

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

COMMODITIES FUTURES	)	
TRADING COMMISSION,	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 81-1070-MLW
	)	
U.S. INVESTMENT CO. LTD., et al.,	)	
Defendants.	)	

MEMORANDUM AND ORDER

WOLF, D.J.

April 10, 2000  
Corrected April 14, 2000

This memorandum is based upon part of the transcript of the decision rendered orally on March 16, 2000. It adds citations, deletes some colloquy, clarifies some of the language, and reiterates the written Order issued on March 16, 2000.

\* \* \* \* \*

Upon consideration of voluminous submissions, the testimony of Edmund Fleming, Esq., and the arguments presented at hearings on January 19 and 28, 2000, and March 16, 2000, the court hereby: adopts the factual findings set forth in the December 3, 1996 Final Report and Recommendation of the Successor Receiver, A. Hugh Scott, Esq., and incorporates that entire Report and Recommendation in this decision; finds that the Original Receiver, Mr. Fleming, intentionally and willfully violated his fiduciary duty to the Receivership; and orders Mr. Fleming to restore to the

Receivership the entire amount of the estate that he disbursed, \$912,592. The reasons for these decisions are substantially set forth in the December 3, 1996 Final Report and Recommendation of the Successor Receiver and his June 9, 1997 Reply to Mr. Fleming's response and objections to that Report. The court, however, adds the following.

This is a case that the Commodity Futures Trading Commission ("CFTC") brought against United States Investment Company Ltd. ("USIC"). By a Final Order dated June 5, 1981, the District Court for the District of Massachusetts permanently enjoined USIC from engaging in activities relating to the sale of commodity futures and, as recommended by the CFTC, appointed Mr. Fleming, as Receiver.

From 1981 until this court relieved him of his duties on January 10, 1996, Mr. Fleming disbursed \$912,592 in Receivership funds, leaving assets of only \$33,307 for distribution to the USIC investors. Mr. Fleming's disbursements, as accurately described in the Successor Receiver's Final Report, included approximately \$300,000 to himself for purported legal fees and expenses, and approximately \$180,000 to his associate, Karen Galat, Esq. Although Mr. Fleming initially sought court approval for four interim fee applications, he made all disbursements after March 1982 without court approval.

Other than seizing and liquidating USIC assets, a process that Mr. Fleming completed by May 1984, he recovered nothing on behalf of USIC investors. By May 1984, Mr. Fleming had seized and liquidated about \$592,000 in assets that he could have then distributed to USIC investors. Instead, from April 1984 until December 1990, Mr. Fleming pursued two unfounded and futile court actions that unsuccessfully sought to recover investors' losses. See Fleming v. Bank of Boston Corp., 127 F.R.D. 31 (D. Mass. 1989) (consolidated case with Fleming v. Lind-Waldock & Co.). Long-established judicial precedent unequivocally established that Mr. Fleming as Receiver had no standing to pursue these actions. The actions were dismissed, and the Court of Appeals for the First Circuit imposed costs against Mr. Fleming for a meritless appeal. Fleming v. Lind-Waldock & Co., 922 F.2d 20, 28 (1st Cir. 1990). After 1990, no meaningful activity was conducted by the Receivership.

During the period he was Receiver, Mr. Fleming failed to maintain adequate records of his time and expenses. In addition, he intentionally and willfully violated his fiduciary duty to the estate by: (1) paying himself for hours not worked; (2) using USIC funds to pay his non-USIC business expenses; (3) using USIC funds for interest free loans and cash advances to employees; and (4) mismanaging the estate, including failing to file income tax

returns, failing to remit payroll taxes, commingling funds, and incurring needless expenses.

On December 11, 1995, following a motion to compel a final accounting brought by one of the USIC investors, Mr. Fleming filed a motion to approve a final accounting of fees and expenses in the amount of \$912,592. That motion is being denied.

As recommended by the Successor Receiver, the court referred his Final Report and Recommendation, and the associated exhibits, to the United States Attorney for the District of Massachusetts for evaluation of whether criminal proceedings against Mr. Fleming were warranted. Subsequently, the United States Attorney reported that he declined to prosecute Mr. Fleming. However, as the Successor Receiver also recommended, the court is now referring this matter to the Massachusetts Board of Bar Overseers for evaluation of whether disciplinary proceedings concerning Mr. Fleming are warranted.

Because of his intentional and willful breaches of fiduciary duty, the court is also ordering Mr. Fleming to restore to the estate the entire amount that he disbursed, \$912,592. For the reasons stated in the Successor Receiver's Final Report, however, it would also be appropriate to order Mr. Fleming to repay a series of smaller amounts, particularly: the amount that he disbursed without court approval, \$845,707; the amount he disbursed in

excess of the benefit he conferred on the receivership, \$736,989; or the amount he disbursed without adequate records, \$744,292.

The court does not wish to repeat, and perhaps inadvertently to limit, the factual findings in the Successor Receiver's Final Report. The court has, however, considered Mr. Fleming's challenges to them, the documents he has submitted, the testimony he has given, and the arguments he has made. At the extreme margins, there may be some details in doubt. For example, Mr. Fleming ardently argues that Ms. Galat was confused about a computer that might or might not have been bought with USIC funds. However, the court's doubts relate, at most, to facts that are of marginal importance. On analysis, the court finds that the findings of the Successor Receiver are fundamentally sound and persuasive on all material matters.

There are several points in the Final Report that Mr. Fleming particularly contested in the course of the two hearings in January 2000. The court will describe its reasoning with regard to those issues briefly.

First and foremost, Mr. Fleming has continuously claimed that after March 1982, the written Orders requiring that he seek and receive authorization to make payments to himself and others were superseded by another written Order, authorizing him to make unlimited disbursements of Receivership funds, for an indefinite

period of time, without interim court approval. The court finds that this contention is not true. No such Order has been produced. The docket does not reflect the entry of any such Order. No one except Mr. Fleming claims to have seen any such Order, or any Order at all, authorizing Mr. Fleming to pay himself without court approval. This includes Mr. Fleming's associate, Karen Galat, whose testimony has been characterized differently by the parties and read carefully by the court.

In addition, the court finds that Mr. Fleming knew that he did not have the authority to make any payments to himself and his employees, among others, without the approval of the court. Therefore, the violations of his fiduciary duties that have been proven by the Successor Receiver were both intentional and willful. Intentional in that the actions constituting the violations were deliberate and did not occur as a result of accident or mistake. Willful because Mr. Fleming knew that those actions violated the legal duty imposed on him by the court.

There are many facts in the Successor Receiver's Final Report which support this conclusion. The fact that Mr. Fleming knowingly and willfully violated his fiduciary duty is most graphically demonstrated by his own words, which may not be included in the Final Report. As was developed in the examination of Mr. Fleming on January 28, 2000, on January 19, 1984, almost two years after

his last application to the court for interim authorization and approval for the payment of fees and expenses, Mr. Fleming signed and filed with Judge John McNaught, who was then the presiding judge in the case, the Receiver's Memorandum of Law Regarding Powers and Responsibilities of an Equity Receiver (Dkt. No. 45). That document, which was entered as Exhibit 2 on January 28, 2000, said in pertinent part:

The Court requested at the close of the arguments [that had been held on December 21, 1983] that by January 18, 1984 each party submit a memorandum to the Court on the following issues. . . .

\* \* \*

III. Whether a receiver can pay out of receivership funds without the authorization of the court.

Receiver's Mem. of Law Regarding Powers and Responsibilities of an Equity Receiver at 1-2.

Then, Mr. Fleming wrote:

A Court appointed Receiver (an equity receiver) is an officer and representative of the court which appointed him and is subject to its control. . . . He has no inherent powers, save those defined by the relevant statute and those conferred by an order of the court appointing him, which he cannot exceed.

Id. at 2 (internal citations omitted).

Mr. Fleming went on to add:

The Receiver herein has not been given the

power to take any action affecting the Receivership funds without the prior authorization of this Court, and even if he attempted to do so, his acts would not be ratified by this Court unless deemed to be in the best interest of the Receivership.

Id. at 3.

Later, Mr. Fleming returned to this theme, stating:

A Receiver cannot dispose of receivership funds or property without the prior authorization of the Court which appointed him.

Id. at 9.

Then, he wrote:

A court-appointed Receiver cannot dispose of Receivership funds or property without the prior authorization of the court which appointed him. He is merely a custodian of such funds and property with the responsibility of their care and possession, but without title to them. . . . The Receiver holds such funds subject to the orders of the appointing court and cannot make unauthorized distributions, especially if such distributions would be prejudicial to other parties involved in the Receivership proceedings. . . . Further, the order appointing a receiver in and of itself prevents any alienation of receivership funds without court approval.

Id. at 9-10 (internal citations omitted).

Thus, Mr. Fleming's own statements, made several years after he claims a written Order was issued authorizing him to make payments to himself and others without court approval, contributes



to the court's finding that the breaches of fiduciary duty described in the Successor Receiver's Final Report were intentional and willful. In these circumstances, the Court of Appeals for the First Circuit has held that a successor trustee may file a claim against his predecessor. In re San Juan Hotel Corp., 847 F.2d 931, 937-38 (1st Cir. 1988).

In the interest of completeness, and without qualifying what has been stated previously, the court notes that even if Mr. Fleming's conduct was only deemed negligent, rather than intentional and willful, it would be permissible and appropriate to impose a surcharge of the full \$912,592 that he disbursed. The Court of Appeals for the First Circuit recently addressed this issue, which had been left open in In re San Juan Hotel Corp., holding that, "[a] trustee can be held liable for negligent breach of fiduciary duty." In re Mailman Steam Carpet Cleaning, 196 F.3d 1, 7 (1st Cir. 1999).

As stated in a leading treatise concerning the law of receivers, it is axiomatic that:

If the property and funds are subject to the control of the court, it follows that the receiver should not pay out any funds except under orders of the court. If he does he may hold himself personally liable for such improper payments.

2 Ralph E. Clark, The Law and Practice of Receivers, § 403 at 691

(1959) (citation omitted). That is a well-known duty of which a reasonable Receiver would be aware. As described earlier, Mr. Fleming was aware of this duty.

In the circumstances of this case, Mr. Fleming's misconduct would have been negligent if it was not, as the court has found, deliberate and willful. In view of the numerous, continuing, and egregious violations of Mr. Fleming's fiduciary duty proven by the Successor Receiver, the court would exercise its authority to surcharge Mr. Fleming the full \$912,592, even if his conduct was only negligent.

As stated orally and in a written Order issued on March 16, 2000, it has been ORDERED that:

1. Edmund Fleming's motion to approve a final accounting of fees and expenses in the amount of \$912,592 is DENIED.
2. Edmund Fleming shall, by May 5, 2000, pay to the Clerk of this District Court, for the benefit of U.S. Investment Co., Ltd. \$912,592. This date for repayment may be modified by the court if Edmund Fleming and the Commodity Futures Trading Commission agree to a different schedule for repayment, and the court is satisfied with the proposed modification.
3. The Successor Receiver's Final Accounting, filed January 27, 2000, as modified by the March 14, 2000 Successor Receiver's Motion to Pay Taxes and to Pay Accountant, is ALLOWED.

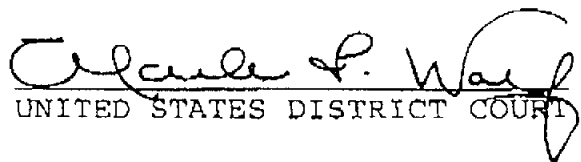
4. The Successor Receiver is DISCHARGED, without prejudice to the possibility that he or his law firm may be retained by plaintiff CFTC in the further prosecution of this case.

5. The Successor Receiver shall furnish to plaintiff CFTC all funds and documents in his possession as Successor Receiver.

6. Plaintiff CFTC shall be responsible for taking any action that is necessary and appropriate to seek to assure that Edmund Fleming makes the payment required by this Order. See CFTC v. Wellington, 950 F.2d 1525, 1529 (11th Cir. 1992).

7. The CFTC shall monitor matters relating to this case, report monthly to this court concerning them, and propose for the court's approval a method and schedule for distributing USIC assets to USIC investors.

8. The CFTC shall provide forthwith a copy of the full record of the proceedings in this case concerning Edmund Fleming, to the Massachusetts Board of Bar Overseers, to which this matter is referred. See Rule 83.6(5) of the Local Rules of the United States District Court for the District of Massachusetts.

  
UNITED STATES DISTRICT COURT