



Neutral Citation Number: [2024] EWHC 678 (Comm)

Claim number: CL-2023-000189

**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**  
**KING'S BENCH DIVISION**  
**COMMERCIAL COURT**

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

Date: Thursday, 21 March 2024

BEFORE:

**MR STEPHEN HOUSEMAN KC**  
(Sitting as a Deputy Judge of The High Court)

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BETWEEN:

**DOLPHIN CAPITAL PARTNERS LIMITED**

Claimant/Respondent

- and -

**DCI ADVISORS LIMITED**  
**(FORMERLY DOLPHIN CAPITAL INVESTORS LIMITED)**

Defendant/Applicant

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**MS CAMILLA BINGHAM KC and MR DANIEL BENEDYK** (Instructed by Covington & Burling) appeared on behalf of the **Claimant**

**MR McCOURT FRITZ KC and MR BENHAM-MIRANDO** (Instructed by Gowling WLG (UK) LLP) appeared on behalf of the **Defendant**

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**APPROVED JUDGMENT**  
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STEPHEN HOUSEMAN KC:

Relevant Background

1. This dispute arises out of an investment management relationship between C as manager/agent and D as client/owner/principal stretching back over many years. The relationship is or was most recently enshrined in an Investment Management Agreement dated 21 December 2021 (“IMA”).
2. C provided asset, investment and corporate management services on behalf of D in relation to a portfolio of hospitality assets, including or comprising luxury hotels and resorts located in Greece which were under D’s ultimate ownership. C was thereby engaged to assist in the disposal of some heavily-financed properties to third party purchasers within a contemplated timeframe.
3. D purported to terminate the IMA on 20 March 2023 at a time when C says it was owed fees of around €1.1 million under the agreement.
4. The reason given for early termination was C’s alleged non-disclosure of a share call option in its favour in an agreement dated 1 August 2018 relating to the sale and transfer of a leisure resort known as “Amanzoe” near Porto Heli on the East Coast of the Peloponnese. I refer to this as the “Call Option” and the agreement in which it was contained as the “SPA”.
5. There was a separate sale and purchase agreement between D as seller and the relevant purchaser (G) in respect of which the SPA represented a partial sub-sale of shares; as well as a further asset management agreement between C and the holding company behind Amanzoe. These agreements together comprise the transaction by which Amanzoe was transferred out of D’s ultimate ownership.
6. C disputes the validity of D’s termination of the IMA. It has sued for its unpaid fees as well as substantial damages for repudiation at common law.
7. D has counterclaimed for return of monies - described contractually as “advance payments” - made to C prior to termination, as well as an account of profits and other equitable relief relating to the value or alleged proceeds of the Call Option. D contends that it never gave its fully-informed consent to C to obtain the benefit of or any benefit akin to the Call Option in relation to its role in the disposal of Amanzoe; and that C, therefore, took a secret commission or made an illicit profit in violation of its elemental fiduciary responsibilities and express contractual duties owed to D in such a managing agency capacity.
8. C’s fiduciary status is not disputed. It was enshrined at the time in the predecessor to the IMA, an investment management agreement on substantially equivalent terms concluded in 2016. C was required, amongst other things, to “*disclose to the Board, at each Board or Board committee meeting (as agreed with the Board) details of any transactions to be entered into by [D] in which [C] ... has, directly or indirectly, a material interest*” (see Clause 12.2).

9. The Call Option was one component of the package of rights belonging to C pursuant to the terms of the Amanzoe disposal as outlined above. It is self-evident that C had a “*material interest*” in such transaction and that the Call Option was one of the “*details*” requiring disclosure to the board.
10. By its application notice dated 23 June 2023, issued one week after filing its Defence and Counterclaim, D seeks (i) reverse summary judgment on the allegations underpinning its counterclaims and C’s own debt claim; and, in effect (ii) summary judgment on the liability platform of its counterclaims with quantum and remedies to be addressed later. D also seeks to strike out large parts of the Particulars of Claim (“PoC”) served by C.
11. It is common ground that C disclosed to D the existence of its intended participation in the future management of Amanzoe and its proposed equity stake of 15% in the corporate holding structure prior to the approval by D’s board of the transfer documentation. That financial interest was disclosed at a board meeting held on 31 July 2018, i.e. the day before the deal was concluded and duly announced. There is a central factual dispute as to whether the existence of the Call Option was also disclosed at that board meeting.
12. The effect of the Call Option, if exercised, would have been to increase C’s equity stake in Amanzoe from 15% to 30%. In the event, a dispute arose between C and G which went to arbitration. Those parties reached a settlement in March 2023 whereby C received a substantial sum of money. That settlement sum is said by D to comprise or include the fruits of C’s secret profit acquired in breach of fiduciary duty.
13. The draft version of the SPA was, accidentally or otherwise, sent to D’s long-standing solicitors (Gowling) by Mr Tsirikos (C’s COO) on 19 July 2018, some 12 days before the board meeting. The recipient at Gowling (Mr Lacey) asked to speak about a section of the draft agreement which related to the Call Option contained in what was then clause 7 and became clause 8 in the final executed version of the SPA.
14. There is a factual dispute as to whether a conversation ensued and, if so, whether the Call Option was mentioned. There is a separate legal dispute as to whether disclosure of the Call Option to Gowling, so far as factually assumed for such purposes, could mean that D (as Gowling’s client) gave its fully-informed consent to C obtaining a benefit akin to the Call Option from the arranged sale of Amanzoe. This raises an issue of imputation of knowledge via a solicitor.
15. There is (as yet) no pleading by C to the effect that Gowling had actual authority on behalf of D to give the latter's consent to C at such time and in such a way. The present application suspended C’s procedural obligation to file a Defence to Counterclaim. D filed a Reply on 11 August 2023. Its PoC alleges that Gowling had actual or apparent authority on behalf of D to receive information, transmit it to D and give advice as appropriate.
16. All issues are agreed to be governed by English law. Both C and D are BVI registered companies. The IMA and its predecessor are or were, as the case may be, governed by English law by clause 19 of both contracts. The equitable analysis at the heart of this dispute and present application is accordingly governed by English law.

## Legal Framework

17. The approach to determining applications for (reverse) summary judgment is well-established and needs no recitation here. I will not add to the notional royalties which accrue upon successive citations of *EasyAir v. Opal Telecom*.
18. There was a difference between counsel as to the concept of “*particular issue*” as distinct from “*whole of a claim*” in CPR 24.2. My conclusion does not turn on any resolution of that debate or articulation of the precise boundaries between the two.
19. It is common ground that an agent/fiduciary must ordinarily establish as a matter of fact that its principal beneficiary gave fully-informed consent to the relevant benefit being earned by the former in the discharge of or within the scope of its entrusted mandate. Such consent can be inferred as a matter of fact from the agent’s disclosure of the existence and nature of such actual or potential benefit, coupled with the principal’s decision to proceed with the relevant transaction without objection to such component. It all depends on the circumstances. See *Snell’s Equity* (34<sup>th</sup> ed.) at 7-015; *Bowstead & Reynolds on Agency* (23<sup>rd</sup> ed.) at 6-039.
20. In order for consent to be given, the relevant benefit must be disclosed with proper specificity. This is baked into the concept of fully-informed consent. Materiality and counterfactual behaviour do not inform this strict legal inquiry. What matters is fully-informed consent, because only that can purge the conscience of the fiduciary who stands to gain from a transaction initiated or facilitated on behalf of their principal/beneficiary. Full information is what matters. It has been said to supply the sunlight which bleaches and sterilises. Consent given on this basis demarcates the scope of self-interest which is otherwise abnegated or subjugated by a fiduciary. All of this is elementary to students and practitioners of equity.
21. It is likewise axiomatic that the scope of a fiduciary’s duty must be “*moulded according to the nature of the relationship*” as enshrined most typically in the terms of any contract between fiduciary and its principal/beneficiary. Where the later knows that a fiduciary agent will receive remuneration from a counterparty or third party for performance of its mandate, this may lessen or even negate the duty to disclose the full terms or amount of such remuneration: see *Medsted Associates v Canaccord Genuity Wealth International* [2019] EWCA Civ 83; [2019] 1 WLR 4481 at [42]-[46]. An ‘ethical licence’ of this kind depends no less on consent. The question is as to the scope of such (prospective) consent objectively ascertained.
22. I confine my analysis below to the position prior to execution of the SPA. It is, of course, possible for a principal/beneficiary to give their fully-informed consent retrospectively as well as implicitly.

## Analysis

23. I am satisfied that C has at least a real or reasonable prospect of success on the factual question of fully-informed consent given by D at the time of the SPA.

24. D did not give such consent in writing or expressly. C's case is that it was given implicitly through D's non-objection to the disclosed component of the proposed transfer of Amanzoe. The key issue for trial is whether C did in fact disclose the Call Option prior to execution of the relevant contractual documentation.
25. There is a material dispute of fact as to what was said at the board meeting on 31 July 2018. C's version is attested to by three witnesses, all of whom attended that meeting; whereas D has not provided witness evidence from a single attendee. D's only witness at this stage, despite seeking and obtaining extensions of time for further factual witness evidence, is Mr Huls. He became a director of D in June 2021.
26. The three witnesses who have provided signed statements on behalf of C are as follows:
  - (i) Mr Miltos Kambourides - founder and the managing partner of C, who was also a director of D at the relevant time;
  - (ii) Mr Michael Tsirikos - COO of C and also a qualified lawyer admitted to the Athens Bar Association. He says he took the board through the salient terms of the proposed deal, including reference to the Call Option when covering C's future participation and economic interest in Amanzoe; and
  - (iii) Mr Neophytos (Notis) Papageorgiou - a qualified barrister in this jurisdiction also registered with the Cyprus Bar Association. He was D's company secretary and remains so. He wrote to D's board two days after the termination of the IMA in March 2023, stating that the Call Option was mentioned in his presence at the board meeting held on 31 July 2018.
27. Two of those three witnesses are qualified and regulated legal professionals.
28. As noted above, it is common ground that C's continuing management role and hence financial benefit in the form of equity stake in (the holding structure behind) Amanzoe was disclosed to D's board at the meeting on 31 July 2018. C's three witnesses explain in their statements that the Call Option was also mentioned in that meeting without any objection on behalf of D.
29. As it happens, C also disclosed the gist of the Call Option to at least one of D's shareholders and the Greek press the day after the SPA. It made no secret of its entitlements as managing agent of Amanzoe under new ultimate ownership.
30. The main problem for C in this context is that none of the documents which relate to the board meeting make mention of the Call Option or its effect. C is said to be acquiring a 15% stake in Amanzoe, not a potential 30% stake. Neither the board report prepared in advance nor either of the sets of minutes makes such mention.
31. Many of D's observations in this regard concern what it says are conspicuous or even deafening omissions in the documentary record surrounding that board meeting. Indeed, a correction to one set of minutes changed "50%" to "15%" as the equity stake to be acquired by C.

32. The meeting lasted about three hours. Representatives of Gowling joined after the first half hour of the meeting. C's witnesses say that the deal terms, including the Call Option, were discussed in that first half hour. This is said by D to be a convenient piece of timing, putting it mildly. D's counsel also conducted a withering critique of the witness evidence itself, pointing out its mutually supportive terms and aspects which appear to be contradictory. I have some forensic sympathy with these criticisms. The witnesses can expect to face some testing cross-examination at trial, should the matter proceed that far.
33. D asks the court to conclude that there is no maintainable basis to find that the Call Option was mentioned at the board meeting. The burden of proof rest firmly on C at trial. For present purposes D must show that C has no real prospect of establishing this key fact.
34. There is more than a fanciful prospect of C's version being accepted at trial, however slender that may seem when the three attendees' witness evidence is considered in its own terms and compared with the contemporary communications and records of events.
35. D's primary focus was likely to have been upon the price it was getting for its equity holding in Amanzoe. The disclosure of C's post-transfer participation and economic interest in Amanzoe was nevertheless a presumptive point of interest for D to understand and approve ahead of execution of the sale documentation. Although the Call Option created a potentially much larger stake, 30% compared with 15%, it was not objectively inconsistent or incongruent with C's ongoing role in the management of the resort on behalf of G, as to which C could ordinarily expect substantial remuneration in the form of fees or other benefits.
36. Whilst I do not go so far as to say the Call Option was just 'icing on the cake' in terms of C's financial benefit from the transfer of Amanzoe to new owners, its existence may not have been a 'game changer' or 'deal breaker' when viewed in its proper context. This is not so much a point about materiality as part of the matrix feeding into the inherent probabilities of each side's version of what took place at the board meeting and the plausibility of C's explanation for absence of reference to the Call Option, or its potential impact upon C's future equity stake in Amanzoe, in the contemporary records of such meeting.
37. One prominent difficulty for D in this context is how to rationalise the fact that three individuals who all attended the relevant meeting, two of whom are regulated legal professionals, find themselves recollecting events so differently from what D says happened at that meeting. D shies away at this time from suggesting that all three are fabricating their evidence to suit C's or their own interests in this litigation. Instead, it is suggested that all three have succumbed to an innate cognitive predilection to recall past events in a deceptively self-enhancing way, citing observations of Leggett J (as he then was) in *Gestmin SGPS SA v. Credit Suisse* [2013] EWHC 3560 (Comm); [2020] 1 CLC 428 and, more particularly, *Blue v. Ashley* [2017] EWHC 1920 (Comm) at [69] and fn.2. Both *Gestmin* and *Ashley* are judgments following trial. They contain observations designed to assist trial judges in commercial matters relating to disputed past events.

38. This benign rationalisation is an assumption too far for my own palate at this summary evaluation stage. D's more obvious thesis is that all three witnesses must have coordinated to fabricate or embellish their recollections of what took place at the board meeting in July 2018. The specificity in their written evidence makes it inherently unlikely that they have each individually and coincidentally succumbed to a subconscious cognitive bias of the kind identified in *Ashley* which, on proper analysis, may concern an individual's subjective interpretation of past external evaluation or ethical self-perception at an earlier point in time.
39. Here all three witnesses give evidence as to what actually happened at the board meeting. C was open in telling the world at large about its potential 30% equity stake in Amanzoe when publicising the deal just a day after signing, i.e. two days after the board meeting itself. That objective behaviour is more or less contemporaneous. It tends to suggest candour rather than concealment about the Call Option.
40. The trial judge may yet conclude that their evidence is concocted. Any such finding would have serious personal and professional consequences for each of them, as they are no doubt already aware. This is all a matter for the trial judge.
41. In light of this conclusion, it is not necessary for me to deal with the alternative case based on disclosure of the Call Option in the draft SPA sent to Gowling 12 days before the board meeting. D was content to assume the factual dispute in this context in favour of C. Summary judgment was pursued on the basis that such disclosure, if made, is legally insufficient to supply the fully-informed consent of D to C obtaining the relevant benefit qua fiduciary.
42. The legal question is whether disclosure by a fiduciary, here C, to another agent of its own principal/beneficiary can ever suffice for the purposes of the latter, here D, giving its fully informed consent to the fiduciary receiving a relevant benefit. The other agent in this scenario is the solicitor acting for the principal/beneficiary.
43. To this end, D placed much reliance on the decision of the Inner House of the Court of Session in April 2014 in *Parks of Hamilton (Holdings) Ltd. v. Colin Campbell* [2914] CSIH 36; 2014 SC 726 ("*Campbell*"). This decision appears to suggest that disclosure to a solicitor will not and cannot be imputed to the principal for these purposes.
44. *Campbell* has not been cited in any judgement of a court in this jurisdiction in the decade since it was decided. It is said by C to be at odds with authorities supporting propositions in *Bowstead* as to imputation of a solicitor's knowledge. C also contends, so far as relevant given that it is a Scots case, that statements in *Campbell* are *obiter* on this point, given that (i) the solicitor acted for all of the shareholders (including the fiduciary/agent himself, who was managing director of the company being sold) in relation to the share transfer; and (ii) the relevant disclosure amounts to constructive or 'line of inquiry' knowledge, which lacks the specificity needed for fully-informed consent in this area of equitable doctrine. It is not clear from the judgments of the Inner House or Outer House whether the solicitors involved had been retained for longer than just the proposed share sale transaction.
45. I need not determine the state of the law on this discrete issue, including whether or the extent to which *Campbell* is consistent with the law of England and Wales. It

nevertheless strikes me that much turns on the specific circumstances, both as regards the precise role of the solicitor at the time of the relevant disclosure by the fiduciary and importance of the matter disclosed within the context of the solicitor's professional engagement on behalf of the principal/beneficiary.

46. Insofar as legal imputation depends upon the legitimate expectation of the disclosing party as to onward transmission as a matter of probability or predictable fact, the circumstances are crucial. This is exemplified by the Vice Chancellor's reference in *Strover v. Harrington* [1988] Ch. 390 to the "normal channel for communication" being the appointed solicitor for each party in a conveyance of land (see p.409-H) such as to ground an estoppel preventing a denial of relevant knowledge on behalf of the solicitor's client (see p.410A-B).
47. This factual matrix is a matter for trial. I do not discern a pure legal answer in favour of D on this side of the case which is capable of summary determination divorced from its essential factual impetus. In the absence of any witness evidence from Mr Lacey himself, it remains unknown whether he in fact read the Call Option in clause 7 of the draft agreement sent to him on 19 July 2018, or what he told any representative of his corporate client about that draft agreement.
48. Whether Gowling had authority on behalf of D to give consent to C obtaining the benefit of the Call Option in the SPA is not obviously relevant to this inquiry. The consent that matters is that of D itself. The question is whether its non-objection to such collateral benefit amounts to fully-informed consent through imputation of knowledge by its solicitor.
49. For what it is worth, I have some sympathy for D's legal analysis, given the dissonance at play between actual subjective knowledge and the inference of consent from silence on the part of the principal. This feels harsh on the principal, especially given the strictures surrounding the concept of fully-informed consent and what might be said to be a non-delegable positive duty of disclosure on the part of the fiduciary itself in such context.
50. As noted above, it all depends on the specific circumstances and, crucially, whether an inference can be established by the fiduciary, here C, as to fully-informed consent on the part of its principal/beneficiary. Drawing an inference of fact may be more challenging where the material information said to make such silence or omission conspicuous is itself imputed as a matter of legal fiction, rather than proven fact. It might also be said that the phrase "*disclosed to the Board, at each ... meeting*" in clause 12.2 of the relevant IMA means what it says and operates to exclude imputed knowledge via D's solicitors appointed in respect of the relevant "*transaction*".
51. As already noted, the point is superfluous in light of my conclusion as to disclosure of the Call Option at the board meeting 12 days later.
52. It does not follow from the dismissal of D's summary judgment application that C must be entitled to payment of the sums claimed in this action as accrued management fees. Separate issues arise in this regard. C has not cross-applied for summary judgment. I say no more about this head of claim, save to note that C has a real prospect of success on this debt claim, notwithstanding D's case that such debt was countermanded by or



subsumed within a subsequent agreement between the parties. The status and effect of that subsequent agreement raise triable issues that are not appropriate for summary determination or strike out.

53. I add three further observations.
54. First, if I had been against C on the central factual dispute, I cannot see that I would have been satisfied as to the existence of some other “*compelling reason*” for a liability trial in this case. The fact that D has pleaded a proposed Part 20 claim against his former director, Mr Kambourides, does not mean that there will be a trial of all the same liability issues in any event. D has not yet obtained permission to serve such claim on him out of the jurisdiction. That ancillary claim may not proceed. Even if it does, the issues may not be the same given the different legal position of a BVI director as compared with a fiduciary under English law. The court should not refuse summary judgment where otherwise justified on the intrinsic merits of the core dispute between principal parties. The tail should not wag the dog.
55. Second, my conclusion on D’s application makes it unnecessary to consider the prospects of its own counterclaim based on unjust enrichment. The status and fate of what are said to have been advance payments from D to C is a matter for trial. The trigger for this restitutionary claim is D's presumed lawful termination of the IMA. That too is an issue for trial according to the logic of my conclusion as to whether C disclosed the existence of the Call Option prior to the SPA.
56. Finally, as regards the strike out basis of the application, this has been largely dealt with in my dismissal of the summary judgment application. Some aspects, however, warrant separate attention, namely certain parts of the case pleaded in paragraphs 28 to 42 of the PoC. As to this, I agree with D that the plea of apparent authority in paragraphs 28 and 35 is without basis. However, I am satisfied that the plea in paragraph 33 (“*Gowling represented itself...*”) has a potential role to play in the case of disclosure to Gowling; the pleas of constructive knowledge in paragraph 41(1) and (3) are legally otiose; and the plea of express consent by D in paragraph 42 of the PoC is unsustainable, as is the separate allegation that D is “*to be taken to have*” consented to the Call Option. D either did or did not consent impliedly to the Call Option - full stop.
57. As matters stand, these allegations are liable to be struck out. I do not accept that paragraph 36 of the PoC falls to be struck out. The fact that C has pleaded that the disclosure of the Call Option at the board meeting on 31 July 2018 was on the basis that it formed part of its own “*remuneration for*” its continuing asset management role in respect of Amanzoe is not objectionable. It is a matter for trial whether C gave full disclosure to the board in accordance with its fiduciary and contractual obligations, including whether any aspect of such disclosure, if given at all, was misleading in any material way. C is free to take the case of its choosing forward. The case as pleaded is not susceptible to being struck out.
58. Since C is next due to serve a Defence to Counterclaim it may well wish to amend its PoC to remove the unsustainable or embarrassing aspects I have identified. The judge who hears the CMC in these proceedings will have the benefit of the transcript of the present hearing, if useful, when it comes to looking at the state of C's pleaded case in light of the procedural evolution in the meantime.

59. That concludes my judgment. It was handed down between 3:30 and 4:00pm on Thursday 21 March 2024.