IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

FSD NO: 316 OF 2021 (RPJ)

BETWEEN

KEITH HARRELL

PLAINTIFF

AND

S3 ASSURANCE COMPANY

FIRST DEFENDANT

S3 MANAGEMENT GROUP, LLC

SECOND DEFENDANT

JARED SMITH

THIRD DEFENDANT

COVENANT EQUITY PARTNERS, LLC

FOURTH DEFENDANT

Appearances:	Mark Goodman and Harry Shaw of Campbells appeared for the Second and Third Defendants. James Clifford, Marc Kish and Max Galt of Ogier appeared for the Plaintiff. Tony Heaver-Wren of Appleby appeared for the First and Fourth Defendants
Before:	The Hon. Justice Raj Parker
Heard:	22 August 2022

Draft Judgment circulated: 22 September 2022

Judgment delivered: 29 September 2022

HEADNOTE

Service out of jurisdiction-inter partes hearing-GCR Order 11-rules (1) and 4(2)-sub rules c),(d),(ff) and (j) -earlier similar proceedings in Texas-proper law of contract-duties of director of Cayman Islands company -discretion-whether Cayman islands is clearly or distinctly the appropriate forum for resolution of the dispute

JUDGMENT

Introduction

1. An ex parte Order dated 11 April 2022 was granted giving leave for the Plaintiff to serve the Amended Writ of Summons upon the Second, Third and Fourth Defendants, D2, D3 and D4 in the United States of America. D2 and D3 now apply for orders and declarations that:

    a. the case is not a proper one for service out of the jurisdiction on the basis that the Cayman Islands is not the appropriate forum;

    b. service of the Amended Writ of Summons dated 28 February 2022 upon D2 and D3 be set aside;

    c. the ex parte Order dated 11 April 2022 granting leave for the Plaintiff to serve the Amended Writ of Summons upon D2 and D3 in the United States of America be discharged;

d. such other relief as may be appropriate; and

e. costs.

2. Mark Goodman and Harry Shaw of Campbell's LLP appeared for D2 and D3. James Clifford, Marc Kish and Max Galt of Ogier appeared for the Plaintiff. Tony Heaver-Wren of Appleby appeared for D1 and D4 on a 'watching brief'.

Background

The S3 Group of Companies

3. D3, Mr Smith, is a businessman, and is involved in providing services relating to unemployment and its associated risks to employers. The Plaintiff, Mr Harrell, is the beneficiary of a family-owned national oil company located in Texas.

4. In 2011, the Plaintiff approached Mr Smith seeking to invest in Mr Smith's company, D2 ("S3 Management"). S3 Management is a Texas limited liability company with no office or assets in the Cayman Islands[1]. S3 Management's Restated Company Agreement (similar to its Articles) is governed by the laws of Texas, USA.

5. Mr Smith was apparently not interested in selling equity in S3 Management (which he owned 100%), however Mr Smith and the Plaintiff established D4, another Texas company, ("Covenant") as an investment vehicle which ultimately invested in a new project through D1 ("S3 Assurance") which is a Cayman Islands company.

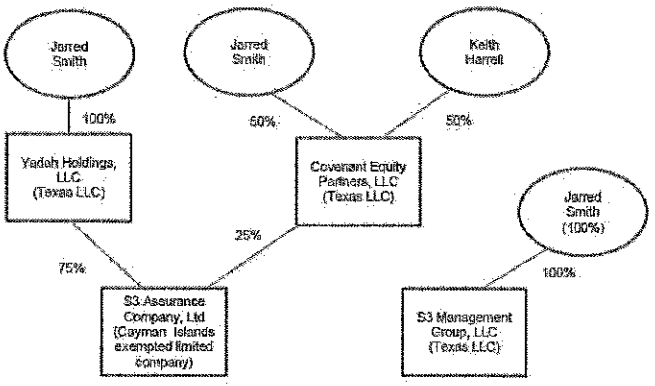
[1] *It may have offices in other states eg a claims office in Kansas and it may do business in Oklahoma (see Mr Smith's deposition 3 June 2020 at p 116*

6. D1, S3 Assurance's purpose was to act as a captive insurer for D2, S3 Management, and to provide stop loss insurance to indigenous tribes in the US in relation to unemployment claims.

7. Covenant, a Texas limited liability company with no office or assets in the Cayman Islands[2], is owned 50/50 by Mr Smith and the Plaintiff. Covenant's Restated Company Agreement (similar to its Articles) is governed by the laws of Texas, USA.

8. Covenant maintains a 25% shareholding in S3 Assurance, and the other 75% is owned by Mr Smith's company, Yadah Holdings, LLC ("Yadah Holdings"). Yadah Holdings is a Texas limited liability company with no office or assets in the Cayman Islands. Yadah Holdings' Restated Company Agreement (similar to its Articles) is governed by the laws of Texas, USA.

9. The diagram below sets out the structure:



10. The Plaintiff, Mr Harrell accordingly has a 12.5% indirect ownership interest in the Cayman Islands company, D1, S3 Assurance, whereas Mr Smith owns the remaining 87.5%. Mr Smith is the sole director of S3 Management and Covenant.

[2] *Although it owns shares in D1 S3 Assurance*

11. S3 Assurance, D1 is the only entity domiciled in the Cayman Islands and Mr Smith is a director of that company as well.

12. Every other individual and entity connected with this dispute resides in or is domiciled in Texas, USA, and subject to the laws of that state. This can be viewed as essentially a Texas corporate structure, with a licensed insurer in Cayman providing cover for indigenous tribes in the US, with whom S3 Management contracted.

13. It is argued by D2 and D3 on this application that the derivative nature of the claims alleged by the Plaintiff are such that D1, S3 Assurance is no more than a nominal party against which no claim is made and no relief is sought. D2 and D3 argue that the case is fundamentally a dispute between the Plaintiff and Mr Smith as the ultimate shareholders in D1, S3 Assurance, and D4, Covenant, and principally concerns the performance of various contracts between entities within the S3 Group of Companies.

14. D2 and D3 say that it is clear that the jurisdiction or jurisdictions most closely connected with the contracts would be Texas, being the jurisdiction of incorporation and centre of main interests of D2, S3 Management, or the respective States in which the individual Tribes were located.

The Contractual Framework

15. There are three claims :

(a) The Consultant's Agreement Claim.

(b) The Stop-Loss Policy Claim.

(c) The Monthly Retainer Claim.

16. The Consultant's Agreement Claim and the Stop-Loss Policy Claim are brought by the Plaintiff derivatively on behalf of D1, S3 Assurance.

17. The Monthly Retainer Claim is brought by the Plaintiff on behalf of D4, Covenant.

18. It is said by the Plaintiff that each claim gives rise to claims against D3, Mr Smith and D2, S3 Management.

The Consultant's Agreement

19. D1, S3 Assurance and D2, S3 Management entered into a Consultant's Agreement dated 16 May 2013 (the "Consultant's Agreement") pursuant to which S3 Management was engaged to provide S3 Assurance with "*services associated with the ongoing development and management of [S3 Assurance]'* Such services included underwriting, marketing and claims administration. The term of this contract began on 2 April 2013, and it was renewed annually.

20. In exchange for services provided, and in addition to being reimbursed for expenses incurred in the performance of duties under this agreement, S3 Management was entitled to compensation in the following terms:

> *"Subject to annual adjustment and approval by the [S3 Assurance] Board of Directors, for all services rendered by [S3 Management] under this Agreement, [S3 Management] shall be paid at the rate of 10% of all premiums paid to and received by [S3 Assurance]. [S3 Management] shall invoice [S3 Assurance] when premiums are paid, and [S3 Assurance] shall remit payment immediately."*

21. The Consultant's Agreement is governed by the laws of the Cayman Islands, however it does not contain any provisions regarding jurisdiction.

22. It is to be noted that the Plaintiff points out that D1, S3 Assurance is not itself suing on the Consultant's Agreement although it would appear that this is the entity which would naturally do so.

23. The Consultant's Agreement claim made by the Plaintiff, on behalf of D1, S3 Assurance, is said to be that Mr Smith breached his duties as a director of S3 Assurance by causing S3 Assurance to enter into the Consultant's Agreement in circumstances where Mr Smith had already agreed to provide the same services as part of his personal capital contribution to Covenant.

24. The Plaintiff said on the *ex parte* application that Mr Smith was the intended 'anchor defendant' (assuming the Court gave leave to serve him outside the jurisdiction) for the purposes of the necessary or proper party gateway to allow the claim against S3 Management.[3]

25. On analysis and in passing the Court notes that this is not the obvious route which such a claim by D1, S3 Assurance would naturally take against S3 Management, involving as it does a derivative action on D1's behalf, and a claim that Mr Smith breached his duties as a director of D1 by allowing monies to be paid to S3 Management (of which he was 100% owner and sole director.)

26. The claims include :

a) A personal claim against D3, Mr Smith for breach of his fiduciary duties as a director of D1, S3 Assurance (which is governed by Cayman Islands law);

b) A personal claim against D2, S3 Management on the grounds of knowing receipt; and

c) A proprietary claim against D2, S3 Management for so much of the payments made under the Consultant's Agreement ("the Consultant's Agreement Compensation") as remains in its hands.

[3] *It was pointed out by Mr Campbell that Mr Smith was not served first, but D1 S3 Assurance was served first in Cayman which suggests that the intention was that D1 was the anchor defendant*

The Administration Agreements

27. D2, S3 Management entered into an administration agreement each year, beginning in 2013, with a number of Native Indian Tribes within the USA (the "Tribes"), in relation to the S3 Unemployment Risk Management Program which was administered and managed by S3 Management (the "Administration Agreements").

28. Each agreement was negotiated differently with each Tribe, and the compensation model changed in 2015. The Plaintiff is not a party to these agreements.

29. The particular details of the Administration agreement are not material for present purposes, and varied slightly from Tribe to Tribe, however it is of some relevance to note that:

    a. S3 Management was entitled to receive various contractual fees in connection with services it offered to the Tribes under the Administration Agreements, with such services including the purchase of stop-loss insurance policies to protect the Tribes;

    b. the Administration Agreement was governed by and construed in accordance with the laws of the State in which the relevant Tribe was located, which included Oklahoma, Kansas and Michigan, without regard to its principles of conflicts of laws. In some cases, the Administration Agreements were governed by Tribal laws; and

    c. any controversy or claim arising out of or relating to the Administration Agreement was to be settled by binding arbitration, in accordance with the arbitration agreement contained within clause 9(c) of the Administration Agreement although some agreements did not include any arbitration clause.

Monthly retainer claim

30. This is a claim by the Plaintiff that Mr Smith, as a director of Covenant, wrongly paid to S3 Management a monthly retainer.

31. The Monthly Retainer Claim is said to give rise to:

(a) a personal claim against Mr Smith for breach of his fiduciary duties as a director of Covenant;

(b) a personal claim against S3 Management on the grounds of knowing receipt; and

(c) a proprietary claim against S3 Management for so much of the monthly retainer as remains in its hands.

32. It is to be noted that all the engaged entities are Texan in relation to this claim. There is no Cayman connection.

The Stop-Loss Policies

33. D2, S3 Management and D1, S3 Assurance entered into stop-loss insurance policies annually, beginning on 8 May 2013 pursuant to which S3 Assurance provided stop-loss insurance for the benefit of S3 Management as the insured, and the Tribes as the additional insureds.

34. By these claims the Plaintiff alleges that Mr Smith, as a director of S3 Management, caused S3 Management to pay less than the minimum premiums to S3 Assurance.

35. The claims include:

a) A further personal claim against Mr Smith for breach of his fiduciary duties as a director of D1, S3 Assurance (which is governed by Cayman Islands law);

b) A personal claim against D2, S3 Management for damages for breach of the Stop-Loss Policy (which the Plaintiff says is also governed by Cayman Islands law);

c) A further claim against D2, S3 Management on the grounds of knowing receipt; and

d) A further proprietary claim against D2, S3 Management for so much of the premiums as remain in its hands.

36. At § 2.1 of the SOC the claim is summarised as follows:

> *"Causing his wholly owned company S3 Management, the Texas entity, to collect and remit lower premiums under the stop loss policy than it should have done and causing S3 Management to charge, and S3 Assurance to pay, consultant's agreement compensation in circumstances in which Mr Smith had to provide the services under the consultancy agreement as part of his capital contribution to Covenant."*

37. At § 52.2 SOC:

> *"S3 Assurance's claim against Mr Smith for breaches of duty to S3 Assurance. Further or alternatively, Mr Smith breached his duties to S3 Assurance in causing his wholly owned company S3 Management, to collect and remit less than the required premiums to S3 Assurance and/or in causing S3 Assurance to accept less than the required premiums from S3 Management and he is personally liable to account to S3 Assurance in the amount of a shortfall in the premiums."*

38. It is to be noted that the claim as summarised might have more naturally alleged misconduct by Mr Smith as a director of S3 Management, a Texas entity, not as a director of the Cayman entity D1, S3 Assurance.

39. There is no claim brought by the Plaintiff against D1, S3 Assurance for accepting less than it was due, which on this analysis would have its own claim against S3 Management.

40. The "Insuring Clause" of the Stop Loss Policies states:

> *"In consideration of the payment of premium, and subject to all the terms and conditions of the policy, [S3 Assurance] agrees to indemnify [S3 Management] for all Loss which the Insured shall become legally obligated to pay that is within the scope of an Insured Agreement and exceeds the applicable Retention, but not exceeding the Stop-Loss Limit that applies to [the Tribes] whose operations resulted in such Loss."*

41. Such policies were entered into in connection with the Administration Agreements recorded above, which were incorporated into the Stop-Loss Policies within the definition of "Insured Agreement". S3 Management was responsible for the payment of premiums, which it collected from the Tribes in accordance with the Administration Agreements.

42. The largest of the Plaintiff's claims in terms of quantum is for allegedly under-paid premiums equal to:

a. US$959,368.00 for the years ended 31 December 2013, 2014 and 2015;

b. US$1,558,528.00 for the years ended 31 December 2016, 2017, 2018, 2019 and 2020; and

c. such amount due for the year ended 31 December 2021 and beyond[4]

43. Assuming the claim is made out in full, and not discounted on account of any limitation defence, the underpaid premiums are allegedly in the region of US$2.5 million. The Plaintiff's 12.5% interest would be, according to D2 and D3, be approximately US$312,500.

[4] (see SOC at§ 5]).

44. The Stop-Loss Policies also recorded that "*any dispute arising out of the interpretation, performance or breach of this policy, including the execution or validity thereof, shall be submitted for arbitration*" (the "*Arbitration Agreement*")

45. The Arbitration Agreement further provides:

> *"The dispute shall be submitted to one arbitrator, to be chosen jointly by the parties, and if the parties are unable to agree, to be appointed by a judge of a Cayman Islands court with jurisdiction over the Company. The arbitrator shall be an impartial, disinterested active or former executive officer of an insurance or reinsurance company.*
>
> *... The arbitrator shall interpret this Agreement as an honorable engagement and not as merely a legal obligation, and shall be relieved of all judicial formality and shall not be bound by the strict rules of law, procedure and evidence. ... The arbitrator shall make his decision considering the custom and practice of the applicable insurance and reinsurance business as promptly as possible following the termination of the hearings.*"

46. The Cayman Islands is designated as the place for such arbitration to take place "*unless some other place is mutually agreed by the parties*", however the Stop-Loss Policies are silent as to what law governs the arbitration.

Texas Proceedings

47. A dispute arose in late 2018/early 2019 regarding the subject matter of this proceeding, and the Plaintiff filed a lawsuit against Mr Smith, S3 Management, Yadah Holdings and S3 Assurance in the District Court of Collin County, Texas, USA (the "Texas Proceedings").

48. The Texas Proceedings were commenced by the Plaintiff on 9 October 2019, and concerned direct claims made on the Plaintiff's own behalf and also derivatively on behalf of Covenant. The Texas Proceedings ran for two years before being withdrawn (dismissed) by the Plaintiff, effective 1 November 2021.

49. The Petition in the Texas proceedings dated 3 August 2020 states: Defendants are resident in or domiciled in Texas, save for S3 Assurance which is described as being "*a company incorporated in the Cayman Islands, but is owned, dominated, and controlled by Smith from Texas. It has been sued as a necessary party*".

50. §§ 8-9 dealing with jurisdiction and venue state:

> *'8.This Court has subject matter jurisdiction over this action under the Texas Constitution and the Texas Government Code. This Court has personal jurisdiction over all Defendants because Defendant Smith resides in Texas, and Defendants Yadah Holdings and S3 Management are business entities formed under Texas law, with their principal places of business in Texas.* ***The Court has specific jurisdiction over S3 Assurance because the actions complained of have been committed to a material extent by Smith while acting in Texas on behalf of S3 Assurance as its agent, and through his ownership interest, he effectively controls that entity. Asserting personal jurisdiction over S3 Assurance comports with traditional due process notions of fair play and substantial justice. Moreover, S3 Assurance has now appeared and waived any objection to jurisdiction.*** *(emphasis added)*
>
> *9. Venue is proper in Collin County under Chapter 15 of the Texas Civil Practice and Remedies Code because (i) one or more of the Defendants resides in and/or does business in Collin County and (ii) a substantial part of the events at issue occurred in Collin County.'*

51. The Plaintiff's causes of action in the Texas Petition can be seen to arise from the same factual matrix as that pleaded in the Cayman Statement of Claim (SOC), and included:

i. "Breach of Fiduciary Duty and Joint Tortfeasor Participation in Breach of Fiduciary Duty (against all Defendants)"
ii. "Breach of Contract (against Smith)"
iii. "Fraud (against Smith)"
iv. "Money Had and Received (against all Defendants)"
v. "Appointment of Rehabilitative Receiver for Covenant"
vi. "Unjust Enrichment/Money Had and Received (against all Defendants)"

52. The Petition included derivative claims on behalf of Covenant which can be seen to be substantively the same and arise from the same subject matter as the derivative claims sought to be brought within these proceedings.[5]

53. There was no claim brought derivatively on behalf of D1, S3 Assurance. There was a claim against S3 Assurance and Yadah and other ways of putting the claims made in the SOC.[6]

54. The Plaintiff elected to dismiss the Texas Proceedings against all Defendants, effective 1 November 2021 after his motion to compel additional discovery was denied by the District Court in October 2020, and his related appeals to the Texas Court of Appeals and the Texas Supreme Court were denied in April 2021 and September 2021 respectively.

55. The Plaintiff says in Harrell 1 at §72 that

> "*This meant that the case would proceed to trial without the requested information. I then elected to nonsuit (dismiss) my action, as my experts lacked the financial information necessary to determine an appropriate damages model, and a trial would be an empty (but expensive) exercise without that information.*"

[5] *SOC §§12-13*
[6] *§§ 41-43 and 48,50-53 ,54 and 56 of the Texan pleadings contain claims which are not the same as the case sought to be advanced in Cayman.*

56. D2 and D3 say the dismissal of the Texas Proceedings occurred on a without prejudice basis, and there is nothing to preclude the Plaintiff commencing further proceedings in Texas in the future. There is no contrary position argued by the Plaintiff on this application.

57. The Plaintiff's original Writ of Summons filed in these proceedings was dated 1 November 2021, the same day as the dismissal of the Texas Proceedings was ordered.

58. Mr Smith has filed a related proceeding against the Plaintiff in Texas seeking declaratory relief concerning the Plaintiff's alleged breach of Covenant's Company Agreement, which he says justifies expulsion from Covenant[7] , which D2 and D3 say could have a direct impact upon the Plaintiff's derivative standing in relation to Covenant, and accordingly upon the double derivative standing of the Plaintiff in relation to D1,S3 Assurance.

59. As the Plaintiff explains in Harrell 1 at §73, his motion to dismiss Mr Smith's related action failed at first instance, and is now subject to an appeal. Mr Harrell says the claim against him in Texas, which Mr Harrell seeks to dismiss there, is whether Mr Harrell had a right to challenge Mr Smith's management of Covenant in the previous proceedings. He says Mr Smith's claim in Texas is therefore self-contained and likely to be capable of being determined without the Texas Court having to resolve the issues that arise in the claims that are now before the Court.

The law

60. The legal principles and rules concerning service of proceedings outside of the jurisdiction and the appropriate forum are well-settled in the Cayman Islands.

61. The starting point is Order 11, rule 1 of the Grand Court Rules ("GCRs") which permits service of a writ out of the jurisdiction, with leave of the Court, where the action begun by writ meets one of the gateways within the sub-rules (a) to (m).

[7] *Smith 1, at §26.6*

62. Order 11, rule 4(2) further provides that "*no such leave shall be granted unless it shall be made sufficiently to appear to the Court that the case is a* ***proper one*** *for service out of the jurisdiction under this Order." (emphasis added)*

Sub rules relied on

63. The specific sub-rules or "gateways" under Order 11, rule 1(1) which were relied upon by the Plaintiff in his skeleton argument for the *ex parte* hearing in this case are:

> *(c) the claim is brought against a person who has been or will be duly served within or out of the jurisdiction and a person out of the jurisdiction is a necessary or proper party thereto;*
>
> *(d) the claim is brought to enforce, rescind, dissolve, annul or otherwise affect a contract, or to recover damages or obtain other relief in respect of the breach of a* contract, *being (in either case) a contract which -... (iii) is by its terms, or by implication, governed by the law of the Islands; ...*
>
> *(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;*
>
> *(j) the claim is brought for any relief or remedy in respect of any trust, whether express, implied or constructive, that is governed by or ought to be executed according to the laws of the Islands or in respect of the status, rights or duties of any trustee thereof in relation thereto;*

Necessary or proper party

64. The gateway under (c) – the "necessary or proper party" gateway – is relied upon by the Plaintiff in circumstances where D1, S3 Assurance is the only "defendant" with any connection to the Cayman Islands.

65. This gateway was considered recently by Doyle J in *Aspect Properties Japan Godo Kaisha v Cheng et al (Unreported, 27 April 2022, DDJ)*. At §46 he cited *Ritchie Capital Management LLC v Lancelot Investors Fund Ltd (Unreported, 15 December 2020, RPJ)* where Irecorded in relation to gateway (c) (with footnotes omitted):

> *"250. As is well known the necessary and proper party jurisdictional gateway is an anomaly, because by contrast with other gateways under GCR Order 11, it is not founded on any territorial connection between the claims, the subject matter of the action and the jurisdiction of the court. The focus in the surrounding rules on the nature of the cause of action is missing. Therefore, caution is needed and this gateway should not be used as a matter of practice on the basis that the only alternative is to require suit in more than one different jurisdiction.*
>
> *251. The court can take into account the fact that a defendant is sued on the basis of undoubted jurisdiction, as an 'anchor defendant', only for the purpose of bringing another defendant, which is incorporated and has its place of business elsewhere, into the jurisdiction. Motive can be an important factor in the exercise of discretion.*
>
> *252. So of course on the other hand is the risk, where this can be demonstrated, of irreconcilable judgments which would arise from a multiplicity of proceedings."*

66. Doyle J also cited the Privy Council's decision in *AK Investment*[8], which explored the "*necessary or proper party*" gateway and the significance of a plaintiff's motive for suing the

[8] [*2011*]*UKPC 7*

"anchor defendant" (see §§73-79). In the Privy Council, Lord Collins considered the consequences of suing the anchor defendant only for the purposes of being able to serve other defendants outside of the jurisdiction under gateway (c), and concluded at §79 that:

> *"...the fact that D1 is sued only for the purpose of bringing in the foreign defendants is a factor in the exercise of the discretion and not an element in the question whether the action is "properly brought" against D1, provided that there is a viable claim against D1."*

67. At §87 of the Privy Council judgment, Lord Collins noted that "*whether D2 is a proper party is answered by asking: "Supposing both parties had been within the jurisdiction would they both have been proper parties to the action? ... D2 will be a proper party if the claims against D1 and D2 involve one investigation".*

68. In another recent case *Maples FS Limited v B&B Protector Services*, Cause No FSD 213 of 2021 (DDJ) 14 July 2022 Doyle J said:

> *"With the relative ease of modern travel, the development and utilization of electronic communications and digital technology, including the ease of remote hearings and electronic data provision, the importance in forum challenges of the physical location of the parties, witnesses and documents is rapidly decreasing, as both counsel wisely accepted in this case. The physical location of the parties, witnesses and documents are not determinative of the issue of appropriate forum in this case."*[9]

The test

69. A summary of the test is outlined in the note of Smellie C.J. in *AHAB v SAAD [2010 (2) CILR Note 6* as follows:

[9] *Ibid § 14*

> *"On an application for leave to serve a person outside the Cayman Islands under one of the sub-paragraphs of the Grand Court Rules, O.11, r.1(1), a three-fold test applies. First, it needs to be shown that the applicant has a good arguable case. Secondly, it needs to be established that there is a strong probability that the claim falls within the "letter and spirit" of the sub-paragraph of r.1(1) on which the application for leave is based. This requirement is treated strictly since, if leave is given, it will not subsequently be investigated, and, moreover, a person outside the Islands should not lightly be subjected to the legal process of a foreign jurisdiction. It is not, however, necessary, in a case where several heads of claim are asserted against the proposed subject of service out of the jurisdiction, for every individual head of claim to come within one of the subparagraphs of r.1(1)—rather, at least one of the heads of claim must do so (Société Comm. de Réassurance v. Eras Intl. Ltd., [1992] 1 Lloyd's Rep. 570, dicta of Lord Mustill applied). Thirdly, the Islands need to be the appropriate forum for the trial in the interests of all the parties and of justice..."*

70. On appeal in *AHAB v SAAD [2010 (2) CILR 289]* the Cayman Islands Court of Appeal affirmed the test applied by the Chief Justice when setting out the applicable principles at §§15-19 of the appellate judgment.

71. In the headnote to the Court of Appeal's Judgment it was observed that:

> *(1) ... The Chief Justice had taken the correct approach to the question of whether leave to serve out of the jurisdiction should be granted. He had directed himself correctly as to the applicable principles of law, which required AHAB to show that (a) a relevant condition in GCR, O.11, r.1(1) had been established; and (b) the case be a proper one for service out, pursuant to r.4(2). ...*
>
> (2) *Further, the Chief Justice had correctly applied the test for whether the case was a proper one for service out of the jurisdiction, which was* ***whether the Cayman Islands were the forum in which the case could most suitably be tried in the interests of the parties and of justice. He did not fall into the error of thinking that his finding that***

> ***Mr. Al Sanea was a necessary and proper party under r.1(1)(c) was determinative of the question of the appropriate forum for the trial under r.4(2).*** *(emphasis added)*

72. The Court of Appeal confirmed that if the gateway through which a defendant is served is that in Order 11, rule 1(1)(c), (i.e. *"the claim is brought against a person who is or has been duly served within or out of the jurisdiction and a person out of the jurisdiction is a necessary or proper party thereto,"*) this is an important but not a decisive factor.

73. Chadwick P. said that the Chief Justice had been right to say that, "*While the circumstances of each case will be different and must be considered in their own light for the identification of the most appropriate forum... the fact that there will, in any event, be related Cayman proceedings to which Mr. Al Sanea is a necessary or proper party goes a long way to 'virtually concluding' the issue here as well."*[10]

74. In *Raiffeisen International Bank AG v Scully Royalty et al (Unreported, 7 July 2020, RPJ)* I cited *AK Investment* and confirmed the three stage test at § 159 as follows:

> *"159. The test to be applied to these arguments is first whether, in relation to each defendant, there is a serious issue to be tried on the merits i.e. a substantial question of fact or law, or both, which has a real, as opposed to fanciful, prospect of success. Second, whether 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 i.e. there is a jurisdictional gateway as set out at GCR 0.11 rule 1.(1)(necessary or proper party). Third,* ***that in all the circumstances the Cayman Islands is clearly or distinctly the appropriate forum for trial of the dispute and that in all circumstances the court ought to exercise its discretion to permit service of the proceeding out of the jurisdiction pursuant to GCR 0. 11 rule 4(2)."*** *(emphasis added).*

[10] *§§70 and 71*

Other factors

75. In *Insurco International Limited v Voluntary Purchasing Group Incorporated* [1999 CILR 532] Zacca P. said that the fact that the proper law of the contract was the law of the Cayman Islands was important on the question of *forum non conveniens*, albeit not decisive.

76. In *In the Matter of Cairnwood Global Technology Fund Limited [2007 CILR 193]* Foster Ag. J. held that,

> *"... it was particularly desirable that the duties of directors of Cayman companies be determined by the courts here, given the status of the Cayman Islands as an international financial centre. This was well established as a matter of public policy and law and therefore this court was prima facie the appropriate forum for the trial of the plaintiff's action. That the defendants were neither resident nor conducted business in the Islands was not sufficient to shift the balance in their favour..."*

77. In *Aspect* Doyle J quoted with approval from page 35 of Barker Roye on *Civil Litigation in the Cayman Islands*, in which the learned author had said, when dealing with Order 11, rule 1(1)(ff) and *Cairnwood*:

> *"Clearly, the learned judge placed great emphasis on the public policy factors under this head, even in light of cogent factors militating against Cayman as the appropriate forum. This seems to indicate a willingness on the part of the Cayman Court to declare the Cayman Islands to be, prima facie, the most appropriate forum for actions involving the determination of duties of directors of Cayman companies"*

Discretion

78. The principles applied to the exercise of the Court's discretion (i) in connection with Order 11, and (ii) when the common law doctrine of *forum non conveniens* is engaged by a defendant,

were considered by Lord Goff in the well-known House or Lords decision in *Spiliada Maritime Corp v Cansulex Ltd [1987] AC 460, at 475-484.*

79. The question for the Court is to identify "*the forum in which the case can be suitably tried for the interests of all the parties and the ends of justice.*" The Court will look for the "*natural forum,*" which is "*that with which the action has the most real and substantial connection."*

> *'Connecting factors include not only factors affecting convenience or expense (such as availability of witnesses), but also other factors such as the law governing the relevant transaction ... and the place where the parties respectively reside or carry on business:*" *Spiliada Maritime Corporation v Cansulax Ltd ("The Spiliada")* [1987] A.C. 460, at pages 480

80. As a stand-alone doctrine, *forum non conveniens* allows a court to dismiss an action where an appropriate and more convenient alternative forum exists in which to try the action, and this is so even though the forum is proper and the court in question may have jurisdiction over the case and the parties as of right.

81. As Lord Goff highlights, although there is considerable overlap, the application of such principles differ between applications for a stay/dismissal based on the doctrine of *forum non conveniens* compared with applications for leave to serve proceedings outside of the jurisdiction under Order 11 of the GCRs (or the RSC, as was considered in *Spiliada*).

82. Lord Goff's consideration of the principles applying to Order 11 begin at p.478 where he cites the speech of Lord Diplock in *Amin Rasheed Shipping Corp v Kuwait Insurance Co (The Al Wahab) [1984] A.C. 50 at pp.65-66*

> *"the jurisdiction exercised by an English court over a foreign corporation which has no place of business in this country, as a result of granting leave under R.S.C., Ord. 11, r.1(1)(f) for service out of the jurisdiction of a writ on that corporation, is an exorbitant jurisdiction, i.e., it is one which, under general English conflict rules, an*

> *English court would not recognise as possessed by any foreign court in the absence of some treaty providing for such recognition.* ***Comity thus dictates that the judicial discretion to grant leave under this paragraph of R.S.C., Ord. 11, r.1(1) should be exercised with circumspection in cases where there exists an alternative forum, viz. the courts of the foreign country where the proposed defendant does carry on business, and whose jurisdiction would be recognised under English conflict rules."*** *(emphasis added)'*

83. Lord Goff then refers to the speech of Lord Wilberforce at page 72 in *The Al Wahab* commenting on R.S.C. Order 11, r.4(2), where he said:

> *"The intention must be to impose upon the plaintiff the burden of showing good reasons why service of a writ, calling for appearance before an English court, should, in the circumstances, be permitted upon a foreign defendant. In considering this question* ***the court must take into account the nature of the dispute, the legal and practical issues involved, such questions as local knowledge, availability of witnesses and their evidence and expense."*** *(emphasis added)*

84. In summarising the authorities, and the principles applying in their different yet related contexts, Lord Goff concludes at pp.480-482:

> *'It seems to me inevitable that the question in both groups of cases must be, at bottom, that expressed by Lord Kinnear in Sim v. Robinow, 19 R. 665 , 668, viz.* ***to identify the forum in which the case can be suitably tried for the interests of all the parties and for the ends of justice.*** *That being said, it is desirable to identify the distinctions between the two groups of cases. These, as I see it, are threefold. The first is that, as Lord Wilberforce indicated, in the Order 11 cases the burden of proof rests on the plaintiff, whereas in the forum non conveniens cases that burden rests on the defendant. A second, and more fundamental, point of distinction (from which the first point of distinction in fact flows) is that in the Order 11 cases the plaintiff is seeking to persuade the court to exercise its discretionary power to permit service on the defendant outside*

the jurisdiction. ***Statutory authority has specified the particular circumstances in which that power may be exercised, but leaves it to the court to decide whether to exercise its discretionary power in a particular case, while providing that leave shall not be granted "unless it shall be made sufficiently to appear to the court that the case is a proper one for service out of the jurisdiction:"*** *see R.S.C., Ord. 11, r.4(2).*

Third, it is at this point that special regard must be had for the fact stressed by Lord Diplock in the Amin Rasheed case [1984] A.C. 50 , 65 that the jurisdiction exercised under Order 11 may be "exorbitant." This has long been the law. In Société Générale de Paris v. Dreyfus Brothers (1885) 29 Ch.D. 239 , 242-243, Pearson J. said:

> *"it becomes a very serious question ... whether this court ought to put a foreigner, who owes no allegiance here, to the inconvenience and annoyance of being brought to contest his rights in this country, and I for one say, most distinctly, that I think this court ought to be exceedingly careful before it allows a writ to be served out of the jurisdiction."*

The effect is, not merely that the burden of proof rests on the plaintiff to persuade the court that England is the appropriate forum for the trial of the action, but that he has to show that this is ***clearly so****. In other words, the burden is, quite simply, the obverse of that applicable where a stay is sought of proceedings started in this country as of right. Even so, a word of caution is necessary. I myself feel that the word "exorbitant" is, as used in the present context, an old fashioned word which perhaps carries unfortunate overtones: it means no more than that the exercise of the jurisdiction is extraordinary in the sense explained by Lord Diplock in the Amin Rasheed case [1984] A.C. 50 , 65.* ***Furthermore, in Order 11 cases, the defendant's place of residence may be no more than a tax haven to which no great importance should be attached. ... In these circumstances, it is, in my judgment, necessary to include both the residence or place of business of the defendant and the relevant ground invoked by the plaintiff as factors to be considered by the court when deciding whether to exercise its discretion to grant leave; but, in so doing, the court should give to such factors the***

weight which, in all the circumstances of the case, it considers to be appropriate." *(emphasis added)*

The Parties essential cases

85. D2 and D3 argue that the Plaintiff has not come close to discharging the burden of proving that the Cayman Islands is "*clearly or distinctly*" the appropriate forum for trial of the dispute, so as to engage the extraordinary jurisdiction under Order 11 of the GCR.

86. The Plaintiff on the other hand argues that the Cayman Islands is clearly the appropriate forum for the trial of the action. He says where, as here, the claim is against a director of a Cayman Islands company that is a powerful, albeit not conclusive, reason for saying that the Cayman Islands is the most appropriate forum for the trial of the action.

Decision

Good arguable case on the merits

87. D2 and D3 make no substantive challenge to this as they say it would necessitate the filing of lengthy evidence and more time and expense, but have reserved their position and maintain all available defences. That is a reasonable approach given that the Court should not be drawn into a mini trial if at all possible in relation to factual issues on such applications.

88. However ,the Court does not proceed on the basis that in relation to each defendant, there is a serious issue to be tried on the merits (i.e. a substantial question of fact or law, or both, which has a real, as opposed to fanciful, prospect of success) on one important aspect of this case.

89. In relation, critically, to the case against D1, S3 Assurance, there is a doubt as to whether there is a good arguable case on the merits such that there is a real prospect of success. The Court is not in a position to determine the matter one way or another, but notes that Mr Smith's, so far unanswered, evidence in relation to S3 Assurance and the Consultant Agreement is:

"I consider it is important to explain that Mr Harrell was regularly updated regarding the structure, fees and underwriting for each year of the company's existence from inception. He was provided with annual audited financial statements and was invited to attend director's meetings as he was a director of S3 Assurance. Mr Harrell declined to attend the director's meetings and he only ever attended such meetings by proxy.
"In each case, I provided him with the minutes of the meeting. I consistently provided Mr Harrell with full information and documentation and he did not ask any questions or raise any concerns. Such matters including those that are cited by Mr Harrell as the basis for claims in these proceedings. Those matters were known to him since 2013 and 2014. On every occasion Mr Harrell simply stated he had familiarised himself with the information that I had provided. He was very happy about the success of his investment and he would let me know if he had any concerns or needed any additional information."[11]

And

"Although he initially showed interest in some of the details concerning business matters, Mr Harrell thereafter showed little interest and by the end of 2013, he had become largely, if not completely, disengaged."[12]

There is also the point that Mr Smith has an indemnity (against which a plea of fraud is made) [13].

[11] *Smith 1 § 13*
[12] *Smith 1 § 13.5 the point is also made that Mr Harrell confirms this at § 123 of Harrell 1*
[13] *SOC §§64 and 65*

Jurisdictional gateways

90. The authorities make clear that the Plaintiff must establish that there is a strong probability that the claims fall within (the letter and spirit) of one or more classes of case in which permission to serve out may be given i.e. there is a jurisdictional gateway under GCR 0.11 rule 1.(1)

Gateway (c)

> *'(c) the claim is brought against a person who has been or will be duly served within or out of the jurisdiction and a person out of the jurisdiction is a necessary or proper party thereto;'*

91. D2 and D3 argue that the Plaintiff has relied on D1's incorporation in the Cayman Islands to justify bringing D2 and D3 into the jurisdiction as "*necessary or proper parties*". They say this must be viewed with caution on the basis of the authorities set out[14], and motive is relevant to the exercise of the court's discretion. The Plaintiff does not accept that D1 is relied upon in this regard.

92. I accept D2 and D3's submission that no cause of action is pleaded against D1[15] and the purpose of the case against it is only to have been to bring various derivative claims against D2 and D3 on D1's behalf. D1 can be viewed as a derivative claimant, not a defendant '*against whom a claim is made*'.

93. The Court is not satisfied that this a proper basis to anchor jurisdiction upon D1, S3 Assurance or that there is a strong probability that there is a claim which is '*brought against a person*' in the jurisdiction, i.e. D1, S3 Assurance, within the sub rule.

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[14] *AK Investment and Ritchie ibid*
[15] *See §§ 1-6 SOC*

Gateway (d)(iii)

> *'(d) the claim is brought to enforce, rescind, dissolve, annul or otherwise affect a contract, or to recover damages or obtain other relief in respect of the breach of a contract, being (in either case) a contract which -... (iii) is by its terms, or by implication, governed by the law of the Islands;...'*

94. This gateway is relied upon in connection with the Stop-Loss Policy claim against D2, S3 Management, which it is said is a contract governed by its terms or by implication by the laws of the Cayman Islands. As noted above, all disputes arising in relation to the performance of that agreement are subject to the Arbitration Agreement (and not the jurisdiction of the Grand Court). Any dispute in relation to that agreement is to be resolved by an insurance executive acting as arbitrator.

95. There is no express choice of law clause in the Stop-Loss Policy. The arbitrator is to determine any dispute "*as an honorable engagement and not as merely a legal obligation, and shall be relieved of all judicial formality and shall not be bound by the strict rules of law, procedure and evidence*".

96. This gateway is not relied up by the Plaintiff in relation to the derivative claim by D1, S3 Assurance, against D2, S3 Management, in relation to the Consultant's Agreement where there is a choice of law clause.

97. It seems to the Court that there is no strong probability that this claim falls within (d) (iii) and even if it did, there are factors relevant to the exercise of the Court's discretion which do not make this determinative.

Gateway (ff)

> *'(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'

98. This gateway is relied upon in relation to the "Consultant's Agreement Claim" which the Plaintiff seeks to bring derivatively on behalf of D1, S3 Assurance, against D3, Mr Smith.

99. This gateway is also relied on relation to the Stop-Loss Policy Claim against Mr Smith (brought derivatively on behalf of D1,S3 Assurance), notwithstanding that all disputes arising in relation to the performance of that agreement are subject to the Arbitration Agreement noted above.

100. This in the Court's view is the strongest claim. Claims for breach of director's duties to a Cayman domiciled company would on the face of it fall within this gateway. The Plaintiff goes further and says Mr Smith is as a result the anchor defendant for the purposes of serving S3 Management out of the jurisdiction, as a necessary or proper party.

101. For the reasons given below the Court has to look at whether there is a strong probability that the Cayman director's conduct as a director of the Cayman entity (D1, S3 Assurance) was seriously engaged. This in the Court's view is doubtful and moreover the Court has found that there are strong factors as to why the Court should not exercise its discretion in relation to allowing such claims in this Court.

Gateway (j)

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

102. The reliance on this gateway (which concerns claims brought for any relief or remedy in respect of any trust governed by the laws of the Cayman Islands), appears to be in relation to breach of

trust claims against D2, S3 Management, a Texas company. No trust, whether express, implied or constructive, is pleaded in the SOC to exist in the Cayman Islands.

Discretion and proper forum

103. Under the third limb of the Order 11 test, the Plaintiff has to satisfy the burden of establishing that "*in all the circumstances the Cayman Islands is clearly or distinctly the appropriate forum for trial of the dispute and that in all circumstances the court ought to exercise its discretion to permit service of the proceeding out of the jurisdiction*" .

104. The Court has formed the clear view that for the following reasons the Cayman Islands is not "*clearly or distinctly*" the appropriate forum for the trial of this dispute (against all the defendants), and it should not exercise its discretion to permit service out. It follows that the order allowing service outside of the jurisdiction on the Applicants should be discharged. There is a clearly more appropriate alternative forum in Texas.

Reasons on proper forum

105. In assessing the location of the natural forum for the resolution of this dispute, the Court examines where the dispute has its most real and substantial connections. The centre of gravity of this dispute and the most appropriate forum, having regard to the totality of the circumstances, points clearly towards Texas as the appropriate forum where the defendants D2 - D4 can be served as of right.

106. A comparison between the Plaintiff's Fifth-Amended Petition filed in Texas and the Plaintiff's SOC filed in Cayman confirms the claims and the relief sought are substantively the same, and arise from the same subject matter

107. The Court finds that the underlying dispute is between two protagonists: the Plaintiff, Mr Harrell, and D3, Mr Smith who are both resident in Texas.

108. Two important companies used for their business dealings, D2, S3 Management, and D4, Covenant, are each domiciled in Texas, and are subject to the laws of that state. Claims for breaches of duties owed by D3, Mr Smith, to D4, Covenant, or breaches of any contract with Covenant are governed exclusively by the laws of Texas.

109. The evidence relating to the dispute (both live and documentary) will mostly originate from Texas where the business of the S3 Group of Companies was conducted.[16]

110. The Courts of Texas and the Cayman Islands can be expected to enforce each other's judgments. However, any enforcement action upon a judgment obtained would likely take place against D2 and D3 in Texas.

111. D3, Mr Smith, and D2, S3 Management, are said to have no realisable assets in this jurisdiction against which a judgment would be enforced. Similarly, the Plaintiff is said (by D2 and D3) to have no assets in this jurisdiction against which D2 and D3 would be able to enforce any costs order they might obtain.

112. The Court finds that D1 is simply a nominal defendant in any proceedings brought in Cayman. There is no pleaded claim against it. The case is brought on its behalf.

113. The Court notes that D1, S3 Assurance submitted to the jurisdiction of the Texas court and the case was pleaded in Texas on the basis that the Texas court had specific jurisdiction over D1 because the actions complained of had been committed to a material extent by Mr. Smith while acting in Texas on behalf of D1 (as its agent and controlling shareholder).

114. The Consultant's Agreement Claim and the Monthly Retainer Claim seem on their face to be both based on alleged breaches of Covenant's Re-Stated Company Agreement between the

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16 *Given the ease of modern travel and communications, as well as the proximity of Texas to the Cayman Islands, the location of the witnesses and the documents are not weighty factors -see Maples FS Limited v B&B Protector Services, Cause No FSD 213 of 2021 (DDJ) 14 July 2022 per Doyle J ibid*

Plaintiff and Mr Smith as shareholders, which is governed by the laws of Texas. The Court notes that the Plaintiff says the Consultant's Agreement Claim is not based on breach of Mr Smith's breaches of the Covenant's Company Agreement, but instead on breaches by Mr Smith of his duties towards S3 Assurance .This is not the natural way to pursue the case made.

115. Mr Smith's claim to indemnification pursuant to Covenant's Company Agreement is also governed by Texas law, and Mr Smith's pending claim regarding the Plaintiff's alleged breach of the Company Agreement and expulsion from Covenant is, as noted above, pending before the Texas Courts.[17]

Mr Smith's duties as a director of a Cayman Islands company

116. The Court finds that the only substantive connection to the Cayman Islands is in relation to the limited role played by D1, S3 Assurance in providing captive insurance cover.

117. Otherwise Texas has the most real and substantive connections to the dispute between Mr Harrell and Mr Smith.

118. These factors clearly in the Court's view outweigh the fact that the duties owed by Mr Smith to D1, S3 Assurance are to be governed by Cayman law, where there is no strong probability that those duties are seriously engaged.

119. The Court also notes that the duties owed by Mr Smith to Covenant and D1, S3 Assurance, whether fiduciary or contractual, are said to be no different under Cayman law than under Texas law.[18] The Plaintiff was content for Texas court to determine such matters by starting proceedings there and continuing them for two years.

[17] *Smith 1, at §26.6*
[18] *Smith 1, at §26.2*

Plaintiff arguments on these points

120. The Plaintiff argues that the claims are claims by two companies against one of its directors (Mr Smith) for breaches of fiduciary duty, and against a related company (S3 Management) which arise out of the director's breaches of fiduciary duty.

121. The Plaintiff says the claims are by D1, S3 Assurance and Covenant for (i) compensation from Mr Smith for his breaches of duties as a director, (ii) compensation from S3 Management as an accessory to those breaches, (iii) proprietary claims against S3 Management as an accessory, and (iv) damages for breach of the Stop-Loss Policy.

122. The Plaintiff says this is not a shareholders dispute between Mr Smith and Mr Harrell.

Decision

123. The Court finds that this is not the natural way of looking at the case and not the way the case was presented to the Texas courts.

124. On analysis the essential nature of the case brought by the Plaintiff is not S3 Assurance's case against Mr Smith for his breaches of fiduciary duty as a director of that Cayman Islands company. That is an unnatural and convoluted way of presenting the case.

125. Having reviewed the SOC, the way these claims are pleaded against Mr Smith are in his capacity as a director of S3 Management, not as a director of S3 Assurance. The only complaint that is made against him as a director of S3 Assurance is that he allowed S3 Assurance to pay the consultancy fee to S3 Management. It remains to be determined, but it is likely to be said that S3 Assurance had a contractual obligation to make the payment. A breach of fiduciary duty and moreover a breach of fiduciary duty that involves fraud, dishonesty and wilful neglect, in those circumstances would involve a high evidential threshold.

126. It is not clear to the Court what the claim *against* D1 is by the Plaintiff which gives rise to these consequences. They are more naturally to be viewed as shareholder claims brought derivatively on behalf D1, S3 Assurance.

Consultant Agreement Claim

127. The Consultants Agreement claim does have a stronger connection, but is proportionately small. The quantum of the Consultant's Agreement claim, between D1, S3 Assurance and D2, S3 Management (governed by the laws of the Cayman Islands, but with no provisions regarding jurisdiction) assuming the entire claim is proven, is said by D2 and D3 to be US$84,191.85 (being the total alleged loss suffered by S3 Assurance of US$673,534.77 x 12.5%, reflecting Mr Smith's indirect shareholding in S3 Assurance). This is a small proportion of the total losses claimed, and does not account for any deduction for losses claimed beyond any limitation period defence.

128. It is relevant to the Court's exercise of discretion and as to whether the Cayman Islands are "*clearly or distinctly*" the proper forum where the claim brought on behalf of the D1, S3 Assurance, is a small proportion of the total claim.

The Monthly Retainer Claim

129. The Monthly Retainer Claim exclusively concerns Texas entities and relates to services provided in Texas. The Monthly Retainer Claim has no connection to the Cayman Islands. Mr Smith has brought a counterclaim in Texas related to indemnification against this claim and a new proceeding is on foot in Texas in relation to the Plaintiff's expulsion from Covenant for allegedly breaching its Company Agreement. Mr Harrell accepts that Covenant and S3 Management are incorporated in Texas, that the law governing Mr Smith's duties towards Covenant is Texas law, that the Covenant Company Agreement (similar to its Articles of Association) will be construed in accordance with Texas law and that Covenant's derivative claim and S3 Assurance's double-derivative claim engage issues of standing under Texas .

130. It is the least valuable of the claims. Although a Cayman court could apply Texas law to this claim it is plainly not the natural forum.

The stop loss insurance claim

131. The Stop-Loss Policy claim is the Plaintiff's largest claim in terms of quantum (approximately US$312,500 if proven in full). It is subject to the Arbitration Agreement.

132. Even if the Plaintiff was permitted to continue the double derivative Stop-Loss Policy claim, standing in the shoes of D1, S3 Assurance, the claim would be likely to be arbitrated and would not be continued before the Grand Court.

Other factors

133. The Court notes that it was presented to the Texas court that D1, S3 Assurance operates substantively from Texas, despite its deliberate incorporation within the Cayman Islands, no doubt for regulatory and tax purposes.[19].

134. It was said: "*The Court has specific jurisdiction over S3 Assurance because the actions complained of have been committed to a material extent by Smith while acting in Texas on behalf of S3 Assurance as its agent, and through his ownership interest, he effectively controls that entity.'*

135. The underlying transactions occurred between Texas/USA counterparties (i.e. the Tribes, and/or between Covenant and S3 Management), and the business of S3 Assurance was conducted in Texas and other US States.

[19] *Mr Fryer explained in advice that was given to the Board of S3 Assurance on 2 April 2013, "... the selection of the Cayman Islands as a domicile for the Company provided a number of major benefits such as a predictable and flexible regulatory environment and no income or premium taxes."*

136. The performance of the Administration Agreements between S3 Management and the Tribes are governed by the laws of the State in which the Tribes were domiciled, namely Oklahoma, Kansas and Michigan, or are governed by Tribal laws.

137. The derivative claim sought to be bought by the Plaintiff on behalf of Covenant exclusively concerns issues of derivative standing under Texas law only. The double derivative claim sought to be bought by the Plaintiff on behalf of S3 Assurance (via Covenant) engages issues of derivative standing under both Texas law (as regards Covenant) and Cayman law (as regards S3 Assurance). If there is no derivative standing under Texas law to bring derivative claims on behalf of Covenant (which is an issue which will be impacted by Mr Smith's pending action before the Texas Court), there is force in Mr Goodman's argument that the Cayman Court should not be vexed with considering this double derivative claim.

138. The Texas District Court is a court of competent jurisdiction, and is no doubt equipped to deal with and determine any matters of Cayman law arising in the proceedings in that forum (which it can be inferred was the view taken by the Plaintiff when he commenced the Texas Proceedings).

Conclusion

139. In exercising its discretion the Court has come to the clear view that justice in this case is available in Texas (which is clearly the appropriate forum). The case was dismissed without prejudice at the Plaintiff's instigation and he is able to issue new proceedings there. The Plaintiff has not alleged that there is any procedural or juridical bar prohibiting him from obtaining the substantive relief he sought in Texas and there is no specific relief sought from the Cayman court which it is said could not be granted in Texas.

140. The basis of his decision to commence proceedings in this court is that his financial experts were unable to value claims against D2, S3 Management and D3, Mr Smith. He therefore filed a double derivative action on behalf of D1, S3 Assurance to seek to recover documents relating

to the management of D1, S3 Assurance and financial dealings with its insureds, by pursuing proceedings against D3, Mr Smith through D1, S3 Assurance.[20]

141. This is a case where the Plaintiff has, for strategic reasons, taken the decision that he could not prove his pleaded case in Texas because he could not obtain the necessary information in that court (after appeals to the Court of Appeals and Texas Supreme Court), and hopes that he might obtain a better outcome in Cayman (through broader discovery orders). It is a naked decision to '*forum shop*'[21].

142. The Court is satisfied that substantial justice can be done in the available appropriate forum, which in the Court's opinion is clearly Texas.

143. Orders to the effect will follow that the case is not a proper one for service out of the jurisdiction on the basis that the Cayman Islands is not the appropriate forum; service of the Amended Writ of Summons dated 28 February 2022 upon D2 and D3 be set aside; and the ex parte Order dated 11 April 2022 granting leave for the Plaintiff to serve the Amended Writ of Summons upon D2 and D3 in the United States of America be discharged.

144. Costs are to follow the event and be taxed on the standard basis.

THE HON. JUSTICE RAJ PARKER
JUDGE OF THE GRAND COURT

[20] §119 Harrell 1
[21] *Spiliada at p 482*