

1 IN THE GRAND COURT OF THE CAYMAN ISLANDS  
2 FINANCIAL SERVICES DIVISION

3 CAUSE NO. FSD 36 OF 2011 (PCJ)

4 The Hon Sir Peter Cresswell  
5 In Open Court on 18 and 21 September 2012  
6

7 BETWEEN

8 ORIGAMI PARTNERS III, LP

Plaintiff

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AND: (1) PURSUIT CAPITAL PARTNERS (CAYMAN) LTD  
(2) PURSUIT CAPITAL PARTNERS MASTER (CAYMAN) LTD  
(3) PURSUIT INVESTMENT MANAGEMENT LLC

Defendants

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18 **Appearances**

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Mr. Neil Timms QC instructed by and with Mr. Simon Dickson of Mourant Ozannes for the Plaintiff.

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Mr. Nicholas Dunne of Walkers for the Defendants

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**JUDGMENT**

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**The application**

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The Plaintiff applies by *ex parte* summons on notice dated 4 September 2012 for injunctions preventing the Defendants from pursuing proceedings they have brought in the Federal Court for the District of Connecticut against it and others or other proceedings that relate to an issue pending in these Cayman Islands proceedings.

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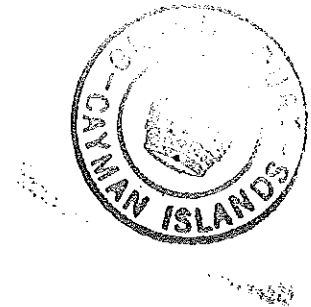
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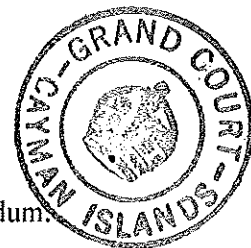
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I will refer to the Plaintiff as the Plaintiff or "Origami" and to the Defendants collectively as the Defendants or "Pursuit". Where the context requires, the First and Second Defendants (D1 and D2) may be referred to as the "Funds" and, respectively, the "Feeder Fund" and the "Master Fund" whilst the Third Defendant D3 (their investment manager) may be referred to as the investment manager or "Pursuit IM".





1 **Background: Cayman Proceedings**

2  
3 The following summary of the Cayman Proceedings is taken from the Case Memorandum.

4  
5 The Defendants are a Cayman master fund, its Cayman feeder fund and their Delaware  
6 investment manager. The Plaintiff Origami alleges that it is the assignee of certain of the  
7 First Defendant's shareholders (whether they are present or former shareholders is disputed)  
8 being three Russell companies (collectively "Russell"), pursuant to a purchase agreement  
9 dated 30 November 2010 and Deed of Assignment dated 7 January 2011 (the "Assignment").

10  
11 The background to the case is that on 26 February 2008 the investment manager informed  
12 investors that due to then-prevailing market conditions the Directors of the Funds had  
13 determined to suspend the calculation of its Net Asset Value (NAV) and redemptions. A  
14 restructuring proposal was sent by the investment manager to investors on 21 January 2009.

15  
16 Russell owned approximately 34% of the Participating Shares in the Feeder Fund (D1) and  
17 did not agree with the restructuring proposal advanced. Russell issued an Originating  
18 Summons in the Grand Court on 23 February 2009 seeking the appointment of Inspectors  
19 over D1 pursuant to section 64 of the Companies Law (2007 Revision).

20  
21 A period of negotiation comprising communications and *inter partes* correspondence ensued,  
22 culminating in the conclusion of a Deed of Settlement (the "Deed of Settlement" or "the  
23 Settlement") between the parties to settle the Originating Summons. The Settlement provides  
24 that Russell would withdraw its Originating Summons in exchange for redemption from the  
25 Feeder Fund on the terms of the Settlement.

26  
27 It is common ground that Russell has been paid all but US\$4,337,297.87 (the "Retained  
28 Amount") pursuant to the Settlement. The Plaintiff (as Russell's alleged assignee) alleges in  
29 these proceedings that it is entitled to be paid the Retained Amount. The Defendants deny  
30 this on the bases that:

31  
32 -they are entitled to retain the Retained Amount pending the final determination of the First  
33 Defendant's NAV as at 31 March 2009, which has not been determined; or, in the alternative,

34  
35 -they are entitled to retain the Retained Amount pursuant to clause 1(A)(i)(I) of the  
36 Settlement,

37

1 -they are entitled to keep the Retained Amount until the completion of the First Defendant's  
2 audit for fiscal year 2009, which also allegedly remains incomplete.

3  
4 The Plaintiff disagrees that the Settlement permits the Defendants to retain the Retained  
5 Amount and sues for breach of contract and seeks immediate payment of the Retained  
6 Amount together with interest.

7  
8 The Defendants challenge the validity of the Assignment on the basis that Russell remain  
9 shareholders in the Feeder Fund until they are redeemed in full and that the Retained  
10 Amount is an incident of Russell's shareholding which cannot be assigned or transferred  
11 without the First Defendant's consent (which consent has not been obtained).

12  
13 The Plaintiff's case is that pursuant to the Settlement Russell ceased to be shareholders and  
14 became creditors of the Feeder Fund.

15  
16

17 **The issues to be determined in the Cayman proceedings.**

18  
19 The issues to be determined in the Cayman proceedings include the following.

20  
21 Whether Russell's rights under the Deed of Settlement can be assigned?

22  
23 The Plaintiff says it can because the right is a debt arising out of a contract or a breach of  
24 contract.

25  
26 The Defendants say:

27  
28 -Russell as the owners of the shares being redeemed are the only party entitled to enforce the  
29 rights of redemption in the Deed of Settlement.

30  
31 -Redemption under the Deed of Settlement does not occur until all the terms of the Deed of  
32 Settlement are completed.

33  
34 -Not all the terms have been completed and accordingly at the time of the alleged assignment  
35 and presently Russell are unredeemed shareholders in the First Defendant.

36  
37 -The alleged assignment purported to transfer the entirety of Russell's rights to the Plaintiff  
38 such that the alleged assignment was therefore a transfer of shares within the meaning of



1 Article 16 of the First Defendant's Amended and Re-stated Articles of Association so as to be  
2 prohibited without prior written approval of the First Defendant's directors.

3  
4 -Rights of and in connection with the redemption of shares are personal to the shareholder  
5 and neither the shares nor those rights are capable of being assigned other than by transfer of  
6 the shares themselves under the conditions laid down in the Articles.

7  
8 -Regardless of the provisions of the alleged assignment, if the Defendants are under any  
9 obligation to make further payments by way of distribution of Available Cash or Divisible  
10 Securities under the Deed of Settlement, then the obligation is to make distributions by  
11 paying the Russell Nominee and not by paying the Plaintiff (this is the effect of clause 1.A.iii  
12 of the Deed of Settlement).

13  
14 Are the Defendants entitled to retain the Retained Amount:

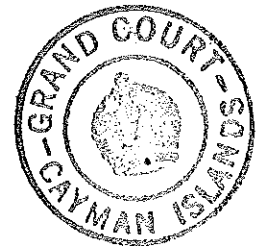
- 15
- 16 -because there has been no determination of NAV as at 31 March 2009: or
- 17 -for reasonable expenses including but not limited to legal administrative and accounting
- 18 expenses, together with accrued but unpaid expenses of the First Defendant: or
- 19 -pending the completion of their audit for the year ended 31 March 2009?

20  
21 By an Order of Foster J. dated 21 December 2011, Pursuit were given leave to amend their  
22 pleadings to include a Counterclaim against Russell and their custodian. Pursuit thereby  
23 claimed rectification of the Deed of Settlement and remedies for mistake. Following a Case  
24 Management Conference on 30 May 2012, the rectification claims were abandoned and the  
25 Counterclaim was dismissed by order dated 26 June 2012.

26  
27 **US Proceedings and the Complaint**

28  
29 On 26 July 2012, Pursuit filed proceedings in the United States District Court for the District  
30 Connecticut, under the title "Case 3:12-CV-01089" (the "Complaint"), against Origami,  
31 Russell and Russell Capital, Inc. ("Russell Capital" and together " the Russell Defendants")  
32 and Origami Capital Partners, LLC ("Origami Capital").

33  
34 In the Complaint, Pursuit seek a declaratory judgment that the Deed of Assignment is illegal  
35 and in breach of contract and damages and punitive damages against each of the defendants.  
36 Jurisdiction is claimed on the basis of a statutory diversity in that the dispute is between  
37 citizens of different states and a foreign state.



1 Pursuit allege that the venue is appropriate because "a substantial part of the acts and  
2 omissions giving rise to the claims occurred" within the jurisdiction of the Connecticut court  
3 (Complaint paragraphs 15 and 16). Specifically, Pursuit allege that drafts of the Subscription  
4 Agreement were exchanged and electronic and telephonic communications regarding those  
5 drafts and Russell's investment in the Feeder Fund were held with representatives of the  
6 Pursuit I M located in Connecticut (Complaint paragraph 27). The Complaint includes a  
7 demand for jury trial.

8  
9 Pursuit seeks, by its First Cause of Action against all defendants, a declaration that the Deed  
10 of Assignment is illegal and unenforceable.

11  
12 By its Second Cause of Action against Russell, it seeks damages for breach of a contract as  
13 set out in the Feeder Fund's Articles, the Offering Memorandum and Subscription  
14 Agreement. Damages are claimed on the basis that the alleged breaches are a direct and  
15 foreseeable cause of the Origami defendants' "*improper attempts to enforce an agreement to*  
16 *which they are not a party*". (Complaint paragraph 103).The impropriety is the bringing of  
17 proceedings in the Cayman Islands.

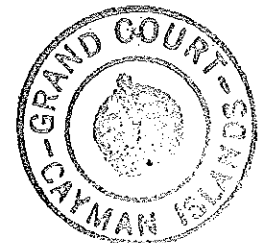
18  
19 The Third and Fourth Causes of Action are against the Origami defendants. The Third is an  
20 alleged Tortious Interference with Contract Relations.

21  
22 The Fourth is an alleged Tortious Interference with Business Expectancies. Pursuit alleges  
23 that they had a business relationship with Russell and that the demand for payment by  
24 Origami (and its General Partner) constitutes an intentional interference with the nature and  
25 terms of Pursuit's business relationship with Russell. Origami is alleged to have acted with  
26 improper intent to extract payment from and leverage over Pursuit through litigation  
27 (Complaint paragraph 112 and 120) - the litigation being that pending in this Court. Pursuit  
28 claims compensatory damages for loss by reason of the legal expenses incurred in this  
29 litigation (Complaint paragraphs 113 and 121).

30  
31 Pursuit claims punitive damages from each defendant (Complaint Prayer F).

32  
33 The US Court has extended the time of all defendants to respond to the Complaint until 4  
34 October 2012. Pursuit opposed the extension (see Young 6 paragraph [34]).

35  
36  
37



1 Although pleaded in slightly different wording, each claim alleges a knowledge or a reckless  
2 disregard that the beneficial interest in shares held by Russell could not properly or  
3 unilaterally be assigned to a third party and, in particular, a US person. The central issue  
4 raised in the Complaint is that Russell could not assign their interest in the Feeder Fund  
5 without the consent of its directors and that, consequently, the Assignment is invalid and  
6 unenforceable.

7  
8 This is according to Origami precisely the issue raised by Pursuit in June 2012 in these  
9 proceedings. Having not admitted the validity of the assignment in their Defence and  
10 Amended Defence, Pursuit were permitted to deny its validity in their Particulars of  
11 Paragraph 6 of the Re-Amended Defence. In effect, (according to Origami) Pursuit seeks to  
12 litigate proceedings against the same party in respect of the same subject matter in the courts  
13 of more than one jurisdiction.

14  
15 Breach of contract claims are made against Russell (two Irish companies that no longer exist  
16 and a Cayman company in liquidation) and Origami Capital a company that was not party to  
17 any of the contracts referred to in the Complaint. According to Origami it is unclear from the  
18 Complaint what contractual obligation Russell Capital is alleged to have entered into and to  
19 have breached.

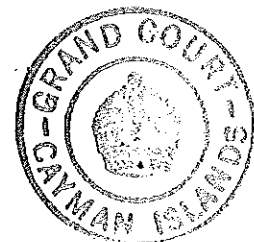
20  
21 The compensatory damages claimed are the costs of the Cayman litigation.

22  
23 The tort claims against Origami and its General Partner are predicated on two matters. First,  
24 that they acted in bad faith and collusively with the Russell Defendants in the US proceedings  
25 in entering into an illegal and unenforceable Deed of Assignment (Complaint paragraphs 69  
26 et seq.). Second, that the proceedings before this Court are improper (Complaint paragraphs  
27 82 et seq.).

28  
29 The case against Origami Capital appears to be that it directed Origami to execute the  
30 Assignment and that it brought the action in this Court for payment of the Holdback  
31 (Complaint paragraph 86).

32  
33 I will set out the respective submissions of the parties at some length because in my opinion it  
34 is important that the Federal Court is informed of the arguments presented to this Court.

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1 **Origami's Submissions**

2

3 Origami rely on the advice of Mr David Wollmuth of Wollmuth Maher & Deutsch LLP  
4 ("WMD") as to relevant aspects of Connecticut law set out in his letters of 3, 17 and 20  
5 September.

6

7 Mr Neil Timms QC on behalf of Origami submitted as follows.

8

9 *The legal principles*

10

11 An anti-suit injunction is a remedy in support of a legal or equitable right. Typically, the legal  
12 right is contractual and contained within an exclusive jurisdiction clause. In this case, there is  
13 no privity of contract between Origami and Pursuit although the Deed in question contained  
14 an exclusive Cayman jurisdiction clause. Here Origami seeks an injunction on the basis that it  
15 would be unconscionable or unjust for Pursuit to be permitted to litigate in the USA an issue  
16 pending before this court. Unconscionable conduct includes conduct that is vexatious or  
17 oppressive or which interferes with the due process of the Court: see: Glencore International  
18 Ag v Exeter Shipping Ltd [2002] 2 All ER (Comm) 1, 13-14.

19

20 The following principles apply to this category of cases:

21

22 An injunction is directed against parties proceeding in the foreign court not against the  
23 foreign court. Accordingly, an injunction will only be granted to those amenable to the  
24 jurisdiction of the Court.

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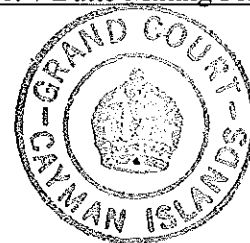
26 Because the jurisdiction indirectly affects the foreign court, it is exercised with caution. There  
27 must be a clear balance in favour of the person seeking the injunction to restrain foreign  
28 proceedings.

29

30 The jurisdiction is exercised when the "ends of justice" require it. Account must be taken of  
31 any injustice to either party. See: Société Nationale Industrielle Aerospatiale v Lee Kui Jak  
32 [1987] AC 871 PC 892-897.

33

34 The court will usually restrain the pursuit of foreign proceedings only if that pursuit is  
35 unconscionable. Generally that is because it would be vexatious or oppressive. Such factors  
36 as the availability of damages greater than those available here, exposure to expensive and  
37 onerous pre-trial procedures and significant expenditure of irrecoverable costs may  
38 collectively constitute sufficient oppression (see: Simon Engineering Plc. v Butte Mining Plc.  
39 [1997] 1L Pr 599 at [28-32].



1 The decision as to whether or not proceedings are unconscionable or vexatious or oppressive  
2 is evaluative and not the exercise of a discretion. Either they are or they are not (see: Star  
3 Reefers Pool Inc v JFC Group Co Ltd[2012] EWCA Civ 14 (CA). A finding of  
4 unconscionability is a condition precedent to the grant of an injunction.

5

6 *Natural Forum*

7

8 As a general rule, the court must first decide that it provides the natural forum for  
9 determination of the dispute. The natural forum is that with which an action has the most real  
10 and substantial connection (see: Simon Engineering Plc. v Butte Mining Plc. [1997] 1L Pr  
11 599 at [21]. This is a single forum case in favour of the Islands, so strong are the connections  
12 to this jurisdiction. Cayman law governed redemption of shares in a Cayman Fund and  
13 Cayman law governed the assignment of the balance of the redemption payment. Cayman is  
14 the natural forum for determination of the issues.

15

16 Connecticut has been used solely because management of the Pursuit IM work there, it is  
17 asserted it has a principal place of business there and consequently a “substantial part of the  
18 acts and omissions giving rise to the claims occurred in” Connecticut. Pursuit do not explain  
19 what “omissions” there were in Connecticut. All that is claimed is that drafts of the initial  
20 investment documents and communications were exchanged with Pursuit IM residing there  
21 [Complaint paragraphs 4-6, 16 and 27].

22

23 In the agreed Case Memorandum dated 4<sup>th</sup> July 2012, Pursuit expressly confirm that: *"The*  
24 *Constitutional Documents, Deed of Settlement and Deed of Assignment are all governed by*  
25 *the laws of the Cayman Islands. Accordingly the laws of the Cayman Islands (including*  
26 *common law principles relevant to the issue) will determine whether the Russell Funds'*  
27 *shares were fully redeemed and the validity of the assignment."*[Emphasis added].

28

29 *The Balance of Injustice*

30

31 A factor in the balance is whether or not the litigation in the foreign court would confer  
32 advantages upon the person bringing proceedings there of which it would be unjust to deprive  
33 him. If the balance of injustice lies in favour of the foreign proceedings being allowed, an  
34 injunction will usually be refused. Only genuine and credible advantages can have any  
35 weight at all. The appropriate test is:

36



1 -whether an injunction deprives Pursuit of a legitimate advantage of which it would be unjust  
2 to deprive them and

3 -this injustice outweighs any injustice occasioned to Origami.

4  
5 In considering these questions the Court will need to conduct a balancing exercise looking at  
6 where the justice lies (see: Metall und Rohstoff AG v ACLI Metals (London) Ltd [1985]  
7 ECC 502 at [59]).

8

9 *No Injustice to Pursuit*

10

11 The grant of the injunction sought would cause no injustice to Pursuit, whilst the continuation  
12 of the US proceedings would create significant injustice for the Plaintiff.

13

14 Unless this Court regarded Connecticut as the appropriate forum bearing in mind the real  
15 connections with the subject matter, differences in law and procedure cannot be regarded as  
16 legitimate advantages for Pursuit (see: Simon Engineering *ibid*).

17

18 The only real factor in favour of that jurisdiction is that Pursuit's director witnesses work  
19 there. In any event, even if Connecticut was considered an appropriate forum, juridical  
20 procedures are not to be regarded as legitimate advantages carrying any weight.

21

22

23 *CLAIMS MAY/COULD HAVE BEEN BROUGHT IN CAYMAN*

24

25 Equivalent claims to those in the US proceedings are available in this jurisdiction, but Pursuit  
26 took no steps to bring them.

27

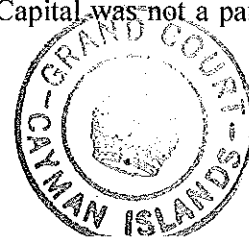
28 *Breach of Contract Claims*

29

30 A breach of contract claim could have been brought in the Cayman Islands. A relevant  
31 defendant was within the Islands and it was open to Pursuit to bring in other parties as being  
32 necessary or proper parties. It appears that the Connecticut court would have to be invited to  
33 interpret Cayman law.

34

35 As to Russell, of the three companies two have been dissolved and one is in Voluntary  
36 Liquidation. In respect of Russell Capital WMD confirm that the US rules on privity of  
37 contract are substantively the same as the Cayman rules. Russell Capital was not a party to



1 any contract sued on. It follows that there is no legitimate advantage to be found by reason of  
2 it being domiciled in the USA.

3  
4 *Equivalent Tort Claims*

5  
6 Cayman law also recognises causes of action substantively similar to Tortious Interference  
7 with Contractual Relations and Tortious Interference with Business Relations. As can be seen  
8 from the first WMD letter, the essential elements are similar.

9  
10 *Procuring a breach of contract*

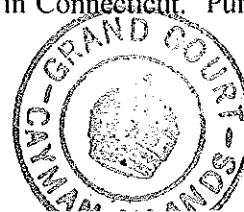
11  
12 Inducing or procuring a breach of contract is an established tort in the Cayman Islands. It  
13 exists when a person knows of the existence of a right but does an act that will impair or  
14 destroy it. Knowingly to procure a third party to break his contract to the damage of another  
15 contracting party without reasonable justification or excuse is a tort in Cayman law. The  
16 procurer must act with the requisite knowledge of the existence of the contract and intention  
17 to interfere with its performance (see: OBG Ltd v Allan [2008] 1 AC 1).

18  
19 *Unlawful Interference with Economic and Other Interests*

20  
21 Since OBG Ltd v Allan, an "interference with business" tort has been distinguished from the  
22 tort of procuring a breach of contract. It requires that a person, using unlawful means, causes  
23 damage to another intending to inflict the harm of which the complaint is made. Damage to  
24 economic expectations is sufficient (see OBG Ltd v Allan at paragraph 8). The tort is based  
25 on the deliberate use of unlawful means and therefore differs from inducement of a breach of  
26 contract in which liability stems from a direct invasion of a legal right. The scope of the  
27 unlawful means required has not been definitively circumscribed. In the Complaint, Pursuit  
28 assert a deliberate course of conduct, bad faith and collusion that, if made out, would be  
29 sufficient.

30  
31 *The Jurisdiction of the Cayman Court in respect of Torts*

32  
33 In Boys v Chaplin [1971] AC 356 the House of Lords explained and restated the rule in  
34 Phillips v Eyre that the English court will adjudicate in respect of a tort not committed in  
35 England, when civil liability also existed between the parties in another jurisdiction where the  
36 act was done. This Court could therefore properly adjudicate on that basis even were Pursuit  
37 able to show that the torts, if committed at all, were committed in Connecticut. Pursuit has



1 already pleaded torts substantively equivalent to those available here. In any event, the  
2 general rule that the wrong be doubly actionable can be displaced under modern law by  
3 evidence that, in all the circumstances, as in this case, Cayman law has the most significant  
4 relationship with the occurrence and the parties.

5  
6 The double actionability rule does not, in any event, impinge on the question of jurisdiction  
7 for the purposes of GCR O 11. A court may accept jurisdiction, for example, on the grounds  
8 that one defendant is within the jurisdiction and others are necessary or proper parties,  
9 notwithstanding that a case falls outside the double actionability rule. In those circumstances  
10 the court might sometimes be required to apply the foreign rule of law (see: Red Sea  
11 Insurance Co Ltd v Bouyges SA [1995] 1 A C 1900). In the present case it is accepted that  
12 Cayman law applies both to the contracts of which breach is alleged and the validity of the  
13 Assignment.

14  
15

16 *PARTIES NOT AMENABLE TO THE CAYMAN JURISDICTION*

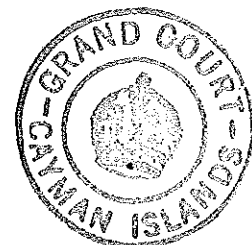
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18 Russell Capital and Origami Capital are amenable to this jurisdiction. Pursuit did not attempt  
19 to join them in these proceedings or make the same claims against them here.

20

21 The amenability of persons to this jurisdiction goes to where is the natural forum. The court  
22 however must be careful not to assert an excessive jurisdiction. It might be an excessive  
23 jurisdiction (1) if the claims in the US proceedings were properly brought there and (2) there  
24 was unacceptable risk of injustice by restraint of an action against another party that could  
25 not otherwise be brought (see, for example: Bank of Tokyo v Karoon [1987] AC 45). The  
26 opposite is the case here and Pursuit cannot suggest that their substantive claims could only  
27 have been brought in Connecticut. Indeed, Pursuit brought claims here by the counterclaim  
28 against Russell. Russell Capital and Origami Capital are alleged to be, with Russell, in  
29 breach of contract and to be a joint tortfeasor with Origami. Pursuit could have sought to join  
30 them as necessary and proper parties here. Instead those companies are evidently joined as a  
31 pretext for institution of proceedings in Connecticut. That is inadmissible (see for example  
32 Smith Kline *ibid* 744). Pursuit chose to bring and abandon the counterclaim. It has made no  
33 effort to attempt to prosecute the claims here and can have no legitimate complaint if  
34 litigation in the foreign forum, turning on the invalidity of the Assignment, is restrained.

35  
36



1 *PROCEDURAL DIFFERENCES*

2  
3 *Punitive Damages as a Legitimate Juridical Advantage*

4  
5 That punitive damages may be available in the US proceedings does not constitute a  
6 legitimate litigation advantage that militates against the grant of an anti-suit injunction.

7  
8 At most, very little weight should be given to the availability of punitive damages in the  
9 foreign jurisdiction as a factor in assessing the justice in the grant of an anti-suit injunction.  
10 (See: Metall und Rohstoff AG v ACLI Metals (London) Ltd [1985] ECC 502 at [59]). The  
11 better view is that it is not a legitimate juridical advantage at all (see: Smith Kline & French  
12 Laboratories Ltd v Bloch [1983] 1 WLR 730 at 738).

13  
14 In any event, since the House of Lords decided Rookes v Barnard [1964] AC 1129,  
15 exemplary damages have been available in respect of all torts if the defendant's conduct has  
16 been calculated by him (in the sense of being likely) to make a profit for himself that may  
17 well exceed the compensation payable (at 1226). Whilst exemplary damages will be  
18 sparingly granted, they may be available, for example, to confiscate profit and when a tort has  
19 been deliberately committed with the guilty knowledge that, looking at it broadly, it would  
20 pay the wrongdoer to take the risk of the consequences (see also: Broome v Cassell & Co Ltd  
21 [1972] AC 1027, 1079, 1088).

22  
23 *Jury Trial as a Legitimate Juridical Advantage*

24  
25 The availability of Jury trial in Connecticut it is not a factor that should be taken into account  
26 (see, for example: Metall und Rohstoff AG v ACLI Metals (London) Ltd at [60]).

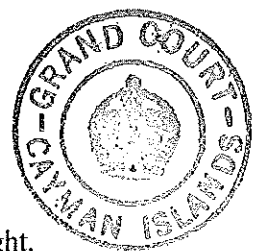
27  
28 *Discovery as a Legitimate Juridical Advantage*

29  
30 Oral Discovery is available in a suitable case in the Islands (GCR O.24, r.16).

31  
32 Any wider discovery than permitted here is not a juridical advantage that carries any weight.

33  
34 Extensive discovery has already been given in this case. Pursuit has had the opportunity to  
35 seek from Origami all documents relevant to the issue and seek oral discovery.

36  
37 As in Smith Kline & French Laboratories Ltd v Bloch at 744 in respect of English Procedure,  
38 there is no reason to believe that Cayman procedure by way of discovery and interrogatories  
39 is in any way inadequate.



1 *Injustice to Origami*

2

3 The balance of fairness and justice lies strongly in favour of Origami. The US Proceedings  
4 are clearly oppressive vexatious and unconscionable. Cayman is the natural and appropriate  
5 forum of the proceedings and the institution of foreign proceedings in itself is oppressive.

6

7 *Delay*

8

9 Pursuit failed to bring the US Proceedings until some 17 months after the Cayman  
10 proceedings were commenced. Pursuit issued the US Proceedings without warning or notice.  
11 This failure, together with the failure to challenge this Court's jurisdiction as a proper forum  
12 or seek any stay of Cayman proceedings, constitutes an element of oppression. Pursuit has  
13 engineered this situation. It has deliberately created this diversion as the trial date in these  
14 proceedings nears, irrespective of the lack of merit of the claims made in the US proceedings.  
15 Pursuit has left the US Proceedings so late that companies from whom Origami might have  
16 claimed indemnity or contribution are no longer in existence or are in liquidation.

17

18 Where the same issue is litigated in multiple forums with the risk of inconsistent decisions on  
19 the validity of the Assignment and thus to the enforceability of this Court's judgment, there is  
20 injustice to Origami. Pursuit may attempt to frustrate enforcement of any Cayman Islands  
21 Judgment against it by asserting a conflicting US Judgment.

22

23 *Russell as Parties in these Proceedings*

24

25 The US Proceedings are unjust and vexatious and oppressive in that Pursuit could (and  
26 should) have brought these claims in and joined these parties to the Cayman Proceedings.

27

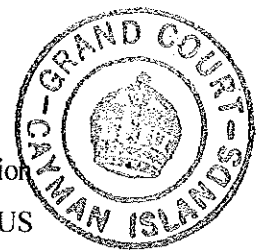
28 *Costs*

29

30 If Pursuit is permitted to continue the US proceedings, not only would there be a duplication  
31 of costs relating to the same issue arising from the same facts, the attorney costs of the US  
32 proceedings will almost certainly be irrecoverable if Origami is successful. These costs are  
33 considerable.

34

35 The conduct of Pursuit has deliberately increased costs. Given that the Funds are of doubtful  
36 solvency and that Pursuit IM is under serious SEC investigation and may itself be of doubtful  
37 solvency, the risk of an irrecoverable judgment or even of any costs awarded are increased by  
38 the assets it expends in Connecticut. For Pursuit it is a deliberate "no risk" policy. The



1 Funds intend to indemnify Pursuit IM first before payment of the Holdback. They estimate it  
2 will be insufficient. Any money spent in the US proceedings will serve to deplete the funds  
3 for payment of any judgment here.

4  
5 *Vexatious Allegations impugning the Process of the Cayman Court*  
6

7 It is vexatious and oppressive to fail to make the claims in the US proceedings in the Cayman  
8 Proceedings, and yet seek to obtain from a foreign court a judgment impugning and seeking  
9 to overturn a judgment that may be made by this Court. The Court should not allow such  
10 vexatious allegations to be maintained in a foreign Court, not only to protect Origami but also  
11 to protect its own process.

12  
13 *Lack of Merit*  
14

15 It is now clear from discovery of the Share Registers that Pursuit were forced to give, that  
16 Russell are not shareholders of the Feeder Fund. The assertion that they are is the  
17 fundamental underpinning of the claims in the US proceedings (as it must be of the claim  
18 here that the Assignment is invalid). The timing of the issue of the US Proceedings and the  
19 discovery obligation here is not coincidental. The US Proceedings are intimidatory and  
20 designed to increase Origami's costs of recovery.

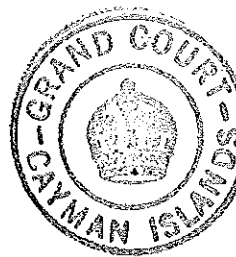
21  
22 *The US Proceedings directed at the Plaintiff*  
23

24 The gravamen of the Complaint relates solely to the assignment to Origami of the creditor  
25 rights of Russell under the Assignment and the proceedings that Origami has brought in this  
26 Court.

27  
28 Two of the US defendants no longer exist; another is in liquidation in the Islands. The breach  
29 of contract claim against Russell Capital that was party to no contract is at best tenuous.  
30 Origami Capital is alleged to direct Origami and therefore be liable. The reality is that the US  
31 Proceedings are directed principally at Origami and in response to these proceedings here.

32  
33 *Unconscionability of unrestrained US Proceedings*  
34

35 Pursuit seeks by the US Proceedings, to impugn the proceedings before this Court, jeopardise  
36 the enforceability of any judgment against them by this Court and introduce a new price in  
37 cost and management time that Origami will have to pay for a proper and final determination  
38 of its status and right to recover the Holdback.



1 The fundamental issue in both proceedings is the same and arises from the same facts. Pursuit  
2 themselves have raised and pleaded it and this Court is seized of it (and was first seized of it)  
3 with an imminent trial date.

4  
5 Unless the US Proceedings are restrained, Origami faces duplication of administrative and  
6 legal effort, irrecoverable costs (and possible depletion of outstanding funds for payment  
7 even if it obtains judgment) and the prospect that any judgment it obtains here may be  
8 jeopardised. Origami will give the usual undertaking in damages to protect Pursuit.

9  
10

11 *Conclusion*

12  
13 In a global economy and in the circumstances of the mutual funds business in the Islands,  
14 anti-suit injunctions are a necessary part of the Court's armoury. They were developed by US  
15 courts, which understand their rationale. They are not directed at the foreign court. It is  
16 because of the indirect effect on it that there must be a clear balance in favour of the  
17 applicant. If the Court concludes Pursuit's decision to proceed with the US proceedings is  
18 oppressive or otherwise unconscionable, the ends of justice require that Origami and its own  
19 process be protected. The Court should not stand back and watch. The fact that trial is so near  
20 in the Islands makes the US Proceedings the more oppressive, not less.

21

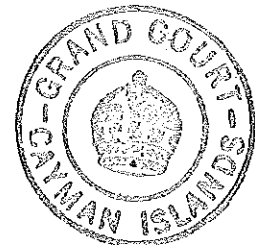
22 The Connecticut proceedings are vexatious and oppressive. A party put in the position of  
23 Origami is entitled to be protected against unconscionable conduct. The Court also has an  
24 interest in protecting its own process and ensuring its own judgments are not frustrated. This  
25 is not a question of an injunction "for the sake of 5 weeks." Pursuit refused to engage with  
26 Origami for weeks. They refused the reasonable offer to avoid the necessity of an order (see  
27 the 7 September letter). They refused on 11 September to extend time for the Defendants'  
28 response in the Connecticut Proceedings and still refuse to undertake to take no step in the  
29 action until after the Cayman trial. The Court can draw its own inferences. Origami is now  
30 being forced to make unwarranted and irrecoverable expenditure of funds and effort when  
31 they should be devoted to the Cayman trial.

32  
33

34 **Pursuit's submissions**

35  
36  
37

Mr Nicholas Dunne for Pursuit submitted as follows.



1 Pursuit's position is that the ends of justice militate against the grant of an injunction in the  
2 present case. The ordinary position is that a party is entitled to commence proceedings in  
3 whichever jurisdiction it deems appropriate, and that it will be a matter for the court in that  
4 jurisdiction to determine whether the court will hear the case. That position ought not to be  
5 departed from in anything other than an exceptional case, and there is no proper basis upon  
6 which to do so in relation to the proceedings instituted by Pursuit in the US.

7  
8 The US proceedings are properly and necessarily brought, and thus not unconscionable. To  
9 the extent that issues of *forum non conveniens* arise in relation to the US proceedings, these  
10 should be determined by the US court. By bringing the claims that are the subject matter of  
11 the US proceedings in the United States, Pursuit accrues a number of meaningful and  
12 legitimate juridical advantages. The US proceedings have no material impact upon the  
13 Cayman proceedings and do not prejudice Origami.

14

15 *The nature of the US Proceedings*

16

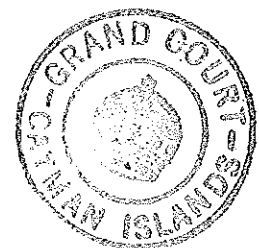
17 The US proceedings are properly brought, relating to matters that took place in the US  
18 involving US parties. They are not "insurance", or "a bargaining chip" or a tactic designed to  
19 put Origami to unnecessary expense.

20

21 The US proceedings are barely more than embryonic, and it appears unlikely that any  
22 significant demands will be placed upon the Origami parties in advance of the trial in  
23 Cayman. The limited temporal overlap between the two sets of proceedings means that there  
24 is virtually no realistic possibility of one interfering with the other. By the time that the US  
25 proceedings move beyond their initial stages, the Cayman proceedings will be concluded.

26

27 It is difficult to imagine therefore how the US proceedings might interfere with those in  
28 Cayman so as to be properly considered either vexatious or oppressive. Whilst it is said that it  
29 would be "unconscionable or unjust for Pursuit to be permitted to litigate in the USA an issue  
30 pending before this court", the fact is that, even if there were a substantial overlap between  
31 the proceedings (which is not accepted), by the time that the US Court was invited to make  
32 any substantive ruling, even on an interlocutory basis, there would no longer be any issue  
33 pending before the Cayman Court and no process with which to interfere.



1 Origami's response to the US proceedings is due to be filed on 4 October. To the extent that  
2 that response raises any preliminary issues, the US judge will clearly not be in a position to  
3 hear those issues until well after the conclusion of the trial in Cayman. This is far from the  
4 classic situation in anti-suit proceedings where proceedings are commenced in different  
5 jurisdictions in parallel. The fact that they are at such widely differing stages and thus have  
6 such limited capability to affect each other is indicative not (as Origami would have it) of  
7 deliberate oppression, but of the fact that they are unconnected and are properly brought.

8  
9 Origami has made no application for an extension of the 4 October deadline to the US judge.  
10 The application for an extension to 4 October was made by the Russell parties alone.

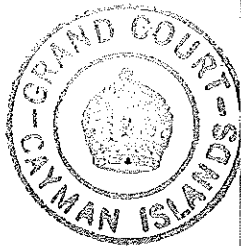
11  
12 Origami's failure to seek relief in the United States

13  
14 The starting point in relation to any set of proceedings must be that, absent an exceptional  
15 reason to the contrary, they will be managed and controlled by the court before which they  
16 are commenced. This approach finds its expression in the doctrine of comity and the caution  
17 with which courts approach applications for anti-suit relief.

18  
19 In this case, the US proceedings have now been on foot for more than 1½ months, but no  
20 attempt has been made by Origami in that jurisdiction to ask the US court to manage its own  
21 proceedings and decline jurisdiction. No reason has been advanced on the evidence, other  
22 than the putative cost, why such an application has not or could not be made.

23  
24 In SNI Aerospatiale v Lee Kui Jak [1987] 1 AC 871(at p895) Lord Goff noted that "in normal  
25 circumstances, application of the now very widely recognised principle of *forum non*  
26 *conveniens* should ensure that the foreign court will, itself, where appropriate decline to  
27 exercise its own jurisdiction" and went on to observe that the United States was a country in  
28 which the principle was recognised as applicable in cases of stay of proceedings. Gee on  
29 Commercial Injunctions 5<sup>th</sup> edn page 298-9 notes that "If the foreign court applies the  
30 principle of *forum non conveniens* normally the English court should respect its decision".

31  
32 This approach was applied in Pan-American World Airways Inc. v Andrews [1991] SCLR  
33 257, where the Outer House of the Court of Session determined that in the circumstances of  
34 that case it was inappropriate to grant an anti-suit injunction the effect of which would be to



1 pre-empt the ability of a United States court to determine issues of forum. It is settled law that  
2 the jurisdiction to grant an anti-suit injunction, which inherently interferes with the  
3 administration of justice by an overseas Court and engages questions of comity, should be  
4 exercised with caution (*per* Lord Goff in SNI Aerospatiale (p892)).

5  
6 By seeking an anti-suit injunction from the Grand Court, Origami invites the Grand Court to  
7 pre-empt the Connecticut Court's power to regulate its own proceedings in this regard. It is  
8 not appropriate to arrogate this element of the US court's jurisdiction and disregard comity by  
9 seeking to determine the issue through the agency of an overseas Court. The Plaintiffs have  
10 had ample time to apply to the US Court to dismiss the US proceedings on the basis of *forum*  
11 *non conveniens* and, having not done so, should not be permitted to bypass that jurisdiction in  
12 favour of seeking injunctive relief to the same end in Cayman. To do so entirely disregards  
13 proper considerations of comity.

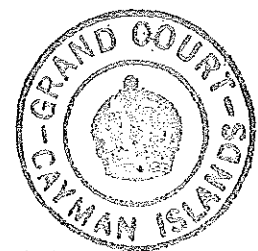
14  
15 As to the question of costs, as was observed by the court in Pan-American v Andrews, the  
16 bulk of the alleged inconvenience and additional expense would not arise unless and until a  
17 plea of *forum non conveniens* had been rejected by the US Court and the stage of preparing  
18 evidence had been reached. The fact that a *forum non conveniens* application in the United  
19 States involves a cost to the applicant cannot of itself entitle that applicant to seek a remedy  
20 elsewhere. Given the proximity of the filing date in the US (4 October), much of the cost of  
21 responding has in all likelihood been incurred already. There is of course also a significant  
22 cost involved in bringing the application in the Cayman Islands, in light of which the  
23 objection to asking the US court to deal with its own proceedings falls away.

24  
25 *The Appropriate Forum*

26  
27 *Choice of Law*

28  
29 Whilst it is accepted that the contracts in question are governed by Cayman Islands law, they  
30 are not subject to any exclusive jurisdiction clause and therefore the issues that arise are not  
31 bound to be litigated before the Cayman Islands courts.

32 Given the substantial similarity between the law of contract in the Cayman Islands and the  
33 United States, there is no reason to suggest that the US Court is likely to have any difficulty  
34 in determining these issues in accordance with Cayman Islands law. In circumstances where



1 the actions alleged to give rise to a breach of contract took place in the United States, it does  
2 not follow that the issue can only be determined by the Cayman Islands courts simply  
3 because the contracts are governed by Cayman Islands law.

4

5 Given the nature of the tort claims advanced in the US proceedings, the contract claims are a  
6 necessary adjunct to them if they are to make any sense. In relation to the tort claims it is far  
7 less obvious that Cayman Islands law applies. As set out in WMD's letter of 3 September,  
8 Connecticut's choice of law rules takes into account a number of factors, including the place  
9 where the injury occurred and the place where the conduct causing the injury occurred. To  
10 the extent that the parties involved in this case are Cayman Islands exempt companies, they  
11 must by definition conduct their business outside of the Islands, and to the best of Pursuit's  
12 knowledge the interaction between the Russell and Origami parties took place in the United  
13 States.

14

15 As such, the Connecticut Court may well (and in Pursuit's view, is likely to) determine that  
16 the tort claims fall to be determined according to US Law. It is notable that WMD in their  
17 letter of 3 September hold back from asserting that it is probable, or even more likely than  
18 not, that the tort claims will be determined under Cayman Islands law, instead putting it as a  
19 mere possibility. In their second letter of 17 September, it is said to be "highly unlikely" that  
20 the tort will be governed by Connecticut law. The more preferable route is for the US Court  
21 to make up its own mind about issues in the cases brought before it.

22

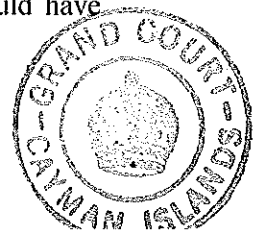
23 As a matter of common sense tort claims subject to US law, involving US parties and relating  
24 to events that took place in the United States, are unlikely to find their natural forum in the  
25 Cayman Islands. The Court should be extremely slow to grant an anti-suit injunction the  
26 effect of which would be to restrain a person resident in a foreign country from bringing an  
27 action against another resident of that country relating to events that occurred in that country.  
28 That, however, is precisely the nature of the order sought by Origami.

29

30 *Domicile of Parties and amenability to the jurisdiction*

31

32 Both Origami Capital and Russell Capital are entities incorporated in the United States and  
33 are not party to the Cayman proceedings. These entities cannot therefore be relied upon to  
34 submit to the jurisdiction of the Grand Court. It may be the case that Pursuit could have



1 applied to join them to the Cayman proceedings, but this is not the same as saying that the  
2 entities would have submitted to the jurisdiction, just as leave to join a foreign party is not the  
3 same as securing that party's participation in the litigation.

4

5 To say that "there is no evidence that Russell Capital or Origami are not amenable to this  
6 jurisdiction", approaches this issue from the wrong direction- the better view is that there is  
7 no evidence that they are amenable. This is particularly so given that it is within Origami's  
8 power to produce evidence showing that Origami Capital would submit, but they have chosen  
9 not to do so: Mr Young, a partner in Origami Capital, does not anywhere in his sixth affidavit  
10 confirm that the company will submit to the jurisdiction of the Grand Court. This omission is  
11 telling. There is clearly no basis for saying that Russell Capital would submit if joined to the  
12 Cayman Islands proceedings, particularly given that no Russell entity is presently involved in  
13 the Cayman litigation. A cautious view should prevail, and the Court should not be quick to  
14 infer that the foreign party will voluntarily submit to the jurisdiction.

15

16 In a claim which seeks a remedy in damages, it is an important consideration whether a  
17 judgment, once obtained, will be for practical purposes enforceable. Cayman Islands  
18 judgments are not enforceable in the US as of right, and accordingly there is a risk that, were  
19 the US entities sued in Cayman as opposed to the United States, any judgment that might be  
20 obtained against them would be of limited, if any, value.

21

22 Origami seek an order that would prevent Pursuit from litigating not only against Origami  
23 but anyone at all in relation to the issues raised in the US proceedings, irrespective of whether  
24 they are party to the Cayman proceedings or not. Quite apart from the issue whether Russell  
25 should be entitled to the benefit of an anti-suit injunction for which it has neither applied nor  
26 indicated any support, Origami should not be permitted to pre-empt the issue of forum in  
27 relation to disputes with unrelated third parties, simply on the basis of a purported (and  
28 fanciful) future risk to their own rights in the event that litigation against that third party  
29 proceeds.

30

31 *Administrative Convenience*

32

33 Whilst it is accepted that considerations of administrative convenience will rarely, if ever,  
34 provide a free standing basis upon which to justify the institution of proceedings in a



1 particular jurisdiction, it is nevertheless one factor that the Court ought to take into account.  
2 In this case, the likelihood is that all of the relevant witnesses and documents are located in  
3 the United States, which militates in favour of the matter being dealt with there as opposed to  
4 in the Cayman Islands.

5  
6 Given the advanced stage of the Cayman litigation, which has been on foot for over a year  
7 and in which trial is imminent, it would be undesirable to introduce fresh issues and parties at  
8 this point in time.

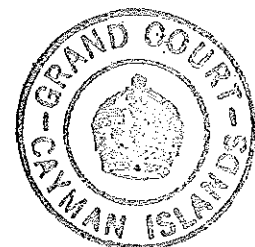
9  
10 *Inconsistent Judgments*

11  
12 The risk of inconsistent judgments, whilst a proper consideration, is substantially overstated.

13  
14 The trial of the Cayman proceedings is listed to take place on 22 and 23 October, and no  
15 application has been made for an adjournment. Accordingly, the Cayman judgment will be  
16 available long before any final determination is made in the US proceedings and will  
17 doubtless be made available to, and given due consideration by, the Connecticut judge.

18 In circumstances where, as is accepted above, the contractual issues fall to be determined as a  
19 matter of Cayman Islands law, Pursuit would anticipate that the judgment of the Grand Court  
20 would have substantial (if not conclusive) persuasive value in relation to any common ground  
21 with the contractual issues before the US Court. This in itself reduces the risk of the issue of  
22 conflicting judgments to a *de minimis* level.

23  
24 In any event, the issues before the two Courts are not the same. In the Cayman Islands the  
25 Defence challenges Origami's right to rely upon the Assignment of Shares on the basis of  
26 Article 16 of the Articles of Association, which prohibits a transfer of shares without the  
27 written approval of Pursuit's directors, whereas the US proceedings (*Complaint, paragraph*  
28 *94*) also allege that Russell acted in breach of contract because they were unable to transfer  
29 the shares as the terms of the Governing Documents (to which Origami are not party)  
30 precluded the transfer of their interest in the fund to a U.S. person. The US proceedings  
31 therefore involve issues well beyond the scope of the Cayman proceedings in respect of  
32 which no risk of conflict can possibly arise.



1 *Impugning the Cayman process*

2  
3 It is incorrect to say that a successful claim for punitive and/or compensatory damages in the  
4 US proceedings might "directly reverse" "defeat", "impugn" or "overturn" any award that  
5 might be made by the Grand Court. Any award made by the US Court cannot affect the  
6 validity of the Cayman judgment

7  
8 Although any sums found due to Pursuit in the Connecticut proceedings might stand to be set  
9 off against any found due to Origami in the Cayman proceedings, this does not have the  
10 effect of overturning either judgment. Instead, it would simply be a "set off", taking account  
11 of both judgments. Setting off of liabilities is an entirely routine process, and cannot properly  
12 be described as representing a "substantial injustice".

13

14 *Advantages to Pursuit*

15

16 In litigating the US proceedings before the Connecticut courts, Pursuit is able to accrue a  
17 number of juridical advantages that would not be available to it were the matter litigated in  
18 the Cayman Islands. These are:

19

20 -Causes of action that are not available in the Cayman Islands or are better developed in the  
21 United States;

22

23 -An advantageous discovery regime;

24

25 -The availability of punitive damages.

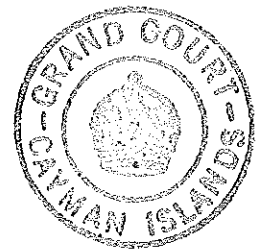
26

27

28 Causes of Action

29

30 The suggestion that Pursuit's claims for tortious interference with contractual and business  
31 relations could equally well be litigated in the Cayman Islands is misguided for a number of  
32 reasons. Firstly, it is far from clear that Cayman Islands law applies to these claims. The  
33 Chaplin v Boys approach, whereby torts committed overseas may be litigated elsewhere if  
34 some other state has a more significant relationship with the occurrence of the tort and the  
35 parties, does not afford *carte blanche* for the Cayman Islands to assume jurisdiction over torts  
36 committed elsewhere. There is plainly a distinction to be drawn between this case, where  
37 torts under US law are alleged to have been committed in the US by US resident entities, and  
38 the situation in Chaplin.



1 Second, Origami do not assert that the torts in the US and Cayman are identical, going only  
2 so far as to assert that the essential elements are "similar". The Court should be particularly  
3 slow to assume jurisdiction unless the torts available in the two jurisdictions are for practical  
4 purposes identical.

5  
6 Insofar as the torts in question do exist in Cayman law, they can only be regarded as in their  
7 comparative infancy (no Cayman case having been cited by the Plaintiff, or, as far as the  
8 Defendant can establish, ever reported). Compared to this is what appears to be a significant  
9 and established corpus of Connecticut law cited by WMD, to be supplemented by further  
10 decisions from the courts of other US states. Suing in a jurisdiction where a tort is well  
11 established and frequently litigated represents a significant juridical advantage.

12

13 *Discovery as a legitimate juridical advantage*

14

15 Origami's reliance upon O.24 r.16 as negating any juridical advantage conferred by the  
16 discovery regime in the United States is misplaced. In Phoenix Meridian Equity Limited v  
17 Lyxor Asset Management and others [2009] CILR N18, Foster J held that pre-trial discovery  
18 under the rule was "a concept foreign to the well-established rules governing discovery in the  
19 Cayman Islands" and cast doubt upon the extent to which it had any practical application,  
20 stating that its use would only be permitted in exceptional circumstances "if at all". In  
21 circumstances where such a restrictive approach has been adopted, extending to requesting  
22 the Rules Committee to reconsider the appropriateness of the procedure in the Cayman  
23 Islands, it cannot properly be said that O.24 r.16 provides a practicable way forward.

24

25 Nor is it appropriate to characterise the US discovery regime as authorising "fishing" simply  
26 on the basis that wider discovery is available than might be the case in the Cayman Islands.  
27 Indeed, in earlier proceedings in the Phoenix v Lyxor litigation [2009] CILR 342) Smellie CJ  
28 specifically identified that the courts of the United States were alive to such concerns and  
29 able to curtail applications for depositions that could be shown to be "fishing".

30

31 The US regime for discovery is particularly important in the context of these claims given  
32 that they relate to torts committed against Pursuit in the course of interaction between  
33 Origami and Russell, to which Pursuit was not privy. Accordingly, other than the assignment  
34 agreement itself, Pursuit holds none of the relevant documentation. In light of the agreement



1 evidenced by the Assignment agreement, the US proceedings are clearly not a fishing  
2 expedition, and the ability to depose witnesses from both Origami and Russell is likely to be  
3 of substantial assistance in advancing Pursuit's case.

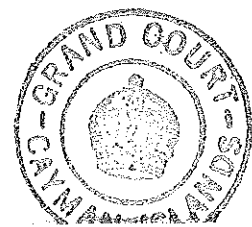
4  
5 Pursuit's repeated requests in the context of the Cayman proceedings for documents relating  
6 to the communications which took place between Russell and Origami prior to the execution  
7 of the assignment agreement (which are plainly material to the issues at stake in the US  
8 proceedings) have been refused on the basis that they are said to be irrelevant. From this it  
9 can be inferred that not only are the issues at stake in the US proceedings substantially  
10 different to those before the Grand Court, but also that the availability of pre-trial depositions  
11 and/or a wider scope of discovery than ordinarily permitted in Cayman is likely to represent a  
12 legitimate (and significant) juridical advantage to the Pursuit parties.

13  
14  
15 *Punitive damages*

16  
17 It is plain from the judgment of Purchas LJ in Metall und Rohstoff v ACLI (p527, paragraph  
18 59) that the availability of punitive damages in the United States is capable of being a  
19 relevant juridical advantage.

20  
21 In the circumstances of this case, it is insufficient to say that Cayman Islands public policy  
22 has circumscribed the availability of exemplary damages. This may well be relevant in  
23 relation to torts committed within the Cayman Islands, but cannot be used to shield entities  
24 from more extensive liabilities in relation to torts committed in jurisdictions such as the  
25 United States where public policy has taken a different direction.

26  
27 The allegations made in tort relate to the interaction between the Origami and Russell parties,  
28 an interaction that took place, to the best of Pursuit's knowledge, within the United States. It  
29 would be a substantial injustice to Pursuit if it were enjoined from pursuing proceedings in  
30 the United States in respect of events that occurred within the United States, and in doing so  
31 surrender its claim for exemplary damages. As a matter of common sense, the extent of  
32 Origami's (and Russell's) liability in tort ought to be determined under the law of the  
33 jurisdiction in which that tort was committed. The scope for the award exemplary damages  
34 under Rookes v Barnard is far more limited, and is illustrative of the extent to which Pursuit  
35 would be prejudiced.



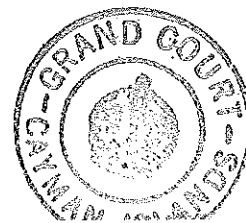
1 This situation can plainly be distinguished from that in, for example, Smithkline & French v  
2 Bloch, where the torts complained of took place in England, and the American action was  
3 brought opportunistically on no other basis than that the alleged tortfeasor had an American  
4 parent company. Here, there is a very much more obvious nexus with the US, both in terms  
5 of governing law and physical action- certain of the parties have a legal presence in the  
6 Cayman Islands by reason of the favourable environment for the establishment of funds, but  
7 as a matter of practicality carry out all of their business activities elsewhere.

8  
9 Impact upon Origami

10  
11 In the event that the US proceedings continue, no prejudice will result to Origami. The US  
12 proceedings are at an early stage, whereas the Cayman proceedings are virtually at their  
13 conclusion. Accordingly, the former is not in a position to interfere with the latter.

14  
15 By the same token, given that the US proceedings are in their earliest stages, little is required  
16 to be done in them prior to the Cayman trial. If Origami considers that the intervention of that  
17 trial will cause them any difficulty in terms of the preparation of the response due in early  
18 October (which, realistically, will be the only filing due prior to the hearing in Cayman) then  
19 the appropriate course would be to seek an extension in the US, not to seek anti-suit relief in  
20 Cayman.

21  
22 It is unclear why Origami say that there will be a duplication of administrative and legal  
23 effort. The two sets of proceedings deal with discrete claims and different parties, and  
24 therefore the overlap in the work required will be limited, if it exists at all. As the Cayman  
25 proceedings are virtually at an end, there is no question of Origami being required to litigate  
26 in the US in parallel. Therefore there is really no issue that arises as to the division and  
27 management of resources. Of course, the significant time and effort that appears to have been  
28 devoted to the application for an anti-suit injunction could, had Origami so elected, instead  
29 have been applied to the provision of a reply and/or a challenge to forum in the US  
30 proceedings. Any duplication of effort or additional workload in this regard is therefore a  
31 matter of choice rather than compulsion. In any event, the mere fact that claims exist in the  
32 US requiring the instruction of US attorneys, and that the costs rules in the US may be  
33 different, cannot of itself be a basis for Origami to say that it must be permitted to deal with  
34 proceedings only in Cayman where it chose to commence its proceedings.



1 The oft-repeated argument that Pursuit may use a conflicting US judgment to hinder  
2 enforcement of any judgment that Origami might obtain in Cayman is wholly dependent  
3 upon the contingencies that (a) a conflicting judgment is in fact issued and (b) Pursuit use that  
4 judgment to frustrate enforcement of the Cayman award. The risk of conflicting judgments is  
5 extremely small, and the Court should not indulge in the grant of injunctions in restraint of  
6 foreign proceedings in order to guard against mere theoretical possibilities. No evidence at all  
7 has been produced to show that Pursuit would act in such a way.

8

9 Conclusion

10

11 Prior to an injunction being granted, there must be a clear balance in favour of the party  
12 seeking the injunction to restrain foreign proceedings. Such a clear balance is not present and,  
13 were the Court to make the order sought, there is a very real risk of unjustified trespass upon  
14 the jurisdiction of the US court.

15

16 The US proceedings involve claims that are likely to be governed by US law, involve US  
17 entities and refer to events that occurred within the US. The proceedings are in their early  
18 stages, and the US Court is plainly equipped to deal with any issues that may arise as to  
19 proper forum and the risk of conflicting judgments. Questions of the merit or otherwise of  
20 those proceedings can only be answered by the US court.

21

22 The relief sought is extraordinary in its scope, and is premised on a combination of a  
23 misconception of the motives underlying the US proceedings and conjecture as to events that  
24 may or may not occur at some indeterminate point in the future. In circumstances where the  
25 trial of the Cayman action is barely a month away the capacity for any real prejudice to result  
26 is in any event virtually non-existent. Whilst there will in exceptional circumstances be cases  
27 that warrant the issue of an anti-suit injunction, this is not such a case and Origami's  
28 application should be refused.

29

30

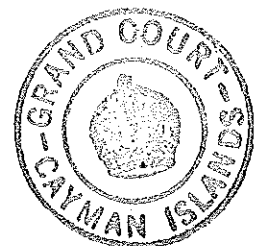
31 **ANALYSIS AND CONCLUSIONS**

32

33 **The relevant legal principles**

34

35 The relevant legal principles in my opinion include the following.



1 It is necessary to distinguish between anti-suit injunctions founded on jurisdiction or  
2 arbitration agreements and anti-suit injunctions where there is no jurisdiction or arbitration  
3 agreement.

4

5 *Injunctions founded on jurisdiction or arbitration agreements*

6

7 1. The Grand Court may restrain a party over whom it has personal jurisdiction from the  
8 institution or continuance of proceedings in a foreign court in breach of a contract to refer  
9 disputes to the Grand Court (or, it seems, another foreign court). (Dicey, Morris & Collins  
10 The Conflict of Laws 14th edn (“Dicey”) Rule 32 (4)). Where the basis for the exercise of the  
11 Court’s discretion is that the defendant has bound himself by contract not to bring the  
12 proceedings which he threatens to bring/ has brought in the foreign court, the principles  
13 which guide the exercise of the discretion of the Court are distinct from those which govern  
14 applications for anti-suit injunctions not founded on contractual agreements (see below). In  
15 particular there is no need to show that there is oppression or vexation, or that Cayman is the  
16 natural forum for the claim. (Dicey 12-137 and following).

17

18 2. The Grand Court also has jurisdiction in personam to restrain by injunction foreign  
19 proceedings brought in breach of an agreement to refer disputes to arbitration.(Dicey 12-144  
20 and 16-088 and following).

21

22 *Anti-suit injunctions where there is no jurisdiction or arbitration agreement*

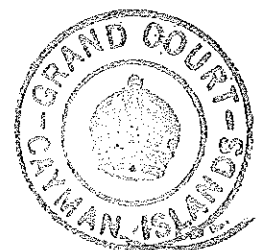
23

24 3. The Grand Court may restrain a party over whom it has personal jurisdiction from the  
25 institution or continuance of proceedings in a foreign court, or the enforcement of foreign  
26 judgments, where it is necessary in the interests of justice for it to do so. (Dicey Rule 31 (5)  
27 para 12R-001).

28

29 4. Although the injunction operates only in personam against the party to the foreign  
30 proceedings, the remedy cannot avoid being seen as an indirect interference with the process  
31 of the foreign court, and the jurisdiction must therefore be exercised with caution, particularly  
32 if the foreign claimant, respondent to the application, is suing in his own court. (Dicey para  
33 12-067 and the cases there cited).

34



1 5. As the jurisdiction is exercised in personam, the court must have personal jurisdiction  
2 over the respondent to the application. It must be possible to serve process upon the party  
3 against whom the order is sought.

4

5 6. The underlying principle is that the jurisdiction is exercised “where it is appropriate to  
6 avoid injustice”. (Castanho v Brown & Root (UK) Ltd [1981] AC 557,573).

7

8 7. An injunction may be granted if the Cayman Islands is the natural forum for the  
9 resolution of the dispute and the proceedings in the foreign court are vexatious or oppressive.  
10 English courts have refrained from giving a comprehensive or limiting definition of these  
11 expressions. They have deliberately refrained from marking the outer extent of their power to  
12 act to restrain conduct which may give rise to injustice or, if the need for caution is given its  
13 due weight, serious injustice. (See Dicey para 12-073 and the cases there cited). A similar  
14 approach is appropriate in the Cayman Islands.

15

16 8. The following conditions (as set out in the latest authorities) apply in the second  
17 category of case (where there is no jurisdiction or arbitration agreement).

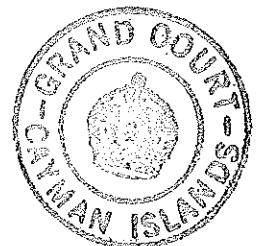
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19 First, the threatened conduct must be “unconscionable”. What is unconscionable cannot be  
20 defined exhaustively, but it includes conduct which is oppressive or vexatious or which  
21 interferes with the due process of the Court. The underlying principle is one of justice in  
22 support of the ends of justice. It is analogous to abuse of process. It is related to matters  
23 which should affect a person’s conscience.

24

25 Second, although the natural forum for the litigation must be in the Cayman Islands this,  
26 while necessary, is not a sufficient condition. To reflect the interests of comity and in  
27 recognition of the possibility that an injunction, although directed against the respondent  
28 personally, may be regarded as an (albeit indirect) interference in the foreign proceedings, an  
29 injunction must be necessary to protect the applicant’s legitimate interest in Cayman  
30 proceedings. The applicant must be a party to litigation in Cayman at which the  
31 unconscionable conduct of the party to be restrained is directed. There must be a clear need to  
32 protect existing Cayman proceedings.

33



1 While the above conditions must be met, at a further stage, that of the exercise of discretion,  
2 the court will always exercise caution before granting such an injunction.

3

4 Moreover the respondent will always be entitled to show why it would nevertheless be unjust  
5 for the injunction to be granted.

6 (Rix LJ in *Star Reefers Pool Inc v JFC Group Co Ltd* [2012] 1 CLC 294 at para 26 where he  
7 set out his summary of the relevant authorities in the earlier case of *Glencore International*  
8 *AG v Exter Shipping Ltd* [2002] CLC 1090 at paras 42-43).

9

10 The principle of comity (where the injunction sought is not founded on a contractual  
11 agreement) requires the Court to recognise that, in deciding questions of weight to be  
12 attached to various factors, different judges operating under different legal systems with  
13 different legal policies may legitimately arrive at different answers, without occasioning a  
14 breach of customary international law or manifest injustice, and that in such circumstances it  
15 is not for the Grand Court to arrogate to itself the decision as to how a foreign court should  
16 determine the matter. The stronger the connection of the foreign court with the parties and the  
17 subject matter of the dispute, the stronger the argument against intervention.

18

19 The prosecution of parallel proceedings in different jurisdictions is undesirable, but not  
20 necessarily vexatious or oppressive.

21

22 (Toulson LJ in *Deutsche Bank AG v Highland Crusader Offshore Partners LP* [2010] 1 WLR  
23 1023 at [50].)

24

25 See further *Phoenix Meridian Equity Ltd v Lyxor Asset Management SA and another* [2009  
26 CILR 342] Smellie CJ.

27

28 *Post-judgment anti-suit injunctions*

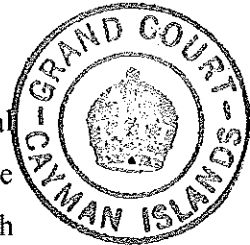
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30 9. As to the grant of a post-judgment anti-suit injunction to restrain the judgment debtor  
31 from taking steps overseas to undermine a Cayman Islands judgment or its enforcement see  
32 *Masri v Consolidated Contractors International Co SAL (No.3)* [2009] QB 503.

33

34

35



1 **The relevant legal principles applied to the circumstances of the present case**

2  
3

4 This is an application for an anti-suit injunction where there is no jurisdiction or arbitration  
5 agreement. The relevant legal principles are those set out above in the second category of  
6 case, where there is no jurisdiction or arbitration agreement. It is elementary that it is far  
7 more difficult to obtain an anti-suit injunction where there is no contractual right not to be  
8 sued.

9 It is important to note that the trial of the Cayman proceedings is due to take place in less  
10 than a month's time – on 22-23 October.

11

12 Although Mr Timms QC has advanced powerful arguments in support of the contention that  
13 the two conditions in 8 above have been met, I will be in a far better position to express an  
14 opinion as to these having conducted the trial.

15

16 The Connecticut proceedings are at a very early stage. While the conditions set out at 8 above  
17 must be met, at a further stage, that of the exercise of discretion, the Court will always  
18 exercise caution before granting such an injunction. Considerations of comity would cause  
19 me to pause, even if I were to conclude that the two conditions in 8 above have been met.

20

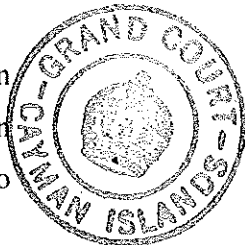
21 Is an injunction necessary shortly prior to trial in the circumstances of the present case? Is an  
22 injunction necessary to protect the Cayman proceedings, so close to the trial? Is an injunction  
23 necessary to protect Origami's legitimate interest in the Cayman proceedings, so close to  
24 trial?

25

26 It is in my opinion (as the assigned judge in the Grand Court) most regrettable that despite  
27 two adjournments to enable Mr Dunne to take instructions, Pursuit has refused to take the  
28 necessary steps to agree/procure the grant of a further extension of time so that Origami (and  
29 the other defendants) do not have to respond to the Complaint in the US proceedings by 4  
30 October. If a short and appropriate extension were granted the US proceedings (which are at a  
31 very early stage) would not advance further until after the judgment in these Cayman  
32 proceedings is available.

33

34 In the agreed Case Memorandum dated 4<sup>th</sup> July 2012, Pursuit expressly confirm that: *"The*  
35 *Constitutional Documents, Deed of Settlement and Deed of Assignment are all governed by*



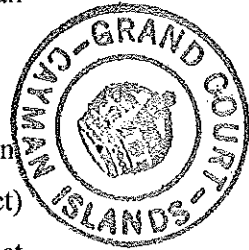
1 *the laws of the Cayman Islands. Accordingly the laws of the Cayman Islands (including*  
2 *common law principles relevant to the issue) will determine whether the Russell Funds'*  
3 *shares were fully redeemed and the validity of the assignment."[Emphasis added].*

4  
5 I respectfully ask that this Judgment should be shown to the Court in Connecticut so that the  
6 judge there knows that the assigned judge in Cayman considers that a short postponement of  
7 the US proceedings would be most helpful. I refer to the correspondence between the  
8 attorneys and the exchanges in the Grand Court. I repeat that it is most regrettable that the  
9 respondent has refused to take the necessary steps to agree/procure the grant of, a further  
10 extension of time so that Origami (and the other defendants) do not have to respond to the  
11 Complaint in the US proceedings by 4 October, and until after the judgment in these Cayman  
12 is available.

13  
14 But (reflecting the interests of comity and in recognition of the possibility that an injunction  
15 although directed against the respondent personally, may be regarded as an (albeit indirect)  
16 interference in the foreign proceedings), is an injunction necessary at this stage to protect  
17 Origami's legitimate interest in Cayman proceedings? In my opinion as matters stand an  
18 injunction is not necessary in the next few weeks (so close to the trial) to protect these  
19 Cayman proceedings. A distinction should be drawn between what is necessary to protect  
20 Origami's legitimate interest in these Cayman proceedings in the next few weeks, and what is  
21 necessary to protect Origami from having to spend legal fees in the United States. It is the  
22 former which has to be considered having regard to the principles stated above.

23  
24 I read Pursuit's submissions set out above as a clear indication (if not an assurance) that no  
25 steps will be taken in Connecticut prior to judgment in the Cayman proceedings, with a view  
26 to preventing Origami from obtaining a considered judgment in Cayman . If my  
27 understanding proves to be wrong (and I think this is most unlikely) Origami should restore  
28 its application forthwith.

29  
30 Pursuit may lose on one or both of the main issues in these proceedings (the validity of the  
31 assignment and the construction of the Settlement). Pursuit may win on both issues. I have  
32 not heard argument on these issues. I have not considered these issues. I remain entirely open  
33 minded about them. After the forthcoming trial I will be in a far better position to form an  
34 opinion on some of the detailed arguments of the parties set out above.



1 It is to be noted that in *Star Reefers* under the heading 'Comity' Rix LJ said at para [40] when  
2 allowing the appeal and refusing an injunction-

3  
4 "...the English proceedings were very likely to have been completed before the Russian  
5 proceedings in any event. It was not necessary to protect the English proceedings that an anti-  
6 suit injunction be given against the foreign proceedings."

7 The circumstances of *Star Reefers* were of course not the same as those in the present case,  
8 but it is clear that the stage reached in the two sets of competing proceedings is a factor that is  
9 relevant to discretion.

10  
11 I wish to add the following drawn from my own experience. In applications for anti-suit  
12 injunctions in the second category (where there is no jurisdiction or arbitration agreement) it  
13 is important for courts to tread warily because a precipitous order may prove to be counter-  
14 productive and do more harm than good.

15  
16 Mr Timms QC makes a number of powerful arguments in support of the contention that the  
17 two conditions in 8 above have been met, but in the exercise of my discretion I refuse the  
18 relief sought at this stage, so close to trial, for the reasons I have given. I will adjourn the  
19 summons to the trial of this action with liberty to apply in the meantime.

20  
21 I propose to reserve all questions of costs until after the conclusion of the trial.

22  
23  
24 Dated this 27<sup>th</sup> day of September 2012

25  
26  
27   
28 \_\_\_\_\_  
29 The Honourable Justice Cresswell  
30 Judge of the Grand Court

