Neutral Citation Number: [2017] EWHC 3338 (Ch)

Case No: BL-2017-000450

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

BUSINESS LIST (ChD)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 15/12/2017

Before:

MASTER CLARK

- -

Between:

MILES SMITH BROKING LIMITED	**Claimant**
- and -	
BARCLAYS BANK PLC	**Defendant**

- -
- -

Jeremy Richmond (instructed by **EC3 Legal LLP**) for the **Claimant**

Hearing date: 6 December 2017

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Judgment Approved

Master Clark:

1. This is a Part 8 claim dated 28 November 2017 seeking an order for disclosure of documents by Barclays Bank plc ("the bank") relating to an account in the name of the Square Mile Partnership Limited ("SMP"). The order is sought under the jurisdiction established in *Norwich Pharmacal Co v Customs and Excise Commissioners* [1974] AC 133 and *Bankers Trust Co v Shapira* [1980] 1 WLR 1274.

2. In the usual way, the claim is not opposed by the bank, and has been listed for a disposal hearing.

Factual background and basis for the claim

3. The factual basis for the claim is set out in the witness statement dated 28 November 2017 of the claimant's solicitor, Graham Denny. This evidence is, of course, unchallenged, and I set it out without making any findings of fact, though some of it is non-contentious.

4. The claimant is a reinsurance broker, formerly named Robert Bruce Fitzmaurice Limited. On 26 February 2001, it placed an Excess of Loss reinsurance policy ("the policy") on behalf of Euclidean Syndicate 1243 ("the reinsured") with Lloyd's Consortium 9169 ("the Consortium").

5. On 8 May 2003, the claimant entered into a "run off" agreement with SMP. The claimant's case, in broad terms, is that under that agreement, SMP stepped into the claimant's shoes as the broker of the policy: it was entitled to collect the premiums due under the policy from the reinsured, and obliged to pay them to the Consortium.

6. On 9 February 2004, SMP sent to "Xchanging Ins-sure Services" a mandate addressed to the bank to activate a Debit/Credit Settlement Account in US dollars with the bank. The account was in SMP's name, sort code 20 00 00, account number 86981244 ("the account"). The broker reference given was "577", the claimant's broker reference.

7. In September 2004, two premiums due to the Consortium under the policy, totalling US$541,884.90, were paid by the reinsured to SMP. They were collected and paid to it through a collection service, Lloyd's Settlements, under the claimant's broker reference number 577, and paid into the account.

8. The premiums were not paid to the Consortium. On 18 August 2009, SMP was dissolved. The Consortium's case (set out in its letter before claim dated 2 August 2017) is that SMP was acting as the claimant's agent in the collection of the premiums, and that the claimant remained primarily liable to pay the premiums to the Consortium. The claimant's case is that, from the date of the run off agreement, SMP was (and it was not) primarily liable to collect and pay sums due under the policy; albeit that up to February 2004 (when the mandate in respect of the account was provided), it acted as SMP's agent in carrying out these tasks.

Applicable legal principles

9. As to these, it is sufficient to refer to *Ramilos Trading Limited v. Buyanovsky* [2016] EWHC 3175, a decision of Flaux J (as he then was):

> "11. The three conditions to be satisfied for the court to exercise its power to grant *Norwich Pharmacal* relief were set out by Lightman J in *Mitsui v Nexen Petroleum* [2005] EWHC 625 (Ch); [2005] 3 All ER 511 at [21] (in a passage approved in the notes to Civil Procedure 2016 at 31.18.4 and, albeit without attribution, in Hollander: Documentary Evidence 12th edition at [4–01]):
>
> 'The three conditions to be satisfied for the court to exercise the power to order Norwich Pharmacal relief are:
>
> i) a wrong must have been carried out, or arguably carried out, by an ultimate wrongdoer;
>
> ii) there must be the need for an order to enable action to be brought against the ultimate wrongdoer; and
>
> iii) the person against whom the order is sought must: (a) be mixed up in so as to have facilitated the wrongdoing; and (b) be able or likely to be able to provide the information necessary to enable the ultimate wrongdoer to be sued.'"

Wrong carried out or arguably carried out by wrongdoer

10. The standard of proof is that of a good arguable case as in freezing injunction cases: *Ramilos* at [27]. In *Norwich Pharmacal* itself the wrong was a tort. However, any type of wrong may be sufficient, including breach of trust or other equitable wrong and fraudulent payments: see *Matthews and Malek,* Disclosure (5th edn) at para 3.05. Self-evidently, the claimant must identify the cause of action it relies upon, and even if it cannot identify the specific person or entity who is the wrongdoer, must be able to say what acts amount to the wrongdoing.

Need for order

11. As for this requirement, I refer to *Ramilos* at [24]:

> "The second condition for relief is that the disclosure sought must be necessary in order to enable the applicant to bring legal proceedings or seek other legitimate redress for the wrongdoing and in considering the question of necessity, the cases emphasise the need for flexibility and discretion. This is clear from [57] of the speech of Lord Woolf CJ in *Ashworth*:
>
> > "The *Norwich Pharmacal* jurisdiction is an exceptional one and one that is only exercised by the courts when they are satisfied it is necessary that it should be exercised. New situations are inevitably going to arise where it would be appropriate for the jurisdiction to be exercised where it has not been exercised previously. The limits which apply to its use in its infancy should not be allowed to stultify its use now that it has become a valuable and mature remedy. That new circumstances for its appropriate use will continue to arise as illustrated by the decision of Sir

> Richard Scott V-C in *P v T Ltd* [1997] 1 WLR 1309 where relief was granted because it was necessary in the interests of justice, albeit that the claimant was not able to identify without discovery what would be the appropriate cause of action."
>
> To the same effect is a passage in the judgment of Lord Kerr in *The Rugby Football Union v Consolidated Information Services Limited (formerly Viagogo Limited) (in liquidation)* [2012] UKSC 55; [2012] 1 WLR 3333 at [15]."

12. Finally, even if the three threshold requirements are satisfied, the court has a discretion as to whether to make the order, and examples of relevant factors are set out at [27] of *Ramilos*.

13. The claimant also relies upon the separate equitable jurisdiction established in *Bankers Trust v Shapira*, considered by Neuberger J in *Murphy v Murphy* [1999] 1 WLR 282 at 288F – 289F:

> "A somewhat different jurisdiction was considered and invoked by Robert Goff J. in *A. v. C. (Note)* [1981] Q.B. 956, where the plaintiff had obtained a *Mareva* injunction pursuant to an *ex parte* application, and the court was considering a continuation of that injunction. The injunction, which the court granted, was based on the plaintiff's contention, which the judge, at p. 957f, accepted was supported by "prima facie evidence that a fraud had been committed," that he had been defrauded of substantial sums. The judge was considering an application which required a bank, which was, on the face of it, wholly innocent of any fraud, but through whose accounts the money may have passed, to disclose the sums presently standing in the names of the other defendants (who may well have been implicated in the fraud) and "all the facts within [the bank's] knowledge as to the present whereabouts" of the sum of which the plaintiff claimed to have been defrauded. Robert Goff J. held that he had jurisdiction to make such an order. He said, at p. 958e: "I take first the proprietary claim. In such cases, there is good authority that the court may make orders with the purpose of ascertaining the whereabouts of the missing trust fund." He found assistance from a decision of the Court of Appeal, *Mediterranea Raffineria Siciliana Petroli S.p.A. v. Mabanaft G.m.b.H.* (unreported), 1 December 1978; Court of Appeal (Civil Division) Transcript No. 816 of 1978 , where Mocatta J. had made what Robert Goff J. called [1981] Q.B. 956 , 959a : "a sweeping order requiring directors and an employee of the defendant company to make full disclosure of certain specified facts." He then quoted and relied on what Templeman L.J. said about that order on appeal, namely that this was:
>
> > "a strong order, but the plaintiff's case that there is a trust fund of $3,500,000. This has disappeared, and the gentlemen against whom orders are sought may be able to give information as to where it is and who is in charge of it. The court of equity has never hesitated to use its strongest powers to protect and preserve a trust fund in interlocutory proceedings on the basis that, if the trust fund disappears by the time the action comes to trial, equity will have been invoked in vain. That is why

> orders of this sort were made long before the recent orders for discovery, and they are at the heart of the Chancery Division's concern, and it is the concern of any court of equity, to see that the stable door is locked before the horse has gone."

He concluded [1981] Q.B. 956, 959:

> "in an action in which the plaintiff seeks to trace property which in equity belongs to him, the court not only has jurisdiction to grant an injunction restraining the disposal of that property; it may, in addition … make orders to ascertain the whereabouts of that property."

A similar approach was adopted by the Court of Appeal on not dissimilar facts in *Bankers Trust Co. v. Shapira* [1980] 1 W.L.R. 1274, where Lord Denning M.R., having approved *A. v. C. (Note)* [1981] Q.B. 956 and quoted from the decision in *Mediterranea*, 1 December 1978, said [1980] 1 W.L.R. 1274, 1281:

> "In order to enable justice to be done—in order to enable these funds to be traced—it is a very important part of the court's armoury to be able to order discovery. The powers in this regard, and the extent to which they have gone, were exemplified in *Norwich Pharmacal* …"

He then went on to say, at p. 1282:

> "This new jurisdiction must, of course, be carefully exercised. It is a strong thing to order a bank to disclose the state of its customer's account and the documents and correspondence relating to it. It should only be done when there is a good ground for thinking the money in the bank is the plaintiff's money—as, for instance, when the customer has got the money by fraud—or other wrong-doing—and paid it into his account at the bank."

Discussion

Norwich Pharmacal relief

Wrong carried out or arguably carried out by wrongdoer

14. As noted, the claimant disputes that SMP acted as its agent or sub-contractor in the collection of the premiums. However, its application is made on the footing (which it disputes) that the basis of Consortium's claim against it is correct. If so, its counsel submitted, it would itself be entitled it to make a claim in respect of the paying away of the premiums.

15. In the evidence in support of this claim, Mr Denny states that is it at least arguable that the premiums were (a) beneficially held by the claimant "and/or" (b) was paid away wrongfully by an (as yet unknown) party to a third party other than the Consortium. The claimant's counsel also submitted that SMP received the reinsured's money on the claimant's behalf, and therefore held it on trust for the claimant, who in turn held it on trust for the reinsured to pay to the Consortium.

16. I do not accept the submission that an agency relationship is of itself sufficient to give the principal proprietary rights in monies received by its agent. An agent owes fiduciary duties to his principal, but those duties do not mean that the agent holds on trust monies payable to the principal. Whether a trust in fact arises depends upon the terms of the agency agreement between the parties. Thus, the agreement may provide that the agent is entitled to deal with the money as his own, paying it into his account, using it for his own benefit, deducting his commission and only accounting to the principal for the balance at the end of the year: the monies are not then held on trust – see *Gwembe Valley Development Company Limited v Koshy* [2004] 1 B.C.L.C. 131 at [110]. On the other hand, it may provide that the agent receives the monies on behalf of the principal, is obliged to hold them separately from its own monies, and may not deal with them without the principal's consent– in which case, a trust will arise.

17. In this case, the relevant provisions in the run off agreement provided:

> "2 Transfer of the IBA Assets
> [The claimant] shall transfer to [SMP] all the IBA Assets … subject only to SMP providing confirmation that is registered with the GISC. [SMP] shall hold all IBA Assets and discharge the IBA Liabilities in a proper manner, consistent with the status of a Lloyds broker in accordance with the GISC rules. SMP shall not transfer any of the IBA Assets except to a creditor with an IBA liability, save as permitted under the GISC Rules and shall not appoint an agent or sub-trustee of them without the prior written consent of [the claimant]. The IBA Assets are held and shall continue to be held in a separate account or accounts to any non-IBA monies."

The GISC is defined as The General Insurance Standards Council. "IBA Assets" are defined as:

> "The amount of debts owing to [the claimant] in respect of all insurance broking transactions of [the claimant] and the amount credited to all bank accounts of [the claimant] designated IBA in accordance with the requirements of GISC."

"IBA Liabilities" are defined as:

> "The liabilities of [the claimant] in respect of all insurance broker transactions of [the claimant] and the amount debited to all bank accounts of the claimant designated IBA in accordance with the requirements of GISC. The term IBA Liabilities shall also include any Liabilities arising in relation to insurance business placed by [the claimant] prior to the Transfer Date [9 May 2003] of the nature of the IBA Liabilities which have not been incurred or reported at the Transfer Date."

("IBA" is defined as "Insurance Broking Assets".)

18. The reference to appointing "an agent or sub-trustee" is indicative that the parties' relationship is intended to be a trust one; as are the restrictions on transfer of the

IBA Assets and the requirement that they be held in a separate account. This is confirmed by para 4 of the agreement:

> "[SMP] will from the Transfer Date, assume responsibility for the processing and accounting of all current and future loss advices, claims, premiums and treaty balances in relation to the IBA Fund, IBA Liabilities and Litigation without any costs whatsoever to the claimant ..."

("IBA Fund" is defined as "the Insurance Broking Bank Accounts" maintained by [the claimant] pursuant to the Regulations of GISC.)

This clause would be unnecessary if beneficial ownership of the IBA Assets had passed to SMP and also points to it having been retained by the claimant. Finally (for present purposes) the run off agreement includes a power of attorney granted by the claimant to SMP entitling it to compromise any claim made by or against the claimant in respect of IBA Assets, Liabilities or IBA Funds and to conduct litigation on the claimant's behalf arising out of them. Again, such a provision would be unnecessary if SMP had become the beneficial owner of the IBA Assets.

19. I am therefore satisfied that the claimant has a good arguable case that it was the beneficial owner of the premiums held in the account, even if it held those premiums on trust for the reinsured or was itself subject to obligations to pay them to the Consortium.

20. The wrongdoing consists therefore in the misapplication of the premiums and their payment to someone other than the Consortium. SMP, if it still existed, would be liable for that wrongdoing, both as a breach of the run off agreement and as a breach of trust. Although, the claimant's counsel suggested that it might wish to sue SMP, I do not consider that there is any realistic prospect of it doing so, as there is no reason to suppose it has any assets to meet a judgment (if it were restored to the register).

21. However, the claimant's counsel submitted that it would also have a claim against SMP's directors in respect of such paying away; and that the legal basis for the directors' liability would be likely to include inducing breach of trust, accessory to a breach of trust and/or unlawful means conspiracy or a simple conspiracy between the directors and/or SMP. I accept that these are good arguable claims.

22. In addition, although a director is not liable for the wrongdoing of her/his company merely by reason of being a director, s/he is nonetheless liable for wrongs personally carried out by her/him. As Lord Hoffman pointed out in *Standard Chartered Bank v Pakistan National Shipping (Nos 2 and 4)* [2003] 1 AC 959 HL at [22]:

> "No one can escape liability for his fraud by saying: "I wish to make it clear that I am committing this fraud on behalf of someone else and I am not to be personally liable."

23. A director is also liable where s/he has procured or directed the company to commit the wrongful act: *Fish & Fish Ltd v Sea Shepherd UK* [2015] UKSC 10; [2015] A.C. 1229.

24. I am satisfied therefore that the claimant has a good arguable case against the persons who procured the payments to be made out of the account and that those persons are likely to be SMP's directors.

25. As for the need for the order, it will or may enable the claimant to identify the persons responsible for instructing the bank to pay the monies away. The documents sought may also enable the claimant to make out a defence to the Consortium's claim if it transpires from them that the premiums were in fact paid to it. I am therefore satisfied as to the need for the order.

26. I am also satisfied that the bank was mixed up in so as to have facilitated the wrongdoing; and, it follows from the above, is able or likely to be able to provide the information necessary to enable the ultimate wrongdoer to be sued.

27. Finally, as to my discretion as to whether to grant the order, I note that only person entitled to assert the confidentiality of the documents sought, namely SMP, no longer exists, so no rights to confidentiality are being breached.

Bankers Trust relief

28. In addition, the claimant's proprietary claim would entitle it to trace the premiums, and, in my judgment, it is also entitled to seek relief under *Bankers Trust.* As set out above, the claimant has an arguable case that it had a proprietary interest in the premiums, notwithstanding that it may itself have held them on trust for the reinsured. But if I am wrong as to that, it cannot, in my judgment, be a bar to relief that the claimant was not the ultimate beneficial owner of the premiums. This can be tested by considering the position if monies were fraudulently removed from the bank account of a trustee of an express private trust. No authorities relevant to this scenario were cited by the claimant's counsel. However, in my judgment, this would be a situation in which it would be legitimate to exercise the *Bankers Trust* jurisdiction: the trustee would be able to sue to recover the monies, to trace them and to obtain a *Bankers Trust* order in respect of that claim. The fact that the claimant may itself have been a trustee for the reinsured (or the Consortium) is not a reason for denying it the relief it seeks.

Conclusion

29. For these reasons, I will therefore grant the order in the form sought by the claimant, amended as indicated in the course of the hearing.