IN THE HIGH COURT OF SOUTH AFRICA (CAPE

OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: 1310/05

in the matter between:

LEON JOHN SINGER NO. First Plaintiff

ANDRIES OLIVIER N.O. Second Plaintiff

FRANK WILLIAM MUGGLESTON N.O. Third Plaintiff

and

m CUBED INTERNATIONAL (PTY) LIMITED First Defendant

m CUBED LIFE LIMITED Second Defendant

JUDGMENT: DELIVERED ON 9 NOVEMBER 2007

MANGA AJ:

[1] The plaintiffs are the trustees of the Leon John Singer Family Trust ("the Singer Trust").

[2] The defendants are m Cubed international (Pty) Limited and m Cubed Life Limited, the fatter carrying on business as a life insurance company. The defendants are associated companies in that they are both wholly-owned subsidiaries of m Cubed Holdings Limited. I shall use the term "m Cubed" to describe the group of companies trading under that name, including the two defendants. I shall also from time to time refer to the defendants singularly as "m Cubed International" and "m Cubed Life".

[3] The Singer Trust has sued the defendants for damages purportedly suffered as

a consequence of two alleged misrepresentations made by persons acting on behalf of the defendants. Two witnesses, *viz.* Leon Singer ("Singer"), the first plaintiff, and Carl Liebenberg ("Liebenberg"), testified on behalf of the Singer Trust. The defendants closed their case without calling any witnesses.

[4] Singer has a considerable property portfolio, with the properties being housed in various close corporations and trusts. He is also a member of a management corporation known as Progressive Housing Investments CC, which manages the property portfolio.

[5] In August 2001 Singer met Liebenberg, at the time a financial adviser with Origin. Origin was a private banking division of FirstRand Bank Limited ("FirstRand") which specialised in high net-worth clients. Prior to the meeting, Singer had been advised by the second plaintiff, Eric Olivier ("Olivier"), who was also the accountant for his business interests, and by Nathan Gordon ("Gordon") of Bass Gordon & Willis, who were Singer's auditors, that it would be advisable for him to diversify his investments. At that time Singer had no offshore investments other than the individual allowance permitted by the South African Reserve Bank ("the Reserve Bank"). His individual allowance and the individual allowances of his family members had been placed in a trust established in Guernsey.

[6] Shortly thereafter Singer invested an amount of R1 million offshore. The investment was made by the Singer Trust and was done through the rn Cubed group of companies.

[7] Singer discussed with Liebenberg the possibility of investing considerably greater funds offshore and an amount of between R35 million and R50 million was discussed. The underlying motive for the offshore investment was in order to benefit from what was seen as the declining value of the South African rand. Liebenberg

had attended an m Cubed presentation in August 2007, at which presentation m Cubed's ability to invest money offshore in structures different from the typical structures or investment options was explained.

[8] As a consequence of this presentation Liebenberg approached m Cubed's representative in Cape Town, John Lester ("Lester") about the possibility of a substantial offshore transaction. Lester referred Liebenberg to Dave Cosgrove ("Cosgrove"), who headed up m Cubed's international division - the division that did structured offshore investments for high net-worth individuals. At the time Cosgrove was a director of m Cubed International. Shortly thereafter he also became a director of m Cubed Life.

[9] A meeting was duly arranged for 20 September 2001, with Cosgrove to fly to Cape Town to meet with Singer.

[10] At the meeting held on 20 September, Cosgrove presented Singer with advice, as had been requested by Liebenberg in a fax sent to Cosgrove on 12 September 2001. Singer was accompanied at the meeting by Liebenberg, Olivier, Gordon and Peter Moody ("Moody"), Singer's office manager.

[11] The essence of the structure offered by Cosgrove on behalf of m Cubed was as follows:

(i) m Cubed Life was in possession of a facility which constituted a foreign direct investment allowance granted by the Reserve Bank to life insurance companies;

(ii) Singer (or an entity nominated by him) could make an investment with m Cubed Life through a rand-denominated linked endowment policy which would be issued by m Cubed Life;

(iii) m Cubed Life would then convert the rands received into United States dollars using its foreign direct investment allowance and immediately place these into an interest-bearing dollar account or into a dollar money-market fund;

(iv) the investment would be limited to the range of offshore investments offered by m Cubed Capital Assurance PCC Limited ("m Cubed Capital"), another company in the m Cubed group, registered in Guernsey;

(v) the investment could however be made in an offshore life insurance policy ("the life policy"), with the entity issuing the life policy in turn investing in one or more of the aforesaid range of investments; and

(vi) the life policy would be owned by m Cubed Life.

[12] A further meeting took place on 11 October 2001, at which the three trustees of the Singer Trust - Singer, Olivier and the third plaintiff, Frank Muggieston ("Muggleston") - were present, as well as Liebenberg and Moody and, representing m Cubed, Cosgrove and Lester. Shortly before the meeting, Gordon had raised with Singer the risk of m Cubed Life's insolvency, saying that m Cubed was not Old Mutual. At the meeting, therefore, the institutional risk of insolvency was raised with Cosgrove, who immediately proposed a revised version of the structure previously proposed by him. In the revised version, there was to be the addition of an offshore trust as a special purpose vehicle ("the SPV") to acquire the life policy and then to cede it to the investor (Singer or an entity nominated by him) *in securitatem debiti.* The cession by a third party would serve to protect the investor against the risk of m Cubed's insolvency.

[13] The agreed-upon revised structure was as follows:

(i) the Singer Trust would be the entity through which Singer would make the investment;

(ii) the Singer Trust would invest the amount of R10 million with m Cubed Life in a single premium endowment plan;

(Hi) m Cubed Life would issue to the Singer Trust ten endowment policies of R1 million each;

(iv) m Cubed Life would invest the R10 million received from the Singer Trust by way of a capital subscription in the SPV, to be known as the Samson Shield Trust;

(v) the SPV would in turn apply for and be issued a R10 million life insurance policy by SelectLife Linked ("SelectLife"), a cell of m Cubed;

(vi) the life insured would be Singer, and the beneficiary of the SelectLife life insurance policy ("the SelectLife policy") in the event of the death of Singer would be the existing offshore trust in which Singer's and his family's foreign allowance had been invested;

(vii) SelectLife would invest the R10 million in the m Cubed Minimum Return Fund; and

(viii) the SPV, acting through its trustees, would cede the SelectLife policy to the Singer Trust *in secuhtatem debit!* in order to provide the Singer Trust with security against the loss of the R10 million invested with m Cubed Life in the event of m Cubed Life's insolvency.

[14] Subsequent to the meeting, Liebenberg encapsulated the new structure - absent the cession - in a schematic attended by notes. The schematic and

accompanying notes were sent to Cosgrove on 15 October 2001, and a response was received from Corinna Harvey ("Harvey") of m Cubed on the same day, *inter alia* explaining the nature and effect of the cession. She attached a draft of the cession to this response.

[15] Further negotiations and discussions followed, and there was a lengthy delay before Singer, on behalf of the Singer Trust, on 19 March 2002 signed an m Cubed Life application form in order to implement the investment of R10 million. There can be little doubt that the prime motivation for Singer making the investment in March 2002 was a substantial discount on fees offered by Liebenberg. The application form stated that the funds were "to be invested in the SPV and subsequent structure as per the agreed proposal". The schematic was referred to, and annexed. Although the schematic did not include the cession, it was not disputed by m Cubed that the cession was an intrinsic part of the *"structure as per the agreed proposal".* I shall refer to the structure as per the agreed proposal hereafter as "the structure".

[16] Although Singer is a man of some considerable means, most of his assets (or the assets owned by entities of which he is the effective controller) are held in fixed property and Singer chose not to liquidate any of his fixed properties to finance the investment but chose rather to borrow the amount of R10 million from Origin. There was no compelling reason for Singer to finance the transaction in this manner.

[17] The way in which this financing worked was that various properties were sold or transferred to the (newly-created) Dalezbro Trust (not the Singer Trust), which in turn used them as security to obtain a loan facility of R40 million from Origin. The Dalezbro Trust in turn loaned the R10 million required for the investment to Singer in his personal capacity, and Singer then advanced the R10 million onto the Singer Trust, for investment offshore.

[18] The structure was never implemented. The R10 million borrowed by the Singer Trust was paid to m Cubed Life, which duly issued a rand-denominated linked endowment policy to the Singer Trust. The SPV was not created before, at the earliest, 20 May 2002. On the probabilities it never opened a bank account. There is also no evidence that m Cubed Life invested the R10 million by way of a capital subscription in the SPV. Instead, m Cubed Life was itself issued with the SelectLife policy. The United States dollar equivalent of the R10 million investment at that time was $865 800,67. The SelectLife policy was moreover never ceded to the Singer Trust - even after what appears to have been an erroneous endorsement of the SelectLife policy by m Cubed Life to the SPV on 6 November 2003.

[19] On 7 October 2003 m Cubed's in-house lawyer, one Brett Landman ("Landman"), informed Singer at a meeting that the structure could not be implemented, as, in m Cubed's considered opinion, it would be illegal to do so.

[20] Prior to this meeting, and despite much frustration with the apparent ineptitude of m Cubed and an ongoing battle to obtain documentation and sensible responses from m Cubed, the trustees of the Singer Trust were for most of the period between 19 March 2002 and 7 October 2003 under the impression that the structure had been implemented and that the Singer Trust was secured against the risk of m Cubed Life's insolvency. The only times when they knew that the security was not in place would have been for a number of weeks after 19 March 2002, when there were delays in establishing the SPV and in having the cession signed and for a few days after 16 September 2002, when they were told that the original cession had not been signed by the trustees of the SPV but that a new cession would be signed by them.

[21] In fact and on 27 May 2002 Cosgrove and Harvey represented in a letter to the Singer Trust that the cession of the SelectLife policy was in place. This was untrue:

m Cubed Life rather than the SPV was at the time the owner of the policy, the cession had not been signed by the trustees of the SPV and there had been indications, albeit at an earlier stage, that the trustees of the SPV would not sign the cession. This problem, *viz.* that the proposed trustees of the SPV would not sign the cession, was never communicated to Liebenberg or the Singer Trust. The cession was, as a fact, never signed.

[22] I am satisfied, on the probabilities, that the principal reason for the cession not having been signed by the trustees of the SPV was that the structure fell foul of the conditions under which m Cubed were permitted to externalise funds offshore under what was colloquially referred to as its *"asset swap"* facility. This was effectively said by m Cubed to the Reserve Bank in representations made to the Reserve Bank in February 2004 and to which I refer below.

[23] On 26 February 2004 the Singer Trust terminated the investment and an amount of R6 115 041.74 was subsequently paid to the Dalezbro Trust after being redeemed from offshore. The reason that this amount was repaid and not the original R10 million was principally due to the strengthening of the rand since 19 March 2002.

[24] The Singer Trust claims, as its principal claim, payment of damages for negligent misrepresentation regarding the legality of the structure, which misrepresentations induced the Singer Trust to make the investment through m Cubed. The damages consist, first, of the difference between R10 million and R6 115 041.74, i.e. R3 884 958.26; and, secondly, of the interest payable by the Singer Trust to Singer, being equal to the compound interest payable by the Dalezbro Trust to FirstRand, and which amounted as at the time when summons was served to R3 881 017.47.

[25] The Singer Trust also has an alternative claim, which arises only in the event that the claim based on negligent misrepresentation of the structure fails. It arises from Cosgrove and Harvey's allegedly fraudulent, alternatively negligent,

misrepresentation regarding the cession on 27 May 2002, the Singer Trust's case being that, but for that misrepresentation, it would have immediately terminated the investment As at 27 May 2002 the converted rand value of US$865 800.67 was R8 662 164.54. As a result of the misrepresentation, therefore, the Singer Trust lost the difference between that amount and the amount of R6 115 041.74 eventually repaid to it, i.e. R2 547 122.80.

[26] Both the first and the second claims are against m Cubed Life and m Cubed International jointly and severally, alternatively against m Cubed International. The defendants, In addition to denying the essential elements of the Singer Trust's alternative claims, have alleged contributory negligence on the part of the trustees of the Singer Trust in relation to the main claim.

[27] The first alleged misrepresentation was purportedly made during the negotiations which led to the *agreement* between the Singer Trust and the defendants about an investment structure for Singer to invest offshore, and was allegedly to the effect that the agreed investment structure *"was lawful, was fully in accordance with the relevant foreign exchange requirements of the Reserve Bank, and had the Reserve Bank's approval.*

[28] The Singer Trust further alleged in relation to this claim that:

(i) the representation(s) were false;

(ii) the representation(s) were negligently made (in that persons making the alleged representations supposedly could, and should, have determined the true legal position);

(iii) the persons making the alleged misrepresentations "were *under a legal duty to the Trust not to misrepresent the true position"]*

(iv) but for such purported representations, the Singer Trust would not have agreed to the proposed investment structure and invested any money with

the Defendants; and

(v) as a consequence of making the investment - which involved placing R10 million in linked endowment policies with m Cubed Life - the Singer Trust has suffered a loss of R3 884 958.26 (being the difference between the R10 million invested and the amount ultimately received back from the investment after it was unwound), plus interest on the funds borrowed to make the investment.

[29] In order to succeed with this claim the Singer Trust must establish the following:

(i) That there were representations of the kind alleged;

(ii) That the representations were statements of fact or opinions which would sustain an action;

(iii) That the representations were wrong;

(iv) That the maker of the misrepresentations acted wrongfully;

(v) That the misrepresentations were made negligently; and

(vi) that the misrepresentations were the cause, both factually and legally, of any loss suffered by the Singer Trust.

[30] Three instances of representations were alleged in the pleadings, *viz,* the representation by Cosgrove at the meeting of 20 September 2001 that m Cubed Life stii! had funds that could be invested offshore in terms of the allowance granted to life insurance companies by the Reserve Bank; an e-mail addressed to Liebenberg and copied to Singer on 6 November 2001 in which it was stated that *"[t]he funds are being externalised through the license [sic] of m Cubed Capital Life*

Limited, for which we received specific Reserve Bank approval; and a fax sent to Liebenberg on 5 March 2002 and signed by Cosgrove and Harvey in which it is stated that *"the funds will be send [sic] offshore via the m Cubed Life license [sic]".*

[31] *Mr Fagan,* who appeared for the Singer Trust, submitted that these representations were borne out by the evidence and that such representations were false. He also submitted that m Cubed owed a duty of care to the Singer Trust not to misrepresent the true position and he argued that the misrepresentations were wrongfully made.

[32] In his evidence in chief, Singer was notably not asked to specify what the purported representations on which the Singer Trust relied consisted of, or when, where or how they were made. The high water mark of Singer's evidence on this score essentially involved him reading out a passage from the Singer Trust's attorney's letter of demand and confirming that the statements there were, as far as he knew, correct. The relevant portion of the letter of demand reads as follows:

> *'7[doing so] and at various times during negotiations, Mr Dave Cosgrove and other members of your organization represented that this was a lawful mechanism that could be used in conjunction with the asset swap in order to give our client the required protection. Mr Cosgrove also confirmed that the investment structure, including the protective mechanism, had recently been utilised by other large investors"*

[33] When pressed in cross-examination to provide details of the kinds of representations that were being referred to in this letter, Singer was unable to do so. He was unable to recall any examples of alleged representations or misrepresentations off the top of his head and when invited to locate alleged representations in the exhibit bundle, he was not readily able to do so. Ultimately he only referred to two documents, *viz.:*

(i) The minutes of the **20** September **2001** meeting with Cosgrove, Liebenberg, Moody, Olivier and Gordon. The structure was not however discussed at that meeting, nor were any representations made by Cosgrove other than in respect of the use of the life policy as a so-called "wrapper". In effect, all that was represented at this meeting was that m Cubed had Reserve Bank approval to transfer funds offshore using its life insurance licence. This was what was known as asset swapping and it was not suggested before me that this representation was false.

(ii) The next document referred to by Singer was the notes of the *"PHI Investment Schematic"* which had been prepared by Liebenberg a couple of days after a meeting held with Singer, Olivier, Moody, Liebenberg, Cosgrove and Lester held on **11** October **2001.** Those notes (which included various *"questions which arise out of the above structure")* did not however refer to any particular representation or statement of legality by Cosg rove.

[34] I agree with the submission made by Mr *Farlam,* who appeared for the defendants, that what was apparent from Singer's evidence, when viewed in its totality, was that the Singer Trust did not rely on any particular representation of legality by Cosgrove or any other representative of m Cubed. The Singer Trust either simply assumed that the structure was legal, or never actually gave it any thought at all.

[35] As a consequence 1 find that the Singer Trust's main claim thus falls at the first hurdle as the Singer Trust has not established the misrepresentation alleged in its particulars of claim. It follows, as a matter of logic, that the interest as damages claim also fails.

[36] 1 now turn to deal with the alternative claim.

[37] In terms of *Liiiicrap, Wassenaar and Partners v Pitkington Brothers (Pty) Ltd* 1985 (1) SA 475 (A) an extension of Aquilian liability to allow a claim for pure economic loss is not justified where satisfactory and adequate contractual remedies are available to a plaintiff. In the present case, the investment was made on 19 March 2002 and in my view the making of the investment constituted a contract with m Cubed Life.

[38] In *Trustees, Two Oceans Aquarium Trust v Kantey & Tempter (Pty) Ltd* 2006 (3) SA 138 (SCA) Brand JA said this concerning *LiiJicrap* (at 147C-D);

> *"The point underlying the decision in* Lillicrap *was that the existence of a contractual relationship enables the parties to regulate their relationship themselves, including provisions as to their respective remedies. There is thus no policy imperative for the law to superimpose a further remedy"*

[39] The essential question in *Lillicrap* was therefore whether in the factual circumstances of that case there should be an extension of Aquilian liability to allow the plaintiff to claim damages from the defendant.

[40] *Mr Fagan* submitted that an extension of the *actio legis Aquiliae* is not required where the delictual claim is one that is already recognised, such as a claim for damages arising from a negligent misstatement. Nevertheless, the same policy considerations presumably do arise, which include the concern expressed by Grosskopf AJA in *Lillicrap* about the difficulties that might arise if the delictual and contractual standard of damages were not to coincide (at 500G-501B).

[41] What *Lillicrap* does not say, is that the mere fact of a contract between two parties precludes the one from suing the other in delict. Indeed, the contrary is expressly stated (at 500H): *"This does not of course mean that the law may not impose additional obligations by way ofnaturalia arising by implication of law, or, as*

I have indicated above, those arising ex delicto independently of the contract"

[42] The misrepresentation relied on by the Singer Trust for the alternative cfaim was made after the contract was concluded and related to whether or not certain of the agreed upon terms had been implemented by m Cubed.

[43] There can be little doubt that in such circumstances m Cubed's representatives had a duty to tell the Singer Trust the truth and the fact that the contract had been concluded and investment had been made did not therefore change the nature of the relationship between m Cubed and the Singer Trust in so far as the making of representations was concerned. As *Mr Fagan* correctly submitted, it would be highly artificial to seek to insert into the contract an implied term that m Cubed Life would not make fraudulent or negligent misrepresentations to the Singer Trust.

[44] *Mr Farfam* contended, however, that the Singer Trust had failed to establish, on a balance of probabilities, that had the Singer Trust known the true position, as at 27 May 2002, it would have immediately terminated its investment and claimed repayment of the money invested.

[45] In my view, the evidence has clearly established that, as at 27 May 2002, the cession *in secuhtatem debiti* was not in place and, indeed, the structure could never have been lawfully implemented.

[46] As I have already said, it was m Cubed's in-house lawyer, Landman, who stated at the meeting held on 7 October 2003 that the structure was in contravention of exchange control regulations.

[47] Furthermore, as appears from submissions which m Cubed made to the Reserve Bank in February 2004, m Cubed conceded that the structure constituted a breach of the Exchange Control Regulations and that the implementation thereof would be unlawful.

[48] Whilst it was alleged by the Singer Trust that the misrepresentations made by Cosgrove and Harvey on 27 May 2002 were fraudulent I am, for present purposes, prepared to accept that they were not fraudulently made. However, Cosgrove and Harvey certainly knew that not only had the cession not been signed but knew, or ought to have known, that there were problems with the implementation of the structure. They were under a duty to communicate this to the Singer Trust and their failure to communicate the fact that the cession *in securitatem debiti* was not in place was both wrongful and negligent. The structure was proposed and agreed upon because Singer wished to be protected against the risk of m Cubed's insolvency. If he could not be protected against this risk he would not have made the investment.

[49] In the circumstances I am satisfied that had the Singer Trust been aware of the true position, *viz.* that the cession had not been signed and the structure could not be implemented (or at the very least, that there were problems with implementation), it would have immediately cancelled the contract and terminated the investment.

[50] The Singer Trust's entitlement to terminate the investment in May 2002 stemmed from m Cubed's failure to implement the structure and did not arise from any pre-contractual misrepresentation inducing the Singer Trust to make the R10 million investment. This entitlement to terminate the contract would have flowed as a consequence of m Cubed's inability to implement the structure agreed upon. In those circumstances the Singer Trust would not have enjoyed any claim against the defendants arising from the fact that it may have incurred a useless interest liability by borrowing R10 million in order to make the investment. In other words, it would not have enjoyed any claim against the defendants for the interest paid on the R10 million borrowed from Origin. As a consequence, the alternative *"interest as damages"* claim falls away and ! do not need to express my further views in regard

thereto.

[51] Had the Singer Trust terminated the investment at the end of May 2002 it would have received an amount of US$865 800.67 or R8 662 164.54. The difference between this amount and the amount which was eventually repaid is in the amount of R2 547 122.80 and I am satisfied that the Singer Trust has established that it suffered damages in this amount as alleged in its alternative claim.

[52] One final point remains. The Singer Trust sued both m Cubed International and m Cubed Life for misrepresentations made on their behalf by Cosgrove and Harvey. I am satisfied, on a balance of probabilities, that although the letter of 27 May 2002 was written on an m Cubed International letterhead, Cosgrove, at the very least, represented both m Cubed International and m Cubed Life and that they are jointly and severally liable for the damages sustained by the Singer Trust as a consequence of Cosgrove's representations.

[53] In the result I make the following order:

(a) The first and second defendants are ordered, jointly and severally, to pay to the plaintiffs, in their capacities as trustees of the Leon John Singer Family Trust, an amount of R2 547 122.80 as damages;

(b) Interest is awarded on the said damages at the rate of 15.5% per annum calculated from the date of service of summons to the date of final payment;

(c) The first and second defendants are ordered, jointly and severally, to pay the plaintiffs' costs of suit, including the cost of two counsel where two counsel were employed.

MANCA, A J