IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

Cause No: FSD 22 of 2018 (IMJ)

BETWEEN

(1) GEORGE ALLEN COWAN
(2) GEORGE ALLEN COWAN (ON BEHALF OF EQUIS SPECIAL L.P. (PREVIOUSLY KNOWN AS EQUIS ASIA FUND SPECIAL L.P.))

Plaintiffs

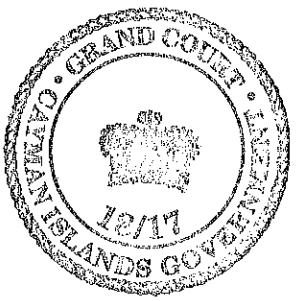
AND

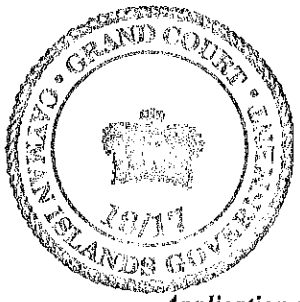
(1) EQUIS SPECIAL LP (PREVIOUSLY KNOWN AS EQUIS ASIA FUND SPECIAL L.P.) ACTING BY ITS GENERAL PARTNER EQUIS SPECIAL G.P.)
(2) EQUIS SPECIAL G.P. (PREVIOUSLY KNOWN AS EQUIS ASIA FUND SPECIAL G.P. IN ITS CAPACITY AS GENERAL PARTNER OF EQUIS SPECIAL L.P.)
(3) DAVID CHARLES RUSSELL
(4) ADAM BERNHARD BALLIN
(5) LANCE MICHAEL COMES
(6) JOSEPH THOMAS CARMODY
(7) RAJPAL SINGH CHAUDHARY
(8) TONY GIBSON
(9) EQUIS DEVELOPMENT LIMITED

Defendants

CHAMBERS

Appearances:	Mr. Stephen Atherton QC instructed by Mr. Brett Basdeo and Mr. Nicholas Dunne of Walkers for the Plaintiffs/Respondents to the Application. Mr. Michael Green QC instructed by Mr. James Eldridge and Mr. Adrian Davey of Maples and Calder for the First and Second Defendants/ Applicants.
Present:	Mr. Jordan McErlean of Conyers, Dill & Pearman, watching proceedings on behalf of the Sixth Defendant
Before:	**The Hon. Justice Ingrid Mangatal**
Heard:	**11 September 2019**
Draft Ruling Circulated:	**30 September 2019**
Ruling Delivered:	**3 October 2019**





HEADNOTE

Application to Amend Defence - Principles Applicable - Application not made at a late stage of the proceedings - Whether Withdrawal of Admission - Whether any difference in principle between withdrawal or amendment re withdrawal of admission of liability or any other amendment

RULING

Introduction

1. The application before me is an application by the First and Second Defendants, Equis Special L.P. and Equis Special G.P. (respectively "**Special LP**" and "**Special GP**") (collectively the "**Applicants**") to re-amend their Amended Defence in terms attached to the Summons filed on 23 May 2019, as amended on 4 September 2019, marked "A".

2. The application is opposed by the Plaintiffs.

3. On the 26 and 27 March 2019, the Third to Ninth Defendants (inclusive) applied to set aside the permission to serve the Re-Amended Claim out of the jurisdiction which I had granted on an *ex parte* application on 24 September 2018. The application to set aside was made on the grounds that, amongst other things, there was material non-disclosure by the Plaintiffs at the *ex parte* hearing for permission to serve those Defendants out of the jurisdiction, and on the basis that the newly pleaded fraud claim of approximately US$350 million in relation to Japan Solar LP disclosed no serious issue to be tried. My Ruling in relation to those applications is being delivered simultaneously with the instant application.

4. The proposed re-amendments to the Amended Defence concern principally the original claim that was being pursued by the First Plaintiff, Mr. Cowan. The claim was originally essentially a contractual claim and is based on a question of construction of the Limited Partnership Agreement ("**LPA**") as amended and restated on 20 June 2013 in relation to Special LP. Mr Cowan's claim depends on whether he is a "*Good Retired Partner*" under the LPA. Special LP and Special GP say that, based upon certain recent discoveries of serious wrongdoing by Mr. Cowan and breaches of his employment agreement, they wish to re-amend their Amended Defence to plead that Mr. Cowan is a "*Bad Retired Partner*"

under the LPA and not entitled to recover anything in respect of his "*Carry Proportion*", carry proportion being effectively the allocation of profit share to a retired partner.

5. It was submitted by Mr. Green QC on behalf of the Applicants, that there can be no relevant prejudice suffered by the Plaintiffs from such an amendment, particularly at this early stage. He further asserts that this is not an application on which the underlying claims of the parties can be heard or for there to be a mini-trial of the issues in dispute. It is simply an application seeking leave to re-amend the Amended Defence at a preliminary stage of the proceedings.

Background to this application

The Executive Agreement

6. Mr. Cowan was employed by a company within the Equis Group; Equis (Hong Kong) Limited ("**Equis HK**"). Originally that employment was thought by the Applicants to be pursuant to an executive agreement dated 5 December 2011, but it has since been discovered that the more recent and operative executive agreement was actually dated 5 March 2012 (the "**Executive Agreement**"). Both executive agreements are in the same terms so far as relevant to these proceedings, and it is common ground that those are the relevant terms of Mr. Cowan's employment by Equis HK. It is agreed that the Executive Agreement is governed by the laws of Hong Kong.

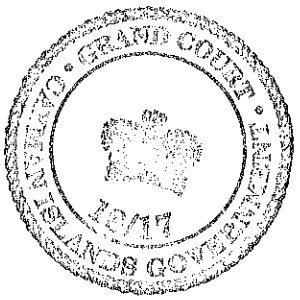
7. Clause 6 of the Executive Agreement provides for the termination of Mr. Cowan's employment. By Clause 6(b)(ii), Equis HK can terminate the employment for "*Cause*" and there is listed a number of such bases including for "*fraud, theft, misappropriation of property, embezzlement or breach of trust*"; materially breaching the material obligations under the Executive Agreement; "*materially failed to exercise a reasonable level of skill and efficiency in performing its duties or responsibilities*"; "*engaged in conduct that injures the general reputation of Equis or any portfolio company of an Equis Fund*". Alternatively, under Clause 6(b)(iii) Equis HK could terminate "*for any reason whatsoever, upon 30 days written notice to* [Mr. Cowan]".

8. There were definitions of a "*Good Leaver*" and a "*Bad Leaver*" under the Executive Agreement as follows:

> *"Bad Leaver" means, in respect of an executive, the occurrence of any circumstance which does not constitute a Good Leaver.*
>
> *"Good Leaver" is where Executive permanently retires from the private equity industry or dies or suffers (other than as a result of an abuse of alcohol or recreational drugs) poor health or disability which materially inhibits Executive from fulfilling his duties or any other event agreed by the Equis Board.*

9. Schedule 2 of the LPA deals with "*Joiners and Leavers*" from the partnership. By Schedule 2 of the LPA there were the following definitions:

"Bad Retired Partner	*a Founding Partner who ceases to be an Eligible Person... and is not a Good Retired Partner*
Eligible Person	*an employee or director of Equis Funds Group Pte Ltd, the General Partner or any Associate*
Good Retired Partner	*Any Founding Partner....who ceases to be an Eligible Person by reason of:* *(i) permanently retiring from the private equity industry following the end of the Investment Period;* *(ii) death or suffering (other than as a result of an abuse of alcohol or recreational drugs);* *(iii) Poor health or a disability which materially inhibits that limited partner from fulfilling his or her duties* *(iii) termination without cause and in such case, such Founding Partner shall remain a Good Leaver [sic] where the Founding Partner....subsequently becomes*



	an employee, adviser or consultant to a Direct Competitor; *(iv) the Founding Partner or its Related Person terminating its employment with Equis Funds Group Pte Ltd for cause with regard to the actions of Equis Funds Group Pte Ltd and in such case, such Founding Partner shall remain a Good Leaver where the Founding Partner or its Related Person subsequently becomes an employee, adviser or consultant to a Direct Competitor; and* *(v) such other reason as the Compensation Committee may from time to time determine.*
Termination for Cause	*has the meaning set out in paragraph 9 of this Schedule 2."*

10. Clause 5 of Schedule 2 deals with "Good Retired Partners" and states as follows (underlining added by Counsel):

> *"5.1 If a Founding Partner <u>becomes a Good Retired Partner</u>, the General Partner will determine and notify the Good Retired Partner whether:*
>
> *(a) The Good Retired Partner will retain its Vested Carry Proportion, subject to the lock up and transfer restrictions contained in this Agreement, or*
>
> *(b) The Good Retired Partner will sell at Fair Value its Vested Carry Proportion in one or more transactions back to the General Partner or any other Founding Partners identified by the General Partner to the Good Retired Partner.*
>
> *5.2 The Vested Carry Proportion of such Good Retired Partner shall not be reduced except <u>if such Founding Partner subsequently becomes a Bad Retired Partner</u> provided that: (i) a Founding Partner who becomes a Good Retired Partner as a result of its, or*

its Related Person, ceasing to be an Eligible Person as a result of termination without cause; or as a result of the Founding Partner or its Related Person terminating its employment with Equis Funds Group Pte Ltd for cause with regard to the actions of Equis Funds Group Pte Ltd shall not have their vested interests reduced."

11. Clause 6 of Schedule 2 deals with "Bad Retired Partners" as follows (underlining added by Counsel):

"6.1 If a Founding Partner <u>becomes a Bad Retired Partner</u>:

(a) The Carry Proportion of such Bad Retired Partner shall immediately be reduced to 50 per cent of the Vested Carry Proportion where the Compensation Committee, acting reasonably, determines that the Founding Partner is a Bad Retired Partner as a result of the Founding Partner and/or its related Person becoming an indirect Competitor; or

(b) In all other cases, the Carry Proportion of such Bad Retired Partner shall immediately be reduced to zero."

12. Special LP and Special GP say in their proposed re-amendments to the Amended Defence that Mr. Cowan has subsequently become a "*Bad Retired Partner*" and under Clause 6.1 (b) his "*Carry Proportion*" should be reduced to zero.

13. In the Applicants' written skeleton argument dated 5 September 2019, Special LP and Special GP refer to the fact that Clauses 5 and 6 refer to the consequences of a retired Founding Partner who *"becomes a Good Retired Partner"* or *"becomes a Bad Retired Partner"*. It was argued that this indicates that an original designation is not necessarily decisive and that circumstances can change post-termination so that a retired partner can become a "*Bad Retired Partner*". Further, that Clause 5.2 refers to a Founding Partner who *"subsequently becomes a Bad Retired Partner"*, and therefore clearly contemplates a situation where that person's status has had to be changed.

14. Mr. Green QC points out that a *"Bad Retired Partner"* is defined negatively as someone who is not a *"Good Retired Partner"*. He submits that a *" Good Retired Partner"* is, relevantly either a person who ceases to be an *" Eligible Person"* by reason of *"termination without cause"* or *"such other reason as the Compensation Committee may from time to time determine"*. This language leads Mr. Green QC to posit that the Compensation Committee therefore has a discretion to determine a person's status.

15. Whilst there is no definition of *"Termination without cause"* in the LPA, there is a definition of *"Termination for cause"* in section 9 of Schedule 2. It was submitted that this must be the obverse of *"termination without cause"*. It was averred that Clause 9 includes a number of matters which Mr. Cowan is alleged to be guilty of, as follows:

> *"(a) any serious act or omission which brings or is likely to bring the General Partner or any Associate into disrepute;*
>
> *(b) any fraudulent or materially dishonest act or omission committed against the General Partner or any Associate or investor or client or customer(current or potential);*
>
> *(c) disclosing or misusing any confidential information relating to the General Partner or any Associate or Investor or client or customer to any outside third party except where so authorised to do;*
>
> .....
>
> *(f) negligence, incompetence or dereliction of duty; and*
>
> *(g) any other act pursuant to which the General Partner or any Associate would be entitled to summarily dismiss the Eligible Person under such person's employment agreement, service agreement or similar* [sic]. *"*

16. The Applicants assert that a reasonable interpretation of Schedule 2 of the LPA is that if Special GP comes to the conclusion that Mr. Cowan should have his employment terminated for cause within the meaning of Clause 9 then he is not a *"Good Retired Partner"* and can be re-designated as such. It was argued that it must be the case, that if, for example, it was discovered some time after a Founding Partner had retired that he had been misappropriating assets of the partnership, the remaining partners could re-designate him as a *" Bad Retired Partner"*. It was submitted that (paragraph 41 of the Applicants'

skeleton argument) *"The position is entirely analogous with Mr. Cowan in respect of whom* [Special GP] *is perfectly within its rights to rely on the fact that his employment could- and would- have been terminated for cause and thereby re-designate him as a " Bad Retired Partner".*

The Termination Letter

17. By a letter dated 29 September 2017 from Equis HK to Mr. Cowan, his employment was terminated with effect from 29 October 2017 (the "**Termination Letter**"). The Termination Letter was written pursuant to Clause 6 (b)(iii) of the Executive Agreement and gave Mr. Cowan 30 days' notice of termination. Under the heading "*Carry and GP Co-Investment*", the Termination Letter said this (underlining by Counsel):

> *"We consider that there are grounds for termination for cause pursuant to clause 6(b)(ii)(F) of the Executive Agreement but have opted to treat you as a "Good Leaver" and "Good Retired Partner" ("**Good Leaver**") pursuant to the terms of the Executive Agreement and EAF Special ARLPA subject to our reserving the right to treat you as a "Bad Leaver" or "Bad Retired Partner" ("**Bad Leaver**") in our sole discretion."*

18. After explaining Mr. Cowan's continuing obligations of confidentiality, non-solicitation and non-disparagement, the Termination Letter concluded:

> *"Any breach of the Executive Agreement, including but not limited to any breach of confidentiality or should you defame or disparage Equis or Equis Persons, will be seen as a cause event pursuant to the Executive Agreement and your status will be amended from Good Leaver to Bad Leaver and you will lose any and all entitlement to your 5% Carried Interest in that regard."*

19. It was submitted that Mr. Cowan could be in no doubt that Equis HK was reserving its position in case it had reasons subsequently to change him from being a "*Good Leaver*" to a "*Bad Leaver*". The Termination Letter also reserved Special GP's right to re-designate those reservations. Mr. Green QC refers to those reservations as being significant, because precisely that which was envisaged in the Termination Letter and which is implicitly envisaged in the Executive Agreement and LPA has now happened, namely the need to re-designate Mr. Cowan to the status of "*Bad Leaver*" and "*Bad Retired Partner*".

The Parties' Statements of Case

20. Mr. Cowan served his Amended Writ and Statement of Claim on 23 February 2018 (the "**Statement of Claim**") He was the only Plaintiff at that stage and was claiming in his personal capacity in respect of certain benefits that he alleged he had been wrongly deprived of under the LPA. In paragraphs 38 – 44 of the Statement of Claim, Mr. Cowan referred to and relied upon the Executive Agreement, the LPA and the Termination Letter and said that he is a "*Good Retired Partner*" with the consequences that followed from that under the LPA.

21. Mr. Cowan's claim was re-amended on 24 September 2018 (the "**Re-Amended Statement of Claim**"). This was the occasion when Mr. Cowan added the Second Plaintiff (purporting to sue derivatively on behalf of Special LP), joined the Third to Ninth Defendants and raised for the first time the US$350 million Japan Solar claim based on alleged fraud and conspiracy.

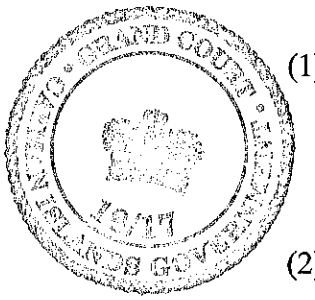
22. On 7 December 2018, Special LP and Special GP filed their Amended Defence in response to the Re-Amended Statement of Claim. That Amended Defence admitted that Mr. Cowan had been designated a "*Good Retired Partner*" by the Termination Letter although it referred to the fact that the Termination Letter contained the express reservation of rights in such respect and also pleaded that different consequences flowed by a proper interpretation of the LPA. The Amended Defence also pointed out that Mr. Cowan was relying on the Executive Agreement without recognising that it was subject to Hong Kong law and that Equis HK was not even a party to the proceedings.

23. No further pleadings by any party have been filed. Mr. Green QC asserted that, with the judgment outstanding on the service out question, the proceedings are still in a very preliminary stage, with pleadings not being closed yet and matters such as disclosure and witness statements a long way off. No trial date has been set or been discussed. It was submitted that this cannot be considered, on any view, to be a late application to amend.

The Re-Designation to a Bad Retired Partner

Discovery of Misconduct

24. In his Third Affirmation, Mr. Tony Gibson, General Counsel and Head of Risk and Compliance and Corporate Secretariat of Equis Pte Ltd., (the Eighth Defendant), has given evidence as to the investigation that he instigated after Mr. Cowan had left. This included a forensic search of Mr. Cowan's laptops by an independent third-party consultant, Mr James Tan of Infinity Risk Control Pte Ltd. These investigations allegedly brought to light the following:



(1) Mr Cowan engaged in numerous sexually explicit conversations with unknown third parties on his laptop owned by Equis HK, including soliciting and sending vulgar pornographic content and soliciting sexual services from those third parties;

(2) Mr. Cowan stole two hard drives owned by Equis HK containing confidential information relating to the business of the Equis Group; he has since refused to hand these hard drives over;

(3) Mr. Cowan disclosed confidential information relating to the business, listing strategy and internal administration of Equis HK to third parties;

(4) Mr. Cowan has made numerous disparaging remarks to investors in funds managed and or/advised by Equis Pte Ltd and other third parties relating to these proceedings, with the intention of damaging the reputation, standing and goodwill of the Equis Group.

(5) Mr. Cowan was guilty of gross incompetence and underperformance throughout the duration of his employment with Equis HK on projects that he was charged with managing; an example is failing to ensure that necessary licences and permits were in place in relation to numerous investments made in China which could have potentially exposed the Equis Group to very serious regulatory penalties and/or civil liabilities and significant detriment.

25. Mr. Cowan has denied these allegations and said that they are irrelevant and only put forward for prejudicial reasons. Mr. Green QC emphasises that this is not the occasion for a mini-trial of the allegations; he submits that this Court has only to decide if Special LP and Special GP should be allowed to make these allegations. He countered Mr. Cowan's

assertion that these allegations are put forward for purely prejudicial reasons and that they are not relevant; their relevance is that they form the basis for and justify the decision to re-designate Mr. Cowan as a "*Bad Retired Partner*".

Inter Partes Correspondence

26. After the results of the investigation were considered in January 2019, Equis HK's Hong Kong counsel, Haldanes, notified Mr. Cowan by letter dated 14 February 2019 that Equis HK was exercising its right to reverse Mr. Cowan's status as a "*Good Leaver*" and that thereafter he would be treated as a "*Bad Leaver*" under the Executive Agreement. The Haldanes letter referred to the grounds set out above as the basis for changing Mr. Cowan to "*Bad Leaver*" status.

27. Mr. Cowan responded to this letter by email sent on 19 February 2019. In that email, Mr. Cowan denied most of the allegations and accused Equis HK of intimidation and harassment. Haldanes responded to this by letter dated 14 March 2019 in which they referred to the Forensics Investigation Analysis Report dated 12 February 2019 as supporting the allegations made in their 14 February 2019 letter. They said:

> "*We are aware that you were once designated a "Good Leaver" albeit on a "without prejudice" basis. However, in light of the new evidence discovered after your termination – evidence which you concealed before and after that event – your leaver status has been changed accordingly.*"

28. By letter dated 1 March 2019 from Special LP and Special GP's legal representatives in these proceedings, Maples and Calder ("Maples") to the Plaintiff's legal representatives Walkers, Maples referred to Haldanes' letter of 14 February and notified them that Mr. Cowan was being re-designated as a "*Bad Retired Partner*" under the LPA. Maples sent with the letter a draft Re-Amended Defence reflecting the change in Mr. Cowan's status and seeking the consent of the Plaintiffs to the amendments.

29. Walkers responded to Maples' letter by letter dated 7 March 2019. On behalf of their clients, Walkers said that they would not be consenting to the amendments for a number of reasons including that they had been made in "*bad faith*" and they did not raise a "*triable issue with reasonable prospects of success*". They also asserted that the allegations

contained in the Haldanes' letter of 14 February "*would naturally have to be resolved as a matter of Hong Kong employment law in Hong Kong*" and any re-designation under the Executive Agreement would have "*to be decided by a tribunal in Hong Kong in the normal way.*"

30. Special LP and Special GP say that, in accordance with Walkers' invitation to do so, Equis HK has begun proceedings in Hong Kong to have Mr. Cowan declared a "*Bad Leaver*" under the Executive Agreement. These proceedings were issued on 30 August 2019 in the High Court in Hong Kong as described in the First Affidavit of Aline Mooney sworn on the same date. I should point out that the Plaintiffs, through Counsel, deny that they issued any invitation to have proceedings brought in Hong Kong. Equally of note is that the Applicants, also through Counsel, deny any intention to cause delay to these proceedings, and indicated they have no intention of seeking a stay pending the outcome of the Hong Kong proceedings.

The Proposed Re-Amendments

31. It was submitted that the proposed re-amendments are straightforward and should be uncontroversial, particularly at this stage of the proceedings. In answer to the Plaintiff's averments in paragraphs 38 – 44 of the Re-Amended Statement of Claim that Mr. Cowan is a "*Good Retired Partner*" and thereby entitled to rely on Clause 5 of Schedule 2 of the LPA, Special LP and Special GP deny this and aver that Mr. Cowan has now been designated a "*Bad Retired Partner*" under the LPA and therefore is subject to Clause 6, rather than Clause 5, of Schedule 2 to the LPA.

32. Paragraphs 10.3 and 10.4 of the proposed re-amendments explain that the Termination Letter expressly reserved Equis HK's right to treat Mr. Cowan as a "*Bad Leaver*" or "*Bad Retired Partner*" and that Equis HK had, in the light of information since discovered as to Mr. Cowan's conduct, re-designated him as a "*Bad Leaver*" under the Executive Agreement. Paragraph 10.5 avers that Mr. Cowan is now designated as a "*Bad Retired Partner*" under the LPA and goes on to set out the details of the findings of the investigation and forensic search of Mr. Cowan's laptop with the allegations that follow as detailed above.

33. Paragraphs 10.6 to 10.8 of the proposed amendments are denials of paragraphs 42 – 45 of the Re-Amended Statement of Claim and follow as a consequence of the re-designation of Mr. Cowan as "*Bad Retired Partner*", in particular his "*Carry Proportion*" is said to thereby be reduced to zero.

34. Mr. Green QC opined that it is baffling that such straightforward amendments at this stage of the proceedings should be objected to by the Plaintiffs. He submits that this can only be because the Plaintiffs know that if the allegations are correct, not only is Mr. Cowan's case for his Carry Proportion under the LPA hopeless but all the other claims by the Plaintiffs are also bound to fail. This is because, if Mr. Cowan has no tangible interest in Special LP as a result of being a "*Bad Retired Partner*" and is not entitled to any share of profits, he can have no proper interest in pursuing the derivative proceedings on behalf of Special LP and should not be allowed to proceed with those claims. The argument of the Applicants is that this is not a good reason for opposing the proposed re-amendments.

Legal Principles on Applications to Amend

35. The application to amend is made under ***Grand Court Rules*** ("***GCR***") Order 20 Rule 5(1) which has the same wording as in the pre-CPR Rules of the Supreme Court of England and Wales as follows:

> "*Subject to Order 15, rules 6, 7 and 8 and the following provisions of this rule, the Court may at any stage of the proceedings allow the plaintiff to amend his writ, or any party to amend his pleading, on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct.*"

36. It was submitted that this discretion is obviously subject to the Overriding Objective in particular the requirement to deal with the case justly and proportionately.

37. Learned Counsel submits that the Cayman Islands has retained the long-standing practice in relation to applications to amend, namely that such applications will be allowed if the amendments can be made without causing prejudice to the other side beyond that which can be compensated in costs. He argued that the Cayman Islands has specifically not followed the more stringent approach that has been adopted in England and Wales, in

particular concerning late or very late applications – such as ***Swain-Mason and others v Miller and Reeve LLP*** [2011] 1 WLR 2735, as explained in ***Quah Su-Ling v Goldman Sachs International*** [2015] EWHC 759 and ***Nesbit Law Group LLP v Acasta European Insurance Co Ltd*** [2018] EWCA Civ 268 where the "*heavy onus*" test has been established. In any event, it was pointed out that these amendments are neither "*late*" nor "*very late*".

38. Reference was made to ***Lemos v CIBC Bank and Trust Company (Cayman) Limited***, where Smellie CJ referred to the post-CPR in England cases but specifically upheld earlier Cayman Islands Court of Appeal decision in ***Swiss Bank and Trust Corp Ltd v Lorgulescu*** as representing the current practice.

39. In relation to the merits of proposed amendments, Smellie CJ in ***Lemos***, which concerned a new alternative claim, said that leave would only be refused if the amendment "*would be unjust, doomed to fail or otherwise improper*".

40. It was submitted that therefore, unless the Plaintiffs can show that the amendments are "*doomed to fail*" or that they are prejudiced by the amendments in a way that cannot be compensated for in costs, the amendments should be allowed.

The Submissions on behalf of the Plaintiffs in relation to the Substance of the Application

41. The Plaintiffs say that Special LP and Special GP previously accepted and admitted (both prior to and in the course of the present proceedings) that Mr. Cowan was to be, and was designated as a "*Good Leaver*" (as defined under the terms of his contract of employment – the Executive Agreement, dated as of 5 December 2011) and a "*Good Retired Partner*" (as defined under the terms of the LPA). By the proposed substantive re-amendments to the Defence, (paragraphs 10.4, 10.5 and 10.8 of the draft Re-Amended Defence), Mr. Atherton QC on behalf of the Plaintiffs asserts, that Special LP and Special GP now seek to withdraw those admissions and have the proceedings continue on the basis that Mr. Cowan should now be designated as a "*Bad Leaver*" under the Executive Agreement and as a "*Bad Retired Partner*" under the LPA.

42. Reference was made to Special LP and Special GP having acknowledged and accepted that both prior to the commencement of these proceedings (in correspondence with Mr Cowan at the time of him leaving the Equis Group), and subsequent to the commencement of these proceedings (in both the Defence and the Amended Defence), that Mr. Cowan was a "*Good Leaver*" and a "*Good Retired Partner*". It was submitted that the effect of this was that it was further accepted and admitted by Special LP and Special GP that upon Mr. Cowan leaving the Equis Group he was entitled to receive a distribution in respect of his proportionate share in the profits from Special LP (his "*Vested Carry Portion*") - see Clause 1.1 and Schedules 2 and 10 of the LPA. Although there was and is a dispute as to the nature and extent of this interest and consequently the amount duly payable to Mr. Cowan.

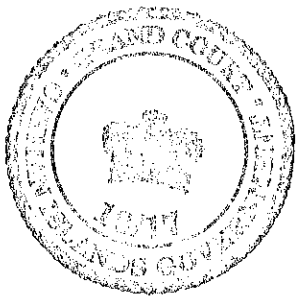
43. Learned Counsel submits that the effect of the proposed re-amendments previously made and referred to above is that the accepted premise upon which these proceedings were commenced on 19 February 2018 and have, to date, been pursued, namely that Mr. Cowan was and is entitled to a distribution of his profit share from the Equis Group, has been resiled from by Special LP and Special GP who now deny that Mr. Cowan has any entitlement to a distribution of profits from the Equis Group (see paragraphs 9.2(c) and 9.2A of the draft Re-Amended Defence), in the sense that any entitlement to a profit share should be valued at or reduced to zero (pursuant to Clause 6.1(b) of Schedule 2 to the LPA).

44. As I understand the Plaintiffs' oral arguments, it is being argued that apparently there is some link in the minds of Special LP and Special GP that designation under the Executive Agreement has a connection with designation under the LPA. As I understood the arguments of the Applicants, it is accepted that there could be issues under the LPA that may be slightly different to those under the Executive Agreement.

45. Mr. Atherton QC emphasizes that the LPA has its own provisions for dealing with "*Termination for Cause*", and that the Haldanes letter only deals with the Executive Agreement. Mr. Atherton QC also referred to the Termination Letter, and submitted that it all depends upon whether Equis HK is an "*Associate*" within the meaning of the LPA.

Mr. Cowan's Position

46. In the written skeleton arguments, Mr. Cowan's position is stated to be that the application should be dismissed and the proposed amendments disallowed on the basis that:



1. The proposed re-amendments are inadequately pleaded and particularised and not supported by evidence;

2. The proposed re-amendments involve the withdrawal of an admission made pre-action (nearly 2 years ago) and repeated in both the Defence and the Amended Defence. In the circumstances and by reference to relevant procedural principles, the withdrawal of the admission ought not to be permitted.

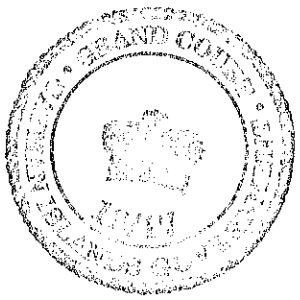
3. The amendments do not give rise to a case that can be said to have real, as opposed to fanciful, prospects of success;

4. The Court cannot be satisfied that the proposed re-amendments are being put forward in good faith and not for some ancillary purpose; and

5. If the proposed re-amendments are allowed, Mr. Cowan will suffer real prejudice. By contrast, if the proposed re-amendments are not allowed, no prejudice will be suffered by Special LP and Special GP.

47. In relation to the second point, Mr. Atherton QC relies upon the decision in ***Bird v Birds Eye Wall*** (1987), The Times, 24 July, a decision of the English Court of Appeal. A more extensive quotation from the judgment of Ralph Gibson L.J. is to be found in ***Gale v Superdrug Stores Plc*** [1996] 1 WLR 1089. In allowing an appeal from the Judge's decision to allow the defendants to retract a long-standing admission, Ralph Gibson L.J. discussed the matter as follows:

> *"...when a defendant has made an admission the court should relieve him of it and permit him to withdraw it or amend it if in all the circumstances it is just so to do having regard to the interests of both sides and to the extent to which either side may be injured by the change in front... This was a formal admission made after a fully pleaded case in every respect. There had been ample time to investigate the matter. The consequence of the admission was to stop the plaintiffs completing their investigations at a time which, as Mr. Methuen has pointed out, was somewhat delayed from December 1982 to a date in the late summer of 1984, but nevertheless much closer to the relevant*



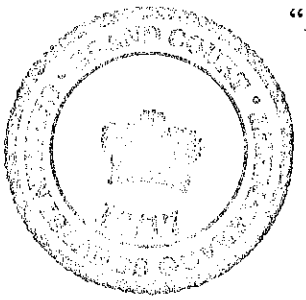
events than would be possible after the period which followed the admission of liability. It seems to me there plainly was some risk of damage to the plaintiffs' cases. They had to start investigating after considerable delay. They had to see what sort of documents they got on the delayed discovery and start looking for any relevant witnesses whose evidence would appear to be useful and relevant after the investigation had been carried out. Those were the matters which I think should have been before the court on 31 July. There would inevitably be further delay if leave was given: delay required by the investigation, exchange of reports etc. Into that balance must be taken the disappointment of plaintiffs who have for a substantial period of time supposed that the only issue in the case was the proper compensation for them to receive for the injuries which they say they have suffered and the fact that they would inevitably be kept out of that compensation for a further period of time. Asked to give leave in those circumstances, as it seems to me, the court must look to the explanation which the applicant offers for wishing to change his position.....

.....If a mistake has been made the court would in my view tend to the view that the victim of the error must be relieved if the other side can be properly protected. If some new evidence has been discovered which puts a different complexion on the case, that is in the nature of mistaken assessment of the case. For my part I would be anxious to assist a party who has made an honest error and not hold that party to a liability which, if the error had not been made, he would not have been under. The only explanation tendered in this case, as we are told, is that there has been a decision in November 1984 made by insurers on economic grounds that they would not fight these cases, i.e. the amount which they might expect to have to pay was such that it was not worth incurring the costs of fighting the issue of liability and having it decided by the court. It was said that that decision had been made without the knowledge of the parent company of these defendants, Unilever, and that in July, shortly before the hearing date, it was discovered that the admission had been made and there was a decision to depart from it. Speaking for myself, having regard to all the other factors, I cannot regard that as a sufficient explanation which would justify the grant of leave. The making of an admission, with the consequences that follow from it when it is allowed to lie as long as this did, are such that for my part I would look for a better explanation than that before granting leave, having regard to the actual and potential injury to the plaintiffs which would follow from it."

48. Mr. Atherton QC also referred to the decision of the English Court of Appeal in ***Gale v Superdrug Stores Plc.*** [1996] 1 WLR 1089, and relied in particular on the judgment of Thorpe LJ though dissenting. That case, like the ***Birds Eye*** case, was also concerned with how the court should approach the issue of a defendant withdrawing or amending an admission.

DISCUSSION AND ANALYSIS

49. In ***Lemos***, which was an authority referred to by the Applicants, the learned Chief Justice discussed the approach to be followed regarding amendments to pleadings as follows:



> *"15. In **Lorgulescu,** the Court of Appeal approved the following dictum from Brett MR delivered more than a century ago in **Clarapede & Co v Commercial Union Assu** (1884) 32 WR 202 and later approved by Lord Griffiths speaking on behalf of the House of Lords in **Kitteman v Hansel Properties Ltd** [1988] All ER 38)*
>
> > *"However negligent or careless may have been the first omission and however late the proposed amendment, the amendment should be allowed if it can be made without prejudice to the other side. There is no injustice if the other side can be compensated by costs."*
>
> *16. In my view this dictum still represents good practice, despite the change in emphasis in the more recent case law, I describe the change as one of emphasis because the more recent case law emphasizes the need for pro-active judicial case management to ensure the timely dispensation of justice, while not purporting to detract from the importance of doing justice in each particular case. And so, where the more recent case law cited above speaks of "heavy onus" resting upon an applicant seeking leave to amend (here pursuant to Grand Court Rules Order 20 rule 5), the primary question must still be – however late in the day the application may be – whether or not injustice or prejudice will result from leave to amend being granted. As Lord Griffiths declared in **Kitteman** above:*
>
> > *"Whether an amendment should be granted is a matter for the discretion of the trial judge and he should be guided in the exercise of the discretion by the assessment of where justice lies.""*
>
> (My emphasis)

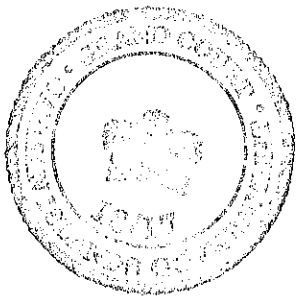
50. In relation to the merits of proposed amendments, Smellie CJ in ***Lemos***, which concerned a new alternative claim, said that leave would only be refused if the amendment "*would be unjust, doomed to fail or otherwise improper*". In ***Lorgulescu***, Georges JA also placed a low threshold on an applicant for leave to amend in relation to the merits. Referring to ***Lawrance v Lord Norreys*** (1887) 39 Ch D 213, he said as follows:

> "*Lawrance v Lord Norreys does establish that an amendment will be refused and a statement of claim will be struck out if the cause of action which they seek to raise is vexatious and an abuse of the process of the court. Bowen LJ emphasized that it is a power which should be exercised with care*:
>
> > *"I quite agree that this power ought to be exercised with the very greatest of care, that it is not for the Court on a motion of this kind to discuss the probabilities of the case which is going to be made, except so far as to see whether the case stands outside the region of probability altogether, and becomes vexatious because it is impossible. In the present case it seems to me that the history of the allegations points unmistakably in one direction.*"
>
> (My emphasis)

51. As regards the issue of withdrawing or amending a pleading in relation to an admission, in ***Gale v Superdrug Stores*** allowing the appeal from the judge's decision striking out a defence, the majority, (Waite and Millett L.J.J.s), held that the judge had interpreted the observations of Ralph Gibson L.J in ***Birds Eye*** incorrectly.

52. At page 1096 F-1098 D, Waite L.J. discusses the matter in this way:

> "(1096F-1097 B)
>
> ***The argument***
>
> *Both sides agree that the test mentioned by Ralph Gibson L.J. in Bird v Birds Eye Walls Ltd [1987] CA Transcript 766 that:*
>
> *"when a defendant has made an admission the court should relieve him of it and permit him to withdraw or amend it if in all the circumstances it is*



just to do so having regard to the interests of both sides and to the extent to which either side may be injured by the change in front"

is the correct test, but there is disagreement as to how it is to be applied.

Mr. Soole for the plaintiff fastens upon the attention devoted by Ralph Gibson L.J. in the ***Birds Eye*** *case to the sufficiency of the excuse advanced by the party seeking to resile. That, he submits, is the starting point for application of the test, and if no sufficient excuse is established it is also the finishing point. ....That, he submits, was the approach rightly followed by the judge in this case. The judge's finding that "the explanation given in this case is really a very weak one" was conclusive and, although he referred to other matters as well, provided sufficient justification on its own for the exercise of his discretion in the way that he chose.*

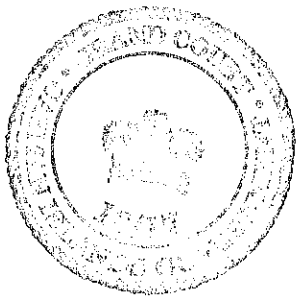
Mr. Vineall for the defendants says that the discretion is not to be so constrained. Explanation or excuse are, he accepts, relevant, but can never be conclusive. What the discretion requires is that the judge should conduct a weighing exercise, carefully balancing the prejudice suffered by the defendant if he is deprived of his prima facie right to resile from his admission against any prejudice which the plaintiff stands to suffer if admission is withdrawn. In that appraisal it is not enough for the court to presume prejudice: it must be established specifically and affirmatively.

.....

(1097 F-1098A)

Conclusion

I would reject Mr. Soole's preliminary submission. There are certainly instances where, as a preliminary to the exercise of discretion, the court will insist upon a satisfactory explanation. One such case is where a plaintiff is seeking an extension of time for service after the validity of the proceedings has expired: see Ward-Lee v. Linehan [1993] 1 W.L.R.754. But those are instances where a party has been in breach of some rule or direction and needs to make his peace first with the court. A party withdrawing an admission is to be regarded in a more favourable light. Excuse (or lack of it) is not entitled, in my judgment, to any particular emphasis: it is just part of the overall picture and will carry no more weight than the particular circumstances require.



I prefer Mr. Vineall's submission that the discretion is a general one in which all the circumstances have to be taken into account, and a balance struck between the prejudice suffered by each side if the admission is allowed to be withdrawn (or made to stand as the case may be). Although the judge reached his conclusions in the course of a full and careful judgment, Mr. Vineall's criticisms of the judge's approach to the exercise of his discretion are also, in my judgment, well founded. The judge had no evidence before him of any specific matter which rendered it more difficult for the plaintiff to prosecute a claim in liability than it would have been if the admission had never been made.

.....

(1098C-E)

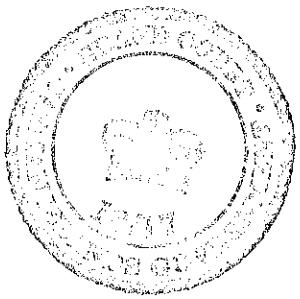
The right order for the judge to have made in a proper exercise of his discretion would, in my judgment, have been to grant the defendants leave to resile from the admission. In saying that, I do not wish to minimise the distress suffered by the plaintiff. She had every reason to be gravely disappointed. Litigation is, however, a field in which disappointments are likely to occur in the nature of the process, and it cannot be fairly be conducted if undue regard is paid to the feelings of the protagonists. That does not mean that the late retraction of an admission is something that the courts should encourage. But what it does mean is that a party resisting the retraction of an admission must produce clear and cogent evidence of prejudice before the court can be persuaded to restrain the privilege which every litigant enjoys of freedom to change his mind.

I would allow the appeal and discharge the orders for the striking out of the defence that were made below."

(My emphasis)

53. Millett L.J, having pointed out that the general principles governing the court's approach to an application to amend pleadings is to be found in the oft-cited passage from ***Cropper v Smith*** (1884) 26 Ch. D. 700, 710-711, further discussed the matter as follows at page 1099C-1100 G:

"(1099 C-1099H)



There numerous other authorities to the same effect. In Clarapede & Co. v. Commercial Union Association (1883) 32 W.R. 262, 263 Sir Baliol Brett M.R. said:

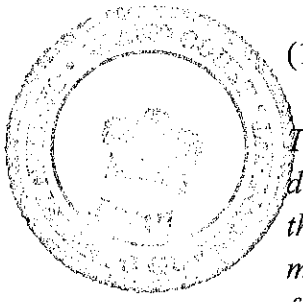
"However negligent or careless may have been the first omission, and, however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs; ..."

I do not believe that these principles can be brushed aside on the ground that they were laid down a century ago or that they fail to recognize the exigencies of the modern civil system. On the contrary, I believe that they represent a fundamental assessment of the functions of a court of justice which has a universal and timeless validity.

In my judgment the same principles apply whether or not the amendment involves the withdrawal of an admission previously made in the pleadings. The position of a defendant who belatedly seeks to raise a new defence cannot sensibly be distinguished from that of a defendant who seeks to withdraw an earlier admission. Each is seeking to raise an issue which cannot be raised without amendment; the amendment will almost invariably cause some delay and expense; and it must come as a disappointment to the plaintiff who did not expect to have to litigate the issue now raised for the first time. Nor is the position of a defendant who pleads a defence which is inconsistent with an admission made before action brought materially different from that of a defendant who seeks to withdraw an admission made in the pleadings. If anything, his position should be easier, since his change of stance is signaled at an earlier stage of the litigation, and is less likely to waste time or costs. Accordingly, I respectfully agree with the observations of Ralph Gibson L.J. in Bird v Birds Eye Walls Ltd., The Times, 24 July [1987] CA Transcript, where he indicated that a defendant should be relieved of an admission and allowed to withdraw it or amend it "if in all the circumstances of the case it is just to do so having regard to the interests of both sides and to the extent to which either side may be injured by the change in front."

In conformity with the approach of the court towards applications to amend the pleadings where no withdrawal of an admission is involved, I consider that the court should ordinarily allow an admission to be withdrawn if it can be done without injustice to the other party and if no question of bad faith or overreaching is involved.

.....



(1100E-G)

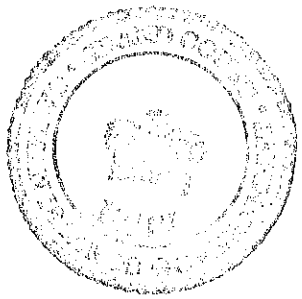
The present is a very different case. The admission was made by the defendants' insurers. When their solicitors came on the scene, they advised that liability should be contested. The admission should never have been made; the defendants have a strongly arguable defence; they wish to put it forward; they are acting in good faith; there is no question of strategic maneuvering. It would be a serious injustice to them if they were precluded from disputing liability. They have taken all necessary steps to prevent their change of front from causing any prejudice to the plaintiff.

Of course, the unexpected nature of the defence must have been disappointing to the plaintiff; but I cannot think that this should count for anything. The sounder the defence sought to be raised by amendment, the greater the disappointment to the plaintiff if it is allowed and the greater the disappointment to the defendant if it is not. What the court must strive to avoid is injustice, not disappointment.

In my judgment this was a very clear case. The defence was a proper one with a real prospect of success and the judge was plainly wrong to strike it out." (My emphasis)

54. In his dissenting judgment, upon which Mr. Atherton QC relies, Thorpe LJ had this to say at page 1101H-1102 C:

> *"Although his judgment was given some weeks before the issue of the Lord Chief Justice's practice direction calling for much firmer judicial control of civil litigation (see Practice Direction (Civil Litigation: Case Management) [1995] 1 W.L.R. 508), it certainly reflects the message of the direction. The civil justice system is under stress and far-reaching reforms are in prospect. There is a public interest in excluding from the system unnecessary litigation and a consequent need to curb strategic maneuvering. Here the plaintiff presented the defendants insurers with the choice of an admission of liability or service of writ. The defendants' insurers, presumably advisedly, chose to admit liability. That admission was the foundation of over two years of continuing search for a compromise on quantum. As Mr. Soole submitted, had the plaintiff insisted upon obtaining a consent judgment on the issue of liability before embarking on that protracted negotiation the defendants would have protested that it was*



a proposal to incur costs to no purpose. I share Judge Wroath's opinion that against that background the defendants explanation for resiling from their admission was "really a very weak one."

Although I accept the force of Waite LJ's criticisms and although I recognise that this was a robust conclusion in the absence of any specific evidence of prejudice, I ultimately conclude that this was a decision to which the judge was entitled to come in the exercise of discretion and in furtherance of a more disciplinary approach to adversarial maneuvering which the public interest now requires. I would dismiss this appeal."

55. In my judgment, the allegations in the proposed re-amendments to the Amended Defence are sufficiently particularised. The Plaintiffs can be in no doubt what Special LP and Special GP are alleging in the proposed re-amendments and the core allegations are set out. Although Mr. Atherton QC sought to make the point that the pre-condition for why or how Mr. Cowan could be re-designated, is not pleaded, in my judgment the Applicants are not required to plead evidence and to set out the provisions of the LPA which the Applicants say implicitly allows for the re-designation.

56. As regards the submission that the proposed re-amendments involve the withdrawal of an admission pre-action made nearly two years ago, I note that Special LP and Special GP make the point that the position taken by them previously that Mr. Cowan was a *"Good Retired Partner"*, was not really an admission in the sense in which that is discussed in the cases. It was simply an admission that at the time of termination, and up to the time that they discovered his wrongdoing, they had opted to treat Mr. Cowan as a "*Good Retired Partner*". It was submitted that it was not seriously in dispute that the LPA allowed for a re-characterization of Mr. Cowan if at a later stage there was discovery of serious misconduct on his part. In my view, that submission is sound. It is important to note that this is not a question of a defendant purporting to change its position by going back in time to alter its then stance as to circumstances then obtaining. What the Applicants are proposing to do is to currently re-characterize Mr. Cowan's status based upon both discovery subsequent to his termination in relation to his past actions, as well as his actions subsequent to the termination. The evidence and correspondence suggest that the investigation into Mr. Cowan's conduct were initiated not long after the termination.

57. In my judgment, that does mean that the facts and circumstances of this case are distinguishable from those in the ***Birds Eye*** case, or in ***Gale v Superdrug Stores*** and therefore the application in the instant case does not fall within the general or usual meaning of withdrawal of, or amendment of, an admission, whether of liability or otherwise, discussed in those cases.

58. However, in any event, I note that in ***Gale v Superdrug*** Millett LJ referred with approval to the ***Clarapede*** case, the same case that Smellie CJ referred to in ***Lemos***, with approval, going so far as to say that the principles therein discussed represent a fundamental assessment of the functions of a court of justice *"which has a universal and timeless validity"*. Further, it was Millett LJ's view that the same principles apply whether or not the amendment involves the withdrawal of an admission previously made in pleadings. He also opined that neither is the position of a defendant who pleads a defence which is inconsistent with an admission made before action materially different from that of a defendant who seeks to withdraw an admission made in the pleadings.

59. It seems to me that the views of the majority, even in a case to do with withdrawal of an admission, are consistent with the views of Smellie CJ in relation to amendments generally, sought at a late stage or not. In my judgment, the approach of Thorpe LJ is not consonant with the approach to amendment taken in this jurisdiction.

60. In any event, the explanation in Mr. Gibson's affidavit as to the investigation that ensued and its results, and the discovery of other actions allegedly taken by Mr. Cowan after his employment at Equis HK was terminated, does offer an explanation as to why Mr. Cowan's designation was changed, and this needs to be put in the balance along with other considerations.

61. In my judgment, there is no question of bad faith involved, particularly given what was stated in the Termination Letter, that Equis HK considered that there were good grounds for terminating Mr. Cowan's employment for cause, but had opted to treat Mr. Cowan as a "*Good Leaver*" and "*Good Retired Partner*", however, expressly reserving the right to treat Mr. Cowan as a "*Bad Leaver*" or a "*Bad Retired Partner*" in their sole discretion.

Further, in relation to the Termination Letter, Mr. Cowan expressly agreed he would have continuing obligations.

62. The Plaintiffs referred to the Termination Letter, and sought to raise an issue as to whether Equis HK is an Associate, within the meaning of the LPA. I accept Mr. Green QC's submission that it is odd that Mr. Cowan wishes to rely upon the letter designating him as a "*Good Retired Partner*" as being binding, and him being an eligible person, yet sought to raise a query as to whether Equis HK is an Associate. In Schedule 2 to the LPA, dealing with *"Joiners and Leavers"*, *"Eligible Person"* is defined as *"an employee or director of Equis Funds Group Pte Ltd, the General Partner or any Associate"*. The words of the definition of *"Associate"* in the LPA are a bit confusing, but plainly Mr. Cowan regards himself as having been an employee of an Associate and therefore an "*eligible person*". *"Associate"* means *"in relation to any undertaking ("U"), a parent undertaking of U, a subsidiary undertaking of U, a subsidiary undertaking of a parent undertaking of U or a parent undertaking of a subsidiary undertaking of U"*.

63. In my judgment, the proposed re-amendments to the Amended Defence raise defences with a real prospect of success. These proposed re-amendments do not raise a defence that can be described, as Smellie CJ put it in ***Lemos***, as being "*unjust*", "*doomed to fail*", or otherwise "*improper*".

64. In those circumstances, in accordance with the guidance in the authorities, even if what the Applicants now want to plead is a withdrawal of an admission, which I do not consider it to be, the court should ordinarily allow such an amendment if it can be done without injustice to the other party. As stated by Waite L.J. in ***Gale v Superdrug Stores***, in a case where a party resists a retraction of an admission, they must produce clear and cogent evidence of prejudice before the court can be persuaded to restrain the privilege that every litigant has to change his mind, much less in this case, where the right to do so was expressly reserved.

65. In my judgment, the Plaintiffs have not produced such evidence. There is no evidence of prejudice to the Plaintiffs which cannot adequately be compensated in costs. The fact that Mr. Cowan's case as filed was launched on the basis that he was entitled to benefits arising

under the LPA by virtue of his leaving the Equis Group as a "*Good Retired Partner*" under the LPA, is not in the circumstances of this case evidence of, or a true manifestation of prejudice. This is because, to Mr. Cowan's knowledge, there were rights expressly reserved by the Termination Letter, and he had continuing obligations, and he was aware of the rights to re-designate implicit in the terms of the LPA.

66. On the other hand, the Applicants will in my view suffer serious injustice if they are not allowed to amend their case to raise this defence that has real prospects of success. There is no proper basis upon which I could conclude that this is a case of strategic maneuvering.

67. Mr. Cowan will no doubt be extremely disappointed. However, as both Waite LJ and Millett LJ expounded, disappointments are liable to occur during the course of the litigation process. Indeed, as Millett LJ aptly put it:

> *"What the court must strive to avoid is injustice, not disappointment."*

68. Of course, one of the most important considerations in this case in relation to this application is that it cannot be said that this application is being made at a very late, or even late stage in the proceedings. The pleadings are not closed, and indeed, the Plaintiffs' case has also changed shape significantly since the Writ of Summons was first filed on behalf of Mr. Cowan as the sole Plaintiff on 19 February 2018.

69. In my judgment, dealing with this case justly, and proportionately, favours the Court exercising its discretion and case management powers to grant the application set out at paragraph 1 of the Summons dated 23 May 2019, as amended on 4 September 2019. The Re-Amended Defence set out at Tab 8 of the Core Bundle, is to be filed and served within 14 days of the delivery of this Ruling.

70. I will hear from the parties as to costs.

THE HON. JUSTICE INGRID MANGATAL
JUDGE OF THE GRAND COURT