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

CLAIM NO: BVIHC (COM) 2011/0087

BETWEEN:

(1) SPHEREINVEST GLOBAL HIGH YIELD FUND LIMITED
(2) SPHEREINVEST HIGH YIELD (CYPRUS) LTD

Claimant/Applicants

and

(1) EXIMTECH INVESTMENTS LTD.
(2) EUROINVEST ALLIANCE LTD.
(3) ZOLOTOI FINANCE LIMITED
(4) TARGET COINS CORPORATION
(5) MARKETING PREMIUM INC.

Defendant/Respondents

Appearances: Mr Ben Mays for the Applicant Claimants
Mrs Sandie Corbett for the Respondent Defendants

JUDGMENT

[2012: 23 January; 8 February]

(Summary judgment/strike out – whether defences credible – whether pleaded defences should be struck out)

[1] **Bannister J [ag]:** This is a portmanteau application by the Claimants for summary judgment against the five Defendant companies under CPR 15.2 on the grounds that they have no real prospect of defending the claim or in the alternative that their defences be struck out under CPR 26.3(1) as failing to disclose and reasonable grounds for defending the claim or as not complying with the provisions of CPR Part 10.5.

Background

[2] The first Claimant is incorporated in Bermuda and was, until December 2010, called Millennium Global High Yield Fund Limited. The second Claimant is a Cypriot registered company previously known as Millennium High Yield (Cyprus Ltd). They are investment funds open to what are described as 'sophisticated' (which I take to mean not risk averse) investors and specialise, it seems, in debt securities.

[3] The Defendants are BVI registered companies. The Claimants' evidence is that those companies are beneficially owned by them (as having been incorporated at the Claimants' expense) but the statement of claim contains no allegation of beneficial ownership. Instead, it alleges that certain assets said to be held by the Defendants and listed in a Schedule to the statement of claim are the Claimants' property (although, contrary to what is said in the body of the pleading, the Schedule does not say which assets are said to belong to the first and which to the second Claimant). It is alleged that these assets are held by the Defendant companies as nominees for or as agents of the Claimants or on trust for the Claimants. The Scheduled assets comprise certain real property situate in the Russian Federation, shares of (apparently) Russian corporations, promissory notes and cash.

The pleadings

[4] There is no specific particularisation of the allegation of nomineeship/trusteeship and none has been sought by the Defendants. Instead, the Claimants say that in 2008 they delegated the management of certain of their Russian assets (including but not limited to those listed in the Schedule to which I have referred), defined as 'the Claimants' Assets', to a Russian company called ZAO UK Prof ('UK Prof'), under the control of someone called Dmitry Chirakadze ('Mr Chirakadze'), and to a Cyprus company called UK Prof Limited, also controlled by Mr Chirakadze and which is said to be the owner of UK Prof. The pleading then lists Mr Chirakadze and certain other Russian individuals as being responsible for the relationship between the Claimants and UK Prof. They are described compendiously as 'the Russian fiduciaries' and certain of them were (although none is any longer) directors of certain of the Defendants. The most important of these persons for present purposes is Alexander Batsyn ('Mr Batsyn'). The pleading goes on to allege that UK Prof's authority to manage the Claimants' Assets derived from two powers of attorney, each of which has now either expired or been determined, together with a services agreement, also now determined, for the provision of legal, consultancy and other services. It is then pleaded

that the Claimants' Assets are under the custody, control and management of UK Prof and the Russian fiduciaries pursuant to the powers of attorney, the Claimants remaining the 'ultimate beneficial owner (sic)' of the Claimants' Assets.

[5] The statement of claim goes on to plead the incorporation of the Defendants (as I have mentioned) and says that their purpose was to hold the Claimants' Assets and that the Claimants non cash Assets were transferred to the Defendants in 2008, 2009, with the Claimants' cash assets being transferred during 2009, 2010, pursuant to the powers of attorney and the services agreement.

[6] The pleading goes on to say that in January 2010 UK Prof provided the Claimants with a list supposedly showing how, as between the Defendants, certain of the Claimants' assets were held. That list is in evidence and does not include a large number of promissory notes which are listed in the Schedule to the statement of claim. It is also alleged that on 1 December 2008 the first Claimant issued indemnities in favour of Mr Mikhaylov and Mr Batsyn. The statement of claim goes on to allege the breakdown of the relationship in mid to late 2010 and that the Claimants have demanded the return of their property, but that 'UK Prof and the Russian fiduciaries' have refused to do so or account for the Claimants Assets. It is not pleaded that any demands have been made upon the Defendant companies for the return of the assets.

[7] The allegation that the Defendants are nominees or trustees for the Claimants of the Scheduled assets can, therefore, only be supported by inference from the facts pleaded. Title to and property in the scheduled items of real property will, in accordance with BVI law, fall to be determined by reference to the law of the Russian Federation. The statement of claim is silent as to whether the Claimants were originally the registered holders of the real property or, if they were, how the transfers were effected and into the name of which party. If the Defendants are now registered as the holders of the real property[1], they may turn out to be nominees or trustees for the Claimants if Russian law admits of such a relationship on whatever turn out to be the facts relating to the alleged transfers. It is not pleaded whether the Claimants are the registered holders in respect of the shares or whether they are the original promisees (or assignees of the original promisees) in respect of the promissory notes. Presumably beneficial ownership of these items of movable property falls to be determined by the law of the Russian Federation, but neither side pleads any such thing and it has to be assumed that Russian law in this respect is the same as the law of the British Virgin Islands. If these securities (and the cash) belonged to the Claimants before being

[1] the pleading is silent as to the manner in which the alleged transfers were effected

transferred to the respective Defendants, one imagines that unless there was an intention to make a gift, then under BVI law property in them remained in the Claimants, since the transfers are not alleged by the Defendants to have been for consideration. If that is the case, then the Defendants will be nominees for the Claimants of the movable property.

[8] Finally, it is alleged that the Defendants have knowingly and dishonestly assisted UK Prof and the Russian fiduciaries in their breach of trust or have converted the Claimants Assets for their own use.

[9] The defences of each of the Defendants are for all material purposes identical. Each was amended in January of this year. As amended, they deny that the defendants hold assets as nominees, agents or trustees. They positively aver that the assets which they do hold (for particulars of which they rely upon an affidavit of Mr Chirakadze sworn in the present proceedings) are held for the ultimate benefit of Mr Chirakadze as part of a partnership or joint venture agreement entered into between Mr Chirakadze and the first Claimant (by a Mr Joseph Strubel) in 2008. They deny that they were incorporated to hold the Claimants' Assets and assert that they were incorporated to hold the property of the alleged partnership/joint venture. They deny that any of the assets which they hold were transferred to them by the Claimants. They say that they received them from various third parties through a series of complex arrangements. They deny that they are bound to account for or return any assets or that they have acted in breach of fiduciary duty. The allegations of dishonest assistance and conversion are similarly denied. The only matters relied upon in support of these denials are 'the matters aforesaid' – in other words, that they do not hold assets of the Claimants but assets held for the ultimate benefit of Mr Chirakadze as part of the partnership and that no assets were transferred to them by the Claimants, such assets as they hold having been received from third parties.

[10] Every other allegation in the statement of claim is simply not admitted. The frivolous justification for this is that their directors have recently been changed (the new directors are all, it appears, resident in the Seychelles) and that they therefore have no actual knowledge through their directors of the matters alleged in the statement of claim and are dependent upon the documents in their possession or third party information.

[11] Unsurprisingly, no reply has been served by the Claimants. Neither party has requested any further information.

The strike out application

[12] As I have said, this is put in two ways. The first (CPR 26.3(1)(b)) is that the defences disclose no reasonable ground for defending the claim. I do not think that this will do. The allegations are that the Defendants were incorporated to receive property for the benefit of the supposed partnership between the first Claimant and Mr Chirakadze and they received property from third parties which they hold for the ultimate benefit of Mr Chirakadze for the benefit of that partnership. In those circumstances, they are not holding property of the Claimants as nominees for the Claimants, they neither owe nor have broken any fiduciary duties owed to the Claimants, have not knowingly assisted any breach of trust on the part of UK Prof or the Russian fiduciaries and have not converted any property of the Claimants. The language in which this is put is clumsy and extremely unhelpful, but the pleas, if true (and for present purposes I have to assume that they are) seem to me to disclose reasonable grounds for defending the claim.

[13] The second way in which the Claimants put the matter (CPR 26.3(1)(d)) is that the defences do not comply with CPR Part 10.5. That provides as follows:

> 'Defendant's duty to set out case
>
> 10.5 (1) The defence must set out all the facts on which the defendant relies to dispute the claim.
>
> (2) Such statement must be as short as practicable.
>
> (3) In the defence the defendant must say which (if any) allegations in the claim form or statement of claim –
>
> (a) are admitted;
>
> (b) are denied;
>
> (c) are neither admitted nor denied, because the defendant does not know whether they are true; and
>
> (d) the defendant wishes the claimant to prove.
>
> (4) If the defendant denies any of the allegations in the claim form or statement of claim –
>
> (a) The defendant must state the reasons for doing so; and
>
> (b) If the defendant intends to prove a different version of events from that given by the claimant, the defendant's own version must be set out in the defence.
>
> (5) If, in relation to any allegation in the claim form or statement of claim the defendant does not –
>
> (a) Admit it; or

(b) Deny it and put forward a different version of events;

The defendant must state the reasons for resisting the allegation.

(6) The defendant must identify in or annex to the defence any document which is considered to be necessary to the defence.

(7) A defendant who defends in a representative capacity must say –

(a) What that capacity is; and

(b) Whom the defendant represents.

(8) The defendant must verify the facts set out in the defence by a certificate of truth in accordance with rule 3.12.'

[14] In my judgment, the defences cannot be said to have flouted CPR 10.5. The defences may be highly uninformative documents, but it seems to me that they comply with the letter, although certainly not the spirit, of CPR 10.5. I do not think that it would be right in those circumstances to strike out the defences because they could have been better pleaded, or more informative.

[15] The strike out application accordingly fails.

Summary Judgment

[16] Mr Mays, for the Claimants, says that the Defendants defence is unreal, or fanciful, within the meaning of the authorities referred to by Hariprashad-Charles J in **Loretta Frett v A-G of the Virgin Islands and anor**[2] and as such should not be permitted to stand in the way of immediate summary judgment. There was no dispute about the principles to be applied in exercising the summary judgment jurisdiction. The dispute was whether they cover the present case.

[17] Mr Mays says that they do. He took me to correspondence carried on between the Claimants and, in the main, Mr Bastyn, between about February 2009 and September 2010 and exhibited to an affidavit sworn on behalf of the Claimants on 17 June 2011 by Mr Fox, who appears to have had some sort of service agreement with them and who was the individual on the Claimants' side corresponding with Mr Batsyn. That correspondence is not always easy to follow, since the right hand margin of each page has been truncated, but, doing the best I can, it is possible to see statements from Mr Batsyn which contain regular references to, for example, assets being held 'for the benefit of the Fund'; or assets being held 'by SPV [usually meaning the second Defendant, Euroinvest Alliance Limited] for the benefit of the Fund'; or to real estate in Nizhny Novgorod being

[2] [2010] 1 JBVIC 2601

held by 'SPV . . . for the benefit of [the Claimants]'; and to 'structure of [the Claimants'] assets' being sent to the Claimants by UK Prof, with schedules of assets not unlike that appended to the statement of claim; and to a particular asset being held as to 41% by Mr Batsyn on trust for the Claimants and as to the balance by the second Defendant on similar terms.

[18] On 17 January 2010 Mr Fox asked Mr Batsyn whether the Claimants had any trust agreement with 'Bering', 'Yaushkin', Mr Batsyn himself and the third Defendant, Zolotoi Finance Limited. The answer was 'Of course we hold all the asset[s] . . . for the benefit of the Claimants'. The fact that this inquiry was made at all seems to me to be indicative of, at the least, a lack of precision about the arrangements between the Claimants and UK Prof in relation to title to the assets in which the Claimants were interested and the manner in which they were held.

[19] Finally, Mr Mays relies upon evidence of Russian law which has not been challenged by the Defendants and which is to the effect that under Russian law an oral partnership agreement would be invalid.

[20] Mr Mays says that all of this material, coupled with the imprecision of the Defendants' pleading, shows that the defence cannot be treated as more than fanciful. He relies upon dicta in **Standard Chartered Bank v Yaacoub**[3], in which the English Court of Appeal upheld a decision of the Deputy High Court judge giving judgment for the plaintiff bank on a guarantee. The defendants in that case up had set up an oral agreement under which, it was claimed, the bank had released the defendants' company from liability under the guarantee. The defence was dismissed as inconsistent with contemporary documents and as being incredible. That case, of course, was decided before either of **Swain v Hillman**[4], which, on the corresponding provision in the English CPR, pointed up the distinction between deciding that one side or another had no prospect of success and conducting a mini trial and **Three Rivers DC v Bank of England**[5], which elucidated it, but it remains the case that summary judgment may be given where 'it is clear beyond question that the statement of facts is contradicted by all the documents or other material upon which it was based.[6]' Nevertheless, summary judgment should not be given if the inquiry involves a mini trial without the benefit of discovery and oral evidence.[7] The analysis of Lord Hobhouse at page 282 of the report is of great assistance. He makes clear that the criterion for exercising the power to give

[3] unreported; 3 August 1990
[4] [2001] 1 All ER 91
[5] [2003] 2 AC 1
[6] per Lord Hope at page 261 A-B
[7] ibid

summary judgment is not probability, but the absence of reality, a conclusion to be reached by assessing the whole case, not by making findings of fact and proceeding on the basis of such findings.

[21] It is striking that when the first Claimant brought proceedings in Bermuda, it brought them not against the Defendant SPV's for the recovery of assets held by them as nominees for the Claimants, but against UK Prof and the Russian fiduciaries for breach of duty. The Defendants in the present (BVI) proceedings were mentioned in the Bermuda proceedings as the grantors to the Claimants of 'an unknown number' of promissory notes. It was further alleged that the first Claimant was the legal and beneficial owner of a collection of assets, broadly conforming to the mix of assets in issue in the BVI proceedings and specifically including promissory notes in favour of the first Claimant but also comprising assets, including promissory notes purchased from one Grinchishin, who had previously dealt with the Claimants is respect of their Russian interests, using assets beneficially owned by the first Claimant. The Bermuda statement of claim pleads that 'the [first Claimant's] assets having been vested in the [Defendants to these (BVI) proceedings],[8] [the BVI Defendants] issued promissory notes in favour of [the first Claimant] in the sum of US$76 million'. It then complains that UK Prof and the Russian fiduciaries have failed to identify the first Claimants assets, account for them, or deliver them up to the first Claimant. The first Claimant claimed repayment of all management fees paid to UK Prof, delivery up of all financial instruments in which the first Claimant was interested or damages in lieu, damages for breach of contract and breach of fiduciary duty and damages for conspiracy. It will be seen that although there was an allegation that the BVI Defendant companies held assets beneficially belonging to the first Claimant, those companies were not made party to the Bermuda proceedings. This pleading is not necessarily inconsistent with the Claimants' pleading in the present case, and the background to the Bermuda allegations is obviously the same. Nevertheless, the way in which the case is cast in Bermuda is significantly different from the way in which the present case is cast here in the BVI. In particular, it is not obvious why it should have been thought necessary for the Defendants to give promissory notes in favour of the first Claimant if they were mere nominees holding the first Claimant's assets in trust, although it might equally be said that that would have been a strange thing for the Defendants to have done if their assets were the property of a partnership with Mr Chirakadze.

[8] in what capacity is not stated

[22] It was in the Bermuda proceedings, in an affidavit sworn by Mr Chirakadze on 18 February 2011, that the partnership allegation first seems to have seen the light of day. Mr Mays says that that is very late and contrasts it with the complete absence of any reference to it in the correspondence which I have mentioned in paragraph [17] of this judgment.

[23] I have been extremely troubled about this part of the application. At the end of the day it seems to me that I have to be guided by the principles set out in the speeches of Lord Hope and Lord Hobhouse in **Three Rivers**. On the basis of what is said there, I think that if I were to decide this part of this application by finding that Mr Batsyn's assurances from time to time *could not* sit side by side with the allegation of underlying partnership (for which Mr Chirakadze gives reasons which are not inherently absurd), I would in effect be deciding the case on the basis of a finding of fact. I bear in mind that English is not Mr Batsyn's first language and that the answers he gave to Mr Fox's questions, which appear unequivocal, were not given in the context of a dispute as to ownership between the Claimants and Mr Chirakadze. There are, in my judgment, too many loose ends both on the Claimants' pleading and on the evidence and too many uncertainties about the legal effect of the dispositions that appear to have taken place to make it safe for me to brush aside everything that Mr Chirakadze says and give summary judgment for the Claimants. That would be deciding the case on the facts and in the absence of discovery and cross examination, which is something I may not do, rather than making an assessment that it is not worth sending the defence to trial, which is something which, in a proper case, I may do, but which, in this particular case, I have come to the conclusion I should not.

[24] I take some comfort from the fact that in an affidavit sworn in opposition to an earlier application by the Defendants for these proceedings to be stayed on *forum* grounds, Mr Strubel, a senior adviser to the Claimants' investment manager, says this:

> It is clear from Chirakadze's affidavit[9] that the crux of this dispute is whether the Claimants' assets are (as the Claimants say) held by the Defendants pursuant to and as a result of the arrangements documented by the Bermuda power of attorney, the Cyprus power of attorney and the Service Agreement, or whether (as Chirakadze claims) those documents are essentially window dressing and the real status of ownership of the relevant assets is determined by a separate oral agreement entered into between Chirakadze or his firm and the Claimants, pursuant to which the Fund and Chirakadze and/or UK Prof operated some kind of partnership. Chirakadze asserts that he negotiated this oral agreement with me. I deny that there is any such agreement.

[9] of 15 September 2011

I agree with Mr Strubel that that is the principal (although not the only) issue which is going to have to be resolved before the Court will be in a position to decide whether all the assets held by the Defendants belong absolutely to the Claimants or are held subject to some other arrangement. In my judgment, that issue can be resolved only after discovery and cross examination, as was envisaged by Mr Strubel in the affidavit from which I have quoted. The application for summary judgment must therefore be dismissed.

Directions

[25] I am required by the Rules on dismissing an application for summary judgment to treat the hearing as a case management conference. Although I have refused to strike the defences out, it seems to me that the state in which they presently stand risks prejudicing a fair trial of these proceedings. I therefore propose, subject to any submissions that may be made on the handing down of this judgment, to give the following directions:

(1) that each Defendant reamends its defence so as

(a) to particularise the allegation that it holds its assets for the ultimate benefit of Dmitry Chirakadze as part of a partnership/joint venture agreement entered into between Mr Chirakadze and Joseph Strubel on behalf of the first Claimant (paragraph 2) by setting out (i) where and when such agreement was entered into and whether it was oral or in writing and (ii) the full terms, express and/or implied, of such agreement

(b) to particularise the property alleged to have comprised the assets of the partnership (paragraph 4) by setting out (i) the nature of such property, (ii) the full terms of any agreement relied upon providing for such property to be an asset of the partnership and (iii) the nature of any dispositions or transactions relied upon by reason of which the property is alleged to be held by the relevant Defendant otherwise than as nominee or trustee for the Claimants or either of them

(c) to identify, in relation to each asset held by the relevant Defendant, the third party from whom it is alleged to have been received and to particularise in the case of each several item of property the dates, parties to, nature and full terms of each several one of the complex arrangements referred to (paragraph 8)

(2) that each Defendant file and serve such reamended defence by 4 pm on Thursday 8 March 2012.

(3) that the costs of such reamendment shall be borne by the relevant Defendant in any event

(4) that unless reamended defences fully complying with these directions are served by 4 pm on 8 March 2012, the Claimants have permission to apply to strike out the relevant defence or defences and for judgment to be entered in their favour

(5) that the Claimants have permission, if so advised, to reply to each reamended defence by 4 pm on Thursday 5 April 2012

(6) that all parties give disclosure by list by 4 pm on Thursday 3 May 2012

(7) that statements of all witnesses of fact be exchanged by 4 pm on Thursday 14 June 2012

(8) that there be a further case management conference to be fixed on the first available date 21 June 2012 for 30 minutes.

[26] Subject to any submissions which Counsel may wish to make at the handing down of this judgment, I propose to order that the costs of these applications should be costs in the case, to be assessed if not agreed.

Commercial Court Judge

8 February 2012