CITATION: East West Investment Management Corporation v. Higgins et al., 2023 ONSC 5077
COURT FILE NO.: CV-22-00692289-00CL
DATE: 20230911

ONTARIO - SUPERIOR COURT OF JUSTICE – COMMERCIAL LIST

APPLICATION UNDER RULES 14.05(3)(b), (d) and (h), 72.02 OR THE RULES OF CIVIL PROCEDURE, R.S.O. 1990, c. C.43

RE: East West Investment Management Corporation, Applicant

AND:

Thomas Higgins and the TRH Foundation., Respondents

BEFORE: Peter J. Osborne J.

COUNSEL: *Graeme Hamilton, Pierre Gemson and Monica Kozycz,* for the Applicant

Scott Fenton and David Martin, for the Respondents

HEARD: August 25, 2023

ENDORSEMENT

1. This Application engages an unusual issue: In what circumstances and on what terms, if any, should an investment manager be permitted to pay into court funds that may constitute proceeds of crime?

2. The Applicant, East West Investment Management Corporation ("East West"), seeks an order directing it to pay into court certain funds as described below. In the alternative, East West seeks an order declaring that the continued management of those funds by East West on behalf of the Respondents, Thomas R. Higgins ("Higgins") and the TRH Foundation (the "Foundation"), does not contravene ss. 354 or 462.31 of the *Criminal Code*, R.S.C. 1985, c. C-46.

3. The Application proceeds on the consent of the Respondents, and indeed with their active support. The Application is not opposed by any other party, including any regulator. There was, quite properly, an issue of service of the Notice of Application on the Respondents, which is further discussed below.

4. Also as discussed below, it is important to note that the Financial Transactions and Reports Analysis Centre of Canada ("FINTRAC") has been served with the materials. Neither has appeared, filed any materials, nor indicated any intention to oppose any of the relief sought.

Background

5. East West is an Investment Fund Manager, Portfolio Manager, Commodity Trading Manager and Exempt Market Dealer registered with the Ontario Securities Commission. It is a "Registrant" as defined in the *Securities Act*, R.S.O. 1990, c. S.5.

6. East West manages assets on behalf of investors, including family offices and high net worth Canadians.

7. The Respondent Higgins was formerly the Chief Executive Officer of Maple Financial Group Inc. ("Maple Financial"). The Foundation is a charitable foundation established by Higgins and of which he is a trustee.

8. Higgins opened an investment account with East West on October 19, 2020. The Foundation opened an account on February 17, 2021. Each of Higgins and the Foundation deposited funds with East West through their respective accounts.

9. Those accounts are discretionary managed accounts and, pursuant to the investment management agreement applicable to each, East West has full discretion and authority to manage the account assets.

10. Pursuant to the terms of those investment management agreements, as well as Ontario Securities Commission *Rule* 31 – 505, East West is required to exercise its discretion and authority honestly, in good faith and in the best interest of its clients with the care, diligence and skill required of a reasonably prudent portfolio manager in the circumstances.

11. East West received information about criminal proceedings pending in Germany related to Maple Bank GmbH ("Maple Bank"), a subsidiary of Maple Financial. In the course of its ensuing investigation (more fully described below), East West came to be of the view that there was a risk that some of the funds deposited by Higgins and the Foundation could constitute "proceeds of crime" as defined in s. 462.3 of the *Criminal Code*.

12. Accordingly, on December 9 and 12, 2022, East West filed suspicious transaction reports with FINTRAC in relation to deposits and withdrawals made by Higgins and the Foundation, all as required pursuant to s. 7 of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, S.C. 2000, c. 17 (the "*Act*").

13. The conundrum now facing East West and which gives rise to this Application, is that, since some of the funds on deposit may be proceeds of crime, either or both courses of action available to East West - continuing to manage those funds, or returning them to Higgins and the Foundation respectively - would likely contravene s. 462.31 of the *Criminal Code*.

14. Accordingly, East West brought this Application seeking an order permitting it to pay the funds into Court in discharge of its obligations under the *Criminal Code*, and also in discharge of its obligations to Higgins and the Foundation. In the alternative, it seeks a declaration that the continued management of the funds does not contravene ss. 354 or 462.31 of the *Criminal Code*.

15. East West relies on the Affidavit of Richard Phillips, its Chief Executive Officer, Chief Investment Officer and Chief Compliance Officer, affirmed March 22, 2023, together with the exhibits thereto.

Service on the Respondents – FINTRAC and Suspicious Transaction Reports

16. On the first return date of this Application, the Respondents had not been served. Nor had FINTRAC, although as noted above the suspicious transaction reports had previously been filed. The Court inquired as to whether the issue of service on the Respondents had been raised with FINTRAC in the particular circumstances of this matter.

17. Subsequent to that appearance, FINTRAC was advised by the Applicant that it had commenced this proceeding, that the Notice of Application specifically referenced the suspicious transaction reports, and that the Applicant intended to serve the Notice of Application on the Respondents since the Applicant was of the view that service of that originating process on the Respondents was consistent with the requirements of s. 8 of the *Act*.

18. Section 8 provides that: "no person or entity shall disclose that they have made, are making or will make a report under section 7, or disclose the contents of such a report, *with the intent to prejudice a criminal investigation*, whether or not a criminal investigation has begun" (emphasis added).

19. In response, FINTRAC stated that while it was unable to advise on individual questions or concerns regarding the *Act*, it did not object to service of the Notice of Application on the Respondents, nor did it take the position that such service would constitute a violation of s. 8 of the *Act*.

20. However, FINTRAC went on in its response to refer to a recent policy interpretation with respect to s. 8 of the *Act* as it relates to sharing suspicious transaction reports (Policy Interpretation PI-10662). FINTRAC advised that this policy interpretation was germane to the situation and contained pertinent information.

21. The Application was then made returnable before the Court for the second time, at which attendance the Applicant sought direction regarding service of the Notice of Application on the Respondents, given the response of FINTRAC.

22. Steele, J. was satisfied that the Applicant was bringing this Application for an order that it be permitted to pay the funds into Court or obtain declaratory relief as described above, and not "with the intent to prejudice a criminal investigation" as was prohibited by s. 8. Steele, J. observed in her Endorsement dated February 6, 2023 that the fact of the suspicious transaction reports is referenced in the Notice of Application as it is an integral fact in the Application. Given the notice provided to FINTRAC and its lack of objection to service on the Respondents, service was directed to be effected. That was done, the Respondents filed materials and, as noted above, now consent to the relief sought.

23. The Application is now before me on the merits, and the Applicant now seeks an order directing the payment into court of the funds in the accounts, or in the alternative, a declaration to the effect that continued management of the funds does not constitute a breach of the relevant provisions of the *Criminal Code*.

Jurisdiction to Grant the Relief Sought

24. The first issue is whether this Court has jurisdiction to grant the relief sought.

25. Typically, funds are paid into Court pursuant to r. 72 of the *Rules of Civil Procedure*. That Rule requires reference to any "statutory provision or rule that authorizes payment into court". There is no applicable provision or rule here.

26. Similarly, r. 43, which authorizes interpleader motions or applications, contemplates, among other things, payment into Court as a mechanism for the determination of the respective interests in funds when there is an ongoing proceeding and a dispute between two or more parties about ownership to those funds, which are in turn held by a third party who has no beneficial interest in them.

27. Neither of the two types of interpleader proceedings contemplated by r. 43 applies here (interpleader by a stakeholder who claims no beneficial interest in the funds claimed by two or more other parties; or interpleader by a creditor or claimant who is involved in a dispute over ownership of funds seized by a sheriff). Rule 43 does not apply here.

28. I also observe, for completeness, that in my view none of the other *Rules* that contemplates the payment of funds into Court applies here either (see, for example, r. 7 (parties under disability); 20.05 (summary judgment); 44 (interim recovery of personal property); 45 (interim preservation of property); 49 (settlement); or 64.01 (mortgage actions)).

29. None of those Rules applies here for the simple reason, among others, that there is no dispute (intended or pending) between or among the parties as to the beneficial ownership of the funds. That is in part why this Application is somewhat unique.

30. The Applicant submits that jurisdiction to grant the relief sought flows from the inherent jurisdiction of this court as a Superior Court.

31. Such inherent jurisdiction is not derived from any statute or rule, but rather from the very nature of the court as a superior court of law: *MacMillan Bloedel Ltd., v. Simpson*, [1995] 4 S.C.R. 725 at para. 36 ("*MacMillan Bloedel*").

32. Pursuant to s. 11(2) of the *Courts of Justice Act*, R.S.O. 1990 c. C.43, the Superior Court of Justice "has all the jurisdiction, power and authority historically exercised by courts of common law and equity in England and Ontario."

33. In *Endean v. British Columbia*, 2016 SCC 42, [2016] 2 S.C.R. 162, the Supreme Court adopted the definition of "inherent jurisdiction" of Master Jacob (I. H. Jacob, "The Inherent Jurisdiction of the Court" 1970, 23 Curr. Legal Probs. 23 at p. 51 ("Jacob"), cited with approval in *R. v. Caron*, 2011 SCC 5, [2011] 1 S.C.R. 78 ("*Caron*") and *MacMillan Bloedel*):

> [T]he inherent jurisdiction of the court may be defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, and in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them.

34. As the Court of Appeal has observed in *Glover v. Minister of National Revenue* (1980), 29 O.R. (2d) 392, aff'd [1981] 2 S.C.R. 561.:

> Inherent jurisdiction is the reserve or fund of powers which the Court may draw upon as necessary whenever it is just or equitable to do so. … [It] is not an unlimited jurisdiction and … it cannot be exercised in contravention of any statutory provision. In dealing with the general jurisdiction of the Court, a term which includes inherent jurisdiction, Brooke, J.A., in *80 Wellesley St. East Ltd. v. Fundy Bay Builders Ltd. et al.*, [1972] 2 O.R. 280 at p. 282, 25 D.L.R. (3d) 386 at p. 388, said:
>
> As a superior court of general jurisdiction, the Supreme Court of Ontario has all of the powers that are necessary to do justice between the parties. Except where provided specifically to the contrary, the Court's jurisdiction is unlimited and unrestricted in substantive law in civil matters.

35. Even in matters governed by statute or rule of court, a superior court may exercise its inherent jurisdiction "so long as it can do so without contravening any statutory provision": Jacob at p. 24, quoted in *Caron*, at para. 32.

36. The Applicant submits that in this case, no statute or rule constrains the ability of this Court to order the relief sought, and in particular no statutory provision or rule (such as is contemplated by r. 72) is required for the court to exercise its inherent jurisdiction to grant such an order.

37. As the Supreme Court of Canada has confirmed in *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, 2013 SCC 42, [2013] 2 S.C.R. 774, at para. 73, quoting Jacob, p. 25, the Rules and inherent jurisdiction together confer upon a superior court a plenary power to dispense justice:

> The inherent jurisdiction of the court may be exercised in any given case, notwithstanding that there are Rules of Court governing the circumstances of such case. The powers conferred by Rules of Court are, generally speaking, additional to, and not in substitution of, powers arising out of the inherent jurisdiction of the court. The two heads of powers are generally cumulative, and not mutually exclusive, so that in any given case, the court is able to proceed under either or both heads of jurisdiction.

38. I also observe that there is authority to the effect that the Court has an inherent jurisdiction to order that funds be paid into court not only to await the outcome of a pending proceeding, but also to prevent fraud or abuse of court process: *Anstey v. St. Johns (City)*, 2014 NLCA 35 at paras. 21 and 22:

> In each case, the objective of ordering payment into court is to maintain neutral control over the money paid in so as to facilitate the conclusion of some other juridical act in a fair and equitable manner. The only limitation on the exercise of the jurisdiction to order payment into court is that it has to purport to advance the objective, or be within the purpose, of the other contemplated legal act in relation to which the money was initially paid in.

39. Moreover, the Court has an inherent supervisory jurisdiction over trusts. As observed by our Court of Appeal, the law of trusts is a creature of equity and the Courts of Chancery. In exercising equitable jurisdiction, a court must ensure that fairness is done for all parties. Where there is no suitable or alternative trustee for funds, an order for the payment of money into court may be appropriate. The matter should be approached with the objective of finding a practical solution: *Evans v. Gonder*, 2010 ONCA 172, 2010 CarswellOnt 1240.

40. The approach urged on the Court in this case is similar to that adopted by the English High Court in *Petrosaudi Oil Services (Venezuela) Limited v. Clyde & Co. LLP*, [2021] EWHC 444 (Ch.), 2021 WL 00781594 (2021). The defendant law firm held a significant amount of money in its trust account as a result of it having been appointed escrow agent in the course of an international arbitration between a Bajan company and a Venezuelan company. While the chronology appears to have been somewhat complicated, the arbitral tribunal made a final award and ordered the defendant law firm to pay the net amounts to the successful party. The defendant law firm therefore desired to bring the escrow account arrangements to an end. The problem was the alleged source of the funds.

41. In that case, the funds in question were alleged to be proceeds of fraud involving a Malaysian sovereign wealth fund. The Malaysian government had alleged that significant funds were inappropriately taken from its sovereign wealth fund and that the proceeds of that fraud were laundered around the world. The Malaysian court had made an order freezing the funds on the basis that they were proceeds of crime, although that order had never been served on the defendant law firm or domesticated in the United Kingdom under the relevant legislative regime.

42. The matter became even more complicated. The United States Department of Justice then commenced a proceeding in California claiming that the funds held by the defendant law firm were liable to forfeiture on the basis that they were proceeds of fraud. A warrant was ultimately issued, and that warrant was served on the defendant law firm in the United Kingdom.

43. As a result of all of the above, the defendant law firm concluded that parting with the funds would expose it to a risk of criminal prosecution or civil liability in the United States, if not elsewhere. A motion was brought for the payment of the funds into the English court on the basis of the court's supervisory jurisdiction over trusts.

44. The Court there was persuaded that there was a risk of prosecution of the defendant law firm if it parted with the funds, and ultimately concluded that the Court had the power to remove the law firm as trustee and require it to pay the funds into Court. It held that one applicable principle of trust law is that a trustee is not obliged to expose itself to a (real and not fanciful) risk of liability.

45. In my view, many of the same principles apply here. The exposure there was different in that the defendant law firm in the UK risked prosecution in the United States, whereas here, the exposure to the Applicant, domiciled in Canada, arises out of the *Criminal Code*. In addition, the United Kingdom proceeds of crime legislation includes a provision permitting a trustee to transfer funds that are or may be proceeds of crime, on notice to the Crown. If such a provision were a component of our *Act*, this Application would be much more straightforward.

46. It seems to me, however, that many of the same underlying legal principles apply here and that given both the inherent jurisdiction of the Court and its supervisory jurisdiction over trusts,

there are circumstances in which it may be appropriate to authorize and order the payment of funds into Court.

47. For all of the above reasons, I am satisfied that in the unusual circumstances of this case, the Court has the inherent jurisdiction to grant the relief sought.

Should Inherent Jurisdiction be Exercised to Grant the Relief Sought

48. The substantive question, therefore, is whether I should exercise this jurisdiction. I am satisfied that I should, on terms as have been agreed by the parties following submissions and questions I posed.

49. I observe a number of factors in addition to those noted above.

50. Canada's money laundering laws, and in particular the *Act* and the *Criminal Code*, are intended to prevent the transfer or disposition of proceeds of crime and "money laundering". I am satisfied on the record here that such is not the intent of the Applicant. On the contrary, this Application itself is evidence of the efforts of the Applicant to balance its obligations owed on the one hand under the relevant statutory provisions and to the relevant regulators, with its obligations owed to its clients on the other hand.

51. This is clear from the Affidavit of Mr. Phillips, the Chief Executive Officer, Chief Investment Officer and Chief Compliance Officer of East West.

52. The accounts of Higgins and the Foundation respectively were properly opened. Discretionary investment management agreements were properly executed. Deposits were made by Higgins into his account, and deposits were made by the Foundation into its account.

53. In October 2022, East West became aware of an imminent conviction in Germany of former executives of Maple Bank for criminal tax fraud. East West obtained this knowledge from a Bloomberg article. That article referred to prosecutions of individuals, including Maple Bank's former CEO, in which participation by Maple Bank in "cum-ex" trading constituted criminal tax fraud.

54. "Cum-ex" (Latin for "with without") trading involved exploiting an interpretation of the relevant tax code that appeared to let multiple people claim ownership of the same stock and, importantly, the right to a refund of taxes withheld from dividends. This enabled more than one investor to claim a refund on a tax that was paid only once.

55. Maple Bank's former CEO and other Maple Bank executives were convicted and sentenced on November 7, 2022 in Germany. A second Bloomberg article reported on those criminal convictions.

56. Armed with this knowledge, East West conducted further inquiries with respect to how Maple Bank and Maple Financial were implicated in the cum-ex trading activity, all of which are set out in the Phillips Affidavit.

57. Through open-source information, the Applicant also learned that three major Canadian shareholders of Maple Financial had entered into settlements with the German tax authorities that

involved the voluntary repayment of a portion of the proceeds they received as shareholders attributable to cum-ex trading by Maple Bank.

58. All of this led East West to conclude that it had reasonable grounds to suspect that the funds on deposit in the relevant accounts may include, in part, proceeds of illegal cum-ex trading by Maple Bank. Accordingly, it took the steps described above.

59. It is important to note that neither Respondent has been charged criminally, let alone convicted, in Germany, nor have they been sued civilly.

60. It is equally important to note that there is no evidence that any of the proceeds on deposit in the accounts in fact constitute proceeds of crime or indeed that either Respondent was involved in the scheme that is the subject of the proceedings in Germany. However, given that the respondent Higgins received funds by way of salary and/or bonus from his employer, Maple Financial, of which Maple Bank is a subsidiary, and given that Higgins was the Chief Executive Officer of Maple Financial at the relevant time, there is a risk as to the source of those funds.

61. That risk tracks through Higgins to his charitable Foundation, which obtained its funds from him in turn.

62. All of this leads in turn to the risk, as submitted by the Applicant, that either or both Respondents might eventually be subject to a forfeiture order sought by German authorities.

63. Accordingly, and notwithstanding the absence of any criminal or civil proceedings against either Respondent in Germany (or in any other jurisdiction), the Applicant remains of the view that there is a risk that funds deposited into the accounts could constitute proceeds of crime (i.e., proceeds of the illegal cum-ex trading scheme). It follows that it would be inappropriate to deal with the funds in any way (including, for example by either simply returning the funds to Higgins and the Foundation respectively, or continuing to manage them).

64. The question then is what amount of the funds deposited into the accounts is affected?

65. Once served with the Application materials, the Respondents served a Responding Record including the Affidavit of Professor Dr. Markus Rubenstahl sworn March 10, 2023 and the Affidavit of Robert Mackay sworn March 10, 2023.

66. Dr. Rubenstahl is a lawyer in good standing in Frankfurt, Germany, and an Honourary Professor at the University of Freiburg, where he teaches courses in criminal tax law. He has also published on this topic. He was retained by counsel for Higgins to provide an independent expert opinion regarding Higgins' potential exposure to an order of forfeiture in connection with the German criminal investigative proceedings in Frankfurt am Main relating to the alleged tax evasion and cum-ex trading by Maple Bank from 2006 to 2010.

67. In his Affidavit, Dr. Rubenstahl describes how he reviewed the German Criminal Code provisions relevant to forfeiture in the particular circumstances of this matter. He also describes how he reviewed the transcript of the proceedings held in the German court on November 7, 2022, on which date other executives of Maple Bank were convicted and sentenced, and forfeiture orders were issued.

68. He then considered Higgins' employment terms, Higgins' compensation and bonuses and other relevant materials to inform his opinion that the hypothetical exposure of Higgins regarding a possible conviction and forfeiture order by the Regional Court Frankfurt am Main would likely amount to no more than €5,577,349.16 (gross) since that amount represented the sum accrued as gross bonuses.

69. Income tax imposed on Higgins for the bonuses he received in Canada would be deducted on the premise that the German court would consider those tax payments tantamount to wage tax payments made by other Maple Bank executives and also on the premise that the German Federal Constitutional Court case law would apply to preclude a double tax burden on Canadian taxpayers/citizens.

70. Mr. Mackay is a Chartered Professional Accountant in Vancouver, British Columbia. He was retained to calculate the after-tax amount of the gross bonus income of €5,577,349 accrued by Higgins from Maple Financial during the years 2006 to 2010 (for clarity, accrued during that period and received between 2007 and 2011).

71. After reviewing all of the relevant materials, Mr. Mackay came to the conclusion that the after-tax equivalent of the bonus received was approximately CDN$ 4,398,168.

72. Based on this evidence, the amount proposed to be paid into court is CDN $4,398,168, submitted to be the maximum amount that could be sought by German authorities for forfeiture from the Respondent Higgins.

73. Higgins, on his own behalf and on behalf of the Foundation that he controls, denies having knowingly or recklessly engaged in any conduct while CEO that could expose him to any civil or criminal liability in Germany or elsewhere, and maintains that he acted reasonably and prudently in carrying out his duties as CEO. Nonetheless, he agrees with and accepts "the proactive, protective approach that the Applicant has adopted" and consents to the proposed order.

74. I am satisfied that the draft order, which has the consent of the Applicant and both Respondents following extensive submissions made to this Court, is appropriate in the circumstances.

75. Absent relief being granted, the Applicant is for all practical purposes paralyzed and arguably cannot concurrently fulfil its investment management obligations to its clients, and its obligations with respect to proceeds of crime and the avoidance of money laundering under the *Act*, let alone both. Yet, at the same time, it would seem to be inconsistent with the objectives of the *Act* for all of the funds to simply be released to Higgins and/or the Foundation in the circumstances, and notwithstanding the lack of any civil or criminal proceeding against them.

76. I am satisfied that authorizing payment into Court of the amounts sought represents an appropriate exercise of my inherent jurisdiction in a manner that is consistent with the objectives of the relevant legislation and the rights of the parties.

77. Notwithstanding the lack of any criminal or civil proceedings against either Respondent in Germany or in any other jurisdiction, the risk remains that the funds could represent proceeds of crime. I am satisfied, for the purposes of this Application, that the maximum amount that could be the subject of any forfeiture order sought by German authorities is the amount described above.

78. I pause to observe, at the risk of repetition, that such a forfeiture order could be sought only if charges were brought and convictions obtained in Germany, none of which has occurred. Nor have the German authorities indicated to the Applicant or the Respondents, even informally, that they have any intention to commence such proceedings.

79. The terms of the proposed order strike an appropriate balance. They provide, among other things, that:

a. the investments in the accounts of both Respondents will be liquidated into cash proceeds;

b. CDN $4,398,168 of those proceeds shall be paid into Court in accordance with r. 72.02;

c. CDN $282,000 shall be paid to East West for legal fees, disbursements and taxes;

d. the balance of the proceeds shall be paid to Higgins or the Foundation, respectively;

e. the order shall be in force for a period of two years, without prejudice to Higgins or such other party claiming standing, applying to have the term of the order extended for an additional period of time;

f. before the expiry of this order or any extension thereof, unless another party seeks standing to have paid out of Court all or part of the CDN $4,398,168 paid into Court under this order, Higgins shall bring an application pursuant to r. 72.03(1) for the payment out of all or part of those funds;

g. upon bringing that application, Higgins shall:

i. provide proof in a form satisfactory to the Court that any investigation by the German prosecutors' office of Higgins in relation to the cum-ex taxation investigation has concluded without any enforcement action being taken against Higgins; or

ii. provide 30 days notice in writing to the German prosecutors' office in charge of the cum-ex taxation investigations, who shall, upon an application for standing being filed with the Court, be entitled to respond to that application.

80. Order to go in the form signed by me today and which is effective immediately without the necessity of issuing and entering, although it may be taken out through the Commercial List Office if required by any party.

Osborne J.