IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS
ON APPEAL FROM THE GRAND COURT

CICA (Civil) 8 of 2018
Grand Court Cause No: FSD 163 of 2017(RPJ)

BETWEEN

ARGYLE FUNDS SPC INC. (IN OFFICIAL LIQUIDATION)

Appellant (Defendant)

-AND-

BDO CAYMAN LTD

Respondent (Applicant)

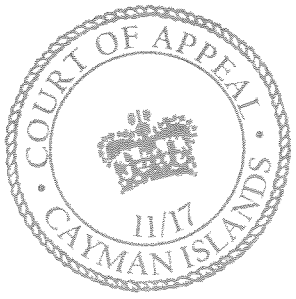
BEFORE: **The Hon Sir Richard Field, J.A**
The Hon Dennis Morrison, J.A
The Rt. Hon Sir Alan Moses, J.A

Appearances: **Ms. Clare Stanley QC instructed by Mr Ulrich Payne, Ms. Jennifer Fox and Ms. Britt Smith of Ogier of the Appellant**
Mr Graham Chapman QC instructed by Mr Andrew Pullinger and Mr Shaun Tracey of Campbells for the Respondent

Heard: **3 September 2018**

Draft Judgment Circulated for comment: **14 September 2018**

Judgment Delivered: **8 October 2018**



JUDGMENT

Field, JA:

Introduction

1. This is an appeal by Argyle Funds SPC ("Argyle") against that part of the order of Parker J dated 23 March 2018 whereby Argyle, acting by its joint official liquidators ("the JOLs"), is restrained from continuing proceedings ("the New York proceedings") commenced

against BDO Trinity Limited ("BDO Trinity"), BDO USA LLP ("BDO USA") and Schwartz & Co LLP ("Schwartz") in the Supreme Court of the State of New York, County of Nassau. BDO Trinity, BDO USA and Schwartz are hereinafter referred to collectively as "the Affiliates".

2. Argyle is a Cayman Islands Mutual Fund which at the relevant time consisted of up to 31 segregated classes. It went into insolvent liquidation on 26 April 2016 at which time Mr David Griffin and Mr Andrew Morrison were appointed as Joint Voluntary Liquidators. On 31 May 2016, Argyle went into official liquidation and Messrs. Griffin and Morrison were appointed as JOLs.

3. There is no appeal against that part of Parker J's order by which Argyle was restrained from continuing the New York proceedings against BDO Cayman Ltd ("BDO Cayman"). The four defendants sued in the New York proceedings, BDO Cayman, BDO Trinity, BDO USA and Schwartz are hereafter collectively referred to as "the New York Defendants".

4. BDO Cayman, BDO Trinity, and BDO USA are members of BDO International, a global network of public accounting, tax consulting and business advisory firms. Schwartz is an independent accountancy firm and is not a member of BDO International. Instead, it is a BDO "*alliance firm*" in that its name is on a BDO International list of pre-approved firms that can be used to assist in audits conducted by firms who are BDO International members.

5. BDO Cayman was Argyle's statutory auditor for the audit years ending 31 December 2006 – 2014, in the course of which audits the investments held by certain of Argyle's classes would have had to have been scrutinised.

6. In the period 2004 to 2016, Argyle invested in entities known as "*credit advisors*" who managed factoring transactions under which accounts receivable were sold at a discounted price as a means of financing. Amongst the credit advisors in which Argyle invested were

two companies controlled by a Mr Donald Barrick, ECB Funding LLC ("ECB") and RMP Capital Corp ("RMP"). ECB and RMP are hereafter referred to collectively as "the Barrick Credit Advisors". Argyle also invested in a third company, New Solutions Financial (III) Corp ("NSF"), which had no connection to Mr Barrick or the Barrick Credit Advisors.

7. In 2016, it was discovered that large sums under the control of the Barrick Credit Advisors had been misappropriated through the fraudulent actions of Mr Barrick ("the Barrick fraud"). In 2012, it was discovered that NSF had been involved in a fraudulent scheme investing in very risky loans which turned out to be of little value ("the NSF fraud").

8. In the New York proceedings, Argyle claims compensatory damages of US$86,416,916.21 and punitive damages of not less than US$260 million on the basis that the New York Defendants ought to have but did not alert Argyle in the course of each of the relevant four audits that Argyle was or might be the victim of the Barrick and NSF frauds. Argyle pleads four causes of action, the first three of which are averred against all the New York Defendants jointly, whilst the fourth, a cause of action in contract, is pleaded solely against BDO Cayman. The first cause of action (paras 221-234 of the Amended Complaint) pleads professional and gross negligence alleging a tortious failure to exercise ordinary and reasonable skill in a way that grossly deviated from the degree of care commonly possessed and exercised by auditors in performance of their duties to such an egregious extent as to render the New York Defendants' conduct wilful and/or intentional. The second cause of action (paras 235 – 242) pleads fraudulent conscious concealment of "*red flags*" signifying the indicia of fraud in order to avoid the loss of fees collectable from Argyle. The third cause of action (paras 243 – 248) is for unjust enrichment based on the retention by the New York Defendants of the audit fees received from Argyle notwithstanding their breaches of duty to Argyle. The fourth cause of action (paras 249 – 254) pleads that under the audit contracts for the relevant audits BDO Cayman owed and were in breach of the duty to alert Argyle to material errors, fraud, illegal acts and other significant findings encountered when conducting the audits and failed properly to supervise the Affiliates who participated in the audits.

9. The Amended Complaint claims jurisdiction on the basis that the New York Defendants regularly transact business in the State of New York and avers that the chosen venue is proper on the grounds that: (i) the audits involved review of the Barrick Credit Advisors' files in New York State; and (ii) BDO Cayman, BDO USA and BDO Trinity (through one or more "*alliance firms*") each maintain an office and conduct audit review business in Nassau County, New York.

The Engagement Letters

10. The terms on which the 2010, 2011, 2012 and 2013 audits were carried out were set out in engagement letters that constituted contracts made between Argyle and BDO Cayman ("the Engagement Letters").

11. All four Engagement Letters included the following applicable law, exclusive jurisdiction, and dispute resolution clauses:

> ***"Applicable Law***
>
> *This Agreement shall be governed by and construed in accordance with the laws of the Cayman Islands.*
>
> ***Jurisdiction***
>
> *The courts of the Cayman Islands shall have exclusive jurisdiction in relation to any claim or matter arising from this Agreement.*
>
> ***Dispute Resolution Procedure***

If any dispute, controversy, or claim arises out of, relates to, or results from the performance or breach of this Agreement, [excluding claims for non-monetary or equitable relief][1] (collectively, the "Dispute"), either party may, upon written notice to the other party, request non-binding mediation. A recipient party of such notice may waive its option to resolve such Dispute by non-binding mediation by providing written notice to the party requesting mediation and then such parties hereto shall resolve such Dispute by binding arbitration as described below. Such mediation shall be assisted by a neutral mediator acceptable to both parties and shall require the commercially reasonable efforts of the parties to discuss with each other in good faith their respective positions and different interests to finally resolve such Dispute. If the parties are unable to agree on a mediator within twenty (20) days from delivery of the written notice, either party may invoke the mediation service of the American Arbitration Association (the "AAA"). The venue of the mediation shall be the Cayman Islands and all issues of law, procedure and confidentiality shall be determined by and governed by the law of the Cayman Islands...

Any Dispute not resolved first by mediation between the parties (or if the mediation process is waived as provided herein) shall be decided by binding arbitration. The seat of arbitration proceedings shall be the Cayman Islands, unless the parties agree in writing to a different seat[2], and governed by the prevailing Arbitration Law. In any arbitration instituted hereunder, the proceedings shall proceed in accordance with the then current Arbitration Rules for Professional Accounting and Related Disputes of the AAA, except that the Arbitration Panel (as defined below) shall permit discovery that is consistent with the scope of discovery typically permitted by the Grand Court Rules and/or is otherwise customary in light of the complexity of the Dispute and the amount in controversy. Any

[1] These words appear in the 2012 and 2013 Engagement Letters, but not in the 2010 and 2011 Engagement Letters.
[2] The 2010 Engagement Letter used the word "locale".

Dispute regarding discovery, or the relevance or scope thereof, shall be determined by the Arbitration Panel (as defined below). The governing law of the arbitration shall be the law of the Cayman Islands and the substantive law of the Cayman Islands shall apply to all issues therein, save where applying the principles of private international law applicable in the Cayman Islands, the law of another jurisdiction would apply.

The arbitration shall be conducted before a panel of three persons, one selected by each party, and the third selected by the two party-selected arbitrators (the "Arbitration Panel"). At least one arbitrator shall be an attorney admitted to practice in the Cayman Islands. The party-selected arbitrators shall be treated as neutrals. The Arbitration Panel shall have no authority to award non-monetary or equitable relief, but nothing herein shall be construed as a prohibition against a party from pursuing non-monetary or equitable relief in the Grand Court of the Cayman Islands. The parties also waive the right to punitive damages and the arbitrators shall have no authority to award such damages or any other damages that are not strictly compensatory in nature. In rendering their award, the Arbitration Panel shall issue in writing findings of fact and conclusions of law. The Arbitration Panel shall not have authority to grant an award that is not supported by substantial evidence or that is based on an error of law, and such absence of substantial evidence or such error of law may be reviewed on appeal to vacate an award based on the standard of review otherwise applicable in the Court of Appeal of the Cayman Islands reviewing a first instance judgment of the Grand Court, and without regard to any heightened standard of review otherwise applicable to an arbitration decision rendered by the AAA. The confidentiality provisions applicable to mediation shall also apply to arbitration. Upon final determination of the issues between the parties, the award issued by the Arbitration Panel may be confirmed and enforced in any jurisdiction. No payment of any award or posting of any bond of any kind whatsoever is required to be made or posted until such Dispute is finally determined.

In no event shall a demand for arbitration be made after the date on which the initiation of the legal or equitable proceeding on the same Dispute would be barred by the applicable statute of limitations or by application of the equivalent under the principles of equity. For the purposes of applying the statute of limitations or equivalent equitable principles, receipt of a written demand for arbitration by the AAA shall be deemed the initiation of the legal or equitable proceeding based on such Dispute.

In any event, BDO's maximum liability to the Funds for any reason, including BDO negligence, relating to the services under this letter shall be limited to three times the audit fee for the services or work product giving rise to the liability, except to the extent finally determined to have resulted from the wilful default of BDO. "

12. The 2011, 2012 and 2013 Engagement Letters also included a "*Sole Recourse Clause*" in the following terms (the "Sole Recourse Clause"):

"***Sole Recourse***

This Agreement is between [Argyle] and [BDO Cayman] only...

If one of our affiliates carries out any work for you in relation to the services to which this Agreement applies, our affiliates will do so as a sub-contractor of [BDO Cayman.] [BDO Cayman] will remain the contracting party and will be the sole entity that is responsible to you, including for the work carried out by any of our affiliates.

Also, where appropriate, we may use a Permitted Assignee[3] *to assist us with the services to which this Agreement applies. Notwithstanding the fact that the services may be carried out by other member firms of the international*

[3] The 2012 Engagement Letter used the term "BDO Member Firms" which it defined as "BDO sub-contractors" rather than the term "Permitted Assignee" throughout this clause.

BDO network assisting us as supplemental providers of services and as sub-contractors of [BDO Cayman], you agree that [BDO Cayman] shall have sole liability for both its acts and/or omissions and also all acts and/or omissions of any Permitted Assignee and you agree that you shall bring no claims or proceedings of any nature whatsoever (whether in contract, tort, breach of statutory duty or otherwise) against any Permitted Assignee or BDO International entities (including, without limitation, BDO International Limited and Brussels Worldwide Services BVBA) or other member firms of the international BDO network in any way arising from, in respect of or in connection with the services or this Agreement.

These exclusions shall not apply to any liability, claim or proceeding founded on an allegation of fraud or wilful misconduct or other liability that cannot be excluded under applicable laws.

It is agreed that, unless otherwise specified, the limitation of liability provisions in this Agreement shall apply equally to [BDO Cayman], our affiliates and any Permitted Assignee we may involve in the services.

You agree that any of our affiliates and any BDO sub contractors who we may involve in the services of BDO International entities or other BDO Member Firms shall each have the right to rely on and enforce the paragraphs above as if they were parties to this Agreement."

13. All four of the 2010 – 2013 Engagement Letters contained an assignment clause ("the Assignment Clause") whose material terms were as follows:

"Assignment

BDO [Cayman] shall have the right to assign its rights to perform a portion

of the services described above to any of its independent affiliates (including, where applicable, BDO USA LLP and/or its independent Alliance members or other Member Firms of the international BDO network and/or their independent Alliance members), agents, or contractors (a "'Permitted Assignee") without the Funds' prior consent. If such assignment is made, the Funds agree that, unless it enters into an engagement letter directly with the Permitted Assignee, all of the applicable terms and conditions of this agreement shall apply to the Permitted Assignee. We agree that we shall not permit the Permitted Assignee to perform any work until it agrees to be bound by the applicable terms and conditions of this agreement. We further agree that we will remain primarily responsible for the services described above, unless we and the Funds agree otherwise, and we will properly supervise the work of the Permitted Assignee to ensure that all such services are performed in accordance with applicable professional standards. From time to time, and depending on the circumstances, Permitted Assignees located in other countries may participate in the services we provide to the Funds. In some cases, we may transfer information to or from the Cayman Islands or another country..."

14. The Applicable Law, Exclusive Jurisdiction, Dispute Resolution and Assignment Clauses are hereafter collectively referred to as "the 4 key clauses".

The proceedings below

15. The proceedings below were commenced by an Originating Summons issued on 8 August 2017 seeking an *ex parte* order to restrain Argyle from continuing the New York proceedings. In accordance with local practice, since the summons contemplated an ex parte order, it did not name Argyle as a Defendant. In the event, BDO's application was eventually made *inter partes* pursuant to an agreed timetable, but Argyle was never joined in to the proceedings as a Defendant.

16. BDO Cayman's case before the judge was that the 4 key clauses constituted a contractual scheme under which Argyle was obliged to have any dispute arising out of an audit governed by one of the Engagement Letters determined by arbitration against BDO Cayman pursuant to the Dispute Resolution Clause, even where complaint was made against a third party used by Argyle in the audit process, unless the fraud, wilful default and non-excludable liability exception ("the carve-out") in the Sole Recourse Clause applied, in which case the claim had to be brought in a Cayman Islands Court under the Exclusive Jurisdiction Clause.

17. As noted above, the 2010 Engagement Letter did not contain the Sole Recourse Clause and in respect of this audit, BDO Cayman's case in respect of the claim against the Affiliates relied on the Dispute Resolution and the Assignment Clauses, together with the backstop contention that if those clauses did not prohibit court proceedings against the Affiliates, those proceedings must be brought in the Cayman Islands' Courts pursuant to the Exclusive Jurisdiction Clause.

18. In addition, BDO Cayman invited the judge to prefer the evidence given in the affidavits of Mr Glen Trenouth, BDO's Managing Partner, and Mr Riaz Ali, a partner in BDO Trinity, to the affidavit evidence of Mr Casey Laffey, a partner in the law firm Reed Smith LLP, and Mr Morrison and conclude that neither BDO Trinity nor Schwartz did any work at all in the course of any of the four audits. Mr Chapman QC for BDO Cayman also severely criticised the way in which the fraud and wilful default allegations were pleaded in the Amended Complaint.

19. Argyle's case was that the Dispute Resolution Clause had no application because: (i) Argyle was a "*consumer*" for the purposes of section 8 of the ***Arbitration Law, 2012*** and had not by a separate agreement certified that it had agreed to be bound by the Dispute Resolution Clause; (ii) the obligation to arbitrate was subject to a condition precedent that

there be a mediation and no such mediation had been undertaken; and (iii) the Dispute Resolution Clause had not been adopted by the JOLs as required by section 7 of the ***Arbitration Law***. All three of these contentions were roundly rejected by the judge and were not relied on in the appeal.

20. Argyle also argued that even if the Dispute Resolution Clause applied to the claim against BDO Cayman, there were good reasons why it should not be enforced since there existed no grounds for restraining the New York claims against the Affiliates and the interests of justice were best served with there being one set of proceedings against all the New York Defendants in the New York Court. This contention too was rejected by the judge and understandably formed no part of Argyle's case on appeal in light of Argyle's acceptance of the judge's anti-suit injunction restraining the continuation of the New York proceedings against BDO Cayman.

21. In respect of the 2010 audit, Argyle submitted that the Assignment Clause was not engaged because there was no evidence of an assignment to an "*independent affiliate*" or that the Affiliates were "*permitted assignees*". Further, a covenant not to sue the Affiliates in court proceedings could not be spelled out of the Assignment Clause. As for the 2011, 2012 and 2013 audits, the claims in the New York proceedings against the Affiliates fell squarely within the Sole Recourse Clause carve-out.

22. It was also argued on behalf of Argyle that the court lacked jurisdiction to grant any injunction against Argyle because it had not been made a party to the Originating Summons proceedings.

The relevant findings of the judge

23. The judge correctly identified section 11 of the Grand Court Law (2015 Revision) and section 37 (1) of the English Senior Courts Act 1981 as providing the jurisdiction of the

Grand Court to grant the anti-suit injunction applied for. Citing the decision of Cresswell J in *Origami Partners III LP v Pursuit Capital Partners (Cayman) Limited et al* [2012 (2) CILR 191], the *Angelic Grace* [1995] 1 Lloyd's Rep 87 and *Donohue v Armco Inc* & Ors [2001] UKHL 64, he also correctly held that the jurisdiction was discretionary and would not be exercised in favour of an injunction as a matter of course but if proceedings were started in breach of a binding arbitration clause or exclusive jurisdiction clause the court would ordinarily enforce the contract between the parties unless there were strong reasons for not doing so. (Paras 39 – 45).

24. The judge rejected Argyle's submission that BDO Cayman's application for an injunction must fail *in limine* because Argyle had not been made a party to the Originating Summons proceedings. In his view (para 51) the court had jurisdiction to grant the order *in personam* and the way in which the matter had proceeded to an *inter partes* hearing had been effectively agreed. He concluded (para 52) that there had not been any material non-compliance with the Grand Court Rules or unfairness resulting from the procedure adopted and, were it necessary to do so, he would have allowed the defect to be cured under GCR Order 2 Rule 1 applying the Overriding Objective and giving a liberal interpretation to the Rules to secure the most expeditious and least expensive determination. Ms. Clare Stanley QC for Argyle took the same jurisdiction point in the appeal. I deal with the point at the end of this judgment.

25. The judge reviewed the affidavit evidence on the question whether BDO USA and Schwartz had had any involvement in the four audits. Mr. Trenouth deposed that to the best of his knowledge, information and belief, none of the audit work relating to the Engagement Letters was performed by BDO USA or Schwartz, neither of which had any role in relation to the audit of Argyle during the audit years covered by the Engagement Letters. In reply, Mr. Laffey put forward what he described as "*compelling evidence*" that showed BDO USA and Schwartz played "*crucial roles*" in relation to the audits. This evidence consisted of: (i) a statement by Mr. Laffey that during the relevant period the books and records of RMP and ECB were located in Long Island, New York, which meant

that the New York Defendants were required to seek the assistance of BDO USA and Schwartz, based as they were in New York; (ii) statements made by Mr. Barrick that BDO USA and Schwartz were involved in the audits; and (iii) an email from Ms. Sue-Ann Pierre using BDO USA's email address sent on 8 April 2015 during the 2013 audit and some emails from Mr Riaz Ali of BDO Trinity sent in 2016 in which references are made to "*BDO NY*" and Schwartz.

26. Mr Andrew Morrison, one of the JOLs, baldly stated that BDO Trinity, BDO USA and Schwartz did act as *de facto* auditors of Argyle.

27. It was Mr Ali's evidence that he was personally involved in all four of the relevant audits and neither BDO USA nor Schwartz had any involvement in any of those audits. It was he who conducted the site visits to the combined offices of RMP and ECB for the 2010 and 2011 audits and Sue-Ann Pierre of BDO Trinity conducted the site visit for the 2014 audit. No site visits to RMP and ECB were conducted for the 2012 and 2013 audits as the necessary information was obtained by email. As to Ms. Pierre's email of 8 April 2015, this was when she was on secondment to BDO USA's Los Angeles Office during which time she remained a BDO Trinity employee doing work on behalf of that firm as well as work as a secondee for BDO USA and she was in the habit of forwarding emails received in her BDO Trinity account relating to her BDO Trinity work to her BDO USA account, and then responding from that account, often with a "*cc*" or "*bcc*" to her BDO Trinity account. The email of 8 April 2015 is an example of this. As to the emails sent by Mr Ali in 2016, these were sent after Mr Ali had first been introduced to Schwartz on 1 March 2016 and all related to work performed in relation to the 2014 audit year which is not an audit sued on in the New York proceedings.

28. In paragraph 61, the judge found the evidence of Mr Laffey to be thin and unconvincing. He preferred the evidence of Mr. Ali and accepted Mr. Ali's conclusion that BDO USA and Schwartz had no relevant involvement. In paragraph 62, he declared that he accepted the evidence of Mr. Trenouth and Mr Ali that BDO USA and Schwartz had played no part

in the four audits. He preferred the evidence of Mr. Trenouth and Mr Ali to that of Mr. Laffey because, unlike Mr. Laffey, they had direct and personal knowledge of the relevant audits.

29. In paragraph 83, the judge held that on a proper construction of the 4 key clauses, the obligation on Argyle to arbitrate with BDO Cayman alone remained where a third party was engaged to assist with the performance of the audit. BDO Cayman remained solely liable for its own performance and that of its assignee, and Argyle agreed not to bring claims or proceedings of any nature whatsoever against any assignee.

30. In paragraphs 87, 88, 89 and 90 the judge said:

> "*87. As to the submission that the clauses have no application because there is a claim founded on an allegation of fraud or wilful misconduct or other liability which cannot be excluded under applicable laws in New York, I am not satisfied that this would be a reason to deprive the clauses of effect. It is of course the case that I am in no position to finally determine the merits of the claims made in the New York proceedings on this application, were they to proceed to trial because they are highly facts specific. However, for the exclusion to apply, the claims should contain the bare facts which support them to show that they are reasonably arguable. Otherwise at one extreme fanciful claims could be brought to avoid the effect of the clause.*
>
> *88. I am also conscious that in forming any views on the way the claims are pleaded in New York I should not approach the case solely from the lens of Cayman and/or English law without regard to the fact that New York may well allow a more liberal approach to pleading, and the taking of evidence and discovery to support allegations which might not be able to be so readily made in Cayman or*

England without sufficient evidence – see Elektrim SA v Vivendi Holdings [2009] 1 Lloyd's Rep 59.

89. *However, I am entitled to form a view in the round on the New York proceedings and I have formed a view on the evidence before me. Insofar as they plead fraud or wilful misconduct they are weak claims. Further, I bear in mind in this regard that they have been brought in the face of arbitration and exclusive jurisdiction agreements and in circumstances where I am asked to exercise my discretion to allow the New York proceedings to nevertheless continue on the basis that there are strong reasons to do so.*

90. *On the evidence before me I have not seen material that would need to be adduced in order to persuade an English or Cayman court to find that fraud or wilful misconduct by a reputable professional international firm (in the ways alleged in the Amended Complaint and with the motivations suggested), would be likely to be proven. Suffice it to say that I find the way the case has been put in New York against BDO Cayman and the other entities is inherently implausible. Broad assertions have been made with no particularity or supporting evidence and no specific collusion by the auditors with anyone else has been pleaded. Neither has cogent evidence of fraud been pleaded, and the motivations alleged are inherently implausible."*

31. In paragraphs 95 and 100, the judge said:

"95. *Ms. Stanley QC maintained that the claims against the other entities should continue even if the claims against BDO Cayman were prevented from continuing by reason of the arbitration clause. Moreover, she submitted that if Argyle were prevented from suing*

them in New York they would not be able to sue them anywhere BDO USA and Schwartz have not been shown to have had any involvement in the audits. As for BDO Trinity, it is an affiliate of BDO Cayman and any work performed was delegated to it. Under the Engagement Letters BDO Cayman is solely responsible to Argyle for the services provided by BDO Trinity and any claim relating to the work performed by BDO Trinity on a delegated basis must be pursued by Argyle through a Cayman Islands arbitration against BDO Cayman in accordance with the agreed provisions. The claims against BDO Cayman and the other entities should not continue in the New York proceedings."

"100. The New York proceedings breach the arbitration and exclusive jurisdiction agreements and the Sole Recourse clauses contained in the Engagement Letters between BDO Cayman and Argyle. The forum in which Argyle is required to pursue any claims arising under or in relation to the Engagement Letters is by arbitration against BDO Cayman alone. To the extent that there is any dispute about the meaning of the terms of those agreements or as to the applicability of those terms, if not resolved by the Cayman arbitration tribunal, it is to be resolved exclusively by this court and in accordance with Cayman law."

The judge's finding that BDO USA and Schwartz had no involvement in the audits

32. It was submitted by Ms. Stanley that in finding that BDO USA and Schwartz had played no part in the four audits, the judge was making a summary finding of fact equivalent to striking out the claims against those parties in the New York proceedings, and in so doing,

the judge was in error. In my judgment, Ms. Stanley's submission is well founded. Whilst it may have been appropriate for the judge to consider in the round the strength of Argyle's claims against BDO USA and Schwartz when weighing Ms. Stanley's submission that, even if Argyle were contractually bound to proceed against BDO Cayman in a Cayman arbitration, the New York proceedings should be allowed to proceed as a matter of discretion, it was not open to him to make the summary finding of fact that he did, even if Messrs. Trenouth and Ali were clear winners on points in the evidence contest. Trial of an issue on affidavits without the benefit of discovery and cross-examination in interlocutory proceedings such as were before the judge is almost never appropriate, and it was not appropriate in the instant case. As Lawrence Collins L J (as he then was) said in *Elektrim SA v Vivendi Holdings 1 Corporation et al* [2009] 1 Lloyd's Law Rep 59 at para 84, an application for an anti-suit injunction should not be used as a means of obtaining a summary determination of the foreign claims in an English court, particularly where (as in the United States) material may turn up on discovery which may support a case which otherwise appears unlikely to succeed: see *British Airways Board v Laker Airways Ltd* [1985] AC 58, 86 and *Midland Bank plc v Laker Airways Ltd* [1986] QB 689, 700.

33. The significance of this Court's acceptance of Ms. Stanley's submission depends on whether the judge's finding was a direct part of his non-discretionary reasoning for granting the injunction or whether it went to the above-mentioned issue of discretion. BDO Cayman's case was based full square on the proposition that the New York proceedings were in breach of contract. It was not submitted that an injunction should be granted on the basis that the New York proceedings were vexatious and oppressive on the ground, *inter alia*, that it was clear on the evidence that BDO USA and Schwartz did not participate in the audits. Instead, BDO Cayman's invitation to the judge to find that BDO USA and Schwartz played no part in the audits was directed at Argyle's above-mentioned argument that even if the claim against BDO Cayman were caught by the Dispute Resolution Clause, the Court should nonetheless permit the New York Proceedings to continue in their entirety. This would suggest that the judge's finding of fact went only to Argyle's discretion argument and, in my view, this is how the judge's finding is to be understood. On this basis, the judge's error does not irredeemably vitiate his decision to grant the anti-

suit injunction and I now turn to consider Argyle's case that the judge erred in concluding that the New York proceedings were in breach of contract.

The findings in respect of the 2011, 2012 and 2013 audits.

34. Under the Sole Recourse Clause, Argyle agrees to "*bring no claims or proceedings of any nature whatsoever (whether in contract, tort, breach of statutory duty or otherwise) against any ... BDO entities ... or other member firms of the International BDO network in any way arising from, in respect of or in connection with the services of this agreement*". As Ms. Stanley accepted, this agreement is a clear "*covenant not to sue*" and in my judgment it is a covenant not to sue BDO Trinity, BDO USA and Schwartz (the Affiliates) as these entities are all members of the international network of BDO entities under the governance of BDO International Ltd (see paragraph 72 of Mr Laffey's affidavit) and are thus "*member firms of the International BDO network*".

35. The covenant not to sue the Affiliates is, of course, subject to the carve-out. It follows that whether Argyle is contractually free to sue the Affiliates in the New York proceedings raises the following issues: (i) are the New York proceedings against the Affiliates a "*claim or proceeding founded on an allegation of fraud or wilful misconduct or other liability that cannot be excluded under the applicable laws*"? and (ii) if so, are the New York proceedings brought in breach of the Exclusive Jurisdiction Clause?

36. It is regrettably rather unclear whether the judge held that the claims against the Affiliates in the New York proceedings did fall within the carve-out. The first two sentences of paragraph 87 of his judgment appear to say that they did not, but the rest of that paragraph and what is said in paragraphs 88 – 90 seem to be saying no more than that the pleading of the fraud and wilful misconduct claims in the Amended Complaint did not satisfy the English and Cayman rules of pleading and were inherently implausible.

37. In my opinion, if the judge did indeed hold that the claims of wilful misconduct and fraudulent conscious concealment set out in paragraphs 221 – 242 of the Amended Complaint were not covered by the carve-out, he was in error. I say this because it is manifest that these claims are founded on an allegation of fraud or wilful misconduct within the wording of the carve-out. They may not comply with the pleading requirements in England and the Cayman Islands, but Mr. Laffey deposed in his affidavit that they complied with New York's pleading requirements and there was no admissible evidence to the contrary.

38. Given that the claims in wilful misconduct and fraud against the Affiliates in the New York proceedings are within the carve-out, is the bringing of the claims in New York a breach of the Exclusive Jurisdiction Clause?

39. It is regrettable that the judge did not make a clearly expressed finding as to whether the bringing of the claims against the Affiliates in New York in respect of the 2011, 2012 and 2013 audits was a breach of the Exclusive Jurisdiction Clause, but I conclude from the last sentence of paragraph 100 of the judgment that he did. This was certainly the submission of Mr. Chapman for BDO Cayman who went on to argue that, notwithstanding that the Affiliates were not parties to the contract contained in the Engagement Letters and would be free to contest the jurisdiction of the Cayman Islands Court if sued here, the New York claims against them breached the Exclusive Jurisdiction Clause.

40. Ms. Stanley submitted that, if the judge was here deciding that the New York claims against the Affiliates were in breach of the Exclusive Jurisdiction Clause, he had erroneously construed the clause. She cited a trilogy of cases decided in the Commercial Court of England and Wales in each of which there is a discussion of the approach the court should take when considering whether an exclusive jurisdiction clause restrains a party to the clause from suing third parties in some other jurisdiction. Most unfortunately, neither side cited these authorities to the judge.

41. In ***Credit Suisse First Boston (Europe) Ltd v MLC (Bermuda) Ltd*** [1999] 1 All ER (Comm) 237 the Claimant ("CS Europe") sued the Defendant ("MLC") in the Commercial Court seeking damages for the breach of a global master repurchase agreement ("the GMRA") in respect of an alleged failure to repurchase certain Russian bond notes. The GMRA contained a non-exclusive English Courts jurisdiction clause.

42. Clause 5.2 of the initial sale and purchase agreement for the notes provided:

> *"5.2 The courts of England are to have jurisdiction to settle any disputes which may arise out of or in connection with this Agreement ... The Purchaser irrevocably submits to the jurisdiction of such courts ... This submission is made for the benefit of the Seller and shall not limit the right of the Seller to take proceedings in any other court of competent jurisdiction ..."*

43. Shortly after the London proceedings were begun, MLC started proceedings in New York against CS Europe and two other parties, CS US and CS Switzerland, alleging violations of the US Securities Act 1934 based on alleged misrepresentation and non-disclosure both in connection with the initial sale of the notes and in connection with the after-sale relationship at a time when the repurchase transactions were in effect. Relying in particular on clause 5.2 in the initial sale and purchase agreement, CS Europe sought an anti-suit injunction restraining MLC from continuing with the New York proceedings not only against itself but also against its affiliates, CS US and CS Switzerland.

44. CS Europe contended that clause 5.2 of the initial sale and purchase agreement obliged MLC not to bring proceedings in New York against CS Europe and also CS US and CS Switzerland. Rix J (as he then was) rejected this contention. He held (at p. 252) that it was far-fetched to regard the words "*any dispute*" in clause 5.2 as covering disputes between MLC and anyone other than MLC's counterparty under the initial purchase agreements,

namely, CS Europe. Clause 5.2 was part of a bilateral agreement between a seller and buyer, and the disputes to which such an agreement may give rise are prima facie bilateral disputes. It was axiomatic in the absence of plain language to the contrary that a contract seeks neither to benefit nor to prejudice non-parties: even where such plain language is used, it was black-letter law that the non-party can himself neither take the benefit nor suffer the burden of the contract. There was nothing in the express language of the clause to suggest that it was intended to bind MLC as to where it was entitled to sue such affiliates.

45. In ***Morgan Stanley & Co International plc v China Haisheng Juice Holdings Co Ltd*** [2009] EWHC 2409 (Comm), the claimant bank ("MSIP") sought to enforce an English courts exclusive jurisdiction clause contained in a contract between itself and the Defendant ("CH") by restraining proceedings in China begun by CH against MSIP and its Hong Kong affiliate (MSAL). The exclusive jurisdiction clause (Clause 13) applied to "*any suit, action or proceedings relating to any dispute arising out of or in connection with [the Agreement]*". Clause 13 (b) (ii) provided that an Affiliate could enforce rights expressly granted to it under the Agreement, subject to certain conditions. Under, respectively, Clauses 13 (c) and (d), each party irrevocably appointed a process agent, consented to service given in the manner set out elsewhere in the Agreement and waived all immunity on the ground of sovereignty.

46. Relying on Lord Collins' observation in ***UBS AG v HSH Nordbank AG*** [2009] EWCA Civ 585 [82] that jurisdiction clauses should be construed widely and generously, it was argued by MSIP that the claims against MSAL were covered by the words "*any suit, action or proceedings relating to any dispute arising out of or in connection with this Agreement*" in the jurisdiction clause.

47. Teare J held that the jurisdiction clause did not apply to the claims made by CH against a non-party to the Agreement. The key question was whether clause 13 would be reasonably understood to mean that MSIP and CH promised each other that claims arising out of or in connection with the Agreement would be brought in England regardless of whether the

claims were against a party or a non-party to the Agreement [para 21]. Clause 13 (b) (i) had to be construed in the context of the whole Agreement, including in particular the whole of Clause 13. The fact that the parties dealt expressly with Third Party Rights in that clause but did not expressly deal with claims against third parties, supported the suggestion that the parties were not addressing claims against third parties in clause 13. Further, the parties as rational businessmen would have to take into account that there would be a considerable imbalance between a party and a non-party if claims by CH against a non-party were subject to the jurisdiction clause. The imbalance was this: (i) MSAL (a non-party) was not bound to sue CH in England whereas CH would be bound to sue MSAL in that jurisdiction; and (ii) there was no guarantee that the English Court would have jurisdiction over MSAL which had not submitted to the English Court.

48. In ***Team Y & R Holdings Hong Kong Limited v Ghossoub*** [2017] EWHC 2401 (Comm), a sale & purchase agreement ("SPA") to which the parties were Cavendish Square Holding BV ("Cavendish") (by novation) and, inter alios, the Defendant, contained an English Courts exclusive jurisdiction clause (clause 23.2). Relying on this clause, Cavendish and four other Claimants which were not parties to the SPA, applied in the Commercial Court for an anti-suit injunction restraining proceedings brought against them in Hong Kong alleging that the affairs of Team Y & R Holdings Hong Kong Ltd ("TYRH") had been conducted in an unfairly prejudicial manner. In dealing with the question whether the exclusive jurisdiction clause could be enforced in relation to proceedings brought against persons who were not parties to the SPA, the judge, Mr Laurence Rabinowitz QC, sitting as a Deputy High Court Judge, made the following observations in the light of a number of authorities including ***Credit Suisse*** and ***Morgan Stanley***:

(1) Whether an exclusive jurisdiction clause should be understood to oblige a contractual party to bring claims relating to the contract in the chosen forum even if the claim is one against a non-contracting party, requires a consideration of the contract as a whole including not just the language used in the exclusive jurisdiction clause but also all other terms in the contract that may shed light on what the parties are likely to have intended.

(2) The principle that rational businessmen are likely to have intended that all disputes arising out of or connected with the relationship into which they had entered would be decided by the same court cannot apply with the same force when considering claims brought by or against non-contracting third parties. More particularly, whilst it is well established that the language of an exclusive jurisdiction clause is to be interpreted in a wide and generous manner, the starting position in considering whether disputes involving a non-contracting third party might come within the scope of the clause must be that, absent plain language to the contrary, the contracting parties are likely to have intended neither to benefit nor prejudice non-contracting third parties.

(3) Where it is clear from the express terms that the contracting parties have turned their minds to the position of third parties and more particularly whether such third parties are to benefit or bear the burden of rights and obligations agreed between the contracting parties, the absence of any express language in the exclusive jurisdiction clause that provides for the application of that term in relation to claims brought by or against third parties may be an indication that the clause was not intended either to benefit or prejudice such third parties.

(4) Where the exclusive jurisdiction clause is silent on the question, the fact that any provision in the contract dealing with third parties indicates an intention that third parties should not acquire rights as against the contracting parties by virtue of the contract, may be a further indication that the clause was not intended either to benefit or prejudice such third parties.

(5) Where a particular interpretation of the exclusive jurisdiction clause produces a material contractual imbalance because for example it results in one party to a dispute relating to the contract being subjected to an obligation to bring proceedings in the chosen jurisdiction in circumstances where the other party to the dispute is not similarly obliged, or where that interpretation would require a claim against a non-contracting third party to be brought in the agreed jurisdiction even where the chosen forum may not actually have jurisdiction over such a claim against that party, this too may be an indication that the clause was not intended to so apply

because such a result is unlikely to be what the contracting parties as rational businessmen would have agreed.

(6) The fact that there is nothing in the contract that might indicate a rational limit in terms of the identity of non-contracting third parties whose rights and interests might be affected by the application of an exclusive jurisdiction clause might provide a further indication that the clause was only intended to affect the rights and interests of the contracting parties.

(7) It follows that where contracting parties intend that any claim relating to the contract be subject to the exclusive jurisdiction clause even where it is one brought by or against a non-contracting party, clear words should be used expressly setting out this intention, the parties to be affected and, if relevant, the manner in which submission of any non-contracting parties to the jurisdiction of the chosen court is to be ensured.

49. Mr Chapman drew the Court's attention to the decision of the New South Wales Court of Appeal in ***Global Partners Fund Limited v Babcock & Brown Limited (in liq)[2010] & Ors*** (79 ACSR 383) where it was held that an English Courts exclusive jurisdiction clause in a limited partnership agreement ("the LPA") did require a party to the LPA to bring proceedings against three non-party affiliates in England rather than in New South Wales. The LPA was part of an investment scheme ("the Partnership") with a General Partner and a number of investor Limited Partners. Under the exclusive jurisdiction clause, all parties to the LPA agreed that the Courts of England should have exclusive jurisdiction to settle "*any disputes which may arise out of or in connection with [the LPA] or the Private Placement Memorandum or the acquisition of Commitments [funds advanced to the Partnership by investors who become Limited Partners] whether or not governed by the laws of England ...*".

50. The application before the NSWCA was for leave to appeal against an order staying proceedings brought in the trial court of the NSW Supreme Court against Babcock & Brown Limited ("BBL"), Babcock & Brown International Pty Limited ("BBI"), Babcock & Brown LP ("BBUS") and BBGP Managing General Partner Ltd ("BBMGP"). Whilst

BBMGP was a party to the LPA, none of the other respondents were parties, but they were all part of the same corporate group. The Claimant ("GPL") had become the Managing General Partner of the Partnership in place of BBMGP and sued BBL and BBI, BBUS and BBMGP for losses allegedly suffered by the Partnership on an investment ("the Coinmach transaction") made prior to GPL becoming the Managing General Partner. Shortly after the NSW proceedings were begun, BBMPG, BBI and BBUS commenced proceedings in the English High Court against GPF to recover management fees and compensation for termination of its appointment as Managing General Partner and for a negative declaration that they had not breached any duties owed, and had no liability to the Partnership and GPF, in respect of the Coinmach transaction. By commencing the English proceedings, BBMPG, BBI and BBUS submitted to the jurisdiction of the English courts.

51. The lead judgment on the application for leave was given by Chief Justice Spigelman who, at an early point in his judgment, expressed the view that there were overwhelming commercial and policy reasons to support the proposition that only one court should determine the whole of the dispute between the parties. He also noted that the LPA envisages that members of the BB Group will be involved in making decisions with respect to the Partnership's investments. Giving the exclusive jurisdiction clause, including in particular the words "*in connection with*", its ordinary and natural meaning, Spigelman CJ held that it encompassed the full range of proceedings that could be launched in the broad range of jurisdictions from which investors could come with respect to the original investment, as well as the conduct of the affairs of the Partnership. He went on to say that this natural and ordinary meaning of the words was in accord with the necessity to interpret exclusive jurisdiction clauses in the same liberal manner as is authoritatively established with respect to arbitration clauses.

52. I turn to construe the Exclusive Jurisdiction Clause and do so gratefully adopting the observations of Mr. Rabinowitz QC in ***Team Y & R Holdings Hong Kong Limited***. In my judgment, notwithstanding the breadth that results from the words "*any claim or matter arising from this Agreement*" and the problems that arise from the same issues being

litigated in two different jurisdictions, the clause does not extend to claims brought by Argyle against third parties pursuant to the carve-out in the Sole Recourse Clause. Plainly, the intended effect of the carve-out was that Argyle should be free to bring claims that fall within the carve-out in judicial rather than arbitration proceedings, since the Dispute Resolution Clause can apply only to claims by or against the parties to the Engagement Letters. If it had been the parties' intention that the Exclusive Jurisdiction Clause should apply to such judicial claims, one would have expected this to be expressly provided for in the Exclusive Jurisdiction Clause itself, or in the carve-out, but there is no such provision. On the contrary, the carve-out refers to "*applicable laws*" which strongly suggests that claims in jurisdictions other than the Cayman Islands are contemplated. Further, there is no machinery in the Engagement Letters that would result in a third party sued under the carve-out submitting to the jurisdiction of the Cayman Courts, an omission which could render the carve-out right to sue of little, if any, value. As Ms. Stanley submitted, proceedings in New York are the only way in which Argyle can obtain enforceable judgments against the Affiliates BDO USA and Schwartz.

53. Mr. Chapman argued that Argyle, in agreeing to the Exclusive Jurisdiction Clause, took the risk that a third party sued under the carve-out would not be subject to the jurisdiction of the Cayman Islands' Courts. I reject this contention. I cannot accept that it was the contractual intention of the parties that the right to sue under the carve-out should be such a fragile, vulnerable right. The lack of machinery dealing with the submission by the respondents to the jurisdiction of the English courts in ***Babcock & Brown Limited*** does not seem to have been argued in that case, perhaps because the risk referred to by Mr Chapman was not present because all of the parties to the NSW proceedings except BBL had submitted to the jurisdiction of the English Courts.

54. It follows that there was no sustainable basis for restraining Argyle from continuing the New York proceedings against the Affiliates in respect of the 2011, 2012 and 2013 audits.

The finding in respect of the 2010 audit

55. The judge made no separate finding in respect of this audit, the Engagement Letter for which did not contain the Sole Recourse Clause. Instead, the judge's finding was wrapped up in his conclusion in paragraph 100 of the judgment.

56. Ms. Stanley submitted that the judge erred in finding that the claims against the Affiliates in New York in respect of the 2010 audit were in breach of the Engagement Letter. I agree.

57. It was for BDO Cayman to establish that, under the Assignment Clause, Argyle was contractually obliged to litigate any claim against the Affiliates pursuant to the Dispute Resolution Clause or that otherwise Argyle had entered into an enforceable covenant not to sue the Affiliates.

58. Assuming for the moment that an assignment was made to the Affiliates as contemplated by the Assignment Clause, in my judgment, on the true construction of the clause, the "*applicable terms and conditions of the [Engagement Letter]*" would only apply to Affiliates as Permitted Assignees once each thereof had agreed to be bound by those applicable terms and conditions. As the applicant for an anti-suit injunction which in practice would be permanent, BDO Cayman had to establish "*a high degree of probability*" that its case was made out, see ***Bankers Trust Co v PT Jakarta International Hotels & Development*** [1999] 1 Lloyd's Rep 910 at 913 and ***Midgulf International Ltd v Groupe Chemiche Tunisien*** [2009] EWHC 963 (Comm) at [36]. However, BDO Cayman produced no evidence at all that the Affiliates had agreed to be bound by the applicable terms and conditions. Indeed, they produced no evidence that there had even been an "*assignment*" of its rights to perform a portion of the services described in the 2010 Engagement Letter in accordance with the first sentence of the Assignment Clause. Instead, BDO Cayman's evidence was that BDO USA and Schwartz played no part in any of the four audits and BDO Trinity was engaged to assist with the provision of the audit services to Argyle pursuant to which "*arrangement*" BDO Trinity had primary conduct of the audits

subject to BDO Cayman being responsible for finalising the audited financial statements and issuing the audit opinion (see para 15 of Mr Ali's affidavit).

59. Mr. Chapman sought to rely on paragraph 219 of the Amended Complaint which he maintained constituted a positive averment that there had been "*assignments*" to the Affiliates within the Assignment Clause. I reject this submission. Paragraph 219 pleads that the New York Defendants breached obligations imposed by the International Ethics Standard Board's Code of Ethics for Accountants by, among other things, failing properly to supervise affiliate entities to whom BDO Cayman and BDO Trinity "*assigned*" work for the audits. In my view, the word "*assigned*" in paragraph 219 does not denote an assignment of rights to perform a portion of the services described in the Engagement Letter, but rather the delegation of parts of the audit work to BDO USA and Schwartz.

60. Is Argyle the subject of a covenant not to sue third parties by reason of the Assignment Clause apart from being bound by the applicable terms and conditions if they agree to be so bound? The answer in my judgment is plainly "*no*". The scheme of the clause is that Permitted Assignees will be brought within the Dispute Resolution Clause once they have agreed to be bound by the applicable terms and conditions of the agreement. There is nothing in the wording that constitutes a covenant not to sue in addition to the provisions concerned with Permitted Assignees being bound by the applicable terms and conditions.

61. It follows that there was no basis for concluding that the claims against the Affiliates in the New York proceedings were in breach of the Assignment Clause.

62. Finally, are the claims against the Affiliates in respect of the 2010 audit covered by the Exclusive Jurisdiction Clause? In my judgment, notwithstanding the absence of the Sole Recourse Clause (including the carve-out), they are not. Adopting the reasoning of Rix J in ***Credit Suisse***, the Exclusive Jurisdiction Clause was part of a bilateral agreement between an auditing firm and its client and the claims arising from that agreement are prima

facie claims made by and against the parties to the agreement. If claims against third parties to whom audit work is delegated by BDO Cayman are to be within the clause, clear wording to that effect would be necessary. There would also be the imbalance noted by Teare J in ***Morgan Stanley & Co*** if the clause did apply to claims against third parties. In particular, by reason of the absence of any machinery that would ensure that the third party was subject to the jurisdiction of the courts of the Cayman Islands.

63. It follows that, just as is the case in respect of the New York claims against the Affiliates for the 2011, 2012 and 2013 audits, so also is there no sustainable basis for the injunction restraining the continuation of the New York proceedings against the Affiliates in respect of the 2010 audit. I would therefore propose that the appeal be allowed in its entirety.

The jurisdiction point

64. Since that part of the judge's order restraining the New York proceedings against the Affiliates must be set aside and Argyle do not challenge the injunction restraining the continuation of the New York proceedings against BDO Cayman, it is unnecessary to deal with Ms. Stanley's submission that there was no jurisdiction to issue the injunction because Argyle was not made a party to the Originating Summons proceedings. Suffice it to say that I think that Argyle should have been made a party to the proceedings prior to the hearing before the judge and if the appeal had been unsuccessful, BDO Cayman would have had to join Argyle in as a party before the order of this Court refusing the appeal was perfected.

Sir Alan Moses, JA

I agree.

The Hon Dennis Morrison JA

I agree.