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# Alan Paul Booth v Zenith Trust Company Ltd

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| **Jurisdiction:** | Jersey |
| **Judge:** | Matthew John Thompson |
| **Judgment Date:** | 15 November 2017 |
| **Neutral Citation:** | [2017] JRC 195 |
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| **Date:** | 15 November 2017 |

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**Text**

[2017] JRC 195

ROYAL COURT

(Samedi)

Before:

Advocate Matthew John Thompson, Master of the Royal Court.

Between
Alan Paul Booth
Plaintiff
and
Zenith Trust Company Limited
Defendant

Mr A. P. Booth **appeared on his own behalf**.

**Advocate** M. P. Cushing **for the Defendant**.

**Authorities**

*Booth v Zenith Trust Company Limited* [2014] JRC 231 .

*Booth v Zenith Trust Company Limited* [2015] JRC 126 .

*Booth v Zenith Trust Co Ltd* [2015] JRC 142 .

*Booth v Zenith* [2017] JRC 098B .

*Cunningham v Cunningham* [2009] JLR 227 .

Fraud — reasons for refusing the plaintiff to further amend his amended order of justice.

**THE MASTER:**

**Introduction**

1 This judgment represents my detailed written reasons for refusing to allow the plaintiff to further amend his amended order of justice to plead fraud against the defendant.

**Background**

2 This is the fifth interlocutory decision I have had to determine in these proceedings. Three of the previous decisions are directly relevant to the latest application. Therefore I set out in summary form all my previous decisions as follows:

(i) The first decision was dated 24 th November, 2014, and reported at *Booth v Zenith Trust Company Limited* [2014] JRC 231 (“Judgment No.1”) and concerned an application to strike out parts of the plaintiff's claim which application was successful.

(ii) The second decision dated 11 th June, 2015, and reported at *Booth v Zenith Trust Company Limited* [2015] JRC 126 (“Judgment No.2”) was a specific discovery application brought against the defendant.

(iii) The third decision dated 29 th June, 2015, and reported at *Booth v Zenith Trust Co Ltd* [2015] JRC 142 (“Judgment No.3”) was an application by the defendant to strike out the entirety of the plaintiff's claim. This application failed but led to clarification of the plaintiff's claim.

(iv) The fourth decision dated 28 th June, 2017, and reported at *Booth v Zenith* [2017] JRC 098B (“Judgment No.4”) concerned an application for specific discovery

brought by the defendant as well an application to strike out part of the plaintiff's witness statement.

3 I set out later in this judgment the relevant parts of judgments numbers 1, 3 and 4 which are material to the present application.

4 The general background to the dispute between the parties is set out at paragraphs 2 to 8 of Judgment No.1 which I adopt.

5 The present status of the action is that a trial is due to start on 21 st November, 2017, for 4 days.

6 A pre-trial review has already taken place where Commissioner Clyde-Smith referred any application to amend for determination by me.

7 The summons issued by the plaintiff to amend initially came before me on the afternoon of Monday, 30 th October, 2017. Attached to the summons was a draft amended order of justice setting out the amendments sought by the plaintiff. However, during the submissions on 30 th October, 2017, it was clear that the plaintiff intended to rely on much more material beyond that contained in the bundle filed in advance by him for the hearing. In particular, he produced a further bundle containing various barristers' opinions which he had been ordered to disclose pursuant to judgment No.4. The relevance of these opinions was that it was only following their disclosure, so the plaintiff argued, that he could formulate the present application in fraud because previously he had always been informed that the opinions were privileged and could not be referred to.

8 It was further clear from the plaintiff that there were documents he wished to refer to explain why he considered that he should be entitled to amend to plead fraud.

9 This approach was unfair on the defendant, because the defendant had not received notification of either why it was said there was a case in fraud beyond the pleading or any details of which material the plaintiff was relying on to enable Advocate Cushing to take instructions from his client and to prepare for the hearing.

10 Accordingly, I adjourned the hearing and gave directions for the plaintiff to set out why he said there was case in fraud, to address why the claim had not been brought previously and to produce all materials he relied upon. The defendant was also given an opportunity to prepare a response for the matter coming back before me for determination on Thursday, 2 nd November, 2017, at 10am. While this period was short, in view of the forthcoming trial dates, a decision had to be made whether or not the plaintiff was going to be allowed to amend because if an amendment was permitted then it was likely that the trial dates would have had to have been vacated.

11 Both parties filed written submissions with each other and with the court to enable a hearing on 2 nd November, 2017, to proceed. At the commencement of this hearing, I indicated I wanted to be addressed first on whether or not there was an arguable case in fraud because if there was no arguable case in fraud, it was not necessary for me to consider as a matter of discretion whether or not to allow the amendment at this stage.

**The parties' contentions**

12 The amendments proposed by the plaintiff to his amended order of justice were firstly to plead at paragraph 32 that the defendant was the plaintiff's trustee and secondly at paragraph 53 to add the following:-

> *"Furthermore, it has become evident that the Defendant acted in an inappropriate manner, by arranging loan(s), without authority from monies the Defendant should have protected on behalf of the Plaintiff.* The Defendant then proceeded to pay itself to establish trusts in favour of individuals to whom the *Defendant paid monies that were not authorised, nor made in accordance with the terms of the ITMP scheme."*

13 It was the allegations at paragraph 53 that the plaintiff said amounted to fraud.

14 In oral argument he explained that what was meant by paragraph 53 was that the defendant had defrauded the plaintiff by concealing from the plaintiff that it had been acting in breach of trust. The breach of trust was that the plaintiff in administering the scheme had authorised a loan to be made by a company called Colm Associates Limited. The rationale for this loan was to enable money to be lent to participants in the scheme to establish trusts where the defendant could act as trustee. The defendant had received trustee fees from these trusts.

15 The plaintiff further alleged by reference to paragraph 121 of the witness statement of Michael Charles Russell dated 11 th September, 2015, that the agreement reached between the plaintiff and the defendant on 18 th July, 2003, pursuant to which certain monies were split between the parties (and a third party) was a fraud because the invoice raised by the defendant dated 13 th July, 2003, was not genuine. This allegation was not in the draft re-amended order of justice. In particular, the plaintiff claimed that the 18 th July agreement was based on a *"fudge"* using the words of Mr Russell. If it was not genuine then the plaintiff argued he had been induced to pay money on a false basis. In his view this was fraud which entitled him to claim back monies paid pursuant to the 18 th July, 2013, agreement.

16 In support of this argument the plaintiff further questioned why the fee was payable under

the 18 th July, 2013, agreement when the defendant had already received through a company called Bayroc International Limited ("Bayroc") over £500,000 in administration fees.

17 Advocate Cushing in response contended as follows:-

(i) He complained about the plaintiff's failures to provide a draft amended order of justice covering the allegations now being made;

(ii) The present application was no more than a rehash of matters considered by Judgment No.1 in 2014;

(iii) In respect of the first allegation of fraud concerning an unauthorised loan there was no concealment. These were also matters that had been known to the plaintiff since 2003;

(iv) While reserving the defendant's position, at best the allegations were claims for breach of contract (albeit now out of time);

(v) The fact that the plaintiff may not initially have known about alleged breaches of duty did not make those breaches of duty fraudulent;

(vi) The allegations in respect of the agreement dated 18 th July, 2003, did not give rise to a claim in fraud. This was clear from the full context of the discussions that led to the 18 th July, 2003, agreement set out at paragraphs 120 to 123 of the witness statement of Mr Russell;

(vii) The plaintiff had been a director of Bayroc since 2000 and therefore had known for many years what fees were paid to Zenith including prior to the plaintiff entering into the 18 th July, 2003, agreement.

(viii) The rationale for excluding part of the plaintiff's witness statement by Judgment No.4 was because the plaintiff, though his witness statement, had attempted to introduce other claims for breaches of duty which had been rejected. The same approach should apply to the present application. What the trial was about was whether or not the plaintiff had a contractual right to an account; it was not a claim for breach of duty. If the court ordered an account to be provided and once any account so ordered was provided, it was a matter for another day whether or not any steps taken by the defendant were said to amount to a breach of duty. This latter submission was subject to a reservation that any such claims were arguably barred by effluxion of time in any event.

**Decision**

18 I firstly set out my view as to the scope of the present proceedings because this was a point of some contention between the plaintiff and Advocate Cushing. In my judgment, I agree

with Advocate Cushing that the present action is a claim for an account only. This was determined by Judgment No.3. In that judgment I recorded that the plaintiff was putting his claim on two alternative bases. The first was that he was claiming income over expenditure that the offshore companies should have received, but secondly he was also bringing a personal claim against the defendant, in reference to the matters set out at paragraph 7 of Judgment No.3. This led me to say at paragraphs 11 to 13 of Judgment No.3 as follows:-

> ***"11. Having heard from the plaintiff, it is now clear to me that the plaintiff is claiming 20% of gross revenues representing his intellectual property rights in the ITPM System out of any surplus of income over expenditure. This is consistent with the wording of the agreement made on 18th July, 2003, set out at paragraph 21 of the 2014 decision*** .
>
> ***12. This claim is advanced on the basis that it was a personal obligation of the defendant to account for such monies to the plaintiff on the basis that it was the defendant who was operating the ITPM System through its administration and day to day control of the offshore companies. Advocate Cushing also fairly accepted in reply that such a claim would not be covered by the reflective loss principle, a concession in my view he was right to make*** .
>
> ***13. Accordingly, I ruled that the plaintiff's claim for an account in paragraph 56 of the order of justice should be limited to 20% of the gross revenues of the offshore companies in accordance with the plaintiff's intellectual property rights, by reference to the matters pleaded at paragraphs 7, 13, 18(b), 30(c) and 33(j) of the amended order of justice, out of any surplus of income over expenditure arising out of the ITPM System."***

19 While the plaintiff in argument emphasised the fact that the amended order of justice set out the duties owed by the defendant to the plaintiff, the only breaches complained about were a failure to account as set out at paragraphs 49 and 50 of the amended order of justice. No other allegations of breach of duty have been pleaded.

20 The conclusion in Judgment No.3 is also consistent with Judgment No.4 and my decision to exclude part of paragraph 78 of the plaintiff's witness statement. This led me to state at paragraph 26 as follows:-

> ***"26. The decision I have reached is that those parts of paragraph 78 to which objection was taken by the defendant should be struck out. The issue in relation to loans advanced to Mr Bults which were not secured is more than the taking of an account. It is an allegation that the defendant was under a duty to take certain steps and failed to do so; it is therefore either an allegation of breach of negligence, breach of contract or breach of trust. This goes beyond the account I permitted in 2015. <u>There is a difference between the taking of account and asking for someone to</u>***

***explain what they did with certain monies and whether an entity acted in breach of duty in how they dealt with those monies. The relevant part of paragraph 78 referring to funds advanced to Mr Bults falls into the latter category and does not form part of the present proceedings. To have allowed them to remain would have caused confusion at trial and would have been unfair on the defendant."*** [Emphasis Added].

21 The sentence I have emphasised in paragraph 26 of the Judgment No.4 applies equally to the present application. What the plaintiff was seeking to do was to extend the ambit of the trial beyond the issue of whether or not an account is to be ordered to whether or not the defendant has acted in breach of duty. Yet the only allegation of breach raised in the amended order of justice is a failure to provide an account.

22 In any event I was not satisfied that the plaintiff had established a case in fraud. In respect of the complaint against the defendant that it procured the borrowing of monies from Colm Associates Limited to enable participants in the scheme to set up trusts for which the defendant or an associated company would receive a fee, the material produced by the plaintiff does not indicate why this conduct, assuming it to be true for the purposes of this application, amounts to fraud. In particular, there is no evidence that the defendant made any untrue or false representations to conceal the conduct complained of. This would be required to enable a claim in fraud to be pleaded.

23 The highest the plaintiff can put the claim at present is that the defendant acted in breach of duty by the taking of an unauthorised loan and the setting up of trusts. However, when the plaintiff became aware of this conduct in 2003 and challenged it by his letter dated 17 th November, 2003, the defendant in its response dated 18 th November, 2003, set out the steps that it had taken. In other words the defendant explained the steps that it had carried out. The fact that the plaintiff did not know about those steps until a challenge was posed by him on the previous day does not make the previous actions of the defendant fraudulent. At best they would be a breach of duty (if established) unknown to the plaintiff.

24 This is a very different situation from an organisation taking steps in breach of duty and then concealing those steps deliberately. The latter scenario can amount to fraud; the matters complained of by the plaintiff are not capable of amounting to fraud.

25 Furthermore, the matters complained of by the plaintiff were matters that I addressed in Judgment No.1. At paragraph 13(i) I summarised the first reason as to why the plaintiff then said there was fraud as follows:-

***"13. The plaintiff set out four reasons as to why there was fraud which could be pleaded against the defendant:-***

***(i) The defendant wrongly arranged a loan in the sum of £68,474 to a company called Colm Associates owned by the plaintiff and Mr Bults***

***which was the main shareholding company of the ITPM Scheme.*** It was said to be a fraud on Colm Associates for the defendant to have borrowed this money. The rationale of the loan was to lend money to the participants in the ITPM scheme to establish trusts where the defendant could act as trustee."

26 In relation to this complaint, I stated at paragraph 20 of Judgment No.1 as follows:-

> ***"20. In relation to the plaintiff's complaint that an unauthorised loan was taken from Colm Associates to provide funds to enable scheme participants to establish a trust, I do not consider this amounts to fraud or dol. As the plaintiff accepted, the loan is recorded in the accounts of Colm Associates. There was no attempt by the defendant to conceal the loan from the plaintiff or to deceive the plaintiff. Rather what the plaintiff is really complaining about is that an unauthorised deduction was made out of monies administered through the defendant which deduction should be accounted for by the defendant. In my judgment this complaint is a complaint of breach of contract and forms part of the account that will be resolved by the Royal Court at trial. If it is necessary to apply the criminal law test, I conclude that no representation has been formulated to deceive Colm Associates. The claim in my judgment is therefore for breach of duty not a fraudulent breach of trust."***

27 Judgment No.1 was never appealed by the plaintiff. The application by the plaintiff is therefore a reformulation of matters raised in 2014. The correct approach if the plaintiff disagreed with that decision should have been to appeal Judgment No.1. No such appeal was filed and it is now far too late to do so.

28 In relation to the suggestion by the plaintiff that in 2014 he could not refer to legal advice which I had later ordered to be disclosed because it was not privileged, contrary to the advice the plaintiff had received, this position does not alter the plaintiff's knowledge. The plaintiff had been told in 2003 about the approach taken by the defendant. The fact that that approach might have been in breach of the scheme or was in breach of UK Tax Legislation does not mean that the plaintiff has been defrauded or has a case in fraud. Putting it simply the plaintiff knew in 2003 the steps that the defendant either was going to take or for the most part had taken and so had the knowledge to formulate a claim.

29 In relation to the second allegation of fraud, it is appropriate to set out paragraphs 120 to 123 of the witness statement of Michael Charles Russell as follows:-

> *"120. This position presented me with something of a problem since I remained concerned that the payment of the 5% closure fee from the assets of the OffCos would be something that might be challenged by scheme participants since, in reality, we had not made progress towards closing the ITPM scheme and paying the residual monies to scheme participants. I therefore considered that describing the payment as a termination fee at this stage might present*

*problems*.

*121. An option which was discussed was to describe the closure fee as an intellectual property fee payable by the OffCos to cover research time in the development and operation of the scheme. This was very much a fudge since in reality this was the termination fee which has been discussed between Alan, Elik and I over the preceding 12 months and was the fee that Castlemaine had confirmed had been agreed by the scheme participants could be paid as a termination fee*.

*122. On 4 July 2003 I received an email from Alan Booth, copied to Elik Bults. A copy of that email is at page 352 of MRC1. In that email Alan referred again to the proposal in relation to the payment of the 5% closure fee (or £750,000). I believe that it was in this email that Alan raised for the first time a direct relationship between the RAMS and ITPM schemes and that he considered that he was entitled to payments in relation to alleged intellectual property rights. Alan put it as follows:*

*"At this point, I believe it prudent to reiterate my comments regarding 'intellectual property'*. I have already confirmed that I would consider not pursuing recovery of my entitlement on the understanding that a satisfactory financial agreement is achieved. As you are fully aware from your records, this entitlement arises from the RAMS consultancy agreements, which were signed by Ray Trew, Mike Campbell and Brian Earle when they became 'consultants' of that Scheme. This effectively provides me, as the acknowledged owner of the intellectual property, with 20% of any revenue arising from any schemes based on knowledge gained from the RAMS operations. Whilst I am presently prepared not to pursue this recovery I will not simply give this entitlement away, commenting that if this matter is not satisfactorily resolved, before our next meeting, then I shall reluctantly enforce the terms of the agreements and seek recovery of the entitlement. In this regard I note that if I do seek recovery then the sums sought would be considerably in excess of those present held."

*123. Alan then went on to say: "I would suggest that in order to avoid any unnecessary action being taken the closing fees, or such other wording as suits your requirements, takes place during the early part of Elik's next visit on 14th July… The details regarding the agreed director's loan facilities must also be available at this time as I have a transaction due to go through Royal Court on Friday 18th July and the potential consequences of this not taking place would be extremely unfortunate for all parties concerned.""*

30 It is clear from the full extract that the concern of both the plaintiff and the defendant in 2003 were possible claims by scheme participants. There was also clearly a difference of view as to the rationale for the payment that was going to be made. The plaintiff saw it as a payment on account; the defendant did not want to describe the fee as a termination fee. The plaintiff's words quoted at paragraph 123 mean that the plaintiff left it to the defendant to come up with appropriate wording it was comfortable with. What the plaintiff was

focusing on at that time was receiving his share of monies to be divided up between the individual parties, including the plaintiff and the defendant. The extracts relied upon by the plaintiff do not therefore justify allowing him to plead a claim in fraud.

31 Again this issue was also raised by the plaintiff in his application leading to Judgment No.1. At paragraph 13 of the judgment I noted the following:-

> ***"13. The plaintiff set out four reasons as to why there was fraud which could be pleaded against the defendant:-***
>
> ***(ii) A fee note raised by the defendant dated 21st July, 2003, in the sum of £410,113.13 was fraudulent because the defendant now states it never provided any services to the plaintiff, and yet the fee note purported to be a closure fee for winding up the scheme."***

32 This led me to state at paragraph 24 and 25 as follows:-

> ***"24. The plaintiff complains that, because the defendant accepted it did not provide any services to the plaintiff and that there was no basis for a closure fee in the defendant's terms and conditions, there is no basis for the defendant to raise a fee note that specifically referred to services rendered*** .
>
> ***25. I cannot see any basis upon which this aspect of the plaintiff's complaints can amount to fraud. In the 18th July, 2003, agreement it records that the fee is to be paid for services provided for administration of the offshore companies. The plaintiff ultimately did not dispute that services were being provided by the defendant to Bayroc to administer the offshore companies. The language in the 18th July, 2003, agreement is entirely consistent with the arrangements between the defendant and Bayroc. The fact that, on the defendant's case, it was not providing the services to the plaintiff, does not give rise to a case of fraud in respect of an agreement drawn up between the plaintiff and the defendant and Mr Bults to divide up surplus monies, which agreement was signed by all of them. There is nothing that is capable of amounting to any kind of fraud in respect of this part of the claim."***

33 The present application again is an attempt by the plaintiff to revisit issues which I had already determined albeit now in reliance on the witness statement of Mr Russell rather than the terms of the invoices raised by the defendant. Again the plaintiff chose not to appeal Judgment No.1. Finally, it is difficult to understand what misrepresentation took place that would amount to fraud. At best there was a difference of view as to the justification for the payment to the parties that was made but that was known to the parties.

34 For all these reasons I refused to allow the plaintiff to amend to plead fraud because I was

not satisfied that an arguable case in fraud could be pleaded.

35 It was therefore not necessary for me to consider, had the plaintiff satisfied me that an arguable case in fraud existed, whether or not I would have allowed an amendment. As I was not addressed on this point I will limit my observations to the fact that the plaintiff would have faced significant hurdles to persuade to allow the application at this stage applying *Cunningham v Cunningham* [2009] JLR 227.