IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO. FSD 36 OF 2011 (PCJ)

The Hon Sir Peter Cresswell
In Open Court on 18 and 21 September 2012

BETWEEN

ORIGAMI PARTNERS III, LP

Plaintiff

AND: (1) **PURSUIT CAPITAL PARTNERS (CAYMAN) LTD**
(2) **PURSUIT CAPITAL PARTNERS MASTER (CAYMAN) LTD**
(3) **PURSUIT INVESTMENT MANAGEMENT LLC**

Defendants

Appearances

Mr. Neil Timms QC instructed by and with Mr. Simon Dickson of Mourant Ozannes for the Plaintiff.

Mr. Nicholas Dunne of Walkers for the Defendants

JUDGMENT

The application

The Plaintiff applies by *ex parte* summons on notice dated 4 September 2012 for injunctions preventing the Defendants from pursuing proceedings they have brought in the Federal Court for the District of Connecticut against it and others or other proceedings that relate to an issue pending in these Cayman Islands proceedings.

I will refer to the Plaintiff as the Plaintiff or "Origami" and to the Defendants collectively as the Defendants or "Pursuit". Where the context requires, the First and Second Defendants (D1 and D2) may be referred to as the "Funds" and, respectively, the "Feeder Fund" and the "Master Fund" whilst the Third Defendant D3 (their investment manager) may be referred to as the investment manager or "Pursuit IM".

Background: Cayman Proceedings

The following summary of the Cayman Proceedings is taken from the Case Memorandum:

The Defendants are a Cayman master fund, its Cayman feeder fund and their Delaware investment manager. The Plaintiff Origami alleges that it is the assignee of certain of the First Defendant's shareholders (whether they are present or former shareholders is disputed) being three Russell companies (collectively " Russell"), pursuant to a purchase agreement dated 30 November 2010 and Deed of Assignment dated 7 January 2011 (the "Assignment").

The background to the case is that on 26 February 2008 the investment manager informed investors that due to then-prevailing market conditions the Directors of the Funds had determined to suspend the calculation of its Net Asset Value (NAV) and redemptions. A restructuring proposal was sent by the investment manager to investors on 21 January 2009.

Russell owned approximately 34% of the Participating Shares in the Feeder Fund (D1) and did not agree with the restructuring proposal advanced. Russell issued an Originating Summons in the Grand Court on 23 February 2009 seeking the appointment of Inspectors over D1 pursuant to section 64 of the Companies Law (2007 Revision).

A period of negotiation comprising communications and *inter partes* correspondence ensued, culminating in the conclusion of a Deed of Settlement (the "Deed of Settlement" or "the Settlement") between the parties to settle the Originating Summons. The Settlement provides that Russell would withdraw its Originating Summons in exchange for redemption from the Feeder Fund on the terms of the Settlement.

It is common ground that Russell has been paid all but US$4,337,297.87 (the "Retained Amount") pursuant to the Settlement. The Plaintiff (as Russell's alleged assignee) alleges in these proceedings that it is entitled to be paid the Retained Amount. The Defendants deny this on the bases that:

-they are entitled to retain the Retained Amount pending the final determination of the First Defendant's NAV as at 31 March 2009, which has not been determined; or, in the alternative,

-they are entitled to retain the Retained Amount pursuant to clause 1(A)(i)(I) of the Settlement,

-they are entitled to keep the Retained Amount until the completion of the First Defendant's audit for fiscal year 2009, which also allegedly remains incomplete.

The Plaintiff disagrees that the Settlement permits the Defendants to retain the Retained Amount and sues for breach of contract and seeks immediate payment of the Retained Amount together with interest.

The Defendants challenge the validity of the Assignment on the basis that Russell remain shareholders in the Feeder Fund until they are redeemed in full and that the Retained Amount is an incident of Russell's shareholding which cannot be assigned or transferred without the First Defendant's consent (which consent has not been obtained).

The Plaintiff's case is that pursuant to the Settlement Russell ceased to be shareholders and became creditors of the Feeder Fund.

The issues to be determined in the Cayman proceedings.

The issues to be determined in the Cayman proceedings include the following.

Whether Russell's rights under the Deed of Settlement can be assigned?

The Plaintiff says it can because the right is a debt arising out of a contract or a breach of contract.

The Defendants say:

-Russell as the owners of the shares being redeemed are the only party entitled to enforce the rights of redemption in the Deed of Settlement.

-Redemption under the Deed of Settlement does not occur until all the terms of the Deed of Settlement are completed.

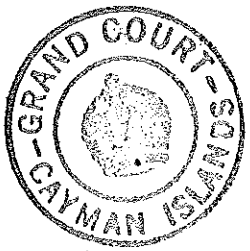
-Not all the terms have been completed and accordingly at the time of the alleged assignment and presently Russell are unredeemed shareholders in the First Defendant.

-The alleged assignment purported to transfer the entirety of Russell's rights to the Plaintiff such that the alleged assignment was therefore a transfer of shares within the meaning of

Article 16 of the First Defendant's Amended and Re-stated Articles of Association so as to be prohibited without prior written approval of the First Defendant's directors.

-Rights of and in connection with the redemption of shares are personal to the shareholder and neither the shares nor those rights are capable of being assigned other than by transfer of the shares themselves under the conditions laid down in the Articles.

-Regardless of the provisions of the alleged assignment, if the Defendants are under any obligation to make further payments by way of distribution of Available Cash or Divisible Securities under the Deed of Settlement, then the obligation is to make distributions by paying the Russell Nominee and not by paying the Plaintiff (this is the effect of clause 1.A.iii of the Deed of Settlement).



Are the Defendants entitled to retain the Retained Amount:

-because there has been no determination of NAV as at 31 March 2009: or
-for reasonable expenses including but not limited to legal administrative and accounting expenses, together with accrued but unpaid expenses of the First Defendant: or
-pending the completion of their audit for the year ended 31 March 2009?

By an Order of Foster J. dated 21 December 2011, Pursuit were given leave to amend their pleadings to include a Counterclaim against Russell and their custodian. Pursuit thereby claimed rectification of the Deed of Settlement and remedies for mistake. Following a Case Management Conference on 30 May 2012, the rectification claims were abandoned and the Counterclaim was dismissed by order dated 26 June 2012.

US Proceedings and the Complaint

On 26 July 2012, Pursuit filed proceedings in the United States District Court for the District Connecticut, under the title "Case 3:12-CV-01089" (the "Complaint"), against Origami, Russell and Russell Capital, Inc. ("Russell Capital" and together " the Russell Defendants") and Origami Capital Partners, LLC ("Origami Capital").

In the Complaint, Pursuit seek a declaratory judgment that the Deed of Assignment is illegal and in breach of contract and damages and punitive damages against each of the defendants. Jurisdiction is claimed on the basis of a statutory diversity in that the dispute is between citizens of different states and a foreign state.

Pursuit allege that the venue is appropriate because "a substantial part of the acts and omissions giving rise to the claims occurred" within the jurisdiction of the Connecticut court (Complaint paragraphs 15 and 16). Specifically, Pursuit allege that drafts of the Subscription Agreement were exchanged and electronic and telephonic communications regarding those drafts and Russell's investment in the Feeder Fund were held with representatives of the Pursuit I M located in Connecticut (Complaint paragraph 27). The Complaint includes a demand for jury trial.

Pursuit seeks, by its First Cause of Action against all defendants, a declaration that the Deed of Assignment is illegal and unenforceable.

By its Second Cause of Action against Russell, it seeks damages for breach of a contract as set out in the Feeder Fund's Articles, the Offering Memorandum and Subscription Agreement. Damages are claimed on the basis that the alleged breaches are a direct and foreseeable cause of the Origami defendants' "*improper attempts to enforce an agreement to which they are not a party*". (Complaint paragraph 103).The impropriety is the bringing of proceedings in the Cayman Islands.

The Third and Fourth Causes of Action are against the Origami defendants. The Third is an alleged Tortious Interference with Contract Relations.

The Fourth is an alleged Tortious Interference with Business Expectancies. Pursuit alleges that they had a business relationship with Russell and that the demand for payment by Origami (and its General Partner) constitutes an intentional interference with the nature and terms of Pursuit's business relationship with Russell. Origami is alleged to have acted with improper intent to extract payment from and leverage over Pursuit through litigation (Complaint paragraph 112 and 120) - the litigation being that pending in this Court. Pursuit claims compensatory damages for loss by reason of the legal expenses incurred in this litigation (Complaint paragraphs 113 and 121).

Pursuit claims punitive damages from each defendant (Complaint Prayer F).

The US Court has extended the time of all defendants to respond to the Complaint until 4 October 2012. Pursuit opposed the extension (see Young 6 paragraph [34]).

Although pleaded in slightly different wording, each claim alleges a knowledge or a reckless disregard that the beneficial interest in shares held by Russell could not properly or unilaterally be assigned to a third party and, in particular, a US person. The central issue raised in the Complaint is that Russell could not assign their interest in the Feeder Fund without the consent of its directors and that, consequently, the Assignment is invalid and unenforceable.

This is according to Origami precisely the issue raised by Pursuit in June 2012 in these proceedings. Having not admitted the validity of the assignment in their Defence and Amended Defence, Pursuit were permitted to deny its validity in their Particulars of Paragraph 6 of the Re-Amended Defence. In effect, (according to Origami) Pursuit seeks to litigate proceedings against the same party in respect of the same subject matter in the courts of more than one jurisdiction.

Breach of contract claims are made against Russell (two Irish companies that no longer exist and a Cayman company in liquidation) and Origami Capital a company that was not party to any of the contracts referred to in the Complaint. According to Origami it is unclear from the Complaint what contractual obligation Russell Capital is alleged to have entered into and to have breached.

The compensatory damages claimed are the costs of the Cayman litigation.

The tort claims against Origami and its General Partner are predicated on two matters. First, that they acted in bad faith and collusively with the Russell Defendants in the US proceedings in entering into an illegal and unenforceable Deed of Assignment (Complaint paragraphs 69 et seq.). Second, that the proceedings before this Court are improper (Complaint paragraphs 82 et seq.).

The case against Origami Capital appears to be that it directed Origami to execute the Assignment and that it brought the action in this Court for payment of the Holdback (Complaint paragraph 86).

I will set out the respective submissions of the parties at some length because in my opinion it is important that the Federal Court is informed of the arguments presented to this Court.

Origami's Submissions

Origami rely on the advice of Mr David Wollmuth of Wollmuth Maher & Deutsch LLP ("WMD") as to relevant aspects of Connecticut law set out in his letters of 3, 17 and 20 September.

Mr Neil Timms QC on behalf of Origami submitted as follows.

The legal principles

An anti-suit injunction is a remedy in support of a legal or equitable right. Typically, the legal right is contractual and contained within an exclusive jurisdiction clause. In this case, there is no privity of contract between Origami and Pursuit although the Deed in question contained an exclusive Cayman jurisdiction clause. Here Origami seeks an injunction on the basis that it would be unconscionable or unjust for Pursuit to be permitted to litigate in the USA an issue pending before this court. Unconscionable conduct includes conduct that is vexatious or oppressive or which interferes with the due process of the Court: see: Glencore International Ag v Exeter Shipping Ltd [2002] 2 All ER (Comm) 1, 13-14.

The following principles apply to this category of cases:

An injunction is directed against parties proceeding in the foreign court not against the foreign court. Accordingly, an injunction will only be granted to those amenable to the jurisdiction of the Court.

Because the jurisdiction indirectly affects the foreign court, it is exercised with caution. There must be a clear balance in favour of the person seeking the injunction to restrain foreign proceedings.

The jurisdiction is exercised when the "ends of justice" require it. Account must be taken of any injustice to either party. See: Société Nationale Industrielle Aerospatiale v Lee Kui Jak [1987] AC 871 PC 892-897.

The court will usually restrain the pursuit of foreign proceedings only if that pursuit is unconscionable. Generally that is because it would be vexatious or oppressive. Such factors as the availability of damages greater than those available here, exposure to expensive and onerous pre-trial procedures and significant expenditure of irrecoverable costs may collectively constitute sufficient oppression (see: Simon Engineering Plc. v Butte Mining Plc. [1997] 1L Pr 599 at [28-32].

The decision as to whether or not proceedings are unconscionable or vexatious or oppressive is evaluative and not the exercise of a discretion. Either they are or they are not (see: Star Reefers Pool Inc v JFC Group Co Ltd[2012] EWCA Civ 14 (CA). A finding of unconscionability is a condition precedent to the grant of an injunction.

Natural Forum

As a general rule, the court must first decide that it provides the natural forum for determination of the dispute. The natural forum is that with which an action has the most real and substantial connection (see: Simon Engineering Plc. v Butte Mining Plc. [1997] 1L Pr 599 at [21]. This is a single forum case in favour of the Islands, so strong are the connections to this jurisdiction. Cayman law governed redemption of shares in a Cayman Fund and Cayman law governed the assignment of the balance of the redemption payment. Cayman is the natural forum for determination of the issues.

Connecticut has been used solely because management of the Pursuit IM work there, it is asserted it has a principal place of business there and consequently a "substantial part of the acts and omissions giving rise to the claims occurred in" Connecticut. Pursuit do not explain what "omissions" there were in Connecticut. All that is claimed is that drafts of the initial investment documents and communications were exchanged with Pursuit IM residing there [Complaint paragraphs 4-6, 16 and 27].

In the agreed Case Memorandum dated 4th July 2012, Pursuit expressly confirm that: *"The Constitutional Documents, Deed of Settlement and Deed of Assignment are all governed by the laws of the Cayman Islands. Accordingly the laws of the Cayman Islands (including common law principles relevant to the issue) will determine whether the Russell Funds' shares were fully redeemed and the validity of the assignment."*[Emphasis added].

The Balance of Injustice

A factor in the balance is whether or not the litigation in the foreign court would confer advantages upon the person bringing proceedings there of which it would be unjust to deprive him. If the balance of injustice lies in favour of the foreign proceedings being allowed, an injunction will usually be refused. Only genuine and credible advantages can have any weight at all. The appropriate test is:

-whether an injunction deprives Pursuit of a legitimate advantage of which it would be unjust to deprive them and

-this injustice outweighs any injustice occasioned to Origami.

In considering these questions the Court will need to conduct a balancing exercise looking at where the justice lies (see: Metall und Rohstoff AG v ACLI Metals (London) Ltd [1985] ECC 502 at [59]).

No Injustice to Pursuit

The grant of the injunction sought would cause no injustice to Pursuit, whilst the continuation of the US proceedings would create significant injustice for the Plaintiff.

Unless this Court regarded Connecticut as the appropriate forum bearing in mind the real connections with the subject matter, differences in law and procedure cannot be regarded as legitimate advantages for Pursuit (see: Simon Engineering ibid).

The only real factor in favour of that jurisdiction is that Pursuit's director witnesses work there. In any event, even if Connecticut was considered an appropriate forum, juridical procedures are not to be regarded as legitimate advantages carrying any weight.

CLAIMS MAY/COULD HAVE BEEN BROUGHT IN CAYMAN

Equivalent claims to those in the US proceedings are available in this jurisdiction, but Pursuit took no steps to bring them.

Breach of Contract Claims

A breach of contract claim could have been brought in the Cayman Islands. A relevant defendant was within the Islands and it was open to Pursuit to bring in other parties as being necessary or proper parties. It appears that the Connecticut court would have to be invited to interpret Cayman law.

As to Russell, of the three companies two have been dissolved and one is in Voluntary Liquidation. In respect of Russell Capital WMD confirm that the US rules on privity of contract are substantively the same as the Cayman rules. Russell Capital was not a party to

any contract sued on. It follows that there is no legitimate advantage to be found by reason of it being domiciled in the USA.

Equivalent Tort Claims

Cayman law also recognises causes of action substantively similar to Tortious Interference with Contractual Relations and Tortious Interference with Business Relations. As can be seen from the first WMD letter, the essential elements are similar.

Procuring a breach of contract

Inducing or procuring a breach of contract is an established tort in the Cayman Islands. It exists when a person knows of the existence of a right but does an act that will impair or destroy it. Knowingly to procure a third party to break his contract to the damage of another contracting party without reasonable justification or excuse is a tort in Cayman law. The procurer must act with the requisite knowledge of the existence of the contract and intention to interfere with its performance (see: OBG Ltd v Allan [2008] 1 AC 1).

Unlawful Interference with Economic and Other Interests

Since OBG Ltd v Allan, an "interference with business" tort has been distinguished from the tort of procuring a breach of contract. It requires that a person, using unlawful means, causes damage to another intending to inflict the harm of which the complaint is made. Damage to economic expectations is sufficient (see OBG Ltd v Allan at paragraph 8). The tort is based on the deliberate use of unlawful means and therefore differs from inducement of a breach of contract in which liability stems from a direct invasion of a legal right. The scope of the unlawful means required has not been definitively circumscribed. In the Complaint, Pursuit assert a deliberate course of conduct, bad faith and collusion that, if made out, would be sufficient.

The Jurisdiction of the Cayman Court in respect of Torts

In Boys v Chaplin [1971] AC 356 the House of Lords explained and restated the rule in Phillips v Eyre that the English court will adjudicate in respect of a tort not committed in England, when civil liability also existed between the parties in another jurisdiction where the act was done. This Court could therefore properly adjudicate on that basis even were Pursuit able to show that the torts, if committed at all, were committed in Connecticut. Pursuit has

already pleaded torts substantively equivalent to those available here. In any event, the general rule that the wrong be doubly actionable can be displaced under modern law by evidence that, in all the circumstances, as in this case, Cayman law has the most significant relationship with the occurrence and the parties.

The double actionability rule does not, in any event, impinge on the question of jurisdiction for the purposes of GCR O 11. A court may accept jurisdiction, for example, on the grounds that one defendant is within the jurisdiction and others are necessary or proper parties, notwithstanding that a case falls outside the double actionability rule. In those circumstances the court might sometimes be required to apply the foreign rule of law (see: Red Sea Insurance Co Ltd v Bouyges SA [1995] 1 A C 1900). In the present case it is accepted that Cayman law applies both to the contracts of which breach is alleged and the validity of the Assignment.

PARTIES NOT AMENABLE TO THE CAYMAN JURISDICTION

Russell Capital and Origami Capital are amenable to this jurisdiction. Pursuit did not attempt to join them in these proceedings or make the same claims against them here.

The amenability of persons to this jurisdiction goes to where is the natural forum. The court however must be careful not to assert an excessive jurisdiction. It might be an excessive jurisdiction (1) if the claims in the US proceedings were properly brought there and (2) there was unacceptable risk of injustice by restraint of an action against another party that could not otherwise be brought (see, for example: Bank of Tokyo v Karoon [1987] AC 45).The opposite is the case here and Pursuit cannot suggest that their substantive claims could only have been brought in Connecticut. Indeed, Pursuit brought claims here by the counterclaim against Russell. Russell Capital and Origami Capital are alleged to be, with Russell, in breach of contract and to be a joint tortfeasor with Origami. Pursuit could have sought to join them as necessary and proper parties here. Instead those companies are evidently joined as a pretext for institution of proceedings in Connecticut. That is inadmissible (see for example Smith Kline ibid 744). Pursuit chose to bring and abandon the counterclaim. It has made no effort to attempt to prosecute the claims here and can have no legitimate complaint if litigation in the foreign forum, turning on the invalidity of the Assignment, is restrained.

PROCEDURAL DIFFERENCES

Punitive Damages as a Legitimate Juridical Advantage

That punitive damages may be available in the US proceedings does not constitute a legitimate litigation advantage that militates against the grant of an anti-suit injunction.

At most, very little weight should be given to the availability of punitive damages in the foreign jurisdiction as a factor in assessing the justice in the grant of an anti-suit injunction. (See: Metall und Rohstoff AG v ACLI Metals (London) Ltd [1985] ECC 502 at [59]). The better view is that it is not a legitimate juridical advantage at all (see: Smith Kline & French Laboratories Ltd v Bloch [1983] 1 WLR 730 at 738).

In any event, since the House of Lords decided Rookes v Barnard [1964] AC 1129, exemplary damages have been available in respect of all torts if the defendant's conduct has been calculated by him (in the sense of being likely) to make a profit for himself that may well exceed the compensation payable (at 1226). Whilst exemplary damages will be sparingly granted, they may be available, for example, to confiscate profit and when a tort has been deliberately committed with the guilty knowledge that, looking at it broadly, it would pay the wrongdoer to take the risk of the consequences (see also: Broome v Cassell & Co Ltd [1972] AC 1027, 1079, 1088).

Jury Trial as a Legitimate Juridical Advantage

The availability of Jury trial in Connecticut it is not a factor that should be taken into account (see, for example: Metall und Rohstoff AG v ACLI Metals (London) Ltd at [60]).

Discovery as a Legitimate Juridical Advantage

Oral Discovery is available in a suitable case in the Islands (GCR O.24, r.16).

Any wider discovery than permitted here is not a juridical advantage that carries any weight.

Extensive discovery has already been given in this case. Pursuit has had the opportunity to seek from Origami all documents relevant to the issue and seek oral discovery.

As in Smith Kline & French Laboratories Ltd v Bloch at 744 in respect of English Procedure, there is no reason to believe that Cayman procedure by way of discovery and interrogatories is in any way inadequate.

Injustice to Origami

The balance of fairness and justice lies strongly in favour of Origami. The US Proceedings are clearly oppressive vexatious and unconscionable. Cayman is the natural and appropriate forum of the proceedings and the institution of foreign proceedings in itself is oppressive.

Delay

Pursuit failed to bring the US Proceedings until some 17 months after the Cayman proceedings were commenced. Pursuit issued the US Proceedings without warning or notice. This failure, together with the failure to challenge this Court's jurisdiction as a proper forum or seek any stay of Cayman proceedings, constitutes an element of oppression. Pursuit has engineered this situation. It has deliberately created this diversion as the trial date in these proceedings nears, irrespective of the lack of merit of the claims made in the US proceedings. Pursuit has left the US Proceedings so late that companies from whom Origami might have claimed indemnity or contribution are no longer in existence or are in liquidation.

Where the same issue is litigated in multiple forums with the risk of inconsistent decisions on the validity of the Assignment and thus to the enforceability of this Court's judgment, there is injustice to Origami. Pursuit may attempt to frustrate enforcement of any Cayman Islands Judgment against it by asserting a conflicting US Judgement.

Russell as Parties in these Proceedings

The US Proceedings are unjust and vexatious and oppressive in that Pursuit could (and should) have brought these claims in and joined these parties to the Cayman Proceedings.

Costs

If Pursuit is permitted to continue the US proceedings, not only would there be a duplication of costs relating to the same issue arising from the same facts, the attorney costs of the US proceedings will almost certainly be irrecoverable if Origami is successful. These costs are considerable.

The conduct of Pursuit has deliberately increased costs. Given that the Funds are of doubtful solvency and that Pursuit IM is under serious SEC investigation and may itself be of doubtful solvency, the risk of an irrecoverable judgment or even of any costs awarded are increased by the assets it expends in Connecticut. For Pursuit it is a deliberate "no risk" policy. The

Funds intend to indemnify Pursuit IM first before payment of the Holdback. They estimate it will be insufficient. Any money spent in the US proceedings will serve to deplete the funds for payment of any judgment here.

Vexatious Allegations impugning the Process of the Cayman Court

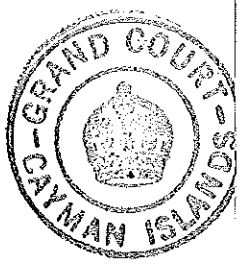
It is vexatious and oppressive to fail to make the claims in the US proceedings in the Cayman Proceedings, and yet seek to obtain from a foreign court a judgment impugning and seeking to overturn a judgment that may be made by this Court. The Court should not allow such vexatious allegations to be maintained in a foreign Court, not only to protect Origami but also to protect its own process.

Lack of Merit

It is now clear from discovery of the Share Registers that Pursuit were forced to give, that Russell are not shareholders of the Feeder Fund. The assertion that they are is the fundamental underpinning of the claims in the US proceedings (as it must be of the claim here that the Assignment is invalid). The timing of the issue of the US Proceedings and the discovery obligation here is not coincidental. The US Proceedings are intimidatory and designed to increase Origami's costs of recovery.

The US Proceedings directed at the Plaintiff

The gravamen of the Complaint relates solely to the assignment to Origami of the creditor rights of Russell under the Assignment and the proceedings that Origami has brought in this Court.



Two of the US defendants no longer exist; another is in liquidation in the Islands. The breach of contract claim against Russell Capital that was party to no contract is at best tenuous. Origami Capital is alleged to direct Origami and therefore be liable. The reality is that the US Proceedings are directed principally at Origami and in response to these proceedings here.

Unconscionability of unrestrained US Proceedings

Pursuit seeks by the US Proceedings, to impugn the proceedings before this Court, jeopardise the enforceability of any judgment against them by this Court and introduce a new price in cost and management time that Origami will have to pay for a proper and final determination of its status and right to recover the Holdback.

The fundamental issue in both proceedings is the same and arises from the same facts. Pursuit themselves have raised and pleaded it and this Court is seized of it (and was first seized of it) with an imminent trial date.

Unless the US Proceedings are restrained, Origami faces duplication of administrative and legal effort, irrecoverable costs (and possible depletion of outstanding funds for payment even if it obtains judgment) and the prospect that any judgment it obtains here may be jeopardised. Origami will give the usual undertaking in damages to protect Pursuit.

Conclusion

In a global economy and in the circumstances of the mutual funds business in the Islands, anti-suit injunctions are a necessary part of the Court's armoury. They were developed by US courts, which understand their rationale. They are not directed at the foreign court. It is because of the indirect effect on it that there must be a clear balance in favour of the applicant. If the Court concludes Pursuit's decision to proceed with the US proceedings is oppressive or otherwise unconscionable, the ends of justice require that Origami and its own process be protected. The Court should not stand back and watch. The fact that trial is so near in the Islands makes the US Proceedings the more oppressive, not less.

The Connecticut proceedings are vexatious and oppressive. A party put in the position of Origami is entitled to be protected against unconscionable conduct. The Court also has an interest in protecting its own process and ensuring its own judgments are not frustrated. This is not a question of an injunction "for the sake of 5 weeks." Pursuit refused to engage with Origami for weeks. They refused the reasonable offer to avoid the necessity of an order (see the 7 September letter). They refused on 11 September to extend time for the Defendants' response in the Connecticut Proceedings and still refuse to undertake to take no step in the action until after the Cayman trial. The Court can draw its own inferences. Origami is now being forced to make unwarranted and irrecoverable expenditure of funds and effort when they should be devoted to the Cayman trial.

Pursuit's submissions

Mr Nicholas Dunne for Pursuit submitted as follows.

Pursuit's position is that the ends of justice militate against the grant of an injunction in the present case. The ordinary position is that a party is entitled to commence proceedings in whichever jurisdiction it deems appropriate, and that it will be a matter for the court in that jurisdiction to determine whether the court will hear the case. That position ought not to be departed from in anything other than an exceptional case, and there is no proper basis upon which to do so in relation to the proceedings instituted by Pursuit in the US.

The US proceedings are properly and necessarily brought, and thus not unconscionable. To the extent that issues of *forum non conveniens* arise in relation to the US proceedings, these should be determined by the US court. By bringing the claims that are the subject matter of the US proceedings in the United States, Pursuit accrues a number of meaningful and legitimate juridical advantages. The US proceedings have no material impact upon the Cayman proceedings and do not prejudice Origami.

The nature of the US Proceedings

The US proceedings are properly brought, relating to matters that took place in the US involving US parties. They are not "insurance", or "a bargaining chip" or a tactic designed to put Origami to unnecessary expense.

The US proceedings are barely more than embryonic, and it appears unlikely that any significant demands will be placed upon the Origami parties in advance of the trial in Cayman. The limited temporal overlap between the two sets of proceedings means that there is virtually no realistic possibility of one interfering with the other. By the time that the US proceedings move beyond their initial stages, the Cayman proceedings will be concluded.

It is difficult to imagine therefore how the US proceedings might interfere with those in Cayman so as to be properly considered either vexatious or oppressive. Whilst it is said that it would be "unconscionable or unjust for Pursuit to be permitted to litigate in the USA an issue pending before this court", the fact is that, even if there were a substantial overlap between the proceedings (which is not accepted), by the time that the US Court was invited to make any substantive ruling, even on an interlocutory basis, there would no longer be any issue pending before the Cayman Court and no process with which to interfere.

Origami's response to the US proceedings is due to be filed on 4 October. To the extent that that response raises any preliminary issues, the US judge will clearly not be in a position to hear those issues until well after the conclusion of the trial in Cayman. This is far from the classic situation in anti-suit proceedings where proceedings are commenced in different jurisdictions in parallel. The fact that they are at such widely differing stages and thus have such limited capability to affect each other is indicative not (as Origami would have it) of deliberate oppression, but of the fact that they are unconnected and are properly brought.

Origami has made no application for an extension of the 4 October deadline to the US judge. The application for an extension to 4 October was made by the Russell parties alone.

Origami's failure to seek relief in the United States

The starting point in relation to any set of proceedings must be that, absent an exceptional reason to the contrary, they will be managed and controlled by the court before which they are commenced. This approach finds its expression in the doctrine of comity and the caution with which courts approach applications for anti-suit relief.

In this case, the US proceedings have now been on foot for more than 1½ months, but no attempt has been made by Origami in that jurisdiction to ask the US court to manage its own proceedings and decline jurisdiction. No reason has been advanced on the evidence, other than the putative cost, why such an application has not or could not be made.

In SNI Aerospatiale v Lee Kui Jak [1987] 1 AC 871(at p895) Lord Goff noted that "in normal circumstances, application of the now very widely recognised principle of *forum non conveniens* should ensure that the foreign court will, itself, where appropriate decline to exercise its own jurisdiction" and went on to observe that the United States was a country in which the principle was recognised as applicable in cases of stay of proceedings. Gee on Commercial Injunctions 5th edn page 298-9 notes that "If the foreign court applies the principle of *forum non conveniens* normally the English court should respect its decision".

This approach was applied in Pan-American World Airways Inc. v Andrews [1991] SCLR 257, where the Outer House of the Court of Session determined that in the circumstances of that case it was inappropriate to grant an anti-suit injunction the effect of which would be to

pre-empt the ability of a United States court to determine issues of forum. It is settled law that the jurisdiction to grant an anti-suit injunction, which inherently interferes with the administration of justice by an overseas Court and engages questions of comity, should be exercised with caution (*per* Lord Goff in SNI Aerospatiale (p892)).

By seeking an anti-suit injunction from the Grand Court, Origami invites the Grand Court to pre-empt the Connecticut Court's power to regulate its own proceedings in this regard. It is not appropriate to arrogate this element of the US court's jurisdiction and disregard comity by seeking to determine the issue through the agency of an overseas Court. The Plaintiffs have had ample time to apply to the US Court to dismiss the US proceedings on the basis of *forum non conveniens* and, having not done so, should not be permitted to bypass that jurisdiction in favour of seeking injunctive relief to the same end in Cayman. To do so entirely disregards proper considerations of comity.

As to the question of costs, as was observed by the court in Pan-American v Andrews, the bulk of the alleged inconvenience and additional expense would not arise unless and until a plea of *forum non conveniens* had been rejected by the US Court and the stage of preparing evidence had been reached. The fact that a *forum non conveniens* application in the United States involves a cost to the applicant cannot of itself entitle that applicant to seek a remedy elsewhere. Given the proximity of the filing date in the US (4 October), much of the cost of responding has in all likelihood been incurred already. There is of course also a significant cost involved in bringing the application in the Cayman Islands, in light of which the objection to asking the US court to deal with its own proceedings falls away.

The Appropriate Forum

Choice of Law

Whilst it is accepted that the contracts in question are governed by Cayman Islands law, they are not subject to any exclusive jurisdiction clause and therefore the issues that arise are not bound to be litigated before the Cayman Islands courts.

Given the substantial similarity between the law of contract in the Cayman Islands and the United States, there is no reason to suggest that the US Court is likely to have any difficulty in determining these issues in accordance with Cayman Islands law. In circumstances where

the actions alleged to give rise to a breach of contract took place in the United States, it does not follow that the issue can only be determined by the Cayman Islands courts simply because the contracts are governed by Cayman Islands law.

Given the nature of the tort claims advanced in the US proceedings, the contract claims are a necessary adjunct to them if they are to make any sense. In relation to the tort claims it is far less obvious that Cayman Islands law applies. As set out in WMD's letter of 3 September, Connecticut's choice of law rules takes into account a number of factors, including the place where the injury occurred and the place where the conduct causing the injury occurred. To the extent that the parties involved in this case are Cayman Islands exempt companies, they must by definition conduct their business outside of the Islands, and to the best of Pursuit's knowledge the interaction between the Russell and Origami parties took place in the United States.

As such, the Connecticut Court may well (and in Pursuit's view, is likely to) determine that the tort claims fall to be determined according to US Law. It is notable that WMD in their letter of 3 September hold back from asserting that it is probable, or even more likely than not, that the tort claims will be determined under Cayman Islands law, instead putting it as a mere possibility. In their second letter of 17 September, it is said to be "highly unlikely" that the tort will be governed by Connecticut law. The more preferable route is for the US Court to make up its own mind about issues in the cases brought before it.

As a matter of common sense tort claims subject to US law, involving US parties and relating to events that took place in the United States, are unlikely to find their natural forum in the Cayman Islands. The Court should be extremely slow to grant an anti-suit injunction the effect of which would be to restrain a person resident in a foreign country from bringing an action against another resident of that country relating to events that occurred in that country. That, however, is precisely the nature of the order sought by Origami.

Domicile of Parties and amenability to the jurisdiction

Both Origami Capital and Russell Capital are entities incorporated in the United States and are not party to the Cayman proceedings. These entities cannot therefore be relied upon to submit to the jurisdiction of the Grand Court. It may be the case that Pursuit could have

applied to join them to the Cayman proceedings, but this is not the same as saying that the entities would have submitted to the jurisdiction, just as leave to join a foreign party is not the same as securing that party's participation in the litigation.

To say that "there is no evidence that Russell Capital or Origami are not amenable to this jurisdiction", approaches this issue from the wrong direction- the better view is that there is no evidence that they are amenable. This is particularly so given that it is within Origami's power to produce evidence showing that Origami Capital would submit, but they have chosen not to do so: Mr Young, a partner in Origami Capital, does not anywhere in his sixth affidavit confirm that the company will submit to the jurisdiction of the Grand Court. This omission is telling. There is clearly no basis for saying that Russell Capital would submit if joined to the Cayman Islands proceedings, particularly given that no Russell entity is presently involved in the Cayman litigation. A cautious view should prevail, and the Court should not be quick to infer that the foreign party will voluntarily submit to the jurisdiction.

In a claim which seeks a remedy in damages, it is an important consideration whether a judgment, once obtained, will be for practical purposes enforceable. Cayman Islands judgments are not enforceable in the US as of right, and accordingly there is a risk that, were the US entities sued in Cayman as opposed to the United States, any judgment that might be obtained against them would be of limited, if any, value.

Origami seek an order that would prevent Pursuit from litigating not only against Origami but anyone at all in relation to the issues raised in the US proceedings, irrespective of whether they are party to the Cayman proceedings or not. Quite apart from the issue whether Russell should be entitled to the benefit of an anti-suit injunction for which it has neither applied nor indicated any support, Origami should not be permitted to pre-empt the issue of forum in relation to disputes with unrelated third parties, simply on the basis of a purported (and fanciful) future risk to their own rights in the event that litigation against that third party proceeds.

Administrative Convenience

Whilst it is accepted that considerations of administrative convenience will rarely, if ever, provide a free standing basis upon which to justify the institution of proceedings in a

particular jurisdiction, it is nevertheless one factor that the Court ought to take into account. In this case, the likelihood is that all of the relevant witnesses and documents are located in the United States, which militates in favour of the matter being dealt with there as opposed to in the Cayman Islands.

Given the advanced stage of the Cayman litigation, which has been on foot for over a year and in which trial is imminent, it would be undesirable to introduce fresh issues and parties at this point in time.

Inconsistent Judgments

The risk of inconsistent judgments, whilst a proper consideration, is substantially overstated.

The trial of the Cayman proceedings is listed to take place on 22 and 23 October, and no application has been made for an adjournment. Accordingly, the Cayman judgment will be available long before any final determination is made in the US proceedings and will doubtless be made available to, and given due consideration by, the Connecticut judge.
In circumstances where, as is accepted above, the contractual issues fall to be determined as a matter of Cayman Islands law, Pursuit would anticipate that the judgment of the Grand Court would have substantial (if not conclusive) persuasive value in relation to any common ground with the contractual issues before the US Court. This in itself reduces the risk of the issue of conflicting judgments to a *de minimis* level.

In any event, the issues before the two Courts are not the same. In the Cayman Islands the Defence challenges Origami's right to rely upon the Assignment of Shares on the basis of Article 16 of the Articles of Association, which prohibits a transfer of shares without the written approval of Pursuit's directors, whereas the US proceedings (*Complaint, paragraph 94) also* allege that Russell acted in breach of contract because they were unable to transfer the shares as the terms of the Governing Documents (to which Origami are not party) precluded the transfer of their interest in the fund to a U.S. person. The US proceedings therefore involve issues well beyond the scope of the Cayman proceedings in respect of which no risk of conflict can possibly arise.

Impugning the Cayman process

It is incorrect to say that a successful claim for punitive and/or compensatory damages in the US proceedings might "directly reverse" "defeat", "impugn" or "overturn" any award that might be made by the Grand Court. Any award made by the US Court cannot affect the validity of the Cayman judgment

Although any sums found due to Pursuit in the Connecticut proceedings might stand to be set off against any found due to Origami in the Cayman proceedings, this does not have the effect of overturning either judgment. Instead, it would simply be a "set off", taking account of both judgments. Setting off of liabilities is an entirely routine process, and cannot properly be described as representing a "substantial injustice".

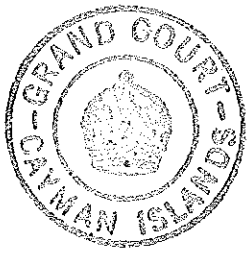
Advantages to Pursuit

In litigating the US proceedings before the Connecticut courts, Pursuit is able to accrue a number of juridical advantages that would not be available to it were the matter litigated in the Cayman Islands. These are:

-Causes of action that are not available in the Cayman Islands or are better developed in the United States;

-An advantageous discovery regime;

-The availability of punitive damages.



Causes of Action

The suggestion that Pursuit's claims for tortious interference with contractual and business relations could equally well be litigated in the Cayman Islands is misguided for a number of reasons. Firstly, it is far from clear that Cayman Islands law applies to these claims. The Chaplin v Boys approach, whereby torts committed overseas may be litigated elsewhere if some other state has a more significant relationship with the occurrence of the tort and the parties, does not afford *carte blanche* for the Cayman Islands to assume jurisdiction over torts committed elsewhere. There is plainly a distinction to be drawn between this case, where torts under US law are alleged to have been committed in the US by US resident entities, and the situation in Chaplin.

Second, Origami do not assert that the torts in the US and Cayman are identical, going only so far as to assert that the essential elements are "similar". The Court should be particularly slow to assume jurisdiction unless the torts available in the two jurisdictions are for practical purposes identical.

Insofar as the torts in question do exist in Cayman law, they can only be regarded as in their comparative infancy (no Cayman case having been cited by the Plaintiff, or, as far as the Defendant can establish, ever reported). Compared to this is what appears to be a significant and established corpus of Connecticut law cited by WMD, to be supplemented by further decisions from the courts of other US states. Suing in a jurisdiction where a tort is well established and frequently litigated represents a significant juridical advantage.

Discovery as a legitimate juridical advantage

Origami's reliance upon O.24 r.16 as negating any juridical advantage conferred by the discovery regime in the United States is misplaced. In Phoenix Meridian Equity Limited v Lyxor Asset Management and others [2009] CILR N18, Foster J held that pre-trial discovery under the rule was "a concept foreign to the well-established rules governing discovery in the Cayman Islands" and cast doubt upon the extent to which it had any practical application, stating that its use would only be permitted in exceptional circumstances "if at all". In circumstances where such a restrictive approach has been adopted, extending to requesting the Rules Committee to reconsider the appropriateness of the procedure in the Cayman Islands, it cannot properly be said that O.24 r.16 provides a practicable way forward.

Nor is it appropriate to characterise the US discovery regime as authorising "fishing" simply on the basis that wider discovery is available than might be the case in the Cayman Islands. Indeed, in earlier proceedings in the Phoenix v Lyxor litigation [2009] CILR 342) Smellie CJ specifically identified that the courts of the United States were alive to such concerns and able to curtail applications for depositions that could be shown to be "fishing".

The US regime for discovery is particularly important in the context of these claims given that they relate to torts committed against Pursuit in the course of interaction between Origami and Russell, to which Pursuit was not privy. Accordingly, other than the assignment agreement itself, Pursuit holds none of the relevant documentation. In light of the agreement

evidenced by the Assignment agreement, the US proceedings are clearly not a fishing expedition, and the ability to depose witnesses from both Origami and Russell is likely to be of substantial assistance in advancing Pursuit's case.

Pursuit's repeated requests in the context of the Cayman proceedings for documents relating to the communications which took place between Russell and Origami prior to the execution of the assignment agreement (which are plainly material to the issues at stake in the US proceedings) have been refused on the basis that they are said to be irrelevant. From this it can be inferred that not only are the issues at stake in the US proceedings substantially different to those before the Grand Court, but also that the availability of pre-trial depositions and/or a wider scope of discovery than ordinarily permitted in Cayman is likely to represent a legitimate (and significant) juridical advantage to the Pursuit parties.

Punitive damages

It is plain from the judgment of Purchas LJ in Metall und Rohstoff v ACLI (p527, paragraph 59) that the availability of punitive damages in the United States is capable of being a relevant juridical advantage.

In the circumstances of this case, it is insufficient to say that Cayman Islands public policy has circumscribed the availability of exemplary damages. This may well be relevant in relation to torts committed within the Cayman Islands, but cannot be used to shield entities from more extensive liabilities in relation to torts committed in jurisdictions such as the United States where public policy has taken a different direction.

The allegations made in tort relate to the interaction between the Origami and Russell parties, an interaction that took place, to the best of Pursuit's knowledge, within the United States. It would be a substantial injustice to Pursuit if it were enjoined from pursuing proceedings in the United States in respect of events that occurred within the United States, and in doing so surrender its claim for exemplary damages. As a matter of common sense, the extent of Origami's (and Russell's) liability in tort ought to be determined under the law of the jurisdiction in which that tort was committed. The scope for the award exemplary damages under Rookes v Barnard is far more limited, and is illustrative of the extent to which Pursuit would be prejudiced.

This situation can plainly be distinguished from that in, for example, Smithkline & French v Bloch, where the torts complained of took place in England, and the American action was brought opportunistically on no other basis than that the alleged tortfeasor had an American parent company. Here, there is a very much more obvious nexus with the US, both in terms of governing law and physical action- certain of the parties have a legal presence in the Cayman Islands by reason of the favourable environment for the establishment of funds, but as a matter of practicality carry out all of their business activities elsewhere.

Impact upon Origami

In the event that the US proceedings continue, no prejudice will result to Origami. The US proceedings are at an early stage, whereas the Cayman proceedings are virtually at their conclusion. Accordingly, the former is not in a position to interfere with the latter.

By the same token, given that the US proceedings are in their earliest stages, little is required to be done in them prior to the Cayman trial. If Origami considers that the intervention of that trial will cause them any difficulty in terms of the preparation of the response due in early October (which, realistically, will be the only filing due prior to the hearing in Cayman) then the appropriate course would be to seek an extension in the US, not to seek anti-suit relief in Cayman.

It is unclear why Origami say that there will be a duplication of administrative and legal effort. The two sets of proceedings deal with discrete claims and different parties, and therefore the overlap in the work required will be limited, if it exists at all. As the Cayman proceedings are virtually at an end, there is no question of Origami being required to litigate in the US in parallel. Therefore there is really no issue that arises as to the division and management of resources. Of course, the significant time and effort that appears to have been devoted to the application for an anti-suit injunction could, had Origami so elected, instead have been applied to the provision of a reply and/or a challenge to forum in the US proceedings. Any duplication of effort or additional workload in this regard is therefore a matter of choice rather than compulsion. In any event, the mere fact that claims exist in the US requiring the instruction of US attorneys, and that the costs rules in the US may be different, cannot of itself be a basis for Origami to say that it must be permitted to deal with proceedings only in Cayman where it chose to commence its proceedings.

The oft-repeated argument that Pursuit may use a conflicting US judgment to hinder enforcement of any judgment that Origami might obtain in Cayman is wholly dependent upon the contingencies that (a) a conflicting judgment is in fact issued and (b) Pursuit use that judgment to frustrate enforcement of the Cayman award. The risk of conflicting judgments is extremely small, and the Court should not indulge in the grant of injunctions in restraint of foreign proceedings in order to guard against mere theoretical possibilities. No evidence at all has been produced to show that Pursuit would act in such a way.

Conclusion

Prior to an injunction being granted, there must be a clear balance in favour of the party seeking the injunction to restrain foreign proceedings. Such a clear balance is not present and, were the Court to make the order sought, there is a very real risk of unjustified trespass upon the jurisdiction of the US court.

The US proceedings involve claims that are likely to be governed by US law, involve US entities and refer to events that occurred within the US. The proceedings are in their early stages, and the US Court is plainly equipped to deal with any issues that may arise as to proper forum and the risk of conflicting judgments. Questions of the merit or otherwise of those proceedings can only be answered by the US court.

The relief sought is extraordinary in its scope, and is premised on a combination of a misconception of the motives underlying the US proceedings and conjecture as to events that may or may not occur at some indeterminate point in the future. In circumstances where the trial of the Cayman action is barely a month away the capacity for any real prejudice to result is in any event virtually non-existent. Whilst there will in exceptional circumstances be cases that warrant the issue of an anti-suit injunction, this is not such a case and Origami's application should be refused.

ANALYSIS AND CONCLUSIONS

The relevant legal principles

The relevant legal principles in my opinion include the following.

It is necessary to distinguish between anti–suit injunctions founded on jurisdiction or arbitration agreements and anti-suit injunctions where there is no jurisdiction or arbitration agreement.

Injunctions founded on jurisdiction or arbitration agreements

1. The Grand Court may restrain a party over whom it has personal jurisdiction from the institution or continuance of proceedings in a foreign court in breach of a contract to refer disputes to the Grand Court (or, it seems, another foreign court). (Dicey, Morris & Collins The Conflict of Laws 14th edn ("Dicey") Rule 32 (4)). Where the basis for the exercise of the Court's discretion is that the defendant has bound himself by contract not to bring the proceedings which he threatens to bring/ has brought in the foreign court, the principles which guide the exercise of the discretion of the Court are distinct from those which govern applications for anti-suit injunctions not founded on contractual agreements (see below). In particular there is no need to show that there is oppression or vexation, or that Cayman is the natural forum for the claim. (Dicey 12-137 and following).

2. The Grand Court also has jurisdiction in personam to restrain by injunction foreign proceedings brought in breach of an agreement to refer disputes to arbitration.(Dicey 12-144 and 16-088 and following).

Anti-suit injunctions where there is no jurisdiction or arbitration agreement

3. The Grand Court may restrain a party over whom it has personal jurisdiction from the institution or continuance of proceedings in a foreign court, or the enforcement of foreign judgments, where it is necessary in the interests of justice for it to do so. (Dicey Rule 31 (5) para 12R-001).

4. Although the injunction operates only in personam against the party to the foreign proceedings, the remedy cannot avoid being seen as an indirect interference with the process of the foreign court, and the jurisdiction must therefore be exercised with caution, particularly if the foreign claimant, respondent to the application, is suing in his own court. (Dicey para 12-067 and the cases there cited).

5. As the jurisdiction is exercised in personam, the court must have personal jurisdiction over the respondent to the application. It must be possible to serve process upon the party against whom the order is sought.

6. The underlying principle is that the jurisdiction is exercised "where it is appropriate to avoid injustice". (Castanho v Brown & Root (UK) Ltd [1981] AC 557,573).

7. An injunction may be granted if the Cayman Islands is the natural forum for the resolution of the dispute and the proceedings in the foreign court are vexatious or oppressive. English courts have refrained from giving a comprehensive or limiting definition of these expressions. They have deliberately refrained from marking the outer extent of their power to act to restrain conduct which may give rise to injustice or, if the need for caution is given its due weight, serious injustice. (See Dicey para 12-073 and the cases there cited). A similar approach is appropriate in the Cayman Islands.

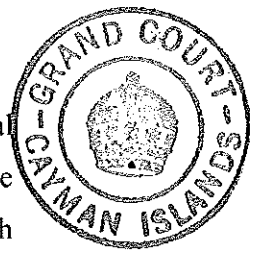
8. The following conditions (as set out in the latest authorities) apply in the second category of case (where there is no jurisdiction or arbitration agreement).

First, the threatened conduct must be "unconscionable". What is unconscionable cannot be defined exhaustively, but it includes conduct which is oppressive or vexatious or which interferes with the due process of the Court. The underlying principle is one of justice in support of the ends of justice. It is analogous to abuse of process. It is related to matters which should affect a person's conscience.

Second, although the natural forum for the litigation must be in the Cayman Islands this, while necessary, is not a sufficient condition. To reflect the interests of comity and in recognition of the possibility that an injunction, although directed against the respondent personally, may be regarded as an (albeit indirect) interference in the foreign proceedings, an injunction must be necessary to protect the applicant's legitimate interest in Cayman proceedings. The applicant must be a party to litigation in Cayman at which the unconscionable conduct of the party to be restrained is directed. There must be a clear need to protect existing Cayman proceedings.

While the above conditions must be met, at a further stage, that of the exercise of discretion, the court will always exercise caution before granting such an injunction.

Moreover the respondent will always be entitled to show why it would nevertheless be unjust for the injunction to be granted.
(Rix LJ in Star Reefers Pool Inc v JFC Group Co Ltd [2012] 1 CLC 294 at para 26 where he set out his summary of the relevant authorities in the earlier case of Glencore International AG v Exter Shipping Ltd [2002] CLC 1090 at paras 42-43).



The principle of comity (where the injunction sought is not founded on a contractual agreement) requires the Court to recognise that, in deciding questions of weight to be attached to various factors, different judges operating under different legal systems with different legal policies may legitimately arrive at different answers, without occasioning a breach of customary international law or manifest injustice, and that in such circumstances it is not for the Grand Court to arrogate to itself the decision as to how a foreign court should determine the matter. The stronger the connection of the foreign court with the parties and the subject matter of the dispute, the stronger the argument against intervention.

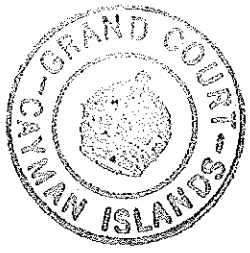
The prosecution of parallel proceedings in different jurisdictions is undesirable, but not necessarily vexatious or oppressive.

(Toulson LJ in Deutsche Bank AG v Highland Crusader Offshore Partners LP [2010] 1 WLR 1023 at [50].)

See further Phoenix Meridian Equity Ltd v Lyxor Asset Management SA and another [2009 CILR 342] Smellie CJ.

Post–judgment anti-suit injunctions

9. As to the grant of a post–judgment anti-suit injunction to restrain the judgment debtor from taking steps overseas to undermine a Cayman Islands judgment or its enforcement see Masri v Consolidated Contractors International Co SAL (No.3) [2009] QB 503.



The relevant legal principles applied to the circumstances of the present case

This is an application for an anti-suit injunction where there is no jurisdiction or arbitration agreement. The relevant legal principles are those set out above in the second category of case, where there is no jurisdiction or arbitration agreement. It is elementary that it is far more difficult to obtain an anti-suit injunction where there is no contractual right not to be sued.

It is important to note that the trial of the Cayman proceedings is due to take place in less than a month's time – on 22-23 October.

Although Mr Timms QC has advanced powerful arguments in support of the contention that the two conditions in 8 above have been met, I will be in a far better position to express an opinion as to these having conducted the trial.

The Connecticut proceedings are at a very early stage. While the conditions set out at 8 above must be met, at a further stage, that of the exercise of discretion, the Court will always exercise caution before granting such an injunction. Considerations of comity would cause me to pause, even if I were to conclude that the two conditions in 8 above have been met.

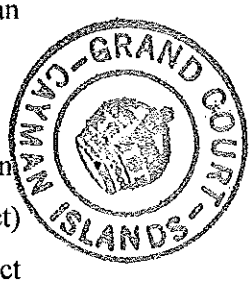
Is an injunction necessary shortly prior to trial in the circumstances of the present case? Is an injunction necessary to protect the Cayman proceedings, so close to the trial? Is an injunction necessary to protect Origami's legitimate interest in the Cayman proceedings, so close to trial?

It is in my opinion (as the assigned judge in the Grand Court) most regrettable that despite two adjournments to enable Mr Dunne to take instructions, Pursuit has refused to take the necessary steps to agree/procure the grant of a further extension of time so that Origami (and the other defendants) do not have to respond to the Complaint in the US proceedings by 4 October. If a short and appropriate extension were granted the US proceedings (which are at a very early stage) would not advance further until after the judgment in these Cayman proceedings is available.

In the agreed Case Memorandum dated 4th July 2012, Pursuit expressly confirm that: *"The Constitutional Documents, Deed of Settlement and Deed of Assignment are all governed by*

the laws of the Cayman Islands. Accordingly the laws of the Cayman Islands (including common law principles relevant to the issue) will determine whether the Russell Funds' shares were fully redeemed and the validity of the assignment."[Emphasis added].

I respectfully ask that this Judgment should be shown to the Court in Connecticut so that the judge there knows that the assigned judge in Cayman considers that a short postponement of the US proceedings would be most helpful. I refer to the correspondence between the attorneys and the exchanges in the Grand Court. I repeat that it is most regrettable that the respondent has refused to take the necessary steps to agree/procure the grant of, a further extension of time so that Origami (and the other defendants) do not have to respond to the Complaint in the US proceedings by 4 October, and until after the judgment in these Cayman is available.



But (reflecting the interests of comity and in recognition of the possibility that an injunction although directed against the respondent personally, may be regarded as an (albeit indirect) interference in the foreign proceedings), is an injunction necessary at this stage to protect Origami's legitimate interest in Cayman proceedings? In my opinion as matters stand an injunction is not necessary in the next few weeks (so close to the trial) to protect these Cayman proceedings. A distinction should be drawn between what is necessary to protect Origami's legitimate interest in these Cayman proceedings in the next few weeks, and what is necessary to protect Origami from having to spend legal fees in the United States. It is the former which has to be considered having regard to the principles stated above.

I read Pursuit's submissions set out above as a clear indication (if not an assurance) that no steps will be taken in Connecticut prior to judgment in the Cayman proceedings, with a view to preventing Origami from obtaining a considered judgment in Cayman . If my understanding proves to be wrong (and I think this is most unlikely) Origami should restore its application forthwith.

Pursuit may lose on one or both of the main issues in these proceedings (the validity of the assignment and the construction of the Settlement). Pursuit may win on both issues. I have not heard argument on these issues. I have not considered these issues. I remain entirely open minded about them. After the forthcoming trial I will be in a far better position to form an opinion on some of the detailed arguments of the parties set out above.

It is to be noted that in Star Reefers under the heading 'Comity' Rix LJ said at para [40] when allowing the appeal and refusing an injunction-

"...the English proceedings were very likely to have been completed before the Russian proceedings in any event. It was not necessary to protect the English proceedings that an anti-suit injunction be given against the foreign proceedings."

The circumstances of Star Reefers were of course not the same as those in the present case, but it is clear that the stage reached in the two sets of competing proceedings is a factor that is relevant to discretion.

I wish to add the following drawn from my own experience. In applications for anti-suit injunctions in the second category (where there is no jurisdiction or arbitration agreement) it is important for courts to tread warily because a precipitous order may prove to be counter-productive and do more harm than good.

Mr Timms QC makes a number of powerful arguments in support of the contention that the two conditions in 8 above have been met, but in the exercise of my discretion I refuse the relief sought at this stage, so close to trial, for the reasons I have given. I will adjourn the summons to the trial of this action with liberty to apply in the meantime.

I propose to reserve all questions of costs until after the conclusion of the trial.

Dated this 27th day of September 2012

Cresswell J

The Honourable Justice Cresswell
Judge of the Grand Court

GRAND COURT - CAYMAN ISLANDS