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IN THE GRAND COURT OF THE CAYMAN ISLANDS

HOLDEN AT GEORGE TOWN, GRAND CAYMAN

C 489/91

BETWEEN: Pyramid Securities Limited **PLAINTIFF**

AND: Ernst & Whinney (Sued as a firm) **FIRST DEFENDANT**

AND: Allan Gee **SECOND DEFENDANT**

AND: Ernst & Young (Sued as a firm) **THIRD DEFENDANT**

HARRE CJ

For the Plaintiff - Mr. Norman Hill, Q.C.
Mr. Norman Klein

For the Defendants - Mr. Ramon Alberga, Q.C.
Mr. Angus Foster

REASONS

On 21st June 1996 I refused an application by the plaintiff for leave to amend its reamended statement of claim to include a claim for fraud, granted leave to appeal against that refusal and ordered that the proceedings be stayed pending the outcome of the appeal. I granted the stay with reluctance because a hearing of preliminary issues had been set for the following week.

This and a related case concern matters which took place more than a decade ago. The new allegation of fraud which the plaintiff wishes to add relates to legal proceedings against a securities brokerage firm in Florida ("Hutton") and its staff in

relation to losses alleged to have been suffered by the plaintiff as a result of unauthorised trading. The plaintiff alleges that certain documentation, essential to this litigation, was to have been introduced into evidence by the attendance of the second defendant ("Gee") at a deposition and that at all material times the plaintiff relied on the advice, professional skill and expertise of Gee in performing professional services in the investigation and analyses of the plaintiff's portfolio. The plaintiff is a company which was at all material times wholly owned and controlled by Mr. Edward Attridge ("Attridge").

The new allegation of fraud arises in the following way. The plaintiff says that it had been agreed with Gee on or about 1st August 1983 that it would defer until the conclusion of the Florida litigation the payment of fees for services to be rendered by Gee's employer in relation to that litigation. That agreement was made by Gee to deceive his employers. In any event, without the Plaintiff's knowledge, the Plaintiff's attorneys had in or about the middle of 1985 provided a guarantee that payment of the fees would be made by them (the Plaintiff's attorneys) in the event they remained unpaid by the Plaintiff. However, having been invited to attend for deposition in Florida, Gee sent a telegram to the plaintiff's attorney stating that he was "unable to proceed further until matter of outstanding fees settled." That, and making (or seeking to make) continued assistance in the Florida litigation dependent on a substantial payment of fees, with knowledge that payment would be made by the plaintiff's attorneys in the event that they were not paid by the plaintiff, intending for the plaintiff to act on the represented reason for non-attendance, is alleged to be fraudulent and/or deceitful.

The particulars of fraud and/or deceit by Gee which are alleged to arise from those circumstances are set out as follows in the amendment to the statement of claim which is sought -

> "Fraudulently and/or deceitfully representing to the Plaintiff on behalf of the First Defendant that the First Defendant had agreed that the Plaintiff could defer payment of its fees until the end of the Florida litigation knowing that was false; further, representing that he (Second Defendant) was unable to proceed further until payment of the First Defendant's fees notwithstanding his representation that the First Defendant had agreed otherwise and in light of the guarantee given by the Plaintiff's attorneys. In furtherance of the fraud and/or deceit, the Second Defendant had in October 1984 induced the Plaintiff, through its sole beneficial owner, to accept the sum of $17,500.00, for the purpose of making a refund of fees paid by the Plaintiff in 1983 and for making a partial payment of US$13,918.00 and thereby falsely giving the impression to the First Defendant that the agreement regarding fees was otherwise than the Plaintiff had been lead to believe it to be by the Second Defendant and further representing that no further fees would be payable until completion of the Florida litigation. The Second Defendant was under a duty at all times to disclose to the Plaintiff that the First Defendant had not agreed to defer payment of its fees so that the Plaintiff could make alternative arrangements. This fraud and/or deceit enabled the First Defendant and the Second Defendant to retain the Plaintiff as its/his client to a point in time shortly before trial when he failed to attend the scheduled deposition, thereby causing substantial loss/damage."

The defendants resist the amendments on the following grounds -

> All the facts on which the allegations of fraud are now sought were known to Mr. Attridge the controlling mind of the plaintiff since at least 1986.
>
> There is no good and sufficient reason for the plaintiff not to have alleged fraud at the outset or to have waited until 1996. It is not a bona fide application. The reasons for it are false, contrived and concocted and the delay culpable.
>
> The facts surrounding the guarantee were pleaded in Cause No. 134/86 in which Gee and Attridge were opposing parties and repeated in the defendant's pleading in this action. Even (which is not accepted) he did not know them until 1986 he could have with reasonable diligence have ascertained the facts on which he bases his claim for fraud and could have pleaded them at the outset of this action.

A plea of fraud would be defeated by the fact that it is a new cause of action brought after the limitation period in which it should have been brought has expired. It is therefore a useless amendment and should be refused for this, if no other, reason.

The case was launched and proceeded with independently of fraud and an amendment to allege fraud at this late stage should not be allowed unless there is good ground for so doing and exceptional circumstances established.

The Plaintiff's attempt to plead fraud now amounts to over reaching and is connected with some tactical manoeuvre, for example the belief that his new cause of action may meet the pleas on the preliminary issues. This is a further indication of mala fides.

Justice does not demand that this amendment should be allowed on any view of the matter, and especially so, since the alleged consequences of the alleged fraud are no different from the consequences alleged to have resulted from the alleged breach of contract and negligence.

The facts pleaded as constituting fraud do not in any event constitute fraud and so disclose no cause of action, irrespective of the limitation point.

To allow the amendment at this stage will be severely prejudicial do the Defendants.

I was taken through the affidavit evidence in great detail. I will refer to what I regard as the most important elements under applicable headings -

1. Cause No. 134 of 1986

This was an action brought by Gee against Attridge for repayment of a loan of US$17,500. The pleadings raised various issues which foreshadowed issues in the present case.

The reply and defence to counterclaim dated 18th September 1986 contained the following -

> "The Plaintiff, at the request of the Defendant's U.S. Attorneys, ANDERSON, MOSS, RUSSO, GEIVERS AND COHEN, in his capacity as agent of E.W. attended a meeting in Miami in or about July 1985, to discuss the proceedings against HUTTON. The Defendant, along with his Attorney, MR. DON RUSSO, attended

> this meeting. The Plaintiff, at this meeting, informed the Defendant and his Attorney that until E.W.'s accounts were paid no further work would be undertaken. The Defendant's said Attorneys, by MR. RUSSO, guaranteed payment of E.W.'s future accounts for services rendered in connection with the litigation in the event of further default by the Defendant."

That is what was first pleaded against Attridge. in 1986 and which it is said by the plaintiff was a secret arrangement which was not known to it until discovery in the present action. The "smoking gun" said to have been then discovered is a letter from Mr. Russo, Attridge's American attorney addressed to Mr. Gee at Ernst & Whinney. It reads as follows -

"Dear Alan and Roger:

Please find enclosed our firm's check for $10,000.00. I am sending only one half of our debt to you because I expect to receive the rest of these monies directly from Mr. Attridge. In any case, even if I have not received the full $20,000 from Mr. Attridge, I shall provide your firm with another check for $10,000 resolving our debt to you.

Kindly do not discuss with Mr. Attridge our having provided this $10,000 check or, our intentions with regard to providing you the other $10,000.

Enclosed please find a copy of the Closing Statement which Mr. Attridge signed wherein the money owed to your firm is mentioned and wherein he agreed to pay your firm said amount.

Very truly yours,

DON RUSSO, ESQUIRE

Mr. Attridge had this to say about the letter in his affidavit dated 25th March 1996 -

> "Gee contends that I was fully aware of the undertaking made by Anderson, Moss to Ernst & Whinney. That is not true. If I was aware of such an undertaking, I would have seriously questioned why Gee would not attend at his scheduled deposition in light of such an undertaking. On

> the face of the letter from Russo to Gee dated 3 December 1986 it is obvious that I knew nothing of the undertaking by my former attorneys and that they were concealing it from me. Russo in that letter tells Gee, "Kindly do not discuss with Mr. Attridge our having provided this $10,000.00 check or, our intentions with regard to providing you the other $10,000.00.... Gee contends that the guarantee given by Anderson, Moss to Ernst & Whinney regarding its outstanding fees was never an undertaking to pay Ernst & Whinney's fees "in any event." However, in his telex to Anderson, Moss on 12 December 1985, Gee specifically breaks down the fees owed by me and Anderson, Moss separately indicating who was responsible for the relevant accounts. Whether it was a guarantee by Pyramid's former attorneys to pay the fees in the event Pyramid did not, or whether it was a guarantee in any event, the fact remains that Ernst & Whinney had a guarantee (without my knowledge) that their fees would be paid. Gee has failed to explain why he did not attend at the scheduled deposition in light of this. Further evidence of my understanding appears on the Closing Statement with respect to the Florida litigation where it is specifically stated that "any sums owed to Ernst & Whinney for accounting services performed at the direct request of Edward Attridge are understood to be the responsibility of Edward Attridge and Pyramid Securities Ltd. and not the responsibility of Anderson, Moss, Russo, Geivers & Cohen, P.A."

The defendants' response to that is that it was not the guarantee arrangement, but the payment of $10,000 and the intention to pay another $10,000 which Mr. Russo wanted concealed from Mr. Attridge, for the obvious reason that it would otherwise be harder to induce Mr. Attridge to meet his primary liability for these sums.

It is not my task now to reach a conclusion between these two interpretations. That will be a matter for trial. It is clear, however, that the secret, if secret there was, was out in the open on service of the reply and defence to counterclaim in Cause No. 134/86. Moreover, the fact of the telex by Gee to Anderson Moss dated 12th December 1985 was pleaded as follows by Attridge himself in his defence dated 22nd August 1986 in that action -

> "15. That on the 12th December 1985, just about three days prior to the date fixed for the Plaintiff to give his deposition in Florida, the

> Plaintiff sent a telegram to Pyramid's American attorneys demanding that the Defendant pay US$20,106.00 for fees."

It is noteworthy that that pleading made no mention of this communication showing a breakdown between the fees owed respectively by Attridge and his attorneys.

At this point I refer to two authorities, Atkinson v. Fitzwalter (1987) 1 All ER and Stimp v. Barclays plc (Lexis - unreported) which deal with late applications for amendments to pleadings which allege fraud.

A statement made by Lord Esher M.R. in Bentley v. Black (1893) 9 TLR 550 was considered by the Court of Appeal in Atkinson v. Fitzwalter by reference to the note in the 1985 Edition of the Supreme Court Practice. It is convenient for me to start my consideration of the law with the 1995 Edition which was cited to me and is of similar import. The following are relevant passages from Note 20/5-8/22 in that work-

> "Although it has been stated that it is "the universal practice, except in the most exceptional circumstances, not to allow an amendment for the purpose of adding a plea of fraud where fraud has not been pleaded in the first instance (per Lord Esher M.R. in Bentley v. Black (1893) 9 TLR 580; cf. Hendriks v. Montague (1881) 17 Ch.D. 638, p. 642; Symonds v. City Bank (1885) 34 WR 364; Lever v. Goodwin (1887) WN 107, CA) yet such an amendment may be allowed at an early stage. There is, indeed, no rule of practice that allegations of fraud have to be pleaded at the outset and could not be added by amendment, and amendments alleging fraud are no different from other amendments which are allowed on the general principle that all amendments are allowed so that the real matters in controversy between the parties are before the Court, and accordingly the Court in its discretion may allow an amendment to add a plea of justification in a libel action, even though fraud is the gist of that plea (Atkinson v. Fitzwalter (1987) 1 WLR 201; (1987) 1 All ER 483, CA citing with approval the first sentence of this sub-paragraph)."

But, as May LJ observed, that should be done without injustice to the other side, and it must be remembered that fraud is a very serious allegation.

On behalf of the plaintiff it was submitted that all the ingredients of fraud were present in the matter pleaded in.the amendment sought. There was a representation made knowingly, without belief in its truth or recklessly, and made with a view to inducing another party to enter into a contract: Bodden v. Ferryman Investments Ltd. and another 1992-3 CILR, Notes p.8. These, it was argued, are matters to be determined at trial. But the question of the state of the plaintiff company's knowledge, through Attridge, would have fallen for determination at the trial of the preliminary issues of estoppel and res judicata. It is not a matter which relates to the element of concealment only in relation to the question whether an allegation of fraud is statute-barred.

For the allegation of fraud to be properly tried the recollection of witnesses as to state of mind and motivation over eleven years ago would have to be gone into. That must be strongly prejudicial to the defendants.

While I accept that a different measure of damages may apply if fraud is proved, that argument must also be viewed in the light of the difficulty put in the way of the defendants in resisting the allegation after such a long passage of time.

It is counsel's duty not to put a plea of fraud on the record unless there is clear and sufficient evidence to support it and the court may well refuse his application if there has been delay or failure to make proper enquiries earlier.

The following passage is from the judgment of Lord Denning MR in Associated Leisure Ltd. v. Associated Newspapers Ltd. (1970) 2 AllER 754 at 758 -

> "But when the defendant seeks to plead justification at a late stage, his conduct will be closely enquired into. The court will expect him to have shown due diligence in making his enquiries and investigations. The court may well refuse his application if he has been guilty of delay or not made proper enquiries earlier."

That must apply with at least equal force to a direct allegation of fraud. Having reviewed the documentary record, and in particular the pleadings in Cause No. 134/86 the plaintiff has, in my judgment, failed to meet those standards.

The facts on which the allegations of fraud are now based were known to the plaintiff, through Attridge since at least 1986. The plea of concealment is bound to fail and the plaintiff's delay is culpable and gives rise to the suspicion that it is a tactical attempt to overcome the statutory defence of limitation otherwise open to the defendants and prevail with regard to the points of estoppel and res judicata which were to be argued as preliminary issues.

The allegation of fraud against the plaintiff, even if the facts alleged were proven, is at least unclear and equivocal.

To ask the defendants to meet the allegation so many years after the event must be extremely prejudicial.

It was for these reasons that I refused the plaintiff's application to amend its statement of claim so as to include an allegation of fraud.

G.E. Harre
Chief Justice

6th May 1997