**IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS**
**CICA APPLICATION No: 08 of 2016**

**ON APPEAL FROM THE GRAND COURT OF THE CAYMAN ISLANDS**
**Cause No: FSD 30 of 2010 – AJJ**

**IN THE MATTER OF THE COMPANIES LAW (2013 REVISION)**
**AND**
**IN THE MATTER OF PRIMEO FUND (IN LIQUIDATION)**

BEFORE:

**THE RT. HON. SIR JOHN GOLDRING, PRESIDENT**
**THE HON. SIR GEORGE NEWMAN, JUSTICE OF APPEAL**
**THE HON. (CECILE) DENNIS MORRISON, JUSTICE OF APPEAL**

Appearances: Mr Tom Smith QC instructed by Mr. Peter Hayden and Mr. Jonathan Moffatt of Mourant Ozannes for Primeo.

Mr. Richard Gillis QC and Mr. Toby Brown, instructed by Mr. Andrew Pullinger of Campbells for the HSBC Respondents.

Mr David Allison QC instructed by Ben Hobden of Conyers Dill & Pearman for the Appellant.

Hearing: 31 August 2016

Judgment delivered: 18 November 2016

**Sir George Newman, J.A.**

1. Primeo Fund ("Primeo") entered into official liquidation on 8 April 2009 as a result of the fraud committed by Bernard Madoff. The judge overseeing the liquidation is the Hon. Justice Andrew Jones QC. On the 5 April 2016 he made an order that a Letter of Request should be issued to the Federal Ministry of the Republic of Austria in the terms approved by him and annexed to an Order made by him dated 16 December 2015. The Order dated 5 April 2016

also required the Official Liquidators ("the JOLs") to take all such steps as are necessary or appropriate to carry the Letter of Request into effect. It will be necessary to trace the origins of the order because its evolution saw tactical changes and shifts of position by the parties and its final form was forged through extensive dialogue in hearings held in the months before April 2016.

2. The alleged need for a Letter of Request to be issued was first advanced by a summons dated 8th May 2015. It was considered in a case management hearing on 28th May 2015 as part of an extensive application for discovery by two banks, being defendants in proceedings for damages brought by Primeo against Bank of Bermuda (Cayman) Limited and HSBC Securities Services (Luxembourg) SA. ("the Defendants"). The application was not formulated as a complaint against the JOLs for having failed to act in their capacity as JOLs but was included in a catalogue of complaints about the extent to which Primeo, being the Plaintiff, was discharging its discovery obligations in accordance with the Grand Court Rules ("the GCR"). The Defendants were asking the court to conclude that there could be no fair trial of the issues in the action unless all the discovery being sought by the summons was ordered. Counsel for the Defendants submitted that the trial judge faced the prospect of "…a profoundly unsatisfactory and unfair position ..arising in which critical issues on causation and knowledge and failings on the part of Primeo could not be fairly tried". The judge declined to make an order in connection with the request. He adjourned it to enable the Defendants to have another "bite of the cherry".

3. In 2011 Primeo had commenced another set of proceedings in the Grand Court in order to recover damages arising out of the Madoff fraud. The proceedings were against Pioneer Alternative Investment Management Limited ("Pioneer"). The claim was settled on terms which included Primeo being paid $100m and releasing Pioneer, Bank Austria and the Austrian Directors ("the Service Providers") from all its claims against them. The terms were set out in a detailed written settlement agreement dated 24 January 2014. The Defendants were pressing a claim for a Letter of Request to be issued against a number of parties, including the Austrian parties, in order to obtain the documents it believed were being held by them. The Defendants have pleaded a defence which includes an allegation of a lack of causation between the loss sustained by Primeo through investing in the Madoff scheme and any conduct on the part of the Defendants. They have also alleged relevant knowledge and failings on the part of Primeo as having caused or contributed to the loss. It is clear the Defendants believed that documents in the possession of Bank Austria and the Austrian Directors, who had acted as the service providers to Primeo, might support their defence. It is not difficult to understand the thinking behind the request for the Austrian documents and it is obvious that that they were seeking third party discovery to assist in establishing their defence. The Defendants' case on causation and knowledge might be assisted if the role played by Bank Austria and the Austrian Directors served to demonstrate that the liability of the Defendants played a small part in causing the loss sustained by Primeo and that, at least to some degree, the loss had been contributed to by Bank Austria or the

directors. Counsel for Primeo correctly characterised the request as a "fishing" exercise.

4. After the hearing of the Defendants' "second bite of the cherry" on the 16 December 2015 the judge indicated his intention to make an order. Written reasons for this decision were given, dated 4 February 2016. In the absence of an appeal by Primeo, Pioneer (like Bank Austria a member of the UniCredit group of companies) intervened and contended that the order sought by the Letter of Request was precluded by the terms of settlement in the Pioneer damages action. The judge heard Pioneer on 5 April 2016 but determined the issue against it. Pioneer also challenged the judge's proposed exercise of jurisdiction to order and direct the JOLs to issue the Letter of Request. Primeo initially asserted in correspondence that the terms of the settlement agreement precluded it from taking steps to obtain documents by the means of a Letter of Request but then changed its position. Thus before the April hearing Primeo had not appealed the December Order, had informed the Defendants that the settlement agreement was a bar to initiating the Request and had issued a summons to have the issue determined with Pioneer as a party. However at the hearing, despite its detailed and forceful submissions submitted at the December hearing, Primeo did not substantially support Pioneer's submissions that the proposed Order directing that a Letter of Request be issued should not have been made and, contrary to its earlier position, asserted it was not precluded by the settlement agreement from complying with the Order. It is important to note however that at no time have the JOLs resiled from the contention

that the exercise was speculative and likely to be very expensive. One of the JOLs, Mr. Gordon MacRae swore an affidavit (his seventh) setting out the extent and detail of the attempts which had been made to obtain such documents as were in the possession of the Austrian parties. It should also be noted that in May 2015 the judge had expressly refrained from criticising the JOLs in the performance of their statutory duties. There was good cause to refrain because he accepted that prior to the issue being raised by the Defendants he could see that the JOLs had no reason to apply to obtain documents, which in their judgment were not needed for the purposes of the liquidation and which if pursued would involve an exercise disproportionately expensive when weighed against the likely return it would provide.

**The Damages Claim.**

5. Primeo is claiming hundreds of millions of dollars against the Defendants for alleged breach of contract and negligence in connection with the Madoff fraud. As I have already recited, the pleaded defence includes allegations of knowledge as well as control weaknesses on the part of Primeo in connection with the Madoff investments. Counsel for the Defendants placed considerable emphasis on these allegations which were said to be critical to the question of causation which was a central defence advanced by the Defendants. It has not been suggested that the Defendants are not entitled to discovery from Primeo under the GCR in connection with issues of causation and all other issues raised on the pleadings. The important issue raised by this appeal is whether the jurisdiction of the court over the JOLs should have

been exercised under the Companies Law (2013 Revision) so as to give rise to the incidental but expressly desired consequence that the Defendants requests for disclosure of third party documents could be met.

6. As the cases cited in argument demonstrate, there is a distinction between the public purpose of seeing that JOLs fulfill their public duties and the public purpose under the general law of securing justice in accordance with the rules governing litigation between private individuals. The general law in the Cayman Islands under the Cayman Grand Court Rules ("GCR"), unlike the English Procedure Rules, does not provide a means to obtain discovery from a third party to the litigation. The Defendants nevertheless, in their summons for discovery dated 8 May 2015 requested extensive third party discovery, framed as an order pursuant to the GCR and the common law. In particular the Defendants sought "...the provision, including by exercise of the liquidator's statutory powers, of all relevant documents held by relevant third parties". This was an unambiguous request that the JOLs' statutory powers should be used to obtain documents from third parties outside the jurisdiction relevant to the issues in the damages action between Primeo and the Defendants. It is obvious that the court was being asked to assist the Defendants to obtain documents beyond those allowed for under the GCR. As first advanced the request was not even limited to documents which belonged to Primeo or to which Primeo was entitled, being the categories of documents to which the JOLs' statutory powers extend.

7. At the first hearing which took place on these issues on the 28 May 2015 the Defendants asserted that too little had been done by the JOLs to obtain

documents from third parties. The judge agreed that they did not appear to have "tried particularly hard to obtain information from these service providers" but he stated that he was not criticising the JOLs. In the context of what eventually occurred the absence of a ground to criticise the JOLs is significant. It is well established (see Edennote Ltd. [1996] 2 BCLC 389; Re Greenhaven Motors Ltd [1999] BCC 463; Abbey Forwarding Limited v Hone [2010] EWHC 1644 (Ch)) that the relevant test to be applied before interfering with the conduct of a liquidator is to ask whether he has " …done something so utterly unreasonable and absurd that no reasonable man would have done it" (Edennote). There are good reasons for this, including the undesirability of the court attempting to substitute its view for the judgment of the liquidator in the detailed running of the liquidation. In addition, the judge observed that the Defendants had not identified any class of document "sufficiently material" to justify issuing a Letter of Request. Mr Crystal QC, leading counsel for Primeo submitted that the service providers had already responded to the effect that they had no more documents and that there did not appear to be "any room for a section 103 application".

8. The judge was minded to conclude that the level of response from Bank Austria itself indicated there were relevant documents in the possession of the Bank. Despite warnings that the exercise was speculative and was likely to be very contentious and expensive the judge eventually concluded that the Defendants' request that the JOLs should be ordered to use their statutory powers to obtain documents from the third parties should be left over for the Defendants to have another "bite at the cherry". As I have

already indicated, whilst there have been tactical changes of position on the part of Primeo, it has not at any time resiled from Mr. Crystal's first submission that such a process was speculative and would be expensive. In the Skeleton Argument to this Court, although adopting a neutral stance on the principal issues, the JOLs have forcefully maintained that the documents sought from the Austrian parties are not necessary for the conduct of the liquidation. No evidence has been advanced to the contrary. Later I shall come to the judge's response to this uncontradicted position. This part of the case gives rise to highly relevant considerations which go to the basis upon which the Court should exercise its jurisdiction to order liquidators to issue a Letter of Request.

9. There is jurisdiction under Section 103(7) of the Companies Law to make an order that a Letter of Request be issued. The section provides that the Grand Court has jurisdiction:

> "(a) to make an order under this section against a relevant person resident outside the Islands: and
>
> (b) to issue a letter of request for the purpose of seeking the assistance of a foreign court in obtaining the evidence of a relevant person outside the jurisdiction."

It is a jurisdictional provision, framed in terms which make it clear that the court should not exercise its jurisdiction unless satisfied that a factual basis for its exercise, sometimes referred to as a basis in jurisdictional fact, has been established. Yet further, before the jurisdiction can properly be

exercised the court must consider whether a sufficient basis exists for the court to exercise its discretion to make the order.

10. The hearing on the 28 May 2015 concluded on the following note: The judge stated: "I am certainly not persuaded that I should make any direction today forcing [the JOLs] to commence 103 proceedings. I am not going to dismiss this application either. I am going to give Mr. Gillis [leading counsel for the Defendants] a further opportunity to present this application in a more effective way. He could draft a letter of request for us. He could draft the skeleton argument that's going to need to be presented to me, wearing my hat as the judge supervising the liquidators…". He added: "He could obtain some Austrian advice which he would need". Having observed that the adjournment would affect the hearing date, the judge added: "..I will give you the opportunity to come back and have another bite of the cherry if you think fit".

11. The Defendants grasped the opportunity and issued a fresh summons on 1 October 2015. The summons contained four paragraphs By the first it applied to strike out paragraphs in the Re-Re Amended Statement of Claim. By the second paragraph it requested an order directing Primeo "…to the extent it had not already done so..." to seek delivery up of documents from third parties, including the Austrian directors and Bank Austria. By the third paragraph it was requested that Primeo should file and serve affidavits setting out all the steps it had taken to obtain the documents from third parties. By paragraph 4(a) the Defendants sought an order directing Primeo "...through its Official Liquidators..." to make an application for a letter of

request seeking to compel Bank Austria and the Austrian directors to produce any documents belonging to Primeo or any documents to which it is entitled. For completeness I should add that at no time has the Defendants' locus standi to make a section 103 application been considered and I do not propose that this court should consider it.

12. The summons was issued in the damages action. The Defendants duly produced evidence on Austrian law and submitted that it was clear that the Austrian authorities would adhere to the Letter of Request either under the Convention relating to Civil and Commercial Matters, which had been extended to UK territories, including the Cayman Islands, or possibly, it would be adhered to under Austrian insolvency law. The Defendants' Skeleton Argument identified what was referred to as the insolvency route and distinguished it from what was referred to as the litigation route. The court was asked to order the JOLs to issue a Letter of Request under the statutory powers conferred by section 103(7) and section 138 of the Companies Law and the common law. The emphasis of the argument was upon the breadth of the power to order documents other than those which belonged to Primeo. In paragraphs 132 -143 of its Skeleton Argument Primeo had submitted that it was not permissible to use sections 103 and 138 purely so that documents could be handed over to the Defendants and where there was no point in the powers being exercised for the purpose of securing the fulfillment of the JOL's statutory powers. An affidavit in support of the summons stated that the documents were of central importance to the

issues in the HSBC proceedings and were needed "in order for justice to be done and for a fair trial to take place".

13. So far as it was alleged there had been a failure on the part of the JOLs to act the Defendants adopted the judge's observation at the previous hearing : "Having looked at the relevant parts of Mr. MacRae's affidavit , it seems to me the liquidators have not tried particularly hard to obtain information from those service providers . " No reference was made to the fact that the judge had stated he was not criticising the JOLs. The Defendants also reminded the judge of the view he had expressed about the likelihood of voluntary disclosure : " I think I am going to proceed on the assumption at least some of these service providers are going to take a very cautious approach when it comes to disclosing information to the liquidator." Mr Gillis QC repeated the Defendants submission that ".....disclosure from particularly the directors and the third party service providers " was "of critical importance in this action . I do not need to expand upon that causation, reliance and contributory negligence ...." Mr Gillis added "..the third point : one can understand in some ways why the plaintiffs are not overly enthusiastic to be pursuing their disclosure obligations because fundamentally it is likely to be disclosure which may not assist their claim". There appears to have been no ground or reason for this optimistic suggestion to be advanced. It is a forensic approach frequently adopted in discovery applications but it was irrelevant to the JOLs exercise of their statutory powers and it seems clear that by the reference to "disclosure obligations" counsel was not referring to any obligations arising under the Companies Law.

14. Perusal of the transcript of the hearing on the 15 December shows that the judge had decided to take a different approach from the one adopted at the May hearing and it was not long before the judge made his position clear. Mr. Smith QC leading counsel for the JOLs submitted that the question for the JOLs "as office holders" was whether there was an appropriate and proper basis for commencing proceedings in Austria, at great cost, great time, greater expense…". The judge interrupted: "The cost is not going to be great in the context of this litigation . Your opponents say they have spent $11 million…and they are asking you to spend perhaps a few hundred thousand". Mr. Smith was sceptical about the figure and the judge replied: "The more they oppose, that is evidence that they have relevant material, otherwise they would not be opposing it". It is not clear what the judge meant, in the context of a hearing involving a statutory application, by the expression "relevant material" but on balance it looks as though he was referring to documents relevant to the issues in the damages action. Mr. Smith repeated the submission that there was no appropriate basis for commencing proceedings in Austria and no factual basis for asserting that Bank Austria had documents which would justify the course . The judge replied: "My view is that you need to take steps commencing proceedings."

15. Written reasons for the decision were given dated 4 February 2016. They were short but the judge stated the basis for his decision to make the order. In summary he stated that it was inherently likely that the Director's files were in the possession of Bank Austria and that it was inherently unlikely that the Directors had themselves retained the files but to avoid or

discourage Bank Austria from claiming that the directors did retain them an order including the directors made sense because it might serve to compel Bank Austria to produce them. Thus at the first stage he directed that an application to the court for a Letter of Request should be issued by the JOLs. The judge did not state his conclusions on the argument about the use of the Companies Law. He did not state what test he had applied to the conduct of the JOLs nor the reasons why he had exercised his discretion to make the order.

16. Primeo did not seek leave to appeal any part of the Order but after being given notice that Pioneer was maintaining the proposed course was precluded by the settlement agreement, it issued a summons dated 19 February 2016 seeking a hearing to determine the correct construction of the settlement agreement between Primeo and Pioneer, Bank Austria and the Austrian Directors. By this date London solicitors for Pioneer had indicated that they considered that the JOLs were precluded by the settlement agreement from commencing proceedings against the Austrian Bank and the directors. Since Justice Andrew Jones QC was the judge appointed to try the damages claim it was not unreasonable having regard to the judge's comments to date to conclude that further resistance on their part to take steps to obtain the documents could run a risk that the judge would draw adverse inferences against Primeo's case. Mr. Gillis had sown the seeds by stressing how important the documents were to having a fair trial and by the suggestion he advanced that the JOLs' reluctance to act was no doubt because it was feared they would damage Primeo's case.

**The April 2016 Hearing**

17. Bank Austria and the Austrian directors have not at any time been served but it appears that they were put on notice of the April hearing (though not the December hearing). Given that Bank Austria and the Austrian directors did not attend the April hearing, it follows that they cannot be bound by the declaration made by the judge that the order directing a Letter of Request to be issued was not precluded by the settlement agreement. It has to be said that little attention appears to have been given to what was capable of being seen as the obvious desirability of the Bank and the directors being given notice and being given an opportunity to be heard. The judge expressed himself as content to see whether or not objection was raised at some stage later in the course of the proposed proceedings in Austria.

18. Pioneer submitted a detailed Skeleton Argument which set out the relevant cases governing the exercise of the statutory powers of liquidators under the Companies Law to issue a Letter of Request and detailed argument on the effect of the settlement agreement. By its Skeleton Argument dated 1 April 2016 Primeo implicitly abandoned its objections to the use of section 103 and section 138 of the Companies Law and stated that it had a preference to have the Letter of Request issued. It supported the Defendants' submissions on the effect of the settlement agreement. Whilst the Defendants accepted that Bank Austria and the Directors would not be bound by the court's determination on the construction issue, it was submitted that the court should not decline to make the declaration on this ground because it would be open to the Austrian parties to oppose the relief sought in the Letter of

Request. It was not stated where this might occur but the judge obviously accepted this approach and contemplated that this might be in Austria.

19. It is clear from the transcript of the hearing that the judge was not minded to accept the argument that it would be an abuse of the jurisdiction under the Companies Law to direct the JOLs to issue a Letter of Request. He distinguished the facts he was considering from the facts in the cases cited to him where the courts had identified an abuse. In his judgment all the cases demonstrated that an abuse will occur where liquidators use their statutory powers not for the purpose of a liquidation but for the purpose of obtaining an advantage over opponents in actual or contemplated litigation. He expressed the view that in the case he was considering there was no such advantage to be obtained by the JOLs and further that no disadvantage or prejudice would occur to Bank Austria or the directors if delivery up was given. It is clear that he did not consider whether there was any risk Bank Austria might be brought into the damages claim by the Defendants by the use of third party contribution proceedings or whether they could otherwise be made a party to action taken by the Defendants. He should have considered this risk.

20. The judge had in mind the principle that JOLs must exercise their statutory powers for the purposes for which the powers had been conferred by the Companies Law and subject to any applicable limitations upon its exercise. He concluded that collecting in the company's books was a proper exercise of the statutory powers of the JOLs and therefore they could be directed to issue a Letter of Request. By his adoption of this approach the judge

neglected to consider that whilst collecting in the company's books falls within the category of actions which can be necessary for the purpose of the liquidation, the undisputed evidence from the JOLs was that the documents were not necessary for that purpose, that there was no ground for believing the Austrian parties held documents which were necessary and that in any event the exercise was likely to give rise to wasted expense. As we shall see it is implicit in his written reasons that he accepted this part of the JOLs' case and founded his order on a different basis comprising two functions which can be performed by liquidators, namely collecting in documents and pursuing a claim for damages .

**The Judge's Written Reasons dated 28 July 2016**

21. The judge referred to the damages claim. He surveyed the origins of the request for the exercise of the liquidators statutory powers, identifying the issue as one whether it "…was reasonable and proportionate to require further efforts be made to obtain these documents not from the individuals themselves, but from the service providers who employed them". In paragraph 3 of his Reasons he stated: "I was persuaded that the Official Liquidators had not, up to that point, taken sufficient or appropriate steps to collect the Director's Files. The underlying assumption is that the Directors' files are discoverable documents in the Primeo/HSBC proceedings but it seems to me that, in principle, they are also documents of a kind which the Official Liquidators ought to have collected, or at least made a serious attempt to collect, in any event." This conclusion came nowhere near meeting the test laid down in Edennote and elsewhere.

22. The judge set out section 138(1) and section 103 of the Companies Law and accepted the submission that the powers conferred by the sections should be exercised for the purposes of the liquidation but stated that "…this does not mean that the section 138(1) power should never be used for collecting in a company's documents when the purpose or the principal purpose, of obtaining them is to enable the company to fulfill its discovery obligations in pending litigation. Conducting litigation for the purpose of enforcing causes of action belonging to a company is an important function of official liquidators. In order to perform this function the official liquidator of an investment fund such as Primeo, which never had any premises or employees of its own, must take steps to collect in its books and records from the various service providers who have custody of them."

23. The judge described the argument advanced by Mr Allison QC, leading counsel for Pioneer, that to use the liquidators' statutory powers to enable the HSBC Defendants to obtain extra-territorial non party disclosure was outside the reach of the Companies Law, as "…misconceived and wholly wrong." The judge stated that: " It is not an abuse for the Official Liquidators to use the machinery of a letter of request based upon section 138(1) and/or section 103 against Bank Austria and the Austrian Directors, merely because the reason for collecting in the documents in question is to comply with Primeo's discovery obligations in litigation against an unrelated party. Nor would it have been an abuse of the process for the Official Liquidators to have issued a writ in the name of Primeo seeking an order for specific discovery." He added a little later: "The Official Liquidators are not

contemplating the commencement of any litigation against Bank Austria or the Austrian Directors. To the extent that Primeo had any causes of action against any of them for damages for breach of duty, those causes of action have been released by the Settlement Agreement."

24. In my judgment the judge's approach to these issues was flawed for a number of reasons. He conflated the JOLs' statutory duties with the obligations which Primeo had to discharge under the GCR with regard to discovery. It is obvious that official liquidators conducting an action for damages in the Grand Court are obliged to comply with the obligations imposed upon a litigant by the GCR. The Defendants sought and obtained extensive orders for discovery under the GCR. These included requiring more steps to be taken by Primeo to obtain documents in the possession of third parties including Bank Austria and the directors. Official liquidators do not by reason of their office when conducting litigation in the name of the company have greater obligations under the GCR than any other litigant has to discharge. As Mr. Allison submitted if this was the case "...the discovery process would be extraordinarily burdensome and expensive for liquidators of insolvent companies". It would leave "...a liquidator with a duty to assist an opponent in adversarial litigation by seeking letters of request against non-parties who may be in possession of documents located out of the jurisdiction". If the approach of the judge is correct there is a special benefit enjoyed by a party to litigation brought by liquidators on behalf of a company.

25. The judge accepted that the statutory powers had to be exercised for the purposes of the liquidation but failed to apply the principle when he concluded that since the collection of documents from third parties was capable of being a statutory purpose it could be exercised when the collection would not assist in the realisation and distribution of the company's assets. It is clear that the making of a claim to recover damages fulfills a statutory purpose, but its pursuit engages the obligations imposed by the general law including the procedures laid down by the GCR. The liquidators' statutory powers are not available for the benefit of a party to an action to enforce for its benefit where the purpose of the liquidation will not be served.

26. The judge had not been prepared to criticise the JOLs for failing to obtain the documents earlier, which they could have done, had they concluded they were necessary for the purpose of the liquidation. There was no finding that they had failed to exercise their discretionary powers in circumstances which clearly required that they should have done so (see Edennote). As the judge acknowledged, until the Defendants raised the issue for their own purposes in the litigation the manner in which the statutory powers had been exercised had not been in issue.

27. I am satisfied the facts demonstrate that if the documents were to be obtained the only purpose which would be served would be their disclosure to the Defendants. The JOLs remained constant in their evidence and submissions to this effect. So far as the judge found to the contrary he erred. The judge failed to give any or any proper weight to the JOLs' opinion that it

was speculative and would be expensive. He dismissed the former on the basis of a speculative and adverse assumption against the Austrian bank that the failure to respond to the JOLs indicated that it must have something "relevant" and dismissed the suggestion that it would be expensive by taking account of an irrelevant consideration, namely that the Defendants had already spent $11m. Thus the judge failed to give any proper consideration as to how much it might cost. His view appears to have been that Primeo had plenty of money. That may be the case but it does not avoid the need for the court to consider the expense of the requested exercise. Further the judge failed to take account of the likelihood that there would be re-litigation on the true effect of the settlement agreement. It is not necessary for me to consider the judge's conclusion on the effect of the agreement since I would allow the appeal on the Companies Law. Further and in any event the judge was wrong to conclude that there was no risk of prejudice arising for the Austrian bank and the directors. As I have already stated they would be at risk of being involved in some way in the resolution of the issues being raised by the Defendants.

28. Mr. Allison also submitted that it was by no means clear that the directors had any files to which Primeo had a proprietary claim. In the light of my firm conclusion that for the reasons I have given the judge erred in concluding that a basis in jurisdictional fact existed, and my firm conclusions that even if a basis had been made out there was no proper consideration given to the matters which were highly relevant to the exercise of the court's discretion, I do not propose to lengthen this judgment by dealing with the submission.

29. There has been no dispute about the jurisprudence established by the cases save in connection with the issue of the character of the abuse with which the court must be concerned.

30. Lord Millett said in Re Pantmaenog Timber Co Ltd [2004] 1 AC 158: " In my opinion, the only limitation which is implicit in section 236 [the equivalent provision of the Insolvency Act 1986 to section 103(3)(b) of the Companies Law] is that it may be invoked only for the purpose of enabling the applicant to exercise his statutory functions in relation to the company which is being wound up." In Re Atlantic Computers plc [1998] BCC 200 at 208 it was stated that the section 236 power was "…not to be used for giving a litigant (just because he is office-holder) special advantages in ordinary litigation." This was followed in the Cayman Islands by Smellie CJ in Re Basis Yield Alpha Fund (Master) 2008 CILR 50. He put the principle in this way: "…the court must always be astute to ensure that the special statutory powers by which the compulsory orders are made, is not abused." Justice Jones QC relied upon Re Basis Yield and the facts in other cases for his conclusion that the principle of abuse was confined to cases where liquidators were using their statutory powers to obtain a benefit over persons against whom they might litigate. With respect he was wrong. Whilst prejudice of a particular nature can arise for a party ordered to deliver up documents, the concept of abuse is derived from legal principle not specific facts. One must start by considering the extent of the power conferred by the Companies Law. The relevant abuse arises when a statutory power conferred for certain purposes is deliberately used to obtain a result outside the contemplation of the Law

creating the power. The purpose or effect is likely to be relevant and aggravate the abuse but it does not define it. There are any number of situations in which the abuse can arise but it is noteworthy that the case of Sutton v GE Capital Commercial Finance Ltd [2004] 2 BCLC 662 can be seen as an example where an office-holder's application to obtain documents for the benefit of a third party was regarded as an abuse.

31. For the reasons I have given this appeal must be allowed and the judge's order directing the JOLs to issue a letter of request must be set aside. I would also set aside the declaration on the effect of the settlement agreement. In the absence of agreement on costs the parties should submit written submissions within 14 days.

**Goldring P**

I agree.

**Morrison JA**

I also agree.