FM Capital Partners v Frédéric Marino, Aurélien Bessot, Yoshiki Ohmura & Marit Sjøvaag

[2018] EWHC 1768 (Comm)

A claim by FMCP in conspiracy against its former director and CEO and his associate failed. Claims for breach of fiduciary duty, bribery and dishonest assistance were established. Consideration of where the relevant damage occurred for the purposes of the Rome II Regulation.

In this case FMCP, a UK company established in July 2009 and majority-owned by a Libyan sovereign wealth fund, Libya Africa Investment Portfolio ("LAP"), brought a variety of claims alleging fraud against its former director and CEO Mr Marino and his associate Mr Ohmura, a former banker at Julius Baer ("JB"). Claims against another of FMCP's former directors, Mr Bessot, and Mr Marino's former wife, were settled before the trial.

FMCP was established as the vehicle for a joint venture between Mr Marino, Mr Bessot and LAP. The purpose of the company was to advise upon and manage various of LAP's assets.

The case related to a number of payments made out of LAP funds to companies owned by Mr Marino, Mr Bessot and/or Mr Ohmura between August 2009 and December 2011. FMCP's overarching claim was that the defendants were engaged in a dishonest conspiracy to procure and share those monies, which it said were bribes and secret commissions. The alleged conspiracy, in relation to which FMCP sought damages of US$16,231,426, had two major strands. The first related to a series of large investments of LAP assets in certain financial products offered by JB. Payments were then made out of those monies by JB's investment arm, GAM, whose founder and general director was Mr Ohmura, to companies owned by Mr Marino and/or Mr Ohmura. The second strand of the alleged conspiracy related to payments made to those same companies arising out of a series of at least 14 one-off, shorter-term trades, again using LAP's assets, in structured products.

As well as the claim in conspiracy, claims arising out of the same payments were made against Mr Marino and Mr Ohmura for various sums in dishonest assistance, knowing receipt and bribery; and against Mr Marino for breach of his duties as a director. Claims were also made against Mr Marino in respect of payments amounting to US$856,271 that he made to a Mr Haggiagi of LAP, who was also a director of FMCP, which were also said to be bribes. Proprietary claims were also made against Messrs Marino and Ohmura.

The Defendants denied the claims. Their primary argument was essentially that the payments were legitimate distribution fees for work done by them for which they were entitled to be paid. Mr Ohmura also submitted that the claim against him should be determined in accordance with Swiss law; accordingly the Court heard evidence on Swiss law from experts on behalf of both FMCP and Mr Ohmura.

In the event, the only key factual witness to give evidence before the Court was Mr Ohmura. Mr Marino chose not to be called on his own behalf and withdrew his witness statements from evidence when FMCP indicated that it would otherwise apply to cross-examine him on them. Mr Bessot, who FMCP had originally indicated it would call, was also not called. The Defendants argued that negative inferences should be drawn against FMCP because it only called one witness, a Mr Eltriki, who had only joined LAP in September 2011 and was not therefore centrally involved in the key events; Cockerill J however declined to draw any such inferences.

Cockerill J found that the overarching conspiracy claim failed; in particular, it was difficult to see the necessary intent to injure FMCP, rather than LAP, as having been formed. However, liability

was established in respect of most of the payments because Cockerill J found Mr Marino to be liable in breach of fiduciary duty, dishonest assistance and bribery, and Mr Ohmura to be liable in dishonest assistance and bribery, in respect of all the heads levelled against them. Neither was liable in knowing receipt.

Those findings were made on the basis of English law, which Cockerill J found to be the governing law in relation to the claims against Mr Ohmura (as well as those against Mr Marino). The Judge held that on a proper application of Article 4(1) of the Rome II Regulation and the relevant case-law, in particular *Dolphin Maritime & Aviation Services Ltd v Sveriges Angfartygs Assurans Forening* [2009] EWHC 716 (Comm); [2010] 1 All ER (Comm) 473, the damage suffered by FMCP occurred in England. Even if that were wrong the damage was manifestly more closely connected with England than it was with Switzerland, under Article 4(3) of Rome II. In any event, Cockerill J found that Mr Ohmura would also have been liable in part (if on a somewhat different basis) if Swiss law were to apply.