**Neutral Citation Number: [2025] CIGC (FSD) 79**

**Cause No: FSD 2024-0011 (JAJ)**

**IN THE GRAND COURT OF THE CAYMAN ISLANDS**

**FINANCIAL SERVICES DIVISION**

**BETWEEN:**

**(1) BANCO PRIVADO PORTUGUÊS (CAYMAN) LTD (In Official Liquidation)**

**(2) SIMON CONWAY**

**(3) JESS SHAKESPEARE**

**(As Joint Official Liquidators of Banco Privado Português (Cayman) Ltd)**

**Plaintiffs**

**-and-**

**(1) THE ESTATE OF JOÃO MANUEL OLIVEIRA RENDEIRO (Deceased)**

**(2) SALVADOR PIZARRO FEZAS VITAL**

**(3) ANTÓNIO PAULO ARAÚJO PORTUGAL DE GUICHARD ALVES**

**(4) PRIVADO GESTE SGPS, SA (In Liquidation)**

**Defendants**

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| **Appearances:** | **Mr Graham Chapman KC of counsel and Adam Huckle and Justin Naidu of Maples & Calder (Cayman) LLP for the Plaintiffs** |
| | **Mr Tom Lowe KC of counsel and Laura Hatfield, Norberto Ayala Rodriguez and Amandy Jimenez of Bedell Cristin for the Fourth Defendant** |
| | **The First, Second and Third Defendants were not represented and did not appear** |
| **Before:** | **The Honourable Justice Jalil Asif KC** |
| **Heard:** | **25 November 2024** |
| **Judgment:** | **11 August 2025** |

*Practice and procedure—service out of the jurisdiction—GCR O.11, r.1(1)(c) "necessary or proper party"—whether abuse of process to rely on GCR O.11, r.1(1)(c) where anchor defendant not participating in action*

*Practice and procedure—service out of the jurisdiction—issue of appropriate forum—claim involving conduct of directors of Cayman Islands registered company—whether there is a public policy in favour of determination by Grand Court—whether the Cayman Islands is the appropriate forum in all the circumstances*

*Practice and procedure—full and frank disclosure on ex parte application—principles to be applied when applying and when challenging disclosure made—need for respondent to focus on quality of most important complaints over quality*

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# JUDGMENT

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## A. Introduction

1. On the Plaintiffs' *ex parte* application heard on 26 April 2024, I gave the Plaintiffs leave to serve the amended writ of summons in this action on the First, Second and Third Defendants pursuant to GCR O.11, r.1(1)(ff), and on the Fourth Defendant company pursuant to GCR O.11, r.1(1)(c) as a *"necessary or proper party"* to the claim against the First, Second and Third Defendants. All of the Defendants are based in Portugal. The Fourth Defendant now applies by summons filed on 11 September 2024 to set aside service of the writ upon it, to discharge the order giving leave to serve the writ upon it, and for declarations that the Fourth Defendant has not been validly served and that the Grand Court does not have jurisdiction over the Fourth Defendant. In addition, the Fourth Defendant seeks an order that the Plaintiffs pay its costs on the indemnity basis.

2. The Plaintiffs were not able to serve the First Defendant, who has died, and Mr Conway has indicated in his evidence that the Plaintiffs are not intending to pursue the claim against his estate. The Plaintiffs served the Second and Third Defendants but neither of them filed an acknowledgment of service. The First, Second and Third Defendants have therefore taken no part in the proceedings.

3. The Fourth Defendant's summons came before me for hearing on 25 November 2024, when it was represented by Mr Tom Lowe KC, supported by Bedell Cristin, and the Plaintiffs were represented by Mr Graham Chapman KC with assistance from Maples & Calder. I regret that it has taken me significantly longer than I would like to complete this judgment due to the number of other matters requiring hearings before the court. I am grateful for the parties' patience.

4. The material before me on the Fourth Defendant's summons includes:

   4.1 the first affidavit of Simon Conway, sworn on 3 April 2024 in support of the Plaintiffs' *ex parte* application for leave to serve out;

4.2 the affidavit of Amandy Tatianna Jimenez, an attorney employed by Bedell Cristin, sworn on 11 September 2024 to exhibit a legal opinion on Portuguese law prepared by Professor Rui Pinto Duarte in support of the Fourth Defendant's summons;

4.3 the first affidavit of Maria Teresa Martins Revês, the court-appointed insolvency administrator of the Fourth Defendant, sworn on 12 September 2024 in support of the Fourth Defendant's summons;

4.4 the first affidavit of Rachel Catherine Baxendale, a paralegal employed by Maples & Calder, sworn on 1 October 2024 to exhibit documents relating to service of the Defendants in Portugal;

4.5 the second affidavit of Simon Conway sworn on 2 October 2024 in opposition to the Fourth Defendant's summons;

4.6 the second affidavit of Maria Teresa Martins Revês sworn on 15 October 2024;

4.7 the second affidavit of Rachel Catherine Baxendale sworn on 14 November 2024 to exhibit recent *inter partes* correspondence; and

4.8 a transcript of the hearing of the Plaintiffs' ex parte summons on 26 April 2024.

5. I record that the Fourth Defendant objects to the admission of Ms Baxendale's second affidavit and exhibit into evidence on the ground that it was late. However, as Ms Baxendale's second affidavit merely exhibits *inter partes* correspondence from September to November 2024, there is no merit in the Fourth Defendant's objection.

6. Finally, by way of introductory matters, the original version of the writ included claims by the Second and Third Plaintiffs for declarations pursuant to s.4 of the Fraudulent Dispositions Act and s.146 of the Companies Act that one of the transactions giving rise to the First Plaintiff's claim was void as a fraudulent disposition or a transaction at an undervalue. However, the Second and Third Plaintiffs abandoned those claims and amended the writ before service to delete them, on the ground that they are statute barred. As a result, there is therefore no separate claim advanced by the Second and Third Plaintiffs; the only claim advanced in the amended writ is that of the First Plaintiff. Mr Lowe submitted for the Fourth Defendant that the Second and Third Plaintiffs should therefore be removed from the action. Mr Chapman did not demur from this, and I consider it is procedurally correct that they should be removed as Plaintiffs and will so order. I therefore proceed in this judgment on the

basis that the only live claim is that of the First Plaintiff, which I refer to as the Plaintiff for simplicity, and I refer to the Second and Third Plaintiffs as the Cayman Liquidators.

## B. Outline of the factual background

7. In very broad outline, the Plaintiff's claim arises out of the collapse of the Privado Group in the aftermath of the 2008 global financial crisis, and certain transactions involving certain members of the Privado Group. The Cayman Liquidators wish to challenge these transactions as wrongfully depleting the Plaintiff of €22.4 million and wrongfully creating a liability of the Plaintiff in favour of the Fourth Defendant in an amount that includes the €22.4 million in question. The result of the transactions, unless set aside, is that the Plaintiff's other creditors are likely to be very significantly disadvantaged.

8. The Privado Group was an international corporate and banking group primarily operating in Portugal. Privado Holding SGPS SA (currently in liquidation) was the holding company. So far as relevant, Privado Holding had two wholly owned subsidiaries, Banco Privado Português SA ("BPP SA") and the Fourth Defendant. Below those two companies, BPP SA wholly owned and controlled the Plaintiff, and the Fourth Defendant wholly owned and controlled Geste Advisers Limited, a BVI incorporated company. The Plaintiff's books and records were kept in Portugal and were intermingled with those of other group entities. Mr Conway explains that the information available to the Cayman Liquidators regarding the Plaintiff has been patchy as a result.

9. The First, Second and Third Defendants were directors of various companies within the Privado Group, including the Plaintiff. More specifically, until 28 November 2008, the First, Second and Third Defendants were members of the boards of directors of both the Plaintiff and BPP SA, and between 12 February 2004 and 30 August 2006 they were the Plaintiff's sole directors. The Plaintiff rarely held board meetings; instead, strategic and commercial decisions were made on its behalf by the BPP SA Board.

10. All of the relevant companies in the group are now in separate liquidations except for Geste Advisers Limited, which was struck off in about January 2019. In more detail:

10.1 On 24 November 2008, BPP SA's directors notified the Bank of Portugal, which was the supervisory authority for banks in Portugal, that BPP SA was unable to pay its debts. On 1 December 2008, the Bank of Portugal appointed temporary directors to BPP SA, and suspended all payments by BPP SA to its creditors in order to enable a potential reorganisation of BPP SA. At the same time, the First, Second and Third Defendants resigned or were removed as directors of BPP SA and the Plaintiff.

10.2 On 16 April 2010, the Bank of Portugal placed BPP SA into liquidation. Since that date, BPP SA has been under the control of a liquidation commission appointed by the Lisbon Commercial Court.

10.3 On 27 May 2010, CIMA appointed controllers over the Plaintiff in order to enquire into and report on the Plaintiff's financial position and viability. On 9 July 2010, the Grand Court appointed liquidators and ordered that the Plaintiff be wound up. The Cayman Liquidators are the successors to the initially appointed liquidators.

10.4 On 21 November 2012, the Fourth Defendant was placed into insolvent administration by the court in Madeira, its location of incorporation. Initially, the insolvency administrator was Mr Rui Jorge Soares de Castro Lima. He was replaced by Ms Revês on 20 May 2014.

11. During their conduct of the winding up of the Plaintiff, the Cayman Liquidators (and their predecessors) have taken steps to realise value for the benefit of stakeholders. Most relevantly, the Cayman Liquidators commenced a claim before the Grand Court in 2014 to challenge an alleged pledge of the Plaintiff's assets in favour of the Republic of Portugal to support a loan to BPP SA to assist with its attempts to restructure following the 2008 global financial crisis. The Plaintiff settled this claim in December 2016 for approximately €28 million, which was paid to the Plaintiff by 6 July 2017.

12. As a result, in July 2017 the Cayman Liquidators intended to declare an interim dividend in favour of creditors. They published notice of that intention and requested creditors to submit proofs of debt.

13. On 1 November 2017, Ms Revês filed a proof of debt in the Plaintiff's liquidation in the sum of €36,347,107.52. This claim was in respect of money which the Fourth Defendant was said to have deposited with the Plaintiff in its capacity as a bank.

14. An attorney for the Fourth Defendant had previously filed a proof of debt on 18 August 2010 in respect of the same sum. When the earlier proof of debt was submitted, the Plaintiff's liquidators did not consider it appropriate to investigate or adjudicate the proof of debt as there was no indication that the Plaintiff would have any significant assets for distribution.

15. On 21 August 2018, Ms Revês confirmed that the proof of debt she had filed and the one from 2010 are duplicative, and that the Cayman Liquidators should disregard the 2010 proof of debt.

16. The Cayman Liquidators have not yet declared any interim dividend in light of their concerns about the validity of the transactions underlying the Fourth Defendant's proofs of debt. The Cayman Liquidators first became aware of the transactions in question between February 2018 and May 2018 during their consultations with BPP SA in relation to the Cayman Liquidators' intended adjudication of claims in the Plaintiff's estate. From early 2018 until 1 December 2022, the Cayman Liquidators corresponded with Ms Revês and with BPP SA to try to obtain assurance as to the propriety of the transactions giving rise to the claim outlined in the Fourth Defendant's proofs of debt. However, they have not been satisfied with the responses they have received and have concluded that the Plaintiff has viable claims against the First, Second and Third Defendants for breach of fiduciary duty and against the Fourth Defendant for knowing receipt. The Cayman Liquidators have been given sanction by the judge overseeing the liquidation to pursue the claims.

## C. Summary of the Plaintiff's intended claim

17. The Plaintiff alleges that the First, Second and Third Defendants breached their fiduciary duties to the Plaintiff by orchestrating a fraudulent scheme in 2008, against the background of the global financial crisis, to divert €22.4 million away from the Plaintiff and hence from its creditors to other Privado Group entities.

18. The Plaintiff asserts that:

    18.1 The Plaintiff was a party to a Portfolio Management Agreement executed on 10 April 2001 by the First and Third Defendants on behalf of the Plaintiff and the First and Second Defendants on behalf of the counterparty. The Portfolio Management Agreement entitled the Plaintiff to a

fee of 10% for investment management and custody services in relation to a particular investment transaction.

18.2 The Plaintiff provided the services required under the Portfolio Management Agreement and earned its fee in 2001 and 2002. The fee was approximately €23 million.

18.3 By a Consultancy Contract dated 30 December 2005 but apparently executed on 10 October 2008, the Plaintiff's fee was adjusted to 0.5%, with the remaining 9.5% to which the Plaintiff had been entitled becoming payable to Geste Advisers, a related entity, for alleged financing, capital structuring and investment advice.

18.4 The Consultancy Contract was executed by the Second and Third Defendants on behalf of the Plaintiff and also by the same individuals on behalf of Geste Advisers.

18.5 The services allegedly provided by Geste Advisers under the Consultancy Contract were either unnecessary or were never performed, because the underlying transaction giving rise to the Plaintiff's fee had essentially completed no later than 2002. Mr Conway complains that the Portuguese liquidators of the relevant counterparties have not satisfactorily explained what services, if any, were provided by Geste Advisers to justify payment of any fees to it pursuant to the 2005 Consultancy Contract and some of their explanations have increased the Cayman Liquidators' concerns.

18.6 The Consultancy Contract was executed when the 2008 global financial crisis had already begun to be felt and when it was already apparent that the Plaintiff was in financial distress. The purpose appears to have been to move assets from the Plaintiff to the Fourth Defendant.

18.7 In causing the Plaintiff to execute the Consultancy Contract, the First, Second and Third Defendants acted in breach of their fiduciary duties to the Plaintiff. These duties arise under Cayman Islands law notwithstanding that the First, Second and Third Defendants were in Portugal at all times.

19. The Plaintiff alleges that the Fourth Defendant was guilty of receipt of the benefit of the Consultancy Contract and/or the monies wrongfully paid away by the Plaintiff under the Consultancy Contract knowing that the €22.4 million represented the proceeds of the First, Second and Third Defendant's breach of fiduciary duty or turned a blind eye, with the result that it received the benefit and/or the money as a constructive trustee for the Plaintiff.

20. In support of its claim, the Plaintiff relies on certain regulatory proceedings and criminal convictions in Portugal of the First, Second and Third Defendants in respect of their conduct as directors of Privado Group companies, for which each of them was sentenced to substantial terms of imprisonment.

21. I record at this point that the Fourth Defendant does not accept the Plaintiff's complaints and nothing in this judgment should be understood as amounting to any finding on the merits of those complaints.

## D. The alleged money-go-round

22. The Plaintiff alleges that the money that should have been paid to it as its fee under the Portfolio Management Agreement was diverted to the Fourth Defendant as a result of the Consultancy Agreement and was then deposited with the Plaintiff by the Fourth Defendant in the Plaintiff's capacity as a bank. The Plaintiff alleges that as a result, the proofs of debt submitted on behalf of the Fourth Defendant in 2010 and in November 2017 in the Plaintiff's liquidation in respect of that deposit, represent money that should rightfully belong to the Plaintiff for the benefit of its own creditors, not including the Fourth Defendant.

23. The details underpinning that allegation are:

23.1 On 20 August 2007, the counterparty under the Portfolio Management Agreement paid:

(a) €22,400,677.88 to Geste Advisers representing 9.5% of the overall performance fee as per the Consultancy Agreement; and

(b) €1,178,983.05 to the Plaintiff representing 0.5% of the overall performance fee.

23.2 During December 2007, Geste Advisers made a distribution by way of dividend to the Fourth Defendant of €31,400,000, which included Geste Advisers' share of the performance fee.

23.3 On 28 December 2007, the Fourth Defendant deposited the dividend sum into a bank account it held with the Plaintiff.

23.4 On 18 August 2010, the Fourth Defendant filed the first proof of debt in the Plaintiff's liquidation for €36,347,108 in relation to its unsecured deposit, without providing a more detailed description of the nature of the deposit.

23.5 On 1 November 2017, Ms Revês submitted the second proof of debt on behalf to the Fourth Defendant in respect of the deposit, which she subsequently confirmed should be treated as the effective proof of debt. She has since confirmed to the Cayman Liquidators that the vast majority of the Fourth Defendant's deposit claim represents the dividend it received from Geste Advisers.

## E. The Fourth Defendant's objections to service and jurisdiction

24. The Fourth Defendant seeks to set aside service and the order granting leave to serve the Fourth Defendant in Portugal on three primary grounds, namely that:

24.1 the Plaintiff does not have a seriously arguable claim against the Fourth Defendant for knowing receipt;

24.2 the Plaintiff does not have a genuine intention to pursue the claim against the First, Second or Third Defendants, so that there is no proper basis for the Fourth Defendant to be joined as a *"necessary or proper party"* under GCR O.11, r.1(1)(c) to the claim against the other Defendants, and the Plaintiff's reliance on that gateway to obtain leave to serve out as regards the Fourth Defendant is an abuse of process; and

24.3 the Plaintiff failed to make a fair presentation at the *ex parte* hearing of its application for leave to serve out regarding:

(a) the legal difficulties with the knowing receipt claim;

(b) the absence of a *bona fide* intention to pursue the claim against the First, Second or Third Defendants and the resulting impact on the argument that the Fourth Defendant was a *"necessary or proper party"* under GCR O.11, r.1(1)(c); and

(c) the multiple factors that indicated that the Cayman Islands are not clearly or distinctly the more appropriate forum for determination of the Plaintiff's claim.

25. As regards knowing receipt, the Fourth Defendant argues that if the money in question has passed through a country that does not recognise equitable interests, then a plaintiff's equitable interest will be extinguished. The Fourth Defendant relies on *Byers v Saudi National Bank* [2023] UKSC 51. Mr Lowe submits that Portugal is such a country. I understand Mr Lowe's argument to be as follows:

25.1 When Geste Advisers received the fee and then declared a dividend and paid the dividend over to the Fourth Defendant, those funds continued to be impressed with the Plaintiff's alleged equitable interest because Geste Advisers is a BVI incorporated company and the BVI recognises equitable interests.

25.2 However, the dividend was then received by the Fourth Defendant in Portugal, which does not recognise equitable interests. The Fourth Defendant therefore received the money free from any equitable interest of the Plaintiff.

25.3 Moreover, although the Fourth Defendant then deposited funds with the Plaintiff alleged to include the fee, the Plaintiff's own banking arrangements were located in Portugal and were subject to Portuguese law, which provides another basis for saying that any equitable interest that the Plaintiff might have had in the money in the Fourth Defendant's hands was extinguished.

26. On the question of *"necessary or proper party"*, Mr Lowe submits that the Plaintiff has known at all relevant times that the First Defendant has died and the Second and Third Defendants are in prison, so that none of them are worth powder and shot. He invites me to infer that the Plaintiff has no genuine intention of pursuing enforcement against the First, Second or Third Defendants in Portugal of any judgment obtained. He prays in aid that none of the First, Second or Third Defendants have acknowledged service; the Plaintiff has not entered judgment in default against them; and there is no evidence of any attempt by the Cayman Liquidators to correspond with them regarding the Plaintiff's claim. Mr Lowe contends that it is difficult to resist the inference that they were joined as makeweights in order to provide a jurisdictional hook for the claim against the Fourth Defendant. Mr Lowe says the authorities show that because of its wide ambit, GCR O.11, r.1(1)(c) is recognised to be prone to abuse, and the court should be astute to prevent it.

27. Mr Lowe submits that the Plaintiff bears the burden of showing that the Cayman Islands are clearly or distinctly the most appropriate forum: see *Taiping Trustees Limited v Valley Stone Industry Fund Ltd & Ors* (unreported 29 January 2024). He contends that the Plaintiff has failed to do so. Mr Lowe argues that there are a number of strong factors pointing away from the Cayman Islands and towards Portugal as being the more appropriate forum for determination of the Plaintiff's claim and argues that Portugal is the more appropriate forum. Mr Lowe founds his submission on the factors set out in the following paragraphs.

28. The first factor that Mr Lowe relies upon is that the Cayman Liquidators have not suggested the Plaintiff would not receive a fair trial in Portugal.

29. The second is that this matter is a dispute between two sets of insolvency practitioners each of which have a summary and cost effective procedure to resolve creditor disputes in their respective bankruptcies, however Ms Revês' evidence is that she has very limited funding generally and no funding to defend the Plaintiff's claim in the Cayman Islands, whereas legal aid is available for insolvent companies in Portugal and she would be able to obtain legal aid for any Portuguese proceedings. This points towards Portugal as the more appropriate forum.

30. Third, there is no good reason why the Plaintiff cannot pursue its claim against the Fourth Defendant within the Fourth Defendant's insolvency proceedings in Portugal: Professor Duarte's expert evidence is that all creditors of a Portuguese company in liquidation must pursue their claims within that liquidation, which is similar to the principle in the Cayman Islands.

31. Fourth, the wider interest of the Cayman Islands in the supervision of the statutory claims by the Cayman Liquidators does not arise because the statutory claims have been abandoned and only the knowing receipt claim remains live. There are no public policy or public interest reasons for preferring the Cayman Islands, even if those were a relevant factor when determining forum, which they are not.

32. Fifth, the Plaintiff cannot or should not be allowed to rely on the *"necessary or proper party"* gateway to support its forum argument because the inclusion of the Fourth Defendant is arguably abusive. In addition, it is plain that the First, Second and Third Defendants will not take any active part in the litigation, so reliance on the *"necessary or proper party"* gateway is misplaced.

33. Lastly, Mr Lowe submits that the centre of gravity of the case, and clearly a much more appropriate forum for its trial, is Portugal. He relies on the following:

    33.1 all of the Defendants are based in Portugal, whether as a result of residence or incorporation, as are their assets;

    33.2 the Second and Third Defendants speak Portuguese as their main or only language;

33.3 the Fourth Defendant is in liquidation in Portugal, with a Portuguese liquidator who speaks Portuguese as her main language and is not fluent in English;

33.4 the principal and effective centre for decision making and administration of the entities within the Privado Group was Portugal, the relevant documents are in Portuguese, and any witnesses are likely to be from Portugal and to speak Portuguese as their main or only language;

33.5 the Plaintiff itself had limited connections with the Cayman Islands in that it held a Class "B" banking licence and was only authorised to conduct business with non-Cayman resident customers, and its administration was handled from Portugal;

33.6 the Plaintiff's insolvency has a strong connection with Portugal in that all of its books and records are held in Portugal, its creditors are mostly based in Portugal, and in recognition of these features, all creditors meetings have taken place in Lisbon, Portugal;

33.7 the majority of the Fourth Defendant's creditors are Portuguese persons, based in Portugal;

33.8 the investment which gave rise to the fee payable to the Plaintiff, and which has generated the dispute was in a company whose shares were traded on Euronext in Lisbon;

33.9 the governing law of both the Portfolio Management Agreement and the Consultancy Contract is Portuguese law, and both include exclusive jurisdiction clauses in favour of the Portuguese court in Lisbon;

33.10 the place where the alleged breaches of duty by the First, Second and Third Defendants and the alleged knowing receipt by the Fourth Defendant occurred is Portugal;

33.11 the loss was not suffered in Cayman because the Plaintiff's fee would have been paid into its bank account maintained with BPP SA in Portugal, and the share of the fee paid to Geste Advisers, which the Fourth Defendant deposited in its account with the Plaintiff as part of the dividend payment, was in fact held by the Plaintiff in omnibus accounts which the Plaintiff maintained with BPP SA in Portugal;

33.12 no significant questions of Cayman law will arise since the Cayman Liquidators have abandoned their statutory claims, the claims against the First, Second and Third Defendants are unlikely to proceed, and the applicable law for the knowing receipt claim against the Fourth Defendant and in respect of any question of attribution of the knowledge of the First, Second and Third Defendants to the Fourth Defendant will be Portuguese law; and

33.13 the claim would clearly be more efficiently and more economically brought in Portugal having regard to the location of the likely discovery and witnesses.

34. Separately, Mr Lowe argues that the Plaintiff failed to make a fair presentation of its *ex parte* application for leave to serve out, and that the court should set aside the order on that basis. Ms Revês, and Mr Lowe on her behalf, complains that:

34.1 The Plaintiff emphasised the interests of the Cayman Islands in resolving issues about the conduct of directors of a Cayman company, which is not a legitimate consideration, relied on authorities which are no longer good law and failed to refer the court to *Taiping Trustees Ltd v Valley Stone Industry Fund Ltd & Ors* (unreported, 29 January 2024).

34.2 The Plaintiff failed to warn the court about the need for caution when considering the necessary and proper party gateway, and that this was enhanced in this case because the First, Second and Third Defendants had not been served and were not themselves connected to the Cayman Islands. The Plaintiff did not refer the court to *Altimo Holdings and Investment Ltd v Kyrgyz Mobil Tel Ltd* [2012] 1 WLR 1804 or to *Dicey* on this point.

34.3 The Plaintiff failed to make clear that there was nothing to gainsay an inference that the First, Second and Third Defendants had been included simply as anchor defendants to achieve a basis for serving the Fourth Defendant. The court was not referred to *Ritchie v Lancelot* [2021] 1 CILR 128 and instead was told that the involvement of the First, Second and Third Defendants was a strong reason in favour of the Cayman Islands.

34.4 The court was not shown the decision in *Byers v Saudi National Bank*. The court should have been warned that the Cayman Liquidators had not investigated and had no idea whether the Plaintiff retained any proprietary interest in the funds once they were transferred to Portugal, and that if they did not then that would defeat the Plaintiff's claim.

## F. The Plaintiff's case in response to the Fourth Defendant's objections

35. The Plaintiff's response is that the claim against the Fourth Defendant for knowing receipt is necessarily premised upon the First, Second and Third Defendants' breaches of duty as directors of the Fourth Defendant, which arise as a matter of Cayman Islands law. The Plaintiff will have to establish the primary factual and legal liability of the First, Second and Third Defendants as a

necessary step to proving the Fourth Defendant's secondary liability for knowing receipt arising from those breaches. The Fourth Defendant is thus a necessary or proper party to the claims brought against the First, Second and Third Defendants. Further, staying the claim against the Fourth Defendant in the Cayman Islands in favour of proceedings in Portugal will risk inconsistent judgments as well as increased cost and expense.

36. The Plaintiff says that the breach of duty claims against the First, Second and Third Defendants are subject to Cayman Islands law. Similarly, the claim against the Fourth Defendant for receipt of the proceeds of those breaches of duty with the requisite knowledge of those breaches is also governed by Cayman Islands law.

37. The Plaintiff accepts that enforcement of any judgment it obtains is most likely to be successful against the Fourth Defendant. However, the Plaintiff argues that it is not surprising or improper to bring the claim against all Defendants: it is very common for successful enforcement of a judgment to be more likely against some defendants than others. The claims against the First, Second and Third Defendants are genuine and appropriate, the Cayman Liquidators have concluded they are actionable and pursuing those claims is in the best interests of the Plaintiff's creditors. Both the Plaintiff's liquidation committee and the supervising judge for the Plaintiff's liquidation have authorised the proceedings.

38. Mr Chapman submits that the Cayman Islands, and not Portugal, is the appropriate forum for the trial of the Plaintiff's claims. The Plaintiff accepts that there are numerous connecting factors to Portugal but says that none of those factors alone or in combination outweigh the fact that the Plaintiff's claims concern breaches of fiduciary duties of the directors of a Cayman Islands company, which are governed by Cayman Islands law, and are in principle most appropriately dealt with by the Grand Court. Mr Chapman submits that the vast majority of claims by Cayman Islands companies against their directors for breaches of duty relate to companies that conduct their business in another jurisdiction: if the Fourth Defendant's position were correct, then very few such claims should be tried by the Grand Court.

39. The evidence of Professor Duarte relied upon by the Fourth Defendant is that the equitable doctrine of knowing receipt does not exist as a matter of Portuguese law. The Plaintiff says that, if correct, the Plaintiff cannot make a claim for knowing receipt against the Fourth Defendant in the court in

Portugal. The other possible claims that Professor Duarte has suggested that the Plaintiff could pursue under Portuguese law are very different in nature and would apparently be fraught with difficulty. The Plaintiff therefore needs to pursue its claims in the Cayman Islands. I interpose here that Professor Duarte was not asked and has not expressed an opinion on whether the Portuguese court would apply Cayman Islands law when determining the questions of the First, Second and Third Defendants' breach of fiduciary duty and the Fourth Defendant's knowing receipt, which undermines the force of Mr Chapman's argument.

40. The Plaintiff says it did not breach its duties at the *ex parte* hearing to give full and frank disclosure or to present the application fairly. Even if the Plaintiff should have made the disclosures alleged by the Fourth Defendant, which the Plaintiff disputes, they fall far short of justifying setting aside the *ex parte* order for leave to serve out.

41. Finally, the Plaintiff complains that the basis for the Fourth Defendant's application to set aside the *ex parte* order has been a moving target, with the allegation that the Plaintiff's knowing receipt claim is defective being made for the first time in the Fourth Defendant's skeleton argument. It appears that the Fourth Defendant has simply advanced any and all arguments that have sprung to mind in a desperate attempt to find a basis for challenging the *ex parte* order. In the circumstances, there are two questions: whether the Fourth Defendant should be allowed to advance the arguments in light of the English authority of *Mex Group Worldwide Ltd v Ford* [2024] EWCA Civ 959 and the Fourth Defendant's conduct; and whether they have any merit. The Plaintiff says that the answer to both questions is no.

## G. The relevant law

### *G.1 Service out of the jurisdiction*

*a) Legal test*

42. There was no substantial dispute between the parties on the legal test to be applied when determining whether to permit service out of the jurisdiction. In summary, a plaintiff must satisfy the court that:

42.1 There is a good arguable case that the claim is within one of the gateways in GCR O.11, r.1. A "good arguable case" requires more than a mere prima facie case but does not require proof on the balance of probabilities. This is the initial jurisdictional question.

42.2 As between the plaintiff and the foreign defendant, there must be a serious issue to be tried on the merits, i.e. a substantial question of fact or law, or both. The test is whether there is a real (as opposed to fanciful) prospect of success.

42.3 Where there are disputed questions of fact, the court will look primarily at the plaintiff's case and will not attempt to resolve the dispute on affidavit evidence. However, the defendant can try to show that the plaintiff's evidence is incomplete or plainly wrong. Where the issue is one of Cayman Islands law, the court may go fully into the issue and will refuse leave if it considers that the plaintiff's case is bound to fail.

42.4 The case is a proper one to grant leave to serve out: see GCR O.11, r.4(2). This encompasses the requirement that the Cayman Islands are clearly or distinctly the most appropriate forum to decide the dispute.

*b)* *Necessary or proper party*

43. GCR O.11, r.1(1)(c) allows service on a defendant out of the jurisdiction with leave of the court where:

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

Thus, the "anchor" defendant may be within or outside the Cayman Islands and may already have been served or will be served in due course. In addition, it is important to bear in mind that *"necessary or proper"* are alternatives.

44. In my judgment, in order to be a *"necessary"* party, the claim against the existing defendant must require the joinder of the additional party in order for the claim to proceed, for example where the claim is based upon an alleged conspiracy. Otherwise, such joinder is not *"necessary"*. This alternative therefore provides a narrow gateway for authorisation to serve out of the jurisdiction.

45. However, the inclusion of a defendant as a *"proper"* party is broader in scope. In *Contadora Enterprises SA v Chile Holdings (Cayman) Ltd* [1999] CILR 194 at 202, the Court of Appeal described the test as being:

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

46. A defendant may be a *"proper"* party for the purpose of service out where the liability of several parties, whether cumulative or alternative, depends upon one investigation. This was the basis for Smellie CJ's decision in *Ahmad Hamad Algosaibi and Brothers Company v SAAD Investments Company Limited* (unreported, 25/06/10) to allow joinder of and service out of the jurisdiction on a defendant based abroad, which was then upheld by the Court of Appeal at [2010] 2 CILR 289 quoting Smellie CJ's holding at [65] and confirming it at [79].

47. Justice Henderson in *Condoco Grand Cayman Resort v Broadhurst DaCosta* [2004-05] CILR 236 added the qualification that the court has a discretion to refuse leave to serve out where the involvement of the foreign defendant would confer no real additional benefit to the plaintiff, for example where the proposed defendant has merely induced the tort alleged to have been committed by the local defendant and the total damages will not be increased by the joinder of the defendant.

*c) Appropriate Forum*

48. Based on the English House of Lords judgment in *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460, the Plaintiff identifies the relevant test as being whether the interests of justice are best served by proceedings in the Cayman Islands or in Portugal. The Plaintiff also relies on the statements in that case that the court should look for the jurisdiction with *"the most real and substantial connection"* (478A) with the action in order 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"* (480F).

49. In the English case of *Lungowe v Vedanta Resources plc* [2020] AC 1045 at [66], Lord Briggs interpreted the guidance from *Spiliada* as being that it:

> *"… generally requires a summary examination of connecting factors between the case and one or more jurisdictions in which it could be litigated. Those include matters of practical convenience such as accessibility to courts for parties and witnesses and the availability of a common language so as to minimise the expense and potential for distortion involved in translation of evidence. Although they are important, they are not necessarily conclusive. Connecting factors also include matters such as the system of law which will be applied to decide the issues, the place where the wrongful act or omission occurred and the place where the harm occurred."*

50. There is a healthy thread of authority to the effect that it is generally most appropriate for the courts of the Cayman Islands to determine disputes concerning the management of Cayman Islands incorporated companies and the conduct of their directors and officers, since the law of the Cayman Islands governs that relationship. This factor is given considerable weight when considering forum issues. Examples are:

50.1 *Re Cairnwood Global Technology Fund Limited (in voluntary liquidation)* [2007] CILR 193, where a mutual fund in voluntary liquidation brought claims for breach of duty against its former directors and officers, promoters and manager. The fund was a Cayman Islands company and had Cayman Islands liquidators. However, the fund carried on its business from Georgia, US, as did certain of the defendants, and most of the fund's books and records were kept in Georgia. Nevertheless, the court concluded that those factors did not outweigh the importance of the duties of directors and officers of Cayman Islands companies being governed by Cayman Islands law and being dealt with by the Cayman Islands court.

50.2 *Bancredit Cayman Limited v Pellerano* [2010] 1 CILR 400, where the claim was against a company director for breach of fiduciary duty. The connecting factors were that the company was incorporated in the Cayman Islands, the applicable law was that of the Cayman Islands and the books and records were said to be in the Cayman Islands. Whilst the director's evidence was that the books and records were maintained in another jurisdiction, Henderson J stated that the company's directors and officers were under an obligation to deliver its books and records to the official liquidators in the Cayman Islands, and therefore the location of the books and records tended to favour a trial in the Cayman Islands. The factors pointing away from the Cayman Islands as being the appropriate forum were that the defendant was imprisoned in the Dominican Republic, the company conducted its business in the Dominican Republic, many witnesses were Spanish speaking and largely located in the Dominican Republic, and many of the relevant document were in Spanish.

51. However, the Plaintiff and the Fourth Defendant disagree on whether and to what extent the preference for resolving questions about the management of Cayman Islands incorporated companies and the conduct of their directors and officers is properly to be described as a public policy consideration. It is therefore necessary to consider the relevant cases to trace through how it has been addressed by the courts in the Cayman Islands.

52. I start with the Court of Appeal's judgment in *Contadora Enterprises S.A. v Chile Holdings (Cayman) Ltd* [1999] CILR 194. Collett JA said at 206 that:

> *"… Here is a case of the alleged fraudulent mismanagement of a Cayman international company. The reputation of Cayman international business is to some extent at issue in these proceedings. Furthermore, a judicial system which perceived itself as powerless to intervene effectively to prevent the proceeds of such a fraud from disappearing overseas would inevitably invite disparagement from the international financial community. There are, therefore, strong public policy considerations here which, in my judgment, were rightly taken into account by the learned judge."*

53. In *Telesystem International Wireless Inc v CVC/Opportunity Equity Partners LP* (01/08/22, reported in note form only at [2002] CILR Note 21), the Court of Appeal, comprising Zacca P, Collett and Rowe JJA, held at page 23 of the judgment that:

> *"… for public policy reasons, (a) the status of the Cayman Islands as an advanced and reputable financial center and (b) as a jurisdiction which can and does deal with international disputes between parties who use Cayman Islands companies in their structure, are factors that can be taken into consideration in an appropriate case when deciding* forum non conveniens *issues …".*

The Court of Appeal continued at page 23-24:

> *"We hold that public policy is an important factor to be taken into consideration by the trial judge but it does not trump all other factors".*

The trial judge had found that Brazil was the more appropriate forum and the Court of Appeal upheld that decision.

54. In *KTH Capital Management Ltd v China One Financial Ltd* [2004-05] CILR 213, referring to the Court of Appeal's judgment in *Telesystem*, Smellie CJ stated that:

> *"23. The choice of domicile of a company does, however, carry its own practical significance, in recognizing the benefits and advantages—real or perceived—of incorporation in an established international financial centre such as the Cayman Islands. Implicitly, this includes the reasonable expectation that the courts here are competent and able to resolve any complex dispute that may arise in an efficient and just manner. … Our Court of Appeal has recognized them to be relevant considerations on grounds of public policy …"*

55. In *Re Cairnwood* [2007] CILR 193, a decision of Acting Justice Foster (as he then was), the learned judge said:

> *"35. Having regard to the position of the Cayman Islands as an international financial centre, it is in principle particularly desirable that the courts of this jurisdiction determine issues such as the duties and responsibilities of directors or officers of Cayman companies. This is now well established as a matter of Cayman public policy and law. Of course, that factor may be outweighed by other factors in any particular case …"*

56. Against this line of authority, in *Brasil Telecom S.A. v Opportunity Fund* [2008] CILR 211, Mottley JA, with whom Zacca P agreed, quoted the passage from *Contadora* set out above and noted that counsel had also referred to *KTH Capital Management Ltd* in support of the argument that the judge should have taken public policy considerations into account when deciding the forum question, but did not. Mottley JA discussed the English House of Lords' decision in *Lubbe v Cape plc (No.2)* [2000] 1 W.L.R. 1545 and concluded:

> *"37. [Lord Hope] expressly declined to follow the judgment in the United States, which decided the issue as to where cases should be tried, on the broad ground of public policy. ... Lord Hope reiterated that the issues should be determined by an examination of the interest of the parties before the court and securing the ends of justice. His Lordship concluded that so long as considerations of policy could not be dealt with in the context of the interest of the parties and the ends of justice, they must not be taken into account in applying the* Spiliada *principles to the case before the court.*
>
> *...*
>
> *39. With respect, I decline to follow the earlier statement expressed by Collett, JA, on the ground that it was obiter. I accept the ruling and reasoning of Lord Hope of Craighead in* Lubbe v Cape plc (No. 2)*. To take account of the public policy considerations, as contended by the appellant, would, in my view, be another way of placing additional weight to the factor that jurisdiction to institute proceeding in the Cayman Islands has been founded as of right, because the respondent is incorporated and is domiciled in the Cayman Islands. To do so would make more onerous the burden on the respondent ... It would be giving undue weight to one factor, at the behest and interest of the appellant, to the detriment of the respondent. Such public policy considerations can not co-exist, in this case, with the interest of the parties and the ends of justice, or fall within the* Spiliada *principles.*
>
> *40. Collett, JA rejected the idea that the court of the Cayman Islands would be powerless to intervene to prevent the proceeds of fraudulent mismanagement of a Cayman international company from disappearing overseas. I share the concerns of the Justice of Appeal, about the effect on the Cayman Islands' reputation overseas in the international business community, should the courts in the Cayman Islands be perceived to be powerless to act where fraudulent conduct is being alleged. However, in my opinion, should fraudulent mismanagement of a Cayman international company occur in circumstances in which the reputation of that company is called into question, the courts would likely claim jurisdiction on the basis that there is no other forum considered to be an appropriate forum, within the* Spiliada *principles, and not on the basis of public policy considerations.*
>
> *41. In the circumstances, I hold that the judge was correct in not taking into account public policy considerations in coming to the conclusion that, in the interest of the parties and the ends of justice, a stay should be granted, on the ground that the Cayman Islands are forum non conveniens, and that Brazil is the appropriate forum, being the forum with which the action has the most real and substantial connection."*

57. Taylor JA gave his own judgment, in which he added:

> *"55. The sixth point made by the appellant, concerning 'public policy,' is dealt with in the judgment of Mottley, J.A., with which I agree. The appellant asserts a 'reasonable expectation,' on the part of those dealing with Cayman companies, that the Cayman courts would 'resolve disputes involving those entities in an efficient and just manner.' I agree that public policy will rarely be a factor today in forum choice. It is certainly not in the present case. Neither efficiency,*

> *nor justice, would be served by bringing to this jurisdiction a dispute with which the Cayman Islands has no significant connection, when all conventional criteria for forum choice point clearly to another jurisdiction …"*

58. Justice Doyle in the recent cases of *Taiping Trustees Limited v Valley Stone Industry Fund Ltd* (unreported, 29/01/24) and *Seahawk China Dynamic Fund v Gold Dragon Worldwide Asset Management Limited* (unreported, 02/02/24) held that he was bound to follow *Brasil Telecom*, and *Lubbe* on which it was based, and that public policy considerations should therefore not be taken into account when determining issues of forum or service out of the jurisdiction.

59. The Plaintiff complains that the Court of Appeal in *Brasil Telecom* did not refer to its previous judgment in *Telesystem* and tentatively suggests that the decision in *Brasil Telecom* was *per incuriam* or should not be followed. The Plaintiff does not address Mottley JA's heavy reliance on Lord Hope's speech in *Lubbe* to underpin his reasoning. The Plaintiff says that Justice Doyle was not referred to *Telesystem* in *Taiping* or *Seahawk* and would therefore not have been aware of the decision in that earlier Court of Appeal authority and that it conflicted with *Brasil Telecom*. The Plaintiff also argues that *Brasil Telecom* should be distinguished because it concerns a *forum non conveniens* argument raised by the defendant, who was served in the jurisdiction as of right, not an argument about leave to serve out, where the burden was on the plaintiff.

60. I disagree with the Plaintiff's submission. It is clear from the passages that I have set out that the Court of Appeal in *Brasil Telecom* carefully considered and rejected the statements in *Contadora* about the importance of public policy, which are to the same effect as what was said in *Telesystem*. The Court of Appeal was referred to *KTH Capital Management Ltd*, which itself referenced *Telesystem*. Thirdly, it is notable that Zacca P sat in both appeals and should be assumed to have been aware of the decision in *Telesystem*, when *Brasil Telecom* was before the Court of Appeal. Fourthly, the foundation for Mottley JA's reasoning om *Brasil Telecom* was clearly Lord Hope's speech in *Lubbe*.

61. Lastly, I disagree with the Plaintiff's submission that there is a relevant difference of approach to the forum question in cases involving service out under GCR O.11, r.1(1) and a *forum non conveniens* argument raised by a defendant validly served as of right. In my judgment, it is clear from the authorities that in both situations, the court will apply the guidance provided from *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460. The only difference is who bears the burden of proof.

62. I therefore adopt and apply the approach set out in *Brasil Telecom*, namely that there is no public policy that requires that cases involving the management or operation of Cayman Islands companies or exempted limited partnerships, or alleged breaches of duty by their directors or general partners, should be tried by the Grand Court. Instead, that aspect is simply one of the factors that must be weighed in the balance when determining the *"forum in which the case can be suitably tried for the interests of all the parties and for the ends of justice"*: *Spiliada* at 480F.

***G.2 Full and frank disclosure / fair presentation***

63. Whilst each party relies on different authorities, there is no real dispute between them as to the principles to be applied in respect of issues of full and frank disclosure. The Plaintiff relied, amongst other cases, on the English authority of *Mex Group Worldwide Ltd v Ford* [2024] EWCA Civ 959. In his judgment in that case, Coulson LJ endorsed the summary of the principles to be applied in cases where it is alleged that an applicant failed to comply with their duty of full and frank disclosure, as set out by Carr J (as she then was) in *Tugushev v Orlov & Ors* [2019] EWHC 2031 (Comm) at [7], and the rider of the Court of Appeal in *Derma Med Ltd v Dr Zack Ally* [2024] EWCA Civ 175 that these principles are of general application. It is therefore useful at this point to confirm that those principles also apply in the Cayman Islands and to summarise them as follows:

63.1 An applicant for without notice relief must make full and accurate disclosure of all material facts and draw the court's attention to any significant factual, legal or procedural aspects of the application.

63.2 The applicant's duty is a high one and is of primary importance to ensure the integrity of the court's process. It is the necessary corollary of the court being prepared to depart from the basic principle of fairness that it will hear both sides before reaching a decision. Derogation from that principle is an exceptional course adopted only in cases of extreme urgency or where secrecy is required. The court must be able to rely on the applicant and its attorneys to present the argument in a fair and even-handed manner, drawing attention to evidence and arguments which the applicant can reasonably anticipate the respondent would wish to make.

63.3 Full disclosure must be linked with fair presentation. The judge must be able to have complete confidence in the thoroughness and objectivity of those presenting the case for the applicant. Thus, for example, it is not sufficient merely to exhibit numerous documents. The judge must

be taken to relevant documents and their relevance to the arguments the respondent would wish to make must be explained.

63.4 An applicant must make proper enquiries. They must investigate the cause of action asserted and the facts relied on and then identify and address any likely defences. The applicant's duty to disclose extends to matters of which they would have been aware had they made reasonable enquiries. The urgency of a particular case may make it necessary for evidence to be in a less tidy or complete form than is desirable. But no amount of urgency or practical difficulty can justify a failure to identify the relevant cause of action, the principal facts to be relied on and the principal grounds of objection that the respondent would wish to raise.

63.5 Material facts are those which it is material for the judge to know in dealing with the application as made. The duty requires the applicant to make the court aware of the issues likely to arise and the possible difficulties in the applicant's claim but does not require a detailed analysis of every possible point which may arise. It extends to matters of intention, for example to disclosure of related proceedings or intended proceedings in another jurisdiction.

63.6 Facts that are material will have degrees of relevance. The applicant must maintain a due sense of proportion. Sensible limits have to be drawn, particularly in more complex and heavy commercial cases where the opportunity to raise arguments about non-disclosure will be all the greater. Where alleged non-disclosure is raised, the question is not whether the evidence in support could have been improved and is not to be approached with the benefit of hindsight. The primary question is whether in all the circumstances the effect of any non-disclosure was to mislead the court in any material respect.

63.7 A respondent alleging non-disclosure must clearly and specifically identify the alleged failures, rather than adopt a scatter gun approach. This must be done in the summons and evidence at the outset. It is important to maintain a due sense of proportion in complex cases.

63.8 In general terms it is inappropriate to seek to set aside an order for non-disclosure where the allegations of non-disclosure depend on proof of facts which are in issue in the action, unless the facts are truly so plain that they can be readily and summarily established. A dispute about full and frank disclosure should not require the judge to make findings, even provisionally, on issues which should be more properly reserved for the trial itself. It should not be allowed to turn into a mini-trial of the merits.

63.9 If material non-disclosure is established, the court will be astute to ensure that a claimant who obtains *ex parte* relief without full disclosure is deprived of any advantage they may thereby have derived.

63.10 Whether or not the applicant's non-disclosure was innocent is an important consideration, but is not necessarily decisive. Immediate discharge of the *ex parte* order, without renewal, is likely to be the court's starting point, at least when the failure is substantial or deliberate. It will only be in exceptional circumstances in cases of deliberate non-disclosure or misrepresentation that an *ex parte* order will not be discharged.

63.11 The court generally will take a penal approach, to deter breaches of the duty, and will discharge the *ex parte* order even if the order would still have been made had the relevant matter(s) been brought to its attention at the *ex parte* hearing.

63.12 The court nevertheless has a discretion to continue the *ex parte* relief, or to grant it afresh, despite a failure to disclose. Although the discretion should be exercised sparingly, the overriding consideration will always be the interests of justice.

63.13 The interests of justice require the court to consider matters such as (a) the importance of the facts not disclosed to the issues before the judge; (b) the need to encourage proper compliance with the duty of full and frank disclosure and to deter non-compliance; (c) whether and to what extent the failure to disclose was culpable; (d) the injustice to the applicant which may occur if the order is discharged leaving the respondent free from the relief sought, although a strong case on the merits is not on its own a good excuse for a failure to disclose material facts.

63.14 The interests of justice may sometimes require that an *ex parte* order be continued and that a failure of disclosure be marked in some other way, for example by a suitable costs order. The court has at its disposal a range of options in the event of non-disclosure.

64. Coulson LJ in *Mex Group Worldwide Ltd* provided the following additional practical guidance, which attorneys in the Cayman Islands should take to heart when challenging the adequacy of full and frank disclosure:

> *"127. … It is almost always the position that, no matter how big the case or how complex the underlying issues, a defendant's case that the claimant failed to make full and frank disclosure at the ex parte hearing will stand or fall on no more than a handful of alleged failures. That is because, if the 'big ticket' allegations of failure are not established, or are established but found to be immaterial, then the less significant failures will not bridge the gap. It is the law of diminishing returns. …*

> *128. Accordingly, those preparing this sort of attack in the future should ensure that they concentrate their efforts on alleged failures of disclosure which are clear-cut and obviously important. Quality not quantity should be the watchword. The failure to follow that course, as happened both before the judge and again on appeal, means that there is a real risk that the best points become buried in an avalanche of trivia. …"*

## H. Decision

### *H.1 The Fourth Defendant's conduct in relation to the summons*

65. I have sympathy for the Plaintiff's complaint that the Fourth Defendant's position has been a moving target. It was unhelpful and contrary to the overriding objective for the Fourth Defendant not to have included in its summons and in Ms Revês' first affidavit all of the grounds for setting aside service that it advanced at the hearing. It was equally unhelpful and contrary to the overriding objective for the Fourth Defendant not to provide proper particulars of the complaints about the Plaintiff's full and frank disclosure that it intended to advance until very late in the progress of the summons towards the hearing, despite the Plaintiff's request that it should do so or withdraw the complaint. This was exacerbated by the Fourth Defendant's decision to provide details in its evidence in reply, apparently in an effort to prevent the Plaintiff from being able to respond.

66. On the other hand, the Plaintiff does not argue that it is unable to respond to the Fourth Defendant's complaints or that it needs to file further evidence to do so. Any prejudice to the Plaintiff caused by the Fourth Defendant's conduct therefore appears suitable to be addressed within the question of costs. I therefore do not consider it appropriate to refuse to consider the Fourth Defendant's arguments about alleged failures of the Plaintiff to comply with its duty of full and frank disclosure on their merits.

### *H.2 Good arguable case for service out*

67. I do not accept Mr Lowe's argument for the Fourth Defendant that the Plaintiff does not have a genuine intention to pursue the claim against the First, Second or Third Defendants, and that that undermines the application for leave to serve the Fourth Defendant. I agree with Mr Chapman's submission that the Plaintiff's claim against the First, Second and Third Defendants for breach of fiduciary duty is a necessary precondition to the Plaintiff's claim against the Fourth Defendant for knowing receipt. In other words, the Plaintiff will have to prove the First, Second and/or Third

Defendants' factual and legal liability as a necessary step to proving the Fourth Defendant's secondary liability for knowing receipt arising from the First, Second and/or Third Defendants' breaches of duty.

68. The failure of the First, Second and Third Defendants to participate in the proceedings does not affect that question. The Plaintiff will still need to prove its case against them in order to establish its case against the Fourth Defendant. The fact that the Plaintiff is unlikely to pursue enforcement of the First, Second or Third Defendants' liability against them is not relevant.

69. I therefore reject the Fourth Defendant's argument that the application for leave to serve the Fourth Defendant out of the jurisdiction based on it being a necessary or proper party to the Plaintiff's claim against the First, Second and Third Defendants was an abuse of process. I find that the Plaintiff has a good arguable case that service on the Fourth Defendant out of the jurisdiction was within GCR O.11, r.1(1)(c). The Fourth Defendant is a proper party to the Plaintiff's claim against the First, Second and Third Defendants and determination of the claims against all of them will involve a common investigation and consideration of common questions of law or fact, such that they could all have been joined to the same proceedings if they were within the Cayman Islands.

***H.3 Serious issue to be tried on the merits***

70. The Plaintiff's claim against the First, Second and Third Defendants is for breaches of their duties as directors of a Cayman Islands registered company. That claim should be governed by Cayman Islands law. Similarly, the Plaintiff's claim against the Fourth Defendant is for knowing receipt of the proceeds of those breaches of duty. That claim should also be governed by Cayman Islands law and is seriously arguable. It may be that, following trial, the court will accept the Fourth Defendant's argument that the Fourth Defendant's position is governed by Portuguese law or that the effect of the funds flows is that any equitable interest in the money in question was extinguished and that the Plaintiff's claim therefore fails. However, the factual and legal position is not so clear at this stage to rebut the Plaintiff's case or to persuade me that it is not seriously arguable.

***H.4 Appropriate Forum***

71. I have carefully considered the question whether the Cayman Islands are clearly or distinctly the most appropriate forum for determination of the Plaintiff's claims in light of the guidance from the authorities to which I have referred earlier in this judgment as applied to the facts.

72. I do not give any weight to the following factors advanced by Mr Lowe on behalf of the Fourth Defendant:

72.1 The fact that the governing law of the Portfolio Management Agreement and the Consultancy Contract is Portuguese, and that they have exclusive jurisdiction clauses in favour of the Portuguese court in Lisbon. The Plaintiff's claims are for breach of fiduciary duty and knowing receipt, not for breach of either of those agreements. The relevance of these documents to the issues is likely to be peripheral at best.

72.2 The fact that the investment which gave rise to the fee payable to the Plaintiff, and which has generated the dispute, was in a company whose shares were traded on Euronext in Lisbon. This is likely to be irrelevant to the Plaintiff's claims.

73. I consider that the following factors are neutral in the balance.

73.1 The parties would receive a fair trial in either jurisdiction. This is therefore not a factor that points in favour of one jurisdiction over the other.

73.2 The Plaintiff argues that the relevant loss was suffered in the Cayman Islands; the Fourth Defendant argues that in practical terms it was suffered in Portugal. I cannot resolve this dispute at this stage and therefore treat the location of the loss as being a neutral factor.

73.3 The claim against the Fourth Defendant will be subject to either Cayman Islands law or Portuguese law. If it is subject to Cayman Islands law, then it is clearly a legally viable claim. If it is subject to Portuguese law, then Professor Duarte's evidence is that Portuguese law does not have an equivalent to a claim for knowing receipt and the claim would not be allowed. Neither side addressed me on the conflicts of laws considerations that would apply depending on which system of law applied and in which jurisdiction. It seems to me that there are four possibilities:

(a) If the claim is subject to Cayman Islands law and were to be tried in the Cayman Islands, then the position would be straightforward in that it could be advanced.

(b) If the claim is subject to Cayman Islands law and were to be tried in Portugal, then it can be presumed that the Portuguese court would apply conflicts of law principles and would faithfully apply Cayman Islands law in making its determination on the claim. On that

assumption, there is no or limited prejudice to the Plaintiff in requiring it to pursue its claim in Portugal rather than in the Cayman Islands.

(c) Similarly, if the claim is subject to Portuguese law and were to be tried in Portugal then the position would be straightforward in that it could not be advanced on Professor Duarte's evidence.

(d) If the claim is subject to Portuguese law and were to be tried in the Cayman Islands then the court would apply conflicts of law principles and would faithfully apply Portuguese law and would be required to dismiss the claim assuming that Professor Duarte's evidence is accepted. There is therefore no or limited prejudice to the Fourth Defendant in requiring it to defend the claim in the Cayman Islands rather than in Portugal.

Thus, in my judgment, the location where the claim is tried is not or should not be material to the legal validity or not of the claim.

74. I consider that there are the following factors that more strongly favour one or the other jurisdiction:

74.1 Both jurisdictions provide a summary and cost-effective mechanism to resolve the dispute between the two sets of liquidators. However, Portugal provides the practical benefit for Ms Revês that she would be able to obtain legal aid to assist with funding whereas she would not be able to do so in the Cayman Islands. Thus, access to justice and level playing field factors favour Portugal as the appropriate forum.

74.2 The alleged breaches of duty occurred in Portugal.

74.3 A number of practical factors point towards Portugal as the appropriate forum, so that the claim would be more efficiently and more economically brought in Portugal. These include:

(a) the physical location of the participants and witnesses being Portugal and their spoken language being Portuguese; and

(b) the physical location and language of the relevant documents also being Portugal and Portuguese.

74.4 The fact that the Plaintiff's claims are said to arise under Cayman Islands law and concern alleged breaches of fiduciary duty by directors of a Cayman Islands incorporated company and knowing receipt of money paid to the Fourth Defendant pursuant to their breach of duty is an important factor in favour of the Grand Court but is not decisive.

74.5 The Plaintiff has brought claims against the First, Second and Third Defendants before the courts of the Cayman Islands (albeit served on the Second and Third Defendants only). The Second and Third Defendants have not challenged jurisdiction, and so the claims against them will proceed to a determination, even in the absence of participation by the Second and Third Defendants. This factor points in favour of the Cayman Islands as the appropriate forum for the determination of the Plaintiff's claim against the Fourth Defendant to avoid duplication of work and the risk of conflicting judgments.

75. Taking all these various factors into account, I conclude that the Cayman Islands is the forum in which the case can most suitably be tried for the interests of all the parties and for the ends of justice. I acknowledge that the practical factors identified favour the conclusion that the claim would be more efficiently and more economically tried in Portugal. However, the factor of the desirability of the courts of the Cayman Islands determining questions of breach of fiduciary duty by the First, Second and Third Defendants as directors of a Cayman Islands company and the associated knowing receipt claim coupled with the fact that the claims against the Second and Third Defendants will proceed before the courts of the Cayman Islands tips the balance in favour of the Cayman Islands as being the location where the case can most suitably be tried for the interests of all the parties and for the ends of justice.

***H.5 Full and frank disclosure***

76. I have also carefully considered the complaints put forward by the Fourth Defendant about the adequacy of the Plaintiff's full and frank disclosure when making the application for leave to serve the Defendants out of the jurisdiction. I do not consider that those complaints are sufficiently made out or are sufficiently serious to justify discharging the order permitting service out.

76.1 Whilst the Plaintiff did not cite *Taiping Trustees Ltd* at the *ex parte* hearing, I do not consider that the Plaintiff overstated the importance of the factor that disputes concerning Cayman Islands companies and exempted limited partnerships should be decided by the courts of the Cayman Islands. Although this was wrongly said to be a public policy issue, the Plaintiff's argument was that it was a factor in the overall balance, not that it was determinative, which is a reasonable reflection of the law.

76.2 The Plaintiff did not give the court an explicit warning that it should be cautious about invoking GCR O.11, r.1(1)(c) because it allows service where there is no connection with the jurisdiction

other than that the defendant is a necessary or proper party. The Plaintiff did not direct the court's attention to the warnings in *Altimo Holdings and Investment Ltd v Kyrgyz Mobil Tel Ltd* [2012] 1 WLR 1804 or *Ritchie v Lancelot* [2021] 1 CILR 128. However, as submitted by Mr Chapman and as I have accepted earlier in this judgment, I am satisfied that there is a *bona fide* reason for the Plaintiff wishing to pursue its claims against the First, Second and Third Defendants (or the Second and Third Defendants in light of the First Defendant's death). This is not therefore a case where a warning of the kind postulated by Mr Lowe was required or where raising it would be likely to have resulted in leave to serve out against the Fourth Defendant being refused.

76.3 There is nothing in the complaint that the warning should have been enhanced because the First, Second and Third Defendants had not been served and were not themselves connected to the Cayman Islands. GCR O.11, r.1(1)(c) expressly allows service where the anchor defendant *"has been or will be duly served within or out of the jurisdiction."*

76.4 The Plaintiff did not refer me to the decision in *Byers v Saudi National Bank*. However, it is unclear on the facts that *Byers* applies to defeat the Plaintiff's claim against the Fourth Defendant. If the Plaintiff had raised the issue, it would most likely have submitted that it was unclear whether *Byers* would prevent the claim from being advanced, and that was something that would have to be determined at trial. The Plaintiff would have been entitled to maintain that it did not have the result that there was no longer a serious issue to be tried between the Plaintiff and the Fourth Defendant.

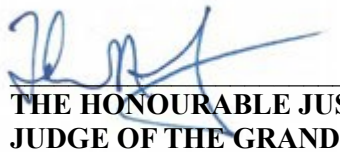
77. Finally, it is pertinent to note that the Plaintiff adverted to the key factors that indicated Portugal to be an appropriate forum, which Mr Lowe raised, including that the Defendants are all based in Portugal, the First, Second and Third Defendants are Portuguese, the governing law of the 2001 Portfolio Management Agreement and the 2005 Consultancy Contract is Portuguese, and the majority of the documents relevant to the matters at issue are likely to have been originally created in Portuguese. There was thus no failure to disclosure the relevant factors in favour of Portugal as the most appropriate forum.

## I. Disposal

78. I therefore order that the Second and Third Plaintiffs should be struck out as parties, and, for the reasons set out in detail in this judgment, I dismiss the Fourth Defendant's summons.

79. My provisional view is that the Fourth Defendant should pay the Plaintiff's costs on the standard basis. However, within 14 days of handing down of this judgment, counsel should indicate: (a) whether they wish to be heard on costs and any consequential matters, providing their agreed available dates and time estimate for a hearing; or (b) whether they will submit written submissions on those points within a further 14 days. In either case, counsel should provide a draft order, agreed if possible, in advance of the hearing or with their written submissions.

**Dated 11 August 2025**



**THE HONOURABLE JUSTICE JALIL ASIF KC**
**JUDGE OF THE GRAND COURT**