

1  
2 **IN THE GRAND COURT OF THE CAYMAN ISLANDS**  
3 **FINANCIAL SERVICES DIVISION**  
4

5 **CAUSE NO. FSD 30 OF 2010 (RMJ)**

6 **IN THE MATTER OF THE COMPANIES LAW (2013 REVISION)**

7 **AND**

8 **IN THE MATTER OF THE PRIMEO FUND (IN OFFICIAL LIQUIDATION)**  
9



10  
11 **Appearances:** Mr. Christopher Harlowe and Mr. Rupert Hamilton of Mourant for  
12 the Official Liquidators of The Primeo Fund  
13 Mr. Barry Isaacs Q.C instructed by Mr. Paul Kennedy of Appleby for  
14 Ernst & Young Cayman  
15

16 **Before:** The Hon. Mr. Justice Robin McMillan, In Chambers  
17

18 **Heard:** 13<sup>th</sup> July and 13<sup>th</sup> September 2016  
19

20 **Draft Judgment**

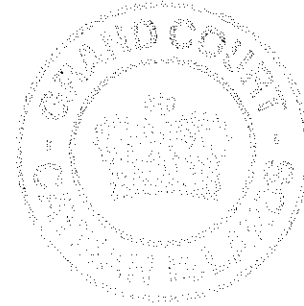
21 **Circulated:** 18 Nov 2016  
22

23 **Judgment Delivered:** 21 Nov 2016  
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25  
26  
27

28 **HEADNOTE**

29  
30 *Company Auditor not necessarily a "relevant person" for the purpose of section 103*  
31 *Companies Law (2013 Revision) – Construction of section 138 of Companies Law - Object of*  
32 *section 138 is the getting in of Company's property – Official Liquidators' statutory powers*  
33 *must not be confused with the role of ordinary civil litigant.*  
34  
35  
36  
37

## REASONS FOR JUDGMENT



38

39

### Introduction

41

42 1. This was the hearing of an application made by the Joint Official Liquidators ("JOLs") of  
43 The Primeo Fund ("Primeo"), by a Summons dated 22 April 2016, for an order,  
44 pursuant to sections 103 and/or 138 of the Companies Law ("the "Law"), compelling  
45 Ernst & Young (Cayman) ("EY Cayman") to use its best endeavours to obtain and  
46 provide certain documents pertaining to audits of Primeo held by Ernst & Young  
47 (Luxembourg) ("EY Lux"). On 13 September 2016 the Court dismissed the Summons.  
48 The Court now sets out the reasons for the decision.

49

### Background to the Summons

51

52 2. Primeo commenced operation as an open ended investment fund in 1994. By  
53 December 2008 the vast majority of its assets were (supposedly) held and managed by  
54 Bernard L Madoff Investment Securities Inc ("BLMIS"). Following the revelation in  
55 December 2008 that BLMIS was in fact being used to carry out a scheme of fraud,  
56 Primeo was put into liquidation on 23 January 2009.

57

58 3. EY Cayman was the auditor of Primeo from 1993 to 2008 (the "Relevant Period").  
59 During parts of the Relevant Period certain audit fieldwork was carried out by EY Lux,

60 although at all times the CIMA-approved statutory auditor of Primeo (as required by  
61 section 8 of the Mutual Funds Law) was EY Cayman.

62

63 4. By a letter dated 24 June 2015, the JOLs requested that EY Lux deliver up all documents  
64 in its control, possession or power which belong to Primeo or to which Primeo is  
65 entitled.

66

67 5. By a letter sent on 15 June 2015, EY Lux rejected this request, primarily on the basis  
68 that the request was too general in nature to be admissible as a matter of Luxemburg  
69 law.

70

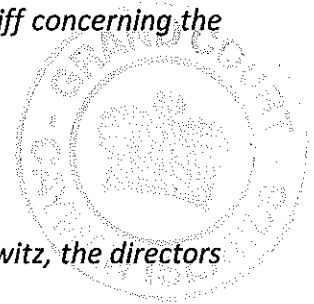
71 6. By an Order dated 16 December 2015, the Court (Mr Justice Jones ) ordered, *inter alia*,  
72 that:

73

74 *"The Plaintiff shall request that EY Cayman conduct searches for and delivers up to the*  
75 *Plaintiff as soon as practicable all documents belonging to the Plaintiff or to which the*  
76 *Plaintiff (including its Official Liquidators) is otherwise entitled pursuant to its*  
77 *contractual, statutory and/or common law rights or containing or recording*  
78 *information belonging to the Plaintiff insofar as not already delivered up to the Plaintiff*  
79 *including (without limitation) the following categories of documents:*

80

81 *(6) the following documents held by EY Luxemburg in connection with the audit of the*  
82 *Plaintiff (which documents EY Cayman shall request from EY Luxemburg);*



- 83 i. *contractual documents between EY Luxemburg and the Plaintiff concerning the*  
84 *audit services provided to the Plaintiff;*
- 85 ii. *draft and final audit reports in respect of the Plaintiff;*
- 86 iii. *email and other correspondence with BLMIS, Friehling & Horowitz, the directors*  
87 *of the Plaintiff, BA Worldwide, Pioneer, the Defendants and/or other Ernst &*  
88 *Young offices generated in connection with the direct or indirect provision of*  
89 *audit services to the Plaintiff;*
- 90 iv. *copies of all audit working papers and other documents which contain*  
91 *information acquired by EY Luxemburg in connection with the provision of audit*  
92 *services to the Plaintiff, which information shall not be redacted (although such*  
93 *documents may be redacted to obscure other information to which the Plaintiff*  
94 *is not entitled); and*
- 95 v. *telephone and other attendance notes concerning the provision of direct or*  
96 *indirect audit services to the Plaintiff, including documents relating to EY*  
97 *Luxemburg's field work, surveillance, monitoring or investigation of the*  
98 *Plaintiff, BLMIS and/or Friehling & Horowitz."*

99

100

- 101 7. By a letter sent on 23 February 2016, EY Cayman requested that EY Lux "take steps to  
102 identify, retrieve and provide us with any documents it holds in connection with the  
103 audit of [Primeo] responding to the descriptions above at paragraph 6(i) – (v) " of what  
104 was then a draft version of the Order of 16 December 2015.

105

106 8. EY Lux's response, by a letter dated 1 April 2016, disputed the JOLs' entitlement to the  
107 requested documents on a number of grounds and indicated that it would not comply  
108 with EY Cayman's request.

109

110 9. At a hearing on 5 April 2016, which was convened primarily to deal with unrelated  
111 matters, Mr Justice Jones indicated that:

112

113 *"...the appropriate course is for you [Primeo] to make an application in the liquidation*  
114 *proceeding, put the Ernst & Young firms on notice. They may or may not choose to*  
115 *participate, but put them on notice, put HSBC on notice and take it from there."*

116

117 10. The Summons of 22 April 2016 and this hearing were the product of that direction and  
118 of the Order of 16 December 2015.

119

120 **Primeo's Case**

121

122 11. Primeo's case is that:

123 (1) The Court has power to make an order under section 103 and/or section 138 of the  
124 Law;

125 (2) The documents which Primeo has been directed to seek are within the possession  
126 of EY Cayman, including to the extent that it must have either an implied or express  
127 contractual right to obtain possession of documents from EY Lux;

- 128 (3) The documents belong to Primeo and/or Primeo is entitled to the documents on  
 129 the basis that they contain information which belongs to Primeo; and  
 130 (4) The Court should therefore make an order for EY Cayman to use best endeavours to  
 131 obtain and deliver up the documents.

132

- 133 12. It is claimed that EY Cayman's attempts to deny any relationship with EY Lux which  
 134 would entitle it to recover the documents must be rejected. EY Cayman's evidence and  
 135 viewpoint as to Luxembourg law are said not to be relevant for present purposes.

136

137 **Section 103 of the Law**

138

- 139 13. Section 103 of the Law provides (insofar as relevant) as follows:

140 *103. (1) This section applies to any person who, whether resident in the Islands or*  
 141 *elsewhere-*

142

...

143 *(b) is or has been a director or officer of the company;*

144 *(c) is or was a professional service provider to the company;*

145

...

146 *(e) not being a person falling within paragraphs (a) to (c), is or has been concerned or*  
 147 *has taken part in the promotion, or management of the company,*  
 148 *and such person is referred to in this section as the "relevant person".*

149 *(2) It is the duty of every relevant person to co-operate with the official liquidator.*

150 *(3) While a company is being wound up, the official liquidator may at any time before*  
 151 *its dissolution apply to the Court for an order-*

152 *(a) for the examination of any relevant person; or*

153 *(b) that a relevant person transfer or deliver up to the liquidator any property or*  
 154 *documents belonging to the company.*

155

...

156

157 14. Section 89 defines "*professional service provider*" for the purposes of Part V of the Law

158 as follows:

159 "*professional service provider*" means a person who contracts to provide general  
160 managerial or administrative services to a company on an annual or continuing basis."

161

162 15. No such particular written contract as between Primeo and EY Cayman is known to  
163 exist however in relation to general managerial or administrative services.

164

165 16. Part V of the Law, like the UK Insolvency Act 1986 ("IA 1986"), gives a liquidator rights  
166 (or potential rights) against certain parties who have some particular connection with  
167 the company and responsibility for its affairs which go beyond those which apply in  
168 general to third parties who had some dealing with the company. It is argued that one  
169 aspect of this is the obligation to co-operate with a liquidator and the possibility of an  
170 application by a liquidator for delivery up of documents belonging to the company  
171 under section 103.

172

173 17. In *ICP Strategic Credit Income Fund, 2012 (1)*, CILR 383, Jones J clearly found at  
174 paragraph 7 that section 103 (1) which defines "*relevant person*" had no application  
175 against outsiders whose only relationship with the company is that they have been in  
176 business with it or contracted to provide it with goods or services. In that case  
177 therefore the auditors KMPG LLP fell outside the statutory definition. Furthermore, in

178 this case EY Cayman is not a professional service provider as defined by section 89  
179 above. Likewise there is no basis before the Court from which it can be alternatively  
180 concluded that EY Cayman was in fact a director or officer of Primeo.

181  
182 18. Jones J alludes at paragraph 7 to section 103 (1) as defining "*relevant person*" by  
183 reference to their role in the company's affairs and not by reference to the fact that  
184 they may be expected to possess information which would be of use to an official  
185 liquidator. This qualification must be borne in mind as well.

186  
187  
188 19. In relation to section 103, having considered the governing law and the facts the Court  
189 therefore dismisses the JOLs' application.

190

191 **Section 138 of the Law**

192

193 20. Further or in the alternative to the application under section 103, the JOLs seek  
194 delivery up of documents pursuant to section 138.

195 21. Sub-section 138 (1) provides as follows:

196 *"138. (1) Where any person has in his possession any property or documents to which*  
197 *the company appears to be entitled, the Court may require that person to pay, transfer*  
198 *or deliver such property or documents to the official liquidator."*

199

200

201

202 22. Section 138 thus permits the Court to order production as against any third party,  
203 regardless of their relationship to the company, to the extent that it can be shown that  
204 it is in possession of property which appears to belong to the company.

205  
206 23. However, it is in relation to what is precisely sought that a number of serious technical  
207 difficulties now arise which directly impinge upon the ambit, scope and construction  
208 of section 138.

209  
210 24. At this point it is material and instructive to set out the precise terms of the Summons  
211 application, which is for an Order that:

212 *"Pursuant to sections 103 and/or 138 of the Companies Law (2013 Revision), Ernst &*  
213 *Young Ltd (located in the Cayman Islands) use its best endeavours to obtain and*  
214 *provide to the Joint Official Liquidators of the Fund the following documentation held*  
215 *by Ernst & Young S.A. (located in Luxembourg):*

- 216 i. *contractual documents between Ernst & Young S.A. and the Fund*  
217 *concerning the audit services provided to the Fund;*  
218 ii. *draft and final audit reports in respect of the Fund;*  
219 iii. *email and other correspondence with Bernard I. Madoff Investment*  
220 *Securities, Friebling & Horowitz, the directors of the Fund, BA*  
221 *Worldwide Fund Management, Pioneer Alternative Investment*  
222 *Management Limited, Bank of Bermuda (Cayman) Limited, HSBC*  
223 *Securities Services (Luxembourg) SA and/or other Ernst & Young offices*

224 *generated in connection with the direct or indirect provision of audit*  
225 *services to the Fund;*

226 *iv. copies of all audit working papers and other documents which contain*  
227 *information acquired by Ernst & Young S.A. in connection with the*  
228 *provision of direct or indirect audit services to the Fund, which*  
229 *information shall not be redacted (although such documents may be*  
230 *redacted to obscure other information to which the Fund is not*  
231 *entitled); and*

232 *v. telephone and other attendance notes concerning the provision of*  
233 *direct or indirect audit services to the Fund, including documents*  
234 *relating to Ernst & Young S.A. fieldwork, surveillance, monitoring or*  
235 *investigation of the Fund, Bernard L. Madoff Investment Securities*  
236 *and/or Friehling & Horowitz.”*

237

238 25. The wording of the Summons itself is of particular significance as that wording relates  
239 to section 138 because it has given rise to a number of legal issues which ultimately  
240 have led the Court to dismiss the Summons in its entirety on 13 September 2016.

241

242 26. The Court’s reasons are numerous. For the purposes of this Ruling however I propose  
243 to set out what appear to be those which are of principal and most salient  
244 significance.

245

246 **The Terms of the Summons Application**

247

248 27. Although the Summons contains a request for an order that Ernst & Young Cayman  
249 Ltd. "*use its best endeavours*" to obtain and provide to the JOLs certain  
250 documentation "*held by Ernst & Young S.A. (located in Luxembourg)*" section 138  
251 confers no power on the Court to make such an order. There is no reference  
252 whatsoever in the section to a party being compelled by the Court to use its best  
253 endeavours, and in the view of the Court it is not open to the Court to make any such  
254 order in the terms requested.

255

256 28. In contrast, the Court may only "*require*" a party to transfer or deliver property where  
257 it is otherwise appropriate to do so. The section confers no additional powers as to  
258 ordering the use of best endeavours.

259

260 29. In the alternative, it would be contrary to the interests of justice to require a party to  
261 use its best endeavours when the exact circumstances in which that person must do  
262 so are unclear and undefined. The Court will return to this issue separately in the  
263 context of the Court's powers to order by analogy a mandatory injunction as such, or  
264 to make a similar stipulation.

265

266

267



268 The Evidence

269

270 30. It is noted that no written contract between Ernst & Young Cayman and Ernst & Young  
271 Luxembourg has been produced. As the JOLs concede at paragraph 31 of their  
272 Skeleton Argument, it seems that the precise structure of the contractual relationships  
273 between Primeo, EY Cayman and EY Lux may have changed from year to year and  
274 audit to audit.

275

276 31. Nonetheless, the JOLs at paragraph 34 contend that EY Lux's role was parasitic upon  
277 or subsidiary to that of EY Cayman, and that the only reason any documents came into  
278 the latter's possession was for the purpose of allowing EY Lux to assist EY Cayman in  
279 this respect.

280

281 32. EY Cayman however submits at paragraph 14 as follows;

282 *"The Court has no jurisdiction to grant the order sought because:*

283 i. *EY Cayman has no enforceable right to obtain delivery up of the*  
284 *Documents from EY Lux.*

285 ii. *The Documents are not property or documents "belonging to" Primeo or*  
286 *to which Primeo "appears to be entitled" within the meaning of s 103*  
287 *and s 138 respectively.*

288 iii. *EY Cayman is not a "professional service provider" within the meaning*  
289 *of s 103, as is asserted by the JOLs."*

290

291

292 33. It also contended at paragraph 25 that there are and were no engagement letters  
293 between EY Lux and EY Cayman and that EY Cayman and EY Lux provided services to  
294 Primeo pursuant to engagement letters with Primeo itself. Furthermore, it contends

295 that in the absence of evidence of an express contract between EY Cayman and EY Lux  
296 there is in the circumstances of the case no basis in fact for nonetheless implying one.

297

298

299 34. Having considered the submissions on this subject as well as the Affidavit evidence to  
300 which the parties have referred the Court, it is the considered conclusion of the Court  
301 that the JOLs have failed to prove on a balance of probabilities that EY Cayman has in  
302 its possession the said documentation sought, or alternatively that it has the right to  
303 possession of any of the said documentation.

304

305 35. Upon the facts of this case alone, the application simply fails.

306

307 36. An alternative theoretical approach to this difficulty is set out in Note 24 of paragraph  
308 33 of the JOLs' Skeleton Argument. Note 4 sets out, inter alia, that

309 *"It may be that EY Lux acted as EY Cayman's agent in certain respects or at certain*  
310 *times, in carrying out audit fieldwork, or that it acted as EY Cayman's sub-contractor,*  
311 *or it may be that there was some tri-partite relationship between Primeo, EY Cayman*  
312 *and EY Lux."*

313

314 37. Quite apart from the speculative nature of this formulation, EY Cayman in any event  
315 argues that as a matter of law the formulation is fundamentally misconceived, by  
316 reason of true agency necessarily connoting an authority or capacity in one person to

317 create legal relations between a person occupying the position of principal and third  
318 parties. EY Cayman states that neither in law nor in fact has this agency been made  
319 out in these proceedings.

320  
321 38. For example, Lord Herschell states in *Kennedy v De Trafford* [1897] AC 180 at 188:

322 *"No word is more commonly and constantly abused than the word agent. A person*  
323 *may be spoken of as an agent and no doubt in the popular sense of the word may*  
324 *properly be said to be an agent, although when it is attempted to suggest that he is an*  
325 *agent under such circumstances as create the legal obligations attaching to agency*  
326 *that use of the word is only misleading."*

327  
328 39. The Court agrees entirely with the submissions at paragraph 50 of EY Cayman's  
329 skeleton that EY Cayman did not in fact entrust EY Lux with the making of transactions  
330 binding upon it. EY Lux was not therefore EY Cayman's agent in the sense which gives  
331 rise to an obligation to provide documents to EY Cayman.

332

333 **The JOLs' Statutory Powers**

334

335 40. The Court now turns to consider the formal scope and application of the JOLs'  
336 statutory powers in the context of an application under section 138.

337

338 41. In essence EY Cayman contends that the JOLs' purpose in seeking delivery up of the  
339 stated documents is to obtain third party discovery in certain ongoing HSBC  
340 proceedings, and that this is not a proper purpose. In addition, it is argued that the  
341 JOLs are purporting to use their powers at the behest of another party to obtain third  
342 party discovery and that this course is unprecedented and wrong.

343

344 42. EY Cayman especially relies upon the following dicta of Megarry J in *In re Spiraflite Ltd*  
345 [1979] WLR 1096, at page 1100 B-D:

346 *"What primarily must be considered is why the liquidator is seeking the order. The*  
347 *essence of the matter is that the powers conferred by the section are given to the court*  
348 *in order to enable the liquidator the better to discharge his functions as such: they are*  
349 *not given in order to enable a litigant to improve his prospects of litigious success by*  
350 *giving him rights which other litigants lack, even if he is a liquidator. In all normal*  
351 *circumstances, to give such rights to a litigant as such is to misuse the section. What*  
352 *may properly be given to liquidator qua liquidator will not be given to a liquidator-*  
353 *litigant qua litigant."*

354

355 43. The Court considers this principle of law and its application fundamental to the proper  
356 resolution of this issue.

357

358 44. The powers in question are not to be used for giving a litigant (just because he is an  
359 officeholder) special advantages in ordinary litigation (see *re Atlantic Computers plc*  
360 [1998] BCC 200, at page 208).

361

362 45. However in terms of broad conceptual exposition the point is perhaps most  
363 eloquently stated by Robert Walker J in *Re BCCI SA (No.12)* [1997] 1 BCLC 526 at page  
364 538 A-E as to:

365 *"a basic and important distinction between the procedures which the court may order*  
366 *under section 236, on the one hand, and discovery on the other hand. Discovery (like*  
367 *other procedures to which accusations of 'fishing' may be pertinent, such as*  
368 *interrogatories and writs of subpoena duces tecum) is naturally constrained by and*  
369 *limited to issues which have, by then, been raised and pleaded in adversarial*  
370 *proceedings. The same is not true of applications under section 236, whose object (as*  
371 *Sir George Jessel MR said in *Re Gold Co (1879)*) is to enable the office-holders to find*  
372 *out facts before they bring an action... In short, discovery is a different procedure*  
373 *designed for a different purpose and available at a different stage in the making of a*  
374 *claim."*

375

376 46. Finally, in terms of Cayman Islands law we have the following invaluable guidance  
377 provided by Smellie CJ in *Re Basis Yield Alpha Fund (Master)*, 2008 CILR 50 at  
378 paragraphs 67-68 and 73 respectively:

379 *"...the court must always be astute to ensure that the special statutory powers by*  
380 *which the compulsory orders are made, are not abused. The case law demonstrates*  
381 *that it is important not to confuse the role of liquidators, which is statutory and*  
382 *peculiar to liquidation proceedings and in which special context liquidators will seek to*  
383 *avail themselves of the compulsory order, with the role of the ordinary civil litigant...*  
384 *The special statutory powers given by s.127 and s.128 of the Companies Law were*  
385 *never intended to be used merely to provide liquidators with a strategic advantage*  
386 *over persons against whom they may seek to litigate or arbitrate about disputed*  
387 *claims. Those sections are rather intended and designed (at least primarily) to protect*  
388 *the interests of creditors of a company in insolvent liquidation by the court's being able*  
389 *to compel persons who have information about the company's affairs to disclose it."*

390

391 47. The learned Chief Justice's insightful comments put the matter beyond any  
392 conceivable doubt. Section 138 (1) is not an appropriate or lawful mechanism for  
393 general and ongoing civil discovery, which is ultimately governed by facts and issues  
394 arising in specific civil pleadings.

395

396 48. In summary, the JOLs' purpose in using their powers to obtain discovery for use in the  
397 HSBC proceedings is not a proper one and it is not in the interests of justice to have  
398 recourse to section 138 (1) for the purpose which the JOLs have identified.

399

400

401 **The Object of Section 138**

402

403 49. It is clear from a careful consideration of the relevant section that the object of section  
404 138 of the Companies Law (2013 Revision) is the getting in of the company's property.  
405 It has no other purpose which is consistent with the principles and practice of  
406 insolvency as set out in that Law.

407

408 **Mandatory Terms of the Order Sought**

409

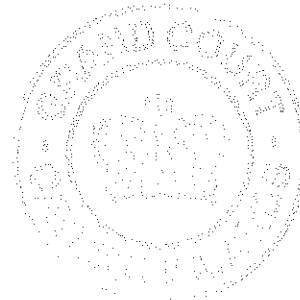
410 50. EY Cayman contends that the Summons does not make clear exactly what EY Cayman  
411 is to be ordered to do. The JOLs seek an order that EY Cayman take "*all necessary and*  
412 *appropriate steps, including if necessary the issue of proceedings,*" to compel EY Lux to  
413 deliver up the documents to EY Cayman. Having regard to the fact that EY Lux has  
414 refused to deliver up documents to EY Cayman, the meaning of "*all necessary and*  
415 *appropriate steps, including if necessary the issue of proceedings*" is said to be too  
416 opaque.

417

418 51. First, EY Cayman claims that it has no right to the documents which can be enforced in  
419 the Luxembourg Court in any event. So the issue of proceedings is neither necessary  
420 nor appropriate.

421

422



423 52. Secondly, even if proceedings were necessary and appropriate, EY Cayman states that  
424 it would not know what steps it was ordered to take in relation to proceedings. There  
425 are numerous possible steps in relation to proceedings (relating, for example, to the  
426 instruction of attorneys/advocates; conducting correspondence; drafting pleadings;  
427 making oral and written submissions; bringing appeals). EY Cayman would not know  
428 what would be required of it in relation to all the steps. Nor is it clear who is to pay the  
429 costs of the anticipated proceedings.

430

431 53. In summary, it is argued, the point is perhaps best expressed by the Court's guidance  
432 in relation to mandatory injunctions which is helpful by analogy, since the order  
433 sought by the JOLs is, in its form, a mandatory injunction. In *Morris v Redland Bricks*  
434 *Ltd* [1970] AC 652, 666 G the House of Lords held that if the Court decides that it is a  
435 proper case to grant a mandatory injunction, it must be careful to see that the  
436 defendant knows exactly what he has to do as a matter of fact, so that in carrying out  
437 an order he can give his contractors the proper instructions. The injunction issued by  
438 the judge had there required the defendants "to take all necessary steps to restore the  
439 support" to the claimants' land within a certain period of time. It thus offended  
440 against this principle of certainty and was not allowed to stand.

441

442 54. The Court finds this submission to be highly persuasive and the Court accepts it as  
443 correct. In fairness to a party so ordered, the Court must clearly inform that party  
444 what it has to do. This principle is one that is well settled and it is unarguably right.

445

446

447 **Conclusion**

448

449 55. The reasons addressed above are sufficient to dispose of the Summons application,  
450 which is dismissed. The Court has been greatly assisted by the helpful and scholarly  
451 submissions of counsel for the JOLs and of Leading Counsel for EY Cayman. Ultimately  
452 however the Court must respectfully conclude that the application is misconceived.

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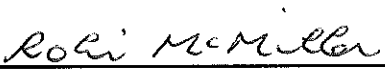
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**The Hon. Mr. Justice Robin McMillan**  
**Judge of the Grand Court**

