23.11.95 Legal

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

CAUSE #271 OF 1995

BETWEEN (1) GRUPO TORRAS S. A.
(2) TORRAS HOSTENCH LONDON LIMITED
(IN LIQUIDATION) **PLAINTIFFS**

AND (1) BANK OF BUTTERFIELD INTERNATIONAL
(CAYMAN) LTD.
(2) WILLOW INVESTMENTS LIMITED
(3) FASAB INVESTMENTS LIMITED
(4) SCIROCCO LIMITED
(5) BARBARA ALICE AL-SABAH
(6) MISHAL ROGER AL-SABAH **DEFENDANTS**

Mr. Andrew Popplewell instructed by Mr. Graham Ritchie of Charles Adams, Ritchie and Duckworth, for the plaintiffs.

Mr. Ewan McQuater instructed by Mr. Huw Moses of Hunter & Hunter, for the 1st to 4th defendants.

Mr. Adrian Beltrami instructed by Mr. Diarmond Murray of W. S. Walker & Co, for the 5th and 6th defendants.

SMELLIE J **JUDGMENT**

The plaintiff companies ("GT" and "THL") commenced this action by writ on the 28th June 1995. It is one of several offshoots of proceedings ongoing in London against some fifty-six defendants

including a Sheikh Fahad Mohammed Al Sabah.

GT and THL are incorporated in Spain and England respectively and are beneficially owned by the Kuwaiti Investment Office ("The KIO"). The KIO is the Overseas Investment vehicle established by the Kuwaiti Government.

Sheikh Fahad is the former chairman of the KIO and former president of GT. He is alleged to be the central figure in a fraudulent conspiracy by which the plaintiffs have been defrauded more than 450 m United States dollars, of which some 337 m dollars remain untraced and unaccounted for. Of the sums accounted for, 22.5 m dollars have been traced into accounts or trusts connected to Sheik Fahad. The amount of 3 m dollars has been traced into an account held on his behalf by Bahamian lawyers and of that, the lesser sum of 2.4 million has been shown to have been spent in the maintenance and upgrading of assets held by a trust called the Comfort Trust.

The Comfort Trust is an instrumentality of Sheikh Fahad - he is its grantor and its only primary beneficiary, although the 5th and 6th defendants are named as contingent beneficiaries.

The Comfort Trust is domiciled in the Cayman Islands and the 1st defendant is trustee. It is joined as a party for that reason. The second, third and fourth defendants are companies by which assets of the Trust are held.

Following on the filing of the writ in this action, there were interlocutory applications by which ex parte mareva injunctive relief, early disclosure orders and leave to serve outside the jurisdiction on the 2nd to 6th defendants were granted to the plaintiffs. Then followed inter partes hearings in which, among other things, the early disclosure orders in favour of the plaintiffs were varied and the ambit narrowed for reasons given in a written ruling dated 7th August 1995. Up until then no statement of claim had been filed by the plaintiff. Filed on 31st August 1995, the statement of claim contains claims (in paragraphs 12 - 17) for the sum of $3 million traced to the Bahamian account and of which the lesser sum of $2.4 m is claimed to be traceable into certain assets of the Trust.

Paragraphs 18 - 21 contain "claims in respect of further receipts of the plaintiff's monies." Those paragraphs contain no further particularisation of the further monies alleged to have been received. They assert what may be described as a bare tracing claim and a bare claim of unjust enrichment.

The present application by the defendants, respectively in two separate summonses, is that this latter part of the statement of claim ("the wider claim") is bad and should be struck out.

As Mr. McQuater for the 1st to 4th defendants puts it - broadly speaking the basis of the application to strike out is that although there is some evidence to support the first part of the

statement of claim (the claim for $3 m) there is no evidence to support the wider claim.

Although that is the common basis of both strike out summonses, Mr. McQuater sought to emphasise the separate role and responsibilities of the first defendant. The Bank, as trustee, sought and obtained the earlier directions of this Court to defend against the plaintiff's claim. He emphasised that the interest of the trustee in bringing this summons and those of the 5th and 6th defendants in their summons did not coincide. Nor did they coincide with Sheikh Fahad's, who is not a party to these proceedings.

No suggestion was raised that the trustee, in bringing this application, has acted other than as an independent and responsible trustee.

What must not be overlooked, however, is the underlying reality of Sheikh Fahad's ultimate beneficial interest.

The strike out summonses

The summonses, in paragraph one, seek the same relief in near identical terms that:

> "Paragraphs 18 to 21 of the Statement of Claim filed herein on August 31, 1995 be struck out pursuant to Grand Court Rule Order 18 Rule 19 and/or the inherent jurisdiction of the Court."

It is just as well that I set out the provisions of GCR O 18 R. 19. The trustees and the 5th and 6th defendants between them seek to invoke all of its provisions, variously in support of their respective

summonses:

> "19. (1)the Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that -
>
> (a) it discloses no reasonable cause of action or defence, as the case may be; or
> (b) it is scandalous, frivolous or vexatious, or
> (c) it may prejudice embarrass or delay the fair trial of the action; or
> (d) it is otherwise an abuse of the process of the court, ..."

No reasonable cause of action - paragraph (1)(a)

This is the first ground on which both applications to strike out depend. The technical fulcrum of the complaints raised in both summonses is that the statement of claim in paragraph 18 - 21 (the wider claim) although pleading a tracing claim, failed to identify any property which the plaintiffs seek to trace and therefore discloses no reasonable cause of action. That, as a tracing claim is a proprietary claim and can only be based on specific assets into which the money to be followed can be traced, the wider claim in failing to identify and specify assets beyond the aforementioned sum of $3 m, discloses no reasonable cause of action and should be struck.

The rules governing an application to strike out a pleading for disclosing no reasonable cause of action are well settled. They have been invoked and applied in these Courts on a number of occasions in the past. The following passage from a leading English case provides an appropriate summary. I quote from the well known passage of the judgment of Stephenson L.J. in McKay v Essex Area Health

Authority [1982] 2 All E.R. 771 at 778: letters B-F:

> "The defendants have to show that the case is "obviously unsustainable" See A.G. of Lancaster v London and North Western Railway Co. [1892 3 Ch 274 at 273 per Lindley LJ; "obviously and almost uncontestably bad": See Dyson v A-G [1911] 1 KB 410 at 419 per Fletcher-Moulton LJ: see Nogle v Fielden 1 All E.R. 689 at 695, 697 "quite unsustainable": see Schmidt v Secretary for Home Affairs [1969] 1 All E.R. 904 per Denning MR "hopeless": see Riches v DPP [1973] 2 All ER 935. This is all summed up in a sentence from the judgment of Lord Pearson in Drummond-Jackson v British Medical Association [1970] 1 All ER 1094 at 1105..."the order for striking out should only be made if it becomes plain and obvious that the claim or defence cannot succeed."

It is also well settled that the court, when considering striking out on this ground, should not look beyond the allegations of fact put forward by the plaintiff in the pleadings (in this case the writ and statement of claim) and should assume that those allegations of primary fact are capable of being proved at the trial.

Assuming that those allegations are capable of being proved, the Court then proceeds to the examination of the issues whether it is nonetheless plain and obvious that the pleading is unsustainable and must fail if it goes to trial: see (CH Limited v F [1988-89] CILR 516 at p 520, and O 18 R 19 (2) itself which reads: "No evidence shall be admissible in an application under subparagraph (1) (a).").

But the defendants are not deterred by this strict approach.

They say it is plain from the plaintiffs' pleadings that there is to be no evidence capable of proving the wider claim. That paragraphs 18 and 19 of the statement of claim proceed upon suppositions and inferences as the basis for alleging that Sheikh Fahad (and hence the Comfort trust) received further substantial sums emanating from the four main fraudulent transactions through which the very large sums of the plaintiffs' monies were stolen. Moreover, they say that in the process of the detailed and extensive audit investigations and discovery so far, there has not been any direct evidence of Sheikh Fahad having received any sums beyond the sum of 22.5 m dollars already admitted and accounted for.

The defendants also rely on the leading cases which cite the basic principles governing an equitable claim in tracing and unjust enrichment: a plaintiff must be able to identify and specify the property which is his that he seeks to trace and by which he says a defendant has been unjustly enriched. See respectively Borden v Scottish Timber [1981] Ch 25 and Lipkin Gorman v Karpnale [1991] 2 A.C. 548.

In the former, at page 46, Buckley LJ concisely extracted the essential principles of the pure tracing claim in a case where the property claimed had become admixed with other property:

> "... in my judgment it is a fundamental feature of the doctrine of tracing that the property to be traced can be identified at every stage of its journey through life, and that it can be identified as property to which a fiduciary obligation still attaches in favour of the person who traces it."

In the latter case Lord Templeman (at pages 559 - 560) defined the nature of a claim of unjust enrichment and showed the similarities between that and a claim in tracing:

> "In the course of argument there was a good deal of discussion concerning tracing in law and in equity. In my opinion in a claim for money had and received by a thief, the plaintiff victim must show that money belonging to him was paid by the thief to the defendant and that the defendant was unjustly enriched and remained unjustly enriched."

Can the wider claim in tracing or unjust enrichment be sustained?

The answer to that question must depend on whether the inferences which the pleadings invite are themselves, prima facie, sustainable.

In answering that question and having regard to authority (see CH Limited v F (supra)) I consider it would be inappropriate to seek a finite answer at this stage to the further question whether the plaintiffs, at trial, will ever be able to present the evidence necessary to prove those inferences to the appropriate standards.

Given the known and relevant background to the pleadings, I can find no basis for concluding that they obviously will not be able to do so.

It is a matter of procedure and evidence.

Now that the pleadings are settled and the issues may be

fairly joined, there is, already to my mind, sufficient to allow the plaintiffs to invoke the course of discovery which the Court may properly direct.

For the following reasons, I consider that the statement of claim, in paragraphs 18 and 19, invites inferences which are reasonable and, as a matter of meeting the formal requirements of pleading, sufficient to disclose the aforesaid cause of action:

(a) As its chief executive officer, Sheikh Fahad was the plaintiffs' fiduciary. Thus fiduciary obligations still attach to all of the plaintiffs' money stolen by him and passed on by him to any person or entity:see Borden (UK) Ltd v Scottish Timber (supra).

(b) He is alleged and prima facie shown to have been the pivotal figure in the very sophisticated and elaborate scheme by which the plaintiffs have been defrauded enormous sums of money.

(c) Although 22.5 m dollars of that money have been traced directly to him (and through him, 2.4 m dollars to the Comfort Trust), approximately 337 m dollars remain unaccounted for. Notwithstanding the alleged involvement of 55 other defendants, because of his pivotal position, it is reasonable to infer that he would have received other further proceeds of the fraud.

(d) The very fact that such enormous sums remain unaccounted for, is testimony to the elaborate and extensive nature of the scheme employed to hide the trail. It also results in the plaintiffs being placed in the difficult position of having reasonable belief and grounds to infer, but with the direct evidence of receipt, or for that matter, of non-receipt, resting only with the defendants.

(e) Sheikh Fahad has become regarded and described by the English Courts as a sophisticated international fraudster. He has been shown to use his Trusts (the Esteem Settlement in Jersey and the Comfort Trust) as repositories of large sums of the plaintiffs' monies and as vehicles by which to maintain his personal life-style, he being the Trusts' grantor and, at the same time, their sole primary beneficiary.

(f) Notwithstanding that he has, admittedly, at least become "mixed up" in the fraud and has been ordered so to do by the English Courts, Sheikh Fahad has repeatedly failed to give complete and frank disclosure of the assets of his Trusts - citing what at best can only be described as legal technical reasons.

At no stage should it be forgotten that this is a case of blatant fraud perpetrated on a massive and labyrinthine scale.

Plaintiffs which are the victims of such a scheme are entitled to expect that a court of justice will afford them all the latitude which the rules permit to arrive at the just disposition of their claim.

There are the off-cited and special rules of discovery (see Banks Trust Co v Shapira [1980] 1 WLR 1274 and Norwich Pharmacal v Customs and Excise Commissioners [1973] 2 All E.R. 943) which have been developed to assist such plaintiffs and which obligate anyone who has become "mixed-up" in the wrongdoing to do all he can to assist the victim by giving full information which would include, to my mind, in a case like this, information whether the wrongdoer may have sought to benefit any defendant by paying into it monies which may likely belong to the plaintiffs.

That is an issue which, I expect, will have to be squarely met, at the appropriate time, by all concerned in this case.

There can be no legitimate expectation of avoiding it.

In earlier proceedings, this Court found an arguable case for the plaintiffs, sufficient on which to grant ex parte, and to continue after inter partes challenges, mareva injunctive relief over all the assets of the Comfort Trust.

That arguable case depended then as it still depends, upon the reasonable inference that Sheikh Fahad received and was likely to pay into the Comfort Trust, more of the plaintiffs' monies, in excess

of the sum of 2.4 m USD already traced to the Trust.

The limitations later placed on the ambit of early disclosure in favour of the plaintiffs, were placed for reasons then given (see ruling of 7th August 1995). Nothing in those reasons should be seen to contradict the reasonableness of those inferences which may still be drawn and which, as I conclude, may properly be the pleaded basis of the wider claim.

It may as well also be noted at this stage that this Court will not be a mere bystander to its own proceedings - allowing the rules of pleading to become foils in the hands of parties for use merely in a manoeuveral contest, until one side disables the other.

The rules are intended to serve the ends of justice.

At the appropriate time and upon the appropriate application that must surely involve assistance to the plaintiffs in this case by way of full and frank discovery.

The plaintiffs should thereupon be better informed so as to be able fully to particularise their case in the wider claim. If they are then still unable to do so, it may then be more appropriate to hear the complaint of litigants who have become mixed up in the fraud, against the plaintiffs, seeking to say that the plaintiffs' claim is obviously unsustainable.

Until then the wider claim can and should stand if only on the basis of the reasonable inferences available.

For the conclusion that such inferences may be the primary basis of a claim in a case of complex fraud, some support may be gleaned from the approach taken in Arab Monetary Fund v Hashim and Others (No.2) [1995] 1 All E.R 673. In that case where Mrs. Hashim had become 'mixed up' in her husband's fraud perpetrated against the fund, a pleading which asserted a right to trace against her "in so far as she remained in possession of (the fund's) moneys or assets" was upheld. So far as Mrs., Hashim was concerned, those assets against which tracing claims were made included "any money in her Toronto bank account ..." and generally "any other substantial assets" which she had not yet disclosed. Hoffman J opined at page 678 letters E-F. "In my view it is enough to plead that the defendant recovered and retains assets which are identifiable as representing the plaintiff's money."

In that context I read the word "identifiable" in contradistinction to "identified".

In a case where, as in this, the plaintiff at that early stage could rely only on inference that the defendants were likely to have received as yet undisclosed sums, and because of their proven involvement, the learned judge allowed the pleadings of a tracing claim to stand on the reasonable inferences. The assets claimed, though not yet specifically identified, were identifiable nonetheless.

I therefore conclude that in a case such as the present, it must be only appropriate that the plaintiffs should be entitled to frame their pleadings in general terms and defer particularisation until after discovery.

A further observation is, I think, necessitated by the nature of this case and by submissions made in respect of the application of the principles of the Bankers Trust v Shapira case (supra).

While it is correct that a tracing claim in equity (or a claim for unjust enrichment) must begin with property which can be traced, I do not understand the principles as allowing a defendant who is mixed up to say "you must first establish the trail of each and every asset to me before I am obliged to give you full and complete assistance". Or that "I am only obliged to assist you to the extent you can prove what of your assets I have received."

If that were so why would a plaintiff need assistance, and why would a defendant who is 'mixed up' be required to give assistance?

Finally, I do not consider that the defendants' obligation to assist is in any way diminished by the fact that they are named as defendants (and thus engaged in the adversarial process) and because there is not a separate "Bill of Discovery" action of the sort revived in the Norwich Pharmacal case (supra).

Although the Trustee is reputable and responsible, and although there are other defendants with contingent beneficial interests in the Comfort Trust, there can be no gainsaying the fact established by the available evidence, that Sheikh Fahad remains the sole primary beneficiary and that the interests of the Comfort Trust are coincidental with his own interests.

Frankly, in a case such as this, I can see nothing inequitable about allowing a trail of discovery to be demarked and followed, if it leads from the Comfort Trust back to the coffers of the plaintiffs who have been defrauded, instead of first going the other way around.

The reasonable inference, already established, is that such a trail, wider than that of the sum of 2.4 m dollars, may well exist.

For those reasons, the defendants have failed to discharge the onus on them to show that no reasonable cause of action in respect of the wider claim exists.

The other grounds of the strike-out summonses - O.18 r. 19 (b), (c) and (d)

These also depend on the first ground to the extent that if, as in the event I have found, there is a reasonable cause of action shown, very little else by way of complaint remains to justify striking out the wider claim.

Although the grounds of "frivolous and vexatious and abuse of the process" are such as to invite and allow a more detailed examination of the evidence, the object of such an examination would, at this stage, only be to measure the degree of persuasiveness of the inferences to be drawn.

In that sense, I am invited by the defendants to conclude that the inferences to be drawn at this stage, must be at least very persuasive to allow the wider claim to continue to discovery and/or trial.

Apart from the importance of first identifying property in a tracing action, the defendants (in particular the 5th and 6th defendants) cite what their counsel, Mr. Beltrami, described as "a clear risk of injustice arising out of the continuation of an action without a reasonable underlying basis." If the present action were to proceed in its current form, to discovery, his argument goes, the trustee would be obliged to reveal confidential information as to the assets and operation of the Trust - information which was refused as part of the injunction."

To my mind, such an argument rings rather emptily when its ultimate refugee, Sheikh Fahad, carries, himself, such heavy and unfulfilled obligations in respect of disclosure in the wider action in which he is a party.

I have no reservation at all that a proper order for

discovery can be eventually drawn, with the aid of experienced counsel, to ensure that discovery excludes information about assets of the Trust obtained prior to the times of the fraud or from sources other than Sheikh Fahad himself. No proprietary tracing claim can initially attach to those assets. If those assets (in addition to those already admittedly so affected) have been maintained or improved by use of the plaintiffs' monies, then different considerations may apply.

In this last regard his own evidence (given in his 7th affirmation in the English proceedings) is that apart from one asset (a house in the Bahamas) settled upon the Trust by his wife, all other Trust assets came from him.

Other submissions, made by reference to the manner and style of the pleadings in the English proceedings as a measure of what might be proper or acceptable pleadings in this jurisdiction, can be shortly disposed of.

The plaintiffs have traced substantial sums of money to the Comfort Trust in this jurisdiction. In England, where Sheikh Fahad is amenable as a defendant, they seek, inter alia, to recover all their monies in a claim based on constructive trusteeship, in personam.

It does appear from the points of claim that the proprietary tracing claims in England are limited to those sums which are already identified and already specifically traced.

I am not prepared to second guess the English Court or the plaintiffs' counsel as to what may be the proper pleadings to bring there and certainly not for the purpose of deciding whether pleadings before this Court are frivolous and vexatious.

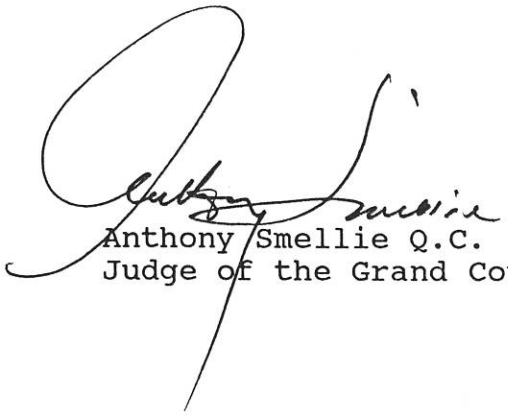
I can only proceed, as I have attempted to do, upon an examination of the merits of the pleadings before this Court.

As to abuse of process, I was again driven to the view that the arguments of counsel for the defendants were unhelpful. They invite speculation as to the motive of the plaintiff in mounting these proceedings in this jurisdiction.

If the pleadings are not obviously unsustainable, there can be no basis for striking them out because the defendants perceive an ulterior purpose i.e. the objective of getting discovery to further the proceedings in England.

Whatever the true objectives of the plaintiffs may be in that regard, there are clear and well established safeguards to prevent abuse. I need not recite them here. But it may be important to note that in a proper case and with the proper safeguards, the Court may well order a defendant to give disclosure to assist a plaintiff to pursue the wrongdoer in a foreign jurisdiction, provided it is shown that the defendant had become mixed-up in the subject-matter of the wrongdoing: Smith Kline & Trust Laboratories Ltd. v Global Pharmacutics Ltd. [1986] R.P.C. 394.

For those reasons I refuse the defendants' application on grounds 2, 3 and 4, as well.



Anthony Smellie Q.C.
Judge of the Grand Court.

23rd November 1995.