

3. He objected however, to the relief sought on the second summons and his arguments against were heard; no objection having been raised by Ms. Houghton notwithstanding the ex parte nature of the second summons.

BACKGROUND

4. In coming to my decision on the second summons, it is necessary that I set out a summary of the background circumstances.
5. The dispute in the action arises out of a transfer of shares held in the 4th Defendant (“Opus”), a nascent Cayman Islands investment fund company which has not yet traded. This transfer took place from the Plaintiff, Terra Nex Asset Management (“TNAM”), to the 2nd Defendant “Mr. Karch”.
6. TNAM, (itself a Cayman Islands exempt company through its sole director and beneficial owner, Mr. David Heimhofer), asserts that the transfer of shares in Opus to Mr. Karch was obtained by breach of fiduciary duty on the part of the former 1st Defendant (Mr. Rene Bliggendorfer) acting in concert with Mr. Karch.
7. At the time when this breach of fiduciary duty and transfer are alleged to have occurred – between the 2nd and 9th November 2007 – Mr. Bliggendorfer and Mr. Karch were the directors of Opus.
8. The question of Mr. Karch’s entitlement to the shares in Opus arises against the background of the following transactions (as averred by TNAM in the Statement of Claim).
9. On 5th October 2007, Opus entered into an investment management agreement (“the IMA”) with TNAM. On the same day TNAM entered into a management

agreement (“the MA”) with the proposed third party Terra Nex Fund Advisors WLL (“TNFA”), a Bahraini company.

10. The MA was also executed by Opus. Both agreements related to the provision by Opus of investment management services to prospective investors in the Middle East (Bahrain in particular) on behalf of TNAM and/or TNFA.

11. At a meeting of the Board of Directors of Opus held on 2nd November 2007 (attended by Mr. Bliggendorfer and Mr. Karch) it was resolved, inter alia, that:

(i) *“the current contract (the MA) with TNFA is not valid at least until a clear fully licensed entity is in place”;*

(ii) *TNAM should “give back” the shares in Opus to Mr. Karch “otherwise investors and Monetary Authorities have to be informed about current situation.”*

12. TNAM (through Mr. Heimhofer) asserts that these resolutions were taken on spurious and fallacious grounds. In the case of the first resolution, TNAM asserts in the Statement of Claim (paragraph 7) – that neither TNFA, nor, in the premises TNAM, required to be licensed under Cayman Islands law. Alternatively, if, which is denied, TNAM required to be licensed, the situation could have easily been rectified by (presumably Opus) resolving to replace the IMA and the MA with an investment management agreement entered into directly between Opus and TNFA.

13. As to the second resolution, it is asserted that there was no logical or any other connection between the licensing requirements for TNFA or TNAM as the investment manager of Opus, and the identity of the holder of the shares. That, in

reality, the passing of the resolutions was the opening shot in a campaign orchestrated by Mr. Karch, with the co-operation of Dr. Bliggensdorfer, wrongfully to deprive TNAM of the shares and thereby obtain the benefit of management fees payable by Opus.

14. Mr. Karch, for his part, denies the allegation raised by TNAM per Mr. Heimhofer. According to his affidavit, Mr. Karch will assert that the shares were transferred to him pursuant to binding re-transfer agreement which Mr. Heimhofer entered into with him, with the benefit of legal advice and after quite lengthy negotiations between the various parties including himself, Dr. Bliggensdorfer and Mr. Heimhofer. That this agreement (tendered in evidence before me) was intended to reflect the situation which had arisen when the business venture (the promotion of Opus as a fund investment manager) which Mr. Heimhofer and he had agreed to enter into, could not get off the ground because Mr. Heimhofer was unable to secure the necessary operating licences for his companies in Bahrain (rather than in Cayman) without which he could not act as an investment manager in Bahrain. Furthermore, asserts Mr. Karch, the transaction was subject to a number of conditions, which dealt with the "re-transfer" of the shares in certain circumstances. Mr. Karch exhibits a series of agreements upon which he relies annexed to the proposed Amended Defence and Counterclaim, for which leave was granted pursuant to his first Summons.
15. In the Amended Defence and Counterclaim, Mr. Karch seeks a declaration that the putative share transfers and the re-transfer agreement are binding and that he

is entitled to keep the shares, primarily because the requirement of licensing in Bahrain as a condition to re-transfer of the shares to TNAM, was never fulfilled.

16. However, he also points to the provision of the re-transfer agreement which appears on its face to require him, in the events which have allegedly arisen allowing him to keep the shares, to re-imburse to TFNA the sum of USD100,000 (referred to in Clause 4 of the re-transfer agreement as being USD25,000 lawyers costs for setup and USD75,000 “upfront” fees).
17. Further, Mr. Karch asserts that, as against this sum of USD100,000 which he acknowledges would be owed (on his own case) to TNFA, he is however entitled to set off certain sums due and owing to him by TNFA (said to be for travel expenses and other out of pockets related to professional services provided to TNFA) and that it is in respect of those sums that he seeks to claim against and to bring TNFA into these proceedings by way of the Third Party Notice. He also, of course, relies on the fact that TNFA appears to be an essential member of the *dramatis personae* of the case even as it stands.
18. Put another way in terms as argued by Ms. Houghton; it is said that TNFA is a necessary and proper party to these proceedings in order that all the issues in dispute touching and concerning the entitlement to the shares in Opus can be resolved. And this is the basis for the second aspect of the relief sought in her summons; that is: leave to serve the Third Party Notice ex juris upon TNFA, in Bahrain (albeit by service upon attorneys here, on which more below).

THE LAW

19. Leave to serve the Third Party Notice upon TNAF ex juris in Bahrain, requires the sanction of the Court pursuant to two different but, for present purposes, inter-related rules of Court.

20. First, under GCR Order 16 rule 1(c) which provides that:

(1) *Where in any action a defendant who has given notice of intention to defend....*

...

(c) *requires that any question or issue relating to or connected with the original subject matter of the action should be determined not only as between the plaintiff and the defendant but also as between either or both of them and a person not already a party to the action,*

then, subject to paragraph (2), the defendant may issue a notice ...(in this order referred to as a third party notice) containing a statement of the nature of the claim made against him and, as the case may be, either of the nature and grounds of the claim made by him or the question or issue required to be determined.

(2) *A defendant to an action may not issue a third party notice without the leave of the Court unless the action was begun by writ and he issues the notice before serving his defence on the plaintiff."*

21. In this case, leave is required because Mr. Karch had already served his defence to the writ before seeking to issue the Notice and so sub rule (2) applies.

22. The question then becomes whether Mr. Karch satisfies the requirements of Order 16 rule 1(c). (Not rule 1(b) as it seems from his arguments, Mr. Farrow QC had misunderstood Ms. Houghton to be seeking to invoke).

23. In my view the requirements of rule 1(c) are clearly satisfied from the circumstances of this cases as outlined above. It is clear that the issue of whether

the proposed third party (TNFA) under the direction of Mr. Heimhofer, was in breach of a contractual obligation to become licensed in Bahrain and whether that breach entitled Mr. Karch to have re-transferred to him the shares in Opus; is an issue that “relate(s) to or (is) connected with the original subject matter of the action.”

24. This is readily apparent from the Defence (as originally filed) as well as from the Amended Defence and Counterclaim excerpts from which follow and are self-explanatory against the background already given (and using the same acronyms).
25. Paragraph 5 of the Amended Defence:

“As to paragraph 5 [of the Statement of Claim]

....

(b)On its true construction the MA operated to appoint TNFA the agent of TNAM and delegated the provision of investment management services which TNAM was obliged to provide to Opus pursuant to the IMA to TNFA.

(c) ...TNAM was at all material in repudiatory breach of the IMA. Further, TNFA rendered no, alternatively no valuable, service either to TNAM or to Opus, thereby placing TNFA in repudiatory breach of IMA.

....

As to paragraph 7 [(of the Statement of Claim)]

...

(b) ...TNFA (or any investment manger of Opus) required a licence to trade as an investment manager in its country of operation, that is, Bahrain, and it neither held, nor was ever able to obtain, a trading licence entitling it to conduct investment management business on behalf of Opus from the relevant licensing authority in Bahrain. Accordingly, it was unable to perform its duties under the MA (being the obligated duties of TNAM under the IMA) and was accordingly in repudiatory breach of the MA leading to TNAM being in repudiatory breach of the IMA.

...

8. (a) In or about the 4th week of October 2007, the Central Bank of Bahrain confirmed that TNFA was not authorised to conduct investment management business on behalf of Opus in Bahrain. Accordingly the purpose of the arrangement between Mr. Karch and Mr. David Heimhofer (the sole director and beneficial owner of TNAM), namely, the establishment of a fund trading in Bahrain for high net worth Bahrain individuals, could not be accomplished using TNFA as the investment manager.

26. The Defence goes on to aver, inter alia, as the background also suggests; that it had been agreed that Mr. Heimhofer would transfer the shares in Opus to Mr. Karch so that – as the de facto investment manager himself having personal

contact with Bahraini high net work individuals who were ready and keen to invest in Opus – Mr. Karch would have an equity interest in Opus. This led, it is also averred, to Dr. Bliggensdorfer acting on the instructions of Mr. Heimhofer and with the assistance of Mr. Heimhofer’s Cayman Islands and Swiss attorneys, executing the share transfers to Mr. Karch on 9th November 2008.

27. That being the nature of the Amended Defence, the Counterclaim then pleads Mr. Karch’s entitlement to keep the shares, his readiness and willingness to pay to TNFA the sum of USD100,000 (mentioned above) subject to setting off the sums to be awarded to Mr. Karch against TNFA in the proposed third party proceedings (for professional services, travel expenses, etc. also as mentioned above).
28. The proposed Third Party Notice (with the draft Third Party Statement of Claim attached) sets out the claim for those last referenced sums of money, that is: USD46,000 and USD 6,411.25; alternatively damages in like amount, plus interest and costs.
29. Against that background, the proposed Third Party Notice could hardly be described as a quantum leap, unconnected “with the original subject-matter of the action”; such as not being given to determination “not only as between the plaintiff and the defendant but also as between either or both of them and a person not already a party to the action”.
30. Mr. Farrow QC nonetheless argued staunchly against the grant of leave to issue the Third Party Notice. This he was able to do (notwithstanding the initial focus of his arguments on the different O. 16 R 1(b)), because of the similar

requirement of a relationship or connection as between the original cause of action and the proposed Third Party action under O. 10 R. 1(c) as well.

31. He argued against the essential finding of such relationship or connection in the following terms.

“Mr. Karch’s apparent justification in seeking leave to issue the TNP is to set off the sums alleged to be due to him from TNFA against the sum of USD100,00 which he says is due to TNFA: see Karch’s Affidavit, paragraph 10, 12. With respect, this justification is misconceived for the following reasons:

- (i) TNAM is not claiming payment of USD100,000 in the action: on the contrary, it seeks to set aside the transfer of shares which, according to Mr. Karch, were part of an arrangement which also involved the possible payment of that USD100,000.;*
- (ii) TNAM could not sue for the USD100,000 since it is expressed to be payable to TNFA;*
- (iii) TNFA has not sued, and cannot sue, for the USD100,000 since it was not a party to the arrangement;*
- (iv) Mr. Karch cannot, and does not claim to, set off the sums he is allegedly owed by TNFA against any damages awarded by TNAM in the action;*
- (v) Since there is no claim for the USD100,000 in the action, it is difficult to see how Mr. Karch’s set off claim can relate*

*to or be connected with the subject-matter of the action –
assuming, that is, that a set off claim can ever make the
difference between falling within and outwith Limb (a) (sic)
– [meaning Limb (b)] of GCR O.16 R..1.*

32. Mr. Farrow's submissions would be more compelling were Mr. Karch's submissions themselves based upon sub-rule 1(b) as that sub-rule requires the further element, not only of a relationship or connection with the original action, but also – in the further words of sub-rule 1(b) – that the relief sought in the Third Party Notice be “substantially the same as some relief or remedy claimed by the plaintiff in the original action”.
33. That, however, is not the test to be satisfied under sub-rule 1(c). As shown above, sub-rule 1(c) will be satisfied if a defendant in his defence “requires that any question or issue relating to or connected with the original subject matter of the action should be determined not only as between the plaintiff (here TNAM) and the defendant (Mr. Karch) but also as between them and a person not already a party (here TNFA).
34. Too strict or narrow a construction of the Third Party Rules could readily defeat their objective which are explained in the 1999 Edition of the Rules of the Supreme Court at 16/-/1 (at page 274) in these terms:

“The object of the rules of this order are two-fold (1) to prevent multiplicity of actions and to enable the Court to determine disputes between all parties to them in one action, and (2) to prevent the same question from being tried twice with possible different results.”

35. As usual, there is assistance to be found in the case law. In Myers v J.J. Serick Ltd. and Others 1974 1 W.L.R.31; the question was whether the vendor of property who had sold it without notice of the encumbrance on it being disclosed to the purchaser and who was sued by the purchaser for misrepresentation and breach of implied covenant, could issue third party proceedings against his solicitors on the basis that the non-disclosure was the result of their negligence.
36. In granting leave for the issuance of the Third Party proceedings against the solicitors pursuant to the then equivalent English sub-rules 1(b) and (c), Goff J. stated as follows (at p 35 c):

"In my judgment, although similarity of the facts is an important element, it is not necessarily decisive, and the fact that the third party claim is designed to determine who should ultimately bear the loss is also very important. Each case must depend on its own facts and, in my judgment, there is here sufficient similarity to satisfy the second requirement of head (b) of the rule....

Even if I am wrong on head (b), still in my judgment, this case clearly falls within head (c). "

(He then comments on the former wording of head (c), distinguishing its requirements from the modern wording similar to that of GCR O.16 r. 1(c) and continued).

at p. 36 B-C:

"In my judgment, there is here a question or issue relating to or connected with the original subject matter of the action" which,

subject to the Court's undoubted discretion, the defendants are entitled to have determined not only as between the plaintiff and themselves, but also as between themselves and the firm (of solicitors)....”

37. Goff J. then proceeded (at p 36 letter D) to address the further objection raised by the plaintiff before him – as also raised by Mr. Farrow QC here – that there will be hardship on the plaintiff because the case between the defendants and the firm involved much which did not concern him. He concluded, as I do here; that such concerns are to a large extent to be avoided by a direction that the liability of the proposed Third Party (here TNFA) shall be determined after the trial of the main action (here as between TNAM and Mr. Karch).
38. A further cause for concern raised by the plaintiff in the Myers' case before Goff J – that the plaintiff might have somehow been prejudiced by having to face the combined opposition of the defendant and the firm of solicitors – does not arise here. Quite the contrary because, as has been averred, TNFA is very much under the control and direction of one man, Mr. Heimhofer; as is the plaintiff TNAM itself. A circumstance which, clearly in my view, makes this case a *fortiori* one for the issuance of the Third Party Notice.
39. Moreover, the general rule applies to prevent prejudice to a third party. It is that where a defendant issues and serves a notice on another person who is not already a party to the action, the respective parties stand in relation one to another as if the defendant had brought a separate action against that other person: McCheane v Gyles [1902] 1 Ch. 287; Johnson v Ribbins [1977] 1 W.L.R. 1458 at 1464, per

Goff L.J. (C.A.). Thus, for one thing, an unsuccessful defendant will be liable for any additional costs incurred by the plaintiff as a result of the Third Party proceedings as well as of course, the costs of the third party.

40. The subject is further dealt with generally at RSC 1999, Edition, para 16/0/2, page 274:

“The proceedings which thereby arise have or may have, as it were, a life of their own, quite independent of the main action. They create a “lis” between the parties in question which will remain to be disposed of by the Court in the event of all the other issues falling away. For example, where the main action is settled.” (**Staff v West Yorkshire Road Car Co. Ltd.** [1971] 2 QB 651).

41. The further potential consequence could be that, in this case, the Court having directed that the Third Party proceedings await the outcome of the main action, the latter may well be determined according to the outcome of the former; so clear is the nexus between the two proceedings.

LEAVE TO SERVE EX JURIS UPON TNFA IN BAHRAIN

42. As noted above, the requirements to be satisfied here are those of GCR Order 11 Rule 1(1)(c) which provides:

“3. (1) *Provided that the writ does not contain any claim mentioned in Order 75 Rule 1(3)[(Admiralty Proceedings)] service of a writ out of the jurisdiction is permissible with the leave of the court if in the action begun with the writ*

...

(c) *the claim is brought against a person duly served within or without the jurisdiction and a person out*

of the jurisdiction is a necessary or property party thereto.”

43. The only issue arising here is whether TNFA – the person out of the jurisdiction sought to be served – “is a necessary or proper party” to the action.

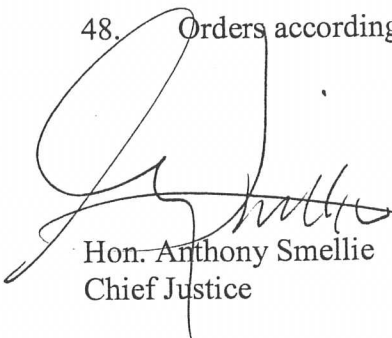
44. In light of the foregoing discussion leading to the appropriateness of and grant of leave for issuance of the Third Party Notice against TNFA; I conclude that the requirements of GCR Order 11 Rule 1(1)(c) are also satisfied.

45. The final question is whether service may be allowed upon Mourant, the law firm representing the plaintiff TNAM and TNFA in this jurisdiction; by way of substituted service pursuant to Order 65 Rule 4; in order to save time and costs.

46. In this regard Order 65 Rule 4 speaks of substituted service where personal service for one reason or another is “impracticable” (*Re Conan Doyle’s Will Trusts [1915] 1 K.B. 857*). *And see RSC 1999 Ed. Notes at 65/4/2 page 1290.*

47. I can see no prejudice to TNFA by requiring service of the Third Party Notice to be served upon Mourant by way of substituted service upon TNFA. That course should, indeed, save time and costs with Mourant’s having been in these very proceedings (in the person of Mr. Farrow QC) resisting the issuance of the Third Party Notice on behalf of TNFA.

48. Orders accordingly.


Hon. Anthony Smellie
Chief Justice



February 8 2010