

**IN THE SUPREME COURT OF SEYCHELLES**

**Commercial Side: CC04 /2012**

**[2017] SCSC 88**

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**HEDGE FUNDS INVESTMENT MANAGEMENT LTD**

Plaintiff versus

**HEDGEINTRO INTERNATIONAL LTD.**

Defendant

**1. RAMINDER PANESAR**

**2. ASHLEY FRENCH**

Interveners

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Heard: 28 May 2012-16 November 2016

Counsel: Mr. Serge Rouillon and Mr. Bernard Georges for Plaintiff  
Mr. John Renaud for Defendant and for 1<sup>st</sup> Intervener  
Mr. Anthony Derjacques for Defendant and for 2<sup>nd</sup> Intervener

Delivered: 6 February 2017

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**JUDGMENT**

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**M. TWOMEY, CJ**

***Unusual Procedure and Pleadings***

[1] This case has followed an unusual course which has in the main not been in keeping with the Seychelles Code of Civil Procedure. Be that as it may, I note that it is a commercial matter that has taken nearly five years to complete in breach of protocols in place that

clearly indicate that commercial actions should be completed within six months. Let this be the last case of its kind.

- [2] A further complication is the manner in which pleadings have been filed and the nature of the pleadings themselves. Section 71(d) of the Seychelles Code of Civil Procedure provides that a plaint must contain:

*“a plain and concise statement of the circumstances constituting the cause of action and where and when it arose and of the material facts which are necessary to sustain the action.”*

- [3] Similarly section 75 of the Code provides in respect of a statement of defence that it:

*“must contain a clear and distinct statement of the material facts on which the defendant relies to meet the claim...”*

- [4] As it is the Plaintiff runs to 8 pages, the Statement of Demand of Mr. Raminder Panesar runs to 26 pages and that of Mr. Ashley French to 11 pages. Not to be outdone the Plaintiff then files a reply to the Counterclaim with an attachment of a list of documents spanning another 15 pages. Later a Statement of Defence (to which I shall shortly return) running to another 10 pages is filed. The pleadings in this case are therefore anything but plain and concise. They are given to rambling, unnecessary and unclear averments. They are filled with opinions and submissions of evidence. They should have been struck out for obfuscating the issues to be decided in the suit. I am once more reminded of Blaise Pascal, the French mathematician and philosopher who had the following to say on long windedness:

*“Je n'ai fait celle-ci plus longue que parce que je n'ai pas eu le loisir de la faire plus courte”.*

- [5] Admonishment of those responsible is now too late. It cannot repair the damage caused by this case both in terms of time wastage and the image of the Judiciary and the Bar on these islands but the Court cannot stay silent so that others may remain comfortable. Such reprehensible actions will have to be sanctioned.

- [6] Let this therefore be the final warning - such pleadings before this Court will no longer be acceptable as they clearly run counter to the rules of civil procedure and are an obstacle to the smooth case management and Court administration of the Supreme Court. Costs will be imposed on Counsel who continue to defy established rules of procedure and wastes the precious time of the court. In *Allisop v FIU* (2016) SCAA 1 the Court of Appeal imposed such costs on Counsel. This Court will not hesitate to do the same.
- [7] As for the evidence adduced it is yet another unpleasant aspect of the case which I shall address later.
- [8] Yet another further complication is the fact that the case was begun before Judge Burhan who permitted Raminder Panesar and Ashley French, shareholders of the Defendant Company to appear as Intervenors in the case (see Ruling of 15 March 2013). On 12 June 2013 after the case was taken up before Judge Karunakaran, for reasons that are unclear these two individuals were permitted to file a joint defence on behalf of the Defendant Company. They were shareholders but not directors of the company. It has not been demonstrated that they were in a position to represent the Defendant Company. They were also not of one mind as is clear from their pleadings and oral evidence.
- [9] The Statements of Demand were never withdrawn or struck out. They remain on file and the averments they contain are sometime at variance with the averments in the joint Statement of Defence.
- [10] On 28 October 2014 at 1.54 pm there was an exchange in court as to who represented which party and how many parties were involved in the matter. Nothing conclusive was achieved and all pleadings remained on file. It transpires from subsequent submissions that both Mr. Renaud and Mr. Derjacques then represented the Defendant. Subsequently, no submissions were filed by the Intervenors, only a joint submission Mr. Renaud and Mr. Derjacques for the Defendant.
- [11] In October 2016, I took over carriage of the case. Parties unanimously agreed that I adopt the evidence adduced and deliver a judgment. This, I now proceed to do.

### ***The Facts of the Case***

- [12] The facts of this case are simple: the Plaintiff is an English company authorised by the Financial Services Authority (now named the Financial Conduct Authority) of the UK to carry out specific activities, inter alia, to advise on investments and deal with investments as agent. At the time of the matters complained of, Tushar Patel and Raminder Panesar were the directors of the company.
- [13] After a meeting between Raminder Panesar and one Ashley French, an employee of Barclays Corporate Bank and his wife Jun Deng, Raminder Panesar caused prospectuses drawn up by the Plaintiff to be forwarded to Jun Deng who was to send these to a contact who would pass them on to an Investor.
- [14] This Investor was China Investment Corporation, a sovereign wealth fund responsible for managing part of the People's Republic of China's foreign exchange reserves. As it turned out, the Plaintiff's products did not match the Investor's requirements and it was agreed that Raminder Panesar would approach other investment firms regarding an introduction with the Investor.
- [15] Subsequently the terms of such an introduction were negotiated between Aspect Investment Partners and Raminder Panesar with these negotiations being subject to a non-disclosure agreement signed on 19 December 2008.
- [16] On 20 February 2009, an Introducer Agreement was signed by Aspect and the Defendant Company, Hedgeintro International Ltd, an International Business Company incorporated on 2 February 2009 in Seychelles under the International Business Companies Act. The Introducer Agreement contains a non-exclusive jurisdiction clause in favour of the Courts of England and Wales. It also contained clauses relating to the payment of commission to the Defendant by Aspect for the introduction services.

- [17] On 25 February 2009, a Sub-Introducer Agreement was also entered into between the Plaintiff, the Defendant and Aspect which agreement also contained a non-exclusive jurisdiction clause in favour of the Courts of England and Wales and clauses relating to the payment of commission to the Plaintiff by the Defendant “in respect of the shares, bonds or other units in the Investment Products at the rates, within the specified times and in the manner set out in a side-letter.”
- [18] In accordance with the Agreements, Aspect paid the sum of US\$ 664,353 between September 2009 and October 2010 to the Defendant.
- [19] In mid-2010 a dispute arose between Raminder Panesar and Ashley French regarding the fee sharing arrangements for the fees paid by Aspect. Subsequently, Aspect suspended payments to the Defendant on the basis that the Defendant had made payments of commission to third parties in breach of the agreements.
- [20] The dispute concerns the distribution of the commissions paid by Aspect to the Defendant and it must be settled by construing and interpreting the provisions of the Sub-Introducer Agreement.
- [21] As I have stated, a substantial amount of evidence was adduced in this case and much of it is totally irrelevant. In a nutshell, once a clear construction of the provisions of the Sub-Introducer Agreement is made, the Court will have to decide whether these provisions were breached and what consequences follow including the payment of compensation and the quantum of such compensation.

***Authority to bring Suit***

- [22] At the outset, I have to consider whether the Plaintiff through its director had authority to bring the present action. The Defendant has submitted that no authorisation from the shareholders of either the Plaintiff Company or its holding company Alternative Investments Strategies (AIS) was secured in order to bring the present suit. I am of the view that the Articles of Association of the Plaintiff Company clearly mandated the director or directors to engage in litigation on behalf of the company (See Article 4 and

Table A of the Articles of Association, Exhibit P44). The suit was therefore properly brought.

***Jurisdiction and Choice of Law***

[23] Before I venture into the construction of the Sub-Introducer Agreement I must consider the effect of one of its clauses, namely clause 14. This clause is also contained in the Introducer Agreement. It provides:

*“14. Governing Law and Jurisdiction*

*14.1 This Agreement shall be governed by and construed in accordance with the laws of England and Wales.*

*14.2 The parties to this Agreement irrevocably agree that the Courts of England shall have non-exclusive jurisdiction to hear and determine any suit, action or proceeding, and to settle any disputes which arise out of or in connection with this Agreement.”*

[24] Both the choice of law and jurisdictional clauses were ruled upon by the trial judge who concluded that the contractual choice of law provision was clear and that the contract had been entered into by the parties with their eyes wide open and should therefore be given effect. Similarly with the jurisdiction clause. In the circumstances, the Supreme Court of Seychelles is not therefore prevented from hearing litigation arising from the Agreement.

[25] In terms of the applicable substantive law, that is, the law of England and Wales, any reference or reliance on the Indian law of contract is therefore inappropriate and authorities cited in this context will be disregarded.

[26] Further, although the substantive law to be applied in this case is that of England and Wales, the choice of law clause is silent on the procedural law and rules of evidence to be

applied. Seychelles jurisprudence is rich with authorities regarding proper law. In *Intelvision Network Ltd & Ors v Multichoice Africa Ltd* [2015] SCCA 31 following the authorities of *Rose v Mondon* (1964) SLR 134, *Morgan v Morgan* (1972) SLR 79, *Pillay v Pillay* (1973) SLR 307 and *Pillay v Pillay* (1978) SLR 217), the Court of Appeal stated that it is the procedural law of the forum which is seized by the Plaintiff that is applicable. Hence, it is Seychellois procedural law that applies to this case.

### ***Applicable Seychellois procedural law***

[27] In this context, it must be noted that the procedural rules of our civilist tradition, namely the rules of evidence are subject to a hierarchy insofar as their weight in deciding a case is concerned. Article 1316 *et seq* of our Civil Code provides for rules of evidence in respect of “written evidence, oral evidence, presumptions, admissions...” Articles 1341 to 1348 and 1715 of the Code forbid oral testimony in certain circumstances. Further, civil evidence gives priority to documentary evidence over oral evidence (see the Civil Code). Distilled from these rules together with jurisprudence is the presumption that documentary evidence is superior to oral evidence. Implicit in those rules is the belief that documents are more reliable and truthful than the memory of witnesses.

[28] The Court therefore in the present matter places greater reliance on the written evidence than on the oral testimony of parties.

[29] Moreover, it must also be noted that there is also a risk in any civil claim. This principle (*actori incumbit probatio*) is set out at Article 1315. The article provides:

*“A person who demands the performance of an obligation shall be bound to prove it.*

*Conversely, a person who claims to have been released shall be bound to prove the payment or the performance which has extinguished his obligation.”*

[30] Hence, whenever a party makes an allegation, he supports the risk of evidence; in other words, the risk to lose the case if he cannot prove that such allegation is grounded.

### ***The Proof of Foreign Law and Expert Evidence***

[31] With these cautions in mind I now turn to some evidential issues. It is already settled that the law to be applied to the Agreement is that of England and Wales. Given that this is the case, it was incumbent on the Plaintiff to prove the foreign law in this case. (See *Intelvision Network Ltd & Ors v Multichoice Africa Ltd* 2015] SCCA 31, *Pillay v Pillay* (1973) SLR 307 and *Beitsma v Dingjan (No 1)* (1974) SLR 292.)

[32] In this respect, the Plaintiff called Mr. Nick Brocklesby to testify and produce a Legal Opinion jointly prepared by the legal firm of King & Wood Malleson LLP (since taken over by Reed Smith LLP) and Tom Smith, a barrister of South Square Chambers, London. This was tendered as expert opinion on the law of England and Wales as the Plaintiff was relying on that law to interpret the Agreement. Although this evidence was admitted it is not the end of the matter.

[33] At this juncture it is necessary to consider who can be regarded as an expert. Stroud's Judicial Dictionary defines an expert as:

*“one who has made the subject upon which he speaks a matter of practical study, practice, or observation; and he must have a particular and special knowledge of the subject”* (2<sup>nd</sup> Edn 670, citing *Dole v Johnson* 50 N Hamp 454,).

[34] Black's Law dictionary defines an expert as

*“A person, who through education or experience, has developed skill or knowledge in a particular subject, so that he or she may form an opinion that will assist the fact-finder”* (9<sup>th</sup> Edn, 661).

[35] It can be inferred from these definitions that expert evidence is opinion evidence.

[36] Section 17 of the Evidence Act 1884 (Seychelles) provides in relevant part:

*(1) In any trial a statement, whether of fact or opinion or both, contained in an expert report made by a person, whether called as a witness or not, shall, subject to this section, be admissible as evidence of the matter stated in the report of which direct oral evidence by the person at the trial would be admissible.*



...

(3) *Nothing in this section affects the admissibility of an expert report under any other written law or otherwise than for the purpose of proving the matter stated in the expert report.*

(4) *In this section "expert report" means a written report by a person dealing wholly or mainly with matters on which the person is or would, if living, be qualified to give expert evidence."*

[37] It was in reliance on the provisions above that the trial judge admitted the expert evidence report from the Bar without the need for the expert to be called. He however reserved for himself the assessment of the truth of the contents of the report and the weight to be given to it.

[38] This expert opinion is challenged by the Defendant. It submitted its own views on the legal principles applicable to this case. It also stated that the legal opinion was "frivolous and vexatious and an attempt to mislead the Court on facts." Notwithstanding the fact that the Report has already been admitted it has submitted that "the opinions of witnesses are not generally admissible, except in cases where the Court lacks the witnesses competent (sic) to form an opinion on particular issues that may arise." It submitted that this was not the case in this instance.

[39] In citing Part 35 of the Civil Procedure Rules of England and Wales, the Defendant pointed out that expert evidence was limited to what was reasonably required to resolve proceedings and that experts should be independent. In its submission, the expert was a motivated and interested witness.

[40] In his testimony, Mr. Panesar stated that Nick Brocklesby who was a partner of SJ Berwin LLP in 2013 had previously acted for the Plaintiff and had sent a letter and several emails to him (Exhibit D 42). Subsequently he had met Mr. Brocklesby in an attempt to resolve the issues between him and the Plaintiff. There was a clear lawyer-client relationship between the Plaintiff and Mr. Brocklesby and the letter indicates that the firm Berwin LLP was retained on the basis of a conditional fee arrangement. It was

Mr. Panesar's submission that on this basis Nick Brocklesby's expert evidence is tainted with bias and cannot be accepted by the Court.

[41] The letter from Mr. Brocklesby (Exhibit D 42) is a letter before claim and informs Mr. Panesar of his breach of fiduciary and /or other duties owed to the Plaintiff. There is very little doubt that Mr. Brocklesby is acting for the Plaintiff in respect of matters in London related to the present case.

[42] There is very little relevant authority on the issue of when expert evidence should be excluded on the grounds of bias in Seychelles. I have therefore looked at English authorities. In *Whitehouse v Jordan* [1981] 1 WLR 246 Lord Wilberforce stated that:

*"Expert evidence presented to the Court should be, and should be seen to be, the independent product of the expert, uninfluenced as to form or content by the exigencies of litigation."*

[43] In *Liverpool Roman Catholic Archdiocesan Trust v David Goldberg QC* [2001] Lloyd's Rep PN 823, the defendant's expert witness was a friend for 28 years, working from the same chambers. The Court disallowed his evidence, since the risk of his evidence being coloured by this relationship was incompatible with the need for justice to be seen to be done. The bias in this case was apparent.

[44] However, the Court of Appeal depreciated this "apparent bias" approach in *Factortame* (No 8) [2002] 3 WLR 1104 in which it stated that :

*"Expert evidence comes in many forms and in relation to many different types of issue. It is always desirable that an expert should have no actual or apparent interest in the outcome of the proceedings in which he gives evidence, but such disinterest is not automatically a pre-condition to the admissibility of his evidence. Where an expert has an interest of one kind or another in the outcome of the case, this fact should be made known to the Court as soon as possible. The question of whether the proposed expert should be permitted to give evidence should then be determined in the course of case management. In considering that question the judge will have to weigh the alternative choices open if the expert's*

*evidence is excluded, having regard to the overriding objective of the Civil Procedure Rules" (Paragraph 70)."*

[45] In *Toth v Jarman* [2006] All ER (D) 271, the Court stated that the presence of a conflict of interest would not automatically disqualify an expert. In that case the expert had an undisclosed conflict of interest in that he was a member of the Cases Committee of the Medical Defence Union who acted for the GP against whom the claim had been made. The Court specified that the key question to be answered was whether the expert's opinion was independent of the parties and the pressures of the litigation. The Court found that in the particular circumstances there was a potential conflict of interest and the information should have been disclosed. However, since the Cases Committee had the practice of excluding any member who was an expert on a case from deliberations on that same case and the expert was not serving on the Committee at the time of the case, the conflict of interest, even if it had been of itself a disqualifying interest, had become immaterial.

[46] In *Armchair Passenger Transport Ltd v Helical Bar Plc* [2003] EWHC 367 Mr. Justice Nelson stated:

*"It is not the existence of an interest or connection with the litigation or a party thereto, but the nature and extent of that interest or connection which determines whether an expert witness should be precluded from giving evidence."*

[47] Mr. Panesar has also stated and supported his statement by the letter dated 30 April 2013 (Exhibit D 42) that Mr. Brocklesby had been retained by the Plaintiff on a conditional fee arrangement to pursue litigation against him. He is therefore, if I understand him correctly, accusing Mr. Brocklesby of champerty. Although this medieval concept has never been converted in our jurisdiction into either a criminal offence or a delict (although arguable it could under Article 1382 of the Civil Code of Seychelles), I still have to consider this accusation in the context of whether it would add to further bias on the part of Mr. Brocklesby so as to disqualify his evidence.

[48] I note first of all, in the context of the authorities above, namely *Factortame*, that Mr. Brocklesby has from the outset disclosed his interest in the case. In a letter to the Supreme Court dated 16 October 2014, that is two weeks before the expert opinion was admitted by the Court, he states inter alia:

*“I confirm that I was previously a Partner of King & Wood Mallesons LLP and, pursuant to paragraph 1.3 of the Legal Opinion, I had overall responsibility for the preparation of the Legal Opinion...”*

*I further confirm that:*

*a. King & Wood Mallesons LLP is no longer instructed in this matter. Since I moved to Reed Smith LLP in May 2014, Reed Smith LLP is instructed by Hedge Funds Management Limited (“HFIM”) in this action, and other related matters.*

*b. As a Partner at King & Wood Mallesons LLP, I instructed Tom Smith to assist in the preparation of the Legal Opinion. Tom Smith is now a Queen’s Counsel at the Bar of England and Wales...”*

[49] The Legal Opinion is signed by both Mr. Brocklesby and Mr. Smith. In its Introduction, the following statement is also made:

*“This is a joint legal opinion of the London office of King & Wood Mallesons LLP, a multinational law firm, and Tom Smith of South Square Chambers...”*

[50] Further, the Plaintiff has also submitted that no contingency fee arrangement is in place in respect of the case in Seychelles.

[51] I have sought to weigh all the relevant factors outlined by the parties in the light of the authorities above. It is clear from UK case-law that a person is not precluded from acting as an expert witness simply due to the fact that he has a pre-existing relationship with one of the parties to the action. However where such a relationship exists, it will clearly have an effect on the weight to be accorded to such an expert's testimony.

- [52] While it might be inferred that given the client-lawyer relationship between the Plaintiff and Mr. Brocklesby, the impartiality of the latter might be clouded, Mr. Brocklesby did disclose this fact in the Report. Further, the Opinion is a joint one produced with Tom Smith QC who has not been impugned in any way. I am not in the circumstances persuaded that Mr. Brocklesby's relationship with the Plaintiff colours the Opinion with bias.
- [53] Moreover, the Opinion is a guide to the court solely on the principles of the law of England and Wales applicable to the Agreement. This Court will in any case be the judge of fact in this suit.
- [54] There has been in any case no attempt to challenge the correctness and accuracy of the legal principles expounded in the Opinion. It was open to the Defendant to adduce expert evidence to contradict that of the Plaintiff. It has chosen not to do so. I am therefore of the view that the Opinion evidence admitted in respect of the law applicable in this case should be relied on by this Court in its assessment of the evidence and in determining whether there was a breach of the Sub Introducer Agreement.
- [55] The Plaintiff's legal experts in the Executive Summary of their Report state that the Report of Ian Morley is central to their analysis. Mr. Morley is a senior consultant at Wentworth Hall Consultancy Ltd, a firm of Research Consultants. He states that he was founding Chairman of Alternative Investment Management Association (AIMA). He has advised Central Banks, International Regulators, the EU, OECD and many others on matters relating to hedge funds and regulation.
- [56] Mr. Morley testified before this Court and produced his Report in the course of his examination in chief. He stated that he was involved in the hedge fund industry in many capacities and that his specialty is expertise in hedge funds investments. There was no objection by either Counsel for the Defendant, Mr. Panesar or Mr. French on this aspect of his expertise. Mr. Morley disclosed that he had no known actual or potential conflict of interest with either of the parties of the suit.

[57] He was however vigorously cross-examined as to his relationship with Mr. Tushar Patel but maintained that he had only known him as a member of AIMA and as a colleague in the industry. In his evidence Mr. Panesar stated that Mr. Morley's Report lacked the quality expected of an expert, was full of holes, and was inaccurate, incorrect and misleading. In this respect he held himself out as an expert and testified as to the normal practices of the industry. His contempt and disrespect for Mr. Morley is apparent when he states that the witness does not even use good English and uses a "marvellous sentence" on Page 9 of his report (See Page 25 of the transcript of proceedings of 15 October 2015 of 9 am). However this does not discredit the Opinion evidence of Mr. Morley.

[58] In *The Queen v Bonython* (1984) 38 SASR, King CJ in the context of admitting the opinion of a witness into evidence stated that:

*"...the judge must consider and decide two questions. The first is whether the subject matter of the opinion falls within the class of subjects upon which expert testimony is permissible. This first question may be divided into two parts:*

*(a) whether the subject matter of the opinion is such that a person without instructions or experience in the area of knowledge or human experience would be able to form a sound judgment on the matter without the assistance of witnesses possessing specialised knowledge or experience in the area; and*

*(b) whether the subject matter of the opinion forms part of a body of knowledge or experience which is sufficiently organised or recognised to be accepted as a reliable body of knowledge or experience, a special acquaintance with which the witness would render his opinion of assistance to the court. The second question is whether the witness has acquired by study or experience sufficient knowledge of the subject to render his opinion of value in resolving the issues before the court.*

[59] No evidence has been adduced by the Defendant in terms of another expert witness to challenge the evidence of Mr. Morley. I am satisfied from the evidence adduced by the Plaintiff that Mr. Morley fits the criteria set out in *Bonython* (supra). However, the Defendant's objection to the reliance of the Court on the expert evidence of Mr. Morley

is contained in further written submissions. It objects to his evidence on market practice, on his definition of regulated activity, on his opinion whether the Defendant could have carried out the introduction activity or whether Aspect would have shared its funding information, due diligence documents without the involvement of the Plaintiff, on the side letter which was never executed, and on the remuneration of the Plaintiff and the Defendant and other interested parties as guesswork.

[60] It is correct that Mr. Morley opines on several matters allied to but not directly about the hedge fund industry. But that is the whole purpose of opinion evidence. This fact seems to be lost on the Defendant. In *Proton Energy Group SA v Orlen Lietuva* [2013] All ER (D) 206, the Court found that although experts cannot deal with issues of law, which remain the province of the judge, contractual construction is carried out by placing emphasis on all the background facts. It will interpret what the parties have said and done against that backdrop. This means that the expert, where appropriate, has to opine on the relevant background and the context of the issues. This can be particularly useful to the Court when the relevant background is not straightforward, and where as in the present case there are difficult commercial and technical issues that form part of the context, for example, as to what the market practice would be as regards introducer agreements or rates of commission payable in the absence of a side letter to that effect being executed. The expert in this area assists the judge to understand the technical issues at hand.

[61] It was again open to the Defendant to impugn Mr. Morley's evidence by calling its own expert. This, it also failed to do. It relied instead on the expertise of Mr. Panesar. As the representative of the Defendant his evidence on these issues can only be viewed as self-serving and not independent. I will therefore be guided by Mr. Morley's expert evidence on matters involving the hedge fund industry and its practices.

***Issues to be decided***

[62] I have earlier referred to the fact that an enormous amount of evidence was adduced in this case. Most of it was completely unnecessary and a complete and utter waste of time and money. And yet so much ink need not have been spilt. I am able to distil the issues of

the case from the evidence and the reports of the two experts down into the following four matters:

1. Was the Sub-Introducer Agreement validly executed?
2. Was the Agreement breached?
3. If so, is compensation payable?
4. If so what is the quantum of such compensation?

**1. Was the Sub-Introducer Agreement validly executed?**

[63] It is the Plaintiff's case that the Agreement is validly binding despite the absence of the side letter between the parties relating to commissions to be paid. It relied on the expert opinion on this issue to which I shall return.

[64] I have earlier referred to the difficulty in Mr. Panesar and Mr. French first appearing as Intervenor and then both acting for the Defendant Company. As I have stated the Statements of Demand from the Intervenor were not withdrawn nor the Statement of Defence substituted for them. I have therefore had to take all pleadings into account in my deliberations. There is therefore a plethora of pleadings which are at odds with each other. This undermines a clear defence.

[65] In the Statement of Defence, the case for the Defendant is that the Sub-Introducer Agreement is an incomplete contract and therefore unenforceable.

[66] In contrast, in Mr. French's Statement of Demand it is stated that "[t]he Defendant, Plaintiff and the Fund Management Company entered into a Sub-Introducer Agreement (see paragraph 18).

[67] Mr. Panesar's Statement of Demand on that point is anything but clear. Paragraph 3 states in relevant part:

*"That the said Sub-Introducer Agreement was (apparently and allegedly) executed between the Plaintiff company and Defendant company...And till the*



*time no specific activities were undertaken under or in pursuance of the said agreement , the said Sub-Introducer Agreement would remain static and inert... As a matter of fact notwithstanding anything and without prejudice to rights and intentions of the answering Defendant, the said Sub-Introducer Agreement has never been given effect to ...”*

- [68] I am frankly perplexed as to what is being said in the statement above. First, it is not proper to plead without prejudice rights in pleadings to be considered by the court. Without prejudice refers to the privilege attaching to written or verbal statements made by a party to a dispute in a genuine attempt to settle that dispute outside court. They are generally not admissible in court. The use of without privilege in court pleadings is therefore not only confusing but entirely meaningless. Secondly, Paragraph 3 is also equivocal in that it pleads execution of the contract and non-execution of the contract. This is problematic in terms of civil procedural rules as I have already stated but also in terms of what may have amounted to a judicial admission under the provisions of Article 1356 of the Civil Code of Seychelles that there was indeed a contract.
- [69] As I have stated, much documentary evidence was adduced by both the Plaintiff and Defendant but little of it goes to the heart of the matter of whether the Sub Introducer Agreement was validly formed and enforceable. The oral evidence adduced does not help very much either.
- [70] Mr. French in a question put by the Court stated that the Introducer agreement was put in place so that the Defendant would receive money and the Sub-Introducer Agreement was so that Aspect would not object to the money going to the Plaintiff (P. 26 of Transcript of Proceedings dated 8 June 2015 at 1.45pm).
- [71] Mr. Panesar in his testimony stated that much more work needed to be done “to complete the Sub Introducer agreement.” He refers to several letters, namely the letter of 22 December 2010 from Aspect Capital to the Plaintiff (Exhibit 23) and his email dated 5 January 2011 to Mr. French (Exhibit 24) to support this submission (Transcript of Proceedings dated 15 October 2015 at 9 am).

[72] As the oral evidence and documentary evidence produced by the Defendant obfuscates the issue, the only option left for the court is to examine the Agreement itself. As regards the first issue, I find the oft quoted dictum of Lord Tomlin in *Hillas & Co v Arcos Ltd* [1932] All ER Rep 494 very appropriate. In a claim for a breach of contract for the supply of timber, the respondent contended that the agreement was incomplete because it left some essential terms still to be agreed. The House of Lords held that the uncertainties did not prevent there being a concluded contract. Lord Tomlin stated:

*"The problem for a court of construction must always be so to balance matters, that without violation of essential principle the dealings of men may, as far as possible be treated as effective, and that the law may not incur the reproach of being the destroyer of bargains."*

[73] In the opinion of the experts, Mr. Brocklesby and Mr. Smith QC, the Defendant cannot cast doubt on the formation and validity of the Sub-Introducer Agreement. I reproduce their opinion on the matter in relevant part (noting that Raminder Panesar is referred to as RP, Ashley French as AF, the Plaintiff as HFIM and the Defendant as HIL) :

*4.3 The Sub-Introducer Agreement contains the key elements of an enforceable contract under English law; offer, acceptance, consideration and intention to create legal relations:*

*It contains the entire understanding of the parties and any other documents relevant to the bargain are incorporated by reference, namely the side letter.*

*The Sub-Introducer Agreement provides that "in consideration" of HFIM acting as Sub-Introducer for the "Investment Products" to the Investor on an "exclusive basis for a period of 24 months from the date of the Initial Investment" HIL agrees to pay HFIM commission. The mutual promises in the Sub-Introducer Agreement constitute good consideration under English law.*

*The Sub-Introducer Agreement was plainly intended to give rise to binding legal relations.*

4.4... the terms of the Sub-Introducer Agreement largely mirror those of the Introducer Agreement, save for that the “commission in respect of the shares, bonds or other units in the Investment Products at the rates, within the specified times and in the manner set out in a side letter between [HIL] and [HFIM]. We understand that HFIM and HIL did not enter into any such side letter and that HIL is seeking to rely upon this fact to demonstrate that the Sub-Introducer Agreement was not validly entered into and/or that HFIM cannot claim damages since there are no terms upon which those damages can be calculated.

4.5 We do not consider that the absence of the side letter has any effect on the validity of the Sub-Introducer Agreement. The position under English law is that “even if certain terms of economic or other significance to the parties have not been finalised, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a precondition to a concluded and legally binding settlement.”

4.6 The words and conduct of HIL objectively demonstrate that HFIM, HIL and Aspect did not intend the entry into the side letter to be a pre-condition to a legally binding Sub-Introducer Agreement. Indeed, the Sub-Introducer Agreement was integral to the overall arrangement. Aspect confirmed that it was not willing to agree that all commissions should be paid through HIL instead of directly to HFIM, unless it was party to the ultimate Sub-Introducer Agreement between HIL and HFIM.

4.7 All parties were aware that the Sub-Introducer Agreement had to be entered into and, therefore, HFIM and HIL must have intended to be bound by it at the outset, regardless of whether the side letter was in place. The onus was upon RP to draw up the side letter at a later date. His failure to do so does not invalidate the Sub-Introducer Agreement.

4.8 In circumstances where the parties intend to be bound straight away, even though there are further terms still to be agreed or some further formality to be fulfilled, and the parties fail to reach agreement on such further terms, then the

*existing contract is not invalidated unless the failure to reach agreement on such further terms renders the contract as a whole unworkable or void for uncertainty.*

*4.9 In this regard, as a matter of English law, an agreement will not be incomplete merely because it requires some further agreement to be reached between the parties. Accordingly, once the parties have reached agreement, it is not fatal that some points (even important ones) remain to be settled by further agreement. As the leading textbook states, “commercial agreements are often intended to be binding in principle even though the parties are not at the time able or willing to settle all the details” (Chitty on Contracts 31<sup>st</sup> ed., 2-130, 2-114-115).*

*4.10 In such circumstances, absent agreement of the outstanding points, the court will complete the missing parts of the agreement by applying the standard of reasonableness. Accordingly, in the present case, the failure to agree the terms of the side letter does not render the Sub-Introducer Agreement, as a whole unworkable or void for uncertainty as the Court will supply the missing details by applying a standard of reasonableness.*

*4.11 Finally, we have considered whether there could be any argument that the Sub-Introducer Agreement was unenforceable for reasons of lack of authority. Taking each entity in turn:*

*RP, as the signatory for HFIM, had the requisite authority under English common law and statute to enter into the Sub-Introducer Agreement. Section 43(1)(b) of the Companies Act 2006 provides that a contract may be made on behalf of a company by any person acting under its authority, whether express or implied. RP entered into the Sub-Introducer Agreement in his capacity as a director of HFIM. HFIM has not stated that it was entered into without authority, or that it wishes to set the contract aside.*

*We understand from Seychelles Counsel that RP and AF, as the signatories for HIL under a Power of Attorney, had the requisite authority under Seychelles law to enter into the Sub-Introducer Agreement. Seychelles IBC Act 1994 contains*

*similar statutory provision allowing contracts to be made on behalf of a Seychelles company by a “person acting under the express or implied authority of the company”. We understand that HIL has not sought to set aside the Sub-Introducer Agreement for lack of authority, not it would appear that it would have any basis on which to do so.*

*4.12 As such, there is no basis on which to suggest that the Sub-Introducer Agreement is unenforceable for lack of authority for either HIL or HFIM.*

[74] I endorse these findings and find therefore that the Sub-Introducer Agreement was a validly executed contract which is enforceable.

## **2. Was the Agreement breached?**

[75] Mr. Panesar was at pains to point out that the Introducer Agreement permitted the Defendant to introduce Aspect’s products to CIC whereas the Sub Introducer Agreement permitted the Plaintiff to introduce Aspect’s products to CIC. The evidence of Mr. Panesar, Ms. Deng and Mr. French are to the effect that the Plaintiff, in the event did not do any introduction work under the Agreement to merit payment of commission by Aspect. They support these submissions by Aspect’s letter of 26 November 2010 (Exhibit P4) and the Plaintiff’s letter of 15 December 2010 (Exhibit P45).

[76] Mr. French and Ms. Deng testified to the work they did together with Ms. Deng’s brother, Daqing Deng, in terms of introducing Aspects’ investment products to CIC.

[77] Further, Mr. Panesar has in his evidence endeavoured to show that it was his individual involvement and not that of the Plaintiff that won the introduction work with Aspect. He has also attempted to show that introduction work is not a regulated activity which should only have been performed by a regulated firm such as the Plaintiff and for which therefore no authorisation was necessary from the Financial Services Authority (FSA now FCA) of the UK under the Financial Services and Markets Act 2000 (FMSA).

[78] He has also stated that in any case there was an agreement concluded in 2008 between himself and Dr. Nick Dhandsa the director of AIS (the holding company of the Plaintiff)

that business opportunities advanced and pursued by him personally even in the name of the Plaintiff would be solely for his own profit. This has however been denied by Dr. Dhandasa (see transcript of proceedings of 16 October 2015).

[79] Mr. Brocklesby and Mr. Smith have commented that:

*“5.12 In any event, neither of these alleged agreements affect the terms of the Sub-Introducer Agreement since they are expressly excluded by the entire agreement clause, which states that the Sub-Introducer Agreement constitutes the “whole and only agreement between the parties relating to the provision of services by the Sub-Introducer and, save to the extent repeated in [the Sub-Introducer Agreement], supersedes and extinguishes any prior drafts, agreements, undertakings, representations, warranties and arrangements of any nature whatsoever, whether or not in writing, relating thereto.*

*5.13 In addition, any agreement allegedly reached after the execution of the Sub-Introducer Agreement cannot and will not vary the terms of the Sub-Introducer Agreement, since all variations must be in writing and signed by each of the parties.*

[80] In regard to whether the introduction work was excepted work under the FMSA, Mr. Panesar has relied on the fact that the introduction work was performed outside the UK by the Dengs and by persons outside the UK (again the Dengs) which would make them exempted persons in terms of the provisions of the FSMA and the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (RAO). In his view the activities as performed by the Dengs transform them from regulated activities into unregulated ones.

[81] None of the Defendant’s witnesses have however been able to explain the relationship between the Introducer and the Sub-Introducer Agreements in respect of the commission to be paid for the introduction work with CIC relating to Aspect’s products and why it was necessary to have them in place with the Plaintiff as a party if it was to play no part whatsoever in the work.

[82] Nor have they been able to convincingly explain to the Court the following: why a non-disclosure agreement was signed in which it is clearly stated that the parties were contemplating entering into an arrangement whereby the Plaintiff would introduce new business to Aspect; why Ms. Deng was a card carrier of the Plaintiff and had the company's email address assigned to her without being an employee; why in correspondence the e-mail address or letter head of the Plaintiff was used; why the Plaintiff's Evolution Fund Prospectus was forwarded to Ms. Deng to pass on to CIC; why meetings were arranged in the Plaintiff's office; why in his capacity as Managing Director of the Plaintiff, Mr. Panesar tried to source other investment options including that with Aspect for CIC, why the due diligence work on Aspect was carried out demonstrably by the Plaintiff.

[83] The subterfuge (of using the Plaintiff's name, regulated status and goodwill for the introduction work and of wooing CIC) by Mr. Panesar is for example revealed in the e-mail of 6 February 2009 (Exhibit 21) to John Wareham of Aspect and Jun Deng:

*“Finally, just to reiterate what we agreed in the conference call, neither Aspect nor HFIM will be the first to raise the question of our relationship, but if specifically asked by any of our guests about our relationship, we will only say that: “the two companies have known each other for a long time and on matters of important client relationships we are used to cooperating together.””*

[84] Finally, I am unable to see any evidence from the Defendant to indicate that Aspect would have agreed to either three individuals, namely Mr. Panesar, Mr. French and Ms Deng or Mr. Deng's company (Global Time Investment Limited) or any unregulated company, that is, the Defendant carrying out the introduction work. The letter of distress and email sent by Aspect when it discovered that commissions paid under the agreements had been diverted to third parties confirm that it would not have entered into such a relationship (see Exhibit P 23).

[85] The Defendant has also submitted that since no side letter was ever executed, there was no commission arising and therefore no breach of the Agreement. Both experts disagree with him on the issue of the introduction activities and the side letter.

[86] Ian Morley explains in his report and evidence that:

*“The field of financial services in the UK are strictly and high regulated and come under various UK and EU laws and Directives. It appears (and the relevant emails indicate the same) that HFIM, as an FSA regulated entity, was negotiating the arrangement, through RP. This is because all such activities would be strictly required to take place as “Regulated Activities” under the Financial Services and Markets Act (FSMA), 2000 and FSMA (Regulated Activities) Order, 2001.*

*The general prohibition regarding Regulated Activities under Section 19 of FSMA, 2000 states “No person may carry on a regulated activity in the United Kingdom, or purport to do so, unless he is (A) an authorized person; or (B) an exempt person.”*

[87] He emphasises that the Plaintiff was a regulated entity but the Defendant was not. As to whether introduction activities were regulated, he is categorical on that point. He states:

*“It should also be noted that under Article 29 of FSMA (Regulated Activities) Order, 2001 which deals with exclusions for Regulated Activity, an exception to such exclusions is given in Article 29 (b). It clearly states (such) exclusions do not apply if A receives from any person other than the client (CIC) any pecuniary reward or advantage for which he does not account to the client (CIC), arising out of his making the arrangements.”*

*Therefore, if a person receives pecuniary reward (commissions), such person could not carry out a Regulated Activity without being an authorised or exempt person.*

[88] He goes on to state that in any event, from the documentation produced there is nothing to show that the introduction activities carried out by the Defendant or other third parties was performed under any capacity other than under the guise of employees of the Plaintiff.



[89] He then goes on to state:

*In my experience it would be most unusual and irregular for a regulated Hedge fund firm to agree to enter into formal due diligence, provide documentation and agree to make commission payments unless the other parties were regulated. And where they were not regulated, that any other parties receiving payments were transparently identified to allow normal Anti Money Laundering (“AML”) investigations to take place so that the regulated entities, Aspect and HFIM, were comfortable that any and all other parties were fit and proper to receive such payments...*

*From the documents I have seen and the sequence of events that have occurred that RP at all times until he entered into a signed agreement with Aspect (the Introducer Agreement and Sub-Introducer Agreement), held himself out to be a regulated Director of HFIM. It also seems clear that the good offices, name, personnel, experience and regulated nature of the services undertaken when sourcing potential fund for client investment were all undertaken under the HFIM umbrella and status as a regulated entity. There is also email evidence to clearly indicate that HFIM because of its knowledge and position within the Hedge Fund industry and as a regulated firm had brought to the attention of the client the names of other potential Hedge Fund Investment firms and funds.*

*It does not appear from the information that I have seen that either RP or AF or HIL (which did not formally exist at the time!) nor their associated parties have the necessary financial competence, regulatory standing or experience to undertake investment due diligence alone and without the use and name of a FSA regulated firm like HFIM. As stated previously, I would be most surprised and even shocked to find a regulated and high profile investment firm agreeing to provide confidential information to an unregulated and unknown party or parties.*

[90] I am not persuaded by the evidence of Mr. Panesar, Mr. French or Ms Deng on this issue. I adopt the findings and opinion of the experts on this matter and conclude that the Sub-Introducer Agreement was breached.

**3 and 4. Is compensation payable for the breach of the Agreement and if so what is the quantum of compensation to be awarded?**

- [91] The Plaintiff has prayed for US \$498,264, being 75% of the fees and commissions together with other fees due from the introduction but suspended by Aspect and interest at the commercial rate from the dates the fees became payable. It has also claimed its costs including the costs incurred from travelling to Seychelles from the UK to prosecute the suit.
- [92] In his Statement of Demand Mr. Panesar has prayed for US\$5000 for himself and US \$5000 for Mr. French in moral (sic). In his Statement of Demand Mr. French has prayed for the sum of US\$ 10,000 in moral (sic).
- [93] In its statement of Defence and Counter Claim the Defendant has prayed for the sum of US\$ 10,000 in moral damages, for the costs of the suit or alternatively costs and interest at the commercial rate of 10% per annum.
- [94] While it is accepted that moral damages may be claimed by a company (see Cass. com., 15 mai 2012: Pourvoi 11-10278), I am not of the view that even if the Intervenors had been successful in their demands that either of them would have been successful in their claims as they have lead no evidence of the moral damage they are claiming.
- [95] I have found that the Sub-Introducer Agreement was breached by the Defendant. The Plaintiff has submitted that its compensation relates to the sums it should have received for the introduction business according to normal commercial industry terms. It has claimed that it has lost other income which would have been payable on a continuing basis had the terms of the Agreement with Aspect been respected by the Defendant.
- [96] The expert opinion of Mr. Brocklesby and Mr. Smith is to the following effect:

*“5.6 The general rule for breach of contract, under English law, is for the Court to place the claimant in the same positon as if the contract had been performed (Robinson v Harman (1848) 1 EX 850).*

5.7 *The terms of the side letter were not in fact ever drafted or finalised. However as explained above, the Court will complete such missing terms by applying the standard of reasonableness.*

5.8 *Applying the standard of reasonableness, if the side letter had been drafted by RP and entered into by both HFIM and HL, and based upon HFIM's standard distribution and introducer agreements, HFIM's general practice and/or industry practice, HFIM would be entitled to "75% of all Management fees and 100% performance fees due from Aspect, plus any loss and damages". HFIM would typically charge a "fee of 20% of all management and performance fees... in line with industry practice within a regulated firm... [and HFIM] would typically compensate firms like [HIL] with 25% of the management fees received from the hedge fund manager for potential Client/Investor introduction, if it is successful, and it is normal practice to be set out in the introduction agreement".*

...

5.16 *There are no rigid rules for the quantification of damages in contract; it is essentially a question of fact. As explained at paragraph 4.9 above, we consider that the Court will supply the missing terms which should have been contained in the side letter by applying a standard of reasonableness and will not permit the individual who failed to draft the side letter from relying on that failure to his own advantage. ..*

5.17 *We have read the Report of Ian Morley dated 14th February 2014. It is his conclusion that a manager such as Aspect would ordinarily agree to pay HFIM in the region of 20% of both the Management Fees and Performance Fees. He states that it would be normal practice for HFIM to retain 75% of the Management Fees and 100% of the Performance Fees paid to it and to pay onto the other parties demonstrably involved in the introduction, such as HIL, "up to 25% of the Management Fees". This supports HFIM's position, as set out in the *Plaint*.*

5.18 *Ultimately, it is for the Seychelles Court to decide the level of damages, taking into account all relevant factors, however, we consider that an English Court would view the position taken by Mr. Morley and HFIM to be fair and reasonable.”*

[97] I have no reason to disregard this evidence, which I find compelling, in the absence of its impugment by the Defendant.

[98] I am guided by this evidence. I note that the commission payable would have been outlined in the side letter which was never executed. Nothing indicates that the side letter would not have been drafted along the proposals discussed with Aspect. I am guided in this respect by the contents of the e-mail of John Wareham of Aspect on 23 December 2008 to Raminder Panesar (page 2 of Exhibit P9) in which he states:

*“I have prepared the following indicative scenarios which may be helpful in demonstrating the range of potential payments:”*

*\$100mio investment into the Aspect Diversified Fund, which pays 2% Management Fee and 20% Performance Fee*

*Total commission payable to HFIM at 20% of all fees = \$4.2 mil.*

*Total commission payable to HFIM at 40% of Management Fee = \$3.6mio*

[99] I also am guided by the evidence of Mr. Morley on this issue. He testified that it would be in the range of normal practice for the Plaintiff to retain 75% of the management fees and 100% of the performance fees and pay on approximately 25% of the management fee received to other parties demonstrably involved in the introduction.

[100] I endorse Mr. Morley’ opinion and make a finding accordingly in terms of the management and performance fees received from Aspect. It is not denied that Aspect paid \$664.353 to the Defendant altogether. As regards, payments to Mr. French or to Mr. Panesar personally, Mr. Morley stated:

*“The question arises as to whether any of the other related parties, in particular Jung Deng and her husband Ashley French were involved in the deal, as*

*intermediaries and if so how much, if anything, should they be compensated as Introducers of the client CIC?*

*From my experience the normal payments to such third party introducers who have acted as conduits but not regulated investment management houses capable of finding suitable investment candidates and carrying out the required level of due diligence would be up to 25% of the Fees only (exceptions can be above or below), receivable by, in this case HFIM the main and transparent company involved in this transaction.*

...

*In my Expert Opinion based on the evidence that I have seen and the experience I have of such transactions the normal rules of transparent honesty were not applied by HIL and therefore from a commercial stand point I would not agree if I were the Plaintiff for them to share in any of the proceeds and commission trail generated. This is because it's normal practice that the main introducer, arranger or distributor to agree with the third parties the terms of payments to be made to them for the work done but in the instant case, the fee arrangements were diverted from HFIM.*

*Therefore that in my considered and expert opinion I conclude that since Aspect has only been dealing with HFIM, as a regulated entity during the process of introduction, arrangement or distribution, the whole of the commission in question and any outstanding commissions payable in respect of this transaction should be paid to HFIM. This should include all amounts accrued and paid to date, all amounts accrued but suspended to date, all amounts accruing to date and all amounts to accrue in future.*

[101] Mr. Brocklesby and Mr. Smith agree with Mr. Morley. They state that "...an English court would view the position taken by Mr. Morley and HFIM to be fair." At the beginning of my decision I referred to Articles 1315 -1316 of the Civil Code. After reviewing the evidence, I am of the view that the Plaintiff has proved its case through the

clear and overwhelming contents of its documentary evidence. The actions of Mr. Panesar, who at the time of the introduction services was a director of the Plaintiff are reprehensible to say the least and should not be rewarded. For the same reasons I do not find that any of the fees paid or due from Aspect should be paid to the Defendants or any other third party. However in its prayer the Plaintiff has only claimed 75% of the fees so far paid which he has quantified at \$498,264.00. The Court cannot make the case for the Plaintiff in this respect and can only grant the maximum of what it is has claimed.

[102] In the circumstances I make the following Orders:

I Order the Defendant to pay the Plaintiff the whole sum received as commission from Aspect, that is, the sum of \$498,264.00.

I also Order that any further fees due from the introduction and payable by Aspect but suspended should be paid to the Plaintiff.

The whole with interests at the commercial rate from the date of payment

Costs are awarded to the Plaintiff including travel to Seychelles

Signed, dated and delivered at Ile du Port on 6 February 2017.

**M. TWOMEY**  
Chief Justice