THE HON. MR JUSTICE PETER SMITH
Approved Judgment

Neutral Citation Number: [2014] EWHC 2046 (Ch)

Case No: HC12C00507

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

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

Date: 26/06/2014

Before:

THE HONOURABLE MR JUSTICE PETER SMITH

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Between:

(1) Group Seven Limited
(a company incorporated under the laws of Malta)
(2) Rheingold Management Inc
(a company incorporated under the laws of Panama) **Claimants**
- and -
(1) Allied Investment Corporation Ltd
(a company incorporated under the laws of Malta)
(2) Marek Rejniak
(3) Paul Sultana
(4) Larn Limited
(5) Luis Nobre **Defendants**

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Mr J Chapman QC and Mr S Atrill (instructed by **Mischon de Reya**) for the **Claimant**
Mr R Tager QC and Mr P Kremen (instructed by **Hughmans**) for the **Third Defendant**
Mr J Harvie QC and Mr H Adamson (instructed by **Sillett Webb**) for the **Fourth Parties**

Hearing dates: 13, 14, 17, 18, 20, 21, 24, 25, 26, 27 February, 3, 4, 5, 6, 7, 10, 11, 12, 13, 14, 17, 18, 19, 20, 21, 24, 25, 26 March and 3, 4, April 2014

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Judgment

amount in 24 hours. The scam operates by proposing a scheme which involves fabulous returns and for no risks. The proposed victim is either dazzled and goes along with it or he is not deceived in which case they move on to find another victim. The procedure then involves various convoluted proposals over a period of time which the victim just fails to participate in. All of those involve as I have said the money miraculously not leaving his account or being in a blocked account which is sold as a protection for him. Then at the last minute when the victim is well and truly ensnared and thinking he keeps missing these wonderful opportunities he is presented with the big final proposal which due to technical reasons requires the victim to release the control of his monies for a short time. Once that is done the money disappears.

29. As I have said that happened in the **Manolakakie** case. She was an unsophisticated investor as the $1m which she had were the proceeds of a sale of a business in Greece. Unfortunately she was defrauded by her own solicitor and it was not therefore difficult to see how she could have been misled. As this judgment will show the officials advising Allseas were apparently extremely experienced and sophisticated lawyers and accountants. Mr Heerema, the ultimate owner of Allseas was also a sophisticated business man. Yet their evidence is that they were all taken in by this scam and so taken in they put aside any kind of investigation as to the bona fides of the proposals or the scheme. At the end the loss was confined to €12m not because of anything the Claimants did but because of the efforts of the Metropolitan Police who protected the balance of the monies in the Notable account despite the protests on the part of Allseas. They actually threatened the Metropolitan Police with claims for damages if the monies were not released. The precise detail will be set out below because it is essential to understand the case to go through the chronology leading up to the removing of the €100m from the control of the Claimants in November 2011.

30. These types of scams are to be found all over the internet including warnings about them.

31. The final scam in this case involved the proposition that the Fed were willing to issue "MTNs" to various "special" investors via specifically authorised intermediaries at a discount of up to 20% of the face value of the notes. As these were Fed notes they were immediately marketable and the proposal was that the MTNs would be sold immediately on the open market which would then produce at least the face value of the notes. The 20% profit would be divided as to 10% back to the Fed and the balance (less expenses) to the Claimants. This was capable of being done over and over again hence the ability of the Claimants to make as much as €1.3bn over the course of 13 months.

32. It is an easy question to ask afterwards (and not really very difficult beforehand in reality) ***"why would the Fed give away so much money?"*** The answer provided by the fraudsters was this was the way of the Fed supporting various schemes and projects that it considered to be beneficial to mankind as a whole. What was it that Allseas were doing which was so philanthropic? Allseas' main business was making oil pipe lines and it was extremely profitable. However Mr Heerema had a project (and still has) to build a super catamaran type ship which would be able to sail up to oil rigs, lift them out of the water on to the body of the ship and repair them in situ. The suggestion was that it was such a good idea that the Fed wished to support it.

33. The ship was named the Pieter Schelte after Mr Heerema's late father in recognition of his reputation as being an international engineer. However he had a dark side to him as is demonstrated by the following cross examination (Day 4: 93-95):-

Q. So you left Malta, and, no doubt, when you got back you reassured Mr Heerema that, after the nine days, everything you heard was to the effect that whatever would happen to the money would always be safe. There was no -- zero risk of you losing the money?

A. At that time, yes.

Q. The only risk that had been identified months earlier by your CFO was the risk of the Bank of Valletta going bust.

A. Yes.

Q. So this was a zero -- not even a 0.001 per cent, a zero risk transaction with huge profits?

A. Yes.

Q. And because the American Government liked your ship. Is that right?

A. Yes.

Q. What was it about the ship that they liked?

A. Because the ship would -- offers safe, cheap solutions for the removal of oil platforms, so --

Q. Why is that of interest to the US Government?

A. Because that would also -- there will be no risk to the environment. So in the Gulf of Mexico and other areas in the world it could -- we could provide good services to -- that will be in the interest of the United States, but also of other countries and companies, of course, to do this work quickly, safely and good for the environment. So ...

Q. Who told you all that, that the American Government, as it were, were giving you 200 million -- the opportunity to earn USD 200 million a month because they liked the environmental advantages of using your ship as opposed to conventional methods for uploading and removing oil platforms?

A. Mr Rejniak did that. And the other two UN people did that as well.

Q. The UN people?

A. Yes.

Q. Is this project a little controversial in the United States?

A. Our shipbuilding?

Q. The ship, yes. What about its name? How well has the name of the ship gone down in the United States of America?

A. The name of the ship, the name being Pieter Schelte, has not caused any issues in the United States.

Q. Are you not aware of the fact that there has been a lot of fuss in the United States and, indeed, in Europe because of the choice of that particular name?

A. I am aware that the name causes issues mainly in Holland.

Q. Mainly in Holland, yes. Because how did Mr Heerema's father spend the war?

A. Mr Heerema's father was a member of the SS during the first part of the war.

Q. Yes.

A. And then changed his mind and became a -- somebody that was against the Germany army or the German – against it, yes.

MR JUSTICE PETER SMITH: He was in the Dutch SS, was he?

A. No, he was in the German SS.

MR JUSTICE PETER SMITH: The German SS.

MR TAGER: He joined the German SS. And then he left the SS you say in the middle of the war?

A. I don't know the exact time but that is -- he changed his mind, that is --

MR JUSTICE PETER SMITH: I didn't know you could leave the SS. I thought it was a job for life.

A. I have no comment on that, my Lord.

MR JUSTICE PETER SMITH: Was he in the Waffen SS or the non-Waffen SS? Do you know?

A. I do not know that.

MR TAGER: My Lord, some might regard that as a quibble. He was in the SS. And, after the war, he went to Argentina, didn't he?

A. He went to South America. I think he went to Venezuela.

Q. Venezuela. I'm so sorry. With the help of the Vatican?

A. I don't know.

Q. And that is why the name of the ship is very controversial, isn't it? They're not many ships afloat on the seas named after a former member of the SS, are there?

A. No.

Q. And yet you regarded the American Government as being so happy with this project that they were prepared to give you the opportunity to earn 200 million euros a month for 13 months?

A. That is what we have -- we were told, yes.

THE CREATION OF THE SCAM

34. I will set out in some detail as to how this scam started, its development and its culmination in the transfer of the €100m in November 2011. Thereafter I propose to deal with the specific allegations against the Defendants and Mr Sultana's response thereto.

ALLSEAS DESIRE TO INVEST

35. During 2010 Allseas was looking to find funding to build the ship. The cost would be €1.3bn. It is currently expected to be completed in June 2014. Allseas financed much of the cost of the building with its own resources including cash. In the autumn of 2010 it had the €100m on deposit but it did not require it in the short term and was prepared to invest it for up to a year.

36. Mr Heerema was contacted by a Mr Brouwer, a former CFO of the Allseas Group who had an investment opportunity for Allseas. Mr Heerema told him to contact Mr van Tiel, the Allseas CFO. Mr Brouwer put Mr van Tiel in contact with a Mr Ken Fulton who provided a long document describing certain international institutions and financial markets in general terms. The document actually said nothing about any particular form of recommended investments. It was explained to Mr van Tiel that the investment worked by very fast buying and selling of bonds which were bought at a discounted 2% and sold at full value with the profits split equally with special traders. Mr van Tiel apparently did not think much of the proposal and was sceptical. A meeting took place which was no more satisfactory and a further meeting took place where Mr Visser was delegated to attend. At this stage Mr Heerema and Mr

271. Lastly in relation to the World Trade Document is the dispute between Mr Sultana and Mr van Wezel. Mr van Wezel gave evidence to the effect that Mr Sultana gave him the document from his briefcase and told him that he did not want the police to find the document on him in the event that he was arrested. This conversation took place at Mishcon's offices on the 29th December 2011. Mr Sultana was arrested at those offices when he attended. Mr van Wezel took the document back to Rotterdam instead of giving it to the police which is surprising for a former police officer. He showed it to Mr Kooger who (unusually for his expertise as demonstrated in this case) expressed the view that the document was an obvious forgery. The document then found its way to Mr Stubbs the Partner in Mishcon's acting for Allseas. He handed it to his assistant Ms Pigott on 11th January 2012 who then put it in a locked cabinet in her room. The next time she had recourse for that document was 5th April 2012 when the Metropolitan Police asked for the original. It was then collected by DC Andy Ledbetter on 11th April 2012 and taken away and examined for fingerprints. The results of the fingerprint test showed that one mark in photo E on the rear surface of the document was a fingerprint of Mr Sultana.

272. The only way in which the document on that analysis could have come into possession of Ms Pigott was via Mr Stubbs, Mr Kooger and Mr van Wezel. Mr Sultana could not explain why his fingerprint was on it.

273. Mr van Wezel had given a statement to the police on 25th January 2012 where (amongst other things) he told them that Mr Sultana had given him the document because he did not want the police to find it when he was arrested.

274. I accept that evidence and I reject Mr Sultana's. In so doing however, I am surprised Mr van Wezel (a former detective of considerable experience) did what he did. Mr Sultana when he was about to be arrested gave him this document because he wanted to hide it from the police. It clearly was an important document yet Mr van Wezel took it away to the Netherlands and it was then retained by Allseas solicitors and no attempt was made to give it to the police until the police asked for it in April 2012. It is a small point but the episode shows the unreliability of Mr van Wezel's evidence but that is not as serious as Mr Sultana's untruthful evidence.

275. I can only conclude that Mr Sultana wanted to hide it because it would be evidence of a fraud. Equally I reject Mr van Wezel's evidence that he did not look at this document to any serious degree. I would believe that his curiosity as a former detective would have overcome him. The idea that he would take away a document given to him to hide from the police and not look at it is quite extraordinary. Further he omitted to say in his original statement that the car that took him to the airport to fly back to the Netherlands was actually a police car. He therefore made a conscious decision to take the document to the Netherlands despite the fact that a suspect just arrested wanted to hide it from the Metropolitan Police. The reason he did this is that he seemed to be more concerned about getting the money back despite the relatively low chances (he estimated in cross-examination of 1%). Allseas' attitude to the police was not particularly co-operative (see above). It is another example of the inadequacy of the evidence of Allseas in this case.

OTHER CRITICISMS OF MR SULTANA

ALLSEAS' WITNESSES

316. Before I go on to consider the consequences of my factual findings above under Maltese law, I should say something about the Allseas witnesses, because that will be relevant to matters raised by Mr Sultana.

MR HEEREMA

317. Mr Heerema is the beneficial owner of Allseas. Clearly, he is a very successful engineer. However, he tried in his evidence to portray the impression that he was a good engineer but a bad financier. I remained unconvinced about the performance throughout. Whilst he might not understand technicalities of finance, no such technicalities were being paraded in this case. There are a lot of obscure-sounding words and expressions, but it would not, in my opinion, have required much inquisitiveness to have exploded the whole balloon completely. Mr Heerema accepted that he believed in these kind of investments and had done for many years. I was not persuaded by his evidence that he was actually convinced the proposition was credible. When told of the likely returns by Mr Visser, he simply smiled. He was careful to distance himself from the actual detail and left it all to Mr Kooger and Mr Visser. He clearly was sceptical, but if Mr Kooger and Mr Visser could bring it off, he was not going to look a gift horse in the mouth.

318. He was aware from the early investigations by his chief accountant, Mr van Tiel, that the latter was extremely sceptical about it. He told Mr Heerema that the proposal was a lot of nonsense. Although Allseas attempt in their closing to suggest that Mr van Tiel was not sidelined, in my view he plainly was. Mr Heerema attempted to suggest that in effect the matter was not significant to him because it was **"only"** €100m. Having seen Mr Heerema, my view is that he was sceptical about the proposal but he was content to allow it to be evaluated by his two employees, Messrs Kooger and Visser, because he believed he could rely upon them to see whether the proposal was a genuine one or not. Apart from meeting Mr Sultana in May 2011, he had no direct role in the ensuing negotiations, and left it to Mr Visser and, more importantly, Mr Kooger to conclude the transactions and report back to him.

319. He could not have been more misplaced in his trust. He believed at all material times, in my view, that Allseas' money was under its control. As long as it was under its control he felt there would be no risk. If the transactions did not work, the money would still be there. If the transactions did work, the money would be received.

320. There were suggestions that the way in which the diversion of the profits was to be organised and the way in which the monies were taken from Allseas was in some way improper. It is an easy thing to say when organisations operate through offshore companies. However, there was in my judgment no clear basis for suggesting the way in which the proposed profits were to be dealt with was somehow improper or illegal, and I discount it.

321. Equally, there were suggestions that Allseas' representatives were not fooled by the proposal. This then led to the development of that to suggest that if they were not fooled, then they must have known that there was some other proposal. It is self-evident that if they were not fooled but did not believe there was something else, they would not have handed their money over. It was therefore suggested that what was

being concealed was an illegal transaction such as money-laundering or drug-dealing. I do not accept that. Whatever the failings of Messrs Heerema, Kooger and Visser, I do not believe for one minute that they would be willing to become involved in something that they believed or knew was illegal in that way. I accordingly reject that suggestion.

322. In any event, such a suggestion was not open to Mr Sultana on his pleadings. Whilst he pleaded that Allseas acted irresponsibly, incompetently and recklessly, no allegation was made of any wrongdoing by Mr Heerema, Mr Kooger or Mr van Wezel, Mr Swan or Mr Pathuel (paragraph 26 of Amended Further Information).

323. It is true that Mr Tager asserted that Mr Visser had been dishonest, but I reject that and there was no basis for it in the cross-examination. Equally, I rejected an application mid-trial to allege that all of the witnesses and Allseas were dishonest.

MR KOOGER

324. Mr Kooger is the general legal counsel and director of Allseas group. He is also a director and company secretary of Allseas. He has been the general legal counsel for over 11 years. Prior to that he worked at the Dutch Treasury legal department, Rothmans, and British and American Tobacco. He has a close working relationship with Mr Heerema, and speaks to him on a daily basis.

325. He, with Mr Visser, was the one responsible for Allseas falling victim to the fraud.

326. It is impossible to overstate the level of incompetence demonstrated by Mr Kooger's evidence at this trial. He did no checks on the background of these people trying to sell this transaction to him. He was in Malta for 9 days and discovered nothing about them. He discovered nothing about the details of the transactions during that 9-day period that amplified what he had been told beforehand. He fell under the spell of Rejniak, Nasir (and Mr Sultana) to such an extent that he became subject to autosuggestion, in effect. He accepted without challenge anything they said. Finally, in October 2011, he signed away control over the €100m, despite being required by Mr Heerema never to agree anything like that and despite the assurances to the contrary that he gave to Mr Heerema in his last communication with him via his email of 14th October 2011. He took comfort from documents which were meaningless (the Trust Deed, for example). His excuse was that he was not a trust lawyer. I find that absurd. He was there as a lawyer to advise Mr Heerema. If he was uncertain as to the law, he should have obtained advice from somebody else. That is what one would expect of a senior in-house legal counsel who might have knowledge of generalities, but would not necessarily have knowledge of specifics. It is plain that he had no idea what the investments were, but was content to accept the vague descriptions provided by the Defendants and fell into the trap of believing in the secrecy of everything. I reject his evidence when he was recalled, that Mr Heerema knew that there was going to be a release. His email referred to above runs totally against that.

327. Even after that, both he and Mr Heerema rejected Miss Brigit Mayer's communications and rejected the blandishments of the Metropolitan Police when they told them that they were being defrauded (see paragraph 138 above).

385. Article 1051(1) provides for the court to have the power to assess the contribution caused by persons in each case.

386. I have not heard any submissions on that at the moment and will consider that when I hand the judgment down.

SILENCE

387. There was a lot of material in the expert reports addressing the question as to whether or not Mr Sultana could be liable when he saw fraudulent activities on behalf of the other fraudsters but was merely silent. In my view this is an interesting but academic point on the facts of this case. Mr Sultana was not **silent;** he had his own part in the fraud and he carried that out. No question of silence therefore arises.

CAUSALITY

388. Equally there was a debate about the need to identify that the relevant Defendant's actions had **caused the loss.** I accept that that is a requirement but in my view it is made out. It is not necessary to say that a particular act caused a particular loss. In the present case one looks at the whole pattern and the result that ensued. Mr Sultana was a willing participant in the fraud throughout. He might not have done every act that was done in the fraud but as I have said above, he had his role and the object was to obtain Allseas money dishonestly. He knew that and he had his role in it which led to the money being removed. It does not matter therefore that the actual transfer of monies took place after he had left Malta for example. He knew it was going to happen and that was the logical result of all of the activities of the fraudsters including Mr Sultana prior to that.

RESTITUTIONARY CLAIM AGAINST MR REJNIAK

389. This was addressed in Dr Zammit's second supplemental report dated 6 March 2014. The Maltese court apparently adopted the robust attitude that the claim for return of monies that were subsequently stolen. Dr Zammit cited a number of authorities and concluded that there would be a claim against Mr Rejniak for return of that part of the €100m that came into his possession.

390. Mr Sultana (for obvious reasons) did not challenge that and I accept Dr Zammit's report in that regard.

CONTRIBUTORY NEGLIGENCE

391. Article 1051 provides ***"if the party injured has by his* imprudence, negligence for want of attention, contributed or given an occasion to the damage, the court, in assessing the amount of damages payable to him, shall determine, in its discretion, the proportion in which he has so contributed or given occasion to the damage which he has suffered, and the amount of damages payable to him by such other persons as may have maliciously or involuntary contributed to such damages shall *be reduced accordingly.*"**

392. It is submitted on behalf of Mr Sultana that he is entitled to have the damages which he would otherwise be liable for reduced in this case because Allseas has caused or

contributed to its loss. This submission is made on the basis that that applies even in a case of Dolus.

393. Dr Zammit was unable to refer to any case where the principle of raising contributory negligence in a case of Dolus has been dealt with (see paragraph 159 of his report). Professor Rafalo had not found any case either but expressed the view (unsupported by any kind of authority) that it would be available in his opinion.

394. It seems to me that article 1051 expressly provides that the Contribution can be raised where other parties have maliciously or involuntarily contributed to such damage. I have no doubt that the word ***"maliciously"*** in this context covers Fraud and Dolus.

395. It is therefore in my view open to Mr Sultana to raise the question of contributory negligence and to seek to reduce Allseas damages by an appropriate amount because Allseas has ***"by its imprudence, negligence, or want of*** **attention, contributed or** ***given occasion to the damage..."***

396. I have already commented on the performance of Messes Kooger and Visser. It is clear that their conduct (attributable to Allseas) potentially falls within the type of conduct that would attract a claim for contribution under Article 1051. It is clear that they have been in breach of their duties as directors to Allseas to perform their duties with reasonable skill and care. I do not see that they have been in breach of their fiduciary duty in their conduct.

397. Mr Sultana seeks at least fifty per cent reduction.

398. Alternatively, Mr Sultana seeks contribution on the same basis against Messrs Kooger and Visser on the basis that they have caused loss by reason of their breach of their fiduciary and employment duties owed by them to Allseas. The only difference between them will be in the effect namely that if it is done as against Allseas, Mr Sultana's primary liability will be reduced whereas if it is done by way of a contribution claim against Messrs Kooger and Visser he will have the full liability to Allseas. Given the sums of money involved, this is likely to be an entirely academic exercise.

399. Dr Zammit was of the opinion that any amount of reduction in the case of fraud was in practice unlikely or likely to be small.

400. In England and Wales, such a plea is not available to a deceitful Defendant (see **Standard Chartered Bank v Pakistan National Shipping Corp** [2003] 1AC959.

401. It is also extremely unattractive for a fraudster in effect to say that a Claimant's damages should be reduced because the fraudulent Defendant has been more successful in deceiving the victim than he should otherwise have been.

402. In my view, the Maltese courts would accept that there is a possibility of reducing damages by contribution at the behest of a person guilty of Dolus but would be extremely unlikely ever to do that and if it did would reduce the damages minimally. It would be a question of fact in each case and would be subject to the courts overriding discretion conferred on it by Article 1051. There must be something extreme in the facts to justify such a reduction in the case of Dolus.