

1 IN THE GRAND COURT OF THE CAYMAN ISLANDS  
2 FINANCIAL SERVICES DIVISION  
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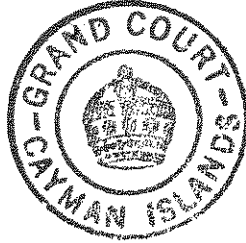
4 Cause No: FSD 160/2012

5  
6 BETWEEN:

7 WEAVING MACRO FIXED INCOME  
8 FUND LIMITED (IN OFFICIAL  
9 LIQUIDATION)

10  
11 PLAINTIFF

12 AND:



13 1. ERNST & YOUNG CHARTERED  
14 ACCOUNTANTS (A FIRM)

15 FIRST DEFENDANT

16 2. ERNST & YOUNG LTD.

17 SECOND DEFENDANT

18 3. ERNST & YOUNG (A FIRM)

19 THIRD DEFENDANT

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27 Appearances:

28 Mr. James Thom Q.C. and Ms. Anna Littler  
29 instructed by Mr. Michael Makridakis and  
30 Ms. Amy Altneu of Carey Olsen on behalf of  
31 the Plaintiff

32 Mr. Justin Fenwick Q.C. instructed by Mr.  
33 Michael Mulligan and Mr. Ben Hobden of  
34 Conyers Dill & Pearman on behalf of the  
35 Defendants

36  
37 Before:

The Hon. Mr. Justice Charles Quin Q.C.

38 Heard:

10<sup>th</sup> and 11<sup>th</sup> February 2015

39 Supplementary Written Submissions:

16<sup>th</sup> February 2015

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41 JUDGMENT  
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*INTRODUCTION*

1. This is the hearing of a Summons issued by the Plaintiff on the 4<sup>th</sup> February 2015 for the following relief:

i. An Order that:

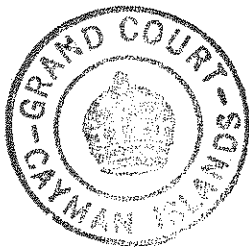
- a) The Fund be given leave to further amend the Amended Statement of Claim filed on the 15<sup>th</sup> April 2014;
- b) So far as may be necessary, the time for filing and serving the Further Amended Statement of Claim be abridged;

ii. Further, or in the alternative, an Order granting leave to the Fund to use the documents discovered by the Defendants in the present proceedings (Cause No. FSD 160 of 2012 (CQJ)) in new proceedings against the Defendants for the following purposes:

- a) The purpose of issuing a Writ making such further allegations against the Defendants in connection with the Defendants' audits of the Fund as the Fund may wish to pursue;
- b) Any and all purposes connected with the prosecution of the proceedings commenced by such Writ (including consolidation of the new proceedings with the present proceedings).

iii. Costs

iv. Such further or other orders as the Honourable Court may consider appropriate.

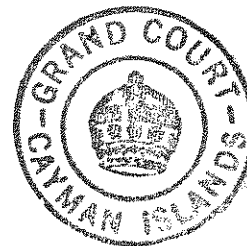


1 *SUMMARY OF FACTS*

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

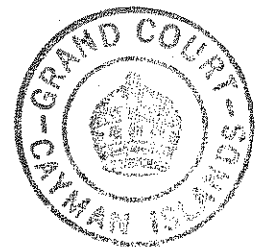
5 3. The Plaintiff’s case is, in short, that a fraud was perpetrated by Magnus Peterson, a  
6 director and Chief Operating Officer of the Fund’s investment manager –  
7 Weaving Capital (UK) Limited (“WCUK”). His stepfather, Hans Ekstrom (“Mr.  
8 Ekstrom”) and brother, Stefan Peterson, who were, at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

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



- 1           5.       The Fund alleges that as a consequence of the dishonestly inflated NAV there was  
2                    an increase in investment in the Fund with the result that the continuing surplus of  
3                    investment proceeds over redemption payments assisted the Fund to continue to  
4                    appear solvent.
- 5           6.       The Fund retained the Defendants (it matters not for present purposes to distinguish  
6                    between them) in relation to the audit of its financial statements for the periods  
7                    ended 31<sup>st</sup> December 2004, 2005, 2006, and 2007.
- 8           7.       The Plaintiff has also brought proceedings in this Court against its directors (Stefan  
9                    Peterson and Mr. Ekstrom) and is also pursuing proceedings against the  
10                  Administrator of the Fund, BNY Mellon Investment Servicing (International)  
11                  Limited (“PNC”).
- 12          8.       On the 30<sup>th</sup> November 2012 the Plaintiff issued a Writ of Summons against the  
13                  Defendants in which its first prayer was a claim for damages for deceit in and in  
14                  relation to their audits and auditors’ reports as auditors of the Plaintiff for the years  
15                  ended 31<sup>st</sup> December 2005, 2006, and 2007. In addition, the Writ of Summons  
16                  claimed, in the alternative, damages for breach of contract and damages for  
17                  negligence.

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1 9. On the 26<sup>th</sup> March 2013 the Plaintiff filed its Statement of Claim alleging that the  
2 Defendants acted dishonestly in relation to the audits of the financial statements for  
3 the periods ended 31<sup>st</sup> December 2005, 2006 and 2007. The Statement of Claim  
4 alleges that Ms. O'Malley, a servant and agent of the Second Defendant acted  
5 dishonestly in respect of an audit for the year 2005. The Plaintiff also claimed that  
6 Ms. Allen, another servant and agent of the Second Defendant acted dishonestly in  
7 respect of the audit of the year 2006 and, Mr. Barber, another servant and agent of  
8 the Second Defendant acted dishonestly in respect of the audit of the year 2007.

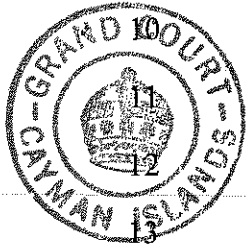
9 10. In essence, the Plaintiff alleges that, had the Defendants not produced dishonest  
audit reports then the "allegedly" true NAV position of the Fund would have been  
revealed and it would, as a result, have entered into liquidation sooner – avoiding, it  
is said, losses of (depending on which version of the case is considered) in the  
region of US\$400,000,000.00.

14 11. On the 27<sup>th</sup> March 2013 the Defendants filed their acknowledgment of service  
15 confirming that they intended to defend the proceedings.

16 12. On the 5<sup>th</sup> July 2013 the Defendants filed and entered their defence and  
17 counterclaim.

18 13. On the 15<sup>th</sup> April 2014 the Plaintiff filed its first Amended Statement of Claim and  
19 Defence to the Defendants counterclaim, and on the 27<sup>th</sup> June 2014 the Defendants  
20 filed their Amended Defence.

21 14. On the 31<sup>st</sup> July 2014 the Plaintiff filed its Amended Reply and Defence to the  
22 Defendants' counterclaim.



1 15. On the 21<sup>st</sup> and 22<sup>nd</sup> July 2014 the Court heard an extensive Case Management  
2 hearing in relation to, inter alia, discovery, and, in particular, the analysis of  
3 computers and electronic data for both the Plaintiff and the Defendants and also in  
4 relation to Magnus Peterson, Stefan Peterson, Mr. Ekstrom, Edward Platt and Chas  
5 Dabhia. Both parties have retained technical experts in relation to computer and  
6 electronic data, as well as experts in relation to auditing practice.

7 16. As a result of the order arising from the July 2014 CMC there has been extensive  
8 discovery in the latter part of 2014 and I understand that some discovery is still yet  
9 to be completed.

10 17. The Plaintiff's Summons issued on the 4<sup>th</sup> February 2015 seeks leave to amend as  
11 follows:

12 i. To abandon the claims in fraud in respect of Ms. Allen for 2006 and  
13 Mr. Barber for 2007;

14 ii. To make a claim in respect to Mr. Tiernan, servant and agent of the  
15 Second Defendant in relation to the 2005 audit;

16 iii. To extend the claim in relation to the 2006 audit to Ms. O'Malley;

17 iv. To make amendments consequential upon having had discovery in late  
18 2014.

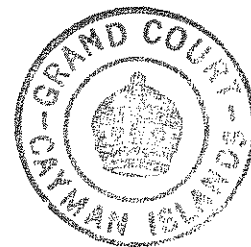
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1 18. The Plaintiff's Summons is grounded by the First Affidavit of Amy Altneu who  
2 exhibits the further discovery documentation obtained from the Defendants upon  
3 which the Plaintiff relies in support of its application for leave to further amend the  
4 Amended Statement of Claim.

5 19. The Defendants oppose the application for the aforementioned amendments and  
6 have filed two affidavits in response to the Plaintiff's Summons, namely, the Third  
7 and Fourth Affidavits of Eric Bodden ("Mr. Bodden"), sworn on the 6<sup>th</sup> and 9<sup>th</sup>  
8 February 2015 respectively. Mr. Bodden's Third Affidavit contains a number of  
9 submissions as to why this Court should not grant the Plaintiff's application for  
10 leave to further amend, including, limitation, new claims, the absence of proper  
11 evidence and the Order of this Court dated the 14<sup>th</sup> April 2014.

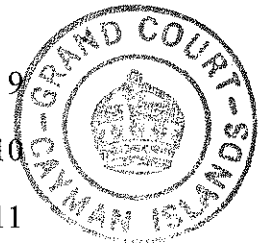


*DEFENCE POSITION*

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20. Leading Counsel Mr. Fenwick Q.C. on behalf of the Defendants concedes that:

- i. The Court should permit and indeed require the amendment to abandon the allegations against Ms. Allen and Mr. Barber, with costs to be determined at a later stage;
- ii. The Defendants do not object to the minor amendments for the claim in negligence for the 2007 audit and so leave can be granted subject to the question of costs;
- iii. There is no objection to relying on the additional documentation in relation to the claim against the Defendants on the basis of the allegations against Ms. O'Malley for the 2005 audit.



21. The Defence submits that the new allegations of deceit in relation to Mr. Tiernan for the 2005 audit, and Ms. O'Malley for the 2006, constitute new causes of action which do not arise out the same or substantially same facts on the existing cause of action and therefore the Court has no jurisdiction to grant leave for those amendments.

22. The Defence submits that there is an absence of proper evidence grounding the Plaintiff's application. The Defendants contend that there is no supporting affidavit or affirmation and this failure to ground its application by evidence is fatal to the Plaintiff's application for Leave to Amend.

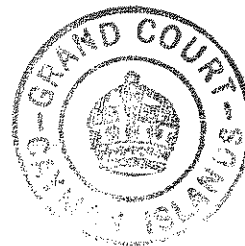
1 23. The Defendants complain that there is a lack of evidence of suppression of  
2 documents or concealment or collusion and, therefore there is a lack of evidence to  
3 support the claim of deceit against the Defendants. Consequently the Defendants  
4 contend that no leave to amend should be granted.

5 24. Furthermore the Defendants submit that these “new claims of deceit” are barred by  
6 the terms of the Consent Order approved by this Court on the 8<sup>th</sup> April 2014 and  
7 also the terms of the Order made by the Cayman Islands Court of Appeal (CICA)  
8 dated the 3<sup>rd</sup> April 2014 – which each have both the effect of confining the Plaintiff  
9 to its existing claims in deceit. The relevant recital to the CICA Order reads:

10 *“And upon the Respondent (i.e. the Plaintiff) having agreed to amend its*  
11 *Statement of Claim in this action so as to delete any claim other than its claim*  
12 *in deceit in relation to both the 2005 and 2006 audits, and having agreed to*  
13 *confine its claim in relation to both the 2005 and 2006 audits to its claim in*  
14 *deceit.”*

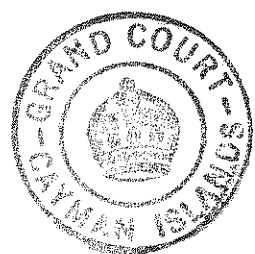
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16 25. The relevant Order of this Court dated the 8<sup>th</sup> April 2014 is at paragraph 2 of the  
17 Order which reads that the Plaintiff shall:

18 *“...file an amended Statement of Claim omitting the claims in breach of*  
19 *contract and negligence in relation to the audits for the years 2005 and 2006*  
20 *and shall confine its case in this and subsequent amendments in relation to the*  
21 *audits for the years 2005 and 2006 to its claim in deceit.”*



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26. The Plaintiff submits that the Fund collapsed because the Defendants failed to react appropriately to obvious related party trading. There is no material controversy regarding the history of the Fund as shown in the financial statements which were audited by the Defendants. The Plaintiff maintains that these show a pattern of apparent growth in both NAV and NAV per share typical of a successful Fund. The figures in the financial statements are set out below. They are contrasted with the figures relating to the IRS transactions in particular as follows:



<b>31<sup>st</sup> Dec. 2004</b>		
	Assets	US\$210,710,557.00
	Liabilities	US\$184,025,240.00
	Net Assets	<b>US\$26,685,317.00</b>
	Shares in Issue	<b>223,818</b>
	NAV per share	<b>US\$119.23</b>
	IRS transactions	nil
	% of NAV	--
	NAV per share excluding swaps	--
<b>31<sup>st</sup> Dec. 2005</b>		
	Assets	US\$470,974,355.00
	Liabilities	US\$407,152,065.00
	Net Assets	<b>US\$63,822,290.00</b>
	Shares in Issue	<b>481,801</b>
	NAV per share	<b>US\$132.47</b>
	IRS transactions	US\$15,902,275.00
	% of NAV	<b>24.92%</b>
	NAV per share excluding swaps	<b>US\$99.46</b>
<b>31<sup>st</sup> Dec. 2006</b>		
	Assets	US\$359,224,490.00
	Liabilities	US\$253,886,981.00
	Net Assets	<b>US\$105,337,509.00</b>
	Shares in Issue	<b>721,458</b>
	NAV per share	<b>US\$146.01</b>
	IRS transactions	US\$86,790,018.00
	% of NAV	<b>82.39%</b>
	NAV per share excluding swaps	<b>US\$25.71</b>
<b>31<sup>st</sup> Dec. 2007</b>		
	Assets	US\$817,083,565.00
	Liabilities	US\$536,606,095.00
	Net Assets	<b>US\$280,447,470.00</b>
	Shares in Issue	<b>1,701,150</b>
	NAV per share	<b>US\$164.88</b>
	IRS transactions	US\$195,602,461.00
	% of NAV	69.74%
	NAV per share excluding swaps	<b>US\$49.89</b>

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1 27. Mr. Thom Q.C. on behalf of the Plaintiff states that the view presented by the  
2 foregoing balance sheet is of a steady growth in NAV. The Fund complains that this  
3 was not a true and fair view. The Fund submits that the NAV per share when the  
4 worthless shams are excluded fell in 2005, plunged in 2006, and then produced a  
5 slight rally in 2007 – no doubt due to the huge increase in subscriptions by investors  
6 in that year, from 721,458 to over 1.7 million shares in issue.

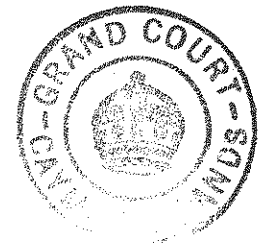
7 28. The Plaintiff submits that, in order to attract new investors, the investment manager,  
8 Magnus Peterson and the directors of the Fund Stefan Peterson and Mr. Ekstrom  
9 tried to portray a safe Fund with moderate and steady growth, however, far from  
10 being a “safe” fund, the Fund was consistently trading at a loss, and this was  
11 disguised by the IRS transactions.

12 29. When PWC was instructed in early 2009 it became rapidly clear that the IRS  
13 contracts – which then had a purported value of US\$637 million – were worthless.  
14 In effect, over 100% of the NAV was a purported asset with no substance. The  
15 Plaintiff’s leading counsel, Mr. Thom Q.C., describes this as a “devastating  
16 revelation”. Mr. Thom Q.C. concedes that many Funds lost value in 2008, but to  
17 discover that a Fund, with an apparent positive value of hundreds of millions of  
18 dollars was actually insolvent, was a truly extraordinary event.

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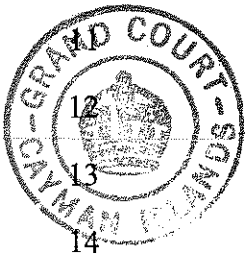
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1 30. It is the Plaintiff's position that when the first Statement of Claim was filed on the  
2 20<sup>th</sup> March 2013 the Plaintiff had limited material upon which to plead its Writ of  
3 Summons and Statement of Claim. The Plaintiff has recently been provided with  
4 voluminous and significant discovery including the Defendants' audit files. It is not  
5 challenged that the Plaintiff only had access to these audit files since December  
6 2014.

7 31. The Plaintiff has provided an Affidavit of Amy Altneu ("Ms. Altneu") exhibiting  
8 the documentation which supports the Plaintiff's application for leave to amend.  
9 This documentation exhibits some significant evidence of IRS transactions between  
10 two Weaving Funds. In addition, there was a director in common and there is  
11 evidence to suggest that the two Weaving funds shared the same investment  
12 manager. Accordingly, it is the Plaintiff's contention that there was at least the risk  
13 that there was related party trading and that it should have been obvious to any  
14 financial services auditor that this matter needed to be investigated and reported.



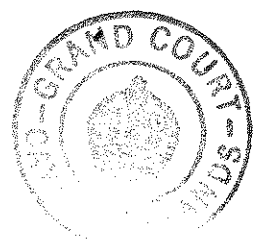
15 32. It is the Plaintiff's position that it is clear from the terms of the financial statements  
16 and, in particular, the related parties' notes, and the auditors' reports, that no action  
17 had been taken to investigate the evidence of related party trading.

18 33. Accordingly, it is the Plaintiff's case that it was improbable that a specialist  
19 financial services audit team would have missed such a blatant example of  
20 undisclosed related party trading – especially in light of the fact that the  
21 Defendants' own audit strategies memoranda laid such stress on the need to ensure  
22 that all related party trading was properly disclosed.

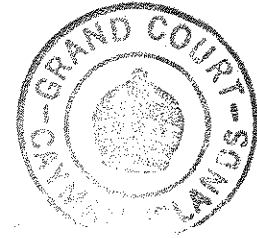
1 34. Consequently, it is the Plaintiff's case that both Ms. O'Malley and Mr. Tiernan  
2 consciously ignored the related party issue for the 2005 audit and that Ms.  
3 O'Malley consciously ignored the related party issue in relation to the 2006 audit.

4 35. Although the Plaintiff acknowledges that the investment manager, Magnus  
5 Peterson, caused the collapse of the Fund, the Plaintiff contends that the Defendants  
6 also caused the Fund to collapse by their failure to discharge their duty to protect  
7 the Fund from, amongst other things, fraud by the investment manager.

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1 *ANALYSIS & CONCLUSION*



2 *LIMITATION*

3 36. The Court has to decide whether to grant leave to the Plaintiff to further amend its  
4 statement of claim or, in the alternative, to grant the Plaintiff leave to use the  
5 documents discovered by the Defendants in new proceedings against the  
6 Defendants for the purpose of issuing a Writ making such further allegations  
7 against the Defendants in connection with the Defendants audits of the Funds for  
8 the years 2005 and 2006.

9 37. S.37 of the Limitation Law (1996 Revision) reads:

10 *"37. (1) Subject to subsection (3), where in the case of any action for*  
11 *which a period of limitation is prescribed by this Law, either –*

12 *(a) the action is based upon the fraud of the defendant;*

13 *(b) any fact relevant to the plaintiff's right of action has been*  
14 *deliberately concealed from him by the defendant; or*

15 *(c) the action is for relief from the consequences of a mistake,*

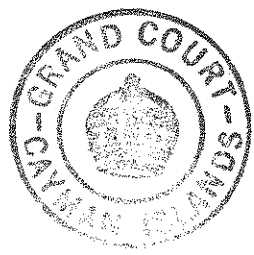
16 *the period of limitation does not begin to run until the plaintiff has*  
17 *discovered, or could with reasonable diligence have discovered, the*  
18 *fraud, ..."*  
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20 38. It is common ground that the Peterson fraud was not discovered until March 2009.  
21 Mr. Thom Q.C. has explained to the Court that the 6-year period applicable to  
22 actions in tort in relation to deceit against the Defendants could not have started to  
23 run until the Fund had material – not only in relation to the Peterson fraud, but also  
24 in relation to the Defendants' conduct of the audits – which it cannot have seen  
25 until sometime in or after March 2009. Accordingly, as at February 2015 that  
26 period has not expired.

1 39. The Plaintiff has confirmed to the Court that the limitation period in deceit may  
2 expire sometime in March 2015 and that is why it has brought this application to be  
3 heard in February 2015.

4 40. As matters stand, and assuming leave to amend is to be granted, it is my view that it  
5 is preferable to avoid yet further proceedings and consider the question of leave to  
6 further amend the Amended Statement of Claim, rather than leave to use the  
7 discovered documents in this action in new proceedings.

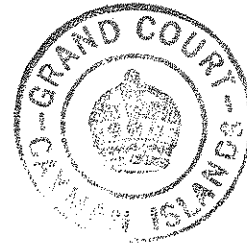
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1 *PLAINTIFF'S PRAYER FOR DAMAGES FOR DECEIT – NEW CLAIMS*

2 41. Simply put, the Plaintiff's case is that it is impossible to accept that two  
3 experienced fund auditors could look at these documents with the knowledge set  
4 out in the notes and not appreciate that there was at least a risk that there was  
5 related party trading and, accordingly, the Plaintiff contends that such a level of  
6 incompetence is beyond belief and leads to the inevitable claim of deceit against the  
7 Defendants.

8 42. The Fund has unreservedly withdrawn its allegations against Ms. Allen in relation  
9 to the 2006 audit, and against Mr. Barber, in relation to the 2007 audit. However,  
10 the Fund makes the point that the claim contained in its Amended Statement of  
11 Claim is an entirely proper one and, further, that the claim of deceit against the  
12 three defendants is the same – based on new allegations and particulars resulting  
13 from the recent discovery.



GCR O.20

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43. GCR O.20 r.5 governs the applications relating to the amendment of a writ or pleading with leave. As this application does not relate to any misjoinder and non-joinder of parties, or, new parties GCR O.20 r.1 reads:

*“... the Court may at any stage of the proceedings allow the plaintiff to amend his writ, or any party to amend its pleading, on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct.”*

GCR O.20 r.5(2) reads:

*“Where an application to the Court for leave to make the amendment mentioned in paragraph (3), (4) or (5), is made after any relevant period of limitation current at the date of issue of the writ has expired, the Court may nevertheless grant such leave in the circumstances mentioned in that paragraph if it thinks it just to do so.”*

GCR O.20 r.5(5) reads:

*“An amendment may be allowed under paragraph (2) notwithstanding that the effect of the amendment will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the action by the party applying for leave to make the amendment.”*

44. The learned editors of the Supreme Court Practice 1999 state at O.20/8/6 on page 379:



1                    *“It is a guiding principle of cardinal importance on the question of amendment*  
2                    *that, generally speaking, all such amendments ought to be made “for the*  
3                    *purpose of determining the real question in controversy between the parties to*  
4                    *any proceedings or of correcting any defect or error in any proceedings.”*” (See  
5                    Jenkins LJ in *G.L. Baker Ltd. v. Medway Building and Supplies*.<sup>1</sup>

6  
7            45.     In *Cropper v. Smith*<sup>2</sup> Bowen LJ stated:

8                    *“It is a well-established principle that the object of the Court is to decide the*  
9                    *rights of the parties, and not to punish them for mistakes they make in the*  
10                    *conduct of their cases by deciding otherwise than in accordance with their*  
11                    *rights... I know of no kind of error or mistake which, if not fraudulent or*  
12                    *intended to overreach, the Court ought not to correct, if it can be done without*  
13                    *injustice to the other party. Courts do not exist for the sake of discipline, but for*  
14                    *the sake of deciding matters in controversy, and I do not regard such*  
15                    *amendment as a matter of favour or grace... It seems to me that as soon as it*  
16                    *appears that the way in which a party has framed its case will not lead to a*  
17                    *decision of the real matter in controversy, it is as much a matter of right on his*  
18                    *part to have it corrected if it can be done without injustice, as anything else in*  
19                    *the case is a matter of right.”*

20                    with which observations A.L. Smith L.J., expressed “emphatic agreement” in *Shoe*  
21                    *Machinery Co. v. Cuttam*<sup>3</sup>.

22            46.     The Cayman Islands Court of Appeal reviewed the relevant authorities in relation to  
23                    leave to amend in *Swiss Bank and Trust v. Iorgulescu*<sup>4</sup> and Georges JA stated at  
24                    page 154 line 15:

25                    *“There has been no serious dispute as to the principles which should govern the*  
26                    *grant or refusal of an amendment. The dictum of Brett, M.R. in *Clarapede &**  
27                    *Co. v. Commercial Union Assn. (1) (32 W.R. at 263) as cited in *Ketteman v.**  
28                    *Hansel Properties Ltd. (4) ([1988] 1 All E. R. at 61-62) by Lord Griffiths*  
29                    *remains authoritative:*

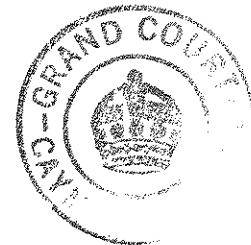
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<sup>1</sup> [1958] 1 WLR 1216 at 1231

<sup>2</sup> [1883] 26 Ch. 700 at 710-711

<sup>3</sup> [1986] 1 Ch. 108 at 112

<sup>4</sup> 1994-95 CILR 149



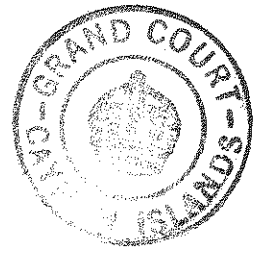
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*“The rule of conduct of the court in such a case is that, however negligent or careless may have been the first omission, and however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs.”*

47. Georges JA in quoting Lord Griffiths in *Ketteman v. Hansel Properties Ltd.* where Lord Griffiths referred to the concept on which Brett M.R. in *Clarapede & Co. v. Commercial Union Assn* (*op cit. ibid*) stated:

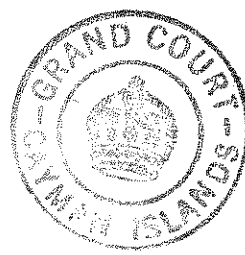
*“Whether an amendment should be granted is a matter for the discretion of the trial judge and he should be guided in the exercise of the discretion by the assessment of where justice lies.”*

48. The Plaintiff’s claim has always been for damages for deceit against the defendants, although new allegations are now being made against Mr. Tiernan for his conduct in relation to the 2005 audit and Ms. O’Malley for her conduct in relation to the 2006 audit. The Plaintiff submits that these new allegations arose out of the recent inspection of the Defendants’ discovery documents obtained in late 2014. The overriding claim of deceit in relation to their failure to act on evidence of related party transactions does not add a new cause of action. However, if it did add a new cause of action it could still be allowed, provided it comes within GCR O.20 r.5(2) as read with O.20 r.5(5).



1       49.     Having read the newly discovered documents exhibited to Ms. Altneu's affidavit,  
2             reviewed the draft amended Statement of Claim, and, heard the submissions of both  
3             leading counsel for the respective parties, I find that the new allegations against Mr.  
4             Tiernan and Ms. O'Malley arise out of the same facts or substantially the same facts  
5             as the cause of action in respect of which relief has already been claimed by the  
6             Plaintiff in its Writ and Statement of Claim. I find that by granting the Plaintiff  
7             leave to further amend its Amended Statement of Claim the Court will be in a  
8             proper position to decide upon the real matter in question, namely, did the  
9             Defendants behave dishonestly in their preparation of their audits and audit reports  
10            of the Fund. In light of the current existing claim for deceit against the Defendants I  
11            can find no injustice to the Defendants, and any loss that the Defendants may have  
12            sustained as a result of this amendment can be compensated in costs.

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1 *SUBMISSIONS AGAINST GRANTING LEAVE TO AMEND*

2 50. In its Writ of Summons issued on the 30<sup>th</sup> November 2012 the Plaintiff's first  
3 prayer for relief against the Defendants is for damages for deceit in relation to each  
4 of the 2005, 2006 and 2007 audits. The Defendants have made no application to  
5 strike out this claim on the basis that it has no prospect of success or that it is  
6 vexatious or that it is an abuse of process of this Court. As Georges JA stated in  
7 *Swiss Bank and Trust v. Iorgulescu* on page 155 line 25:

8 *"Lawrence v. Lord Norreys (5) established that an amendment will be refused*  
9 *and a statement of claim will be struck out if the cause of action which they*  
10 *seek to raise is vexatious and an abuse of the process of the Court."*

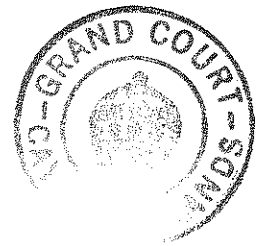
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12 51. Leading counsel Mr. Fenwick Q.C., on behalf of the Defendants has stated on a  
13 number of occasions that this is not a case where an application to strike out the  
14 Plaintiff's claim is going to shorten these proceedings rather than prolong them.  
15 There is considerable authority to confirm that this approach is appropriate and will  
16 avoid a prolonged investigation into the merits of the parties' cases at an  
17 interlocutory stage. As Neill L.J. in *McDonald Corp. v. Steel*<sup>5</sup>:

18 *"The power to strike out is a draconian remedy which is only to be employed in*  
19 *clear and obvious cases. I have already set out the wide variety of the evidence*  
20 *which a Defendant may be able to rely upon at the trial. I anticipate therefore it*  
21 *will only be in a few cases where it will be possible to say at an interlocutory*  
22 *stage and before full discovery that a particular allegation is incapable of*  
23 *being proved."*

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<sup>5</sup> [1995] 3 All E R. 615 at 623



1 52. Furthermore, in *Ferguson v. British Gas Trading*<sup>6</sup> Sedley LJ stated at page 315:

2 *“It is therefore worth reiterating that the court on an application such as this*  
3 *(i.e. strike out) is required to assume that the claimant [Plaintiff] will prove all*  
4 *that she [it] has alleged and this will be the totality of the evidence. It is only if*  
5 *some unrevealed but incontestable fact will render the case hopeless that*  
6 *evidence can be adduced in support of such an application. This apart (and*  
7 *nothing advanced by British Gas comes close to it), if the claim is capable of*  
8 *succeeding, it is at trial, it at all, that the explanations and excuses become*  
9 *relevant.”*

10

11 53. I have not seen hitherto unrevealed incontestable facts which would render the  
12 Plaintiff’s case hopeless and, further, I cannot find on the material before me that  
13 the Plaintiff’s case is incapable of succeeding. Therefore on that basis I would grant  
14 the Plaintiff leave to further amend its Amended Statement of Claim.

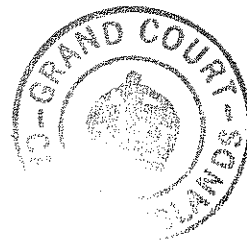
15 54. Furthermore, I should add, for the sake of completeness, that in my view, based on  
16 the material before me, the Plaintiff’s claim – both in the existing Amended  
17 Statement of Claim and the draft further amended Statement of Claim – is not  
18 vexatious and the application for leave to further amend the Amended Statement of  
19 Claim is not an abuse of the process of the Court.

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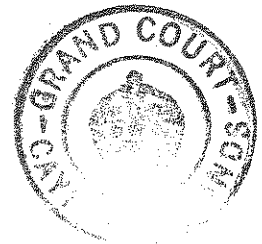


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<sup>6</sup> [2009] 3 All E R 304

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55. On the 27<sup>th</sup> January 2015 the Defendants’ attorneys invited the Plaintiff’s attorneys to agree to certain case management directions which are contained in a draft Order and exhibited to Eric Bodden’s Third Affidavit. The Defendants’ attorneys have suggested in this draft order for directions that trial bundles be completed no later than the 1<sup>st</sup> December 2016. The Defendants’ attorneys have also suggested an estimate of 30 days for the trial of this action – with a pre-trial review to take place in 2017. The Court considers these draft directions, suggested by the Defendant to be reasonable and urges the parties’ attorneys to agree a timetable as soon as reasonably practicable.



1 *ABSENCE OF EVIDENCE*

2 56. In relation to the Defendants' contention that the absence of affidavit evidence is  
3 fatal to the Plaintiff's application to amend, I again rely upon the CICA case of  
4 *Swiss Bank and Trust v. Iorgulescu* and in the holding on page 150 the Court held:

5 *"The Court is entitled to act upon counsel for the Respondent's version of the*  
6 *history of the matter since it was not imperative for there to be an affidavit in*  
7 *an application for leave to amend, although the court might request one."*

8  
9 57. Mr. Thom Q.C. on behalf of the Plaintiff has done no more than review the relevant  
10 new discovery documentation exhibited to Ms. Altneu's affidavit and the draft  
11 amended Statement of Claim which he submits as being amended in light of the  
12 recent discovery obtained by the Plaintiff in late 2014. Accordingly, in light of the  
13 dictum of Georges JA in *Swiss Bank and Trust v. Iorgulescu* I reject the  
14 Defendants' contention that the Plaintiff's failure to file a proper supporting  
15 affirmation is fatal to the Plaintiff's application for leave to further amend its  
16 amended Statement of Claim.



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*ORDER OF THE 8<sup>TH</sup> APRIL 2014*

58. I turn now to the Defendants' submission that the CICA order dated the 3<sup>rd</sup> April 2014 and this Court's Order dated the 8<sup>th</sup> April 2014 prevent the Plaintiff from amending its Statement of Claim.

(a) The CICA Order recites the fact that the Plaintiff agreed to delete any claim other than its claim of deceit and therefore its claim in deceit for both the 2005 and 2006 audits is not affected by the CICA Order.

(b) The Order of this Court records that the Plaintiff has omitted its claims in Breach of Contract and Negligence in relation to the audits for the years 2005 and 2006 and specifically confines its case to deceit and any subsequent amendments in relation to the audits for the years 2005 and 2006 to its claim in deceit.

59. I find that, far from preventing any amendment to its claim in deceit against the Defendants, this Court's order dated the 8<sup>th</sup> April 2014 expressly contemplates possible future amendments similar to the amendments contained in the Plaintiff's draft amended Statement of Claim. Therefore I can see no basis for the contention that either the CICA Order or the Order of this Court should prevent the Plaintiff from amending and I reject that submission on behalf of the Defendants.



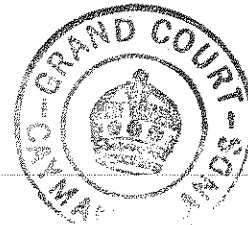
1       60.     For all the aforesaid reasons I grant the Plaintiff's application for an Order that it be  
2             given leave to further amend the Amended Statement of Claim filed on the 15<sup>th</sup>  
3             April 2014 and so far as it may be necessary, the time for filing and serving the  
4             Further Amended Statement of Claim be abridged.

5       61.     On the question of costs, if they cannot be agreed, I am quite prepared to consider  
6             written submissions or, alternatively, oral and written submissions, at the earliest  
7             convenient time to both parties.

8

9

10     **Dated this the 19<sup>th</sup> February 2015**



11

12

A handwritten signature in black ink, appearing to be "C. Quin", written over a horizontal line.

13

14

15     **Honourable Mr. Justice Charles Quin Q.C.**  
16     **Judge of the Grand Court**