IN THE GRAND COUR TOF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

FSD 12 OF 2012 (ASCJ)

IN THE MATTER OF A DECLARATION OF TRUST DATED 17 JANUARY 2000 AND MADE BY CIBC BANK AND TRUST COMPANY (CAYMAN) LIMITED (ESTABLISHING A TRUST KNOWN AS PANMAR TRUST)

BETWEEN	(1)	MARIKA CHRISTOS LEMOS	
	(2)	PANDELIS CHRISTOS LEMOS	
	(3)	VIRTUS TRUST LIMITED	PLAINTIFFS
AND		CIBC BANK AND TRUST COMPANY (CAYMAN) LIMITED	DEFENDANT

IN CHAMBERS
BEFORE THE HON. ANTHONY SMELLIE, CHIEF JUSTICE
THE 19TH DAY OF FEBRUARY 2015

ATTENDANCES: Mr. Francis Tregear QC and Mr. Harry Hickman (by video link) instructed by Ms. Linda DaCosta and Mr. Paul Smith of Conyers Dill & Pearman for the Plaintiff

Mr. Blaney QC (by video link) instructed by Mr. Hector Robinson; with him Miss Lucy Diggle and Mr. Charles Moore of Mourant for the Defendant

Application for leave to amend pleadings – the applicable test

RULING

1. The question is whether I should grant leave to the Plaintiffs to re-amend their pleadings to include an alternative claim.

2. "Alternative" in the sense that it would arise for a decision of the Court only if the primary claim fails.

3. A brief summary of the history of the matter will set the necessary context.

4. The Plaintiffs are beneficiaries of the PanMar Trust of which the Defendant was trustee.

5. Important assets of the PanMar Trust were two ships named "Oinoussian Leader" and "Oinoussian Seaman".

6. Both ships were sold by the Defendant and the proceeds of sale eventually reinvested as trust assets.

7. No complaint is made about the sale of Oinoussian Leader but the Plaintiffs claim that Oinoussian Seaman ("Seaman") was sold in willful and/or grossly negligent breach of trust by the Defendant having regard, among other things, to the state of the market when it was sold and its comparable value had it been retained as an income earning asset.

8. Damages resulting from the sale of Seaman in 2007, are pleaded by way of prima facie loss, at USD35 million. With interest and costs since then, I am told by Mr. Blaney that the claim would now amount to some USD65 million.

9. The proposed amendment would introduce an alternative claim for loss said to have arisen, not from the sale of Seaman in breach of trust, but from the willful or grossly negligent failure on the part of the Defendant to have re-invested the proceeds in a timely manner. That failure is said to have given rise to a loss of something in the order of USD712,000 – USD800,000.

Defendant's objections

10. These are, essentially, that

(1) the alternative claim is patently bad and doomed to fail;

(2) the alternative claim as presented for the amendment is vague and unparticularized; the proposed amendment would necessarily result in the postponement of the trial now set for only three months away in May 2015 and that the postponement would be detrimental to the Defendant in a number of ways, including the unavailability of its specialist counsel for any trial to be rescheduled for any time within several months of the adjourned trial;

(3) the alternative claim is really a new and separate claim; one that could readily be brought as a separate claim and disposed of as such without jeopardy to the trial date now set for the existing claim in May 2015 and without undue inconvenience to the Plaintiffs.

11. I have given careful consideration to the very detailed arguments on both sides, including, most important to my mind at this stage, those advanced by Mr. Blaney QC as to why the addition of the proposed alternative claim at this stage would be detrimental to the Defendant in ways not to be compensated for by an order for costs of the amendment.

12. I recognise that it has been held in recent cases that where a proposed amendment would likely result in the postponement of a trial and in consequential undue hardship to the other side which could not be compensated by the usual order for costs, the party seeking leave to amend has a "heavy onus" to discharge.

13. This is the test propounded in *Swain-Mason and others v Miller and Reeve LLP* [2011] EWCA Civ. 14 (Practice Note) and in *Worldwide Corp Ltd. v GOPT Ltd.* [1998] All E.R. (D) 667; in both of which cases the claimants had applied at or after the start of the trial for leave to re-amend their pleaded claims. In both cases, the English Court of Appeal, refusing leave and turning away from the more liberal approach of the past, emphasized that where "very late" or "last minute" amendments were sought which would cause the trial to be delayed and would cause inconvenience to the parties or to other litigants in other cases; the onus would be a heavy one on the amending party to show the strength of the new amended case and why justice both to him, his opponent and other litigants, required him to be able to pursue it.

14. In *Bodden v Thomson* 2011 (2) CILR 320, Williams J. of this Court was called upon to say whether that approach now adopted in England and Wales to the determination of applications for leave to amend (or as in the case before him – for leave to adduce late expert evidence after the commencement of the trial), should be followed in this jurisdiction. He declined to follow the new approach as the refusal of the adjournment would deny the applicant in the case before him, the opportunity to adduce important evidence and result in injustice.

15. In the arguments before Williams J., a juxtaposition between what was described as the "pre-CPR" and "post-CPR" English approach was sought to be struck, as the former approach has been recognised and followed in the Cayman Islands since the Court of Appeal's decision in *Swiss Bank and Trust Corp Ltd. v Iorgulescu* 1994-95 CILR 149. In *Iorgulescu*, the Court of Appeal (per Georges JA) approved of the

following dictum from Brett MR delivered more than a century ago in *Clarapede & Co. v Commercial Union Assu.* (1884) 32 W.R. 202 (and later approved by Lord Griffiths speaking on behalf of the House of Lords in *Ketteman v Hansel Properties Ltd.* [1988] All E.R. 38):

> *"[H]owever negligent or careless may have been the first omission and however late the proposed amendment, the amendment should be allowed if it can be made without prejudice to the other side. There is no injustice if the other side can be compensated by costs."*

16. In my view, this dictum still represents good practice, despite the change in emphasis in the more recent case law. I describe the change as one of emphasis because the more recent case law emphasizes the need for pro-active judicial case management to ensure the timely dispensation of justice, while not purporting to detract from the importance of doing justice in each particular case. And so, where the more recent case law cited above speaks of "a heavy onus" resting upon an applicant seeking leave to amend (here pursuant to Grand Court Rules Order 20 rule 5[1], the primary question must still be – however late in the day the application may be – whether or not injustice or prejudice will result from leave to amend being granted. As Lord Griffiths declared in *Kitteman* (above) (at p.82):

> *"Whether an amendment should be granted is a matter for the discretion of the trial judge and he should be guided in the exercise of the discretion by the assessment of where justice lies."*

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[1] Adopting the equivalent rule form the Pre-CPR Rules of the Supreme Court of England and Wales, Order 20 r 5(1) reads: *"Subject to [(rules dealing with misjoinder of parties or limitation of actions)], the Court may at any stage of the proceedings allow the plaintiff to amend his writ or any party to amend his pleading, on such terms as to costs or otherwise or may be just and in such manner (if any) as it may direct."*

17. If the answer to that question is that prejudice will ultimately result from allowing the amendment, then leave should not be granted. If not, and the resultant costs can be made good by an order for costs of the amendment in favour of the other side, then the amendment would ordinarily be allowed for much the same reasons as the Court of Appeal in *Iorgulescu* explained.

18. The further concern recognised by the more recent cases – that is: whether resultant delay will have a knock-on detrimental impact upon other cases and court users – does not, in my view, extend the principles any further.

19. I say this because even while a judge should always be mindful of the consequences of delay upon the timely and effective disposal of cases, it is hardly likely that an otherwise just and proper amendment will be disallowed out of such general concerns, not directly related to the case at bar. And where the amendment would be unjust, doomed to fail or otherwise improper; it will be disallowed, in any event. Thus, while at first glance the approach in the recent English cases may seem rather less liberal than that approved in *Iorgulescu*; on closer examination the practical difference will likely be inconsequential. The "heavy onus" is not imposed simply to discountenance applications for leave to amend, it is imposed to discountenance late applications which are likely to result in delay and so likely to prejudice the fair and timely disposal of the case in which it is made and perhaps other cases as well. There is nothing inconsistent between that approach and the principles laid down in the earlier case law as adopted in this jurisdiction in the *Iorgulescu* case, especially when regard is had to the qualifying words of the *Iorgulescu* dictum: *"if it can be made without prejudice to the other side"*.

The present case

20. Turning to the present case with the foregoing principles in mind, I am satisfied that the amendment should be allowed. My reasons are straightforward. The trial is still some three months away and so the application is not made at the "eleventh hour" as Mr. Blaney suggests; even if, in relative terms, it is a late amendment when viewed against the history of this case as one now before the Court for six years. The alternative claim sought to be pleaded arises very much from the same factual matrix as the existing claim. The marginally new factual matrix – that which arose during the time when the proceeds of sale were held on fixed deposit rather than invested as the Plaintiffs allege they should have been – involves a fairly narrow compass of time and circumstances already quite well known to the parties.

21. While, as Mr. Blaney properly submits, the proposed amendment could be better particularized to explain to the Defendant the precise nature of the claim it has to meet, that shortcoming can be remedied by directions. For instance, it is already recognised by Mr. Tregear QC that the different allegations of "gross negligence" and "willful default", being very different in nature, may not be pleaded as they now are (in paragraph 68A of the proposed amended Statement of Claim) on a rolled up basis. Moreover, I also accept that as this will be a claim for loss of notional investment income on the proceeds of sale of some USD7.4 million; the potential source of that lost income should be particularized. And there must be no "double counting" for instance, by overlooking in the pleadings the overall value of distributions or other payments that were in fact paid out from the account and which would have inevitably reduced the capital sum and so its potential for growth as an investment.

22. The very fact that Mr. Blaney now argues that the amendment should not be allowed because it is "doomed to fail" (a premise which, for present purposes, I only need to note I do not accept on the *prima facie* basis) is itself indicative of the Defendant already having a firm grasp of the nature of the alternative claim.

23. It is already adumbrated by Mr. Blaney that the Defence to the alternative claim will be a straightforward one; viz: that it is trite law that where beneficiaries consent to or acquiesce in what is alleged to be a breach of trust, those beneficiaries may not complain. In this regard, there is already evidence of an extensive body of communications between the Defendant and the primary beneficiaries (who have been *sui juris* at all relevant times) revealing discussions over how the proceeds of sale should have been invested. The Defendant will rely on that evidence as proof of consent to the way in which it was dealing with the sale proceeds.

24. So, the issues for trial arising from the pleading of the alternative claim are already identified and will be fairly narrowed:

    (a) Was there a breach of trust for which the Defendant is liable for not having invested the proceeds of sale?

    (b) Did the Plaintiffs consent to or acquiesce in that breach so as to exonerate the Defendant?

    (c) Was "the ball in the Plaintiffs' Court", as Mr. Gilloby of the Defendants Management, had expressed his feelings about the matter in one of the communications?

25. Given its fairly narrow compass, I do not see why adding the alternative claim should result in an inevitable adjournment of the trial now set for May.

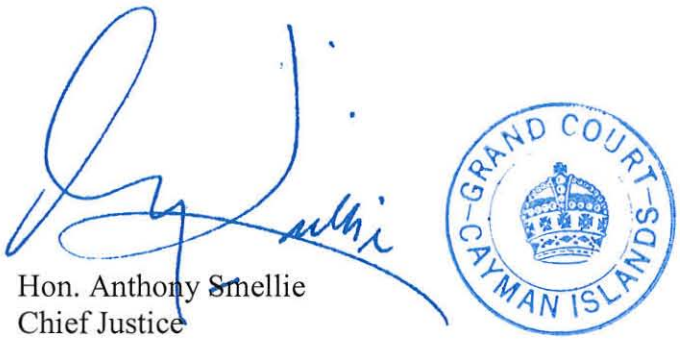
26. Mr. Blaney says there will be need for further expert evidence and this will inevitably result in an adjournment of the trial. But I am compelled to agree with Mr. Tregear on this. I do not see the need for further expert evidence beyond that already available from the experts whose reports are to be relied upon on that issue – Mr. Charles Mackinnon and Mr. Richard Sayers. Both have filed reports commenting upon the merits or demerits of the proposed alternative investments of the proceeds of sale.

27. But if I am wrong about that (assuming that both sides would not rely respectively on the hypotheses put forward by their current experts) the further expert evidence could relate only to the subject of what other investments should have been made by the Defendant. Any such further expert opinion evidence should be readily available.

28. Moreover, as this new claim is to be regarded as a true alternative to the existing claim arising as it does out of the sale of the Seaman complained of in the existing claim, it can clearly be conveniently tried at the same time so as to avoid a multiplicity of proceedings. That, as the case law recognises, is a very important reason for the existence of the power to allow amendments. See again *Iorgulescu* (above) and subsequent cases decided by this Court: *Grupo Torras v Bank of Butterfield et al* 2001 CILR 9; *Cayman Islands Civil Aviation Authority v Island Air Limited* 2003 CILR 483 and most recent (per Quin J. in *Weavering Macro Fixed Income Fund Ltd. v Ernst & Young Chartered Accountants (A Firm) and others*, FSD 160 of 2012) (unreported – February 2015).

29. Finally, I am satisfied that any resultant costs of the amendments to the Defendant can be compensated by an order for costs.

30. The amendment is allowed accordingly.



Hon. Anthony Smellie
Chief Justice

February 20, 2015