Cause No: FSD 2023-0113 (JAJ)

IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

IN THE MATTER OF HAMMER INTERNATIONAL FOUNDATION
IN THE MATTER OF THE COMPANIES ACT (2023 REVISION)

BETWEEN:

THE ARMAND HAMMER FOUNDATION, INC.

Plaintiff

-and-

(1) HAMMER INTERNATIONAL FOUNDATION
(2) MARK ALFANO
(3) SAMUEL 1 LTD
(4) REX ALEXANDER
(5) MISTY HAMMER
(6) JEFF KATOFSKY
(7) RANDALL BARTON
(8) RAISHA PARK
(9) CECIL KYTE
(10) ALEXANDER MENZEL
(11) THE ATTORNEY-GENERAL

Defendants

Appearances:	**Mr Graeme McPherson KC instructed by Mr Matthew Dors of Collas Crill for the Plaintiff**
	Mr John Harris of Nelsons for the Second to Tenth Defendants
	Ms Reshma Sharma KC appeared on behalf of the Eleventh Defendant
Before:	**The Honourable Justice Jalil Asif KC**
Heard:	**13 May 2024**
Ex tempore Judgment delivered	**13 May 2024**
Finalised judgment approved	**16 May 2024**

CASE SUMMARY
(not part of judgment)

Grant of injunction to restrain directors from purporting to exercise control over company, the subject of litigation due to be tried imminently, pending determination of litigation.

JUDGMENT

1. I have before me a summons issued by the Plaintiff on 10 May 2024 for injunctive relief. The summons is directed at the Second to Tenth Defendants and seeks orders to restrain them individually and collectively from acting on behalf of Hammer International Foundation – the First Defendant in these proceedings – in any way whatsoever in any jurisdiction, pending the resolution of these proceedings. The summons includes an application for costs to be paid by the Second to Tenth Defendants on the indemnity basis.

2. This matter has had a slightly chequered recent procedural history. In very brief summary, the matter was reassigned to me from the Chief Justice in March 2024, at a time when there was a trial due to start on 8 April 2024. Very shortly before the trial, on Thursday 4 April 2024, the Second to Tenth Defendants applied to adjourn the trial on the basis that their then attorneys were intending to come off the record and it would be unfair for the trial to proceed in circumstances where the Second to Tenth Defendants would either not be represented at the trial or would have representation who had not had sufficient time to get up to speed.

3. It was not a straightforward decision to make, given the circumstances, but I accepted the arguments put forward by the Second to Tenth Defendants and adjourned the trial from 8 April 2024 to begin on 3 June 2024, approximately three weeks from now. Part of the reason that I took that course was that it was going to be possible to have a trial within a fairly short period so that the prejudice to the Plaintiff – and indeed to the First Defendant, a charitable foundation – was minimised so far as possible.

4. It now appears that the Second to Tenth Defendants caused the First Defendant to apply a few days ago for US Bankruptcy Code Chapter 11 protection in California. The basis for doing so is not clear to me and there is no satisfactory explanation by the Second to Tenth Defendants. I should note that there is no evidence filed on behalf of the Second to Tenth Defendants in response to the application. Mr Harris, who has appeared for the Second to Tenth Defendants, has told me that due to the shortness of time and other commitments, it has not been possible for him to assist the Second to Tenth Defendants to prepare such evidence. I am not satisfied by this

explanation, given that the Second to Tenth Defendants apparently resolved to pursue Chapter 11 bankruptcy for the First Defendant on 18 March 2024, some seven weeks ago, and have been able to prepare detailed filings for the purpose of the US proceedings. As I indicated to Mr Harris during argument, I would expect them to have explanations of the need for the First Defendant to pursue Chapter 11 bankruptcy protection, and to do so at this particular point in time, at their fingertips.

5. With no evidence from the Second to Tenth Defendants as to why they chose to proceed as they have done and at precisely the time that they did, the best that Mr Harris was able to present to the Court was speculation, his own term, as to why it might be appropriate for the First Defendant to seek Chapter 11 protection. Unfortunately, speculation does not really help me to reach a conclusion.

6. I am left with the situation as described in the Fourth Affidavit of Mr Viktor Hammer, which raises a number of concerns in my mind about the conduct of the Second to Tenth Defendants, and the reasons why they have chosen to adopt the course they have at this precise moment – less than three weeks before trial. I note, as drawn to my attention by Mr McPherson, that nothing was said when the Second to Tenth Defendants applied on 5 April 2024 to adjourn the trial due to commence on 8 April 2024 about the fact that they had resolved some 3 weeks earlier to put the First Defendant into Chapter 11 bankruptcy. Instead, at that time, and today, Mr Harris argued that the Second to Tenth Defendants want the trial to proceed as soon as possible.

7. In addition, I have seen statements made by Mr Katofsky, who was formerly a purported director of the First Defendant and now appears to be acting as one of the attorneys for the Second to Tenth Defendants, expressing rather extreme positions as to what is the Second to Tenth Defendants' position.

8. In a letter dated 7 May 2024, written on an open basis -- I pause just to say that Mr Harris asserted that under US law a letter of this kind might be considered to be written on a without prejudice basis. I am somewhat sceptical about that, and there is no evidence as to US law to satisfy me that it would be treated as without prejudice. In any event, it seems to me it is intended to be written on an open basis – Mr Katofsky wrote:

> *"My client wants to express its intentions if matters are not quickly resolved between our respective clients. HIF* [the First Defendant] *intends through the Bankruptcy Court to orderly sell everything piece by piece until it is all gone, then give all the money away to*

eligible and deserving charities. The final chance for a resolution is now. The following must occur:

1. *a stipulation to adjourn the Caymans matters for 120 days;*

2. *a mediation in my office (with or without a mediator) in May 2024* [and he then sets out requirements as to who should attend that mediation]*;*

3. *if an agreement is reached at mediation, a binding agreement shall be signed prior to the end of the mediation for review and approval by the Bankruptcy Court, if required;*

4. *a written notice of acceptance of the above by noon, Friday, 10 May 2024. There will be no turning back after this deadline."*

Then he signs off with the phrase,

"If you think HIF is bluffing, call. HIF is all in."

In context it seems to me, as I think Mr McPherson is suggesting, the reference to a "call" was not to a telephone call, but a poker call, which is why Mr Katofsky continued, "HIF is all in," to use the well-known poker phrase when someone bets all their remaining chips on the outcome of the hand.

9. It is of real concern to me that, having had an informal truce over the last 12 months between the two factions as to what should happen in relation to HIF pending the determination of the trial in the Cayman Islands, the Second to Tenth Defendants now appear to have decided that they will no longer consider themselves bound by that arrangement and, as a result, have instituted the Chapter 11 proceedings in the US. It seems to me that that is an attempt by them to prejudge the outcome of the trial in the Cayman Islands, and to take steps which are potentially inconsistent with, and certainly likely to be damaging to, the working out of whatever decision I make in due course at the end of the trial.

10. I am satisfied that there is clearly a serious issue to be tried between the parties as to whether it is the Plaintiff or the Second to Tenth Defendants who are entitled to control the First Defendant. That is the very question to be decided in the Cayman proceedings. Furthermore, I understand from Mr McPherson, and Mr Harris did not dissent, that the outcome of the Cayman proceedings is intended by the parties then to feed into the existing US proceedings in California and Florida. The recent action by the Second to Tenth Defendants presupposes that the outcome of that trial is in their favour. For the purpose of considering whether or not to grant injunctive relief, there is therefore clearly a serious issue to be tried, and so that requirement is easily met.

11. Secondly, it seems to me, based on the correspondence from Mr Katofsky, that there is a real and significant risk that, unless restrained, the Second to Tenth Defendants are likely to take action which is likely to damage the interests of the First Defendant and potentially the Plaintiff. I refer here to Mr Katofsky's statement in his letter of 7 May 2024 that they will cause the First Defendant to sell all of its assets (at least some of which are claimed to be owned by the Plaintiff) and to give away the proceeds to third parties.

12. Mr Harris urged on me that the Second to Tenth Defendants have no intention of doing anything that is not sanctioned by the US Bankruptcy Court, and therefore I should be reassured that there will be – putting it colloquially – no misbehaviour on their part. However, it seems to me that that overlooks the possibility that the US Bankruptcy Court accepts an argument that I have been told the Plaintiff intends to make, that the Chapter 11 proceedings are void, and sets aside those Chapter 11 proceedings, in which case the US Bankruptcy Court will no longer have any jurisdiction or control over what the Second to Tenth Defendants cause HIF to do in the future.

13. The possibility that the US Bankruptcy Court dismisses or sets aside the Chapter 11 proceedings is a real one: Mr McPherson took me through the Chapter 11 filing, which, in summary, shows that the First Defendant's assets are approximately 90 times its liabilities, so it does not appear that the First Defendant is balance-sheet insolvent, and that the First Defendant recently paid its US attorneys handling the Chapter 11 proceedings US $100,000, which suggests it is not cash-flow insolvent either (contrary to Mr Harris's speculation that that might be the reason for the Chapter 11 filing occurring now).

14. So, I am satisfied that there is a real risk that unless restrained, the Second to Tenth Defendants will carry out the actions sought to be restrained, that those actions are likely to damage the interests of the Plaintiff and the First Defendant, and that, subject to other considerations that I need to deal with in a moment, it is appropriate in principle for me to grant an injunction along the lines sought by the Plaintiff.

15. The next obvious question is: Are damages an adequate remedy? In light of Mr Katofsky's letter and the threat that the Second to Tenth Defendants will essentially sell off the First Defendant's assets and give the money away, it is clear that damages are not going to be an adequate remedy. HIF will have no assets, and there is no good evidence – indeed there is no evidence at all in front of me at the moment – that the Second to Tenth Defendants have sufficient assets to meet a

potential liability of up to $100 million. So, damages, it seems to me, are clearly not an adequate remedy.

16. On the other hand – and I appreciate the balance of convenience is not a live consideration, given that I am applying *American Cyanamid*[1] principles – I am reassured that the balance of convenience is strongly in favour of granting the injunction:

    a) The likely duration of the injunction is going to be a matter of months, rather than years, and will be until judgment in the Cayman proceedings is given. Mr Harris stated on several occasions in argument that the Second to Tenth Defendants have no intention of further delaying or disrupting the trial due to commence on 3 June 2024 and judgment is likely to be 2-3 months thereafter at most.

    b) The injunction will not have any personal impact on any of the Second to Tenth Defendants in their ability to go about their ordinary everyday lives. The extent of the injunction will simply be to prevent them from causing the First Defendant to take any action until I have determined who is entitled to control and make decisions on behalf of HIF.

17. I am completely satisfied that there is minimal or indeed no real prejudice to the Second to Tenth Defendants, whereas, to the extent it would be a relevant consideration, there is the risk of very substantial prejudice to the Plaintiff if I do not grant an injunction.

18. Mr Harris urged me that I should not make any order because I would risk trespassing on matters that are properly for determination by the US Bankruptcy Court. It seems to me that it is important to draw a distinction between what happens in relation to HIF and what happens in relation to the Second to Tenth Defendants. I am not being asked to make any order in relation to the First Defendant, HIF; I am only being asked by the Plaintiff to make an order in relation to the Second to Tenth Defendants, who are the individuals purporting to act on behalf of HIF and causing HIF to behave in the ways complained of by the Plaintiff. In answer to my question during argument about how the First Defendant would be able to participate in any applications to dismiss or set aside the Chapter 11 proceedings if I grant the injunction, I was told that there is a trustee appointed in the Chapter 11 proceedings on behalf of the First Defendant and that the Second to

[1] *American Cyanamid Co v Ethicon Ltd [1975] AC 396*

Tenth Defendants could appear personally in the Chapter 11 proceedings to put forward their position.

19. It seems to me therefore that there is no inappropriate trespass by my proposed order on the ambit of what the US Bankruptcy Court will determine in due course. Granting an injunction against the Second to Tenth Defendants does not seem to me to be likely to stifle the First Defendant's ability to pursue Chapter 11 protection, through its trustee: it will simply prevent the Second to Tenth Defendants from continuing to exert control of the First Defendant until the issue of who should properly be in control of it has been decided following the trial in 3 weeks.

20. For all of these reasons, it seems to me that it is appropriate to make an order along the lines set out in the draft order provided to me.

Dated 16th May 2024

THE HONOURABLE JUSTICE ASIF KC
JUDGE OF THE GRAND COURT