IN THE GRAND COURT OF THE CAYMAN ISLANDS
CIVIL DIVISION

Cause No. GC 80 of 2022

IN THE MATTER OF THE REGISTERED LAND ACT (2018 REVISION)

BETWEEN

CAYMAN KAI PROPERTY OWNERS ASSOCIATION

Plaintiff

AND

SEA WATCH VILLAS LTD

Defendant

IN CHAMBERS

Appearances:	Brett Basdeo, Chaowei Fan from Walkers on behalf of the Plaintiff, Samuel Jackson and Selina Tibbetts of Jackson Law on behalf of the Defendant.
Before:	Hon Justice Alistair Walters (Actg.)
Date of Hearing:	16 November 2022
Date of Decision:	16 November 2022
Draft Written Reasons Circulated:	23 November 2022
Written Reasons Delivered:	30 November 2022

HEADNOTE

Application for leave to appeal against dismissal of action - question of capacity of party. Whether meets test for representative person under GCR O.15 r.12 - Whether Originating Summons proceeding should continue as a writ action pursuant to GCR O.28, r.8, - Whether action should re-commence as a writ action, question of costs and overriding objective.

REASONS FOR DECISION

1. This matter first came before me on 18 August 2022. The proceedings were started by the Plaintiff which is an unincorporated association (the "Association") on 6 April 2022. The members of the Association are some of the owners of houses and land that are within an area known as Cayman Kai which comprises approximately 350 parcels of land. Membership is open to any owner of property within Cayman Kai. As between the various parcels of land within Cayman Kai there are restrictive covenants (the "Restrictive Covenants").

2. The relevant sections of the Restrictive Covenants read as follows:

> *"1. The premises shall not be used except for residential purposes. No building shall be erected, altered, placed or permitted to remain on the premises other than one detached single-family dwelling not to exceed 2 ½ stories in height and a private garage for not more than three cars.*
>
> *2. No building shall be erected, placed or altered on the premises until the construction plans and specifications and a plan showing the location of structure had been approved by the architectural control committee as to quality of workmanship and materials, harmony of external design with existing structures and as to location with respect of typography and finish grade elevation. No fence or wall shall be erected, placed or altered on the premises unless similarly approved. Approval shall be as provided in paragraph 8."*

3. Paragraph 8 provides for the establishment of an "*architectural control committee*" (the "ACC") comprising three elected members elected by the registered proprietors of Cayman Kai (presumably also being members of the Association).

4. I will come back to the proceedings themselves but the first affidavit of George Reynolds, III who states that he is an elected member of the "Cayman Kai Architectural Control Committee" and makes his affidavit on behalf of the Plaintiff sets out the background to the dispute. In summary:

   4.1 The Defendant, Sea Watch Villas Limited is a registered proprietor of Block 33B, Parcel 139 (the "Property") which is included within the parcels of land comprising Cayman Kai such that the Restrictive Covenants are registered against the title to that property.

   4.2 In or around 2 February 2016, prior to the Defendant acquiring the Property, the ACC was approached by the then owner who was seeking the ACC's approval for the design of a home (the "House") to be constructed on the Property and his membership in the Association. Over time and with some modifications to the initial plans, apparently the ACC approved the

proposed design of the House and construction commenced in March 2017. Final approval of the plans by the ACC occurred on 30 August 2017. However the construction of the House was not completed and the construction project remained dormant for a number of years.

4.3 Mr Reynolds says that in December 2021 he was made aware that construction had restarted on the House and that the construction now appeared to include a third storey which he says is outside the approval given by the ACC to the former owner and, Mr Reynolds says, was in breach of the Restrictive Covenants.

4.4 Mr Reynolds was advised that the Property/House had been sold and on 6 January 2022 contact was made with Ms Bernadette Wood-Bodden, the principal of the Defendant which is the new owner. Mr Reynolds spoke with Ms Wood-Bodden on 7 January 2022. She explained that she was not aware of the provisions of the Restrictive Covenants before purchasing the Property. Mr Reynolds said that he was surprised by this as the Restrictive Covenants were noted in the encumbrances section of the land register for the Property.

4.5 Mr Reynolds said that he sent a copy of the Restrictive Covenants by email to Ms Wood-Bodden. Mr Reynolds explains that the final design proposed by the former owner that was eventually approved by the ACC was very similar to the design proposed by the Defendant save for the inclusion of a third storey.

4.6 On 12 January 2022 Mr Reynolds says that he received an email from Ms Wood-Bodden explaining that she believed that the construction was not in breach of the Restrictive Covenants.

4.7 On 20 January 2022 Mr Reynolds emailed Ms Wood-Bodden to inform her that the plans that she provided for the construction could not be approved by the ACC because they included a third storey.

4.8 Mr Reynolds says that this issue was raised at the AGM of the Association and that the meeting agreed unanimously that action should be taken against the Defendant to stop the construction of the third storey on the Property.

4.9 During March and April 2022 the parties instructed counsel. The Defendant did not provide a requested undertaking to cease construction on the Property and the Association therefore commenced proceedings. By the time that the proceedings were commenced, apparently the construction of the House was substantially complete with only some finishing items left to be dealt with.

5. The proceedings themselves were commenced by way of Originating Summons dated 6 April 2022. The Plaintiff's claim is put as follows:

> *"1. A declaration that the Defendant's construction of the proposed dwelling (the "**Dwelling**") on Block 33B, Parcel 139 of Registration Section Cayman Kai is in breach of the restrictive covenants registered thereon.*
>
> *2. Until further order of the Court, orders to restrain the Defendant from continued construction of the dwelling as proposed.*
>
> *3. Such further or other relief as this Honourable Court thinks fit.*
>
> *4. Costs."*

6. No further pleadings were filed and the parties exchanged a number of affidavits. The affidavits served on behalf of the Plaintiff do not elaborate on the relief sought by the Plaintiff. The furthest that Mr Reynolds goes in his first affidavit which was expressed to be sworn in support of an application for an injunction against the Defendant is to say:

> *"40. In the circumstances, it is hoped that this Honourable Court will grant the relief sought in the Association's Originating Summons, to enable the parties to return to the negotiating table and make best efforts to preserve the Restrictive Covenants enjoyed by all proprietors of Cayman Kai."*

7. Mr Reynolds swore a third affidavit dated 19 July 2022 in support of the application to amend the Originating Summons[1] (see below) and concludes:

> *"14. Despite these bare assertions, it is important for the Plaintiff, and this Honourable Court, to understand the extent to which the Defendant has contravened the Restrictive Covenants, especially where the Defendant has committed further breaches of the Restrictive Covenants. In the event that this Honourable Court grants the relief sought by the Plaintiff in its Originating*

---

[1] In relation to which, the position of the Defendant is that *the Third Affidavit of George Reynolds was sworn and filed outside of the time permitted for filing affidavit evidence pursuant to O 28 r 1A, and, consequently, the Plaintiff made an application for leave to adduce additional evidence in respect of that Third Affidavit simultaneously with the application for leave to amend (on 19 July 2022), which application was refused and the proceedings were struck out. Therefore, the Third Affidavit of George Reynolds has never been granted leave to be filed in the proceedings. Had this evidence been granted leave to be adduced out of time, the Defendant would have been constrained to seek leave to also file additional evidence in answer to that Third Affidavit.*

Summons, the ACC will be considering what steps the Defendant will need to take to bring the dwelling into compliance."

8. The Originating Summons seems to be seeking an interim injunction pending the resolution of the question of whether the Restrictive Covenants have been breached. As at the date of the 22 August 2022 hearing, an application for an interim injunction had not been made.

9. After inter partes correspondence, matters came to a head when counsel for the Defendant issued a summons dated 9 August 2022 seeking an order striking out the proceedings pursuant to GCR O. 18, rule 19 (a) and (d) on the basis that the Plaintiff does not possess the requisite *locus standi* whether in its own capacity or in a representative capacity to bring and continue the proceedings. The relevant rule reads as follows:

> *"19. (1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that –*
> *(a) it discloses no reasonable cause of action or defence, as the case may be; or*
> *(b) it is scandalous, frivolous or vexatious; or*
> *(c) it may prejudice, embarrass or delay the fair trial of the action; or*
> *(d) it is otherwise an abuse of the process of the court, and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.*
> *(2) No evidence shall be admissible on an application under subparagraph (1)(a).*
> *(3) This rule shall, so far as applicable, apply to an originating summons and a petition as if the summons or petition, as the case may be, were a pleading."*

10. In response, although not accepting that it was necessary, the Plaintiff issued its own summons dated 19 July 2022 worded as follows:

> *"LET ALL PARTIES CONCERNED attend... upon an application by the Cayman Kai Property Owners Association, in its representative capacity for its members, for the following orders:*
>
> 1. *Pursuant to Order 20, rule 5(1) of the GCR, the Plaintiff has leave to file and serve the Amended Originating Summons in substantially the same form as annexed to this Summons.*
> 2. *Pursuant to Order 28, rule 1A(6) of the GCR, the Plaintiff has leave to file and serve the Third Affidavit of George Koues Reynolds, III, sworn 18 July 2022, and the exhibits thereto, as annexed to this Summons.*
> 3. *Costs*
> 4. *Such further or other orders or directions as the Court sees fit."*

11. The proposed amendments to the Originating Summons[2] were:

11.1 To add after the name of the Association as Plaintiff the words "*On behalf of the Proprietors*" and to then list the names of owners of homes and land in Cayman Kai.

11.2 To add after the name of the Association in the body of the Originating Summons the words "*... as the representative for and on behalf of the proprietors set out herein...*".

11.3 A minor amendment to the reference to the registration details of the Property.

12. The basis for the Plaintiff's application to amend the Originating Summons was GCR O.15, r. 12 which provides that:

> "*12. (1) Where numerous persons have the same interest in any proceedings, not being such proceedings as are mentioned in rule 13, the proceedings may be begun, and, unless the Court otherwise order, continued, by or against any one or more of them as representing all of as representing all except one or more of them.*"

13. The notes to the equivalent order in the Supreme Court Practice[3] make it clear that it is an essential condition of a representative action that the persons who are to be represented and the person or persons representing them should have the same interest in the same proceedings. All members of the alleged class should have a common interest, all should have a common grievance and the relief sought is, in its nature, beneficial to all.

14. Although relying on GCR O15, r, 12, the Plaintiff's counsel argued at the 22 August 2022 hearing and at the hearing of application for leave to appeal that the decision of Sanderson J in the case *Cayman Kai Property Owners Association v. Cayman Island Basic Industries Limited, North Coast Resort Management Limited and Cayman Kai Development Limited*[4] constitutes binding authority that the Plaintiff does have *locus standi* to bring this action in its own name and to seek the relief pleaded in the Originating Summons.

---

[2] It is worth noting that GCR O. 6, r.3 (applicable to originating summonses by virtue of GCR O. 7, r. 3, (3)) provides that where a plaintiff is suing in a representative capacity the writ (or originating summons) must be endorsed with capacity in which they or it sues.

[3] RSC O.15, r.12, (2).
[4] [2006 CILR 117].

15. That action related to proceedings brought in the Plaintiff's name seeking *inter alia* a declaration that Cayman Kai constituted a scheme of development and an injunction preventing the second defendant operating a real estate business from one of the parcels of land in Cayman Kai in breach of the restrictive covenants applying to the various parcels of land. The scheme of development was recognized and an injunction was granted. The Court stated in paragraph 4 of its judgment that:

> *"The plaintiff is an unincorporated organisation comprising approximately 80 persons who own property in an area known as Cayman Kai. Approximately 35 members of that organisation bring this summons in the plaintiff's name. Those members' names and addresses are identified in the originating summons and they are the actual plaintiffs."*

16. It does appear from the judgment that there were two sets of proceedings underway at the time. The first set (Cause 384 of 2004) were the proceedings in which the judgment referred to above was given. However, there was also a separate set in Cause 8 of 2005 in which the Plaintiff petitioned pursuant to s.96 Registered Land Act for an order that the Restrictive Covenants as they then were could be amended to provide a new mechanism for electing the members of the ACC. The order dated 14 October 2005 in Cause 8 of 2005 is exhibited by Ms Wood-Bodden to her first affidavit dated 31 May 2022 and states that:

> *"IT IS HEREBY DECLARED that all those parcels of land ... which parcels are generally known as and referred to as "Cayman Kai", constitute a scheme of development as a matter of law with the result that he proprietor of any parcel of land within Cayman Kai, including the Petitioners that have the restrictive covenants contained in the Schedule to this Order registered against their parcel, may enforce the restrictive covenants contained in the Schedule to this Order against the proprietor of any other parcel of land within Cayman Kai that have those restrictive covenants registered against it."*

17. In Cause 384 of 2004, the court appears to have treated the 35 members as the true plaintiffs and the extract form the order made in Cause 8 of 2005 clearly refers to "*Petitioners*" (plural) as being included in the reference to proprietors of land within Cayman Kai. The Plaintiff cannot fall within that group. The question of the capacity of the Association to bring both or either proceeding in its own name and the extent to which it could be said to have the same interest in those proceedings as the relevant member/owners and therefore act in a representative capacity was not addressed in the judgment or the order mentioned above.

18. Mr Jackson took the position that the Association simply cannot be said to have the same interest in these proceedings as its members. It does not own or occupy any part of Cayman Kai that benefits from the Restrictive Covenants and cannot therefore enforce them. He referred to s.93 of the Registered Land Act which provides that:

> *"(1) A covenant may be —*
> *(a) a positive covenant; or*
> *(b) a restrictive covenant, and if registered under this Law is enforceable against the covenantor and the covenantor's successor in title by the owner or occupier of land benefitting from the covenant."*

19. In summary, his position was that the Association has no legal ability to enforce the Restrictive Covenants in its own right and cannot share the same interest as its members and cannot represent them. He says that it can neither act in its own name nor in a representative capacity on behalf of its members.

20. Having heard the parties, I indicated to them that I was of the opinion that the 2006 decision of Sanderson J had not specifically addressed the question of whether the Association did have *locus standi* to bring those proceedings in its own name or whether it could properly act in a representative capacity on behalf of some or all of its members.

21. I did not agree with Mr Basdeo that for the purposes of GCR O.15, r.12 it could properly be said that the Association shared the same interest as its members for the purposes of these proceedings[5]. That being the case, in my view the proposed amendment did not cure the Plaintiff's lack of standing to act as the Plaintiff on behalf of the relevant members. In my view, the correct format for an amendment would have been for one of those members individually to be substituted as the Plaintiff on behalf of the remainder.

22. The issue then arose as to the manner in which the Plaintiff's claim had been put and precisely what relief it was seeking. I addressed this with Mr Basdeo both at the hearing on 18 August 2022 and at this hearing. The Originating Summons seeks a declaration that the Restrictive Covenants have been breached, but goes no further. An injunction seemed to serve little purpose as the House was substantially complete when proceedings were commenced. If a declaration in favour of the Plaintiff

[5] Indeed during the course of this current application for leave to appeal, Mr Basdeo stated that the Association can't bind its members and has no control over them. He went further by saying that each covenantor has a right to enforce the Restrictive Covenants and that the Association could not cut across that.

is granted (assuming that it is entitled to seek that relief) it is unclear what additional relief, if any, the Plaintiff is seeking. In my view, the Defendant was and is entitled to know that[6].

23. In my view, the action should not have proceeded by way of Originating Summons at all. In view of the issues raised it should have proceeded by way of a writ action with detailed pleadings. During the hearing on 18 August 2022 I gave consideration as to whether an order should be made pursuant to GCR O.28, r.8 that the proceedings should be continued as if they had been commenced by way of a writ and whether the affidavits filed could stand as pleadings.

24. The difficulty with that approach is that the affidavits filed on behalf of the parties, and in particular the Plaintiff, do not address the precise relief sought by the Plaintiff beyond the very simplistic reference to an injunction and declaration that I have set out above.

25. Taking into account the issues in relation to the capacity of the Plaintiff and that the affidavits of the parties do not really engage with the nature of the relief being sought in the way that pleadings would, I took the view that the overriding objective would not be served by making any orders under GCR O.28, r.8. To do so would either require substantial amendments to the Originating Summons with consequential pleadings served by the Defendant (the costs of which would be the responsibility of the Plaintiff in the usual way) or further detailed exchanges of affidavit evidence setting out the complete case of the aggrieved members of the Association and responsive affidavits from the Defendant. This would likely also have been at the expense of the Plaintiff.

26. In my view, the most appropriate and cost effective way for the aggrieved members of the Association to proceed was to start a fresh writ action with the correct representative plaintiff (with their capacity clearly pleaded) and a clear statement of claim setting out precisely what relief they

---

[6] I should also add that when considering GCR O15, r.16[6] for the purposes of writing these reasons, I re-read the notes to the Supreme Court Practice (RSC 15/16/1) which state:
"The jurisdiction of the Court to make a declaration of right is confined to declaring contested legal rights, subsisting or future, of the parties represented in the litigation before it and therefore a person who is not a party to a contract has no locus standi, save perhaps in exceptional circumstances, to obtain a declaration in respect of the rights of the parties to the contract, e.g. a re-insured party under a contract of reinsurance cannot claim against the original insured person a declaration as to the latter's rights against his insurer under the original insurance contract Meadows Indemnity Co. Ltd v. Insurance Corporation of Ireland plc [1989] 2 Lloyd's Rep. 298, CA."

It does seem to me that there may be further questions, quite separate from GCR O.15, r.12, as to whether the Association which is not a covenantor or covenantee has any legal basis to seek a declaration in relation to the Restrictive Covenants; all the more reason for this case to be re-pleaded with some care.

are seeking, the basis for that relief and, in particular, what consequential relief beyond the declaration. It is not enough in my view for Mr Reynolds to suggest that if a declaration is granted it will then be up to the ACC to decide what should happen next in relation to the House. If, for example, it might be the position of the aggrieved members of the Association that subsequent to a favourable declaration they will seek the demolition of the third storey, that must be pleaded and the Defendant given an opportunity to defend itself. Those issues should properly be dealt together, in one action.

27. As a result, at the hearing on 18 August 2022, I made an order striking out/dismissing the proceedings on the basis that it would be most expedient for the aggrieved members of the Association and fairest to the Defendant to re-start a properly pleaded fresh writ action. I prepared a minute of order reflecting my decision and the issues raised during the hearing. It was relatively brief and I was not asked to provide any more detailed written reasons.

Application for leave to appeal

28. On 16 November 2022 I heard the Plaintiff's application for leave to appeal against that decision. At the hearing I refused leave to appeal and these are the reasons for that decision.

29. The principles that the Court should apply when considering an application for leave to appeal have been helpfully set out by Doyle J in a recent group of matters[7]. The judge referred to the case of *Telesystem International Wireless Incorporated v CVC/Opportunity Equity Partners L.P.*[8] which set out the test to be applied"

> "*The general test if whether leave to appeal should be granted is: Does the appeal have a real (i.e. realistic, not fanciful) prospect of success? .... In exceptional circumstances leave will be granted even where no such prospect exists if the appeal involved an issue which should be examined by the Court of Appeal in the public interest, e.g. when a public policy issue arises or a binding authority requires reconsideration. The relative significance of the issues and costs necessary to examine them will be a relevant factor.*
> *In an appeal on a point of law (including on the ground that a finding or the lower court is unsupported by evidence), leave should not be granted unless the court considers there is a real prospect that the Court of Appeal will come to a different conclusion that will materially affect the outcome of the case...*

[7] Abbreviated *Chia Hsing Wang v Credit Suisse AG and Credit Suisse London Nominees Ltd* FSD 262 of 2021, 10 May 2022.
[8] 2001 CILR N-21.

If the court is unsure whether leave should be granted, it should then refuse leave and allow the Court of Appeal to decide the matter."

30. The first ground of appeal is that the Plaintiff Association does in fact have the "*same interest*" as its members despite the Plaintiff accepting that it is not legally capable of owning any parcels of land within Cayman Kai. The Plaintiff asserts that "*Given that the Plaintiff exists primarily to "protect and promote the interest of its members as proprietors of property at Cayman Kai" and to "enforce the Restrictive Covenants", it therefore begs the question as to what type of proceeding can the Plaintiff bring ... if it is unable to carry out those primary objects.*"

31. The Plaintiff relies heavily on the decision of the English Supreme Court in *Lloyd v Google LLC*[9]. That case involved an action brought by Mr Lloyd against Google LLC ("Google") alleging that Google breached its duties as a data controller under s. 4(4) of the Data Protection Act 1998. The claim alleges that, for several months in late 2011 and early 2012, Google secretly tracked the internet activity of millions of Apple iPhone users and used the data collected in this way for commercial purposes without the users' knowledge or consent. As the court said, what was new in that case is that Mr Lloyd was not just claiming damages in his own right, he was seeking to represent everyone resident in England and Wales who owned an Apple iPhone at the relevant time and whose data were obtained by Google without their consent, and to be entitled to recover damages on behalf of all of these people.

32. There was no legislation in England providing for class actions so Mr Lloyd sought to make use of the representation procedure in CPR rule 19.6, which is in broadly similar terms to GCR O.15, r.12.

33. In the context of the facts of that case, the Supreme Court considered the phrase "same interest" which appears in CPR rule 19.6 and took the view that "*The phrase "the same interest", as it is used in the representative rule, needs to be interpreted purposively in light of the overriding objective of the civil procedure rules and the rationale for the representative procedure.*"

34. That may well be the case, but the *Lloyd v Google* case seems clearly distinguishable from the present simply because Mr Lloyd was within the class of iPhone users who he sought to represent and clearly therefore shared the same interest.

---

[9] [2021] UKSC 50.

35. I do not agree with Mr Basdeo that the fact that the Plaintiff was set up to pursue the purposes outlined above means that, for that reason, it has capacity to act as Plaintiff in this case. It cannot create its own capacity for the purposes of acting as a legal representative of others.

36. There also seems to be an issue as to the extent to which any order made against the Plaintiff could be enforced against it. At the application for leave to appeal, Mr Jackson raised the question of the order for costs made against the Plaintiff on 22 August 2022 and questioned how and against whom that could be enforced on the basis that the Plaintiff does not exist as a legal entity. As the Supreme Court said in the *Google case:*

> *"The premise for a representative action is that claims are capable of being brought by (or against) a number of people which raise a common issue (or issues): hence the potential and motivation for a judgement which binds them all."*

37. It seems to me that in the absence of a plaintiff who has the same rights and same interest as the other aggrieved members of the Association and is acting in a properly constituted representative capacity, any order made for or against the Plaintiff is not going to be binding on them individually.

38. In the circumstances and for the reasons set out above, I do not agree that the Plaintiff has real prospect of success with the first ground of appeal.

39. The second ground of appeal is that I was wrong to exercise my discretion the way that I did. In particular it is said that I should have allowed the Plaintiff's counsel time to take instructions on the possibility of a revised proposed amendment to the Originating Summons seeking an order under GCR O.15, r.12 to substitute an aggrieved member of the Association as the representative plaintiff on behalf of the others in that class. It is further argued that the consequences of striking out the Plaintiff's claim are disproportionate when considering the costs that had been incurred to that date and the costs of re-starting fresh proceedings. It is stated that neither party adduced evidence in that regard.

40. As indicated above, in my view, consistent with the overriding objective, the lack of capacity on the part of the Plaintiff and the lack of a clear pleaded case militated heavily in favour of the order that I made. During the present hearing, I raised again with Mr Basdeo the state of the Plaintiff's pleaded case. During that exchange he made the comment that the case was on the cusp of being set down for hearing, a further reason why he submitted I was mistaken to have made the order that I did. But

when I then asked him what consequential relief his client would seek if he was successful in obtaining a declaration, he replied by saying that this would have to be a matter for the court after the question of the declaration was resolved. To me that highlights the very serious difficulty with the Plaintiff's case as it was pleaded and conducted which is that it simply does not set out clearly and with any particularity the case against the Defendant and the relief that is actually being sought. That relief could readily have been set out as being consequential to the declaratory relief if obtained and the Defendant is entitled to know what that is.

41. The costs consequences of the action and my order affect both parties in this case and not just the Plaintiff. Having taken all of the factors in this case into account and the costs implications for both parties I am satisfied that I exercised my discretion in a way that was consistent with the overriding objective and was as fair to both parties as possible with the aim of ensuring costs are directed at productive proceedings.

42. The third main ground of appeal is that there is sufficient public interest for leave to be given.

43. It is argued that the question of public interest arises in a number of ways:

    43.1 It is argued that the extent to which the Association might bring proceedings in its own name is a matter of public interest. It is suggested that public interest also arises because of the interest that other, similar unincorporated associations might have in the outcome. I disagree. It seems to me that the capacity of the Association to bring proceedings in its own name is a matter of interest for the Association and its members, not the general public. I expect that all unincorporated associations will be set for a particular purpose and on terms chosen by their members. I do not accept therefore that there can be any common interest that would amount to public interest justifying the granting of leave to appeal.

    43.2 It is argued that the 2006 decision of Sanderson J is a binding precedent in relation to the capacity of the Plaintiff to bring proceedings such as these and by not "*following*" that decision, uncertainty and confusion are created. Again, unfortunately, I do not agree. As I have already indicated it does not appear from the judgment in that case that either the question of capacity was argued or decided by the judge. It is also unclear what order would have been made if an application had been made by the Plaintiff to be appointed to act in a representative capacity pursuant to GCR O. 15, r. 12.

    43.3 Finally, it is argued that by dismissing/striking out the Plaintiff's claim on the grounds in question, the Plaintiff has been deprived of its opportunity to a full adjudication of its

substantive property rights[10]. Setting aside the question of whether the Plaintiff can properly argue that it has any rights at all in the context of this case capable of protection or enforcement, that argument seems to ignore the fact that the reasons for the order made on 22 August 2022 were that I was of the opinion that the Plaintiff was not the correct plaintiff, could not act in the proposed representative capacity and that for the additional reasons outlined above, a fresh action should be commenced by the correct party in the correct, fully pleaded format. That cannot be said to prejudice the right of the latter (correct) party to seek adjudication of the rights that they seek to assert.

44. Having considered the arguments put forward by the Plaintiff, I am not satisfied that it has demonstrated any public interest that would justify giving leave to appeal.

45. When considering the question of leave to appeal I have also taken into account the likely costs for the appeal when compared to the likely costs of re-starting by way of a writ action and getting on with the claim. As I have already said I am of the view that the best use of the funds of the aggrieved owners is for a new writ action to be started. In the circumstances, I also do not think that it is reasonable for the Defendant to have to incur the costs of defending an appeal.

46. Leave to appeal is therefore refused on all grounds.

47. The Defendant has applied for costs and I have invited the parties to address the Court in respect of the question of costs of these proceedings by way of written submissions once these Reasons for Decision were delivered.

Honourable Mr. Justice Alistair Walters, (Actg.)
Judge of the Grand Court

[10] *In the Matter of Avendis Global Fund Ltd (In Official Liquidation) & Ors* (25 October 2022), paragraph 30.