THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
TERRITORY OF ANGUILLA
(CIVIL)
AD 2008

CLAIM NO. AXA HCV 2008/0042

BETWEEN:

BAGANI STIFTUNG

Claimant/Respondent

AND

(1) JMV FIXED INCOME ARBITRAGE PERFORMANCE PARTNERS, LTD
(2) REGENMACHER HOLDINGS LIMITED
(3) SIAM CAPITAL MAMAGEMENT LTD

Defendants/Applicants

APPEARANCES:

Mr. Victor Joffe QC and Ms. Jenny Lindsay for the 1st and 2nd Defendant/Applicant.

Mr. Michael Driscoll QC, Ms. Tameka Davis and Mr. Harry Wiggin for the Claimant /Respondent.

Ms. Keesha Webster for the Interim Receiver.

Date: 2008: 26th September
28th October

JUDGMENT

[1] **GEORGE-CREQUE, J.:** On 9th July, 2008, the court made an interim order ("the Order") on a without notice application sought by the Claimant /Respondent ("Bagani") against the Defendants who for ease of reference will be referred to as D1, D2 and D3 respectively. The Order granted the following reliefs: a freezing order, a provision of information order, the appointment of an interim receiver, and permission to serve D3 out of the jurisdiction.

Directions were also given for the matter to come on for a full hearing inter-partes on 21st July, 2008.

The Background

[2] Based upon the First Affidavit of Dr. Alexander Schoeller, a qualified Austrian lawyer who was appointed to act on behalf of Bagani and also appointed to the management board of Bagani as well as other affidavits filed on behalf of Bagani and affidavits filed on behalf of D1 and D2, the following information is gleaned:

(a) Bagani is a Liechtenstein foundation. It is said to hold investments for the benefit of a large Austrian trade union ("OGB").

(b) D1 and D2 are Anguillian IBC companies. D3 is a Bahamian company. D1 and D2 are subsidiaries of D3. A Mr. Jonathan Knight is said to be a director of D1, D2 and D3. He has sworn affidavits on behalf of D1 and D3.

(c) In 2004, another Liechtenstein foundation called Bensor Stiftung ("Bensor") whose ultimate beneficiary was BAWAG P.S.K (an Austrian Bank "Old BAWAG") made a US $50 million investment through D1("The JMV Investment")[1] pursuant to two contracts. Bagani was not a party to those contracts. One contract was between D1 and D2. In one of the 2004 contracts D1 authorized D2 to hold the JMV Investment in a designated account and to invest it in accordance with a strategy described as the 'Investment Goals and Strategy'. The designated account was a securities custody and safekeeping account established at UMB Bank in Missouri. Under that contract D2 was authorized to appoint an Investment Adviser and pursuant to the second of the 2004 contracts, D2 appointed D3 as its Investment Adviser. Pursuant to the terms of the second contract, the JMV Investment was to remain in the same custody safekeeping account. D3 was authorized to make investments but only in accordance with the 'Investment Goals Strategy'.

(d) It is said that the JMV Investment was assigned by Bensor to Bagani whereby Bagani paid to Bensor via an entity called Acies Capital Inc. € 47,367,800 for Bensor's interest in the JMV Investment. According to Dr. Mario Frick, the Zero

Coupon Performance Participation Certificate ("ZCPPC") of 28th October, 2004 shows the signatures of one Jayme Colter and Jonathan Knight as Directors of D1 witnessed by his father Kuno Frick who was then a board member of Bensor.

(e) An assignment and Securities Purchase Agreement dated 10th October, 2005, was made between Acies and Bagani. Also on 10th October, 2005, a Securities Purchase Agreement was entered into between D1 and Bagani. Dr. Mario Frick, stated in his affidavit that he was one of the three original members of the board of Bagani and as from October, 2005 was also a member of the board of Bensor. He is still a member of the boards of both Bensor and Bagani. He says he executed both of those 2005 agreements on behalf of Bagani and that his brother, Dr. Kuno Frick, witnessed the execution by Jonathan Knight and Tamischa Ambrister of the 10th October, 2005 Certificate. Mr. Mario Frick says that he also executed on 10th October 2005, the Side Letter and Pledge Agreement[2] and has no reason to believe that those agreements did not effect a full and complete assignment and novation of the contracts between Bensor and DI in favour of Bagani.

(f) The JMV Investment remained with D2. All that appeared to have changed was that the JMV Investment was now held and invested by D2 for the benefit of Bagani instead of Bensor.

(g) Ms. Tamischa Ambrister and Ms.Patrina Farqharason swore affidavits in this matter. Ms. Ambrister is a director of D1 and D3. Ms. Ambrister spoke to the fact that she returned to the Bahamas after execution of the documents in respect of the October 10th, 2005 Transaction with the original execution documents provided to D1 and which she holds in her possession. She said that Bagani never made the required deliveries of documents required for closing the transaction under the Securities Purchase Agreement ("SPA") A central plank of the case for D1 and D2 is that Bagani failed to deliver a ZCPPC described as the "Former Certificate". The Former Certificate is defined as *the ZCPPC as issued by the Company (i.e.*

[1] The name "JMV Investment" is used for identification purposes only and as desriptive of the nature of the transaction.

[2] The Pledge Agreement states thatD3 owns all the issued shares of D1 and that D3 pledged all the shares in D1 to Bagani for D1's indebtedness.

D1) on October 10th, 2005. Ms. Ambrister, however, failed to particularize the various transaction documents which were executed. She merely said that the Transaction documents include the SPA. Neither did she specifically identify which of the documents required for delivery by Bagani under the SPA that Bagani failed to deliver. In evidence is a copy of a ZCPPC dated 10th October, 2005 issued by D1 granted to "the Holder" identified as the Purchaser under the SPA. The SPA refers to Bagani as the 'Purchaser'. This aspect of the matter at this stage remains clouded as to whether there was a ZCPPC, whether there was more than one such document relating to the same transaction and the whereabouts of the original. These are matters best left for ventilation at trial.

(h) Ms. Patrina Khoo Fraquharson, in her affidavit stated that she managed all the affairs of D3 and knows Mr. Knight Sr. She says, in essence, that Knight Sr. has no ownership in D3 and among other things has had no involvement in any aspect of D3's operations. Yet in evidence there are emails in respect of the JMV Investment which appear to be from and sent to Knight Sr. I am not required, however, at this stage to arrive at any determination in respect of such conflicting evidence.

[3] Bagani contended that the 2005 contract between D1 and Bagani provided for D1 each year to send Bagani a sum of US$862,500. D1 has failed or refused to make those payments. D1 says this is because Bagani has not proved to it that Bagani is the person entitled to the payments. Under the 2005 contract D1 was also to send to Bagani detailed financial information about the JMV Investment on a monthly basis. This has not been the case since 31st May, 2006. The contract is said to be governed by Anguilla Law and D1 and Bagani are said to have irrevocably submitted to the exclusive jurisdiction of the Anguilla court.

[4] Bagani claims to be entitled to enforce its rights under the 2005 contracts with D1, and consequently D2 and D3 and to recover the JMV Investment. Bagani said, however, that it did not at the time know where the money representing the JMV Investment was or knew how it was invested. Apart from asserting a proprietary claim to the JMV Investment it

also claims that Ds have breached the contract. Bagani also bases its claims in trust and equity on the basis that the JMV Investment was to be invested in a specific manner for the benefit of Bagani who is the beneficial owner of the funds. It further said that based upon Ds prevarication for two years and its actions in placing some US$30,000 in an escrow account for Ds' benefit the details of which they only discovered by chance in 2008, that there is a fear that Ds could easily take steps to move the investments out of reach or easy reach of Bagani. They also express fears regarding Knight Sr. who appear to be involved in the management of the JMV Investment despite the fact that he has been barred from association with any Investment Adviser by the USA after pleading guilty to attempted grand larceny in respect of a Bahamian Trust.

[5] For reasons which will later become clear, it is worthwhile making mention of the following matters to which the court's attention was drawn and deposed to in Dr. Schoeller's First Affidavit relating to a financial scandal in which the management of OGB and other related entities as well as Old BAWAG were involved or implicated:

(a) Bensor, in October, 2004, transferred just over US$50 million to Refco Capital Markets LLC for the account of D1 for investment by Ds for Bensor's benefit. The money was provided to Bensor by Austost , a subsidiary of Old BAWAG. Bensor, in return for its investment, received a Zero Coupon Performance Certificate with a maturity date of 2015. This investment was recorded in the 2004 agreements.

(b) Acies, being the conduit through which Bagani is said to have acquired Bensor's interest in the JMV Investment, is said to be controlled by one Thomas Hackl, former head of Investment banking at Old BAWAG. He had joined Refco in 2002.

(c) Refco collapsed in 2005. Mr. Hackl was named as a co -conspirator in litigation involving Refco. Mr. Hackl is said to have known and was closely involved with Mr. Knight and Patricia Koo Farquharson.

(d) It is believed by Dr. Schoeller that the structure of Acies and its artificial transactions relating to the investment was designed by Mr. Hakcl, and Mr. Knight in conjunction with Messrs. Keithley Lake and Associates to obscure the previous connection of the investment with Bensor.

(e) Old BAWAG was also named as a co-conspirator. Old BAWAG paid out at least $683 million in 2006 to avoid US prosecution for its role in Refco's collapse. Refco was said to have engaged in sham transactions in order to conceal losses and in short had been assisted in this activity by Old BAWAG which had entered into a number of high risk financial transactions with REfco which brought Old BAWAG also on the verge of collapse saved only by the intervention of the Austrian Government.

(f) In June 2006, Old BAWAG reached the settlement referred to earlier to avoid prosecution. It was as a result of this course of events that Old BAWAG was restructured and new management put in place in respect of OGB and the New BAWAG entity emerging from the restructuring.

[6] Ds have not sought to say the JMV Investment is their money or that they are entitled thereto as beneficiaries although they claim that they are entitled to place the US$30 million in an escrow account to provide, in essence, a fund out of which they can be indemnified for harm and losses they say they have suffered as a result of the Refco and Old BAWAG financial scandal to which they have been exposed due to their dealings with those entities.

[7] At the inter-partes hearing on 21st July, 2008, The Defendants were represented by counsel. They sought to have the receivership order stayed on the ground that the order was a draconian one, and its terms too wide; that the Receiver had given no security, and Bagani had given no fortification in respect of their undertaking in damages. Counsel also raised the issue as to whether Bagani had made full and fair disclosure at the ex–parte hearing. The cases of **Norgulf Holdings**[3] and **IPOC**[4] were relied upon. The issue as to the ownership of the monies was also raised and it was alluded to that Bensor was the beneficial owner thereof. Ds did not seek to say that they had or have any beneficial entitlement to the monies. It was also said in essence that Ds were in essence suffering financial hardship in not being able to meet its operating expenses by virtue of the freezing

[3] Norgulf Holdings Limited –v- Michael Wilson &Partners Limited BVI Civil Appeal No.8/2007
[4] IPOC International Growth Fund Limited –v- LV Finance Group et.al BVI Civil Appeal Nos. 20/2003 & 1/2004

and receivership orders. Ds generally sought an adjournment to address such issues further. This course was opposed by Bagani and urged that the Order be continued. Counsel for Bagani drew the court's attention to the fact that Ds were in deliberate breach of the Provision of Information order as borne out by the letter of 15th July, 2008 from Mr. Knight's solicitors whereby information provided to the Interim receiver was refused to be given to Bagani, and moreso directing the Receiver not to do so. No excuse or apology was proffered for this breach. Further, D3, subsequent to the date of the exparte proceedings, had commenced proceedings in Philadelphia which were then withdrawn and then proceedings had been started in New York wherein they set out their claim in a detailed manner to the $30 million escrow account in which they referred to a 'ratification and amendment agreement" between D1 and D3 in respect of the said $30 million escrow account, which agreement had not been seen by Bagani. Ds is also said to have first instructed Conyers Dill and Pearman and clearly took time to set out a case and bring proceedings in Philadelphia and then New York between the time of the exparte hearing and the time fixed for the full hearing before this court. By the date of the full hearing the Receiver had located and managed to freeze $19 million of the assets held at an account at UMB Bank. Counsel also contended that there could be no prejudice to Ds by the freezing and receivership orders as the funds were being safeguarded for whoever is proved to be the rightful owner. The court in its oral decision refused Ds' application and continued the orders of 9th July, 2008, but expressly reserved to Ds the right to apply on notice for a variation of the order so as to permit them to pay out of the assets any fees or expenses to which they may be contractually entitled and or sums in respect of legal costs.

The later Application to discharge

[8] On 27th August, 2008, D1 and D2 applied to discharge the orders of 9th July and 21st July. This was after they had applied on 25th July, in Missouri, USA to set aside the temporary restraining orders obtained by the Receiver in that State. After much correspondence as to whether or not and the date on which the Application ought to be listed it came on for hearing on 26th September, 2008. D3 expressly stated that it does not submit to the jurisdiction of this court. D1 and D2, notwithstanding making this application to discharge, have also expressly reserved the right to challenge the jurisdiction of the Court. At the

onset of the hearing counsel for the Receiver informed the Court that the parties had agreed to mediate but subject to the litigation continuing.

Applicable principles

[9] I regard it as well settled that on an application to discharge an order made on an inter partes hearing the party seeking its discharge must show either (i) a material change of circumstances or (ii) that the judge who made the earlier order was misled in some way, whether innocently or otherwise as to the correct factual position before him. The leading authority for this proposition is **Collier-v-Williams**[5] in which the dictum of Patten J to this effect in **Lloyds Investment (Scandinavia) Ltd –v- Ager-Hanssen**[6] was approved and followed. In **Collier,** English Court of Appeal court went on to say that the circumstances as set out above are the only ones in which the power to revoke or vary an order already made should be exercised. This dictum has been approved and followed in the court of the Eastern Caribbean[7]**.** Whilst CPR 2000 contains no equivalent rule to Rule CPR 3.1(7) [UK] which was there under consideration, it is also well settled that the court retains this power under its inherent jurisdiction. As to the first ground, the Court of Appeal, though referring to the rule dealing with an amendment to a statement of case after the first case management conference, opined that the change in circumstances envisaged is a change in the factual circumstances and not a change in the parties awareness or understanding of their legal right or of the existence of possible defences to the claim. In my view, a similar approach must be adopted for the purposes of revisiting an order earlier made. As to the second ground, material non-disclosure would certainly come into play in determining whether the court was in any way misled as to the correct state of the facts. The duty imposed on a party for making full and fair disclosure, in particular where freezing receivership or similar type orders are sought on an exparte basis, has been stated and followed in several cases[8]. Gordon JA in delivering the judgment of the Eastern Caribbean Court of Appeal in **IPOC International Growth Fund Ltd. -v- LV Finance**

[5] [2006] 1WLR 1945
[6] [2003] EWHC 1740 (Ch)
[7] See: Michael Wilson & Partners Limited –v- Temujin International Limited and others BVIHCV 2006/0307.
[8] See: Memory Corporation Plc. & Anr. -v- Sidhu [2000] 1 WLR 1442; Bank Mellat –v- Nikpour FSR 87; Brink's Mat Ltd –v- Elcombe [1988] 1WLR 1350

Group[9] succinctly stated and adopted the principles regarding compliance with that duty. I consider that they are so well known that I need not recite them here. In this regard, however, it must always be kept in mind that where a matter has come on for a hearing on full notice and an order has been made, it is not open to a party on a later application to set aside the order to seek to re-argue or invite a review of the same material with a view to the court being persuaded to come to a different conclusion thereon. That would be tantamount to the court acting as an appellate court in review of its own order.

[10] D1 and D2 do not seek to rely on the first ground set out above. Rather, they say that the court was misled as to the facts in that Bagani failed to disclose:

(a) That Bagani did not deliver the consideration contemplated by the SPA; that there is no evidence that ZCPPC was ever delivered. This reference they say is to the "Former Certificate"

(b) That Bagani does not hold a ZCPPC entitling it to anything, the transaction not having closed. As such they say that Bagani cannot claim any rights or benefits to the assets held for D1 by D2.

(c) That the ZCPPC which would have been issued had the 10th October 2005 transaction closed would not have conferred any rights to the assets held for D1 by D2 on Bagani, but would have conferred rights to assets held and managed by Austsot Anstalt, a subsidiary of BAWAG, a direct beneficiary of Bensor.

(d) That on that said date according to the ANB Report two separate transactions occurred: in one, BAWAG's funds had been used in a round robin flow of funds that channeled in excess of £237m through, inter alios, Bagani and back to BAWAG in return for worthless bonds. In the other, OGB had used Bagani to transfer in excess of £432m derived from a circular loan from BAWAG back to BAWAG.

(e) That D1 had no obligations to Bagani and even if they did D1 would be precluded from providing information and transferring funds to Bagani because Bagani had not established that it, rather than Bensor, was the party to whom the contractual obligations were owed or as having an interest in the JMV Investment.

[9] Civil Appeals Nos. 20/2003/ & 1/ 2004 BVI (unreported)

(f) That Bagani has failed, despite being requested to provide a legal opinion by a reputable law firm confirming that Bagani has a valid interest in the JMV Investment. This was required, they say, given the various frauds and other improper activities in which OGB and BAWAG were involved so as to ensure dealings with and payments to the proper party.

(g) That in 2007, KPMG, BAWAG 's auditor, stated in writing that as at the end of 2006, BAWAG was the beneficial owner of all of several notes including the ZCPPC in issue here. This, they say, is in complete conflict with Bagani's claim to entitlement to the proceeds.

(h) That for more than two years after D3 informed Bagani that US$30m had been placed in escrow, it took no steps to challenge D3's right to act in that manner.

(i) That there are facts to support a reasonable inference that OGB is not the beneficiary of Bagani given the fact that in the list in which BAWAG and OGB were to disclose all subsidiaries and affiliates to the US Department of Justice in respect of the Non Prosecution agreement entered into, neither OGB or BAWAG claim an interest in Bagani. Further, BAWAG did not claim an interest in Bensor; The conclusion being that either (i) they have no interest in Bagani or Bensor or (ii)they failed to disclose that interest in order to hide assets during the US settlement process.

(j) That OGB and BAWAG admitted their criminality in the DOJ Agreement.

(k) That OGB was involved in the Refco Scandal and is under criminal investigation for a pervasive tax fraud and a political corruption scheme involving Austria's ruling party.

(l) The description of the criminal convictions in Austria of the OGB and BAWAG officials involved in the transactions in issue.

(m) That those involved with D3, according to the witnesses in the Austrian trials, were not involved in any of the criminal or improper activities and were not targets in the US criminal investigations resulting in the DOJ agreement involving BAWAG and OGB but rather that Mr. Schoeller sought to create the impression that D3 was actively involved in the criminality.

[11] The issue as to whether or not there was a closing of the 10th October, 2005 Agreement has now become a live issue and is not one which can be or ought to be determined at this stage and is properly to be left to trial. It is a wholly undesirable course to embark upon a mini trial within a trial. The question of the rightful ownership of theJMV Investment is also a live issue. Ds suggests that it belongs to Bensor whereas Dr. Frick who is a director of both Bensor and Bagani suggests it belongs to Bagani by way of assignment from Bensor. It appears also that there is some confusion in respect of transactions and subsidiaries and affiliates of the old BAWAG and the identity of the new BAWAG. These are all matters which are best left for full ventilation at trial. What is at least clear at this stage is that Ds do not claim any beneficial entitlement to the monies forming the JMV Investment and accept that they hold those funds for the benefit of some person. The question is 'who is that person'.

[12] As to the allegations of Bagani's implication in and connection with BAWAG and OGB in the Refco financial scandal and the fraudulent wrongdoings admitted to by old BAWAG and OGB, I am satisfied that the court's attention was drawn to these matters by Bagani in discharging its duty of full and fair disclosure. Such information or facts must be material to the matter under consideration. The fact that persons in the management of these entities were engaged in wrongdoing in respect of which they entered into a non prosecution agreement or received criminal convictions and the fact that Bagani may be said to have entered into transactions which are questionable, to my mind, affords strong reasons for the making of the order rather than the contrary. I am satisfied that the court was not misled in the making of the Order.

[13] D1 and D2 say further, in essence, that Bagani delayed for a period of approximately two years before bringing the application and obviously had the appointment of a receiver in mind for about five months prior, based on correspondence with the proposed receiver. Furthermore, they say that all Ds sought to do was to ensure that the proper party was being paid and given information, particularly in light of the circumstances where Bagani appeared to be implicated in questionable transactions, in keeping with their duty to

comply with anti-money laundering regulations, and to ensure that the funds were free of taint.

Delay

[14] Both sides assert delay. Whilst it may be said that Bagani did not bring its claim until some two years after correspondence between it and Ds commenced, it may equally be said that Ds have also delayed in bringing this application to discharge. The Receiver has been in place since early July, and has already done work in safeguarding some, if not all, the assets. Ds may be said to be actively fending off these proceedings. They have launched a full scale attack in the US with regard to the US$30m escrow which they created out of the JMV Investment even before taking steps to set aside the Order.

[15] Considering the matter in the round, what strikes me as surprising is the stance of D1 and D2 who, admittedly, merely hold the JMV Investment specifically for the purpose of investing it for the benefit of a third party - be it Bensor, OGB, or Bagani. Bensor who must be taken to have knowledge of this, in essence, through its director, disclaims ownership. Bagani is said to hold investments for OGB. D1 and D2 say they are concerned to ensure that they are paying and giving information to the proper party and ensuring that they are not dealing with funds which may be tainted or otherwise acting in breach of money laundering laws. Given this concern, one would have thought that there would be some relief that the matter was placed in the hands of the court. This could not be prejudicial to them save to the extent of affecting payment to them of fees and the like in the administration and investment of the funds. However, if they suspect that the funds may be tainted, then it begs the question as to why, in any event, they would wish to manage and invest tainted funds by seeking a discharge of the Order which would simply free up the funds for continued investments in the market rather than the same being frozen and safeguarded by a court appointed receiver. This is the course which D1 and D2 appear to be inviting the court to sanction, notwithstanding their own admitted unease pertaining to the JMV Investment. This, to my mind, would be quite wrong. Accordingly, even were I of the view that the court had been misled, (which I do not find), I am satisfied

that it is just and convenient that the Order remain in place pending a final determination as to the rightful ownership of the JMV Investment.

[16] The court notes the criticisms made with regard to the form of the Order in terms of the lack of security given by the Receiver and lack of fortification of the undertaking in damages. These criticisms were canvassed during the 21st July hearing. Suffice it to say that the court is fully aware that the case relates to an investment or loan (by whatever name called) in the original sum of US$50m. The receivership and companion freezing orders safeguard and protects the funds for the benefit of whomever the court finds to be the rightful owner at the end of the day. Ds have already set aside $30m thereof in respect of harm they claim to have suffered. Their right to so do is also a live issue. Nothing further arises thereon warranting a re-consideration at this stage. Of course it is still open to Ds to apply for a variation of the Order as per the terms of paragraph 2 of the Order as made on 21st July, 2008, in respect of fees and expenses claimed as being due to them under the relevant contracts.

Conclusion

[17] For the foregoing reasons, the application to discharge or vary the Order is refused. D1 and D2 shall pay the costs occasioned by this application to be assessed unless agreed within 21 days.

[18] Finally, I am grateful to counsel for their assistance in this matter.

Janice M. George-Creque
High Court Judge