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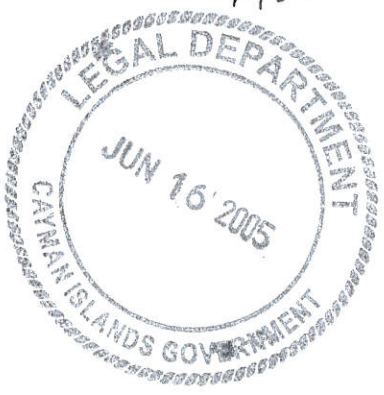

IN CHAMBERS

IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO: 230 OF 2004

BETWEEN:

MAGNUM GLOBAL INVESTMENTS, LTD.

Plaintiff

AND:

(1) ZULAUF EUROPE LDC
(2) ZULAUF EUROPE FUND USD LTD.
(3) ZULAUF EUROPE FUND EURO LTD.
(4) ZULAUF EUROPE FUND L.P.
(5) ZULAUF ASSET MANAGEMENT AG
(6) BISYS HEDGE FUND SERVICES (IRELAND) LTD. (formerly HEMISPHERE MANAGEMENT (IRELAND) LTD.)

Defendants

BEFORE: THE HON. MADAM JUSTICE LEVERS

APPEARANCES:
Counsel for Plaintiff: Tom Lowe and Ms. Cherry Bridges of Ritch & Conolly
Counsel for the 4th & 5th Defendant: Ms. Ingrid Pierce of Walkers
Counsel for the 6th Defendant: Kenneth Farrow of Quin & Hampson

Heard: December 15 & 16, 2004

JUDGMENT & RULING

Levers J,

This is an application by the Fifth and Sixth Defendants pursuant to GCR Order 12, Rule 8 to set aside an Order of the 12 May 2004 which granted the Plaintiff leave to serve proceedings out of the jurisdiction on two Defendants in this Cause.

The First, Second, Third and Fourth Defendants (known as "the Fund") were duly served within this jurisdiction on the 3 May 2004 at the offices of their attorneys, Walkers with a sealed copy of the Writ of Summons and Statement of Claim.

THE PARTIES

The First, Second and Third Defendants are Cayman Islands Funds, the First Defendant being the Master

Fund and the Second and Third Defendants being Feeder Funds. The First, Second and Third Defendants were established in August 1998. The Fourth Defendant is a Cayman Island exempted limited partnership established in 2001 and also a feeder fund of the First Defendant. The Feeder Funds had two classes of Shares "Z" shares and "M" shares. The Fifth Defendant ("ZAM") that is Zulauf Asset Management is a Swiss Company and investment manager and advisor to the fund pursuant to an investment advisory and management agreement entered into in October 1998 between the Fifth Defendant and the First, Second and Third Defendants. The Sixth Defendant called "Hemisphere" is an Irish company and administrator of the fund pursuant to an administration agreement entered into between the First, Second and Third Defendants and the Sixth Defendant in August 1998. Hemisphere performed the usual administration and related services to the Fund but was subject to the

control and review by the Directors of the First Defendant.

The Plaintiff Magnum is a Bahamian company. Magnum entered into a fee sharing agreement with the funds and the Fifth Defendant that stipulated the fees payable to the Plaintiff in respect of M shares in the feeder fund. If Magnum introduced investors to the fund then the fee sharing agreement provided that M shares would be issued to those investors and fees would be payable to the Plaintiff. Under the fees sharing agreement, the parties mandated Hemisphere to attribute the appropriate fees to the Fifth Defendant and the Plaintiff.

WIDER ORAL AGREEMENT

In addition to the 3 agreements mentioned above, the Plaintiff contends that there was a wider oral agreement known as "the 1998 Agreement". The Fifth

and Sixth Defendants deny that they were party to this agreement or in fact had knowledge of it. The Plaintiff contends that this agreement amongst other things permitted the Plaintiff to have reasonable opportunity to introduce investors by marketing the fund. The First, Second and Third Defendants summarily terminated the Plaintiff's arrangement with the fund and treated the Plaintiff, as if it had no marketing rights after the 17 September 2002. The Plaintiff claims that its efforts to introduce the investors were being undermined from January 2002 onwards.

The issue is whether the Fifth and Sixth Defendants can be liable for the failure of the Fund to make payments that were due to the Plaintiff and if so to what extent they are so responsible.

THE SIXTH DEFENDANT'S CASE

Mr. Farrow on behalf of the Sixth Defendant contends that the Plaintiff is bound by the claims it has made against Hemisphere in the Statement of Claim.

THE CLAIMS MADE ARE:

1. An account of inquiry as to the identities of investors and the amounts of investments subscribed in the Zulauf Europe Funds as a result of introductions made by the Plaintiff;

2. A declaration that the Plaintiff is entitled to further payments in the future of its share of fees in respect of introductions effected by it.

3. Further or alternatively damages from the Fifth and/or the Sixth Defendant and/or the Zulauf Europe Funds resulting from the misallocation of investors.

4. Damages from ZAM and/or Hemisphere and/or the Zulauf Europe Funds for the loss of opportunity of introducing investors to the feeder funds and the LP feeder funds during 2002 up to the closing to additional subscriptions in 2003.

Mr. Farrow, submits initially that the Hemisphere Directors are not parties to the action and that there are no contractual obligations between Hemisphere and the Plaintiff. As a general proposition he states that the Plaintiff has not made out a good arguable case against his clients since there is no contractual relationship between the Plaintiff and his clients. He goes further to state that his clients are not a proper party to the proceedings since its joinder confers no real advantage to the Plaintiff. He further contends that the claims as pleaded against his clients in the Statement of Claim disclose no serious issues to be tried.

The Defendants' counsel have conveniently classified the claims against them by the Plaintiff as follows:

1. The Lost Opportunity Claim

That is, that the Plaintiff was wrongly deprived of the opportunity of introducing investors generally and because of the premature closing of the Funds, thereby losing the right to earn fees.

2. The Misapplication Claim

The Plaintiff's share of fees payable in respect of investments introduced into M shares after the 17 September 2002. The Plaintiff claims that fees were wrongly diverted to the Fifth Defendant who was paid in full.

3. The Misallocation Claim

The claim is that certain investors were allocated Z shares when they should have been allocated M share resulting in fees not being paid to the Plaintiff. This claim is not being pursued against the Sixth Defendant.

Hemisphere therefore has to respond only to the misapplication and the misallocation claim. The misapplication claim relates to the Plaintiff share of fees under the Fee Sharing Agreement in respect of the M shares that were allocated to the investors introduced by the Plaintiff between the 17 September 2002 and the 24 January 2003

when the fund was closed. The issue is whether, in fact, the Plaintiff's services could have been terminated summarily under the fee sharing agreement. The Plaintiff contends that it could not be so and that even if it was terminable it could only be done on reasonable notice, which was not given. The Plaintiff's claim against Hemisphere is pleaded on a basis of a trust. Mr. Farrow contends that as there was no contractual obligation and as Hemisphere's role was purely one of a signatory mandated to sign on the bank account of the fund, it was a contractual obligations and not a trust obligation and that the Plaintiff's claim that this was trust property is erroneous. The complaint that Hemisphere did not pay the Plaintiff it's full entitlement lies if it all in contract and not in trust. He submits that the Plaintiff may have contractual claims against the other defendants

but not against his client. He therefore says that there is no serious question to be tried.

On the Misallocation Claim - this claim relates to fees payable to the Plaintiff in respect of shares issued to investors alleged to have been introduced by it but not acknowledged as such by the Defendants, that is, the issued Z shares which the Plaintiff says, should have been M shares. The Statement of Claim specifically claims that the non-payment of these fees was in breach of the fee sharing agreement. The Sixth Defendant was not a party to the fee sharing agreement and therefore could not act in breach of it says, Mr. Farrow. Further, he submits that this cannot be the correct position since the Plaintiff's entitlement under the fee sharing agreement is exclusively in terms of M shares and not investors introduced by the Plaintiff. The misallocation claim is it is submitted on behalf of Hemisphere embedded in the

1998 Agreement which agreement Hemisphere denies any knowledge of or denies being a party to. The Statement of Claim pleads extensively against the fund by reference to the express terms of the 1998 Agreement and the particulars as pleaded of negligence and bad faith relates to the 1998 agreement. However, although the particular claim is exclusively against the Funds, the Particulars of Negligence refer to Hemisphere in terms which suggest that Hemisphere is also guilty of negligence. Mr. Farrow submits that once this Court holds there is no contractual relationship, such a failure could only give rise to liability if Hemisphere owed the Plaintiff a tortious duty of care. No such duty is pleaded, he submits. Further, he submits there is a claim for procurement against Hemisphere and that the Particulars of Procurement are wholly inadequate. Relying on ***DC Thomson and Co. Ltd. v Deakin*** [1952] Ch 646 and ***Merkus Island Corpn v Laughton*** [1983] 2

A.C. 570 at 607. He submits that the first requirement is that the person charged, "knew of the existence of the contract and intended to procure its breach". He submits that the evidence here does not support the Sixth Defendant being a party to the agreement or having knowledge of it. Finally, he submits that the Sixth Defendant is not a proper party to the action for the following reasons:

1. None of the claims pleaded against Hemisphere can succeed without them also succeeding against the Funds;

2. Given the likely quantum of these claims and the respective net assets of the Funds and of Hemisphere, the Funds will be able to meet those claims without the Plaintiff having to have recourse to the assets of Hemisphere;

3. This is not a case where there is a possibility of claiming, in respect of the same cause of action, damages against the Funds and an account of profits against the Sixth Defendant or vice versa.

He submits that I should not exercise my discretion, as this is not a proper case for service out of the jurisdiction.

THE CLAIM AGAINST ZULAUF ASSET MANAGEMENT AG

The claims against ZAM are the same as the claim against Hemisphere, save and except that in addition, the Plaintiff claims against the Fifth Defendant payment by the Defendant of all sum due to the Plaintiff in respect of investors introduced to the fund by the Plaintiff and/or an account from the Defendant of all sums so due to the Plaintiff but not paid to it. Ms. Pierce adopts Mr. Farrow's submission on behalf of the Fifth Defendant where relevant and also states that the Plaintiff must be strictly held to the paragraphs of the GCR, order 11 under which it applied for leave to serve out of the jurisdiction. She claims that the Fifth Defendant is not a proper or necessary party to the

action and for the reason that the Plaintiff is guilty of non-disclosure, she urges me not to exercise my discretion in granting leave.

On the Lost Opportunity Claim - she submits that the Plaintiff's contention that the Fifth Defendant breached an agreement to cooperate and assist the Plaintiff in marketing and introducing investors to the fund thereby depriving it of the opportunity of earning fees is not a proper claim. She contends that there was no agreement between the Plaintiff and the Fifth Defendant as regards to marketing. That the first three defendants alone were responsible for the decision to close the fund and therefore the lost opportunity claim is misconceived against the Fifth Defendant who was purely the manager of the fund under the directions of the Fund's Directors.

On the Misapplication Claim - she submits in the same vein as Mr. Farrow and states that the Plaintiff's pleaded case against her client is unclear and contradictory. She states that the Fifth Defendant did not and could not pay any fees to the Plaintiff and that in fact the Plaintiff's own case is that the Sixth Defendant was to give effect to the agreement if any to pay fees.

On the Claim of Misallocation - she submits that although the Plaintiff contends that her clients wrongfully procured the misallocation of Z shares to investors introduced by the Plaintiff who should have been allocated M shares, the Court should be alerted to the fact that the Plaintiff is only entitled to payment in respect of investment in M shares under the Fee Sharing Agreement. She quotes from the affidavit of Mr. David Friedland to support her assertion that the Plaintiff themselves accepted this proposition. In fact, it is

acceptance by the Plaintiff's agent that she states was not disclosed to the Court at the inception and that therefore, the Plaintiff is guilty of non-disclosure. She submits that the Plaintiff must satisfy the Court by its evidence that there is a real issue which it may reasonably ask the Court to try against her clients and no leave should be granted if suing an alternative defendant is a complete answer to the Plaintiff's claim. She submits that there is no advantage to the Plaintiff to join the Fifth Defendant and that the Fifth Defendant is neither a proper nor a necessary party to this action. The real claim she states lies against the Fund not against the Fund's Investment Manager, whose only role was to advise and manage the Funds. That her client has no relationship as such with the Plaintiff and it is only the Fee Sharing Agreement that even connects them. Ms. Pierce goes much further than Mr. Farrow. She says that Cayman is not the proper venue for this case

to be tried. She states that the Plaintiff has chosen this venue because another agreement between the Plaintiff and the Defendants not related to the Fee Sharing Agreement or to the 1998 Agreement specifically states the Cayman Islands is the law to govern that contract. She does not agree that purely because a proceeding is on the way on the same subject matter in the Cayman Islands, that this makes Cayman the most appropriate venue. She says that the onus is on the Plaintiff to show that Cayman is clearly the most appropriate forum for the trial of the action and that the Plaintiff has not done so. In concluding she submits that I should exercise my discretion and set aside the order granting leave to serve outside of the jurisdiction.

THE RELEVANT LEGAL PRINCIPLES ON APPLICATIONS TO SERVE OUT OF THE JURISDICTION.

1. The applicant applying for leave must show that the case falls clearly within one of the grounds set out in GCR Order 11:

> (a) He must choose which sub-paragraph of Order 11, he relies on and the sub-paragraphs are, generally speaking, to be read disjunctively;
>
> (b) The case must fall within the spirit as well as the letter of the Order;
>
> (c) The court must decide upon the application on the basis of the cause or causes of the action expressly mentioned in the writ or statement of claim. The plaintiff will not be allowed to rely on an alternative cause of action which he seeks to spell out of the facts pleaded, if such cause of action has not been so mentioned.

The standard of proof required is a good arguable case. This of course does not mean that the court

requires proof to its satisfaction but a strong case for argument. Where questions of facts are concerned, the court must look primarily at the Plaintiff's case and not attempt to try disputes of facts on affidavit. This grounds the jurisdiction for the court to proceed further and look to see if serious issues are to be tried.

Once the Court is satisfied that it has jurisdiction, the court can then look at the evidence and unless plainly wrong exercise its discretion to grant leave on the merits. The Plaintiff must satisfy the court that it is proper to exercise its discretion to grant leave. The matters to be taken into account are that it has a good arguable case whether there is a serious issue to be tried so as to enable it to exercise its discretion to grant leave and whether it is the proper forum in which the case should be tried. As to the proper forum, the test is whether the

interest of justice is best served by proceedings here or abroad. Generally speaking the power to serve out of the jurisdiction is discretionary. The general points to be applied are that the discretion is to be exercised sparingly, the Plaintiff must make full disclosure of relevant facts and any doubt about the construction of the relevant case in GCR Order 11 rule 1 is to resolved in favour of the defendant.

The Plaintiff's Response To The Defendants Application.

Mr. Lowe on behalf of the Plaintiff submits that there is a serious question to be tried and that the test is less than a good arguable case. He submits that under the Statement of Claim there are broad causes of action that are good and arguable. On the question of the serious question to be tried, he submits that one needs to look at the legal structure that had been set up. He says

there was a holding company with two nominee directors and that the investment manager (the Fifth Defendant) controlled everything. In reality he says, the investment manager dictated what was to be done. Further, he says the termination of the fund and the rights which the Plaintiff had in the event of termination and whether or not it was the Fifth Defendant's decision to close the fund is an issue that should be tried. Ms. Pierce submitted that in fact it was the Fund's decision to close the Fund and therefore there is no case against her client, but Mr. Lowe points to an affidavit in which it is stated that it was on Fifth Defendant's advice that the fund was closed. On the question of notice, he submits that onus is on the Defendant to prove the right of termination. He relies on **Spenbourough Corpn v Cooke Sons & Co. Ltd. 1 Ch at page 139 (1968)**, on the question of whether an agreement making no express provisions for termination on notice was terminable. The

authorities support his contention that it is for the defendants to prove the right of termination.

On the question of non-disclosure he submits, that if the letter which was annexed to the affidavit is read in its entirety it does not support the contention that the Plaintiff accepted the position as put forward by Ms. Pierce that it was not entitled to the fees. Further, he says relying on **Electric Furnace Co. v Selas Corporation of America [1987] RPC 23** that the Plaintiff's evidence had not been misleading and had not failed to disclose material facts. It was unreasonable to expect the Plaintiff preparing his evidence in support of any application under Order 11, rule 1, to anticipate all the arguments which might be raised against his case.

On the question of Obstruction the Plaintiff has conceded that its claims is only against the Fifth

Defendant. The Fifth Defendant's only answer to this is that there was no agreement to market. It is Mr. Lowe says a matter for the judge at trial to adjudicate on the 1998 Agreement.

On the misallocation and the misapplication of funds, he responds to ZAM's allegation that both the termination and the marketing fees were not specifically stated in the fee agreement, by stating that both claims are about payment of fees. Schedule 1 annexed to the Statement of Claim attempts to quantify the amounts at issue and he says, that the entitlement gives rise to a contractual right under the IAMA Agreement. His submission is that if the Fifth Defendant took part of the fees then the Fifth Defendant took the entitlement to the Plaintiff knowing full well that the Plaintiff was entitled to it. The entitlement he submits is proprietary because the Fifth Defendant's fees were assigned to the Plaintiff

under the fee agreement. He also submits that the Sixth Defendant accepted the mandate to pay and as the Sixth Defendant does the actual transaction, the Sixth Defendant is liable as it was dealing with trust property. It is his contention that even if there is no proprietary claim he has a claim for breach of contract in relation to the implied terms. It is perhaps convenient at this stage to look at the Fee Sharing Agreement and the words specified therein which are of some importance:

> "In consideration of Magnum serving as sponsor of the Feeder Funds concerning the class M shares the parties of this contract herewith agree and mandate the Administrator to directly attribute out of the investment advisory fee as per the Investment Advisory Agreement between ZAM and Zulauf Europe directly the following portions of the fee to Magnum and pay them out to Magnum pari passu with payments to ZAM on the advisory fee."

He submits that this is similar to an assignment. The effect of it is that it at the point when the money becomes due, it is the Plaintiff's and the Plaintiff is entitled to those sums. "The chose in action", he says, is the Plaintiff's. Simply put Mr. Lowe's submission is that the fund is not entitled to pay all the money to the Fifth Defendant, once the Fifth Defendant under the fee sharing agreement had assigned it to the Plaintiff. It is not open to the other Defendants to pay the Fifth Defendant. That the Sixth Defendant was dealing with the funds and was mandated to deal with them and knew of the Fee Sharing Agreement. Once the money became due it was the Plaintiffs. He relies on the case of **William Brandt's Sons & Co. v Dunlop Rubber Co. Ltd. [1905] AC, HL** in which it was held:

> "That there was evidence of an equitable assignment of the debt to the bank with notice to the purchasers, and that the bank

> could recover the debt from the purchasers."

Goods having been sold by the merchants the bank forwarded to the purchasers notice in writing that the merchants had made over to the bank the right to receive the purchase-money and requested the purchasers to sign an undertaking to remit the purchase-money to the bank. He further, relies on the case **Brice v Bannister [1878] C.A.** to support his submission that future money that will become due are assignable.

In the alternative, he submits that if it is not a contractual relationship with the Fifth Defendant it is a proprietary relationship, that the money to be received became the Plaintiff's money and that the Fifth Defendant had control and was mandated to have control over this money and pay out in a proper fashion. He submits that the Fifth Defendant accepted these instructions and should

have acted upon it. He says that the defendant did not need to own the fund, what is necessary he submits is a right of disposal. He submits that the Plaintiff has both contractual and/or proprietary rights over this money and that in both cases the interest results in a promise to be paid in the future. He submits that the promise has to relate to identifiable property not necessarily existing property. He therefore urges the Court to hold that there are serious questions to be tried and that this court has jurisdiction over those issues.

RULING

This is a matter of construction of agreements. A Fee Sharing Agreement, and a 1998 Oral Agreement which went beyond the fee sharing agreement, an investment advisory and management agreement and the administrative agreement between the First, Second and Third Defendants and the Fifth

Defendant. The issues in this matter are fairly simple. The Plaintiff claims money that it submits should have been paid to him by the fund and were not paid to him for investors that he introduced but were not acknowledged as introduced by him. The misapplication of funds have been quantified in the claim. The misallocation of funds (those shares that should have been issued in a specific manner as they were introduced by the Plaintiff and were not issued in that manner) are yet to be quantified but the claim remains. The Defendants rely on lack of knowledge of a 1998 Agreement which goes beyond the fee sharing agreement to which the Fifth Defendant and the Plaintiff were parties with the other Defendants. The law is that the Plaintiff is bound by the claims made in the Statement of Claim and cannot go beyond that. I find that the Plaintiff has pleaded the broad causes of action and they fall squarely under the Grand Court Rules and that the persons whom the

claims are brought against are persons out of the jurisdiction who are a necessary or proper parties to the action. I agree with counsel for the Plaintiff that the causes are based on contract and on breach of trust against the Defendants. The question I must now turn to is whether there is a serious question to be tried. As a result of the sudden closure of the fund, the Plaintiff lost the opportunity of effecting introductions and earning the resulting share of fees. The Plaintiff claims that this amounted to a breach of expressly agreed marketing rights as set out in paragraphs 11 (2) of the Statement of Claim and the implied rights as set out in paragraphs 12 (2) of the Statement of Claim. The Fifth Defendants response is a pure denial and I hold that this is a serious issue for trial. The other serious question to be tried is a breach of trust claim against the Sixth Defendant. In view of the Fifth Defendant's assignment of the money to the Plaintiff and the knowledge that the

Sixth Defendant had of this assignment was there a breach when the Sixth Defendant who was mandated to distribute the funds in accordance with the fee sharing agreement paid everything over to the Fifth Defendant. This is a question that can only be resolved at trial.

The Plaintiff pleads its case against the Fund and the Fifth Defendant by reference to the wider agreement. The express and implied terms of the agreement are set out in paragraphs 11 and 12 of the Statement of Claim. The agreement must at trial be interpreted in the context of the evidence led by the Plaintiff. Finally, I need to address the question of forum conveniens and non-disclosure which was a fundamental plank of Ms. Pierce's submission. She submitted that the Cayman Islands is not the proper forum and that as there was such fundamental non disclosure at the time of the ex-parte application that I should not exercise my

discretion in granting leave to the Plaintiff. I rule that there was no material, non-disclosure.

The words relied upon by Ms. Pierce in the letter do not advance the Defendant's case and or show that there is an acceptance by the Plaintiff's of the Defendant's position. The entire letter and the context in which it is written does not advance the Defendant's case any further. There is no governing clause as to the law to be applied in the fee sharing agreement and therefore this Court must look at the following factors and exercise its discretion as to whether Cayman is the proper forum. The positive factors are:

1. The Funds are incorporated and registered in the Cayman Islands.

2. The other Defendant's have instructed Walkers to accept service of the proceedings. There will therefore be a trial in the Cayman Islands in any event.

3. The Sixth Defendant has an office in the Cayman Islands namely BISYS Cayman Limited and the Fifth Defendant chose to incorporate the funds in Cayman.

I find that this is the most suitable forum in which the dispute between all the parties could be resolved and that the dispute has a sufficient nexus to the Cayman Islands. For these reasons I hold that the Defendants' applications be dismissed and that the matter proceed with the Plaintiff having leave to serve the Fifth and Sixth Defendants out of the jurisdiction. Costs to the Plaintiff, to be agreed or taxed.

Dated this 25th day of January, 2005

Judge of the Grand Court