In The Supreme Court of Bermuda

CIVIL JURISDICTION
2009: No. 450

BETWEEN:

M. ARNAULT DE TORQUAT (1)
MR LUIGI BARZINI (2)

Plaintiffs

- and -

AEGEAN SERVICES LIMITED

Defendant

Dates of Hearing: 6 April 2010
Date of Judgment: 30 April 2010

Alan Dunch of Mello, Jones & Martin for the Plaintiffs;
Kelvin Hastings-Smith of Appleby for the Defendant.

RULING

1. This matter comes before the Court on the plaintiffs' summons of 12th February 2010 for summary judgment under RSC Ord. 14. The general endorsement on the writ is a claim for –

> ". . . fees due upon the introduction of investment business to Harmony Capital Fund Limited, a company incorporated in Bermuda, which the Defendant received in the knowledge of and under an obligation to pay to the Plaintiffs."

The statement of claim was filed and served with the writ, and it claims an account for the period from September 2009 to date; 'restitutionary damages'; or alternatively payment over of all sums found to be due as 'money had a received'. The 'restitutionary damages' amounts to a claim for a

liquidated sum, being $111,512 due to the first plaintiff, and $39,400 due to the second plaintiff, as pleaded at paragraph 12 of the statement of claim[1].

The Background

2. The background is that there is a mutual fund company incorporated in Bermuda which operates a fund of hedge funds. It is now known as Harmony Capital Fund Limited ('the Fund'). The Fund was managed by Harmony Capital Management Limited ('the Fund Manager'), which is incorporated in England and Wales. The defendant has a service agreement with the Fund, dated 30th June 2006 ('the Service Agreement'). That much is admitted. The plaintiffs also allege that the sole service the defendant in fact provides under the Service Agreement is the distribution of commissions from the Fund to those introducing business to the Fund, and that it carries on no other trading or commercial activity.

3. The plaintiffs claim that they, among many others, were and are entitled to receive remuneration on account of the introduction of business to the Fund. In the documentation this remuneration is confusingly referred to as a 'rebate', but essentially it was a trailing commission, with sums continuing to become due in respect of business introduced in the past. The plaintiffs say that the commissions were paid out of fees levied by the Fund[2] and thereafter paid to the defendant for distribution. They claim that from September 2008 to June 2009 the defendant received $111,512 due to the first plaintiff, and $39,400 due to the second plaintiff[3], but is refusing to pay it over. They also claim an account in respect of an unknown sum for money had and received by the defendant since September 2009.

4. The timing is not accidental. The plaintiffs were directors of the Fund Manager until their resignation on 21st August 2008. They continue to have a minority shareholding. They may also have a minority interest in the defendant through an intermediary, but that is not admitted. When they left the Fund Manager they retained control of the Fund, which is now managed by another entity.

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[1] These figures are made up of various currencies converted to US $, as set out in the schedules in paragraph 37 of the first plaintiff's first affidavit, the commission being accounted for in the currency of the investment in the fund.
[2] In paragraph 11 of the statement of claim the fees are pleaded as being levied by the Fund Manager, but this is conceded to be in error: see paragraph 19 of the first plaintiff's second affidavit.
[3] See note 1 above.

The Law

5. The plaintiffs implicitly acknowledge that there is no contract or agreement between them and the defendant. Rather they assert a cause of action by way of a restitutionary remedy. The constituents of their cause of action are summarized in 'The Law of Restitution', Goff & Jones, 7th ed. (2007), at pp. 696/7 as follows:

> "The law cannot be regarded as settled. But the following conditions must apparently be satisfied before the claimant can succeed in his claim to the money:
>
> (1) There must be a "fund" in the defendant's hands. . . .
>
> (2) A third party, from who the defendant received the "fund" or to whose use he held it, must have requested the defendant, either before or after the "fund" reached the defendant's hands, to hold it to the claimant's use.
>
> (3) The defendant must have assented to hold the "fund" to the claimant's use, and such assent must have been communicated to the claimant by the defendant or his authorized agent. In other words, the defendant must have "by some act attorned" to the claimant."

I think that that statement of the law is sufficient for the purposes of this case.

The Issues

6. As noted above, the plaintiffs parted company with the Fund Manager in August 2008. At that time they took the Fund's business with them to a new enterprise, Jason Capital Partners Ltd. which they own. Until they parted company with the Fund Manager, the plaintiffs received their commission from the defendant via the Manager. This stopped when they parted company. Under the Service Agreement, however, the monthly fee continues to be paid to the defendant for onward distribution. The heart of this dispute is that the defendant says that any commission due to the plaintiffs in respect of business introduced while they were directors of the Fund Manager is due to the Fund Manager, and not to them personally. It says that it will, therefore, continue to distribute that commission to the Fund Manager.

7. The defendant's case is set out in the affidavit of a Mr. Ettore Paratore, who is a Director of both the defendant and of the Fund Manager. Mr. Paratore had previously been employed by the

Fund Manager until September 2007, when he says he was dismissed by the Plaintiffs who at that time controlled the Board of the Fund Manager. He subsequently became a director of the Fund Manager on 5th August 2008, and the plaintiffs then resigned on 21st August 2008.

8. Mr. Paratore, says that under the Service Agreement with the Fund, the defendant is to –

> "2.2.7 engage the services of marketing agents in all and any jurisdictions in which such marketing or solicitation is permitted and lawful and provide for their remuneration."

And, moreover, that remuneration is to be provided from its own funds:

> "5.6 Subject as specifically provided for herein, [Aegean] shall render the services provided for in this Agreement at its own expense including without limitation any fees payable to its marketing agents . . . "

9. Mr. Paratore says that one of its marketing agents is the Fund Manager, and that the agreement between them is constituted by a course of dealings, under which it is obliged to pay the Fund Manager for introductions made by it, and by its directors and employees. He says that the Fund Manager invoices the defendant for the sums due, and has not consented to the defendant paying any sums direct to the plaintiff. Indeed, he produces a letter from the Fund Manager to the defendant, signed by a director, Mr. Capodilista, which says:

> "You are quite right that rebates have historically been paid to Harmony Capital Management Limited (HCML) and not directly to its employees. This reflects the position that any marketing of the Fund by HCML employees was undertaken in that specific capacity, and supported by the HCML brand, infrastructure and resources. Accordingly, I do not consent to the Rebate payments being made directly to the individuals directly and require you to continue to make those payments to HCML."

10. The letter then goes on to refer to the policy set out in the memorandum of 22nd January 2007 (for which see below), and concludes that the plaintiffs "should therefore be well aware that they are not entitled to receive Rebate Payments directly from Aegean".

11. Mr. Paratore further asserts that no such payments have ever been made directly to the plaintiffs by the defendant, except for one to the first plaintiff in December 2006, which was in

error and was reversed. He produces all the defendant's bank accounts to demonstrate this[4]. However, that point is accepted. The plaintiffs accept that their payments were channeled through the Fund Manager but they assert that this was merely to ensure that UK tax and national insurance obligations were complied with.

12. The defendant relies on a memorandum of 22nd January 2007, written by the first plaintiff and signed by both plaintiffs when they were directors of the Fund Manager, and members of its Executive Committee[5]. It deals with the payment of Commissions to employees, and in particular provides for the termination of that when their employment ceased. It begins:

> "As you are aware, HAML has always encouraged directors and staff to participate in the fund raising exercise; in order to stimulate this, it was decided to implement a system of internal rebate (50 BP of management fee and half of the performance fee) which is maintained.
>
> Today a very significant amount of new investment inquiries has and is expected to "land on your desk" (i.e. does not come from investors personally known to us) given our higher profile in the databases, in specialized media as well as because our higher profile and reputation in the market place
>
> The purpose of this Memorandum is to establish clear rules of the road so we can continue this incentive in all fairness for the Harmony Group and its staff."

13. The memorandum then sets out the Rules, which stipulate that Commissions for business which "lands on our desks" are to be paid to the company and not to the person who processes the business. The Executive Committee will review and validate claims to Commission once a quarter, and no Commission is to be paid without all three members of the Committee having signed off on it. All such Commissions will cease on the departure of the individual concerned from the firm and will automatically be transferred to the firm.

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[4] These were produced as pages 44 to 699 of the exhibit to Mr. Paratore's affidavit. They represented a huge block of paper, which rendered the file unmanageable. I therefore removed them from the file and returned them to counsel for the defendant at the hearing.

[5] The copy of the memorandum produced by the first plaintiff is unsigned, but he deposes, at paragraph 43 of his first affidavit, that "The memorandum is signed by the Executive Committee of HCML, which in January 2007 comprised me, the Second Plaintiff and Mr. Giovanni Emo Capodilista."

14. The defendant says that that means that the plaintiffs ceased to be entitled to Commissions once they left the Fund Manager. As noted above, the Fund Manager takes a similar view. Indeed the Fund Manager's letter is signed by the same Mr. Capodilista who was a member of the Executive Committee at the time of the memorandum and one of its signatories[6]. However, the plaintiffs say that the memorandum was not intended to apply to Directors, and only applied to business which came through the door without personal introduction. They say that it was not intended to, and could not, interfere with the Fund's obligation to make payments to persons such as themselves who had personally introduced business to it.

15. As to the Fund's obligation to the plaintiffs, the Fund acknowledges it, and the plaintiffs rely on a letter of 21st January 2009 from the Fund to the Fund Manager, stating:

> "As you will be aware from the schedules to the financial statements of Aegean services Limited ("Aegean"), the rebates are due to the individuals and not HCML."

16. There is also a further letter of 2nd March 2010, which says –

> "You will note that this letter confirms the position of the board of Harmony Capital Fund Limited (the "Fund") that the fees paid to Aegean by the Fund represent rebate payments to introducers of investors to the Fund. These monies are paid by the Fund to Aegean as an intermediary with the agreement that Aegean will pay these on to the individual introducers of the investors in question.
>
> In respect of the investors introduced to the Fund by [the plaintiffs], it is the position of the board of Fund that rebate payments due from these fees in respect of such investors are payable to these individuals and not to Harmony Capital Management Limited. The payment of such fees to Harmony Capital Management Limited is inappropriate."

17. The financial statements referred to in the first letter are schedules of commissions due prepared by the accountants to the defendant, Tromino Financial Services Ltd. These show the Commission allocated to individuals. For the period June 2006 to August 2008, while the plaintiffs were in control of the Fund Manager, the sums shown as allocated to them were, they say, paid to them. Thereafter, although the sums are still shown as accruing to them in the books,

[6] See note 5 above.

they have not been paid. They base their liquidated claim upon the sums so shown. They have not seen similar statements for the period after September 2009, hence the claim for an account.

18. The defendant says that the allocation of these sums to the plaintiffs is for accounting purposes only and does not found a liability to them personally. Thus, in paragraph 22 of his affidavit, Mr. Paratore deposes:

> ". . . they are simply calculations for internal use and have no effect on the contractual arrangements between the parties. The reference to individuals' names, including the Plaintiffs', is simply so that the Rebates earned can be identified: for example, a reference to Mr. Barzini simply means that as a[re] result of his introduction of an investor, a Rebate has become due to HCML [*i.e. the Fund Manager*] under the introduction agreement. This information could then be used by HCML."

Conclusions

19. There is plainly an underlying dispute here that goes wider that this particular issue. On one side there is the Fund and the plaintiffs, who appear now to control the Fund. On the other there is the former Fund Manager and the defendant, of both of which Mr. Paratore is a Director. There remains, however the Service Agreement, which locks the Fund into a continuing relationship with the defendant. Against that background, there is an issue whether monies received by the defendant from the Fund are held by it for the plaintiffs or for the former Fund Manager.

20. To the extent that all of this involves issues of fact, I have to apply a two-fold test[7]. The first question is "Is what the defendant says credible?" The second question is "Is there a fair or reasonable probability of the defendant having a real or bona fide defence?" On the first question I think that what the defendant says is credible, in the sense of reasonably capable of belief. It is not obviously wrong or inherently implausible, it is supported by the Fund Manager, and the plaintiffs' case is hampered by the absence of any written contract or other similar documentation setting out their entitlement to receive their commission. On the second question, if the defendant makes out its case at trial, it will succeed. In my judgment, therefore, the evidence raises a serious issue to be tried.

[7] See the discussion at note 14/4/9 to the Supreme Court Practice, 1999 ed., where the law is summarized and distilled.

21. It may be that that issue could be avoided if the plaintiffs could make out a case under the restitutionary doctrine set out above. Accepting, for the purposes of this hearing, that the plaintiffs can establish that there is (or at least was) money[8] in the defendant's hands, which it received from the Fund, and that the Fund has requested them to hold it to the plaintiffs' use, it remains for the plaintiffs to prove an attornment in their favour by the defendant. It seems to me that such an attornment necessarily involves a clear and unequivocal act or statement by the holder of the money.

22. In their skeleton argument the plaintiffs put their case on attornment as follows:

> "15. In the premises, the Defendant, by
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> (i) entering into the service agreement, and/or
> (ii) by its conduct in receiving and continuing to receive Rebates due to the Plaintiffs, and
> (iii) until November 2008, paying the Rebates at the Direction of the Plaintiffs,
>
> has thereby attorned to the Plaintiffs."

23. There are difficulties with the plaintiffs' case on that. The plaintiffs are not identified in the service agreement, and the defendant's conduct since then is equivocal, being equally compatible with what it alleges, namely that it holds the money for the Fund Manager. Similarly, the defendant's conduct in paying the commissions to the Fund Manager in the period before November 2008 is also equivocal. It all comes back to the same issue – were, and are, the commissions payable to the plaintiffs personally or to the Fund Manager? I have already said that I think that there is a serious issue to be tried on that, and I think that the plaintiffs' case for summary judgment founders on that issue.

24. I have also considered whether this might be a case for conditional leave to defend, but I do not think that it is. I cannot say that this is a 'shadowy' or a sham defence. Nor, despite the hints

[8] I have avoided the use of "a fund" at this point, simply because it invites confusion with "the Fund". There are difficulties in the case law about what constitutes "a fund" for these purposes, but none of them arise here.

of personal animosity in the background situation, could I properly hold at this stage and without cross-examination, that there is a real doubt as to the defendant's good faith.

25. I therefore dismiss the application for summary judgment and give the defendant unconditional leave to defend. I will hear the parties on costs.

Dated this 30th day of April 2010

Richard Ground
Chief Justice