Neutral Citation Number: **[2019] EWHC 725 (Comm)**

Case No: CL-2014-000863

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28 March 2019

Before:

THE HONOURABLE MRS JUSTICE COCKERILL

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Between :

FM CAPITAL PARTNERS LTD	**Claimant**
- and –	
(1) FREDERIC MARINO **(2) AURÉLIEN BESSOT** **(3) YOSHIKI OHMURA** **(4) MARIT SJØVAAG**	**Defendants**

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Nathan Pillow QC & Anton Dudnikov (instructed by **Hogan Lovells International LLP**) for the **Claimant**
Laurence Emmett & James Fox (instructed by **Cooke Young and Keidan LLP**) for the **Third Defendant**

Written Submissions of February 2019

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MRS JUSTICE COCKERILL DBE

Cockerill J :

1. On 12 December 2018 I heard arguments following on from the Consequentials judgment in this matter. One issue which arose was that of an account to be taken in relation to equitable compensation for dishonest assistance. I indicated that this should be taken by a Master, and a concern was raised that legal issues might arise which would render the taking of an account by a Master in the usual way either impractical or otherwise undesirable. One particular concern raised related to the application of the authority of *Imageview v Jack* [2009] 1 Lloyd's Rep. 436.

2. In order to deal with this concern, I ordered that a Schedule of Loss be served and responded to and any issues, including so far as necessary the *Imageview* issue, be referred to me on paper for determination, following which the taking of an account could be referred to a Master.

3. A Schedule of Loss was duly served; or to be more precise two schedules. By the first, which refers to what is now FMCP's primary case ("the First Basis") - that FMCP is liable to LAP- the amount sought to be recovered is simply the full amount of the GAIN Ironfly Commissions, namely US$4,308,400. The alternative basis ("the Second Basis") put forward is for US$1,897,490 and represents the amount by which the GAIN Ironfly Commissions exceeded the Note Advisory Fees received by FMCP.

4. I have now before me submissions from the parties on the Schedule of Loss. The issues which arise are:

    i) Whether the First Basis is the appropriate basis for assessment;

    ii) As regards the Second Basis whether LAP would have agreed to pay more fees, as alleged by FMCP or at all;

    iii) Whether FMCP should give credit for sums recovered from Ms Sjøvaag, Mr Haggiagi and (if any are ever recovered) Mr Marino;

    iv) The basis for an award of interest in relation to the equitable compensation for dishonest assistance;

    v) Directions for the taking of an account.

Issues relating to the First Basis

5. The first point made is that Mr Ohmura argues that there has been no precise finding as to the basis of liability and FMCP has not set out a precise case as to LAP's cause of action against FMCP. It is said that, absent FMCP setting out a case as to the basis of the claim and how it falls to be quantified, it would not be appropriate for the Court to adopt this basis. I do not find this persuasive. I made a finding of liability as between Mr Ohmura and FMCP. The questions which remain now are as to quantum. I have

determined, at trial, in the light of argument from the parties, that there would have been a liability on the part of FMCP to LAP. There seems to be no good reason why at this stage it should be necessary to determine exactly how FMCP's liability to LAP might have been argued.

6. On quantum it is said that the recovery of the full amount pursuant to the First Basis is inconsistent with paragraph 425 of the Main Judgment where I held that: "*I would therefore conclude that on the balance of probabilities FMCP did suffer some loss as a result of the various payments made to the Defendants; but that that loss was less than the full amount of those commissions*." I disagree with this submission. Paragraph 425 relates to what was then FMCP's primary case (loss to FMCP because it would otherwise have been paid the sums in question - see paragraph 412), but is now the Second Basis. That is how it was intended, and that is how it reads.

7. The third point made is the *Imageview* point: whether there is no requirement for LAP to give credit to FMCP for a notional increase in the fees that would have been payable to FMCP on the putatively higher fund balances because, on this hypothesis, FMCP was caused by Mr Marino to have (dishonestly) breached its duties to LAP, such that FMCP would not be entitled to any fees or commissions.

8. It is said for Mr Ohmura that if FMCP were liable to LAP, the quantum of FMCP's liability (and hence its claim against Mr Ohmura) would fall to be reduced by the additional management fees that LAP would have incurred if the amounts of the commissions had been left within LAP's funds. He argues that *Imageview* is distinguishable as encapsulating a rather different reality; in that there was no contract in that case which would have entitled the commission to be earned honestly, and here FMCP not only had a contract but there is no suggestion that it earned any commission dishonestly.

9. FMCP submits that the fees would not fall to be brought into account. It relies on *Imageview* at [16]-[24] and [47]-[51] and says that Mr Ohmura's argument relies on a misinterpretation of that case.

10. There is no question as to the principle in *Imageview*. The question is simply whether on the facts of this case it should be regarded as sufficiently analogous as to be applicable. I do not regard the position as being relevantly different in this case to the position in *Imageview*. In that case there was an agency contract. That is clear from Jacob LJ's judgment at 2(a)-(b) where he says:

> "There was [a written contract] later, dated 3rd August 2004. It is agreed that the written contract reflected the July oral agreement. …The contract was for a 2 year term. Mr Jack was to pay *Imageview* 10% of his monthly salary if *Imageview* successfully made arrangements for him to sign with a UK club."

11. Although the arrangement in that case was somewhat different - for a single percentage commission on the salary earned under the transaction and not for management fees- there was an agreed contractual structure for payment of a commission. The basis for that being held to be unavailable to *Imageview* was the same – the breach of fiduciary duty by the claimant, which breach can only have arisen through an individual negotiating an illegitimate payment. The difference is that the payment in *Imageview*

went to the company, not to the individual. But given that essentially the same route to liability for breach of fiduciary duty exists, I conclude that there is no good reason why the same result would not follow.

Issues relating to the Second Basis

12. This renders any decision on the Second Basis academic, but I nonetheless consider it for completeness.

13. In relation to the Second Basis it is submitted for Mr Ohmura that I should conclude, in the context of my other findings in the Main Judgment, that LAP would not have agreed to FMCP receiving any more fees than it actually received. It is also submitted that it would follow, if further fees would have been paid to FMCP, that the net gain to FMCP would have been less than the amount of the fees (because for example a discretionary bonus to Mr Bessot might have been triggered).

14. FMCP submits that there is every reason to conclude (on the evidence and on the basis of the inherent probabilities) that LAP would have been prepared to pay FMCP a further amount by way of introducer's fees.

15. It is regrettable that owing to the multiplicity of other issues in play at the trial this point was not the subject of any specific evidence. I do see that there is a tension between the evidence on LAP's expressed desire to cut costs at an early stage of the negotiations with Mr Marino on the one hand and the fees which they ultimately agreed to on the other. I must however do the best I can with the evidence which emerged on the issues. Ultimately, weighing that evidence, the safest guide seems to be the evidence of LAP's position later in time, which is also the evidence of what LAP were prepared to pay in fact, as opposed to LAP's aspirations before FMCP came into existence. I therefore reach the view that it is probable that if a market standard introducer fee had been put in place for payment to FMCP, LAP would have sanctioned it. That conclusion appears to have a degree of commercial logic because in effect some of that fee would come back to LAP.

16. As for the question as to bonuses, there is simply no evidence on the basis of which I can conclude that the net gain from that single fee would have been affected by any bonus payment.

17. Accordingly, there is no basis for any reduction.

Credit for recoveries

18. There are then arguments about credit being given for recoveries, which apply to both bases. These are (i) payments by Ms Sjøvaag, (ii) payments by Mr Haggiagi and (iii) sums recovered from Mr Marino.

19. The recoveries from Ms Sjøvaag are the most complex, comprising (i) traceable proceeds of the GAIN Ironfly Commissions (ii) sums received from the JB Secret Commissions and (iii) costs expended in pursuing Ms Sjøvaag. However only the first is really in issue; the other recoveries have already been taken into account in calculating the amount of the judgment against Mr Ohmura on other claims.

20. The debate between the parties is whether, as Mr Ohmura contends, this recovery essentially goes to wipe out the loss which FMCP suffered in relation to the GAIN Ironfly Commissions, or whether the recovery is collateral, as FMCP contends.

21. On this issue I am not persuaded that there is a basis upon which the sums in question have to be brought into account. The sums are the product of US$270,000 of monies used by Mr Marino to acquire shares in FMCP. Those shares in turn yielded substantial dividends, and £2.5m of those dividends were transferred to Ms Sjøvaag. She was the subject of a claim not because she had any involvement in the torts which formed the subject of the Main Judgment, but because a claim was made against her on a proprietary basis, i.e. that the funds were not really her funds at all but were in equity those of FMCP. In those circumstances it would perhaps seem illogical for those funds to be regarded as reducing a loss.

22. In support of this case FMCP referred me to *Tiuta International Ltd v De Villiers Surveyors Ltd* [2017] UKSC 77, [2017] 1 WLR 4627 where Lord Sumption stated at [12] that "*benefits under distinct agreements for which the claimant has given consideration independent of the relevant legal relationship with the defendant*". However, this situation could hardly be said to be such a situation – this is not a case of a separate agreement or independent consideration. Lord Sumption also said the following:

> "The general rule is that where the claimant has received some benefit attributable to the events which caused his loss, it must be taken into account in assessing damages, unless it is collateral. In *Swynson Ltd v Lowick Rose LLP* [2017] 2 WLR 1161, para 11, it was held that as a general rule "*collateral benefits are those whose receipt arose independently of the circumstances giving rise to the loss.*"

23. The *Swynson* case (now reported at [2018] AC 313) has a longer passage in that same paragraph which is of assistance. It says this:

> "It is difficult to identify a single principle underlying every case. …the critical factor is not the source of the benefit in a third party but its character. Broadly speaking, collateral benefits are those whose receipt arose independently of the circumstances giving rise to the loss. Thus, a gift received by the claimant, even if occasioned by his loss, is regarded as independent of the loss because its gratuitous character means that there is no causal relationship between them. The same is true of a benefit received by right from a third party in respect of the loss, but for which the claimant has given a consideration independent of the legal relationship with the defendant from which the loss arose. …. The position may be different if the benefits are not collateral because they are derived from a contract (say, an insurance policy) made for the benefit of the wrongdoer… [o]r because the benefit is derived from steps taken by the claimant in consequence of the breach, which mitigated his loss…"

24. The question is therefore really whether this is a benefit whose receipt arose independently of the circumstances giving rise to the loss. In this case, the sum recovered may only have been available because of the proprietary claim which has its basis in Mr Marino's actions, and in that sense, is linked to the loss, but its existence does arise independently of that loss. It may in that sense be seen as somewhat akin to a gift received which is occasioned by the loss. It also arises from a legal relationship entirely separate to that one which gives rise to the right to recover against Mr Ohmura; there was no concurrent or even overlapping liability. I therefore conclude that it satisfies the test of collaterality. It follows that I accept that recoveries from Ms Sjøvaag in relation to the traceable proceeds of the GAIN Ironfly Commissions are collateral recoveries arising from a claim independent of any legal relationship with Mr Ohmura and for which he had no overlapping or concurrent liability. Accordingly, they do not have to be brought into account.

25. As regards recoveries from Mr Haggiagi, I conclude that these are again collateral in the sense that they relate to a claim which did not overlap with the claims against Mr Ohmura. Further they have been credited already against Mr Marino's liability (which did overlap with that of Mr Haggiagi).

26. As for any recoveries from Mr Marino, these may be academic, but to the extent such recoveries are made I do consider that they fall to be credited as Mr Ohmura contends. These are not collateral recoveries, but recoveries in respect of the same or overlapping liabilities.

Basis for interest

27. The final question is that of interest – whether it should be simple or compound. Mr Ohmura contends that interest should only be recoverable on a simple basis because the order for equitable compensation is analogous to common law damages.

28. Mr Ohmura says that the starting point is to be found in *Libertarian Investments v Hall* [2014] 1 HKC 368 at [170] and [171] where Lord Millett describes equitable compensation as akin to compensatory damages and in the judgment of Lord Reed in *AIB v Mark Redler & Co Solicitors* [2015] AC 1503 at [137] where he described equitable compensation as "isomorphic" with an award of damages. Reliance is also placed on the judgment of Peter Smith J in *AG for Zambia v Meer Care & Desai* [2007] EWHC 1540 (Ch) at [9] and [10] where he found that the court had no power to award compound interest for dishonest assistance, because there was no "*fiduciary element*".

29. Mr Ohmura acknowledges the thrust of the case of *Central Bank of Ecuador v Conticorp SA* [2015] UKPC 11 where, by reference to the judgment of the Court of Appeal in *Novoship v Nikitin* [2015] QB 499, the Privy Council concluded at [185] that the refusal in that case to distinguish between the liability in dishonest assistance of a fiduciary and a non-fiduciary assister was equally applicable to the discretion to award compound interest.

30. He submits, however, that the discretion is really applicable where money has been received or retained by fraud or where it has been withheld or misapplied by a trustee or anyone else in a fiduciary position. This, it is submitted, is not a case where Mr Ohmura received or retained money by fraud or procured or assisted Mr Marino and

Mr Bessot to misapply FMCP's assets. In such a case the analogy with damages should be found to be appropriate and simple interest would follow.

31. I will start first by dealing with the materials to which I was referred which I do not regard as safe to place weight upon. I do not find myself to be much assisted by the citation of Peter Smith J in *AG for Zambia v Meer Care & Desai*. In the context of this area that case is now somewhat elderly, and expresses a view with an absolute assurance which is not reflected by the more recent authorities. As for the case of *Orix Australia Corp Ltd v Moody Kiddell & Partners Pty Ltd* [2005] NSWSC 1209 that is interesting, but it is not purporting to state English Law, and the basis for the underlying liability is not quite the same. Nor should the textbooks cited by the parties be regarded as a safe guide. This is an area where there is no doubt that the law has been developing in very recent years. I therefore proceed only on the basis of the principal cases set out above.

32. Those authorities support the view that:

    i) Whatever the very real analogies between equitable compensation and damages, the two are in fact distinct. As Lord Reed says in *AIB* at [136] that liability for breach of trust is *"not generally the same as a liability in damages for tort or breach of contract"* and at [137] "*structural similarities do not however entail that the relevant rules are identical: as in mathematics, isomorphism is not the same as equality*";

    ii) Compound interest is most clearly applicable to cases where money has been obtained and retained by fraud or misapplied by a fiduciary;

    iii) However, there is a discretion to award compound interest against a non-fiduciary dishonest assistant. That is now clear from:

        a) *Novoship*, where the liability of both fiduciary and non-fiduciary to the remedy of an account of profits was settled. It is noteworthy that the court at [75] also stated that: "*a liability to make good loss and a liability to account for profits* "*follow from the premise that the defendant is held liable to account as if he were truly a trustee to the claimant*"" and at [82] "*The nature of the liability, as it seems to us, is that the knowing recipient or dishonest assistant has, in principle, the responsibility of an express trustee*".

        b) The (admittedly non-binding) endorsement of that approach in *Central Bank of Ecuador* at [185]:

> "The Board considers that this is in principle correct, and that the same approach must govern the discretion to award compound interest. There is in this connection no satisfactory reason why those who dishonestly receive and retain, or procure or assist the fiduciary to misapply, the fiduciary assets, should be in any different position from the fiduciary who actually misapplies the assets. This is perhaps particularly obvious in the case of those who have dishonestly procured or assisted the fiduciary to misapply the assets."

33. It therefore appears that the balance of authority as it stands now favours the view that an award of compound interest can be made against a dishonest assistant who is not a fiduciary. That seems to be logical, given that the basis of the assistant's liability is accessory, that it is predicated on dishonesty and that as far as the principal amount of the remedy is concerned, his liability is co-extensive with that of the fiduciary/trustee whom he has assisted.

34. It may be said (as Mr Ohmura appears to do) that the formulation in *Central Bank of Ecuador* should not be regarded as a statement of co-extensiveness but rather as providing some limit for the applicability of the principle. That may or may not be the case. But even applying that formulation I conclude that Mr Ohmura falls within the ambit of the circumstances where an award of compound interest may be made: he may not have received or retained the fiduciary assets, nor have procured their misapplication, but in my judgment, he plainly did assist Mr Marino and Mr Bessot to misapply those assets. The result may be a liability on the part of FMCP to LAP, but that is the result of the misapplication of the assets, in which exercise Mr Ohmura played a key part. What is more he did so, as I have found, dishonestly.

35. It is not suggested that I conclude that if the discretion exists I should not exercise it; and in the light of the facts I have found it would seem natural to do so absent some good reason. I do therefore order that Mr Ohmura pays interest on a compound basis as sought by FMCP.

Directions

36. It follows that there will be no need for further directions. I invite the parties to submit an order encapsulating the findings set out above. That is likely to be very similar to the draft submitted by FMCP, but there are interest calculations to be performed and it is right that the parties should have the opportunity to agree a final form or raise any last points of detail on the draft Order before that order is made.