BRITISH VIRGIN ISLANDS
EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
COMMERCIAL DIVISION

CLAIM NO: BVIHCV 2009/0253

BETWEEN:

(1) MARTY STEINBERG

(2) LANCER OFFSHORE INC

(3) THE OMNIFUND, LIMITED

Claimants

and

BANQUE DE PATRIMOINES PRIVES GENEVE ET AL

Defendants

Appearances: Mr William Hare and Mr Robert Nader for the twenty second Defendant, Swisstor & Co
Mr Eliott Simpson for the twenty fourth Defendant, Wise Global Fund Limited
Mr Martin Mann QC and Ms Susan V Demers for the Claimants

JUDGMENT

[2011: 12, 19 April]

(Applications by two defendants to set aside (1) permission to serve proceedings out of the jurisdiction and (2) order extending time for service – whether claim satisfying CPR 7.3(3)(b) – whether application for extension of time complied with CPR 8.13(4) – whether claimant has good cause of action - limitation - s 25 Limitation Ordinance considered)

[1] **Bannister J [ag]:** These are applications to set aside permission to serve these proceedings out of the jurisdiction on two out of the forty four defendants to the claims. The claimants are Marty Steinberg ('the Receiver') and two BVI registered companies which carried on the business of mutual funds in the United States ('the Funds'). On 10 July 2003 the United States District Court for the Southern District of Florida on the application of the United States Securities and Exchange Commission appointed the Receiver to the Funds. On 9 July 2009 the claimants issued the claim

form in these proceedings together with a statement of claim, just within the period of six years following the Receiver's appointment.

[2] The claims are simple. The claimants plead that unknown to the Funds, the NAVs calculated by their Investment Manager (one Lauer) had been inflated by him in bad faith and had been deliberately and dishonestly represented by him to be realistic and reasonable when he knew that they were not. As a result, the Funds mistakenly made excessively large redemption payments, such that those redeemers to whom they were paid were overpaid. A similar allegation is made in respect of those defendants which were allegedly paid inflated management fees for the same reason. The pleading then asserts:

> 'In the premises, the Defendants must repay the Funds their respective overpayments.'

There follow allegations that as a result of these matters the defendants had been unjustly enriched and that they held the amount of the overpayments as constructive trustees. No particulars are given of the alleged injustice nor of the basis upon which constructive trusteeship is said to have arisen.

[3] Service of the proceedings was duly effected on certain of the defendants which were BVI registered companies. Some ten months later, on 11 May 2010, the claimants applied for permission to serve the proceedings out of the jurisdiction on the remainder.[1]

[4] The application relied, first, on the contention that the subscription agreements pursuant to which these defendants had acquired their shares in the respective funds contained a non-exclusive jurisdiction clause in favour of the BVI for proceedings with respect to the subscription agreement and all transactions relating to it and provided that subscribers irrevocably consented to service of process in any such suit at the address of the subscriber contained in the Funds' records.

[1] the proceedings had been discontinued as against certain of the defendants

[5] Next, it was said that the claim was brought to enforce, rescind, dissolve or otherwise affect a contract or to obtain a remedy in respect of a breach of contract and that the subscription agreements contained a terms conferring jurisdiction on the Courts of the BVI and were by their terms or by implication governed by BVI law. So, it was said, CPR 7.3(3) was engaged.

[6] Finally, the application relied upon CPR 7.4 as justifying permission to serve the constructive trust claim out of the jurisdiction on the grounds that while the remedy did not fall within CPR 7.3(3), it arose out of the same or substantially the same facts as the claims allegedly based in contract.

[7] I heard the application on 25 May 2010 and made the order sought.

[8] On 10 June 2010, just within the 12 month validity period of the claim form, the claimants applied for a prospective six month extension of the time within which the proceedings could be served. The reason given for the application, which I granted, was that where proceedings were going to have to be served pursuant to the Hague Convention, the period of time between the grant of permission to serve out and the expiry of the claim form's original validity was too short to enable this to be effected. I granted the application.

[9] On 25 January 2011 the 24th defendant ('Wise Global') applied to set aside both my orders, for service to be set aside and for the statement of claim to be struck out. Its essential grounds were that it is a BVI registered company and should have been served here; that no claim was made under the subscription agreement; that CPR 7.3(3) was not engaged; that the claim was statute barred; and that no special reason had been given why time for service of the claim form should be extended.

[10] On 16 March 2011 the 22nd Defendant ('Swisstor') made a similar application, but confined to the contentions that the claim is time barred and that the constructive trust claim was unsupported by any pleaded facts capable of giving rise to a constructive trust. No application was made by Swisstor to set aside the order extending time for service of the claim form.

The nature of the applications

[11] It was common ground that these applications must be treated as re-hearings of the original applications[2]. In other words, it is as if the claimants were applying all over again.

The CPR 7.3(3)(b) point

[12] It is plain that these proceedings do not involve any claim under the subscription agreements. The service provisions referred to in paragraph [4] above therefore have no application. That leaves the CPR. The material parts of CPR 7.3(3) are in the following terms:

> (3) A claim form may be served out of the jurisdiction if –
>
> (a) a claim is made in respect of a breach of contract committed within the jurisdiction;
>
> (b) a claim is made to enforce, rescind, dissolve or otherwise affect a contract or to obtain any other remedy in respect of a breach of contract and (in either case) the contract –
>
> (i) contains a term to the effect that the court shall have jurisdiction to determine any claim in respect of the contract; or
>
> (ii) is by its terms or by implication governed by the law of any Member State or Territory;
>
> (iii) was made by or through an agent trading or residing within the jurisdiction; or
>
> (iv) was made within the jurisdiction.

[13] Mr Martin Mann QC, who appeared together with Ms Susan V Demers for the claimants, referred me to a decision of Lightman J[3] in which he held that there was a good arguable case that the words 'claim made in respect of a contract' where they occur in the equivalent part of the English CPR were wide enough to cover a claim in restitution arising out of an overpayment made under a

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[2] **Collier v Williams** [2006] EWCA 20 at para 83

[3] **Albon v Naza Motor Trading Sdn Bhd and another** [2007] EWHC 9

qualifying contract. So, he submits, the words 'claim made to otherwise affect' a qualifying contract will cover the claimants claim to repayment of the allegedly excessive redemptions in the present case.

[14] The difficulty with this submission is that a claim to affect a contract carries the meaning that if the claim succeeds the contract in question will have been affected, whether in one of the ways expressly mentioned (enforcement, rescission, dissolution) or in some other way (e.g, by rectification or by the implication of some term). If the claimants' restitution claims in the present case succeeded, the subscription agreements, which are the contracts relied upon by the claimants, would remain completely untouched. I do not think that there is any ambiguity about this construction of CPR 7.3(3), but if I thought that there were, I would resolve it in favour of the defendants.[4] It follows, in my judgment, that the only gateway relied upon by the claimants on their application of 25 May 2010 was not, as a matter of law, open to them. This is sufficient to determine this application, but since the other points were fully argued, I shall say a word on each of them.

Limitation

[15] Both applicants submit that the claimant's case is time barred and that accordingly they have no cause of action. They put it in this way, I think, so as to enable themselves to rely upon CPR 7.7(2)(b), which provides that the Court may set aside service of a claim form which has been served out of the jurisdiction on the grounds that the claimant 'does not have a good cause of action.' Mr Mann QC submits, correctly, that (as a matter of general law and except in cases where the statute bars the right as well as the remedy) the fact that a defendant may have a limitation defence does not mean that the claimant does not have a good cause of action. It means only that he will not be able to recover in respect of it if the point is pleaded against him and succeeds.

[16] There are two answers to that submission. The first is that, in my judgment, a broad construction should be given to CPR 7.7(2)(b). The sub-rule is plainly intended to cover cases where

[4] See Dicey, Morris & Collins, The Conflict of Laws, 14th Ed, para 11-148

proceedings are never going to get anywhere – which will be the case if an obvious limitation point is available to a foreign defendant. The second reason is that CPR 7.7 is expressly non- exclusive – see CPR 7.7(3). It does not, in my judgment, and even if narrowly construed, justify a departure from the long established principle, regularly acted upon in this jurisdiction, that a candidate for service out must show that there is a serious issue to be tried – or, as it is sometimes put, must show that he could successfully oppose an application by the intended defendant for summary judgment.[5] He cannot do that if it can be shown that there is an unanswerable limitation point in his way.

[17] Mr Hare for Swisstor and Mr Simpson for Wise Global say that the claims against their clients are plainly statute barred. The last redemption paid to Swisstor was paid in August 2001 and the last payment to Wise Global was made in November 2002. The earliest redemptions were paid out in April and January of 1997 respectively. There is no dispute that the primary limitation period for recovery of money paid by mistake is six years and that if the claimants were to establish a constructive trust at all a similar period would apply to that.[6]

[18] Mr Mann QC, however, submits that the claimants would be entitled to rely upon section 25 of the Limitation Ordinance (Cap 43) ('section 25'), the material parts of which for present purposes are in the following terms:

> 'Where in the case of any action for which a period of limitation is prescribed by this Ordinance . . .
>
> (c) the action is for relief from the consequences of a mistake,
>
> the period of limitation shall not begin to run until the plaintiff has discovered the . . . mistake . . . or could with reasonable diligence have discovered it.'

[19] Mr Hare and Mr Simpson say that unchallengeable facts show that section 25 is unavailable to the claimants. I set out the more significant of them.

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[5] **Seaconsar (Far East) Ltd v Bank Marcazi Jomhouri Islami Iran** [1994] 1 AC 438

[6] **Paragon Finance v Thakerar** [1999] 1 All ER 400

[20] On 21 May 2003 Deloitte & Touche ('Deloittes') presented a report to the BVI Financial Services Commission ('the report', 'the FSC'). At paragraph 3.4 of the report Deloittes refer to negative publicity surfacing in around September 2002 concerning the Funds and related parties, including Lauer. I do not propose to set this material out, but if the report is accurate there is no doubt that by that date there were publicly acknowledged concerns which had led, ultimately, to Deloittes' appointment by the FSC in May 2003.

[21] At paragraph 5 of their report Deloittes gave their view that the current carrying values of some 91% of the Funds' portfolio would require write downs of 'hundreds of millions of dollars.'

[22] On 22 July 2008 the Receiver filed a 193 page second amended complaint in the United States District Court for the Southern District of Florida against various Citco entities (as former administrators of the Funds) and three individual former directors of the Funds for damages for breach of duty. In that complaint the Receiver alleges that going back to at least 1999 'and possibly even earlier' down to the resignations of the Citco directors in 2002, numerous red flags that were known to the Citco defendants and the director defendants would have put a reasonably prudent fund administrator on notice that Lauer was engaged in conduct to the extreme detriment of the Funds. The gains reported by Lauer in what is alleged to have been a declining market should have caused the defendants to scrutinise the sources of the gains and recalculate the NAV.

[23] On the basis of this and other material which I do not propose to refer to specifically, Mr Hare and Mr Simpson say that those administering the Funds and their boards of directors should have been alerted well before the Receiver's appointment in July of 2003 to doubts being raised about the Fund's reported NAV and could have got to the bottom of the matter.

[24] What is said by Mr Mann QC, however, is that the Funds were victims of a fraud perpetrated upon them by Lauer and that until the appointment of the Receiver there was no independent party in a position to take action. This point is made explicit in an affidavit sworn on behalf of the claimants by David Bane ('Mr Bane') on 4 April 2011. Mr Bane is a partner in Hunton & Williams LLP, who act for the Receiver and acted in the second amended complaint which I have referred to earlier in this judgment. Mr Bane deposes to the difficulties facing the Receiver on his appointment. He

says that the Funds' books and papers were incomplete and disorganized and that some third party service providers declined to supply the Receiver with documents. Despite these difficulties, Mr Bane says that the Receiver was able to determine that NAV's had been inflated by Lauer. He mentions, without giving dates, that the Receiver has commenced some proceedings in the United States against allegedly overpaid redeemers, and that some of those defendants have asserted that the BVI, rather than the United States, is the appropriate forum for the litigation of such claims. Mr Bane says that for the Receiver to reach the position where he could establish that viable claims lay against overpaid redeemers 'took quite some time'.

[25] Mr Bane continues by saying that throughout the time during which Swisstor was an investor the (then) Citco directors failed to discharge their duties to the Funds by 'failing to disclose' the stock price manipulation and the inflated portfolio valuations to the 'independent' directors and by failing to alert investors to the Funds true financial position by approving or acquiescing in Lauer's inflated valuations, which had the incidental effect of inflating their own administration fees. Mr Bane says that the Citco directors were on notice of the fraud yet did nothing to halt it and effectively dishonestly assisted Lauer. Mr Bane ends this section of this affidavit by saying that upon information and belief the independent directors had neither knowledge nor notice of Lauer's fraud.

[26] Finally, Mr Bane says that the earliest date upon which the Receiver could have known of the fraud was when he was appointed and that these proceedings were commenced within six years from that date.

[27] This latter point ignores the fact that the claims, if any, are vested in the Funds, since it is the Funds which are alleged to have made mistaken overpayments to redeemers before the Receiver was appointed. The question is whether the Funds could with reasonable diligence have discovered that they had been making overpayments at any date earlier than 10 June 2003. Assuming, as I think it right to do for the purposes of these applications and contrary to the assertions made by Mr Bane, that all the directors of the Funds were honest but were being misled by Lauer, it cannot be the case that they *could* not have discovered his overvaluations before the Receiver was appointed. The question is not whether, given a plausible but fraudulent investment manager, they were likely to have challenged him before any particular point in time. The question

is whether it was within their power, using no more than reasonable diligence, to verify his figures for the purposes of carrying out the NAV calculations. It seems to me that there can be only one answer to that question. The duty to calculate NAV's was placed by the Funds' Articles of Association upon the directors and it cannot lie in their mouths to say that they could not have calculated it correctly at the time without exercising more than reasonable diligence. The Funds can be in no better position.

[28] The evidence which I have sketchily referred to above is not relevant on the issue of mistaken overpayment. It might have been relevant had the Funds been suing in fraud. The confusion in the Funds' submission on this part of the applications is that it attempts to rely upon facts which might have suspended the running of time if they were suing Lauer, for example, in fraud, but which cannot suspend the running of time in relation to the recovery of payments which the Funds were obligated to calculate and which were allegedly miscalculated as a result of misinformation supplied by their own agent. Section 25 is there to give latitude to the innocently mistaken or to those prejudiced by the mistake of a third party, not to the incompetent.

[29] In my judgment, therefore, any claims for recovery of money allegedly overpaid by the Funds to redeemers[7] became statute barred after six years following the making of each payment. I appreciate that the effect of this part of my decision is that section 25 has no part to play in cases where a paying party makes a slip in calculating the amount of a payment. There seems to me to be nothing unjust in that. I do not see why principle requires that the negligent should have more than six years to wake up to their errors.

[30] It follows that the claimants fail to establish that they have good causes of action for the purposes of CPR 7.7(2)(b); alternatively they fail to establish that there is a serious issue to be tried.

Extension of time for service

[31] Mr Simpson, for Wise Global, says that I should not have extended time for service of the proceedings by my order of 16 June 2010. There is a particular irony in his case because Wise

[7] the allegations of constructive trust add nothing to these claims

Global, being a BVI company, could have been served within the jurisdiction. Indeed, part of Mr Simpson's complaint is that he should have been served within six months of the issue of these proceedings, not within an extended period of 18 months.

[32] In any event, he submits that no application for an extension of time within which to serve a claim form may be granted unless the applicant complies with CPR 8.13(4), which requires the Court to be satisfied either (a) that the claimant has taken all reasonable steps to trace the defendant and serve the claim form but has failed to do so (which was not alleged in the present case) or (b) that there is some other special reason for extending the period.

[33] The reason given on the application was that when the original order giving permission to serve out was made, only a few days of the 12 month period for service of the claim form remained outstanding. Since, however, it was anticipated that there would be a need to take advantage of the Hague Convention to effect service, that left insufficient time and it was on that basis that the extension was granted. Mr Simpson says that quite apart from the fact that Wise Global could have been served in the BVI, it could just as easily have been served personally in Hong Kong without the need to resort to the Hague Convention, since Hong Kong is for this purpose a common law jurisdiction within which the authorities would have taken no objection to personal service of BVI proceedings.

[34] Either way, Mr Simpson says that the reason given for extension of time for service could not amount to a special reason as that term is used in CPR 8.13(4)(b). He says that the term 'special reason' connotes some exceptional circumstance and that so far from there having been exceptional circumstances the need for an extension arose (to the extent that it arose at all) from the fact that the Receiver frittered away eleven months of the available year before applying for permission to serve out. He says that cannot amount to a special reason. I agree with him. It follows that on that ground also service upon Wise Global should be set aside.

[35] Swisstor made no application to set aside the extension of time order pursuant to which the proceedings were served upon it in Canada, but having listened to Mr Simpson's submissions Mr Hare sought to adopt them on behalf of his client. Ms Demers objected on behalf of the claimants

to his being permitted to do that in the absence of a specific application, but Mr Hare submitted that since this application was by way of rehearing, not review, the point must be open to him. I accept Mr Hare's submission and it follows that the order extending time for service must be set aside in favour of his client also.

Conclusion

[36] For the reasons given above, service of these proceedings on Swisstor and Wise Global is set aside. I will not strike out the statement of claim, since in the absence of service there are no effective proceedings within which such an order may be made. I will hear the parties on the question of costs.

Commercial Court Judge

19 April 2011