THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)

01 November 2018

Recovery Partners GB Ltd v Rukhadze
[2018] EWHC 2918 (Comm)

BEFORE: MRS JUSTICE COCKERILL

CASE SUMMARY

The Defendants had acted in breach of fiduciary duty by diverting a "maturing business opportunity" from the Claimant companies, of which they had previously been directors/ employees, for their own profit. A business opportunity will be treated as "maturing" if there was contact between the principal and a third party with regard to future business, which had progressed to the stage where some outlines of future contractual relations were in play (even absent a draft contract the imminence of an agreement). It could not be said that a resignation by a director with the intention of competing with the company would necessarily always be a breach of fiduciary duty. However, a resignation that was inconsistent with the obligation to act in good faith in the best interests of the company would, as in the present case, constitute a breach of fiduciary duty.

A very wealthy Georgian businessman, known as "Badri", died intestate in England in 2008. Badri was secretive about his assets and disdained orthodox methods of holding those assets, preferring to place them in the hands of those with whom he had relationships of trust. His family had had little or no involvement in his business interests during his lifetime. They believed that he had left behind a potentially hugely valuable estate, consisting of business and property assets located in many jurisdictions, but had little knowledge what those assets were, where they were located, or how they were held.

One person who did have such knowledge was Mr Jaffe, the CEO of Salford Capital Partners International ("SCPI"). SCPI had worked with Badri on numerous projects, in particular a private equity fund, which was a vehicle for Badri's investments and which SCPI managed (including through its subsidiaries in Russia, Ukraine, Georgia and the Balkans). Mr Jaffe had also come to know Badri's family. His own London residence was in the same building where they maintained an apartment, once they relocated to London. Another person with knowledge of Badri's assets was Mr Rukhadze, who had been a director of SCPI from 2004 until December 2009 and was from 2004 the head of its Georgia office.

Following Badri's death, Mr Jaffe and Mr Rukhadze worked together to assist the family and to put together an arrangement for the recovery of Badri's assets and to perform that recovery. As part of putting together that arrangement, SCPI incorporated the two Claimant companies: Revoker (an LLP), and Recovery Partners ("RP"), which was admitted as one of Revoker's members. The Second Defendant ("Mr Alexeev") and the Third Defendant ("Mr Marson") joined to work on the project full-time in 2009. Badri's family did not, ultimately, pursue these plans through SCPI, Revoker, and RP. Instead, Mr Rukhadze, Mr Alexeev and Mr Marson, having resigned from their roles at the Claimant companies in Spring 2011, incorporated a series of corporate entities (the Fourth to Ninth Defendants). An agreement for the provision of asset recovery services was reached between Badri's family and these new corporate entities in 2012.

SCPI, Revoker, and RP alleged that the First to Third Defendants had acted in breach of fiduciary duty, by diverting a maturing business opportunity from the Claimants. They also claimed against the Fourth to Ninth Defendants in knowing receipt. It was common ground that the First to Third Defendants had at some point owed the Claimants fiduciary duties. It was, however, a matter of dispute whether those duties continued up until the Spring of 2011, and if so whether their resignations in Spring 2011 brought those duties to an end. It was also a matter of dispute whether there had in fact been any diversion of a business opportunity by the Defendants, there having been no contract reached between the family and the Claimant companies.

Cockerill J summarised the basic principles of fiduciary law at [46] – [51]. The relevant principle in the present case was the "no profit" rule. As well as encompassing the diversion or appropriation of the company's current business, this rule also prohibits a fiduciary from setting "the groundwork for diverting a corporate opportunity whilst a director" (see *Kingsley IT Consulting v McIntosh* [2006] EWHC 1288 HC, at [53]). A fiduciary is prohibited "from usurping for himself or diverting to another person or company with whom or with which he is associated a maturing business opportunity which his company is actively pursuing."

The question therefore arose of what constitutes a "maturing business opportunity". The Defendants submitted that this required the Claimants to show that a deal would, on the balance of probabilities, have been done. The Judge rejected this proposition, at [60]:

> "Such limited guidance as the authorities provide indicate to me that a business opportunity may be regarded as "maturing" so long as there is contact between the principal and a third party with regard to future business and that contact has progressed to the stage where some outlines of future contractual relations are in play. There need not be a draft contract or any imminence of agreement. Such regimented requirements would be out of keeping with the very fact sensitive nature of these cases as pointed out by Rix LJ in Foster Bryant Surveying Ltd v Bryant [2007] EWCA Civ 200; [2007] BCC 804 at [76])."

On the facts, SCPI did have a maturing business opportunity to provide asset recovery services to Badri's family.

As to the duration of fiduciary duties, Cockerill J summarised the essential principles at [70] – [73]:

> "70 The starting point, which was not in issue is that:
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> i) It is not a breach of fiduciary duty for a fiduciary to resign from his post, regardless of how much damage it causes the company; *CMS Dolphin* at [87], [95]. *British Midland Tool* at [89].*Shepherd Investments Ltd v Walters [2007] FSR 15* , *Balston v Headline Filters Ltd [1990] FSR 385* at 412.
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> ii) In general, fiduciary duties do not extend beyond the end of the relevant relationship: "We do not recognize the concept of a fiduciary obligation which continues notwithstanding the determination of the particular relationship which gives rise to it. Equity does not demand a duty of undivided loyalty from a former employee to his former employer": *Attorney General v Blake [1998] Ch 439* at 453.
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> iii) As Snell puts it at 7-013, a fiduciary is not barred from "resigning and exploiting opportunities within the market in which his principal operates, where he did not resign from his fiduciary position with a view to exploiting such opportunities and where the opportunity was not one which his principal was pursuing at the time of resignation or thereafter."
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> 71 This rule prevents what would otherwise be an unattractive situation: that, purely by virtue of having been a fiduciary of a company and having become aware of a business opportunity in that capacity, a director is the only person in the whole world who is forever prohibited from taking up that opportunity.

72 Nonetheless, in order to prevent the emasculation of fiduciary duties, a fiduciary may be found to have breached fiduciary duties by reference to what he later does. Resignation will not avoid liability where the fiduciary uses for their own benefit property or information which they have acquired while a fiduciary; this will be a breach of the "no profit rule": see *Snell* at 7-013 and *Ultraframe* at [309]. This ensures that he does not resign the fiduciary position in order to do what the fiduciary doctrine would otherwise bar the fiduciary from doing: see Snell at 7- 013 and *Boles & British Land Company's Contract [1902] 1 Ch 244* at 246 - or that if he does do so, he pays the price for so doing.

73 The underlying basis of the liability of a fiduciary who exploits after his resignation a maturing business opportunity of the company is that the opportunity is to be treated as if it were property of the company in relation to which the fiduciary owed fiduciary duties. By seeking to exploit the opportunity after resignation he is appropriating for himself that property: *CMS Dolphin* at [96]."

At [76], Cockerill J accepted the Defendants' submission that a Director's conduct *after* resigning from that role cannot constitute a breach of fiduciary duty. However, "[w]here liability arises from post resignation conduct it arises not because duties persist post resignation, but because of breaches of fiduciary duties prior to resignation which manifest only post resignation." The Judge concluded, at [83] – [84]:

"The turning point in any case will thus depend upon whether what has in fact been done is inconsistent with the fiduciary duty of a director to act in good faith in the best interests of the company ie. to do his best to promote its interests and to act with complete good faith towards it, and not to place himself in a position in which his own interests conflict with those of the company (or equally with the duty of fidelity of an employee). Thus, it is quite possible that a "bad faith resignation" in breach of fiduciary duty may exist unaccompanied by any preparatory steps which qualify as separate breaches. That seems in the abstract to be consistent with the approach of regarding business opportunities as the property of the company, so that a resignation specifically to exploit such an opportunity can be seen both as a breach of a duty of loyalty and as a breach of the no-profits rule. […] However, I do not consider that the authorities to date justify a firm conclusion that a resignation with an intention to compete is necessarily by itself a breach."

Cockerill J also rejected the Defendant's submission that fiduciary duties necessarily come to an end whenever the relationship on which they are effectively based breaks down. Nonetheless (at [87]), as the Claimants accepted, "there may be cases where fiduciary duties cease to be owed because the relationship has come to an end in all but name, even if the formal arrangements have not yet caught up with the reality."

On the facts, the Defendants' respective fiduciary duties had not come to an end by the time of their resignations. The Defendants were in bad faith, as evidenced by the preparatory steps taken to divert the business opportunity from the Claimant companies prior to their resignations, and their disloyalty in failing to support the Claimant entities in pursuing that opportunity. The Claimants had thereby also made out their related claims in breach of confidence and conspiracy, and (as against the Fourth to Ninth Defendants, and subject to proof that these Defendants had received monies that resulted from a breach of fiduciary duty), in knowing receipt.
