20/1/06

IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN

CAUSE NO. 542/2005
Civil.

BETWEEN:

INVESTIDORES INSTITUCIONAIS FUNDO DE INVESTIMENTO EM ACOES (A CORPORATION ORGANISED UNDER THE LAWS OF BRASIL)

Plaintiff

AND: OPPORTUNITY FUND (A CORPORATION ORGANISED UNDER THE LAWS OF THE CAYMAN ISLANDS)

Defendant

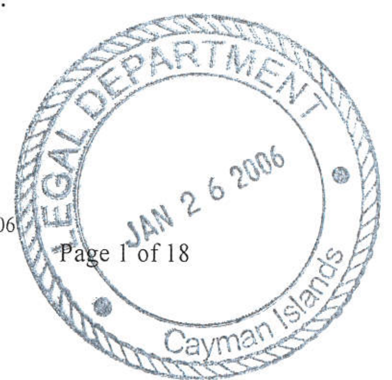
Appearances: Michael Black Q.C. and Seamus Andrew instructed by David McGrath of L.A. Samson & Co. all for the Plaintiff
Roger Ellis Q.C. and Robert Lamb instructed by James Chapman of Ogier & Boxalls all for the Defendant

Before: Hon. Justice Levers

Heard: January 10, 11, 12 & 13, 2006

JUDGMENT

The issue before this court is whether the Mareva Injunction granted by this court on 24th November, 2005 should be extended. All parties are *ad idem* that the obligation rests upon the party seeking to continue the injunction to satisfy its continuation.



1 On 24th November, 2004, the Plaintiff, a corporation organised under the laws of Brazil
2 filed a Writ of Summons and on the 24th November, 2005 obtained a Mareva Injunction.
3 Also on 24th November, 2005, a Statement of Claim was filed seeking the following
4 relief:

5 (1) all proper accounts and inquiries to determine the full extent of the
6 commercial benefit received by the Defendant at the direct or
7 indirect expense of the Plaintiff;
8 (2) an account of all sums received by the Defendant representing income
9 or proceeds of the said commercial benefit or any part thereof;
10 (3) an inquiry what assets in the hands of the Defendant represents such
11 commercial benefit;
12 (4) an order for payment by the Defendant to the Plaintiff of all sums found
13 to be due to the Plaintiff from the Defendant on the taking of the said
14 accounts and inquiries;
15 (5) interest by way of equitable relief at a commercial rate on all sums
16 found due to the Plaintiff;
17 (6) the appointment of a receiver of the Defendant's assets with power
18 to manage continue the Defendant's business;
19 (7) further or other relief.
20
21
22
23

The Plaintiff's Allegation

The Plaintiff alleges that these proceedings are brought to protect the pensions of over three hundred thousand working men and women, ordinary employees of banks and utilities companies owned or formally owned by the Government of Brazil. The applicant is a Brazilian investment fund containing approximately half a billion dollars invested by the employees' pension funds of three banks directly owned by the Brazilian Government and various other entities.

The applicant was formed to invest the pensioners' money in the Brazilian privatization programme Side-by-Side with Citibank in what was called the portfolio companies. Citibank invested through a Cayman-based fund. The applicant was known as the Onshore Fund and the Citibank Fund known as the Offshore Fund. The Onshore and Offshore Funds participated in a number of consortia with strategic or operational partners who were to manage the business of the portfolio companies. The applicant is a Closed End Fund. Its initial term of duration was eight years from the date of the first subscription which was September 1997. The term of the fund was due to come to an end in September 2005, at which point the applicant would have come under a duty to its investors, principally the pension funds to realize the investment and distribute the proceeds.

The pension funds removed the Defendant's sister company Opportunity Equity Partners Administrado de Particpoes Limited which was acting as investment manager for the

1 applicant as investment manager in October 2003. There has been ongoing litigation
2 since that time.
3
4 Citibank too has now litigated against Opportunity Equity Partners Ltd. the former
5 manager of the Offshore Fund.
6
7 In its several allegations in these proceedings, five instances of wrong doing have been
8 highlighted by the Plaintiff. The Plaintiff alleges that in breach of fiduciary duty the
9 management company took out monies (ill gotten gains) and that those monies have
10 found their way into the Opportunity Fund which is the Cayman Islands based company.
11 The specific transactions identified by the Plaintiff
12 are: -
13 (1) the Highlake transaction;
14 (2) the Alcatel transaction;
15 (3) the Brasil Telecom Tag-along Agreements;
16 (4) the Umbrella Agreement and
17 (5) Zain or alteration of structure of Solpart Consortium.
18
19 Out of the above transactions, there are several causes of action that are alleged. In the
20 main they are:
21 (a) breach of constructive trust;
22 (b) knowing receipt and
23 (c) dishonest assistance.

The Plaintiff alleges that the Defendant is a constructive trustee and that it has benefited from monies which have been derived from breaches of fiduciary duty on two separate bases. On the basis (a) that it is a member of the Opportunity Group and under common control it must have knowledge of the means by which these benefits accrued to it, alternatively if it is an innocent third party by reason of the applicant's ongoing beneficial interest in the economic benefit taken from the Onshore Fund and other portfolio companies. It alleges also (b) that it knowingly received these dishonest funds and in the alternative (c) that it assisted in the Defendant's sister company's breaches of fiduciary duty.

The Defendant is a mutual fund regulated by the Cayman Islands Monetary Authority (CIMA). Its sole director Opportunity Asset Management Inc. is also the owner of all the management and voting shares in the Defendant. Opportunity Asset Management is also investment advisor to the Defendant. The Defendant was launched in 1992 and is one of the oldest Offshore Funds in the Cayman Islands. It is organized with multiple sub-funds and is an open-ended and successful fund that receives funds from various investors and allocates those funds according to respective investment objectives and risk tolerance of those investors.

In response to the allegations of breach of fiduciary duty, the Defendant states by way of affidavit that there was a Side-by-Side agreement in which they were entitled to invest in the same entities as the Onshore and Offshore Fund. The Plaintiff now accepts this saying

1 that the contractual provision should be read to contain the proviso that they could not
2 compete against the Funds. The short answer the Defendant says is that they were co-
3 investors and were entitled to Side-by-Side participation. A Side-by-Side Agreement has
4 been seen by the Court which is the subject of litigation presently. The Defendant says it
5 is misleading to pretend it is a simple case of an investment manager conferring benefits
6 on itself which has no involvement as an investor.
7
8 The Defendant also makes the submission that the Onshore Fund's investment ceiling
9 was fixed and approved by the Brazilian Regulator and required the consent of the
10 Regulator if this ceiling was to be increased. The Onshore Fund was to have a life of
11 eight years as I stated previously, which was divided into two. The investment period for
12 the first four years and a divestment period for the second four years. The Defendant
13 states that the Onshore Fund's investment reached its investment ceiling before the end of
14 the investment period.
15
16 It denies a fiduciary relationship based on the fact that Banco Opportunity was in fact the
17 administrator of the Onshore Fund and Opportunity Brasil its investment manager.
18 Opportunity Cayman was the manager of the Offshore Fund pursuant to the partnership
19 agreement with Citibank. It reminds the court that the Opportunity companies are not
20 under the same control and Banco Opportunity is not under the same control as
21 Opportunity Fund.
22

1 Before I deal with the five specific allegations Mr. Roger Ellis Q.C. for the Defendant
2 strenuously objects to the continuation of the Mareva on the basis that at the *ex parte*
3 hearing proper and full disclosure was not made. It is I think fundamental to any Mareva
4 Injunction made *ex parte* that full and frank disclosure is made. As with other applicants
5 for an *ex parte* injunction an applicant for a Mareva Injunction must in its affidavit make
6 full and frank disclosure of material facts. It may be that it must also disclose any
7 defence it has reason to anticipate may be advanced. The duty of disclosure is not
8 breached by a mistaken submission of law.
9
10 In my view it makes no difference whether the non-disclosure is deliberate or innocent.
11 Of course if a first injunction is discharged because of material non-disclosure the court
12 has a discretion whether to grant a second Mareva Injunction when the whole of the facts
13 including that of the original non-disclosure are before it, (providing the original non-
14 disclosure was innocent) and if an injunction could properly have been granted even if
15 the facts had not been disclosed. Mr. Roger Ellis Q.C. as I stated previously complains
16 bitterly that the Side-by-Side Agreement which is fundamental to the defence was not
17 disclosed to this court and that there was also exaggerated generalisations placed before
18 the court. Mr. Michael Black Q.C. responds that the Side-by-Side Agreement was
19 irrelevant. With respect, I disagree. I believe it was fundamental to the issue at hand and
20 the court should have been told of that agreement and the proposed defence.
21
22 However, for purposes of this application this court will view the question of the grant of
23 a Mareva Injunction *de novo* now that it has all the facts before it. The first stage of the

1 test for a grant of the Mareva is whether the Plaintiff has a good arguable case. Sitting as
2 a deputy judge of the Queen's Bench Division in *A.L.G. Inc. v. Uganda Airlines*
3 *Corporation 1992* (the Times July 31st) Southwell Q.C. offered some observations on
4 procedure when applying for a Mareva Injunction with particular reference to
5 applications for worldwide injunctions. He said "in applications for worldwide Mareva
6 Injunctions where those would inevitably cause problems for a legitimate business
7 carried on by a Defendant worldwide, the Plaintiff could be required to set out in a
8 Skeleton Argument delivered to the court with other papers the precise grounds on which
9 the case was set:

10 (a) to meet the requirements for the issue of a Mareva Injunction and
11 (b) to give rise to a specified exceptional circumstance justifying
12 the grant of a world wide Mareva Injunction.
13
14 With that in mind it is now important to look at the arguments in detail put forward by the
15 Plaintiff. The following factors emerge from the Plaintiff's allegation as a general
16 proposition against the Defendant:

17 (1) that the Plaintiff argues it has a strong case involving substantial impropriety
18 on the part of the Defendant;
19 (2) that little is known about the Defendant's management or its assets;
20 (3) that the Defendant has shown a propensity to use offshore or corporate
21 structures to launder dubious payments and hide them from view;
22 (4) that the Defendant is no respecter of court orders;

1 (5) that there is evidence that the Defendant has been involved in the suppression
2 of evidence of its wrong doings.
3
4 General allegations are made against the Defendant and it is perhaps best that they are
5 dealt with at this stage before I go into the details of the specifics that the Plaintiff alleges
6 as Breach of Trust. The Plaintiff relies on the fact that it has a strong case which has
7 been substantiated after hotly-contested proceedings in the New York Federal Court. The
8 New York Federal Court dealt with an Interlocutory Injunction preventing a merger
9 agreement. Evidence was given in that court and the learned judge came to the
10 conclusion that the Interlocutory Injunction should be granted.
11
12 I make this point to say that an Interlocutory Injunction stopping a merger is a very
13 different proposition to a world-wide freezing injunction. The learned judge came to
14 certain conclusions about breach of fiduciary duty in those proceedings. I will be mindful
15 of his findings when I come to make my decision, but must note that the criteria for a
16 grant of a Mareva is different.
17
18 The next allegation is that little is known about the Defendant's management and its
19 assets. That transpires not to be completely accurate. The Defendant is a CIMA
20 regulated company. It has as its auditors Peat Marwick and Company and it is known
21 that it is part of the Opportunity Group of Companies.
22

1 The Plaintiff also makes an allegation that the Defendant by objecting to disclosing its
2 assets in a previous application was wishing to hide its assets from the court. I find this is
3 a quantum leap which should not be made on this evidence. There is also the allegation
4 that the Defendant has been shown to use elaborate multi-jurisdictional corporate
5 structures to launder dubious payments and hide them from view. There is absolutely no
6 evidence at all of laundering dubious payments and hiding them from the view of this
7 court. I shall therefore make no further comment on that allegation.
8
9 The next allegation is that the Defendant is no respecter of court orders. It is true to say
10 the Defendant was found guilty of contempt on a previous occasion. However, I believe
11 it was a technical contempt which this Court is not going to hold as evidence of bad
12 conduct on the part of the Defendant for purposes of this application.
13
14 The last of these allegations is that there is evidence the Defendant is involved in the
15 suppression of evidence of its wrong doing. This allegation I believe is purported to be
16 supported by the fact that there is a statement on file to say that the Defendant's
17 representative removed boxes from a business place and took them to a house for a week
18 after which the boxes were returned. They cannot be found. Nobody knows where the
19 boxes are or what the boxes contained and it is wholly inappropriate to have that
20 evidence put before the court to say that the Defendant was now involved in the
21 suppression of its wrong doings.
22
23 I've dealt with these generalities to show that the Plaintiff's case has been from the

1 *ex parte* stage one in which allegations have been made which when carefully scrutinized
2 have little substance. The Plaintiff may well have a good arguable case on the specific
3 allegations made; but it is important to note that inflammatory language which tends to
4 give the court a prejudiced view of the case does not always enhance the position of a
5 Plaintiff.
6
7 Turning now to examine the details of the five instances of wrong doing to enable the
8 Court to decide whether the Plaintiff has a good arguable case.
9
10 (1) <u>The first one is Highlake</u>. The allegations in this are that Opportunity purchased
11 shares for itself instead of the two Funds. It purchased them via the Defendant through
12 Highlake International Business Company Limited which is a Barbadian Company. It is
13 alleged that Opportunity negotiated for the purchase of these shares with T.I.W. for its
14 forty-nine percent in Telepart and ultimately agreed in March 2003 upon a purchase price
15 of US $65 million dollars. This it is said represented a tremendously advantageous price
16 as T.I.W. had paid U.S. $390 million dollars for its forty-nine percent stake in Telepart in
17 1998. Of the sixty-five million, twenty-two million was borrowed by Highlake from
18 Citibank and the balance was money borrowed through a purported investment fund in
19 the Dutch Antilles called Telecom Capital Fund BV. The investment manager of the
20 fund was a Bahamian entity called Link Ventures.
21

1 The Plaintiff alleges it was an obvious sham transaction although the money was repaid.
2 They allege that the Fund did not function as a genuine investment fund notwithstanding
3 that it had standard private placement memoranda.
4
5 The Plaintiff says that the money was laundered through this fund. The Defendant's
6 answer to this is that the investment was made in March 2003 which was during the
7 divestment period and that they owed no fiduciary duty during the divestment period.
8 They also submit that there is no evidence that the transaction was hidden, or that the
9 money was laundered. In short, the Plaintiff says that this was a secret and clandestine
10 purchase based on information obtained by reason of being manager of the Onshore and
11 Offshore Fund.
12
13 (2) The Alcatel transaction. According to the Plaintiff the Onshore Fund suspects that
14 Opportunity is receiving its interest and economic interests in Brasil Telecom as a *quid*
15 *pro quo* for Alcatel's supply contract but "it is not known exactly what kind and how
16 much economic benefit has accrued to Opportunity Fund." The allegation is that it is
17 extremely "odd" that a company such as Alcatel should be investing in a mutual fund like
18 the Defendant and the Plaintiff suggests there is no other explanation offered by
19 Opportunity in the New York proceedings for this investment and the subsequent service
20 contracts given to Alcatel. This is a suspicion that the Plaintiff itself puts no higher than
21 that it is "odd". The Defendant submits that the suspicion is evidence of nothing and that
22 there is no basis for it on the evidence.
23

1 <u>The Brasil Telecom Tag-along Agreements</u>. The Plaintiff alleges that this is the largest
2 single investment made on behalf of the Plaintiff by Opportunity and it was to do with the
3 purchase of a controlling interest in Brasil Telecom. This investment was made through
4 the Consortium in conjunction with the Offshore Fund and Telecom Italia. In late 2000
5 and early 2001 Opportunity, it is alleged, purchased in the open market for its own
6 account over 9 billion voting shares in BTP (the holding company of Brasil Telecom).
7 The Plaintiff states that on or about the 1st December, 2000 Opportunity then sought to
8 consolidate its interest in the majority of those shares by granting to itself Tag-along
9 rights as offered as against the Offshore Fund. This meant that if the Offshore Fund were
10 to sell five percent or more of its interest in Opportunity Zain (the company ultimately
11 controlling its interests in the Solpart Consortium), the purchaser would be compelled to
12 buy at the same price per share the relevant Opportunity shareholding in BTP. The
13 alleged purpose and effect of the Brasil Telecom Tag-along Agreement was to enrich the
14 Defendant at the expense of both the Offshore and the Onshore Funds, each of whom
15 stood to loose a portion of the control premium otherwise due to them upon a disposal of
16 Solpart's controlling interest in Brasil Telecom.
17
18 Opportunity responds that the reason for these purchases was to protect all investors by
19 preventing a predator from seizing control and they say that in any event the Onshore
20 Fund had at this stage fully invested all funds up to its ceiling and had no further funds
21 itself with which to buy these BTP shares.
22

1 The Plaintiff on the other hand states that even if the Onshore Fund did not have funds it
2 ought to have been told and its approval sought.
3
4 The alteration of structures of consortia to give Opportunity Fund leverage. The Plaintiff
5 allege that over a period of time the ownership structures of the portfolio companies
6 changed to the detriment of the Plaintiff. Opportunity Fund it alleges has built up a
7 9.75% stake in Opportunity Zain the holding company of the Solpart Consortium which
8 controls Brasil Telecom.
9
10 It alleges that Opportunity appears not to care whether it is the Onshore Fund or the
11 Offshore Fund which is cut out of the control premium as long as Opportunity captures a
12 share of that premium. The effect of the strategy is to cause loss to one or the other of the
13 Offshore or Onshore Funds by cutting it out of the control premium. The Plaintiff alleges
14 a breach of fiduciary duty as what is important is the Defendant's duties with regard to
15 their disposal of the shares. It touches on the Side-by-Side Agreement and states that
16 nowhere in the Constitution of the Onshore Fund is Opportunity permitted to take a
17 competing proprietary stake. The short response by the Defendant is that the Opportunity
18 Fund as an investor is entitled in its own right to make this investment and that there is
19 nothing clandestine about Opportunity Fund's actions.
20
21 The Umbrella Agreement. It is alleged that unknown to the investors in the Onshore
22 Fund in 2002 Opportunity purported to cause a shareholders' agreement to be executed
23 among other Opportunity controlled entities, the Onshore Fund and the Offshore Fund.

1 The purported agreement was designed to maintain Opportunity's control of the portfolio
2 companies in the event that it was removed as the investment manger of either the
3 Onshore and Offshore Fund.
4
5 At present the Umbrella Agreement is currently suspended by the order of the Brazilian
6 Court. In the New York proceedings his honour Judge Kaplan also found that the
7 Umbrella Agreement presented a risk of irreparable injury to both the Offshore Fund and
8 the Plaintiff. The Defendant's answer to this is that it was a sensible agreement that
9 insured that if there was a change in management that one of the Opportunity entities
10 would remain in charge and would be able to ensure a proper Side-by-Side divestment to
11 the advantage of all funds including that which had undergone a change in management.
12
13 In short they say the Umbrella Agreement was to preserve the original and continuing
14 purpose of the investment of all the investors.
15
16 As I stated previously, this court is to first decide whether there is a good arguable case
17 and the next step is to decide whether there is evidence of dissipation of assets in order to
18 ensure that the assets are preserved in the event the Plaintiff is successful. In doing so
19 however, it is not the duty of this court to completely paralyze the business of the Fund. I
20 therefore now turn to the allegations of dissipation made by the Plaintiff. On the *ex parte*
21 application there was no evidence of dissipation whatsoever alleged. At the *inter partes*
22 hearing the Plaintiff alleged that I should look at the <u>conduct</u> of the Defendant namely

1 that they removed documents from Brasil Telecom's premises in an attempt to conceal
2 potentially improper transactions. This as I stated previously has not been substantiated.
3
4 In a Skeleton Argument submitted on behalf of the Plaintiff, the Plaintiff submitted "in
5 those circumstances the only proper course for the registrar and transfer agent and the
6 international custodian to take is to refuse to act upon any transfer request as long as the
7 Mareva Injunction continues". The Plaintiff also alleges that it does not know who the
8 Defendant's officers or directors are and that little is known about the Defendant's
9 management or its assets and that the location and nature of the Defendant's assets
10 remain shrouded in mystery". It urges the Court for these reasons, not to discharge the
11 Mareva Injunction.
12
13 The Defendant is a mutual fund which is constantly trading. Obviously, the nature of the
14 trading is unknown; but it is an open fund regulated by the Cayman Islands Monetary
15 Authority.
16
17 The grant of a Mareva Injunction is not the same as the grant of an Interlocutory
18 Injunction. In a Mareva Injunction it would be unrealistic not to acknowledge the fact
19 that a mutual fund subjected to a billion dollar Mareva must of necessity come to a
20 standstill, especially in circumstances where the Plaintiff itself points out that it is not
21 possible to protect the innocent investor in the Defendant, for the reason that it would be
22 unable to distinguish a transfer for the purpose of complying with a redemption request

1 by an innocent investor on the one hand from a transfer whose purpose is to defeat the
2 Mareva Injunction on the other.
3
4 The Defendant is a trading company and investors are attracted to the Defendant because
5 they have confidence in the reputation, track record and the perceived expertise of the
6 team. The Defendant states that the release of details of the assets of the sub funds would
7 undermine that confidence. In view of that this court has to look carefully at the
8 preservation of the status quo and indeed the fund which involves third parties.
9
10 In the case of *The Republic of Haiti v. Duvalier* [*1990*] Queen's Bench 202, a worldwide
11 Mareva Injunction before trial which was to be in France was approved by the Court of
12 Appeal because the plain and admitted intention of the Defendant was to move their
13 assets out of reach of the courts of law. The resources they had obtained and the skill
14 they had shown in doing that and the vast amount of money involved demanded
15 international co-operation by all nations.
16
17 In this case, this court is of the view that on the Highlake transaction, the Tag-along
18 Agreement and the Umbrella Agreement, the Plaintiff may have a good arguable case,
19 but there is no evidence of dissipation. The Plaintiff needs to establish a real risk of
20 dissipation of assets. The *locus classicus* remains Mustill, J. in *Ninemia Maritime Corp.*
21 *v. Trave Schiffahrtsgesellschaff MDH & Co. K.G. The Niedersachsen [1984]* 1 AER
22 page 398 at page 406: "Nevertheless, certain themes can be seen to run through the
23 cases. It is not enough for the Plaintiff to assert a risk that assets will be dissipated. He

1 must demonstrate this by solid evidence." The Grand Court in *J.P. Morgan Multi*

2 *Strategy Fund LP v. Marco Fund Ltd. (2002)* CILR 569 also refused an injunction for

3 lack of evidence of dissipation.

4

5 In my view the Plaintiff has failed to do this. They have used language which the courts

6 could construe as dissipation or suspicious behaviour by the Defendant but on a close

7 examination of these allegations, there is no real risk of dissipation of these assets.

8

9 I remind myself that the Plaintiff has not gone to the Cayman Islands Monetary Authority

10 which is the regulatory body of the Defendant. In view of the findings above, I discharge

11 the Mareva Injunction.

12

13 Costs to the Defendant to be agreed or taxed.

14

15 Dated this 20th day of January, 2006

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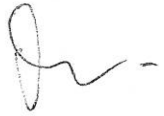
17 
18

19 Levers, J.

20 Judge of the Grand Court