Judgment 34/ 2006 HFT International (Guernsey) Limited v Equinox Finance Management (Guernsey) Limited – Royal Court (Civil Action File 924) – 20th June, 2006

Fund promoter's claim for remuneration from fund manager – Royal Court Civil Rules, 1989 (Rules 43 and /or 47) – order for specific discovery previously granted – plaintiff applied for order that defendant (a fund manager) calculate the net asset value of the Fund - order sought does not fall under Rule 43 or 47 – review of circumstances in which inherent powers of the Court could be invoked – Court not satisfied that the order sought was necessary – application dismissed

IN THE ROYAL COURT IN THE ISLAND OF GUERNSEY

The 20th day of June, 2006 before Richard John Collas, Esquire, Deputy Bailiff; sitting alone.

Civil File 924

Between:-

HFT INTERNATIONAL (GUERNSEY) LIMITED

Plaintiff

v

EQUINOX FINANCE MANAGEMENT (GUERNSEY) LIMITED

Defendant

WHEREAS on the 8th day of June, 2006 the Deputy Bailiff considered an application for an order requiring the Defendant to calculate the net asset value of the fund known as the Russian Opportunities Fund Limited and heard thereon Advocates P.T.R. Ferbrache and J.P. Greenfield, Counsel for the Plaintiff and Defendant respectively, the Deputy Bailiff this day gave judgment in the terms attached hereto and DISMISSED the application.

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

Final Judgment
20 June 2006

IN THE ROYAL COURT OF GUERNSEY

ORDINARY DIVISION

Between **HFT INTERNATIONAL (GUERNSEY) LIMITED** **Plaintiff**

-v-

EQUINOX FINANCE MANAGEMENT (GUERNSEY) LIMITED **Defendant**

APPLICATION FOR AN ORDER REQUIRING THE DEFENDANT TO CALCULATE THE NET ASSET VALUE OF THE FUND

Judgment handed down: 20 June 2006

Before: Richard John COLLAS Esq., Deputy-Bailiff

Advocate for Plaintiff: Advocate P T R Ferbrache
Advocate for Defendant: Advocate J P Greenfield

Cases, texts & statute referred to:

1. Rule 43 and Rule 47 of the Royal Court Civil Rules 1989.
2. Ecclesiastical Court (Jurisdiction) (Bailiwick of Guernsey) Law 1994.
3. Cherub Investments Limited -v- The Channel Islands Aero Club (Guernsey) Limited (1982).
4. Mayo Associates v Cantrade Private Bank Switzerland (CI) Limited [1998] JLR 173
5. Laughton v Main on appeal from the Court of Alderney (14 January 2000).
6. Angenent -v- Pring (Royal Court 30 December 2004 and 4 January 2005).
7. Morton -v- Paint (Guernsey Court of Appeal) (9 February 1996) 21.GLJ.61.
8. Ledochowski -v- Copernicus Asset Management Limited Royal Court – Interlocutory Court 5 September 2003.

Introduction

1. The Plaintiff is applying for an Order that the Defendant, who is the manager of Russian Opportunities Fund Limited ("the Fund"), be required to calculate the net asset value ("NAV") of the Fund as at the 23 April 2004. The Plaintiff requests the calculation forthwith as the substantive hearing before the Jurats is to start on Monday 12 June. The application is made under Rule 43 and/or Rule 47 of the Royal Court Civil Rules 1989 and/or the inherent jurisdiction of the Royal Court. It follows on from an Order for Specific Discovery which I made on 3 May 2006 under Rule 39 of the 1989 Rules, whereby I ordered the Defendant to give discovery of certain documents including:

> *"all and any documentation relating to the calculation of the net asset value of the fund as at the close of business on the last business day prior to 25 April 2004".*

2. The Defendant has complied with that Order so the Plaintiff has the information that should enable it to calculate the NAV, but it is asking that the Defendant do so as the Defendant has the expertise and knowledge to enable it to do so much more easily than the Plaintiff would be able to do.

3. On 9 June I told counsel I was dismissing the application and these are the reasons for my decision.

The Facts

4. For completeness, I repeat here what I said about the factual background to this matter in my Judgment of 3 May.

5. The Plaintiff was the promoter of Russian Opportunities Fund Limited, an open-ended investment company incorporated in Guernsey ("the Fund"). The Defendant was the manager of the Fund. Advocate Peter Ferbrache, appearing for the Plaintiff, described the history of the relationship between the parties as a three-stage process. The first stage was governed by the terms of an agreement, dated 12 August 1997, that is defined in the pleadings as the Co-operation Agreement. Early in the year 2000 the relationship was renegotiated at the instigation of the Defendant and on 31 March 2000 the parties entered into a new agreement defined as "the Agreement" which, inter alia, terminated the Co-operation Agreement. The Agreement provided for the payment of remuneration from the Defendant to the Plaintiff "by way of commission". There were two components to the commission (in clauses 3 and 4.2 of the Agreement). The first was calculated in accordance with a formula related to the performance fees received by the Defendant from the Fund and the second related to the management fees it received.

6. The second stage of the relationship between the parties commenced with the signing of the Agreement and ended on 25 April 2004 when the Agreement was terminated following the expiry of four months' notice given by the Defendant. The Agreement contained no express provisions for its termination and the Plaintiff has not challenged the Defendant's ability to terminate the Agreement with reasonable notice pursuant to an implied term and has not challenged the termination date. The parties are therefore agreed that the relationship ended on 25 April 2004.

7. The parties disagree as to whether the Plaintiff is entitled to any remuneration in respect of the period from 1 July 2003 to the date of termination and, if so, the basis on which that remuneration is to be calculated and the amount of remuneration due.

Procedural Background

8. Again, for completeness, I repeat what I said about the procedural background to the application in my 3 May Judgment.

9. In the Royal Court, before myself and 3 Jurats, the trial of this action opened on 21 November 2005 but was adjourned at the conclusion of the Plaintiff's counsel's opening speech following an application by Advocate Greenfield, on behalf of the Defendant, contending that the basis on which the case had been opened went beyond the scope of the pleadings. That gave rise to an application to amend the Cause which I granted on 22 November. Later, the Defendant tabled a request for further and better particulars of the amended Cause which has since been resolved.

10. Discovery had been given by both parties on the original Cause prior to the commencement of the hearing on 21 November. Following the amendment of the Cause, I made an order for discovery on 23 January this year and an application for specific discovery followed.

11. As I have said, I made an Order on 3 May requiring disclosure of two categories of document. First, all documentation relating to the calculation of the NAV on the last business day prior to 25 April 2004 which the parties are now agreed was 23 April 2004. Secondly, all documents relating to the performance fee and management fee paid to the Defendant for the year ended 30 June 2004.

12. My Order was that the documents be disclosed by the close of business on 17 May. The Defendant had difficulty complying with the Order within that timescale so the matter came before me for a further review on Friday 19 May. I am pleased to say that the Defendant was able to comply with the Order the following Monday and no further issue has been taken by the Plaintiff concerning the Defendant's compliance with the Order of 3 May.

13. On 26 May Advocate Roland, appearing on behalf of the Plaintiff, made an application for an Order that the Defendant calculate the NAV as at 23 April. The reason she gave was that although the documentation provided to the Plaintiff would be sufficient to enable the NAV to be calculated, no one other than the Defendant has the knowledge and expertise to do so prior to the commencement of the hearing on 12 June. Also, she argued the Defendant could do the exercise at minimal cost, whereas someone unfamiliar with the Fund would take more time and at greater cost. I heard brief arguments from Advocate Roland and Advocate Greenfield on behalf of the Defendant on 26 May 2006 and gave a preliminary view that I did not consider I had the power to make the Order requested. If the Plaintiff wished to pursue the application, I ordered that written submissions be submitted to me with supporting authorities so that it could be properly considered by me. As a result, the application came back before me, on 8 June in an amended form when Advocate Peter Ferbrache appeared for the Plaintiff and Advocate Greenfield for the Defendant.

14. I am extremely grateful to all counsel for the clarity and thoroughness of their written and oral submissions.

Res Judicata/Issue Estoppel/Abuse of Process

15. In my Judgement of 3 May on the Specific Discovery application, I said (in Para 22):

> *"Advocate Ferbrache submitted, without citing any supporting authority, that I had the power to order calculations to be made. I do not accept that I have such power".*

16. And at para 24 I held:

> *"I cannot, at this stage in the proceedings, order the Defendant to calculate the NAV of the [Fund]".*

17. In the light of that finding, Advocate Greenfield submitted that the issue was now res judicata or alternatively the Plaintiff was precluded or barred from bringing the application by virtue of issue estoppel and further that it was an abuse of the process of the court.

18. I did not hear oral submissions on these arguments because it was my preliminary view they would not succeed as the earlier application was made under Rule 39 (Discovery). This new application is brought under Rules 43, 47 and/or the inherent jurisdiction of the Royal Court. I have decided to refuse the present application on other grounds so I do not need to consider further the arguments of res judicata, issue estoppel and abuse of process.

Rule 43

19. Rule 43 is as follows:

> "*43. The Court may by order give directions as to the hearing of any action or any question raised by the pleadings, including any exception, fin de non-recevoir or other preliminary point in issue, and may (without prejudice to the generality of the foregoing) –*
>
> *(a) order that any facts specified or described in the order shall be proved by affidavit;*
>
> *(b) order that not more than a specified number of expert witnesses may be called;*
>
> *(c) order that the evidence of a particular witness shall be taken by commission; and*
>
> *(d) order the manner in which such evidence is to be taken".*

20. The Order sought does not fall within any of the Orders envisaged under sub-paragraphs (a) to (d) of Rule 43. I recognise the sub-paragraphs are merely examples of the type of order that the court can make, but I do not consider that Rule 43, even on its widest possible interpretation, empowers the court to order a party to carry out calculations and create documents that do not presently exist and have not existed.

Rule 47

21. Rule 47 is as follows:

> *"47. (1) Where the Court has power to make an order under these Rules, the order may be made –*
>
> *(a) at any stage of the proceedings;*
>
> *(b) of the Court's own motion or on the application of any party to the proceedings;*
>
> *(c) on such terms (including terms as to costs and security therfor) as the Court thinks just.*
>
> *(2) A person intending to apply to the Court for an order under these Rules shall give notice of the fact to the opposite party to the application by serving a signification upon him.*
>
> *(3) The signification -*

(a) shall be served not less than 2 days before the day of the application;

(b) shall state the date and time appointed for the hearing of the application;

(c) shall contain or have annexed to it a copy of the application; and

(d) shall be signed by an Advocate

(4) The provisions of this Rule do not apply to the extent that contrary provision is made elsewhere in these Rules.

22. I agree with Advocate Greenfield that Rule 47 does not empower the court to make any orders other than where the power to make the order exists elsewhere in the Rules.

23. The Plaintiff is unable to point to any other written rule which would empower the court to make the order sought. Significantly, in my view, neither party has been able to draw my attention to any previous authority, whether in this jurisdiction or elsewhere, where a court has had to consider a similar application. So, neither counsel can produce any decisions where such an Order has either been made or refused.

24. The main thrust of the Plaintiff's argument was to seek to persuade me that I could make the order under the inherent jurisdiction of the Royal Court.

Inherent Jurisdiction or Inherent Power

25. Advocate Ferbrache submitted that it is not disputed by the Defendant that the court has the power to order the Defendant to calculate the NAV at the conclusion of the hearing before the Jurats. Indeed the relief sought by the Plaintiff at paragraph 39 (i) of its cause is:

"39 (i) A declaration that the Plaintiff is entitled to the performance and management fees due under the Agreement from 1 July 2003 up to 25 April 2004 and an account to be taken of the monies due to the Plaintiff from the Defendant as a result and judgment in a like amount; alternatively, damages to be assessed; and

(ii) an order that such sum shall be paid by the Defendant to the Plaintiff in accordance with the agreement.

26. In its defences, the Defendant has not pleaded that the court has no power to make an order in such terms and is therefore taken to have agreed the court has the power. So, Advocate Ferbrache submits, is it

not better that the court makes such an order now so that we all know what the Defendant alleges the figure to be and any dispute about it can be explored in the evidence and the Jurats will be able to give a single definitive judgment. The alternative is that if the Plaintiff is successful in obtaining the declaration that it seeks, the figure will have to be calculated after the trial and there may be further litigation thereafter to resolve the amount of damages due.

27. Reference was made to the court's power to order an Executor to produce an account of his administration of the Estate of a deceased. I do not agree that is a true analogy. An Executor appointed by the Ecclesiastical Court of the Bailiwick of Guernsey takes an oath to render an account of his administration whenever required by law so to do. The jurisdiction of the Royal Court in respect of disputes in the administration of the estate of deceased persons is confirmed by the Ecclesiastical Court (Jurisdiction) (Bailiwick of Guernsey) Law 1994. Consequently, the Royal Court has power to enforce the terms of the oath taken by the Executor or Administrator and to require him to produce an account whenever it is just to do so whether at an interlocutory stage, or at the conclusion of a substantive hearing.

28. That power does not assist the Plaintiff in the present case. I therefore have to examine what is the extent of the court's inherent jurisdiction or inherent powers.

29. I was reminded of the judgment of the Guernsey Court of Appeal in *Cherub Investments Limited -v- The Channel Islands Aero Club (Guernsey) Limited (1982)* in which Mr Leonard Hoffmann QC (as he then was) sitting as a Judge of the Appeal Court confirmed that the:

> *"Royal Court remains master of its own procedure and can allow departure from those rules when justice requires this to be done".*

30. The rules to which he was referring were laid down in an Ordinance of 1851 but the same is equally true of the Royal Court Civil Rules 1989 which of course post date that judgment.

31. I gratefully adopt the approach of the Court of Appeal of Jersey in *Mayo Associates v Cantrade Private Bank Switzerland (CI) Limited [1998] JLR 173*. At page 188, Smith J A said:

> *"In our view, the vital clue to the nature of inherent jurisdiction in its procedural setting…… is necessity. The court has a particular procedural power because it has to have it to be a court in any meaningful sense".*

32. Continuing on page 189 he said:

> *"It will be observed that this approach is antithetical to a definition of inherent jurisdiction based simply on fairness or by*

reference to what is perceived in a particular situation to be just. If inherent jurisdiction exists to enable a court to order that a thing be done, fairness and justice will obviously be major factors to be taken into account when the court is deciding whether or not to exercise its discretion to so order; but the conclusion that it would be fair or just to order that thing to be done does not determine whether there is inherent jurisdiction to order it".

33. The decision of the court is summarised in paragraph 4 of the head note on page 177 as follows:-

> *"(4) The boundaries of the Royal Court's inherent jurisdiction could not be precisely defined, for there was no unifying principle behind the instances in which it could be invoked. It was clear, however, that it was derived solely from necessity, in that the Royal Court had to be able to exercise such powers as were needed to make it effective as a court. In the context of civil proceedings, "necessity" referred to the need to protect or enforce the legal rights in relation only to issues raised by the parties to proceedings then before the court. The court's inherent jurisdiction could not be invoked simply on the basis of fairness or to do justice in a given situation (although fairness and justice would be major factors to take into account), nor was it available to provide new remedies at will. Rather, whether the court's inherent jurisdiction allowed it to wield any particular power was to be established using traditional legal reasoning from precedents relating to the existence, merits, consequences of and alternatives to the use of that power".*

34. I have no doubt that it would be convenient for the parties, and the court, to know at the hearing what was the value of the NAV on 23 April 2004. The question however is whether it is required of "necessity".

35. I am satisfied that it is not necessary. If the Plaintiff is entirely successful at trial, the court can make the declaration and order requested at paragraph 39 of the cause requiring that an account be prepared to enable damages to be quantified. In order to prepare the account, the NAV will have to be calculated if the Plaintiff's remuneration is to be based upon the value of the Fund as at the date of termination of the Agreement. I accept that might result in further proceedings before the Royal Court if the NAV cannot be agreed. However, that is the consequence of the manner in which the Plaintiff has chosen to present its case. I am guided by Smith JA in ***Mayo*** who said, at the top of page 190:

> *"Thus necessity is to be judged in the light of the objectives the party have sought to achieve through invocation of the court's function."*

36. The objective the Plaintiff has sought to achieve is to obtain first a declaration from the court that fees are due and then to have an account prepared to calculate the quantum of the fees due.

37. Having decided that necessity does not require the invocation of the court's inherent jurisdiction, I do not have to consider whether it would be fair and just to grant the order sought. I note in passing that it would be helpful to the court to know the figure, even though it is not essential.

38. During an earlier hearing I asked whether calculation of the NAV at 23 April 2004 would assist the parties in any settlement negotiations which I hope they will be conducting in order to avoid the necessity of a trial if at all possible. My understanding is that as the NAV is calculated on a monthly basis, the Plaintiff already knows its value at the end of March and at the end of April 2004 and it would not be difficult to interpolate between those dates to obtain an approximate, but reasonably accurate, value on the 23rd day of the month.

39. Counsel drew my attention to three recent decisions of the Royal Court considering when inherent powers could be invoked. First in time was *Laughton v Main* on appeal from the Court of Alderney where in a Judgment dated 14 January 2000, Deputy Bailiff Day, (as he then was), held that in the absence of any written rules of procedure in the Court of Alderney, the court had the inherent power to order interrogatories.

40. In the two other judgments, both in the matter of *Angenent -v- Pring*, Lieutenant-Bailiff Talbot, QC held first (on 30 December 2004) that the Royal Court did not have the power to order an interim payment in an action for damages alleging medical negligence, notwithstanding that all parties were agreed that if the court had such a power it would be appropriate to order an interim payment of £50,000. In his second judgment delivered a few days later (4 January 2005), Mr Talbot concluded the Royal Court does not have inherent jurisdiction to make an order, either with or without the consent of the parties, for the service of a report from a jointly appointed expert witness.

41. I am satisfied that all three judgments applied the same principles even though Mr Day was not referred to the Jersey case of *Mayo.* I respectfully believe that this judgment adopts a similar approach.

42. Advocate Ferbrache also referred me to the judgment of the Guernsey Court of Appeal in *Morton –v- Paint* (9 February 1996) in which the Court of Appeal revised the law concerning an occupier's liability so as to incorporate into Guernsey law principles which in England and Wales had been introduced through legislation in the Occupiers Liability Act 1957. In *Laughton v Main* Day DB said at page 7 F of the judgment, that he found *Morton –v- Paint* to be of comfort to him in reaching his conclusion. He was not, in my view, applying the

principles laid down in *Morton –v- Paint*. He had not been referred to the Jersey case of *Mayo* and hence could not be guided by that judgment (unlike Talbot LB and myself). In the absence of any such local authority, *Morton –v- Paint* was, as he said, a comfort to him.

43. I believe there is a considerable distinction between on the one hand, the application of the court's inherent powers or inherent jurisdiction and, on the other hand, an amendment or revision of the common law as in *Morton –v- Paint.* Having regard to the "aids to navigation" cited by Sir Louis Blom Cooper J A at page 19 of the judgment (quoting from the speech of Lord Lowry at pp. 27 B – 28 D/E of *CvDPP* [1996] 1 AC HL (E)), I believe that there will be very few, if any, circumstances where the Royal Court will be able to amend its procedures by reference to the *Morton –v- Paint* principles. The second of the "aids to navigation" is especially relevant:

> *"Caution should prevail if Parliament has rejected opportunities of clearing up a known difficulty or has legislated while leaving the difficulty untouched".*

44. The States has delegated to the Royal Court the power to make rules governing its procedure so the second navigational aid would have to be adapted by replacing "Royal Court" for "Parliament". The Royal Court, (unlike the Court of Alderney prior to *Laughton v Main*) has promulgated written rules of procedure. If the written rules do not contain a particular power, and if the court does not have inherent power to make an order, I will be surprised if there are many, or any, situations where the Royal Court could invoke *Morton –v- Paint* in order to supplement its powers.

45. Advocate Ferbrache relied upon a decision by Deputy Bailiff Rowland (as he then was) in *Ledochowski v Copernicus Asset Management Limited* at an Interlocutory Court held on Friday 5 September 2003. There is a superficial similarity between the facts of that case and the present case. Copernicus was the manager of an investment fund and responsible for its administration and Mr Ledochowski was employed by it as a consultant entitled to receive fees including a percentage of any performance fees received by the Copernicus from the fund. The first head of relief claimed sought a declaration that he was entitled to a relevant percentage of the performance fees accrued as at 31 May 2002. The Plaintiff issued an application seeking inter alia to be advised of the amount payable. There is no written Judgment and no Act of Court, but the note of the hearing prepared by the Plaintiff's Advocate records that Mr Rowland pressed earnestly for the information to be provided, stating that the Fund Managers in Guernsey (who were not a party to the proceedings), should have access to the figures and should already have calculated them. If they could not be calculated, Rowland DB required an explanation and, if necessary, would require a representative of the Fund Manager to attend in court to explain why the figure cannot be calculated. We do

not know whether that is an accurate record of what was stated by the then Deputy Bailiff. If it is accurate, we do not know the full facts or circumstances of the case or the application he was considering, nor do we know what authorities, if any, were cited to him. I am certain however that he would not have had the power to order someone who is not a party to the litigation to calculate any figures, even if he had such a power if they were a party, which is doubtful. It appears that he was merely ordering the disclosure of a figure which should already exist or, if not already in existence, would be calculated very soon thereafter in the normal course of the operation of the fund. So, even though there is a superficial similarity between the two cases, regretfully it is not a decision upon which I can rely.

46. For the reasons I have given I dismiss the application.

