (b) represented to the Plaintiff shortly after she made her redemption request that her investment would be liquidated at the end of 2007.

53. This is a case where the First Defendant has no obvious *bona fide* defence on the merits and has not supported the Defence which has been filed with affidavit deposing the belief of an officer of the company that a *bona fide* defence exists. Mr. Harshaw invited the Court to treat Dr. Black's Affidavits as evidence filed on behalf of the Company as well as himself. I have taken their contents into account but the Affidavits on their face are filed on behalf of the Second Defendant and their contents in any event do not contain any explicit support for the *bona fides* of the Defence of the First Defendant. The First Defendant's counsel has succeeded in demonstrating that there is an issue to be tried as to precisely what happened to the monies after they were received. The question of whether they were misappropriated or invested in HHCF makes no difference to the First Defendant's liability to repay the monies, but is potentially relevant to what the measure of damages to be assessed is for breach of contract.

54. In my judgment it is insufficient to defeat a summary judgment claim as to liability to identify, through counsel's submissions or otherwise, "triable" factual issues which do not, properly analysed, raise an arguable defence to the substance of the Plaintiff's claim. This Court will not ordinarily embark upon a full trial merely because there is a reasonable prospect that a defendant can undermine the precise way in which a claim is formulated in a manner which will have no impact on the substantive success of a plaintiff's claim. This point has greater force where the cause of action relied upon is an essentially uncomplicated claim for the return of payment of money due under a contract and which (as Mr. Pachai was keen to point out) involved no allegations of fraud. The Plaintiff is granted summary judgment on liability accordingly.

Quantum

55. Mr. Harshaw persuasively argued that there was insufficient evidence before the Court to support a finding that a specific sum was due to the Plaintiff. This was because the Plaintiff sought an amount in Swiss francs and there was no evidence about exchange rates. He referred to the case of *Contract Discount Corporation Ltd.-v- Furlong and Others* [1948] 1 All ER 274 where the English Court of Appeal set aside summary judgment for £10,000 based on a qualified admission and substituted a judgment for £8000 with leave to defend as regards any sum in excess of that reduced amount.

56. The Plaintiff's Summons seeks summary judgment in the amount claimed in the Amended Specially Indorsed Writ and damages to be assessed. The liquidated amount claimed is the amount of the original investment, namely US$6 million. No evidence has been filed in support of the pleaded "average exchange rate" for conversion into Swiss francs, and I think counsel's challenge based on an absence of evidence is sufficient to justify refusing to make a finding as far as the exchange rate question is concerned. Is there any justification for declining to enter summary judgment for a minimum amount of $6 million based on an unqualified admission that US$6million was in fact received "*on or about the*

dates alleged by wire transfer in United States dollars at the First Defendant's account at the Bank of NT Butterfield & Son Ltd"?

57. If the monies were not invested in HHCF, the Plaintiff will be entitled to recover the principal amount of US$6 million remitted with interest (both pre-judgment at a rate to be assessed from the date of receipt and post-judgment interest at the statutory rate) and costs.

58. If the monies were invested in HHCF, it is perhaps arguable that the First Defendant will be estopped from asserting that the Plaintiff's HHCF investment was worth less than what it represented her investment was worth at year-end 2007 when redemption ought by the First Defendant's own account to have taken place. US$ 7,016,560 or 8, 163, 767 Swiss francs was the value at September 30, 2007 according to the First Defendant's own statements. On the other hand, the Plaintiff has not been awarded summary judgment on the basis of a misrepresentation claim[4] and so it seems more probable that the Court would assess damages against the First Defendant for its failure to redeem any shares the Plaintiff is found to have in the Fund on the market value of those shares at the relevant redemption date in late 2007, as opposed to the liquidation value when redemption actually occurs.

59. According to the 2006 financial statements signed by HHCF's auditors but not approved by its management, shares were redeemed at the price of $7.09 per share and issued for $7.21 per share in 2006. If the Plaintiff owned 916,000 participating shares in HHCF as the First Defendant's statements indicate, these shares were conservatively worth between $6.5 million and $6.6 at year-end 2006 by the auditor's own account. It is possible that the 2008 suspension of redemptions is connected to a declining share value for 2007 to an uncertain extent. Adopting a very conservative approach and having regard to my provisional view that the Plaintiff is likely not to be an investor in HHCF at all, I would enter summary judgment in the minimum amount of US$ 5 million and grant the First Defendant unconditional leave to defend for any amounts in excess of that sum[5].

Conclusion

60. The Second Defendant's application to set aside the Default Judgment entered against him on January , 2009 is hereby set aside, but on the condition that (a) he pay into Court or otherwise secure to the satisfaction of the Plaintiff or, in the absence of agreement, this Honourable Court the sum of US$1 million, and (b) that the question of whether or not the Plaintiff became a shareholder (directly or indirectly) of HHCF –and if so when and to what extent- should be tried as a

[4] The Agreement contains an indemnity clause which would have required the Plaintiff to prove more than a mere breach of contract to sustain such a misrepresentation claim.
[5] No doubt this minimum figure could be reviewed by this Court in the light of evidence not presently available that demonstrates that the 2007 share value had in fact dramatically collapsed.

preliminary issue on an expedited basis. Although he has not demonstrated that he has a defence which has reasonable prospects of success, the wider interests of justice require that he be afforded an opportunity of absolving himself from the serious allegation that he has misappropriated the Plaintiff's monies. Moreover, his conduct will have to be considered in any event to enable the Court to assess damages as against the Second Defendant. Unless either party applies within 28 days to be heard as to costs, I would nevertheless award the costs of the application to set aside to the Plaintiff in any event.

61. The Plaintiff's summary judgment application against the First Defendant is granted in the minimum amount of US$ 5 million plus interest and damages to be assessed and costs to be taxed if not agreed. The First Defendant's Defence does not raise any triable issues with respect to the Plaintiff's claim for damages for the failure to repay the monies she placed with the Company for investment, although the precise sum due in excess of the minimum amount of US$ 5 million (and as converted into Swiss francs) is unclear. The First Defendant is granted unconditional leave to defend with respect to the Plaintiff's right to recover any liquidated sum in excess of US$ 5 million.

Dated this 1st day of June, 2009

KAWALEY J