

**Judgment 18/2012**

**Saffrey Champness Management  
International Limited v Mahmood  
& Mahmood  
Civil File No 1546  
Royal Court  
17<sup>th</sup> April 2012**

---

**Dispute over payment of fees.**

**IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY**

The 20<sup>th</sup> day of April 2012 before Richard John Collas, Bailiff and B J Bartie, S M Jones, and P Girard, Jurats

Between:

**SAFFERY CHAMPNESS MANAGEMENT INTERNATIONAL LIMITED**

**Plaintiff**

**-v-**

**MR HAROON MAHMOOD**

**and**

**MR KAMRAN MAHMOOD**

**Defendants**

**WHEREAS** on 2<sup>nd</sup> and 3<sup>rd</sup> April 2012 the Court heard the action of the Plaintiff against the Defendants and heard thereon Advocate M G A Dunster, Counsel for the Plaintiff and Mr H Mahmood on behalf of himself and confirmed that he was appearing on behalf of his brother (together “The Defendants”).

**THE COURT** heard evidence from Mr Kelvin Hudson, Mr Ajay Wiltshire and Mrs Vanessa Basham for the Plaintiffs.

**THE COURT** heard evidence from Mr Haroon Mahmood and Mr Kamran Mahmood via video link on 3<sup>rd</sup> April only on behalf of the Defendants. Mr Kamran Mahmood confirmed to the Bailiff that Mr Haroon Mahmood (his brother) was entitled and authorised to act on his behalf in all matters in relation to this litigation.

Having heard all the evidence and considered the legal submissions and documentation in the agreed trial bundle, the Jurats were **unanimous** in finding that the Security Interest Agreement provided additional security for the obligations owed by the Defendants and MiNC jointly and severally under the Company Management Agreement (“CMA”) and that there was no termination of the CMA or modification of the obligations created thereunder to pay to the Plaintiff the fees due to it.

Consequently, the Jurats unanimously found in favour of the Plaintiff and Judgment is given as follows:

- 1) The principal sum of £250,000.00;
- 2) Interest pursuant to the contractual agreement between the parties up to 3<sup>rd</sup> April 2012 in the sum of £31,338.75;
- 3) Interest on the principal sum of £250,000 to run (from 3<sup>rd</sup> April 2012) pursuant to the Judgment's (Interest) (Bailiwick of Guernsey) Law, 1985 as amended;
- 4) The Plaintiff is awarded its recoverable costs; and
- 5) For the avoidance of doubt the Judgment and the amount which is set out in 1-4 above inclusive, is a joint and several liability of both the Defendants.

**THE COURT** this day handed down written judgment in the terms attached hereto.

S J Collins  
Her Majesty's Deputy Greffier



4. In this judgment, the findings of fact are the unanimous findings of the Jurats unless the judgment says otherwise.
5. The Bailiff directed the Jurats that the burden of proof is on the Plaintiff throughout. The standard of proof is the civil standard of the balance of probabilities. To establish something on the balance of probabilities means to prove that something is more likely so than not so. Where the Defendants sought to establish a fact, the burden of proof rested on them to prove it to the civil standard.

### **Summary of the Facts and Submission of the Parties**

6. The Plaintiff is a Guernsey company which for the past 35 years has provided company administration and fiduciary services in this Island. The Defendants are two brothers who in 2002 entered into a Company Management Agreement whereby the Plaintiff was to provide administration services to a company owned by them called MiNC Property Investments (Guernsey) Limited (“MiNC”). Initially there was a third beneficial owner but he ceased to be involved some time prior to the events with which the Court is concerned in the present case. The Company Management Agreement (“CMA”) was dated 3 September 2002. The central issue in the present case is whether the Defendants are personally liable to the Plaintiff for fees due under the CMA or whether the CMA has been subsequently terminated or varied in such a way as to release them from liability.
7. MiNC is part of a large group of companies that was administered by the Plaintiff on behalf of the Defendants who engaged in property investments in London and Dubai. Following the global financial crisis in 2008, the Defendants needed to rationalise their activities. The group of companies had grown and the volume of administration work had consequently increased. Substantial fees were owed to the Plaintiff and the parties mutually agreed that a new service provider be appointed in place of the Plaintiff. The Defendants’ companies were facing a liquidity crisis and were not in a position to pay in full immediately. There was a question as to whether MiNC could satisfy the balance sheet solvency test.
8. Before releasing company administration files to a new provider in such circumstances, the Plaintiff normally requires payment of all outstanding fees. In the present case, the parties negotiated as to the amount to be paid and as to payment terms. The negotiations are evidenced in a chain of emails at Tab 9 of the Court bundle. The exchange was between Kelvin Hudson, the Managing Director of the Plaintiff on the one hand and the First Defendant on behalf of himself and his brother on the other hand.
9. The agreement was concluded on 29 April 2009. The Plaintiff agreed to reduce the level of fees claimed to £350,000.00. The Defendants agreed to pay £100,000.00 immediately and a further £250,000.00 plus interest at a later date. The present dispute relates to that sum of £250,000.00 which the Defendants admit is owed to the Plaintiff by MiNC and they agree it has not been paid but they say they are not personally liable.
10. In relation to that further sum, a Security Interest Agreement (“SIA”) was completed dated 30 September 2009. The purpose of the SIA was to give the Plaintiff security over assets belonging to MiNC namely 180 “C” shares in a company called Boubyan MiNC Investments UK Limited (“Boubyan MiNC”) in which MiNC had a 7% shareholding, the remainder being owned by a Kuwaiti bank, Boubyan Bank KSC (“Boubyan”). Boubyan MiNC owned real property in London, formerly an hotel that has been converted into serviced apartments.
11. There were five parties to the SIA namely the Plaintiff as the secured party, MiNC as the chargor, Rysaffe Trustee Company (C I) Limited (one of the Saffreys group of companies in Guernsey) as the nominee company that held the shares for MiNC, Boubyan and Boubyan MiNC. Officers or employees of Saffreys signed the SIA on behalf of four of the five parties.

12. The central issue in the case is whether, as the Plaintiff alleges, the SIA created additional security for the Defendants' obligation to pay the indebtedness owed to the Plaintiff whilst leaving the Defendants jointly and severally liable along with MiNC under the terms of the CMA. Alternatively whether, as the Defendants allege, the SIA substituted the security for their principal obligations and the Defendants were released from their obligations under the CMA.
13. The Plaintiff relies upon the terms of the CMA itself. In sections 16, 17 and 18, it provides that it may only be terminated or modified by notice in writing to the other party. No such written notice has been produced and Ajay Wiltshire, the Plaintiff's in-house counsel said that despite carrying out a very thorough search of the Plaintiff's documents and electronic records, he can find no such document. The SIA contains no mention of the CMA.
14. The parties are in agreement that there is no single document that can be produced in which it is expressly recorded that they agreed the Defendants would be released from their personal liability under the CMA upon execution of the SIA. If there were such an agreement, it must have been concluded verbally. Depending on the findings of the Jurats, there could be an interesting legal debate as to whether a written agreement can be varied verbally when the written document expressly states that it can only be terminated or modified in writing.
15. There is no Guernsey decision but Advocate Dunster referred to two English cases which he said were somewhat conflicting, World Online Telecom Limited v I-Way Limited [2002] EWCA Civ 413 and United Bank Limited v Massod Asif and others (Court of Appeal 11 February 2000) and a third decision, Spring Finance Limited v Hs Real Company Llc [2011] EWHC 57 (Comm) in which HH Judge Mackie QC declined to decide the point. The Bailiff decided to adopt the latter approach in the first instance and to ask the Jurats whether, on a balance of probabilities, they were persuaded that there was evidence establishing that there had been a verbal agreement to terminate or vary the CMA.
16. The two Defendants both gave evidence that all the negotiations with the Plaintiff leading up to the signing of the SIA were conducted on behalf of them both by the First Defendant.
17. As for the Plaintiff's side of the negotiations, the evidence of both Mr Hudson and Mrs Vanessa Basham was of a hierarchical, pyramid style structure of authority and responsibility, under which a decision to terminate or modify a CMA could only be taken by the Managing Director, Mr Hudson. He said he was responsible for negotiating the fee settlement with the Defendants but he could not recall having any conversations with them over the issue, all such negotiations were, he said, conducted by email. The critical exchange of emails took place over 28 and 29 April 2009 and is to be found at Tab 9 of the Court bundle.
18. Mrs Vanessa Basham was the Senior Trust Manager responsible for the client relationship for three years including the relevant period in 2009. She could recall telephone discussions or correspondence with the Defendants regarding MiNC's cash flow and the availability of funds. She said that Mr Hudson was always involved and that she had no authority to vary the terms of the client relationship. She saw and heard nothing regarding variation of the CMA or removal of the Defendants' personal liability for fees.
19. The principal point of contact for the Defendants in day-to-day matters was with the Trust Officer, Ginette Blondel who sat alongside Mrs Basham. Mrs Basham did not hear Ms Blondel discussing any waiver of personal liability with the Defendants. Mr Hudson said, and Mrs Basham confirmed, that it was the Plaintiff's policy to record all significant telephone conversations by way of a file note or confirmatory email.
20. Mr Haroon Mahmood said that most of his telephone discussions at that time were with Ginette Blondel. He discussed with her the termination of their relationship and he recalled a specific conversation when he was in the Dubai Emirates Towers when they talked freely about

terminating the relationship. He said his understanding of the discussions was that all agreements would lapse and he signed the SIA in the belief that obligations under the CMA would then cease. Ginette Blondel was not called by either party to give evidence.

21. Mr Kamran Mahmood said that he left all the negotiations to his brother; he was principally involved with transactional matters. He understood that by entering into the SIA, the Defendants would be released from their personal liability under the CMA. That was what his brother told him and that is the only reason he signed.
22. In response to the submissions of the Plaintiff, the Defendants argue that the CMA must have been modified because the Plaintiff has ceased to perform its obligations which are now being carried out by another service provider. Mr Haroon Mahmood asked Mr Hudson to identify the written notice of such modification. In reply, he said it exists in the notices of resignation executed by the directors, company secretary etc.
23. In support of the Defendants' case, they submit that evidence of termination of their release from personal liability to pay fees is to be found in an email from Vanessa Basham sent on 15 June, 2009 at 4.29 p.m. in which she wrote:

*"So if MiNC are unlikely to be able to sell the asset to a third party, and it does not win the serviced apartment operator role, and the associated income stream, the only method by which Saffrey Champness can be paid the £250,000 balance of fees will be from dividends declared by Boytonbay Limited (under clause 5.5 of the Security Interest Agreement)."*

And:

*"When Saffrey Champness agreed to this fee arrangement and security, it was on the basis that the sale to the SIPP was nearing conclusion, and that sufficient capital would be released to repay the entire sum; as this is no longer the case, I would appreciate your comments as to from which source the debt will be extinguished, and the likely timescale."*

24. The Defendants argue that reference to *"the only method"* of payment confirms their understanding that the Plaintiff would no longer be relying upon the Defendants' personal, joint and several, obligations to pay the fees due if they were not paid by MiNC.
25. The Defendants attach great weight to their submission that if they were not being released from personal liability, there was no commercial reason for them to enter into the SIA.
26. The Defendants also rely on an email from Ginette Blondel sent on 7 May 2009 at 7.58 a.m. in which she wrote:

*"...Kamran advised that the shares would be sold for approximately £1.1m so the SIPP trustee will be satisfied that this amount will be paid and the charge lifted....It is also in [the Plaintiff's] best interest to sell the shares to the SIPP trustee in order to realise its debt in the near future and so [the Plaintiff] would not want to hinder this sale."*

And:

*"I have reviewed the agreement again and can confirm that the event of default has actually already occurred as the debt is now due. However, [the Plaintiff] is just seeking to secure its debt and has no intention of getting involved with the property market vis a vis selling this holding or any others. This event of default and right of sale is a standard clause in a Security Interest Agreement drawn under Guernsey Law. [The Plaintiff] would be happy to confirm this in writing if you desire, or you may feel more comfortable to take separate legal advice."*

27. Mr Hudson suggested that the agreement to reduce the level of fees claimed to a lower figure amounted to commercial justification. The Defendants refute that. They say that the Plaintiff had not carried out its duties properly or efficiently. In particular, it had allowed a number of special purpose vehicles and other entities to remain in existence or lie dormant when they were not needed and had charged significant costs when it was unnecessary to do so. Mr Kamran Mahmood felt very strongly that the fees charged were excessive and not justified by the Plaintiff who was slow to produce invoices and unable to provide supporting documentation such as time sheets. There was no benefit, he said, in agreeing a figure of £350,000.00 as that was more than what was deserved.
28. The Defendants also believed that as the Plaintiff supplied the Directors of companies within the MiNC group, it shared some of the responsibility for MiNC being in the predicament in which it found itself in the recession. There was therefore an incentive for the Plaintiff to extricate itself from the relationship.
29. An explanation given by the Plaintiff of the commercial benefit for MiNC and the Defendants signing the SIA was that it enabled them to move to another service provider. The Defendants dismiss that reason, saying that they still had to pay the new provider for the services.
30. The Defendants accept that they gave express approval to the Plaintiff to execute the SIA on behalf of MiNC. Their authorisation is recorded in a letter signed by them both dated 11 August 2009 by Haroon and 17 September 2009 by Kamran. The letter is at Tab 14 of the court bundle. They assert that the only commercial benefit to them and the only reason for doing so was because they understood the Plaintiff would look only to its security for payment and not to the Defendants' personal liability under the CMA.
31. In their criticism of the SIA, the Defendants pointed out that an "Event of Default" as defined had already occurred in that the indebtedness was already due. Hence, the Plaintiff could take immediate steps to enforce the security.
32. The Defendants had other concerns about the standard of service provided by the Plaintiff. There were occasions when there was potential for conflicts of interest between the business interests of the Plaintiff and the duties that it and its officers owed to the MiNC group. They referred to clear breaches of fiduciary duty such as the instance in 2010 when the Plaintiff appropriated funds from the sale of another property which it sought to apply in reduction of the debt. After the intervention of London lawyers, the funds were returned to MiNC. The Plaintiff accepted it was in error. The execution of the SIA was another potential source of conflict but the Plaintiff obtained the express prior approval of the two Defendants. In the view of the Jurats such issues are not relevant to the central issue they have to decide which is whether the Defendants have been released from personal liability.

## **Decision**

33. Having reviewed all the documents and all the evidence, the Jurats are not persuaded that there was evidence of a modification, variation or termination of the CMA so as to release the Defendants from personal liability.
34. The Jurats found that there was no evidence of a written variation of the CMA as required in accordance with the terms of the CMA. There was no evidence before the Court that the parties had ever expressly discussed a variation of the CMA to release the Defendants from their joint and several liability.
35. The Jurats were satisfied that the SIA was additional security for the indebtedness. They were not persuaded that the Plaintiff would have been likely to have released the Defendants from personal liability in circumstances where the solvency of MiNC was in doubt and there was no

certainty that MiNC would be in a position to pay particularly after the administration had moved to another service provider.

36. In the view of the Jurats, all the Defendants' concerns about the standard of the administration service provided by the Plaintiff are not relevant to the specific issue the Court had to resolve in the present case. The same applies to the alleged breaches of fiduciary duty.
37. The essential fact is that a deal was concluded in April 2009 agreeing the amount to be paid in respect of outstanding fees owed. It was agreed that £100,000.00 be paid forthwith and £250,000.00 at a later date. The first payment was taken by the Plaintiff from funds it was holding. The balance is outstanding.
38. In those circumstances, the Bailiff therefore directed the Jurats that there was no question that the CMA might have been varied there was consequently no need for him to decide the legal issue as to whether there could have been a verbal variation or termination when the agreement provided for such matters to be in writing.
39. The findings of fact of the Jurats are that the SIA provided additional security for the obligations owed by the Defendants and MiNC jointly and severally under the CMA and that there has been no termination of the CMA or modification of the obligations created thereunder to pay to the Plaintiff the fees due to it. Consequently, the Jurats unanimously found in favour of the Plaintiff.