



**IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION**

Cause No. 36 of 2022 (RPJ)

BETWEEN:

**THE FAMILY (GLOBAL GODFATHERS) SPC
(on its own behalf and on behalf of THE FAMILY (FREYA) SP,
and THE FAMILY (ODIN) SP,
THE FAMILY (HNOSS) SP and THE FAMILY (VIDHAR) SP)**

Plaintiff

-and-

- 1. OUSSAMA AMMAR**
- 2. FABULEO LIMITED**
- 3. ALETHEIS, THE FIRST LIMITED**

Defendants

Before: The Hon. Justice Parker

Appearances: Peter Hayden and Luke Burgess-Shannon, Mourant Ozannes (Cayman)
LLP for the Defendants
Michael Wingrave and Jack Stringer, Dentons, for the Plaintiff

Heard: 9 April 2024

**Draft judgment
circulated:** 29 July 2024

Judgment delivered: 6 August 2024

Service out of the jurisdiction-substituted service - worldwide freezing order - caps on legal spending and cross-undertaking in damages - allegations of non-disclosure in relation to full and frank disclosure - transcripts and notes of ex parte hearings – delay - collateral purpose - abuse of process - Overriding Objective - discretion.

JUDGMENT

Introduction

1. The Defendants (Ds) apply to discharge the Order dated 15 March 2022 which granted service out of the jurisdiction, substituted service by e-mail and a worldwide freezing order (WFO)(the Order). The Plaintiff (P) opposes the application and applies to strike out Ds' application as an abuse of process.
2. The Court heard an application on 9 April 2024 to vary the legal spending limit in the WFO and accepted that the matter should be heard, notwithstanding that D1 was found to have been in contempt of court for not complying with asset disclosure pursuant to the WFO. The Court by the variation agreed to permit D1 to spend a reasonable amount on legal costs. Asset disclosure has apparently now been provided.

Background

3. The writ in this case was issued on 22 February 2022. P is a segregated portfolio company incorporated under the laws of the Cayman Islands. Mr Ammar (D1) is a French citizen who served as a director of P between 27 March 2019 and 17 November 2020. D2 is a company incorporated under the laws of Hong Kong, legally and/or beneficially owned by D1 who is the sole director. D3 is a company incorporated under the laws of Hong Kong again legally and/or beneficially owned by D1 who is the sole director.
4. P is part of a group of companies which offers investments in new startup ventures to investors. It was founded in 2013 by D1, Nicholas Colin and Alice Zagury.
5. P's case is that Ds dishonestly misappropriated funds paid into P by investors in connection with particular projects which Mr Ammar (D1) marketed to them in his capacity as a director of P, a Cayman Islands company.
6. An unusual feature of this case is that Ds have taken no part whatsoever in the Cayman proceedings until relatively recently. Ds brought this application on 30 April 2024, just over 2 years since P obtained the WFO and after Judgment was entered against them on 5 December 2023.

7. As to the merits of P's case Mr Ammar (D1) says in his first affirmation dated 29 April 2024 at § 23:
- 'My overall position is that there should be an account between the Plaintiff's group and the Defendants to ascertain the sums that are properly due and owed between the parties, because I believe there are substantial sums due from the family to the Defendants. This is my position in the similar proceedings brought by the Plaintiff in England, where I believe there is jurisdiction to deal with the claims where they should be dealt with'.*
8. In terms of a short chronology, the Order was obtained on 15 March 2022. In May 2022 P entered default judgment for a sum to be assessed. On 6-7 November 2023 a hearing took place to determine quantum and on 5 December 2023 the Court rendered a final award in favour of P and ordered that Ds pay all of P's costs on the indemnity basis. The Ds took no part in any of those matters.
9. P then took steps to enforce this Court's Judgment in Delaware and says that it was no coincidence that Ds belatedly decided to engage in the Cayman litigation for the first time in early March 2024 to avoid enforcement in Delaware, rather than as a result of a genuine concern over jurisdiction or any defects in procedure which they did nothing about for 2 years.
10. D1, Mr Ammar now apologises for his approach to these proceedings and his non-participation in them¹. He says that he was prevented from engaging in these proceedings because of a legal spending cap (US\$10,000) in the WFO.
11. Ds do not say that they were not aware of the various steps P took in the Cayman proceedings and the material P relied upon. Instead, they now rely on a number of arguments relating to what they say are serious irregularities in the way that P has conducted its case to obtain the outcome it has achieved.
12. Peter Hayden appeared for the Ds. Michael Wingrave appeared for P.
13. Ds arguments centred on breaches of the obligation to make full and frank disclosure and a fair presentation to the Court together with procedural defects relating to substituted service at the March 2022 hearing, which they argue show that the WFO must be set aside.
14. Ds also argued that the Court wrongly exercised its discretion to permit service out on Ds. They argued that the Order for substituted service should also be set aside because of serious irregularities. As a result, they argued the writ was not properly served and will have expired, so

¹ Ammar 1 at para 7.

the WFO must also be set aside on that basis. The court will first deal with the merits of those applications and then with P's abuse of process application.

Full and frank disclosure

The law

15. The application for the WFO was made on notice to Ds with relevant materials having been provided in advance of the hearing, but nevertheless, the parties are agreed the duty of full and frank disclosure applied. In the Court's view this is correct and is in accordance with the Financial Services Division Guide 2nd Edition at B1.2(d):

“On all ex parte applications with or without notice it is the duty of the applicant and those representing him to make full and frank disclosure to the court of all matters relevant to the application, whether favourable or unfavourable to the applicant”

16. Merely because the Ds might have chosen not to object or appear does not water down the basic obligation on P. The duty extends to drawing the Court's attention to significant *'factual, legal and procedural aspects of the case'*².
17. The ultimate touchstone is whether the presentation of the application is fair in all material respects³. The evidence and the argument must be presented and summarised in a way which, when taken as a whole, is not misleading or unfairly one-sided.
18. The duty also extends to drawing the Judge's attention to any parts of a draft order which depart from a standard form and ensuring that the Judge is aware of all the terms and their implications⁴.
19. This is an important duty and if it is breached the Court will be astute to ensure that the applicant is deprived of any advantage obtained.⁵
20. In this context the Court has considered the helpful decision of Doyle J in *Wang*⁶ and bears in mind that materiality is to be assessed by the Court, not by an applicant or his legal advisers, and not all facts which might or should have been disclosed are sufficiently material to justify or require the

² *Memory Corporation plc v Sidhu* [2000] 1 WLR 1443, at 1459H to 1460B.

³ *Fundo Soberano de Angola v Dos Santos* [2018] EWHC 2199 (Comm) at paras 50 to 53 cited with approval in *Cowan v Equis Special LP (Unreported, 3 October 2019, Mangatal J)* at paras 77 to 78.

⁴ *Memory Corporation*, at 1458-1460.

⁵ *Ritchie* 2021 (1) CILR at paras 271-286 Parker J.

⁶ *Wang v Credit Suisse AG & Ors* (Unreported Decision, FSD 262, 268, 269, 270 of 2021, 8 April 2022) see paras 25-26.

immediate discharge of the order without examination of the merits. In complex cases and bearing in mind time pressures there is scope for a limited margin of error.

21. The Court retains a discretion which could justify an immediate discharge of the order, no discharge, a continuation on terms, or indeed a new order depending on the circumstances. The discretion is to be applied on a principled and fair basis so that material breaches of the duty are properly dealt with.
22. On the other hand, applications are not to become an instrument of injustice where there is a minute examination of all points which might have been made, with little prospect of discharge on the merits of the case.

Decision

23. Mr Hayden advanced a number of arguments (summarised for completeness from his written submissions below) to show that P failed to comply with its full and frank disclosure obligations in the context of service out in relation to D1 as follows:
 - a) *The gateways were only addressed very briefly in P's written submissions at paras 27-30. P identified the gateways on which the application was based, as set out in the Ex Parte Summons but failed to give any explanation of the relevant law underlying each gateway or apply that law to the alleged facts.*
 - b) *P misled the Court in relation to the issue of jurisdiction by failing to correct the Judge when he expressed the view that the claim was much wider and sounded in deceit, breach of trust and fiduciary duty⁷. P should have corrected the Judge and explained that for the purposes of the application to serve out P had only applied on the basis of, and was only relying on, gateways (d)(iii), (e), (ff) and (c). P should have informed the Judge that P was not relying on the gateways that applied to deceit, breach of trust or breach of fiduciary duty. P should also have explained to the Judge that the relevant gateways for those other claims could not be satisfied.*
 - c) *P failed to explain to the Court that gateway (e) required P to prove that a breach of contract took place within the jurisdiction. P failed to address this issue in its submissions at all.*
 - d) *In the context of gateway (e), P failed to inform the Court that none of the payments pleaded in the SOC were made from or received in the Cayman Islands. In this context, P also failed to inform the Court that none of the actions alleged to give rise to claims after receipt of the payments were carried out in the Cayman Islands. In short, P failed to explain to the Court that there was no basis on which gateway (e) could apply to the claims being advanced in the SOC.*
 - e) *P failed to explain to the Court that gateway (d)(iii) required P to prove that there was a contract between P and a defendant, which was governed by Cayman Islands law*

⁷ Page 1 of Withers note.

and that there was a good arguable case that the claim affects such a contract. P failed to address this issue in its submissions at all.

- f) In the context of gateway (d)(iii), P failed to explain that the SOC pleaded breach of contract claims against D2 based on the SSA and that Article 6 of the Hague Convention on Choice of Court Agreements required the Cayman Court to give effect to the exclusive jurisdiction clause in favour of the English courts contained in the SSA, and to suspend or dismiss the proceedings (or at least the relevant claims pleaded in the SOC).
- g) P failed to draw the Court's attention to Ms Zagury's evidence that, in relation to the proposed investments, P believed that it would be contractually 'protected by the SSA' and that it was P's view that no further contractual documentation was necessary. This evidence was inconsistent with the case pleaded in the SOC and advanced at the Ex Parte Hearing that there was another contract made sometime in 2020 which dealt with the proposed investments and was governed by Cayman law.
- h) P wrongly suggested to the Court that it was important for the purposes of jurisdiction against Ds that the subscription agreements between P and its investors were governed by Cayman law⁸. This was irrelevant for the purposes of the gateways. P later compounded this error by claiming that all the relevant documents were governed by Cayman law⁹
- i) P failed to address the Mandate at all in its written submissions. In oral submissions, P referred to the Mandate, noted it was backdated and said that it reflected the general understanding that had been in place from the start. However, P failed to explain to the Court that the alleged earlier agreement was pleaded at para 18 of the SOC as simply a proposal by D1 that investments in three targets be made via an intermediary under his control or by him directly, which P accepted. P failed to point out to the Court that it was not pleaded that the earlier agreement went beyond this and, in particular, it was not pleaded that there was any earlier agreement governed by Cayman law.
- j) P also failed to inform the Court that there was no evidence that a binding agreement in broader terms than the Mandate was entered into between P and D1 in 2020 or that such agreement was governed by Cayman law.
- k) P failed to explain to the Court that, in addition to D1 being a director at the relevant time, to come within gateway (ff) P had to prove that the subject matter of the claim related to his duties as a director.
- l) P failed to refer the Court to the relevant authority on gateway (ff) indicating that the Court should look closely at whether there is a 'strong possibility' that the Cayman director's conduct as a director of the Cayman entity was 'seriously engaged', and where it was not, the gateway did not apply¹⁰
- m) P misled the Court by relying on purported public policy considerations in an attempt to justify the use of gateway (ff), based on *In The Matter of Cairnwood Global Technology Fund Limited* [2007 CILR 193]. However, the following year, the CICA made clear in *Brasil Telecom SA v Opportunity Fund* [2008 CILR 211] that the

⁸ Page 1 of Withers note.

⁹ Page 3 of Withers note.

¹⁰ *Harrell v S3 Assurance and Others*, at para 101

question of forum is to be determined only with regard to the interest of the parties and the ends of justice, without regard to public policy. P failed to explain this to the Court.

- n) P misled the Court by stating in its written submissions [§27] that 'D1 was both a director and [P] is a Cayman Islands company. Thus the Court is in a position to permit service outside of the jurisdiction*
 - o) P failed to point out to the Court that D1 was no longer a director of P at the time of the purported payment on 27 July 2021 of EUR 9,344 to an entity described as 'Palazzari Turries Ltd'*
 - p) P failed to explain to the Court that it was not pleaded that D1 was acting as a director of P when receiving the payments. P also failed to explain that, given it was accepted that the payments pleaded at paras 22-25 of the SOC were authorised and it was not pleaded that the payments at para 28 of the SOC were not authorised, it followed that D1 was not acting as a director in relation to those payments. P failed to point out to the Court that D1 was acting in a different capacity when dealing with the funds after they had been transferred away from P.*
 - q) P failed to explain to the Court that it was only in relation to a small minority of the payments, pleaded at paras 26-27 of the SOC and representing less than 9% of all the payments, that D1 could be argued to have been acting in his capacity as a director by authorising those payments*
 - r) P failed to explain to the Court that the facts which were relied on to demonstrate that those payments were unauthorised, which were required to be pleaded, were not pleaded in the SOC. In particular, P failed to point out to the Court that it was not pleaded how those particular payments were processed or how those facts could properly give rise to an inference that the payments were not authorised. P failed to tell the Court that the pleading consisted purely of an assertion that the payments were not authorised.*
 - s) P failed to draw the Court's attention to the lack of any evidence to show that the payments were not authorised. P failed to explain that Ms Zagury's evidence simply repeated the pleading and that the documents exhibited to her affirmation that were said to be 'supporting bank documents' were no more than spreadsheets including lists of transfers.*
 - t) P failed to demonstrate any arguable case either that the payments were made or authorised by D1 or that they were unauthorised at the time they were made*
24. The Court has examined the matter by reference only to the arguments and material which were before the Court in March 2022.
25. The Court is in a good position to judge in the light of these arguments and material whether the nature and effect of the alleged failures should result in a discharge of the order. The Court has considered each of these arguments individually and the totality of them to assess whether there was a fair presentation. It has come to the clear view that the presentation was fair and not misleading and did not omit any material facts. The Court is satisfied that any omissions were inadvertent and not material.

26. The Court is not persuaded that it should in its discretion discharge the order made as a result of Ds arguments.

Further procedural defects

27. Mr Hayden also complained that Ds were not provided with proper details of the hearing. He says P should have provided Ds with a full note or transcript of the hearing to allow them to understand the basis upon which the order had been granted and prepare any application to set aside challenge or vary. This was a particularly serious breach he submitted given that the order included a number of unusual amendments from the norm and significantly departed from the standard form order at GCR Form 65.

The caps

28. Mr Hayden submitted that the Court was not referred to any terms which departed from the standard form¹¹. Particular terms criticised by Mr Hayden were the legal spending cap and cross-undertaking in damages. Those terms set a US \$10,000 limit in respect of spending on legal costs and a limit on the amount of the cross-undertaking in damages of US\$25,000.
29. Mr Hayden said in failing to draw the Court's attention to the spending limit Ds did not ensure the Court was aware of it or its implications. The usual provision allows a reasonable sum and no justification on the facts, or the law was addressed regarding the imposition of spending limits on legal advice and representation. The usual position on the cross-undertaking is also that it is not limited in amount. Both were outside the norm.

Decision

30. A draft order was filed with the Court on 10 March 2022 with figures in blank.
31. An Order was provided to the Court on 16 March 2022 which had the figures suggested inserted in it. The Court considered those figures and approved them.
32. There is authority in the UK, which the Court was not referred to when the WFO was granted- *HMRC v Begum [2010] EWHC 2186 Richards J.*

¹¹ See *Memory Corporation* at 1458-1460.

33. In that case HMRC had decided to abandon its proprietary claims so the purpose of the freezing order was no longer to protect the fund which it claimed belonged to it, but to prevent the disbursement of a fund against which it may be able to enforce a judgement¹². Richards J (as he then was) said that the court will not in general impose a cap on a defendant's legal costs¹³. This he said was a facet of the more general point that the court will not set itself up as a cost assessor.
34. The standard protection is that a defendant may use the frozen assets for the payment of his reasonable legal costs provided that the claimant is informed as to the source of those payments.
35. P's claim was proprietary and the limit for the freezing provision was according to P set by reference to the sum misappropriated in cash from P's accounts. P's case was that it was not aware that Ds had access to other sources of funds at the time save for those misappropriated.
36. It is the case that no deviation from the standard form of order set out in *Begum* was put forward by P. *Begum* makes it clear that the standard practice which applies in England and Wales at least, is that the rule to impose no monetary cap on legal spend applies to proprietary claims as well, in order that there should be a consistent, standard approach¹⁴.
37. Likewise, it is the case that there was a departure from the usual position of requiring an unlimited cross-undertaking in damages. A cap of US\$25,000 was proposed and was not explored at the hearing by reference to relevant authorities.
38. However, notwithstanding these departures from the usual orders, the Court is of the clear view (see below) that the legal spend limit and the cross undertakings cap has caused no real prejudice to the Ds in circumstances where they had no intention whatsoever of participating in the Cayman proceedings. Each case must turn on its own facts and merits. The Court must act in what it considers to be in the interests of justice.
39. Mr Ammar (D1) now says that it would have been better if he had written to the court at the outset to seek a variation of the limit on legal spending which he regrets not doing¹⁵.
40. The fact remains that although Mr Ammar's English solicitors did contact P's Cayman attorneys about the spending limit¹⁶, no points were taken by Ds about these terms for 2 years and it is, in the Court's view, too late to take them now.

¹² At para 33.

¹³ At para 43.

¹⁴ At para 50.

¹⁵ Ammar 1 at para 21.

¹⁶ Ammar 1 at para 14.

Details of the hearing

41. It is also the case that there should have been a transcript produced of the hearing so that a true record of what was said is in evidence. P's attorneys should then have provided that timeously to Ds. That is good practice.
42. However, the Court has formed the view, in all the circumstances, that Ds had been aware of and were content to simply ignore the Cayman proceedings. They are not to be permitted to now complain that they were not given proper details when at the relevant time they showed no interest in the proceedings and what is worse, even public contempt for the Cayman court (see below).
43. It is also to be noted that D1 Mr Ammar was notified in advance of the hearing and he or his English solicitors could have attended, requested a copy of the audio from the hearing, or asked P's attorneys to obtain a transcript. They did not do so.
44. The Court also notes that the email under which the Order was served indicates that there was an intention to attach a copy of the submission note prepared for use at the hearing¹⁷. The 'submissions note' appears to have been omitted from the email in error. Neither Ds nor their English solicitors sought a copy of that note notwithstanding that it was not attached in error to the email. When D's English solicitor wrote to P's attorneys on 23 March 2022, they did not indicate that their client sought a note of the hearing.

*Service out/jurisdiction**The law*

45. A number of well-settled requirements must be satisfied before it is appropriate to permit service out of the jurisdiction so that the Court's extraterritorial reach is not wrongly extended.
46. The applicant has to show, in relation to each defendant, that the claims which it seeks permission to serve out raise a serious issue to be tried on the merits i.e a substantial question of fact or law or both which had a real as opposed to fanciful prospect of success, that the case against each of the Ds is one where service out is permissible by reference to the gateways provided for in GCR Order 11 rule 1, and that in all the circumstances it is appropriate to exercise the Court's discretion to permit service out.

¹⁷ Colin 5 para 80.

47. P has to show at least a plausible evidential basis for the application of a relevant jurisdictional gateway. The Court needs to have regard to the pleadings placed before it and the evidence in support of the application.
48. If the jurisdictional threshold has been established the task for the court is then to identify the forum in which the case can be suitably tried for the interests of all the parties and the ends of justice.

Analysis

49. P applied for jurisdiction over D1 based on the GCR, O.11, r.1 gateways (d)(iii) (contract giving the Court jurisdiction in respect of that contract), (e) (breach of contract within the Cayman Islands) and (ff) (claim against a director of a Cayman Islands company which relates to the company or the status, rights or duties of the director).
50. The only gateway relied on as regards D2 and D3 was (c) (necessary and proper party) and jurisdiction over D2 and D3 relies on P establishing jurisdiction against D1 (sometimes referred to as the anchor defendant).
51. It is common ground on this application that gateway (e) (breach of contract within the Cayman Islands) had and has no relevance in this case.

Gateway (ff), GCR O.11, r.1(1)(ff) provides:

'the claim is brought against a person who is or was a director, officer or member of a company registered within the jurisdiction ...and the subject matter of the claim relates in any way to such company ... or to the status, rights or duties of such director... in relation thereto.'

52. The claim and its subject matter must relate in some way to the duties of the director acting as a director of a Cayman company. P is a Cayman Islands corporation of which D1 was a director¹⁸.
53. D1 was a director between 27 March 2019 and 17 November 2020. During that period P alleges that the payments from P's accounts relate to his duties as a director of that company.
54. Mr Hayden argued that any payments made were made pursuant to the Strategic Services Agreement dated 18 May 2018 between The Family (Holdings) Limited and D2 (the SSA) wherein D1 acted as an agent of D2 in providing services to P's group. He argued that D1 received the

¹⁸ Ammar 1 at para 61.

payments as D2's agent under the terms of the SSA and that it was not pleaded that D1 had received any payments in his capacity as a director of P.

55. The Court notes that in the High Court proceedings in London Ds have sought to suggest that their arrangements with P were not subject to the SSA, but arose from a separate suite of contractual documents¹⁹.
56. The Court rejects Mr Hayden's arguments and finds that the claim relates to the duties of D1 as a director of a Cayman company. D1 was a founding director of P (which was incorporated in the Cayman Islands) to offer investment opportunities to investors which resulted in separate portfolio companies. The investment opportunities were subject to subscription agreements with Cayman Island law and Cayman jurisdiction clauses.
57. The case against D1 concerns his conduct while a director of the Cayman Islands company and the scope and extent of his duties are in issue and are to be determined under Cayman Islands law.
58. As regards gateway (d)(iii), GCR O.11, r.1(1)(d)(iii) provides:

'The claim is brought to enforce, rescind, dissolve, annul or otherwise effect a contract, or to recover damages or obtain other relief in respect of the breach of a contract, being (in either case) a contract which... is by its terms, or by implication, governed by the law of the Islands.'

59. Mr Hayden argued:
- a) The relevant, and only, contract in place at the time of the alleged payments was the SSA dated 18 May 2018.
 - b) The SOC pleads breach of contract claims against D2, based on the SSA²⁰.
 - c) D1 acted as an agent of D2 in providing services to P's group pursuant to the terms of the SSA (see clause 3.1 of the SSA).
 - d) P's evidence at the *ex parte* hearing was that, in relation to the proposed investments, it believed that it would be contractually 'protected by the SSA'²¹.

¹⁹ Colin 5 at para 108.

²⁰ For example, paras 40-41 of the SoC.

²¹ Zagury 1 at para 23.

- e) SSA is governed by English law and contains an exclusive jurisdiction clause in favour of the English courts.
 - f) Although P is not a party to the SSA, the SOC pleads that P '*is entitled to enforce the contents of the SSA against [D2] by virtue of clause 11.6 thereto*' (SOC, para 10).
 - g) Clause 11.6 is drafted with specific reference to an English statute (the Contracts (Rights of Third Parties) Act 1999). Accordingly, P's ability, as a third party, to rely on the SSA as against D2 turns on the application or otherwise of the English statute, which is presumably one of the reasons that the parties to the SSA provided for it to be governed by English law and subject to the exclusive jurisdiction of the English courts.
 - h) Although the SSA underpins the relationship between the parties and the claims that are advanced, it does not provide any basis for jurisdiction in the Cayman Islands as against D1 (or D2) pursuant to gateway (d)(iii). In any event, that gateway is not relied upon as regards D2.
60. He rounded off these submissions by saying given the exclusive jurisdiction clause in favour of the English courts contained in the SSA, pursuant to Article 6 of the Hague Convention on Choice of Court Agreements dated 30 June 2005 the Cayman Court must suspend or dismiss all claims relating to the SSA (none of the narrow exceptions to Article 6 apply in this case). He argued that this is also a very significant factor going towards whether the Cayman Islands are the most appropriate forum for the claims against the Defendants.
61. The Court rejects Mr Hayden's arguments.
62. At the *ex parte* hearing P relied on a contract between P and D1 made in July 2021 but backdated to 6 July 2020 to reflect an earlier agreement²². This is a contract governed by Cayman Islands law. P pleads this at §§ 18 to 20 of the Statement of Claim.
63. P did not rely on the SSA at the *ex parte* hearing which it also pleads. The SSA is not the only contract relied on by P. It was not the only contract in place at the time of the relevant payments.
64. Mr Hayden said the Mandate did not exist when the payments were made - see SOC §22-28. However, the Court finds that the Mandate was effective not only from the date made in July 2021,

²² Zagury 1 at paras 25-27.

it was to be backdated to reflect the earlier dealings between the parties. There was a plausible factual basis for the Mandate as particularised at § 39 of the SOC.

65. P brings separate proceedings in England under the SSA which are distinct from these proceedings. The Court again notes that in the High Court proceedings in London Ds have sought to suggest that their arrangements with P were *not* subject to the SSA, but arose from separate contractual documents. It is to be inferred that this is a reference to the Mandate.

66. As regards GCR O.11, r.1(1)(c) this is the only gateway that was relied on as against D2 and D3:

'the claim is brought against a person who has been or will be duly served within or out of the jurisdiction and a person out of the jurisdiction is a necessary or proper party thereto.'

67. The Court accepts that caution must always be exercised in bringing foreign defendants to the jurisdiction where this is the only gateway not founded on any territorial connection between the claim, the subject matter of the action, and the jurisdiction of the Court.

68. The Court has decided that it properly exercised jurisdiction over D1 and has considered the particular cause of action in respect of which leave to serve out was given as regards D1 and whether D2 and D3 are necessary and proper parties to that cause of action. It has come to the clear conclusion that D2 and D3 are necessary and proper parties. They were companies owned and controlled by D1 and used to receive funds that were misappropriated.

69. The Court was correct to find that the claims against D1 involved a real issue to be tried and that it was reasonable for the Court to try that issue. D2 and D3 are clearly necessary or proper parties to those claims and the Cayman Islands is the proper place for the combined claims. If all the defendants had been within the Cayman Islands they would all have been joined in the same proceedings. There is a real risk that P would not obtain justice in any alternative jurisdiction. The Court finds that there clearly was jurisdiction to make the Order through the relevant gateways.

Forum conveniens

70. The Court has also considered whether the case was a proper one for service out under GCR Order 11 rule 4(2) and has come to the view that the Cayman Islands were and are the proper forum in which the case can be suitably tried for the interests of all the parties and for the ends of justice²³. P persuaded the Court that the Cayman Islands were clearly and distinctly the proper forum and in

²³ *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460 at 476B.

all the circumstances the Court should exercise its discretion to permit service out. Notwithstanding Mr Hayden's arguments for the Ds, that in the Court's view was the correct decision.

71. Mr Hayden argued that in breach of its duty of full and frank disclosure, P failed to draw the Court's attention to the requirement to carry out a summary examination of the connecting factors. He argued that P failed to explain a number of matters to the Court including (again for completeness taken from his written submissions):

- a) *None of the parties had any real connection to the Cayman Islands. Whilst P was incorporated in Cayman, it did not carry out any business in Cayman, and its business was operated from England and France. D1 lived and worked in France and D2 and D3 were incorporated in Hong Kong.*
- b) *TFHL, the party to the SSA, was incorporated in, and operating from, England. P's ability to rely on the SSA pursuant to the provisions of the English Contract (Rights of Third Parties) Act 1999 was an issue of English law.*
- c) *That the SSA being governed by English law and containing an exclusive jurisdiction clause in favour of the English Courts was an important connecting factor to England.*
- d) *No alleged wrongdoing took place in the Cayman Islands. The substance of any alleged breach of contract and/or claim in tort occurred in England or France, and not in the Cayman Islands.*
- e) *All relevant bank accounts were held with Belgian banks in Belgium, and the accounts were operated from England or France. None of the parties held relevant bank accounts in the Cayman Islands.*
- f) *To the extent any loss was suffered by P, such loss would have been suffered in England or France, rather than the Cayman Islands.*
- g) *As a result of the above matters, the law governing P's claims was likely to be English law or French law.*
- h) *Prior to commencing these proceedings, P had already commenced proceedings in France and had issued a letter before action in England. Although P spoke to these matters by way of introduction at the Ex Parte Hearing, their significance was not addressed in the context of considering the appropriate forum.*
- i) *There were no potential witnesses in the Cayman Islands. All the potential witnesses were based in either England or France. The key witnesses were all French nationals, whose first language was French, and they lived in England or France.*
- j) *There was no relevant documentation or evidence within the Cayman Islands. All the relevant documentation and evidence was in England and France.*
- k) *From a practical and case management perspective, given all the above factors, England or France was plainly the more appropriate jurisdiction.*
- l) *From a costs, convenience and expense perspective, England or France was plainly the more appropriate jurisdiction.*

- m) *In its evidence and submissions at the Ex Parte Hearing, P did not seek to demonstrate that England or France was not the appropriate forum for the resolution of the issues.*

Decision

72. The Court does not accept that these arguments lead to the conclusion that the Court wrongly exercised its discretion to permit service out. The Court examined the connecting factors between the case and one or more of the jurisdictions in which it could be litigated provided in the evidence.
73. As can be seen from the 5th affidavit of Mr Colin²⁴, Ds have adopted contradictory positions in the Cayman, English and French proceedings which have not been explained by Ds.
74. D1's conduct as a director of a Cayman Islands company is central to P's case. Investors were marketed to on the basis that their agreements would be subject to Cayman Islands law and jurisdiction. The losses suffered derive from misappropriated funds from P and liability to compensate investors under those agreements.
75. The Court has evaluated the connecting factors and confirms that it was correct to conclude that in all the circumstances the Cayman Islands is clearly the appropriate forum for the trial of the dispute.

Substituted service

Ds' submissions

76. The Court made an order for substituted service, allowing service of the proceedings on Ds by email and/or by service on their English solicitors, Charles Fussell. This was a departure from the usual rule that a writ must be served personally on each defendant²⁵.
77. Mr Hayden submits that P knew the personal addresses for all Ds and the D2 and D3 are limited companies incorporated in Hong Kong.
78. It was only if it was impractical to personally serve a defendant that an application for substituted service could be made. There was no such impracticality on the facts of this case.

²⁴ Set out in paras 102-109.

²⁵ GCR O.10, r.1(1).

79. There was no application for an order for substituted service made by affidavit stating the facts on which the application was founded²⁶ and no proper application was made supported by sufficient evidence and a focused skeleton argument dealing with the relevant authorities and arguments²⁷.
80. Mr Hayden submitted that this failure is a serious one. There was no proper application and no evidence that personal service was impracticable or that the steps proposed to serve the document (by substituted service) were not contrary to the laws of the relevant countries.
81. Zagury-1 addresses service out of the jurisdiction (but not substituted service) at §§65-68. The only paragraph which could be said to go to substituted service is §68 which simply requests permission to serve Ds by email but does not set out any basis for making such orders.
82. Zagury-2 does not address service at all, save to note at §26(a) that Charles Fussell had come on the Court record to act for Ds in the English proceedings and on 4 March 2022 had acknowledged that Ds had received notice of the Cayman application.
83. None of these matters were drawn to the attention of the Court. Instead, P misrepresented the position to the court in oral submissions by suggesting that the e-mail addresses were being monitored and so that was a proper basis for ordering substituted service by e-mail.
84. Mr Hayden submitted that there was no basis for the Court to find, and the Court did not find, that personal service was impractical, that service by email would not be contrary to the laws of England, France or Hong Kong, that any of Ds were deliberately evading service and/or that exceptional and special circumstances existed justifying the making of an order for substituted service.
85. Mr Hayden submitted substituted service on parties located in Hague Convention countries is an 'exceptional' measure, requiring 'exceptional circumstances'²⁸. Dispensing with personal service cannot be justified in the absence of evidence of deliberate evasion of service²⁹.
86. There were also some more minor breaches in relation to the time period within which Ds were to acknowledge service as the Order contained no such time limit and the writ contained a period of 14 days, rather than 28 days, which should have been the case³⁰.

²⁶ GCR O.65 r.4.

²⁷ See *In the matter of Harvey River Estate Pty Ltd* (unreported, Doyle J, 14 March 2024), at para 99.

²⁸ *China Shanshui*, at para 59; *Libyan Investment Authority v JP Morgan Markets Ltd* [2019] EWHC1452 (Comm), paras 162-164.

²⁹ *Libyan Investment Authority*, para 173. See also *Raier* at paras 75-78 and para 151.

³⁰ GCR O.11, r.4(3) and r.1(4).

87. Mr Hayden submitted that it is difficult to conceive of a more extreme case of failing to comply with the rules and breaching the duty of full and frank disclosure than P's approach to substituted service in this case. P made no attempt to comply with the relevant rules, misled the Court and in doing so obtained an order for substituted service which was not justified or appropriate.

P's submissions

88. Mr Wingrave pointed out that Ds do not say they did not receive copies of the Writ when served by e-mail or that service by e-mail prejudiced them in any way.
89. Zagury 1 at § 59 says her understanding was that Mr Ammar had or was in the process of arranging some form of residence in Dubai. Ammar 1 says that he resided between an Airbnb in Dubai and a residence in France from April 2022 suggesting that he may have been in the process of moving from France to Dubai in March 2022.
90. Colin 5 explains that Ps were not sure where D1 could properly be found at the time of the March 2022 hearing and for that reason, permission to serve via e-mail had been sought and that it was known that his e-mail addresses were monitored and responded to.

Decision

91. Personal service is not required for documents unless the document is one which by an express provision of the GCR or by order of the court is required to be served-see GCR O.65 r.1. A writ is such a document³¹. However rule 1 does not affect the Court's power under the rules to dispense with the requirement for personal service-see GCR O.65 r.2.
92. In this case the procedure for substituted service under GCR O.65 r.4 was not followed. It is a procedure which allows the Court a discretion in circumstances where a document is required to be served personally to dispense with personal service on the basis that it appears to the court that it is impracticable for any reason to serve personally. An application for substituted service may be made by an affidavit stating the facts on which the application is founded.
93. The Court reinforces the importance of O.65 being followed³². The rationale for its provisions are clearly so that the Court may determine whether the case is one in which personal service can be added to or dispensed with in particular circumstances where personal service is problematic. Having reviewed affidavit evidence in support, the Court may be satisfied that an order for

³¹ GCR Order 10 r.1.

³² See *China Shanshui* (unreported 27 January 2021 Segal J) at para 62 and *Raier* (unreported 9 June 2023 Doyle J) at paras 56 and 60.

substituted service may be made. The affidavit should deal with the impracticability of personal service and the legality of the method of service in the relevant country. The Court is usually assisted by a short written argument³³. It is also the case that Order 11 rule 4(1) (e) was, as a consequence of failing to deal with the legality of service by email in the relevant countries, not complied with.

94. The question that the Court asks itself is whether in the circumstances of this case there is a good reason for validating service, which was not in accordance with the rules.
95. In the Court's view the fact that the procedure was not followed on the facts of this case is, exceptionally, not a reason to find that service was not validly effected. The Court provided an alternative to personal service on D1 (at his known Paris address) on the basis of the submissions made by P's attorney that it was not known where Mr Ammar might be found if he was not at the Paris address and they knew that e-mail addresses were being monitored. The Court was satisfied that the documents were likely to reach the relevant Ds electronically or come to their knowledge. There is no evidence to suggest that service by e-mail was contrary to the laws of France or Hong Kong to where the e-mails were sent.
96. The Ds' English solicitors Charles Fussell had received the *ex parte* summons and accompanying documents well before the hearing. No steps were taken by Ds to oppose or appear at the hearing.
97. Following the hearing, the Order and the proceedings were sent by e-mail to the e-mail addresses contained within the Order and copied to a lawyer, Mr Winter, at Charles Fussell representing Ds in the English proceedings at that time. On 23 March 2022, Mr Winter wrote to P's Cayman Islands attorneys saying that they had seen the Order referring to the proceedings 'on foot in the Cayman Islands' and indicating that he was instructed by D1 and D2 but not at that stage by D3³⁴.
98. It then took 2 years for Ds to argue that service was defective.
99. There is no discernible prejudice raised by Ds on the basis that they were not provided with the relevant documents by e-mail at the relevant time. They simply chose to ignore them for 2 years.
100. In the event that it was necessary, the Court would in its discretion on the facts of this case cure any procedural irregularity on service of proceedings under GCR O.2 r.1. It would be just and convenient on the facts of this case to do so³⁵. It would not be right to punish P in the interests of

³³ See *Harvey Estate* (unreported 24 March 2024 Doyle J) at para 99.

³⁴ Colin 5 at para 20.

³⁵ *Golden Ocean* [1990] WL 754813 at 884 per Megaw LJ.

upholding the importance of following the rules for service (important though they are) and the court should instead, in the absence of prejudice to Ds, allow any irregularity to be cured.

Abuse of process

101. If an action is not brought bona fide for the purpose of obtaining relief but for some other ulterior or collateral purpose, it may be struck out as an abuse of process, following *Lonrho v Fayed (No.5)* [1993] 1 WLR 1489.
102. In *Nolan v Devonport & Devonport* [2006] EWHC 2025, an application to set aside judgment which was aimed in reality at delaying enforcement, rather than there being true prospects of a successful defence, was found to be an abuse of the process of the court's procedure, amongst other faults, and was struck out.
103. The procedural steps P has taken from January 2022 to 5 December 2023 have been set out in detail in Colin 5 §135. P obtained leave to serve out and a WFO, brought proceedings for contempt of Court and obtained an order for committal, obtained judgment in default and damages following a hearing. All the communications and service of documents on Ds before and after these events have been ignored until 21 March 2024 when a notice of motion seeking default judgment in Delaware was obtained by P.
104. By virtue of O.12, r. 6 of the GCR a defendant may not give notice of intention to defend in an action *after* judgment has been obtained therein, without leave of the Court. Ds have not sought such leave notwithstanding that Ds are subject to a default judgment and to the Judgment after trial on quantum.
105. Even if the Court were prepared to overlook that, Mr Ammar, D1, instead of engaging actively with the proceedings chose to publicly denigrate the jurisdiction of the Cayman Islands Grand Court and expressly stated that he did not wish to engage with these proceedings³⁶.
106. The details of his approach and conduct appear in §§26 to 28 of Colin 5. His statements were as unwise as they are offensive. There has been no evidence about them from Ds.
107. The evidence from Mr Colin³⁷ shows that up until March 2024, Mr Ammar routinely publicly denigrated the Cayman Islands judicial system and expressed his contempt for the prospect of becoming involved with these proceedings.

³⁶ Colin 5 at paras 26-28.

³⁷ Colin 5 at para 27.

108. Mr Ammar has variously stated in relation to the Cayman Judgment: that the decision was rendered without due process; that the Cayman Islands is a ‘banana republic’ with a legal system that is ‘worth nothing’; that he had ‘no intention’ of taking part in the Cayman proceedings; in response to a question about the Cayman Judgment: ‘We will see what that the real judges think’; that he intended to have the Cayman Judgment invalidated ‘before the right jurisdictions’; to Le Parisien that he would not appeal the Cayman Judgment because he considered that it had no value, and he did not think it would ‘hold up’ before the right jurisdictions; that after the Judgment was handed down: ‘... it's only now that the real battle in the proper jurisdictions begins’.
109. As Mr Hayden did not have time at the end of the two day hearing of this matter to properly address the Court in reply, the Court gave permission for written submissions to be provided after the hearing. In those submissions, in relation to these public statements by Mr Ammar, Mr Hayden says this:
- ‘.. these statements need to be seen in the context of the frustration DI felt at being faced with proceedings in the Cayman Islands, where he believed there was no jurisdiction, and prevented from appearing to contest those proceedings by the fee limit. DI's statements were over the top and unwarranted, but they are consistent with his position that there was no jurisdiction in Cayman. DI has apologised for his previous approach in relation the proceedings at Ammar-1, paras 7-21.’*
110. This provides no apology or excuse for these offensive remarks and in the Court’s view show Mr Ammar’s real strategy. Mr Ammar did not up until March 2024 suggest either in any public forum or in any inter partes correspondence that he had been prevented from taking part in the Cayman proceedings³⁸. Neither did he make any complaint about jurisdiction or defective service of process.
111. The application on jurisdiction is substantially out of time. Pursuant to O.12, r.8(1) GCR, any defendant wishing to dispute jurisdiction is required to enter a notice of intention to defend the proceedings and, within the time limited for service of a defence, they ‘*shall apply to the Court for (c) discharge of any order giving leave to serve the Writ on the defendant out of the jurisdiction*’.
112. None of the Ds have entered any such notice and are now years out of time to do so. Applying the Overriding Objective to this conduct it is clear that Ds are engaging the Court's valuable and limited resources in dealing with their application which has been brought too late and for a collateral purpose to the disadvantage of other litigants. This should not be entertained.
113. Applications to discharge orders giving leave to serve proceedings out of the jurisdiction must be made promptly or risk that they will not be entertained by the court.

³⁸ Colin 5 at para 28.

114. It is not in the interests of justice to deprive P of years of litigation cost and the outcomes achieved where non-disclosure and jurisdictional arguments could and should have been made promptly.
115. If any authority were needed for the proposition that Ds have no basis for seeking to invoke the indulgence of this Court in the light of their conduct and delay it can be found in the following cases.
116. In *Reynolds v Coleman* (1887) 36 Ch. D 453, the English Court of Appeal was faced with circumstances similar to this case, including suggestions that there had been non-disclosure at the *ex parte* hearing for permission to serve outside the jurisdiction. In that case, the period of delay was approximately one year. By virtue of service pursuant to that order, judgment was obtained on the ground that the defendant had not delivered a defence and an application was made, not to set aside the judgment on the merits, but to have the order for service discharged on several grounds.
117. Cotton LJ stated: *'Now, I do not for a moment intimate an opinion that persons applying for ex parte orders of this kind ought not fully and fairly to state the facts on which their application depends, but fully as I adhere to that rule, it is in my opinion too late for the Defendant, who has lain by without taking any step for more than twelve months, to ask us to interfere on the ground of those alleged irregularities, however much we might have attended to them if, immediately after service had been made, he had applied on those grounds to discharge the order for service.'*
118. In *Mid-East Sales Limited v United Engineering And Trading Company (Pvt) & Ors* [2014] EWHC 1457, a much more recent decision, the Court was faced with an application to set aside permission to serve outside the jurisdiction and judgment in default. In that case, the applications were procedurally regular and contained proper applications for extensions of the applicable time limits and reliefs. The applications included an attack on the *ex parte* order founded on material non-disclosure.
119. *Reynolds* was referred to by Mr Justice Burton during a review of cases of this nature. At §81(iv) he stated: *'There is a statement in Gee: Commercial Injunctions (5th Ed) at 9.028 that an allegation of non-disclosure should be made without unnecessary delay... it seems to me even without reference to authority, that such statement is correct. It is the court which is to be invited to exercise possible draconian powers to enforce the court-made rule, and after 7½ years its appetite to do so must have waned. In any event, Reynolds v Coleman is exactly on point: it is too late now to set aside on that ground.'*
120. Accordingly, Mr Justice Burton dismissed the defendants' application to set aside permission to serve outside the jurisdiction on the grounds of delay notwithstanding that §86 *'... this is a case of*

depriving a party not otherwise subject to the jurisdiction of this court the opportunity to challenge it...'

121. An explanation given by Ds for the failure to engage in these proceedings was that they were prevented from doing so by reason of the fee spending limit imposed by the Order³⁹.
122. The Court does not accept that explanation. The Court finds that Ds exercised a deliberate choice, before the hearing at which the Order was made, not to become involved in that application (in person for D1) or to secure representation in advance of the hearing. They made the deliberate choice to ignore the proceedings, generally, at the same time. Ds then simply ignored all the procedural steps P went through to finally obtain Judgment in Cayman.
123. There is also evidence to suggest that Ds' legal fees have been funded by third parties⁴⁰. Charles Fussell have confirmed the same⁴¹.
124. On the evidence, the Court finds that Ds were aware of the application for the Order before the hearing on 15 March 2022. On 4 March, Ds' English solicitor wrote to P's English solicitor confirming they had seen the application papers provided to Ds⁴².
125. Ds had been provided with all the application papers (which included the proceedings) and supporting evidence well in advance⁴³. Ds would have known from this that P intended to bring its claim in the Cayman Islands. No steps were taken to raise concerns about jurisdiction or to object to P's application.
126. Ds already had attorneys in both France and in England instructed to deal with the pending claims in those jurisdictions. They responded to correspondence before proceedings were issued in those jurisdictions. Conversely, no Cayman Island firm responded to P's attorneys here.
127. Ds' assets were not at that time frozen and could have been used to instruct attorneys in the Cayman Islands if they wished. If they had genuine points to make about jurisdiction, attorneys could be instructed to consider them and, potentially, to appear on Ds' behalf before (or indeed after) the Order was made.
128. The inference the Court draws is that Ds chose to actively defend the proceedings in France and England and chose to ignore the proceedings in the Cayman Islands. Mr Ammar himself says '*Until*

³⁹ Ammar 1 at paras 7-21.

⁴⁰ Colin 5 at para 32; Mr Ammar explained in the course of an interview posted on YouTube on 8 November 2023 that funding was available through his friend Yomi Denzel in March/April 2022 at or around the time the Cayman Islands proceedings were served.

⁴¹ Colin 5 at para 33.

⁴² Colin 5 at para 15.

⁴³ Colin 5 at para 13.

now, I have prioritised applying those limited funds to paying legal expenses in England and France...”

129. The Court infers from the evidence that it was not until Delaware recognised the Cayman Islands Judgment and enforcement⁴⁴ was imminent that Ds realised that they should have engaged with the proceedings and should not have ignored them. Once the Delaware enforcement proceedings were brought to Ds’ attention it did not take long for Ds to find and pay for appropriate representation. The Court finds this ulterior purpose for attacking the Orders made in Cayman should not be allowed.
130. Ds also say they did not consider that the Cayman Court had jurisdiction. But if that was the real reason for non engagement they could and should have filed an acknowledgement of service recording an objection to the jurisdiction within the time limited for service of a defence, and applied to the Court to discharge the Order.
131. I accept Mr Wingrave’s submission that had they responded to P’s attorneys they would have provided them with copies of the relevant rules to help them understand how to proceed without representation and had they contacted the court office they would have been provided with similar information.
132. It is also clear that Ds’ English solicitors knew that the fee spending cap was capable of being varied because the matter was raised in correspondence⁴⁵.
133. Moreover, Colin 5 §§104-109 points out Ds’ tactical manoeuvres to suit their positions at various times:
- a) In London, Ds stated that matters concerning P were being appropriately dealt with in the Cayman Islands.
 - b) In France, Ds stated the matter concerning P should be dealt with in the Cayman Islands and they successfully opposed the jurisdiction of the French Court on that basis.
 - c) In London, Ds have sought to suggest that their arrangements with P were not subject to the Strategic Services Agreement (‘SSA’), but arose from a separate suite of contractual documents.

⁴⁴ Colin 5 at para 134.

⁴⁵ Colin 5 at para 30.

- d) But, in the Cayman Islands, Ds have sought to suggest that the SSA is the only operative contract surrounding the relationship between P and the Ds.
134. The Ds have not adequately explained these inconsistencies. What is obvious from the evidence is the manifest efforts Ds have made to avoid justice in any of these courts by saying whatever it suits them to say at the relevant time and place.
135. The Court finds that Ds' true motivation in bringing the applications is not a genuinely held belief that this Court does not have jurisdiction, or that service was defective, but rather arises from their desire to frustrate enforcement of the Judgment⁴⁶.
136. Were it otherwise they would not be seen to be asserting the precise opposite in the English proceedings and would have made this application two years ago.
137. Even if the Court had found that there had been a breach of the duty of full and frank disclosure and that a fair presentation had not been made, there are such strong reasons for departing from the usual sanction for non-disclosure that it would not be in the interests of justice to set aside the Order made.
138. Ds have made no attempt to set aside the default judgment obtained and P should not be deprived of the outcomes it has achieved by the expenditure of considerable time, effort and expense in pursuing Ds through the Cayman legal process.
139. Ds' conduct and delay in bringing the application is so unreasonable and improper that the Court should refuse to entertain the applications and will dismiss them.
140. D's should pay Ps costs. If Ds wish to argue that a taxation on the indemnity basis should not be ordered, which is the Court's inclination, they have permission to do so by providing a written argument to that effect of no more than 5 pages in length within 14 days. P has permission to reply if so advised within 14 days.



THE HON. MR. JUSTICE RAJ PARKER
JUDGE OF THE GRAND COURT

⁴⁶ *Lonrho v Fayed (no 5)* [1993] 1 WLR1489.