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Evidence for the future

Clarifying the facts before a trial ?

Par Célian Hirsch le 8 February 2021

How can you assess the chances of success of a lawsuit against an asset management company ? A recent Geneva court ruling opens the door to a judicial assessment through the procedure of evidence for the future (Civil Chamber of the Court of Justice, 14 December 2020, ACJC/1791/2020).

Let us begin with a brief legal overview before turning to the facts of this ruling.

Under Art. 158 CPC, the procedure for obtaining evidence in anticipation of future legal proceedings allows the court to take evidence in proceedings that are independent of the main proceedings. The evidence thus obtained not only enables the applicant to assess their chances of success, but also makes it easier for them to adduce evidence in any subsequent action against the defendant.

In 2015, the Federal Court ruled that a request for evidence in the future aimed at obtaining bank documents was not possible since the client has, in principle, a substantive right, namely the right to access their accounts (ATF 141 III 564, commented on *in* Nicolas Ollivier, cdbf.ch/938/). In 2016, the Geneva Court of Justice followed this approach (ACJC/885/2016 commented on *in* Nicolas Ollivier, cdbf.ch/952/).

Since this case law, the filing of applications for future evidence in banking matters seemed to have lost its relevance. However, this new ruling by the Court of Justice calls this conclusion into question.

In 2017, an individual entrusted a company with the management of his assets (approximately CHF 5 million). The parties agreed on a moderate growth objective with a significant degree of risk and volatility. In early 2019, the client complained about losses and certain transactions carried out for several million at intervals of a few weeks. Shortly afterwards, she terminated the asset management contract and asked the company to provide her with a full account of all transactions.

She then filed an application for evidence in the future with the Geneva Court of First Instance, alleging breach of contract. She asked the court to appoint an expert to answer fourteen questions, which related in particular to :

- the investment profile,

- management fees,
- the potential for churning,
- the amount of the loss,
- the company’s liability for the losses incurred, and
- any commissions received.

The court dismissed the applicant’s claim, ruling that not only were some of the questions raised legal questions, but also that the client had not demonstrated that clarification of the facts was necessary in order to assess the chances of success of an action on the merits. The case was referred to the Court of Justice, which examined the application of evidence in the future in this particular case.

The application for evidence in the future is admissible in three alternative scenarios :

- Substantive law confers on the applicant a right to obtain the evidence sought.
- There is a likelihood that the evidence will be endangered.
- The applicant has a legitimate interest in obtaining the evidence.

In order for the last condition to be met, the applicant must demonstrate that there is a concrete material claim against the opposing party which requires the taking of evidence in the future.

The Court of Justice emphasises that assessing the results of the performance of an asset management mandate is complex and requires financial knowledge which neither the courts nor the parties generally possess. In the present case, the applicant has set out in detail a possible breach of contractual obligations by the company. It has also made the existence of damage plausible.

The Court of Justice therefore considers that there is a real prospect of success on the merits. The last condition of Article 158 CPC is thus fulfilled.

The Court then examined each of the fourteen questions raised by the client in order to determine whether they were indeed questions of fact and not questions of law. It held, in particular, that the question of whether the profile chosen by the company was appropriate was a question requiring the intervention of a specialist, and not a question of law. The same applies to the question relating to the conformity of the management fees charged with customary practice and that relating to compliance with the “average” investment profile. However, the questions relating to churning, the amount of the loss, the collection of commissions and the company’s liability are matters of law. They cannot therefore be submitted to an expert for an opinion.

This ruling reopens the door to evidence in future proceedings in banking matters. It shows that a request for evidence in future proceedings can be of definite interest, namely to obtain a judicial opinion in order to assess the chances of success of an action before the start of lengthy and costly proceedings. As the Court of Justice points out, the defendant may also benefit from a procedure for the preservation of evidence if the expert opinion shows the applicant that their action has no chance of success.

Practitioners wishing to initiate such proceedings should bear in mind the two cumulative conditions that must be met : the applicant must have an interest in obtaining an expert opinion

and the substantive claim must be plausible. In our opinion, the judgment discussed here confirms that the first condition will be met when it is not easy for a judge to assess for himself the quality of the performance of the asset management mandate. The second condition will obviously depend on the specific circumstances of the case. It will be up to the counsel to allege the facts in sufficient detail for the court to consider that the claim is plausible. Finally, the questions to be put to the expert must be particularly well formulated in order to avoid, as in this case, half of them being rejected by the judge.
