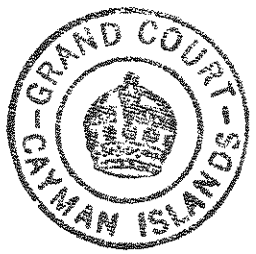
IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

Cause No: FSD 160/2012

BETWEEN:

WEAVERING MACRO FIXED INCOME FUND LIMITED (IN OFFICIAL LIQUIDATION)

PLAINTIFF



AND:

1. **ERNST & YOUNG CHARTERED ACCOUNTANTS (A FIRM)**

FIRST DEFENDANT

2. **ERNST & YOUNG LTD.**

SECOND DEFENDANT

3. **ERNST & YOUNG (A FIRM)**

THIRD DEFENDANT

Appearances: **Mr. James Thom Q.C. and Mr. Michael Makridakis of Ogier instructed by Ms. Sophia Harrison of Ogier on behalf of the Plaintiff**

Mr. Justin Fenwick Q.C. and Mr. Graham Chapman instructed by Mr. Michael Mulligan and Mr. Ben Hobden of Conyers Dill & Pearman (Cayman) Limited on behalf of the Defendants

Before: **The Hon. Mr. Justice Charles Quin**

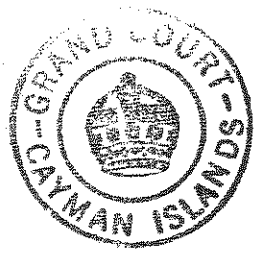
Heard: **8th and 9th August 2013**

JUDGMENT

INTRODUCTION

1. This is the hearing of the Plaintiff's Summons dated the 22nd April 2013 seeking the following relief:

i. A determination, further to GCR O.14A r.1(1), whether on the true construction of the Standstill Deed dated the 21st October 2012 and made between the Plaintiff and the Defendants ("the Deed"), the issue by the Plaintiff of the Writ of Summons herein at a time before 5 p.m. on the 30th November 2012 was a breach of clause 2.4 of the Deed, and if so:



a) Whether the legal consequence of such breach is that the Plaintiff's proceedings herein are invalid; and/or

b) Whether the Defendants affirmed the Deed with knowledge of the breach; and/or

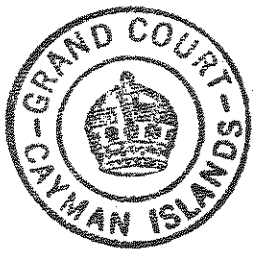
c) Whether by reason of such breach the Defendants were entitled to, and by their Attorneys' letter dated the 2nd April 2013 did determine the Deed by acceptance of a repudiation consisting of the issue of the Writ of Summon herein; and if so

d) Whether the legal consequence of such determination is to preclude the Plaintiff from relying upon the suspension of time which had been provided for by clauses 2.1 and 2.3 of the Deed.

ii. Such further or other orders as thought appropriate by this Honourable Court.

iii. An Order that the first, second and third Defendants do pay the Plaintiff's costs of the application.

2. The Plaintiff's application is grounded by the affidavits of Sophia Victoria Harrison ("Ms. Harrison"), dated the 28th May 2013 and the 11th July 2013. The Defendants' opposition to the Plaintiff's Summons is grounded by the affidavit of Michael McKerr ("Mr. McKerr"), dated the 20th June 2013.



SUMMARY OF FACTS

3. For the sole purpose of the hearing of the Plaintiff's GCR O.14A Summons, many of the following facts are agreed.

4. The Plaintiff, also referred to as "the Fund", was incorporated in the Cayman Islands on the 2nd April 2003. It traded as an open-ended investment fund from about August 2003 until March 2009. It entered liquidation on the 19th March 2009.

5. The Plaintiff's case is, in short, that a fraud was perpetrated by Magnus Peterson, a director and Chief Operating Officer of the Fund's investment manager – Weavering Capital (UK) Limited ("WCUK"). His stepfather, Hans Ekstrom, and brother, Stefan Peterson, who were, at all material time, the directors of the Fund acted in deliberate breach of their fiduciary duties by consciously abstaining from carrying out their duty of oversight of the Fund's affairs and thus failed to detect or prevent the fraud.

6. The Fund alleges that Magnus Peterson dishonestly inflated the reported net asset value ("NAV") of the Fund by using sham transactions with a related party (which he also controlled), Weavering Capital Fund Limited ("WCF"). In particular it alleges that sham over the counter ("OTC") Interest Rate Swap ("IRS") transactions between WCF and the Fund were used to this end by creating a value for the Fund which was booked as an unrealised gain, which was effectively rolled into further IRS transactions between the parties such that the unrealised gain was never realised in the way of a payment by WCF to the Fund. It is alleged that WCF was never in a position to make any such payments in any event.

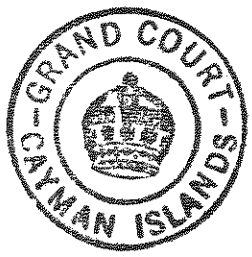
7. The Fund alleges that as a consequence of the dishonestly inflated NAV there was an increase in investment in the Fund with the result that the continuing surplus of investment proceeds over redemption payments assisted the Fund to continue to appear solvent.

8. The Fund retained the Defendants (it matters not for present purposes to distinguish between them) in relation to the audit of its financial statements for the periods ended 31st December 2004, 2005, 2006, and 2007.

9. The Plaintiff alleges that the Defendants acted dishonestly in relation to the audits of the financial statements for the periods ended 31st December 2005, 2006 and 2007. It alleges that three separate individuals employed by the Defendants acted dishonestly in respect of the three separate audits for the years 2005, 2006 and 2007. It also alleges that the Defendants acted in breach of contract and/or negligently as regards the audit.

10. The claim is denied in full by the Defendants.

11. The Plaintiff alleges that had the Defendants not produced dishonest audit reports then the (allegedly) true NAV position of the Fund would have been revealed and it would, as a result, have entered into liquidation sooner, avoiding, it is said, losses of (depending on which version of the case is considered) anything up to something like US$400 million.



12. The Plaintiff has also brought proceedings in this Court against its directors (Messrs. Peterson and Ekstrom) and is also pursuing proceedings against the Administrator of the Fund, BNY Mellon Investment Servicing (International) Limited ("PNC").

13. On the 26th January 2012 the Plaintiff's attorneys sent a letter before action to the Defendants' attorneys, indicating that the Fund intended to bring proceedings against the Defendants alleging negligence, breach of contract and deceit.

14. The Defendants' attorneys sent a substantive response on the 29th March 2012 and stated that the Plaintiff's claim was misconceived. The Defendants' attorneys also stated that the Defendants would put in a proof of debt for their costs pursuant to an indemnity in the retainer letters.

15. On the 1st May 2012 the Plaintiff's attorneys wrote to the Defendant's attorneys and stated that the Fund was minded to issue proceedings and asked the Defendants' attorneys to identify the correct parties to be sued. The Plaintiff's attorneys also asked whether the Defendants' attorneys were instructed to accept service.

16. On the 7th May 2012 the Defendants' attorneys identified the parties to be sued. It was at this point that the parties entered into "without prejudice" negotiations and they agreed the first Standstill Agreement dated the 9th May 2012. Under the heading "Background" at recital C, the first Standstill Agreement stated:

> *"The parties wish to enter into this standstill deed to prevent the running of the limitation period during the term of this deed."*

It was also stated in the background provisions that:

> *"Nothing in this deed waives any limitations or other defences that exist prior to the execution of this deed."*

17. Clause 2 of the first Standstill Agreement stated:

> *"2.1 The parties hereby agree that:*
>
> *(a) For all purposes of any defence or argument based on limitation, time bar, laches, delay or any related issue in connection with the Dispute ("Limitation Defence"), time will be suspended from the date of this deed until the earlier of any of the dates or events referred to in paragraph 2.3 (Period).*
>
> *(b) no party shall raise any limitation defence that relies on time running during the Period."*
>
> *"2.2 No party will object to another party joining any additional persons to the proceedings by using any Limitation Defence that relies on time running during the Period.*
>
> *"2.3 The suspension of time under this deed shall continue in force until the earlier of (Long Stop Date):*
>
> *(a) 14 days after the service by any party of a notice stating that the running of time is to recommence; or*
>
> *(b) 21st June 2012.*
>
> *"2.4 This deed shall prevent the parties issuing and dispatching and serving proceedings in relation to the Dispute until the Long Stop Date."*

18. On the 20th June 2012 the parties entered into a second Standstill Agreement. For these purposes the only material change was at clause 2 – the agreement-to-suspend-time clause – which was amended to insert a new Long Stop Date from the 21st June 2012 to the 14th September 2012.

19. Again, under the heading "Background" at recital C it is repeated that:

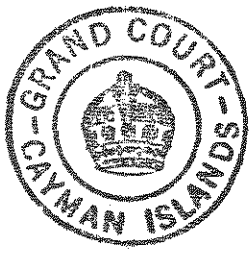
> *"The parties wished to enter into this further standstill deed to prevent the running of the limitation period during the further term set out in this deed."*

And at recital E, the words that were originally contained in recital C of the first Standstill Agreement remained, namely:

> *"Nothing in this deed waives any limitations or other defences that exists prior to the execution of this deed."*

20. The same provisions in relation to the suspension of time remained – i.e. 2.3 read:

> *"2.3 The suspension of time under this deed shall continue in force until the earlier of (Long Stop Date):*
>
> *(a) 14 days after the service by any party of a notice stating that the running of time is to recommence; or*
>
> *(b) 14th September 2012.*



21. Clause 2.4 has the same wording as the first Standstill Agreement and reads:

> *"2.4 This deed shall prevent the parties issuing and dispatching and serving proceedings in relation to the Dispute until the Long Stop Date."*

22. On the 12th September 2012 the parties entered into a third Standstill Agreement. For our purposes, the only material amendment again related to clause 2.3 which stated that the Long Stop Date was to be the 15th October 2012. However, in the third Standstill Agreement clause 2.3(b) reads "*5:00 pm on the 15th October 2012.*" This was the first time that a specific time was inserted in the Long Stop Date.

23. On the 21st October 2012, the parties entered into their fourth and last Standstill Agreement. Again, the only material amendment was the extension of the Long Stop Date to the 30th November 2012. In this fourth Standstill Agreement the time of 5 p.m. was also inserted in the Long Stop Date in clause 2.3(b) which reads *"5:00 pm on the 30 November 2012"*. The wording in clause 2.4 remained as it did in the previous three Standstill Agreements:

> *"2.4 This deed shall prevent the parties issuing and dispatching and serving proceedings in relation to the Dispute until the Long Stop Date."*

24. The important purpose provision under the heading "Background" under recital E that:

> *"The parties now wish to enter into this further standstill deed to prevent the running of the limitation period during the further term set out in this deed"*

remains at recital C as does the wording,

> *"Nothing in this Deed waives any limitations or other defences that exist prior to the execution of this Deed"* remain at recital E.

25. The Plaintiff relies on the affidavits of Ms. Harrison dated the 28th May 2013 and the 11th July 2013 in which Ms. Harrison provides factual background and exhibits relevant documents and correspondence.

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26. The Plaintiff's case against the Defendants is that they are responsible for the EY Cayman and Irish entities which audited the Plaintiff's financial statements for the year ending 31st December 2005, 2006 and 2007. The audits were carried out in each case in the Spring/Summer of the following year, with the reporting date of the 30th June in each successive year. The Plaintiff pleads that by reason of the unqualified auditors' reports given in respect of those financial statements, the Defendants are liable in negligence, for breach of contract and in deceit.

27. Ms. Harrison deposes to the fact that the audit for the period ending 31st December 2005 took place in 2006. Accordingly, the Plaintiff relies on a number of matters which took place in May 2006 beginning with an email sent on the 10th May 2006.

28. Ms. Harrison states that whilst the Plaintiff's case would be that time started to run for the purposes of the claim in relation to this audit no earlier than the date of EY's auditors' report which is the 29th June 2006, the sixth anniversary of those matters in May 2006 was fast approaching. Ms. Harrison avers that the Plaintiff was therefore intent upon issuing proceedings on or before the 9th May 2012.

29. By letter dated the 7th May 2012 the Plaintiff's attorneys identified to the Defendants' attorneys the EY entities against which proceedings would be issued. Ms. Harrison avers that the Plaintiff was on the point of issuing proceedings when the Defendants agreed to enter into a standstill deed to prevent time running for limitation purposes. Ms. Harrison explains that it also enabled the parties to engage in without prejudice negotiations, without the necessity for proceedings being filed. Accordingly, the first Standstill Agreement is dated the 9th May 2012. Ms. Harrison submits that the Plaintiff could simply have issued proceedings, and thereafter

agreed to stay the proceedings. This would have enabled the parties to enter into negotiations without prejudicing the Plaintiff's position in relation to limitation. However, Ms. Harrison points out that had the Plaintiff issued proceedings on the 9th May 2012, then the Plaintiff's allegations contained in its pleadings would become a matter of public record and could consequently have damaged the reputation of the Defendants. Accordingly, Ms. Harrison states that the suspension of time for bringing proceedings made it possible for a compromise to be effected (if the parties were able to agree terms) without the Plaintiff's allegations being made public.

30. The four Standstill Deeds were entered into between the parties from the 9th May to the 30th November 2012. However, as Ms. Harrison points out, the negotiations did not resolve the dispute and the suspension of time under the final Deed was due to expire at "5:00 pm on the 30th November 2012."

31. The Writ was issued on the 30th November 2012. As Ms. Harrison states in her affidavit, it is common ground between the parties that the Writ was issued before 5 p.m. on that day. Ms. Harrison deposes to the fact that it could not have been issued on or after 5 p.m. on the 30th November 2012 since the Court's office would not have been open at that time.

32. On the 21st March 2013 the Plaintiff's attorneys wrote to the Defendants' attorneys asking if they had instructions to accept service of the Plaintiff's Writ of Summons and Statement of Claim.

33. On the 26th March 2013 the Defendants' attorneys wrote to the Plaintiff's attorneys confirming that they had instructions to accept service on behalf of the Defendants.

34. The Plaintiff's Writ of Summons and Statement of Claim were served on the 26th March 2013 by service on the Defendants' attorneys, the latter having confirmed that they were instructed to accept service earlier that day. The Defendants' attorneys did not raise any question regarding the Writ of Summons being issued on the 30th November 2012 but expressly stated that they reserved the rights and position of the Defendants.

35. On the 28th March 2013 the Defendants' attorneys wrote to the Plaintiff's attorneys to acknowledge receipt of the Plaintiff's Writ of Summons and Statement of Claim and to request an extension of time for service of their Defence. Again the Defendants' attorneys raised no question regarding the Writ of Summons being issued on the 30th November 2012.

36. On the 2nd April 2013 the Defendants' attorneys wrote to the Plaintiff's attorneys requesting security for the Defendants' costs. The Defendants' attorneys stated that the Defendants deny any liability and that the Plaintiff's claim is misconceived. In addition, the Defendants' attorneys confirmed that the Defendants would submit a proof of debt in respect of the indemnities contained in the engagement letters and the Fund's articles of association. The Defendants' attorneys did not raise any question regarding the issue of the Writ of Summons on the 30th November 2012.

37. In a second letter dated the 2nd April 2013 the Defendants' attorneys wrote to the Plaintiff's attorneys taking the point that, because the Writ was issued before 5 p.m. on the 30th November 2012, it was issued prematurely, and in breach of clause 2.4 of the fourth Standstill Deed, with the consequences, principally, that the proceedings were irregular and deprived the Plaintiff of the right to rely upon the fourth Standstill Deed.

38. The Defendants rely upon the affidavit of Mr. McKerr dated the 20th June 2013 in which Mr. McKerr sets out the Defendants' position in relation to this GCR O.14A application and exhibits relevant correspondence and draft agreed facts.

39. Mr. McKerr's evidence is that the suspension of time under the final Standstill Deed was due to expire at 5 p.m. on the 30th November 2012. Mr. McKerr states at paragraph 18 that the proceedings were issued prematurely and in breach of the terms of the Deeds prior to 5 p.m. on the 30th November 2012, because the Fund and its advisors anticipated that a potentially relevant time period might expire if the Fund were to adhere to its contractual obligations under the Standstill Deed. It would appear therefore that the Fund's breach of the contractual terms of the Standstill Deed was deliberate.

40. Mr. McKerr contends that the issue of the Writ was not inadvertent. He goes on to state that the Plaintiff could have issued the Writ on the following Monday – the 3rd December 2012 – or any time thereafter. Mr. McKerr states that this strongly suggests that the decision to issue prior to 5 p.m. on the 30th November 2012, in breach of the Standstill Deeds was deliberate.

POSITION OF THE PLAINTIFF

41. The Plaintiff's case is that it was entitled to issue proceedings at any time on the 30th November 2012 so that there was no breach of the fourth Standstill Deed.

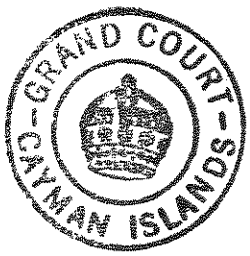
42. The Plaintiff contends further that the prohibition in clause 2.4 of the fourth Standstill Deed was not against issuing proceedings but against "issuing and despatching and serving proceedings." Accordingly, the Plaintiff's position is that since it only issued proceedings on the 30th November 2012, but did not then dispatch or serve them, there was no breach.

43. The Plaintiff disputes the Defendants' contention that the proceedings are irregular and invalid, and further disputes that there was any repudiatory breach of the Deed. If, however, the Court finds that there was a repudiatory breach of the Deed, the Defendants affirmed the Deed.

44. Leading counsel Mr. Thom Q.C. submits that, on the Defendants' case, the proceedings have not been issued contrary to or outside the time allowed by any statutory provision or any provision of the Grand Court Rules. The only breach alleged is a breach of contract personal to the parties, in the form of the fourth Standstill Deed.

45. Furthermore, Mr. Thom argues that it is a fundamental principle of the rule of law that parties have a right to bring legal proceedings and submits that a private agreement should not deprive a Cayman Islands company, such as the Fund, of its right to bring proceedings before the Grand Court for determination.

46. In order to establish repudiation, the Defendants have to demonstrate that one of three circumstances exists:



a. Renunciation by a party of his liabilities under the contract;

b. Impossibility of person created by a party's own act.

c. Total or partial failure of performance – but this must go to the root of the contract.

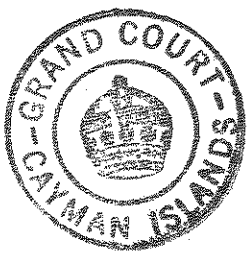
The Plaintiff argues that a. and b. do not apply. As to total or partial failure of performance, the Plaintiff maintains that the Fund has never evinced an intention not to be bound by the terms of the fourth Standstill Deed, nor has the Fund done any act making performance impossible.

47. The Plaintiff's case is that the Defendants knew they had a right to accept the repudiation. They further submit that the Defendants knew this long before their attorneys' second letter of the 2nd April 2013.

48. By writing to the Plaintiff's attorneys on the 28th March to acknowledge receipt of the Statement of Claim and to request an extension of time for service of the Defence, the Defendants have affirmed the fourth Standstill Deed. Furthermore, the Plaintiff argues that Defendants' attorneys' first Letter, dated the 2nd April 2013, asking for security for costs, is further affirmation that the Defendants accepted that the proceedings were regular and valid and constituted an election to affirm the fourth Standstill Deed.

POSITION OF THE DEFENDANTS

49. In his submissions, leading counsel, Mr. Fenwick Q.C., on behalf of the Defendants submits that the Plaintiff's Summons raises an important issue of public policy as to the extent to which the Court will uphold the terms of Standstill Agreements in order to encourage the settlement of disputes. Mr. Fenwick submits that the Court has an obvious interest in the consensual resolution of disputes and adds that the effect of limitation acts all too often lead to the commencement of proceedings which, if given more time, the parties could have resolved without recourse to the Court. Accordingly Mr. Fenwick contends that the Court should support consensual arrangements between the parties where by contract, they preserve the jurisdiction of the Court that would otherwise be removed by the expiry of statutory limitation periods. Leading counsel for the Defendants submits that what is important in this case is that a critical element to the effectiveness of these arrangements is the preparedness of the Court to uphold the contracts entered into between the parties by requiring the parties to adhere to their terms. Mr. Fenwick submits that if the Plaintiff is permitted to retain the benefit of issuing proceedings in breach of the terms of the Standstill Agreement, then faith and trust in these important consensual arrangements will be undermined, with the inevitable result that parties will issue proceedings rather than enter into Standstill Agreements.



50. The Defendants' case as set out in Mr. McKerr's affidavit is that there is a plain, obvious and deliberate breach of the terms of the fourth Standstill Deed, and, because it was filed before 5 p.m. on the 30th November 2012, the Writ is irregular, invalid and liable to be struck out as an abuse of process. Putting it another way: the Plaintiff's issuing of the Writ before 5 p.m. on the 30th November 2012, was a repudiatory breach of the terms of the fourth Standstill Deed, which was accepted by the Defendants – who are, consequently, entitled to plead and rely upon their limitation defence, which relies on the passage of time during the currency of the four Standstill Agreements.

51. The Defendants submit that the breach renders the proceedings irregular, invalid and/or an abuse of the process of the Court.

52. The Defendants rely upon the dicta of Lord Diplock in ***Hunter v. Chief Constable of the West Midlands Police*** [1982] A.C. 529 at page 536 where he states:

> "*....misuse of its (the court's) procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right thinking people.*"

Accordingly, Mr. Fenwick submits that the Plaintiff should not be permitted to take advantage of its own breach of contract in issuing the proceedings prematurely on the 30th November 2012. Further, leading counsel submits that to allow the Plaintiff to continue with the proceedings with the agreed suspension of time remaining in place would be manifestly unfair to the Defendants.

53. The Defendants' case is that the Plaintiff's breach of the October Standstill Agreement entitles the Defendants to treat the Agreement as discharged. The Defendants' leading counsel submits that clause 2, and, by their very nature, the conditions in sub clauses 2.1 and 2.4 embody the essential quid pro quo between the parties that forms the essence of their bargain and I quote from paragraph 58 of the Defendant's written submissions:

> *"no limitation of defence will be raised and time will be suspended in consideration for proceedings not being issued until the Long Stop Date."*

Accordingly, if proceedings are issued in breach of clause 2.4, then that would be a breach of the condition entitling the innocent parties, namely the Defendants, to treat the bargain as discharged.

54. Furthermore, it is the Defendants' position that the Plaintiff's repudiatory breach of the contract was accepted in terms by the Defendants' attorneys second Letter of the 2nd of April 2013.

55. In answer to the Plaintiff's submission that the Defendants affirmed the repudiatory breach by their letter of the 26th March 2013 and the first letter of the 2nd April 2013, Mr. Fenwick points to the fact that the Defendants' attorneys' letter of the 26th March 2013 stated that it was:

> *"..... entirely without prejudice to [the Defendants'] position in respect of such proceedings, and the subsequent request for an extension of time and security for costs do not derogate from that reservation of rights."*

56. The Defendants contend that their request for an extension of time for the service of their defence and for security of costs do not constitute an affirmation of the October Standstill Agreement in any event.

57. Finally on this point it is the Defendants' position that there is nothing contained in the correspondence or conduct of the Defendants that could be said to amount an unequivocal expression of an intention to carry on with the contract.

58. Accordingly, the Defendants submit that the effect of their acceptance of the repudiatory breach of the terms of the October Standstill Agreement is not in dispute and it eliminates the Plaintiff's claim in relation to the 2005 audit. The further effect of the Defendants' acceptance of the repudiatory breach means that the Defendants have an unanswerable limitation defence to that claim and, accordingly, that claim in relation to the 2005 audit falls to be struck out or summarily dismissed, if not discontinued by the Plaintiff.

ANALYSIS AND CONCLUSION

59. The first and fundamental question the Court must address is: Was the Plaintiff's issue of the Writ of Summons before 5:00 p.m. on the 30th November 2012 a breach of clause 2.4 of the October Standstill Deed?

60. I find that in order to give this question the scrutiny and analysis it requires, it is necessary to review at considerable length and in some detail the history of the development of the principles of construction on the interpretation of contractual documents such as the fourth Standstill Agreement.

61. In ***Mannai Investment Co. Ltd. v. Eagle Star Life Assurance Co. Ltd.*** [1997] A.C. 749, the House of Lords, and in particular, Lords Steyn and Hoffman, considered the question of construction of notices to determine landlord and tenant leases. At letter G on page 767 Lord Steyn stated:

> *"(2) The question is not how the landlord understood the notices. The construction of the notices must be approached objectively. The issue is how a reasonable recipient would have understood the notices. And in considering this question the notices must be construed taking into account the relevant objective contextual scene...Relying on the reasoning in Lord Wilberforce's speech in the* ***Reardon Smith [Line Ltd. v. Yngvar Hansen-Tangen]***[1] *case, at pp 996D-997D, three propositions can be formulated. First, in respect of contracts and contractual notices the contextual scene is always relevant. Secondly, what is admissible as a matter of the rules of evidence under this heading is what is arguably relevant. But admissibility is not the decisive matter. The real question is what evidence of surrounding circumstances may ultimately be allowed to influence the question of interpretation. That depends on what meanings the language read against the objective contextual scene will let in. Thirdly, the enquiry is objective: the question is what reasonable*

[1] ***Reardon Smith Line Ltd. v. Yngvar Hansen-Tangen*** [1976] 1 W.L.R. 989

persons, circumstanced as the actual parties were, would have had in mind. It follows that one cannot ignore that a reasonable recipient of the notices would have had in the forefront of his mind the terms of the leases. Given that the reasonable recipient must be credited with knowledge of the critical date and the terms of clause 7(13) the question is simply how the reasonable recipient would have understood such a notice."

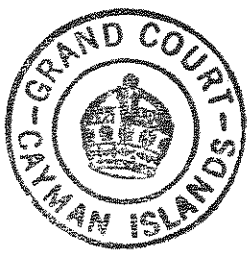
Continuing at letter A on page 771 Lord Steyn stated:

"*In determining the meaning of the language of a commercial contract, and unilateral contractual notices, the law therefore generally favours a commercially sensible construction. The reason for this approach is that a commercial construction is more likely to give effect to the intention of the parties. Words are therefore interpreted in the way in which a reasonable commercial person would construe them. And the standard of the reasonable commercial person is hostile to technical interpretations and undue emphasis on niceties of language.*"

Lord Hoffman at letter E on page 774, provides the memorable illustration from Richard Brinsley Sheridan's classic comedy, "*The Rivals*" (1775) of the words of Mrs. Malaprop: "*She is as obstinate as an allegory on the banks of the Nile*" and states:

"*... we reject the conventional or literal meaning of allegory as making nonsense of the sentence and substitute "alligator" by using our background knowledge of the things likely to be found on the banks of the Nile and choosing one which sounds rather like "allegory".*

More seriously, Lord Hoffman stated at letter H:



> *"If one applies that kind of interpretation to the notice in this case, there will also be no ambiguity. The reasonable recipient will see that in purporting to terminate pursuant to clause 7(13) but naming 12 January 1995 as the day upon which he will do so, the tenant has made a mistake. He will reject as too improbable the possibility that the tenant meant that unless he could terminate on 12 January, he did not want to terminate at all. He will therefore understand the notice to mean that the tenant wants to terminate on the date on which, in accordance with clause 7(13), he may do so, i.e. 13 January."*

Lord Hoffman went on to state at letter C on page 775:

> *"It is of course true that the law is not concerned with the speaker's subjective intentions. But the notion that the law's concern is therefore with the "meaning of his words" conceals an important ambiguity. The ambiguity lies in a failure to distinguish between the meanings of words and the question of what would be understood as the meaning of a person who uses words. The meaning of words, as they would appear in a dictionary, and the effect of their syntactical arrangement, as it would appear in a grammar, is part of the material which we use to understand a speaker's utterance. But it is only a part; another part is our knowledge of the background against which the utterance was made. It is that background which enables us, not only to choose the intended meaning when a word has more than one dictionary meaning but also, in the ways I have explained, to understand a speaker's meaning, often without ambiguity, when he has used the wrong words."*

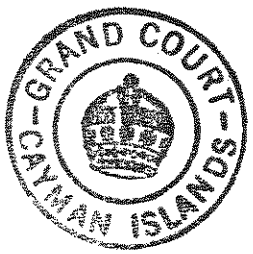
At letters G and H on page 779 Lord Hoffman states:

> *"In the case of commercial contracts, the restriction on the use of background has been quietly dropped. There are certain special kinds of evidence, such as previous negotiations and express declarations of intent, which for practical reasons which it is unnecessary to analyse, are inadmissible in aid of construction. They can be used only in an action for rectification. But apart from these exceptions, commercial contracts are construed in the light of all the background which could reasonably have been expected to have been available to the parties in order to ascertain what would objectively have been understood to be their intention:* ***Prenn v. Simmonds*** *[1971] 1 W.L.R. 1381, 1383. The fact that the words are capable of a literal application is no obstacle to evidence which demonstrates what a reasonable person with knowledge of the background would have understood the parties to mean, even if this compels one to say that they used the wrong words."*

62. Lord Hoffman again considers the construction of contractual documents in another House of Lords decision of ***Investors Compensation Scheme (ICS) Ltd. v. West Bromwich Building Society*** [1998] 1 W.L.R. 896. In a decision delivered less than a month after ***Mannai***. Lord Hoffman giving appropriate credit to Lord Wilberforce in ***Prenn v. Simmonds*** [1971] 1 W.L.R. 1381 and ***Reardon Smith Line Ltd. v. Yngvar Hansen-Tangen*** [1976] 1 W.L.R. 989 stated:

> *"My Lords, I will say at once that I prefer the approach of the learned judge. But I think I should preface my explanation of my reasons with some general remarks about the principles by which contractual documents are nowadays construed. I do not think that the fundamental change which has overtaken this branch of the law, particularly as a result of the speeches of Lord Wilberforce in* ***Prenn v. Simmonds*** *[1971] 1 W.L.R. 1381, 1384-1386 and* ***Reardon Smith Line Ltd. v. Yngvar Hansen-Tangen*** *[1976] 1 W.L.R. 989, is always sufficiently appreciated. The result has been, subject to one important exception, to assimilate the way in which such documents are interpreted by judges to the common sense principles by which any serious utterance would be interpreted in ordinary life. Almost all the old intellectual baggage of "legal" interpretation has been discarded."*

Lord Hoffman then proceeds to set out his five classic commonsense principles at letter H on page 912:



"(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract. (2) The background was famously referred to by Lord Wilberforce as the "matrix of fact," but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man. (3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them. (4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax. See ***Mannai Investments Co. Ltd. v. Eagle Star Life Assurance Co. Ltd.*** *[1997] 2 W.L.R. 945. (5) The "rule" that words should be given their "natural and ordinary meaning" reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in* ***The Antaios Compania Neviera S.A. v. Salen Rederierna*** *A.B. 1985 1 A.C. 191, 201:*

> *". . . if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense."..."*

63. I note at this point that, in response to the Defendants' Written Submissions, where they submit that only the Plaintiff can say why it introduced the time of 5 p.m. into the third Standstill Deed, which was reproduced in the fourth Standstill Deed, leading counsel for the Plaintiff, Mr. Thom, stated that the fact is that the exclusionary rule of admissibility on declarations of subjective intent, as set out by Lord Hoffman in ***ICS Ltd. v. West Bromwich Building Society*** prevents such a declaration of subjective intent from the Plaintiff being admissible.

64. Some ten years after ***Mannai*** and ***ICS Ltd. v. West Bromwich Building Society*** Lord Hoffman was again called upon to consider the construction of articles of association and the process of implication. In ***Attorney General of Belize & Ors v. Belize Telecom Ltd. and Another*** [2009] 1 W.L.R. 1988 he gave the Judgment of the Privy Council which judgment has recently been applied by Jones J. in the Grand Court of the Cayman Islands in ***Lehman Commercial Paper Incorporated v. Anthracite Balanced Company (36) Limited*** [2011] (2) CILR 299. In ***Attorney General of Belize & Ors*** the then Chief Justice of Belize, Conteh C.J., granted the claimants a declaration that there was an implied term that directors would vacate office. The articles of association made no provision for the removal of directors appointed by a party acting in its capacity as a special shareholder, holding 37.5% in C shares in circumstances where such a party no longer existed. The claimants sought a declaration that the articles should be construed as having an implied term that, in such circumstances, the directors concerned would vacate office. Conteh CJ. made

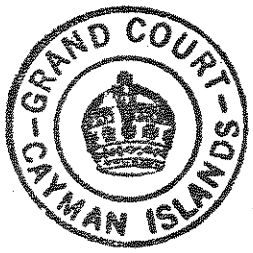
the declaration but the Court of Appeal of Belize found that there was no scope for reading words into Articles of Association and set aside the Order of Conteh CJ.

65. Lord Hoffman gave the judgment of the Board which reversed the decision of the Court of Appeal of Belize and upheld the decision of Conteh C.J. It is necessary to review this judgment at considerable length because it does provide such important guidance and assistance for this Court. At paragraph 16 on page 1993, Lord Hoffman states:

> *"[16] Before discussing in greater detail the reasoning of the Court of Appeal, the Board will make some general observations about the process of implication. The court has no power to improve upon the instrument which it is called upon to construe, whether it be a contract, a statute or articles of association. It cannot introduce terms to make it fairer or more reasonable. It is concerned only to discover what the instrument means. However, that meaning is not necessarily or always what the authors or parties to the document would have intended. It is the meaning which the instrument would convey to a reasonable person having all the background knowledge which would reasonably be available to the audience to whom the instrument is addressed: see* ***Investors Compensation Scheme Ltd v West Bromwich Building Society*** *[1998] 1 WLR 896, 912-913. It is this objective meaning which is conventionally called the intention of the parties, or the intention of Parliament, or the intention of whatever person or body was or is deemed to have been the author of the instrument.*
>
> *[17] The question of implication arises when the instrument does not expressly provide for what is to happen when some event occurs. The most usual inference in such a case is that nothing is to happen. If the parties had intended something to happen, the instrument would have said so. Otherwise, the express provisions of the instrument are to continue to operate undisturbed. If the event has caused loss to one or other of the parties, the loss lies where it falls.*
>
> *[18] In some cases, however, the reasonable addressee would understand the instrument to mean something else. He would consider that the only meaning consistent with the other provisions of the instrument, read against the relevant background, is that something is to happen. The event in question is to affect the rights of the parties. The instrument may not have expressly said so, but this is what it must mean. In such a case, it is said that the court implies a term as to what will happen if the event in question occurs. But the implication of the term is not an addition to the instrument. It only spells out what the instrument means.*

[19] The proposition that the implication of a term is an exercise in the construction of the instrument as a whole is not only a matter of logic (since a court has no power to alter what the instrument means) but also well supported by authority. In ***Trollope & Colls Ltd v North West Metropolitan Regional Hospital Board*** *[1973] 1 WLR 601, 609 Lord Pearson, with whom Lord Guest and Lord Diplock agreed, said:*

> *"[T]he court does not make a contract for the parties. The court will not even improve the contract which the parties have made for themselves, however desirable the improvement might be. The court's function is to interpret and apply the contract which the parties have made for themselves. If the express terms are perfectly clear and free from ambiguity, there is no choice to be made between different possible meanings: the clear terms must be applied even if the court thinks some other terms would have been more suitable. An unexpressed term can be implied if and only if the court finds that the parties must have intended that term to form part of their contract: it is not enough for the court to find that such a term would have been adopted by the parties as reasonable men if it had been suggested to them: it must have been a term that went without saying, a term necessary to give business efficacy to the contract, a term which, though tacit, formed part of the contract which the parties made for themselves."*



[20] More recently, in ***Equitable Life Assurance Society v Hyman*** *[2002] 1 AC 408, 459, Lord Steyn said:*

> *"If a term is to be implied, it could only be a term implied from the language of [the instrument] read in its commercial setting."*

[21] It follows that in every case in which it is said that some provision ought to be implied in an instrument, the question for the court is whether such a provision would spell out in express words what the instrument, read against the relevant background, would reasonably be understood to mean. It will be noticed from Lord Pearson's speech that this question can be reformulated in various ways which a court may find helpful in providing an answer – the implied term must "go without saying", it must be "necessary to give business efficacy to the contract" and so on – but these are not in the Board's opinion to be treated as different or additional tests. There is only one question: is that what the instrument, read as a whole against the relevant background, would reasonably be understood to mean?

[22] There are dangers in treating these alternative formulations of the question as if they had a life of their own. Take, for example, the question of whether the implied term is "necessary to give business efficacy" to the contract. That formulation serves to underline two important points. The first, conveyed by the use of the word "business", is that in considering what the instrument would have meant to a reasonable person who had knowledge of the relevant background, one assumes the notional reader will take into account the practical consequences of deciding that it means one thing or the other. In the case of an instrument such as a commercial contract, he will consider whether a different construction would frustrate the apparent business purpose of the parties. That was the basis upon which Equitable Life Assurance Society v Hyman [2002] 1 AC 408 was decided. The second, conveyed by the use of the word "necessary", is that it is not enough for a court to consider that the implied term expresses what it would have been reasonable for the parties to agree to. It must be satisfied that it is what the contract actually means.

[23] The danger lies, however, in detaching the phrase "necessary to give business efficacy" from the basic process of construction of the instrument. It is frequently the case that a contract may work perfectly well in the sense that both parties can perform their express obligations, but the consequences would contradict what a reasonable person would understand the contract to mean. Lord Steyn made this point in the Equitable Life case (at p. 459) when he said that in that case an implication was necessary "to give effect to the reasonable expectations of the parties."

[24] The same point had been made many years earlier by Bowen LJ in his well known formulation in The Moorcock (1889) 14 PD 64, 68:

> *"In business transactions such as this, what the law desires to effect by the implication is to give such business efficacy to the transaction as must have been intended at all events by both parties who are business men"*

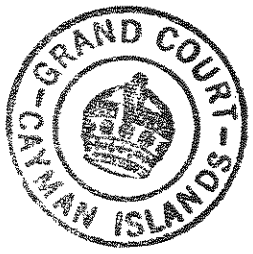
[25] Likewise, the requirement that the implied term must "go without saying" is no more than another way of saying that, although the instrument does not expressly say so, that is what a reasonable person would understand it to mean. Any attempt to make more of this requirement runs the risk of diverting attention from the objectivity which informs the whole process of construction into speculation about what the actual parties to the contract or authors (or supposed authors) of the instrument would have thought about the proposed implication. The imaginary conversation with an officious bystander in ***Shirlaw v Southern Foundries*** *(1926) Ltd [1939] 2 KB 206, 227 is celebrated throughout the common law world. Like the phrase "necessary to give business efficacy", it vividly emphasises the need for the court to be satisfied that the proposed implication spells out what the contact would reasonably be understood to mean. But it carries the danger of barren argument over how the actual parties would have reacted to the proposed amendment. That, in the Board's opinion, is irrelevant. Likewise, it is not necessary that the need for the implied term should be obvious in the sense of being immediately apparent,*

even upon a superficial consideration of the terms of the contract and the relevant background. The need for an implied term not infrequently arises when the draftsman of a complicated instrument has omitted to make express provision for some event because he has not fully thought through the contingencies which might arise, even though it is obvious after a careful consideration of the express terms and the background that only one answer would be consistent with the rest of the instrument. In such circumstances, the fact that the actual parties might have said to the officious bystander "Could you please explain that again?" does not matter.

[26] In ***BP Refinery (Westernport) Pty Ltd v Shire of Hastings*** *(1977) 180 CLR 266, 282-283 Lord Simon of Glaisdale, giving the advice of the majority of the Board, said that it was "not ... necessary to review exhaustively the authorities on the implication of a term in a contract" but that the following conditions ("which may overlap") must be satisfied:*

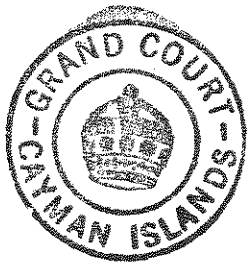
> *"(1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that 'it goes without saying' (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract".*

[27] The Board considers that this list is best regarded, not as series of independent tests which must each be surmounted, but rather as a collection of different ways in which judges have tried to express the central idea that the proposed implied term must spell out what the contract actually means, or in which they have explained why they did not think that it did so. The Board has already discussed the significance of "necessary to give business efficacy" and "goes without saying". As for the other formulations, the fact that the proposed implied term would be inequitable or unreasonable, or contradict what the parties have expressly said, or is incapable of clear expression, are all good reasons for saying that a reasonable man would not have understood that to be what the instrument meant."



66. Some four months after Lord Hoffman gave his decision in the ***Attorney General of Belize***, he was once again called upon to consider the principles of construction of commercial contracts in ***Chartbrook Ltd. and Another v. Persimmon Homes Ltd. and Another*** [2009] 1 A.C. 1101, although this time, in the House of Lords and not in the Privy Council. Again, Lord Hoffman considered ***Mannai*** and ***ICS Ltd. v. West Bromwich Building Society*** and at paragraph 14 on page 1112 Lord Hoffman stated:

> *"14. There is no dispute that the principles on which a contract (or any other instrument or utterance) should be interpreted are those summarised by the House of Lords in* ***Investors Compensation Scheme Ltd v West Bromwich Building Society*** *[1998] 1 WLR 896, 912-913. They are well known and need not be repeated. It is agreed that the question is what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean. The House emphasised that "we do not easily accept that people have made linguistic mistakes, particularly in formal documents" (similar statements will be found in* ***Bank of Credit and Commerce International SA v Ali*** *[2002] 1 AC 251, 269,* ***Kirin-Amgen Inc v Hoechst Marion Roussel Ltd*** *[2005] RPC 169, 186 and* ***Jumbo King Ltd v Faithful Properties Ltd*** *(1999) 2 HKCFAR 279, 296) but said that in some cases the context and background drove a court to the conclusion that "something must have gone wrong with the language". In such a case, the law did not require a court to attribute to the parties an intention which a reasonable person would not have understood them to have had.*
>
> *[15] It clearly requires a strong case to persuade the court that something must have gone wrong with the language and the judge and the majority of the Court of Appeal did not think that such a case had been made out. On the other hand, Lawrence Collins LJ thought it had. It is, I am afraid, not unusual that an interpretation which does not strike one person as sufficiently irrational to justify a conclusion that there has been a linguistic mistake will seem commercially absurd to another: compare the* ***Kirin-Amgen*** *case [2005] All E. R 667, 684-685. Such a division of opinion occurred in the Investors Compensation Scheme case itself. The subtleties of language are such that no judicial guidelines or statements of principle can prevent it from sometimes happening. It is fortunately rare because most draftsmen of formal documents think about what they are saying and use language with care. But this appears to be an exceptional case in which the drafting was careless and no one noticed. [16] I agree with the dissenting opinion of Lawrence Collins LJ because I think that to interpret the definition of ARP in accordance with ordinary rules of syntax makes no commercial sense."*



Lord Hoffman went on to state at paragraph 21 at page 1113:

> *"21. I therefore think that Lawrence Collins LJ was right in saying that ARP must mean the amount by which 23.4% of the achieved price exceeds the MGRUV. I do not think that it is necessary to undertake the exercise of comparing this language with that of the definition in order to see how much use of red ink is involved. When the language used in an instrument gives rise to difficulties of construction, the process of interpretation does not require one to formulate some alternative form of words which approximates as closely as possible to that of the parties. It is to decide what a reasonable person would have understood the parties to have meant by using the language which they did. The fact that the court might have to express that meaning in language quite different from that used by the parties ("12th January" instead of "13th January" in* ***Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd*** *[1997] AC 749; "any claim sounding in rescission (whether for undue influence or otherwise)" instead of "any claim (whether sounding in rescission for undue influence or otherwise)" in* ***Investors Compensation Scheme Ltd v West Bromwich Building Society*** *[1998] 1 WLR 896) is no reason for not giving effect to what they appear to have meant."*

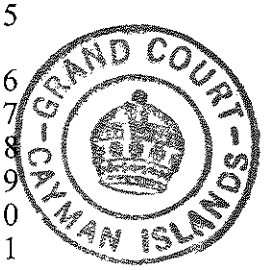
Lord Hoffman went on to quote Brightman J who, in ***East v Pantiles (Plant Hire) Ltd*** (1981) 263 EG 61 stated the conditions for what he called "correction of mistakes by construction" as:

> *"22. .....*
>
> > *"Two conditions must be satisfied: first, there must be a clear mistake on the face of the instrument; secondly, it must be clear what correction ought to be made in order to cure the mistake. If those conditions are satisfied, then the correction is made as a matter of construction."*

Lord Hoffman continued at paragraph 23:

> *"Subject to two qualifications, both of which are explained by Carnwath LJ in his admirable judgment in* ***KPMG LLP v Network Rail Infrastructure Ltd*** *[2007] Bus LR 1336, I would accept this statement, which is in my opinion no more than an expression of the common sense view that we do not readily*

accept that people have made mistakes in formal documents. The first qualification is that "correction of mistakes by construction" is not a separate branch of the law, a summary version of an action for rectification. As Carnwath LJ said (at p. 1351, para 50):



> *"Both in the judgment, and in the arguments before us, there was a tendency to deal separately with correction of mistakes and construing the paragraph 'as it stands', as though they were distinct exercises. In my view, they are simply aspects of the single task of interpreting the agreement in its context, in order to get as close as possible to the meaning which the parties intended."*

> *24. The second qualification concerns the words "on the face of the instrument". I agree with Carnwath LJ (at pp 1350-1351) that in deciding whether there is a clear mistake, the court is not confined to reading the document without regard to its background or context. As the exercise is part of the single task of interpretation, the background and context must always be taken into consideration.*

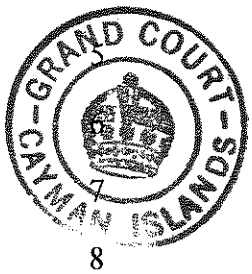
> *25. What is clear from these cases is that there is not, so to speak, a limit to the amount of red ink or verbal rearrangement or correction which the court is allowed. All that is required is that it should be clear that something has gone wrong with the language and that it should be clear what a reasonable person would have understood the parties to have meant. In my opinion, both of these requirements are satisfied."*

67. The Defendants' leading counsel accepts that the Plaintiff was intent on issuing proceedings on or before the 9th May 2006[2] [2012] in order to protect its position prior to the sixth anniversary of the 2005 audit and those matters in May 2006. The Defendants' counsel focuses on Ms. Harrison's affidavit and the fact that the Plaintiff, in order to avoid the need to issue the proceedings, entered into the Standstill Agreement so as to suspend the running of time for limitation purposes. Accordingly, Ms. Harrison points out that this enabled the Plaintiff to enter into

[2] See paragraph 29 of the Defendants' Written Submissions.

further discussions with the Defendants without drawing their allegations into the public arena.

68. Mr. McKerr disputes that the purpose of entering into a Standstill Agreement was not this one-sided – pointing out that the conclusion of the Agreement also had the benefit from the Plaintiff's perspective of affording the Plaintiff a largely cost-free opportunity to consider and discuss its claims without needing to issue proceedings, and, it further prevented the Defendants from issuing proceedings to enforce its contractual indemnities.



69. In any event, it was common ground that the sixth anniversary of the 2005 audit, and those matters in May 2006, was imminent and unless the Plaintiff issued its proceedings or entered into a standstill agreement to stop time running, the Plaintiff's claim would become statute barred sometime in May or June 2012.

70. What is important to note is that the relevant wording in recital C of all four Standstill Agreements states:

> *"The parties entered into a Standstill Deed to prevent the running of the limitation period during the term of the Deed."*

71. It is common ground that "without prejudice" negotiations continued from the 9th May 2012, which was the date of the first Standstill Agreement, until the Long Stop Date in the fourth Standstill Agreement dated the 30th November 2012.

72. The prohibition on issuing and despatching and serving proceedings applied to the Plaintiff's claim against the Defendants and also applied to the Defendants' claim to issue its contractual indemnities against the Plaintiff.

73. From the evidence before this Court, it appears that only the Defendants could effectively run a limitation defence and therefore, Standstill Agreements were entered into so that the Plaintiff would not find itself time-barred by any lapse of time during the negotiations.

74. As Lord Steyn stated in ***Mannai*** at paragraph 61 above. The contextual scene is always relevant. What is admissible is what is arguably relevant. The enquiry has to be objective and the Court must endeavour to place a commercially sensible construction on the deed in question.

75. Accordingly, following Lord Hoffman and Lord Steyn's dicta in ***Mannai*** when construing the fourth Standstill Agreement, this Court is not concerned with the subjective intentions of the parties. The Court must look at the Deed as a reasonable person with knowledge of the relevant background would have understood the parties to mean even if this compels one to say they used the wrong words.

76. In relation to the fourth Standstill Agreement the Court does not have to consider the question of the Long Stop Date in relation to a notice by either party stating that the running of time is to re-commence pursuant to clause 2.3(a). The Court is solely concerned with the second alternative Long Stop Date, which, at clause 2.3(b) is stated to be "*5:00 p.m. on the 30th November 2012*".

77. The suspension of time which was agreed by the parties shall continue in force until the earlier of the two Long Stop Dates and clause 2.4, which is found in all four Standstill Agreements, confirms that the Deeds should "*prevent the parties issuing and despatching and serving proceedings in relation to the dispute until the Long Stop Date.*" This wording was never amended or varied.

78. All four Standstill Agreements had Long Stop Dates which were 21st June 2012, the 14th September 2012, the 15th October 2012 and the 30th November 2012, respectively, but the third Agreement introduced the time of 5:00 p.m. inserted in the Long Stop Date of the 15th October 2012. The fourth Standstill Agreement kept in the time of 5:00 p.m. on the final Long Stop Date of the 30th November 2012.

79. The date is clearly the 30th November 2012. If the intention of the parties was for the date to be the 3rd December 2012 or some other date, it would have been a simple matter of inserting that date. In my view the addition of the time of 5:00 p.m. does not and cannot amend, vary or alter the Long Stop Date of the 30th November 2012.

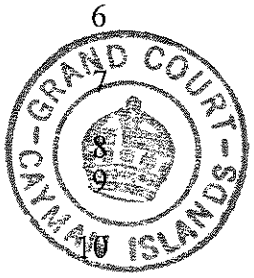
80. On the Defendants' case 5:00 p.m. was introduced (albeit by the Plaintiff) because that is the time when the Court's office closes, thereby making it impossible for the Plaintiff to issue proceedings on the 30th November 2012. If the parties did not intend the 30th November 2012 to be the Long Stop Date, the Deed could easily have expressly stated the 3rd December 2012 or some other date after the 30th November.

81. There is an obvious and plain inconsistency caused by the addition of the time of 5:00 p.m. to the Long Stop Date. Had the Plaintiff's messenger or the person tasked to file the Writ of Summons prevailed upon the Registry to allow the Writ to be issued at 5:01 p.m. the Defendants would not be taking any issue that there was any breach of the fourth Standstill Agreement.

82. The Court acknowledges that it must exercise great caution and not readily accept that people have made mistakes in formal documents such as the fourth Standstill Agreement.

GCR O.63 r.9 reads:

> *"The office of the Court shall be open on every day of the year except –*
>
> *(a) Saturdays and Sundays; and*
>
> *(b) Public holidays*
>
> *The hours during which the office of the Court shall be open to the public shall be such as the Chief Justice may from time to time direct."*



This Grand Court Rule would appear to give the Chief Justice the discretion to stipulate the hours during which the office of the Court shall remain open to the public.

83. Rule 7 of the Probate and Administration Rules (2008 Revision) under the heading "Business Hours" reads:

> *"The Registry will be open for public business between the hours of 10:00 until noon and 14:00 until 16:00 on every weekday excluding Saturdays and public holidays."*

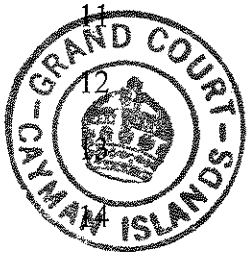
84. So the Grand Court Rules confirm that opening hours of the Court's office shall be such as the learned Chief Justice directs, and the Probate and Administration Rules state that the Registry shall be open for public business until 4 p.m. However, the parties have agreed and accepted that 5 p.m. is the time when the Courts office closes for the purpose of filing pleadings and other court documents.

85. As Lord Hoffman stated in the first of his five principles in ***ICS***[3]:

> "*Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person, having all the background knowledge which would reasonably have been available to the parties in the situation which they were at the time of the contract..... and further, the meaning which a document would convey to a reasonable man is not the same thing as the meaning of its words.*"

86. We have a Long Stop date of the 30th November and the Deed states:

> "*The suspension of time under this Deed shall continue in force until the earlier of the Long Stop Dates.*"



The insertion of 5:00 p.m. if applied literally means that the Plaintiff cannot issue proceedings on the Long Stop Date. The reasonable recipient with the relevant background knowledge will understand that the insertion of the time will frustrate the agreed intention of the parties by preventing the Plaintiff from issuing its Writ of Summons on the 30th November 2012 unless the person tasked with filing the Writ can persuade the registry to stamp the Grand Court seal on the Writ of Summons at 5:01 p.m. on the 30th November 2012. So on a strict, literal interpretation of clause 2.3(b), the Writ could not be issued at 4:59 p.m., but could be issued at 5:01 p.m.

87. As Lord Hoffman stated in ***Chartbrook***:

> "*It clearly requires a strong case to persuade the Court that something must have gone wrong with the language.*"

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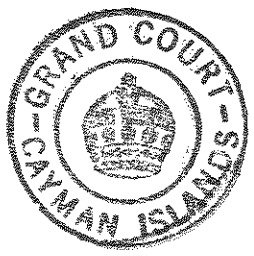
[3] ***Investors Compensation Scheme (ICS) Ltd. v. West Bromwich Building Society*** [1998] 1 W.L.R. 896

Having reviewed the affidavits of Ms. Harrison and Mr. McKerr, the correspondence between the parties' attorneys and, having taken into account the submissions of both leading counsel, I find that there is a clear inconsistency contained within the wording of clause 2.3(b). The agreed Long Stop Date was to be the 30th November 2012, but by placing "*5:00 pm on*" before it, the Plaintiff is prevented from issuing proceedings on the date on which it should be able to issue its proceedings in order to take immediate advantage of the lifting of the agreed suspension of time.

88. The mistake was made when, and somewhat ironically, at the instigation of the Fund, "*5:00 pm on*" was inserted before the Long Stop Date of the 15th October 2012 in the third Standstill Agreement. The time of 5:00 p.m. remained in the fourth Standstill Agreement. If the parties had intended the Long Stop Date to be the 3rd December 2012, then, that would have been expressly stated. The court is forced to conclude that something has gone wrong. I find that there has been an inadvertent and accidental mistake. In ***Mannai*** the parties intended to say the 13th January 1995 and not the 12th January 1995. In this case, I find that the parties intended the 30th November 2012 to be the Long Stop Date and not the 3rd December 2012 or any other date.



89. Accordingly, I find that the Long Stop Date is anytime on the 30th November 2012 and not after 5:00 p.m. on the 30th November 2012. If the Plaintiff had issued its Writ of Summons on the 29th November 2012 this Court would have held that there was a breach of the terms of the fourth Standstill Agreement. I find that there is a clear mistake on the face of the fourth Standstill Agreement and, to adopt Brightman J's words, "it is clear what correction has to be made to cure the mistake."

90. Having considered the development of the case law from ***Mannai*** to ***Chartbrook***, I find that any time on the 30th November 2012 is the only possible construction of the Long Stop Date consistent with all the provisions of the four Deeds against the relevant background set out above.

91. There is, as Lord Hoffman stated at paragraph 25 in ***Chartbrook***:

> "... *no limit to the amount of red ink or verbal rearrangement or correction which the Court is allowed.*"

Accordingly, I use the red ink and I delete "5:00 pm on." in clause 2.3(b) of the fourth Standstill Agreement, so that clause 2.3(b) reads: "30th November 2012."

92. Furthermore, having read the affidavits of Ms. Harrison and Mr. McKerr, and having heard both leading counsel for the parties, I find that my correction to clause 2.3(b) is to adopt Lord Simon of Glaisdale's words, reasonable and equitable, necessary to give business efficacy to the fourth Standstill Agreement, and does not contradict any express term of the fourth Standstill Agreement.

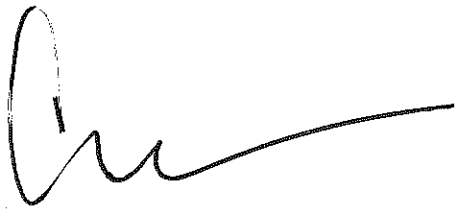
93. By applying the red ink to delete "*5:00 pm on*" the Court is merely preserving the status quo that existed on the 9th May 2012 before the parties entered into the first Standstill Agreement. Consequently, the Plaintiff's position has not improved from where it found itself on the 9th May 2012, and the Defendants have suffered no prejudice.

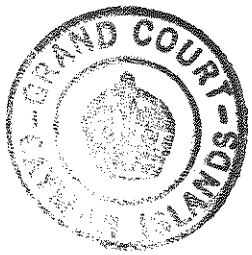
94. Accordingly, I find, pursuant to GCR O.14A r.1(1) that on a true construction of the fourth Standstill Deed dated the 21st October 2012 and made between the Plaintiff and the Defendants, that there was no breach of clause 2.4 of the Deed and, accordingly, the Plaintiff's proceedings are regular and valid.

95. As a result of my decision, the remaining issues set out in the Plaintiff's GCR O14A Summons do not arise for determination.

96. I make no order as to costs. Should the parties wish to make submissions as to the costs of the hearing in August, I will hear counsel for the parties at a mutually convenient time.

Dated this the 2nd October 2013





Honourable Mr. Justice Charles Quin
Judge of the Grand Court