

Judgment 31/2005

**The Wessadah Foundation v. Barings (Guernsey)
Limited – Royal Court (Civil action file 896) –
31 May, 2005**

**Royal Court Civil Rules, 1989 – strike out application – proper approach to strike out –
application dismissed.**

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

The 31st day of May, 2005, before Sir de Vic Carey, Bailiff; sitting alone.

In the matter of

Between:

THE WESSADAH FOUNDATION

Plaintiff

-v-

BARINGS (GUERNSEY) LTD.

Defendant

Whereas on the 18th day of March, 2005, the Bailiff considered the application to strike out the Plaintiff's cause and heard thereon Advocates J.P. Greenfield and A.D. Laws, Counsel for the Defendant and Plaintiff respectively, The Bailiff this day handed down judgment in the terms attached hereto and DISMISSED the application.

S. M. D. ROSS
Her Majesty's Deputy Greffier

**IN THE ROYAL COURT OF GUERNSEY
ORDINARY DIVISION**

Between:

THE WESSADAH FOUNDATION

Plaintiff

v.

BARINGS (GUERNSEY) LTD.

Defendant

**JUDGMENT OF THE BAILIFF ON THE DEFENDANT'S APPLICATION TO STRIKE
OUT THE PLAINTIFF'S CAUSE**

Advocate for the Defendant: J. P. Greenfield

Advocate for the Plaintiff: A. D. Laws

Date of Hearing: 18th March, 2005

Date judgment handed down: 31st May, 2005

Background

1. The Plaintiff is a Liechtenstein Foundation. Its representative at all material times has been a Mr. Hani Al-Qadi, an investment banker with the Arab Jordan Investment Bank in Amman. The Defendant is a Guernsey company, which as part of its business provides investment management services.
2. In February 1998 the Plaintiff and the Defendant entered into an agreement whereby the Defendant agreed to provide the Plaintiff with an investment management service. In addition to the agreement the Defendant drew up a document called an "investment management client profile" which was also signed on behalf of the Plaintiff along with the Investment Management Agreement. I will have to look at this agreement in more detail later but the salient points to note are that the Defendant was given a complete discretion as to how it managed the port folio (clause 2) and whilst being obliged to exercise good faith and reasonable care and diligence in the performance of its duties save for breach of such obligations it would not be in any circumstances under any liability to the client for any loss or damage howsoever caused (clause 5). The investment management client profile made reference to certain bench marks under a paragraph headed "reporting" where at sub-paragraph 4.1(f) an indication was required of the client as to whether it required performance comparison. The two benchmarks were then specified by the client.

3. We shall see how to say the least there was ongoing dissatisfaction on the part of the Plaintiff as to the way in which the Defendant carried out its duties. There was various correspondence, which may or may not have varied the terms of the original Investment Management Agreement. Affidavits have been introduced on both sides explaining the relationship between the Plaintiff and the Defendant, but at the end of the day I cannot have a preliminary trial on the facts of the matter.

The Law

4. This application is brought pursuant to Rule 36(1) of the Royal Court Civil Rules, 1989 which reads as follows:

"36.(1) The Court may order any cause, counterclaim or other pleading, or anything therein, to be struck out or amended on the grounds that –

- (a) it discloses no reasonable cause of action or defence, as the case may be;
- (b) it is scandalous, frivolous or vexatious;
- (c) it may prejudice, embarrass or delay the fair trial of the action or any other proceedings; or
- (d) it is otherwise an abuse of the process of the Court;

and the Court may order the claim or counterclaim to be stayed or dismissed or judgment to be entered accordingly, as the case may be."

The issue for me is whether at this stage I can be satisfied that the amended cause of the Plaintiff discloses no reasonable cause of action.

5. Put another way does the cause of action as amended and as amplified in the Further and Better Particulars that have been provided by the Plaintiff, show that there is a claim, which after evidence had been led to support it by the Plaintiff, could persuade the Jurats that there was to be inferred a liability on the part of the Defendant for the losses that the Plaintiff claims resulted from the performance of the Defendant's services under the Investment Management Agreement.

The Proper Approach to strike out

6. I turn to the White Book 1999 and the commentary on Order 18 Rule 19 for guidance as to how I should proceed. Two passages sum up the principles which apply

"18/19/6 Exercise of powers under this rule – It is only in plain and obvious cases that recourse should be had to the summary process under this rule, *per* Lindley M.R. in *Hubbuck v. Wilkinson* [1899] 1 Q.B. 86 at 91 (*Mayor, etc.*,

of the City of London v. Horner (1914) 111 L.T. 512, CA). See also *Kemsley v. Foot* [1951] 2 K.B. 34; [1951] 1 All E.R. 331, CA, affirmed [1952] A.C. 345, HL. It cannot be exercised by a minute and protracted examination of the documents and facts of the case, in order to see whether the plaintiff really has a cause of action (*Wenlock v. Moloney* [1965] 1 W.L.R. 1238; [1965] 2 All E.R. 871, CA). If there is a point of law which requires serious discussion, an objection should be taken on the pleadings, and the point set down for argument under O.33, r.3 (*Hubbuck v. Wilkinson* [1899] 1 Q.B. 86 at 91).

Where an application to strike out pleadings involves a prolonged and serious argument, the Court should, as a rule decline to proceed with the argument unless it not only harbours doubts about the soundness of the pleading but, in addition, is satisfied that striking out would obviate the necessity for a trial or substantially reduce the burden of preparing for a trial, and therefore, where the Court is satisfied, even after substantial argument both at first instance and on appeal; that the defence does not disclose a reasonable ground of defence, it will order it to be struck out (*Williams & Humbert Ltd v. W. & H. Trade Marks (Jersey) Ltd* [1986] A.C. 368; [1986] 1 All E.R. 129 HL."

"18/19/10 (1) Principles – A reasonable cause of action means a cause of action with some chance of success when only the allegations in the pleading are considered (*per* Lord Pearson in *Drummond-Jackson v. British Medical Association* [1970] 1 W.L.R. 688; [1970] All E.R. 1094, CA). So long as the statement of claim or the particulars (*Davey v. Bentinck* [1893] 1 Q.B. 185) disclose some cause of action, or raise some question fit to be decided by a Judge or a jury, the mere fact that the case is weak, and not likely to succeed, is no ground for striking it out (*Moore v. Lawson* (1915) 31 T.L.R. 418, CA; *Wenlock v. Moloney* [1965] 1 W.L.R. 1238; [1965] 2 All E.R. 871, CA);"

Both passages refer to the case of Wenlock v. Moloney [1965] 1 WLR 1238 to which I will return.

The pleaded case

7. Paragraphs 6-8 of the amended cause plead the original agreement to which I have referred.
8. Paragraph 9 goes on to claim that notwithstanding anything in the agreement expressed the contrary the Defendant agreed that the portfolio would be invested as to 50% in European equities and 50% in European bonds. There is then a claim that the Defendant agreed that the investment strategy would be by reference to two benchmarks, which are mentioned in the investment management client profile.
9. There is then a claim in paragraph 10 that the Defendants were on notice that Mr. Al-Qadi attached special importance to benchmarks. This was pleaded as having been relayed at a meeting at the Four Seasons Hotel in London in the early part of 1998. There is then

reference (paragraph 11) to an implied term in the agreement that the Defendant would exercise all reasonable care and skill as an investment manager of the portfolio.

10. There is then reference in paragraphs 12 and 13 to a substitution that took place on the 8th July, 1998 when the Plaintiff wrote to the Defendant changing one of the indices which was to be used as a benchmark. Likewise in 1999 it is pleaded that there was a further change of the benchmarks.
11. There is then a further claim in clause 13A that there was a variation of the contract which was accepted by the Defendant's conduct in continuing to manage the Plaintiff's portfolio. The pleaded variation was in the following terms:-

"13A. On 2nd February, 2001, Mr. Al-Qadi sent a fax [to the Defendant] stating:-

"In view of the disappointing performance of the Portfolio last year, and the continuing underperformance relative to the benchmark year upon year, you are requested to instruct the Portfolio managers to adhere strictly to the benchmark parameters with no deviation whatsoever."

This fax constituted an offer to vary the terms of the agreement, which offer BGL accepted by its conduct in continuing to manage the Plaintiff's portfolio without any demur as to its ability to adhere strictly to the benchmarks. The variation was supported by consideration from the Plaintiff in continuing to use the services of BGL to manage the portfolio despite the fact that the Plaintiff could have determined such mandate at will. The effect of the variation was that, with effect from 2 February 2002, BGL was contractually obliged to replicate the performance of the benchmark indices within reasonable tolerances."

12. Paragraphs 14 to 16 make reference to statutory duties of the Defendant under the legislation involving the regulation of investment businesses. I do not think that adds anything to its case and I will not spend more time on it.
13. Paragraphs 17 to 31 then trace the history of the portfolio from its inception down to the closing of the relationship between the Plaintiff and the Defendant. The thrust of the complaint is that the performance of the portfolio did not correspond with the performance of the benchmark index. Various correspondence and communications between the parties is rehearsed. In paragraphs 28 to 30 there is reference to various comparators, the upshot of which is that the performance of the portfolio has not measured up to the benchmarks.
14. Paragraph 31 is interesting in that it pleads a letter written by a Mr. Jeffries of the Defendant to Mr. Al-Qadi in which the Defendant acknowledged

"that individual stock selection has been the most significant detractor from performance and I would reiterate that by being able to hold 75 stocks in the Portfolio there will always be a significant risk of under or out performance of the stock level"

15 In Paragraph 33 of the cause there are some nine breaches of duty pleaded some of these are expanded in the further and better particulars. I am not going to consider separately the issue of statutory duty as I can deal with this case on the basis of the breaches of general duty alleged in paragraph 33.

16 Eventually Mr. Al-Qadi decided to liquidate the portfolio. Between the 19th and 23rd June, 2003, the portfolio was liquidated and Wessadah received €4,319,290. It now claims that if the portfolio had properly managed namely that had the portfolio been invested in the benchmark index the value of the portfolio would have been €5,350,965.

Mr. Greenfield's submissions on behalf of the Defendant

17. Mr. Greenfield produced a skeleton argument which he amplified in oral submissions to me. The skeleton argument at paragraph 3 states:-

"The claim is plainly and obviously misconceived."

It then takes Mr. Greenfield 25 pages and 59 footnotes to explain his case, supported by 20 written authorities and a reference to the Loi relative aux Preuves, 1865.

18. Paragraph 3 continues as follows

"It is trite law that a stockbroker is not liable to his client for the performance of shares held in the client's portfolio. The mere fact of losses on unpredictable markets does not provide evidence of negligence on the part of a stockbroker."

19. What then is the authority for this statement? Two cases are quoted in footnote 1 Stafford v. Conti Commodity Services Ltd. [1981] 1 All AER 691 and Merrill Lynch Futures Inc. v. York House Trading Ltd. (21 May 1984, CA). Both these cases involve commodity brokers and not stockbrokers, so it is somewhat misleading to use them as authority for what goes on in the Stock Market if that was a fair comparison at any rate. In the case of Stafford the claim was for damages for negligence. The flavour of the dealings between the parties can be obtained from the first sentences of the headnote

"The plaintiff, an investor on the London commodities future market, after discussions with the defendants, who were well-known brokers dealing on the market, gave them a substantial sum to invest on the market. There was no written agreement between the parties. Between January and August 1976 the defendants carried out 46 transactions on the market for the plaintiff. The defendants gave the plaintiff advice and brought to his notice different points of view regarding a

proposed transaction but the plaintiff usually made his own decision and often rejected the defendants' advice."

I can well understand the decision of Mocatta, J. in rejecting the claim which is explained in the first part of the decision.

20. Merrill Lynch is a decision of a two man Court of Appeal which appears only to have been reported in The Times. This approves Stafford but involved considering an application to set aside a judgment that has been obtained following failure to provide further and better particulars. The facts of these cases are very different from what we have here and I will revert to this part of Mr. Greenfield's submissions when I reach my conclusions. In addition to a long skeleton Mr. Greenfield has had to rely on evidence from Mr. Collins which has been put in by affidavit. In his skeleton and his submissions he relies heavily on the principle that the Plaintiff cannot go behind the investment agreement, which absolves the Defendant from responsibility for losses. He invites me to reject any suggestion that the subsequent course of dealings between the parties entitled the Plaintiff to expect of the Defendant any concession that the Defendant's absolute discretion to invest this portfolio as it wished without responsibility for loss was not sustainable. Likewise I was to reject any suggestion of implied terms being read into a relationship such as existed between the Plaintiff and the Defendant. This of course is only a very brief summary of what Mr. Greenfield argued. Again in my conclusions I will explain why I do not think it necessary to record them in greater detail.

The submissions of the Plaintiff

21. The Plaintiff has drawn attention to the principles in the White Book to which I have already referred and also the case of Wenlock v. Moloney [1965] 1 WLR 1238. This is in my view a very important case relating to strike-out. The judgment of a strong Court of Appeal is succinct and contained a rare reprimand for Master Jacob who was one of the most respected Queen's Bench Masters of the middle of the twentieth century. The Plaintiff was a litigant in person who had a complex claim in conspiracy against some of his former business partners. He had to have two efforts before his pleadings were in a state to take him anywhere and it is quite clear that success was a long way off.
22. Be that as it may the judgment of Sellers, L.J. of which I set out below an edited extract explains in my view the approach which this Court should adopt. The decision is also interesting in that it considers whether affidavit evidence should be relied upon in cases where the argument is essentially that the action should be struck out because it is not likely to succeed. I accept that here that Mr. Greenfield is relying on the action being scandalous,

frivolous or vexatious or being otherwise than an abuse of Court, but much of the argument that has developed in the written and oral cases have really centred on the former issue.

23. In Wenlock the Court of Appeal refused to look at the affidavit evidence. I have not gone that far in this case. At this stage I will record an edited extract from the judgment of Sellers, L.J. in Wenlock which I take as guidance to this Court

"In my judgment, the appeal of the plaintiff (who has appeared in person in this court) should be allowed. What has taken place here is, I think, without precedent and far from encouraging it, as counsel have submitted, I would disapprove it. It is not the practice in the civil administration of our courts to have a preliminary hearing, as it is in crime.

.....

If, as here, the only ground on which the action can be said to disclose no reasonable cause of action is that it is not one which is likely to succeed, then I doubt whether affidavit evidence was admissible. There have been cases where affidavits have been used to show that an action was vexatious or an abuse of the process of the court but not, as far as we have been informed, or as I know, where it has involved the trial of the whole action when facts and issues had been raised and were in dispute. To try the issues in this way is to usurp the function of the trial judge, *Lawrance v. Lord Norreys* and *Willis v. Earl Howe*, which were referred to, were, in my view, quite different cases based on affidavit evidence establishing that they were frivolous or vexatious, not that they disclosed no cause of action. Our practice is to have discovery and to hear the case on oral evidence subject to cross-examination. The master acceded to the request of the defendants on the ground that he was saying the defendants from costs and the burden of litigation. But it involved him and the parties in the trial of the action by affidavit on more than two full days of hearing. It was not, therefore, a plain and obvious case on its face.

It may well be a case which will fail and what has taken place may well discourage the plaintiff from continuing. But I feel no doubt that the procedure has been wrong and that the plaintiff's action cannot be stifled at this stage. I think that the judge fell into the same error as the master and that this appeal must be allowed."

Conclusions

24. I have some sympathy for the Defendant in this case as the Plaintiffs pleadings do reveal some disparity with the documentation so far disclosed. The problem for the Defendant is that it undertook to provide an investment management service relating to a portfolio valued at US\$5 million for which it would charge ¾% per annum that is to say US\$37,500 per year. The only documentation setting out what the Bank will do is a short pro forma Investment Management Agreement and an accompanying Investment Management Client Profile.
25. I do not want anything that I say to give any encouragement to this Plaintiff that this litigation has any real chance of success.

26. However, the first issue, which seems to me relevant for the Court of trial, is what is the significance of the exclusion clause in the Investment Management Agreement. As I have indicated we are not dealing with the old regime of the 1970s involving a stockbroker producing advice on suitable investments and then the client deciding to accept or reject that advice and if he accepted it paying a one off commission to the stockbroker for effecting the transaction on his behalf on the Stock Exchange.
27. This case concerns a wholly different situation. The Defendant is in the business of providing investment management services in return for a periodic fee calculated as a percentage of the value of the portfolio and I am not aware of any authority which has explored the parameters of the responsibility of investment managers when they undertake these fairly generously rewarded assignments for customers.
28. I accept that it is unlikely that any Court would conclude that the inclusion in the instructions to the investment advisor of a provision that reports on performance were to make comparisons with benchmarks is to be interpreted as the imposition of an obligation to keep the value of the portfolio in line with those benchmarks and in consequence the acceptance of liability to indemnify in the event of failure to do so. As is made clear in the correspondence the only way of meeting a benchmark is to invest in what is known as a tracker fund, which creates a portfolio of investments, weighted in precisely the same way as the index concerned.
29. It is interesting to note that the old stockbrokers commission, if I may describe it as such, which is now replaced by a dealing fee appears to be a disbursement and not to be met out of the ¾% management fee (see clause 5 of the Investment Management Agreement). There must therefore be some hesitation from running up dealing fees unnecessarily and therefore a claim that if there is an acceptance that a portfolio is to be split between two types of investment temporary disparity may be fully justified.
30. There is a well established authority which has not occupied this hearing that exemption clauses have got to be construed narrowly against the person who is seeking to rely on them. I acknowledge the force of the argument that when a contract is reduced to writing the provision of the Loi Relative aux Preuves applies and no evidence is admitted from outside the contents of the document. However, this is not a complicated contract where parties have gone to lawyers and had a tightly negotiated bargain redacted with the assistance of the clarity of thought of the best legal draftsman. This is a standard form agreement which clients are required to sign, apparently without more, before they agree to employ the Defendant as their investment advisor. There is no indication of what expertise the Defendant claims to have to enable it to look after the client's money in this way. The relationship in this case continued for some five years. There is evidence of concern being

expressed by Mr. Al-Qadi on behalf of the Plaintiff and to that concern being responded to by the Defendant. It is not for me to try and evaluate the significance of all that material which is contained in the pleadings between paragraphs 17 and 31. These are matters for the Court of trial.

31. In my judgment the Defendant has not satisfied the test for a strike out and in view of the delay in that has regrettably occurred in delivering this judgment I do not consider it necessary to trawl further through the long and overstated written contentions produced in support of the strike out application. The Plaintiff should however consider its position. It seems unlikely from what I have seen that any Court even if the Defendant fails to exclude liability in the way it pleads going to impose a liability on an investment advisor where all that has happened is that the market has not performed as well as one had hoped. The exact terms of the contract and the extent of any liability will be matters for trial. The Application is dismissed.