IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

Neutral Citation Number: [2025] CIGC (FSD) 23

CAUSE NO FSD 162 OF 2019 (RPJ)

BETWEEN:-

RAIFFEISEN BANK INTERNATIONAL AG
(a company incorporated in Austria)

Plaintiff

-and-

(1) SCULLY ROYALTY LTD
(a company incorporated in the Cayman Islands)

(2) LTC PHARMA (INT) LTD
(a company incorporated in the Marshall Islands, and dissolved on 16 August 2022)

(3) MERKANTI HOLDING PLC
(formerly MFC Holding Ltd, a company incorporated in Malta)

(4) 1178936 BC LTD
(a company incorporated in British Columbia, Canada)

(5) GARDAWORLD CN LTD
(formerly MFC 2017 II LTD, a company incorporated in the Marshall Islands)

(6) 1128349 BC LTD
(a company incorporated in British Columbia, Canada)

(7) IEM SERVICES CO LTD.
(a company incorporated in the Marshall Islands)

(8) LTCM ASSETS PRIVATE LIMITED
(a company incorporated in Liberia)

(9) MICHAEL JOHN SMITH

Defendants

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Before:	The Hon. Justice Raj Parker
Appearances:	Mr Tim Penny KC, instructed by Mr Christopher Levers and Ms Victoria King of Ogier on behalf of the Plaintiff Mr Rupert Wheeler and Mr Kai McGriele of KSG on behalf of the First, Third, Fourth, Fifth, Sixth and Seventh Defendants (on a watching brief) Mr Alex Potts KC, instructed by Mr Jonathon Milne and Ms Tonicia Williams of Conyers, Dill & Pearman LLP on behalf of the Ninth Defendant
Heard:	10 and 11 February 2025
Draft Judgment circulated:	12 March 2025
Judgment delivered:	20 March 2025

GCR Rules (2023 Revision) Orders 15 r 4 (1), 20 r 5 (1), 11 r 1 (1)c,11 r (1) ff,11 r 4 (2), application to set aside ex parte order, tort claim unlawful means conspiracy, jurisdiction and joinder, approach to evidence, previous decisions, Hong Kong law, expert evidence ,task of court, serious issue to be tried, good arguable case, gateways on jurisdiction, forum conveniens, delay, discretion.

JUDGMENT

Introduction

1. On 27 June 2023 the Court granted permission *ex parte* to the Plaintiff to join Mr Michael Smith to these proceedings as a Ninth Defendant ('D9'), pursuant to GCR Order 15, rule 4(1).

2. The Court also granted permission to the Plaintiff to re-re-amend its Writ and to re-amend its Statement of Claim in these proceedings, so as to introduce claims against D9, pursuant to GCR Order 20, rule 5(1) and the Court granted permission to the Plaintiff to re-issue and serve the Re-Re-Amended Writ and Re-Amended Statement of Claim on D9, outside the jurisdiction in Hong Kong.

3. D9 applies under GCR Order 12, rule 8 and /or GCR Order 32, rule 6 for:

a) an order setting aside the Re-Re-Amended Writ, and/or service of the Re-Re-Amended Writ on him;

b) a declaration that, in the circumstances of the case, the Court has no jurisdiction over him in respect of the subject matter of the claim or the relief or remedy sought in the action; and

c) an order setting aside or discharging the *ex parte* Order of the Court dated 27 June 2023.

The application in outline

4. D9's application is supported by the evidence contained in:

a) the First Affidavit of Michael Smith ('Smith 1'), dated 27 September 2023;

b) the Fourth Affidavit of Michael Smith, dated 13 September 2024 (mistakenly labelled the Third Affidavit) (Smith 4) and the Fifth Affidavit of Michael Smith dated 21 November 2019 and sworn on behalf of the First Defendant ('Smith 5'); and

c) the Expert Report of Mr Brian Fan addressing issues of Hong Kong law, dated 9 September 2024 (Fan).

5. The Court has reviewed this material in detail, as well as the helpful written arguments. It has also reviewed the written submissions and evidence provided for the *ex parte* hearing.

6. Mr Potts KC appeared for D9. Mr Penny KC appeared for the Plaintiff. The other Defendants (D1 and D3-7)[1] were represented by KSG who attended on a watching brief.

7. The basis of D9's application is that the Plaintiff's claims against D9:

a) do not disclose a serious issue to be tried; and

[1] *D2 and D8 have not participated to date.*

b) do not satisfy either of the jurisdictional gateways relied upon under GCR Order 11, rule 1(1)(c) and/or rule 1(1)(ff).

8. D9 also says that the Cayman Islands is not the most appropriate or convenient forum for the trial of the Plaintiff's claims against him, and the Plaintiff's application to join him and to serve him out of the jurisdiction should have been (and should be) refused in all the circumstances of the case, since it was not just, convenient nor consistent with his rights and privileges for him to be joined as a party at this late stage of the proceedings.

9. Mr Penny KC for the Plaintiff resisted the application on all fronts.

D9's case

10. Mr Potts KC submitted that the Plaintiff:

a) had not established that there was a serious issue to be tried in relation to its claims against D9 or as against the other, existing Defendants;[2]

b) had not established a good arguable case that its claims against D9 satisfied either of the jurisdictional gateways under the Grand Court Rules;

c) has not established that the Cayman Islands is clearly the most appropriate or convenient forum for a trial of the Plaintiff's claims against D9; he pointed to the absence of connecting factors to Cayman and the applicable law (which he argued to be Hong Kong law) in relation to the claim against D9; and

d) had not established that the case was a proper one for service out of the jurisdiction, such that the Court should exercise its discretion in its favour.

Serious issue to be tried

11. Mr Potts KC further submitted that:

[2] *The Court was referred to § 54 of Smith 1 and §§ 127-200 of Smith 5.*

a) D9 does not accept that Cayman Islands law properly governs the claims made by the Plaintiff against him[3];

b) it is clear that the alleged tort of 'unlawful means conspiracy' did not take place in the Cayman Islands (whether in substance or at all);

c) it is notable that the Plaintiff has not itself sought to invoke the 'tort gateway' under GCR Order 11, rule 1(1)(f) in support of its application for leave to serve out;

d) the proper governing law (on the ordinary application of conflicts of law rules) is, or is most likely to be, the law of Hong Kong; and

e) there are material differences between the law of Hong Kong and the law of the Cayman Islands. D9 relied on the opinion evidence of Mr Brian Fan.

12. Mr Potts KC made the following further submissions:

a) As a matter of Hong Kong law, it is recognized that a Defendant such as D9 would not be liable for the tort of 'unlawful means conspiracy' if he believed that he had a lawful right to do what he was doing [4];

b) The Plaintiff's Re-Amended Statement of Claim does not provide any, or any sufficient, particulars of any allegations that D9 did not believe that he did not have a lawful right to do what he was doing;

c) D9's (inherently credible) evidence is to the effect that he believed that he, and the relevant companies acting by their respective Boards of Directors, had a lawful right to perform the relevant transactions[5]; and

d) it is generally preferable that a claim should be tried in the country whose law applies to the claim especially in a case where issues of law are important, and there is evidence that there are relevant differences in the applicable legal principles, as there are in this case.

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[3] *paragraph 23.3 of Smith 1.*
[4] *Fan §24.*
[5] *see Smith 1 at paragraph 22, 23, 24, and 54; and Smith 5 at paragraphs 127 to 200.*

13. As to Hong Kong connections, Mr Potts KC submitted that:

a) D9's uncontradicted evidence is that he mainly resides (and spends the majority of his time) in Hong Kong, and he was based in Hong Kong at the time of the alleged events in question[6];

b) There is no suggestion that any of the alleged acts committed by D9 in either (a) entering into the alleged 'unlawful means' conspiracy; or (b) executing the alleged 'unlawful means' conspiracy physically took place in the Cayman Islands; and

c) Hong Kong is an available and appropriate jurisdiction, both for the claims against D9 (if taken in isolation) and for the claims against the other Defendants (if assessed in conjunction with the claims against D9).

The jurisdictional gateways

GCR Order 11, rule 1(1)(c) ('the necessary or proper party' gateway)

14. Mr Potts KC submitted that:

a) D9 is not a 'necessary or proper party' to the Plaintiff's claims against the other Defendants;

b) the Plaintiff itself made a deliberate tactical decision not to include D9 as a Defendant to these proceedings in the period between 2019 to 2021 (in circumstances where the Plaintiff itself must have considered that D9's joinder was neither 'necessary' nor 'proper');

c) D9 is not a *necessary* party to the Plaintiff's claims against the other Defendants and D9 is not a *proper* party to the Plaintiff's claims against the other Defendants for the same reasons he advanced relating to the issue of joinder (see below); and

[6] *§§23.3.3, 23.3.4, 28, and 54.11.1 of Smith 1, and paragraphs 6 to 19 of Smith 4.*

d) the Plaintiff has not sought to join other alleged conspirators (e.g. Mr. Samuel Morrow). That fact he said provides further support for the proposition that the joinder of D9 is neither 'necessary' nor 'proper'.

GCR Order 11, rule 1(1)(ff) (the Cayman Islands company director gateway)

15. Mr Potts KC submitted that:

a) the Plaintiff's claims against D9 (in the alleged tort of unlawful means conspiracy) are not governed by the laws of the Cayman Islands and/or the subject matter of the Plaintiff's claims against D9 does not relate in any material way to D9's directorship of D1 or to the status, rights or duties of D9 in relation to D1 (and the Plaintiff does not bring claims as either a shareholder or member of D1, nor does it bring credible claims for alleged breaches by D9 of his duties as a director of D1);

b) the Plaintiff's case against D9 is not a direct claim for breach of his alleged fiduciary duties to D1 as a director of D1 (and the Plaintiff would have no standing to bring any such a claim), the vast majority of the pleaded claim against D9 for 'unlawful means conspiracy' relates to alleged 'unlawful means' that have nothing to do with D9's role as a director of D1 (or the performance of his fiduciary duties as such), and so it would be quite inappropriate to permit service out of the jurisdiction under this gateway, in those circumstances; and

c) in any case it is fanciful for the Plaintiff to allege that D1's and/or D5's alleged receipt of any assets constituted an actionable breach of duty by D9 to D1 and/or D5's, that might then be alleged by the Plaintiff to constitute the alleged 'unlawful means' required for an 'unlawful means' conspiracy.

Multiplicity

16. As to multiplicity of proceedings, he pointed out that:

a) the disputes in this case have already given rise to a multiplicity of legal proceedings involving various parties in different jurisdictions (both in Court and in arbitration, and some of which have been commenced by the Plaintiff itself), with risks of inconsistent outcomes; and

b) since any future judgment of the Cayman Islands Court will probably also need to be the subject of separate recognition or enforcement proceedings in other jurisdictions, further multiplicity of legal proceedings is likely to be inevitable in any event.

Forum conveniens

Connecting factors

17. Mr Potts KC submitted that the Plaintiff had not established that the Cayman Islands was clearly the most appropriate forum:

a) the evidence clearly points away from the Cayman Islands, and to Hong Kong being the most appropriate forum (notwithstanding the various connections with other jurisdictions and other systems of law, including the Marshall Islands, Austria, Liberia, Malta, and/or British Columbia in Canada)[7];

b) save for D1, which although an exempt company incorporated in Cayman, conducts its business overseas, none of the other parties, or potential witnesses, are based in the Cayman Islands [8]; and

c) there is no suggestion that any of the discoverable documents in the case are held or maintained in the Cayman Islands or that any of the assets that are said to be the subject of the Plaintiff's Fraudulent Dispositions Act (1996 Revision) ('FDA') claim, or the subject of the Plaintiff's claim for injunctive relief, are physically located in the Cayman Islands.[9]

18. Mr Potts KC submitted that in all the circumstances the Court could not be satisfied that this was a proper case for service out of the jurisdiction[10].

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[7] See also 54.10 and 54.11 of Smith 1.
[8] The Court notes that D5 was originally incorporated as an exempt company in the Cayman Islands and was re domiciled in the Marshall Islands in 2020. It was a Cayman company at the time of the alleged transfers and when it was joined to these proceedings.
[9] the Plaintiff's case is that the "underlying assets" are not in the Cayman Islands, but located in Canada, Malta, the Marshall Islands, Slovakia and Uganda: see paragraph 133.e. of the Thirteenth Affidavit of Dietmar Dellemann dated 13 July 2021 (Dellemann 13).
[10] GCR Order 11, rule 4(2).
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Discretion

Effect on D9

19. Mr Potts KC argued that it would be an intolerable, and profoundly unfair, burden to impose on an individual such as D9 to expect him to attend as a party, and to give evidence in person, at a substantial trial in the Cayman Islands (which is as far away from his home and his office in Hong Kong as one can get, in terms of distance, travel time, and time zone difference)[11], recognizing that a trial could take many months. The Court noted that D9 is 77 years old, his date of birth being 2 April 1948.

Joinder

20. Mr Potts KC submitted that GCR Order 15, rule 4(1) applies if joinder is sought at the commencement of proceedings and was therefore the wrong basis for the order made. He submitted that it was GCR Order 15, rule 6(2)(b) which applies if joinder is sought after the commencement of proceedings, by way of amendment and addition.

21. He submitted that the interpretation and application of these rules is subject, in turn, to :

a) the Overriding Objective which provides that:

i. the Court should deal with every cause or matter in a just, expeditious and economical way, including ensuring that the normal advancement of proceedings is facilitated rather than delayed, saving expense, dealing with the cause proportionately, and allotting an appropriate share of the Court's resources, having regard to the need to allot resources to other proceedings;

ii. the Court should control the progress of proceedings, consider whether the likely benefits of taking a particular step will justify the cost of taking it, and deal with as many aspects of the proceedings as are practicable on the same occasion;

[11] *See also Smith 4 at paragraphs 17 to 19.*

b) any applicable limitation periods that may have expired by the time of the joinder application;

c) any relevant discretionary considerations (over and above the Overriding Objective), including delay (and any explanation for delay), and the relative balance of prejudice to the parties; and

d) in the case of a foreign proposed party (such as D9 in this case), satisfaction by the Plaintiff of all relevant tests for an application for permission to effect service outside of the jurisdiction.

Discretion on joinder

22. Mr Potts KC submitted that:

a) the discretionary question of whether or not to permit joinder needs to be considered separately and in addition to the question of whether or not to permit service out of the jurisdiction;

b) the Plaintiff clearly made a deliberate and tactical decision, at the commencement of this litigation in 2019 (and also in the period between 2019 and 2021), not to join D9 as a Defendant (nor to apply to do so), despite full knowledge and awareness on the Plaintiff's part of D9's involvement in the transactions of which complaint was made both in 2018 and in 2019[12];

c) the Plaintiff's subsequent delay in seeking to join D9, and/or the Plaintiff's conduct in seeking to make a different tactical decision by joining D9 belatedly, whether in 2021, 2023, or as at 2025, has not been satisfactorily explained in the Plaintiff's evidence[13] or even in submissions[14], and it clearly represents an abuse of the Court's process and/or a breach of the Overriding Objective. He dismissed the explanation offered by the Plaintiff as neither credible nor sufficient;

[12] *Smith 1 §§33-35 and 54.*
[13] *See paragraph 145(g) of Dellemann 13, and paragraphs 46 to 52, and 54, of Smith 1.*
[14] *See paragraphs 201 to 202 of the Plaintiff's ex parte Skeleton Argument dated 20 June 2023.*

d) if it was not considered necessary, desirable, or appropriate for D9 to be joined as a party either at the outset of the proceedings, or when the Fifth to Eighth Defendants were attempted to be joined, it cannot sensibly now be suggested by the Plaintiff (or accepted by the Court) that it has subsequently became necessary, or desirable, or appropriate for D9 to be joined as a party at a later date. He submitted that the Plaintiff was estopped by its conduct from seeking to join D9 belatedly; and

e) the Plaintiff's claims, or remedies, against the existing Defendants are not materially improved (legally, commercially, or practically) by joining D9 in his personal capacity[15]. On the contrary, the Plaintiff is already the beneficiary of a freezing injunction freezing assets up to the value of the full amount of its claims, and there can be no realistic suggestion that the First Defendant (whether on its own or in combination with the other corporate Defendants) would not be good for any damages that might be ordered in the Plaintiff's favour. In the circumstances, the joinder of D9 can only give rise to unnecessary complications, costs, and delays.

23. As to prejudice, Mr Potts KC submitted that:

a) the Plaintiff cannot credibly suggest that it will suffer any material prejudice if D9 is not joined to these proceedings (especially in circumstances where that state of affairs follows from an informed decision made knowingly by the Plaintiff itself over a sustained period of time);

b) the affidavit evidence of D9 says that he has been, and will be, materially prejudiced by the manner in which the Plaintiff has belatedly attempted to join him as a party to these proceedings (which is a prejudice that cannot be satisfactorily compensated by a costs order in his favour)[16];

c) the affidavit evidence of D9 says that he has been materially prejudiced in his ability to take independent legal advice and secure independent legal representation at the earliest opportunity, and before giving evidence on behalf of any other Defendants in circumstances where he was not properly alerted by the Plaintiff of the Plaintiff's

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[15] The Court was referred by Mr Potts KC to what he described as the Plaintiff's primary pleaded claims made under the Fraudulent Dispositions Act against the other Defendants (and which are not made against D9), and the alleged 'unlawful means conspiracy' claim pleaded only in the 'further and in the alternative' (for which the primary pleaded remedy is an injunction against the other Defendants, not D9). See also the points made in Smith 1, at paragraphs 54.5 to 54.7.
[16] See Smith 1 at paragraphs 42 to 54.

intention to sue him personally. Indeed, D9 says that the Plaintiff positively gave the Court, and D9, the clear impression that the Plaintiff was not intending to sue D9 personally[17]; and

d) the other Defendants (and, indeed, other Court users) have been materially prejudiced by the Plaintiff's change of position, and by the Plaintiff's delay. He argued that the Plaintiff had slowly progressed its claim rather than, as it was obliged to, expeditiously prosecute it, given the freezing injunction that it had obtained some years ago.

24. Mr Potts KC added that the other Defendants' jurisdictional challenges proceeded, and were determined by the Court, on a 'false' or materially incomplete basis, in the sense that the Court did not know (and was not informed by the Plaintiff) at the time that the Court heard and determined those applications, that the Plaintiff intended also to bring claims against D9 personally (an individual resident in Hong Kong). That of itself, he submitted, would have made a material difference to the Court's assessment of issues of jurisdiction, and issues of *forum conveniens* (or *forum non conveniens*), since the Court is required to consider the case as a whole against all Defendants.

Decision

25. The Plaintiff's claim is brought pursuant to the FDA and/or in the tort of unlawful means conspiracy. The FDA claim is not advanced against D9, who only faces a claim in tort.

Serious issue to be tried

26. The Plaintiff needs to establish a serious issue to be tried on the merits, that being the same as the summary judgment test of "*a real as opposed to a fanciful chance of success*."[18]

The evidential basis for the claim and approach

27. Mr Potts KC said that his client was bringing this application 'under protest' and without prejudice to his legal rights. The Court has approached this application (as with every application) without predetermination, with an open mind and has publicly recorded that in

[17] *See Smith 1 at paragraphs 35 to 46.*

[18] *Merkanti Holding v. Raiffeisen Bank [2022 1 CILR 497] at §§4-6.*

view of the recusal proceedings brought by D9 (which incidentally took from September 2023 to July 2024 to resolve).

28. The Court has taken account of D9's evidence that he denies[19] the factual basis of the Plaintiff's claims and that he says the Plaintiff is wrong to assert them[20]. It also notes that this is the first time D9 has been represented in the jurisdiction for a substantive challenge to joinder and jurisdiction.

29. Contrary to the course urged upon the Court by Mr Potts KC, the Court is not prepared to ignore the previous decisions in these proceedings, or indeed the VIAC award[21] to the extent that they have a bearing on the matters in issue at this interlocutory stage.

30. The Court has had regard to these materials, and has set them in their proper context, purely in order to assess the 'serious issue to be tried' threshold test on this application. It does so with due regard to the fact that those decisions were made when there was no application to join D9 as a defendant, and that he did not participate in them, save from time to time by way of providing affidavit evidence on behalf of another Defendant (which he says was provided other than "voluntarily", under time pressure, and without having had the benefit of legal advice as to his personal position and potential liability).

31. The Plaintiff's claims against Mr Smith are in the tort of unlawful means conspiracy, as pleaded in the Re-Amended Statement of Claim. The Plaintiff has set out its case in many other written materials as well, for example in a chronology of the transfers and Mr Smith's role in each at Appendix 2 annexed to its written submissions for this hearing and in Dellemann 13[22] by reference to the chronological exhibit in DXD-19.

32. It also provided a very detailed written argument for the *ex parte* hearing which set out the events it relied on relating to the restructure, the re-domicile of D2, the relevant transfers of assets and the conduct of the Defendants and Mr. Smith at §§ 34-124. It is not necessary to repeat these matters here.

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[19] Smith 1 §22"…..I, personally, have never intended to direct or cause any of the Defendants to defraud any creditors by making dispositions at an undervalue for the purpose of defrauding any creditors; and nor have I ever conspired with anybody else, or engaged in concerted action with anybody else, with a view to injuring or damaging the Plaintiff (whether by unlawful means or otherwise)".
[20] Smith 1 §§22 and 54.1 ,Smith 4 §§12 and 14.
[21] Following an arbitration against D2 in Vienna.
[22] See Exhibit DD13 pp 68-110.
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33. There are also four interlocutory judgments in these proceedings. Two from this Court and two from the Court of Appeal which deal with, among other things, the Plaintiff's case in unlawful means conspiracy and Mr Smith's involvement in it. The Court acknowledges that these decisions were made on the available evidence without D9 being a party to the proceedings in his individual capacity as a Defendant.[23]

34. These decisions taken as a whole indicate that on the evidence available the relevant Courts found that there was a good arguable case that D1 and D5, two Cayman companies, together with D2 (formerly a Canadian then a Marshall Islands company and since dissolved), dishonestly conspired to bring about the transactions in issue.

35. These decisions also indicate that the Plaintiff had established its claim in conspiracy against D1 to D8 to at least the serious issue to be tried threshold.

36. On the appellants' (D1 and D5) case in the 2021 CICA that there was no fraudulent intent (i.e. no extrinsic evidence of dishonesty on the part of the appellants and that there was a wealth of evidence which was consistent only with honesty on the part of the appellants), Justice of Appeal Birt said at §104*:*

> *"Having considered the submissions by Mr Penny and Mr Wardell respectively, I am left in no doubt that RBI has a good arguable case that, when undertaking the transactions, the Appellants (D1 and D5) and D2 had the necessary intention to defeat the obligations of D2 under the Guarantee. It has to be emphasised this is not a finding of fact on the balance of probabilities. That will be a matter for the trial in due course"*[24]

37. In the 2022 CICA, Judgment Sir Alan Moses found:

> *"The Judge's conclusion that there was a serious issue to be tried was challenged on two bases. First that the mere fact that D6 was a special purpose vehicle does not justify any conclusion that it was involved in the conspiracy. It was*

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[23] *"**2020 Judgment**" as to amendments against D1-D8 (serious issue to be tried), D4's jurisdiction challenge (serious issue to be tried), joinder and service out against D5-D8 (serious issue to be tried) and freezing orders against D1 and D5 (good arguable case), following a 3-day hearing. "**2021 CICA Judgment**" as to the freezing orders against D1 and D5 (good arguable case), following a 2-day hearing. "**2021 Judgment**" as to D3 and D6's jurisdiction challenges, following a 2-day hearing. "**2022 CICA Judgment**" as to D3 and D6 's challenge to the jurisdiction following a one day hearing.*

[24] *see also findings at §§ 106,107,114,115,130,146,151.*

irrelevant. I disagree: the controlling minds behind the alleged conspiracy plainly considered that it had a part to play. That affords a sufficient basis for concluding that there was a serious issue of conspiracy to be tried." (§23);

"Once there is some evidence of participation in the transactions by which the conspiracy was fulfilled, then the knowledge of the controlling minds of the participants will be attributed to the participant companies" (§ 28);

"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 the Scully Mine were transferred, it follows that there is a serious issue to be tried as to D6's participation in the alleged conspiracy. It is not disputed that there is an arguable case that Mr Morrow and Mr. Smith were the controlling minds of all the members of the group, including D6. Their knowledge and intention are accordingly to be attributed to D6 in relation to its alleged participation in the conspiracy. There is, at the very least, a serious issue to be tried as to the question of participation and attribution and it is not arguable to the contrary" (§ 30)

"… To echo what was said in relation to dissipation of assets [Sir Michael Birt at §165 v and vi CICA 1] the transactions which are impugned amounted to a considerable, expensive and time consuming process whereby D2 was rendered incapable of meeting its obligations while all the assets of which it was stripped were retained within the MFC group. There is a serious issue to be tried as to whether all the participants in that process conspired to achieve that end" (§ 59); and

"I do not disagree that all the intra group transactions have become clouded in suspicion and cloaked in mistrust. Nor do I dispute that the accusations are from time to time vague and confused but to my mind that taint, those suspicions, and what may be described as accusations of guilt by association arise from a justifiable foundation. In light of the behaviour of the two controlling minds of the group, namely Mr. Smith and Mr Morrow, it is not surprising that the assertion of innocence in relation to inter-group transactions, after the initial stripping of the assets from D2 and after D2 was spirited out of the group, is not accepted…"(§ 63)

38. The Court is satisfied that such materials can be relied on both for the facts and evidence recorded in them,[25] and in an interlocutory context, to establish that there is a serious issue to be tried. This is notwithstanding the normal rule in *Hollington*[26] as to the use of a judgment to which a person is not a party. This is not to say D9 is in any way bound by those judgments.

39. A finding of a prior court is opinion evidence which a subsequent court cannot rely on because the later court must make its own findings of fact. However, a reference to the substance of evidence in a prior decision is itself evidence which the court in a later case can take into account as it would any other factual evidence, giving it such weight as it thinks fit. The Court is satisfied that doing so does not risk a fair trial.[27]

40. Further, the Court is satisfied that if it concludes that the matters of primary fact recorded in earlier decisions justify the conclusions reached therein, it is entitled to reach the same conclusion.[28]

41. Although Mr Potts KC sought to argue to the contrary, the cases he relied on[29] are not apposite because the party seeking to rely on such material was seeking to determine the issue conclusively rather than merely seeking to show a serious issue to be tried. For example, *Calyon* involved an application for summary judgment which would have been a conclusive finding and was itself distinguished in *Sabbagh*[30]. The Court also notes, as Mr Penny KC pointed out, that this analysis was followed in this Court by Smellie CJ in *Daiwa v. Al Sanea*,[31] and it has also been followed in the BVI.[32]

Mr Smith's evidence

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[25] *See Kazakhstan Kagazy v. Arip [2021] EWHC 3462 (Comm) at §115, per Henshaw J, Rogers v. Hoyle [2015] QB 265 CA, at §57 and Lawrence Rabinowitz QC in JSC BTA Bank v. Ablyazov [2016] EWHC 3071 (Comm) at §24. Arip and Ablyazov were also applied by Foxton J in Lakatamia v. Tseng [2023] EWHC 3023, at §14.*
[26] *Hollington v Hewthorn [1943] K.B 587 (CA).*
[27] *Sabbagh v. Khoury [2014] EWHC 3233 (Comm) at §206, per Carr J citing JSC Aeroflot-Russian Airlines v. Berezovsky [2013] 2 CLC 206 CA. Sabbagh has been followed on this point in Lakatamia v. Su [2024] 3 WLR 1101, at §15.b.Rogers v Hoyle [2015] QB 265 CA.*
[28] *Lakatamia (above) at [14], citing Arip (above), Ablyazov (above) and Otkritie v. Gersamia [2015] EWHC 821 (Comm), at §23, per Eder J.*
[29] *Calyon v. Michailaidis [2009] UKPC 34.*
[30] *§§204-206.*
[31] *Daiwa v. Al Sanea [KY 2019 GC 487] §28.c, and §§27-28, 32, 34, per Smellie CJ.*
[32] *VTB Bank v. Miccros Group BVIHC (Com) 0067 of 2018 (ECSC) (23 January 2023) at §§85-86, per Jack J.*

42. D9 says in his affidavit evidence (Smith 1) that he struggles to understand how it can be asserted by the Plaintiff that Cayman Islands law is said to be the applicable governing law for any FDA claim against the other Defendants or for any alleged unlawful means conspiracy against him personally and/or how it can be suggested that he can be guilty of an unlawful means conspiracy under any applicable law.

43. He maintains that all of the relevant corporate and contractual decisions that the Plaintiff seeks to impeach in these proceedings were made by the relevant companies' Boards of Directors (acting as such) and they have never been dictated or made by him alone (nor could they have been) nor have they taken place whatsoever in the Cayman Islands. He refers to part of the corporate restructuring that was positively approved by order of the Supreme Court of British Columbia dated 12 July 2017 approving a Plan of Arrangement.

44. Notwithstanding D9's affidavit evidence, the Court is satisfied that there is a serious issue to be tried that D9 is liable personally to the Plaintiff as a director of the relevant Defendants (D1-D8)[33]. There is a realistic basis for suggesting that his conduct and knowledge will be attributed to the relevant Defendants[34] and that the case in unlawful means conspiracy will be made out against him personally. The Court is satisfied that there is no unfairness to D9 in this provisional finding.

45. Whether these matters will in fact be proved at trial will depend, among other things, on whether the elements of the conspiracy have been made out against him and whether on the facts and applicable law he is found to be personally liable.

46. It is however at least seriously arguable and there is a plausible evidential basis for alleging D9 conspired with the other Defendants to enter into the relevant transactions as part of the unlawful means conspiracy alleged, notwithstanding D9's denials and contrary assertions in his affidavit evidence.

47. Mr Potts KC's submission that it was fanciful for the Plaintiff to allege that D1's alleged receipt of any assets constituted an actionable breach of duty by D9 to D1 and/or D5 because D1 and/or D5 was 'gaining assets' is unsound. There is a serious issue to be tried that what D9 was doing pursuant to a dishonest conspiracy, exposed the relevant entities which received the assets to a

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[33] Smith 1 §23.3.1 ,23.4,54.4.
[34] See Standard Chartered Bank v. Pakistan,[2003] 1 AC 959 where a director who wrote a fraudulent letter on behalf of a company, was held to be personally liable to the claimant in the tort of deceit.

claim under the FDA and conspiracy/damages claim, and that as a result he was in breach of his fiduciary duties to the relevant companies.

Hong Kong law

48. The Court finds no other evidence to link the claim to Hong Kong, apart from D9's own evidence that he mainly resides in (and spends the majority of his time in) Hong Kong and was based in Hong Kong at the time of the alleged events in question. The case proceeds to trial against D1 and D3-D8 under Cayman law in this Court for the same conspiracy.

49. Notwithstanding the Hong Kong law argument, the Court is persuaded that there is at least a serious issue to be tried on the available evidence that Cayman law applies to the case against him.

50. There is no good reason to believe, based on the expert evidence of Mr Brian Fan and Mr James Man, that Hong Kong law is likely to be materially different to Cayman law. It is common ground between the Hong Kong law experts that English case law will generally be applied in Hong Kong to unlawful means conspiracy (as is the case in Cayman).[35]

51. Having reviewed the expert evidence, the Court concludes that D9's argument on Hong Kong law is not made out. It remains to be seen whether there would be a defence under Hong Kong law on the basis that D9 considered that what he was doing was lawful.

52. This is because it seems to the Court that there is a serious issue to be tried as to whether Hong Kong law would require the Plaintiff to show that D9 knew that the means employed were unlawful. The Hong Kong authority relied on by Mr Fan[36] has been doubted by Mr Man on the basis that it relied on an *obiter dictum* in an earlier English decision (*Meretz*[37]) which a subsequent decision of the Court of Appeal in England (*Racing Partnership)* did not follow[38].

53. I have noted Mr Man's view that Hong Kong law would be likely to take this later authority into account and that it is more likely than not that the Hong Kong courts would follow *Racing*

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[35] *"The elements of unlawful means conspiracy can be summarized from the English case of Kuwait Oil Tanker Co SAK v Al Bader …" Fan §§21-22 and Man §§14-15.*
[36] *Hui Cheung Fai v Daiwa § 154(unreported HCA 1734/2009 8 April 2014).*
[37] *[2008] Ch 244 §289 B-C.*
[38] *Racing Partnership v. Sports Information Services [2021] Ch. 233 (EWCA). Arnold and Phillips LJJ's (Lewison LJ dissenting).*

Partnership.[39] The task of this Court in this regard is to evaluate the expert evidence of foreign law and to predict the likely decision of the highest court in the relevant foreign system of law[40]. The Court finds that there is at least a serious issue to be tried that Hong Kong law would find that it is not necessary (based on the Court of Appeal's decision in Racing Partnership) for the Plaintiff to show that D9 knew that the means employed for the conspiracy were unlawful.

54. Even if Hong Kong law were to be materially different from English law in the way Mr Fan suggests[41], the Court is satisfied that there is a serious issue to be tried on the facts and evidence as pleaded, despite D9's affidavit evidence to the contrary, that D9 knew that what he was allegedly engaged in was unlawful in Hong Kong.

55. Having reviewed the Re-Amended Statement of Claim at §§ 74.1 and 74.2.2, the Court finds the case to be sufficiently pleaded for present purposes and there is no need for the purpose of determining this application, as submitted by Mr Potts KC, for the Plaintiff to apply for permission to amend to plead that D9 knew that the unlawful means employed were unlawful in Hong Kong. If and when the point is taken in any Defence served by D9, the matter may be fully pleaded out.

Good arguable case as to one or more gateways for service out

Necessary and/or proper party gateway (GCR O.11, r.1.(1).(c))

56. The Court reminds itself that caution needs to be exercised in relation to this gateway, which does not depend upon a territorial connection.

57. Under GCR O.11, r.4.(1)(d), the Plaintiff must also establish that as between itself and one or more of D1-D8 *("the person who has been or will be duly served within or out of the jurisdiction"),* that there is a *"real issue which the plaintiff may reasonably ask the Court to try".*

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[39] §17 (4).
[40] Suppipat v Narongdej Calver J 31 July 2023 Comm. Court.
[41] §§24 and 60.2.

58. The Court is satisfied that there is a good arguable case in the sense that there is a plausible evidential basis[42] that D9 is a necessary or proper party and that there is a real issue which the Plaintiff reasonably asks the Court to try.[43]

59. The Court accepts that D9 is a proper party because the claims against him and the other Defendants involve an investigation into whether or not there was a conspiracy as alleged by the Plaintiff which involves the same sequence of transactions and alleged wrongdoing based on connected facts.

60. There is a plausible evidential basis for alleging that D9 was one of the main persons behind the conspiracy, if not 'the' mastermind behind the conspiracy[44]. There is no question that if he were present in the Cayman Islands he could be properly joined[45] on the basis that there are common questions of law and fact. The relief claimed against D9 is in respect of, or arises out of, the same transactions or series of transactions as alleged against the other Defendants who are proceeding to trial here.

Cayman company/director gateway (GCR O.11, r.1.(1).(ff))

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

61. The Court is satisfied that there is a plausible evidential basis that:

a) the Plaintiff's claim is*: "... brought against a person who is or was a director, officer or member of a company registered within the jurisdiction ...".* D9 is a director of D1

[42] *Brownlie v Four Seasons [2018] 1 WLR 192 UKSC § 7.*
[43] *GCR O.11r.1 (1) (c).*
[44] *see also the 2020 Judgment §§93-4, 161-166.*
[45] *Contadora v. Chile Holdings [1999 CILR 194], at 202 (5-10); Dicey, Morris & Collins on the Conflict of Laws (16th, with Supplement,2023) §§ 811.126.*
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which is registered within the jurisdiction.[46] He is also a director of D5, which was a Cayman company at all material times until June 2020.[47] He is also a member of D1[48]; and

b) *"... 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."*

62. The claim relates to D9's conduct as a director of those companies and it is alleged that the conspiracy consisted of a number of breaches of his fiduciary duties owed to those companies.

63. *GCR O.11, r.1.(1).(ff)* has been analysed in recent decisions of this Court.[49] In *Aspect,* Doyle J helpfully reviewed a number of authorities on this gateway which he suggested appears to be unique to this jurisdiction. The Court agrees with Doyle J's analysis and that the gateway is drafted in very wide terms.

64. In the *LV II* decision[50], as Mr Penny KC pointed out, the Court was concerned with the assignment of an arbitration award by a Cayman company, at the hand of its director, which may be said to be analogous to D5's transfer of Old MFC out of the Group, at the hand of D9.[51] In fact, all of the relevant transfers to D1 and D5 on their face directly involved D9.

65. The Court finds that there is a good arguable case that the claims relate directly to D1 and D5, both Cayman registered entities, which had the relevant assets allegedly transferred to them.

66. There is also a plausible evidential basis for the claim that D9 took part in an unlawful means[52] conspiracy and thereby breached his fiduciary duties as a director of both of these Cayman registered entities. It follows that the claim concerns his duties as a director of each company.

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[46] *See Smith-1 §54.11.1 Smith-4 §13 §§ 10 and 14.*
[47] *For admissions by D5 -see Re amended Statement of Claim ;D1 Reamended Defence and Counterclaim §§ 9A and 11 adopted by D5.*
[48] *Smith 5 §25.*
[49] *Aspect Properties v. Cheng [2022 (1) CILR 685], per Doyle J; Royal Park v. S&P Global [2024] CIGC (FSD) 81 Kawaley J at §§23-24 and LV II v. Floreat (11 October 2024) §§4-7, 13-14 Kawaley J.*
[50] *11 October 2024 Kawaley J.*
[51] *Re Amended Statement Of Claim §§56A, 56B, 63.0G; D9 appears to have signed the relevant agreements on behalf of New MFC II. Both are subject to Cayman law. One of them is subject to the exclusive jurisdiction of the Cayman Islands.*
[52] *Re Amended Statement of Claim §§20A 63.0BC (D5, receipt of Dividend) 63.0CC (D1, receipt of Merchant Bank) 63.0DF (D5, receipt of Interest in Scully Mine) 63.0G (D5, transfer of Old MFC out of Group) pleaded as unlawful means at §§74.2.7-8.*

Forum conveniens

67. The Plaintiff has to establish 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 GCR O.11, r.4(2).

68. The task of the Court in this regard 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[53].

69. In this regard the Court notes that the following transfers at the heart of this case have on their face strong Cayman connections.[54] The Court is satisfied that the Plaintiff has a plausible evidential basis for its claims that:

a) the Dividend was made by D2 to D5 (a Cayman company) on terms subject to Cayman law and exclusive Cayman jurisdiction and signed by D9 for D5. The Plaintiff says this was of most of the assets pleaded at Re-Amended Statement of Claim §32 and was valued by D9 at CAN$247m[55];

b) the only cash consideration for the Scully Mine transfers is said to have been paid to D5 (a Cayman company) on terms subject to Cayman law and exclusive jurisdiction and signed by D9 for D5. D9's evidence is that this cash sum was CAN$41m[56];

c) D2 is itself said to have been transferred out of the MFC Group by D5 (a Cayman company) on the terms as to Cayman law and exclusive jurisdiction and the relevant agreements were signed by D9 for D5; and

d) the transfer of D3 (and the Merchant Bank) was made to D1 (a Cayman Company), and to a lesser degree, D5 (a Cayman Company) and at least one of the purported (€7m) debt agreements relied upon as part of the alleged consideration paid is said to be governed by Cayman law.

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[53] The Spiliada [1987] AC 460, at 480G (UKHL); AK v. Kyrgyz JCPC at §88; Lungowe v. Vedanta [2020] AC 1045, (UKSC) at §§66, 68-70, 73-74.
[54] see 2020 Judgment §§ 84 the Scully Mine,§170 Merchant bank and dividend ,§171 transfer of old MFC.
[55] Smith 5 §§ 176-9.
[56] Smith 4 at §10 to which Smith 5 §165 refers at §165.
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70. The Court finds no strong evidence, apart from D9's uncorroborated affidavit evidence that he mainly resides in (and spends the majority of his time in) Hong Kong and was based in Hong Kong at the time of the alleged events in question to substantially link the claims against him to Hong Kong.

71. The claim is brought against two Cayman registered companies (said to be the anchor Defendants) D1[57] and D5 (which has since redomiciled), which are said to be centrally involved at the apex of the MFC Group and which are direct parties to the transfers and which received directly or indirectly all of the relevant assets. Neither of those companies have challenged jurisdiction and one has brought a substantial counterclaim against the Plaintiff in these proceedings.

72. D9 was a director of both of those two Cayman companies. He was CEO and President of D1 and remains Chairman. Whether D9 breached his duties to D1 and/or D5 is likely to be a matter of Cayman law[58].

73. The Court has found that the Plaintiff has shown that there is at least a serious issue to be tried as to the Hong Kong law arguments. Furthermore, looking at the cause of action in unlawful means conspiracy, from inception to completion, and identifying where in substance each element arose under Cayman law, it seems likely to the Court on the available evidence that the governing law would be Cayman law. D1 and D3-D7 have all accepted that the claims against them at trial will be governed by Cayman law.

74. It is alleged by the Plaintiff that D1 and D5[59], as Cayman entities, agreed as part of the unlawful means conspiracy with the requisite intention to cause harm to the Plaintiff. True it is that the causes of action which are based on the Cayman law FDA are made against the corporate Defendants, not as against D9. However Mr Smith is a natural person through which the relevant companies acted. That is why D9's duties as a director of D1 and D5 are in issue, as are D1 and D5's liability in knowing receipt to D2. The Dividend, the Merchant Bank Transfer, and the Transfer of the Interest in the Scully Mine are all said to be unlawful transfers making it the case that D9 breached his fiduciary duties as a director of the relevant companies and particulars of the unlawful means is given in the pleadings[60].

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[57] *D1 counterclaims in these proceedings against the Plaintiff for substantial sums.*
[58] *D1 and D3-D7 accept Cayman law applies to the claims against them.*
[59] *Direct and indirect parent companies of D3,D4 , D6 and D7.*
[60] *Re-Amended Statement Of Claim §§63.0BB (D5, Dividend) ,63.0CB (D1, Merchant Bank), 63.0DE (D5, Mine) §74 Unlawful means conspiracy.*

75. However, even if Hong Kong law were shown to be the governing law of the Plaintiff's claims against D9 at trial, which seems to the Court unlikely, it is a weak consideration on forum because the Court takes the view that the likelihood is that Cayman law and Hong Kong law would be substantially similar.

76. When the Court is assessing the most suitable place for a claim to be tried it needs to identify a jurisdiction in which the claims against all the Defendants can fairly proceed.[61]

77. There is a good reason to avoid, whenever possible, a multiplicity of proceedings and the risk of inconsistent decisions and unnecessary time and expense in achieving justice.[62] It is true that there are other jurisdictions to which there are some connecting factors.[63] It is also true that there have been proceedings in Malta, Canada and Austria, but that does not deter the Court from looking for a single jurisdiction in which the outstanding claims against all the Defendants may most suitably be tried.

78. In conspiracy cases, the Court is often faced with multiple internationally based persons and entities involved in conduct spanning many jurisdictions. It is preferable to try the heart of such cases in one jurisdiction so that all the evidence can be gathered and given in one place and the case can be properly managed to a fair trial for all parties and in the interests of justice.

79. It is not uncommon in these types of cases that the witnesses are not concentrated in any one country and it follows that the location and places of residence of the witnesses is rarely of any decisive weight.

80. Likewise, in relation to documents which can be expected to be mainly in electronic form and therefore factors relating to storage and transfer of data are more important than physical location of hard copies.

81. The Court has concluded that the clearly most appropriate forum for the trial of the Plaintiff's case is the Cayman Islands. That is the forum in which the Plaintiff's claim has been proceeding

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[61] *Vedanta §68.*
[62] *Vedanta 69-70.*
[63] *for example to Malta as to the Merchant Bank transfer, to two Canadian provinces for the Scully Mine transfers and to the Marshall Islands for the dividend.*

for years against all the other Defendants.[64] There is no one other jurisdiction, which would be the appropriate forum to try the claims fairly. The Court has concluded that the proper forum is clearly not Hong Kong for the Plaintiffs claim against D9 or indeed against the other Defendants.

82. The Court has considered D9's evidence that *"none of the alleged acts or omissions that are alleged against me personally took place in the Cayman Islands"* and *"I personally have no connection with the Cayman Islands whatsoever, other than the fact that I am one of the directors (and certainly not the only director) of [D1]and a few companies."*[65] The Court accepts Mr Penny KC's submission that is not clear from D9's affidavit evidence where any of D9's conduct or actions took place, or that any of the elements of the tort took place in Hong Kong.

83. The Plaintiff has made out a plausible evidential basis that D9's alleged conduct had real and substantial connections to Cayman when the relevant transactions took place.

84. The Court has also carefully considered whether D9 has established a significant connection to Hong Kong such that it otherwise bears on the question of the claim against him. The Court has reviewed D9's affidavit evidence and exhibits[66] and has formed the view that his residence and participation in any unlawful conduct whilst in Hong Kong does not establish that the claim against him has a significant connection to that jurisdiction. Even accepting his evidence that he was in Hong Kong for a large proportion of the time in which the alleged misconduct against him occurred, there are no other factors which connect the claim against him to Hong Kong other than his single physical location during the alleged conspiracy.

85. Whilst he may personally have operated mainly from Hong Kong, international corporate reorganisations of the kind at the heart of this case take place through communications (oral and digital) across countries between numerous persons and entities. No details are provided by D9 of any of the persons or entities that he communicated with. In fact, no details of any conduct or communications relating to the matters claimed by the Plaintiff are revealed at all by D9, which the Court accepts is not required of him at this stage.

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[64] *D3, D4 and D6 all pursued unsuccessful jurisdiction challenges (including to the CICA by D3 and D6), D1 and D5 unsuccessfully appealed to CICA as to the case on the merits against them. D2 and D8 have not participated.*
[65] *Smith-4 §17and Smith-1 §54.11.1.*
[66] *Smith 1 §1 Smith4 §15 16.*
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86. The Court has concluded that, even if D9 was based in Hong Kong at the time of the alleged events in question and the decisions in which he participated were made and acted upon by others when he was resident in Hong Kong, it does not follow that the acts constituting unlawful means took place in Hong Kong.

87. What is clear is that the relevant transfers did not take place in Hong Kong. The Plaintiff's loss was suffered in Austria. The Dividend by which most of D2's subsidiaries were transferred away from it, as well as D2's own departure from the Group, occurred on Cayman law terms subject to Cayman law jurisdiction.[67]

Joinder

88. *GCR O.15, r.4.(1)* sets out two alternative tests for joinder. The first is that*:*

> *"Subject to rule 5(1) two or more persons may be joined together in one action as plaintiffs or as defendants with the leave of the Court*

89. The Court is of the view that this is a proper case for leave to be granted because the most expedient and fair way to progress the Plaintiff's claims against the Defendants is at a single trial against all of them in this jurisdiction.

90. The second test is:

> *"... or where – (a) if separate actions were brought by or against each of them, as the case may be, some common question of law or fact would arise in all the actions; and (b) all rights to relief claimed in the action (whether they are joint, several or alternative) are in respect of or arise out of the same transaction or series of transactions."*

91. The Plaintiff's claims against D9 in unlawful means conspiracy arise out of the same facts and circumstances as those alleged against the other Defendants, all arising out of the same conspiracy.

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[67] *The CAN$41m cash for the Scully Mine allegedly went to D5 (a Cayman company at the time of the events in question).*

92. The Court rejects Mr Potts KC's submission that GCR O.15 r.4(1) applies only to joinder at the commencement of proceedings and that the Plaintiff chose the wrong rule because it is GCR O.15 r.6(2)(b) which applies thereafter. That submission reveals in any case a distinction without a difference because although the two provisions are not identical the factors that the Court will have regard to are materially the same.

93. Therefore, for the same reason under GCR 0.15 r.6 (2)(b), the Court is of the view that this is a proper case for joinder, because the most expedient and fair way to progress the Plaintiff's claim against all the Defendants is at a trial involving all of them in this jurisdiction.

Delay

94. As to Mr Potts KC's forceful submissions that it is an abuse for D9 to be joined to these proceedings at this late stage, the Court does not agree. Having reviewed the relevant facts and written material there is no evidence to suggest that the Court was misled or that the Plaintiff has behaved improperly. The Court is of the view that no unfair advantage has been taken by the Plaintiff and D9 has suffered no unfair detriment by any delay on the Plaintiff's part. There has been no breach of the Overriding Objective by the Plaintiff.

95. The Court has considered each element of the improper delay case advanced by Mr Potts KC, and concluded there is no good basis to suggest that the administration of justice has been brought into disrepute.

96. The Plaintiff obtained permission to serve out against D2 to D4 in September 2019 and joined D5 to D8 in January 2020. It did not obtain permission to join D9 until June 2023.

97. As to the explanation for the delay in the application to join D9 up until July 2021, the Court has reviewed Dellemann 13[68] and also the Plaintiff's *ex parte* written argument in June 2023[69]. The Plaintiff's consideration of the reflective loss principle and its development were therein explained.

98. The Court notes that the Supreme Court decision in *Marex* was rendered on 15 July 2020 which may be said to have cleared away the Plaintiff's reflective loss issue *vis a vis* D9. It is the case

[68] *DD13 §§145g and 146 e.*
[69] *§§154.2,167-73,201-2.*

that it then took the Plaintiff a year to apply to join D9 on 14 July 2021 (which this application is the return date for).

99. During that year the Plaintiff was engaged in various applications involving anti suit issues, jurisdiction challenges, Canadian and Maltese proceedings and appeals, which it is not necessary to rehearse[70]. It also commenced the VIAC arbitration.

100. It may have been better for the Plaintiff to have taken less than a year to bring its application against D9, but such a delay in the context of the case overall and in particular in relation to any alleged prejudice suffered by D9 is not material. He would have been well aware from 2019 that he was to potentially be a significant witness at the very least in a trial involving the various companies in the MFC Group he was involved in.

101. The Court has reviewed D9's affidavit evidence in which he says that he has been, and will be, materially prejudiced by the manner in which the Plaintiff has belatedly attempted to join him .[71] He makes a number of points about how he would have taken a different course of action if he had known in 2019, 2020 and the first half of 2021 that the Plaintiff intended to name him in his personal capacity as a Defendant.

102. It may well be the case that he would have taken independent legal advice in relation to his personal interests and in relation to providing affidavit evidence for the other Defendants. He may well also have sought to organise his personal affairs and his business affairs differently and taken steps to manage his own reputation and made appropriate disclosures to regulators and contractual counterparties. The Court has carefully considered each of those grounds and has found no real basis for D9 to assert material prejudice in being joined now rather than earlier in these proceedings. The Court finds no reason not to exercise its discretion in favour of the Plaintiff, or to find D9 has the balance of prejudice in his favour.

103. The Court has reviewed the Plaintiff's affidavit evidence[72], the *ex parte* written argument[73] and Appendix 3 (which sets out a detailed chronology) to the Plaintiff's written material and rejects Mr Potts KC's submissions that the Plaintiff made a tactical decision not to join D9 and that

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[70] *See Appendix 3 to Plaintiff's written submissions.*
[71] *Smith 1 §§ 42-54 and in particular 42.4,52,54.7.*
[72] *Dellemann 13 §§145g,146.e.*
[73] *§§154.2 167-73 and 201-2.*

the explanation provided by it is not sufficient or credible. The Court rejects the submission that the Plaintiff's explanation was false.

104. It has also considered and rejects the assertion made by D9 that the Plaintiff's late application should be understood as a mere device to harass and oppress him personally and D1 and to put pressure on them to settle the Plaintiff's claims.

105. It seems to the Court perfectly credible that the Plaintiff decided not to join D9 because of the state of Cayman law on the reflective loss principle at the relevant time, as stated by Mr Dellemann:

> *"I understand that on 15 July 2020, the Supreme Court of the United Kingdom handed down its decision in the case of Marex v Sevillja ([2020] UKSC 31) which clarified the scope of the principle of reflective loss under English law. Following that decision (without any waiver of privilege), it became clear to RBI and its advisors that further amendments to RBI's claim might be possible, including in relation to the claims against Mr Smith and it began to explore the scope for making such amendments."*[74].

106. The English Court of Appeal in *Marex*[75] held that the rule against reflective loss applied not only to a claim by a shareholder but also to that of a creditor of a company such as the Plaintiff in this case.

107. The reasoning was if an allegedly asset stripped company (D2) was reimbursed by alleged wrongdoers (D1 and D3-D9), that would make good any loss to a creditor (such as the Plaintiff). The claim against the alleged wrongdoers would not be able to be brought (subject to limited exceptions) by the creditor and had to be brought by the asset-stripped company (D2).

108. The point had been taken against the Plaintiff by the other Defendants at the January 2020 hearing, but those Defendants faced claims under the FDA seeking relief that they should restore to D2 the assets wrongly transferred to them. The claim against D9 is different. The claim against D9 claims damages for the tort of conspiracy and so the Plaintiff faced a problem. That would seem to the Court to be a credible explanation.

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[74] *Dellemann 13 §§145.g, and see 146.e.*
[75] *Followed in Cayman by Xie v Xio [2018] (2) CILR 508 §§45-50,90 and 109-111and Primeo [2019](2) CILR 1 §§376-441.Cayman law changed in August 2021 in the decision of the Privy Council in Primeo [2021] BCC 1015.*

109. The two years it took before the *ex parte* application was granted in June 2023 are explained in detail in the chronology in Appendix 3. The hearing was originally listed in December 2021 but was adjourned because of the VIAC arbitration in Vienna, Austria. It was the position of the other Defendants, who were asked for their consent in relation to the Amendment and Joinder application, that the arbitration needed to conclude before the Cayman proceedings could proceed. The Arbitral Award was obtained in October 2022.

110. The Court finds that the Plaintiff's explanation for the delay is both sufficient and credible. There has been no conduct which can fairly be said to be abusive by the Plaintiff and requiring any remedy to D9.

Discretion

111. The Court has carefully considered Mr Potts KC's submissions and the relevant evidence and has decided that there are good reasons to exercise its discretion separately as to service out and as to joinder in this case.

112. The Plaintiff has a good arguable case against D9 and there are good reasons for it to be permitted to proceed against him by serving him outside the jurisdiction.

113. Joining him as a Defendant is unlikely to have a material effect on the scale or complexity of the action. He is both a necessary and proper party.

114. The Court has taken into account the affidavit evidence of D9 which says that he has been materially prejudiced in his ability to take independent legal advice and secure independent legal representation at the earliest opportunity, (and before giving evidence on behalf of any other Defendants) where he was not properly alerted by the Plaintiff of the Plaintiff's intention to sue him personally. Indeed, D9 says that the Plaintiff positively gave the Court, and D9, the clear impression that the Plaintiff was not intending to sue D9 personally.[76] The Plaintiff denies that it gave any such impression.[77]

115. The Court has taken D9's evidence into account, but is unable to give it much weight as it is not clear to the Court, what if any, material difference that would have made even if he should

[77] *See footnote 1 and 4 statement of Claim.*

have been alerted earlier by the Plaintiff. He has been represented on this application by attorneys and Leading Counsel who has forcefully argued all points available to him.

116. Mr Potts KC also submitted that the other Defendants' jurisdictional challenges proceeded, and were determined by the Court, on a 'false' or materially incomplete basis, in the sense that the Court did not know (and was not informed by the Plaintiff) at the time that the Court heard and determined those applications, that the Plaintiff intended also to bring claims against D9 personally (an individual resident in Hong Kong). That, of itself, he submitted, would have made a material difference to the Court's assessment of issues of jurisdiction, and issues of forum conveniens (or forum non conveniens), since the Court is required to consider the case as a whole against all Defendants.

117. Contrary to Mr Potts KC's submission, it was not a feature of any prior decision of this Court that D9 would not be joined as a Defendant. It would have made no material difference to previously decided issues of *forum conveniens* even if the Court did know that the Plaintiff intended to apply to join D9. It was recognised by the Court that he might well be attending the trial as a key witness and was intimately involved in the alleged events.

118. The balance of prejudice in this case comes down clearly in favour of the Plaintiff. The Court is satisfied that the Plaintiff would suffer real prejudice if it were required to sue D9 in separate proceedings in Hong Kong. There is a clear advantage to the Plaintiff in joining D9, not least to enforce any judgment obtained against him[78].

119. The freezing orders obtained against the other Defendants are not security for the Plaintiff's claims. They relate to the dissipation of assets.

120. The obvious advantage to the Plaintiff in joining D9 is enforcement against him if judgment is obtained at a trial. The Plaintiff takes the view that D9 is likely to have sufficient assets to be able to satisfy all or a significant part of any damages award against him. This does not seem to the Court to be an unreasonable or unfair position to take.

121. On the other hand, there would be an equally obvious risk of irreconcilable judgments and further additional expense and delay to grant D9's application and for there to be a case against D9 in Hong Kong where he says he can be sued as of right (subject to any limitation defence).

[78] *Electric Furnace (no.2) [1987] RPC 23 at pp31,34 and 35.*

122. The Court has carefully considered the effect on an individual of Mr Smith's age and location of being a defendant in a long trial in Cayman, possibly in 2027. That is not such a countervailing factor such as to grant his application, given the Court's findings above. None of the other Defendants have objected to his joinder.

123. For all these reasons, D9's application is refused. He is properly joined to the trial against the other 8 Defendants, as a 9th Defendant. There is no other jurisdiction that is the more natural forum for these claims.

124. There is reason to think that, with a fair wind, which the Court appreciates this case has not had to date as a result of the numerous and varied applications and appeals that have been made, a trial could be organised for 2027. That would be eight years after the litigation had commenced and is still two years away. The Plaintiff seeks to recover considerable sums borrowed by the MFC Group which it alleges have been stripped away and there is a substantial counterclaim against it to resolve. The parties should get on and obtain a hearing date for a case management conference in early course.

125. The Court will deal with submissions on costs if they cannot be agreed, by way of written submissions of no more than 5 pages in length to be provided within 14 days.

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THE HON. JUSTICE RAJ PARKER
JUDGE OF THE GRAND COURT