

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

ANWAR, *et al*
Plaintiffs,

-against-

FAIRFIELD GREENWICH LIMITED, *et al*
Defendants.

This document related to: All Actions

Master File No. 09-CV-0118 (VM)

AFFIDAVIT OF LEWIS HUNTE, Q.C.

AFFIDAVIT OF LEWIS S. HUNTE, Q.C.

I, **LEWIS S. HUNTE**, QC of Hunte & Co Law Chambers, Road Town, Tortola, British Virgin Islands **MAKE OATH** and **SAY** as follows:

PERSONAL HISTORY

1. I am a Queen's Counsel practicing at the Bar of the British Virgin Islands ("BVI"). I was called to the Bar by the Honourable Society of Gray's Inn, London in the year 1965.
2. I held the post of Attorney General of BVI from the year 1982 to the year 1985 and while serving in that capacity I wrote the International Business Companies Act, 1984 of the BVI ("IBC Act"). That Act has now been replaced by the BVI Business Companies Act, 2004 ("BVIBC Act"). A copy of my curriculum vitae is attached hereto as "Exhibit A."

DOCUMENTS REVIEWED

3. I have read the Second Consolidated Amended Complaint ("SCAC"), the Private Placement Memoranda ("PPM") of Fairfield Sentry Limited and Fairfield Sigma Limited, including the Fairfield Sentry PPM dated July 1, 2003, the Fairfield Sentry PPM dated October 1, 2004, the Fairfield Sentry PPM dated August 14, 2006, the Fairfield Sigma PPM dated February 16, 2006, the Fairfield Sigma PPM dated December 1, 2008, and the affidavits of Gerard St. C. Farara Q.C. sworn to on December 22, 2009, Guy Philipps Q.C. sworn to on December 22, 2009, and Robert Miles, Q.C. sworn to on March 19, 2010.

MATTERS ADDRESSED

4. I have been asked to review the statements made by Messrs. Farara, Phillips and Miles and to provide an independent expert opinion with respect to BVI law on the following subjects:
- (i) The legal system of the BVI and precedents relied upon by the BVI courts;
 - (ii) Whether the shareholders of Fairfield Sentry Ltd. and Fairfield Sigma Limited (the "Funds") have standing to bring the claims asserted in the SCAC in this action;
 - (iii) Whether shareholders can maintain a claim for damages for breach of fiduciary duty against the Fairfield Greenwich Defendants.¹
 - (iv) Whether the BVI would recognize a cause of action for aiding and abetting a tort committed by another person.
 - (v) Other matters of BVI law that are relevant to the claims made in this action.

¹ I use the term 'Fairfield Greenwich Defendants' as defined by Mr. Farara in footnote 1 of his affidavit.

I. LEGAL SYSTEM OF BVI

5. The BVI is an Overseas Territory of the United Kingdom ("UK"). The system of law in the BVI is founded on the English system.
6. English Common Law has been legally received in the BVI and is applied except in so far as it is modified by local statutes and, even where the Common Law has been modified by statute in England, it continues to be applied in the BVI, unless it has been similarly modified by statute in the BVI.
7. The Courts of the BVI in descending order are the British Privy Council, the Court of Appeal of the Eastern Caribbean Supreme Court, the High Court and the Magistrate's Court.
8. The Court of Appeal hears appeals from the Magistrates and Judges of the High Court, and the Privy Council hears appeals from the Court of Appeal. Consequently, decisions of the Court of Appeal are binding on the High Court and on the Magistrates' Courts, and decisions of the Privy Council are binding on all Courts in the BVI.
9. The jurisprudence of the BVI, compared with that of the UK, is relatively undeveloped; and so, where there is no local judicial precedent, it is the practice to look first of all to the cases that have been decided in England. This is in keeping with section 11 of the West Indies Associated States Supreme Court Act. That section is reproduced and is appended hereto as "Exhibit B". Nevertheless, case law from other Commonwealth jurisdictions and, in instances where no precedents can be found, decisions of the courts in the USA can be of persuasive force.

II. BVI COMPANY LAW

10. Prior to the enactment of the IBC Act, there existed in the BVI a Companies Act that came in to force in the BVI on March 2, 1885. This Act was amended several times throughout the years.
11. After the enactment of the IBC Act 1984, the IBC Act co-existed with the original Companies Act until the enactment of the BVIBC Act in 2004, which repealed both Acts.

III. SHAREHOLDER STANDING TO BRING CLAIMS

12. The so-called rule in Foss v Harbottle (1843) 2 Hare 461 is that, where a company suffers wrong, the company alone has the right to bring an action for relief in respect of that wrong. There are a number of exceptions to this rule, but these are not engaged in this case, as the Plaintiffs are, as I understand the SCAC, asserting claims which are personal to them. They are not seeking to bring claims in the name of the Funds.
13. The decision in Foss v Harbottle has been affirmed in a long line of cases and one of the latest of those cases is Prudential Assurance Co Ltd v Newman Industries Ltd (No2) [1982] Ch 204.
14. In the case Johnson v Gore Wood & Co. (2002) 2 AC 1, the House of Lords in England, while reaffirming the principle established in Foss v Harbottle, decided that:
 - (a) if the company does not have a cause of action, a shareholder may bring a claim for depreciation in the value of his shares; and

- (b) where both the company and a shareholder have a cause of action, a shareholder may recover damages for any loss he suffers which is distinct from any loss suffered by the company.
15. Consequently, a shareholder is entitled to maintain an action where:
- (a) The company itself has committed the wrong suffered by the shareholder;
 - (b) A third party has committed the wrong and the shareholder, but not the company has a cause of action against that third party; or
 - (c) As a result of some act by a third party, both the shareholder and the company have a cause of action but the shareholder has suffered loss which is distinct from the loss suffered by the company.
16. Further, in my opinion, the case Johnson v Gore Wood & Co is sufficient authority in the BVI for the proposition that where a shareholder and a company both have a cause of action as a result of acts committed by a third party, and the loss suffered by the shareholder is in excess of the loss suffered by the company, the rule in Foss v Harbottle will not bar the shareholder in so far as he seeks to recover the excess loss he suffered.
17. That proposition was discussed by the Court of Appeal in the case Giles v Rhind [2003] BCLC and the judgment of Walter LJ is supportive of it.
18. These are the questions:

- (a) whether the Plaintiffs were induced to purchase and retain shares in the Funds by fraudulent and/or negligent misrepresentation by some of the defendants;
 - (b) whether the Fairfield Greenwich Defendants, which include the directors and investment managers of the funds, induced the Plaintiffs to purchase and retain shares in the Funds by fraudulent and/or negligent misrepresentation;
 - (c) whether Plaintiffs were owed rights under various contracts that were entered into between the Funds and some of the Fairfield Greenwich Defendants on the understanding that those contracts were for the benefit of the Plaintiffs;
 - (d) whether the Plaintiffs have unjust enrichment claims against defendants who received substantial fees in relation to the management of the assets of the Funds;
and
 - (e) whether the Plaintiffs are owed a duty of care by the defendants involved in the Funds, including the auditors and custodians.
19. I confirm that the legal analysis and conclusions of Robert Miles, Q.C. set forth in his affidavit of UK and BVI law dated March 19, 2010 are true and correct under BVI law.
20. Mr. Farara fails to consider liability for misrepresentations made by the defendants that were relied upon by Plaintiffs in purchasing shares in the Funds and remaining invested in the Funds. Under BVI law, the shareholders have direct claims against the defendants for making these representations. As Robert Miles states in paragraph 48 of his affidavit

on U.K. law, a duty of care arises where a party, A, provides information to another party, B, in circumstances where it is reasonably foreseeable that party B will rely on it, party A will come under a duty of care in relation to the accuracy of such information:

Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd., [1964] A.D. 465; Henderson v.

Merrett Syndicates Ltd., [1995] 2 A.C. 145. These cases would be followed in the BVI.

21. Mr. Farara's discussion of Section 184C of the Business Companies (Amendment) Act 2005 is irrelevant because the shareholders here are bringing a class action against the defendants in their own right, not a derivative claim.
22. The answers to the questions in Paragraph 18 above depend almost exclusively on the facts and the evidence available. I would therefore respectfully disagree with Mr. Farara and Mr. Phillips that the Plaintiffs would be excluded by the reflective loss rule. Moreover, a BVI Court would not strike out a claim "where the argument involves a substantial point of law which does not admit of a plain and obvious answer; or the law is in a state of development, or where the strength of the case may not be clear because it has not been fully investigated." Citco Global Custody NV v. YCK Finance, Inc., Court of Appeal of the Eastern Caribbean Supreme Court in Civil Appeal HCVAP 2008/022 delivered 19th October 2009 at 9 citing Blackstone's Civil Practice 2009 at 432, ¶¶33.9 and 33.10. Mr. Farara's conclusions are, with respect to my learned friend, much too wide and sweeping, and a court in the BVI will not make a pronouncement until it has considered the fact situation in each case.
23. The courts in the BVI have not yet decided a case in which the principle of *in pari delicto* has been raised. However, should they be required to do so they would, without doubt,

follow the decisions of the English Courts, and cases such Parkinson v College of Ambulance Ltd [1925] 2KB 1 and Lemenda Trading v. Africa Middle East Petroleum Co. Ltd. [1998] 1 All.E. R. 513, would be of great persuasive force. If a company were barred from bringing claims on its own behalf, the reflective loss rule would not bar the shareholders from bringing such claims on their own behalf.

IV. FIDUCIARY DUTY OWED TO SHAREHOLDERS

24. I agree with the legal analysis and conclusions of Robert Miles concerning the existence of fiduciary duties between Plaintiffs and the Fairfield Greenwich Defendants. His statements accurately reflect the state of the law in the BVI.
25. Mr. Farara incorrectly relies on Arklow Investments Ltd. v. Maclean, [2000] 1 W.L.R. 594 for the proposition that a fiduciary duty does not arise under BVI law merely because one is trusted by the other party to a business transaction, or by superior knowledge, or by having the right or ability to control some action or asset. The case says nothing of the sort. At issue was whether an investment bank owed the plaintiff a fiduciary duty where the plaintiff had never given a mandate to the investment bank. The Court held that the “relationship of the parties never extended beyond one created by and limited to the giving and receipt of confidential information.”

V. AUDIT

26. Section 25 A of the Mutual Funds Act of the BVI provides for the prescribing of a “Code of Practice” in relation to mutual funds, including accounting records and audit requirement. No such code of practice, however, has so far been prescribed.

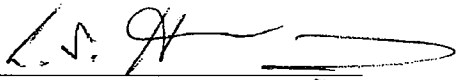
27. In addition, professional funds are not and have never been required by the IBC Act, the BVIBC Act, the Mutual Funds Act or any other legislation in the BVI to have their financial statements audited or to provide certified statements to investors. I append to this affidavit a copy of the Mutual Funds (Professional Funds) Regulations, 1998 as "Exhibit C."

VI. AIDING AND ABETTING BREACH OF FIDUCIARY DUTY

28. I agree with the analysis and conclusions of Robert Miles in §§52-55 of his affidavit which accurately state the BVI law. While the BVI does not recognize a claim for aiding and abetting breach of fiduciary duty, it does recognize accessory liability in the form of knowing assistance in a breach of trust. The same facts that support a cause of action for aiding and abetting breach of fiduciary duty in the American courts may suffice to state a claim for knowing assistance in a breach of trust. A BVI court would look to the substance of the claim, not the label attached to the claim, to determine whether a cause of action existed.
29. I note that Mr. Phillips has not provided any basis for his premise that BVI law should govern a claim by shareholders against PricewaterhouseCoopers for a claim for aiding and abetting breach of fiduciary duty. A New York court might well hold that New York law governs state law claims in tort against PricewaterhouseCoopers.
30. Regarding the choice of law issue, the Funds are not permitted to do business in the BVI or to offer shares for sale in the BVI. The only activity the Funds are permitted to conduct in the BVI is to maintain its registered agent in the BVI. The Funds were sold to

Plaintiffs outside the BVI. Consequently, the BVI does not have a strong interest in having its law apply to state law claims asserted by the Plaintiffs against the defendants in this action, including PricewaterhouseCoopers.

SWORN by the within-named)
LEWIS STEPHENSON HUNTE, QC)
at Road Town Tortola,)
British Virgin Islands)


Lewis Stephenson Hunte, QC

This 19th day of March, 2010.

BEFORE ME:



A Commissioner to Administer Oaths in the British Virgin Islands



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PASHA S. ANWAR, *et al.*,

Plaintiffs,

v.

FAIRFIELD GREENWICH LIMITED, *et al.*,

Defendant.

This Document Relates To: All Actions

Master File No. 09-cv-118 (VM)

AFFIDAVIT OF LEWIS HUNTE, Q.C.

Exhibit A

“EXHIBIT A”

Curricular Vitae

1. Head of Law Firm Hunte & Co **2003 – Present**
2. Appointed Queen’s Counsel at invitation of the Chief Justice **2003**
3. Partner Harney Westwood & Riegels **1989-2003**
4. Associate Harney Westwood & Riegels **1986-1989**
5. Attorney General, British Virgin Islands **1982-1985**
6. Deputy Chief Parliamentary Counsel, (Barbados) **1976-1982**
7. Parliamentary Counsel, (Barbados) **1971-1976**
8. Magistrate (Barbados) **1970-1971**
9. Deputy Registrar, Court of Appeal (Jamaica) **1968-1970**
10. Deputy Registrar, Supreme Court (Barbados) **1967-1968**

I also spent one (1) year’s attachment to the Federal Department of Justice (Legislation Section) 1974-1975 and simultaneously undertook a course in Legislative Drafting at the University of Ottawa under the late Professor Elmer A. Driedger.

My publications are:

- (1) *An Elucidation of the Intellectual Property Laws of Barbados*
- (2) An article entitled “*A Status Report of the Intellectual Property Laws of the Commonwealth Caribbean*”.

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Exhibit B
Intentionally Deleted

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Exhibit C

VIRGIN ISLANDS
STATUTORY INSTRUMENT 1998 NO. 39
MUTUAL FUNDS ACT, 1996
(No. 6 of 1996)

Mutual Funds (Professional Fund) Regulations, 1998

[Gazetted 22nd October, 1998]

The Governor in Council, in exercise of the powers conferred by section 42 of the Mutual Funds Act, 1996 (No. 6 of 1996), makes the following Regulations:

1. These Regulations may be cited as the Mutual Funds (Professional Fund) Regulations, 1998.
2. A mutual fund which meets the conditions stipulated in regulation 3 shall be designated as a professional fund.
3. The conditions referred to in regulation 2 are that
 - (a) the mutual fund was carrying on business or engaged in an activity as a mutual fund on the date of the coming into force of the Act;
 - (b) the initial investments in respect of the majority of each of the investors in the mutual fund have been not less than one hundred thousand dollars in the United States currency or its equivalent in any other currency; and
 - (c) the shares of the mutual fund are, after 30th September 1998, made available only to professional investors.

Citation.

Designation of professional fund.

Conditions.

Made by the Governor in Council this 2nd day of October, 1998.

ERICA SMITH-PENN,
Ag. Clerk of the Executive Council.

(2) The jurisdiction of the High Court in Admiralty shall be exercised in accordance with the Colonial Courts of Admiralty Act 1890, (Imperial) and part I of the Administration of Justice Act 1956.

9. The jurisdiction of the High Court in bankruptcy shall be exercised in accordance with the provisions of the Bankruptcy Act and any rules made thereunder.

Practice in
bankruptcy,
Cap. 8.

10. The jurisdiction of the High Court in all criminal proceedings shall be exercised in accordance with the Criminal Procedure Act and any other law in force, in the Territory.

Practice in
criminal
proceedings.
Cap. 18.

11. The jurisdiction vested in the High Court in civil proceedings, and in probate, divorce, and matrimonial causes, shall be exercised in accordance with the provisions of this Ordinance and any other law in operation in the Territory and rules of court, and where no special provision is therein contained such jurisdiction shall be exercised as nearly as may be in conformity with the law and practice administered for the time being in the High Court of Justice in England.

Practice in civil
proceedings and
in probate,
divorce and
matrimonial
causes.

12. Any judge of the High Court may in accordance with rules of Court, or so far as such rules shall not provide, in accordance with the practice and procedure which shall for the time being be in force in the High Court of Justice in England, exercise, in Court or in Chambers, all or any of the jurisdiction vested in the High Court.

Jurisdiction of
single judge.

13. Subject to the express provisions of any other law in every civil cause or matter commenced in the High Court, law and equity shall be administered by the High Court and the Court of Appeal, as the case may be, according to the provisions of the seven sections of this Ordinance next following.

Law and equity
to be
concurrently
administered.

14. If a plaintiff or petitioner claims to be entitled to any equitable estate or right or to relief on any equitable ground against any deed, instrument or contract or against any right, title or claim whatsoever asserted by any defendant or respondent in the cause or matter, or to any relief founded upon a legal right which before the 1st day of November, 1875 could in England only have been given by a court of equity, the court or judge shall give to the plaintiff or petitioner the same relief as would be given by the High Court of Justice in England in a suit or proceeding for the same or a like purpose.

Equities of the
plaintiff.