BERMUDA

SUPREME COURT

Kingate Global Fund, Ltd (In Liquidation) (2) Kingate Euro Fund, Ltd -v- PricewaterhouseCoopers (A Firm) [2014] SC (Bda) 83 Com (4 November 2014)

WILFUL MISCONDUCT - FURTHER AND BETTER PARTICULARS - AMENDMENT

The Plaintiffs were investment companies which acted as "feeder funds" to Bernard L. Madoff Investment Securities LLC ("Madoff Securities"), an investment company established and operated by the notorious fraudster Bernard L. Madoff. The vast majority of monies raised by the Plaintiffs were transferred to Madoff Securities for investment on the Plaintiffs' behalf. In fact, Mr. Madoff was running a Ponzi scheme and none of the monies were invested. Upon Mr. Madoff's arrest in December 2008, the Plaintiff funds collapsed and were placed in liquidation.

The Defendant was appointed as auditor for the First Plaintiff from 1999 to 2008 and for the Second Plaintiff from 2000 to 2008. The Plaintiffs alleged that, had the Defendant done its job properly, from March 2000 onwards the Plaintiffs would not have invested any monies in Madoff Securities. The amount transferred by the Plaintiffs to Madoff Securities after that date and not recovered is well in excess of US$1 billion.

The Plaintiffs claimed damages to be assessed for breach of contract, negligence, negligent misstatement, and wilful misconduct. The amount claimed is likely to be substantial. On 21 February 2014, the Plaintiffs filed and served a statement of claim that weighed in at 366 pages.

By a summons dated 10 April 2014, the Defendant applied to strike out the statement of claim pursuant to Order 18, Rule 19(1) of the Rules of the Supreme Court, 1985 ("RSC") on the grounds that in breach of RSC Order 18, Rule 7(1) it was not confined to a statement in summary form of the material facts upon which the Plaintiffs relied; it contained evidence and argument and/or was prolix and would thereby embarrass and/or delay the fair trial of the action; or that it was otherwise an abuse of process. Following a part heard strike out application and further correspondence between the parties, the Plaintiffs served a proposed amended statement of claim, now running to 416 pages, which sought to address various concerns raised by the Court and the Defendant.

At the resumed strike out hearing in October 2014 the Defendant did not pursue the strike out application but instead sought, in respect of each audit year, an order for the further and better particulars. The Court gave consideration to the requests for further particulars and held as follows:

- That a defendant to a claim for wilful misconduct is entitled by reason of RSC Order 18, Rule 12(1) to particulars of: (i) the conduct alleged to be wilful (by analogy with the requirement to provide such particulars with respect to an allegation of wilful default) and (ii) the facts relied upon to establish the requisite state of mind. The amount of detail necessary will depend upon the facts of the case. However, the Court accepted that, per Lord Hope in Three Rivers at Para 51, the more serious the allegation of misconduct the greater the need for particulars to be given. In this case, the Judge held that the Claimant had to properly articulate in express terms the fact that each of the senior members of the audit team for that audit year knew or was recklessly indifferent.
- The Defendant's knowledge is alleged to include cumulative knowledge derived from past audits. The Judge held that the proposed amended statement of claim should

set out the material facts on which the allegation of cumulative knowledge is based.

- Due to the collective nature of the audit process, the Defendant's request for details of each act or omission (etc.) of each of the senior members of the audit team was inappropriate. What was material were the breaches of duty, identified in the conclusion to each of the sections dealing with one of the audit years, for which each senior member of the team was, on the Plaintiffs' case, jointly responsible.

The Judge noted that had he ordered additional particulars (beyond those outlined above), they could have run to another 400 pages and he was satisfied that, subject to the further amendments to the proposed amended statement, the Defendant had received adequate notice of the Plaintiffs' case.

Founded in 1928, Conyers Dill & Pearman is an international law firm advising on the laws of Bermuda, the British Virgin Islands, the Cayman Islands and Mauritius. With a global network that includes 130 lawyers spanning eight offices worldwide, Conyers provides responsive, sophisticated, solution-driven legal advice to clients seeking specialised expertise on corporate and commercial, litigation, restructuring and insolvency, and private client and trust matters. Conyers is affiliated with the Codan group of companies, which provide a range of trust, corporate secretarial, accounting and management services.

This article is not intended to be a substitute for legal advice or a legal opinion. It deals in broad terms only and is intended to merely provide a brief overview and give general information.