IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

FSD CAUSE NO. 227 of 2018 (IKJ)

BETWEEN:

FORTUNATE DRIFT LIMITED

Plaintiff

AND

CANTERBURY SECURITIES, LTD.

Defendant

IN CHAMBERS

Before: The Hon. Justice Kawaley

Appearances:

Ms Katie Pearson of Claritas Legal for the Plaintiff

Mr Ben Tonner KC and Ms Sally Bowler of McGrath Tonner for the Defendant

Heard: 13 December 2023

Ex Tempore Judgment Delivered: 13 December 2023

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HEADNOTE

Hearing on quantum-application of tort of conversion to shares-relief in equity-effect of forbearance order on defence and counterclaim

EX TEMPORE JUDGMENT

Introductory

1. The Plaintiff in this matter has sought of damages of the compensation following upon the judgment handed down upon this matter on the 17 August 2023, and has sought an Order in the following material terms:

> "*1. The Defendant holds the sum of US$1,764,520.62, being the Defendant's profits made in breach of fiduciary duty plus interest thereon in the sum of US$209,536.82 (a total of US$ 1,974,057.44) on trust for the Plaintiff.*
>
> *2. As at 7 December 2018, the Defendant held on trust for the Plaintiff:*
>
> *2.1. The proceeds of sale (the '**Proceeds of Sale**') of the YRIV shares held by the Defendant for the Plaintiff (the '**Retained Shares**') which were sold by the Plaintiff unlawfully on 6 and 7 December 2018. For the avoidance of doubt, those Proceeds of Sale were in the sum of US$19,959,397.18 as at 7 December 2018.*
>
> *2.2. 2,969,155 YRIV shares (the '**Remaining Shares**'), being the number of Retained Shares not sold by the Plaintiff on 6 and 7 December 2018.*
>
> *3 Pending the resolution of the proceedings between PFS, Ltd and the Plaintiff in the state of Nevada, USA (the '**Nevada Proceedings**'), the Defendant continues to hold such of the Proceeds of Sale, the Remaining*

Shares, and any proceeds of sale of the Remaining Shares (to the extent they have been sold by the Defendant) as remain in the Defendant's control on trust for the Plaintiff.

IT IS ORDERED *that:*

4. The Plaintiff's claims for conversion and unjust enrichment succeed.

5. The Defendant's counterclaim for an indemnity is dismissed.

6. The Defendant's counterclaim for an equitable allowance is dismissed.

7. The Defendant shall pay the Plaintiff forthwith the sum of US$25,875,605.84, being the value of 45% of the shares held by the Defendant for the Plaintiff (the "Retained Shares") as at 26 October 2023, plus interest thereon in the sum of US$3,072,728.19 (a total of US$28,948,334.03).

8. The Defendant shall pay the Plaintiff forthwith the sum of US$1,974,057.44 which is held on trust by the Defendant (the ***"Constructive Trust Fund"****) in accordance with declaration 1 above.*

9. In the event that the Plaintiff does not recover the entirety of the Constructive Trust Fund pursuant to paragraph 8 above, the Defendant shall pay damages to the Plaintiff in such sum or sums as to put the Plaintiff in the same position as if paragraph 8 had been complied with.

10. In the event that the Nevada Court finds that the Put Option contained in clause 3.11 of the Stock Purchase Agreement dated 16 August 2018 (the "Put Option") was waived prior to 26 October 2018:

10.1. The Defendant shall pay to the Plaintiff the assets held on trust pursuant to declaration 3 above.

10.2. The Defendant shall pay to the Plaintiff further damages in the sum of US$31,625,740.48, being the value of 55% of the Retained Shares as at 26

October 2023 plus interest thereon in the sum of US$7,511,113.36 (a total of US$ 39,136,853.84) save only that such damages are to be reduced to give credit for any sums the Defendant is able to recover by way of its proprietary claim to the assets held on trust pursuant to declaration 3 above.

11. In the alternative event that the Nevada Court finds that the Put Option was not waived prior to 26 October 2018, or does not make the position clear, the parties have liberty to apply for further relief.

12. The stay of the order dated 16 June 2023 (the "Information Order") (as varied) contained at paragraph 6 of the order dated 7 September 2023 is lifted. For the avoidance of doubt the Defendant shall within 3 days provide the Plaintiff with the documents the Defendant was ordered to provide by way of paragraph 1 of the Information Order.

13. The Plaintiff is released from the paragraph 2 of the Information Order. All documents provided to the Plaintiff's attorneys in compliance with the Information Order and this order may be provided to or shared with the Plaintiff.

14. Post-judgment interest to accrue on all sums payable by the Defendant to the Plaintiff until payment at a rate of 2 $^{3}/_{8}$% per annum.

15. Costs payable by the Defendant to the Plaintiff."

2. In the course of argument, it was indicated that the wording similar to "*save only that such damages are to be reduced to give credit when sums then cannot be recovered by way of a proprietary claim to the assets held on trust pursuant to declaration 3 above"* should be added to paragraph 7. But I subsequently indicated that I will reserve for further consideration this aspect of the relief (damages for breach of contract).

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3. I should observe at this juncture that I have not yet heard the Defendant's counsel in respect of proposed paragraphs 12, 13 and paragraph 15 (costs).

The Debarring Order

4. Subsequent to the Judgment on Liability being entered on the 17 August 2023, I made the following Debarring Order:

> *"3. Unless the Defendant has complied with the Restraining Order to the Court's satisfaction, the Defendant shall be debarred from filing any further Summonses, applications or evidence in these proceedings until further Order."*

5. It is common ground that the Defendant has not complied with the Restraining Order which required the Defendant to deposit with its Cayman Islands attorneys' funds representing the value of a Treasury Bill which the Defendant dissipated while the Court was hearing an application to freeze it.

6. Although when directions were originally given in relation to the Quantum Hearing, which I have heard yesterday and this morning, it was anticipated that the Defendant would be in a position to make positive assertions in support of, two defences and/or counterclaims. Firstly, its claims based on a purported indemnity and secondly its application for a relief in equity. Those two matters have been the subject of argument in the course of the present stage of the proceedings, as well as the question as to whether or not the Plaintiff is entitled to damages for the tort of conversion.

Indemnity claim

7. As far as the indemnity claim is concerned, the Defendant sought the following amounts:

   (a) firstly, there was a claim for an outstanding commission and fees pursuant to clause 6 of the Account Agreement in the amount of US$374,531.85. In my provisional views (set out in the Liability Judgment), I indicated that I felt that it appeared that the Defendant was entitled to recover $350,000 in respect of this amount;

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(b) the other head of claim was a claim for what was described as "*Partial allocation of internal costs and loss caused to Canterbury Securities by Fortunate Drift Limited in connection with the provision of the services under the Account Agreement pursuant to clause 4 thereof: USD$ 282,500.*" The difficulty that the Defendant has with that item is that there is not any or any clear evidence filed (because of the Debarring Order) to substantiate that claim. And so that item must be rejected.

8. As far as the commission is concerned, there was in fact a claim that was supported by the evidence that was advanced at trial. Ms Pearson for the Plaintiff submitted that the Court's provisional view was based on a misapprehension of the evidence and, in part, placed too much reliance on the oral evidence of Ms Winczura as to what she felt had been agreed.

9. The position as a matter of law is that the terms of an agreement cannot be based on the subjective intentions of the parties but must be based on an objective analysis of the relevant evidence. In this case, the Plaintiff relies on contemporaneous emails as to the way in which the fee was to be worked out was set out in an email dated the 13 August 2018, from Mr Coleman and the workings as it is described in paragraph 52 of the Plaintiff's Skeleton Argument at the Quantum Hearing were summarised in tabular form as follows:

Net amount to be raised (US$)	10,000,000	
VWAP (US$)	10.72	

Discount		15%
CSL fee		3.5%
Total reduction (discount + CSL fee)		18.5%
Percentage of VWAP FDL to receive		81.5%

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Net price/ share (81.5% of 10.72)	8.7368	
Number of shares sold (net amount/ net price)	1,144,583.829	

10. The email that was sent by Mr Coleman was seemingly agreed by Ms Winczura at the time, and doubt was not cast on this agreement until two events occurred. The first event occurred in late August 2018, when the Plaintiff frustrated at the delays in forwarding the money and was desperately keen to receive payment for the shares that were sold under the terms of the "SPA". The Plaintiff threatened to move the shares deposited with Canterbury from the Defendant's account. In the context of those *contretemps* it was suggested by Canterbury that the fee payable under the SPA had not been paid. Mr Coleman responded that the amount seemed excessive, but did not refer back to the original "agreement". When in September FDL received a statement showing an outstanding amount for the 3.5% commission, Mr Sin promptly referred back to the original agreement and protested FDL's liability to pay.

11. On a fair reading of the contemporaneous documentation, I am satisfied that the fee claimed by Canterbury is not in fact due and its indemnity claim is dismissed.

Relief in equity

12. The question of relief in equity is a positive claim that Canterbury has to assert. On one view, by virtue of the Debarring Order, it is no longer entitled to assert that claim. And my primary view is that in fact, on a sensible reading of the Debarring Order that is an application that it can no longer pursue. But because the matter was fully argued, and in case I am wrong, I will consider the merits of the application.

<u>The governing principles</u>

13. The relevant law which was most significant is found in a case called *Recovery Partners GP Ltd v Rukhadze* [2023] EWCA Civ 305 (reported at [2023] Bus LR 646). Before considering this

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decision, I should try to place in factual context the basis for the claim between the 6 and 7th December 2018. According to the Defendant, in response to the Hindenburg Report being published, various share sales took place which the Court has held were unlawful.

14. The evidence adduced at trial through an Expert suggested, and I have in large measure accepted, that Canterbury had exercise care and skill in the way in which it sold the larger amount of shares in a falling market, yet managing to achieve a respectable return. And against that background it is being contended that (a) the Defendant was acting in the interests of the Plaintiff as well as in the interests of PFS, the other counter party to the SPA, and (b) that there should be an allowance in equity given to the Defendant to reward it for its skill and effort in the liquidation process.

15. The relief in equity claim arises in answer to, most directly, the equitable claim which the Plaintiff asserts to recover the profits made by Canterbury through various share sales on the grounds that a fiduciary is not able to profit from its breach of duty. In the *Recovery Partners* case, the following passages in the judgment delivered by all three members of the Court of Appeal (Popplewell, Phillips and Falk LJJ) were referred to starting at paragraph 34:

> *"**The relevant principles and their application***
>
> *34. The starting point is the 'stringent' rule, recently reiterated in Gray v Global Energy Horizons Corporation [2020] EWCA Civ 1668; [2021] 1 WLR 2264 at [126] by David Richards, Henderson and Rose LJJ, that a fiduciary must not make an unauthorised profit from his fiduciary position, requiring an errant fiduciary to account to his principal for all unauthorised profits falling within the scope of his fiduciary duty. The court emphasised that the rule is intended to have a deterrent effect, and to ensure that no defaulting fiduciary can make a profit from his breach of duty, echoing the opinion of Lord Hodson in Boardman v Phipps [1967] 2 AC 46 at p.105D that '[i]t is obviously of importance to maintain the proposition in all cases and to do nothing to whittle away its scope or the absolute responsibility which it imposes'. In Murad v Al-Saraj [2005] EWCA Civ 959 Jonathan Parker LJ referred to it on several occasions as 'an inflexible rule' and (at [101]), citing Parker v McKenna (1874) LR 10 Ch App 96) a rule that must be 'must be applied inexorably by this court'.*

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35. In Regal (Hastings) Ltd v Gulliver [1967] 2 AC 134 at pp.144G-145A Lord Russell explained the all-embracing nature of a fiduciary's liability to account for profits as follows:

> *'The rule of equity which insists on those, who by the use of a fiduciary position make a profit, being liable to account for that profit, in no way depends on fraud, or absence of bona fides; or upon such questions or considerations as whether the profit would or should otherwise have gone to the plaintiff, or whether the profiteer was under a duty to obtain the source of the profit for the plaintiff, or whether he took a risk or acted as he did for the benefit of the plaintiff, of whether the plaintiff has in fact been damaged or benefited from his action. The liability arises from the mere fact of a profit having, in the stated circumstances, been made. The profiteer, however honest and well intentioned cannot escape the risk of being called upon to account.'*

36. Specifically, it is no defence to a fiduciary's liability to account (i) that the result is to confer a benefit on the principal which the principal would not otherwise have been able to reap (Gray [126]); (ii) that the fiduciary would have made the profit even if there had been no breach of fiduciary duty (Murad [67]); or (iii) that the fiduciary would have been able to secure the principal's agreement to the fiduciary keeping some of the profits (Murad [71]).

37. The strict enforcement of an errant fiduciary's liability to account for all profits is mitigated only by the separate power of the court to make an allowance for the fiduciary's work and skill in generating those profits, as in Boardman v Phipps.

38. Applying those principles, it would seem clear that the fact that an errant fiduciary would have received remuneration (whether in the form of salary, fees, bonuses, a percentage of profits or otherwise) from the principal had he not left to compete with the principal in breach of his fiduciary duty would in no way limit his liability to account for the profits he makes. To permit the fiduciary to retain profits in the amount of sums he would have received from the principal had he not breached his duty would

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remove the deterrent effect of the stringent rule and 'whittle away' at its scope. The fiduciary would have nothing to lose by breaching his duty, whilst hoping to make a greater profit at the expense of his principal. The strict rule requires that the fiduciary account for all profits and be limited to such allowance as the court considers is just, taking into account the work done and skill deployed, but also the policy underlying the rule…

The law

111. We have referred at paragraphs [354]-[36] above to the all-embracing nature of a fiduciary's liability to account for profits. This is a strict and inflexible rule, based in part upon the policy of deterring fiduciaries from placing themselves in positions of conflict or breaching their duties: see the authorities traced by Jonathan Parker LJ at [101]-[109] of Murad (although there is surely some hyperbole in the dictum of James LJ in Parker v McKenna that the safety of mankind requires it); and Gray at [126]. Like many inflexible rules it is capable of having harsh results, depriving a well-intentioned fiduciary of profits earned by his own skill and labour and conferring on the beneficiaries to whom such profits must be disgorged what would generally be regarded as an unjust enrichment. As Arden LJ observed at [82] of Murad, it may be that the time has come when the court should revisit the operation of the inflexible rule of equity in harsh circumstances. It is not, however, a departure which it is open to this court to make in the light of binding authority, despite Clarke LJ's views to the contrary in his dissenting judgment in Murad….

116. A number of points emerge from this analysis. First, an equitable allowance will not be the usual order or one which the defaulting fiduciary can expect as of right. It is in this sense that the exercise of the jurisdiction is exceptional. Secondly the ultimate test, which was that applied by Wilberforce J in Phipps v Boardman, is whether it would be inequitable for the beneficiaries to step in and take the benefit of the profits made by the fiduciary without paying for the skill, labour and risk which has produced it. The taking of an account is an equitable remedy, as is the making of any allowance in favour of the defaulting fiduciary in the fashioning of the account. The assessment will be fact specific. As the High Court of Australia said in Warman at p.559, 'It is necessary to keep steadily in mind the cardinal principle of equity that the remedy must be fashioned to fit the nature of the case and the particular facts.' Thirdly, it will not be inequitable for beneficiaries to take the

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profits without making an allowance for remuneration if and to the extent that such an allowance would be seen as encouraging fiduciaries to breach their fiduciary duties.

117. One consequence of the second and third points is that it will be relevant to consider the degree of culpability which is to be ascribed to the breach of fiduciary duty. It will be more inequitable to deprive a defaulting fiduciary of the profit resulting from his own skill and labour, without making an allowance, where his breach is honest and well intentioned than when it is dishonest or otherwise highly culpable; and the deterrent imperative is all the stronger in the case of dishonest breaches than it is for honest and well-intentioned ones."

16. The main difficulty that the Defendant faced in seeking relief in equity is that it has been debarred from filing evidence to support such a claim. As a result the Court has been left with an incomplete picture, with Mr Tonner KC seeking to make gold out of straw relying on incomplete evidence at trial about precisely what happened in the share liquidation process.

17. It is also very difficult for the Court to draw inferences in favour of the Defendant as regards questions of intent when regard is had to subsequent events, and the very peculiar (and ultimately contemptuous) conduct of the Defendant in failing to disclose what has happened to the proceeds of sale of the shares. That conduct is only inconsistent on its face with a fiduciary who has sought to act in good faith for the benefit of its principals.

18. And so for these reasons I reject the relief and equity claim.

Tort of conversion

19. The question of damages in tort for conversion is a matter of law where Mr Tonner KC submitted that, as a matter ultimately of fundamental principle, the law requires the conversion to related to a chattel. And he submitted that in this case what one had as far as the shares concerned is nothing more than a *chose in action*.

20. He relied on two cases to support that proposition. The first case is *OBG Limited v Allan* [2007] UKHL 21, a decision in the House of Lords. It was not a case which directly concerned shares, but it nevertheless supports the proposition that conversion only applies to chattels.

21. The case which demonstrates the point more clearly is the decision of the Singaporean Court of Appeal in *Alwie Handoyo v Tjong Very Sumito* [2013] SGCA 44. Ms Pearson sought to extract from that decision the proposition that as long as the shares were capable of being reduced to certificated form, it was possible for the claim in conversion to be made out. At paragraph 101 of Justice Raja's judgment, he says this-

> "*131 The general rule is that conversion only protects interest in chattels, or things that can be possessed: OBG at [95]; Clerk & Lindsell on Torts (Michael Jones & Anthony Dugdale eds) (Sweet & Maxwell, 20th Ed, 2010) at para 17-35. In other words, there cannot be conversion of intangibles such as choses in action. There is one recognised exception to the general rule. Documentary intangibles such as cheques, negotiable instruments, guarantees, insurance policies and bonds can be converted, even though their sole value is in their nature as choses in action.*"

22. In the present case, the reality is that conversion was pleaded but not clearly addressed in evidence at trial. The Plaintiff has in my judgment failed to demonstrate that it is in fact entitled to recover the damages for conversion despite my findings in the Liability Judgment to contrary effect. And so, the claim for damages in tort is refused.

23. This was accepted in the course of argument as having no significant impact on the practical result of the measure of damages. The measure of damages in contract appears to be no different to that in tort, insofar as the breaches of contract which have been made out by the Plaintiff in this case are concerned.

Conclusion

24. Hopefully I have dealt with the main controversial issues, while reserving the right to supplement this oral Judgment with any further reasons that may be required.

25. I will return to the Draft Order to signify the relief to which the Plaintiff is entitled. [After hearing counsel an Order in the following principal terms was subsequently made in the following perfected form:

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"***IT IS DECLARED*** *that:*

1. The Defendant holds the sum of US$1,764,520.62, being the Defendant's profits made in breach of fiduciary duty plus interest thereon in the sum of US$209,536.82 (a total of US$ 1,974,057.44) on trust for the Plaintiff.

2. As at 7 December 2018, the Defendant held on trust for the Plaintiff:

2.1. The proceeds of sale (the "Proceeds of Sale") of the YRIV shares held by the Defendant for the Plaintiff (the "Retained Shares") which were sold by the Plaintiff unlawfully on 6 and 7 December 2018. For the avoidance of doubt, those Proceeds of Sale were in the sum of US$19,959,397.18 as at 7 December 2018.

2.2. 2,969,155 YRIV shares (the "Remaining Shares"), being the number of Retained Shares not sold by the Plaintiff on 6 and 7 December 2018.

3. Pending the resolution of the proceedings between PFS, Ltd and the Plaintiff in the state of Nevada, USA (the "Nevada Proceedings"), the Defendant continues to hold such of the Proceeds of Sale, the Remaining Shares, and any proceeds of sale of the Remaining Shares (to the extent they have been sold by the Defendant) as remain in the Defendant's control on trust for the Plaintiff.

IT IS ORDERED *that:*

4. The Plaintiff's claim for unjust enrichment succeeds and the Plaintiff's claim for conversion is dismissed.

5. The Defendant's counterclaim for an indemnity is dismissed.

6. The Defendant's counterclaim for an equitable allowance is dismissed.

7. Judgment is reserved in respect of the amount of damages the Defendant is to pay to the Plaintiff in respect of its breach of contract claim..

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8. The Defendant shall pay the Plaintiff forthwith the sum of US$1,974,057.44 which is held on trust by the Defendant (the "Constructive Trust Fund") in accordance with declaration 1 above.

9. In the event that the Plaintiff does not recover the entirety of the Constructive Trust Fund pursuant to paragraph 8 above, the Defendant shall pay damages to the Plaintiff in such sum or sums as to put the Plaintiff in the same position as if paragraph 8 had been complied with.

10. In the event that the Nevada Court finds that the Put Option contained in clause 3.11 of the Stock Purchase Agreement dated 16 August 2018 (the 'Put Option') was waived prior to 26 October 2018:

10.1. The Defendant shall pay to the Plaintiff the assets held on trust pursuant to declaration 3 above.

10.2. The Defendant shall pay to the Plaintiff further damages in a sum to be determined following issue of the Court's reserved judgment referred to in paragraph 7 above.

11. In the alternative event that the Nevada Court finds that the Put Option was not waived prior to 26 October 2018, or does not make the position clear, the parties have liberty to apply for further relief…

14. Post-judgment interest to accrue on all sums payable by the Defendant to the Plaintiff until payment at a rate of 2⅜ % per annum.

15. Costs reserved."]

THE HONOURABLE MR JUSTICE IAN RC KAWALEY
JUDGE OF THE GRAND COURT

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