IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO. FSD 154 OF 2013 CQJ
(ORIGINALLY CAUSE NO 573 OF 2012)

The Hon. Justice Nigel R.L. Clifford, QC
In Chambers, 28th and 29th July 2015

BETWEEN:

KABUSHIKI KAISHA SIGMA

PLAINTIFF

AND

1. TRUSTCORP LIMITED (IN LIQUIDATION)

2. HIDEO SETO (IN HIS CAPACITY AS TRUSTEE OF THE ESTATE OF KENSHIN OSHIMA, A BANKRUPT)

DEFENDANTS

Appearances:

Mr. Alan Steinfeld, QC instructed by Ms. Shelley White and Ms. Joanne Verbiesen of Walkers for the Plaintiff

Ms. Catherine Newman, QC instructed by Mr. Rupert Coe and Ms. Victoria King of Appleby for the Second Defendant

Ms. Anna Peccarino and Ms. Denise Owen of Travers Thorp Alberga on behalf of Trustcorp Limited, the First Defendant

RULING

1. In this matter three applications have come before the Court for determination. These are as follows:

   (1) An application by the Plaintiff ("**Sigma**") by summons issued on 31 December 2014 to strike out certain paragraphs from the Points of Defence of the Second Defendant ("**Mr. Seto**") dated 1 December 2014 (the "**Strike Out Application**");

(2) An application by the Second Defendant by summons issued on 29 January 2015 for an order directing the Plaintiff to give security for his costs of this action (the "**Security for Costs Application**"); and

(3) An application by Mr Seto by summons issued on 23 April 2015 for directions (the "**Directions Summons**").

2. Mr Seto is the Japanese Trustee in Bankruptcy ("**TIB**") of the estate of Mr Kenshin Oshima ("**Mr Oshima**").

3. In support of the Strike Out Application Sigma has filed the Fourth Affidavit of Yoshihito Oshima ("**Yoshihito**") sworn on 6 January 2015.

4. In support of the Security for Costs Application Mr Seto has filed his Fifth Affirmation affirmed on 28 January 2015 and his Sixth Affirmation affirmed on 2 April 2015.

5. In opposition to the Security for Costs Application Sigma has filed the Fifth Affidavit of Yoshihito sworn on 11 March 2015.

6. The First Defendant ("**Trustcorp**") has not filed any evidence in relation to any of the Summonses. Although represented at the hearing, this was on the basis of it adopting a neutral role and no submissions were made on its behalf.

Background and Parties

7. Sigma is a company registered in Japan which sues as the successor to another Japanese company originally called Kabushiki Kaisha Ken Enterprise ("**Ken Enterprise**") subsequently renamed Kabushiki Kaisha Q & Company ("**Q&Co**"). Prior to October 2008 Mr Oshima was a substantial, albeit a minority, shareholder in Q&Co, as were other members of his family. The shareholders of Sigma are solely members of Mr Oshima's family, his son Yoshihito, his daughter Yuki Scott ("**Yuki**") and his wife Yuriko Oshima ("**Yuriko**"). The directors of Sigma are Yoshihito, Yuki and Yuriko. Yoshihito holds the position of *"representative director"* which means he holds the company seal and may represent Sigma in transactions.

It is a requirement of Japanese law that a company board has at least one such director.

8. Mr Oshima is a Japanese national and formerly an extremely wealthy business man. Mr Seto believes that the principal source of Mr Oshima's former wealth was his shareholding in a company called Kabushiki Kaisha SFCG ("**SFCG**"), which was a company controlled by Mr Oshima prior to its bankruptcy. Mr Seto is also SFCG's trustee in bankruptcy.

9. Mr Seto, the TIB, is a senior Japanese lawyer who has been in practice for more than 35 years. He is also an insolvency practitioner of more than 30 years' standing with considerable experience of conducting both individual and corporate bankruptcies under the supervision of the Japanese Court. He complains of a lack of co-operation from Mr Oshima in the bankruptcy and is concerned that attempts are being made by Mr Oshima and/or his family to defeat Mr Oshima's creditors.

10. The First Defendant, Trustcorp, is the trustee of two unit trusts governed by Cayman law. Mr Oshima is the registered holder of the majority of the issued units in one of the trusts, the Diamond Trust, and all the issued units in the other trust, the Attila Unit Trust (collectively "**the Trusts**" and "**the Units**"). Trustcorp is a company registered in Jersey and is in liquidation in Jersey. By way of an order made in separate Beddoe proceedings in the Grand Court of the Cayman Islands, Jones J. directed that Trustcorp should take a neutral role in this action.

11. There have been various proceedings in Japan to set aside certain transactions entered into by SFCG while under Mr Oshima's control which benefitted Mr Oshima and persons closely connected to him. An action was also brought in Japan by the TIB against Mr Oshima personally for breach of his fiduciary duties as representative director of SFCG. In addition Mr Oshima has been prosecuted in Japan for two criminal offences related to the transfer of assets out of SFCG's bankruptcy estate. He was convicted on one of two counts and sentenced to 18 months' imprisonment with labour, suspended for three years. He has appealed this conviction and therefore, in accordance with Japanese law, is entitled to enjoy a presumption of innocence until the determination of the appeal.

The Proceedings

12. In this action Sigma makes claims in respect of the Units in the Trusts based upon two documents in substantively identical form in Japanese said to have been executed in Japan on 14 March 2003. These instruments are known as "**Joto Tanpos**". By one of them Mr Oshima was expressed to charge all his units in the Diamond Trust and by the other all his units in the Attila Unit Trust in favour of Ken Enterprise to secure claims against him. The signatories to the Joto Tanpos are said to be Mr Oshima on his own behalf and Yuriko on behalf of Ken Enterprise. There is an issue as to the signatures.

13. Prior to the start of the action, on 24 October 2012, the TIB issued an application for recognition of his appointment in Jersey, to seek to take control of the assets in the Trusts. Those proceedings have since been stayed on terms.

14. The present proceedings were issued by Sigma by Originating Summons in the Civil Division of the Grand Court on 12 December 2012. Trustcorp was the only named Respondent. The TIB did not learn of the proceedings until sometime after they had been issued.

15. It is necessary to refer to the procedural background because the TIB makes complaint about how Sigma has conducted the proceedings. This is said to be relevant in revealing that Sigma has attempted to assert a claim to be the rightful owner of the Units behind the back of Mr Seto, the TIB. There are also various issues about the course which the action has taken which the Court has been asked to consider in dealing with the present applications.

16. Mr Seto complained that, as Mr Oshima's trustee in bankruptcy, it was entirely inappropriate for him not to have been named as a party to the proceedings, given that they are designed to transfer assets which fall into the bankruptcy estate into the hands of an Oshima family company. That issue was resolved when the TIB was joined as Second Defendant by way of amendment to the Originating Summons on 12 November 2013.

17. The TIB also objected to the proceedings taking place in the Civil Division. This was on the basis that the action involves cross-border insolvency, unit trusts, a Jersey-based trustee, a Japan-based trustee in bankruptcy, and financial instruments worth millions of dollars. Accordingly, it was contended that it is the type of matter which should be dealt with in the Financial Services Division. Initially Sigma did not accept this and there was some debate of the issue. However, ultimately a transfer was agreed and this was effected by an Order dated 23 December 2013.

18. There was a further objection by the TIB that the proceedings were by way of Originating Summons. It was contended on his behalf that such proceedings are appropriate for summary determination of matters on a point of law where there is no substantial dispute as to fact. This, it was said, is not the case in these proceedings as Sigma well knew. Initially Sigma refused to accept that the proceedings should continue as if begun by writ and the issue was debated in correspondence[1]. The TIB then issued a Summons seeking that the proceedings be converted into a writ action which was listed for hearing on 20 October 2014. However, before the hearing Sigma's attorneys consented to the action continuing as if begun by writ and there followed a Consent Order to this effect dated 22 October 2014.

19. The TIB complains that having to resolve these issues has caused significant delay.

The Pleadings

20. It is Sigma's case that each Joto Tanpo has an effect similar in law to an all moneys charge by a debtor in favour of his creditor over the Units. It is also Sigma's case that (a) prior to his bankruptcy Q&Co had advanced to or for the benefit of Mr Oshima sums totalling nearly 5 billion Japanese Yen (equivalent at current rates of exchange to over US$42 million) which by the terms of each Joto Tanpo were charged on the Units; and (b) by the express terms of each Joto Tanpo on the presentation of the bankruptcy petition against Mr Oshima, Q&Co became entitled to become the owner of the Units.

[1] Exhibit VSK-3 pages 1-4

21. Sigma came into the picture in 2012 because as a result of the merger between it and Q&Co which came into effect on 1 September 2012, it took over all the liabilities of Q&Co and became entitled to all its assets. Such assets it is claimed included Mr Oshima's indebtedness to Q&Co for the sums advanced and the benefit of each Joto Tanpo whereby that indebtedness was secured.

22. Points of Claim were served by Sigma on 11 November 2014. Essentially they rely on the two Joto Tanpo Agreements as entitling Sigma in the events that have occurred to the relief which it seeks.

23. In his Points of Defence the TIB raises a number of responses to the claim in addition to putting Sigma to strict proof of it. These responses include:

    1. The Joto Tanpo Agreements are ineffective to entitle Sigma to be registered as the holder of the Units as by the terms of the deeds of trust (**"the Trust Deeds**") governing the two Trusts units therein can only be transferred by a transfer signed by or on behalf of the holder and post Mr Oshima's bankruptcy that could only be done by Mr Seto as his trustee in bankruptcy[2].
    2. The Joto Tanpo Agreements cannot take effect as transfers of the Units because by the terms of the Trust Deeds the Units can only be transferred with the Trustee's consent which was not and, now that the Trustee has gone into liquidation, cannot now be given[3].
    3. The register of holders of units in the Trusts cannot now be rectified as under the terms of the Trust Deeds and in view of the liquidation of the Trustee without another trustee having been appointed in its place, the Trusts have terminated and have therefore ceased to have effect leaving the Units held for Mr Oshima or his bankruptcy estate[4].
    4. The Joto Tanpo Agreements do not as a matter of Japanese law bind Mr Seto because the date of the documents does not fulfil the statutory requirement of having been duly certified[5].

[2] Paragraphs 16 - 18
[3] Paragraphs 19 - 21
[4] Paragraphs 22 - 27
[5] Paragraph 33

24. These points are in issue. However, there is no question of them being struck out or summarily dismissed. It is accepted on behalf of Sigma that they will have to go to trial. It is what follows that gives rise to the Strike Out Application.

The Strike Out Application

25. The focus of the Strike Out Application is on paragraphs 35 to 40 of the Points of Defence. In order to understand and analyse the issues which arise the relevant paragraphs are set out as follows:

> *35. Further or alternatively Mr Seto avers that the Joto Tanpo Agreements should be set aside as a matter of Japanese law and should not be enforced as sought as a matter of Cayman Islands law because they were not executed as alleged on or around 14 March 2003 but were in fact executed later at a time when Mr Oshima was either already bankrupt or aware of the possibility that he might be declared bankrupt imminently, and backdated, with a view to defeating the interests of Mr Oshima's creditors.*
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> *36. In support of the proposition that the Joto Tanpo Agreements were created after 14 March 2003 and backdated, Mr Seto relies upon similar fact evidence of analogous transfers made by or at the direction of Mr Oshima to defeat his, and SFCG's creditors; bad character evidence against Mr Oshima; and additional evidence that the Joto Tanpo Agreements were not in existence at various dates after 14 March 2003. Notice of that evidence is given in outline in paragraphs 37-41, below.*
>
> *PARTICULARS OF SIMILAR FACT EVIDENCE*
>
> *37. Mr Seto relies upon the following;*
>
> > *37.1 As SFCG's trustee in bankruptcy Mr Seto has been involved in five sets of proceedings in the Tokyo District Court in Japan relating to, or resulting in, the setting aside of unlawful transactions instigated by*

SFCG, while under Mr Oshima's control, in order to move assets out of the bankruptcy estate in favour of Mr Oshima or persons or companies connected to him. These proceedings have the following cause numbers [set out]. The companies who sought to benefit from the transactions, had they not been set aside, were MAG Net, J Factor, Justice, IRE, Byakko, IBI, KEHD, Blue Bird and Ken Estate.

37.2 In all five of these proceedings the relevant transactions were declared invalid and/or set aside.

37.3 In two of the sets of proceedings … the Japanese Court expressly found that legal documents had been backdated, either by Mr Oshima himself or by others acting under his control, with a view to disguising the true date of the documents in order to defeat SFCG's creditors.

37.4 In a third set of proceedings … Mr Seto alleged that a pledge agreement had been backdated with a view to defeating creditors. The Court did not expressly make a finding on the point, but did conclude that the relevant pledge was created without consideration within six months of the commencement of SFCG's civil rehabilitation proceedings, and for that reason the pledge could not be enforced.

37.5 A sixth set of proceedings in the Tokyo District Court were brought by Mr Seto against Mr Oshima personally for breach of his fiduciary duties as SFCG's representative director… The Court held that Mr Oshima had indeed breached his fiduciary duties as SFCG's representative director and was liable to pay compensatory damages of … (around US$650,000). The key findings of the Court were as follows: [findings set out]

37.6 The provisions of paragraph 39 (post) are also adopted as providing similar fact evidence in support of Mr Seto's position.

38. In essence, as his past conduct (referred to above) clearly illustrates, Mr Oshima has an established modus operandi designed to defeat his, and SFCG's, creditors. That modus operandi involves transferring assets either after or just before bankruptcy (at a time when he knew bankruptcy was imminent or inevitable) to companies closely connected to him or his family. Further Mr Oshima has a track record of causing documents to be backdated to achieve this purpose, and he makes use of pledge agreements to assert that security interests had been created some time prior to bankruptcy.

PARTICULARS OF BAD CHARACTER EVIDENCE

39. Mr Seto relies on the following;

39.1 Mr Oshima was prosecuted in Japan for illegal practices conducted while he was representative director of SFCG. On 30 April 2014 he was convicted by the Tokyo District Court and sentenced to 18 months' imprisonment (suspended for three years) for fraudulent registration of loans secured by real estate. Mr Oshima has appealed against the decision and the appeal is ongoing.

39.2 Under Japanese law, the fact of Mr Oshima's appeal means that he continues to enjoy a presumption of innocence. Nevertheless the following findings of the Japanese criminal Court are relevant: [findings set out]

NOTICE OF OUTLINE OF ADDITIONAL EVIDENCE THAT WILL BE RELIED UPON IN SUPPORT OF THE ALLEGATION THAT THE JOTO TANPO AGREEMENTS WERE CREATED AFTER 14 MARCH 2003

40. Mr Seto relies on the following: [additional evidence set out]

26. Paragraph 35 puts forward a positive case that the Joto Tanpo Agreements were executed at a time when Mr Oshima was already bankrupt or facing imminent bankruptcy and backdated. This follows on from the plea in the preceding paragraph that under various provisions of both Cayman and Japanese bankruptcy

law, if they were executed at a time when Mr Oshima knew he was soon to be made bankrupt, they can be avoided.

27. However, it is objected that as the TIB has not served any Counterclaim seeking to have the Joto Tanpo Agreements set aside on this or some other bankruptcy ground, this in itself is sufficient to justify the Court striking out paragraph 35, unless it is amended.

28. As can be seen from paragraph 36, Mr Seto pleads the matters upon which he says he is going to rely to support the proposition that "the Joto Tanpo Agreements were created after 14 March 2003 and backdated". The first two of these are stated to be:

    (a) "similar fact evidence of analogous transfers made by or at the direction of Mr Oshima to defeat his and [his company's] creditors"; and

    (b) "bad character evidence against Mr Oshima".

29. The "Particulars" of this "Evidence" are then pleaded in paragraphs 37 and 39. Paragraph 38 summarises what Mr Oshima's "past conduct" (referred to above) clearly illustrates "namely that, in summary, he has "an established modus operandi designed to defeat his creditors" and a "track record" of using family companies and backdated documents for this purpose.

30. In his submissions Mr Steinfeld, on behalf of Sigma, stresses that the "evidence" which is said to demonstrate Mr Oshima's past conduct and track record pleaded in paragraph 37 consists – and consists only – of the judgments and findings by the Japanese Courts in the various sets of proceedings against Mr Oshima in Japan. Further the "evidence" as pleaded in paragraph 39 which is relied on to demonstrate Mr Oshima's "bad character" consists – and consists only – of findings against Mr Oshima by a Japanese criminal court in the criminal proceedings against Mr Oshima in Japan.

31. It is these two paragraphs 37 and 39, and with them paragraph 38, that Sigma by this application primarily seeks to have struck out.

32. Paragraph 40 contains particulars of what is described as the "additional evidence" upon which Mr Seto intends to rely to support the allegation that the Joto Tanpo Agreements were created after 14 March 2003. It essentially consists of an application made by Mr Oshima in Japan after he was made bankrupt and a statement made by a Mr Yoshida (a former business colleague of Mr Oshima) to "junior members of Mr Seto's team" which are said to be inconsistent with the then existence of the Joto Tanpo Agreements. The evidence is contended to be weak, but Sigma does not seek to have the paragraph in itself struck out. The question, rather, is whether it can stand on its own, if the other paragraphs are struck out, or whether it would become redundant.

33. The grounds upon which Sigma seeks to have paragraphs 37 and 39 struck out are in summary:

(a) First and foremost that the findings of the Japanese Courts against Mr Oshima pleaded in those paragraphs are plainly inadmissible on well-established principle to prove as against Sigma in these proceedings the facts so found;

(b) This is not a case where "similar fact evidence" as pleaded would be admissible as, on the basis that Mr Seto cannot rely on the findings of the Japanese Courts, that would involve this Court having to go effectively into a trial of its own of the issues which concern entirely different and foreign parties who will not be before the Court and the validity of different transactions which are not the concern of this Court; and

(c) This is not a case where evidence of Mr Oshima's alleged bad character is admissible as Mr Oshima's character is not as such in issue in these proceedings (even though, if he were to be called as a witness, it might be open to Mr Seto to cross examine him as to his credit and to put to him the findings of the Japanese Courts for that purpose).

34. The Strike Out Application is made pursuant to Grand Court Rule O.18, r.19 which is in the same terms as Order 18 rule 19 of what were the Rules of the Supreme

Court in England before they were replaced by the new Civil Procedure Rules (which contain a similarly worded provision). By this rule the Court may strike out anything in any pleading which:

(a) Discloses no reasonable cause of action or defence; or
(b) Is scandalous, frivolous or vexatious; or
(c) May prejudice, embarrass or delay the fair trial of the action; or
(d) Is otherwise an abuse of the process of the Court.

35. The rule is amply sufficient to confer jurisdiction on the Court to strike out from the pleadings allegations which the pleadings show are intended to be supported by evidence which is inadmissible and which absent that evidence cannot therefore be sustained. Such a plea discloses to the extent pleaded no reasonable defence. Further in the pleading sense it is "scandalous": see *Plato Films v Speidel* [1961] A.C. 1090, per Devlin LJ at pages 1101 to 1102[6]. In the same sense it is also "embarrassing" in that it may embarrass the fair trial of the action: see *Plato Films* ibid. Mr Steinfeld, on behalf of Sigma, also contends that it is arguably an abuse of process to make serious allegations against a person who is not a party to the proceedings, particularly when the pleaded foundation of those allegations is evidence which is plainly inadmissible.

36. The key question on this Strike Out Application is whether the evidence of the judgments and findings of the Japanese Courts, on which the TIB seeks to rely, is inadmissible.

37. In support of its application Sigma relies on the so-called rule in *Hollington v Hewthorn*. Mr Steinfeld submitted that the crux of the matter is whether this rule which, on the authorities, applies in England is also applicable in the Cayman Islands.

38. *Hollington v Hewthorn* [1943] K.B. 587, a decision of the English Court of Appeal, established the rule that the findings of a tribunal against a person are not generally admissible in subsequent proceedings, even proceedings against the same person, as evidence of the facts so found. In that case the Plaintiff sought to rely in a

[6] Giving the judgment of the Court of Appeal which was upheld in its entirety by the House of Lords

negligence claim against the defendant driver arising from a road accident upon the criminal conviction of the defendant for careless driving. It was held that he was not entitled to do so essentially because the findings of the tribunal are no more than the opinion of that tribunal and so are inadmissible as non-expert opinion evidence. In addition those findings are based on what the tribunal was told by the persons who gave evidence before it and are therefore inadmissible as hearsay evidence.

39. The second of these reasons has essentially gone in England (although not in Cayman) by reason of the virtual abolition of the hearsay rule in England. However, it is submitted, the first of these reasons remains as good still in England as it is in Cayman.

40. The oft quoted dictum of Goddard LJ in the case at page 595, which underpins the reason for the rule, is as follows:

> *"The reason commonly assigned is that this is the precise question the court has to decide, but, in truth, it is because his opinion is not relevant."*

41. Mr Steinfeld accepted that the rule has been criticised[7] but he contends that on the authorities it remains good law and applies, subject only to any statutory relaxation, to the findings of any court or tribunal, whether criminal or civil and whether foreign or domestic. In England the rule has been relaxed by section 11 of the Civil Evidence Act 1968 which allows evidence of a person's criminal conviction to be admitted as evidence of the facts found provided the conviction is a conviction by a U.K. Court. In Cayman a similar relaxation was made by section 39 of the Evidence Law (1995 Revision) now section 52 of the Evidence Law (2011 revision) but, like the English statute, the relaxation applies only to convictions by a Cayman Islands Court. The fact that the Cayman Legislature has found it necessary to follow the position in England in this way indicates that the rule applies in this jurisdiction, otherwise it would not have been necessary for the specific statutory intervention.

[7] Most notably by Lord Diplock in *Hunter v Chief Constable for the West Midlands* [1981] 3 All E.R. 727, 734 and by Lord Hoffman in *Arthur J S Hall v Simons* [2002] 1 A.C. 615, 702

42. I have been referred to various authorities in support of the submission that, subject only to the statutory relaxation referred to which is not relevant to the present case, the rule remains good law and applies in England.

43. In *Union Carbide v Naturin* [1987] F.S.R. 538, the English Court of Appeal in a patent infringement case struck out an allegation in the pleadings that the defendants had been convicted of theft by a French Court on the ground that the conviction was precluded by the rule from being admitted in evidence. In his judgment (at page 11 of the extract) Slade L.J. said as follows:

> *"The actual decision in Hollington v Hewthorn related to a previous criminal conviction in England. Furthermore, the conviction was that of a party to the subsequent civil proceedings. Nevertheless, in my judgment, the ratio decidendi unquestionably extends to criminal convictions in a foreign country and applies whether or not the conviction which is sought to be put in evidence in the subsequent civil proceedings was the conviction of a party to those proceedings. In relations to convictions in this country, the rule in Hollington v Hewthorn has, of course, now been abrogated by section 11 of the 1968 Act. However, in relation to foreign convictions, in my judgment, Mr Jacob is right in submitting that the rule is unimpaired and is binding on this court."*

44. The next case in chronological sequence is the decision of the Privy Council, on appeal from the Court of Appeal of Hong Kong in *Hui Chi-Ming v R* [1992] 1 A.C. 34. The Privy Council applied the rule so as to prevent the acquittal of a person in an earlier trial being adduced in evidence in favour of another person in a later trial. It was decided that evidence of the findings of another tribunal is merely the opinion of that tribunal and so is irrelevant and inadmissible. The underlying facts may or may not be relevant, but the findings are irrelevant.

45. The rule went on to be considered by the House of Lords in *Three Rivers DC v Bank of England (No. 3)* [2003] 2 A.C. 1. There it was held, in reliance on the rule, that the findings by Lord Bingham in his report on the collapse of BCCI were not admissible in proceedings by depositors against the Bank of England. Lord Hope at page 244 (paragraphs 31 to 32) said as follows:

"The first point to be borne in mind is that neither the report itself nor any of its findings or conclusions will be admissible at any trial in this case. At this stage, when the only material that is available for consideration apart from the pleadings is the report and an incomplete bundle of relevant documents, it is tempting to fill in the gaps by reference to Bingham LJ's findings and conclusions which he was able to draw from his review of the evidence. Nevertheless a sharp dividing line must be observed between, on the one hand, his narrative of the evidence and, on the other hand, his findings and conclusions in the light of that evidence …the claimants will in due course have access to the evidence which provides the source material for that narrative, and that evidence will be capable of being led by them at the trial. But, as Bingham LJ's findings and conclusions based on that narrative are inadmissible, they must be held to be incapable either of being led in evidence at the trial or of being used by either side in any other way in support of the competing arguments."

46. There followed the decision of the English Court of Appeal in *Secretary of State v Bairstow* [2004] Ch.1. In this case it was held that findings against the defendant made by a judge in previous wrongful dismissal proceedings brought by the defendant against the company by whom he had been employed were not admissible in subsequent proceedings brought against him for his disqualification from acting as a director. For coming to this conclusion Sir Andrew Morritt V-C, in his judgment at paragraphs 15 to 27, undertook a detailed and illuminating examination of many of the previous authorities which had examined and applied the rule.

47. *Conlon v Simms* [2008] 1 W.L.R. 484 was another decision of the English Court of Appeal. There the rule was applied in holding that the findings against the defendant solicitor of the Solicitors' Disciplinary Tribunal and of the Divisional Court on appeal from those findings were inadmissible as evidence against the defendant in partnership proceedings brought against him by his former partners. Having reviewed the authorities, in paragraph 134 of his judgment (at page 515) Jonathan Parker LJ concluded as follows:

"I respectfully agree with the conclusion of Sir Andrew Morritt V-C [in Bairstow] *as to the continuing applicability of the Hollington case: a conclusion with which the other members of this court agreed and which is in any event binding on us."*

48. There has also been further consideration of the rule by the Privy Council. In *Calyon v Michailidis* (Privy Council Appeal No. 55 of 2008) [2009] U.K.P.C. 34, on appeal from the Court of Appeal of Gibraltar, it was held, applying the rule, that it was not open to the respondents to rely on a Greek judgment, which had determined that certain chattels belonged to them, to prove the ownership of those chattels against the defendant bank not withstanding that the bank derived title to part of the proceeds of sale of those chattels from a person who was party to the Greek proceedings. The Privy Council closely examined the rule and stated why it still held good and should not be departed from. Thus in the judgment of the Court delivered by Lord Rodger at paragraphs 31 to 32 it was stated as follows:

> *"The Committee's reasoning develops the reasoning in the first of the passages which the Board has quoted from Lord Goddard's judgment in Hollington. Their Lordships find that reasoning compelling. What is more significant, perhaps, is that Parliament must have found the reasoning convincing since the Civil Evidence Act and its Scottish counterpart made no change to this aspect of the law. The Parliament of Gibraltar has not yet had occasion to consider the matter.*
>
> *Their Lordships are accordingly satisfied that, even if it were open to them to do so, they would not accede to Mr Steinfeld's submission that they should depart from the established principles underlying Hollington. In particular he argued that, even if the Greek judgment could not be regarded as conclusive, it should still be admitted in evidence and given such weight as seemed appropriate. But there could be no better illustration of the difficulties of that superficially attractive solution. The simple fact is that the Greek judgment does not indicate the substance of the evidence on which the court relied in holding that the Counter-Plaintiffs had proved their ownership of the Collection. So a judge in the Gibraltar Supreme Court would be in no position to determine what weight it was appropriate to give to the Greek judgment on the point."*

49. The rule has also fallen to be considered in this jurisdiction.

50. It is submitted by Mr Steinfeld that in *Re Pegasus Insurance Company* [2004-5] CILR 138 the Cayman Islands Court of Appeal specifically upheld and applied the rule. The point arose in the context of a question of the suitability of a person to be

appointed as an official liquidator. The Judge had felt that it was appropriate to take into account the opinions of other members of the Court who had personal experience of the person concerned. Taylor J.A. in his judgment at paragraph 52 said as follows:

> *"According to the rule in Hollington v Hewthorn, a conviction on a "not guilty" plea is no more than an opinion, and inadmissible in any other proceedings involving the same incident. The authority of that case has largely been over-ridden by statute in most jurisdictions, but only to the extent that a related criminal conviction may now be adduced as evidence in subsequent civil proceedings. Where this is permitted, proof of conviction amounts to evidence that the accused committed the offence, but not as conclusive evidence. Except to the extent that there has been statutory change, the rule in Hollington v Hewthorn still stands for the proposition that a judicial finding is generally inadmissible as evidence in a subsequent proceeding. Where, as here, the issue raised involves suitability for appointment by the court, reference to judicial opinion, whether given in a judgment or given extra-judicially, must be regarded as proper insofar as it gives rise to a concern to which the nominee is asked to respond. It cannot, however, be that judicially expressed views are to be regarded as conclusive, so that any response must, or even may, be disregarded."*

51. It is further submitted on behalf of the Plaintiff that in *Re GFN Corporation Ltd* [2009] CILR 135 this Court upheld and applied the rule so as to prevent the petitioner from relying as against the respondents on findings against the respondents made by the Court of Dominica.

52. On the basis of these English and Cayman authorities Mr Steinfeld makes his primary submission that the rule in *Hollington v Hewthorn* applies and continues to be applied both in England and in the Cayman Islands. It is contended, therefore, that the decisions and findings of the Japanese Courts are inadmissible in these proceedings.

53. He also contends that even if they were admissible, there would be an underlying problem in determining what weight could be attached to them and whether they were of any probative value. He points to the following:

(a) Neither Sigma nor Q&Co was party to any of the proceedings against Mr Oshima which are relied upon by Mr Seto;

(b) At the time of those proceedings Mr Oshima was neither a shareholder nor a director of either company;

(c) The Court knows nothing about the fairness of the procedures of the Japanese Courts;

(d) The findings of the Japanese Courts are in relation to transactions which have nothing whatsoever to do with the transactions sought to be enforced by Sigma in these proceedings; and

(e) Mr Seto has not sought to challenge in Japan the validity of the transactions sought to be enforced in these proceedings.

54. Accordingly, it is submitted on behalf of Sigma that the paragraphs of the Points of Defence referred to should be struck out.

55. In response to the Strike Out Application, Ms Newman submits that the TIB is entitled to rely on the findings and decisions of the Japanese Courts as similar fact evidence and relevant bad character evidence and that they have been properly pleaded for this purpose. It is accepted that this Court will not be bound by those findings and decisions and that it will be a matter for this Court to afford as much or as little weight to them as it sees fit.

56. As far as the rule in *Hollington v Hewthorn* is concerned, Ms Newman submits that it has nothing to do with the admissibility of similar fact evidence. It is also submitted that the rule has been overtaken by changes in the law, that there are indications that it is wrong, and that in this jurisdiction, in particular, the rule is not applied rigidly, but with some discretion and flexibility.

57. In support of these submissions reference was made to *Phipson On Evidence (18th Edition) paragraphs 43-76 to 43-78.* These paragraphs are in a chapter entitled

"Judgments as Evidence Against Strangers". They contain analysis of the rule in *Hollington v Hewthorn* and the reasons for it, be it that judgments are to be excluded as opinion evidence, or as hearsay, or on the ground of *res inter alios acta (or judicata).* I am urged to have regard to this analysis as correctly setting out the ratio of the rule. However, the better course, in my view, is to refer to the authorities themselves.

58. In support of the contention that there are indications that the rule in *Hollington v Hewthorn* is wrong, in her written submissions Ms Newman referred to the recent decision of the English Court of Appeal in *Hoyle v Rogers* [2014] 3 All E.R. 550. That case concerned the admissibility of expert evidence, being a report of an investigation into an aircraft accident. It was held that such expert evidence could be admitted without offending the rule in *Hollington v Hewthorn.* Nevertheless there were comments on the rule. Christopher Clarke LJ. had this to say[8]:

> *"The rule, at any rate so far as it applies to criminal convictions, has been controversial for years. In McIlkenny v Chief Constable of West Midlands Police Force [1980] 2 All ER. 227 at 237, [1980] QB 283 at 319 Lord Denning MR, who had been counsel for the appellant in Hollington v Hewthorn described it as "[b]eyond doubt … wrongly decided". In the House of Lords in the same case Lord Diplock said that that was generally considered to be so. In Arthur J S Hall & Co (a firm) v Simons, Barratt v Ansell (t/a Woolf Seddon (a firm)), Harris v Schofield Roberts & Hill (a firm) [2000] 3 All ER 673 at 702, [2002] 1 AC 615 at 702 Lord Hoffman said that the Court of Appeal in that case was "generally thought to have taken the technicalities of the matter much too far"."*

59. I have also been referred, in this context, to the position in Canada. The rule in *Hollington v Hewthorn* , once also applied in Canada, has recently been rejected by the Supreme Court of Canada in the case of *Jesse v R.* [2012] 1 SCR 716. In the judgment of Moldaver J he said as follows[9]:

> *"This Court has recently questioned the application of Hollington v F. Hewthorn in Canada. Binnie J. writing for a unanimous Court in British Columbia (Attorney General) v Malik 2011 SCC 18, [2011] 1 S.C.R. 657 canvassed the rationale for*

[8] Paragraph 35
[9] Paragraphs 43 to 45

rejecting the holding of that earlier English case (paras. 44-48). In doing so, he observed that the decision has come under academic and judicial criticism for decades. One such criticism appears in Cross and Tapper on Evidence (12th ed. 2010), at pp. 109-110, where Hollington v F. Hewthorn & Co is referred to as a bundle of "indefensible technicalities", arguably at odds with the "modern emphasis on fairness and the abuse of process, especially where the prejudiced party had a full opportunity to contest the finding against him in the earlier proceedings" I cannot improve on Binnie J.'s analysis and do not propose to repeat it here. I agree with his conclusion in Malik, at para. 52:

"…a prior judicial decision between the same or related parties or participants on the same or related issues [is not] merely another controversy over hearsay or opinion evidence. The court's earlier decision was a judicial pronouncement after the contending parties had been heard… [F]or the reasons already discussed I would decline to give effect to the arguments made in Hollington v F. Hewthorn & Co. They give rise to unnecessary inefficiencies and any alleged unfairness can be addressed on a case-by-case basis according to the circumstances."

Although Malik addressed the use of prior decisions in interlocutory proceedings, Binnie J. went on [10]*to observe that "[w]hether or not a prior civil or criminal decision is admissible in trials on the merits … will depend on the purpose for which the prior decision is put forward and the use sought to be made of its findings and conclusions … [T]he weight and significance to be given to [it] will depend on the circumstances of each case".*

I have applied that approach in assessing the issue at hand."

60. Turning back to the English cases, relied upon by the Plaintiff, Ms Newman referred me to various additional passages in the judgments and made certain observations.

61. Thus in *Union Carbide* it was pointed out that on the particular facts the conviction could not be conclusive. It was observed, therefore, that this was merely an application of the rule in *Hollington v Hewthorn* in certain circumstances.

[10] Pages 8 to 9

62. The point made on *Calyon* was that it was an application of the rule where the parties were completely different.

63. There was a reference back to the *Three Rivers* case, to the same paragraphs[11] referred to by Mr Steinfeld. However, Ms Newman submits that this authority is of no assistance in the present case. The reason for this is said to be because the Bingham Report was not a judicial finding.

64. With regard to *Conlon v Simms,* Ms Newman first referred to the *Hunter* case which has been noted to contain criticism of the rule in *Hollington v Hewthorn* (particularly by Lord Diplock). She made the point, however, that this was a case of collateral attack on earlier convictions and so is of no assistance anyway. She made essentially the same point in relation to *Conlon v Simms.*

65. There was also passing reference back to the *Arthur J S Hall* case where, as has been noted, there has also been criticism of the rule in *Hollington v Hewthorn* by Lord Hoffman.

66. Particular emphasis was placed by Ms Newman on the *Hui Chi-Ming* case. She relies in particular on a passage in the judgment of Lord Lowry at page 43 E where, in examining the rule in *Hollington v Hewthorn,* he referred to what he described as:

> *"the general rule all evidence which is sufficiently relevant to an issue is admissible and that evidence which is irrelevant or insufficiently relevant should be excluded"*

67. However, as already observed, in the final analysis in the *Hui Chi-Ming* case the Privy Council applied the rule in *Hollington v Hewthorn* so as to prevent the acquittal in the earlier trial being adduced in evidence at the later trial.

68. The problem for Ms Newman is that whatever debate there may have been about the rule in *Hollington v Hewthorn*, and criticism of it, and notwithstanding that in Canada the rule has been rejected, there is no English authority to the effect that the rule no longer applies. I am satisfied that indeed the position is quite the

[11] Paragraphs 31 to 32

reverse. In my view the authorities demonstrate that the rule, whatever its imperfections, applies and continues to be applied in England, save only to the extent that it has been modified by statute.

69. This leaves the question whether the position is different in the Cayman Islands. Ms Newman submits that the position is different here where there has been a more sensible and pragmatic approach. Reliance is placed on the same two local cases cited by Mr Steinfeld.

70. In the *Pegasus Insurance* case, a decision of the Cayman Islands Court of Appeal which is clearly binding on this Court, in the passage cited from the judgment of Taylor LJ[12], that the rule in *Hollington v Hewthorn* still stands for the proposition that a judicial finding is generally inadmissible as evidence in a subsequent proceeding, particular emphasis is placed on the word "generally". This, it is suggested, allows for some discretion or flexibility.

71. The other Cayman case is the decision of Smellie CJ. in *GFN Corporation.* Ms Newman relies particularly on passages in the judgment of the Chief Justice in paragraphs 35 to 36 which are as follows:

> *"Here I must comment briefly on the evidential significance of Mr. Pellarano's conviction. To the extent that the rule in Hollington v Hewthorn & Co. Ltd. (8) still applies, it of course precludes the Dominican judgment operating by way of estoppel, that is, as a binding judgment on the foregoing issues of collusion and manipulation – in these proceedings joined between the petitioner and GFN. Not only are the present parties different from those before the Dominican court where Mr Pellerano was convicted, the factual issues subsumed in the Dominican conviction of Mr. Pellerano are widely different from those arising now for determination of the question of winding up of GFN, on the ground that it is just and equitable to do so. The fact of the conviction and the findings upon which it is based, are therefore irrelevant to the determination now of the factual basis upon which I might decide to grant the petition to wind up GFN. This, it seems, is all the more so the position in law because the earlier judgment on conviction arose in criminal proceedings: see, for a recent analysis of the surviving*

[12] Paragraph 52

applicability of the rule in Hollington v. F. Hewthorn & Co. Ltd., Trade & Indust Secy. v. Bairstow (15) (especially [2004] Ch. 1, at paragraphs 25 -27).

Nonetheless, Mr Crystal, Q.C. submitted that, while I may not regard as proven facts in these proceedings the factual matters established for the purposes of the conviction of Mr. Pellarano (and for that matter, Mr. Mendoza) by the Dominican court in its judgments, I may have regard to them as "background" considerations showing the need for the inquiry as a basis for the winding up of GFN on the just and equitable ground. Mr. Lowe Q.C. did not argue against that premise and I think that it must be correct. There is no question of my attributing to GFN here the misconduct in respect of which Mr. Pellerano has been convicted. Rather, because of his common influence or control over the affairs of Bancredito, GFN Capital and the GFN Group itself and other entities within the GFN Group as their principal, his proven fraudulent manipulation of the affairs is clearly a factor in all the circumstances of this case showing the need for an inquiry. This is especially as to the possible extent to which the putative debtor/creditor relationship between GFN and the petitioner may have been affected."

72. In the event, as has been seen, in this GFN case the Chief Justice applied the rule in *Hollington v Hewthorn.* However, Ms Newman submits that, in doing so, while he was not bound by the decision of the criminal court of the Dominican Republic, he nevertheless accepted it could be considered as part of the background circumstances of the case, no doubt determining how much weight should be attached to it.

73. Having reviewed the authorities, I am of the view that the rule in *Hollington v Hewthorn* certainly continues to apply in this jurisdiction, save to the extent that it has been specifically modified by legislation. I am unconvinced that the use of the word "generally" in the *Pegasus Insurance* case was really intended to allow discretion in relation to the application of the rule. Judges being able to confer on the suitability of a person to be appointed as a liquidator does not, in my opinion, constitute any real departure from the rule.

74. Nor am I convinced that, in the final analysis, that the Chief Justice intended any real departure from the rule in *GFN Corporation.* However, if I am wrong about that, and if the consideration of the decision of the Dominican court by way of background in the particular circumstances of the *GFN Corporation* case does

indicate there can be some flexibility in applying the rule, it does not follow that this should happen in the present case.

75. The argument by Ms Newman that, even though the findings and decisions of the Japanese courts could not be regarded as binding, they should still be admitted in evidence and given such weight as is deemed appropriate, echoes the submissions in the *Calyon* case which were specifically rejected by the Privy Council. Mirroring the words of Lord Rodger[13], there could be no better illustration of the difficulties of that superficially attractive solution. The simple fact is that the Japanese court decisions do not indicate the substance of the evidence on which the courts relied in reaching their findings. So a judge in Cayman would be in no position to determine what weight it was appropriate to give to the Japanese decisions on the matters decided.

76. The matter does not rest here on Ms Newman's submissions because she also contends that, whatever the position may be under the rule in *Hollington v Hewthorn,* evidence of the Japanese court decisions are admissible on an application of the rules relating to similar fact evidence. She suggests that there is a dichotomy between the rule in *Hollington v Hewthorn* and the rules relating to similar fact evidence and that if the evidence cannot be admitted under the former it can be under the latter.

77. For the purpose of this submission Ms Newman cited various cases[14] which establish the test and rules for the admission of similar fact evidence. I do not find it necessary to refer specifically to these cases. It is sufficient to look at what is undoubtedly the leading case, the decision of the House of Lords in *O'Brien v Chief Constable of South Wales Police* [2005] A.C. 534; [2005] UKHL 26. In that case the House of Lords determined unanimously that similar fact evidence is admissible, so long as it is relevant, and on the facts the evidence should be admitted. As Lord Bingham of Cornhill put it[15] :

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[13] Paragraph 32
[14] *Mood Music Publishing Co. Ltd. V. De Wolfe Ltd* [1976] 1 Ch. 119; Desmond v Bower [2009] EWCA Civ 857; *Mitchell v News Group Newspapers Limited* [2014] EWHC 3590 (QB)
[15] Paragraph 4

"That evidence of what happened on an earlier occasion may make the occurrence of what happened on the occasion more or less probable can scarcely be denied …And if those engaged in the recent event had in the past been involved in events of an apparently similar character, attention would be paid to those earlier events as perhaps throwing light on and helping to explain the event which is the subject of the current enquiry. To regard evidence of such earlier events as potentially probative is a process of thought which an entirely rational, objective and fair-minded person might, depending on the facts, follow…Thus in a civil case such as this the question of admissibility turns, and turns only, on whether the evidence which it is sought to adduce, assuming it (provisionally) to be true, is in Lord Simon's sense probative. If so, the evidence is legally admissible."

78. Ms Newman submits that in the present case there can be no question that the evidence in paragraphs 35 to 39 of the Points of Defence is probative, and therefore admissible.

79. Lord Bingham continued in his speech in *O'Brien* to observe that if the evidence is admissible, the question is then whether it should be admitted. With regard to this, second, test their Lordships differentiated between civil and criminal proceedings. Lord Phillips of Worth Matravers, in identifying a "*policy reason*" which might lead to the rejection of similar fact evidence held that

"…evidence should not be admitted if it is likely to give rise to irrational prejudice which outweighs the probative effect that the evidence has in logic. This consideration of policy carries particular weight where the tribunal is a jury, whose members are not as experienced as are judges in putting aside irrational prejudice".[16]

80. It is submitted that this is a concern which does not arise in the present case as the Grand Court of the Cayman Islands is a tribunal more than capable of assessing what weight to apply to the evidence of the decisions of the Japanese courts.

[16] Ibid at paragraph 11

81. Lord Phillips also added a second policy reason which might lead to the rejection of similar fact evidence, namely that "evidence should not be admitted if its probative weight is insufficient to justify the complexity that it will add to the trial"[17]. Ms Newman submits that any additional complexity here will be minimal, while the probative weight of the evidence against Mr Oshima is significant to such a degree that it would be unfair to the TIB not to admit it at trial.

82. In my judgment this analysis of, and reliance on, the rules relating to similar fact evidence does not assist Ms Newman. This is because I do not accept that there is any dichotomy between the rule in *Hollington v Hewthorn* and the rules relating to the admission of similar fact evidence. If, as I find, the evidence of the findings and decisions of the Japanese courts is legally inadmissible under the rule in *Hollington v Hewthorn*, then the simple answer is that such evidence cannot be admitted as similar fact evidence, bad character evidence, or any kind of evidence.

83. If I am wrong about any of this, I would add that, in any event, I do not accept the submission of Ms Newman that the additional complexity caused by the admission of such evidence will be minimal, nor even that the probative weight of such evidence is significant to such a degree that it would be unfair to Mr Seto not to admit it at trial.

84. As far as the former is concerned, respectfully adopting the same analysis as Lord Rodger in *Calyon,* the findings and judgments of the Japanese courts do not indicate the substance of the evidence on which the courts relied in reaching their decisions. There may well also be different rules of evidence and procedure in Japan. So a judge in Cayman either will be in no position to determine what weight would be appropriate to give to the Japanese judgments, or there would have to be some degree of re-run of the Japanese proceedings to decide what weight should be attached to them which, I believe, should be avoided. Either way, the admission of evidence of the findings and judgments of the Japanese courts would, in my view, likely prejudice, embarrass or delay the fair trial of the action.

[17] Also at paragraph 11

85. With regard to the latter consideration of probative weight, assuming one even gets that far, I do not accept the degree of significance which Ms Newman attributes to it, particularly as the proceedings in Japan involved different parties and different transactions. Sigma is a stranger to the Japanese proceedings, as was Ken Enterprise/Q&Co.

86. Accordingly, for the reasons given, I am of the view that evidence of the findings and judgments of the Japanese courts is inadmissible and that the pleas in respect of them should be struck out on the ground that they are scandalous and vexatious within the meaning of GCR O.18, r.19(1). I am also of the view that such pleas may prejudice, embarrass or delay the fair trial of the action and should be struck out on this ground under the rule as well.

87. It follows that paragraphs 37 and 39 of the Points of Defence should be struck out in their entirety. So too should paragraph 38 which becomes redundant because it relies on what is "referred to above" in paragraph 37.

88. Paragraph 36, on the other hand, does not fall to be struck out entirely, because as well as reliance being placed on similar fact evidence and bad character evidence stemming from the Japanese proceedings (which is to be struck out) there is also a plea of reliance on "additional evidence" particularised in paragraph 40. Following on "Mr Seto relies upon" the words to be struck out are "similar fact evidence of analogous transfers made by or at the direction of Mr Oshima to defeat his, and SFCG's, creditors; bad character evidence against Mr Oshima; and additional". Then in the final sentence the reference should be to "paragraph 40" only. I see no reason to strike out paragraph 40; its heading just needs to have the word "Additional" removed.

89. That leaves only paragraph 35 to be considered. This raises the issue that the Joto Tanpo Agreements should be set aside as a matter of Japanese law. I do not see why this cannot be raised by way of defence (as opposed to counterclaim) and so there is no reason to strike it out.

The Security For Costs Application

90. The TIB's Summons dated 29 January 2015 seeks orders *inter alia* that:

    (a) The Plaintiff pay security for Mr Seto's costs in the sum of US$625,000, or such further or other sum that the Court may deem fit and proper, together with liberty to apply for further security;

    (b) All further steps in the cause be stayed pending provision of security; and

    (c) The costs of and occasioned by the Security for Costs Application be Mr Seto's costs in any event.

91. Mr Seto filed his Fifth Affirmation dated 28 January 2015 in support of the Application. The Plaintiff filed the Fifth Affidavit of Yoshihito sworn on 11 March 2015 in opposition to the Application. Mr Seto then filed his Sixth Affirmation dated 2 April 2015 in response.

92. The Application is brought pursuant to both section 74 of the Companies Law (2013 Revision) ("**s.74**") and, separately or alternatively, pursuant to Order 23 of the Grand Court Rules ("**O.23**").

93. S.74 provides as follows:

    "Where a company is plaintiff in any action, suit or other legal proceeding, any Judge having jurisdiction in the matter, if he is satisfied that there is reason to believe that if the defendant is successful in his defence the assets of the company will be insufficient to pay his costs, may require sufficient security to be given for such costs, and may stay all proceedings until such security is given."

94. O.23 so far as is relevant provides as follows:

    "1.(1) Where on the application of a defendant to an action or other proceeding it appears to the Court –

    (a) that the plaintiff is ordinarily resident out of the jurisdiction; or

(b) that the plaintiff (not being a plaintiff who is suing in a representative capacity) is a nominal plaintiff who is suing for the benefit of some other person and there is reason to believe that he will be unable to pay the costs of the defendant if ordered to do so;

then if, having regard to all the circumstances of the case, the Court thinks it just to do so, it may order the plaintiff to give such security for the defendant's costs of the action or other proceeding as it thinks just.

(2) For the purposes of this rule a person is deemed to be ordinarily resident out of the jurisdiction if he does not have the right either to reside permanently in the Islands or have the right to work in the Islands.

(4) The references in the foregoing paragraphs to a plaintiff and a defendant shall be construed as references to the person (howsoever described on the record) who is in the position of plaintiff or defendant, as the case may be, in the proceedings in question, including a proceeding on a counterclaim.

2. Where an order is made requiring any party to give security for costs, security shall be given in such manner, at such time, and on such terms (if any), as the Court may direct."

95. It is submitted on behalf of Mr Seto that Sigma is a company, albeit a foreign company, which is the Plaintiff in the action, and that accordingly s.74 applies. The Application is made on the ground set out in s.74, that there is reason to believe that if Mr Seto is successful in his defence the assets of the Company will be insufficient to pay his costs.

96. Sigma challenges the ground for the application, but also raises the fundamental objection that as it is a foreign company, which has not been formed and registered under the Companies Law (2013 Revision) ("**the Law**"), s.74 does not apply.

97. On the footing of the submission made in support of the application under s.74, I was referred to authority on what is required for there to be "reason to believe" that a costs order will go unsatisfied. The leading authority in this jurisdiction is the Court of Appeal Decision in *BTU Power Management Company v Hayat* [2011] 1

CILR 315. In that case Chadwick P. (with whom Forte and Motley JJA. agreed) held[18] that the phrase *"there is reason to believe"* in s.74 does not require the Judge to be satisfied on the balance of probability. The threshold is lower than that. As Chadwick P. put it:

> *"It is enough that he [i.e. the Judge] is satisfied that there is a real risk that the defendant's costs will not be paid if the defence is successful."*

98. In *BTU* the Court of Appeal found that the fact that the plaintiff refused to provide evidence of its asset position was not of itself sufficient to be satisfied that the defendant's costs would not be paid if the defence were successful. This is also the position here. Sigma has refused to disclose details of its assets. So this is not of itself enough for the Court to be satisfied that security be payable.

99. However, the matter does not rest there. In discussing the inferences which may be drawn from a plaintiff's silence as to its asset position, Chadwick P. in *BTU* said as follows[19]:

> *"the court may infer, from the failure or refusal to answer that case, that there is no answer to it. It may infer that, if there was an answer, it would have been brought forward, and the fact that it has not been is a sufficient indication that there is indeed no answer. But if the material adduced by the applicant on whom the burden of satisfying the court lies does not raise even a prima facie case to answer, then there is simply no basis on which to draw the inference. A proper inference in such a case is that, because there is no case to answer, the party against whom the allegation is made can say "I need not answer it". No inference is to be drawn from his failure to do something which, on a proper analysis, he need not do."*

100. If this test is met, and there is a case to answer, then security may, but not must, be ordered. In this event, the Court has a discretion which it will exercise considering all the circumstances of the particular case[20].

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[18] Paragraph 3
[19] Paragraph 17
[20] Per Creswell J. in *Cesar Hotelco (Cayman) Limited v Ryan* [2012] 2 CILR 164

101. In reliance on the evidence in the Fifth Affirmation of Mr Seto, Ms Newman submits that applying the test in *BTU* there is a case to answer. She points to the following:

(a) Sigma is a young company, founded only 4 years ago, when Mr Oshima and SFCG (the company from which he had derived his wealth) were already bankrupt.

(b) The company does not trade.

(c) Its issued capital is only the equivalent of some US$84,000.

(d) The claim to a right to be paid the Ken Enterprise loan stems from a company in which Mr Oshima owned shares.

(e) This supposed right is worthless.

(f) The fact that Sigma is, and has been for some time, under the ownership and control of Mr Oshima's immediate family and that shares are transferred between themselves with relative frequency[21] has not been contradicted.

(g) Sigma is not really independent of Mr Oshima.

(h) Neither Mr Oshima nor Yoshihito are truthful, as evidenced by the Japanese proceedings.

102. In all these circumstances it is submitted on behalf of Mr Seto that there is a case to answer and that it is reasonable to infer that there is no answer to it. It is contended that even if Sigma has sufficient assets to pay a costs award now, it might nevertheless relinquish those assets by the time of the end of the trial to avoid paying a costs award made against it.

103. Sigma disputes that there is a case to answer. It submits that evidence of misconduct in foreign proceedings involving parties related to the Plaintiff, but not of the Plaintiff itself, and involving transactions different from the ones in the present case, does not itself constitute evidence giving rise to a reason to believe that the Plaintiff would be unable or unwilling to pay a costs order in the Cayman proceedings. Further, as has been seen, reliance is placed on this evidence being in any event inadmissible to prove the facts found in those proceedings.

[21] Paragraph 15 of the Fifth Affirmation

104. Leaving aside the Japanese proceedings, it is submitted that the evidence is insufficient to establish a case to answer.

105. In my view, for reasons already given as to the inadmissibility of the decisions in the Japanese proceedings, they should be left out of account for present purposes. Nevertheless, there are still the other factors identified by Ms Newman. It is significant to my mind that Sigma is an Oshima family company, even if Mr Oshima himself has no known interest in it. These factors taken together, particularly the bankruptcies of Mr Oshima and SFCG and their potential effect on the finances of the Oshima family, lead me to the conclusion that the evidence, although weak, is just sufficient to establish that there is a *prima facie* case to answer. Accordingly, the Court is entitled to infer, from the failure or refusal to answer that case, that there is no answer to it and so there is reason to believe that a costs order will go unsatisfied.

106. Furthermore, in the circumstances, I would be minded to go on to the second stage to determine whether or not to order security which requires a consideration of various other issues which have been raised. However, there is the fundamental point made by Mr Steinfeld that, come what may, s.74 simply does not apply to this case.

107. This submission is founded on the Plaintiff not being a company, it is said, for the purposes of s.74.

108. Section 2 of the Law provides the following definitions:

> *"company" except where the context excludes exempted companies, means a company formed and registered under this Law or an existing company.*
>
> *"existing company" means a company which, prior to the 1st December, 1961, has been incorporated and its memorandum or association recorded in the Islands pursuant to the laws relating to companies then in force in the Islands.*

109. Only in Part V of the Law, pursuant to section 89 does the following definition apply:

> *"company" includes a foreign company in respect of which the Court has made a winding up order*

110. As s.74 is not in Part V, accordingly it applies, it is submitted, only to Cayman registered companies. So in the circumstances it is contended that s.74 does not apply to the Plaintiff, which is a Japanese registered company.

111. It is submitted on behalf of the TIB that this cannot be right. The point is made that, as it is likely to be more difficult to enforce a costs award against a foreign, rather than domestic, plaintiff it would be most extraordinary should the legislation actually discriminate in favour of foreign plaintiffs in this way.

112. The answer, it was submitted (in Ms Newman's written submissions in her skeleton argument), is that the Court has an inherent jurisdiction to award security and that s.74 is designed to extend, rather than limit, that jurisdiction by providing greater clarity to the rules of practice as to when security may be ordered. Reliance was placed for this purpose on a decision of the Privy Council, on appeal from the Cayman Islands Court of Appeal, in *Re Bancredit Cayman Limited* [2009] CILR 578. However, that case considered a different aspect of s.74, namely what constitutes an "*action or other proceeding*" in which the Privy Council declined to adopt a narrow approach based upon the strict terms of the statute[22]. There were also observations on the court's inherent jurisdiction to make security for costs orders[23].

113. In the present case, however, I am of the view that the Court is constrained by a clear statutory definition. I reach this conclusion with some reluctance because it seems to me that it may well be an unintended consequence of the definition that foreign companies should be excluded from s.74. Such discrimination would appear to be illogical. Nevertheless it seems that this is the unavoidable effect of the definition, although it may well have a bearing on the proper application of O.23, when we come to that.

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[22] Lord Neuberger commented that the question was one of substance rather than form: paragraph 31
[23] Ibid, Lord Scott, at paragraph 11

114. So the result appears to be that the Security for Costs Application cannot be made under s.74.

115. That leads on to O.23. It is contended on behalf of Mr Seto that, even if he cannot make an application pursuant to s.74, he can do so under O.23. This is on the ground that Sigma is ordinarily resident out of the jurisdiction for the purposes of O.23, r.1 (a). On that basis, it is submitted, the Court, if it thinks just to do so, having regard to all the circumstances of the case, may order the Plaintiff to give such security for TIB's costs of the action as it thinks just.

116. There are authorities on O.23 which need to be considered.

117. These are to the effect that the purpose of O.23 is to protect defendants against the extra difficulty and cost of enforcing a Cayman costs order in a foreign jurisdiction and the Court must exercise its discretion in a manner intended to achieve this purpose. On this line of authority, an order for security should therefore be restricted to an amount calculated to cover the added difficulty and cost of enforcement abroad.

118. This was the approach in *Gong v CDH China Management Company Limited* [2011] 1 CILR 57, a decision of Jones J. in this jurisdiction, relying on the judgment of the English Court of Appeal in *Nasser v United Bank of Kuwait* [2002] 1 W.L.R. 1868, and authorities in both this jurisdiction and others which have followed it[24].

119. In the present case the evidence before the Court is that the additional cost to the TIB of enforcing a costs award in Japan would be US$51,250. Thus, it is submitted on behalf of the Plaintiff, that if an order is to be made under O.23 (contrary to its contention that there are grounds for not making such an order) it should be capped at this figure of US$51,250.

120. Ms Newman, however, on behalf of the TIB contends for a different approach.

[24] *Kernohan v The Governor & Others* [2011] 2 CILR 7 is another such authority in this jurisdiction.

121. It is submitted by her that the traditional approach applied in this Court pre-*Nasser* was to award security against a foreign plaintiff, subject only to the Court's exercise of its discretion not to do so. An example is the 1998 decision in *Barclays Private Bank and Trust (Cayman) Limited v McLaughlin and others* [1998] CILR 313, in which Smellie C.J. commented:

> *"the case law suggests that although it is a matter of discretion, it is the usual, ordinary or general rule of practice of the court to require a foreign plaintiff to give security for costs, because it is ordinarily just to do so."*[25]

122. This approach, it is contended, is consistent with the wording of the rules and reflects their original purpose: for the Court, in the right circumstances, to assist defendants in enforcing a costs award which might be made more difficult because the plaintiff is overseas. The change in the approach appears to be primarily for human rights reasons. It is discriminatory, runs the reasoning, to ask a foreign plaintiff to pay security just because he is overseas, in circumstances where a Cayman Islands resident would not be required to pay security. This analysis can be seen in the *Gong* case, in which Jones J. held:

> *"First, I cannot properly exercise any of this court's discretionary powers for a purpose which would be contrary to the public policy of the Cayman Islands. Secondly, I think that the principles set out in the* [European] *Convention* [on Human Rights], *must reflect the public policy of the Cayman Islands. If they did not, the Cayman Islands would not be a party to the Convention, or it would have become a party subject to a reservation in respect of whatever aspect of the Convention is thought to be inconsistent with our public policy …*
>
> *Thirdly, I therefore accept the proposition that, on its true construction, GCR, O.23 could not have been intended to discriminate against foreigners."*[26]

[25] Page 321. See also Jones J.'s comments on the Court's "established practice" in *Gong* p.61.
[26] Page 64, paragraphs 13-14.

123. Sigma relies upon *Gong* as authority that it should not suffer discrimination because it is a foreign company, and that any security should therefore be limited to the costs of enforcement of the judgment in Japan over and above the costs of enforcing in the Cayman Islands. However, it is also claiming that it should get preferential treatment as a foreign company (by arguing that foreign companies escape the ambit of s.74) as opposed to a Cayman company. In my view this is unsatisfactory and the Court should find a way of resolving the matter.

124. The answer, it seems to me, lies in making a logical distinction between private individual plaintiffs and corporate plaintiffs. Given that private individuals are obviously outside the scope of s.74 of the Law, the application of *Gong* (and other similar cases including *Nasser* and *Kernohan* – involving individuals as plaintiffs) is not open to dispute: O.23 must be applied so that it treats individual residents and non-residents of the Cayman Islands in a non-discriminatory manner. However, it does not follow that those cases relating to individuals should serve to put foreign corporate plaintiffs in a better position than domestic corporate plaintiffs, which would in itself be discriminatory.

125. Accordingly, I accept Ms Newman's submission that, if Sigma escapes the net of s.74 of the Law, it must also fall outside the scope of the *Gong* line of cases, which should be distinguished as applying only to individual plaintiffs[27].

126. Either way I am satisfied that it is open to the Court to make an uncapped order for security for costs in this case. It also seems to me that the grounds for finding that there would be a case to answer for the purpose of s.74 of the Law are equally applicable as circumstances for the Court to have regard to under O. 23.

127. Ms Newman submits that as well as being able to make the application under O.23, r.1(1)(a) – on the footing that Sigma is ordinarily resident out of the jurisdiction – that she can also do so under r.1 (1)(b) on the ground that Sigma is a nominal plaintiff suing for the benefit of some other person and that there is

[27] The premise that this was always the intention is supported by the authorities themselves. When giving the decision in *Nasser,* the leading authority applied in *Gong*, Mance L.J. notes that, when exercising discretion in a manner which is not discriminatory *"In this context, at least, I consider that* ***all personal claimants*** *(or appellants) before the English courts must be regarded as the relevant class"* (emphasis added) (p.418). Further, the European Convention on Human Rights is of course designed to protect human, not corporate, rights.

reason to believe that it will be unable to pay the costs of the TIB if ordered to do so. I do not find that the evidence goes as far as establishing that Sigma is a nominal plaintiff bringing the matter within r.1(1)(b).

128. I am, however, of the view that the grounds referred to for finding that there would be a case to answer under s.74 constitute circumstances whereby the Court may consider it just to order the Plaintiff to give security for the TIB's costs under O.23, r.1(1)(a). This is subject only to a consideration of certain other grounds which have been put forward on behalf of Sigma for opposing security.

129. It is now falls to consider these other grounds for opposing security.

130. It is contended on behalf of Sigma that Mr Seto is not a proper defendant. The submission is that Mr Seto was joined to the proceedings at his own request. The Plaintiff, it is said, has no claim against Mr Seto, seeks no relief against him and has no interest in him being joined to the proceedings. Thus, it is submitted, Mr Seto is not therefore a substantive defendant in these proceedings properly so called and that having regard to O.23, r.1(4) he is accordingly not entitled to security for costs against the Plaintiff under O.23, r.1. The fallacy of Mr Seto's application is said to be evident from the fact that the normal sanction for failure to make payment would be that the proceedings would be stayed and eventually dismissed as against Mr Seto, whereas such a sanction would be of no consequence to the Plaintiff as it would remain free to continue its claim as against Trustcorp.

131. Mr Steinfeld submits that Mr Seto's claim to entitlement to the Units makes him a rival claimant to the Plaintiff and so for the purposes of O.23, r.1 he is as against Trustcorp as much in the position of a plaintiff as the Plaintiff itself. Reference is made to the principle that a defendant should not generally be required to give security for costs as he has no choice but to take part in the action: per Smellie J. (as he then was) in *In re Hall* [1994-5] CILR N4[28]. That, it is said, is not correct in this case where Mr Seto has specifically demanded to be joined to the proceedings.

[28] Following *Maatschappij voor Fondsenbezit v Shell Transport & Trading Co* [1923] 2 K.B. 166.

132. In his written submissions Mr Steinfeld also referred to *Taly NDC International NV v Terra Nova Insurance Co Ltd and Others* [1986] 1 All E.R. 69, as authority for the proposition that the Court has no jurisdiction to order a plaintiff to give security for costs of a defendant who is not being sued by the plaintiff (in the sense that no claim is made against him by the plaintiff) and is therefore not in a position of a defendant to the plaintiff's proceedings. Conversely, it was noted, the Court does have jurisdiction to award security for costs against a party who is named as a defendant but who is effectively acting in the position of a plaintiff[29].

133. The TIB responds to these arguments by reference to the procedural history. Mr Seto contends that he is not a party only because he requested to be joined. It is submitted that he should have been joined at the outset and when he was joined, by consent but on Sigma's application, the joinder was pursuant to *GCR O. 15, r.6(2)* on the basis that he is a necessary and proper party.

134. Accordingly, any inference to be drawn from Yoshihito's evidence[30] concerning the Jersey proceedings, which might suggest that the TIB was joined as a party to the Cayman action not because he is a proper defendant, but as part of a wider scheme to deal with the litigation as a whole involving a compromise in the consent to stay the Jersey action, should, it is submitted, be rejected.

135. It is submitted that the rival claimants point should also be rejected because it is Sigma who has chosen to bring a claim adverse to the bankruptcy estate which requires to be defended by the TIB pursuant to his fiduciary obligation to protect the estate.

136. In my view there is force in these responses. The contention that Mr Seto is not a proper defendant relies on what I consider to be an artificial analysis. He may in a sense be a rival claimant, but this is because he is having to contest the claim of Sigma. The Units in the Trusts are registered in Mr Oshima's name and therefore vest in the TIB, subject to Sigma's claim. The claim is in effect and in reality against the bankruptcy estate which is defended by Mr Seto, the TIB.

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[29] See again *Barclays Private Bank* case referred to above.
[30] Paragraphs 8 -19

137. As for the so-called "fallacy" point, that this Application could only stay the proceedings against Mr Seto, leaving the Plaintiff free to continue against Trustcorp, this will not be the result if the Court orders all further steps in the cause to be stayed pending the furnishing of any security for costs, which is what Mr Seto seeks in his Summons[31]. In my view there is nothing in this point.

138. The next of these other grounds for opposing security is that there is already *de facto* security. Sigma contends that Mr Seto already holds *de facto* security for costs as a result of the Plaintiff being an unsecured creditor in the bankruptcy of Mr Oshima. This security is said to be effectively in the form of whatever dividends would be payable to Sigma in the bankruptcy. In this regard, if any costs order is made in Mr Seto's favour in these proceedings, Mr Seto would be able to deduct those costs from any dividends payable to the Plaintiff in Mr Oshima's bankruptcy.

139. It is submitted on behalf of Mr Seto that this argument should be rejected because Sigma's claim in the bankruptcy has not been admitted and has an uncertain outcome. Further, it is not yet clear whether there will be sufficient assets to pay creditors in full, even were Sigma's claim to be admitted for a sum greater than the TIB's costs. Finally, there is the question of whether there could be a set off in the manner suggested as a matter of Japanese law, as to which there is no evidence before this Court.

140. In my view there is too much uncertainty as to what the outcome will be of Sigma's claim in the bankruptcy to rely on there being *de facto* security.

141. Finally, there is the objection by Sigma that Mr Seto was a party to these proceedings for well over a year before issuing the security summons. This is said to be significant delay and that delay is a relevant factor for the Court to take into account in determining whether security should be granted[32]. It is also said that the steps taken by Mr Seto have increased the costs.

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[31] Paragraph 2
[32] See *Elliott v Cayman Islands Health Service Authority* [2007] CILR 163.

142. Various points and counter-points have been made about this on each side debating what are said to be the rights and wrongs of the procedural history of the action. In the event I have found it unnecessary to consider these issues relating to what has gone before because the Security for Costs Application makes no claim for past costs and only looks to the future.

143. In conclusion I am of the view that, were s.74 of the Law to apply, there would be a *prima facie* case to answer that there is reason to believe that if the TIB is successful in his defence the assets of Sigma will be insufficient to pay his costs and that it may be inferred from the failure or refusal to answer that there is no answer to it. I am also of the view that there is a case under O.23, r.1(1)(a) for uncapped security and that the grounds for finding that there would be a case to answer under s.74 of the Law are equally applicable as relevant circumstances for the Court to have regard to for this purpose as well. Either way, having regard to all the circumstances of the case referred to, I find that it would be just to order Sigma to give security for the TIB's costs.

144. That leaves only the question of what amount of security would be just. There are issues as to quantum.

145. There has been produced a Schedule of the Second Defendant's Estimated Costs. The costs have been calculated on the premise that they will be taxed on an indemnity basis. Ms Newman submits that this is appropriate in the circumstances. Her contention is that if the TIB succeeds on the issues raised in the action, and having regard to the procedural history and the point that Mr Seto should have been joined at the outset, there will be an entitlement to indemnity costs. It is submitted that there is authority which suggests that the Court can, and will if necessary, consider the question of indemnity costs at this stage of an action[33].

146. Mr Steinfeld contends that the Court does not generally go into the merits of an action at this stage to consider whether there may be indemnity costs. He submits that there is no authority which indicates that this may be done.

[33] *Stokors SA & Others v IG Markets Ltd* [2012] EWCA Civ 1706.

147. In my view it would be inappropriate to prejudge the issues in the action or to make any assumption about the basis upon which costs might ultimately be awarded. Accordingly, the estimates require to be revised to reflect taxation on a standard basis.

148. There are other specific issues raised on behalf of the Plaintiff in relation to certain Practice Directions. It is submitted that these have not been complied with in the calculation of the estimated costs.

149. In *Practice Direction No. 1/2011* there are Guidelines Relating to the Taxation of Costs for the purposes of GCR O.62, r.16. The Practice Direction concerns taxation of costs on the standard basis in respect of work carried out by attorneys on or after 1 June 2011. Various allowable hourly rates are set out. The maximum hourly rate in the Financial Services Division for an attorney of more than 20 years' post-qualification experience is US$900. So this is the maximum rate which can be allowed for leading counsel for Mr Seto.

150. Also relevant is *Practice Direction No. 1/2001* which sets out other Guidelines Relating to the Taxation of Costs. In paragraph 9.4 this provides that travelling expenses shall not be paid to foreign lawyers. This means that no such expenses can be allowed for leading counsel for Mr Seto. Some reasonable allowance could be made for preparation time spent on the journey out to Cayman, but not, of course, for the return.

151. It is also provided in *Practice Direction No. 1/2001* (in paragraph 7.2) that amounts claimed on the basis of brief fees, refreshers or any basis other than hourly rates will be disallowed. Leading counsel's fees accordingly require to be re-calculated based on reasonable time estimates at a maximum of US$900 per hour.

152. There is an item in the Estimate of preparing the Second Defendant's documents for discovery. However, as there is an indication that the parties are on the point of being ready to exchange lists, this should be eliminated.

153. The exercise of applying these criteria, and allowing within the maximum and minimum figures put forward reasonable amounts of estimated time to be spent in preparing for and attending what is assumed will be a five day trial, produces figures which total in the range between US$300,000 and US$350,000.

154. Then there is the question of discount. As has been noted by Smellie CJ., in his ruling in *Caribbean Islands Developments Limited (In Liquidation)*[34], in paragraph 7, *"one typically finds the pre-estimates provided by defendants have a gross inbuilt margin of error."* Allowing for this, and expected discount on taxation, I am of the view that it would be proper and just to fix the amount of security at US$250,000.

Orders and Directions

155. On the Plaintiff's summons, there will be an order pursuant to GCR O.18, r.19 striking out of the Second Defendant's Points of Defence, dated 1 December 2014, those paragraphs and parts of paragraphs specified in the Ruling on the Strike Out Application.

156. On the Second Defendant's summons, there will be an order that the Plaintiff furnish security by way of payment into Court for the Second Defendant's costs of the action in the sum of US$250,000 within 14 days, or such further period as the Court may allow, and otherwise on the terms of the summons save as to costs.

157. As to costs, it occurs to me that a possible course, having regard to the outcome, would be to allow the costs of the Strike Out Application and the costs of the Security for Costs Application to cancel one another out. This is something that I shall leave to Counsel to consider.

158. There remains the Directions Summons. Unless the action is stayed or dismissed pursuant to the security for costs order, it will be necessary for there to be

[34] Dated 9 June 2014, unreported

directions for the future conduct of the action within a reasonable set timetable. Various issues have been raised about directions which have come to a head in the Directions Summons and a Skeleton Argument produced by Mr Steinfeld. However, there were no submissions on directions at the hearing and the matter was left to Counsel to seek to agree an order or orders on delivery of this Ruling. That, indeed, would be the preferred course.

159. If, however, agreement cannot be reached, or there is a need to raise any question of costs or other ancillary matters, then, of course, there will be liberty to apply for such purpose.

Dated this 19th day of August 2015

The Hon. Justice Nigel R.L. Clifford, QC
JUDGE OF THE GRAND COURT