IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO. FSD 114 OF 2016 (IKJ)

TORCHLIGHT GP LIMITED

Plaintiff

-and-

(1) MILLINIUM ASSET SERVICES PTY LIMITED
(2) MILLINIUM CAPITAL MANAGERS LIMITED
(3) THOMAS JAMES WALLACE
(4) GREGORY PHILIPPE MARSHALL
(5) ACCIDENT COMPENSATION CORPORATION OF NEW ZEALAND
(6) NICHOLAS STUART BAGNALL
(7) CROWN ASSET MANAGEMENT LIMITED
(8) GARY TRAVELLER
(9) SHARON BURLEIGH

Defendants

IN OPEN COURT

Appearances:

Mr Tom Lowe QC, Ms Joanne Verbiesen and Ms Aleisha Brown of Harneys on behalf of the 5th to 9th Defendants

Mr John Wardell QC, Mr Andrew Mold, Mr Ben Hobden, Mr Erik Bodden and Mr Jordan McErlean of Conyers Dill & Pearman on behalf of the Plaintiff

Before: **The Hon. Justice Kawaley**

Heard: **21 – 22 November 2017**

Draft Judgment Circulated: **20 December 2017**[1]

Judgment Delivered: 17 January 2018

GRAND COURT · CAYMAN ISLANDS GOVERNMENT · 14/17

[1] The Judgment was circulated without a hearing in order to save time and costs.

HEADNOTE

Application to set aside ex parte order granting leave to serve 5th to 9th Defendants out of the jurisdiction-abuse of process-whether seriaus issue ta be tried-breach of partnership agreement and tortious canspiracy claims

JUDGMENT

Introductory

1. The Plaintiff is the General Partner of Torchlight Fund LP ("the Cayman Partnership"). It is the respondent in winding-up proceedings commenced against it in this Court on or about June 18, 2015 in Cause No. FSD 103 of 2015 (RMJ) (the "Petition Proceedings"). The co-petitioners in the Petition Proceedings are the 5th Defendant ("ACC"), the 7th Defendant ("CAML") and Aurora Funds Management Limited ("Aurora").

2. The 1st Defendant ("MAS") and the 2nd Defendant are Australian companies alleged to be directed and controlled by the 3rd Defendant ("Mr Wallace"). MAS is said to have engaged in a competing strategy with the Cayman Partnership in relation to the Lantern Hotel Group. The 4th Defendant ("Mr Marshall") is said to be the chief executive officer of Logic Fund Management Limited, and to be involved in advising a group of the Cayman Partnership's limited partners. It is alleged that Mr Marshall "*harbours personal animus*" towards the Plaintiff's chairman ("Mr Kerr"). The 1st to 4th Defendants are separately represented by Mourant Ozannes.

3. ACC is a New Zealand Crown entity responsible for that country's Accident Compensation scheme. The 6th Defendant ("Mr Bagnall") is ACC's chief investment officer and he is said, for the purposes of the imputation of the actions, knowledge and intentions involved in the present case, to be a directing mind of ACC. ACC and CAML are both limited partners of the Cayman Partnership. The 8th Defendant ("Mr Traveller") and the 9th Defendant ("Ms Burleigh") are said to have been at all material times the Chairman and General Manager of CAML.

4. The present proceedings were commenced against the 1st to 7th Defendants on July 26, 2016.

The present applications

5. By Summonses dated September 9, 2016 and June 26, 2017, respectively, the Plaintiff applied for, *inter alia*, leave to serve the 1st to 7th and 8th to 9th Defendants, respectively, out of the jurisdiction. The Plaintiff obtained leave to serve the Applicants abroad through two ex parte orders:

   (a) an Order made by Robin McMillan J on September 15, 2016 (1st to 7th Defendants) (the "First Ex Parte Order");

   (b) an Order made by myself on October 23, 2017 (8th to 9th Defendants) (the "Second Ex Parte Order") joining these Defendants and granting largely ancillary leave to amend the Writ and Statement of Claim.

6. The 5th to 7th Defendants applied by Summons dated November 3, 2016 to set aside the First Ex Parte Order and that application was formally listed for hearing before me. Counsel sensibly agreed that because the issues in dispute were essentially the same, I should proceed as if the 8th to 9th Defendants had filed a corresponding application in relation to the Second Ex Parte Order.

7. As the 1st to 4th Defendants abandoned their own jurisdictional challenge, the Applicants were unable to plausibly contend that Cayman was not in general terms an appropriate forum. Accordingly, the attack on both Ex Parte Orders which was pursued at the *inter partes* hearing was based on the following main grounds:

   (1) the proceedings against the Applicants were an abuse of process because:

      (a) they relied upon documents and/or information disclosed in the Petition Proceedings which were deployed in breach of the Plaintiff's implied undertaking to this Court not to use such documents (and information derived from them) for any collateral purpose, and

      (b) the proceedings, particularly as regards the individual Defendants, were first threatened while the Defendants were actual and/or potential witnesses in the Petition Proceedings;

   (2) the Amended Statement of Claim ("ASOC") did not disclose a serious issue to be tried as regards the relevant causes of action, the onus being on the Plaintiff to meet this limb of the legal requirements for obtaining leave to serve an

overseas party not otherwise subject to the personal or territorial jurisdiction of this Court.

The Amended Statement of Claim: an Overview

8. The starting point for the Plaintiff's pleaded case against ACC and Mr Bagnall is the averment (paragraph 6) that ACC became a limited partner of the Cayman Partnership in the following circumstances:

- in January 2010 ACC invested NZ$4.5 million in the 'Southbury Notes' (debt instruments in the parent of South Canterbury Finance Limited ("SCF")) and subsequently became concerned about its ability to recover its investment when SCF's parent was restructured;

- the General Partner of Torchlight Fund No 1 LP (the "NZ Partnership"), the predecessor of the Cayman Partnership, proposed a swap of ACC's Southbury Notes investment for an investment in the NZ Partnership;

- ACC invested in the NZ Partnership primarily to mitigate its loss, rather than being motivated to invest in the long term closed investment structure which the NZ Partnership actually was. This represented a departure from its standard investment mandate.

9. As far as CAML is concerned, it is averred (paragraph 7) that CAML was incorporated in 2012 to acquire and manage the assets of failed companies which the New Zealand Government had supported in the wake of the Global Financial Crisis. One of those companies was SCF which held a NZ$30 million interest in the NZ Partnership.

10. The main claim is summarised in paragraph 9 of the ASOC, and is an unlawful means conspiracy which is said to have had the following elements[2] to it as far as the Applicants are concerned:

- "***Common Aims***": replacing the General Partner of the Cayman Partnership so that ACC and CAML could achieve an early exit;

- **overt acts**: disclosing confidential information to journalists as part of a misleading media campaign, delaying the completion of the Cayman Partnership's audit, making false complaints to regulators, making ill-founded

[2] For these purposes I adopt the analysis of the Plaintiff's leading counsel in oral argument.

complaints against the Plaintiff as General Partner of the Cayman Partnership, and commencing the Petition Proceedings in furtherance of the Common Aims;

- **intention to cause harm** (paragraph 96.2): this could be inferred because if the Common Aims were achieved, the Cayman Partnership would be prevented from realising the long term benefits of its assets and the Plaintiff deprived of its fee entitlements;

- **unlawful means** (paragraph 96.3): breach of contract and/or confidence, procuring or inducing a breach of contract and/or confidence, and unlawful interference.

11. The key contractual provisions in the Cayman Limited Partnership Agreement ("LPA") which the Plaintiff relies upon include the following:

- **clause 4.7(a)**: limited partners may not get involved with management;

- **clause 4.10**: restricted early exit rights for limited partners;

- **clause 15.5(a)**: duty to protect confidentiality of information about the Partnership and not to use confidential information to the detriment of the Cayman Partnership or any Partner.

The evidence

The Plaintiff's evidence on the first ex parte application

12. The first ex parte application for leave to serve out was supported by an affidavit sworn by an associate attorney with the Plaintiff's attorneys. The basis for the present proceedings being commenced was explained by the deponent as follows:

> "*12. As a result of a detailed review of the Petitioners' disclosure in May 2016, it became clear that the Petitioners do not have a genuine bona fide belief that the General Partner has been guilty of serious misconduct as alleged but have joined forces with a view to achieving a number of disparate aims.*"

13. Based on the discovery materials obtained in the Petition Proceedings, the deponent explains the Plaintiff's case on conspiracy describing Mr Marshall and Mr Wallace as the "*prime movers*" and asserting that they approached ACC and CAML " *as early as 2013 with a view to drumming up support for a campaign against the General Partner*"

(paragraph 15). The deponent also makes reference to the June 14, 2016 "*Conspiracy Letter of Claim*" to which the Applicants' attorneys Harneys responded advising that the firm only acted for the Petitioners. The involvement of ACC is initially set out in five paragraphs over more than one page and the involvement of CAML is set out in three paragraphs over more than half a page. All that is initially said about Mr Bagnall personally is as follows:

> "*Mr Bagnall has been the head of investment at ACC since 1999. We understand that, until recently, Mr Bagnall was responsible for supervising the largest equity portfolio in New Zealand valued at about NZ$31 billion and that he regularly earns in the region of NZ$800,000 per annum, approximately two thirds of which is made up of his bonus.*"

14. When the conspiracy is particularised later in the letter, it is clearly asserted that ACC was acting through Mr Bagnall and that the claim would be relied upon both independently and by way of defence in the Petition Proceedings. Very broadly, the complaint was that unfounded criticisms had been made and published about the Plaintiff's stewardship of the Cayman partnership with a view to obtaining an early exit for ACC and CAML. More narrowly, in terms of the unlawful means element of the conspiracy, it was alleged that ACC and CAML had made their files available to MAS (who was seeking to become a limited partner of the Cayman Partnership through Aurora) "*in clear breach of the confidentiality provisions in clause 15.5(a) in the knowledge that the General Partner did not recognise MAS as a Limited Partner and that MAS was a competitor to the Cayman Partnership which had embarked on a course to wrest control of ...one of the Cayman Partnership's prize assets, namely Lantern.*" It was claimed that the conspiracy had caused losses worth in excess of AU$30 million.

15. The Conspiracy Letter of Claim made no reference to Mr Traveller or Ms Burleigh. Harneys responded dismissively on June 15, 2016 on behalf of ACC and CAML. Mr Bagnall personally responded dismissively by email dated June 16, 2016, describing the letter before action as "*an interesting work of fiction*". However, Conyers Dill and Pearman followed up by letter that same day sent to Mr Bagnall confirming that the Plaintiff's position was that Mr Bagnall was "*a party to the conspiracy*", and particularising the unlawful means complained of including "*(vii) Producing deceptive and misleading affidavit evidence in support of the Petition.*" Examples of factual inaccuracies were then set out. The letter concluded as follows:

> "*We suggest that you seek independent legal advice on the effect of your participation in the conspiracy and your personal liability for all loss suffered by our client as a result of the conspiracy.*

We await your proposals for payment of compensation. As set out in our letter of 16 June 2016, unless satisfactory proposals are received by no later than 7 July 2016, our client will look to recover these damages through court proceedings against you."

16. This prompted Mr Bagnall to reply more fully on June 22, 2016, acknowledging two factual errors in his affidavit sworn in the Petition Proceedings but protesting his innocence of involvement in any conspiracy. He concluded:

> "*From now, I think I will revert to letting the lawyers return to dealing with your threats!*"

17. This complaint of "*threats*" should perhaps be viewed against the background of the Conspiracy Letter of Claim (by way of support for the case that Mr Marshall is motivated by personal animus towards the Plaintiff's Mr Kerr) alleging that in September 2014 Mr Kerr received a death threat from Mr Marshall which was reported to the Police.

18. The Plaintiff proceeded to seek various heads of relief including service on the 5th to 7th Defendants on Harneys and a direction that they acknowledge service within 14 days. In terms of leave to serve out, the following gateways under Order 11 rule 1 were relied upon:

> "*59. With respect to ...ACC and CAML, the Conspiracy Writ comes within one of the grounds listed in GCR Order 11 r.1, namely rule 1(1) (ff), as it is a claim brought against persons who were partners of a partnership which was governed by the laws of the Islands and the subject matter of the claim relates to the Partnership...*
>
> *61....Mr Bagnall...is a necessary and proper party to the claim brought against CAML and ACC.*"

19. The bare assertion that Mr Bagnall was a "*necessary and proper party*" was not elaborated upon. However, the assertion that the documents disclosed in the Petition Proceedings demonstrated that he was a party to the conspiracy clearly supported the conclusion that he was a "*proper*" party. This assertion was not elaborated upon in the ex parte hearing before McMillan J on September 15, 2016, either in the Plaintiff's Skeleton Argument or in oral argument. However, reliance was also placed at that hearing on the fact that the conspiracy claim was founded on a tort resulting in damage being sustained within the jurisdiction (Order 11 rule 1(1) (f)). If this gateway was potentially available, the "*necessary and proper party*" position was not dispositive.

The Plaintiff's evidence in support of its second ex parte application

20. The deponent's Third Affidavit explained the basis for the application to join Mr Traveller and Ms Burleigh as follows:

> "*10. It is as a result both of the contents of the documents that CAML provided as part of CAML's late discovery and the series of admissions made by Mr Traveller and Ms Burleigh over the course of the First and May Hearing (the "**New Evidence**") that the General partner now makes this application to join Mr Traveller and Ms Burleigh as Defendants to the Conspiracy Claim. The transcripts from these hearings now form part of the public record...Each of the documents from CAML's late discovery that the General Partner is seeking to rely upon as evidence of Mr Traveller's and Ms Burleigh' s involvement in the conspiracy have been referred to in open court over the course of the First and May Hearings...*"

21. The Affidavit then sets out the "key role" played by the two CAML employees in aid of the alleged conspiracy. In relation to the application for leave to serve out, the deponent fairly discloses that after the First Hearing her firm wrote to Harneys on March 16, 2017:

(a) advising that the Plaintiff intended to add Traveller and Burleigh as Defendants to the present action; and

(b) that the claim for loss suffered from the unlawful conspiracy was estimated at least AU$200 million.

22. Harneys did not respond and so Conyers sent a second letter dated April 7, 2017 confirming that the two CAML employees would be joined. The deponent also properly disclosed that Harneys responded by letter dated April 10, 2017 stating that it would be an abuse of process to join the duo as Ms Burleigh was still giving evidence and because, *inter alia*, the Plaintiff was seeking to impugn their sworn testimony. These objections, which were somewhat differently framed to the way in which they were advanced on behalf of the Applicants in oral argument at the *inter partes* hearing, were countered in correspondence from the Plaintiff's attorneys. However, the Third Affidavit also explains that:

- in light of the Harneys April 10, 2017 letter, the Plaintiff deferred applying to join the two additional individual Defendants until after Ms Burleigh had completed her evidence; and

- all the documents relied upon for the purposes of the Conspiracy Claim had been referred to in open Court by the time the June 23, 2017 application was made.

23. In terms of the jurisdictional gateways relied upon, the two gateways were (1) Order 11 rule 1(1)(f) (tort resulting in damage within the jurisdiction), and (2) Order 11 rule 1(1)(c), the additional Defendants as co-conspirators were necessary or proper parties to the claims brought against the partners via the Order 11 rule 1(1)(ff) gateway.

The Applicants' evidence

24. The First Bagnall Affidavit was sworn on behalf of ACC and Mr Bagnall. Much of the Affidavit was directed towards supporting matters which were not relied upon at the present hearing, such as the complaints that the purpose of the present action was to prevent the due prosecution of the Petition Proceedings and that the Cayman Islands were not an appropriate forum for the trial of the action in any event. However, the deponent did also complain in paragraph 9 of a second abuse of process, namely the issuance of the present proceedings in order to:

> "*(b) intimidate and dissuade the Petitioners and certain witnesses from giving evidence in support of the Petition by subjecting them to vexatious claims.*"

25. The correspondence from the Plaintiff's attorneys threatening the present proceedings and summarised above was relied upon in support of this complaint. Mr Bagnall also vigorously denied the specific allegations advanced against him and set out in some detail his version of ACC's dealings with the Plaintiff. He then advanced the following further abuse of process complaint:

> "*119. Whilst both ACC and I maintain that these allegations are plainly without merit, it is concerning to ACC that documents discovered for the purposes of the winding-up petition have been utilised by the Cayman GP for separate proceedings that are an abuse of process and intended to discourage witnesses from giving evidence in respect of legitimate and well documented concerns in relation to the affairs of the Cayman Partnership and the conduct of the Cayman GP. The Cayman GP could not have obtained these documents outside of the discovery process.*"

26. It was not disputed at the hearing that some of the documents which were deployed for the purposes of formulating the claims against the 5th and 6th Defendants were obtained through discovery in the Petition Proceedings and that the First Ex Parte Order was obtained before those documents were referred to in those proceedings in open Court. It was also not disputed that both in June 2016 when Mr Bagnall was threatened with

being sued, and on September 15, 2016 when the First Ex Parte Order was obtained, he was a potential witness in the Petition Proceedings who had yet to give evidence in those proceedings.

27. The First Affidavit of Gary Traveller was sworn on behalf of CAML by the Chairman of its Board of Directors. It supported CAML's application to set aside the First Ex Parte Order, largely by contesting the merits of the Plaintiff's claim and on the grounds that "*these proceedings are an abuse of process, vexatious and designed to delay and frustrate the winding up-proceedings and obscure the nature of the General Partner's misconduct*".

28. As far as Mr Traveller and Ms Burleigh are concerned, it was essentially common ground that the Plaintiff's attorneys threatened to sue them before their evidence in the Petition Proceedings was complete but did not follow through on that threat until after their evidence was completed. By the time the application was made for leave to amend to join them as Defendants and to serve them abroad, the documents relied upon to formulate a claim against them (which were obtained through discovery in the Petition Proceedings) had been referred to in open Court.

29. Because the Second Ex Parte Order was only made on October 23, 2017, by the time of the hearing of the application of the 5th-7th Defendants' application to set aside service the newly joined and served 8th-9th Defendants had not yet filed their own applications to set aside service. At the beginning of the hearing, it was agreed that their applications should be dealt with in the absence of formal applications being filed on their part. An application was filed on or about December 7, 2017.

The issues to be determined

30. The main issues to be determined may be summarised as follows:

(1) as against each of the Applicants, whether the ASOC disclosed a serious issue to be tried;

(2) as regards the 5th-7th Defendants, whether leave to serve out should be set aside because the claim involved a breach of the implied undertaking that information discovered in the Petition Proceedings would not (without leave of the Court) be used to bring separate proceedings;

(3) as regards each of the Applicants, whether they were necessary or proper parties to a claim against the primary conspirators;

(4) as against each of the Applicants, whether the First and Second Ex-parte Orders should be set aside because of failure to comply with the Grand Court Rules ("GCR") in two respects (a) 14 days to

acknowledge service was ordered rather than 28 days, and (b) the supporting Affidavits were sworn by a lawyer who did not have personal knowledge of the underlying facts;

(5) as against Mr Bagnall, Mr Traveller and Ms Burleigh (the "Individual Defendants"), whether leave to serve out should be set aside because it was an abuse of process to threaten them with legal action and/or impugn their testimony while they were actual or potential witnesses in the Petition Proceedings;

(6) as against Mr Bagnall, whether the statutory immunity he was afforded as a Crown employee in New Zealand constituted a further supporting factor or freestanding ground for setting aside leave to serve him abroad.

31. From the outset the position of Mr Bagnall was unique in that each of the abuse of process complaints could plausibly be asserted in his case. He was threatened with being sued while he was not personally legally represented and was actually sued before he gave evidence in the Petition Proceedings based on information obtained through discovery in those proceedings before the relevant documents lost their privilege through being referred to in open Court. In addition he was able to assert a statutory immunity as a Crown servant under New Zealand law. As far as the other Individual Defendants were concerned, a threat was made to sue them while they were giving their evidence. However, not only was the threat not acted on until their evidence had been completed; they are unable to complain of the breach of the implied undertaking at all. ACC and CAML were merely entitled to complain of the breach of the implied undertaking, but they were already Petitioners in the Petition Proceeding. Superficially viewed and without considering the governing legal principles, any abuse of process in their case seemed less serious.

32. The Applicants in their written and oral submissions addressed the abuse of process arguments first and serious issue to be tried arguments second. I propose to deal with these two broad topics in reverse order, lastly addressing the distinct position in relation to Mr Bagnall.

Findings: does the ASOC disclose a serious issue to be tried?

Overview of the points relied upon by the Applicants

33. The following arguments were addressed in the 'Applicants' Skeleton Argument' and in oral submissions by Mr Lowe QC under the 'serious issue to be tried' banner:

(1) the Plaintiff had failed to mention or meet the double actionability requirements in respect of its tort claims;

(2) certain heads of loss should be struck out;

(3) no unlawful means were pleaded;

(4) no arguable breach of contract is pleaded and any breaches of contract could only have been committed by ACC and/or CAML, not the Individual Defendants;

(5) there was no evidence that the Individual Defendants had disclosed confidential information on behalf of ACC and/or CAML;

(6) the Individual Defendants as officers of companies and acting as their directing minds cannot, absent dishonesty, be separately liable for inducing breaches of contract;

(7) the requisite intention for a viable plea of unlawful interference was not set out.

Governing legal principles

34. It was common ground that the most recent authoritative guidance on the approach to the question of whether a claimant had established a serious issue to be tried was the Privy Council decision in *Nilon Limited-v-Royal Westminster Investments SA* [2015] UKPC 2. It was also seemingly agreed that the Court should decide at this stage whether on legal grounds the Plaintiff's claim was bound to fail save for where the areas of law concerned were developing ones. As Mr Wardell QC put it, his opponent had to demonstrate that he had a "*killer point*". In the *Nilon* case, Lord Collins described the broader jurisdictional picture as follows:

> "13. *The applicable principles relating to service out of the jurisdiction were set out, with references to the prior authorities, in AK Investment CJSC v Kyrgyz Mobil Tel Ltd [2011] UKPC 7, [2012] 1 WLR 1804, at para 71, per Lord Collins. On an application for service out of the jurisdiction, three requirements have to be satisfied. First, the claimant must satisfy the court that in relation to the foreign defendant there is a serious issue to be tried on the merits, i.e. a substantial question of fact or law, or both. Second, the claimant must satisfy the court that there is a good arguable case that the claim falls within one or more classes of case in which permission to serve out may be given. In this context "good arguable case" connotes that one side has a much better argument than the other. Third, the claimant must satisfy the court that in all the circumstances the forum which is being seised (here the BVI) is clearly or distinctly the appropriate forum for the trial of the dispute, and that in all the circumstances the court ought to exercise its discretion to permit service of the proceedings out of the jurisdiction."*

35. I do not read the Privy Council's decision as giving untrammelled encouragement to Courts to decide questions of law relating to the merits at the interlocutory stage. The

encouragement to decide questions of law was given in the specific context of "*the principles applicable to the 'necessary or proper party' head of jurisdiction*" which "*was anomalous, in that, by contrast with the other heads, it was not founded upon any territorial connection between the claim, the subject matter of the relevant action and the jurisdiction of the English courts*" (paragraph 15 (1)). It was in relation to cases dealing with this particular jurisdictional gateway that Lord Collins went on to opine:

> "*(5) If a question of law arises on the application which goes to the existence of jurisdiction, the court will normally decide it, rather than treating it as a question of whether there is a good arguable case;*
>
> *(6) The question of the merits of the claim is relevant to the question of whether the claim against D1 is 'bound to fail' and to the question whether there is a 'serious issue to be tried' in relation to the claim against D2; and there is no practical difference between the two tests, and they in turn are the same as the test for summary judgment;*
>
> *(7) In considering the merits of the claim, whether the claim against D1 is bound to fail on a question of law should be decided on the application for permission to serve D2 (or to discharge the order), but it would not normally be appropriate to decide a controversial question of law in a developing area, particularly because it is desirable that the facts should be found so that any further development of the law should be on the basis of actual and not hypothetical facts.*"

36. This may be a very nuanced point, but in my judgment this Court should be somewhat more inclined to decide whether or a not a claim is bound to fail on its merits when the jurisdictional gateway relied upon is the "necessary or proper party" gateway as opposed to a gateway which is, for the reasons articulated by Lord Collins in *Nilon*, a less intrusive one.

Governing law

37. The Applicants' Skeleton advanced the following submissions on the topic of "governing law":

> "*26. The GP's allegations of conspiracy/unlawful interference and inducing breach of contract all relate to conduct which apparently occurred overseas i.e. overwhelmingly in New Zealand as regards CAML and ACC. The Plaintiff therefore needed to satisfy the Boys v Chaplin double actionability requirement but did not mention this to the Court on the Ex Parte hearings or engage in any conflicts analysis.*

> *27. The proper law of a tortious claim is that of the country in which the most significant element or elements of the tort occurred and that cannot be the Cayman Islands in this case — it is either New Zealand or, far less probably, Australia.*
>
> *28. The law in New Zealand in relation to the tort of unlawful means conspiracy is potentially materially different from the law in the Cayman Islands as to the element of unlawfulness.*
>
> *29. The proper law of the claim is a relevant factor for consideration of the proper forum. Had this and other matters properly been put before the Honourable Justice McMillan, it is unlikely that leave to serve out would have been granted since all the witnesses are in New Zealand, the only connection to the Cayman Islands being the Cayman Partnership and GP's place of registration.*" [Emphasis added]

38. This point may well have been the residue of the *forum non conveniens* arguments which the Applicants were forced to abandon shortly before the hearing when the 1st-4th Defendants abandoned their own corresponding jurisdictional challenge. It was difficult to see how the proper law of the tort claim issue had any relevance to the merits of the Plaintiff's claims. There was the vague submission, supported by reference to *Wagner-v-Gill* [2014] NZCA 336, that New Zealand law "*is potentially materially different from the law in the Cayman Islands as to the element of unlawfulness*". Even this lukewarm submission was not supported by that authority. The need to consider whether a tort committed abroad is actionable in the *lex fori* and, if so, what law applies only in practice only arises where there are material differences between the *lex fori* and the *lex loci delicti*.

39. I reject the submission that the governing law issues described above support the conclusion that (as regards all Applicants save for Mr Bagnall) there was no serious issue to be tried on the merits of the Plaintiff's claim.

Unlawful means conspiracy

40. Mr Lowe QC invited the Court to strike out paragraphs 113.1 and 113.2 of the ASOC as they pleaded loss flowing from what he characterised as the "Primary Conspiracy" in which the 5th-9th Defendants were not alleged to be involved. In his oral response, Mr Wardell QC argued[3]:

> "*The short answer is if you join a conspiracy that has certain aims, the fact you may not share all those aims is neither here nor there. You are liable for the consequences that flow after you join…*"

[3] Transcript, day 2, page 50 lines 4-7.

41. I decline, in the exercise of my discretion, to decide in the context of a jurisdictional challenge whether or not certain heads of loss are recoverable. The point advanced is not sufficiently clear-cut to support the submission advanced. This was (in effect) that the heads of loss which are recoverable from the Applicants are so trivial that there is no serious issue to be tried.

42. I also reject the complaint that no unlawful means are pleaded in the ASOC. Paragraph 96.3 pleads:

(1) breach of contract or confidence;

(2) procuring or inducing a breach of contract or confidence;

(3) unlawful interference.

43. In the following paragraphs those acts are particularised and advanced as freestanding causes of action. As to the complaints made about the tortious conspiracy claim:

- I find that the question of whether a breach of contract qualifies as an unlawful act is, on the face of the Applicants' Skeleton (paragraph 36.2), a developing question of law which ought not to be determined at this stage;

- however, I accept the submission that, as regards ACC and CAML, if a claim for breach of contract is viable, arguably no need to rely upon tortious liability or a breach of an equitable duty of confidence arises. *Dicta* in *Digicel-v-Cable and Wireless* [2010] EWHC 774 suggest that tortious liability (whether conspiracy to inflict damage by unlawful means, interference or procuring a breach of contract) is designed to afford remedies as against third parties to contracts. This argument seems somewhat circular, though, because it appears to assumes a viable breach of contract claim while the Applicants do not concede that a sustainable breach of contract claim exists as against ACC and CAML;

- it was rightly submitted that the Defendants "*must intend to injure the claimant*". However, it does not follow that the plea that the requisite intention may be inferred from the desire to pursue the "Common Aims" is unsustainable. Lord Hoffman opined in *OBG-v-Allan and Others* [2007]UKHL 21:

"*62. Finally, there is the question of intention. In the Lumley v Gye tort, there must be an intention to procure a breach of contract. In the unlawful means tort, there must be an intention to cause loss. The ends which must have been*

intended are different. South Wales Miners' Federation v Glamorgan Coal Co Ltd [1905] AC 239 shows that one may intend to procure a breach of contract without intending to cause loss. Likewise, one may intend to cause loss without intending to procure a breach of contract. But the concept of intention is in both cases the same. In both cases it is necessary to distinguish between ends, means and consequences. One intends to cause loss even though it is the means by which one achieved the end of enriching oneself. On the other hand, one is not liable for loss which is neither a desired end nor a means of attaining it but merely a foreseeable consequence of one's actions" [emphasis added];

- whether or not the "loss or gain are inseparable", as Mr Lowe QC contended they must be, is a matter for evidence at trial. In my judgment the following pleas set out at paragraph 96 of the ASOC are sustainable:

"*96.1 The Defendants (or any combination of them) combined together in order to achieve the Common Aims;*

96.2 it should be inferred that in doing so, the Defendants intended to cause harm to the Cayman GP and the Cayman Partnership either as an end in itself or as a means to an end because, were the Common aims to be achieved, it would prevent the Cayman Partnership from realising the significant long term value of the Cayman Partnership's assets over the life of the Cayman Partnership and would deprive the Cayman GP of the fees to which it is or would be entitled."

- in my judgment it is arguably unlawful to seek to achieve an early exit from a long term investment otherwise than through the contractually agreed mechanism, as Mr Wardell QC contended.

44. In summary, I reject the submission that the unlawful means conspiracy is legally unsustainable on the face of the ASOC.

Breach of contract

45. The Applicants' Skeleton Argument (paragraphs 46-50) does not assert that the breach of contract claim pleaded is legally unsustainable. It is submitted (correctly) that only the corporate parties to the LPA can be liable for breach of contract. Next it is submitted, with reference to the case against ACC, that the Plaintiff/Respondent has adduced no evidence in the Petition Proceedings of any breach of confidence by Mr Bagnall on behalf of ACC. If right, that submission does not support a finding that the ASOC on its face did not disclose a serious issue to be tried so that the First Ex Parte Order ought

not to have been made on September 15, 2016. It also seems almost surreal for me to contemplate making findings on the sufficiency of evidence led before another judge in the Petition Proceedings before that judge has himself recorded his own findings on oral evidence led before him in the Petition Proceedings.

46. The Applicants then proceeded in their Skeleton to make what I regard as a pleading point. It is said that the Plaintiff has "*not explained why a communication from ACC to CAML is a breach of confidentiality*". This does not mean, for example, that the following plea is on its face not legally sustainable:

> "*31...The disclosure of this confidential information by Mr Bagnall to Ms Burleigh was in breach of clause 15.5(a) of the Cayman Partnership Agreement.*"

47. The additional complaint was admittedly made that the construction contended for was an uncommercial one. As far as CAML is concerned, the viability of the plea that it disclosed confidential information to MAS is also disputed on evidential grounds. The evidential grounds clearly relate to evidence disclosed and/or given in the Petition Proceedings wholly or partly after the First Ex Parte Order was made. Subsequent events are not generally admissible as grounds for setting aside an order granting leave to serve out unless they shed light on what was relevant when the leave was initially obtained: *Supreme Court Practice 1999* paragraph 11/4/16 . Either this issue will be the subject of a finding in the Petition Proceedings or can, if appropriate, form the subject of a separate strike-out application in these proceedings.

48. In oral argument Mr Lowe QC did launch a full frontal assault on the viability of the breach of contract claims against ACC and CAML in one limited respect. He contended that it was legally misconceived to impose an implied duty of confidentiality on limited partners. I find this an interesting and difficult legal argument which it is inappropriate and unnecessary to finally determine at this stage for two main reasons.

49. Firstly, and although Ms Verbiesen in reply rightly submitted that limited partnerships are a distinctive legal relationship in which traditional partnership principles do not automatically apply, the express confidentiality obligations imposed on limited partners by the LPA makes it seriously arguable that the implied duties of good faith contended for (ASOC paragraph 25). The starting assumption must be that the party to any contract is not permitted to undermine its efficacy and performance.

50. Secondly, but less importantly, one must remember that the breach of the implied term case is merely an alternative plea to the primary allegation that ACC (and CAML) breached clause 15.5(a) of the LPA (ASOC, paragraph 101.1-101.2). I place less reliance on this factor, because in my judgment the main unlawful means conspiracy

tort claim is fundamentally based on the premise that the limited partners were not entitled to subvert the contractual bargain they entered into: a long-term investment with limited but exclusive early exit options. And that premise is more dependent on the implied duties of 'loyalty' contended for than on the express confidentiality clause.

51. Mr Lowe QC in opening, however, went on to submit:

> "*In relation to the breaches of contract alleged [in]...paragraph 101.1 and 101.2, it's just worth looking at how ineffectual and ...unimportant these alleged breaches of confidence are in the context of the loss in Lantern or anything else...*"

52. Intuitively, this submission feels like it may well be sound. But in my judgment it could not justify a finding that the breach of contract claim does not disclose a serious issue to be tried. The position might perhaps be different if this were the only claim and the Court was being asked to determine whether the sole claim asserted was too trivial to justify invoking the subject-matter jurisdiction of the Court over overseas actors not subject to the territorial jurisdiction of the Court. Here, the breach of contract plea is quite overtly being used, as Mr Wardell QC explained, as support for a primary tortious conspiracy claim which has more generous attribution of loss features to it.

53. I accordingly find that the ASOC does disclose a serious issue to be tried as regards the breach of contract claim, both in its own right and as a supporting limb of the unlawful means conspiracy and inducing (or procuring) a breach of contract claims.

Inducing a breach of contract

54. The Applicants agreed that the intention element of this tort is the same as for an unlawful means conspiracy (actual intention or recklessness), so I reject any suggestion that this element of the claim is not pleaded in a legally valid manner. Of course for this tort the intention relates to breaching the contract, not to loss, as Mr Wardell QC rightly pointed out.

55. The real complaint here was that "*care must be taken in applying these principles to officers of companies. In order for the individuals to be liable...Since they were all directing minds and it is not alleged that they were acting dishonestly they cannot be separately liable for inducing breach of contract (see SCB v Pakistan Shipping Corp [2003] 1 AC 959 [36])*" (Skeleton Argument, paragraph 52). Mr Wardell QC referred me to that case and submitted that the "punchline" does not support the proposition contended for. I agree. The quoted passage appears in the speech of Lord Rodger and reads as follows:

> "*36. The incorporation of companies is vitally important for commerce since it allows transactions to be entered into and carried out, property to be held and actions to be raised by, or against, a body which continues in existence despite changes in the individuals who conduct or invest in the business. The company is a separate entity, distinct from the directors, employees and shareholders. The law has rightly insisted that the distinction should be duly observed: Lee v Lee's Air Farming Ltd [1961] AC 12. In particular the company does not act as the agent of the directors and, in general, they do not incur personal liability for the acts of the company or its employees: Rainham Chemical Works Ltd v Belvedere Fish Guano Co Ltd [1921] 2 AC 465, 488 per Lord Parmoor. Directors may, however, be personally liable if they directed or procured the commission of a wrongful act. The exact scope of this type of liability has been discussed in a line of cases. Performing Right Society Ltd v Ciryl Theatrical Syndicate Ltd [1924] 1 KB 1, 14 per Atkin LJ and C Evans & Sons Ltd v Spritebrand Ltd [1985] 1 WLR 317 may serve as examples.*" [emphasis added]

Unlawful interference

56. The Applicants complained that there was no reference to a third party and that the intention element of this tort was defectively pleaded in paragraph 111 of the ASOC:

> "*111.1 The Defendants intended to cause harm to the Cayman GP and/or the Cayman Partnership by interfering with its business interests, either as an end in itself or as a means to an end as set out in paragraph 96.2 above...*"

57. I accept the response in oral argument that the third party in question is the Cayman GP. Without prejudice to the Applicants' right to seek further and better particulars,

reject the submission that this subsidiary cause of action discloses no serious issue to be tried.

Equitable breach of confidence

58. The complaint that the breach of confidence claim (ASOC paragraph 105) is unsustainable against ACC and CAML because of the broad contractual duties relied upon was only touched upon cursorily. There is considerable circularity to this argument. If the Applicants are right that, in particular, the broad implied duties of good faith do not form part of the contractual bargain, there may well be a need for equitable relief. On its face the impugned plea is an alternative claim. I reject what appeared to me to be a half-hearted submission.

Summary

59. In summary, I am satisfied that the ASOC discloses a serious issue to be tried on the merits of at least one if not all of the asserted claims.

Findings: breach of the implied discovery undertaking (ACC and CAML)

60. The key facts can be stated shortly:

- in May 2016 the Plaintiff's attorneys carried out a detailed review of the discovery given by, *inter alia*, ACC and CAML in the Petition Proceedings;

- on June 14, 2016 the Plaintiff's attorneys sent the Conspiracy Letter of Claim to the attorneys for ACC and CAML in the Petition Proceedings;

- it was or ought to have been obvious that the threatened writ action would deploy information garnered from the discovery given by the Petitioners in the Petition Proceedings. The second paragraph of the June 14, 2016 letter stated as follows:

  "*For the avoidance of doubt, the matters set out in this letter will be relied upon by the General Partner in its defence to the Petition*";

- the attorneys for ACC and CAML did not raise the issue of the implied undertaking in their response to the Conspiracy Letter of Claim;

- in obtaining the First Ex Parte Order, the Plaintiff's attorneys did not seek leave to be released from the implied undertaking to which they were subject in the Petition Proceedings, but openly acknowledged in their supporting evidence that the discovery given in those proceedings was the basis for the formulation of the present claims.

They also disclosed to McMillan J that

(1) the attorneys for the Petitioners had been given notice of the proposed proceedings; and

(2) the said attorneys (including Harneys for ACC and CAML) had not raised any issue relating to a breach of the implied undertaking.

61. At first blush it seemed clear that the implied undertaking not to use material disclosed in one action in another action had been breached because the Plaintiff had not obtained express leave in the Petition Proceedings to use the discovery for other purposes. The Plaintiff was forced to fall back on somewhat strained arguments. Firstly, against a background of the Applicants not raising the issue when served with the Conspiracy Claim Letter, McMillan J had implicitly granted leave when making the First Ex Parte Order. A further gloss on the notice point is that Mr Wardell QC pointed out (and was not contradicted by Ms Verbiesen in reply) that before the ex parte hearing the Applicants' counsel was served with a draft of the Plaintiff's skeleton argument. It was also contended that the significance of the implied undertaking was diminished because the parties were the same and the subject-matter of the two proceedings were closely connected. Mr Lowe QC demonstrated that the latter point was misconceived by reference to *Miller-v-Scorey* [1996] 1 W.L.R 1122. In that case Rimer J struck-out a second action commenced against certain parties using information obtained from discovery given by the same parties in earlier connected proceedings. He held (at 1133 C):

> "*I do not find it necessary to decide whether I have a jurisdiction to grant the plaintiffs a retrospective leave. It may be that the court does have some such jurisdiction but, if so, it seems to me that the circumstances in which it would be proper to exercise it would be rare.*"

62. In that case granting retrospective leave would have deprived the defendants of a limitation defence to a new action. *Sybron Corpn.-v-Barclays Bank* [1984] 1 Ch. 299 at 319H-320A-B (Scott J) demonstrates that the principle even applies to the commencement of the same second action after an initial proceeding has been struck out. However, Mr Wardell QC relied on the following qualifying remarks made by Rimer J in the same judgment (at 1133F-G):

> "*I do not, however, consider that that result must inevitably follow. If, in principle, I considered it just to allow the plaintiffs to use the discovered documents for the purposes of a separate action raising the same claims as the 1995 action, then, absent any special considerations pointing in a different direction, there would in my view be much to be said for declining to strike out that action and for giving leave to the plaintiffs to make use of*

the documents for its further prosecution. Such an order would, no doubt, amount to a de facto validation of what had happened to date, although the court could perhaps reflect its disapproval of that by making the appropriate costs orders…"

63. It was contended by the Plaintiff's counsel that if the primary implied permission argument was rejected, this Court should in the exercise of its discretion grant retrospective leave. The correct approach to this issue can only be ascertained by first ascertaining the significance of the principles underpinning the implied undertaking. Mr Lowe QC was closer to the mark in his submission that those principles are important ones than was Mr Wardell QC, who surprisingly suggested that complaints that the undertaking has been breached can be breezily ignored. In the Plaintiff's Skeleton Argument the following response to the breach of undertaking complaint was advanced:

> "*33. The short point in response to this ground is that all the documents on which the Plaintiff relies for the purposes of the Conspiracy Proceedings have been referred to in open court during various hearings in the Petition Proceedings...Accordingly, any collateral undertakings which might have existed in relation to any of the documents relied upon by the Plaintiff have now ceased to apply by virtue of GCR O.24, r.22.*"

64. This submission entirely misses the pertinent point. The breach of conduct complained of is not as such a continuing one. It focusses on the date when the present proceedings were commenced and, at the latest, the date when the First Ex Parte Order was obtained (September 15, 2016). The trial of the Petition Proceedings in open Court did not start until February 2017. The practical efficacy of the implied undertaking would be seriously undermined if it could be circumvented by referring to documents in open court before an objection to their use raised in the second action was effectively heard. As Lord Roskill stated in *Home Office-v-Harman* [1983] A.C. 280 at 326 F-G:

> "*My Lords, on practical grounds, too, were the continuance or termination of the undertaking to depend upon whether or not there was a reading in open court, which as already stated may to some extent be a matter of chance, an unfortunate situation might arise with manoeuvring to ensure that particular documents were or were not read aloud, irrespective of their importance to the litigation, and some type of what might not unfairly be called forensic poker might ensue.*"

65. Admittedly, there was in England no equivalent to Order 24 rule 22 of the Grand Court Rules, but those observations are pertinent to the situation under Cayman Islands law at a stage of proceedings where that rule is not yet engaged. In any event, the rule clearly contemplates that the Court may expressly order that reference to a document in open court should not result in the automatic release being triggered:

"*22. Any undertaking, whether expressed or implied, not to use a document or transcript for any purposes other than the proceedings in which it is disclosed or made shall cease to apply to such document or transcript after it has been read to or by the Court, or referred to in open Court, unless the Court for special reasons has otherwise ordered on the application of a party or of the person to whom the document belongs or by whom the oral evidence was given.*"

66. The correct and in my experience customary practice clearly is to seek express permission from the party disclosing the documents or, alternatively, from the Court in an *inter partes* hearing in the proceedings in which disclosure occurred before deploying them in separate proceedings. Moreover, it is for the claimant to justify the release of the undertaking. A few judicial statements illustrate the broad legal position:

- "*The use of discovery involves an inroad, in the interests of achieving justice, upon the right of the individual to keep his own documents to himself; it is an inroad that calls for safeguards against abuse, and these the English legal system provides, in its own distinctive fashion, through its rules about abuse of process and contempt of court*" (Lord Diplock in *Home Office-v-Harman* [1983] A.C. 280 at 300A);

- "*The rule established by the authorities is usually expressed as a rule relating to documents and the use of the documents. The rule must however apply to protect not only the documents themselves but the contents of those documents*" (Scott J, as he then was, in *Sybron Corpn.-v-Barclays Bank* [1984] 1 Ch. 299 at 318D);

- "*...it is not for* [the parties objecting to the undertaking being released] *to advance reasons why the implied undertaking should not be released but rather for the respondents to demonstrate cogent and persuasive reasons why it should be released*" (Lord Oliver in *Crest Holmes plc-v-Marks* [1987] 1 A.C. 829 at 859G);

- "*Undertakings not to use information obtained in court in the discovery process in litigation for purposes other than those required or allowed in the litigation are implicit in the obtaining of that information. This is a settled principle of the common law...*" (Smellie CJ in *Braga-v-Equity Trust Co.* [2011 (1) CILR 402] at 89).

67. Without reference to authority on this point, in my judgment the Court should be slow to find that a judge in an ex parte hearing in a second action, not expressly invited to release the plaintiff from the implied undertaking he was subject to in another action, has implicitly granted a release. It is difficult to imagine circumstances in which a reasonable court, properly and consciously directing itself to this issue, would grant such a release on an ex parte basis, absent evidence that the defendant has given his informed consent, in any event. The implied undertaking was clearly broken when the

First Ex Parte Order was obtained. I reject the implied judicial release argument. Even in the context of a case where permission to deploy confidential documents was referred to in a skeleton argument but not addressed orally, the English Court of Appeal was unwilling to infer permission. In *IG Index Ltd-v-Cloete* [2015] ICR 254 at 270 (which concerned CPR r 31.22 and an application in the proceedings in which the confidentiality arose), Christopher Clarke LJ held:

> "*80... the court should not be treated as having given permission when, in truth, it has made no decision on the question because the need to do so was in no way apparent to it...*"

68. It remains to consider how serious the breach was and whether retrospective approval should be given for what has already occurred. It is helpful to have regard to how this discretionary power has been defined in other cases. I accept that the Court should be willing to assist parties who have good reason for seeking to deploy documents disclosed in one proceeding in another action. Some support for this proposition may be found in the judgment of Thomas LJ in *Aldi Stores Ltd-v- WSP Group plc* [2008] 1 WLR 748 (at paragraphs 27-31). Lord Oliver in *Crest Holmes plc-v-Marks* [1987] 1 A.C. 829 at 860A-B opined as follows:

> "*Your Lordships have been referred to a number of reported cases in which application has been made for the use of documents obtained under Anton Piller orders or on general discovery for the purpose of proceedings other than those in which the order was made...I do not, for my part, think that it would be helpful to review those authorities for they are no more than examples and they illustrate no general principle beyond this, that the court will not release or modify the implied undertaking given on discovery save in special circumstances and where the release or modification will not occasion injustice to the person giving discovery.*"

69. Applying that general principle to the facts of the present case and the breach of the implied undertaking in relation to the second proceedings commenced against ACC and CAML, I find that the following 'special' circumstances minimise the seriousness of the breach and justify releasing the Plaintiff from the implied undertaking to which it was subject in the Petition Proceedings:

(1) the Conspiracy Letter of Claim constituted actual or constructive written notice to the attorneys of record for ACC and CAML in the Petition Proceedings that the Plaintiff proposed to use information obtained through discovery in those proceedings to commence the present Writ action;

(2) ACC and CAML were afforded an opportunity to object to the proposed deployment of the fruits of their discovery in separate proceedings and to apply to this Court in the Petition Proceedings to enforce the implied undertaking before the present proceedings were commenced and the First Ex Parte Order was obtained;

(3) under the usual 'rules of engagement' in high level commercial litigation, and in the context of the vigorous manner in which it seems the Petition Proceedings have been contested, one would expect parties represented by sophisticated lawyers to raise any serious objections to a foreshadowed departure from the implied undertaking at the first opportunity. It was in my judgment not unreasonable for the Plaintiff's attorneys, despite their largely technical failure to expressly ask for their opponents' consent, to assume that there was no serious (as opposed to tactical) objection to the use of the discovered material in both the Petition Proceedings and the present proceedings;

(4) I find that it was reasonable in all the circumstances for the Plaintiff's attorneys, in the absence of howls of protest from their opponents upon receipt of the June 15, 2016 Conspiracy Letter of Claim (and upon being given notice of the September 15, 2016 ex parte hearing), not to seek permission to vary the implied undertaking when seeking leave to serve out from McMillan J in the present action. Any such application in relation to the implied undertaking would of course only properly be made in the Petition Proceedings, on notice to the Petitioners;

(5) although as a general rule all connected disputes should be determined in one action, it was not possible for the Plaintiff to claim damages in contract and tort in the Petition Proceedings;

(6) ACC and CAML will suffer no material prejudice if the present action is not struck out on abuse of process grounds. They would not be deprived of a limitation defence. The Plaintiff could commence a fresh action using the material discovered in the Petition Proceedings because the implied undertaking has now lapsed (Order 24 rule 22).

70. Accordingly, I find that only a technical breach of the implied undertaking occurred and that the Plaintiff has demonstrated that sufficient grounds exist for retrospectively releasing it from the undertaking to such extent as may be required. I decline to set aside the First Ex Parte Order on this abuse of process ground at the instance of ACC and CAML.

Findings: was a good arguable case that the Applicants were necessary and proper parties to the primary conspiracy made out (ACC, CAML, Mr Traveller and Ms Burleigh) ?

71. As far as ACC and CAML are concerned, a good arguable case was clearly made out that they fell within the following provisions of Order 11 rule 1(1):

"*(ff) the claim is brought against a person who is or was a director, officer or member of a company registered within the jurisdiction or who is or was a partner of a partnership, whether general or limited, which is governed by the laws of the Islands and the subject matter of the claim relates in any way to such company or partnership or to the status, rights or duties of such director, officer, member or partner in relation thereto;*..." [Emphasis added]

72. The Plaintiff also made out a good arguable case that two other gateways are available: rule 1(1) (d) (breach of the LPA, a contract governed by Cayman Islands law) and (f) (tort committed out of the jurisdiction resulting in damage within it). At the ex parte hearing before McMillan J, it appears that the "necessary or proper party" gateway was only relied upon in oral argument as being significant as regards the 1st Defendant, whose status as a partner is in dispute.

73. Because I find it impossible to discern how ACC and CAML, who are petitioning this Court to wind up the Cayman Partnership as its limited partners can possibly contend that the Plaintiff cannot access jurisdiction through Order 11 rule (1) (ff), I see no need to determine the question of whether Order 11 rule 1(1) (c) is available on the hypothesis that no other gateway is. If I was required to determine the issue summarily, I would find the availability of this jurisdictional gateway has been established.

74. In the Plaintiff's Skeleton Argument for the hearing before me at which the Second Ex Parte Order was obtained, the following submissions were made:

> "26.2 *...the claims against Mr Traveller and Ms Burleigh fall within at least the following jurisdictional gateways under Ord. 11, r.1:*
>
> *26.2.1. the claim is founded on a tort (namely, unlawful means conspiracy, procuring or inducing a breach of contract or confidence and unlawful interference) and the damage was sustained, or resulted from acts committed, within the jurisdiction because the alleged steps that have been taken pursuant to the conspiracy include issuing the Petition Proceedings, filing misleading evidence in support and causing the Plaintiff to incur costs in those proceedings in the Cayman Islands (r.1 (1) (f));*
>
> *26.2.2. further, both Mr Traveller and Ms Burleigh are necessary or proper parties to proceedings duly served within or out of the jurisdiction because they are co-tortfeasors and jointly liable with the existing Defendants who have been served and the liability of the Defendants depends upon one investigation (r.1(1)(c)).*"

75. As regards these Applicants, it is clear on the face of the Plaintiff's original submissions that the necessary or proper party gateway is only relied upon on the hypothesis that the other Defendants have been duly served. The 1st to 5th Defendants have submitted to the jurisdiction and I have found that there is a serious issue to be tried on the tort claims against Mr Traveller and Ms Burleigh. It follows that a good arguable case has

been made out under Order 11 rule 1(1) (c). The same analysis would seem to apply to the position of ACC and CAML as co-tortfeasors of the 1st-5th Defendants, all original Defendants.

Findings: whether the First and Second Ex Parte Orders should be set aside because of non-compliance with the Grand Court Rules (All Applicants save for Mr Bagnall)

Failure to allow 28 days to acknowledge service

76. Order 11 rule 1 of the Grand Court Rules provides as follows:

> *"(4) Where a writ is to be served out of the jurisdiction under paragraph (2), the time to be inserted in the writ within which the defendant served therewith must acknowledge service shall be 28 days."*

77. The Applicants complain that a breach of this rule occurred because 14 days was sought without explanation or justification when each Ex Parte Order was applied for. This was a technical breach of the Rules in that both McMillan J and myself should have been invited to consciously exercise a discretion on a factual basis to reduce the usual time under Order 3 rule 5, which provides so far as is material as follows:

> *"(1)The Court may, on such terms as it thinks just, by order extend or abridge the period within which a person is required or authorised by these Rules, or by any judgment, order or direction, to do any act in any proceedings."*

78. For my part, I assumed when making the Second Ex Parte Order and in hindsight should have sought confirmation of the position, that counsel had formed the view that the usual time period was not required. I also took comfort from the fact that 14 days was the time specified in the First Ex Parte Order, not appreciating that this point was controversial. I also failed to properly distinguish the position of Mr Traveller and Ms Burleigh from the corporate Defendant (CAML) which was already a party to the proceedings. In fact the position was that on April 10, 2017 Harneys (in response to threats to join them from Conyers) confirmed that they acted for these Defendants although they did not have instructions to accept service. This was a sufficient justification for concluding that the usual 28 day time limit could be abridged because they had lawyers who were fully up to speed on the global dispute.

79. As far as the First Ex Parte Order and ACC are concerned, Mr Wardell QC demonstrated by reference to the transcript that McMillan J was positively invited to reduce the normal time period for case management reasons. Mr Bagnall's position was of course, like Mr Traveller and Ms Burleigh, also different from that of ACC. He too ended up with the same legal representation but this does not appear to have been known when the reduced acknowledgment time was sought and obtained.

80. This appears to me to be a wholly technical complaint, unsupported by any evidence that the Applicants suffered any prejudice which could not be compensated in costs. It affords an insufficient basis for setting aside the Ex Parte Orders, only serves as a make weight abuse of process ground in featherweight terms.

Non-compliance with Order 41 rule 5(1)-(3)

81. Order 41 rule 5, paragraph (3) of which is a locally crafted rule, provides as follows:

> "***5.*** *(1) Subject to Order 14, rules 2(2) and 4(2), to Order 86, rule 2(1), to paragraph (2) of this rule and to any order made under Order 38, rule 3, an affidavit may contain only such facts as the deponent is able of his own knowledge to prove.*
>
> *(2) An affidavit sworn for the purpose of being used in interlocutory proceedings may contain statements of information or belief with the sources and grounds thereof.*
>
> *(3) An affidavit sworn by an attorney shall not be admissible in any cause or matter unless the attorney has direct personal knowledge of the facts and matters to which he deposes and does not appear as advocate in the cause or matter.*"

82. Mr Lowe QC submitted that this rule was clearly breached when the First Ex Parte Order was obtained, supported only by the Affidavit of a Conyers lawyer. In his Skeleton Argument, he asserted that paragraph (3) "*was introduced to deal with the abuse of having lawyers rather than their clients, frequently offshore, swear affidavits.*" The Plaintiff's response was twofold. Firstly, and most weakly, it was argued that the attorney had personal knowledge of the facts through her involvement in the discovery process. Secondly, and more substantively, it was argued that the evidence had now been confirmed by Russell Naylor, one of the Plaintiff's directors, a deponent who clearly did have direct personal knowledge of the facts relating to the claims. His Affidavit, referred to in the course of the hearing, was sworn on December 9, 2016.

83. In my judgment when Order 41 rule 5(1) speaks of "*only such facts as the deponent is able from his own knowledge to prove*", this does not extend to addressing the merits of contentious claims arising out of transactions which a lawyer has not personally been involved in. Rule 5(3) is clearly designed to reinforce this point by expressly limiting lawyers to deposing only as to matters of which they have "*direct personal knowledge of the facts and matters to which he deposes*". A lawyer may accordingly swear an Affidavit in support an application to enforce a discovery order because, if involved personally in the discovery process, the lawyer will likely have direct personal knowledge of whether their opponent has produced documents or not. The same lawyer, if based in Cayman or London, could not possibly have personal knowledge, direct or otherwise, of whether a man in New Zealand has entered to an unlawful means conspiracy unless that lawyer was personally involved in the relevant course of conduct. This rule is an important one because it is designed to ensure that the Court has reliable evidence before it based on the experience that lawyers receiving instructions from

clients in other jurisdictions are particularly vulnerable to being pressed to quickly file important evidence on a distant substantive witness' behalf. Left unchecked, this will mean the best available evidence is not placed before the Court and averments which clients may not be willing to swear to are indirectly verified by a legal representative.

84. Mr Lowe QC suggested that this was attributable to the heavy London representation on the legal team and a failure to take into account the distinctive Cayman Islands rule on this issue. Had Mr Naylor not filed his Affidavit, I would probably have been required to set aside the Ex Parte Orders on the grounds of an insufficiency of evidence to support the serious issue to be tried requirement for the grant of leave to serve out.

85. In my judgment, the non-compliance with the rules which occurred was sufficiently serious to justify a costs penalty, but not serious enough in the final analysis to justify setting aside the Ex Parte Orders altogether. Subject to hearing counsel, if required, I would award the Applicants their costs in relation to this issue in any event, to be taxed if not agreed[4].

Findings: was it an abuse of process to threaten Mr Traveller and Ms Burleigh with being sued while they were still witnesses?

Governing legal principles

86. The Applicants in their Skeleton argument (at paragraph 20(3)) submitted that:

> "*(i) The use of threatening language to a person who is likely to be a witness in litigation, with the likely effect of preventing that person from giving evidence is a contempt of Court (Shaw v Shaw (1861) 2 Sw & Tr 517 (17 December 1861); Borrie and Lowe: The Law of Contempt at paragraph 10.6).*
>
> *(ii) It does not matter whether the threat has any impact on the behaviour of the witness, i.e. whether in fact he or she is deterred from giving evidence, and it is sufficient if the action is inherently likely to interfere (see Re B (JA) (an infant) [1965] 2 All ER 168 at page 175. Borrie and Lowe, paragraph 10.9, citing A-G v Butterworth [1963] 1 QB 696, see page 726).*"

87. In *Shaw v Shaw* (1861) 2 Sw & Tr 517, complaint was made about verbal threats made to a witness and an abusive letter written to a witness. It was unclear whether the alleged contemnor was aware that the witness he wrote the abuse letter to would be a witness when he wrote. The holding was:

[4] If I am mistaken and Mr Naylor in fact filed a sworn Affidavit earlier than the conclusion of the hearing, I would instead award the Applicants their costs of this issue up to such earlier date and make no order as to the Plaintiff's costs on this issue thereafter.
Editorial comments on a draft of this Judgment revealed that the Naylor Affidavit was in fact filed in December 2016, not December 2017.

> *"There can be no doubt that the respondent went to Maria Dowman with the intention of intimidating her from giving evidence at the hearing, and that by his conduct he has been guilty of contempt of court. I hope that what I have said will be a warning to him to abstain from writing to, or having any communication with the petitioner's witnesses for the future…"*

88. *Attorney-General –v-Butterworth* [1963] 1 QB 696 concerned contempt of court proceedings in relation to a trade federation member being disciplined for giving evidence in a hearing. Lord Denning (MR) made the follow broad statements of principle at 719 to 720:

> *"It may be that there is no authority to be found in the books, but if this be so, all I can say is that the sooner we make one the better. For there can be no greater contempt than to intimidate a witness before he gives his evidence or to victimise him afterwards for having given it. How can we expect a witness to give his evidence freely and frankly, as he ought to do, if he is liable, as soon as the case is over, to be punished for it by those who dislike the evidence he has given? After he has honestly given his evidence, is he to be liable to be dismissed from his employment, or to be expelled from his Trade Union, or to be deprived of his office, or to be sent to Coventry, simply because of that evidence he has given? I decline to believe that the law of England permits him to be so treated. If this sort of thing could be done in a single case with impunity, the news of it would soon get round. Witnesses in other cases would be unwilling to come forward to give evidence, or if they did come forward, they would hesitate to speak the truth, for fear of the consequences. To those who say there is no authority on the point, I would say that the authority of Lord Langdale, M.R. in Litter v Thomson* [(1839) 2 Beav 129, 131] *is good enough for me: 'If witnesses are in this way deterred from coming forward in aid of legal proceedings, it will be impossible that justice can be administered. It would be better that the doors of the Courts of Justice were at once closed.' I have no hesitation in declaring that the victimisation of a witness is a contempt of Court, whether done whilst the proceedings are still pending or after they have finished. Such a contempt can be punished by the Court itself before which he has given evidence; and, so that those who think of doing such things may know where they stand, I would add that if the witness has been damnified by it, he may well have redress in a civil Court for damages.*
>
> *Whilst I agree that there is no authority directly on the point, I beg leave to say that there are many pointers to be found in the books in favour of the view I have expressed. I have already mentioned what Lord Langdale said. Next I would turn to what Kay J said in Rowden v. Universities Co-operative Association, Ltd. [71 Law Times Journal, page 373]. Patman, a servant, had made an affidavit in support of a motion against his employers. The general manager thereupon suspended him at once from his duties. A motion was made to commit the general manager for contempt. It was contended on his behalf that the dismissal of a servant could not be interfered with by the Court. The defendants, it was said, were within their legal rights. Kay J rejected this*

argument in words which are worth repeating: 'All that had to be considered in these cases was did the act complained of interfere with the course of justice; or, as here, did it interfere with the freedom of a witness's evidence?' On his part he could not conceive a grosser offence against a court of justice than to endeavor to exercise a power, legal or illegal, in order to punish a witness for giving evidence, or to intimidate a witness from giving evidence, or to induce him to pervert evidence". [Emphasis added]

89. Donovan LJ stated (at 725) that the crucial question in relation to the respondents' conduct was "*not...their state of mind on this particular point but the inherent nature of their act*". Mr Lowe QC relied upon the following application of the principles identified by Lord Denning (at page 726) where Donovan LJ concluded:

> "*I conceive the position, however, to be this. Reg v. Odhams Press Ltd., Ex parte Attorney-General makes it clear that an intention to interfere with the proper administration of justice is not an essential ingredient of the offence of contempt of Court. It is enough if the action complained of is inherently likely so to interfere...*"

90. The doctrine of contempt of court was deployed in the above cases, in my judgment, because the interference complained of did not take place as an incident of the relevant litigation itself. I have no difficulty in finding that if litigation is conducted in a manner that is likely to interfere with the administration of justice that the impugned conduct may appropriately be classified as an abuse of the process of the Court.

The character of the interference complained of

91. The following complaint was made in the Applicants' Skeleton Argument (at paragraph 20):

> "*(6) The GP adopted a similar approach more recently in relation to Mr Traveller and Ms Burleigh when it threatened to commence proceedings against them while they were still subject to cross examination in the Petition Proceedings.*
>
> *(i) The GP told the Court that it waited until Mr Traveller and Ms Burleigh completed their evidence before seeking to join them as defendants to the proceedings, so there was apparently no question of intimidation. The GP said that if it wanted to intimidate Mr Traveller and Ms Burleigh, it would have gone ahead and applied to join them as defendants in the period after the March sitting of the Petition Proceedings.*

(ii) In fact the GP threatened to commence proceedings against Mr Traveller and Ms Burleigh (on no less than three occasions between the March and May sittings in the Petition Proceedings)."

92. This conduct on its face arguably amounts to an abuse of the process of the Court but it has no sufficient connection with the present proceedings and the application to join and serve the two individual Defendants after they had completed their evidence in the present proceedings. What crucially happened was this. On April 10, 2017, Harneys wrote Conyers to, *inter alia*, complain about the threats to join the two CAML Petition witnesses as Defendants to the present action:

> "*Finally, we confirm that we also act for Mr Traveller and Ms Burleigh. We do not have instructions to accept service on behalf of either of them. Your threat to add Mr Traveller and Mrs Burleigh as defendants to the Conspiracy Claim is entirely misconceived. There is no basis upon which to allege that Mr Traveller and Ms Burleigh were complicit in any alleged unlawful means conspiracy. Given that Ms Burleigh has not completed her evidence in the Proceedings, it appears to us that your threat is merely an attempt to intimidate her from giving further evidence in the Petition Proceedings. This calculated attack on one of the Petitioners' witnesses appears to us to be contemptuous. We will bring this behaviour to the attention of the Court unless it desists immediately.*
>
> *Should you follow through with your threat, Mr Traveller and Ms Burleigh will apply to discharge any order granting leave to serve them outside the jurisdiction, including on the basis that the Conspiracy Claim is an abuse of process insofar as it seeks to impugn their sworn testimony in the Proceedings.*" [Emphasis added]

93. I was not taken to any evidence of any threats after this warning shot across the Plaintiff's bows. It is a matter of record that the Plaintiff essentially (and sensibly) held its fire and did not apply to join these two witnesses until after they had both finished their oral evidence (and until the privilege attaching to the documents disclosed in the Petition Proceedings had lapsed). In these circumstances the only question is whether the application for the Second Ex Parte Order can be said to have been abusive because it was punishing the witnesses for having given evidence against the Plaintiff. Such a framing of what occurred is inconsistent with a fair analysis of what happened, especially since I have found that there is a serious issue to be tried on the various claims against these Defendants.

Conclusion

94. I see no proper basis for finding that the Plaintiff's conduct in joining Mr Traveller and Ms Burleigh either interfered or was inherently likely to interfere with the administration of justice.

Findings: whether the First Ex Parte Order should be set aside as against Mr Bagnall

The Crown Entities Act 2004 (New Zealand) immunity point

95. Section 121 (2) of the New Zealand Crown Entities Act, which applies to ACC, provides:

> *"(2) An officer holder or employee is not liable to any person in respect of an excluded act or omission."*

96. On the Plaintiff's own case, Mr Bagnall is chief investment officer of ACC and an officer holder and/or an employee of ACC which is a Crown entity. The term "excluded act" (i.e. an act covered by the immunity) is defined by section 126 as follows: "*an act or omission by the member, office holder, or employee in good faith and in performance or intended performance of the entity's functions*". Mr Lowe QC persuasively argued, without direct reference to these provisions, that Mr Bagnall's immunity would only fall away if he was proved to have acted in breach of duties of good faith owed to ACC.

97. In the Applicants' Skeleton Argument, the following arguments were advanced:

> *"57. GCR Order 11, rule 4(2) makes clear that an application for the grant of leave under GCR Order 11, rule 1(1) 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.*
>
> *58. In Hutchinson Limited & Ors v Cititrust (Cayman Limited) & Ors [1998 CILR 43], Douglas Ag J observed at 68:*
>
> > *'It is axiomatic that [enforceability] is an essential ingredient in deciding the issue of forum conveniens. The question of what is convenient in this regard applies not only to the parties but also to the ends of justice, which cannot be served should there be any doubt regarding enforceability of the court's judgment.'*
>
> *59. In deciding that the Cayman Islands were not the proper forum for the trial in Hutchinson, Douglas Ag J relied on a number of factors but further observed at 69:*
> > *'Most important of all is the likely enforceability of this court's judgment in this matter. The plaintiffs have complained of procedural difficulties which would arise should they find it necessary to proceed in Switzerland. This is of no great significance when compared with the exercise in in futility and embarrassment to a court in the Cayman Islands should it be asked to assume jurisdiction over a matter the judgment in which is unenforceable.' (Emphasis added.)*

60. Mr Bagnall, as an employee of a New Zealand Crown entity, has immunity from civil liability under the laws of New Zealand. Any judgment obtained against him in these proceedings will be unenforceable in New Zealand, rendering these proceedings an embarrassment to the Cayman Islands.

(1) Mr Bagnall is ACC's Chief Investment Officer, having been employed by ACC since 1993. Mr Bagnall has responsibility for ACC's Reserves portfolio and personally manages investments valued at approximately NZ$1.2 billion in total. Mr Bagnall has confirmed that in all his dealings with the GP and Cayman Partnership (as well as the NZ GP and NZ Fund), he has acted for and on behalf of ACC as its employee.
(2) He has also confirmed that his actions were, at all times, done in the performance of, or with the intention of performing, ACC's statutory functions and in good faith. Mr Bagnall has had no dealings with the GP or Cayman Partnership outside of his employment and no personal interest in the investment which is the subject of the Conspiracy Claim.
(3) Mr Bagnall has immunity from civil liability under the laws of New Zealand. Mr Bagnall's immunity is a complete defence to enforcement of a foreign judgment against him. In the circumstances outlined in paragraph (1), any judgment against him in these proceedings would be unenforceable in New Zealand. Accordingly, the case against Mr Bagnall is not a proper one for service out of the jurisdiction: It would be embarrassing to the jurisdiction if these proceedings were allowed to continue against him.

61. Moreover, the failure of the GP to bring the existence of the statutory immunity to the attention of the Court when seeking leave to serve out is a material non-disclosure."

98. This submission was, in cricketing terms, an unplayable delivery which Mr Wardell QC was only able to make flailing attempts to fend off:

> *"My Lord, almost the final point. Complaint is made about Mr Bagnall's immunity but my learned friend accepted that immunity does not apply in bad faith and he also accepted, although the formal label is not used in the pleading, that a conspiracy plea is effectively a plea that someone has acted in bad faith. This is purely a pleading point..."*[5]

99. This submission ignored the inconvenient truth that there is a fundamental distinction between bad faith on the part of ACC and its duties to the Cayman Partnership and bad faith in the sense of Mr Bagnall acting inconsistently with ACC's interests. Ms Verbiesen in reply illustrated the sort of conduct which would deprive Mr Bagnall of his immunity under the 2002 Act with the following colourful, but insightful, example:

[5] Transcript, day 2, page 87 lines 9-15.

"*As an example of when it would not apply is if Mr Bagnall took a couple of million dollars from the ACC fund and, you know, went to Macau and put it all on black.*"[6]

100. Far from being merely a pleading point, the immunity point infects various levels of the Plaintiff's jurisdictional case against Mr Bagnall:

(1) it is a significant freestanding jurisdictional point which it makes it doubtful whether Cayman is the appropriate forum because any judgment may not be enforceable against Mr Bagnall in New Zealand: *Hutchinson Limited & Ors v Cititrust (Cayman Limited) & Ors* [1998 CILR 43];

(2) the spectre of an unenforceable judgment indirectly weakens the grounds for finding that there is a serious issue to be tried on the merits. A meritorious case assumes one which will result in an enforceable judgment, particularly in the context of assuming jurisdiction over a foreign party not subject to the territorial jurisdiction of this Court;

(3) to the extent that the Plaintiff seeks to establish in the present action that Mr Bagnall has breached his duties to ACC, the immunity point raises issue of comity which make it is doubtful whether the Cayman Islands is an appropriate jurisdiction to determine sensitive issues of public policy relating to a foreign State;

(4) it serves to fortify the strength of the abuse of process arguments on the breach of the implied undertaking ground. Because (notwithstanding the fact that a fresh application could be made to join Mr Bagnall using the discovery material which has lost its privilege), it is the sort of point which might have been teased out in an *inter partes* hearing in the Petition Proceedings for permission to use the discovery in a fresh action against an individual who was not already a party to those proceedings. It may have resulted in the Plaintiff deciding that there was no point in joining Mr Bagnall at all.

101. The immunity point does not in my judgment impact materially on the findings made in relation to ACC above on the question of whether a good arguable case has been made out for obtaining leave to serve Mr Bagnall overseas in respect of the tort claims.

Is there a serious a serious issue to be tried as regards Mr Bagnall?

102. Ignoring the Crown immunity point, there is a serious issue to be tried against Mr Bagnall for essentially the same reasons as there is against ACC as far as the tortious

[6] Transcript, day 2 page 136 lines 8-11.

claims are concerned. However, the Crown immunity point dulls the lustre of the Plaintiff's case on this issue considerably. Because whereas none of the other Applicants can credibly challenge the appropriateness of the present forum, this residual discretionary consideration is engaged in Mr Bagnall's case.

How serious an abuse of process was the breach of the implied undertaking in Mr Bagnall's case?

103. In my judgment the breach of the implied undertaking by deploying the discovery in the Petition Proceedings to found a case against the Applicants was to a material (but not great) extent more serious in the case of Mr Bagnall. This is because the Conspiracy Letter of Claim was addressed to him personally as an individual who was a witness but not a represented party in the Petition Proceedings. He responded personally to this correspondence, although of course he clearly elected not to seek immediate legal advice. Not only was there no basis for the Plaintiff to expect that Mr Bagnall (unlike ACC and CAML, who were fully engaged and 'lawyered up') would immediately raise objections about the Plaintiff breaching its implied undertaking in the Petition Proceeding. In his personal capacity, he was not a party to the Petition Proceedings and had no or no clear standing to release the Plaintiff from its undertaking. Harneys, receiving the Conspiracy Letter of Claim on behalf of their clients ACC and CAML, may not even have initially been informed by Mr Bagnall that he had received his own letter.

104. Absent actual notice to Harneys (acting in circumstances where it had held itself out as acting on behalf of Mr Bagnall) on behalf of Mr Bagnall that proceedings were being contemplated against Mr Bagnall, in my judgment it was not reasonable for the Plaintiff's attorneys to assume that no objections were being raised to the proposed deployment of information garnered through ACC's discovery against Mr Bagnall in the present proceedings. An express request for consent or an application to the Court was properly required.

105. The timeline is as follows:

- **June 16, 2016**: Conspiracy Letter of Claim sent directly to Mr Bagnall by Conyers. He responds dismissively by email of the same date;
- **June 22, 2016**: Conyers follow up directly with Mr Bagnall. He responds on the same date concluding: "*From now, I think I will revert to letting the lawyers returning to deal with your threats!*"

- **June 29, 2016**: rather than querying who are "the lawyers" Mr Bagnall referred to in his last email, Conyers follow with him directly again;

- **July 1, 2016**: Mr Bagnall responds robustly, concluding his email in stereotypically blunt Antipodean style: "*Go on, sue me*";

- **July 13, 2016**: Conyers write Harneys querying whether they have been instructed by any other parties in respect of the threatened claim;

- **July 26, 2016**: the Plaintiff commences the present proceedings and follows up with Harneys as to who (in addition to ACC and CAML) they represent;

- **August 3, 2016**: Conyers ask Henry Davis York if they have instructions to accept service on behalf of ACC, CAML and Mr Bagnall;

- **September 9, 2016**: Henry Davis York confirm they have been instructed to respond to Conyers previous correspondence on behalf of ACC, CAML and Mr Bagnall, not to accept service, and reserve their clients' rights.

106. This was a 'cat and mouse' game over service with no regard being had to the perhaps less than obvious nuances of the enhanced significance of the need for express consent for a release from the implied undertaking in relation to a claim against a third party not legally represented. It was in my judgment more than a trivial abuse of process to breach the implied undertaking by commencing proceedings against a mere witness in the Petition Proceedings without obtaining the express consent of ACC, his employer, or the express prior approval of the Court. That is particularly the case because if objections had been raised by ACC and an *inter partes* application for the undertaking to be released had been made by the Plaintiff, it is entirely plausible that the Crown immunity point would have been raised and the release refused in Mr Bagnall's case. It might not have been feasible to join Mr Bagnall at all because the privilege would only have fallen away at the trial of the Petition.

107. Although this point was not fully developed in argument, it is self-evident that Mr Bagnall has suffered more than trivial prejudice as a result of the fact that the present proceedings were commenced and the First Ex Parte Order was obtained based on information obtained and deployed in breach of the implied undertaking to which the Plaintiff was subject in the Petition Proceedings.

Failure to comply with the Grand Court Rules

108. I reject the abuse of process complaint in relation to Order 1 rule 1(1) (4) for the same reasons as set out above in relation to the other Applicants. The non-compliance with Order 41 rule 5 is, for the same reasons stated above, not sufficiently serious in and of itself to justify setting aside the First Ex Parte Order. It does support this outcome when combined with the other grounds which have been made out on behalf of Mr Bagnall.

How serious was the interference with Mr Bagnall as a witness?

109. Having regard to the legal principles set out above, and the fact that Conyers corresponded directly with Mr Bagnall and threatened to sue him when he had given written evidence but before he had given his oral evidence in the Petition Proceedings, I find that this constituted an abuse of process. Mr Bagnall's robust response to the threats suggests that he was no wilting flower. Clearly he was not intimidated in the sense that he was deterred from giving oral evidence. Clearly there was no intent to threaten him in a legally impermissible manner; the delivery mechanism was a lawyer's letter. Nonetheless I find it impossible to view what occurred as anything other than inherently likely to interfere with the administration of justice. This was, viewed in isolation perhaps somewhat marginally, an abuse of process. One which by itself would not justify setting aside the First Ex Parte Order, but which does in combination with the other grounds which have been made out on behalf of Mr Bagnall.

Does the Crown immunity point make Cayman an inappropriate forum?

110. I have some anxiety that this point may not have been fully addressed by the Plaintiff, but Mr Wardell QC displayed little appetite for fully grappling with it. On balance, I am satisfied that this can only be because there is no cogent answer to it. For the reasons set out above, the fact that Mr Bagnall is quite clearly entitled to immunity under New Zealand law unless he breaches his duties of good faith to ACC raises serious questions as to:

(1) whether it is appropriate for this Court to determine questions of New Zealand public policy; alternatively,

(2) whether any judgment would be enforceable against Mr Bagnall in New Zealand. As has been held before by this Court, it is undesirable for jurisdiction to be assumed in the face of such doubts.

111. Not only were these important matters not raised before McMillan J. The Plaintiffs have failed to satisfy me that Cayman is an appropriate forum for the present claims against Mr Bagnall to be pursued.

Conclusion

112. I find that the First Ex Parte Order should be set aside against Mr Bagnall on the grounds of :

(a) abuse of process (breach of the implied undertaking, non-compliance with Order 41 rule 5 and interference with him as a witness); and

(b) the fact that he is entitled to Crown immunity and the Plaintiff has failed to establish that this Court should in all the circumstances assume jurisdiction over the relevant claims.

113. As regards him, it is difficult to see why costs should not follow the event.

Summary

114. For the above reasons, the Applicants' Summonses to set aside the First and Second Ex Parte Orders are dismissed, save as regards Mr Bagnall, whose application succeeds. I will hear counsel if required as to costs and the terms of the final Order.

IAN RC KAWALEY
JUDGE OF THE GRAND COURT