es/lib

IN THE GRAND COURT OF THE CAYMAN ISLANDS 28-04-04

CAUSE NO: 425 OF 2002
CAUSE NO: 616 OF 2002
CAUSE NO: 624 OF 2002

BETWEEN:

1. J.P. MORGAN MULTI-STRATEGY FUND, L.P.
2. J.P. MORGAN MULTI-STRATEGY FUND II, L.P.
3. J.P. MORGAN MULTI-STRATEGY FUND, L.P.
4. J.P. MORGAN MULTI-STRATEGY FUND II, L.P.
5. J.P. MORGAN MULTI-MANAGER STRATEGIES FUND
6. LOCKHEED MARTIN CORPORATION MASTER RETIREMENT TRUST
7. HFI INVESTMENTS, LLC

Plaintiffs

AND:

1. THE MACRO FUND LIMITED
2. THE MACRO FUND (U.S.) LTD.
3. IIU CAPITAL LTD.

Defendants

CAUSE NO: 494 OF 2002

BETWEEN:

DEUTSCHE BANK AG

Plaintiff

AND:

1. THE MACRO FUND LIMITED
2. IIU CAPITAL LTD.

Defendants

BEFORE: MADAME JUSTICE PRIYA LEVERS

Appearances:
Counsel for IIU Capital Ltd: Mr. K. Farrow of Quin & Hampson
Counsel for Marco Fund: Mr. M. Imrie of Maples & Calder
Counsel for JP Morgan: Ms. I. Pierce of Walkers

Heard: 14th & 16th April, 2004

GRAND COURT CAYMAN ISLANDS

JUDGMENT

Levers J.

The essence of the claim against the Defendants in this action is breach of contract. A statement of claim was filed on the 19th June 2002, in which the Plaintiffs claims repayment of monies to the First Plaintiff, Second Plaintiff, Third Plaintiff, Fourth Plaintiff and Fifth Plaintiff. It also claims damages for:

1. breach of the terms of an Agreement further or alternatively;
2. rescission of the Plaintiffs respective subscription agreement for misrepresentation;
3. damages for misrepresentation and/or damages in lieu of rescission;
4. damages for negligent misstatement;
5. repayment of the entirety of the sum originally invested in the Marco Funds by the Plaintiffs by reason of frustration less the amounts paid to the Plaintiffs upon redemption; and
6. interest on any sums awarded to the Plaintiffs.

BRIEF BACKGROUND TO THIS CLAIM

The Plaintiffs invested in a Fund. The Funds are Cayman Islands Mutual Funds managed by the third defendant IIU Capital Limited, a UK Company. The Funds were established in 2001 as feeder funds to invest all of their assets into a master fund known as The Marco Fund Ltd. The Funds were marketed to institutional investors who had to invest a minimum of $5,000,000 Euros or $5,000,000 US in the case of US$ shares. A major element of the marketing related to the key individuals who would be making strategic investment decisions on behalf of the Investment Manager, IIU, including David Morrison, a director of the Funds and also a director and the CEO of IIU. The Offering

Documents also sought to impose a 10% redemption penalty in the event that investors redeemed their shares from the Funds within 12 months of issue or acquisition if purchased in the secondary market.

The Plaintiffs, it is alleged renegotiated that redemption clause and had a "side agreement" with the Marco Fund to the effect that if the shares were redeemed within 12 months and the return to the Plaintiffs was a loss of 10% in net asset value or more, then it would not have to pay any redemption fees. Other conditions were also agreed including, that the Plaintiffs were entitled to enter into swap transactions which could be based on the performance of the Marco Fund and that the entering of such transactions would not be contrary to or be affected or restricted by any of the Marco Fund's constrictive documents. This agreement was with the Plaintiffs in Cause No. 494/2002 (i.e. Deutsche Bank).

The JP Morgan Plaintiffs in Cause Numbers 425, 616, 624 in particular the JP Morgan Alternative Assets Management as Investment Manager on behalf of the JP Morgan Plaintiffs agreed with the Fund that the Plaintiffs would be entitled to redeem their entire interests in the Funds without being charged any redemption fees if Mr. Morrison ceased to be affiliated with or involved in the management of the Funds.

It is alleged also that the Fund agreed that if they gave any more favourable terms or conditions to any other investor then such terms or conditions would

also be given to the JP Morgan Plaintiffs. In the premise the Plaintiffs collectively invested 47 million in the Funds. Mr. Morrison ceased to be affiliated with IIU (i.e the third defendant), and the Plaintiffs' redeemed their investments, but the Fund applied the redemption penalty. The refusal to pay the JP Morgan Plaintiffs and the Deutsche Bank redemption monies has resulted in this litigation.

To this claim a defence and counterclaim has been filed. In essence the Defendants state that the Plaintiffs subscribed for the shares pursuant to the terms and conditions of the application form and such subscription is valid and enforceable on those terms but that conditions in the side letter (i.e. the redemption letter) Agreement on which the Plaintiffs rely are unenforceable. The First Defendant denies that the Plaintiffs are entitled to the relief and remedies claimed in the statement of claim. The alternative defence is that the Plaintiffs' loss is less than the prescribed amount. In the counterclaim the Defendants asks for a declaration that the Plaintiffs' subscribed for the Shares pursuant to the terms and conditions of the Application Form and that such subscription is valid and enforceable on those terms; that the Letter Agreement or alternatively those provisions upon which the Plaintiffs relies are unenforceable. The Defendant therefore, is relying on the normal subscription agreement and denies that there was any special conditions attached to either Plaintiffs' investments. To that defence the Plaintiffs have filed a reply.

On the 22nd October, 2003, a summons for further and better discovery was issued by the Defendants' attorneys asking for:

(a) an affidavit answering request for further and better discovery and specific discovery in respect of 27 categories of documents;

(b) an order requiring the JP Morgan Plaintiffs to verify their lists of documents by affidavit; and

(c) costs.

That summons which was listed for hearing on the 4th November 2003 was adjourned as a result of an affidavit being filed by the JP Morgan Plaintiffs and served on the Fifth Defendant in which the Plaintiffs conceded to most of the points in the discovery application.

The summons against Deutsche Bank sought discovery of 11 categories of documents most of which have been answered by the affidavit of Alan Cloete served on the Defendants on the 3rd November 2003. The Defendants now wish to proceed with their application in respect of 2 categories of documents namely the documents relating to Deutsche Bank's role as prime broker and custodian to the Marco Fund; and documents relating to Deutsche Bank's underlying arrangements with the "Canary" and "Stern" parties (third parties). The request for discovery is worded as follows:

1. All correspondence, file notes, attendance notes and other records recording the advice given to the Macro Funds and IIU by Deutsche Bank

at the time of the Funds' inception (including its reviews of the offering documents and the Articles of Association).

2. All correspondence, files notes, attendance notes and other records relating to Deutsche Banks' role as prime broker and custodian to the Funds (including its reviews of the offering documents and the Articles of Association).
3. All written communications, attendance notes, call notes and file notes of Deutsche Bank, including its communications with Stern Investment Holdings Bermuda Ltd. and/or the C.A.S. companies, in relation to the subscription made by Stern in the Marco Fund on or about 1st October 2001 and the subscription made by Deutsche Bank in the Marco 40-48 on or about 2nd January 2002.
4. To the extent not include within category 3 above, all documents related to the "total return swap transaction" involving C.A.S. Plus Holdings LLC and C.A. S.M. Holdings LLC and Deutsche Bank, insofar as such documents touch or relate to any of the following issues:

    3.1 the terms of the transactions between Deutsche Bank and its counterparties;

    3.2 any side letters entered into between Deutsche Bank and its counterparties; or

    3.3 the side letter relied upon by Deutsche Bank in this proceedings.

This therefore is an application for specific discovery.

THE LAW

Discovery is the process whereby a party to an action is obliged to disclose to the other party the existence of all documents which are or have been in his or her possession, custody or power which are material relating to the issues in the action. Discovery must be given of any documents 'relating to any matter in question between the parties in the action.' It is not restricted to documents

which would be admissible in evidence at trial. The principle was stated by Brett LJ in ***Commerciale du Pacifique v Peruvian Guano Co***. [1828] 11 QBD 55:

> "...every document relates to the matter in question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which may – not which must – either directly or indirectly enable the party [seeking direction] either to advance his own case or to damage the case of his adversary.... a document can properly be said to contain information which may enable the party [seeking discovery] either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to a train of inquiry, which may have either of these two consequences."

Discovery under our law is governed by GCR Order 24, rule 3, 7 and 8. The jurisdiction to grant an order for specific discovery is found within Order 24, rule 7 (1). The rule provides:

> "Subject to rule 8, the Court may at any time, on the application of any party to a cause or matter, make an order requiring any other party to make an affidavit stating whether any document specified or described in the application or any class of documents so specified or described is, or has at any time been in his possession, custody or power, and if not then in his possession, custody or power when he parted with it and what has become of it."

Rule 24 (8) provides as follows:

> "On hearing of an application for an order under rule 3 or 7 the Court, if satisfied that discovery is not

> necessary, or not necessary at that stage of the cause or matter, may dismiss or , as the cause may be, adjourn the application and shall in any case refuse to make such an order if and so far as it is of the opinion that discovery is not necessary either for disposing fairly of the cause or matter or for saving costs."

Specific discovery can only be obtained if there is sufficient evidence that the document exists which the other party has not disclosed, that the documents are relevant to the matter in issue, and there is sufficient evidence that the party has the document. If all of the above are satisfied, the Court still has a discretion and should have regard to necessity, costs and inconvenience to the other party in making the order. Before dealing with this specific request I am aware that in exercising my discretion I must take into consideration the fairness and inconvenience to the parties. An expeditious resolution of issues is an immutable aspiration. Further costs should be minimized. These requests must be viewed within the context of how the issues between the Plaintiffs and the Defendants have been joined.

The first two request can be conveniently taken together.

Request 1 and 2 are that all correspondence file notes, attendance notes and other records recording the advise given to the Marco Fund and IIU by Deutsche Bank at the time of the funds inception (including his reviews of the offering documents and the Articles of Association; (2) all correspondence file notes, attendance notes and other records relating to Deutsche Bank's role as prime

broker and custodian to the funds (including his reviews of the offering documents and the Articles of Association).

The Defendants' attorneys submit that this category of documents relates to Deutsche Bank's role as prime broker and custodian to the fund. This is pleaded as an issue at paragraph 5 of the defence and counterclaim. They submit that Deutsche Bank was more than just a subscriber of the Shares in the Marco Fund and that they were involved in setting up the Funds. Counsel submits that the requested information is relevant because the Marco Fund alleges that Deutsche Bank knew that the terms of the side letter relating to the redemption fee was contrary to the Company's Articles and that the Directors had no authority to waive the redemption fee. The question therefore is, do these documents exist? Are the documents relevant to the matters in issue and is there sufficient evidence that the other party has the documents?

Counsel for the Plaintiffs submit that the documents are not relevant as they are not connected to the issues in the action. She also submits that the documents or class of documents must be shown by the applicant to offer a real probability of evidential materiality, in the sense that it must be expected to yield information or substantial evidence material to the pleaded claim and the defence. She further submits that if the document or class of document cannot be demonstrated to be clearly connected to the issues which have already been raised on the pleadings or which would in the ordinary way be expected to be

raised in the course of the proceedings, the application should be dismissed. I bear in mind that this is not the only criteria. I must further be satisfied in exercising my discretion that the information is necessary and will at the implementation of the order not penalize the Plaintiffs in costs and will not be unduly inconvenient to the Plaintiffs. It is not easy to distinguish between facts and the evidence to prove it. I am aware that the judge must exercise his/her reasonable discretion in every case after carefully looking at all the facts and taking into account any special circumstances.

If the documents can not be demonstrated to be relevant to the issues which have already been raised on the pleadings or which would in the ordinary way be expected to be raised in the course of proceedings, the application should be dismissed. In this case it is my view that the matters are material. They have been raised by the Defendants in the pleadings and they are relevant.

I therefore, order the discovery of the documents and order that the Plaintiffs do within 21 days make and serve on the defendants an affidavit stating whether it has or had at any time had in its possession custody or power the documents specified in 1 and 2 above and if the said documents or any of them have or has been that are not now in its possession custody or power stating when it parted with the same and what has become of the same.

The request for the following 2 specific discovery materials are framed as follows:

(3). all written communications, attendance notes, call notes and file notes of Deutsche Bank including its communication with Stern Investment Holdings Bermuda Ltd and/or the CAS Companies in relation to the subscription made by Stern in the Marco Fund on or about the 1st October, 2001 and the subscriptions made by Deutsche Bank in the Marco Fund on/or about the 2nd January, 2002;

(4). To the extent not included in category 3 above all documents related to the total returns swap transactions involving CAS plus Holdings LLC and CASM Holdings LLC and Deutsche Bank in so far as, documents touched or relate to any of the following issues:

3.1 the terms of the transactions between Deutsche Bank and its counter parties;

3.2 any side letter entered into by Deutsche Bank and its counter parties;

3.3 the side letter relied upon by Deutsche Bank in this proceedings.

Counsel for the Defendants submit that this request is relevant to the issues pleaded at paragraph 40-48 of the defence and counterclaim. He further submits that the documents produced in discovery to date support the Marco Funds position on this issue. Counsel for the Plaintiffs submit that this request is misconceived that her clients have been at pains to explain to the defendants

attorney that the request relating to the swap transactions are irrelevant to the issues in the action. The issue in this case, she submits is whether the said side agreement signed by Deutsche Bank and the Marco Fund is enforceable as a matter of law and if so whether Deutsche Bank suffered a 10% loss on its investments being reclaimed fees wrongfully withheld by the Defendant. I bear in mind that the amounts being reclaimed are substantial and if in fact as Counsel for the Defendants submits Deutsche Bank did not suffer a 10% loss as a result of the swap counter parties agreement, then the loss suffered by the Plaintiffs would be less than 10% being claimed. He relies on certain documentation disclosed by other investors, other than the parties to the action. He submits that this is the evidential platform on which he bases the request for discovery. It must be material on the pleadings whether Deutsche Bank suffered 10% loss or not. It must also be that on the state of the documents, that documentation could exist and in the possession of the Plaintiffs. The issues have been joined in a forthright manner. It cannot be said that the Plaintiffs would be inconvenienced or prejudiced in any way if the order was granted. I therefore hold that these documents are necessary and that the defendants have shown a demonstratable evidential materiality. I therefore order that the Plaintiffs do within 21 days make and serve on the defendants an affidavit stating whether it has or at any time had in its possession custody or power the documents specified in 3 and 4 above and if the said documents or any of them have been but are not now in his possession, custody or power stating when it parted with the same and what has become of the same.

I further order that the Plaintiffs do within 21 days produce to the Defendants for inspection the portfolio reset statement referred to at paragraph 20 of the second affidavit of Alen Clote dated the 3rd November, 2003. The Defendants have not to my satisfaction disclosed why this should not be produced for inspection . Costs to the Defendants to be agreed or taxed.

Dated this 21 day of April 2004

Madame Justice P. Levers
Judge of the Grand Court