my file
30.1.98
Civil procedure
Conflict of laws
Companies - directors

IN CHAMBERS

IN THE GRAND COURT OF THE CAYMAN ISLANDS

HOLDEN AT GEORGE TOWN, GRAND CAYMAN

CAUSE NO. 328/1996

BETWEEN:

(1) HUTCHINSON LTD. (IN LIQUIDATION)
c/o Ernest & Young
George Town, Grand Cayman

(2) CRAIN CREEK LTD. (IN LIQUIDATION)
c/o Ernest & Young
George Town, Grand Cayman

(3) MOUNTAIN DEW LTD. (IN LIQUIDATION)
c/o Ernest & Young
George Town, Grand Cayman

(4) FORUM LTD. (IN LIQUIDATION)
c/o Ernest & Young
George Town, Grand Cayman

PLAINTIFFS

AND:

(1) CITITRUST (CAYMAN) LTD.
George Town, Grand Cayman

(2) DONAT INVESTMENTS S.A.
Panama

(3) MADELEINE INVESTMENTS S.A.
Panama

(4) HITCHCOCK INVESTMENTS S.A.
Panama

(5) BRENNAN LTD.
c/o Cititrust (Cayman) Ltd.
George Town, Grand Cayman

(6) TYLER LTD.
c/o Cititrust (Cayman) Ltd.
George Town, Grand Cayman

(7) CONFIDAS FINANCE ET PLACEMENT S.A.
Zurich, Switzerland

(8) ADZAM YUSOF

c/o Confidas Finance et Placement S.A.
Zurich, Switzerland

(9) MAGGIE GRAF
c/o Confidas Finance et Placement S.A.
Zurich, Switzerland

(10) THOMAS SALMON
c/o Confidas Finance et Placement S.A.
Zurich, Switzerland

(11) CITIBANK (SWITZERLAND)
(formerly Citicorp Investment Bank (Switzerland)
Zurich, Switzerland

Defendants

For the Plaintiffs: Mr. A. Turner of W.S. Walker & Co.
For the Defendants: Mr. N. Timms of Maples & Calder

Before Douglas J.

JUDGMENT

Before me are five summonses involving four plaintiffs and eleven defendants. The Statement of Claim is not only lengthy, but complex, comprising of thirty one pages involving numerous issues. In addition, the plaintiffs seek thirty four declarations. The attorneys representing the parties have vigorously argued each and every issue, and have requested the Court to look into each claim by each defendant against each plaintiff. Although it is the duty of the Court to examine each and every issue, all that is required at this stage of the proceedings is for the Court to determine whether or not to validate or discharge the order of Mr. Justice Smellie giving leave to serve the Writ on second, third, fourth, seventh, eight, ninth, tenth and eleventh defendants. Much of the debate about the applicability of the rules will prove to be academic because of the outcome. However I

take time to examine them because of the considerable discussion of the case law and principles which took place before me in the event that this considered ruling may be useful on another occasion.

The Plaintiffs

The four plaintiffs, Hutchinson, Crain Creek, Mountain Dew Limited and Forum are all limited companies registered in the Cayman Islands and are in liquidation. Mr. Cleaver of Ernst & Young, Grand Cayman and Mr. Alain Winkelmann of ATAG Ernst & Young Switzerland, are joint official liquidators.

At all material times these plaintiffs were underlying companies owned by the First Defendant (Cititrust) as trustees of the Trusts for the benefit of the Nadir family. Hutchinson and Forum were underlying assets of the Nadir family settlements. Crain Creek and Mountain were underlying assets of the Hi-tech settlement. Hutchinson, Crain Creek and Forum were beneficially owned by Mrs. Nadir prior to settlement of the shares into the relevant Trusts. Mountain was established as an underlying company to receive assets settled by Mrs. Nadir who was a major creditor to Hutchinson, Mountain and Forum having lent substantial demand loan.

The Defendants

Cititrust is a company registered in the Cayman Islands. The shares of each of the Plaintiffs' were held by the fifth and sixth defendants, as nominees for and on behalf of Cititrust . Brennan and Tyler, both companies registered in the Cayman Islands, were

respectively appointed as Secretary and President of each of the plaintiffs. Confidas, the seventh defendant, is a company which carries on business from its offices in Zurich and Geneva, administering the trust in Switzerland on behalf of Cititrust. Its officers acted in turn as officers and authorised signatories for Brennan and Tyler in carrying out instructions on behalf of Cititrust.

Yusof, Graf and Salmon, the eighth, ninth and tenth defendants respectively, were at all material times employees of Confidas, Salmon being a Vice President of that company. Graf has apparently not been served and as yet played no part in the proceedings. Donat, Madeleine and Salmon, the second, third and fourth defendants respectively, (or the Panamanian Companies) are registered in Panama, and owned by Cititrust (Bahamas) Limited. They acted as directors for each of the plaintiffs. Their officers and directors included residents of the Cayman Islands. Cititrust (Switzerland) the eleventh defendant, is incorporated in Switzerland and provide banking and related services there.

CHRONOLOGY

In 1988 Mountain purchased a substantial number of shares of the Harland Simon Group (HSG) for which they borrowed money from Bank SG Warburg Solitic AG (BSG) but subsequently financing was provided by General Bank and Trust (Bahamas) Ltd. (GBT). Pursuant to the loan Mountain pledged certain of its shares in HSG to GBT as security. These shares were held by Credit Suisse.

On 11th September 1990, Mountain gave instructions for sale of its shares in HSG. The instructions were, firstly to pay the necessary amount to Credit Suisse in London to obtain good title to HSG shares held by Credit Suisse. Secondly, to transfer the net proceeds of sale to CIBC (Switzerland) to the account of CIBS for the benefit of Mountain.

From the sum of L23,240,521.00 which was the gross proceeds of the sale Mountain paid L12,190,.68.00 to Credit Suisse as repayment of loan. They also paid the sum of L115,000.00 to Singer & Fredlander as commission for selling its HSG shares and a further L228,763.12 as an early payment discount. This is one of the amounts claimed by the plaintiffs from the defendants. Of the shares sold 703,800 at a value of L3,358,316.37 were beneficially owned by Crain Creek the second plaintiff. After the sale Mountain held that amount in trust for Crain Creek.

In October 1990, Mountain also owned 310,000 shares in Kewill Systems Ltd. At the request of Mrs. Nadir these were sold in October 1990, the net proceeds being L406,753.42. The sum of L240,272.09 from that sale was paid to Vermar Ltd. to pay interest on a debt due by Vermar. This loan was treated as a reduction of Mountain's indebtedness to Mrs. Nadir. The balance of the proceeds was placed in a fixed deposit in Mountain's account at CIBC with other available funds.

In September 1990 Mountain owned shares in the Cutting Bureau Ltd. On or about 8th January 1990 Mountain sold it shares in New Cuttings, the

net income being L729,000 and L724,000.00. These amounts were combined with Mountain's fixed deposit in CIBS.

On 6th September 1990 Brennan Tyler gave instructions to CIBS to debit Mountain's account and transfer the sum of L8,692,000 to Mrs. Nadir's account. Then on 14th September a further sum of L1,967,000.00 was debited from Mountain's account in Switzerland and transferred to Mrs. Nadir's account with CIBS. This instruction is alleged to have been given by Mrs. Nadir to Confidas. There were no written instructions.

On 18th February 1991 the Directors of Mountain, Donat, Madeleine and Hitchcock, met in the Bahamas where they passed certain resolutions concerning the payments to Mrs. Nadir. It is as a result of these resolutions that certain of the claims by the plaintiffs against these defendants have arisen. I will deal with these resolutions at the appropriate time.

SUMMONSES

On 25th June 1996 the plaintiffs filed an ex parte summons applying for leave to serve proceedings outwith the jurisdiction upon the defendants. On 27th August Mr. Justice Smellie granted leave for service out of the jurisdiction on the second to fourth, and seventh to eleventh defendants. On 11th December 1996 an Acknowledgment of Service on behalf of the first, fifth and sixth defendants was received and on 17th February the Acknowledgment of Service on behalf of the second to fourth, seventh, eighth, tenth and eleventh defendants were received. On that date also the plaintiffs obtained

an order extending the validity of the Writ of Summons for a further 12 months from its date of expiry until 28th February 1998.

On 24th April 1997, a final date of the time limited for the filing of a defence by the defendants, a total of three summonses were filed by the various defendants. These were, firstly, an applications on behalf of Cititrust, Brennan and Tyler for a stay of the order of Smellie J, on the ground of forum non conveniens. Secondly, an application on behalf of the non-Caymanian defendants seeking various orders under GCR Order 12, Rule 8. Thirdly, another by the non-Caymanian defendants seeking an extension of time for the service on the affidavit in support of the Order 12 Rule 8 application. On 9th May 1997, these defendants were granted leave to withdraw this last summons.

On 15th May 1997, the plaintiffs filed a summons for the dismissal of the Order 12 Rule 8 application. On 12th May they were granted leave to amend the said summons. On 20th May the defendant re-served the Order 12 Rule 8 summons along with supporting affidavits.

On 17th June the plaintiffs filed their amended summons which will now be the first issue with which I will deal. However before I proceed I must record that on 8th July the plaintiffs filed another summons, this time seeking inter alia, the retrospective validation of the leave granted by Smellie J on 27th August 1997.

This application of 17th June sought the following orders:-

1. "That the 2nd, 3rd, 4th 7th, 8th 10th and 11th defendants order 12 Rule 8 summons filed herein on 24th April 1997 be dismissed on the grounds that:-

   (a) the affidavits in support thereof were not filed by 24th April, 1997;

   (b) the affidavits in support thereof were not served with the Order 12 rule 8 summons on 24th April, 1997; and

   (c) the 2nd, 3rd, 4th, 7th, 8th, 10th and 11th defendants voluntarily submitted to the jurisdiction of this honorable court by withdrawing their summons to extend time for service of their affidavit evidence in support of their Order 12 rule 8 summons on 9th May, 1997.

2. That the 2nd - 4th, 7th - 8th and the 10th - 11th defendant do file their defences forthwith."

The plaintiffs' case can be summarised as follows -

(1) that GCR O. 12, r.8 (3) provides for the summons (challenging jurisdiction) and the affidavit in support must be served together and failure to do so renders the summons irregular;

(2) that withdrawal of a summons to extend time for service of an affidavit (supporting a summons challenging jurisdiction) constitutes a voluntary submission to the jurisdiction.

THE RELEVANT RULES

GCR O. 12, r. 8(6) provides:

> "Except where the defendant make and application in accordance with paragraph (1) the acknowledgment by a defendant of service of a writ shall, unless the acknowledgment is withdrawn by leave of the Court under O. 12, r. 1, be treated as a submission by the defendant to the jurisdiction of the Court in the proceedings."

GCR O. 12 r. 8(1) provides that a defendant who wishes to dispute jurisdiction shall give notice of intention to defend the proceedings and "shall within the time limited for service of a defence, apply to the Court for" relief.

"Apply" means the issue of a summons (i.e. receipt by the Court office not when issued by the court) and not "issue and service". An application under GCR O. 12 r. 8 is validly made when the summons is issued. See RSC O. 12, r. 8/2; Gulf East International v. Parvoz Carder Lexis Transcript 23rd March, 1994 QBD (Commercial Court); The Broken Hill Proprietary Co. v. Theodore Xerakis (1982) 2 Lloyds Rep. 304.

Although the affidavit was not filed with the summons, the defendants filed, and therefore applied within the time limited for service of a defence (i.e. on the 24th April, 1997). There is therefore no irregularity in the timing of the application and no allegation that the summons is any way defective. Consequently an application has been made in accordance with GCR O. 12 r. 8(1). GCR O. 12, r. 8(6)

therefore has no application.

The plaintiffs are correct that by GCR O. 12, r. 8 (3) a copy of an affidavit in support of the application must be served with the summons. This was done on the 20th May, 1997. The defendants claimed that prior to that date the plaintiffs received courtesy faxed copies of the affidavit. I find that this service was by way of re-service of the summons which was originally served on the 24th April 1997 was within the time limit.

There are no provisions as to service of the summons within a specified time limit in GCR O. 12, r.8. The normal provisions of GCR O.32, r.3(2) therefore apply (service of a summons and evidence must be served together not less than 4 days before the fixture). The hearing of the defendants' GCR O. 12, r.8 application was fixed for the 14th July, 1997. Service on the plaintiffs was some 8 weeks before the hearing.

The plaintiffs rely on the English case of Carmel Exporter (Sales) Ltd v. Sealand Services Inc. (1981) 1 WLR 1088. This case turned on RSC O. 12, r. 8(2) which was revoked in 1983. GCR do not incorporate the revoked sub-rule. The facts of the Carmel case (supra) were that a summons was issued and served within the requisite period. The plaintiffs did not seek to set aside the application but opposed it on the grounds it must fail because (a) the RSC O. 12, r.8 provisions had not been complied with (b) the summons was defective in not stating the grounds of the application and (c) no copy was served with

the summons; and (d) that the defendants and submitted to the jurisdiction (not by reason of these irregularities but because of correspondence); because of RSC O. 12, r.8(2) it was too late to remedy the situation.

It was admitted that the summons was defective and conceded that there was a failure to serve a copy of the affidavit with the summons. Nonetheless the Court discussed the meaning of "apply". The Court indicated willingness to exercise its discretion under O. 2, r.1 on the basis that each such failure should be treated as an irregularity with did not nullify the step in the proceeding and the Court has the power to proceed with the application despite late service of an affidavit. The Court decided it was an obvious case to exercise a discretion to give leave to amend the summons (to state grounds) and to proceed despite late service of the affidavit. It was submitted that the irregularity resulted in a submission to the jurisdiction; this was rejected.

In any event this case does not support the propositions advanced by the plaintiffs. Both RSC and GCR O. 12, r.8 have since been changed by amendment to rule 8(1) and by deletion (in the case of RSC) and by omission (in the case of GCR) of the former RSC O. 12, r.8(2).

Under the former rule 8(2) the Court might extend time for the application only in an application for an extension was made before 14 days of an acknowledgment of service. The arbitrary limit was criticised by the Court as being inflexible. The rule was

subsequently amended and the GCR reflect that a defendant can apply for an extension of time to file an O. 12, r. 8 application even after the time for such an application is expired. Even if the plaintiffs were right, this would be an obvious case for such an extension as there is no possible prejudice even claimed by the plaintiffs.

I find that the application has been made in accordance with rule 8(1) therefore this is not a case where the acknowledgments of service should be treated as a submission to the jurisdiction. At worst failure to serve the affidavit with the summons would be an irregularity. In **Carmel's** case the Court naturally assumed that in these circumstances the defendants would be allowed leave to continue in any event.

The plaintiffs have not been able to suggest that there is any case in which such an irregularity was deemed to be a submission to the jurisdiction. Non compliance can be cured in the exercise of the Court's discretion under GCR O. 2, r. 1. This is the approach that the Cayman Court has adopted. In **Lawson v. Midland Travellers** (1993) 1 ALL.E.R. 989, 994 the English Court of Appeal rejected an argument the expiry of a primary time limit under GCR O. 12, r 8 resulted in a submission to the jurisdiction. The Court can grant a retrospective extension time. The withdrawal of an application of extension of time to serve an affidavit cannot be treated as a step in the proceeding inconsistent with a challenge to the jurisdiction. Accordingly this application has no merit and is therefore dismissed.

THE DEFENDANTS' SUMMONSES

I now come to those summons filed by the defendant on 24th April and which must to be determined. The first is an application by the first, fifth and sixth defendants seeking an order under the inherent jurisdiction of the Court that all further proceedings in this action be stayed on the ground that the Cayman Islands is not the appropriate forum. The other is an application by the second, third, fourth, seventh, eighth, tenth and eleventh defendants pursuant to Order 12 Rule 8 disputing jurisdiction of the Court.

There is in fact an overlap between the applications as a principal ground under O. 12 r. 8 is that the plaintiff must show that the Cayman Court was the appropriate Court in which to try the issues. The arguments on this issue can conveniently be heard together. A decision on the application for stay of proceedings on forum non conveniens can, however, only be made after determination of which parties are properly before the Court, i.e. after determining the O. 12 r. 8 application. This will enable the Court to decide if there is some other forum available which is more suitable for the interest of all parties and the ends of justice. (See Spiliada Maritime Corp. v. Consulex Ltd. (The Spiliada 1986) 3 ALL. E.R. 843.

Before going into Order 12 rule 8 summons and the various issues and relevant law, it is necessary at this time to mention the question of enforceability. It is axiomatic that an essential ingredient in deciding the issue of forum conveniens. The question of what is convenient in this regard applies not only to the parties but, also to

the ends of justice which cannot be served should there be any doubt regarding enforceability of the Courts judgment. In determining this issue it is therefore necessary to seek the assistance of the affidavits supplied by the Swiss attorneys and for whose guidance I am grateful. I will therefore refer, in the first instance, to that of Alain Winkleman a lawyer and a partner of ATG Ernest Young in Geneva, Switzerland whose affidavit is in support of the plaintiffs. He confirms that the opinions expressed in paragraphs 1 to 18 by Dr. Peter Widmer, are generally correct. Dr. Widmer is the Swiss lawyer who deponed in favour of the defendants. For this reason I will be guided by opinions in my quest to determine enforceability. As one would expect, Dr. Widmer's concern is with the Swiss defendants, Citibank(Switzerland), Confidas, Mr. Yusof and Mr. Salmon.

Dr. Widmer first identifies the claim against the Swiss defendants as contained in the action and as we have seen are all related to certain transactions carried out in the course of the management and administration of the assets of the plaintiff companies. Dr. Widmer has rendered opinions based on the provisions of the Federal Act on International Private Law of December 18, 1987 (IPLA). At present the Lugano Convention is not in force between Switzerland and the Cayman Islands and therefore the provisions of IPLA are applicable. We will see how these provisions apply to each issue as this ruling progresses.

The Order 12 rule 8 Summons

In this summons the foreign defendants seek the following orders and reliefs.

1. an order discharging the order of Mr. Justice Smellie dated the 27th August 1996, giving leave to serve the Writ herein on the second, third, fourth, seventh, eighth, ninth, tenth, and eleventh defendants out of the jurisdiction pursuant to G.C.R. order 11 as against the second, third, fourth, seventh, eighth, tenth and eleventh defendants;

2. further or alternatively, an order setting aside the service of the Writ on the second, third, fourth, seventh, eighth, tenth and eleventh defendants;

3. a Declaration that in the circumstances of the case the Court has no jurisdiction over the second, third, fourth, seventh, eighth, tenth and eleventh defendants in respect of the subject matter of the claim or the relief or remedy sought in the action;

The grounds of this application are as follows:

1. The precondition for seeking leave to serve out of the jurisdiction under G.C.R. Order 111, rule 1 (1) (c), namely that another defendant had been duly served, was not satisfied when the plaintiffs applied for leave.

2. There was, and is, no issue between the plaintiffs and a person on whom the Writ had been served when the said application was made.

3. The evidence upon which the plaintiffs relied in support of the application for leave to serve out of the jurisdiction was insufficient to establish any ground under G.C.R. order 11, rule 1 for leave to server the second, third, fourth, seventh, eighth, tenth and eleventh defendants outside the jurisdiction or to show any claim against them, and in particular -

(i) failed to show a good arguable case establishing jurisdiction under Order 11, rules 1 (1)(c), 1 (1)(e), 1 (1)(f) and 1 (1)(j);

(ii) failed to show serious issue to be tried between the parties;

(iii) failed to show that the plaintiffs had any claim against the second, third, fourth seventh, eighth, tenth and eleventh defendants; and

(iv) in respect of the seventh, eighth, tenth, and eleventh defendants failed to show a good arguable case establishing jurisdiction under G.C.R. Order 11, rule 1 (1)(ff).

Further, the Writ lacked proper particularity of any fiduciary, contractual or other relationship giving rise to the duty of care alleged between the plaintiffs and the second, third, fourth, seventh, eighth, tenth and eleventh defendants or of any of them or of any alleged tort or breach of duty.

4. The affidavit in support of the application for leave to serve outside the jurisdiction failed to show that the Cayman Islands is the appropriate forum for trial.

5. The affidavit in support of the application for leave to serve out of the jurisdiction failed to give full and frank disclosure or relevant facts and matters and, in particular, the want of evidence of any fiduciary or contractual relationship between the plaintiffs and the second, third, fourth, seventh, eighth, tenth and eleventh defendants which may give rise to any of the liability alleged in respect of the facts and matters pleaded by the plaintiffs.

I will now deal with each ground in the order in which they appear above, examining the evidence as it relates to each of the sub-rules under which it falls.

GCR Order 11 Rule 1 (1)(c)

This sub-rule is as follows -

> "The claim is brought against a person duly served within or out of the jurisdiction and a person out of the jurisdiction is a necessary or proper party thereto."

Apart from alleging that another defendant had not been duly served when the plaintiff applied for leave, these defendants also allege that at the said time there was no issue between the plaintiffs and a

person on whom the writ had been served.

This rule require the Court to determine whether each of the defendant a necessary or proper party. In order to do so with the context of rule 1(1)(c), the Court is not required to do more than (i) identify the common questions of law or fact which arise in the claim against the party duly served and the person sought to be served, and the transaction or series of transactions out of which the rights to relief against arise, and (ii) satisfy itself that the questions of law or fact do merit consideration at a trial - alternatively to raise real issues which the plaintiff may reasonably ask the Court to try. This I propose to do in determining the merits of each ground pleaded in this application. See Baring PLC v. Coopers & Lybrand Ch. 1996 B 447 (unreported)

It is conceded by the plaintiffs that before leave to serve proceedings outside the jurisdiction pursuant to GCR Order 11 rule (1)(c) was obtained by the plaintiffs, the 1st, 5th and 6th defendants should have been served with the Writ of Summons. This is strictly necessary as GCR Order 11 rule 1 (1)(c) suggests that the claim must already be brought against a person "duly served within or out of the jurisdiction".

In Kuwait Oil Tanker Co. v. Al Bader et al (1997) 2 ALL. E.R. 855. in which the Court of Appeal considered to this particular aspect of RSC Order 11 Rule 1 (1)(c). It was held in this case that a plaintiff who relies on RSC Order 11 rule 1 (1)(c) to obtain leave to serve

proceedings outside the jurisdiction must have already served another party within or outside the jurisdiction. At page 6 of the Lexis report Stoughton LJ stated as follows -

> "I would on those grounds hold that r1(1)(c) requires another defendant to have been served before can be given under that paragraph. That, as the judge held, was in line with the construction long adopted for the old rule, and that is an additional ground, to my mind, for reaching the conclusion which I have done on the wording of the rules."

In the present case there was no doubt that the plaintiffs would be able to serve the 1st, 5th and 5th defendants within the jurisdiction of this Court. These defendants are Cayman Islands companies and the plaintiffs did not perceive, and indeed did not encounter any difficulty in serving them within the jurisdiction. However, the plaintiffs have technically failed to comply with GCR Order 11 rule 1 (1)(c) by failing to serve these defendants within the jurisdiction before applying for leave to serve the 2nd, 3rd, 4th, 7th, 8th, 9th, 10th & 11th defendants outside the jurisdiction. The plaintiffs contend that this technical breach of the rules can be cured by this Court and case have now re-applied for leave to serve proceedings outside the jurisdiction pursuant to GCR Order 11 rule 1 (1)(c) on the 2nd, 3rd, 4th, 7th, 8th, 9th, 10th & 11th defendants on the basis that the Writ of Summons in the present case has been renewed by this Court by an order of 16th February, 1997 for a period of 12 months, i.e. until 12th February, 1998. Contrary to a submission made by the defendants that the renewal was for a specific purpose, there is no

evidence to support this and accordingly any leave, if granted to the plaintiffs to serve the proceedings outside the jurisdiction would allow a valid service, provided it was done before the 12th February 1998. As I have already stated the issue of who is a necessary and proper this can only determined after the analysis of the evidence which follows. It is the plaintiffs' case that all the defendants are necessary and proper parties in that if actions was brought by the plaintiffs against each defendant there would be common questions of law or facts to merit consideration at a trial. Alternatively that they have raised real issues which the plaintiff may reasonably ask the court to try.

1 (1)(e)

This sub-rule constitutes the next ground of this application. It relates to a claim brought in respect of a breach committed within the jurisdiction of a contract within or without the jurisdiction. The plaintiffs do not appear to have produced any evidence which is capable of showing that they have a good arguable case as far as the sub-rule is concerned. They claim that there has been a breach of contract with Citibank (Switzerland). It is not denied that there was an exclusive jurisdiction clause in both the contract and the pledge agreements. They seem to have recognised that the proper law of contract is the system which the parties have agreed shall regulate their legally enforceable rights and duties to which their agreement gives rise. It follows therefore that should the plaintiffs wish to pursue their claim in contract, the proper forum would be the Swiss

Court. However, from the arguments put forward, it does not appear that they intent to pursue this issue should it be determined that the Cayman Islands is the convenient forum for the hearing of this action.

Tort 1 (1)(f). This rule provides as follows -

> "The claim is founded on a tort and the damage was sustained, or resulted from an act committed, within the jurisdiction."

Under this sub-rule the plaintiff must show (a) his claim is founded on a tort, and either (b) damage has been sustained within the jurisdiction or (c) damage has resulted on an act committed within the jurisdiction. In deciding, for the purposes of requirement (a), whether a tort has been committed in this or another country, it is necessary to look back over the series of events constituting the tort to determine if or where the cause of action arises. If it is found that there is a tort, and that it has in substance been committed in this country, the fact that some of the relevant events have happened abroad is irrelevant, as is the law of the foreign country where such events may have happened. If, on the other hand, the tort has in substance been committed in a foreign country, the court must apply the rule in Boys v. Chaplin (1971) A.C. 356; (1969) 2 ALL. E.R. 1985, H.L., and give leave only if the act complained of is one which, if done in England, would be a tort, and which is also actionable according to the law of the foreign country where it has been done.

Under requirement (b) it is enough that some significant damage has been sustained in this jurisdiction. Requirement (c) obliges the Court to look at the tort alleged in a common sense way, and to ask whether damage has resulted from substantial and efficacious acts committed within the jurisdiction, regardless of whether or not such acts have been committed elsewhere. (See notes to SCP 11/1/19)

The tort alleged in the Statement of Claim is that of conspiracy, and involves all the defendants, and is to be found in paragraphs 43.16 to 43.19. of the Statement of Claim. It is essentially alleged that all of the defendants knew that Mountain was insolvent and that it would be unlawful to transfer the sums alleged but despite this knowledge they transferred these amounts to Mrs. Nadir's account with the 11th defendant to enable Mrs. Nadir to pay debts to her other creditors including the 11th defendant.

In determining where, if any, a cause of action in conspiracy arises, it is now necessary to look at the series of event which the plaintiffs claim constitute the tort. These are as follows -

1. The sale of HSG shares in the U.K.

2. The sale of the Kewill System shares in the U.K.

3. The sale of News Cutting Bureau Ltd. shares in the U.K.

4. The transfer of funds from the U.K. to Mountain's account with the 11th defendant in Switzerland.

5. The transfer of funds from the U.K. to Mountain's account with the 11th defendant to Mrs. Nadir's account with the 11th defendant in Switzerland.

6. The passing of the resolution of 18th February, 1991 in the Bahamas which purported to justify the payments to Mrs. Nadir's L account with the 11th defendant in September, 1990.

7. The insolvency of Hutchinson as a result of Mountain's inability to pay its debts to Hutchinson.

8. The winding up of Hutchinson and then Mountain and Crain Creek.

It is conceded that in substance the tort alleged has been committed abroad. However, in applying the rule in Boys v. Chaplin (supra) the acts complained of if committed in the Cayman Islands, would constitute a tort. There is no evidence to show that the acts complained of would not be actionable according to the law of England (i.e. where the shares were sold), or the law of the Bahamas (i.e. where the resolution was passed) or the law of Switzerland (i.e. where monies were transferred to and eventually paid for Mrs. Nadir's benefit). The common law of conspiracy in the Cayman Islands and the Bahamas is the same as in England.

It is the plaintiffs' case that damage has been sustained within the jurisdiction for the following reasons -

1. Mountain was unable to repay a proportion of its indebtedness

to Hutchinson, which indebtedness was payable in the Cayman Islands.

2. Mountain was unable to make payments of the amount due to Crain Creek which payment was also due in the Cayman Islands.
3. Mountain was eventually wound up by the Court because of its inability to make payments of its indebtedness to Hutchinson. and Hitchcock.

What the plaintiffs are saying is this, that-

(i) Mountain's main creditors were Hutchinson, Mrs., Nadir and Crain Creek;

(ii) Hutchinson's main creditors were First National Bank of Chicago ("FNBC") and Mrs. Nadir;

(iii) Mountain paid its debt to Mrs. Nadir in full and advanced more than L2,000,000 to Forum and Hayford to allow these companies to pay their debts to Mrs. Nadir;

(iv) Mountain paid only 49% of its debts due to Hutchinson.

It is the plaintiffs' position that the defendants in this case were well aware or should have been well aware of their legal responsibilities but deliberately orchestrated matters to prefer certain creditors of Mountain which would directly benefit Mrs. Nadir and/or Citibank(Switzerland). It is contended that the predominant purpose of the defendants was to benefit Mrs. Nadir and possibly Citibank(Switzerland).

As held in Lonrho PlC v. Fayed (1992) (1991 3 ALLL.E.R. p. 304 the tort of conspiracy to injure could be established either by showing that an intention to injure the plaintiff in his trade or business was the predominant purpose of the conspirators, even though the means used to inflict damage on the plaintiff were lawful and would not have been actionable if done by an individual, or by showing that unlawful means were used. It is clear from the pleadings that the plaintiffs are not relying on intent to injure on the part of the defendant but rather the use of unlawful means. This is borne out by the very nature of the pleadings.

I note that in support of their contention that the allegation of conspiracy is defective, the defendants have relied heavily on the RSC rules. This is a misconception as our Grand Court Rules, to which the plaintiffs have adhered, cover this tort comprehensively thus precluding any application of the English rules. Here I must mention that leave to serve will not be denied on the ground that conspiracy to injure every plaintiff has not been alleged. In fact, the plaintiff's pleading does not appear to reflect any intent to injure, nor need it do so. However this Court will only give leave to serve a defendant against whom a proper ground has been alleged.

At this point it is necessary to look closely at the damages alleged to have been suffered. Since no act was committed within the jurisdiction the sub-rule requires that damage must have been sustained here. The rule in Boys v. Chaplin (ibid) requires that the damage be significant. The damage alleged is confined to Mountain's

inability to pay its debts to other plaintiff companies. On reviewing the situation regarding these companies it is difficult to determine the exact nature of the damage alleged to have been suffered, and by whom. The affidavit of Thomas Salmon the seventh defendant states that each of the plaintiff companies was a private investment company which had been beneficially owned by Mrs. Nadir prior to the settlement of the shares in the relevant trusts. The plaintiffs deny this. What cannot be denied is that all these companies were deeply indebted to this lady, that the amounts owed to Mrs. Nadir by Hutchinson, Mountain and Forum were L4 million, L4.8 million and L9.6 million respectively, and that the principal assets of the trust through their underlying companies were represented by PPI shares.

This affidavit also shows that following a failed move by Mrs. Nadir to privatise PP1 in August 1990, there was considerable pressure on the PP1 share price which an announcement of record earnings did not halt. The Nadir family found themselves in urgent need of money to prevent sales of PP1 stock by banks that had made margin loans. Mrs. Nadir was owed substantial sums by various of the PLC's including Hutchinson, Mountain and Forum and she pressed for immediate repayment of those loans. That resulted in assets held by the PLC's being sold to fund the repayment of loans to Mrs. Nadir. On the 20th September 1990 news of an investigation by the UK Serious Fraud Office ("the SFO") caused sales of substantial quantities of PP1 shares and the suspension of PP1 shares by the London Stock Exchange.

The Administrators of PPI, appointed by the English Court, have

alleged that the whole structure of the Nadir family Trust and PLC's was a device by which approximately L75M was misappropriated from PPI, passed to Mrs. Nadir and into the Trusts and PLC's. There is currently litigation in England and in Switzerland between the Administrators of PP1 on the one hand and Citibank(Switzerland), Confidas and Citibank NA on the other hand, and following a decision on the appropriate forum the allegation will be determined by the English or Swiss Courts. This has not been denied by the plaintiffs and indeed, is one of the most potent arguments put forward by the defendants against the Cayman Islands as the forum conveniens.

No indication has been given by the plaintiffs as to the parties who petitioned to place the plaintiffs in liquidation. Records show that the only two Cayman Islands petitioners were Hutchinson and Mountain. If and when this matter comes to trial the onus will be on the plaintiffs to prove that these plaintiffs suffered significant damages. The defendants have contended that being placed in liquidation cannot be considered to be damage, this of course is a defence. At the stage it is not for the Court to determine whether there has been significant damage, but merely to determine whether there is a triable issue.

It is therefore in this context that the Court will be required to decide whether the defendants acted dishonestly in relation to these companies which the defendants allege were insolvent by reason of a debt owed to Mrs. Nadir and Hutchinson, and whether any significant damage has been sustained within the jurisdiction to justify this

Court assuming jurisdiction. In this regard the plaintiffs have cited the case of **Fidelity & Guarantee International Ltd. (In Liquidation) v. Hakemian** (Grand Court Cause No. 491 of 1991 in which Schofield J held that damages had been sustained within the Cayman Islands in the case of a company which was rendered insolvent as result of fraud' and breaches of fiduciary duty committed by its former director who was assisted by his wife. The plaintiff company was the victim of a fraud/breach of fiduciary duty committed by its former director. As a result, the plaintiff company could not pay its creditors and was wound up. Schofield J stated in his judgment-

> "It would be a sorry day for the financial reputation of these Islands if a company was permitted to be formed here by a foreign national with a view to carrying on business in Cayman, when that company is raped of its assets the Grand Court refuses claimants access to any remedy within these Islands."

In view of the facts surrounding the plaintiff companies in this action, the **Fidelity** case (supra) cannot be said to be analogous to the present matter. The case cited involved a straightforward allegation of fraud, which the defendants directed at Cayman Islands company of which the first defendant was the sole shareholder and the second defendant his wife, the first defendant transferring funds of the plaintiff company to his own account. In his judgment Schofield J specifically alluded to the Cayman Islands company carrying on business within these Islands. This could not be said of the plaintiff companies in the present action. In addition there is no such

allegation of a director fraudulently enriching himself at the expense of the company. What we have in this action appears to be a case of the directors and trustees of the plaintiffs selling the plaintiffs' shares in order to pay the plaintiffs' debts. There is evidence of a fraudulent preference, all of which the plaintiffs would have to prove. Furthermore the defendants have referred to them as mere "holding companies", a few of a number of Private Investment companies which are underlying assets of the Trust set up by the Nadir family. The issues involved are far more complicated, and it no less than an extreme simplification of the issues involved for anyone to draw any form of comparison between this matter and the **Fidelity case** (supra).

It is settled law in the Cayman Islands and England that when a company is insolvent or doubtfully solvent it is incumbent upon its directors to keep its assets inviolate for its creditors. If directors fail to do this duty they will be in breach of their fiduciary duties and may in certain circumstances be acting dishonestly. (See Prospect Properties Ltd v. McNeil 1990-91 CILR 171 at pages 201 to 203.) As far as the Panamanian Directors are concerned there is no evidence that they knew of the conspiracy. It can only be claimed that they failed in their fiduciary duty, and by the resolution preferred one creditor over another.

Enforceability

This brings me to the issue of enforceability and the applicable law as provided by Dr. Widmer in his affidavit. He has drawn the Court's

attention to Article 149 of which provides as follows -

Breach of contract and tort claims are governed by Art. 149 of the IPLA and as such are regarded as claims based on the law of obligations:

Art. 149 is as follows -

> "Foreign decisions concerning claims based on the law of obligations shall be recognised in Switzerland if they have been rendered..."

Art 149 para. 2 (a) and (f) contain special provisions for contracts and tort claims respectively;

"Furthermore, a foreign decision shall be recognised:

(a) if it concerns a contractual performance and was rendered in the state of such performance, and if the defendants did not have its domicile in Switzerland;

(f) if it concerns claims based on tort and was rendered at the place where the act was committed or had its effects, and if the defendants did not have his domicile in Switzerland."

Because Citibank(Switzerland), Confidas, Mr. Yusof, Ms. Graf and Mr. Salmon are domiciled in Switzerland, according to Art. 149 para. 2 (a) and (f) of the IPLA, the Swiss courts will not recognise and enforce a judgment based on either tort and/or contractual claims rendered by the Cayman Courts.

Constructive Trust 1 (1) j. This rule provides -

> "The claim is brought for any relief or remedy in respect of any trust, whether express, implied or constructive, that is governed by or ought to be executed according to the laws of the Islands or in respect of the status, rights or duties of any trustee thereof in relation thereto".

43.13 of the Statement of claim alleges -

That CIBS at all material times acted dishonestly and thereby knowingly assisted Cititrust (Cayman), Donat, Madeleine, Hitchcock, Brennan, Tyler, Confidas, Yusof, Graf and Salmon or one or more of them to act dishonestly and/or to breach their fiduciary duties and/or duties of care to Hutchinson, Crain Creek and Mountain by transferring the sums of L8,962,000 and L1,967,000 from Mountain's Account No. 0/127048/002 with CIBS to Mrs. Nadir's L Account No. 0/128248/005 with CIBS and CIBS is a constructive trustee of these amounts and is liable to account for them to Mountain, Crain Creek and/or Hutchinson.

And at 43.22

That Cititrust(Cayman) , Confidas, Yusof, Graf and Salmon acted dishonestly and/or knowingly assisted Donat, Madeleine, Hitchcock, Brennan and Tyler to act dishonestly and/or to breach their fiduciary

duties and/or their duties of care to Hutchinson, Crain Creek and Mountain by transferring and/or orchestrating the transfers and/or allowing the transfers of L8,692,000 and L1,967,000 from Mountain's L Account No. 0/127048/002 with CIBS to Mrs. Nadir's L Account No. 0/128248/005 with CIBS and the payment of L248,272.09 for the benefit of Vemak and Cititrust(Cayman), Confidas, Yusof, Graf and Salmon are constructive trustees of these amounts and liable to account for them to Mountain, Crain Creek and/or Hutchinson.

It is conceded by the defendants that should the Court accept jurisdiction it would impose any constructive trust in accordance with Cayman Islands law. A cause of action founded on receipt of funds known at the time known to be trust funds is complete when the funds are received and the proper law governing the cause of action is the law of the place where they are received. Knowing receipt and its common law counterpart, money had and received, (e.g. an allegation against Citibank) are receipt based restitutionary claims. The law governing such claims is the law of the country where the Defendant received the money. In this case, Switzerland. (See El Ajou v. Dollar Land Holdings PLC (1993) 3 ALL.E.R. 717, 73g-h). The defendants have based this premise on knowing receipt and its common law counterpart, money had and received and in support cited the case of El Ajou v. Dollar Land Holdings PLC (1993) 3 ALL.E.R. 717 at p 730. In this case the learned judge was dealing with a receipt based constructive trust and indeed, the law governing such claims is the law of the country where the defendant received the money. However, the defendants in their written submissions have directed their submissions towards

constructive trusts which they themselves have identified, although not stated in the claim itself. Although they claim to have identified three different forms of constructive trusts, one over assets, another, the imposition of a personal liability on a receipt based claim, and a third, an imposition of personal liability on a knowing assistance claim, they immediately thereafter acknowledge that the plaintiffs seek declarations in respect of the first category i.e. over assets.

Whether or not they are correct in reading into the plaintiffs' claim a receipt based constructive trust, this would be of no consequences. The plaintiffs themselves have repeatedly alleged that Cititrust (Cayman), Confidas, Yusof, Graf and Salmon acted dishonestly and/or knowingly assisted Donat, Madeleine, Hitchcock Brennan and Tyler to act dishonestly.

The Privy Council dealt with this type of trust in Brunei Airlines v. Tan (1995) 3 ALL.E.R. E2 97 it was held that -

> "A person who dishonestly procured or assisted in a breach of trust or fiduciary obligation was liable in equity to make good any resulting loss and although dishonesty was both a necessary and a sufficient ingredient of accessory liable the breach of trust which was prerequisite for accessory liability need not itself be a dishonest and fraudulent breach of trust by the trustee. Accordingly, in order for liability to attach to the accessory it was not necessary that, in addition, the trustee or fiduciary was acting dishonestly,

> although this would usually be so where the third party who as assisting him was acting dishonestly."

Then later Lord Nicholls of Birkenhead said, I quote -

> "Dishonesty means simply not acting as an honest person. Honesty has a connotation of subjectivity as distinct from the objectivity of negligence. Carelessness is not dishonesty. If a person misappropriates another's property, he will not escape a finding of dishonesty simply because he sees nothing wrong in such behaviour (and later) an honest person does not participate in a transaction if he knows it involves a misapplication of trust assets to the detriment of the beneficiaries."

In the present case there is no question of Confidas, Yusof, Salmon or Citibank(Switzerland) receiving the various sums which were transferred to Mrs. Nadir or to Vermar. If the Court accepts jurisdiction over these defendants it will then apply Cayman Islands Law to determine whether or not a knowingly assisting type of constructive trust arose and whether or not the various defendants should in equity to repay the amount claimed by the plaintiffs.

Under the English rule it would be necessary to consider where the knowing assistance took place. The Cayman sub-paragraph is very different from the corresponding English sub-paragraph. In England the acts giving rise to the constructive trust must be occur in England, although recent authorities state that not all acts must take place in England. These difficulties do not exist under GCR Order 11 rule (1) (j) under this rule it is not necessary for the alleged constructive

trustee to have done anything in the Cayman Islands before jurisdiction can be founded. The defendants seek to argue that this Court should not grant leave to serve proceedings outside the jurisdiction in respect of any constructive trust which is governed by foreign law. This approach is wrong in principle and is not warranted by the wording of GCR Order 11 rule 1(1)(j). The sub-pragraph also permits this Court to accept jurisdiction when the constructive trust in question is to be executed according to Cayman Islands law. At paragraph 18.16 of their submissions the defendants concede that "if the Cayman Court accepted jurisdiction, it would impose any constructive trust in accordance with Cayman Islands law." Therefore if the Court accepts jurisdiction under this sub-paragraph the constructive trust which it imposes will be executed according to Cayman Islands law. Although the Cayman Court will not impose a constructive trust on foreign assets against a foreign on a knowing receipt claim, the Court can, under the sub-rule impose such a trust on a knowing assistance claim.

It should also be noted that the sub-paragraph provides for service outside the jurisdiction when the litigation in the Cayman Islands raises issues as to the status, rights or duties of a constructive trustee. It cannot seriously be argued and the defendants have not sought to argue, that the present proceedings do not raise issues as to the status, rights or duties of various defendants in relation to the constructive trust alleged. As in all these issues the question of enforceability arises.

Enforceability

The concept of either trusts or constructive trust (i.e. trusts created by operation of law) is not known under Swiss Law. In this particular case, the construction trust claim would most likely be regarded as an unjust enrichment claim in Switzerland. Constructive trusts are not considered company law related claims relative to Art. 150 para. 2 of the IPLA (Vischer, Id., N 15 to Art. 150).

Art 149 para. 2 (e) of the IPLA provides that:

"Further more a foreign decision shall be recognised;

(e) if it concerns claims based on unjust enrichment and was rendered at the place where the act was committed or had its affects, and if the defendant did not have his domicile in Switzerland."

Although, as already determined, the plaintiffs' claim in constructive trust is not based on unjust enrichment but knowingly assist, it is unlikely that a judgment rendered by a Cayman Islands Court on such a claim would be enforceable in Switzerland against the Swiss defendants. Mr. Winkelmann has stated that although confirming the above opinions of Dr. Widmer, suggests that there are assets of Citibank(Switzerland) in England, without making any effort to identify any. There are also no mention of the availability of the assets of the other defendants. Accordingly I am of the opinion that a

judgment rendered in the Court of these Islands against the Swiss defendants would serve no further purpose than to satisfy the liquidators that they have made a reasonable effort in their duty to gather the assets of the four plaintiff companies.

DIRECTORS 1 (1) (ff)

This ground is in respect of the seventh, eighth, tenth and eleventh defendants. The wording of this sub rule is as follows -

> The claim is brought against a person who is or was a director, officer or member of a company registered within the jurisdiction or who is or was a partner of a partnership, whether general or limited, which is governed by the laws of the Islands and the subject matter of the claim relates in any way to such company or partnership or to the status, rights or duties of such director, officer, member or partner in relation thereto.

Paragraph 25 of the Statement of Claim is as follows -

Hutchinson, Crain Creek, Mountain and Forum say that Cititrust (Cayman), Confidas, Yusof, Graf, Salmon, Brennan and Tyler were at all material times either de facto or shadow directors of Hutchinson, Crain Creek, Mountain and Forum.

The plaintiffs have now to show that there is an arguable case against them under this claim, i.e. that the defendants were at the material time directors of the plaintiffs. The plaintiffs alleged that Confidas is a shadow director, while Yusof and Graf are alleged to be de facto and/or shadow directors. It is argued by the defendants that

the plaintiffs' claimed that a defendant acted as a de facto and/or shadow director without distinguishing between the two is wrong at law. The definitions of de facto and shadow directors were enunciated by Gillett J in the case of Re Hydrodram (Corby) Ltd. 1994 (2) BCLC 180 when he said -

> "A de facto director, I repeat, is one who claims to act and purports to act as a director, although, not validly appointed as such. A shadow director, by contrast, does not claim or purport to act as a director. On the contrary, he claims not to be a director. He lurks in the shadows, sheltering behind others who, he claims, are the only directors of the company to the exclusion of himself. He is not held out as a director by a company. To establish that a defendant is a shadow director of a company it is necessary to alleged and prove: (1) who are the directors of the company, whether de facto or de jure; (2), that the defendant directed those directors how to act in relation to the company or that he was one of the persons who did so; (3) that those directors acted in accordance with such directions; and (4) that they were accustomed so at act.

Before me now is an entirely different situation. There is no evidence of a resolution being passed, either by Brennan, Tyler or the Board of Confidas authorising the transfer of L8,692,000 in September 1996. The instructions was issued by Yusof and Graf. The plaintiffs

contend that the Statement of Claim alleges sufficient facts to show that Cititrust(Cayman), Brennan, Tyler, Confidas, Yusof, Graf and Salmon were de facto and/or shadow directors of the plaintiffs.

The principle outlined in the **Hydroden** (supra) is straightforward. One cannot claim that a company is either a de facto director and/or a shadow director, it cannot be both and a plaintiff must make such a distinction in his claim. The situation is different regarding an officer of the company. A director of the directing company does not become either a de facto director or a shadow director of the instructed company if he acts through the board, it is then on instruction of the instructing trust company. On the other hand if he has given instruction to the instructed company there is nothing wrong in alleging that he was either a de factor and/or a shadow director to that other company. Such is the position in the plaintiff's allegation in this present case. I find this to be a triable issue.

Enforceability

I now come to the question of enforceability. For this purpose I return to Dr. Widmer's affidvit (supra) as it relates to directors liability. His opinion is founded in the provision of Article 165 of the IPLA which is as follows -

Art. 165 is as follows -

"Foreign decisions concerning claims based on company law shall be

recognised in Switzerland if they were rendered:

(a) in the state of the company's registered office or if they are not recognised there and the defendants domicile was not in Switzerland..."

Further, claims based on the company law also include claims regarding officer's and directors liability (Frank Vischer, IPRG-Kommentar, Zurich 1993, N 1 to Art. 165; Girsberger in Kommentar ZumSchweizerischen Privatrecht, Internationales Privatrecht, Zurich 1995, N 3 Art. 165).

Such decisions will only be recognised in Switzerland if they were rendered in the state of the company's registered office or are recognised there and the defendant's domicile is not in Switzerland (Art. 165 para. 1 lit. a IPLA). This concept is derived from Art 59 of the Swiss Constitution whereby defendants domiciled in Switzerland have a constitutional right to be taken to trial before the Swiss Courts (Vischer, Id., N 2 to Art. 165; Girsberger, Id., N 13 to Art. 165).

Consequently, a decision by the Cayman Courts rendered against the defendants domiciled in Switzerland based on breach of the defendants' duties as de facto or shadow directors will not be recognised and enforced in Switzerland. The result would not have been different should the current revision to Art. 59 of the Swiss Constitution be in force at the time of the decision. The revision of Art. 59 entails

the reinforcement of the general principle under Swiss law whereby civil claims should be decided at the defendant's domicile. Although there are exceptions to this rule, they do not relate to Art. 165 para. 1 of the IPLA.

The second limb of this ground of the defendants' Order 12 rule 8 application is directed at what the defendants consider to be a lack of any fiduciary, contractual or other relationships giving rise to the duty of care alleged between the plaintiffs and the second, third, fourth, seventh, eighth, tenth and eleventh defendant or any of them or any alleged tort or breach of duty has already been determined the under sub-rules.

It is the defendants' contention that the affidavit in support of the application for leave to serve outside the jurisdiction failed to give full and frank disclosure on relevant facts and matters. It goes on to refer to fiduciary or contractual relationship between the t. The writ which is itself a virtual carbon copy of the affidavit in support, contains claims of contractual and fiduciary relationships. There have already been examined under their respective sub-rules. Where the affidavit appears to fall short in giving a full and frank disclosure is regarding the background to their claims. This would certainly be the case if, as the defendants allege, the plaintiffs were aware of an Administration Order made in respect of PPI by the High Court in London on 25th October, 1990. That the administrators have subsequently commenced High Court proceedings against Citibank (Switzerland) and Confidas to recover monies which the

Administrators are claiming were stolen from PPI by Mr. Nadir including monies paid through an account in the name of Mrs. Nadir at Citibank(Switzerland).

Litigation in England and Switzerland related to the matter that the background to the case and the claims made by the Administrators of PPI are material to the background of the collapse of PPI's shares. The defendants argue that as the plaintiffs claim equitable relief, it is relevant to show that they are entitled in equity to make the claims asserted notwithstanding what Mr. Salmon says in his affidavits. It cannot be denied that it would be inequitable for the defendants to held personally liable in respect of the same assets to different claimants in different courts.

These are all matters which the plaintiffs are alleged to have known but failed to put before the Court. It is an axiomatic principle of law that the applicant in an ex parte summons must make a full and frank disclosure of any facts known to the application which might lead the Court not to grant relief ex parte. In this regard the Court has a discretion which ought to be exercised to protect its own process of an abuse. The manner in which the power ought to be exercised was enunciated by **Viscount Reading CJ** in R v. Kensington Income Tax Commrs ex p. de Polignac. In his judgment, which was approved on appeal by the Court of Appeal (1917) 1 KB at 486, the learned Chief Justice said -

"This is a power inherent in the Court, but one

> which should only be used in cases which bring conviction to the mind of the Court that it has been deceived. Before coming to this conclusion a
>
> careful examination will be made of the facts as they are and as they have been stated in the applicant's affidavit, and everything will be heard that can be urged to influence the view of the Court when it reads the affidavit and knows the true facts. But if the result of this examination and hearing is to leave no doubt that the Court has been deceived, then it will refuse to hear anything futher from the applicant in a proceeding which has only been set in motion by means of a misleading affidavit."

Certainly the litigation in England and Switzerland relating to this matter, and the possibility that the defendants could be held personally liable in respect of the same assets to different claimants in different courts may very well have led to the court not to grant the application.

In conclusion, although the four plaintiffs are Cayman Islands companies, and that the plaintiffs have raised real issues which they may reasonably ask the Court to try, it is abundantly clear to me that the Cayman Islands is not the proper forum for the trial of this action. I am drawn to the conclusion of this action and the events leading up to it. Of significance is the very nature of the plaintiffs which may well be classified as shell companies. Although registered in the Cayman Islands and therefore considered. Cayman Islands companies, they all appear to be holding companies. There is no

evidence that any of them carried on business within these Islands. On the contrary the purchase and realisation of assets were not made in the Cayman Islands nor were the assets held here. Furthermore the defendants who are alleged to have played the most active role in this action were all in Switzerland along with their papers. In addition there were Swiss liquidators making it possible and convenient for claims to be made in that country.

There is also the plaintiffs' failure to make a full and frank disclosure to the Court at the hearing of the ex parte application. No doubt had the Court been apprised of the true situation for granting of leave to serve the Writ outside the jurisdiction would not have been granted. It has not been denied that there is pending litigation before the Swiss and English Courts which will decide forum relating to issues which may affect the outcome of the action. There is, to may mind, a possibility that by exercising jurisdiction over this matter, the Cayman Court will risk inconsistencies of decision in different jurisdictions.

Most important of all is the likely enforceability of this Court's judgment in this matter. The plaintiffs have complained of procedural difficulties which would arise should they find it necessary to proceed in Switzerland. This is of great significance when compared with the exercise in futility and embarrassment to that Court if the Cayman Islands should it be asked to assume jurisdiction over a matter, the judgment of which is unenforceable.

Finally I come to the last summons filed, that on behalf of the plaintiffs seeking retrospective validation of the order of Mr. Justice Smellie. In keeping with much of this ruling what follows is purely academic. Following the principle laid down in the recent case of Kuwait Oil Tanker Co. v. Al Badar (1997) 2 ALL. E.R. 855 the defendants concede that if leave was granted without justifying the requirement of GCR Order 11 rule 1 (1) (c) that one defendant is duly served within or out of the jurisdiction before leave can be granted to serve another defendant out of the jurisdiction.

In that case leave was validated retrospectively because the Court found that there were a number of special cirumstances which warranted such validation. It is submitted by the defendants that the circumstances in this case are substantially different. In the Kuwait case, service on a defendant within the jurisdiction was effected on the same day tha leave was granted to serve the Writ out of the jurisdiction. In the present case leave to serve out of the jurisdiction was granted on 27th August 1996. Service was effected for the first time in the Cayman Islands on 28th November 1996, three months later. In the Kuwait case, at the time when the leave to serve out of the jurisdiction was challenged, the plaintiffs were still in time to make an application to extend the Writ in order to make a further application for leave to serve out of the jurisdiction, having fulfilled the requirements as to the duly service. Accordingly, they could easily have cured their ealier mistakes. In this regard there seems to be little, if any, difference between this and the present case. Here the Writ was extended on 27th February 1997. Contrary

to the defendants' submission that the Writ was extended for the purpose of re-applying for leave to serve the 9th defendant, there is no indication, neither in the affidavit of Guy Locke supporting the summons, nor on the summons itself, nor the order, that the extension was for any special purpose. As prayed the order merely states the validity of the Writ of Summons be extended for a further period of twelve months from its present date of expiry until 28th Febuary 1997. The validity of the leave was retrospective, going back to the 17th February, the very day on which service was effected outside the jurisdiction. It appears to me, from the chronology of events that the present application for leave to serve falls well within the time extended for service. It stands to reason that the plaintiffs need not, under this extension, re-apply for leave to serve. This would entail repeating the process once more.

It follows therefore that the required leave could have been granted to retrospectively validate the order of Smellie J. However, the order sought cannot be granted as the plaintiffs have not shown that the Cayman Islands is the appropriate forum for this action to have been brought.

In the circumstances of the case the Court has no jurisdiction over the second, third, fourth, seventh, eighth, tenth and eleventh defendants in respect of the subject matters of the claim.

Accordingly, the order of Mr. Justice Smellie dated 27th August 1996 is hereby discharged.

Costs to the defendants to be taxed or agreed.

K. Douglas
Judge of the Grand Court

30th January 1998