28/1/08

IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO. 288 of 2005

BETWEEN	**1. AKRAM OJJEH**	
	2. NAHED TLASS OJJEH	**PLAINTIFFS**
AND	**1. MANSOUR OJJEH**	
	2. ABDULAZIZ OJJEH	
	3. JEAN DE ROQUEFEUIL	
	4. KARIM OJJEH	**DEFENDANTS**

IN CHAMBERS
BEFORE THE HON. ANTHONY SMELLIE, C.J.
THE 29TH 30TH OCTOBER 2007 AND 28TH JANUARY 2008

APPEARANCES: Mr. Francis Tregear QC and Mr. Michael King, for the 1st Plaintiff and Mr. Emile George QC for the 2nd Plaintiff; instructed by Mr. Craig Powles and Ms. Wanda O'Connor of Solomon Harris

Mr. Christopher Nugee QC instructed by Ms. Ziva Robertson of Maples and Calder for the 1st to 3rd Defendants ("the Trustees")

Mr. David Lowe QC instructed by Mr. Murali Ram of Mourant du Feu & Jeune for the 4th Defendant.

RULING

1. In this action the Plaintiffs sue the 1st. 2nd and 3rd Defendants in their capacities as trustees of the Ojjeh Trust, for breach of trust and related causes of actions. The 4th Defendant, a beneficiary of the Ojjeh Trust, was by his own application joined as a defendant on 20 July 2006. He also represents the heirs of Akram Ojjeh

Snr., the settlor of the Trust; as well as the continuing beneficiaries who are not already parties to the proceedings.

2. I now have before me an application by the Plaintiffs for directions that certain aspects of the Plaintiffs' pleaded case be tried as preliminary issues. For an understanding of these issues, some of the background to the action is necessary.

3. The Ojjeh Trust ("the Trust") has been beset by litigation since 1992 when its validity was first challenged by the 2nd Plaintiff Mdm. Ojjeh. Those challenges were raised in proceedings instituted in Europe on her own behalf and on behalf of the 1st Plaintiff her son Akram Jr., who was then a minor. In those European proceedings she sought to establish, among other things, that the trust assets belonged to the estate of her husband Akram Ojjeh Snr., rather than to the Trust.

4. In response the Trustees instituted proceedings in this Court in which they sought, among other things, declaratory relief against the challenge which had been raised. This included a declaration that the Plaintiffs had forfeited their beneficial interests in the Trust by having challenged its validity.

5. In 1999 a compromise was reached with a view to settlement of the issues raised in the European proceedings and in the proceedings in this jurisdiction.

6. As the 1st Plaintiff was then still a minor, that compromise involved first getting the approval of its terms by his *guardian ad litem* and by this Court as being for his benefit and for that of the class of contingent beneficiaries whom he also represented. That approval was given by order of this court on 30th June 1999 ("the 1999 Settlement").

7. The effect of the 1999 Settlement was, in broad terms, the transfer of property representing the value of the shares of the Plaintiffs out of the Trust into a new

Guernsey trust set up for their benefit and that of their descendents. That transfer did take place and it effected their withdrawal from the Trust.

8. The terms of the 1999 Settlement, and in particular the value to be ascribed to the Trust fund overall and thus to the property transferred to the Guernsey trust; had been the subject of hard and extensive negotiations. Competing valuations from two well known firms of valuers – Deloitte and Touche and Mazars & Guerard – were obtained. It is the Defendants' case (not conceded by the Plaintiffs) that the 1999 Settlement involved the eventual acceptance, for the purposes of the transfer, of the higher of the two valuations, that is; that propounded by the firm of Mazars & Guerard ("M&G") on behalf of Madam Ojjeh and Akram Jr.. A significant discount to the value ascribed to their share of the Trust fund was, however, also accepted. This was of course, on the basis that the M&G valuation was fair and accurate (including in the sense of being fully informed) and further (among other things), that the payment out would require virtually all the liquidity of the Trust fund to be achieved.

9. In the present proceedings, the crux of the Plaintiffs' allegations is that important information going to the true value of the Trust fund was withheld from M & G.

10. It has indeed come to light, that the Trustees had not disclosed, for the purposes of the valuation exercise, that they had been in negotiations with a well-known automobile company for the acquisition of one-half of the Trust's shareholding in one of the two major trust enterprises (hereinafter referred to as the "the DaimlerChrysler negotiations"), negotiations which subsequently resulted in the completion of that acquisition.

11. The DaimlerChrysler negotiations are now claimed by the Plaintiffs to have been highly relevant to the valuation exercise because they had involved, and subsequently resulted in, a significantly higher price being offered and eventually paid for the shares of the enterprise, than that asserted by the Trustees during the negotiations, or even that ascribed by M&G in their evaluation which became the basis of the 1999 Settlement.

12. In the present action, it is the Plaintiffs' pleaded case that that failure on the part of the Trustee to disclose was deliberate and fraudulent. That it was intended to deprive the Plaintiffs of the true value of their interests in the Trust when they were to be bought out for the purposes of the 1999 Settlement. It is further averred in respect of the non-disclosure, that the Plaintiffs were deceived into believing that the Trust assets were worth far less than they were actually worth and that they suffered loss and damage arising from the reduced value attributed under the 1999 Settlement to their shares in the Trust.

13. Further and alternatively, that the Trustees – specifically Mansour Ojjeh and Abdulaziz Ojjeh – with intent to defraud the Plaintiffs as above, wrongfully and unlawfully conspired and combined together.

14. There are identifiable some nine different but interrelated and consequential forms of relief claimed by the Plaintiffs which may be summarised as follows:

    (i) a declaration that they are entitled to rescind the 1999 Settlement;

    (ii) alternatively, that the Court should set aside the 1999 Settlement;

    (iii) an inquiry as to the additional sums which would have been paid to them but for the Trustees' failure to make proper disclosure and an order that

these additional sums be raised by the Trustees from the Trust and paid to them;

(iv) further or alternatively, that the 1999 Settlement be rescinded and set aside, that the Trustees be removed as trustees of the Trust and replaced by suitable trustees either –

(a) for the sole purpose of ensuring payment to the Plaintiffs of the sums to which they are entitled; or

(b) with a view to the liquidation of all the Trust Assets and the distribution of the resulting cash in the proper shares to the persons entitled thereto;

(v) further or alternatively; declarations to the effect that the conduct of the Trustees constituted breaches of trust and that they be ordered to pay personally the additional sums owed to the Plaintiffs which would have been paid but for their breaches of trust;

(vi) damages for fraudulent misrepresentation and/or deceit by the Trustees in inducing the 1st Plaintiff to enter into the 1999 Settlement on behalf of her then minor son;

(vii) damages for conspiracy;

(viii) an order for equitable compensation.

15. Thus the Plaintiffs have pleaded numerous causes of action against the Trustees including non-disclosure, fraud, conspiracy and breach of trust. They seek wide-ranging relief including rescission, equitable compensation, damages and the removal and replacement of the Trustees.

16. Of relevance, also to the present application, are the nature of the Trustees' defence and the counter-claim of the 4th Defendant.

17. Importantly for present purposes, the Trustees raise the point of law in defence to the claim for equitable compensation, that such a claim is available only as a substitute for the remedy of rescission to which a Plaintiff would be entitled but for the impossibility of restoring all parties to the position they were in before the Settlement and is not available to a Plaintiff who has affirmed the contract, or is estopped from claiming rescission or who has lost the right to rescind through laches or acquiescence – on all of which defences the Trustees seek to rely.

18. Further, the Trustees aver that even if the Plaintiffs could succeed in establishing a breach of trust and a claim for equitable compensation, the Trustees' liability is not to be assessed in the manner averred by the Plaintiffs; that is: as being the difference between what the Plaintiffs received under the 1999 Settlement and what they would have received had proper disclosure of the Daimler-Chrysler negotiations been made. Rather, the Trustees aver, the comparison would be between the position of the Plaintiffs as beneficiaries under the Ojjeh Trust (the position to which they would revert under a rescission) and their position under the 1999 Settlement.

19. As the Plaintiffs would be deemed to have forfeited their interests under the Trust by virtue of their challenge to its validity prior to the 1999 Settlement – the specially pleaded claim asserted by the 4th Defendant in his counter-claim (and earlier raised by the Trustees in their 1992 action) – the Plaintiffs would inevitably be unable to show that they are worse off under the 1999 Settlement than they would have been had they remained as beneficiaries of the Trust with

the Trustees remaining in place. Their claim for equitable compensation (or further or alternative claim for damages) would therefore come to nil.

20. It is against that background that the Plaintiffs' summons seeks directions that certain of the issues involved in their case as pleaded be tried as preliminary or separate issues before any of the other issues arising in this action. They rely on Grand Court Rules (GCR) Order 33 Rules 3 and 4, which clearly vest the jurisdiction. This is a jurisdiction to be exercised by way of discretion as expressed in these terms:

> "*3. The Court may order any question or issue arising in a cause or matter, whether of fact or law or partly of fact and partly of law, and whether raised by the pleadings or otherwise, to be tried before, at or after the trial of the cause or matter, and may give directions as to the manner in which the question or issue shall be stated.*"

And further, in Order 4(2), somewhat repetitiously:

> *"In any (writ action) different questions or issues may be ordered to be tried by different modes of trial or one or more questions or issues may be ordered to be tried before the others."*

21. The preliminary issues, if directed as sought by the Plaintiffs, would bring forward for trial the pivotal question whether the Trustees had indeed acted in breach of trust in the manner of their failure to disclose and, if so, whether they should be liable to pay equitable compensation to the Plaintiffs or liable to

continue to hold such of the assets of the Trust as would equal that compensation, upon trust for the Plaintiffs.

22. Put more precisely, the questions to be resolved would be:

(i) whether the Trustees were under a duty to disclose the DaimlerChrysler negotiations and related matters to (i) the valuers; (ii) the Court; (iii) the 1st Plaintiffs' Guardian *ad Litem;* and (iv) the 2nd Plaintiff.

(ii) If they did act in breach of that duty in that manner, whether the Trustees are liable to pay equitable compensation and/or to hold such assets of the Trust as ought to have been paid over, on constructive trust for the Plaintiffs.

23. If these issues are resolved by way of preliminary trial in favour of the Plaintiffs, the entire action would be resolved; save, of course for the 4th Defendant's counter-claim.

24. The analysis which I must now undertake will be strictly only for the purpose of deciding whether the directions for the trial of preliminary issues should be given. For present purposes, I will not need to delve into how the issues are framed or into the merits. I must instead be concerned with whether or not it will be appropriate to give those directions for the most effective dispensation, not just of the specific issues, but for the case as a whole. Indeed, as the overriding objectives of the GCR require (as expressed in its Preamble), the Rules are to be applied to enable the action to be dealt with in a manner which is just, expeditious and economical.

25. Experience before the Courts has shown that the segmenting of cases into preliminary points too often prove only to be "treacherous shortcuts" – as Lord Scarman described that practice in ***Tilling v Whiteman*** *[1980] A.C. 2 at p. 25*.

26. Where a case is woven into a complete factual and legal matrix, a misguided attempt to unravel an apparent loose strand could leave the whole case in tatters.

27. Before directing the trial of a preliminary issue, the Court needs therefore to be assured that the issue to be singled out is one which is indeed amenable to the proposed discrete treatment. To be worthy of the time and costs, the issue must also be one which when tried, will have resolved at least an important aspect of the overall complexities of the case. Unless that outcome can be reasonably assured, there is no justification for the risk of a preliminary issue being tried, then going all the way to appeal and back but resulting only in all the issues still left to be tried.

28. Lord Wilberforce cautioned against such an outcome also in ***Tilling v Whiteman*** in these terms (at p. 17h).

> ***"I with others of your Lordships, have often protested against the practice of allowing preliminary points to be taken, since this course frequently adds to the difficulties of courts of appeal and tends to increase the costs and time of legal proceedings. If this practice cannot be confined to cases where the facts are complicated and the legal issue short and easily decided, cases outside this guiding principle should at least be exceptional."***

29. By seeking to confine the practice "to cases where the facts are complicated and the legal issue short and easily decided", Lord Wilberforce must be understood to have meant that the case will be made less complicated by the resolution of a discrete but significant legal issue.

30. A somewhat more detailed statement of the principles guiding the exercise of judicial discretion on directing the trial of preliminary issues has been proffered by this Court. In ***Re T Trust 2002 CILR Note 1*** and in ***Wahr Hansen v Compass Trust 2004-05 CILR Note 32*** it was stated (taking the two sets of dicta together as a whole) that the Court should have regard to the following matters:

(i) whether the determination of the issues will dispose of the case or at least an important aspect of it so as to narrow the triable issues;

(ii) whether the costs and time involved in preparation for the trial or for the trial itself will be significantly reduced;

(iii) where the issue is one of construction, to what extent it can be determined or agreed readily on certainable facts; or if some other type of issue is involved requiring the consideration of evidence, the requirement that the evidence must be brief and uncontroversial;

(iv) the degree of risk that the trial of the preliminary issue (and/or the appeal against the decision given on its trial) will increase costs or delay the trial overall; and

(v) whether, taking into account all other relevant considerations; e.g. the stage which preparations for the trial overall have reached and the parties' relative resources – it would be just to order the preliminary issue to be tried.

31. Whilst each case must depend upon its own circumstances, the burden of showing that the issue is one suitable of preliminary trial will be upon the applicant. And it is just as well to note the basic principle that separate trials of separate issues – being a departure from the beneficial object of the law that all disputes should be tried together – have always required that special grounds are made out: see Notes to R.S.C. Order 33/4/10 SCP 1999 referring to ***Piercy v Young (1880) 15 Ch. D. 415 at 479.***

32. With all the foregoing principles in mind, I cannot see my way clear to the direction of the proposed preliminary issues for trial in this matter.

33. With the background to the action and the pleadings already described, my reasons can be briefly stated. Indeed they are as were already so fully and carefully argued by counsel for the Defendants.

34. The issue whether the Trustees were under a duty of disclosure to disclose the DaimlerChrysler negotiations and, if so, whether they acted in breach of that duty, will not be amenable to being tried only as a strictly legal issue.

35. The Trustees' position is that the question cannot be answered in the abstract. That it can only be satisfactorily answered by having regard to (i) the very specific context in which the DaimlerChrysler negotiations were still at the time of the 1999 Settlement taking place including the strict requirement of confidentiality; (ii) the very valuations upon which the DaimlerChrysler negotiations proceeded which, the Trustees assert, will show that in real terms the acquisition by DaimlerChrysler did not yield for the Trust Fund any value significantly higher than that ascribed to the overall value by the M & G valuation; (iii) the long history of the previous attempts to compromise and the

background of the hostile litigation between the parties including the summonses pending in this Court at the time seeking, among other things, a declaration that the Plaintiffs had forfeited their interests under the Trust; (iv) the factors which influenced the agreement between the parties to the valuation process undertaken by D & T and M & G and (v) the course of the compromise negotiations themselves leading up to the 1999 Settlement.

36. While it may be argued now and may in the end be proven that those factors are but clear indicia going to proof of the existence of the duty of disclosure, rather than as the Trustees would argue, to the contrary; I must accept that those factual issues identified are also those which will set the overall context for the trial of all the issues in this action. As it is clear that it would not be possible to deal with them without detailed evidence, it is equally clear to my mind that they are not given to being dealt with by way of preliminary trial.

37. This first point alone as it relates to the first issue of breach of duty, is well illustrated by the Trustees' assertion that the DaimlerChrysler negotiations did not, in any event, have a material impact on the value of the Plaintiffs' shares in the Trust Fund. This assertion is pleaded in detail in their defence and thus will have to be resolved in a full trial process. It is a not a defence which is amenable to being resolved by trial of the preliminary issues as propounded as it will involve detailed valuation evidence and likely also factual evidence about the course of the DaimlerChrysler negotiations.

38. When one turns to consider the second issue – that of equitable compensation, the inappositeness of a preliminary trial becomes even more apparent.

39. The question whether equitable compensation is available as an alternative remedy to that of rescission (as the Plaintiffs aver) is itself a complex one. While the Plaintiffs' position is said to be supported by authority – (see ***Tito v Waddell No. 2 [1977] Ch 106 (at 259G)*** citing ***Nocton v Lord Ashburton [1914] A.C. 932)*** – the principle can hardly be regarded as clearly settled. It is therefore at least arguable. It is thus fraught with the risk of a decision one way or the other on preliminary trial being reversed on appeal. There are, moreover, the various defences – estoppel, laches, acquiescence – to this claim for equitable compensation which would have to be tried also before there could be a truly dispositive outcome. Yet they are, by their very nature, defences which are dependent upon matters of fact which would have to be investigated. And matters of fact which, as part of the overall factual matrix of the case, would have to be investigated in any event (except outright success for the Plaintiffs), upon any subsequent trial of the remaining claims based upon conspiracy to defraud, fraudulent misrepresentation and deceit.

40. When, as a final consideration here, it is also borne in mind that the Plaintiffs would intend to pursue those claims even if they fail on the preliminary issues for breach of trust and equitable compensation; the risks of having to try many of these complex issues more than once are stark and clear. It is therefore clear to my mind that the criteria for the direction of a trial of preliminary issues are not met in this case.

41. The Plaintiffs' application is therefore dismissed.

DIRECTIONS FOR FULL TRIAL

42. The Plaintiffs' seek directions including directions for discovery of certain material relating to the DaimlerChrysler negotiations and acquisitions which they say have not yet been provided.

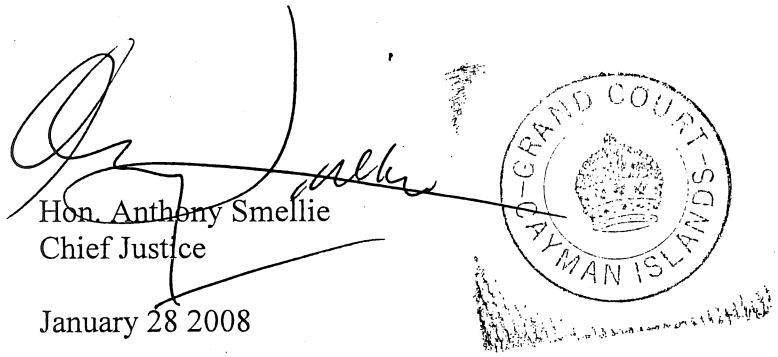
43. These are directions which can now be considered in the context of the preparation for the full trial. They will be considered on a date to be set.

STAY

44. The Plaintiffs also seek a stay of the 4th Defendant's counter-claim for a declaration as to forfeiture of the 2nd Plaintiffs' interest under the Trust. That too is an issue which can now be considered, the applications for the preliminary trial having been resolved.

COSTS

45. Consistent with the established principle that costs follow the event, the Plaintiffs must pay the Defendants' costs of this application, to be taxed if not agreed.



Hon. Anthony Smellie
Chief Justice

January 28 2008