In The Supreme Court of Bermuda

(COMMERCIAL LIST)

2010: No. 42

Between:

(1) TENSOR ENDOWMENT LIMITED

(2) UBS FUND SERVICES (CAYMAN) LTD

Plaintiffs

-v-

NEW STREAM CAPITAL FUND LIMITED

Defendant

JUDGMENT

(in Chambers)

Date of Hearing: June 3, 2010
Date of Ruling: June 17, 2010

Mr. Andrew Martin, Mello Jones & Martin,
for the Plaintiffs

Mr. Cameron Hill, Sedgwick Chudleigh,
for the Defendant

Introductory

1. The Plaintiffs ("Tensor") applied by Summons dated February 26, 2010 for Summary Judgment in respect of their claim set out in a Specially Indorsed Writ issued on February 5, 2010. According to the Prayer, the Plaintiffs claimed "*payment of the price due upon the redemption of redeemable shares in a segregated account maintained by the Defendant and known as Class K*", being "*a liquidated sum of $8,820,838.03*". This claim was further elaborated upon in the Statement of Claim filed on February 5, 2010 together with the Writ.

2. The Defendant filed its Defence on March 11, 2010. It is admitted that the redemption sum payable to Tensor is the amount claimed, but averred that this amount is only payable under the Bye-laws "*as soon as practicable*". It is averred that Tensor is estopped from asserting the present claim because it ought to have brought the claim before, no later than when it brought its application to appoint a receiver under section 19 of the Segregated Accounts Companies Act 2000, which was refused in *Tensor Endowment Limited et al –v- New Stream Capital Fund Ltd.* [2009] SC (Bda) 69 Civ (18 December 2009) ("Tensor I"). It is also averred that the Plaintiffs are not entitled to interest in any event.

3. By Summons dated March 16, 2010, the Defendant applied to strike out Tensor's action on the grounds that it was frivolous and vexatious and/or otherwise an abuse of the process of the Court under Order 18 rule 19(1)(b),(d) of the Rules. The parties' respective Summonses came on for hearing together. At the hearing it became clear that no dispute existed in relation to Tensor's claim for payment as such. Rather the Defendant challenged the Plaintiffs' right to bring the present proceedings on technical grounds and, alternatively, their right to claim interest on any judgment this Court might enter in Tensor's favour.

The Plaintiffs' claim

4. Although Tensor's claim is not disputed on its merits, it must be understood in order to evaluate the interest issue. It is undisputed that from around July 1, 2007, the Tensor beneficially owned segregated account Class K shares in the Defendant Fund as a result of investing US$8 million. The Statement of Claim places reliance on two matters in support of the averment in paragraph 14 that "*on or before 31st May 2008 the Shares were redeemed and the Defendant was immediately liable to pay the Redemption Price to the First or Second Plaintiff calculated on the Valuation date in the sum of US$ 8,820,838.03*". One is a matter of record and has no bearing on the interest controversy. This is the reliance pleaded in paragraph 13 on the finding in Tensor I that "*Tensor became an actual (redemption) creditor on May 31, 2008 in respect of its redemption request in the agreed amount.*" However, it is also averred that:

> "*12. By his affidavit sworn in [Tensor I] at paragraph 75 Mr. Perry Gillies, President of New Stream Capital LLC deposes as follows;*
>
> *'The* [Second Plaintiff] *served notice of redemption on 22nd January 2008 in relation to its shares in Class K for a 31 May 2008 redemption. On 29 May 2008*, [New stream Capital LLC] *offered the* [First Plaintiff] *the chance to 'float' its redemption, which would have allowed interest to continue to accrue on the balance of the redeemed amount until payment, which would be made in due course based on the effective date of redemption. The* [First Plaintiff] *declined to respond and the net asset value (NAV) of its redemption was therefore fixed and became effective as of 31 May 2008 in the amount of US$ 8,820,838.03'*"

5. Tensor nevertheless claimed either compound interest or interest pursuant section 10 of the interest and Credit Charges (Regulation) Act 1975 at the rate of 7.5% from June 1, 2008 until judgment or sooner payment. The Defendant averred in paragraph 23 of its Defence that : (a) the right to interest had been waived; (b) under the terms of the Amended Loan Notes, Tensor has been receiving 3% interest in any event; and/or (c) it would be inequitable to other Class K shareholders for Tensor alone to be paid interest out Class K assets. In addition, liability was challenged, somewhat weakly, on the grounds that the obligation to pay had yet to accrue and more forcefully on the grounds that it was an abuse of process for the present action to be pursued at all.

Findings: are the Plaintiffs entitled to summary judgment?

6. Subject to the Defendant's strike-out application, the Plaintiffs are entitled to summary judgment for the amount claimed. In Tensor I, this Court found on December 18, 2009 that "*Tensor became an actual (redemption) creditor on May 31, 2008 in respect of its redemption request in the agreed amount.*"

7. This finding was based in part on the legal finding that the definition of solvency under section 2(2) of the 2000 Act excluded redemption claims from the assessment of solvency. In this regard, the following observations were made:

> "*36.This construction of section 2(2) (b) of the Act does not leave an unpaid redemption creditor with no enforcement remedies whatsoever. The Act permits ordinary civil proceedings to be brought against a company in respect of one of its segregated accounts. A civil judgment could be enforced against any free assets in the segregated account...*"

8. These *obiter dicta* find further support in the following provisions of section 18 which have yet to receive the benefit of argument by counsel[1]:

[1] Either in Tensor I or in the broader examination of the 2000 Act in *BNY AIS Nominees Limited et al-v-New Stream Capital Fund Ltd* [2010] SC (Bda) 26 (27 May, 2010), perhaps because in neither case was section 18(14) crucial to the issues to be determined.

> "*(14) Subject to the segregated accounts company complying with section 15, and except to the extent it may be agreed otherwise by virtue of the governing instrument or contract, as the case may be, at the time an account owner or counterparty becomes entitled to receive a payment, distribution, allocation or dividend pursuant to any governing instrument, he has the status of, and is entitled to all remedies available to, a creditor of the segregated account with respect to the payment, distribution, allocation or dividend, and the governing instrument or contract may provide for the establishment of record dates with respect to such payment, distribution, allocation or dividend.*" [emphasis added]

9. Accordingly, the Plaintiffs are *prima facie* entitled to enter summary judgment in respect of the undisputed redemption debt.

Findings: is the Plaintiffs' claim liable to struck-out as an abuse of the process of the Court?

10. Mr. Hill posited a somewhat rigid and mechanistic approach to deciding whether the rule against re-litigating issues which were or ought to have been determined in earlier proceedings was engaged. He relied on selected *dicta* from various cases in support of the proposition that if the present claim could have been brought earlier, the Court was bound to find that the present action was an abuse. The principal cases relied upon were *Henderson-v-Henderson* 3 Hare 101, *Yat Tung Investment Co. Ltd.-v- Dao Heng Bank* [1975] AC 581, *Greenhalgh –v-Mallard* [1947] 2 All ER 255 at 257, *Talbot-v-Berkshire County Council* [1994] QB 290, and *Johnson-v-Gore-Wood & Co (a firm)* [2002] 2 AC 1.

11. Mr. Martin submitted that the authorities relied upon by Mr. Hill required the Court to carry out a more complex assessment of whether or not the present proceedings were abusive. The Plaintiff's counsel further submitted[2] that the *Johnson-v- Gore-Wood* case, as explained by Thomas LJ in *Aldi Stores Ltd.-v-WSP Group Plc* [2008] 1 WLR 748, established the following principles applicable to strike-out applications based on the *res judicata* principle:

> "*(i) Where A has brought an action against B, a later action against B or C may be struck out where the second action is an abuse of process.*
>
> *(ii) A later action against B is much more likely to be held to be an abuse of process than a later action against C.*
>
> *(iii) The burden of establishing abuse of process is on B or C as the case may be.*

[2] 'Plaintiffs' Submissions', paragraph 19.

(iv)It is wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive.

(v) The question in every case is whether, applying a broad merits based approach, A's conduct is in all the circumstances an abuse of process.

(vi) The court will rarely find that the later action is an abuse of process unless the later action involves unjust harassment or oppression of B or C."

12. I accept Mr. Martin's submissions as to the correct approach to strike-out applications such as those made by the Defendant in the present case. Once one identifies the correct approach, it is more clearly apparent that the Defendant's application must be refused. It is true that, as Mr. Hill submitted in oral argument, the present Writ action could have been filed at the same time as the receivership application being made in *Tensor I*. This was the approach taken by the Gottex Funds. In the *Gottex* case however, the Writ action was the principal platform upon which the receivership application was based.

13. In the present case, the Plaintiffs are not seeking to erect a new platform for launching a fresh receivership application, which would be abusive. On the contrary, Tensor in this action seeks alternative relief (a judgment) to enforce its claim because its attempt in *Tensor I* to utilize the receivership remedy failed. Moreover, it is clear that the present claim could not have been included in the receivership application under section 19 of the 2000 Act, but required free-standing separate proceedings. The essence of the abusive nature of re-litigating issues which could and should have been determined in earlier proceedings is that a successful defendant is being required to face new claims relating to a common dispute which has already been resolved in his/its favour. This is illustrated by another case upon which Mr. Hill relied, Meerabux J's judgment in *Asbestos Claims Management Corporation et al –v- BF&M Ltd. et al* [1996] Bda LR 63 , where a second strike-out application was dismissed on abuse of process grounds.

14. In the present case, this Court resolved the issue of whether or not a debt was presently due and owing by the Defendant *in the Plaintiffs favour*. The Court ruled that the Plaintiffs could not avail themselves of the specific remedy created by section 19 of the Segregated Account Companies Act, but also expressed the view that other remedies such as a Writ action appeared to exist.

15. Moreover, it is at least arguable, as Mr. Martin hinted his clients hope to achieve, that the Plaintiffs will acquire rights of priority over other account holders by virtue of this Judgment in any event. It was contended by the Defendant and accepted by me in *Tensor I*, that unpaid redemption claims do not fall to be taken into account for solvency purposes because they arise out of the account owners capacity as such as section 2(2) of the 2000 Act expressly provides. It is at least

arguable that Class K's debt obligation to pay the Plaintiffs will now be owed to them in their capacity as judgment creditor, with the result that they are entitled to be paid in priority to mere account owners.

16. I find that the Defendant has failed to establish that the present proceedings, which cannot be defended on their merits, are abusive and liable to be struck out. The strike-out application is accordingly dismissed.

Findings: are the Plaintiffs' entitled to recover pre-Judgment and/or post-Judgment interest, and if so at what rate?

17. Although the Court has an apparently broad discretion as to the grant of pre-judgment interest under section 10 of the Interest and Credit Charges (Regulation) Act 1975, decided cases have laid down certain guiding principles which ought not to be lightly departed from in the interests of certainty. Pre-judgment interest is the normal rule in personal injuries cases, but in contractual cases the Court is normally guided by the parties' agreement.

18. Mr. Hill made the unanswerable point that as a matter of contract the Plaintiffs had no right to receive interest and had expressly turned down the offer to earn interest by "floating" their investment. Accordingly, he submitted, the following dictum of Ground CJ in *Jupiter Asset Management-v- The Asset Management Group* [2005] Bda LR 1 should be applied:

> "*There is no entitlement to interest unless the contract provides for it to run until payment, which is plainly not the case here. Given that I accept that the Notes were intended to substitute for the shares, which would not on the evidence before me, have earned dividends or appreciated in value over the time between demand and judgment, I make no award of interest under section 10.*"

19. I accept this submission and reject the Plaintiffs' claim for pre-Judgment interest. I reject the contention that the same principles should be applied, without more, to the post-Judgment interest claim. The relevant statutory provision (section 9) does not, like section 10, create a discretion to award interest; rather, it creates a presumption that interest will be awarded at the statutory rate unless the Court otherwise orders:

> "***Judgment debts***
> *9 All sums of money due or payable under or by virtue of any judgment, order or decree of any court shall, unless that court orders otherwise, carry interest at the statutory rate from the time the judgment is given, or as the case may be, the order or decree is made, until the judgment, order or decree is satisfied, and such interest may be levied under a writ of execution, or otherwise recovered in the same manner and by the same process as the principal may be recovered.*"

20. The Defendant's counsel cited no case illustrative of the circumstances in which this Court could properly refuse to award any interest at all on a judgment, as opposed to simply tinkering with the applicable rate. Instead counsel relied upon the factual contention that it would be unjust for Class K's other account owners (or former account owners) to have to subsidize interest payments to the Plaintiffs out of that segregated account's limited fund. This is particularly since pursuant to the Plan, the segregated account is only entitled to receive interest at the rate of 1.5% annually.

21. This argument, while clearly meritorious in relation to pre-Judgment interest, on balance must be rejected as regards post-Judgment interest. Neither the Defendant's directors nor the Class K account owners who assented to the Plan elected to implement the Plan in a manner which would have bound Tensor over its objections through, for example, either:

> (a) a resolution of the majority of Class K shareholders in general meeting, if this was sufficient;
>
> (b) a variation of special share rights (e.g. by amending the Bye-law redemption rights to conform to the payment rights under the Plan), if this was required; or
>
> (c) a scheme of arrangement, so as to bind dissenting account owners such as Tensor, which the ownership interests suggest could have been achieved with roughly 80% in value and a majority in number supporting the Plan.

22. In *Tensor I* this Court found that under Bye-law 9 Tensor had a right to immediate payment of its redemption proceeds which right had not been extinguished by the Plan. It is not obviously inequitable for the Plaintiffs to be compensated for a failure to comply with what the Defendant admits[3] are their unaltered Bye-law rights, albeit that the Plaintiffs lack sufficient standing to remove the directors and appoint a receiver.

23. Finally, the purpose of awarding interest on judgment debts is not simply to compensate a judgment creditor for delay but to encourage compliance with this Court's orders. The receivership application was opposed in part on the hypothesis that Tensor was at the front of the payment queue and that initial payments might be made as soon as the middle of 2010. What enforcement mechanisms are available to a judgment creditor of a segregated account in circumstances such as the present case is less than crystal clear. Declining to award interest on the judgment debt would only serve to encourage the Defendant to make haste slowly in satisfying the Judgment.

[3] The Defendant's case was that the Bye-laws had not been violated by the Plan; it unsuccessfully argued in *Tensor I* that no right to immediate payment had crystallized.

24. The Defendant has failed to satisfy me that it is appropriate to depart from the usual course contemplated by section 9 of the 1975 Act. Nor has Tensor satisfied me that it should be awarded compound interest or interest at the higher rate of 7.5%. Accordingly, I award the Plaintiffs interest on the judgment debt at the statutory rate of 7% until payment.

Summary

25. The Plaintiffs are granted summary judgment in the amount of $8,820,838.03 together with interest at the statutory rate of 7% from the date of judgment until payment. Their application for pre-Judgment interest is refused. The Defendant's strike-out application is dismissed.

26. Unless either party applies by letter to the Registrar within 21 days to be heard as to costs, the costs of both applications are awarded to the Plaintiffs to be taxed if not agreed on the standard basis.

Dated this 17th day of June, 2010 _____
KAWALEY J