In The Supreme Court of Bermuda

CIVIL JURISDICTION

COMMERCIAL COURT

2021: No. 257

BETWEEN:

KPMG TAX LIMITED — **PLAINTIFF**

-AND-

(1) FRANK MAJORS
(2) MAXINE MAJORS
(3) MODIFIED MDMW 2000 FAMILY TRUST
(4) MAJORS FAMILY LLC — **DEFENDANTS**

Before: **The Hon. Chief Justice Hargun**

Representation: **Mr David Scorey KC, Mr Mark Chudleigh and Mr Erik Penz of Kennedys Chudleigh for the Plaintiff**

Mr John Jarvis KC and Mr Nicholas Howard of Walkers (Bermuda) Limited for the Defendants

Date of Hearing: **26 September 2023**

Date of Judgment: **20 October 2023**

JUDGMENT

HARGUN CJ

Application for anti-suit injunction restraining the defendant from continuing with foreign proceedings; principles to be applied; whether anti-suit relief should be granted on the basis that the defendant is a party to an arbitration agreement; whether anti-suit relief should be granted on the basis that the defendant is seeking quasi-contractual relief in the foreign proceedings; whether anti-suit relief should be granted on the basis that the foreign proceedings are unconscionable, vexatious and/or oppressive

Introduction

1. Following an *ex parte* hearing on 3 September 2021, Subair Williams J ordered that the Defendants, whether by themselves or through their trustees, officers, directors, employees, servants, agents, representatives, attorneys or otherwise shall be restrained from:

   (1) prosecuting, pursuing and/or otherwise continuing and/or taking any further substantive or procedural step against the Plaintiff in the proceedings commenced by the Defendants in the Chancery Court of the State of Tennessee, in the United States of America, Case No. 21-0641-III (the ("Tennessee Proceedings") because the Tennessee Proceedings breach the terms of the valid and binding arbitration agreement ("Arbitration Agreement") governing the Defendants claims contained in Paragraph 14 of the Plaintiff's Standard Terms and Conditions for Advisory and Tax Services (the "Terms and Conditions"), save for the purpose of dismissing, withdrawing and/or otherwise discontinuing the Tennessee Proceedings;

   (2) seeking and/or obtaining an anti-suit and/or anti-anti-suit injunction and/or a temporary order restraining and/or preventing the Plaintiff for pursuing and/or otherwise enforcing the said valid and binding Arbitration Agreement; and/or

(3) prosecuting, pursuing and/or otherwise continuing and proceeding against the Plaintiff in respect of any dispute subject to the Terms and Conditions other than pursuant to the valid and binding Arbitration Agreement (the "**Interim Order**").

2. On 26 September 2023 the Court heard an application by the Plaintiff seeking a permanent injunction restraining the Defendants in terms of the Interim Order. The Court also heard an application on behalf of the Fourth Defendant, Majors Family LLC (the "**LLC**") seeking to discharge the Interim Order against the LLC. Mr Frank Majors ("**Mr Majors**"); Mrs Maxine Majors ("**Mrs Majors**") and the Modified MDMW 2010 Family Trust (the "**Family Trust**") have written to the Court in letters dated the 6 January 2023 and 10 January 2023 undertaking "*to the Supreme Court of Bermuda and to the Plaintiff not to prosecute, pursue or otherwise continue or take any step against the Plaintiff in respect of any dispute that falls within the scope of the Plaintiff's Standard Terms and Conditions for Advisory and Tax, save for dismissing, withdrawing and/or otherwise discontinuing the proceedings commenced in Tennessee."* The undertakings given to the Court and to the Plaintiff add that it is the understanding of Mr Majors, Mrs Majors and the Family Trustee that they "*will not be in breach of this undertaking merely by reason of the Fourth Defendant [LLC] continuing with this claim in Tennessee, should the Fourth Defendant succeed on its application to the Court to discharge the Interim Injunction granted by the Court on 3 September 2021*." Mr Majors is the sole managing member of the LLC and in his capacity as the managing member, controls and directs the affairs of the LLC.

3. In summary, the LLC contends that the Interim Order should be discharged since its claims in the Tennessee Proceedings are grounded in negligence only and that the LLC is not a party to any arbitration agreement with KPMG. KPMG submits that the LLC's application for discharge of the Interim Order is misconceived, and it should be made permanent on the grounds that:

(1) The LLC is in fact party to the Arbitration Agreement with KPMG which provides that any disputes must be resolved through mediation and/or arbitration in Bermuda which the Defendants appear to have accepted the by their conduct in relation to this application.

(2) In the alternative, the LLC's claim in the Tennessee Proceedings is in any event subject to that arbitration agreement.

(3) In the further alternative, it would be oppressive and/or vexatious to permit the LLC to pursue its claim against KPMG in Tennessee, particularly in light of the other Defendants' concession that their claims are subject to arbitration.

(4) There are no "strong reasons" why the Interim Order should not be continued and made final.

Background

4. The essential background to these proceedings is set out in the First Affidavit of Mr Michael Morrison dated 2 September 2021, the then Chief Executive Officer of KPMG Bermuda. Mr Majors is a co-founder and director of Nephila Holdings Ltd and its wholly owned subsidiary Nephila Capital Ltd (together" **Nephila**"), both Bermuda companies. Mr Majors is a resident of Tennessee in the United States and is a member and the sole manager of the LLC.

5. Mrs Majors is the wife of Mr Majors and is also a resident of Tennessee. She is the settlor of the Family Trust and a member of the LLC.

6. The Family Trust is described in the Complaint in the Tennessee Proceedings as a Delaware *inter vivos* trust. As noted earlier, Mrs Majors is the settlor of the Family Trust, and the Family Trust is in turn a member of the LLC.

7. The LLC is a Delaware limited liability company of which Mr Majors, Mrs Majors and the Family Trust are members.

8. In 2018, Mr and Mrs Majors and The MDMW Discretionary Settlement, a Jersey trust (the "**Jersey Trust**") were partners in Nephila Partners LP, a Bermuda Limited partnership, which owned approximately 56% of Nephila. The Jersey Trust was settled by Mrs Majors in 2010 to hold a portfolio of investment securities, including any interest in Nephila. The assets of the Jersey Trust were re-domesticated from Jersey to Delaware and are now held by the Family Trust.

9. An agreement was reached in 2018 whereby the shares held by Mr Majors' family in Nephila (including via the Jersey Trust and Nephila Partners LP) were to be sold to the global (re)insurance group Markel Corporation ("**Markel**").

10. By letter dated 31 January 2018 Mr Majors engaged KPMG to provide tax advisory services and to prepare certain income tax returns and other revenue related filings for himself and others (the "**Majors First LoE**"). The Majors LoE stated that "*if you are in agreement with the terms of this engagement letter (and the attached Standard Terms and Conditions), please sign the enclosed copy of this letter to confirm our agreement*." Mr Majors signed this letter on 7 March 2018 confirming his agreement. Mr Majors is a party to a further letter of engagement dated 7 February 2019 (the "**Majors Second LoE**").

11. By letter dated 30 January 2018 the trustee of the Jersey Trust engaged KPMG to provide tax compliance and tax advisory services (the "**Trust LoE**"). The Trust LoE stated that "*if you are in agreement with the terms of this engagement letter (and the attached Standard Terms and Conditions), please sign the enclosed copy of this letter to confirm our*

agreement." The trustee of the Jersey Trust signed this letter on 21 February 2018 confirming the agreement on behalf of the Jersey Trust.

12. In anticipation of the potential sale of Nephila to Markel, in or about August 2018 KPMG proposed that, for tax purposes, the interest of the Majors family in Nephila should be transferred to a Delaware limited liability company in exchange for Mr and Mrs Majors and the Jersey Trust acquiring ownership interest in the company, with Mr Majors as the managing member. This led to the formation of the LLC. Accordingly, it is not in dispute that the LLC was the result of, and in furtherance of, the tax advice provided by KPMG to Mr and Mrs Majors and the Jersey Trust.

13. Although the First Majors LoE was addressed to and executed by Mr Majors, Mr William McCallum has advised that it was contemplated that the engagement would include work to be carried out by KPMG on behalf of Mrs Majors and others. Thus, the First Majors LoE references tax returns to be completed for Bedford Avenue LLC, a Tennessee company in which Mrs Majors was a member, and the charitable Devine-Majors Foundation. In the event, KPMG assisted in the completion of tax returns for both Mr Majors and Mrs Majors as well as for the Jersey Trust and provided all three with tax planning advice, advice which led to the creation of the LLC.

14. KPMG performed services on behalf of Mrs Majors. By emails of 2 February and 5 March 2018 KPMG tax manager, Ashley Godek, and Melissa Singler of Nephila Advisers stated that both Mr and Mrs Majors would need to sign the KPMG Tax Ltd Annual Consent to Disclose Tax Return Information and, in an email of 5 March 2018, Ms Godek requested they, "*let us know if Frank or Maxine have any questions".* On 8 March 2018, Ms Singler replied to KPMG by email enclosing, among other documents, the Annual Consent to Disclose Tax Return Information signed on 7 March 2018 by Mr Majors in his capacity as the taxpayer and by Mrs Majors in her capacity as the taxpayer's spouse. A similar KPMG Tax Ltd Annual Consent to Disclose Tax Return

Information form was signed by Mr and Mrs Majors on 18 February 2019 in connection with the subsequent tax year returns.

15. Mr Morrison states that in performing its instructions arising out of the First Majors LoE and the Trust LoE, KPMG rendered various services to Mr and Mrs Majors and the Jersey Trust, including:

    (1) preparation of 2017 US Individual Income Tax Return and supporting schedules, which was a joint return from Mr and Mrs Majors;

    (2) preparation of 2017 Tennessee Individual Income Tax Return and supporting schedules, likewise a joint return for Mr and Mrs Majors;

    (3) preparation of 2017 Form FinCEN 114, Report of Foreign Bank and Financial Accounts, a form for Mrs Majors;

    (4) preparation of 2017 Annual Return to Report Transactions with Foreign Trust and Receipt of Certain Foreign Gifts for Mrs Majors;

    (5) calculation of estimated US income tax payments for Mr and Mrs Majors;

    (6) preparation of 2017 Form 990 – PF, Return of Private Foundation, a US return, and Form NY CHAR500, New York State Annual Filing for Charitable Organisations, for the Devine-Majors Foundation, Mr Majors' private foundation;

    (7) preparation of 2017 Form 170, Tennessee Franchise, Excise Tax Return for Bedford Avenue LLC of which Mr Majors was a member; and

    (8) tax advisory services arising out of the acquisition by Markel of Nephila, including in respect of the formation of the LLC to facilitate such transaction.

16. In respect of the above services related to Mrs Majors, she signed all necessary returns and revenue documents for filings with the revenue authorities, including furnishing KPMG with an authorisation dated 14 October 2018 for KPMG to file electronically her 2017 FinCEN 114, i.e., Report of Foreign Bank and Financial Accounts, referred to at 15(3) above. KPMG's invoice dated 7 November 2018 confirms that KPMG's charges

included charges for the preparation of tax returns and calculations for "Frank and Maxine" and for the reporting of foreign accounts on behalf of Mrs Majors.

17. For the services KPMG performed in relation to the LLC, KPMG's invoice dated 7 November 2018 addressed to Mr Majors included fees of $4500 for "*Review, analysis, and discussion regarding potential tax planning in advance of the Markel acquisition of Nephila Holdings Ltd, including coordination of LLC formation and other transactional issues*". For the tax year following the formation of the LLC, the Majors Second LoE dated 7 February 2019 included reference to anticipated work by KPMG in preparing tax returns on behalf of the LLC as the product of tax advice provided regarding the sale of Nephila.

KPMG Terms and Conditions

18. Paragraph 14 of the Terms and Conditions includes the Arbitration Agreement, providing that any dispute or claim related to KPMG services are subject solely to the procedures provided in paragraph 14, and confidential arbitration in Bermuda. Paragraph 14 provides, in material part:

> *"14. **Alternative Dispute Resolution**. Any dispute or claim arising out of or relating to the Engagement Letter between the parties, the services provided there-under, or any other services provided by or on behalf of KPMG or any of its subcontractors or agents to Client or at its request (including any dispute or claim involving any person or entity for whose benefit the services in question are or were provided) shall be resolved in accordance with the dispute resolution procedures set forth below which constitute the sole methodologies for the resolution of such disputes. By operation of this provision the parties agree to forego litigation over such dispute in any court of competent jurisdiction. Mediation, if selected, may take place at a place to be designated by the parties. Shall take place in Bermuda.*

...

The following procedures are the sole methodologies to be used to resolve any controversy of claim ("dispute"). If any of these provisions are determined to be invalid or unenforceable, the remaining provisions shall remain in effect and binding on the parties to the fullest extent permitted by law.

Mediation

Any party may request mediation of a dispute by providing a written Request for Mediation to the other party or parties… The parties agree to discuss the differences in good faith and to attempt, with facilitation by the mediator, to reach a consensual resolution of the dispute. The mediation shall be treated as a settlement discussion and shall be confidential…

Arbitration

Arbitration shall be used to settle the following disputes: (1) any dispute not resolved by mediation 90 days after the issuance by one of the parties of a written Request for Mediation (or, if the parties have agreed to enter or extend the mediation, for such longer period as the parties may agree) or (two) any dispute in which a party declares, no more than 30 days after receipt of a written Request for Mediation, mediation to be inappropriate to resolve the dispute and initiates a Request for Arbitration. Once commenced, the arbitration will be conducted either (1) in accordance with the procedure in this Engagement Letter and the relevant Bermuda laws as an effect on the date of this Engagement Letter, or (2) in accordance with other rules and procedures as the parties may designate by mutual agreement. The provisions of this document will control.

The arbitration will be conducted before a panel of three arbitrators to be selected as provided in the UNCITRAL Rules provided, that in the case of a dispute involving a claim for less than $100,000, a sole arbitrator shall be agreed by the parties and, in the event that there is no such agreement after 30 days of the Request for Arbitration, the sole arbitrator shall be appointed by the Appointments Committee of the Chartered Institute of Arbitrators Bermuda Branch. Any issue concerning the extent to which any dispute is subject to arbitration, or concerning the applicability, interpretation, or enforceability of these procedures, including any contention that all or part of these procedures are invalid or unenforceable, shall be governed by the Bermuda International Conciliation and Arbitration Act 1993 and resolved by the arbitrators. No

potential arbitrator shall be appointed unless he or she has agreed in writing to abide and be bound by these procedures.

...

The seat of the arbitration is Bermuda and the venue shall be Bermuda save that the panel may choose to hold hearings at any place for the convenience of the parties and/or the panel." (underlining added)

The Tennessee Proceedings

19. On 7 July 2021 Mr Majors, Mrs Majors, the Family Trust and the LLC filed a Complaint in the Chancery Court for the State of Tennessee, 20th Judicial District. In that Complaint the Plaintiffs seek a jury trial and allege and confirm that:

(1) Prior to the events leading to the Tennessee Proceedings, KPMG had provided professional services to **Nephila Capital, Mr Majors and Mrs Majors individually** (paragraph 11).

(2) Subsequently, KPMG, acting through its long-term employee, Mr William McCallum, contacted Mr Majors in Tennessee to offer tax advice in connection with the sale of Nephila Capital, among others, Mr Majors, Mrs Majors and the Family Trust, which involve the restructuring of the ownership of Nephila Capital (paragraph 14).

(3) Mr McCullum, while acting within his scope of employment with KPMG, advised that Mr Majors, Mrs Majors and the Family Trust should form a limited company to hold their interest in Nephila Capital for the purpose of reducing their tax liability incurred as a result of the sale (paragraph 16).

(4) In reasonable reliance upon KPMG's advice, the LLC was formed on 21 August, 2018, as a member managed limited liability company by Mr Majors, Mrs Majors and the Family Trust with Mr Majors, as the sole manager (paragraph 18).

(5) **KPMG, however, failed to consider Tennessee state taxes while providing its advice**. KPMG negligently failed to consider the application of Tennessee taxes to this new entity, specifically the application of Tennessee's Franchise and Excise Taxes to the new entity (paragraph 19).

(6) The LLC was completely unaware there was a problem until September 2020, **when its new accounting firm informed the LLC of its exposure to such state taxes**. Prior to this time, there was no reason for the LLC or its members to be aware of any state taxes **in connection with KPMG's advice that the LLC should be formed to hold the subject ownership interest of Nephila Capital** (paragraph 31).

(7) Under the heading "PROFESSIONAL NEGLIGENCE" it is said that acting through its employee, Mr William McCallum, KPMG **provided tax advice to** the LLC, **Mr Majors, Mrs Majors, and the Family Trust in connection with the formation of the LLC** (paragraph 34).

(8) The LLC, **Mr Majors, Mrs Majors, and the Family Trust reasonably relied on KPMG's professional tax advice in connection with the formation of the LLC** (paragraph 35).

(9) **This breach of duty directly caused** the LLC**, Mr Majors, Mrs Majors, and the Family trust to incur Tennessee taxes, interest, and penalties in excess of $10 million** (paragraph 38).

(10) Under "PRAYER FOR RELIEF" the Plaintiffs pray that the **judgment be awarded to** that the LLC, **Mr Majors, Mrs Majors and the Family Trust, and against KPMG, for compensatory damages in an amount to be proven at trial**. (emphasis added)

Legal principles relating to anti-suit injunctions

20. It is common ground that the Court has jurisdiction to grant an anti-suit injunction in an appropriate case. Section 19(c) of the Supreme Court Act 1905 expressly provides that an injunction may be granted in all cases in which it appears to the Court to be just or convenient that such an order should be made. The Court has previously granted anti-suit injunctions in a number of cases including *Skandia International Insurance Company v Al Amana Insurance and Reinsurance Co Ltd* [1993] Civil Jurisdiction No.381 (Merrabux J); *International Risk Management Group Ltd v Elwood Insurance Ltd* [1993] Civil Jurisdiction Nos 103 and 245 (Ground J); *ACE Bermuda Insurance Limited v Pederson and others* [2005] Bda LR 44 (Kawaley J); and *Carnival Corporation v Estibeiro* [2013] Bda LR 20 (Kawaley CJ).

21. The "*key principles*" relating to the grant of anti-suit injunctions are set out in the judgment of Toulson LJ in *Deutsche Bank AG v Highland Crusader Offshore Partners LP* [2010] 1 WLR at [50]:

"... (1) Under English law the court may restrain a defendant over whom it has personal jurisdiction from instituting or continuing proceedings in a foreign court when it is necessary in the interests of justice to do.

(2) It is too narrow to say that such an injunction may be granted only on grounds of vexation or oppression, but, where a matter is justiciable in an English and a foreign court, the party seeking an anti-suit injunction must generally show that proceeding before the foreign court is or would be vexatious or oppressive.

(3) The courts have refrained from attempting a comprehensive definition of vexation or oppression, but in order to establish that proceeding in a foreign court is or would be vexatious or oppressive on grounds of forum non conveniens, it is generally necessary to show that (a) England is clearly the more appropriate forum ("the natural forum"), and (b) justice requires that the claimant in the foreign court should be restrained from proceeding there.

(4) If the English court considers England to be the natural forum and can see no legitimate personal or juridical advantage in the claimant in the foreign proceedings being allowed to pursue them, it does not automatically follow that an anti-suit injunction should be granted. For that would be to overlook the important restraining influence of considerations of comity.

(5) An anti-suit injunction always requires caution because by definition it involves interference with the process or potential process of a foreign court. An injunction to enforce an exclusive jurisdiction clause governed by English law is not regarded as a breach of comity, because it merely requires a party to honour his contract. In other cases, the principle of comity requires the court to recognise that, in deciding questions of weight to be attached to different factors, different judges operating under different legal systems with different legal policies may legitimately arrive at different answers, without occasioning a breach of customary international law or manifest injustice, and that in such circumstances it is not for an English court to arrogate to itself the decision how a foreign court should determine the matter. The stronger the connection of the foreign court with the parties and the subject matter of the dispute, the stronger the argument against intervention.

(6) The prosecution of parallel proceedings in different jurisdictions is undesirable but not necessarily vexatious or oppressive.

(7) A non-exclusive jurisdiction agreement precludes either party from later arguing that the forum identified is not an appropriate forum on grounds foreseeable at the time of the agreement, for the parties must be taken to have been aware of such matters at the time of the agreement. For that reason an

application to stay on forum non conveniens grounds an action brought in England pursuant to an English non-exclusive jurisdiction clause will ordinarily fail unless the factors relied upon were unforeseeable at the time of the agreement. It does not follow that an alternative forum is necessarily inappropriate or inferior. (I will come to the question whether there is a presumption that parallel proceedings in an alternative jurisdiction are vexatious or oppressive).

(8) The decision whether or not to grant an anti-suit injunction involves an exercise of discretion and the principles governing it contain an element of flexibility."

22. Where the foreign proceedings are commenced in breach of either an exclusive jurisdiction clause or a binding arbitration agreement, it is now well established that an injunction will normally be granted unless the other party can show "strong reasons" why an injunction should not be ordered. Thus, in *Donohue v Armco* [2002] 1 Lloyd's Rep 425, Lord Bingham held at [24]:

"If contracting parties agree to give a particular court exclusive jurisdiction to rule on claims between those parties, and a claim falling within the scope of the agreement is made in proceedings in a forum other than that which the parties have agreed, the English court will ordinarily exercise its discretion (whether by granting a stay of proceedings in England, or by restraining the prosecution of proceedings in the non-contractual forum abroad, or by such other procedural order as is appropriate in the circumstances) to secure compliance with the contractual bargain, unless the party suing in the non-contractual forum (the burden being on him) can show strong reasons for suing in that forum. I use the word 'ordinarily' to recognise that where an exercise of discretion is called for there can be no absolute or inflexible rule governing that exercise, and also that a party may lose his claim to equitable relief by dilatoriness or other unconscionable conduct. But the general rule is clear: where parties have bound themselves by an exclusive jurisdiction clause effect should ordinarily be given to that obligation in the absence of strong reasons for departing from it. Whether a party can show strong reasons, sufficient to displace the other party's prima facie entitlement to enforce the contractual bargain, will depend on all the facts and circumstances of the particular case…"

23. The reasoning of Lord Bingham in *Donohue* applies with equal force when a party commences proceedings in a foreign court in breach of an arbitration agreement (see *The Epsilon Rosa* [2003] 2 Lloyd's Rep 509 at 518L *per* Tuckey LJ). In *The Angelic Grace* [1995] 1 Lloyd's Rep 87, where Millett LJ held at 96 that in such circumstances the Court need feel no diffidence in granting the injunction:

> *"In my judgment, where an injunction is sought to restrain a party from proceedings in a foreign Court in breach of an arbitration agreement governed by English law, the English Court need feel no diffidence in granting the injunction provided that it is sought promptly and before the foreign proceedings are too far advanced. I see no difference in principle between an injunction to restrain proceedings in breach of an arbitration clause and want to restrain proceedings in breach of an exclusive jurisdiction clause as in Continental Bank NA v Aeakos Compania Naviera SA [1994] 1 WLR 588. The jurisdiction for the grant of the injunction in either case is that without it the plaintiff would be deprived of its contractual rights in a situation in which damages are manifestly an inadequate remedy. The jurisdiction is, of course, discretionary and is not to be exercised as a matter of course but good reason needs to be shown why it should not be exercised in any given case."*

24. The relevant principles, in relation to the grant of anti-suit relief in the context of an arbitration agreement were recently summarised by Cockerill J. in *Times Trading Corporation v National Bank of Fujairah (Dubai Branch)* [2020] EWHC 1078 (Comm) at paragraph [38]:

> *i) The Court has the power to grant an interim injunction " in all cases in which it appears to the court to be just and convenient to do so ": section 37(1) of the Senior Courts Act 1981 ("SCA 1981"). "Any such order may be made either unconditionally or on such terms and conditions as the court thinks just": section 37(2).*
>
> *ii) The touchstone is what the ends of justice require: Emmott v Michael Wilson & Partners Ltd [2018] 1 Lloyd's Rep 299 at [36] per Sir Terence Etherton MR.*

iii) The Court has jurisdiction under section 37(1) of the Senior Courts Act 1981 to restrain foreign proceedings when brought or threatened to be brought in breach of a binding agreement to refer disputes to arbitration: Ust-Kamenogorsk Hydropower Plant JSC v AES Kamenogorsk Hydropower Plant LLP [2013] 1 WLR 1889 (SC).

iv) The jurisdiction to grant an anti-suit injunction must be exercised with caution: Société Nationale Industrielle Aérospatiale v Lee Kui Jak [1987] UKPC 12, [1987] AC 871 , 892E per Lord Goff. v) As to the meaning of "caution" in this context, it has been described thus in The "Angelic Grace" [1995] 1 Lloyd's Rep 87 at 92:1 per Leggatt LJ: " The exercise of caution does no involve that the Court refrains from taking the action sought, but merely that it does not do so except with circumspection. "

vi) The Claimant must therefore demonstrate such a negative right not to be sued. The standard of proof is "a high degree of probability that there is an arbitration agreement which governs the dispute in question": Emmott at [39]. The test of high degree of probability is one of long standing and boasts an impeccable pedigree going back to Colman J in Bankers Trust Co v PT Mayora Indah (unreported) 20 January 1999 and American International Specialty Lines Insurance Co v Abbott Laboratories [2003] 1 Lloyd's Rep 267 and has been recently affirmed on the high authority of Christopher Clarke LJ in Ecobank v Tanoh [2016] 1 WLR 2231 at 2250.

vii) The Court will ordinarily exercise its discretion to restrain the pursuit of proceedings brought in breach of an arbitration clause unless the Defendant can show strong reasons to refuse the relief: The Angelic Grace [1995] 1 Lloyd's Rep 87; The Jay Bola [1997] 2 Lloyd's Rep 279 (CA) at page 286 per Hobhouse LJ. viii) The Defendant bears the burden of proving that there are strong reasons to refuse the relief: Donohue v Armco Inc [2002] 1 All ER 749 at [24]-[25] per Lord Bingham.'

25. There are cases where a party has commenced proceedings in a foreign court which are not in accordance with the relevant jurisdiction clause or the arbitration agreement, but

that party is not a party to the contract and therefore not party to the jurisdiction clause or the arbitration agreement. Thus, for example, there are cases where the injunction defendant is not a party to the relevant contract, but it claims to be entitled to enforce rights derived from that contract and seeks to do so in a forum other than that specified in the contract. These cases have been referred to as "quasi contractual claims". "Quasi contractual" anti-suit injunction applications arise in a variety of fact patterns and are not confined to any fixed categories. The central issue raised by these applications is whether the claim pursued by the plaintiff in the non-contractual jurisdiction is in substance a contractual claim which falls within the exclusive jurisdiction clause or the arbitration agreement. If on proper analysis the claim in the non-contractual forum is in substance a contractual claim which falls within the exclusive jurisdiction clause or the arbitration agreement, then an anti-suit injunction would normally be granted unless there are strong reasons not to do so.

26. In *QBE Europe SA v Generali España De Seguros Y Reaseguros* [2022] EWHC 2062 (Comm) Foxton J explained at [12] that in such cases it may nevertheless be the case that the right which the respondent is purporting to assert in the non-contractual forum arises from an obligation under a contract to which the arbitration or jurisdiction agreement is ancillary, such that the obligation sued upon is "conditioned" by the arbitration or jurisdiction agreement. Foxton J summarised the relevant principles as follows:

> (1) When deciding whether or not to grant an anti-suit injunction in relation to "quasi contractual" applications, the court does not treat the arbitration or jurisdiction agreement as irrelevant. Instead, in cases in which the right the respondent seeks to assert in the non-contractual forum is regarded by the English court as contractual in nature and arises under a contract which is subject to the arbitration or jurisdiction agreement, the court regards the arbitration or jurisdiction agreement as a highly significant factor when determining whether or not to grant anti-suit injunction relief [13].

(2) “Quasi contractual” anti-suit injunction applications arise from a number of different fact patterns [14].

(3) In cases where the respondent seeks to assert in the non-contractual forum rights derived from a contracting party, the granting of the anti-suit injunction relief has been rationalised on a “benefit and burden” basis: the respondent cannot enjoy the benefit of the derived right without complying with the associated obligation to pursue the right in the contractual forum [14].

(4) In the “derived rights” context, an application for anti-suit injunction relief will be approached by reference to the same decision-making framework as which applies in a wholly contractual context. In *The Yusuf Cepnioglu* [2016] EWCA Civ 386, [32]-[35], Longmore LJ held that the *Angelic Grace* framework applied, and there was no requirement to establish vexatious or oppressive conduct, because the anti-suit injunction was necessary to protect the contractual right to have the substantive rights arising under the contract in question determined in the contractual forum [16].

(5) The principle underpinning the grant of anti-suit injunction relief in “quasi contract” cases is that it would be invidious to permit someone who is invoking a contract as a basis for its claim to do so otherwise than in accordance with the jurisdiction regime of that contract, to which they have either themselves agreed or to which they claim some right to enforce [20].

(6) In order to determine whether the principles applicable to “quasi-contractual” anti-suit injunctions are engaged it is necessary to classify the right being asserted

in the non-contractual forum by reference to the English conflict of law principles [23].

(7) Whether the claim in the foreign jurisdiction is treated by the law of that jurisdiction as sounding in tort rather than contract is "beside the point" (relying on the judgment of Moore-Bick J in *London Steam-Ship Owners' Mutual Insurance Association Ltd v Spain* [2015] EWCA Civ 333 at [29]) [26(iv)].

Whether an anti-suit injunction should be granted on the basis that the LLC is a party to the Arbitration Agreement

27. As noted earlier, KPMG relies upon two letters of engagement signed by Mr Majors and one letter of engagement with the Jersey Trust. Mr Jarvis KC, appearing for the LLC, contends that none of the engagement letters has any application to the position as between KPMG and the LLC. He says that this was an entirely extracontractual relationship, with any duty of care arising exclusively in tort (and not subject to any arbitration agreement). He also points out that at the *ex parte* application for the anti-suit injunction KPMG in its written submissions accepted that the LLC did not formally subscribe to the Terms and Conditions and/or the Arbitration Agreement.

28. Mr Jarvis KC submits that KPMG agreed to (and did) provide services to the LLC but chose to structure the engagement so that the only parties in contractual privity with KPMG were Mr Majors and the trustee of the Jersey Trust and not the LLC, which was not party to the engagement letters or KPMG's Terms and Conditions, including the Arbitration Agreement. He submits that despite this deliberate choice not to enter into contractual relations with the LLC, KPMG has wrongly obtained an injunction that treats the LLC as if it were a party to the Arbitration Agreement.

29. The relationship between KPMG on the one hand and Mrs Majors and the LLC is complicated because it is reasonably clear that the services provided by KPMG to Mrs Majors and the LLC were provided at the instructions and with the consent of Mr Majors. It appears reasonably clear that the services were specifically mentioned in Mr Majors' letters of engagement and KPMG charged for the services rendered to Mrs Majors and the LLC in the same invoice as services rendered to Mr Majors. Mr Majors paid KPMG its professional charges in respect of the services rendered to Mrs Majors and the LLC. Mr Scorey KC, for the Plaintiff, contends that in the circumstances it is clear that Mr Majors was acting as an agent for Mrs Majors and the LLC. He says that the LLC will be bound by KPMG's Terms and Conditions, including the Arbitration Agreement, if those terms were agreed by Mr Majors acting as an agent for Mrs Majors and the LLC.

30. As noted earlier, Mrs Majors did not sign any letter of engagement with KPMG but it was contemplated that the engagement would include work to be carried out by KPMG on behalf Mrs Majors and others. KPMG provided extensive tax and advisory services to Mrs Majors as outlined in paragraphs [14] to [15] above. Mrs Majors was fully engaged with KPMG in relation to the delivery of these services including furnishing KPMG with an authorisation dated 14 October 2018 for KPMG to file electronically her 2017 Report of Foreign Bank and Financial Accounts.

31. KPMG charged for the services provided to Mrs Majors in the invoice dated 7 November 2018 which was paid by Mr Majors. The invoice dated 7 November 2018 charges the sum of US$ 48,000 for:

> *"Preparation of 2017 U.S. federal and state tax return* ***for Frank and Maxine****, including the following:*
>
> - *Preparation of the 2017 Form 1040, U.S. Individual Income Tax Return, and related schedules* ***for Frank and Maxine***
> - *Preparation of the 2017 Form INC 250, Tennessee Department of Revenue Individual Income Tax Return,* ***for Frank and Maxine***

- *Calculation of the 4th quarter 2017, and the 1st, 2nd and 3rd quarter 2018 estimated U.S. income tax payments* ***for Frank and Maxine***
- *Preparation of the 2017 Form 3520, Annual Return to Report Transactions with Foreign Trusts and Proceeds of Certain Foreign Gifts****, for Maxine***
- *Preparation of the 2017 Form FinCEN 114, Report of Foreign Bank and Financial Accounts,* ***for Maxine****"* (emphasis added)

32. In response to the Interim Order Mrs Majors has written to the Court stating that she undertakes to the Court and the Plaintiff not to prosecute or otherwise continue to take any step against the Plaintiff in respect of any dispute that falls within the scope of the Plaintiff's Standard Terms and Conditions for Advisory and Tax, save for dismissing, withdrawing and/or otherwise discontinuing the proceedings commenced in Tennessee.

33. Given the above circumstances, the Court accepts Mr Scorey KC's submission that it is reasonably clear that in relation to the provision of professional services by KPMG to Mrs Majors, Mr Majors was acting as her agent. As in the case of Mr Majors, the services rendered to Mrs Majors by KPMG were rendered on the basis of its standard Terms and Conditions which included an arbitration clause in the event of a dispute in relation to those services.

34. It is also reasonably clear, as contended by Mr Scorey KC, that the allegedly negligent advice of KPMG which is the subject of the Tennessee Proceedings was provided to, *inter alia*, Mr and Mrs Majors. In the Complaint filed in the Tennessee Proceedings it is alleged that (i) in reasonable reliance upon KPMG's advice, the LLC was formed on August 21, 2018 as a member managed limited liability company by Mr Majors, Mrs Majors and the Family Trust [18]; and (ii) KPMG, however, failed to consider Tennessee state taxes **while providing its advice**. KPMG negligently failed to consider the application of Tennessee taxes to this new entity, specifically the application of Tennessee's Franchise and Excise Taxes to the new entity [19].

35. The affidavit of Mr Daniel O'Brien filed on behalf of the Defendants and dated 9 March 2022 confirms that KPMG provided its initial advice in relation to the restructuring and the creation of the LLC to Mr and Mrs Majors and thereafter provided professional services to the LLC itself. Thus, Mr O'Brien states:

> (1) *Through my work with Mr Majors over many years, I know that KPMG had provided tax planning services to the Majors family and Nephila Partners LP*. [6]
>
> (2) *The selection of a LLC as the proper entity and the coordination of its creation and management to minimise tax burdens were led by Mr McCallum and KPMG. Based on my involvement in discussions and planning at the time, it was my understanding that KPMG was managing all arrangements in relation to the LLC structure with the goal of optimising the LLC's position in relation to all potential taxes*. [7]
>
> (3) *Based on KPMG's historical role in providing tax advice and filing services to the Majors family and the entities in which they held interests I had the impression that it would provide the same services to the LLC. The 29 August letter reflects this understanding, as it says that "we have historically assisted the transferors and the Partnership in complying with the relevant filing requirements*." [22]
>
> (4) *KPMG provided such tax advice and filing services for the LLC after it was created and until it was replaced by Cohn Reznick as the LLCs tax adviser in 2020. As part of the services for the LLC, KPMG prepared tax returns for each year. For example, in 2019 KPMG prepared and filed Form 1065, US Return of Partnership Income for the tax year 2018, for and on behalf of the LLC.* [23]

36. The invoice dated 7 November 2018 from KPMG and addressed to Mr Majors shows charges of $4,500 for "*Review, analysis, and discussion regarding potential tax planning in advance of the Markel acquisition of Nephila Holdings Ltd, including coordination of LLC formation and other transactional issues*".

37. It is clear from the evidence that the advice and the services provided to LLC were not provided gratuitously. KPMG charged for these services and rendered invoices to Mr Majors and Mr Majors paid those invoices to KPMG.

38. It is to be noted that the Majors Second LoE dated 7 February 2019 and signed by Mr Majors expressly notes that the services to be provided include: "*Preparation of the 2018 Form 1065, U.S. Return of Partnership Income for the* ***Majors Family LLC***" (emphasis added). In the circumstances the Court accepts Mr Scorey KC's submission that it is self-evident that Mr Majors signed the second letter of engagement not only on its own behalf but also as an agent and/or on behalf of the LLC. The Court accepts that Mr Majors certainly had the authority to do so as the sole managing member of the LLC.

39. Likewise, the Court accepts Mr Scorey KC's submission that, in respect of the period prior to the Majors Second LoE dated 7 February 2019, any advice provided by KPMG to and in respect of the LLC was subject to the Terms and Conditions (including the Arbitration Agreement), as made clear by the terms of the Majors First LoE. In seeking such advice on behalf the LLC, Mr Majors is to be treated as the LLC's agent.

40. It is to be noted that the LLC's Complaint in the Tennessee Proceedings does not purport to distinguish between the services provided by KPMG to the Defendants and the services provided by KPMG to the LLC. Thus, the Complaint asserts that (i) "*KPMG, acting through its employee, Mr. Will McCallum provided tax advice to Majors Family, LLC, Mr. Majors, Mrs. Majors, and the Trust in connection with the formation of Majors*

Family, LLC" [34]; and (ii) "*Majors Family, LLC, Mr. Majors, Mrs. Majors, and the Trust reasonably relied on KPMG's professional tax advice in connection with the formation of Majors Family, LLC"* [35].

41. Mr Majors accepts any services provided to him by KPMG were pursuant to the KPMG engagement letters which incorporated the Arbitration Agreement. For the reasons set out above at [29] to [33] Mrs Majors must likewise accept that the services provided to her by KPMG were pursuant to the KPMG engagement letters. The Court accepts Mr Scorey KC's submission that the same analysis must apply in relation to services provided by KPMG to the LLC. As Mr Scorey KC rightly points out the alternative is the commercially unreal proposition that KPMG might otherwise have served as the LLC's accountant and/or provided accounting services to the LLC over a number of years but not pursuant to a contract with the LLC.

42. Accordingly, the Court accepts KPMG's contention that the LLC is prima facie subject to KPMG's Terms and Conditions, including the Arbitration Agreement, just as Mrs Majors was equally bound by them as a result of Mr Majors' agency. The Court is satisfied to a high degree of probability that there is an arbitration agreement which governs the dispute between the LLC and KPMG. On that basis there was a valid and binding arbitration agreement between KPMG and the LLC and the contractual forum in which the LLC must bring its claims is therefore Bermuda arbitration. It must also follow that the Interim Order was validly granted and should not be discharged.

Whether ananti-suit injunction should be granted on the alternative basis that LLC is subject to the Arbitration Agreement on a quasi-contractual basis

43. Alternatively, Mr Scorey KC for KPMG, submits that on a "benefit and burden" analysis, the LLC cannot assert rights in respect of KPMG (including its allegedly negligent advice) whilst ignoring the fact that any rights the LLC might have necessarily arose out of, and are therefore subject to, the Defendants' contractual relationship with KPMG. It follows, he argues, that any rights the LLC might assert in respect of that relationship are subject to the "burden" of the agreed contractual dispute resolution process contained in the KPMG engagement letters.

44. Mr Jarvis KC, for the LLC, submits that the question the Court has to determine is whether the LLC's claim in the Tennessee Proceedings is in substance a contractual claim that asserts a liability under the KPMG engagement letters. He contends that the LLC's claim in Tennessee is based on a negligent performance of the post-formation services provided to it by KPMG and that claim is based exclusively on a duty of care in tort under Tennessee law, the essential rationale of which is that a professional who chooses to provide services to a third-party with whom it is not in contractual privity must ensure that it does so in a competent manner. Mr Jarvis KC submits that this duty does not depend for its existence on the contracts between KPMG and Mr Majors and the Jersey Trust documented by the engagement letters, nor is it a claim to enforce those contracts (which are relevant by way of factual background only).

45. In the Court's view, accepting Mr Scorey KC's submission, whilst the claim pursued by the LLC in the Tennessee Proceedings is framed in tort (and not in contract), it is necessarily based on, and derives from, the contractual relationship established by the KPMG engagement letters. In this regard the Court relies upon the following facts:

(1) The LLC was established as a direct result of, and in furtherance of, the services provided by KPMG pursuant to the Majors First and Second LoEs dated 31 January 2018 and 7 February 2019 and the Jersey Trust LoE dated 30 January 2018. Following the First Majors LoE dated 31 January 2018, KPMG rendered its invoice dated 7 November 2018 for services rendered which, as noted above, included professional charges for "*Review, analysis, and discussion regarding potential tax planning in advance of the Markel acquisition of Nephila Holdings Ltd, including coordination of LLC formation and other transactional issues*".

(2) The Majors Second LoE dated 7 February 2019 expressly included, as noted earlier, "*Preparation of the 2018 Form 1065, U.S. Return of Partnership Income for the Majors Family LLC."* The documentary evidence shows that KPMG provided services, pursuant to the engagement letters, not only professional advice leading up to the formation of the LLC but also all necessary accounting and tax advice after the LLC had been formed. The engagement letters incorporated the Arbitration Agreement requiring any dispute or claim arising out of or relating to the engagement letter between the parties shall be resolved by way of arbitration.

(3) As noted earlier, the Tennessee Complaint positively alleges that KPMG provided advice to each of the LLC, Mr Majors, Mrs Majors and the Jersey Trust in connection with the formation of the LLC and thereafter (see in particular paragraph 34 of the Complaint set out at [19(7)] above). This positive case asserted by the Defendants in the Tennessee Proceedings is consistent with the sworn affidavit evidence filed on behalf of the Defendants by Mr O'Brien in which he confirms that (i) through his work with Mr Majors over many years, he knew that KPMG had provided tax planning services to the Majors family and Nephila Partners LP [6]; (ii) based on his participation of Nephila Holdings in 2018, he knew that KPMG advised Mr Majors that he, his wife and the Trust should contribute their ownership interest in Nephila Partners LP, to the newly

formed LLC [7]; (iii) based on his involvement, it was his understanding that KPMG was managing all arrangements in relation to the LLC structure with the goal of optimising the LLCs position in relation to potential taxes [7]; (iv) based on KPMG's historical role in providing tax advice in filing services to the Majors family and the entities in which they have interests he had the impression that it would provide the same services to the LLC [22]; and (v) as part of the services for the LLC, KPMG prepared tax returns each year until it was replaced by another tax adviser in 2020.

46. It is clear from Foxton J's judgment in *QBE Europe* at [26] (relying upon the judgment of Moore-Bick J in *London Steam-Ship Owners Mutual Insurance Association*) that the right being asserted in the Tennessee Proceedings must be classified by reference to Bermudian conflict of law principles. Accordingly, the Court accepts that the legal classification of the claim as a matter of Tennessee law is immaterial, and the views expressed in the Webb Campbell Report are not relevant. The crucial question, in this context is whether the right being asserted by the LLC in the Tennessee Proceedings is in substance a right to enforce the underlying obligations in the KPMG engagement letters based on an allegation of breach of contract by KPMG.

47. The Court is satisfied that in substance the LLC is pursuing a right derived from the KPMG engagement letters in the Tennessee Proceedings. The complaint made in the Tennessee proceedings is that the advice rendered by KPMG was negligent. Count One of the Complaint in the Tennessee Proceedings is headed "PROFESSIONAL NEGLIGENCE" and the particulars of negligence are given thereunder. If the services and the advice rendered by KPMG were rendered pursuant to the letters of engagement, as the Court has so held, then the substance of the claim is one of contractual negligence and the claim, in substance, is one of breach of contract. In substance it is a claim of "*mal-performance*" of KPMG's obligations under the engagement letters (see the similar analysis by Burton J in *Egiazaryan v OJSC OEK Finance* [2015] EWHC 3532 at [30];

and Foxton J in a *Aon UK Ltd v LaMia Corporation SRL* [2021] EWHC 1074 (Comm) at [5]).

48. The Court concludes that in the circumstances it would be invidious for the LLC to be able to bring its claim in the Tennessee Proceedings, which is contrary to the jurisdiction regime of the contract which forms the essential foundation of the claim.

49. The scope of the Arbitration Agreement is wide enough to capture the complaints made in the Tennessee Proceedings, notwithstanding that they are framed in tort. The arbitration agreement provides that "*Any dispute or claim arising out of or relating to the Engagement Letter between the parties, the services provided there-under, or any other services provided by or on behalf of KPMG…"* and extending to "*any dispute or claim involving any person or entity for whose benefit the services in question are or were provided*". The Court accepts that the Arbitration Agreement is wide enough to cover claims even if those claims are framed in tort. It is now well established that it is a matter of construction of the arbitration agreement whether it is apt to cover tortious claims bearing in mind that there is a presumption that the parties intended the arbitration agreement to apply to *any* dispute arising from their contractual relationship (see *Fiona Trust v Privalov* [2007] UKHL 40 at [13] *per* Lord Hoffmann). Indeed, Mr and Mrs Majors, who were pursuing identical claims framed in tort, have withdrawn from the Tennessee Proceedings in compliance with the Interim Order and on the basis that those claims are subject to the Arbitration Agreement (see the undertaking given by Mr Majors at [2] above).

50. On the basis that the parties have agreed that any disputes arising out of the services rendered under the letters of engagement are to be resolved by way of arbitration in Bermuda under Bermuda law the Court would make an order requiring the parties to comply with their contractual bargain unless there are "strong reasons" against the grant

of anti-suit injunctive relief. In this case, the Court is satisfied that there are no such strong reasons why the Court should not continue with the existing Interim Order.

Whether an anti-suit injunction should be granted on the alternative basis that the Tennessee Proceedings are unconscionable, vexatious and/or oppressive

51. Mr Scorey KC, as a further alternative, contends on behalf of KPMG that, even if the Court holds that the LLC is not a party to the KPMG engagement letters, and even if the LLC can establish that it does not claim pursuant to KPMG's contractual obligations, the Tennessee Proceedings are nevertheless unconscionable, vexatious and/or oppressive such that they should be injuncted.

52. In support of the submission, it is said that in the Tennessee Proceedings the Defendants and the LLC sought to pursue identical claims against KPMG. Each party relied on the same factual substratum to allege an identical duty of care, breach of duty, and the loss in those proceedings. As noted earlier, Mr Majors, Mrs Majors and the Family Trust have, as a result of the Interim Order, withdrawn from the Tennessee Proceedings and have undertaken to this Court and to KPMG "*not to prosecute, pursue or otherwise continue or take any step against the Plaintiff in respect of any dispute that falls within the scope of the Plaintiff's Standard Terms and Conditions for Advisory and Tax*…" The withdrawal by these Defendants from the Tennessee Proceedings and the above undertaking given to the Court and KPMG indicates that these Defendants accept that their complaints about KPMG's advice are subject to the Arbitration Agreement.

53. The Court accepts that although a separate legal entity, the LLC is merely a vehicle for the interests of the Majors family. The other Defendants, as noted above, have acknowledged that their complaints against KPMG, if they are to be pursued, must go to arbitration. However, the other Defendants are seeking to use the LLC (which came into

existence as a result of the advice given by KPMG which is the subject matter of the Complaint) as a means of avoiding arbitration. It is reasonably clear that Mr Majors himself is directing the LLC's claim in the Tennessee Proceedings in his capacity as the sole managing member of the LLC. Accordingly, the position presented to the Court is that whilst Mr Majors has acknowledged, by his letter to the Court dated 6 January 2023, that it would be a breach of his contractual obligations under the KPMG letters of engagement for him to continue with the Tennessee Proceedings, he contends that the LLC should be allowed to pursue the very same claims in the Tennessee Proceedings under his direction and control as the sole managing member of the LLC. The Court accepts Mr Scorey KC's submission that this is a misuse of the LLC as a means of circumventing the Arbitration Agreement, and permitting the LLC to proceed in Tennessee in the circumstances would be unconscionable, vexatious and/or oppressive.

54. Mr Jarvis KC disputes that the continuation of the Tennessee Proceedings by the LLC is unconscionable, vexatious and/or oppressive. He says that the LLC is the only proper plaintiff who can pursue the claim made in the Tennessee Proceedings relying upon *Marex Financial Ltd v Sevilleia* [2021] AC 39 and contends that the claim pursued by the LLC is being pursued in the natural forum. Mr Jarvis KC relies upon the decision of Phillips J in *Evison Holdings Limited v International Company Finvision Holdings* [2019] EWHC 3057 (Comm), where Phillips J held at [28]:

> "*In this case however, OEB's claims are its* ***own corporate claims, which only it can bring and only in Russia****. Finvision's counterclaims in the arbitrations, based upon the same matters, appear on their face to be for losses purely reflective of those claimed by OEB. Far from impeding the arbitrations, the OEB by the proper claimants in the proper and natural forum*." (emphasis added)

55. In this case it is however to be noted that the claims set out in the Complaint in the Tennessee Proceedings are made individually by Mr Majors, Mrs Majors, the Family Trust and the LLC, based upon the allegedly negligent advice they all received from KPMG. Paragraph 38(c) of the Complaint seeks judgment to be awarded to the LLC, Mr Majors, Mrs Majors and the Family Trust, and against KPMG, for compensatory

damages in an amount to be proven at trial. Secondly, unlike the position in *Evison Holdings*, this is not a case where the LLC can only bring its claim in Tennessee. The LLC is free to pursue its claim in Bermuda, a jurisdiction which has "sufficient interest" given that the subject matter of the dispute is tax planning advice given in Bermuda, by a company (KPMG) incorporated in Bermuda, and pursuant to letters of engagement governed by Bermuda law. The letters of engagement expressly sought to (i) regulate the mode of dispute resolution; (ii) provide that the dispute resolution procedure take place in Bermuda; and (iii) regulate the extent of liability assumed by KPMG under Bermuda law.

56. In the circumstances the Court is satisfied that the continuation of the Tennessee Proceedings by the LLC would be unconscionable, vexatious and/or oppressive and that it is necessary and appropriate for the Interim Order to continue.

Conclusion

57. For the reasons set out above, the Court (i) dismisses the LLC's application to discharge the Interim Order; and (ii) grants a permanent injunction against the LLC and the other Defendants in terms of the Interim Order. The Court is minded to discharge the injunction against Mr Majors, Mrs Majors and the Family Trust on the basis of their undertaking to the Court and to the Plaintiff but will give an opportunity to the Plaintiff to explain the basis of their objection before doing so.

58. The Court will hear the parties in relation to the issue of costs, if required.

Dated this 20th day of October 2023

NARINDER K HARGUN

CHIEF JUSTICE