IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO: FSD 263 of 2021 (DDJ)

BETWEEN

ASPECT PROPERTIES JAPAN GODO KAISHA

Plaintiff

AND

JONATHAN CHENG

First Defendant

YICHENG CHAN

Second Defendant

LC CAPITAL LIMITED

Third Defendant

INFINITY CAPITAL GROUP LIMITED

Fourth Defendant

LC CAPITAL LIMITED

Fifth Defendant

ICG I

Sixth Defendant

Appearances:	**Liam Faulkner of Campbells LLP on behalf of the Plaintiff** **Kyle Broadhurst of Broadhurst LLC on behalf of the First, Second and Third Defendants**
Before:	**Hon. Justice David Doyle**
Heard:	**22 March 2022**
Draft Judgment Circulated:	**22 April 2022**
Judgment Delivered:	**27 April 2022**

HEADNOTE

Service out of the jurisdiction in a conspiracy claim – gateways under Grand Court Rules Order 11 rule 1 (1) (c) necessary or proper parties, (f) tort, (ff) director, member of local company – Order 11 rule 4 (2) proper case for service out

JUDGMENT

Introduction

1. At the hearing on 22 March 2022 I heard helpful, concise and well focused oral submissions from Kyle Broadhurst of Broadhurst LLC attorneys for the First, Second and Third Defendants (the "Foreign Defendants") and Liam Faulkner of Campbells LLP for the Plaintiff. I reserved judgment. I now deliver my judgment.

The Order made on 24 September 2021

2. On 24 September 2021 I made an order, on an ex parte without notice basis, granting leave "pursuant to Grand Court Rules Order 11 for the Plaintiff to serve the Writ of Summons on the First, Second and Third Defendants out of the jurisdiction at such places in Hong Kong SAR, Australia or other foreign jurisdictions as they may be found."

3. The brief reasons for making that order were contained in my 5 page ex tempore judgment delivered on 24 September 2021.

4. The writ of summons refers to the First Defendant with an address in Australia, the Second and Third Defendants with addresses in Hong Kong SAR, the Fourth, Fifth and Sixth Defendants with addresses in the Cayman Islands. The Plaintiff is a company incorporated under the laws of Japan. I refer to the Fourth, Fifth and Sixth Defendants as the "Cayman Defendants."

The Jurisdictional Application dated 20 December 2021

5. By summons dated 20 December 2021 (the "Jurisdictional Application") Broadhurst as attorneys for the Foreign Defendants applied for:

> "1. A declaration that in the circumstances of the case, the Grand Court does not have jurisdiction over either the First Defendant, Second Defendant or Third Defendant in respect of the subject matter of the claim or the relief or remedy sought in the action;
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> 2. Discharge of the order dated 24 September 2021 giving leave to the Plaintiff to serve the Writ of Summons on the First Defendant, Second Defendant and Third Defendant out of the jurisdiction …"

6. The grounds for applying for such relief were not specified in the Application. One could have been forgiven for thinking having read the first affidavit of Yicheng Chen ("Mr Chen") sworn on 11 January 2022 in Hong Kong that the application for the discharge was on the basis of an allegation that the Plaintiff had breached the duty of full and frank disclosure at the ex parte stage. Mr Chen in the "Conclusion" section of his affidavit at paragraph 42 asks for service out of the jurisdiction to be set aside in the first sentence and then adds:

> "The Plaintiff has failed to disclose the full factual position in this matter. I believe that the Plaintiff failed to make full disclosure as it is aware that if the full factual position was made known it would be obvious that it has no basis to assert that there was a conspiracy."

7. Non-disclosure was not relied upon in the skeleton argument of the Foreign Defendants or in the oral submissions at the hearing.

8. Mr Chen finishes his 15 page affidavit by descending not into fact but into legal argument and submissions which would have been much better left to the attorneys by way of a skeleton argument and oral submissions:

> "43. While the Plaintiff asserts that it has suffered damage in the Cayman Islands, the factual position is that the Plaintiff is a Japanese company whose primary claim
>
> relates to the loss of the Apartments which are also located in Japan. The payments which were due to be made to the Plaintiff under the Contract Documents were to be made to the Plaintiff in Japan. As a result, it is clear that any loss that the Plaintiff claims it has suffered occurred in Japan and not in the Cayman Islands.
>
> 44. To the extent that it has been suggested in Fook 1 that acts undertaken in the Cayman Islands, namely the incorporation of certain of the Defendants and the transfer of certain shares in (alleged) breach of the Deed of Charge constitutes proof of fraud and conspiracy on behalf of the First and Second Defendants, I would respond by saying that it is not a tort to incorporate a company within the Cayman Islands, nor can it be said that any alleged breach of the Deed of Charge could be considered to be a tortious claim, as it is clearly a contractual matter.
>
> 45. Lastly, I note that while the Plaintiff has asserted that the Foreign Defendants are necessary and proper parties with respect to the proceedings brought against the Fourth and Fifth Defendants, to the best of my knowledge those Defendants have not been served."

9. In respect of paragraph 44, if the incorporation of companies within the Cayman Islands was part of a conspiracy then it could, of course, be argued that the tort of conspiracy was committed within the jurisdiction. As regards paragraph 45, it is common ground that the Cayman Defendants including the Fourth and Fifth Defendants have been duly served. I

turn now to a brief reference to the pleadings and the essence of the Plaintiff's case. The Plaintiff's case is disputed and there is plainly a factual dispute between the parties.

The Pleadings and the essence of the Plaintiff's case

10. I focus on the situation at the time permission to serve out was granted. Parker J, in *Raiffeisen International Bank AG v Scully Royalty Ltd* (12 March 2021) at first instance at paragraph 65 citing Dicey 11 – 161 and *Satfinance v Athena* [2020] EWHC 3527 (Ch) in support stated:

> "The assessment on the application to set aside is to be directed to the situation at the time permission was originally granted."

11. The point appears to have been untouched in the subsequent appeal court judgment delivered on 16 March 2022.

12. It would appear in England that applications for jurisdictional stays are to be considered in the light of circumstances existing at the time of determination of the application. (para [22] judgment of Cooke J in *Credit Agricole Indosuez v Unicof Ltd* [2003] EWHC 2676 (Comm)).

13. In the original writ of summons dated 6 September 2021 the Plaintiff claimed against all Defendants and each of them "Damages for conspiracy" and against the Sixth Defendant only a declaration that the Sixth Defendant had been unjustly enriched at the expense of the Plaintiff and an order that it restores to the Plaintiff the property it has received and also a declaration in respect of the Plaintiff's right to trace and an order that the Sixth Defendant "do account for such property and do cause it to be returned to the Plaintiff."

14. The Plaintiff's skeleton argument dated 20 September 2021 for the hearing on 24 September 2021 for leave to serve the Foreign Defendants out of the jurisdiction at paragraph 6 referred to "the claims for unlawful means conspiracy."

15. I gave leave for the writ to be amended on 10 January 2022 and the general endorsement put a little more flesh on the bones of the claim in conspiracy:

> "Damages, declarations and ancillary relief as a result of the Defendants' conspiracy, by which they intended to injure the Plaintiff by unlawful means, and have combined together to defraud the Plaintiff and to conceal such fraud and the proceeds of such fraud from the Plaintiff."

16. The amended writ was in the hearing bundle provided to the court. The following details appear in the amended writ:

> "The Plaintiff's claims are for the following relief, which is set out (for the avoidance of doubt) without any election being made between alternative remedies or cause of action:
>
> Damages, declarations and ancillary relief in respect of the Plaintiff's equitable proprietary interest in the apartments known as Units 201 and 203 at Aspect Niseko, 169-32 Aza-Yamada, Kutuchan-cho, Abuta-gun, Hokkaido, Japan ('the Apartments') that the Sixth Defendant received from the Plaintiff and in any traceable proceeds thereof.
>
> Damages, declarations and ancillary relief as a result of the Fourth and Fifth Defendants' fraudulent misrepresentations made to the Plaintiff.
>
> Damages, declarations and ancillary relief as a result of the Defendants' conspiracy, by which they intended to injure the Plaintiff by unlawful means, and have combined together to defraud the Plaintiff and to conceal such fraud and the proceeds of such fraud from the Plaintiff.

The Plaintiff claims:

Against all Defendants, and each of them:

1. Damages for conspiracy (including liquidated damages of not less than US$128,000);
2. Exemplary damages;
3. Interest under section 34 of the Judicature Act (2021 Revision) and/or alternatively pursuant to the equitable jurisdiction of the Court;
4. Costs; and
5. Further and other relief.

Against the Fourth Defendant and the Fifth Defendant:

6. Damages in respect of their fraudulent misrepresentations (including liquidated damages of not less than US$128,000).

Against the Sixth Defendant:

7. A declaration that:

   (i) the Sixth Defendant has been unjustly enriched at the Plaintiff's expense;

   (ii) the Apartments are held by the Sixth Defendant on constructive trust for the Plaintiff;

   (iii) the Apartments represent traceable property in the hands of the Sixth Defendant; and

(iv) the Sixth Defendant is liable to account for and to restore the Apartments to the Plaintiff and/or to pay equitable compensation to the Plaintiff.

8. An Order that the Sixth Defendant do transfer the Apartments to the Plaintiff.

9. Further or alternatively:

(i) equitable compensation; and
(ii) interest as aforesaid."

17. Also in the hearing bundle was some evidence which I have considered insofar as it was relevant to the issues before the court for determination.

18. From the material contained in the hearing bundle provided to the court by the parties and having considered the submissions put before the court, the following appears to be the essence of the Plaintiff's case:

Until about 3 September 2018 two apartments located in Japan (the "Apartments") were in the beneficial and legal ownership of the Plaintiff, a company incorporated in Japan. As a result of a conspiracy undertaken by and through the Defendants the legal ownership of the Apartments has been transferred to the Sixth Defendant, a company incorporated under the laws of the Cayman Islands on 16 July 2018. Pursuant to a subscription agreement entered into between the Plaintiff and the Fourth Defendant, a company incorporated under the laws of the Cayman Islands, the Plaintiff subscribed for bonds issued by the Fourth Defendant in the principal account of US$5,624,000. The consideration for the subscription was the Apartments which were transferred to the Sixth Defendant on the nomination of the Fourth Defendant. The sole director of the Fourth Defendant is stated

to be the First Defendant, a person who resides in Australia and/or Hong Kong. At the time of the subscription both the Sixth Defendant and the Fourth Defendant were wholly-owned subsidiaries of LC Capital Limited a company incorporated in Hong Kong ("LC Capital HK" – the Third Defendant). The directors of the Third Defendant included the First and Second Defendants. Security for the Fourth Defendant's performance of its obligations under the bonds was given to the Plaintiff in the form of a charge, which was governed by the laws of the Cayman Islands (the "Cayman Charge") over the single share of the Sixth Defendant (the "Share"). At the time the Charge was issued the Share was held by LC Capital HK. The Fourth Defendant and LC Capital HK are and were at all material times controlled by the First and Second Defendants. The Cayman Charge was granted by LC Capital HK pursuant to the Cayman Charge between LC Capital HK, the Fourth Defendant and the Plaintiff. In short, in the event of a default under the bonds by the Fourth Defendant the purpose of the Charge was to enable the Plaintiff to re-take possession of the Apartments by taking control of the Sixth Defendant.

However, through the use of similarly named corporate entities in breach of the Charge and without the Plaintiff's knowledge it appears that on or about 13 February 2020 the ownership of the Share was transferred from LC Capital HK to a different entity bearing the exact same name: LC Capital Limited a company incorporated under the laws of the Cayman Islands ("LC Capital Cayman" – the Fifth Defendant) whose directors are the First and Second Defendants. It appears that the Apartments continue to be held by the Sixth Defendant but the Plaintiff's security under the Charge has been rendered worthless as a consequence of the wrongful actions taken by the Defendants. The Plaintiff has received no payment from the Fourth Defendant under the bonds. It appears that the issue of the bonds was a scheme designed to steal the Apartments from the Plaintiff and then to remove any ability for the Plaintiff to seek to regain control of the Apartments through the enforcement of the security granted by the Charge.

As a consequence of the fraud the Plaintiff has commenced proceedings seeking "declarations and orders entitling it to trace into the [Sixth Defendant's] property and to

require the [Sixth Defendant] to deliver up and transfer the Apartments back to the [Plaintiff], in addition to seeking damages for conspiracy against each of the various parties involved in the fraud."

19. The alleged fraud is summarised at paragraph 72 of the first affirmation of Fook Seng Heng affirmed on 6 September 2021.

20. The Plaintiff considers itself to have been defrauded to the tune of US$5,624,000. Far from what it thought was a legitimate and bona fide investment, the Plaintiff considers itself a victim of a well-planned and carefully executed fraud which has seen its Apartments stolen from it and has received nothing in value in return. The claim is defended.

21. I limit my focus to the "situation at the time permission was originally granted" although it can be seen that since then the Plaintiff's case has evolved or at least more meat has been put on the bones of the case presented at the ex parte hearing. The essence of the claim in conspiracy remains in substance the same.

The submissions

22. I turn now to the submissions.

23. I record that I have considered all that has been written and said on behalf of the Foreign Defendants and the Plaintiff.

The submissions of the Foreign Defendants

24. In essence the Foreign Defendants dispute the facts relied on by the Plaintiff and deny committing the tort of unlawful means conspiracy.

25. The Foreign Defendants submit that the Plaintiff has failed to meet the burden upon it to establish that it has a real prospect of success in showing that the Foreign Defendants conspired with the other Defendants against the Plaintiff because Mr Chen says otherwise.

26. The Foreign Defendants submit that the Plaintiff has not established a good arguable case on any of the jurisdictional gateways relied upon.

27. As regards Grand Court Rules ("GCR") Order 11 rule 1 (1)(c) - the necessary or proper party gateway, the Foreign Defendants submit that the First and Second Defendants were not parties to any of the documents and their involvement was limited to their capacity as directors and there is no basis upon which the corporate veil can be pierced. The Foreign Defendants submit that it is not sufficient to get through this gateway for the Plaintiff to allege that the alleged wrongful actions of the First and Second Defendants were taken "through" the other corporate Defendants. The Foreign Defendants acknowledge that the Third Defendant was a party to the charge agreement but say that this is not sufficient to satisfy this gateway as the claim does not seek to enforce the charge.

28. As regards GCR Order 11 rule 1 (1)(f) – tort, the Foreign Defendants emphasise that: (1) the Plaintiff is a Japanese company whose primary claim relates to property located in Japan; (2) the payments which the Plaintiff alleges were to be paid to it were to be paid in Japan; and (3) there can be no question that the tort alleged occurred in substance in Japan not the Cayman Islands.

29. As regards GCR Order 11 rule 1 (1)(ff) – director, officer or member of a company registered within the jurisdiction, the Foreign Defendants submit that this gateway relates to questions concerning a company and the status, right or duties of a director, officer or member. The Foreign Defendants add that it is effectively a mechanism to assert jurisdiction where there is an issue specific to a Cayman company. They submit (without citing any authority in support) that it is internal in nature and not a mechanism by which a third party unconnected with the company can assert jurisdiction, and according to the facts alleged, they submit that this gateway is not available to the Plaintiff.

30. As regards appropriate forum, the Foreign Defendants submit that it cannot reasonably be asserted that the Cayman Islands is clearly or distinctly the appropriate forum for the trial

of the dispute. They accept that some of the Defendants are incorporated in the Cayman Islands but say that is the only connection with the Cayman Islands. The Foreign Defendants with refreshing conciseness and focus stress the following:

(1) the alleged tort relates to real property located in Japan;

(2) the Plaintiff is a Japanese company;

(3) neither the First nor the Second Defendant reside in the Cayman Islands;

(4) the Third Defendant is a Hong Kong company;

(5) the Plaintiff's allegations concerning non-payment relate to payments that were to be paid in Japan;

(6) the discussions between the parties occurred outside the Cayman Islands;

(7) no relevant documents have been identified in the Cayman Islands; and

(8) none of the witnesses are located in the Cayman Islands.

The submissions of the Plaintiff

31. On behalf of the Plaintiff it was submitted that the Plaintiff has demonstrated a good arguable case that its claim falls within GCR Order 11 rule 1 (1)(c), (f) and (ff). The Plaintiff also submitted that the case was a proper one for service out and the Cayman Islands are the forum in which the case can be suitably tried for the interests of all the parties and for the ends of justice.

32. As regards GCR Order 11 rule 1 (1)(c) the Plaintiff says that the Foreign Defendants "architected" and were intimately involved in the conspiracy against the Plaintiff using the

Cayman Defendants as the apparatus by which to defraud the Plaintiff. The Plaintiff gives the following examples at paragraph 25 of its skeleton argument:

"25.1 the First and Second Defendants caused the Third Defendant to incorporate each of the Cayman Defendants in the Cayman Islands;

25.2 the First and Second Defendants caused the Third Defendant to incorporate a new exempted company in the Cayman Islands, ICG 1, with a name so similar to that of the Sixth Defendant as to be deceptive

25.3 the First and Second Defendants incorporated the Fifth Defendant with an identical name to LC Capital HK. From 31 October 2019, the First and Second Defendants were each directors of two companies with the name "LC Capital Limited", one incorporated in Hong Kong and one incorporated in the Cayman Islands. They chose these names and this structure for the purpose of deceiving parties with whom those companies came to deal, including the Plaintiff;

25.4 the First and Second Defendants caused the Third Defendant to purport to transfer its shareholding in the Sixth Defendant to the Fifth Defendant, in breach of the Cayman Islands law-governed share charge pursuant to which the Third Defendant had charged the one share issued by Sixth Defendant to the Plaintiff (the "Share Charge") as security for the debt owed by the Fourth Defendant to the Plaintiff; and

25.5 the First and Second Defendants caused the Fifth Defendant to purport to transfer the one share issued by the Sixth Defendant to Victory Sky in breach of the Share Charge."

33. The Plaintiff says that there should be a single investigation into the actions of the Cayman Defendants and the Foreign Defendants. The Plaintiff adds that the joinder of the Foreign

Defendants achieves a plain advantage for the Plaintiff in that it will permit its claim to be pursued in a single jurisdiction, reducing cost and expenses and obviating the risk of inconsistent judgments.

34. As regards GCR Order 11 rule 1(1)(f) the Plaintiff says that the tort of conspiracy had its foundation from at least 16 July 2018, the date on which the Sixth Defendant was incorporated in the Cayman Islands for the purpose of receiving a transfer of the Japanese apartments from the Plaintiff, and continues as the Plaintiff has not received any payment in exchange for the transfer.

35. On behalf of the Plaintiff it was also submitted that the damage sustained as a result of the conspiracy was sustained in the Cayman Islands by virtue of the Sixth Defendant, while the Second Defendant was its sole director, registering the purported transfer of its one issued share from the Third Defendant to the Fifth Defendant and then from the Fifth Defendant to Victory Sky Holdings Limited (a BVI company), such share transfer in breach of a share charge (governed by the laws of the Cayman Islands) and being done with the intention and effect of rendering the security granted by the Third Defendant to the Plaintiff under the share charge worthless. Mr Faulkner for the Plaintiff refers to what he describes as "English Court of Appeal authority on the pre-CPR equivalent of GCR Order 11 rule 1 (1)(f)" namely *Societe Commerciale de Reassurance v Eras International Ltd (The Eras Eil Actions)* [1992] 1 Lloyd's Rep 570 in which he says it was held that in a tortious conspiracy action, the claim to jurisdiction is not founded simply on the situs of the claimants and the court should take a wider view of the damage and address in a real sense where the damage was suffered without undue focus on the places where the actual cause of action was completed. Mr Faulkner also refers to *FS Cairo (Nile Plaza) LLC v Lady Brownlie* [2021] UKSC 45 at [35] to [44] in respect of the evolution of the gateway.

36. As regards Grand Court Rules Order 11 rule 1(1)(ff) the Plaintiff refers to the following facts:

(1) the First Defendant is the sole director of the Fourth Defendant, the First and Second Defendants are the directors of the Fifth Defendant and each of the First and Second Defendants have at relevant times been the sole director of the Sixth Defendant; and

(2) the Third Defendant is the sole member of the Fourth Defendant and is suspected to be the sole member of the Fifth Defendant and at the time of the execution of the share charge was the sole member of the Sixth Defendant.

37. The Plaintiff says that the subject matter of the claim against each of the Foreign Defendants plainly relates to each of the Cayman Defendants and the conspiracy was carried out by the Foreign Defendants causing each of the Cayman Defendants to come into being and using the Cayman Defendants as the necessary co-conspirators.

38. Mr Faulkner on behalf of the Plaintiff submitted that the case for the Cayman Islands being the forum for the resolution of the dispute is overwhelming in circumstances where:

(1) the corporate apparatus used to perpetrate the conspiracy was the incorporation of companies incorporated under the laws of the Cayman Islands;

(2) no proceedings concerning the same subject matter have been commenced in other jurisdictions;

(3) the governing law of the share charge, one of the key documents according to the Plaintiff, is the law of the Cayman Islands;

(4) the Plaintiff has suffered loss in the Cayman Islands as a direct result of the conspiracy, being the loss of the value of the Plaintiff's security in the issued share of the Sixth Defendant;

(5) all material witnesses speak English; and

(6) to the extent necessary, the Grand Court has the means to receive evidence from overseas witnesses by video-link.

The relevant Rules and Law

39. In my ex tempore judgment delivered in these proceedings on 24 September 2021 I endeavoured briefly to outline the relevant law (which appears to be common ground between the parties) as follows:

"3. I turn now briefly to the relevant law as set out by Parker J in *Raiffeisen International Bank AG v Scully Royalty Ltd. et al* (unreported, 7 July 2020, FSD 162 of 2019 (RPJ). Parker J took into account the judgment of the Privy Council in *AK Investment CJSC v Kyrgyz Mobil Tel Limited* [2011] UKPC 7 at paragraph 159 and concisely and helpfully outlined what factors had to be satisfied to obtain permission for service out of the jurisdiction, namely:

(1) whether, in relation to each defendant, there is a serious issue to tried on the merits, i.e. a substantial question of fact or law or both which has a real, as opposed to fanciful, prospect of success;

(2) whether there is a good arguable case that the claim falls within one or more classes of case in which permission to serve out may be given, i.e. there is a jurisdictional gateway set out in Grand Court Rules Order 11 Rule 1(1); and

(3) that in all 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 pursuant to Grand Court Rules Order 11

Rule 4 (2). See also the Court of Appeal's judgment in *Brasil Telecom S.A. v Opportunity Fund* 2008 CILR 2011 and *Ahmad Hamad Algosaibi and Brothers Company v Saad Investments Company Limited and Others* 2010 (2) CILR 289."

40. For present purposes the relevant rules and law can be considered in further detail as follows:

41. GCR Order 11 rule 1(1) insofar as it is material provides that service of a writ out of the jurisdiction is permissible with leave of the court in certain circumstances. These circumstances are sometimes referred to as the jurisdictional gateways.

Gateway (c)

42. Gateway (c) is where in the action begun by the writ:

> "The claim is brought against a person who has been or will be duly served within or out of the jurisdiction and a person out of the jurisdiction is a necessary or proper party thereto".

43. In *Contadora Enterprises SA v Chile Holdings (Cayman) Limited* 1991 CILR Collett JA considered, amongst other issues, gateway (c) in the context of a submission that the appellants were necessary and proper parties to the proceedings against the directors since they had been part of the overall conspiracy to defraud. Collett JA at page 202 stated:

> "The approved test is whether, if the directors and the appellants had all been present in the Cayman Islands, they could have been made parties to the same proceedings… In turn this depends upon whether a common question of law and fact arises in respect of the claims against each of them."

44. Collett JA added:

> "I entertain no doubt that Graham J was correct in his finding that the appellants were "proper parties" in this sense. Although the actions may comprise in form of claims for sundry declarations and for compensation, they are each in essence based upon an alleged conspiracy to defraud and the primary purpose is to recover the assets which the respondents assert were wrongfully removed from them …"

45. Gateway (c) was also considered locally in *Hutchinson Ltd v Cititrust* 1998 CILR 43, and *AHAB v SAAD* 2010 (2) CILR 289.

46. Parker J in *Ritchie Capital Management LLC v Lancelot Investors Fund Ltd* (FSD; unreported judgment 15 December 2020) stated (footnotes omitted):

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

252. So of course on the other hand is the risk, where this can be demonstrated, of irreconcilable judgments which would arise from a multiplicity of proceedings."

And at paragraph 259 added:

> "In cases of conspiracy courts are sometimes persuaded that one forum should hear the case involving multiple parties to *one* overarching design or plan…"

47. In *Altimo Holdings v Kyrgyz Mobil Tel Ltd* [2012] 1 WLR 1804 the Judicial Committee of the Privy Council considered a similar Manx rule of court which provided that service out of the jurisdiction may be allowed whenever "any person out of the jurisdiction is a

necessary or proper party to an action properly brought against some other person duly served within the jurisdiction". Lord Collins delivering the judgment of the Board at paragraph 73 stated:

> "The necessary or proper head of jurisdiction is anomalous, in that, by contrast with other heads, it is not founded upon any territorial connection between the claim, the subject matter of the relevant action of the jurisdiction of the English courts"

and advised that caution must be exercised.

48. Lord Collins helpfully provided the following guidance:

(1) First, the mere fact that "anchor defendant" D1 is sued only for the purpose of bringing in the "foreign defendant" D2 is not fatal to the application for permission to serve D2 out of the jurisdiction but is a factor in the exercise of the discretion;

(2) Secondly, the action is not properly brought against D1 if it is bound to fail. Leave will not be granted if the lack of a plausible cause of action against D1 shows that the presence of D1 in the jurisdiction is being used as a device to bring in D2; and

(3) Third, the question whether D2 is a proper party is answered by asking: "supposing both parties had been within the jurisdiction would they both have been proper parties to the action?" D2 will be a proper party if the claims against D1 and D2 involve one investigation. Expressions "closely bound up" and "a common thread" are also used.

49. Lord Briggs in *Lungowe v Vedanta Resources plc* [2019] 2 WLR 1051 at paragraph 20 stated:

> "… the claimant must demonstrate as follows: (i) that the claims against the anchor defendant involve a real issue to be tried; (ii) if so, that it is reasonable for the court to try that issue; (iii) that the foreign defendant is a necessary or proper party to the
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> claims against the anchor defendant; (iv) that the claims against the foreign defendant have a real prospect of success; (v) that, either, England is the proper place in which to bring the combined claims or that there is a real risk that the claimants will not obtain substantial justice in the alternative foreign jurisdiction, even if it would otherwise have been the proper place, or the convenient or natural forum."

Gateway (f)

50. Gateway (f) is where in the action begun by the writ:

> "The claim is founded on tort, fraud or breach of duty whether statutory at law or in equity and the damage was sustained, or resulted from an act committed, within the jurisdiction."

51. In *Contadora Enterprises SA v Chile Holdings (Cayman) Limited* 1999 CILR 194 the Court of Appeal held that the Grand Court had erred in respect of gateway (f) since the respondents had failed to demonstrate that they had a claim in tort, fraud or breach of duty founded on damage sustained in the Islands or caused by an act committed here. Since a company (or an individual) did not suffer economic loss within the jurisdiction merely by reason of being registered (or resident) here, the fact that the respondents were incorporated here was insufficient, and the relevant transfers of shares had occurred in Panama and France.

52. Gateway (f) was also considered in *Hutchinson Ltd, Contadora Enterprises* and *Fidelity & Guar. International Ltd v Hakemian* 1992 – 93 CILR N-6.

53. *FS Cairo (Nile Plaza) LLC v Lady Brownlie* [2021] UKSC 45 concerned, amongst other issues, the tort gateway and the words in the English CPR PD 6B, paragraph 3.1(9): "damage was sustained … within the jurisdiction" (paragraph 13) in the context of the "domestic rules in England and Wales relating to service of civil proceedings on a defendant out of the jurisdiction" (paragraph 28). Lord Lloyd-Jones (with whom Lord Reed, Lord Briggs and Lord Burrows agreed) felt that it was an "unduly restrictive" approach (paragraph 49) to limit "damage" to direct damage. At paragraph 36 Lord Lloyd-Jones referred to the English Court of Appeal decision in *Metall und Rohstoff AG v Donaldson, Lufkin & Jenrette Inc* [1990] QB 391 where the claimants had sought permission to serve out of the jurisdiction alleging, amongst other claims, the tort of conspiracy. On behalf of one of the defendants it had been submitted that it was necessary that all the damage should have been sustained within the jurisdiction. The court rejected that submission. In the court's view it was "enough if some significant damage had been sustained in England." (paragraph 37. Lord Lloyd-Jones felt that the court in *The Eras Eil Actions* [1992] 1 Lloyd's Rep 570 was justified in taking a wide view of damage and "in

addressing in a real sense where the damage was suffered" (paragraph 38). Lord Lloyd-Jones at paragraph 51 concluded this section of his judgment stating:

> "… there is no reason to read "damage" in paragraph 3.1(9)(a) as limited to the damage which violates the claimant's right and which completes the cause of action. On the contrary, the word in its ordinary and natural meaning and when considered in the light of the purpose of the provision extends to the physical and financial damage caused by the wrongdoing, considerations which are apt to link the tort to the jurisdiction where such damage is suffered. Moreover … it is sufficient that some significant damage has been sustained in the jurisdiction."

54. At paragraph 65 Lord Lloyd-Jones commented to the effect that "damage" extends "to harm which has been sustained by the claimant."

55. At paragraph 75 Lord Lloyd-Jones stated:

> "The nature of pure economic loss creates a need for constraints on the legal consequences of remote effects and can give rise to complex and difficult issues as to where the damage was suffered, calling for a careful analysis of transactions. As a result, the more remote economic repercussions of the causative event will not found jurisdiction."

56. Lord Lloyd-Jones at paragraph 76 stated:

> "I would certainly not disagree with the proposition, supported by the economic loss cases, that to hold that the mere fact of any economic loss, however remote, felt by a claimant where he or she lives or, if a corporation, where it has its business seat would be an unsatisfactory basis for the exercise of jurisdiction."

57. Lord Lloyd-Jones at paragraph 81 revealed that in his mind "damage" in paragraph 3.1(9)(a) of Practice Direction 6B "simply refers to actionable harm, direct or indirect, caused by the wrongful act alleged" and "a claimant may suffer damage within the meaning of the domestic tort gateway in more than one place."

58. Lord Leggatt (dissenting on the tort gateway issue) helpfully set out the wording of the relevant gateway:

> "A claim is made in tort where – (a) damage was sustained, or will be sustained within the jurisdiction; or (b) damage which has been or will be sustained results from an act committed, or likely to be committed, within the jurisdiction."

59. Lord Leggatt referred (at paragraphs 169 and 170) to the opposing interpretations. Firstly, the "broad" interpretation of the gateway, namely that the term "damage" refers to any significant harm of any kind, whether physical, psychological or financial which results – whether directly or indirectly – from a tortious act committed by the defendant. Secondly, the "narrow" interpretation namely the ground 9(a) applies only to "damage … sustained … within the jurisdiction" as a direct result of the defendant's wrongful act and does not include indirect or consequential losses.

60. Lord Leggatt at paragraph 171 made the initial observation that if the broad interpretation was correct:

> "… the tort "gateway" is not so much a gateway to bringing proceedings in England against a defendant who is in another country as an open territory with no fence … [with no] principled basis for it."

61. Lord Leggatt (at paragraph 181) agreed with Lord Lloyd-Jones that there is no reason to equate the meaning of the "damage….sustained" with damage that completes a cause of action in tort.

62. Lord Leggatt (at paragraph 208) expressed his view on the relevant part of the tort gateway in the context of the tragic personal injuries case which was before the Supreme Court of the United Kingdom as follows:

> "… the English courts should do as we would be done by and interpret the tort gateway in a way which gives effect to its purpose of requiring a real and substantial connection with the jurisdiction and which provides a legitimate and stable basis for the assumption of jurisdiction over a foreign defendant. I accordingly consider that the narrow interpretation of the tort gateway adopted in the cases involving economic torts is correct …"

63. There is a lot of academic comment in this area of the law. Adrian Briggs in *The Conflict of Laws* (3rd Edition) at page 88 comments that "ascribing a place to damage can be an artificial exercise." Briggs in *Civil Jurisdiction and Judgments* (6th Edition) at page 488 states:

> "In the result, the correct approach is, in practice, not to be too clever or analytical when it comes to the location of intangible, or financial, losses but to rely on the principle of forum conveniens to screen out those cases in which the damage connection with England is too weak or tenuous to justify service out."

Gateway (ff)

64. Gateway (ff) is where in the action begun by the writ:

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

65. Counsel did not take me to any academic commentary or in detail to any local caselaw on gateway (ff) which appears to be unique to the Cayman Islands. On the face of it gateway (ff) is drafted in very wide terms.

66. In *Civil Litigation in the Cayman Islands* (Third Edition 2016) by Deborah Barker Roye 3 pages (33 – 35) are devoted to gateway (ff) and the point is made that it "appears to be peculiar to the Grand Court Rules". The author describes the wording as "straightforward" and sets out a helpful review of some of the local caselaw on (ff). I have considered some of the local caselaw to ascertain if any light is shone upon gateway (ff) in the context of the case presently before me and to ascertain any local policy considerations that may be relevant. I list below in chronological order some of the local caselaw which touches upon (ff) and some general policy considerations in respect of those who incorporate companies in this jurisdiction:

(1) *Hutchinson Limited v Cititrust (Cayman) Limited* 1998 CILR 43;
(2) *Telesystems Intl. Wireless Inc v CVC/Opportunity Equity Partners LP* 2002 CILR N-21;
(3) *Velox International Investments v Peirano Facco* 2003 CILR 30;
(4) *KTH Capital Management Ltd v China One Financial Ltd* 2004-05 CILR 213
(5) *Cairnwood Global Technology Fund Ltd* 2007 CILR 193;
(6) *TCB Creditor Recoveries Limited v Arthur Anderson LLP* 2007 CILR N-14;

(7) *Bancredit Cayman v Pellerano* 2010 (1) CILR 400;

(8) *Torchlight v Millenium* 2018 (1) CILR 244;

(9) *In re China Agrotech* 2019 (2) CILR 302; and

(10) *Daiwa Capital Markets Europe Ltd v A1-Sanea* 2019 (2) CILR Note 9.

67. In *Hutchinson* Acting Justice Douglas on 30 January 1998 at pages 65 – 67 touched upon gateway (ff) in the context of de facto and shadow directors.

68. The short note in the law reports in respect of *Telesystems* indicates that on 1 August 2002 the Court of Appeal (Zacca P, Collett and Rowe JJA) in the context of a stay application held that the status of the Cayman Islands (i) as an advanced and reputable international financial centre and (ii) as a jurisdiction dealing frequently with international disputes between parties using Cayman companies in their structure, may be taken into account as a matter of public policy when considering an application to stay proceedings on the ground of forum conveniens. In some cases the desire to assist in preventing the proceeds of fraud from being dissipated may be a relevant factor for consideration (*Contadora Enterprises SA v Chile Holdings (Cayman) Ltd* 1999 CILR 194, dicta of Collett JA applied). However, this factor is not so weighty as to override all others in any case involving a Cayman Exempted Limited Company or Non-Resident Company. An application for a stay should not be rejected simply because such a defendant is served here as of right, any more than it should be granted on the basis only that such companies are required to carry on their business outside the jurisdiction. The proper text remains that Cayman proceedings should be stayed only if there is some other available forum, having competent jurisdiction, that is the appropriate forum for the trial of the action.

69. In *Velox* Acting Justice Edwards on 27 February 2003 (in a case where A.J Walters appeared for the plaintiffs) at paragraph 17 had regard to (ff) and noted that "there was evidence that Juan had been a director and was president of TCB [which was incorporated

in Cayman in 1989]. That being so, I find there is a clear basis for this court to exercise jurisdiction over the claim against Juan in Cause No 671 ….”

70. In *KTH Capital* Smellie CJ on 4 November 2004 stated at paragraph 23:

> “The choice of domicile of a company does, however, carry its own practical significance, in recognising the benefits and advantages – real or perceived – of incorporation in an established international financial centre such as the Cayman Islands. Implicitly, this includes the reasonable expectation that the courts here are competent and able to resolve any complex dispute that may arise in an efficient and just manner. Those are also practical considerations which always arise when one seeks to determine or choose the appropriate forum for the trial of a matter …”

71. Acting Justice Foster in *Cairnwood* on 17 May 2007, in the context of a stay application, applied *KTH Capital and Telesystem* and at paragraph 34 stated:

> “Having regard to the position of the Cayman Islands as an international finance centre, it is in principle particularly desirable that the courts of this jurisdiction determine issues such as the duties and responsibilities of directors or officers of Cayman companies. This is now well established as a matter of Cayman public policy and law. Of course, that factor may be outweighed by other factors in any particular case and of course, in a case where the proceedings cannot be served as of right within the jurisdiction, the onus is on the plaintiff to satisfy the court that the Cayman Islands are clearly the appropriate jurisdiction for the trial of the issues in the interests of justice and of all the parties. Nonetheless, it seems to me that this is a factor of great weight in the discretionary balance.”

72. Acting Justice Foster continued:

"36. It was argued by the defendants that the connection with the Fund [a company incorporated under the laws of the Cayman Islands] and the Cayman Islands is minimal and purely formal. None of the defendants is resident in the Cayman Islands. The Fund's business, apart from corporate formalities, was conducted outside the Cayman Islands, largely from the Cairnwood offices in Georgia. It is said that most of the Fund's business records were kept there and that the connection between the Fund and this jurisdiction is of no practical relevance in the context of determining the appropriate forum for trial of the Fund's claims. While these are factors taken into account in this context, in my view, they do not as such, in the circumstances of this case and having regard to the nature of the Fund's claims, outweigh the particular significance in this jurisdiction of the public policy (which has no equivalent in England) as expressed by the Cayman Court of Appeal, as emphasised again by the learned Chief Justice and as implicitly reflected in the (apparently unique to the Cayman Islands) additional ground on which it is permissible, with leave of the court, to serve proceedings out of the jurisdiction provided for in the Grand Court Rules, o.11, r.1 (1) (ff)."

73. Roye in *Civil Litigation in the Cayman Islands* at page 35, when dealing with gateway (ff), provides the following observations in respect of *Cairnwood*:

"Clearly, the learned judge placed great emphasis on the public policy factors under this head, even in light of cogent factors militating against Cayman as the appropriate forum. This seems to indicate a willingness on the part of the Cayman

Court to declare the Cayman Islands to be, prima facie, the most appropriate forum for actions involving the determination of duties of directors of Cayman companies."

74. Levers J in the *TCB* case delivered judgment on 1 August 2007. The short note in the law reports states that the public policy of the Cayman Islands is a factor to be taken into

account when considering whether to stay Cayman proceedings on the ground of forum conveniens. The note refers to the special status of the Cayman Islands and states that:

> "a company wishing to obtain a commercial benefit from conducting business in the Islands must therefore be prepared to subject itself to the jurisdiction of the Cayman courts."

The note also refers to the need to avoid "damage to the reputation of the Islands."

75. Henderson J in the *Bankcredit* case on 10 June 2010 at paragraph 16 was satisfied that there was a good arguable case on one of the gateways. His admirably clear and concise reasons were as follows:

> "Bancredit is a company registered within the Cayman Islands and is governed by the laws of the Islands. Mr Pellerano was a director of Bancredit at all material times, and his fiduciary obligations to the company are those described by the laws of the Cayman Islands. The essence of the claim is an allegation that he has breached his fiduciary duty during the time he was a director and, as a consequence, has caused Bancredit to suffer a loss. That is enough to satisfy the requirements of O.11, r.1 (1) (ff)."

76. Over 8 years later, Kawaley J in *Torchlight* on 17 June 2018 dealt with a case concerning service out of the jurisdiction and proceedings in respect of an alleged unlawful means conspiracy. At paragraph 71 gateway (ff) was referred to and at paragraph 73 Kawaley J, with his characteristically open and refreshingly direct approach, stated:

> "Because I find it impossible to discern how ACC and CAML, who are petitioning the court to wind up the Cayman partnership as its limited partners, can possibly contend that the plaintiff cannot access jurisdiction through O.11, r. (1) (ff), I see

no need to determine the question of whether O. 11, r. 1 (1) (c) is available on the hypothesis that no other gateway is …"

77. In the following year Segal J in the much cited *China Agrotech* at paragraph 68(a) of a judgment delivered on 16 July 2019 touched upon (ff) as follows:

> "Particular weight is to be given to the fact that the dispute relates to the conduct of a meeting of shareholders of a Cayman company. The rights and responsibilities of shareholders and the chairman of the EGM are subject to and governed by the company's constitution and are governed by Cayman law. This court is usually the most appropriate forum for dealing with such disputes (see, for example, Grand Court Rules, O. 11, r. 1 (1) (ff) which permits service out of the jurisdiction of claims brought against members of a Cayman company where the subject matter of the claims relates in any way to the company). I appreciate that the Hong Kong court is able to deal with disputes relating to such issues (see a number of decisions of Mr Justice Harris to which reference is made below) but where a forum dispute arises I consider that this court is entitled to pay particular regard to this point."

78. Just over a month later on 19 August 2019 Smellie CJ in the *Daiwa Markets* case was satisfied that gateway (ff) was met in the particular circumstances of that case. In his detailed reasons for judgment the learned Chief Justice set out gateway (ff) at paragraph 18 and at paragraph 21 stated:

> "GCR Order 11, rule 1 (1) (ff) (above) has no equivalent in the English Rules of the Supreme Court. However, this provision, which recognises that service out of the jurisdiction may be appropriate having regard to a proposed party's relationship to a company or partnership domiciled in Cayman, has been considered on several occasions by the Cayman Islands Courts."

79. The Chief Justice gave the following examples: *Telesystem*, *KTH Capital*, *TCB* and *Cairnwood*.

80. I bear in mind the helpful guidance in the academic commentary and the local caselaw in respect of gateway (ff) when considering its application to the facts and circumstances of the case presently before me.

Order 11 rule 4(2)

81. GCR Order 11 rule 4(2) provides that leave should not be granted:

> "unless it should be made sufficiently clear to the Court that the case is a proper one for service out of the jurisdiction under this Order."

82. Chadwick P in *AHAB v SAAD* 2010 (2) CILR 289 giving the judgment of the Court of Appeal on 1 December 2010 at paragraph 16 applied the comments of Lord Goff in *Spiliada Maritime Corp v Cansulex Ltd, The Spiliada* [1987] A.C. 460 at 480 and stated:

> "In a case in which the jurisdictional threshold under Order 11, rule 1(1) has been established, the task for the court, under rule 4(2), is to "identify the forum in which the case can be suitably tried for the interests of all the parties and for the ends of justice."

83. Lord Collins in *Altimo Holdings v Kyrgyz Mobil Ltd* [2012] 1 WLR 1804, sitting in the Judicial Committee of the Privy Council on an appeal from the Isle of Man, at paragraph 71 stated that there were three requirements that a claimant had to satisfy on an application for permission to serve a foreign defendant out of the jurisdiction:

> (1) there is a serious issue to be tried on the merits;

(2) there is a good arguable case that the claim falls within one of the jurisdictional gateways; and

(3) that in all the circumstances the local court "is clearly or distinctly the appropriate forum for the trial of the dispute, and that in all the circumstances of the court ought to exercise its discretion to permit service of the proceedings out of the jurisdiction."

84. Rule 2.42(3) of the Rules of the High Court of Justice of the Isle of Man provides:

> "The court shall not give permission unless it is satisfied that the Island is the proper place in which to bring the claim."

85. At paragraph 88 Lord Collins stated that "in both stay cases and in service out of the jurisdiction cases, the task of the court is to identify the forum in which the case can be suitably tried for the interests of all the parties and for the ends of justice."

86. In service out of the jurisdiction cases the burden is on the plaintiff to persuade the court that one or more of the jurisdictional gateways are available and that the Cayman Islands is "clearly the appropriate forum".

87. Lord Briggs in *Lungowe v Vedanta Resources plc* [2019] 2 WLR 1051 dealt with the English CPR rule 6.37(3) provision that "The court will not give permission [to serve the claim form out of the jurisdiction] unless satisfied that England and Wales is the proper place in which to bring the claim" at paragraph 66 by referring to the guidance of Lord Collins in the *Altimo* case at paragraph 88 that "the task of the court is to identify the forum in which the case can be suitably tried for the interests of all the parties and for the ends of justice …". Lord Briggs added:

> "That concept generally requires a summary examination of connecting factors between the case and one or more jurisdictions in which it could be litigated. Those

include matters of practical convenience such as accessibility to courts for parties and witnesses and the availability of a common language so as to minimise the expense and potential for distortion involved in translation of evidence. Although they are important, they are not necessarily conclusive. Connecting factors also include matters such as the system of law which will be applied to decide the issues, the place where the wrongful act or omission occurred and the place where the harm occurred."

Determination

88. I guard carefully against any sub-conscious confirmation bias but remind myself that in my ex tempore judgment in these proceedings on 24 September 2021 I stated:

"7. In my judgment: (1) in relation to each Defendant I am satisfied that there is a serious issue to be tried on the merits and (2) there is a good arguable case that the claims fall within one or more of the jurisdictional gateways specified in Grand Court Rules Order 11 Rule 1 namely 1(c), (f) and (ff). The Foreign Defendants are necessary or proper parties to the claim. Conspiracy is a tort and arguably at least some of the damage was sustained or resulted from acts committed within the jurisdiction.

8. The claim is brought against the directors of companies registered within the jurisdiction and a member of such a company and the claim arguably also relates to the duties of such directors and member. The First Defendant is the sole director of the Fourth Defendant, the First and Second Defendants are directors of the Fifth Defendant and the Third Defendant is the sole member of the Fourth Defendant.

9. In my judgment the strongest jurisdictional gateway in the particular circumstances of this case is Grand Court Rules Order 11 Rule 1 (1)(c): the necessary or proper parties gateway.

10. In my judgment the Cayman Islands is clearly and distinctly the appropriate forum for the trial of the dispute and in all the circumstances I am persuaded that I should

exercise the Court's discretion to permit service of the proceedings out of the jurisdiction.

11. The whole thrust of the claim is a claim in conspiracy against all Defendants and the use of companies incorporated in the Cayman Islands to further and facilitate such conspiracy. Moreover, it is plainly in the public interest (and to safeguard the international reputation of the Cayman Islands) that claims involving allegations of conspiracy against companies incorporated under the law of the Cayman Islands, and the use by individuals resident out of the jurisdiction of such companies, are properly dealt with by the Courts of the Cayman Islands.

12. Based on what I have read and heard to date, the Writ of Summons seeking damages for conspiracy against all the Foreign Defendants and Cayman Defendants, which concern companies incorporated under the laws of the Cayman Islands, should be dealt with in the Cayman Islands."

89. I remain satisfied in respect of each defendant that there is a serious issue to be tried. The Plaintiff's claims raise serious issues to be tried on the merits. Simply because there is a factual dispute in respect of them does not mean that there is no serious issue to be tried.

90. In *Merkanti Holding PLC v Raiffeisen Bank International AG* (CICA unreported judgment delivered 16 March 2022) Moses JA referred to an argument by the Appellants that there was no serious issue to be tried arising out of the causes of action alleged against them. At paragraph 4 Moses JA stated: "To establish that there was a serious issue to be tried the Respondent needed only to establish that there was a real, as opposed to a fanciful, chance of success." In that case there was a conspiracy claim and it was common ground that both D3 and D6 were necessary and proper parties to the claim. It was alleged that D6, a shell company, was formed as part of the means by which an asset was moved. Moses JA at paragraph 23 stated that "the controlling minds behind the alleged conspiracy plainly considered that it [D6] had a part to play. That affords a sufficient basis for concluding that there was a serious issue of conspiracy to be tried." Moses JA at paragraph 30 added:

"Once it is appreciated that there is a serious issue to be tried as to the participation of D6 in the process by which D2's interests in Scully Mine were transferred, it follows that there is a serious issue to be tried as to D6's participation in the alleged conspiracy." In the case presently before me I have no hesitation in concluding that the Plaintiff has established serious issues to be tried in respect of the conspiracy claims against the Foreign Defendants. The Plaintiff's case (which will have to await trial before it can be determined) is that the Foreign Defendants used the Cayman Defendants to facilitate the conspiracy and they had important roles to play in the alleged conspiracy.

91. I am also satisfied that there is a good arguable case that the claims fall within gateways (c), (f) and (ff). I provide my brief reasons as follows.

92. In respect of gateway (c) I am satisfied that the claims against the Foreign Defendants and the Cayman Defendants involve one investigation or are so closely bound up together and the factual issues so tightly interwoven that the case against all of the defendants demands a single investigation. All defendants are alleged to have been involved in the conspiracy and the Foreign Defendants are proper parties to the claims against the Cayman Defendants. The claims are not bound to fail. They are far from hopeless. All defendants are "closely bound up" and there is "a common thread." If all the defendants were within the jurisdiction there can be no doubt that the claims against them would all be heardtogether. The Foreign Defendants are necessary and proper parties to the claims made against the Cayman Defendants and if all defendants had been within the Cayman Islands they would all have been joined in the same proceedings.

93. In respect of gateway (f) the Plaintiff relies on the unlawful means conspiracy tort as recently touched upon by Lord Sales at paragraph 102 of his short judgment in *Secretary of State for Health v Servier Laboratories Ltd* [2021] UKSC 24. I am satisfied that the claims are founded on the tort of conspiracy and damage has been sustained within the jurisdiction and/or has resulted from an act committed in the jurisdiction. The registration of the purported transfer of an issued share from one of the Cayman Defendants to another,

a central plank of the Plaintiff's claim in conspiracy against all defendants, took place within the jurisdiction and damage was sustained within the jurisdiction. There is also the loss of the value of the Plaintiff's security in the issued share of the Sixth Defendant. These are not remote effects. The "damage" alleged to have been sustained by the Plaintiff was sustained within the Cayman Islands. The incorporation of the companies in the Cayman Islands and the transfer of shares were acts which took place within the jurisdiction. They were acts undertaken within the jurisdiction to further and complete the conspiracy.

94. In respect of gateway (ff) I am satisfied that the claim is brought against a director and/or member of companies registered within the jurisdiction and the subject matter of the claim relates to such companies. The Plaintiff's claim is that the conspiracy was carried out by the Foreign Defendants causing each of the Cayman Defendants to come into being and using the Cayman Defendants as the necessary co-conspirators to cause damage to the Plaintiff.

95. I am also satisfied that Order 11 rule 4 (2) has been satisfied and that the court was right to exercise its direction to permit the service of the proceedings out of the jurisdiction. I provide my brief reasons as follows.

96. My conclusion in respect of (c) weighs heavily and the satisfaction of Order 11 rule 4 (2) (See *The Eras Eil Actions* [1992] 1 Lloyd's Rep 570 at 591 per Mustill LJ; *AHAB v SAAD* 2010 (2) CILR 289 at paragraphs 71 to 73 per Chadwick P; and *Credit Agricole Indosnez v Unicaf Limited* [2004] 1 Lloyd's Rep 196 at paragraph 19 per Cooke J). In my judgment the Cayman Islands is clearly the appropriate forum for the trial of the Plaintiff's claims in conspiracy involving as they do three Cayman Islands incorporated companies which, on the Plaintiff's case, were set up to facilitate the conspiracy it alleges. I identify the Cayman Islands as the forum in which this case can be suitably tried for all parties and for the ends of justice. It cannot be properly suggested that the links between the claim and this jurisdiction are "merely casual or adventitious" to use the words of Lord Lloyd-Jones in *Brownlie* (at paragraph 80).

97. The Plaintiff's case in that the Foreign Defendants used the Cayman Defendants to perpetrate the conspiracy and cause damage to the Plaintiff. There are clearly strong and significant connections with the Cayman Islands. No other forum appears more suitable. There are no proceedings in any other jurisdiction. Witnesses can either travel to the Cayman Islands or give their evidence remotely via video-link. I have noted the places where the respective parties reside or carry on business and have considered issues of language, convenience and expense and the other relevant factors noted in the caselaw.

98. In *Club Resorts Ltd v Van Breda* 2012 SCC 17 LeBel J, giving the judgment of the Supreme Court of Canada, stated:

> "… the framework for the assumption of jurisdiction cannot be an unstable, ad hoc system made up 'on the fly' on a case-by-case basis – however laudable the objective of individual fairness may be…. Justice and fairness are undoubtedly essential purposes of a sound system of private international law. But they cannot be attained without a system of principles and rules that ensures security and predictability in the law governing the assumption of jurisdiction by a court."

99. Lord Lloyd-Jones in *FS Cairo (Nile Plaza) LLC v Lady Brownlie* [2021] UKSC 45 at paragraph 79 made a point to which he attached "particular importance" in the context of forum non conveniens and jurisdiction challenges namely that the "principle is not a mere general discretion, the application of which may vary according to the different subjective views of different judges creating a danger of legal uncertainty. On the contrary, the principle applies a structural direction, the details of which have been refined in the decided cases, in a readily predictable manner."

100. Toohey J had made a similar point in the High Court of Australia (sitting as a 6 judge court) in *Voth v Manildra Flour Mills Pty Ltd* [1990] HCA 55 when he said:

> "It is hardly necessary to stress how important it is that legal practitioners be able to advise their clients with reasonable certainty as to the forum in which they should launch proceedings. Likewise, it is undesirable that the time of the courts be taken up unduly with interlocutory hearings, in which service of process out of the jurisdiction is resisted or a stay is sought of proceedings served within the jurisdiction, because of uncertainty as to the appropriate test to be applied in such cases. There have been too many instances where the parties "have chosen to litigate in order to determine where they shall litigate"."

101. In applying the relevant legal principles to the circumstances of this case I have determined that the parties should litigate their dispute, which at its heart involves the Cayman Defendants, in the Cayman Islands.

102. Having heard the jurisdictional arguments on an inter partes basis my observations at paragraph 11 (set out in full above) of the extempore judgment I delivered on 24 September 2021 still hold good. This case was plainly a proper one for service out of the jurisdiction and the Grand Court is the suitable forum for the determination of the claims.

103. I dismiss the Jurisdictional Application. The Foreign Defendants should file and serve their defences within 28 days. I am minded to order the Foreign Defendants to pay the Plaintiff's costs of their unsuccessful Jurisdictional Application, to be assessed on the

standard basis in default of agreement but await any written submissions on costs within 14 days of the delivery of this judgment before making any orders as to costs.

David Doyle

THE HONOURABLE JUSTICE DAVID DOYLE
JUDGE OF THE GRAND COURT