5/2/08

IN CHAMBERS
IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO: 104/2005

BETWEEN:

TRITTON DEVELOPMENT FUND LTD

Plaintiff

AND:

(1) FORTIS BANK (CAYMAN) LIMITED(FORMERLY MEESPIERSON (CAYMAN) LIMITED)
(2) MEESPIERSON MANAGEMENT (CAYMAN) LIMITED
(3) MEESPIERSON NOMINEES (CAYMAN) LIMITED

Defendants

Before: The Honourable Madam Justice Levers

Appearances:
Counsels for the Applicant (First Defendant): Mr. David Railton,QC with Mr. J. Tarboton of Appleby
Counsels for the Respondent (Plaintiff): Mr. Leslie Kosmin, QC assisted by Mr. K. Farrow of Mourant du Feu & Jeune

Heard: 10th & 11th January 2008

JUDGMENT

GRAND COURT CAYMAN ISLANDS

Levers, J.

This an application by the First Defendant ("MP Cayman") for summary judgment under GCR Order 14, rule 12 and/or the inherent jurisdiction of the Court.

A brief history will suffice for purposes of this application. The Plaintiff is a investment holding company and suing the First Defendant ("MP Cayman") for damages together with pursuing other claims against the Second and Third Defendants ("MP Management" and "MP Nominees").

The claims against the First Defendant are for damages, for breach of contract, negligence and breach of fiduciary duty arising from its position as investment manager pursuant to an Investment Management Agreement dated 2nd June 1999.

This is a very late application as the trial is due to begin in November of this year.

Background

Tritton Development Fund Limited was incorporated on 21st May 1999, the Second and Third Defendants were appointed as directors of Tritton on the same date. The Investment Management Agreement became effective on 18th June 1999.

On 29th June 1999, there was also an Administration Agreement with the Plaintiff.

The summons for summary judgment is based on MP Cayman's contention that as a result of the wording of a letter from it to Tritton dated 20th June 2001, any claims which Tritton may have against MP Cayman in respect of obligations arising from the investment management agreement between the two of them and Tee Square Limited have been settled. MP Cayman therefore contends that Tritton's claims made in the action have no reasonable prospect of success under GCR Order 14, rule 12 and/or the inherent jurisdiction of the Court.

GCR Order 14, rule 12 (1) provides:

> "Where in an action to which this rule applies a defence has been served by any defendant, that defendant may, on the ground that the plaintiff's claim has no prospect of success or that the plaintiff has no prospect of recovering more than nominal damages, apply to the Court for the plaintiff's claim to be dismissed and judgment entered for that defendant."

On the other hand, if I was to deal with it under the inherent jurisdiction of the Court, I agree with the Plaintiff's attorney that in order to dismiss a claim

which amounts to an abuse of the Court's process there is no free standing basis for the summary dismissal of a boni fide claim where abuse of process is neither alleged nor shown.

I have not heard any submissions nor has any evidence been led that this is an abuse of process and therefore, I will base my judgment entirely on the issue of the construction of the relevant agreement. In short, if the settlement is a complete defence as alleged by MP Cayman, it would be entirely appropriate to dismiss those claims brought in these proceedings. If however, it is not a complete defence and I find that there are triable issues then obviously it is only right that this matter go to trial.

It is convenient at this stage to describe the documents and the events that form part of this claim by way of a short introduction.

Events

In 1998, a banking group called "Nomura" acquired a substantial shareholding in a large Czech Bank. At about the same time Pembridge Investments BV, a member of that banking group, entered into an agreement

to acquire indirect ownership of the Pilsners brewery with an option to pay for the interest by a transfer of Nomura's IPB shares at an agreed value per share.

As part of that agreement, three Czech intermediary companies borrowed approximately 7.15 billion CZK (then worth about $220 million US) from IPB in return for the issue of promissory notes by them to IPB payable on 31st December 1999.

They then loaned the money to a company owned by them which used it to purchase shares in the company which owned the brewery.

The Czech Beer Sellers, the three Czech intermediary companies, assigned to Pembridge their loans and their shares in the company owned and incorporated by them to which they had loaned the money, thereby giving Pembridge indirect ownership of the brewery, in return for promissory notes issued by Pembridge and a cash payment.

It was a term of the promissory notes issued by Pembridge to the Czech Beer Sellers that they could be settled by the transfer of Nomura's IPB shares.

As a result of all this, the position was that IPB held promissory notes issued by the Czech Beer Sellers for CZK 7.15 billion and the Czech Beer Sellers held promissory notes issued by Pembridge which were in the same amount but which could be settled at Pembridge's option with IPB shares.

Tritton was incorporated, as I stated previously, on 21st May 1999. Its authorized capital was divided into "founder" shares and "participating" shares. At all material times, all of the participating shares were held by IPB.

In June 1999, Tritton participated in a series of transactions known as "Project Leo", which had the effect of substituting two Cayman Islands companies, Torkmain Investments Limited and Levitan Investments Limited, for the Czech Beer Sellers in the arrangements described previously.

The Second and Third Defendants were also appointed directors of Torkmain and Levitan.

These transactions were known, as stated previously, as "the Project Leo transactions" and set out in a document dated 5th May 1999. In summary it was proposed that:

IPB would transfer the Czech Beer Seller's promissory notes to Torkmain and Levitan in consideration for promissory notes to be issued to IPB by them, payable on 31st December 1999 ("the T&L Notes").

Torkmain and Levitan would transfer the Czech Beer Sellers Notes to Pembridge in consideration for promissory notes to be issued to them by Pembridge and guaranteed by Nomura, payable on 31st December 1999. These were called "the Pembridge Notes". Torkman and Levitan would also grant options in favour of Pembridge ("the Put Options") whereby Pembridge could settle the Pembridge Notes with IPB shares at a deemed value.

Pembridge and the Czech Beer Sellers would settle their obligations between each other by setting off the Czech Beer Seller promissory notes acquired by Pembridge against the Pembridge/Czech Beer promissory notes held by the Czech Beer Sellers.

The end result would be that Pembridge would have a liability to Torkmain and Levitan (guaranteed by Nomura) which would in turn have a liability to IPB in respect of the acquisition of the Czech Beer Sellers promissory notes.

IPB would contribute the T&L Notes to Tritton in consideration for the issue of participating shares in Tritton.

The agreements were executed on 2nd and 3rd of June 1999.

As of 3rd June 1999, Torkmain and Levitan had no assets other than the Pembridge Notes. Their ability to satisfy their obligations, was obviously then dependent on Pembridge's actions.

On 16th to 17th December 1999, some of the Project Leo agreements were modified:

(1) The Subscription Agreement between Tritton and IPB, which had been executed but not yet completed, was amended to increase the number of shares to be issued from 250 to 300.

(2) The Pembridge Notes and the T&L Notes were replaced with new notes on substantially the same terms except that they were payable on 31st December 2000, instead of 31st December 1999, and the new T&L Notes provided for recourse against Torkmain and Levitan to be limited to their assets. These would be called "the New T&L Notes". (The Plaintiff has substantial submissions on this and they will be referred to later in the judgment. Here it is, suffice to say that the Plaintiff contends that this was to the detriment of the Plaintiff, that is the limitation of the liability as well as the extension).

(3) The Put Options granted by Torkmain and Levitan to Pembridge were extended to 31st December 2000.

The subsequent events

On 16th June 2000, IPB was put into conservatorship, a form of compulsory administration under Czech law.

On 19th June 2000, the enterprise of IPB was acquired by another Czech bank, CSOB.

On 21st August 2000, Jan Lucan of CSOB, Tomas Skoumal of Baker & McKenzie and Simon Pascoe and Kenneth Farrow of Quin & Hampson were appointed to act for Tritton under powers of attorney.

On 25th August 2000, MP Cayman gave notice of termination under clause 5.5 of the Investment Management Agreement which effectively concluded their service on 8th September 2000 and concluded the Administration Agreement on 24th November 2000. 14 days' notice was given to the Plaintiff under the Investment Management Agreement.

The following events play an important part in this application:

(1) On 12th January 2001, MP Cayman sends Tritton invoices for its fees under the Administration and Investment Management Agreements.

(2) Tritton writes to MP Cayman on 24th January 2001, asking for the NAV's which has been used in the calculations of the invoices.

(3) In March 2001, there are meetings in Grand Cayman between MP Management, MP Nominees, MP Cayman and Tritton. These meetings will play some role in the conclusion reached on this application and will be referred to later.

(4) On 16th April 2001, MP Cayman replies to Tritton setting out the NAV calculations and the basis for them and asking for any comments urgently.

(5) On 16th May 2001, Mr. Murphy of MP Cayman emails Mr. Lucan chasing for a response to the letter of 16th April 2001 about invoices.

(6) On 18th May 2001, MP Cayman writes to Tritton, asking again for any comments on the NAV calculations.

(7) On 4th June 2001, MP Cayman writes further letter to Tritton containing a without prejudice proposal.

(8) On 8th June 2001, MP Cayman writes to Tritton in response to an instruction received on the previous day to transfer the balance on Tritton's account with MP Cayman to a new bank account at HSBC Cayman.

(9) Tritton replies to MP Cayman on 19th June 2001.

(10) On 20th June 2001, MP Cayman writes to Tritton.

At this stage I think it is appropriate that I set out the letters that are the substance of this claim.

The letter of 8th June 2001, which MP Cayman wrote to Tritton said this:

"...Our invoices, in the total sum of US$588,712.51, were sent to you on 12 January 2001 and, as such these fees have been now outstanding for over four months.

You have indicated to us that there is an issue concerning the amount of our fees. However, to date, you have failed to particularise what the issue might be, apart from the statement that it relates to. The valuation of your portfolio. Given the fact that we believe our fees to be properly calculated, due and owing, and your recent request to close the accounts will result in us holding no funds with which to discharge the administration and investment management fees owed, we regret to inform you that we feel that we cannot currently transfer the funds as requested..."

The letter of 19th June 2001, Tritton replied:

"We do not agree with your questionable NAV calculation as expressed in our previous letters to you, but on the other hand we understand you need to be paid for the outstanding period (till your resignation on November 25, 2000). Due to this fact, we suggest to pay a total amount of US$500,000.00 for the outstanding administration and investment management fees. After this payment is made any and all our obligations arising from Administration Agreement dated 29 June 1999 and the Investment Management Agreement dated 2 June 1999 both entered into between (Tritton), [MP Cayman) and Tee Square Limited will be considered undoubtedly settled. .."

This letter was copied to Quin & Hampson.

On 20th June 2001, MP Cayman wrote to Tritton:

"Thank you for your facsimile letter dated 19 June 2001 addressing the payment of our outstanding fees. In order to draw this matter to a conclusion we accept your offer of payment of US$500,000. Once payment is made, we confirm that *any and all obligations between us arising from the Administration Agreement dated* 29 *June* 1999 *and the Investment Management Agreement dated* 2 *June* 1999 *both entered into between us, you and Tee Square shall be settled.* Obviously, we must make the point that we

> do not accept that our fees are, or were, based on a "questionable NA V calculation...
>
> Please send to us an instruction to transfer US$500,000 from the account of Tritton to the account of [MP Cayman), and an instruction to transfer the balance of Tritton's account with Fortis to HSBC."

And finally, on 26th June 2001, Tritton sent the instructions which MP Cayman had requested on 20th June 2000, that is, to pay US$500,000 from Tritton's account to MP Cayman for administration and investment management fees and to transfer the balance to HSBC (Cayman).

The crux of all this correspondence and the alleged settlement is contained in the following words from the letter of 20th June 2001. Quote:

> "We confirm that any and all obligations between us arising from the Administration Agreement dated 29 June 1999 and the Investment Management Agreement dated 2 June 1999 both entered into between us, you and Tee Square shall be settled."

This, of course, was agreed on the basis that payment of $500,000 was to be made to MP Cayman. It is worthy of mention that there is no termination letter from Tritton to MP Cayman in the correspondence and these agreements did not come to an end through a effuxion of time. The First Defendant gave 14 days' notice in accordance with the Investment

management Agreement to terminate their services as an investment manager.

From the above, it will be seen that the claims of the Plaintiff against the First Defendant all arise out of the extension given on the promissory notes and relate solely to MP Cayman's position as investment manager.

The claims are detailed in the Re-Amended Statement of Claim and allege: (1) that as a result of the actions of the Defendants, full payment or at least the chance of obtaining full payment or improved terms as to the method of payment of the Pembridge Notes (which were the subject of guarantee by Nomurra Europe) was lost by Torkmain and Levitan and thereby Tritton in turn lost the chance of obtaining a full payment or at least some return or a higher return in the respect of the debts under the T&L Notes.
(2) Pending the disclosure by the First Defendant Tritton is not aware of what (if any) advice MP Cayman was requested by Tritton to give, or gave, to Tritton in relation to the transaction pleaded at paragraph 24 hereof. (Which, of course is the transaction of the New T&L Notes. It is the Plaintiff's case that Tritton Cayman should have advised the Plaintiff); and

(3) It is advised, that MP Cayman acted willfully and/or recklessly with gross negligence and in reckless disregard of its obligations and in breach of contract and negligently in advising Tritton to participate in the said transactions.

The First Defendant states that it gave no advice whatsoever but that even if it did, the Plaintiff is estopped because of the settlement agreement referred to above dated 20th June 2001.

As stated earlier, the entire case revolves around the construction of these words that I have quoted.

The Applicant's Case

The defence is formulated in paragraph 35A and 35C of the Re-Amended Defence and Counterclaim.

In short, it says that, MP Cayman did not advise the Plaintiff in relation to any of the transactions pleaded in paragraph 24 of the Statement of Claim (the new transactions; and denies that the First Defendant owed any duty to

the Plaintiff to ensure that it sought to obtain professional advice in relation to the transactions pleaded. Paragraph 35C of the defence states:

> (1) that the First Defendant denies that it ought to have advised the directors of the Plaintiff to insist (or threaten to insist) on payment of the T&L notes on 31 December 1999 as alleged;
>
> (2) that it owed no duty to advise Tritton in relation to the transaction; and
>
> (3) that the Investment Management Agreement properly interpreted extended only to the management of the investments held by Tritton and not to the acquisition of assets by way of share subscription; and
>
> (4) MP Cayman was not requested to give any advice. Therefore MP Cayman does not have any obligation in the first place. MP Cayman submits that even if the Court held that there was an obligation to give advice, the Plaintiff is estopped now because of that letter of 20th June 2001, which categorically stated that it was released under the agreement.

Mr. David Railton, QC on behalf of the First Defendant also relies on the further and better particulars supplied by the Plaintiff, which read:

The request:

> In the light of the admission at paragraph 24A of the Re-Amended Statement of Claim that Tritton is not aware of what if any advice MP Cayman gave to Tritton, state all facts and matters relied on in support of the allegation that MP Cayman advised Tritton to participate in the pleaded transactions.

The reply:

> The words "To the extent that MP Cayman advised Tritton to enter into the transactions pleaded in paragraph 24 hereof, it is averred" that were incorrectly deleted from the Re-Amended Statement of Claim, and that paragraph should be read as if those words still formed part of that pleading (and as if the consequential addition of the words "it is averred" that had not been added by amendment). Accordingly, pending discovery and/or the administration of interrogatories herein Tritton does not plead a positive case that MP Cayman advised Tritton to participate in the pleaded transactions.

There is still left the question of whether a duty was owed and whether it was in fact negligent and/or reckless not to give advice and/or agreed to an extension of the promissory notes.

The question is simply this, whether the words used in that letter, *"any and all obligations between us arising from the administration agreement dated 29th June 1999 and the investment management agreement dated 2nd June 1999, both entered into between us, you and Tee Square shall be settled."*

Does that encompass all obligations or in the context, in which it was written, does it release the First Defendant from all and/or any obligations under the contract, including the fundamental basis of an investment management agreement which this Court is of the view must include the handling of assets, as put by the Defence. But also the management of assets and the management of investments of the assets, the advice given if any, and the care that should be taken in investing those assets.

The First Defendant relies on the case of *ICS v West Bromwich* [1998] 1 WLR page 896 and in particular, Lord Hoffmann at page 912-913:

> "1 do not think that the fundamental change which has overtaken this branch of the law, particularly as a result of the speeches of Lord Wilberforce in *Prenn v. Simmonds [1971]* 1 W.L.R. 1381, 1384-1386 and *Reardon Smith Line Ltd. v. Yngvar Hansen-Tangen* [1976] 1 W.L.R. 989, is always sufficiently appreciated. The result has been, subject to one important exception, to assimilate the way in which such documents are interpreted by judges to the common sense principles by which any serious utterance would be interpreted in ordinary life. Almost all the old intellectual baggage of "legal" interpretation has been discarded. The principles may be summarised as follows:
>
> (1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having **all** the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.
>
> (2) The background was famously referred to by Lord Wilberforce as the "matrix of fact," but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the

> language of the document would have been understood by a reasonable man.
>
> (3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.
>
> (4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax. (see Mannai Investments Co. Ltd. v. Eagle Star Life Assurance Co. Ltd. [1997] 2 WLR 945).
>
> (5) The "rule" that words should be given their "natural and ordinary meaning" reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in *The Antaios Campania Naviera S.A. v. Salen Rederierna A.B.* [1985] A.C. 191,201:
>
> ". . . if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense"."

The speech is set out in full for the records, however, the paragraphs that attracts this court most is paragraph 4.

> "The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax. (See Mannai Investments Co. Ltd. v. Eagle Star Life Assurance Co. Ltd. [1997] 2 WLR 945).

The First Defendant argues that it is apparent from the pleadings that the Plaintiff's claims against the First Defendant are based on MP Cayman's contractual and fiduciary obligations as investment manager pursuant to the agreement and any secondary obligations to pay damages or compensation for their breach are obligations arising from the IM Agreement. Tritton's claims are therefore clearly within the scope they submit, of the First Defendant's letter of 20th June 2001 and have clearly been settled by payment of that $500,000.

There are some subsidiary matters which the First Defendant's QC has brought to the attention of the Court.

The negotiations in March 2001, did not refer in any way whatsoever to the question of fees and obligations under the investment contract. There were attorneys from both sides, he submits, and yet there was no question of any discussion as to invoices. The Plaintiff's on the other hand denies this and

state that they were discussions that did not come to any amicable settlement. However, Mr. Railton submits, that previous negotiations are not relevant.

He also relies on the question of lack of knowledge of claims against MP Cayman. He cites instances where lawyers were involved and these claims could have been raised as early as 2001, but were not. But, he submits in any event, the release of claims of which the Plaintiff was unaware, or did not have any knowledge, is possible and he cites the case of *BCCI S A v Ali* [2002] 1 AC, at page 251, a House of Lords decision, in support. He submits that Lord Bingham said in that case:

> "a court will be very slow to infer that a party intended to surrender rights and claims of which he was unaware and could not have been aware" ---, although that is not a rule of law but a cautionary principle."

But I must, he submits, through a caution a way in this matter as the Plaintiff on it's own evidence was in fact aware or at least could have been aware of the claims it now wish to make against MP Cayman. Relies on the words of Mr. Lucan, a Plaintiff representative, that he was: *"aware of the theoretical possibility of bringing a claim"* and that *"potential claims might exist"*. With respect, I will not go into that aspect of the matter in my judgment at a latter stage because it is my view, that anyone who signs an investment

management agreement must be aware of the contractual obligations and duties and fiduciary duties (if any) on the signing of this agreement and therefore the question of '*theoretical possibility*' must always exist in the minds of the parties that is the subject matter of an agreement.

He also talks of the timing of the defence. He submits that the First Defendant first raised the settlement agreement as a defence, by a letter dated 13th June 2007 and that the Plaintiff did not object. He explains this by saying that it is genuine reason for the delay because the writ of summons was taken out some five years after the events and the First Defendant simply forgot.

In any event, he says, the delay does not really matter because if a settlement was agreed on then its validity cannot be affected by a delay in pleading it.

There is a memo of come interest called "the Murphy Memorandum" dated February 14th 2000 and that is an internal memo written by Mr. Murphy who was appointed by the First Defendant, Mr. Railston's client, to report on findings to date that was dated 14th February 2000, together with a short plan for the year for the First Defendant. It is extremely critical of the standard of

competence of the First Defendant and furthermore, it speaks of: *"the level of service being provided to clients is of a generally poor standard and in the last three months of 1999 I had to focus on avoiding potential breaches of trust and the risk of law suits. One written complaint was made in September 1999 to the Cayman Islands Monetary Authority resulting in authorisation at our cost of an external audit by KPMG of our files to assure the client we have properly administered the company and its assets."*

Going by the records alone it is impossible at this stage to say whether any material errors have been made. The audit commenced on February 14th and it is expected to last +/- 3 weeks. He goes on: "Two of our significant clients where we had serious service and administrative issues were Tritton Development Fund (TDF), and …of which we own 49.9%.

Tritton is a regulated Cayman Islands mutual fund that directly and indirectly own 600 million of Czech Republic securities or around 6% of Czech industry. The fund is administered by Fund Services and PBT provides structural services to and, more significantly, is Investment Manager of TDF. It is interesting that Mr. Murphy himself makes a distinction between administration, structural services and being an

investment manager. However, Mr. Railaston dismisses this letter and says he does not intend to respond to it because it is related to administration and service of the business. He does not assist the court by going into distinction between administration and service of the business. He deals with the question of unconscionability and submits that it is the principle that a court of equity will not permit a party to enforced contractual release that has been obtained by sharp practice or unconscionable conduct in the form of taking advantage of the innocent party's ignorant of its rights of claim. However, he submits that the First Defendant hid nothing, that all the evidence was before the Plaintiff and there is no evidence that the First Defendant advised the Plaintiff and the question is, what was their knowledge at the time of the settlement, he submits that it is impossible to say it was deliberately concealed. That Tritton could have been aware as he stated previously and that this is the most credible evidence that there is and that is that Tritton made a considered decision to release the First Defendant of all its obligations on the agreement on payment of $500,000.

The Plaintiff's Case

Mr. Kosmin, QC on behalf of the Plaintiff submits that this is a strange application, that the pleadings have been closed and that the only reason this application is now being made is because the First Defendant forgot the settlement which was buried in the files (considering that they had the same solicitors all along and that the Plaintiff requested security for costs of $900,000US) is an extraordinary piece of timing, he submits. He refers me to the sequence of correspondence, the affidavit of Mr. Tillemans in support and reminds me at the very start of his submissions importantly that the Murphy Memorandum was not sent to his clients and that they only received it on the 27th September 2007, and that too only as a result of discovery. This application was filed after discovery. That nobody knew on the Plaintiff's side about the Murphy Memorandum, as indeed they could not have because it was an internal memorandum amongst the participance in the First Defendant's organization and that the First Defendant had a positive obligation to tell the Plaintiff when the release was sign that there was in existence this Murphy Memorandum, as Mr. Murphy was a key player. He was the sender and recipient of the settlement letters. Mr. Kosmin's submissions are:

(1) That the letters do not clearly state that the parties are released from their obligations and that on a careful perusal of the letters, it clearly indicates that they are dealing with fees; and

(2) That even if I was to hold that it was a release of all the obligations of the settlement, it would be unconscionable to allow the First Defendant to be released from obligations as a result of the Murphy Memorandum.

It is convenient at this stage to look the letters and bear in mind that the $500,000 was money already owed for work done, allegedly by the First Defendant and so this was not money paid as consideration for any release. Not new money. This was money already owed by the Plaintiff. Mr. Kosmin also points to various paragraphs including paragraph's 93 of Mr. Jan Kukacka's affidavit and refers me to paragraph 2.1 of the investment management which states "the fund hereby appoints the investment manager to act as and the investment manager hereby accept such appointment and agrees to act as investment manage the fund and to provide the services to the Fund on the terms set out in this agreement." At this stage that particular paragraph in the opinion of the Court a complete answer to Mr. Railtons

submission that Murphy's Memorandum deals purely with the administration, as and service aspects.

I am also referred to para 3.1© and (d) of the investment management agreement under the heading "Services to be provided by the investment manager" and also importantly para 3.7 (a) and (b) of the Investment Management Agreement which states:

"Avail itself of all skills and expertise relating to the investment or proposed investments of the Fund possessed by employees, directors or officers of the investment manager and the principal investment adviser; and (b) act as a faithful and honest advisor in relation to all advice given."

Because the First Defendant states that it did not give advice and therefore it is not in breach of that contractual obligation. I shall deal with that at a latter stage.

It is worthwhile looking at the Agreements whether there is in fact a settlement or not. Many of the letters written by Fortis have the following heading "Subject - Outstanding and Investment Fees". Indeed the letter of

the 19th June 2001 which is relied so heavily by Mr. Railton is headed up "Tritton Administration and Management Fees" not conditions of termination of agreement or settlement of all obligations but as fees. The Plaintiff submit that the letter of 20th June in response was not a counter offer as contended by MP Cayman and that it dealt entirely with Investment Management and Administration fees and nothing else, so that in fact there is no settlement. In short, they submit there is a triable issue, they was not full and frank disclosure which is incumbent on the First Defendant and that the actions of the First Defendant in any extending the promissory notes on terms inferior to the previous promissory notes are a breach of contractual duty. A further submission pertaining to the settlement is also that Mr. Lucan did not have the authority to settle and nor did Mr. Ditz.

Mr. Kosmin submits that it is for the trial judge to decide the commercial viability of such an averment and also to decide on the credibility of these persons. He submits that what has really happened according to the First Defendant, which defines our commonsense, is that the potential claim for 200 million US dollars was settled for a discount of 88,000 dollars and that the Plaintiff then gave up all the claims. Surely, he submits that attorneys would have been involved in a formal release. The plain effect of the

language, he says that has been used is clearly that the question of fees alone was being discussed and it was the question of fees alone that was settled. He relies on the case of *Sterling Hydraulics Limited v Dichtomatik Limited,* QBD 1 LR 8 [2007].

He submits the fact that no advice was given does not mean no breach of contractual or fiduciary duty. He relies on the case of *New Zealand Netherlands Society "Oranje" Lorentius Corneli Inc v Kuys and another* [1973] 1 WLR 1126; and also on the case of *Maguire v Makaronis* (1997) 188 CLR 449, an Australian case. The case was on appeal from the Supreme Court of Victoria. I quote at page 466, the Court held:

> "Thirdly, in the circumstances disclosed above, if the appellants were to escape the stigma of an adverse finding of breach of fiduciary duty, with consequent remedies, it was for them to show, by way of defence, informed consent by the respondents to the appellants' acting, in relation to the Mortgage, with a divided loyalty. What is required for a fully informed consent is a question of fact in all the circumstances of each case and there is no precise formula which will determine in all cases if fully informed consent has been given. The circumstances of the case may include (as they would have here) the importance of obtaining independent and skilled advice from a third party. On no footing could it be maintained that the appellants had taken the necessary steps of this

nature to answer the charge of breach of fiduciary duty."

Therefore the Plaintiff submits that:

(a) that this is not a settlement; and

(b) that even if it was, it would be unconscionable to allow that to estop the Plaintiff from pleading breach of contract and breach of fiduciary duty.

In response, Mr. Railton says:

(1) that the Murphy Memorandum is a skeleton that took place a long time and is irrelevant to the application because it really goes against the Second and Third Defendants. The unconscionability aspect of Mr. Kosmin's submissions, he says, had not been raised by way of a pleaded case. It is not relevant to this cause of action. It deals with the administration and service which is the same thing. The subsequent conduct, he says is irrelevant, the fact that the person who settled it had no authority to do so is irrelevant and that I must remember Lord Bingham's words that you must have been unaware and

could not have been aware and it was very clear, he submits, that the Plaintiff could have been aware and should have been aware of the potential claims.

(2) On the question of breach of fiduciary duty, he says, no pleaded case is made out. He submits that it was the Plaintiff who terminated the First Defendant's agree despite the 14 days' notice from the First Defendant. He says that there was no duty on the First Defendant and even if there was, it is settled.

The Law

The procedure for entering summary judgment is not limited to use by claimants against defendants. Defendants may apply for summary judgment to attack weak claims brought by claimants. Further, summary judgment can be used by the court on its own initiative to perform the important function of stopping weak cases from proceeding. The procedure can only be used for the purpose of obtaining a summary determination of some of the issues in a case, thereby reducing the complexity of the trial.

The test for summary judgment is, in this Court's view, that the court may give summary judgment against the claimant or defendant on the whole of a claim or in a particular issue, if

(a) it considers that:

(1) the claimant has no real prospect of succeed on the claim or issue;

(2) the defendant has real prospect of successfully defending the claim or issue; and

(b) there is no other compelling reason why the case or issue should be disposed at trial.

The burden of proof is on the applicant to prove that the respondent's case has no real prospect of success. The words 'no real prospect of succeeding" did not need any amplification as they spoke for themselves said Lord Woolf, MR in against *Swian* [2001] 1 AER 91.

> "The words 'real' directed the court to the need to see whether there was a realistic, as apposed to a fanciful, prospect of success. The phrase does not mean 'real and substantial' prospect of success. Nor does it mean that summary judgment will be

granted only if the claim or defence is 'bound to be dismissed at trial'."

In my view, this procedure is not meant to dispense with the need for a trial where there are issues which should be considered at trial. I must not conduct a mini trial on the documents without oral evidence and cross examination. The only way this application can succeed is if it is clear on uncontradicted or credible evidence that the parties had in fact come to a settlement and released the other party of all and any obligations that arise under the agreement and that at the time of the release, the parties knew full well what the circumstances of the release were, or if they did not know, could have found out what circumstances of the release were and that even if I was to hold that this was a settlement, that this would not be unconscionable to strike the matter out now and not allow it to go to trial.

Striking out a plaintiff's claim against the first defendant is a draconian step and the court must look very carefully at the issues and the interpretation of the letters. Within the bounds of judicial discretion justice becomes a reciudual value that can decide hard cases. I must

ensure that my action means justice for the parties before this court and justice must guide me in the decision I come to, so that even if I was to hold that this is a settlement, I must look carefully if this would be unconscionable for me to strike out the Plaintiff's claim against the First Defendant and grant the First Defendant summary judgment. This therefore revolves around a matter of construction of the terms of the letter of settlement, initially.

The Plaintiff says it revolves around the question of outstanding fees and the First Defendant says it does not revolve around the question of outstanding fees, it revolves around all the obligations that arise under the agreement and that they had sufficient information in order to decide at the time of signing the release.

Guided by the words of Lord Hoffmann, I must look at the context in which it was undertaken and I have done so above. Based on that and the fact that the pleadings are closed and discovery has just recently been made I have to look at the question of the construction of these letters. Is it clear from the correspondence that the basis of the correspondence is the unpaid fees to MP Cayman?

The correspondence is headed OUTSTANDING FEES the question of these came about as a result of invoices being sent and there is no question that the entirety of the correspondence deals with outstanding fees. The issue therefore, is, would persons who do not have the authority to settle in full have settled all obligations which they were unaware of, could have been aware of, in this cursory fashion, especially when lawyers were involved? It would, to may mind, not make commercial sense and would be a triable issue answered in cross examination at trial. Even if the question of whether the persons had authority to settle or not was irrelevant, the action is still in my view subject to several issues that must be settled at trial. I rely on the case of *Sterling Hydraulics Limited v Dichtomatik Limited* (quoted previously):

> "the key lies in identifying precisely when the contract was concluded but that involves analyzing the exchange between the parties in terms of offer and acceptance."

For purposes of such analysis it is often necessary to decide the meaning and effect of the rival terms in order to determine:

(1) whether the response of party (B) to the offer of party (A) was an acceptance of the offer or was a counter offer; and

(2) whether either party did enough to bring its terms to the attention of the other, for those terms to be incorporated into the contract. The more radical a term, the greater the notice required if it is to become part of the contract, as Denning LJ remarked in *Sperling v Bradshaw* [1956] 1 LR 392 at 396 column 2; [1956] 1 WLR 461 at 466 some __- would need to be printed in red ink on the face of document with a red hand pointing to them before the notice could be held to be sufficient.

I come to this finding based on the fact by virtue f other terms of the investment management. It is in my view incumbent on the First Defendant to show that it is alleged it used all caution when it acted on hindsight even in such a way that it was to the detriment of the Plaintiff, especially as the terms of the promissory notes extended by the First Defendant on behalf of the Plaintiff were terms which it is alleged were not as beneficial to the Plaintiff as the first set of terms were. There is no evidence before this Court at this stage that it was so clear to the Plaintiff

that it was a wise move or the decision was made to do this after a skilled and expert advice, that it is in my view a triable issue.

Taken on its own, the words could mean what the First Defendant submits but taken into the context of an investment management, the context of outstanding fees, it is certainly not clear that the Plaintiff intended to surrender the rights and claims of which it was unaware and could not possibly have been aware until discovery, especially the Murphy Memorandum. Dismissed at it is summarily by Mr. Railton this Court does not agree that it does not play an integral role in the court's mind in considering this application for dismissal.

Having considered everything I do not hold that this was a settlement of all and any obligations that could possible arise under the agreement. Even if I am wrong about that it is my view that, in view of the Murphy Memorandum and in view of the circumstances and knowledge that the Plaintiff could not possibly have had at the time of signing this release, if it is in fact a release, it would be unconscionable to strike out the Plaintiff's claim at this stage and that in fact there is a triable issue.

I therefore order that the application is dismissed and that the question of costs is reserved for a hearing at a latter date. The parties can either submit written submissions on the question of cost or attend a hearing for a date to be fixed.

Dated this 5th day of February 2008

Judge of the Grand Court