17/5/07

IN CHAMBERS

IN THE GRAND COURT OF THE CAYMAN ISLANDS CAUSE NO 560 OF 2006

IN THE MATTER OF THE COMPANIES LAW (2004 REVISION)

AND

IN THE MATTER OF CAIRNWOOD GLOBAL TECHNOLOGY FUND, LTD
(IN VOLUNTARY LIQUIDATION)

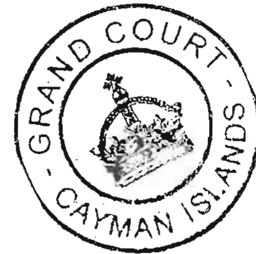
BETWEEN:-

CAIRNWOOD GLOBAL TECHNOLOGY FUND, LTD
(IN VOLUNTARY LIQUIDATION)

PLAINTIFF

-and-

(1) LANE P PENDLETON
(2) KIRK P PENDLETON
(3) THAYER B PENDLETON
(4) LAIRD P PENDLETON
(5) TIMOTHY P LUNDBERG
(6) NADIA AOUAD
(7) JEAN MARC DUBOIS
(8) CAIRNWOOD GROUP, LLC
(9) CAIRNWOOD CAPITAL MANAGEMENT, LLC



DEFENDANTS

JUDGMENT

(corrected)

BEFORE: **The Honourable Mr Justice Foster (Actg)**

APPEARANCES:

Mr Mac Imrie and Mr Ben Mays of Maples & Calder for the Plaintiff
Ms Colette Wilkins of Truman Bodden & Company for the 1st Defendants
Mr Christopher Russell of Ogier for the 2nd, 3rd, 4th, 5th, 6th, 8th and 9th Defendants
Mr Anthony Akiwumi of Stuarts Walker Hersant for the 7th Defendant

Heard: 7 May 2007

Foster J. (Actg)

1. The nine Defendants in this action have applied to set aside the order of 5 January 2007 (Henderson J) granting the Plaintiff leave to serve its writ of summons and statement of claim out of the jurisdiction of the Cayman Islands on the Defendants in several jurisdictions pursuant to GCR O.11,r.1 and alternatively for a stay of the action. The Defendants contend that there is another forum in which the Plaintiff's claims can be suitably tried, namely the Superior Court of Fulton County in Atlanta, Georgia, USA ("the Georgia Court") and that in the circumstances Cayman is not clearly the appropriate forum for the trial of the action. In their applications as filed the Defendants also sought an order that the service of the Plaintiff's writ and statement of claim should be set aside but those applications were not pursued. Accordingly, broadly speaking, this is what has become loosely known as a "forum non conveniens" case in which the application of the well known principles established in England in *Spiliada Maritime Corporation v Cansulex Ltd [1987] 1AC 460,* as subsequently generally adopted by this Court, are to be applied to the particular circumstances of this matter.

2. The Parties

2.1 The Plaintiff, Cairnwood Global Technology Fund Ltd ("The Fund") is a Cayman Islands company in voluntary liquidation. The Fund was incorporated under the Cayman Islands Companies Law on 9 March 2000 and has its registered office in George Town, Grand Cayman. The shares of the Fund are divided into Class A and Class B shares. The only Class A shareholder is Cairnwood Capital Partners LLC, a member of the Cairnwood group of companies owned and operated by members of an American family called Pendleton. There are 5 Class B shareholders, the largest of which is a Luxembourg registered company, Amana 1SA, ("Amana"), with 40% of the B shares. The beneficial owner of Amana is a Mr Mohammed Al-Amoudi, a citizen of Saudi Arabia. Before the Fund was put into voluntary liquidation in May 2006 its business was to act as a closed-end collective investment fund over a period of 5 years. Its purpose was to be the pooling of investors' funds to enable the investors to obtain profits or gains from the acquisition, holding and disposal of investments by the Fund in technology-related businesses. In short, the apparent intention of the Fund was typical of the many mutual funds for which the Cayman Islands are an internationally well known jurisdiction.

2.2 The 9 Defendants are all either former directors or officers of the Fund or, in the case of the 8th and 9th Defendants, they are respectively the former promoter/sponsor and the former manager of the Fund. The first 4 Defendants are all members of the Pendleton family. The 2nd Defendant, Mr Kirk Pendleton, is the brother of the 4th Defendant, Mr Laird Pendleton, and the 1st and 3rd Defendants, Mr Lane Pendleton and Mr Thayer Pendleton are the sons of Mr Kirk Pendleton. The 5th Defendant, Mr Timothy Lundberg, is the former Treasurer of the Fund. The 6th Defendant, Ms Nadia Aouad, and the 7th Defendant, Mr Jean Marc Dubois, were also directors and/or officers of the Fund at material times. The 8th Defendant, Cairnwood Group LLC, the promoter/sponsor of the

Fund, was at all material times owned or controlled by Pendleton family members together with Mr Lundberg and the 9th Defendant, Cairnwood Capital Management LLC, the former manager of the Fund, was also (with the exception of Mr Lane Pendleton) at all material times owned or controlled by Pendleton family members, together with Mr Lundberg. Cairnwood Capital Management LLC acted as manager of the Fund pursuant to a Management Agreement dated 1 April 2000, which was expressly governed by Cayman Islands law.

2.3 None of the Defendants are resident in the Cayman Islands. Mr Lane Pendleton is resident in Singapore. Mr Kirk Pendleton and Mr Thayer Pendleton are resident in Pennsylvania. Mr Laird Pendleton is resident in Massachusetts. Ms Nadia Aouad and Mr Jean Marc Dubois are resident in France and Mr Timothy Lundberg is resident in Georgia. Cairnwood Group LLC is a Delaware company with its principal place of business at Roswell in Georgia and Cairnwood Capital Management LLC is a Georgia company also with its principal place of business at Roswell in Georgia.

3. The Background

3.1 According to the uncontradicted affidavit evidence before the Court sworn on behalf of the Fund, Amana, the largest investor in the Fund, became increasingly concerned about the lack of accounting and other financial information provided to it and about the representations made to it by the Defendants and by Mr Lane Pendleton in particular concerning the Fund. By mid 2005 Amana had become sufficiently concerned that at an Extraordinary General Meeting of the Fund in January 2006 it procured the removal of the Pendleton family members, of Ms Nadia Aouad and of Mr Jean Marc Dubois as directors and/or officers of the Fund and appointed a new sole director. The Management Agreement with Cairnwood Capital Management LLC was also terminated. Prior to this Meeting, in December 2005, Amana obtained from this Court an ex parte

injunction against the Fund restraining the Fund from dealing with or disposing of any of its assets by making payments out of its bank accounts and restraining it from destroying or disposing of any documentation. The Fund, through its newly appointed sole director, then requested a Mr Gray, an English solicitor in the London office of the American law firm, LeBoeuf, Lamb, Green & MacRae, ("LeBoeuf"), who were already acting generally as lawyers for Amana, to recover all of the Fund's documentation and to investigate its activities.

3.2 On 3 April 2006 Amana commenced proceedings in the Georgia Court against Cairnwood Group LLC (the 8th Defendant and promoter/sponsor of the Fund), Cairnwood Capital Management (the 9th Defendant and former Manager of the Fund) and the four Pendleton family members ("the Georgia Proceedings"). I will make further reference to the Georgia Proceedings below.

3.3 At a further Extraordinary General Meeting on 3 May 2006 the Fund was put into voluntary liquidation and two members of the accounting firm, Rawlinson & Hunter, were appointed as joint liquidators. In June 2006, following investigations into the activities of the Fund by LeBoeuf, a letter was sent by LeBoeuf to each of the Defendants asking various questions about their management and direction of the Fund and making a number of claims against them for breach of their duties as directors, officers and manager respectively of the Fund. On 30 September 2006 the joint liquidators of the Fund who had been appointed in May 2006 resigned and were replaced by two others from the local firm, Kinetic Partners LLP. The present action ("the Cayman Proceedings") was commenced by the Fund by writ and statement of claim issued on 29 December 2006 and, as noted above, ex parte leave was given to the Fund to serve the writ and statement of claim on the nine Defendants at their various locations out of the jurisdiction on 5 January 2007.

4. The Cayman Proceedings

4.1 The Fund brings the Cayman Proceedings through its joint liquidators, who are independent professionals resident and carrying on business in the Cayman Islands. The Fund claims breaches of various contractual, common law, statutory and fiduciary duties, including breach of trust (which are all set out at length in the statement of claim) by the Defendants or some one or more of them, depending on the alleged duty concerned, as former directors, officers, promoter/sponsor or manager respectively of the Fund. The Fund alleges that the Defendants' true purpose in establishing and operating the Fund was to attract capital from outside investors which would be used to satisfy the financial obligations of the Pendleton family's Cairnwood group of companies which they were unable or unwilling to satisfy themselves. The Fund alleges in particular that some 18 payments of varying amounts out of the Fund's assets at various times in the period April 2000 to January 2006 were made or caused to be made by the Defendants either to themselves or to third parties in which they had a personal interest in breach of their duties to the Fund ("the Transactions"). The Fund alleges that the Transactions were made for no or no adequate consideration and/or were made by the Defendants for their own personal interests and not the best interests of the Fund and/or were made in breach of their respective duties to the Fund. The total of the Transactions amounts to US $ 13,872,404, which is the amount for which the Fund sues. The Fund also claims an account of profits together with interest and other related relief.

5. The Georgia Proceedings

5.1 The Georgia Proceedings were commenced by Amana, the majority investor in the Fund, on 3 April 2006. Amana's claim is for return of its investment of US$10 million (less a small amount) in the Fund together with triple and/or punitive damages under

Georgia law. The Fund is not a party to the Georgia Proceedings. Six of the Defendants in the Cayman Proceedings, including all four of the Pendleton family members, are the Defendants in the Georgia proceedings ("the Georgia Defendants"). Mr Lundberg, Ms Aouad and Mr Dubois, the 6th, 7th and 8th Defendants respectively in the Cayman Proceedings, are not Defendants in the Georgia proceedings. The Georgia Proceedings were obviously already underway at the time when the Fund commenced the Cayman proceedings and the existence of the Georgia Proceedings was brought to the attention of this Court by the Fund when it applied in January 2007 for leave to serve the Cayman Proceedings out of the jurisdiction. The affidavit by Mr Gray of LeBoeuf filed in support of the Fund's application for leave exhibited Amana's initial Complaint filed in the Georgia Court together with the Georgia Defendants' Answers and Defences filed on 19 June and 16 August 2006 respectively.

5.2 In its initial Complaint, Amana summarised its case as concerning the Georgia Defendants' "*unscrupulous false misrepresentations which induced Amana to invest US $10 million in the Cairnwood Global Technology Fund* [the Fund]". Amana alleged that the Georgia Defendants "*fraudulently induced Amana into investing in* [the Fund] *by continually misrepresenting the size and nature of* [the Fund], *the identity of its investors and the amount of their investments*". Amana went on to allege that the Georgia Defendants *"fraudulently obtained Amana's funds* [and then] f*ailed to manage the Fund in the manner promised and continued to lie to Amana about the Fund in order to keep Amana from discovering the Defendants' fraud"*. Amana also stated that *"Amana has now learned that the Defendants completely disregarded the Fund's investment guidelines and simply used the monies of the Fund's investors for the Defendants' own personal purposes and gain by using the Fund to support ventures and companies in which Defendants and/or the Pendleton family had a direct interest".* Amana's initial

Complaint went on to state that Amana was seeking *"damages caused by the Defendants' fraudulent and negligent misrepresentations, pattern of racketeering through wire fraud, breach of fiduciary duty, civil conspiracy in furtherance of fraudulent inducement and civil conspiracy of furtherance in breach of fiduciary duty".*

5.3 Amana amended its initial Complaint in the Georgia Proceedings on 6 October 2006 ("The First Amended Complaint") and removed the allegations of breach of fiduciary duty and conspiracy in furtherance of breach of fiduciary duty. The Defendants contend that this was done in response to their applications to the Georgia Court to join the Fund to the Georgia Proceedings based inter alia on those claims. In summary it was said that the breach of fiduciary duty claims were claims vested in the Fund and not in Amana and that, broadly speaking, they were being made by Amana on some sort of derivative basis. It was said that this demonstrated that the Georgia Court was considered to be the appropriate forum for the determination of the Fund's claims. Amana's evidence was that it did not need to make breach of fiduciary claims in order to succeed in its claims against the Georgia Defendants, which are essentially claims for misrepresentations made to it as a potential and then actual, investor in the Fund and that it had therefore removed those claims from its Complaint. Accordingly, in its latest and current Complaint ("the Second Amended Complaint") which is dated 30 April 2007, and in which Mr Al-Amoudi is named as a plaintiff, Amana no longer makes reference to alleged breach of fiduciary duty or to conspiracy in furtherance of breach of fiduciary duty by the Georgia Defendants. Amana's current allegation (and for convenience I include Mr Al-Amoudi in my reference to Amana's claims now that the Georgia Court has ordered him to be joined as a plaintiff) is, broadly speaking, that the Defendants induced it by misrepresentations to invest in the Fund in order to be able to use the monies of the Fund's investors for the Defendants' own purposes.

5.4 As already mentioned, during 2006 the Georgia Defendants applied to the Georgia Court to join the Fund to the Georgia Proceedings. Three of the Pendleton family members (Mr Lane Pendleton, the 1st Defendant in the Cayman Proceedings, Mr Kirk Pendleton, the 2nd Defendant in the Cayman Proceedings and Mr Laird Pendleton, the 4th Defendant in the Cayman Proceedings) also applied to the Georgia Court to dismiss Amana's action for lack of jurisdiction of the Georgia Court over them on grounds that they are not resident in Georgia. In addition the Georgia Defendants applied to the Georgia Court to join Mr Al-Amoudi, the beneficial owner of Amana, as a Plaintiff in the Georgia Proceedings. They also applied for partial summary judgment on grounds that certain of Amana's claims were said to be time-barred and for a "Protective Order" to prevent the perceived risk of the sharing of documents between Amana and the Fund. At least the application to join the Fund to the Georgia Proceedings had been made, although not determined, at the time when the Fund applied to this Court for leave to serve its writ and statement of claim out of the jurisdiction.

5.5 The Georgia Defendants' applications, and particularly the application to join the Fund as a party to the Georgia Proceedings, were heard by the Georgia Court (Senior Judge Alice D Bonner) on 1 March 2007 and judgment was issued in the form of a reasoned order on 30 March 2007. The Georgia Court expressly found that the Georgia Proceedings arise "*out of allegations by Plaintiff* [Amana] *of fraud, misrepresentations and conspiracy*". In considering and then refusing the applications by the three Pendleton family members concerned to dismiss the Georgia Proceedings against them for alleged lack of jurisdiction, the Learned Judge found that:

"*the circumstances surrounding and culminating in that $10M investment* [Amana's total investment in the Fund] *form the basis of the Plaintiff's* [Amana's] *Complaint*".

The order went on:

"although the connections to this forum may be construed as tenuous, Georgia presents the only nexus of actions and injury and thus the most convenient and efficient forum for all Parties in this matter. Georgia has been CGTF's [the Fund's] *United States hub of activity and has housed CGTF's [the Fund's] funds within its financial institutions. Georgia thus has an interest in consolidating these claims, to the extent permitted by the law, and resolving them in this forum. Moreover, the court finds it ironic that the Pendleton Defendants' arguments in support of its Motions to Dismiss are contrary to their later arguments made on the issue of joinder urging this court to recognise the confluence of events here in Georgia".*

I should perhaps emphasise that these comments were made in the context of determining whether as a matter of Georgia law and procedure the three Pendleton family members were personally subject to the jurisdiction of the Georgia Court in respect of Amana's claims. The reference to Georgia as being the most convenient and efficient forum for <u>all Parties</u> (my emphasis) must, I think in light of what was said later in the order, have meant all parties to Amana's claims then before the Georgia Court and was not a reference to the Fund or its claims. The Fund was, of course, not then a party to the Georgia Proceedings and, as discussed below, later in the same order the Georgia Court declined to join the Fund as a party. The Georgia Court denied the applications of the three Pendleton family members to dismiss the Georgia Proceedings against them for lack of personal jurisdiction.

5.6 In considering the Georgia Defendants' applications to join Mr Al-Amoudi as a party, the Georgia Court said *"Al-Amoudi has an interest in this action that could subject the Defendants to a substantial risk of 'double, multiple or otherwise inconsistent obligations'*

as contemplated under [the relevant Georgia provisions]". It was in the context of the argument about the joinder of Mr Al-Amoudi to the Georgia Proceedings that Georgia counsel for Amana apparently proposed a "*stipulation order" to prevent double recovery on behalf of Amana from any of the Defendants"*. However, the Georgia Court was not persuaded by the proposed stipulation agreement which was tendered because it did not provide for signature by Mr Al-Amoudi and thus would not have been binding on him. The Georgia Court granted the Georgia Defendants' application to join Mr Al-Amoudi as a party to the Georgia Proceedings and the Second Amended Complaint names Mr Al-Amoudi as a plaintiff together with Amana.

5.7 The Georgia Court denied the Georgia Defendants' applications for partial summary judgment and for a "protective order" but it is the Georgia Defendants' applications to join the Fund as a party to the Georgia Proceedings which seem to me most relevant for present purposes. The Georgia Court was well aware of the Cayman Proceedings and it is instructive to read precisely what the Learned Judge in Georgia said in her judgment on that application:

"In support of their motions to join CGTF [the Fund], *Defendants argued that* [the Fund] *is a necessary party because it was the original "seller" in the transaction. Additionally, Defendants argue that* [Amana] *has the opportunity to recover investment money both in this suit and in the suit pending in the Cayman Islands brought for the mismanagement of* [the Fund]. *Defendants also argue that joinder is proper because* [the Fund] *will inevitably be brought into this action on indemnification claims raised by Defendants. Pursuant to the* [First] *Amended Complaint, however,* [Amana] *claims no wrongdoing by* [the Fund] *nor any harm suffered at its hands.* [After the reference to the First Amended Complaint there is a footnote in the following terms: "[Amana's] *Original Complaint contained two 'derivative claims' which were removed from the Amended Complaint"].*

Instead, [Amana] *complains only of the statements made to it by Defendants to secure* [Amana's] *investments in* [the Fund] *and the alleged conspiracy to defraud* [Amana]. *Additionally,* [Amana] *volunteered to enter into a stipulation agreement to ensure that no threat of double recovery exists.* [The Fund] *is not implicated in* [Amana's] *complaint and claims no interest in the present action. Additionally, the Court finds that this case and the one pending in the Cayman Islands are unrelated. The parties, however, are invited to enter into a stipulation agreement barring any double recovery they believe could occur. Finally, Defendants are free to bring in* [the Fund] *through indemnification claims if they so desire. Accordingly, this Court hereby Denies Defendants' motions to join* [the Fund] *as an Indispensable Party".*

5.8 At the hearing before this court I was informed that the Georgia Defendants concerned will not appeal the Georgia Court's determination that it has personal jurisdiction over them. However, very shortly before the hearing before this court, the Pendleton family members who are Georgia Defendants filed an application in the Georgia Proceedings for leave to file a "Third-Party Complaint" against the Fund seeking indemnification against the Fund as former directors and officers of the Fund pursuant to the Fund's Memoranudm of Association, in other words to join the Fund as a defendant in the Georgia Proceedings. The Fund's Memorandum provides that the Fund's directors, officers, managers, agents and employees "*shall be indemnified and secured harmless out of the assets and funds of* [the Fund] *against all actions, proceedings, costs, charges, expenses, losses, damages or liabilities incurred or sustained by* [any of them] *in or about the conduct of the* [Fund's] *business or affairs or in the execution or discharge of* [their] *duties, powers, authorities or discretions....."* It further provides that such persons shall not be liable "*(i) for the acts, receipts, neglects, defaults or omissions of any other such director or officer or agent of the* [Fund] *or.... (vi) for any loss*

occasioned by any negligence, default, breach of duty, breach of trust, error of judgment or oversight on his part or (vii) for any loss, damage or misfortune whatsoever which may happen in or may arise from the execution or discharge of the duties, powers, authorities or discretions of his office or in relation thereto, unless the same shall happen through his own dishonesty". The Defendants application was only filed a matter of days before the hearing in this court and the eventual outcome of it in the Georgia Proceedings is, of course, not known.

5.9 Since Amana commenced the Georgia Proceedings there has been substantial discovery of the very wide-ranging type common to the American discovery process, although this is not yet complete. This appears to have started in May 2006 and has consisted of numerous requests by the parties to the Georgia Proceedings by way of interrogatories, requests for admissions and for document production and answers. The manner of pleading and discovery and the procedures and processes leading up to trial in Georgia are obviously not the same as they are in this court. That is not to say that one is in any way superior to the other, simply that they are different. For example, it appears that only two of the Transactions are referred to in any detail in Amana's First and Second Amended Complaints (namely (i) a payment of $2,653,770.07 to Cairnwood Group allegedly for purposes unrelated to Amana's investment expectations and (ii) a net payment of $935,000 – initially $1m - to a French garden related company, Plantes et Jardins). Another of the Transactions relates to a loan of $50,000 to Apisis/Flowergrower and it was contended by the Defendants that this is part of a general allegation by Amana in its Complaints that Cairnwood Group foisted debts onto the Fund. No detail apart from the general allegation appears in the Complaints. However, it is apparent that all of the Transactions, possibly with the exception of one, have been the subject of the extensive discovery in the Georgia Proceedings. It is said

that in response to interrogatories Amana has accepted the relevance of all or most of the Transactions to the Georgia Proceedings generally. At the hearing in this court, however, the parties to the Cayman Proceedings (and Amana is, of course, not a party in the Cayman Proceedings) did not agree as to the extent, if any, or the nature of, any relevance of the Transactions to Amana's claims in Georgia. There was considerable dispute about the significance of the Transactions to Amana's claims, particularly now that Amana makes no claims based on breach of fiduciary duty.

6. Singapore and New York Proceedings

6.1 On 14 July 2005 proceedings were commenced in Singapore by a company called Alliance Management SA against Mr Lane Pendleton, the First Defendant in the Cayman Proceedings, Cairnwood Capital International Ltd (another Pendleton family company) and a company called NewFirst ("the Alliance Singapore Proceedings"). The plaintiff, Alliance Management SA, is apparently owned by another citizen of Saudi Arabia, Prince Fahd, who is also the beneficial owner of another investor in the Fund, ABM Amro (Schweiz), which invested some $5 million. On 20 July 2005 proceedings were commenced in Singapore against the same defendants by a company called Freeford Ltd ("the Freeford Singapore Proceedings"). Freeford Ltd is a British Virgin Islands company owned and controlled by Mr Al-Amoudi. On 14 October 2005 Freeford Ltd commenced proceedings in the Supreme Court of New York, USA against inter alia three of the Pendleton family members, including Mr Lane Pendleton, and several Cairnwood companies including the 8th and 9th Defendants in the Cayman Proceedings ("the New York Proceedings"). Neither the Fund nor Amana are parties in the Alliance Singapore Proceedings or the Freeford Singapore Proceedings or the New York Proceedings. The New York Proceedings have now been stayed in favour of the Freeford Singapore Proceedings, the New York Court apparently have been satisfied

that those actions involved substantially the same matters and the same parties. It was claimed by Mr Lane Pendleton, the First Defendant in the Cayman Proceedings, that these several claims against him in various jurisdictions, which concern some related but not the same investments, amount to an oppressive tactic by Mr Al-Amoudi, Prince Fahd and the Fund to overwhelm the Pendleton family members by litigating the same or similar issues against them in various different jurisdictions and was unfair as well as potentially duplicative, However, at the hearing before this court counsel for Mr Lane Pendleton confirmed that, although the Freeford Singapore Proceedings and the Alliance Singapore Proceedings are to be tried by the same judge in Singapore, there is no application in Singapore that either of those proceedings should be stayed in favour of the other or that either of those proceedings should be stayed in favour of the Georgia Proceedings or the Cayman Proceedings or vice versa. The Fund is not a party to the New York Proceedings or either of the Singapore proceedings and none of the Defendants contended that Singapore (or New York) was an appropriate forum for the trial of the Fund's claims. The Defendants' only contention before this court was that the Georgia Court is the appropriate forum for trial of the Fund's claims. It was not suggested that any other forum was appropriate.

7. The Applicable Principles

7.1 Counsel for the Fund and all three counsel for the Defendants agreed that the principles laid down by the House of Lords in *Spiliada Maritime Corporation v Cansulex [1987] 1AC 460,* as subsequently interpreted and applied by this court, are applicable to the circumstances of this matter. It should perhaps be noted that in *Spiliada* Lord Templeman stated at page 465 that *"The factors which the court is entitled to take into account in considering whether one forum is more appropriate are legion. The authorities, do not, perhaps cannot, give any clear guidance as to how these factors are*

to be weighed in any particular case. Any dispute over the appropriate forum is complicated by the fact that each party is seeking an advantage and may be influenced by considerations which are not apparent to the judge or considerations which are not relevant for his purpose.......In the result, it seems to me that the solution of disputes about the relative merits of trial in England and trial abroad is pre-eminently a matter for the trial judge. Commercial court judges are very experienced in these matters. In nearly every case evidence is on affidavit by witnesses of acknowledged probity. I hope that in future the judge will be allowed to study the evidence and refresh his memory of the speech of my noble and learned friend Lord Goff of Chieveley in this case in the quiet of his room without expense to the parties; that he will not be referred to other decisions on other facts; and that submissions will be measured in hours and not days. An appeal should be rare and the appellate court should be slow to interfere".

7.2 In his judgment in the Spiliada case Lord Goff drew a clear distinction between cases where jurisdiction has been founded as of right, that is where the defendant has been served with proceedings within the jurisdiction, and cases where the court exercises its discretionary power to allow the proceedings to be served on defendants out of the jurisdiction. In the latter case, which is this case, the burden of proof rests on the plaintiff to satisfy the Court that it is an appropriate case to be served out of the jurisdiction (whereas in the former cases the burden rests on the defendant). Lord Goff went on to say that *"a second, and more fundamental point of distinction (from which the first point of distinction in fact flows) is that in the Order 11 cases the plaintiff is seeking to persuade the court to exercise its discretionary power to permit service on the defendant outside the jurisdiction. Statutory authority has specified the particular circumstances in which that power may be exercised but leaves it to the court to decide whether to exercise its discretionary power in a particular case while providing that leave shall not*

be granted "unless it shall be made sufficiently to appear to the court that the case is a proper one for service out of the jurisdiction"". Lord Goff made a further point, namely that "*the effect is, not merely that the burden of proof rests on the plaintiff to persuade the court that England is the appropriate forum for the trial of the action, but that he has to show that this is clearly so. In other words, the burden is, quite simply, the obverse of that applicable where a stay is sought of proceedings started in this country as of right".*

Lord Goff went on to say: *"Even so, a word of caution is necessary. It is significant to observe that the circumstances specified in Order 11 as those in which the court may exercise its discretion to grant leave to serve proceedings on the defendant outside the jurisdiction are of great variety, ranging from cases where, one would have thought, the discretion would normally be exercised in favour of granting leave (e.g. where the relief sought is an injunction ordering the defendant to do or refrain from doing something within the jurisdiction) to cases where the grant of leave is far more problematical. In addition, the importance to be attached to any particular ground invoked by the plaintiff may vary from case to case. For example the fact that English law is the putative proper law of the contract may be of very great importance...... or it may be of little importance as seen in the context of the whole case. In these circumstances, it is in my judgment, necessary to include both the residence or place of business of the defendant and the relevant ground invoked by the plaintiff as factors to be considered by the court when deciding whether to exercise its discretion to grant leave; but, in so doing, the court should give to such factors the weight, in all the circumstances of the case, it considers to be appropriate".*

7.3 The Judgment of Lord Templeman and the principles as laid down by Lord Goff have been expressly adopted and relied upon in the Cayman Islands in several judgments of this court and in the Cayman Islands Court of Appeal since then (see for example,

Insurco International Ltd v Gowan Co [1994-95] CILR 210 (Court of Appeal) and more recently *KTH Capital Management Limited v China One Financial Limited and others [2004-05] CILR 213) (Smellie CJ)* and *Brazil Telecom SA v Opportunity Fund, 13 December 2006, unreported (Levers J)).*

7.4 In applying for leave to serve its claim out of the jurisdiction the Fund relied on the following provisions of GCR O.11, r.1(1):

(c) the claim is brought against a person duly served within or out of the jurisdiction and a person out of the jurisdiction is a necessary or proper party thereto;

(d) the claim is brought to enforce, rescind, dissolve, annul or otherwise affect a contract, or to recover damages or obtain other relief in respect of a breach of contract, being (in either case) a contract which:

(i) was made within the jurisdiction; or....

(iii) is by its terms, or by implication, governed by the law of the Islands; or

(iv) contains a term to the effect that the court shall have jurisdiction to hear and determine any action in respect of the contract;

(f) the claim is founded on a tort, fraud or breach of duty whether statutory at law or in equity and the damage was sustained, or resulted from an act committed, within the jurisdiction;

(ff) the claim is brought against a person who is or was a director, officer or member of a company registered within the jurisdiction..... and the subject

matter of the claim relates in any way to such company.... or to the status, rights or duties of such director, officer, member.... in relation thereto;

(j) the claim is brought for any relief or remedy in respect of any trust whether express, implied or constructive, that is governed by or ought to be executed according to the laws of the Islands or in respect of the status rights or duties of any trustee thereof in relation thereto.

7.5 The terms of sub-paragraph (ff) noted above have no equivalent in Order 11 in England and are apparently peculiar to the Grand Court Rules. I was referred in this regard to the judgment of Chief Justice Smellie in *KTH Capital Management Limited v ChinaOne Financial Limited and others [2004-05] CILR 213* and his comments on page 219 at paragraphs 22 and 23. The Learned Chief Justice there referred to the comments of the Cayman Islands Court of Appeal in *Teleystem International Wireless Incorporated v CVC/Opportunity Equity Partners [2002] CILR Note 21*. As summarised in the Note, the Court of Appeal said that "*the status of the Cayman Islands (i) as an advanced and reputable international financial centre and (ii) as a jurisdiction dealing frequently with international disputes between parties using Cayman companies in their structure, may be taken into account as a matter of public policy when considering an application to stay Cayman proceedings on the ground of forum convenience. In some cases the desire to assist in preventing the proceeds of fraud from being dissipated may be a relevant factor for consideration (Contadora Enterprises SA v Chile Holdings (Cayman) Ltd [1999] CILR 194, dicta of Collett, J A applied; Solvalub Ltd v Match Investments Ltd [1996] JLR 361, followed). However, this factor is not so weighty as to override all others in any case involving a Cayman exempted limited company or non-resident company. An application for a stay should not be rejected simply because a defendant*

is served here as of right, any more than it should be granted on the basis only that such companies are required to carry on their business outside the jurisdiction. The proper test remains that Cayman proceedings should be stayed only if there is some other available forum, having competent jurisdiction, that is the appropriate forum for the trial of the action". Unfortunately the full judgment of the Court of the Appeal was not made available at the hearing before this court but that case was apparently one in which at least the principal defendant had been served within the jurisdiction.

7.6 In KTH Capital Management Ltd the defendants were all Cayman companies and accordingly served as of right within the jurisdiction. The plaintiff and some of the defendants were already engaged in separate proceedings in Hong Kong. The agreement in issue between the plaintiff and the defendants for the provision of services related to the acquisition and recovery of non-performing loans in China and the parties accepted that the governing law of the agreement was the law of China. The defendants applied to stay the Cayman proceedings on the ground that Hong Kong and not the Cayman Islands was the appropriate forum for the trial of the action. At page 219 of the report the Learned Chief Justice said:

> "22. *"It is plain from all the foregoing that the connection between the circumstances of the case and this jurisdiction is formal and legal in nature. The formal legal significance is that if the plaintiff is successful, the corporate formalities giving effect to the decision of the court, such as the taking of the necessary resolutions, would require to be done here.*
>
> *23. The choice of domicile of a company does, however, carry its own practical significance, in recognising the benefits and advantages – real or perceived – of incorporation in an established international financial centre such*

as the Cayman Islands. Implicitly, this includes the reasonable expectation that the courts here are competent and able to resolve any complex dispute that may arise in an efficient and just manner. Those are also practical considerations which always arise when one seeks to determine or choose the appropriate forum for the trial of a matter. Our Court of Appeal has recognised them to be relevant considerations on grounds of public policy [and here the learned Chief Justice referred to the *Telesystem International Wireless Inc.* case]. *Here, the applicants do not contend otherwise. What* [Counsel for the defendants] *says, quite properly is that the courts of Hong Kong must be equally highly regarded.*

Before this Court counsel for the Fund submitted that the additional sub paragraph (ff) in GCR O.11,r.1 (1) must be reflective of the public policy to which the Court of Appeal referred and as discussed by the learned Chief Justice in the *KTH Capital Management Ltd* case. Of course as the Court of Appeal implicitly confirmed, it remains the fact that GCR O.11,r.1 is still subject to the overall requirement of GCR O.11,r.4 (2) which provides that:

"No such leave shall be granted unless it shall be made sufficiently to appear to the court that the case is a proper one for service out of the jurisdiction under this order".

There is an overriding discretion in the Court to determine whether the case is a proper one in all the circumstances to be tried by this Court notwithstanding that one or more of the grounds set out in O.11,r.1(1) applies.

7.7 I was referred to a number of cases both reported and unreported, (in addition to the *Spiliada* case, and others already mentioned or mentioned below; *The Abidin Daver* [1984] 1 AC 398; *Insurco International Ltd v Gowan Company* [1992-1993] CILR 445

(1st instance); _Connelly v South Pointe Capital_ [1998] CILR 243; _Hutchinson et al v Cititrust (Cayman) Ltd_ [1998] CILR 43; _Reichhold Norway ASA v Goldman Sachs International_ [2001] 1 WLR 173; _Lubbe v Cape Plc_ [2000] 4 All ER 268; _I G Services Ltd v Deloitte & Touche_ [2003] CILR N2; _Korkola Copper Miner Plc v Coromin Ltd et al_ Court of Appeal, England 17 January 2006)

in which courts both in Cayman and elsewhere have considered varying circumstances in determining whether to set aside orders granting leave to serve out of the jurisdiction under O.11, or whether to stay proceedings which had been served within the jurisdiction as of right. These were, of course, helpful but in the end of the day I am mindful of the comments of Lord Templeman and Lord Goff in the _Spiliada_ case when they made it clear that in exercising its discretion whether or not grant or set aside leave to serve proceedings on defendants out of the jurisdiction or to stay proceedings, the court must have regard to all the particular circumstances of the particular matter which will inevitably vary greatly from one case to another and will be of differing significance and weight. Not surprisingly, in none of the cases to which I was referred, were the circumstances the same as the circumstances of the present case.

8. The Arguments

8.1 All three of the Counsel for the various Defendants submitted that in all the circumstances Georgia is the appropriate forum to determine the Fund's claims as set out in its statement of claim and that the Fund had not shown that Cayman was clearly the appropriate forum for the trial of those claims most suitably for the interests of all the parties and for the ends of justice. In summary they placed most emphasis on the following circumstances:

(1) None of the Defendants are resident in the Cayman Islands or (with one minor exception) have ever even visited the Cayman Islands.

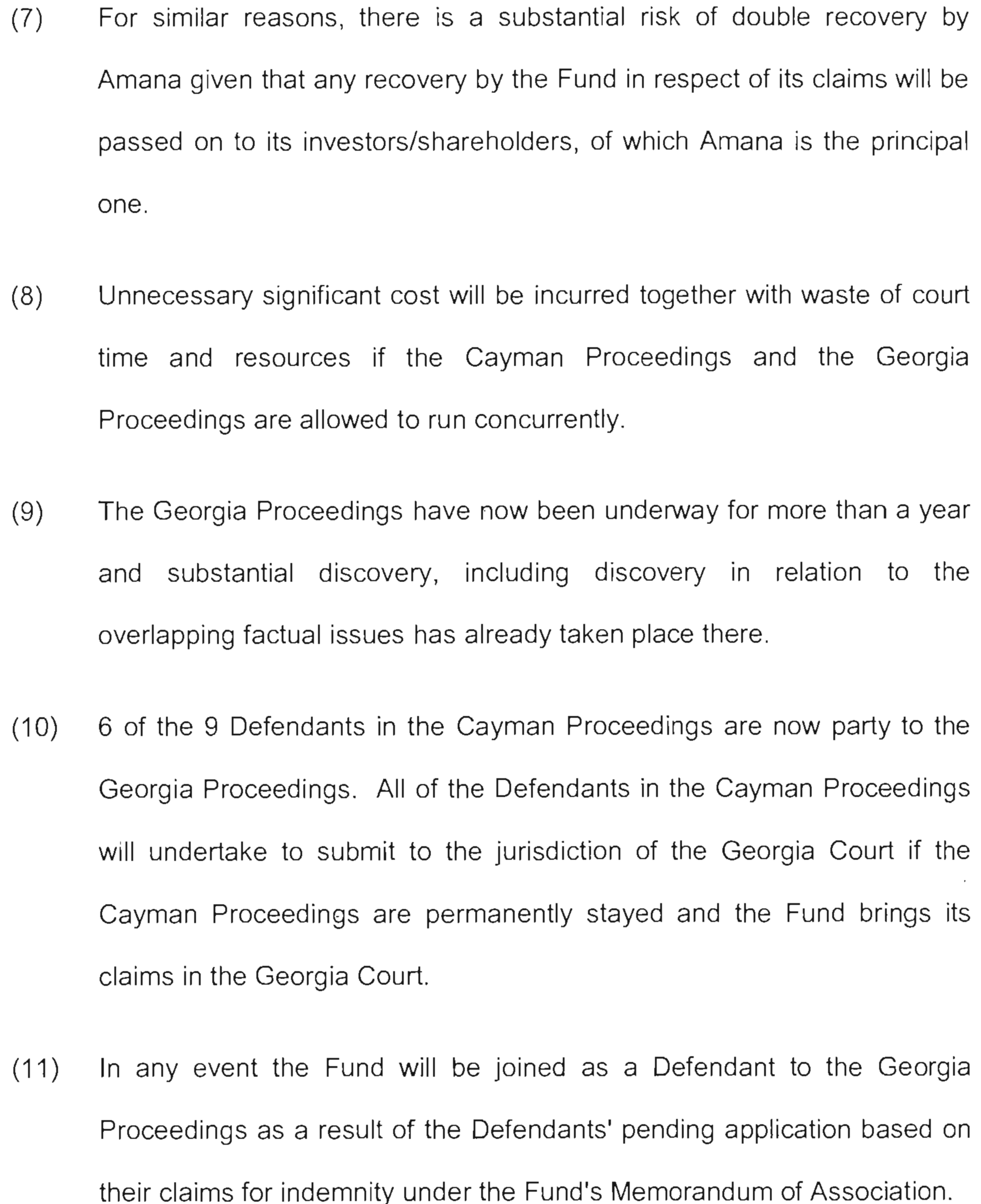
(2) Although incorporated in the Cayman Islands, the Fund conducted its business outside the Cayman Islands, principally from the Cairnwood offices in Roswell, Georgia.

(3) Most of the books and records of the Fund were kept in Georgia and Cayman is not automatically the appropriate forum simply because the Fund is a Cayman company. I was referred in this regard in particular to the circumstances and decision in *Re: Harrods [Buenos Aires] Ltd [1992] Ch.D 72.*

(4) There is substantial overlap of the relevant facts (namely the Transactions) between the claims bought by Amana in the Georgia Proceedings and the claims brought by the Fund in the Cayman Proceedings. Both claims involve substantially the same facts, the same documents and the same witnesses. This is particularly so in respect of the claim by Amana based on the Georgia RICO legislation.

(5) Prior to amending its Complaint in Georgia Amana claimed loss and damages for breaches of fiduciary duty indicating that it is recognised that Georgia is the appropriate forum to determine the Fund's claims. This shows that such claims *could* properly and conveniently be pursued by the Fund in the Georgia Proceedings.

(6) There is a significant risk of inconsistent judgments by the Georgia Court and this court.



(7) For similar reasons, there is a substantial risk of double recovery by Amana given that any recovery by the Fund in respect of its claims will be passed on to its investors/shareholders, of which Amana is the principal one.

(8) Unnecessary significant cost will be incurred together with waste of court time and resources if the Cayman Proceedings and the Georgia Proceedings are allowed to run concurrently.

(9) The Georgia Proceedings have now been underway for more than a year and substantial discovery, including discovery in relation to the overlapping factual issues has already taken place there.

(10) 6 of the 9 Defendants in the Cayman Proceedings are now party to the Georgia Proceedings. All of the Defendants in the Cayman Proceedings will undertake to submit to the jurisdiction of the Georgia Court if the Cayman Proceedings are permanently stayed and the Fund brings its claims in the Georgia Court.

(11) In any event the Fund will be joined as a Defendant to the Georgia Proceedings as a result of the Defendants' pending application based on their claims for indemnity under the Fund's Memorandum of Association.

8.2 Counsel for the Fund submitted that in all the circumstances Cayman is clearly the appropriate forum to determine the Fund's claims. In summary he placed most emphasis on the following circumstances:

(1) The Fund is a Cayman Islands company governed by Cayman Islands

law. It acts through its independent joint voluntary liquidators who are resident and carry on business in Cayman.

(2) The Management Agreement between the Fund and Cairnwood Capital Management LLC (the 9th Defendant) is expressly governed by Cayman Islands law.

(3) The duties of directors and officers of Cayman Islands companies are governed by Cayman Islands law and are best determined by the Cayman Islands courts. Cayman public policy and GCR O.11, r.1(1) (ff) reflects that. If the Funds claims were made in the Georgia Court it would be necessary to prove Cayman Islands law there.

(4) There were strong grounds under O.11 on which this court exercised its discretion to permit service of the Fund's writ and statement of claim out of the jurisdiction. The judge was fully aware of the Georgia Proceedings.

(5) Three of the Defendants to the Cayman Proceedings are not party to the Georgia Proceedings and the proposed undertaking by the Defendants is not unconditional, unequivocal or sufficient to protect the Fund. The Defendants to the Cayman Proceedings reside in various places, including France and Singapore.

(6) The Georgia Proceedings are brought by an investor in the Fund and not by the Fund and the investor's claims are based on quite different causes of action from the Fund's claims. The Fund's claims are based on causes of action available only to the Fund and which only the Fund (and not the investor) can make under Cayman Islands law. The investor is seeking

recovery of its investment based on misrepresentations, the Fund is seeking recovery of the Transactions monies based on breaches of duty by directors, officers and the Fund Manager. Any recovery by the Fund will be payable to its liquidators in Cayman.

(7) The arguments made by the Defendants in support of setting aside the Order for leave to serve out of the jurisdiction or for a stay are precisely the same arguments which they made to the Georgia Court in support of their application to join the Fund to the Georgia Proceedings which the Georgia Court has recently refused.

(8) The Georgia Court has already expressly found that the Georgia Proceedings and the Cayman Proceedings are unrelated. This court should not seek to override the Georgia Court.

(9) All of the investors in the Fund have a stake in the Fund's claims in the Cayman Proceedings. They would be prejudiced if the Cayman Proceedings are not allowed to continue or are delayed. Amana is claiming in the Georgia Proceedings purely in its own interest.

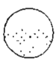
(10) The factual position in relation to the Transactions is not difficult to establish one way or another. They are straightforward allegations which are easy for the Defendants to deal with. It would be no hardship to deal with them in this Court.

(11) There is no real risk of double recovery but if there is, that can easily be dealt with by the respective courts which are fully aware of the issue as are the parties.

(12) The Defendants' claim for indemnity under the Fund's Memorandum of Association should be dealt with under Cayman Islands law by this Court.

9. Discussion

9.1 It is necessary to decide this issue as matter of discretion applying the agreed principles. In my opinion Cayman is prima facie the appropriate forum for the trial of the Fund's claims. The Fund is incorporated in the Cayman Islands and acts by its independent Cayman Islands liquidators. The Management Agreement with the 9th Defendant, Cairnwood Capital Management LLC, is expressly governed by Cayman Islands law. The basis of the Fund's claims is the relationship between the Fund and its directors and officers and their duties as such under Cayman Islands law. The Fund also claims breach of a Cayman Islands agreement and for beach of trust, which may or may not be familiar in this context to the Georgia Court. In principle such matters are most appropriately dealt with by the Cayman Islands courts and this view is recognised by the Learned Chief Justice in the *KTH Capital Management Limited* case and by the Court of Appeal in the *Telesystem International Wireless Inc*. case. Of course in both those cases service on the defendants had apparently been made as of right within the jurisdiction. However, in my view the general principle is equally relevant to a case like this one. Having regard to the position of the Cayman Islands as an international financial centre, it is in principle particularly desirable that the courts of this jurisdiction determine issues such as the duties and responsibilities of directors or officers of Cayman Islands companies. This is now well established as a matter of Cayman public policy and law. Of course that factor may be outweighed by other factors in any particular case and of course in a case where the proceedings cannot be served as of right within the jurisdiction, the onus is on the plaintiff to satisfy the court that Cayman is clearly the appropriate jurisdiction for the trial of the issues in the interests of justice and



of all the parties. Nonetheless, it seems to me that this is a factor of great weight in the discretionary balance. It was argued by the Defendants that the connection between the Fund and the Cayman Islands is minimal and purely formal. None of the Defendants are resident in the Cayman Islands. The Fund's business, apart from corporate formalities was conducted outside the Cayman Islands, largely from the Cairnwood offices in Georgia. It is said that most of the Fund's business records were kept there and that the connection between the Fund and this jurisdiction is of no practical relevance in the context of determining the appropriate forum for trial of the Fund's claims. While these are factors to be taken into account in this context, in my view they do not as such in the circumstances of this case and having regard to the nature of the Fund's claims outweigh the particular significance in this jurisdiction of the public policy (which has no equivalent in England) as expressed by the Cayman Islands Court of Appeal, as emphasised again by the Learned Chief Justice and as implicitly reflected in the (apparently unique to the Cayman Islands) additional ground on which it is permissible, with leave of the court, to serve proceedings out of the jurisdiction provided for in GCR Order 11,r.1(1)(ff).

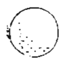
9.2 However, the onus is on the Fund to satisfy this court that in *all* the circumstances Cayman is clearly the appropriate forum for trial of its claims. The Defendants have argued strongly that in all the circumstances the Georgia Court is the appropriate forum to determine the Fund's claims. As summarised briefly above, the Defendants argued that there were various reasons for this but it seems to me that in the ultimate analysis the principal and most significant reason which they submitted is that there is, so they contend, a very significant overlap between the alleged facts on which the Fund's claims in the Cayman Proceedings are based and the facts on which Amana's claims in the Georgia Proceedings are based. The Defendants say that of the 18 Transactions on

which the Fund relies for its claims for breach of duty and contract against the Defendants, 17 of those Transactions are also relevant to the claims of Amana in the Georgia Proceedings. They say that accordingly there will not only be duplication of evidence if both proceedings continue but also a risk of inconsistent decisions as between the two courts and considerable unnecessary duplication of time, effort, cost and court resources which, they say is unfair to the Defendants and undesirable and inappropriate. They say that the Georgia Proceedings are already well advanced and in particular that there has already been extensive discovery relating to the Transactions, although, of course, the Fund has not been party to any of that. It was also contended for the Defendants that, irrespective of their relevance to any other of Amana's claims in the Georgia Proceedings, the Transactions are essential to Amana's claims under the Georgia RICO legislation. Amana's Complaint alleges *"a pattern of racketeering activity"* by the Pendleton family members through, it is alleged, a scheme involving persuading Amana to invest funds in the Fund by wire transfer through fraudulent and deceptive means and then using Amana's investment contributions in a manner contrary to the Fund's investment objectives. Examples of this are given as making short term loans to individuals and companies in which the Georgia Defendants had an interest, often without charging interest or receiving payment. It alleges that the Pendleton family members had the specific intent of fraudulently inducing Amana into investing in the Fund.

9.3 It was emphasised on behalf of the Fund that Amana's principle claim in the Georgia Proceedings is for recovery of its investment in the Fund on grounds of misrepresentation and that the essential issues in that context are the representations made by the Georgia Defendants to Amana from time to time both before and after its investments in the Fund. This is clearly a very different claim from that of the Fund

which is for recovery of the sums involved in the Transactions on grounds of breaches of various duties by its former directors and officers and for breach of the management agreement. It was contended that the Transactions as such are really only background to the misrepresentation claims of Amana and not an integral or essential part of Amana's claims. On the other hand, the Defendants point out that, for example, in the Cayman Proceedings the Fund pleads that "*the Defendants' true purpose in establishing and operating the* [Fund] *was to attract capital from outside investors which capital would be used to satisfy Cairnwood Group's pre-existing financial obligations*" and goes on to plead that this alleged scheme was carried out by allegedly improper payments, loans and investments. They say that Amana makes a very similar factual allegation in the Georgia Proceedings when it states that "[the Defendants] *already decided to use portions of investors' funds as the Pendleton family's personal "piggy-bank" from which Defendants would draw funds at their discretion to attempt to prop up ailing businesses in which Defendants already had personal interests, by, for example, causing the Fund to make interest-free loans..... Defendants completely disregarded the Funds investment guidelines and simply used the monies of the Fund's investors for the Defendants' own personal purposes and gain by off-loading poorly performing investments held by Cairnwood Group LLC onto the Fund and by using the Fund to support ventures and companies in which Defendants and/or the Pendleton family had a direct interest".* The Defendants pointed to other apparent similarities between the specific allegations by the Fund in the Cayman Proceedings and the general statements by Amana in the Georgia Proceedings.

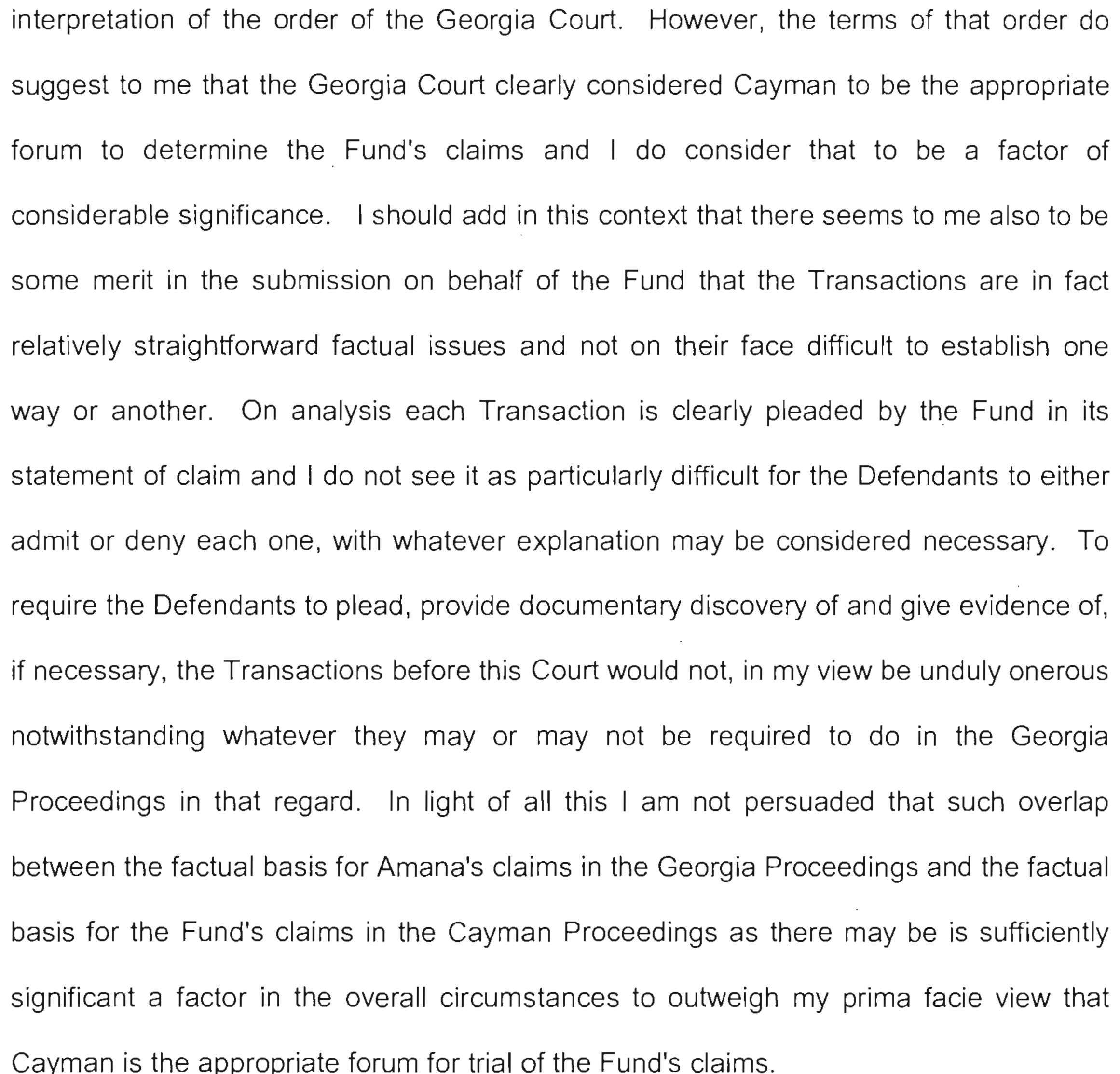
9.4 As I have already pointed out, only two of the Transactions are specifically referred to in Amana's current Complaint (and there is general reference to but, for example, no amount referred to, in relation to a third). Nonetheless, the extensive discovery which



has taken place in Georgia has apparently included discovery in relation to the Transactions to a significant extent. I have considered carefully whether in these circumstances it is appropriate in the interests of justice and of the parties to stay the Cayman Proceedings in some way which would enable the factual allegations relating to the Transactions to be conclusively determined by the Georgia Court but it seems to me that there are several difficulties with that. Firstly, this court is in no position to know as matters presently stand whether and, if so, to what extent, the Transactions will actually be the subject of proof and determination in respect of each one at trial before the Georgia Court of Amana's claims, at least in the manner and to the effect in which the precise factual allegations about the Transactions as made by the Fund in its statement of claim would be expected to be the subject of proof and determination in this Court. At the hearing before me the parties strongly disagreed about and disputed the relevance of the Transactions to Amana's claims in Georgia and I did not find it easy to determine who was right about that. This applies equally to Amana's RICO claim as much as its other claims. Amana's Complaint does not make this clear to me and neither does the fact that there has been wide-ranging discovery, principally by way of interrogatories and answers, in Georgia. I note in this respect the decision of Malone CJ in *Seales & Co et al v Freytag et al* [1990-91] CILR N.6 in which he is summarised as holding that although the evidence led to defend a libel action may be the same as that intended to be used to support an action for breach of fiduciary duty, the Court should allow the libel proceedings to continue and not grant a stay because the cause of action and objectives in each case were different. That case did not concern a stay in favour of foreign proceedings and the full judgment was not made available, but it seems clear that what Chief Justice Malone considered to be material in refusing a stay was not whether the facts upon which the two cases were based were the same or overlapping but the fact that the causes of action were different. Accordingly, the fact that Amana's causes of

action and objectives in the Georgia Proceedings are clearly quite different from the Fund's causes of action and objectives in the Cayman Proceedings does seem to me to be an important factor.

9.5 A further significant factor in this regard is the order made by the Georgia Court on 30 March 2007. I have already quoted from this order but in refusing the Georgia Defendants' application to join the Fund as a necessary party to the Georgia Proceedings the Georgia Court expressly found that the Georgia Proceedings and the Cayman Proceedings are unrelated. I infer that the Georgia Court had in mind the same point as that identified by Malone CJ, in the *Seales* case, namely that the causes of action in the two proceedings (as well perhaps as the relief sought) are different. It is clear that Georgia Court was fully aware of the Fund's claims in the Cayman Proceedings and must therefore have been well aware that the Transactions, which the Defendants contended are relevant to Amana's claims in the Georgia Proceedings and which have apparently been the subject of extensive discovery in Georgia, form the whole basis for the Fund's claims in the Cayman Proceedings. This seems to me to be a considerable obstacle to the Defendants' arguments. This court, of course, has the greatest respect for the Georgia Court and it is not for me to gainsay its judgment on this issue, particularly since the Georgia Defendants made the same arguments in support of their application to join the Fund as a party to the Georgia Proceedings as they have made in this Court in support of their contention that Georgia is the appropriate forum for trial of the Fund's claims. I can, of course, only proceed upon the basis of the evidence put before me and, perhaps not surprisingly, the evidence of Mr Brow, an attorney from Atlanta, Georgia, about the Georgia Proceedings submitted on behalf of the Fund and the evidence of Mr David, an attorney from Philadelphia, Pennsylvania, submitted on behalf of the Defendants, was at odds in various significant respects, including their



interpretation of the order of the Georgia Court. However, the terms of that order do suggest to me that the Georgia Court clearly considered Cayman to be the appropriate forum to determine the Fund's claims and I do consider that to be a factor of considerable significance. I should add in this context that there seems to me also to be some merit in the submission on behalf of the Fund that the Transactions are in fact relatively straightforward factual issues and not on their face difficult to establish one way or another. On analysis each Transaction is clearly pleaded by the Fund in its statement of claim and I do not see it as particularly difficult for the Defendants to either admit or deny each one, with whatever explanation may be considered necessary. To require the Defendants to plead, provide documentary discovery of and give evidence of, if necessary, the Transactions before this Court would not, in my view be unduly onerous notwithstanding whatever they may or may not be required to do in the Georgia Proceedings in that regard. In light of all this I am not persuaded that such overlap between the factual basis for Amana's claims in the Georgia Proceedings and the factual basis for the Fund's claims in the Cayman Proceedings as there may be is sufficiently significant a factor in the overall circumstances to outweigh my prima facie view that Cayman is the appropriate forum for trial of the Fund's claims.

9.6 It was submitted by the Defendants that the Fund would shortly become a party to the Georgia Proceedings in any event as a result of their very recent application to join the Fund as a Defendant in light of their proposed claims for indemnity from the Fund in respect of Amana's claims pursuant to the Fund's Memorandum of Association. However, it seems to me that this court must proceed upon the basis of the circumstances as they pertain at the time of the hearing of this application. Indeed, I was urged to do so by both counsel for the Defendants and counsel for the Fund. In arguing that I should not be influenced by the fact that several of the Georgia

Defendants had recently urged the Georgia Court that it had no jurisdiction over them and that it should dismiss proceedings against them on that ground, the Defendants counsel urged me to have regard to the circumstances as they now are. Arguably the Defendants application was, as the Georgia Court noted, inconsistent with their contention that the Georgia Court is the appropriate forum. I was equally urged to proceed on the basis of existing circumstances by counsel for the Plaintiff in the context of the Defendants' reliance upon the fact that Amana had initially alleged breach of fiduciary duties in the Georgia Proceedings but was not now doing so. While I note that in its order of 30 March 2007 the Georgia Court said that the Georgia Defendants are "*free to bring in the Fund through indemnification claims if they so desire*", I do not think it right for me to proceed on an assumption that the Fund will necessarily ultimately be joined as a Defendant to the Georgia Proceedings for purposes of the Defendants intended indemnity claims. The Defendants application has only very recently been filed and it may well be the subject of successful opposition or appeal in Georgia. I also note that the Memorandum of Law filed in the Georgia Court in support of the Defendants' application appears to rely, at least to some extent, on Amana's claims including breach of fiduciary duty, which is, of course not the case. I should also say that I agree with Counsel for the Fund that the question of any entitlement of former directors and officers to indemnity under the Fund's Memorandum of Association must be a question of Cayman Islands law and that prima facie this Court is anyway the most appropriate forum in which to determine that issue.

9.7 Another factor upon which the Defendants placed considerable emphasis was the perceived risk of double recovery. It was argued that if Amana is successful in the Georgia Proceedings, thereby obtaining recovery of its investment in the Fund, and if the Fund is successful in the Cayman Proceedings thereby recovering for the Fund the

amounts involved in the Transactions, the Fund would then distribute those recoveries to its investors, including Amana, which would thereby effectively obtain double recovery. Counsel for the Fund argued that in practical terms this was not a problematic issue because all of the parties and, more importantly, both the Georgia Court and this court are fully aware of it and could easily take it into account. This issue was, of course, expressly raised by the Defendants before the Georgia Court. As already noted, the order of the Georgia Court of 30 March 2007, explains that Amana proposed a "stipulation order" to prevent any double recovery. The Georgia Court rejected the proposed agreement tendered because it did not make provision for signature by Mr Al-Amoudi but in ruling on the Georgia Defendant's application to join the Fund to the Georgia Proceedings, the Georgia Court expressly invited the parties to the Georgia Proceedings to enter into a stipulation agreement barring any double recovery which they believed could occur. While there was disagreement between counsel at the hearing before this court concerning any such agreement, in the circumstances it does seem to me that there is merit in the Fund's contention that if there is a risk of double recovery by Amana this can readily be taken into account by this court and/or the court in Georgia at the appropriate time. The Georgia Court was clearly not impressed by the Defendants argument in this regard and I infer that the invitation to the parties to enter into a stipulation agreement was simply to ensure that the matter was dealt with in writing rather than because there was any real concern about double recovery. Accordingly, I do not consider that this is a case where there is a real risk of double recovery such as to be a significant factor in determining whether or not this court is the appropriate forum for trial of the Fund's claims.

9.8 As far as the Defendants' submissions that there is, if both the Georgia Proceedings and the Cayman Proceedings are allowed to continue, a risk of inconsistent judgments are

concerned, Amana's claims in the Georgia Proceedings and the Fund's claims in the Cayman Proceedings are brought by different plaintiffs relying on quite different causes of action and seeking different remedies against defendants who are not entirely identical. As matters presently stand, there can be no question of the Georgia Court giving a judgment in respect of Amana's claim for recovery of its investment of US$10 million based on misrepresentations, which is inconsistent with a judgment of this court in respect of the Funds claims for recovery of the monies involved in the Transactions amounting to US$13.8 million based on breaches of duty by directors and officers and breach of contract by the manager. I think what is really being suggested by the Defendants is that if the Cayman Proceedings and the Georgia Proceedings are both allowed to continue there is a risk of inconsistent findings of fact in relation to the Transactions which might then result in judgments respectively by the Georgia Court in relation to Amana's claims and by this Court in relation to the Fund's claims in reliance upon such inconsistent findings of fact. I have already discussed above the Defendants' contentions regarding overlapping factual issues between the Georgia Proceedings and the Cayman Proceedings and for the reasons explained there I am not satisfied that in reality there is such a significant risk in that regard as the Defendants suggest, particularly given the different causes of action and relief sought, or that at least that it will be overly onerous for the Defendants to have to defend the Fund's specific claims in relation to such factual issues in this court.

9.9 Counsel for the Fund pointed out that Mr Lundberg (the 5th Defendant), Ms Aouad (the 6th Defendant) and Mr Dubois (the 7th Defendant) are not parties to the Georgia Proceedings. While Mr Lundberg is apparently resident in Georgia, Ms Aouad and Mr Dubois are both resident in France and are clearly not subject to the jurisdiction of the Georgia Court. In an attempt to meet this point, during the hearing before me counsel

for the Defendants handed up a proposed undertaking by all the Defendants providing that if the Cayman Proceedings are stayed permanently and if the Fund brings its claims raised in the Cayman Proceedings in Georgia by way of separate proceedings consolidated with the Georgia Proceedings or by way of counterclaim to the Defendants' proposed claims for indemnity, all of the Defendants would undertake to submit to the jurisdiction of the Georgia Court in respect of those claims. The proposed undertaking also provided that Mr Lane Pendleton, Mr Laird Pendleton and Mr Kirk Pendleton would not appeal against the order of the Georgia Court dated 30 March denying their application to dismiss the Georgia Proceedings against them for lack of personal jurisdiction. In fact in the affidavit evidence put before this court those Defendants had already confirmed that they would not be appealing against that order of the Georgia Court and, of course, they are now submitting that the Georgia Court is in fact the appropriate forum. Counsel for the Fund argued that the proposed undertaking was not unequivocal and not adequate to meet the Fund's legitimate concerns that at least two and possibly three of the Defendants to the Cayman Proceedings would not be unquestionably bound by any favourable judgment which the Fund obtained in Georgia were it to bring its claims there. He pointed out that the proposed undertaking was not only conditional upon the Cayman Proceedings being permanently stayed, it appeared to assume that the Defendants' claim for indemnity against the Fund is also an appropriate claim to be heard by the Georgia Court. Also, perhaps more significantly, the undertaking gave no assurance that the Defendants would not raise any technical defences, such as limitation, which might be available to them as against the Fund under Georgia law, although the availability of such a limitation defence under Georgia law was disputed by the American lawyers in their respective affidavit evidence. In my view, the proposed undertaking did not go far enough to assure this court that the Defendants could not or would not take advantage of any technical or procedural defences which

might be available to them under Georgia law and not available to them under Cayman law and thereby preclude them from being bound by any judgement on the merits of the Fund's claims if made in Georgia. I accept that the fact that, if it were the case, the Fund's claims might be time-barred under Georgia law is not necessarily a reason of itself not to stay the Cayman Proceedings and, as I have said, it is not anyway accepted by the Defendants that the Fund's claims would be time-barred under Georgia law since, it is said, they are not based on fraud. However, there is sufficient uncertainty about this at present in my view to make the absence of any undertaking in relation to limitation and any other technical or procedural defences a factor to be weighed in the balance.

9.10 In support of the argument by counsel for the Defendants that the fact that Amana had initially included breach of fiduciary duty claims in the Georgia Proceedings and subsequently withdrawn them, apparently in light of the Defendants jurisdictional and joinder arguments, indicated that Georgia was indeed recognised as the appropriate forum for such claims, it was suggested that because Mr Gray, of LeBoeuf, was acting as general counsel to both the Fund and to Amana and apparently co-ordinating the Cayman Proceedings and the Georgia Proceedings on behalf of both of them, the initial inclusion by Amana of claims for breach of fiduciary duty in its initial Complaint was particularly significant. However, as Lord Templeman said in Spiliada at page 465 *"any dispute over the appropriate forum is complicated by the fact that each party is seeking an advantage and may be influenced by considerations which are not apparent to the judge or considerations which are not relevant for his purpose".* I do not consider the fact that Mr Gray may be acting as general counsel to both the Fund and Amana and co-ordinating the respective litigation (of course the Fund has its own Cayman Islands lawyers and Amana has its own Georgia lawyers) is a matter of much relevance. It is by no means unknown for plaintiffs to vary or withdraw causes of action on which they

initially relied and I do not attach much weight to the fact that Amana's Georgia lawyers apparently considered it appropriate initially to include claims based upon breach of duty, which have now been withdrawn. The claims in the Georgia Proceedings are Amana's claims and not the Fund's claims. Anyway, as noted above I consider it appropriate for this court to assess the overall circumstances as they presently are and no claims based upon breach of fiduciary duty are currently made by Amana. Of more importance in my view is the fact that the Funds claims are brought in good faith by its independent liquidators, whose bona fides were expressly acknowledged by counsel for several of the Defendants, who have an obligation under Cayman Islands law to wind-up the Fund's business, including collecting in its assets such as the claims against the Defendants, in the interests of all the Fund's creditors and shareholders.

10. Conclusion

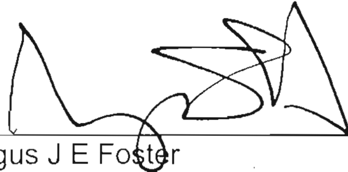
10.1 Having regard to all the circumstances of this matter and in the exercise of my discretion I consider that the prima facie view which I expressed above, that this court is the appropriate forum for the trial of the Fund's claims more suitably for the interests of all the parties and the ends of justice remains the case. It is, of course, for the Fund to show that this is clearly so. Notwithstanding that cogent arguments were made by counsel for the Defendants (and I am grateful to all counsel for their assistance) to the effect that Georgia is the more appropriate forum, I am nonetheless satisfied that in all the circumstances this court is clearly the appropriate forum to determine the Fund's claims.

10.2 The Defendants' summonses applied for, firstly, discharge of the order of this court made on 5 January 2007 giving leave to the Fund to serve its writ out of the jurisdiction, secondly, that the service of the writ shall be set aside and, thirdly, that the Cayman Proceedings should be stayed. It was suggested that there were three possibilities in

this latter regard, namely a permanent stay or a stay until after the conclusion of the Georgia Proceedings. During the hearing counsel for the Defendants suggested the third possibility, namely that the Cayman Proceedings should be stayed for a specific limited period, with the position in relation to the Georgia Proceedings being reassessed after that period had elapsed. As I have already mentioned, the application that service of the writ should be set aside was not pursued. As far as the application for an order setting aside the leave to the Fund to serve its writ and statement of claim out of the jurisdiction, I decline to make such an order and accordingly the order of 5 January 2007 granting leave to serve out will remain in place. As far as the application for a stay of the Cayman Proceedings is concerned, I also decline to grant any stay. In light of my views expressed above, it does not seem to me that either of the alternatives to a permanent stay which were suggested are appropriate. If, as I have determined, this court is clearly the appropriate forum for the trial of the Fund's claims, it seems to me that the Fund's action should now proceed in the normal course. This is irrespective of the progress of and what may happen in the Georgia Court in respect of Amana's claims there. If, as I have inferred, the Georgia Court is of the view that this Court is indeed the appropriate court to determine the Fund's claims, I would anticipate that at some appropriate stage the Georgia Court will be informed that this Court also considers this court to be the appropriate forum in that respect and will have regard to that in whatever way it considers appropriate. Accordingly, I also decline to stay these proceedings pending the outcome of the Georgia Proceedings or for some specific period.

10.3 In the circumstances, the Defendants' applications are refused and the Plaintiffs [the Fund's] costs of and incidental to these applications are to be paid by the Defendants, such costs to be taxed if not agreed.

Dated this 17th day of May 2007



Angus J E Foster

Judge of the Grand Court (Actg.)