Maples

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 LP) ACTING BY ITS GENERAL PARTNER EQUIS SPECIAL G.P.)
(2) EQUIS SPECIAL G.P. (PREVIOUSLY KNOWN AS EQUIS ASIA FUND SPECIAL GP) 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

IN CHAMBERS

Appearances: Mr. Stephen Atherton QC instructed by Mr. Nicholas Dunne and Mr. Brett Basdeo of Walkers for the Plaintiffs
Mr. Richard Millett QC instructed by Mr. James Eldridge and Mr. Adrian Davey of Maples and Calder for the Third, Fourth, Fifth, Seventh, Eighth and Ninth Defendants
Mr. Nigel Meeson QC instructed by Mr. Erik Bodden and Mr. Spencer Vickers of Conyers Dill & Pearman for the Sixth Defendant

Before: **The Hon. Justice Ingrid Mangatal**

Heard: **26 and 27 March 2019**

Draft Ruling Circulated: **30 September 2019**

Ruling Delivered: **3 October 2019**



HEADNOTE

Applications to Set Aside Order for Service Out of the Jurisdiction - GCR Order 11, Rules (1) and (4), Order 32, Rule 6. GCR Order 41, Rule 5(3) Affidavits by Attorneys

Duty of full and frank Disclosure at ex parte hearing – Whether Amended Claim disclosed serious issue to be tried in relation to a certain claim – GCR Order 12, Rule 8(1)(b) and (c) – Whether service defective – Whether there are good reasons for Validating Defective Service.

RULING

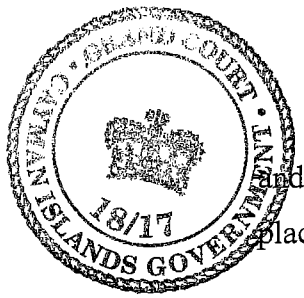
Introduction

1. The two day hearing concerned the Amended Summons of the Ninth Defendant, Equis Development Limited ("**EDL**") dated 30 November 2018 and the Summons of the Third, Fourth, Fifth, Seventh and Eighth Defendants - respectively David Charles Russell ("**Mr. Russell**"), Adam Bernhard Ballin ("**Mr. Ballin**"), Lance Michael Comes ("**Mr. Comes**"), Rajpal Singh Chaudhary ("**Mr. Chaudhary**") and Tony Gibson ("**Mr. Gibson**"), of 7 December 2018. The Third to Fifth and Seventh to Ninth Defendants (collectively the "**Foreign Maples Defendants**") seek to set aside the Court's Order of 24 September 2018 made *ex parte* by which the Plaintiffs were granted leave to serve the proceedings out of the jurisdiction (the "**Service Out Order**").

2. The Sixth Defendant Joseph Thomas Carmody ("**Mr. Carmody**") who is separately represented by Conyers, Dill & Pearman ("**Conyers**"), has filed his own Re-Amended Summons dated 11 December 2018 in some terms similar to those of the Foreign Maples Defendants, but also relying upon different and additional grounds.

3. The Defendants' respective summonses are referred to hereafter as the "**EDL Summons**", the "**Partners' Summons**" and the "**Carmody Summons**".

4. The EDL Summons is supported by the First and Second Affirmations of Sung Woo Yang ("**Mr. Yang**"), dated 30 November 2018 and March 2019. The Partners' Summons is supported by evidence from Mr. Russell, Mr. Ballin, Mr. Comes, Mr. Chaudhary and Mr. Gibson, as described in the Core Bundle. The Carmody Summons is supported by three affidavits of Jordan McErlean, sworn respectively on 21 November 2018, 12 March 2019,



and 20 March 2019 and that of Mr. Carmody sworn on 11 December 2018. Reliance is also placed on the evidence of Mr. Yang.

5. Mr. Cowan filed an affidavit in opposition to all 3 Summonses, sworn to on 28 February 2019 ("Mr. Cowan's First Affidavit"). There have been a number of affidavits in response from Mr. Gibson, Mr. Ballin, Mr. Russell, and Mr. Yang, filed in March 2019.

6. In the EDL and Partners' Summonses, the Foreign Maples Defendants have focused on a brand new claim, being a US$350 million claim brought derivatively by Mr. Cowan on behalf of Special LP in respect of Japan Solar LP (the "**Japan Solar Claim**"), pleaded at paragraphs 37A-T of the Re-Amended Writ of Summons and Statement of Claim (the "**Re-Amended Writ**"). In summary, the Foreign Maples Defendants each seek to set aside the Plaintiffs' permission to serve out of the jurisdiction the Japan Solar Claim on the basis that:

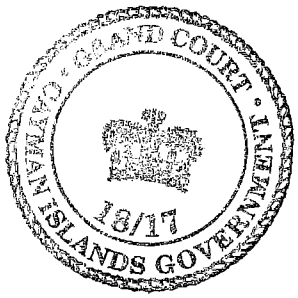
   (1) Mr. Cowan failed to make full and frank disclosure of material facts upon his ex parte application of 24 September 2018, which resulted in the Court being seriously misled into granting the Service Out Order in respect of that claim; and in any event,

   (2) The Japan Solar Claim is inadequately pleaded, legally incompetent, factually hopeless, and discloses no good arguable case for the purposes of some of the jurisdictional gateways and in any event raises no serious issue to be tried in respect of any of them.

7. The Partners' Summons did originally also seek to say that, contrary to the allegations in paragraph 32G of the Re-Amended Writ and several statements in affidavit of Stuart D'Addona dated 12 September 2018 ("**D'Addona 1**"), Mr. Russell, Mr. Ballin, Mr. Comes and Mr. Chaudhary, as directors of Special GP, do not owe any of the fiduciary duties to Special LP that are pleaded in paragraph 32G of the Re-Amended Writ or at all. Thus, they said, no cause of action lay against those Defendants on that basis. However, that point is not being pursued as it does not relate to the Japan Solar Claim.

The Submissions of the Foreign Maples Defendants

8. The Foreign Maples Defendants say that the background events leading up to the Service Out Order are themselves a cause for serious concern:

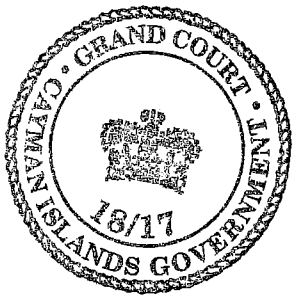


(1) The First Plaintiff ("**Mr. Cowan**") is a former employee of Equis (Hong Kong) Limited ("**Equis HK**") whose employment was terminated on 29 October 2017. On 23 February 2018 Mr. Cowan served a claim on the First and Second Defendants ("**Special LP**" and "**Special GP**"), claiming that he was entitled to certain additional investment proceeds and raising relatively narrow points of contractual construction.

(2) The parties exchanged a Defence, a Reply and various requests for further and better particulars. Following those exchanges, Mr. Cowan wrote to Special LP and Special GP on 25 June 2018 enclosing a draft re-amended claim. There was, at that stage, no suggestion of a claim against other Defendants, or any allegation of conspiracy; the claim was squarely a contractual one, albeit the pleading had been heavily criticized by Maples and Calder ("**Maples**") (acting for Special LP and Special GP).

(3) It was therefore, Maples say, with some surprise and grave concern they received a letter from Walkers on 12 September 2018 (acting for Mr. Cowan), proposing a yet further iteration of the claim. That claim now included the Foreign Maples Defendants and made allegations of fraud against them. The Foreign Maples Defendants say that Mr. Cowan's allegations are wholly baseless, unsupported by any proper evidential foundation and can only have been brought for the cynical tactical purpose of placing pressure on individuals associated with Special LP and Special GP in order to force a settlement.

(4) Mr. Cowan's Summons for leave to re-amend his claim and serve proceedings out of the jurisdiction (the "**Cowan Summons**") was heard ex parte by this Court on 24 September 2018. However, it was submitted that none of the extraordinary and highly material features of the proposed re-amended claim were brought to the Court's attention. Specifically:

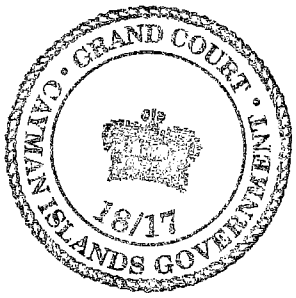


(a) Mr. Cowan failed to indicate the true scale of his proposed amendments. It was incumbent on him, in seeking leave, to state that what had commenced as a relatively self-contained contractual dispute was to become a US$440 million conspiracy claim with multiple related causes of action. He failed to do so.

(b) Further, he failed to disclose that the Japan Solar Claim was entirely novel; at no previous point in the litigation had that claim been so much as suggested. Mr. Cowan also failed to identify any new information that would explain its belated appearance.

(c) The sudden emergence of the Japan Solar Claim raised many important questions, not least as to whether Mr. Cowan honestly believed in its truth. Mr. Millett Q.C., on behalf of the Foreign Maples Defendants contends that it was remarkable that this vast alleged conspiracy had only occurred to Mr Cowan shortly before 12 September 2018, almost a year since he had first threatened proceedings, and only after Maples had highlighted the multiple flaws in his original, contractual claim. Despite Mr. Cowan's legal representatives (Walkers) telling the court at the *ex parte* hearing that "*additional materials subsequently came to Mr. Cowan's attention which necessitated filing an Amended Writ and now a Re-Amended Writ,*" no such "*additional materials*" were identified either in the evidence in support of the ex parte application or the skeleton argument, and Mr. Cowan's reply evidence does not explain it either. A fair presentation to the Judge, the submission continues, required Walkers to show the Court the "*additional material*" that justified the application at that time and supported the re-amendment.

(5) More culpably still, declares Mr. Millett QC, is that the description of the Japan Solar Claim that Mr. Cowan allowed to be presented to the Court was itself seriously inadequate.



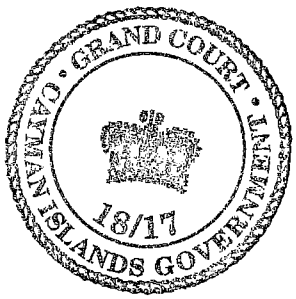
(a) Mr. Cowan's legal representatives argued that the fact the original claim had been defended by Special LP and Special GP was tantamount to an acceptance that the amended claim disclosed a serious issue to be tried. However, given the dramatic reformulation of Mr. Cowan's case, that submission was incorrect, misleading, and should never have been made.

(b) Further, the Court's attention was not drawn to a considerable number of further obvious legal and factual defences that the Defendants would be likely to assert. For example:

i. The fact that the key premise of the Japan Solar Claim of an alleged trust over a 20% Deemed Interest in Japan Solar LP (the "**Deemed Interest**") in favour of Special LP, is directly contradicted by the express terms of Japan Solar LP's own Amended and Restated Limited Partnership Agreement dated 27 November 2013 (the "**Amended JS LPA**"), which says that the Deemed Interest was the consideration payable to EDL for the transfer by EDL of the 'Solar Assets' (as defined) to Japan Solar LP; it is simply astonishing that Mr. Cowan's evidence in support did not seek to exhibit this document or refer to these provisions;

ii. The fact that Mr. Cowan expressly agreed to the terms of the Amended JS LPA when authorizing Equis Asia General Partner as GP of Equis Asia Fund LP ("**EAF**") and Equis Asia Fund Co-Invest LP, (together the "**Initial Funds**") to enter into it;

iii. The fact that EDL owned the relevant original investment assets (defined in the Amended JS LPA as the 'Solar Assets') and sold them to Japan Solar LP expressly in return for the Deemed Interest (as set out at Clauses 3.2 and 13.5 of the Amended JS LPA), meaning that no- one other than EDL could have had beneficial right to that interest;



iv. The fact that Mr. Russell and Mr. Ballin had worked since early 2012 on developing a portfolio of Japanese solar assets outside the scope of the Initial Funds, and indeed the fact that the Initial Funds were specifically prohibited from investing in Japan at that time; and

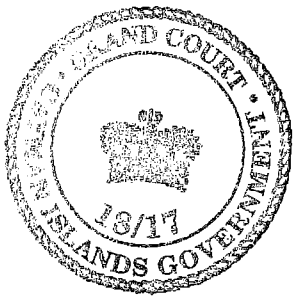
v. The fact that Mr. Cowan had been unable to explain how the alleged trust over the Deemed Interest was said to have arisen, having failed to plead either the declaration of an express trust or any case as to how Special LP might have come to hold a beneficial interest in EDL.

(c) In Mr. Cowan's First Affidavit, Mr. Cowan has sought to respond to these points by arguing that the Amended JS LPA is incorrect and/or does not mean what it says, that the relevant contractual prohibitions were technicalities that could be ignored or amended, and that (without in any way specifying how) the alleged trust arose "*by operation of law*" (at paragraph 59(a)). For the reasons given variously below, the Foreign Maples Defendants contend that those arguments are hopeless. However, they go on to assert that:

i. The Court's attention was never drawn to the fact that Mr. Cowan actually accepts that the Japan Solar Claim is contradicted by the express terms of the key contractual document under which the Deemed Interest was granted; and moreover;

ii. Mr. Cowan provides no proper explanation for these omissions. Instead, his affidavit simply records an apology alongside a vague reference to his obtaining new documents since the date of the hearing: see Mr. Cowan's First Affidavit at para.21. However, there is no attempt to identify those documents, and in any event the terms of the Amended JS LPA have been well known to Mr. Cowan for many years.

(6) There were a number of technical, but nonetheless significant, errors in Mr. Cowan's submissions on jurisdiction. For example, he erroneously suggested that



Mr. Carmody and Mr. Gibson controlled Special LP and Special GP, whereas in fact they are not directors of those entities; and he stated that the alleged trust would be governed by Cayman law, whereas in fact (if it existed) it would be subject to BVI law.

9. The Foreign Maples Defendants therefore seek to discharge the Service Out Order on the grounds of material non-disclosure.

10. Further or as an alternative basis for discharge of the Service Out Order, the Foreign Maples Defendants contend that the claim is devoid of any merit, and obviously so, such that there is no serious issue to be tried that could justify leave to serve the Foreign Maples Defendants out of the jurisdiction. In relation to this aspect of the grounds for setting aside, it was submitted that:

(1) The Deemed Interest was created by the Amended JS LPA and was, according to its terms, the 20% interest in Japan Solar LP which EDL received in return for selling its 100% interest in the Solar Assets, as defined therein, to Japan Solar LP. This is expressly stated on the face of the Amended JS LPA and the various investment approval documents which preceded it.

(2) There is no suggestion anywhere in any document that Special LP ever held any kind of beneficial interest in the Deemed Interest, as Mr. Cowan now claims.

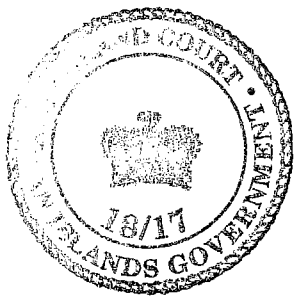
(3) There are no words of trust by either Japan Solar LP or EDL or Mr. Russell as the putative trustee(s), and no evidence of any intention to create a trust of the Deemed Interest.

(4) Moreover, the commercial rationale for such a trust which Mr. Cowan seeks to advance, namely that there are certain tax advantages that would accrue to Special LP, are vague, unidentified and wholly unsupported by any evidence whatsoever. Indeed, since Special LP is a Cayman limited partnership it had no tax exposure of any kind anyway.

(5) The Japan Solar Claim is a late invention by Mr. Cowan and the Court should see straight through it; it is a try-on.

11. The Foreign Maples Defendants therefore seek the following orders and declarations:

(1) Pursuant to the Cayman Islands ***Grand Court Rules*** ("***GCR***"):



(a) An order pursuant to ***GCR*** O.11 r.4(2) that there was no proper basis for permission for service out of the jurisdiction to be granted;

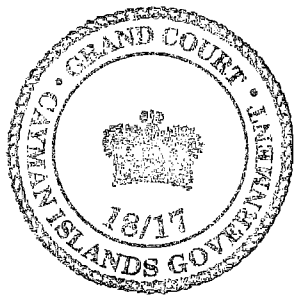
(b) An order pursuant to ***GCR*** O.32 r.6 that paragraph 2 of the Service Out Order be discharged and set aside; and also

(2) A declaration under the Court's inherent jurisdiction that permission to serve out of the jurisdiction is set aside on the grounds that the Japan Solar Claim does not disclose any serious issue to be tried.

12. Mr. Millett QC referred the Court to the decisions of the Judicial Committee of the Privy Council in ***Altimo Holdings v Kyrgyz Mobil Tel Ltd.*** [2012] 1 WLR 1804 and the decision of the Chief Justice in ***Ahmad Hamad Algosaibi & Brothers Company Ltd.v Saad Investments Company Ltd. & Ors.*** [2010] 2 CILR Note 6 and [2010] (2) CILR 289 as to the test on applications to serve out of the jurisdiction. Reference was also made to the decision of Warby J in ***Sloutsker v Romanova*** [2015] EWHC 545 (QB), and Popplewell J in ***Fundo Soberano de Angola v Dos Santos*** [2018] EWHC 2199 (Comm), amongst other authorities.

13. It was submitted that in summary, Lord Collins in ***Altimo***, held that it is necessary for a plaintiff to show three things:

(a) A serious issue to be tried, being the same test as for summary judgment, namely whether there is a real as opposed to a fanciful prospect of success;



(b) Jurisdictional gateway: the plaintiff must show that he has a good arguable case that the claim falls within one of the relevant gateways, and "*good arguable case*" here means that the plaintiff must have much the better of the argument; and

(c) Appropriate forum: the plaintiff must show that in all the circumstances the Cayman Islands is clearly and distinctly the appropriate forum for the trial of the dispute.

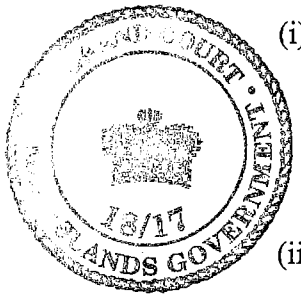
14. It was Mr. Millett QC's submission, by reference to ***Sloutsker v Romanova*** [2015] EWHC 545 (QB), that where an application for leave to serve out of the jurisdiction is made, the applicant is under the same duty of full and frank disclosure as applies on all applications without notice.

Consequences of non-disclosure

15. It was submitted that where it is established that an applicant has failed to disclose material facts on an application for leave to serve out of the jurisdiction, the consequences are serious. At paragraph 50(6) of ***Fundo Soberano***, the non-disclosure of material facts on an *ex parte* application for such leave may lead to the setting aside of the order obtained, without examination of the merits. Warby J in ***Sloutsker v Romanova*** also stated that this is justified on the basis that it is always important to uphold the requirement of full and frank disclosure.

16. The decision as to whether to set aside the order without examination of the merits is subject to the Court's discretion. However, in ***Microsoft Mobile OY (LTD.) V Sony Europe Ltd*** [2017] EWHC 374, Marcus Smith J, at [209], citing ***The Arena Corporation Ltd v Shroeder*** [2003] EWHC 1089 (Ch) at [213], went on to say that where there have been breaches of the duty of full and frank disclosure, "the general rule" is that the Court should discharge the Order so obtained. In the ***Microsoft Mobile*** case, Marcus Smith J proceeded to discharge the order for service out and set aside the service having regard to all of the circumstances, including the seriousness of the non-disclosure and the importance of the issues it went to.

17. Nonetheless, whether the non-disclosed fact is sufficiently material to justify or require the immediate discharge of the order depends on two overarching factors:



(i) the importance of the facts not disclosed to the issues to be decided by the Court upon the ex parte application (whether the Court might have made the same order in any event being of little relevance); and

(ii) whether the non-disclosure in question was innocent , this being an important (but not decisive) consideration.

18. ***Brinks Mat*** makes it clear that whether the non-disclosure of a fact was "innocent" in this context is determined by whether (i) the relevant fact was known to the applicant (or could reasonably have been known, further to the duty to make inquiries), or (ii) whether the relevance was perceived at the time the application was made.

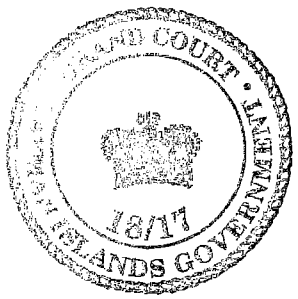
19. Mr. Millett QC helpfully identified that there are two further potential remedies that the Court has in the context of an application for leave to serve out of the jurisdiction, and these are:

(a) It has a discretion to set aside the order for service and require a fresh application for leave to serve out, *de novo*; or

(b) It can treat the claim form as validly served and deal with the non-disclosure by way of an adverse costs order: ***NML Capital Ltd. v Republic of Argentina*** [2011] 2 A.C. 495, [136] per Lord Collins.

The Carmody Summons

20. The Carmody Summons, though relying on several of the core matters relied upon by the Foreign Maples Defendants, also has some unique features. Mr. Carmody seeks the following orders and directions;



"1. Pursuant to GCR Order 12, rule 8(1)(b) that the Plaintiffs' Re-Amended Writ of Summons dated 24 September 2018 has not been duly served on the 6th Defendant in compliance with the order of the Honourable Justice Ingrid Mangatal dated 24 September 2018 in these proceedings giving leave to serve certain of the Defendants outside of the jurisdiction (the "Order"), on the basis that:

a) The Plaintiffs failed to serve the 6th Defendant at his address for service as identified in the Order or within the relevant State; and

b) Further or alternatively, the Plaintiffs failed to provide the 6th Defendant at the time of the purported service of the Plaintiffs' Re-Amended Writ of Summons with the first affidavit of Brett K Basdeo dated 20 September 2018.

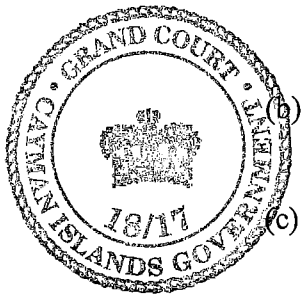
2. Further or alternatively, and without prejudice to paragraph 1 above, pursuant to GCR Order 12 rule 8(1)(c) that leave to serve the Re-Amended Writ of Summons on the 6th Defendant out of the jurisdiction be set aside on the ground that there is no good arguable case against the 6th Defendant in respect of all, alternatively some, of the claims contained in the Re-Amended Writ of Summons.

3. Further or on the alternative, and without prejudice to paragraphs 1 and 2 above, pursuant to GCR Order 18 Rule 19 and/or the inherent jurisdiction of the Court that the claim against the 6th Defendant contained in the Re-Amended Writ of Summons be struck out on the basis that it discloses no reasonable cause of action and/or is frivolous or vexatious or it is otherwise an abuse of the process of the court."

(My emphasis)

21. Thus, Mr. Carmody in essence, seeks:

(a) A declaration that the Plaintiffs' Re-Amended Writ has not been duly served on the Sixth Defendant in compliance with the Service Out Order;



(b) Leave to serve the Re-Amended Writ be set aside on the ground that there is no good arguable case against Mr. Carmody; and

(c) In the alternative, and without prejudice to the jurisdictional challenge, the claims against Mr. Carmody be struck out.

22. Mr. Meeson QC, who appeared for Mr. Carmody, indicated that the orders set out at paragraph 21(a) and (b) above, are sought pursuant to ***GCR***, Order 12, Rule 8(1)(b) and (c), which state:

> *"A defendant who wishes to dispute the jurisdiction of the Court in proceedings by reason of such irregularity as is mentioned in rule 7 or on any other ground shall give notice of intention to defend the proceedings and shall within the time limited for service of a defence apply to the Court for...*
>
> *(b) an order declaring that the writ has not been duly served on him;*
>
> *(c) the discharge of any order giving leave to serve the writ on him out of the jurisdiction."*

23. As to the alternative relief outlined at paragraph 21(c) above, reliance is placed upon the inherent jurisdiction of the Court, as well as ***GCR*** Order 18, Rule 19(1).

Relevant background to Mr. Carmody's Application

24. On 1 August 2018, Mr. Carmody ceased to be a limited partner of Special LP, the Second Plaintiff and First Defendant herein. Mr. Carmody retired on terms that Special LP agreed to indemnify him for any loss, damage or liability which he may incur in respect of or relating to and/or in connection with these proceedings.

25. By Deed of Waiver, Release and Indemnity dated 1 August 2018 between Special LP, Special GP and Mr. Carmody ("**Deed of Indemnity**"), Special LP waived any and all claims against the Sixth Defendant of any nature or description and agreed to indemnify Mr. Carmody for any loss, damage or liability which Mr. Carmody may incur in respect of or relating to and/or in connection with this proceeding.

26. On 24 September 2018, the Re-Amended Writ was filed. Mr. Meeson QC describes the Re-Amended Writ as the third version of the Writ, and that it was filed some seven months after the initial Writ was issued on 19 February 2018. It was also the first version to name Mr. Carmody as a Defendant to these proceedings (amongst the other new Defendants, the Foreign Maples Defendants).

27. The Plaintiffs obtained the Service Out Order permitting service out against Mr. Carmody. So far as relevant, the Service Out Order provides as follows:



"The Plaintiffs be granted leave, pursuant to GCR Order 11, Rule 1 (1)(c), (d), (f), (ff), and/or (j) to serve the Re-Amended Writ of Summons, and any other document, pleading notice or order herein, on the Third to Ninth Defendants out of the jurisdiction at the addresses set out below, or wherever they may be found, in such manner as is compliant with the requirements of the laws applicable in the relevant State. (Counsel's emphasis)

Defendant	***Address for Service***
……	……
Joseph Thomas Carmody	*73 Eng Watt Street, #03-05 Tiong Bahru Estate, Singapore 160073*

28. Mr. Meeson QC asserts that, despite the Plaintiffs obtaining orders to serve Mr. Carmody in Singapore, Mr. Carmody received, in Australia, a letter from Walkers dated 10 October 2018, which Mr. Carmody says purported to contain 8 enumerated documents, but was in fact missing document No. 5, the First Affidavit of Brett Basdeo dated 20 September 2018 ("**Basdeo 1**").

29. There was ultimately a significant chain of correspondence between Walkers and Conyers, exhibited to Mr. McErlean's affidavits and referred to in Mr. Carmody's skeleton argument. This chain culminated in the letter dated 19 March 2019, by which Conyers



responded to Walkers letter of the same day. Conyers confirmed that, should Walkers obtain leave to serve out in Australia (making full and frank disclosure of the Deed of Indemnity), as indeed, would be required to be done, Conyers would then seek instructions to accept service in order to avoid the delay and costs of physically serving Mr. Carmody in Australia.

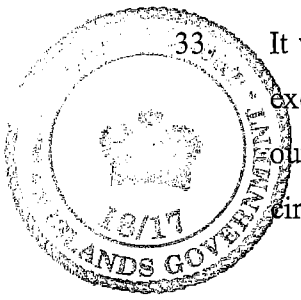
Mr. Carmody's application for a declaration that he has not been duly served

30. Reference was made to Walkers' letter dated 11 December 2018, where the Plaintiffs' lawyers characterized the relief sought by Mr. Carmody in relation to service as *"nothing more than a tactical attempt at delay"*. However, this was unreservedly denied on behalf of Mr. Carmody. Mr. Meeson QC referred to Lord Sumption's judgment in the recent decision of the UK Supreme Court in ***Barton v Wright Hassall LLP*** [2018] UKSC 12, where at paragraph 22 it was opined that just because a party takes the point that service was invalid does not mean that a party is *"playing technical games"*.

31. It was submitted that despite extensive correspondence between the parties, the Plaintiffs failed to take any steps to correct the service defect. Further, that any delay caused by the Plaintiffs' failure to serve Mr. Carmody in accordance with the Service Out Order lies squarely on the Plaintiffs' shoulders.

32. Learned Counsel also reminded the Court that the Plaintiffs are now aware of the Deed of Indemnity which he avers releases Mr. Carmody from all claims by Special LP and thereby extinguishes any possible good cause of action against Mr. Carmody. Accordingly, the argument continues, the Plaintiffs' failure to serve the Re-Amended Writ in accordance with the Service Out Order is not a mere technicality. Further, that this failure combined with the Plaintiffs' current knowledge of the Deed of Indemnity raises substantive issues in relation to the jurisdiction of this Court to serve Mr. Carmody outside of the Cayman Islands.

Service out is not permitted without leave



33. It was opined that it should be common ground that service out of the jurisdiction is an exercise by the Cayman Islands Court of judicial power over a foreigner who is resident out of the jurisdiction and is therefore not permitted without leave, save for in special circumstances not relevant here.

34. Reference was made to the way that Order 11 was drafted. That is said to reflect the concern that service of proceedings out of the jurisdiction is an assertion of foreign power over a defendant, and also a corresponding interference with the sovereignty of the state in which the process is served. Reference was also made to the judgment of Smellie CJ in ***Ahmad Algosaibi and Brothers Company v Saad Investments Company Limited et al*** [2010 (2) CILR Note 6], where Smellie CJ stated that a person outside the Islands should not be lightly subjected to the legal process of a foreign jurisdiction.

35. The next stop on Mr. Meeson QC's tour of GCR Order 11, was Rule 4(1)(c) which requires that an application for leave under Rule 1(1) must be supported by an affidavit stating *"in what place or country the defendant is, or probably may be found."* The point was made that the country where the defendant is located is important, given the various international protocols which must be considered such as the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters. Another aspect of the significance of the country in which the defendant is located is that that may be a relevant consideration in assessing whether the Cayman Islands is the appropriate forum for the trial in the interests of all the parties and of justice.

36. The Court was referred to the ***Supreme Court Practice 1999***, 11/4/5 where it is stated:

> *"Leave is usually given to serve in a particular country. If it turns out that the defendant is in a country other than that named in the order, application to amend the order, and if necessary the writ and concurrent writ, should be made ex parte to the Practice Master on affidavit."*

The Plaintiffs did not serve Mr. Carmody in accordance with the Service Out Order

37. Mr. Carmody's submissions next turned their focus to the position which the Plaintiffs have taken, which is that the Service Out Order permits Mr. Carmody to be served not only in Singapore, but (Mr. Carmody's skeleton argument, at paragraph 2.9), *"in Australia or anywhere else in the whole wide world."* The argument continues that the Plaintiffs say that the words *"or wherever they may be found"* gave them the latitude to serve the Defendants anywhere in the world. This, despite the surrounding language which Learned Counsel says make it clear that service was permitted only to be made within each identified state: *"at the addresses set out below, or wherever they may be found, in such manner as is compliant with the laws applicable in the relevant State."* (Learned Counsel's emphasis)

38. It was submitted that the Plaintiffs' strained interpretation of the Service Out Order does not accord with the words used in the Service Out Order, the relief requested by the Plaintiffs, or the matters put before the Court at the *ex parte* hearing. Further, it was opined that such an expansive order would require corresponding unequivocal and explicit language which the Service Out Order does not contain.

39. It is in those circumstances that Mr. Carmody asked the Court to make a declaration that the Re-Amended Writ has not been duly served on Mr. Carmody in compliance with the Order.

The Court should not exercise any discretion to cure the Plaintiffs' defective service

40. Learned Counsel anticipated that the Plaintiffs may suggest that the Court can cure irregularities in relation to service under ***GCR***, Order 2, Rule 1. However, the comment of the UK Court of Appeal in ***Golden Ocean Assurance Ltd. v Martin*** [1990] 2 Lloyds Rep. 215 was emphasized, where the rule was described by Lloyd LJ at page 219, as:

> *"a most beneficial provision which should be given wide though not unlimited effect."* (Learned Counsel's emphasis)

41. It was submitted that this is not a simple matter where a plaintiff has made a small, technical, error in relation to service. Mr. Carmody takes the position that this is a case in which the Plaintiffs have deliberately served him, an Australian citizen, in Australia, without leave to serve in that jurisdiction. It is contended that this intentional breach of ***GCR*** Order 11 and unsanctioned interference with a foreign jurisdiction cannot, and should not, be tolerated by this Court.

42. Mr. Meeson QC again referred to the recent decision of the UK Supreme Court ("**UKSC**") in ***Barton v Wright Hassall LLP***, where the circumstances in which the Court should exercise its discretion to cure defects in service were considered. While Learned Counsel accepts that the UK's Civil Procedure Rule ("**CPR**") 6.15(2) differs from the ***GCR*** in relation to how defective service is cured, and introduces a more permissive provision to enable the defect to be cured which is not found in the ***GCR***, it was submitted that the principles applied by the UKSC are of helpful guidance in that they show that even under the more permissive regime of the CPR, this would not be a case to allow the defect in service to be ignored or excused.

43. In ***Barton***, the UKSC pointed out that it is not sufficient for a plaintiff to say that a defendant has learnt of the claim through defective service and that therefore the Court should automatically exercise its discretion to cure such service. Indeed, in ***Barton***, where the appellant had failed to obtain leave to serve a claim on the defendant's solicitors by email, the UKSC declined to cure the defective service.

44. Reference was also made to the case of ***Abela v Baadarani*** [2013] UKSC 44, which Learned Counsel argues is distinguishable on the facts.

45. In sum, on this point it was submitted that this case is more akin to ***Barton*** and that it would be inappropriate for the Court to make any order that would have the effect of curing the defective service.

Leave to Serve Mr. Carmody should be set aside

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46. Pursuant to ***GCR*** Order 12, Rule 8(1)(c) Mr. Carmody applies for the discharge of the Service Out Order to serve the Re-Amended Writ on him out of the jurisdiction as there is no good arguable case against Mr. Carmody in respect of all of the claims contained in the Re-Amended Writ.

47. Mr. Meeson QC characterizes the claims against Mr. Carmody as being limited in nature, and opines that this can readily be seen from the contents of D'Addona 1 sworn in support of the Cowan Summons. Paragraphs 16-18 of that affidavit set out Mr. Carmody's alleged connection with the proceedings. Those paragraphs, it was proffered, focus only on the fiduciary duties owed by Mr. Carmody to Special LP. It was pointed out that no mention is made of any obligations owed by Mr. Carmody to Mr. Cowan directly.

48. As to the claims in the Re-Amended Writ, the same point is made. Reference was made to a letter from Walkers dated 23 November 2018, where Walkers identified that paragraphs 32H, 32I, 35B, 35F, 37L, 370 and 37Q include allegations against Mr. Carmody. However, Mr. Meeson QC counters that, at the core of each of these claims is an alleged breach of fiduciary duties owed by Mr. Carmody to Special LP.

49. Accordingly, the argument was that in circumstances where a Deed of Indemnity acts to release the claims by Special LP against Mr. Carmody, there is no good arguable case against him and as such the Service Out Order should be discharged.

The Claims against Mr. Carmody Should Be Struck Out

50. Mr. Meeson QC stated that this alternative submission was made and arises only if the Court rejects the earlier arguments advanced on Mr. Carmody's behalf and if the Court finds it has jurisdiction. It is expressly made without prejudice to the jurisdictional challenge under Order 12 rule 8.

51. The submission is that any claims against Mr. Carmody should be struck out (in accordance with ***GCR*** Order 18, Rule 19 and the Court's inherent jurisdiction) because:



(a) the Re-Amended Writ discloses no reasonable cause of action;

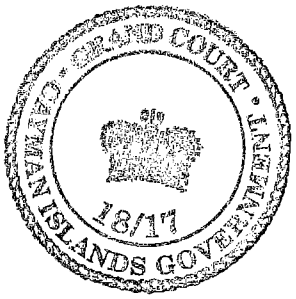
(b) the Re-Amended Writ is frivolous or vexatious; and

(c) it is otherwise an abuse of the process of the court.

The Plaintiffs' Response to the Applications to Set Aside

52. In relation to the allegation that there was not full and frank disclosure at the *ex parte* hearing, Mr. Cowan responded as follows at paragraph 21-23 of Mr. Cowan's First Affidavit:

> *"**Full and Frank Disclosure***
>
> *21. It is alleged in the Applications that at the Ex Parte Hearing I failed to comply with my duty of full and frank disclosure. I did not deliberately withhold any relevant information, and if I did so inadvertently, I must apologise. Having reviewed the evidence filed by the Defendants, it is clear they take a very different view of numerous issues, including the position of Japan Solar LP as an investment vehicle for the Initial Funds. There are substantial differences between us as to our understanding of the underlying facts. To be clear, I did not have in my possession at the time of the Ex Parte Hearing a substantial number of the documents referred to by the Defendants. In any event, I maintain that the documents referred to by the Defendants in their evidence are compatible with my case as it has been advanced in the pleadings and was put at the Ex Parte Hearing. In this Affidavit I will explain why that is the case and why rather it is the Defendants' explanation that is wrong and inconsistent with the available record.*
>
> ***Mr. Russell and Mr. Yang's Evidence***
>
> *22. Mr. Russell's and Mr. Yang's evidence has been drafted so that Mr. Russell cross refers to, and agrees with, the evidence provided by Mr. Yang in support of the EDL Summons, and seeks to embellish and provide further detail on the following contentions, which are essentially that:*
>
> *(a) The Initial Funds had no involvement with the establishment of the investment that became Japan Solar LP;*
>
> *(b) Japan Solar LP was an independent investment devised exclusively by Mr. Russell and Mr. Ballin for the benefit of investors outside of the Initial Funds;*
>
> *(c) It was never intended that the Initial Funds would have any economic interest or benefit in the Japan Solar LP Investment, and indeed they were contractually prohibited from such an investment. Certain investors from the Initial Funds expressed an interest in investing in*



the Seed Assets, which led to the lifting of the contractual restrictions on the Initial Funds' investment in Japanese assets, and the establishment of Japan Solar LP;

(d) Mr. Russell and Mr. Ballin themselves developed, owned and managed 100% of the Seed Assets of Japan Solar LP;

(e) EDL's interest in Japan Solar LP, by way of the Deemed Interest, was a contractual entitlement received by EDL only as a result of the sale by Mr. Russell of 80% of the Seed Assets and all future assets to other investors, and the retention by Mr. Russell of a 20% ownership interest in Japan Solar LP; and

(f) Mr. Russell accordingly kept 100% of the distributions from EDL.

23. Having left the business in September 2017 as a Good Retired Partner, I readily accept that the documentation I currently have access to, and had access to at the Ex Parte Hearing, which may be relevant to the above issues is far from complete. Further, as I have pleaded, I am the victim of a fraud and therefore almost by definition do not have access to all the relevant documents. In the circumstances, the Court must be dependent upon the Defendants to put the full picture before it. From the evidence that has been filed by the Defendants, it is clear to me that has not been done. The Defendants' objective in these applications is to stifle or deny a hearing of my genuine claim. As the paragraphs below make plain with reference directly to the contemporaneous record, not only is the explanation advanced by Mr. Russell and Mr. Yang in their evidence (as summarized in paragraph 22(a) to (f) above) inaccurate but it is also misleading."

53. At paragraphs 40, and 57-59 of his Affidavit, Mr. Cowan also gives evidence as follows:

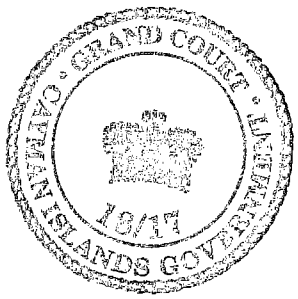
"<u>Acquisition of the Seed Assets</u>

40. As described in paragraph 33 above, as set out in the Japan Solar IAR, and contrary to the statement at paragraph 3.3(b)(iii) of the Russell Affirmation, the Seed Assets were never owned by EDL but were instead acquired by NRE Japan from third party developers, Blue Energy Partners and Shizen Energy.

<u>Characterisation of the Deemed Interest</u>

57. In circumstances where:

(a) Contrary to statements made in the Yang Affirmation and Russell Affirmation, neither EDL nor Mr. Russell ever owned the Seed Assets, such that the Deemed Interest cannot have been consideration for the transfer of the Seed Assets from EDL to Japan Solar LP as contended by Mr. Russell and Mr. Yang;



(b) At no point did EDL procure the right to purchase Seed Assets but rather the Seed Assets were purchased by NRE Japan utilizing funds drawn from the Initial Funds;

(c) Special LP would otherwise (in its capacity as Founder Partner of the Equis Parallel Funds) have received performance fees in respect of any investment by the Initial Funds in Japan Solar LP, but agreed to waive such performance fees;

(d) The amount which ultimately would be received by EDL through the Deemed Interest was contingent on the performance of the Japan Solar LP Investment which was managed by NRE Japan; and

(e) Equis represented to its investors that the Deemed Interest was a performance fee for managing and continuing to grow the Japan Solar Investment, including on page 33 of a due diligence questionnaire circulated to prospective investors in Japan Solar LP in or around the fourth quarter of 2013, a copy of which is at pages 540 to 641 of GAC-1.

It is my case that the Deemed Interest (notwithstanding its description as a deemed interest) was in the nature of a fee payable in lieu of the performance fee which would in the ordinary course have been payable to Special LP. As explained further below, the reason why it was structured in the way that it was as a Deemed Interest and not as a performance fee, as would typically have been the case, was because EDL stood to gain a tax advantage if it was able to characterize the Deemed Interest as a capital gain, rather than as a performance fee which would be construed as business income.

58. *From the incorporation of EDL in March 2013 until mid-December 2017, all of the Directors of EDL at that time, being Mr. Russell, Mr. Ballin and Mr. Comes, were resident in Singapore, which, as a matter of Singaporean law, meant that EDL was subject to Singaporean taxation. A copy of the register of directors of EDL is at page 642 of GAC-1. My understanding is that entities which are subject to taxation in Singapore pay tax on income earned, but do not pay tax on capital gains. It followed that if EDL was able to characterise the Deemed Interest as consideration for the acquisition of the Seed Assets so that the benefit received by EDL in respect of the Japan Solar LP Investment could be characterised as a capital gain rather than as income (which is how a performance fee would be treated), EDL would be able to minimise the tax payable in Singapore.*

59. *The defendants have sought to oppose my claim that the Deemed Interest and Japan Solar Proceeds were held on trust for Special LP by putting into evidence the constitutional documents of Japan Solar LP and stating that such documents: (a) do not refer to any trust; and (b) are in themselves determinative of the nature of the Deemed Interest as consideration for the Seed Assets. However:*

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(a) I am advised (without waiving any privilege) that the trust referred to arises by operation of law rather than by any trust instrument or document. Monies that ought to have been paid and which rightfully belong to Special LP were wrongfully diverted away from Special LP for the benefit of those Defendants defined as the "Recipients" in the Re-Amended Statement of Claim;

(b) It is entirely unsurprising that the constitutional documents of Japan Solar LP are silent on the beneficial ownership of the Deemed Interest (and the Japan Solar Proceeds which flowed from it), given that such beneficial ownership would have been of no concern to Japan Solar LP or its investors;

(c) The documents that are determinative of whether the Deemed Interest was consideration for the acquisition of the Seed Assets from EDL by Japan Solar LP, are not the constitutional documents of Japan Solar LP, but rather the contracts of sale for the Seed Assets. These show that the Seed Assets were sold to NRE Japan for cash consideration in the aggregate amount of ¥491,350,000 (approximately US$4,440,000); and

(d) Contrary to the statements in:

(i) Paragraph 3.3(c) of the Yang Affirmation that the trust pleaded in my claim is contradicted by the constitutional documents of Japan Solar LP; and

(ii) Paragraph 5.4 of the Russell Affirmation that the constitutional documents of Japan Solar LP are evidence in relation to the ownership or development of the Seed Assets,

Insofar as the JS ARLPA states that the Deemed Interest was consideration for the sale of the Seed Assets, that document is factually incorrect and directly contradicted by the sale and purchase agreements negotiated with and signed by third parties which are referred to at paragraphs 40 to 46 above and record the correct position."

The Japan Solar Claim

54. Mr. Atherton QC, who appears for the Plaintiffs, in his Outline Submissions on behalf of the Plaintiffs provide a summary of the Japan Solar Claim, which is set out at paragraphs 37A to 37T of the Re-Amended Writ. In mid-2013 or late 2013, an opportunity to invest in certain Japanese solar energy assets was identified by (as alleged by the Plaintiffs) Equis Asia Fund LP ("**EAF I**"). However, it was not possible for the Initial Funds - the only funds managed by Equis at that time - to take advantage of this opportunity without breaching certain investment mandate conditions as contained in the Initial Funds' respective Limited Partnership Agreements ("**LPAs**"), see



paragraphs 37A to 37C of the Re-Amended Writ. It was subsequently agreed by the investors in the Initial Funds to amend the investment mandates contained in the relevant LPAs to permit investment in the Japanese solar energy assets.

55. Japan Solar LP, he submits, was formed as the vehicle through which the Initial Funds (and subsequently other investors) were to invest and did invest in the Japanese solar sector. It was agreed by the investors in Japan Solar LP that: (i) they would pay management fees equal to the reasonable costs of the general partner of Japan Solar LP; and (ii) a 20% interest in Japan Solar LP Deemed Interest would be given to EDL which would receive distributions by reference to the performance of Japan Solar LP (see paragraphs 37D to 37E of the Re-Amended Writ). EDL was and is wholly owned and controlled by Mr. Russell. However, the Outline Submissions continue, at the time Mr. Cowan believed that EDL was the entity through which the Foundation Partners would receive their entitlement, in simple substitution for Special LP or that EDL would account to Special LP for the sums it received.

56. It is Mr. Cowan's claim that the Deemed Interest was paid to EDL (purely for tax avoidance purposes), in circumstances where:

(a) The sole initial investors in Japan Solar LP were the Initial Funds;

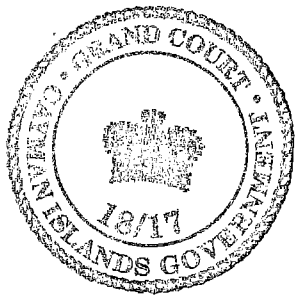
(b) Special LP was created by the Foundation Partners as the vehicle to receive performance fees from all of the Equis funds(including the Initial Funds);

(c) Japan Solar LP was an Equis Fund; and

(d) Ultimately, the Deemed Interest ought properly to have been paid to and received by Special LP.

57. The argument continues that, as a consequence, and in the circumstances, a constructive trust arose for the benefit of Special LP and, in turn for the benefit of the Foundation Partners, in respect of the Deemed Interest and/or the amounts paid to EDL representing the Deemed Interest (see paragraph 37G of the Re-Amended Writ).

58. In early 2018, when Japan Solar LP was sold, together with the assets of other Equis branded funds, approximately US$350 million of the proceeds of sale was attributed to the Deemed Interest (the "**Japan Solar Proceeds**") which amount, according to Learned Counsel *" as far as the Plaintiffs can determine"* was paid to EDL and then on to Mr. Russell. The submission at paragraph18 of the Plaintiffs' skeleton argument continues as follows:



*"Mr. Cowan's and the Special LP's case is that (to the best of Mr. Cowan's knowledge) Mr. Russell then distributed the proceeds of the Deemed Interest ("**the Japan Solar Distribution**") amongst each of the Founding Partners (except Mr. Cowan), as well as to Mr. Gibson, Craig Marsh and Mr. Yang (together, the "**Recipients**") - paragraphs 37H and 37I of the Re-Amended Claim."*

59. In relation to the Japan Solar Distribution, Mr. Cowan and the Special LP claim the following:

a) Breach of trust - Mr. Russell caused the Japan Solar Distribution to be made in breach of trust and in breach of the fiduciary duties that he owed/Special GP owed to Special LP.

b) Knowing receipt - that each of the Recipients are liable to account and/or pay equitable compensation to Special LP as each of them knew or ought to have known that the Japan Solar Distribution was in breach of trust and in breach of fiduciary duties owed to Special LP.

c) Knowing Assistance - that each of the Recipients received the sums of money knowing that the same was being dealt with in breach of trust and therefore knowingly and dishonestly assisted in that breach of trust by participating in the wrongful appropriation of the Japan Solar Distribution;

d) Conspiracy - that each of EDL, Mr. Russell and the Recipients, combined and/or conspired together to deprive Special LP of the Japan Solar Proceeds and/or wrongfully, and with intent to injure Special LP, by unlawful means conspired to divert the Japan Solar Proceeds away from Special LP/Mr. Cowan.

60. Mr. Atherton QC summarized the evidence of the Foreign Maples Defendants, compared it to that of Mr. Cowan, and opined that the detailed evidence provided by Mr. Cowan in answer to the evidence served on behalf of the Defendants provides a credible and compelling rebuttal of the attempts by the Defendants to undermine the case as set out in the Re-Amended Writ. Indeed, Learned Counsel submits, that the account Mr. Cowan provides in relation to the background to and basis of the Japan Solar Claim, at a minimum, casts severe doubt over the reliability of the version of events proffered by the Defendants, in particular that contained in the statements of Mr. Russell and Mr. Ballin in his (responsive) Second Affirmation.

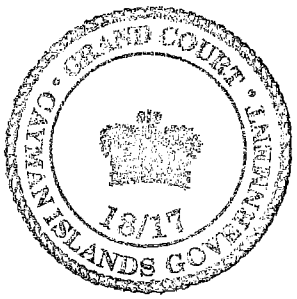
61. It was submitted that it is plain that there are serious issues to be tried in relation to the Japan Solar Claim, and that there was no breach of the duty of full and frank disclosure. It was conceded that at the *ex parte* hearing the statement as to the basis of the defence that the Foreign Maples Defendants were likely to raise was stated in relatively general terms., i.e. that they were likely to aver that there was no improper diversion of funds to the detriment of either Mr. Cowan and/ or Special LP. However, it was submitted that that was in essence the defence that has now been raised, i.e. that Special LP had no right or interest in the Deemed Interest and that therefore there has been no misappropriation of the sums that constitute the Deemed Interest.

62. It was also accepted that Messrs. Russell, Ballin, Comes, Chaudhury and Gibson do raise a point by way of defence which was not brought to the Court's attention at the *ex parte* hearing. This was that these Defendants doubt the legal basis for the assertion made by the Plaintiffs that the directors of Special GP, given that position, not only owed fiduciary duties to Special GP, but also owed fiduciary duties to Special LP. However, it was submitted that such a lapse is not of sufficient seriousness or materiality to cause the Court to discharge the Service Out Order. Specifically, as regards this putative defence and as regards the manner in which the *ex parte* hearing proceeded more generally, it cannot be said that the nature of the case against the Defendants was not fairly presented, or that the Court did not have a sufficiently clear and full representation of the case to make the Service Out Order.

63. Learned Counsel refers to the fact that a specific complaint was made on behalf of Mr. Gibson, in respect of the oral submission made at the *ex parte* hearing, at which it was said that those Defendants who are natural persons *"are in one sense the "real" wrongdoers who are in control of the entities."* Mr. Gibson has pointed out that he has never been a director of Special GP, and avers that he has never been in *"effective control"* of either Special LP or Special GP, nor can he properly be described as a "*real wrongdoer....in control of...*" Special LP and/or Special GP. Mr. Gibson also has indicated that he has never been a limited partner of Special LP. The Re-Amended Writ asserts that Mr. Gibson was a knowing recipient of monies improperly distributed from the Japan Solar Proceeds.

64. Mr. Atherton QC argues that the way the case against Mr. Gibson was put at the *ex parte* hearing was nothing more than an honest and simple misstatement as to the nature of the case being brought by the Plaintiffs. It was posited that such an occurrence does not constitute a breach of the obligation of full and frank disclosure and is not a material misrepresentation.

65. At paragraphs 3.1 and 3.2 of his First Affirmation dated 30 November 2018, Mr. Yang had this to say about Mr. Cowan and the Japan Solar Claim:



"3 The Japan Solar Claim

3.1 Overview

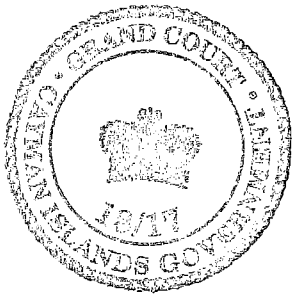
*(a) In the Re-Amended Claim, Mr. Cowan pleads, derivatively on behalf of.. Special LP, a previously unheralded and entirely novel claim in conspiracy in respect of a Cayman Islands exempted limited partnership named Japan Solar LP, with the value of the new claim being put at US$350 million (the "**Japan Solar Claim**").*

(b) However, Mr. Cowan's description of the Japan Solar Claim was seriously deficient. Its deficiencies were reflected in each of the Re-Amended Claim, the D'Addona Affidavit, the Skeleton Argument and the description given in oral argument, as reflected in the Hearing Note. Together, they gave a misleading view of the nature of that claim, and of the cogency of Mr. Cowan's allegations.

3.2 Misleading comparison

(a) At paragraph C2 of the Skeleton Argument, Walkers, Mr. Cowan's attorneys, stated that the [sic] Mr. Cowan's case is that (i) there was an improper diversion of US$90 million "with the intention of depriving Mr. Cowan of his interest therein" and then (ii) a further improper distribution of the proceeds from Japan Solar LP amounting to some US$350 million "again in order to deprive Mr. Cowan of his interest therein." In that way, Walkers drew a parallel between the two alleged distributions, a parallel which they relied upon at the hearing itself. As the Hearing Note confirms, [Walkers] *equated those claims and stated that in each case "the mechanism for the diversion was the limited partnership (see the third page of the Hearing Note).*

(b) However, these suggested parallels are completely incorrect. [Special LP] *was not involved, in any way, in the alleged distribution of the US$350 million relating to Japan Solar. Further, the Japan Solar Claim did not involve a*



diversion that was similar in any way to the alleged diversion of US$90 million; instead, it was predicated upon an alleged breach of an undocumented supposed 'trust' over US$350 million of assets in favour of [Special LP]. *The fact that the Re-Amended Claim is dependent upon Mr. Cowan establishing the existence of a huge and undocumented 'trust' was wholly obscured by the suggestion that it simply mirrored the claim in respect of the alleged diversion of US$90 million."*

66. Mr. Atherton QC submitted that on this issue also the way the case was put was an honest and simple misstatement as to the nature of the case brought by the Plaintiffs.

The Carmody Summons

67. The Plaintiffs make four essential points about the Carmody Summons, as follows:

(a) First, the terms of the Service Out Order itself, when properly construed, are wide enough and were deliberately made in such wide terms to cater for a situation such as that which has actually arisen in relation to Mr. Carmody.

(b) As regards whether or not Mr. Carmody was served with all the relevant material:

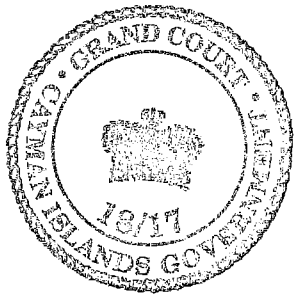
(i) There is no evidence from Mr. Carmody other than the bare assertion from him that the materials were incomplete;

(ii) By contrast, the Court has before it the affidavit of service of Mr. Hoare which attests to the service of the proceedings on Mr. Carmody and precisely what materials were served on him, which included Basdeo 1;

(iii) Even assuming that Mr. Carmody was not served with Basdeo 1, the nature of this document is such that it cannot cause the Service Out Order to be rendered invalid;

(iv) In the circumstances, and in any event, no prejudice can be said to have been suffered by Mr. Carmody. Moreover, the Plaintiffs say, Basdeo 1 was provided to Mr. Carmody's attorneys some months ago.

(c) Whether Mr. Carmody was properly served out of the jurisdiction of this Court is, in the circumstances, irrelevant because: (i) he has plainly received all of the documents relevant to the service of the process and therefore has been given due and proper notice of the proceedings against him; (ii) no prejudice has been suffered by him; and (iii) no particular advantage has been gained by the Plaintiffs in serving Mr. Carmody in Australia (to the extent that such is considered to be non-compliant with the Service Out Order).

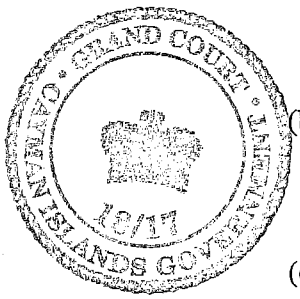


(d) By seeking to strike out the claim against him, at the same time as purporting to challenge this Court's jurisdiction over him on the grounds of ineffective service, but they assert, having added the request to strike out the proceedings by way of amendment to the Carmody Summons, Mr. Carmody has, in fact, submitted to the jurisdiction of this Court. Consequently, the argument continues, there is now no need for service to be made outside the jurisdiction. Reference was made to the decisions in ***Astro Exito Navegacion SA v WT Hsu (the Messiniaki Tolmi)*** [1984] 1 Lloyd's Rep 266 CA, ***Caltex Trading Pte Ltd. v Metro Trading International Inc*** [2000] 1 All E.R. (Comm) 108, ***Global Multimedia International Ltd. v Ara Media Services*** [2007] 1 All E.R. (Comm) 1160, and ***Kenney and CC International Limited v ACE Limited*** [2015 (1) CILR 367].

68. The Plaintiffs then moved on to deal with Mr. Carmody's application to strike out (pursuant to ***GCR*** Order 18, r. 19) and his contention that there is no good arguable case against him (pursuant to ***GCR*** Order 12 r. 8(1)(c)). Although the Plaintiffs sought to deal with these arguments together, the Court notes in passing that these were made as arguments in the alternative. In so far as these applications are predicated on the basis of the Deed of Indemnity, Mr. Atherton QC submits that it is important to bear in mind that these proceedings were commenced in February 2018, before the Deed of Indemnity was entered into. It was asserted that, although the amended pleading joining Mr. Carmody had not been filed or served on the Defendants by the date upon which the Deed of Indemnity was entered into, the Deed of Indemnity was entered into after Special GP and Special LP were put on notice of the intention to amend the claim. Furthermore, the submission continues, the Plaintiffs only became aware of the Deed of Indemnity upon the service of Mr. Carmody's Affidavit on 11 December 2018, therefore after the *ex parte* hearing.

69. It was the Plaintiffs' contention that Mr. Carmody's claim that the Deed of Indemnity constitutes a complete defence is misconceived for at least the following reasons:

(a) The Deed of Indemnity, which is said to have been granted by Special LP and is signed on behalf of both Messrs Comes and Ballin, is voidable at the instance of Special LP (acting by Special GP) and constitutes a further breach of the fiduciary duties owed by Special GP to Special LP and/or the directors of Special GP to Special LP by attempting to stifle a legitimate claim by Special LP against one of the persons that have caused it loss. It was submitted that it is either that, or it represents an example of the directors of Special GP causing or procuring or assisting in a breach of fiduciary duty owed by Special GP to Special LP. It was Learned Counsel's posture that such conduct is a paradigm example of



the type of "*wrongdoer control*" which the derivative action procedure was developed to counter;

(b) In such circumstances, Special LP/Mr. Cowan will either plead to the Deed of Indemnity in the Reply and or/seek to amend the claim, if necessary, in order to avoid the Deed of Indemnity on that basis;

(c) Furthermore, it was submitted that on a proper interpretation of its terms, the Deed of Indemnity does not have the effect of excluding some or all of the claims that are being pursued against Mr. Carmody;

(d) The Plaintiffs also contend that the entry into the Deed of Indemnity falls foul of the general principle that a director of a company or entity or-by parity of reasoning- a party in a fiduciary relationship with an entity akin to that of a director cannot legitimately contract out of his/her irreducible core of duties. Reference was made to ***Renova Resources Private Equity Ltd. v Gilbertson*** [2009] CILR 268 at para 51, ***Re Bristol Fund*** [2008] CILR 317, 340-342, and ***Cesar Hotelco v Ryan*** [2012] CILR 164 at para [41].

70. On behalf of the Plaintiffs it was contended that all of these are real and substantive issues that need to be tried.

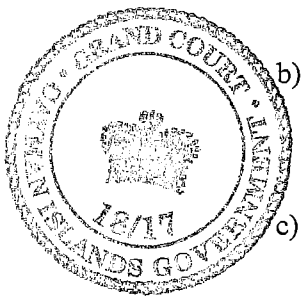
71. In conclusion, Mr. Atherton QC submitted that there is no proper basis upon which the relief sought in the EDL Summons, the Partners' Summons, or the Carmody Summons should be granted. The Plaintiffs therefore requested that the Court dismiss each of the applications with the costs of and occasioned by the same to be paid by the Foreign Maples Defendants and Mr. Carmody respectively, and give further directions for the future conduct of these proceedings.

DISCUSSION AND ANALYSIS

Requirements for Service Out

72. In ***Altimo Holdings v Kyrgyz Mobil Tel Ltd*** [2012] 1 W.L.R.1804, a decision of the Judicial Committee of the Privy Council, Lord Collins discussed the principles and general considerations involved on an application for permission to serve a foreign defendant out of the jurisdiction. Referring to ***Seaconsar Far East Ltd. v Bank Markazi Jomhouri Islami Iran*** [1994] 1 A.C.438, at 453-457, at paragraph 72 of ***Altimo***, his Lordship indicated that three requirements have to be fulfilled. He spelt these out in essence as follows:

a) That in relation to the foreign defendants, there is a serious issue to be tried on the merits, i.e. a substantial question of fact or law or both.



b) The plaintiff must show that he has a good arguable case that the claim falls within one of the relevant gateways. *"Good arguable case"* in this context, means the plaintiff having much the better of the argument.

c) The plaintiff must show that in all of the circumstances the Cayman Islands is clearly or distinctly the appropriate forum for the trial of the dispute, and that in all the circumstances the court ought to exercise its discretion to permit service of the proceedings out of the jurisdiction.

The Duty of Full and Frank Disclosure

73. At paragraphs 51 and 52 of ***Sloutsker v Romanova*** [2015] EWHC 545 (QB), Justice Warby discusses the considerations as follows:

> *"51. The relevant general principles are these:*
>
> *i) An applicant for permission to serve proceedings outside the jurisdiction is under the duty of full and frank disclosure which applies on all applications made without notice.*
>
> *ii) The duty requires the applicant to make a full and fair disclosure of those facts which it is material for the court to know: Brinks Mat v Elcombe [1988] 1 WLR 1350, 1356(1) and (2) (Ralph Gibson LJ). Put another way, disclosure should be made of "any matter, which, if the other party were represented, that party would wish the court to be aware of": ABCI v Banque Franco-Tunisienne [1996] 1 Lloyd's Rep 485, 489 (Waller J).*
>
> *iii) Non-disclosure of material facts on an application made without notice may lead to the setting aside of the order obtained, without examination of the merits. It is important to uphold the requirement of full and frank disclosure.*
>
> *iv) But the court has a discretion to set aside or to continue the order. Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to the issues that were to be decided. The answer to the question whether the non-disclosure was innocent is an important, though not decisive, consideration. See Brinks Mat at pp 1357(6) and (7) and 1358 (Balcombe LJ).*
>
> *v) In the context of permission for service outside the jurisdiction the court has a discretion to set aside the order for service and require a fresh application, or to treat the claim form as validly served and deal with*

the non-disclosure by a costs order: NML Capital Ltd. v Republic of Argentina [2011] UKSC 31, ...(Lord Collins).

52. *Ms. Page submits that in approaching the issue of full and frank disclosure on an application of this kind the court should bear in mind that it is unlike an application for a freezing order, or other interim injunction, the grant of which has an immediate and potentially severe impact on the defendant. But the court on such an application is being asked to bring a foreign defendant before the English Court, exercising what is often called an exorbitant, meaning extraordinary or unusual, jurisdiction. I am not persuaded that the approach should be less strict in principle than it is in respect of other kinds of application."* (My emphasis)

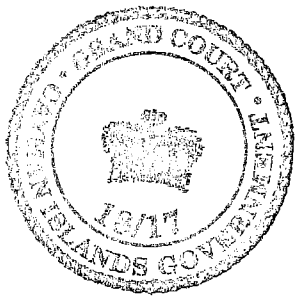
74. On the other hand, in ***A/A D/S Svendborg v Maxim Brand***, Court of Appeal (Civ Div) Transcript No. 39 of 1989 (23 January 1989), Kerr L.J. said in relation to a case concerning an application to discharge leave to serve out of the jurisdiction granted under RSC Ord. 11 as well as Mareva relief that *"in principle the same duty of disclosure arises in relation to Order 11. But in practice such oversights are more likely to be penalized only in the form of costs, since it would not be right to drive the plaintiffs to an inappropriate jurisdiction or to bar a bona fide claim from a proper one. To that extent the practice may be different in relation to Order 11 from cases involving injunctions."*

75. In ***Brinks Mat v Elcombe***, at 1356 H, Ralph Gibson L.J. pointed out that whether or not a fact or matter is material is a matter for the court to determine, and that materiality is not to be decided by the assessment of the applicant or his legal advisors. It was also pointed out that, at page 1356F-G, the:

> *"duty of disclosure therefore applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made such inquiries."*

76. Ralph Gibson LJ also held that the extent of the enquiry that is proper, and therefore necessary, must depend on all the circumstances of the case, the nature of the case which the applicant is making when he makes the application, and the order for which the application is made and the probable effect of the order on the defendant.

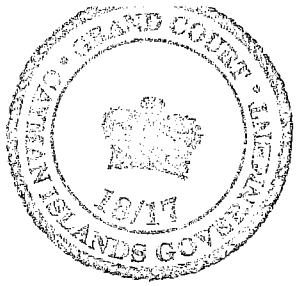
77. In the decision of Popplewell J in ***Fundo Soberano de Angola v Dos Santos*** [2018] EWHC 2199, at paragraphs 51-53, relying substantially on ***Brinks Mat***, the core principles of the duty to make full and frank disclosure were discussed as follows:



"51. Three points which are relevant to the current applications deserve emphasis. The importance of the duty has often been emphasised in the authorities. It is necessary to enable the Court to fulfil its own obligations to ensure fair process under Article 6 of the European Convention on Human Rights. It is the necessary corollary of the Court being prepared to depart from the principle that it will hear both sides before reaching a decision, which is a basic principle of fairness. Derogation from that basic principle is an exceptional course adopted in cases of extreme urgency or the need for secrecy. If the court is to adopt that procedure where justice so requires, it must be able to rely on the party who appears alone to present the evidence and argument in a way which is not merely designed to promote its own interests, but in a fair and even-handed manner, drawing attention to evidence and arguments which it can reasonably anticipate the absent party would wish to make.

52. The second is that although the principle is often expressed in terms of a duty of disclosure, the ultimate touchstone is whether the presentation of the application is fair in all material respects: see Robert Walker LJ in Memory Corporation v Sidhu (No. 2) [2000] 1 W.L.R. 1443, ... This is again the consequence of the exceptional derogation from the principle of hearing both sides. The evidence and argument must be presented and summarized in a way which, taken as a whole, is not mis-leading or unfairly one-sided. In a complex case with a large volume of documents, it is not enough if disclosure is made in some part of the material, even if amongst that which the judge is invited to read, if that aspect of the evidence and its significance is obscured by an unfair summary or presentation of the case. The task of a judge on a without notice application in complex cases such as the present is not an easy one. He or she is often under time constraints which render it impossible to read all the documentary evidence on which the application is based, or to absorb all the nuances of what is read in advance, without the signposting which is contained in the main affidavit and skeleton argument. It is essential to the efficient administration of justice that the judge can rely on having been given a full and fair summary of the available evidence and the competing considerations which are relevant to the decision.

53. Thirdly, the duty is not confined to the applicants' legal advisers but is a duty which rests upon the applicant itself. It is the duty if the legal team to ensure that the lay client is aware of the duty of full and frank disclosure and what it mean sin practice for the purposes of the application in question; and to exercise a degree of supervision in ensuring that the duty is discharged.



……"

Was there material non-disclosure?

78. I echo the words of Popplewell J in ***Fundo Soberano*** as to *ex parte* applications in complex cases such as the present. The task of the judge is not an easy one at all. Indeed, it invariably occurs when a judge is under time constraints, and hard-pressed to get through what is often a mass of material.

79. It was, in the instant case, not possible to read all the documentary evidence upon which the application was based, or to absorb all the nuances of what I managed to read in advance, without proper signposting in the main affidavit and skeleton argument.

80. Further, I regret that I did not pick up on a point that I am usually highly aware of, (or if I did, I did not pursue it), in the midst of what was a lot of material and issues to absorb and cover during the hearing. The point is one taken by the Foreign Maples Defendants. It is that Mr. Cowan failed to serve an affidavit of his own in support of the Cowan Summons. Mr. Cowan instead relied on D'Addona 1 (Mr. D'Addona being a lawyer at Walkers who is based in Hong Kong but employed by Walkers, Cayman Islands) and Basdeo 1, Mr. Basdeo being Senior Counsel at Walkers Cayman.

81. As far as I have been able to ascertain, no explanation was advanced at the hearing of the Cowan Summons as to why Mr. Cowan did not swear an affidavit for that hearing, and indeed, in Mr. Cowan's First Affidavit filed, for the hearing of the applications to set aside, there is no explanation as to that either.

82. This was an improper course. ***GCR Order 41, r.5(3)*** states plainly that "*An Affidavit sworn by an attorney shall not be admissible in any cause or matter unless the Attorney has direct personal knowledge of the facts and matters to which he deposes and does not appear as an advocate in the cause or matter.*" It is clear that neither Mr. D'Addona nor Mr. Basdeo had any personal knowledge of the facts underlying the various allegations for which leave to serve out was sought.

83. It is regrettable that this was how the application was put together. In the context of the applications herein, seeking to set aside on the grounds of a failure to make full and frank disclosure, this cannot be considered to be a mere technical error.

84. If Mr. D'Addona was doing no more than restating the contents of the Re-Amended Writ, I accept Mr. Millett QC's submission that then by definition Mr. Cowan was failing to make full and frank disclosure of all the matters that might be raised by the proposed new Defendants. On the other hand, if Mr. D'Addona was seeking to make full and frank disclosure by D'Addona 1, this does not meet the mark either. It was for Mr. Cowan to give the relevant affidavit, as required by ***GCR*** Order 11, Rule 4(1)(d).

85. In my judgment, at the *ex parte* hearing, there were, I regret to say, a significant and varied number of material non-disclosures and misleading statements or characterisations. They are actually, too numerous to set out fully, but I will simply set out some of the most glaring:

a) There was no clear indication of how massively the claim as set out in the Re-Amended Writ represented a major departure from the previous claim and its various iterations.

b) To make matters worse, it was misleading to suggest that the previous $90 million claim and the Japan Solar Claim were similarly structured as diversions away from Special LP in order to deprive Mr. Cowan of his interest.

c) Mr. Cowan failed to put the Amended JS LPA before the Court.

d) Mr. Cowan must at the material time have been aware of the existence and terms of the Amended JS LPA, and his own approval of it. If he in fact did not have a copy of the Amended JS LPA in his possession at the time of the *ex parte* application, that was itself a highly material piece of information to disclose.

e) The description of the Japan Solar Claim itself was inaccurate and incomplete, and left out of account the single most important fact, viz. that the Deemed Interest had been created by the express terms of the Amended JS LPA;

f) Obviously since Mr. Cowan failed to produce the Amended JS LPA, he also did not refer to what he now claims in his affidavit he has to say about it. He failed to

reveal to the Court that his case depends on maintaining that the terms of the Amended JS LPA are factually incorrect in so far as it is stated that the Deemed Interest was consideration for the sale of the Solar Assets.

g) The Court was never alerted to the fact that Mr. Cowan's allegation that the proposed new Defendants (other than Mr. Russell and EDL) received distributions of the Japan Solar Proceeds was not supported by even a shred of evidence or documentation. What this is is really a bare assertion. In Mr. Cowan's First Affidavit filed months after the hearing of the Cowan Summons, at paragraph 66 Mr. Cowan is essentially saying that his case is based on inference, or perhaps, more accurately, assumption. The opening words of paragraph 66 (indeed the whole paragraph are telling): "*It can safely be assumed that these Defendants* [Ballin, Comes, Carmody and Gibson] *were not dedicating time and energy to these roles, which of course included the burden of complying with the fiduciary duties they entailed, for no compensation....*" (At paragraph 68 of Mr. Cowan's First Affidavit, he also makes assertions as to amounts he claims were received by the 3rd-8th Defendants, with no documentary evidence whatsoever in support).

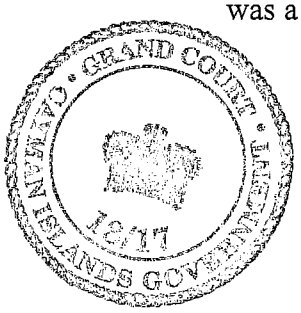
h) Mr. Cowan failed to alert the Court to the fact that Mr. Gibson was not a director of Special LP, had no personal interest in Special LP, and that he had no documentary evidence of Mr. Gibson being involved in receipt of the Japan Solar Proceeds which is said to amount to a conspiracy.

i) The Trust claim that the Deemed Interest was held on trust by EDL and/or Mr. Russell for the benefit of Special LP was not properly explained.

86. I am of the view that, even if Mr. Cowan's non-disclosure were entirely innocent, and even if he had an understandable excuse for these omissions, the large scale, true import and significance of these inaccuracies and omissions, would incline me to exercise my discretion to discharge the Service Out Order.

87. I regret to say that the presentation at the *ex parte* hearing had the effect of being seriously misleading. This Court could not have been expected to discern from the submissions that were made, the fundamental reformulation of Mr. Cowan's case. This was made worse by

the fact that it was suggested that the $90 Million claim and the Japan Solar Claim were similarly structured as diversions away from Special LP to deprive Mr. Cowan of his interest, when there is no claim against the First and Second Defendants, Special GP and Special LP, in respect of the Japan Solar Claim. In the Note of the *ex parte* Hearing, (which was a Note taken by Counsel, and not a recording), it was noted as follows:



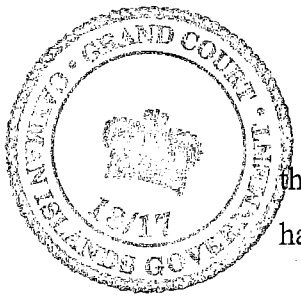
> *"Having issued and served the Writ, it was defended by* [Special LP and Special GP], *that in itself indicates that there is an issue at stake; there was no application to strike out on the basis of there being no cause of action disclosed or for summary judgment..."*

88. So the question now arises; were the inaccuracies and non-disclosures innocent, in the sense in which that expression is used in this area of the law. As stated previously, *"innocent"* here means that (i) the relevant fact was not known to the applicant (or could not reasonably have been known, further to the duty to make inquiries), or (ii) the relevance of the fact was not perceived.

89. I must say that the depth and breadth of the failures do not suggest innocence, and regrettably, Mr. Cowan's explanations and apologies are vague. No cogent explanation has been advanced by Mr. Cowan.

90. In my judgment, the non-disclosure of the matters such as the reformulation of the case, the factual omissions about the Japan Solar Claim, the alleged distributions, there being no documentary or other evidence, and Mr. Gibson's alleged control, are plainly matters that Mr. Cowan knew, or with reasonable enquiry would have known, and it would be incredible if he had not perceived the relevance of these matters. I cannot in the circumstances treat the statements made at the hearing as simple misstatements; it is apparent that Mr. Cowan did not provide his lawyers with all the relevant information.

91. I also take into account the fact that this was by no means an urgent application. There can be no good reason why: (i) Mr. Cowan did not himself attest to the Re-Amended Writ in



he first place, or (ii) why he could not have made thorough enquiries, or (iii) why he should have failed to communicate to his lawyers all the information he considered to be material.

92. In all of the circumstances, given the extent and seriousness of the non-disclosure, and the fact that failure to give full and frank disclosure was not innocent, and the importance of the issues this failure went to, the Service Out Order against the Third to Ninth Defendants should be discharged and the service of the proceedings out of the jurisdiction set aside.

Whether there is a serious issue to be tried in respect of the Japan Solar Claim

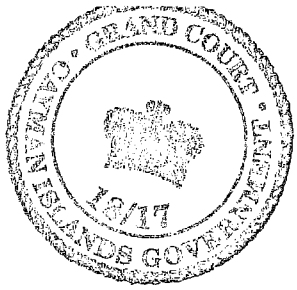
93. I have decided that the Service Out Order should be set aside on the grounds of material non-disclosure. That would not require me to consider the merits or whether the order was justified. However, since extensive argument has been addressed to me on these issues, and based upon the importance of this issue to the parties, and its potential import, I have gone on to deal with this issue.

94. Mr. Millett Q.C. submitted (paragraph 81 of the skeleton argument prepared on behalf of the Foreign Maples Defendants), that a determination that there was no serious issue to be tried in respect of the Japan Solar Claim would mean that:

a) No leave to serve out should be granted in respect of the Japan Solar Claim; and
b) The Service Out Order should be set aside entirely as regards Mr. Gibson and EDL, each of whom are only joined in respect of that claim.

95. The test for a "*serious issue to be tried*" means "*a real prospect of success*". In ***ED&F Man Products v Patel*** [2003] EWCA Civ 472, at paragraph [10], Potter LJ pointed out that, in a case where there are significant factual differences between the parties, the court is in no position to conduct a mini-trial. However, Potter LJ went on to say:

> *"However, that does not mean that the court has to accept without analysis everything said by a party in his statements before the court. In some cases*



it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporary documents."

96. In my judgment, whilst at a glance this may look like an issue in respect of which the Foreign Maples Defendants are seeking a mini-trial, (as Mr. Atherton QC so persuasively sought to argue), on closer examination, it is indeed the case that there is no serious issue to be tried in respect of the Japan Solar Claim. There is no real prospect of success, and this claim does not, it seems to me, carry the necessary degree of conviction – see paragraph [8] of the decision of the English Court of Appeal in ***ED&F Man Liquid Products v Patel.***

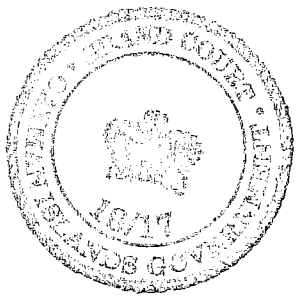
97. In my view, one of the huge difficulties with the Japan Solar Claim is that it is contradicted by a number of contemporaneous documents. I list some examples as follows:

a) Under Clauses 3.2 and 13.5 of the Amended JS LPA, the Deemed Interest was granted to EDL in return for a sale of the Solar Assets. This directly contradicts Mr. Cowan's case that the Deemed Interest was not an equity stake, but was instead a performance fee that EDL held on trust for Special LP.

b) The Investment Approval Request ("**the IAR**"), on page 16, under the heading "CONFLICT OF INTEREST", provided that: "[EDL] *will retain: 20% interest in Japan Solar LP and a commensurate interest in Japan Solar GP".* It was also noted that the transaction would be a Related Party Transaction under Clause 18.5 of the EAF LP LPA. It does seem that this is because, as argued on behalf of the Foreign Maples Defendants, Mr. Russell and Mr. Ballin were Related Parties (as Named Executives) were involved substantively in the transaction. I accept Mr. Millett QC's logic, (as expressed at paragraph 84.1(b)(iii) of the skeleton argument prepared on behalf of the Foreign Maples Defendants), that if Special LP was the beneficial owner either of what was being sold to Japan Solar LP (which Mr. Cowan does not go so far as to allege) or being received by way of the Deemed Interest (which he does allege) it could not have been a Related Party Transaction.

c) The Amended JS LPA of 27 November 2013, which provided:

i. at Recital (A), that the "*Partnership was constituted by the Initial Limited Partnership Agreement...(i) to acquire (directly or indirectly) the rights in and to the Solar Assets from* [EDL]";



ii. at Clause 1.1, that Solar Assets were assets "*belonging to and controlled by* [EDL] *(and its related parties and affiliates)*";

iii. At Clause 2.4, that Japan Solar LP undertook to purchase from EDL the Solar Assets in return for the rights and entitlements "*vested in, and created for,* [EDL]" *under this agreement (including Clause 3.2).*"

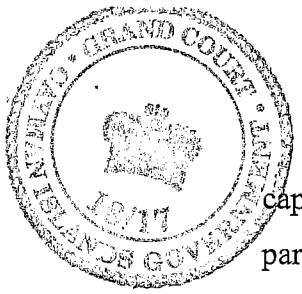
iv. At Clause 13.5, that the parties agreed that the grant of the Deemed Interest (subject to the waterfall at Clause 13.1) "*shall be adequate and due consideration for the transfer of the Solar Assets from* [EDL] *to the Partnership and each party covenants with the other not to take any action that would otherwise challenge the validity of such consideration.*"

d) The 27 November 2013 written resolution of EAF GP resolving to execute the Amended JS LPA (i.e. including Clauses 2.3,3.2 and 13.5), which resolution was signed by Mr. Cowan himself on behalf of EAF GP.

e) The Deemed Interest was not described as a performance fee in the contractual documents and it is also not in the nature of a performance fee. The fact is that the Deemed Interest is an equity stake, and so represents both capital and profit. It is therefore quite different from a simple performance fee payable once a particular investment target is reached.

f) The fact that the Deemed Interest is also accompanied by a range of voting and corporate governance rights giving EDL a say in the management of Japan Solar LP, pursuant to the Clauses of the Amended JS LPA. Those rights were fundamentally inconsistent with the notion that the Deemed Interest was a disguised performance fee.

98. It is also clear that Mr. Cowan has been unable to articulate any reason why a tax problem would have to be avoided by use of an alleged trust. The paragraphs of the Re-Amended Writ dealing with this point do not explain the creation of the trust of the Deemed Interest and are wholly unsupported by evidence as to the tax position. I accept Mr. Millett QC's submission that the fact that EDL could treat the Deemed Interest as a capital gain might in theory benefit EDL in tax terms but it does not explain why it was necessary to give that



capital gain beneficially to Special LP, not least since Special LP is a Cayman limited partnership and pays no tax.

99. Further, had EDL, as the holder of the 20% Deemed Interest, been no more than a proxy for Special LP, the investment materials such as the IAR and the Due Diligence questionnaire (which was for the benefit of third parties) would have presented a wholly false picture of EDL's role. It would mean that the statement at section 1.12 of the IAR that no performance or management fee would be paid to "Equis" (i.e. Special LP) would be false. It is Mr. Millett QC's submission and I so accept, that Mr. Cowan's case involves the proposition that third-party investors into Japan Solar LP were lied to repeatedly about the role of Equis and Special LP. Such an allegation seems fanciful.

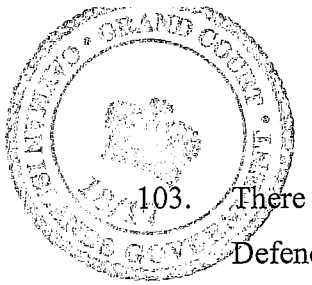
100. In terms of the state of Mr. Cowan's case, as the Foreign Maples Defendants point out, there are also definitional errors which Mr. Cowan makes in relation to "*Project Samurai*" and Mr. Cowan's use of the term "*Seed Assets*", equating his own definition of that with the contractual definition of "*Solar Assets*". This too is misleading, particularly in light of the detailed definition of "*Solar Assets*" in the Amended JS LPA.

101. There are also problems with the specific causes of action that Mr. Cowan has pleaded.

The alleged breach of trust

102. It would seem that Mr. Cowan has conceded that there was no express agreement or declaration of trust. Hence, at paragraph 59(a) of his affidavit he says that it arose by operation of law. Mr. Atherton QC has used the label "constructive trust", but without Mr. Cowan clearly identifying where or how Special LP's pre-existing property rights could be said to have arisen, or the circumstances that call for equity's assistance in the circumstances.

The Alleged Knowing Receipt



103. There is really no basis for Mr. Cowan's claim that specific sums were received by Defendants, as he sets out in paragraph 68 of his affidavit. The only recipients who there is proof and admission received any of the Japan Solar Proceeds, was EDL, and then Mr. Russell. It is quite improper for a plaintiff to make allegations about knowing receipt without a proper foundation. This is particularly so when the receipt is the main basis for the allegation of dishonesty.

Alleged Knowing Assistance

104. This is pleaded at paragraphs 37N-37P of the Re-Amended Writ. However, no relevant assistance is even particularized, since the only relevant pleaded assistance against any defendant other than Mr. Russell is the actual receipt of funds. In that case, the claim lies in knowing receipt and not in dishonest assistance.

105. However, there are no grounds for alleging dishonest knowledge. Indeed, it is not clear how the Foreign Maples Defendants can be said to have known of the alleged breach of trust, in circumstances where on the face of the Amended JS LPA, the Deemed Interest was merely a contractual right granted to EDL. Mr. Cowan has failed to plead how each of the proposed defendants can have been or were made aware of the alleged trust.

Alleged Conspiracy

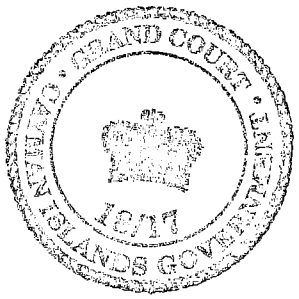
106. It does appear that Mr. Cowan has simply used a broad brush approach, and swept his paintbrush across the canvass and called that work "*Conspiracy*". There is no proper pleaded case to make out the elements of the tort of conspiracy. There are bare assertions and no details. For example, there is no proper pleadings as to whom, where, and which conspirators combined to cause damage to Mr. Cowan or Special LP. This is such a serious allegation to make, against Defendants, particularly such as Mr. Gibson, who is a professional lawyer, with no documentary evidence having been provided that he received any of the Japan Solar Proceeds.

No serious issue to be tried on the Japan Solar Claim

107. In my judgment, there is no serious issue to be tried in relation to the Japan Solar Claim. It is unsustainable both on the facts, and as a matter of law. This is an additional basis upon which the Service Out Order should be set aside. In my view it is just to make the declaration sought by the Foreign Maples Defendants, given all of the circumstances.

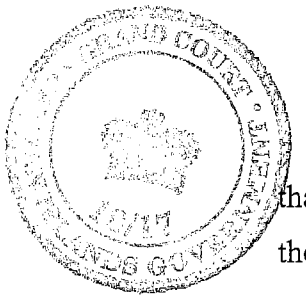
Mr. Carmody's Summons

108. Mr. Atherton QC has sought to argue that Mr. Carmody, by filing the application to Strike Out pursuant to Order 18, Rule 19 has submitted to the jurisdiction. In my view, that argument must be given short-shrift. A quick glance at the cases cited by the Plaintiffs, particularly the judgment of Rix J in ***Caltex Trading v. Metro Trading*** **[2000] 1 All ER (Comm) 108**, makes it clear that a decision on whether a party has submitted to jurisdiction, depends upon all the circumstances. Further, that a party can expressly reserve his right to challenge the jurisdiction, in which event there is not a submission. The Headnote in my view accurately summarizes the position as follows:



*"**Held** - In determining whether a party had submitted to the jurisdiction of the court, the appropriate test was whether, in all of the circumstances of the case, the party had voluntarily recognized that the court had jurisdiction to hear and determine the claim which was the subject matter of the relevant proceedings. In the instant case, by issuing their summons, the applicants had invoked the jurisdiction of the court. They did so as parties to the litigation and as beneficiaries of the receivership order, **without any reservation as to a challenge to the jurisdiction.**"* (My emphasis)

109. The terms of Mr. Carmody's Summons are set out in paragraph [20] above. In my judgment, it is plain, and manifest that the rights of Mr. Carmody to challenge jurisdiction and service were expressly reserved. It was made obvious in the Carmody Summons that the application under Order 18, Rule 19 would only arise in the event that the Re-Amended Writ had been validly served. Mr. Meeson QC in oral reply I think accepted that possibly



that could prevent Mr. Carmody taking any points about ***forum non conveniens***. However, the right to challenge service on the basis of irregularity or otherwise was clearly preserved.

110. I therefore now turn to the Plaintiffs' argument that the Re- Amended Writ was served in accordance with the Service Out Order because it is said that the wording of the Service Out Order was wide enough to allow for service on Mr. Carmody not only in Singapore, but in Australia, or, as Mr. Meeson QC put it in his skeleton argument, *"anywhere else in the whole wide world"*.

111. As I have already said, ***ex parte*** applications can be a most onerous task. I do not remember it ever having been raised before me at the ***ex parte*** hearing that the order I was granting would allow for service anywhere in the world. Nor is such a notation contained in the Note of Hearing taken by Counsel. It was also not in the Plaintiffs' skeleton argument or the evidence put before me at the ***ex parte*** hearing.

112. In my judgment, the words of the Service Out Order, do not convey the strained meaning for which the Plaintiffs contend. In particular the words "*or wherever they may be found*" did not give the Plaintiffs free rein to serve outside of Singapore. Leave was given in respect of a particular country, the country requested by the Plaintiffs in their application, which was Singapore.

113. It is plain that the Plaintiffs' purported service on Mr. Carmody was defective. The Service Out Order did not grant them permission to serve him in Australia. If anything, they should have come back to Court, or applied to amend the Service Out Order.

114. In my judgment Mr. Carmody is entitled to a declaration that the Re-Amended Writ has not been served on him in compliance with the Service Out Order.

115. I now turn to the consideration of the question whether any irregularity in service should in the circumstances of this case, be cured.

116. In ***Barton***, Lord Sumption, who was in the majority, discussed the relevant considerations for validating the non-compliant service of a claim (at paragraph 9), and, (at paragraph 16), points out that it is never enough that the defendant should be aware of the contents of an originating document. He stated as follows:

> *"9. What constitutes "good reason" for validating the non-compliant service of a claim form is essentially a matter of factual evaluation, which does not lend itself to over-analysis or copious citation of authority. This court recently considered the question in* ***Abela v Baadarani*** *[2013] 1 W.L.R. 2043. That case was very different from the present one. The defendant, who was outside the jurisdiction, had deliberately obstructed service by declining to disclose an address at which service could be effected in accordance with the rules. But the judgment of Lord Clarke of Stone-cum-Ebony JSC, with which the rest of the court agreed, is authority for the following principles of more general application:*
>
> *(1) The test is whether, "in all the circumstances, there is good reason to order that steps taken to bring the claim form to the attention of the defendant is good service (para 33).*
>
> *(2) Service has a number of purposes, but the most important is to ensure that the contents of the document are brought to the attention of the person to be served. However, "the mere fact that the defendant learned of the existence and content of the claim form cannot, without more, constitute a good reason to make an order under rule 6.15(2)" (para 36).*
>
> *(3) The question is whether there is good reason for the Court to validate the mode of service used, not whether the claimant had good reason to choose that mode.*
>
> *(4) Endorsing the view of the editors of* ***Civil Procedure*** *(2013), vol I, para 6.15.5, Lord Clarke pointed out that the introduction of a power retrospectively to validate the non-compliant service of*

a claim form was a response to the decision of the Court of Appeal in Elmes v Hygrade Food Products plc [2001] EWCA Civ 121; (2001) CP Rep 71that no such power existed under the rules as they then stood. The object was to open up the possibility that in appropriate cases a claimant may be enabled to escape the consequences for limitation when a claim form expires without having been validly served.

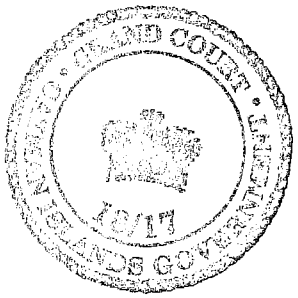
.....

16. The first point to be made is that it cannot be enough that Mr. Barton's mode of service successfully brought the claim form to the attention of Berrymans. ....Although the purpose of service is to bring the contents of the claim form to the attention of the defendant, the manner in which this is done is also important. Rules of court must identify some formal step which can be treated as making him aware of it. This is because a bright line rule is necessary in order to determine the exact point from which time runs for the taking of further steps or the entry of judgment in default of them.....

For these reasons it has never been enough that the defendant should be aware of the contents of an originating document such as a claim form. Otherwise any unauthorized mode of service would be acceptable, notwithstanding that it fulfilled none of the other purposes of serving originating process." (My emphasis)

117. In ***Abela***, the case had to do with service in Lebanon of proceedings brought in England. Lord Sumption (with whom Lord Neuberger, Lord Reed and Lord Carnwarth agreed), was not disposed to have the term "exorbitant jurisdiction" continue to be used, regarding service out. At paragraph 53 Lord Sumption analysed the matter as follows:

"In his judgment in the Court of Appeal, Longmore LJ described the service of the English Court's process out of the jurisdiction as an "exorbitant" jurisdiction, which would be made even more exorbitant by retrospectively



authorizing the mode of service adopted in this case. This characterization of the jurisdiction to allow service out is traditional, and was originally based on the notion that the service of proceedings abroad was an assertion of foreign power over the Defendant and a corresponding interference with the sovereignty of the state in which the process was served. This is no longer a realistic view of the situation.....It should no longer be necessary to resort to the kind of muscular presumptions against service out which are implicit in adjectives like "exorbitant". The decision is generally a pragmatic one in the interests of the efficient conduct of litigation in an appropriate forum.

118. In ***Barton***, the appellant had failed to obtain leave to serve a claim on the defendants' solicitors by email. The UKSC declined to cure the defective service. The case can be distinguished from ***Abela*** in which the UKSC permitted service. In ***Abela,*** the Court had granted the plaintiff permission to serve out in Lebanon at a particular address. In that case service was effected on the defendants' solicitors at a different address than that specified in the order, but in the self-same country of Lebanon. Service was in those circumstances found not to be defective.

119. I accept Mr. Meeson QC's submission that in the instant case, the circumstances are more in line with the circumstances in ***Barton*** rather than ***Abela*** in that the manner of service was not authorized by the Court. In ***Barton*** it was unauthorized email. In the present case it is an unauthorized country. This is not a technical error and in my judgment the interests of justice do not favour the Plaintiff's position.

120. In all of the circumstances, I decline to make any order that would cure the defective service.

Whether Leave to Serve Mr. Carmody should be set aside

121. In discussing the EDL Summons and the Partners' Summons, I have already expressed the view that the Service Out Order should be set aside by reason of non-disclosure. The same

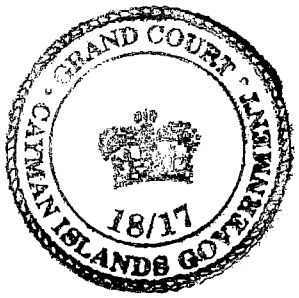
would apply to Mr. Carmody. In addition, I have to examine whether there are serious issues to be tried in relation to the claim made against Mr. Carmody.

122. In my view, at the core of the claims against Mr. Carmody is an alleged breach of fiduciary duties owed by Mr. Carmody to Special LP.

123. There do not appear to be any claims made personally by Mr. Cowan against Mr. Carmody, which do not rely on his alleged breach of duty to Special LP. It is my view that the Deed of Indemnity acts to release the claims by Special LP against Mr. Carmody.

124. There is therefore no serious issue to be tried in relation to Mr. Carmody and therefore no good arguable case against him in relation to any of the relevant gateways. As such, the Service Out Order granting leave to serve the Re-Amended Writ on him out of the jurisdiction should be discharged.

125. I will hear the parties on the issue of costs.



THE HON. JUSTICE INGRID MANGATAL
JUDGE OF THE GRAND COURT