The Court of Appeal for Bermuda

CIVIL APPEAL No. 1 of 2019

IN THE MATTER OF SECTION 2 OF THE APPEALS ACT 1911

AND IN THE MATTER OF AN APPLICATION TO APPEAL TO HER MAJESTY-IN-COUNCIL

B E T W E E N:

(1) IMRAN SIDDIQUI
(2) STEPHEN CERNICH
(3) CALDERA HOLDING LIMITED

Applicants

- v -

ATHENE HOLDING LIMITED

Respondent

Before: **Clarke, President**
Bell, JA
Smellie, JA

Appearances: Alex Potts QC, Kennedy's, for the Appellants;
Kevin Taylor and Benjamin McCosker, Walker's, for the Respondent

Date of Hearing: **7th November 2019**
Date of Reasons: **22nd November 2019**

JUDGMENT

Application for leave to appeal to the Privy Council pursuant to section 2 of the Appeals Act 1911 – contest over forum conveniens – settled principles of law – whether requirements for leave to appeal satisfied.

SMELLIE JA:

Introduction

1. The Appellants, by their notice of motion for leave to appeal to the Judicial Committee of the Privy Council, seek leave to appeal against the Judgment and Order of this Court given on 20 September 2019, ("the Judgment") whereby this Court dismissed (i) the Appellants' application for leave to appeal against the ruling of Justice Hellman dated 28 June 2018 (the "Hellman J Ruling") and (ii) the Appellants' appeal against the ruling of Chief Justice Hargun, dated 14 January 2019 (the "Hargun CJ Ruling").

2. The Appellants also seek a stay of the proceedings, the subject of the Hellman J and Hargun CJ Rulings, pending final determination by the Judicial Committee of the Privy Council of their proposed appeal.

3. Described in broad terms, both the Hellman J Ruling and the Hargun CJ Ruling dealt primarily with the question whether Bermuda, rather than New York, is the appropriate forum for the trial of claims which have been brought in Bermuda by the Respondent ("Athene"), a Bermudian exempt company, against the Appellants.

4. As explained at [4] of the Judgment, Athene was formed in 2009. It has what is said to be a "strategic relationship" with Apollo Global Management LLC ("Apollo"), a Delaware corporation, which is a publicly traded corporation holding a myriad of subsidiaries and which offers pensions and annuities insurance products (together "the Apollo Group"). The Apollo Group is a huge entity with many billions of dollars of assets under its control and management. Athene Asset Management LP ("AAM"), an indirect subsidiary of Apollo, is Athene's investment manager. The Apollo Group holds about 10% of the shares of Athene and controls 45% of the voting power. As at 31 December 2017, five out of twelve of Athene's Directors were employees or consultants of Apollo. These presently include (since 2009) Mr James Belardi who is Athene's

Chairman, Chief Executive Officer and Chief Investment Officer, and a dual employee of both Athene and AAM. Athene is publicly listed on the New York Stock Exchange.

5. In dismissing the consolidated appeals against the Hellman J Ruling and the Hargun CJ Ruling, this Court upheld and affirmed the conclusions reached respectively in them, that, contrary to the contentions of the Appellants, Athene's claims were not susceptible to being struck out on *forum non conveniens* grounds, that there was no basis for a stay of the action on case management grounds, that there is "*a serious issue to be tried*" and "*a good arguable case*" within the meaning of the case law and rules of court, and that Bermuda is clearly or distinctly the appropriate forum for the trial of the dispute raised by Athene's claims.

6. The background to the action and to the appeals, and the reasons for dismissing the appeals, are set out fully in the Judgment which must be read for it full meaning and effect. It will therefore suffice for present purposes to give a brief summary.

7. On 3 May 2018, Athene issued a Specially Indorsed Writ in the present action. In the Statement of Claim Athene claims that the first and second Appellants (Mr Siddiqui and Mr Cernich respectively) have, unlawfully and in breach of (a) their fiduciary duties; (b) their duties of confidence and (c) their contractual duties owed to Athene, used Athene's trade secrets and its confidential and proprietary information relating or relevant to the acquisition of another company, anonymously called "Company A", for the benefit of the third Appellant Caldera, and themselves. The Writ seeks permanent injunctive relief and damages.

8. Caldera is a Bermudian company established in 2017 by Mr Cernich and in which Mr Siddiqui is also a shareholder. While Caldera contests the forum

issue in common with Mr Siddiqui and Mr Cernich, it is sued by Athene as of right in Bermuda. On 8 May 2018, Caldera was served with Athene's writ at its registered office in Bermuda.

9. By summons dated 17 May 2018, Caldera sought leave to enter a conditional appearance and this was granted by order dated 22 May 2018.

10. Caldera also sought by its summons, an order pursuant to RSC Order 12, rule 8 and/or the Court's inherent jurisdiction setting aside, staying or striking out the Writ on grounds of *forum non conveniens*, or alternatively an order staying the Writ on case management grounds, asserting that the State Court of New York, in which it had by then filed a competing claim against Athene, Apollo and other members of the Apollo Group, is the proper forum.

11. This is the aspect of Caldera's summons which was dismissed and relief which was refused Caldera, by the Hellman J Ruling.

12. Neither Mr Siddiqui nor Mr Cernich resides or is domiciled in Bermuda. Although both travelled to Bermuda on regular occasions to attend Athene Board meetings, they live in different States of the United States and whilst employed by Athene, worked mainly from New York in offices from which the business not only of Athene but also of Apollo and other members of the Apollo Group, was conducted. And so, notwithstanding also that Mr Siddiqui was a former director of Athene and Mr Cernich a former employee/ officer of Athene, Athene was required to obtain leave for service of its Writ out of the jurisdiction upon them in the United States and, on 17 May 2018, was granted leave on the *ex parte* basis.

13. As recorded in the Hellman J Ruling at [3]:

"When granting leave, the Court was satisfied that (i) in relation to Mr Siddiqui and Mr Cernich there was a good cause of action; ie a serious issue to be tried on the merits; (ii) there was a good arguable case that pursuant to Order 11, rule 1(1)(c) the claim was brought against a person duly served within the jurisdiction, ie Caldera; that Mr Siddiqui and Mr Cernich were necessary or proper parties thereto; and that as between Athene and Caldera there was a real issue which Athene could reasonably ask the Court to try: and (iii) that in all the circumstances Bermuda was clearly and distinctly the appropriate forum for the trial of Athene's claim against Mr Siddiqui and Mr Cernich. These requirements for leave to serve out of the jurisdiction were stated by Lord Collins in Altimo Holdings and Investment Ltd v Kyrgyz Mobil Tel Ltd [2012] I WLR 1804 PC at para 71"

14. Despite the apparent correctness of those settled statements of principle, as leave to serve out was granted against them on an *ex parte* basis, Mr Siddiqui and Mr Cernich were both entitled to challenge the grant of leave on an *inter partes* basis and both did so before Hargun CJ.

15. Caldera also challenged the conclusions of the Hellman J Ruling on the grounds of *forum non conveniens* above mentioned and sought from Hargun CJ, leave to appeal to this Court against the Hellman J Ruling.

16. In the Hargun CJ Ruling these challenges were each carefully considered and dismissed. Hargun CJ began his judgment on the topic of leave to serve out by reference to the same general principles from ***Altimo Holdings v Kyrgyz*** (above) and agreed with Hellman J except in relation to one factor regarded by Hargun CJ as potentially pointing to Bermuda as the proper forum which Hellman J did not so regard. This was as to the applicability of Athene's Bye-laws, Bye-law 84 of which contains an exclusive jurisdiction clause which Hargun CJ regarded as potentially requiring both Mr Siddiqui and Mr Cernich respectively as director or officer (the latter as Chief Actuary) of Athene, to

submit to the jurisdiction of Bermuda as the proper forum, for the trial of any dispute between them and Athene arising from the terms of their respective contracts of engagement.

17. It will be readily apparent from the foregoing, that the consolidated appeals which came before this Court against the Hellman J Ruling and the Hargun CJ Ruling related essentially to issues of *forum conveniens*. Those issues, as they related to service out against Mr Siddiqui and Mr Cernich, therefore came to be dealt with by this Court as explained in the Judgment, according to settled principles of law[1].

18. This Court, per Sir Christopher Clarke P., found that both Hellman J and Hargun CJ were correct in finding that Mr Siddiqui and Mr Cernich are "*necessary or proper parties*" to the Athene action against Caldera:

> *"In my judgment the Chief Justice was right in this conclusion. Athene's case is that Mr Siddiqui and Mr Cernich, in their capacity as directors and/or officers of a Bermuda company breached their Bermuda law governed duties to that company by incorporating Caldera, another Bermuda company, and seeking to confer upon it the benefit of the breaches of their duties (owed) to Athene. In circumstances where the claim is that Caldera was the vehicle by which the individual defendants intended to profit from their breach of fiduciary duty Caldera was an obvious defendant. If all three appellants were in Bermuda they would almost inevitably be joined in the same proceedings and it*

[1] Applying the well-known three-pronged test mentioned above as cited from the Hellman J Ruling and as recognized by the Privy Council in ***Altimo and Investment Ltd v Kyrgyz Mobil Tel Ltd*** [2012] I1 WLR 1804, following ***Seaconsar Far East Ltd v Bank Markazi Jomhouri Islami Iran*** [1994] 1 AC 438 , 453-457: *"First, the claimant must satisfy the court that in relation to the foreign defendant there is a serious issue to be tried on the merits, i.e. a substantial question of fact or law, or both,.. Second, the claimant must satisfy the court that there is a good arguable case that the claim falls within one or more classes of case in which permission to serve out may be given... Third, the claimant must satisfy the court that in all the circumstances the Isle of Man (for which read Bermuda) is clearly or distinctly the appropriate forum for the trial of the dispute, and that in all the circumstances the court ought to exercise its discretion to permit service of the proceedings out of the jurisdiction"*. The second prong of the test was found to be met under RSC Order 11 rule 1 (1) (c) in this case on the basis that Mr Siddiqui and Mr Cernich are *"necessary and proper parties"* to Athene's action against Caldera.

would be desirable to do so in order to ensure that any orders against Caldera were effective." (See [185] of the Judgment, see also [190].)

19. This Court also found that Mr Siddiqui and Mr Cernich were very arguably bound by Bye-Law 84:

> *"The terms of Bye Law 84 raise the question as to whether its terms could be enforced against directors and officers as contractual terms, bearing in mind that section 97(2) of the Companies Act 1981 provides that every officer of a company shall comply with the 1981 Act, the regulations and the Bye-laws of the Company.*
> ...
> *I would add that it seems to me that, if the individual defendants were under a statutory obligation under the Companies Act 1981 to comply with the Bye-laws, they were bound not to resist the provision in those Bye-laws that any such dispute as is referred to in Bye-law 84 should be subject to the jurisdiction of Bermuda and nowhere else. On the basis that the exclusive jurisdiction clause in Bye-law 84 was a term of their engagement as officers of Athene, Mr Siddiqui and Mr Cernich were bound to submit to Bermuda jurisdiction, unless they could point to exceptional circumstances which could not have been foreseen" (See [134] to [145].)*

20. In addition to the principles relating to service out of the jurisdiction as discussed above, the equally well settled principles as enunciated in *Spiliada*[2], which govern the selection of the *forum conveniens*, were recognized and applied both by Hellman J and Hargun CJ, and affirmed by this Court as pointing to Bermuda as the appropriate forum for the trial of Athene's claims, notwithstanding Caldera's related action pending before the New York Court.

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[2] ***Spiliada Maritime Corporation v Consulex Ltd*** [1987] 1 AC 460 (HL). See also the decision of the Privy Council in ***Nilon Limited v Royal Investments SA*** [2015] UKPC 2 on appeal from the British Virgin Islands which recognized the principle that a company can ordinarily expect to be sued in its domicile of incorporation (while refusing its application on the facts of that case). The principle was applied by this Court (following ***National Iranian Oil Company v Ashland Overseas Trading Limited*** (Bermuda Civil Appeal No. 15 of 1987); ***Sino-JP Fund Company Ltd v Pacific Electric Wire & Cable Company and Others*** [2006] Bda LR 51; ***Arabian American Insurance Company (Bahrain) EC v Al Amana Insurance and Reinsurance Co Ltd*** [1994] Bda 27 and ***Banco Atlantico v BBME*** [1990] 2 Lloyds Rep. 504 at 510 per Bingham LJ where it is stated that: *'Although the Judge described BBME's connection with this forum as 'not a fragile one', it is in truth very solid indeed. It must be rare that a corporation resists suit in its domiciliary forum. Rarely would this court refuse jurisdiction in such a case. In my judgment very clear and weighty grounds for doing so were not shown."*

21. This Court found that both Hellman J and Hargun CJ had correctly analyzed and weighed all of the factors to be considered when determining whether Bermuda was the *forum conveniens* for the trial of the dispute and that, in doing so, both judges had exercised their judicial discretion properly. Speaking of both Rulings, this Court held (at [84]):

> *"Neither of these decisions are surprising. Athene and Caldera are Bermuda companies. Athene is not a mere nameplate. It carries on relevant activity of substance here. The promoters of Caldera [i.e. Siddiqui and Cernich] chose a Bermuda seat for it. The company's seat is where, generally speaking, it can expect to be sued. Mr Siddiqui was a director and Mr Cernich is said to be an officer of Athene. The nature and extent of their duties is likely to be governed by the laws of Bermuda. We have, thus, a claim brought by one Bermuda company against another Bermuda company and its former officers in relation to alleged breaches of duty and confidence owed to the claimant company in relation to a plan to buy another company, which company the defendant company [Caldera] also has it in mind to purchase. These facts do not mandate Bermuda as a jurisdiction but it would, in my judgment, require strong grounds to justify staying a Bermuda action on the footing that New York was the natural forum. Like the judge [i.e. Hargun CJ] I do not regard those grounds as having been made out. More significantly, it does not seem to me that Hellman J has erred in law in reaching the conclusion that he did."*

22. This Court also recognized, as did the Courts below, that in the search for the appropriate forum the question of the location of witnesses (and evidentiary material) will be an important factor. At [53] of the Judgment it was recognized among other factors, that the acts and transactions to which the litigation relates have mainly taken place in New York and that most witnesses, including any forensic expert witnesses are likely to be resident in New York or elsewhere in the United States, and that is where most of the documents are likely to be held. This Court nonetheless concluded, in unison with the judges below, that the factors in favour of Bermuda were obvious and more weighty.

The First and Second JAMS[3] Arbitrations in New York

23. By way of further necessary background, Mr Siddiqui and Caldera on the one side and Apollo and others of the Apollo Group on the other, have been engaged in arbitration proceedings in New York.

24. As explained at [27] of the Judgment, on 9 January 2018 (five months before the institution of Athene's present action), Apollo and two other related entities began the first JAMS arbitration against Mr Siddiqui and Caldera[4]. This arbitration was brought pursuant to an arbitration provision contained in the Partnership Agreement between Apollo and other affiliated entities and Mr Siddiqui, which provided for any dispute arising out of or relating to the Partnership Agreement to be settled by arbitration in New York applying Delaware law. The claim was based on the alleged breach by Mr Siddiqui of his post-employment restrictive covenants and his fiduciary duties of confidence and other matters. The claim against Caldera was for tortious interference with contract.

25. It is important to note that neither Athene nor Mr Cernich was a party to this arbitration and there were no causes of action based on Bermuda law.

26. The claim in this arbitration was summarised by Hargun CJ as follows:

> *"[35] In the first JAMS Arbitration Apollo alleged that Mr Siddiqui was: (a) engaging in work with Caldera that violated his non-compete obligations; and (b) improperly touting new business that was "superior to Athene". Apollo further claimed that Caldera and Mr Siddiqui misappropriated Athene's strategies for purchasing assets in the insurance space and disparaged Apollo and Athene by suggesting a misalignment of interests*

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[3] **Judicial Arbitration and Mediation Services** founded in 1979 and which describes itself as the world's largest private alternative dispute resolution (ADR) provider.

[4] Described in the heading of the Statement of Claim as "Company XYZ", later discovered to be Caldera but was? never served.

and potential regulatory risk with respect to the unique business model used by Apollo with respect to Athene."

27. Apollo (and its affiliate claimants) later amended its claim in this arbitration to seek both a preliminary and a permanent injunction against Mr Siddiqui to prevent him from using confidential information or trade secrets belonging to Apollo relating to Company A. The Statement of Claim recognizes that Mr Siddiqui provided investment advice to Athene and owed a fiduciary duty to Athene not to use its confidential information to its detriment as he was currently doing.

28. On 21 February 2018 there was a settlement of the First JAMS arbitration as between the relevant Apollo entities and Mr Siddiqui. By the Settlement Agreement which was governed by New York law, the Apollo entities released Mr Siddiqui and his affiliates and any company formed by Mr Siddiqui ("the Siddiqui released parties") from all claims, complaints, demands or causes of action relating to the Action[5] and/or the Restrictive Covenants that existed as of, or which ever had existed, at any time up to and including the effective date, February 21 2018. Mr Siddiqui agreed to continue to be bound by paragraph (e) of the Restrictive Covenants in the Apollo Advisers V111 Limited Partnership Agreement which relates to confidential information. Under the Settlement Agreement Mr Siddiqui agreed to return or destroy within five days all Apollo property in his possession or under his control. On 23 February 2018 Mr Siddiqui swore an affidavit attesting to the return or destruction of such property.

29. Importantly for present purposes, Athene was not a party to the Settlement Agreement and received no consideration under it[6].

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[5] Which was defined so as to include all the pleadings in the arbitration proceedings.
[6] It appeared from the Second JAMS award to be described below that, as part of this settlement Mr Siddiqui had forfeited limited partnership interests worth nearly $15 million but Apollo agreed that he would receive over $7.5 million in additional distributions.

The Second JAMS Arbitration

30. On 3 May 2018, the same day on which Athene issued its writ commencing this action and Caldera began its action in the New York Court, Apollo and its affiliate claimants began the second JAMS arbitration against Mr Siddiqui in which they alleged that Mr Siddiqui had breached the Settlement Agreement of 21 February 2018 (pursuant to which the arbitration was invoked) by continuing to use and disclose Apollo's confidential information which was defined thus:

> *"The term 'Confidential information' refers to all confidential and proprietary information that is not generally known to the public in Apollo's possession, including information that Apollo has directly developed. Thus, the confidential and proprietary information that Apollo has obtained from its client Athene falls within this definition of Confidential Information".*

31. Mr Siddiqui filed a Response (later amended) and Counterclaim by which he denied breaching the Settlement Agreement and alleged that the arbitration was part of a campaign by Apollo and Athene to harm Caldera. Further, he alleged that under the Settlement Agreement Apollo released all claims against him challenging his alleged use of confidential information to acquire Company A and that Apollo has pursued this "sham arbitration" solely to harm his and Caldera's investors and marketplace relationships, and sought declaratory relief that in so doing it is Apollo, and not he, which has breached the Settlement Agreement. His Counterclaim was for breach of contract, tortious interference with prospective business relations/prospective economic advantage, and defamation.

32. On 28 November 2018 (which happened to be the last day of the hearing before Chief Justice Hargun), a further arbitration proceeding was commenced by the

Apollo entities (not including Athene) against Mr Siddiqui, Caldera and Mr Ming Dang, a former Apollo employee.

33. By the time of the hearings before Hellman J and Hargun CJ, the arbitrator had given directions in the Second JAMS arbitration as taken with this further arbitration but had not yet produced an award. By the time of the hearing before this Court he had done so.

Caldera's New York action

34. In its action commenced in New York on 3 May 2018, Caldera (and its two affiliates) alleged that there was a conspiracy between Apollo and Athene to manipulate the market for the acquisition of insurance companies. The respondents' misconduct is said to include, but is not limited to, "unfair business practices, unfair competition, tortious interference with commercial relationships, commercial disparagement and other blatantly anticompetitive activities". The claim was for damages of not less than $300 million together with punitive or exemplary damages.

35. On 23 May 2018, the respondents other than Athene filed a Notice of Appearance and Demand for Complaint. On 24 May 2018 Athene filed a Notice of Appearance and Demand for Complaint "*expressly reserv[ing] all of its rights and defences, including, without limitation, that service of the summons with notice was ineffective, and that there is no personal jurisdiction over Athene.*" At the time of the hearing before this Court there were pending motions by Athene and Apollo to dismiss the action.

The Second JAMS Arbitration Award

36. On 26 April 2019, (after the dates of the Hellman J and Hargun CJ Rulings), the arbitrator produced his combined award in the Second JAMS and further arbitration. A summary of what he decided insofar as it was relevant to the

appeal before this Court is set out in the Judgment at [169] – [182]. For present purposes it will suffice to note the following aspects of his findings:

37. The arbitrator recorded that discovery in the proceedings was "*difficult to say the least*"[page 2]. He had had to rule on countless discovery disputes and had appointed a forensic examiner to determine what, if any Apollo information was on Mr Siddiqui's electronic devices and whether any of that information had been disclosed to anyone. That examination did not reveal any evidence that was probative of Apollo's claims. However, the arbitrator recorded [6] that there were "serious credibility issues" with respect to both Mr Dang and Mr Siddiqui and that [8], beginning in mid-2016, Mr Siddiqui and Mr Dang began to engage in conduct that violated both the letter and the spirit of the Apollo Code of Ethics. Starting in July 2016 and continuing thereafter Mr Siddiqui, while an Apollo employee began sending internal Apollo reports, checks and analyses from his personal GMAIL account to the email accounts of Messrs Cernich, Daula (the Chief Risk Officer of Athene) and Mr Dang. Information from these documents was incorporated into decks and models that Caldera used to solicit potential investors to itself. Many active steps were taken by Mr Siddiqui and Mr Dang to hide their involvement. Mr Dang had liability for aiding and abetting Mr Siddiqui's breach of fiduciary duty (in collecting and transmitting Apollo's and Athene's Confidential Information and soliciting investors to invest in Caldera (rather than Apollo or Athene) through 2016 and until at least March 2017. Mr Saddiqui and Caldera were relieved of any liability for aiding and abetting by the Settlement Agreement but were liable in respect of the period from February 22 2018 (the day after the Settlement Agreement) until Mr Dang's October resignation. After his resignation and in breach of various post-employment restrictions Mr Siddiqui continued [9] to solicit investors and Caldera began its first active attempts to purchase Company A. Caldera made certain offers for Company A in late 2017; but no transaction was consummated at that time.

38. The arbitrator found [9] that the attestation completed by Mr Siddiqui (given under oath and penalty of perjury) that he had returned or destroyed all Apollo documents or other Confidential Information in his possession was false. Discovery in the arbitration established that "voluminous" quantities of such information, dating back to 2016, remained under his possession, custody and control.

39. The arbitrator held [11] that the effect of the Settlement Agreement was that any conduct by the Siddiqui Released Parties on or before 21 February 2018 was released. That it was necessary in order for Apollo to prevail against Mr Siddiqui and Caldera to prove that there was a violation of the terms of the Settlement Agreement. The arbitrator found [12] that three out of four of Apollo's claim's had merit but the fourth had not. The three that had merit were (i) Mr Siddiqui's clear breach in failing to return or destroy all Apollo property; (ii) the submission of a false attestation that he had done so; (iii) Mr Siddiqui's solicitation of Mr Dang to work on Caldera material. The claim in respect of which he held Apollo's proof to be deficient related to Mr Siddiqui's alleged use or disclosure of Apollo's confidential Information which he was strictly forbidden to do under the Settlement Agreement. Mr Cernich had brought his considerable knowledge and experience to formulate Caldera's bids and there was considerable unrebutted evidence [13] of his efforts to build Caldera, to consult with outside advisers to the extent necessary, and ultimately to make bids for Company A. But no witness at the hearing analysed those bids and presented evidence that the bids themselves reflected the use of confidential information obtained from Apollo or Athene.

40. The arbitrator awarded Apollo damages of $1 million against Mr Dang for breach of fiduciary duty and for aiding and abetting Mr Siddiqui's breach; and $75,000 against Mr Siddiqui and Caldera for aiding and abetting Mr Dang's breach of fiduciary duty following the execution of the Settlement Agreement on

21 February 2018. Mr Saddiqui was also ordered to pay punitive damages of $150,000.

41. No damages awarded in the arbitration accrued (or ever could have accrued) to Athene which was not a party.

42. Notwithstanding those findings of breaches of the Settlement Agreement and breaches of fiduciary duties, the arbitrator held (5) that Apollo had suffered no damage from a failure on its part to acquire Company A. The arbitrator found [10] that Athene had submitted a bid for Company A in or around April 2018 subject to due diligence. The due diligence however, showed that , as a result of Company A's reserving practices, among other things, there was no basis for Athene making a bid at anywhere near the level of that bid. Its analysis showed that the only bid that could be made was one below Company A's market price. Internal management concluded that an acquisition of Company A would actually be quite harmful. The arbitrator held that:

> *"Although Apollo and Athene continue to insist that they had a long-term interest in acquiring Company A and have continued to tell that to Company A the evidence does not support the conclusion that any such acquisition would be viable"*

43. In May 2018 an email exchange between senior Athene executives characterized the potential transaction as *"mortally wounded"*. The arbitrator found that *"there is no credible evidence to suggest that the accuracy of this description has ever changed."*

44. Finally for present purposes, the arbitrator also recognized the separate nature of Athene's Bermuda action when, in relation to an application for the return by Mr Saddiqui of an advancement of fees which the arbitrator had ordered in relation to the Bermuda action, he said:

> *"That action is still in its preliminary stages and there has been no "final adjudication" that the actions of Siddiqui were made "in bad faith or with criminal intent". The Bermuda court will make its own determination based on the facts before [it] and applicable law, and it would be improper for the undersigned to make judgments about that. Furthermore, the entire basis for imposing...an obligation to advance fees in that case is that it made allegations concerning pre-release conduct which are not of determinative significance in this arbitration."*

Significance of the arbitrator's findings

45. As the Judgment observes at [183], the Appellants submit that this award changes the whole picture (against which Messrs Siddiqui and Cernich were found to be necessary and proper parties to Athene's action and Bermuda found to be the appropriate forum).

46. In essence they say the findings reveal that the Athene bid for Company A was unmaintainable and expose the abusive character of Athene's claim notwithstanding that Athene was not itself a party to either JAMS arbitration. This they say is because Athene had privity of interest with Apollo and so should be regarded as bound by the arbitrator's findings, especially that to the effect that the evidence did not support the conclusion that any bid to acquire Company A would be viable.

47. These arguments as to privity of interest and conclusiveness of the second JAMS award, were rejected in the Judgment for six distinct reasons explained at [185] to [194], reasons which we regard as still revealing the lack of merit of the Appellants' renewed argument to similar effect now on their application for leave to appeal. The arguments are now sought to be bolstered by reference to case authority on the doctrine of privity of interest[7], which could and should have been presented on the appeal. We will come below to address it

[7] **Resolution Chemicals Limited v H Lundbeck A/S** [2013] EWCA Civ 924.

nonetheless, along with the other arguments now also sought to be redeployed on the application for leave to appeal.

The law relating to the grant of leave to appeal to the Privy Council.

48. Applications for leave to appeal to the Privy Council from Bermuda are governed by the Appeals Act 1911 (1989 Revision). For present purposes the relevant provision is in Section 2 (c) which provides:

> *"2. Subject to this Act, an appeal shall lie –*
> *(a)...*
> *(b)...*
> *(c) at the discretion of the Court [(of Appeal)], from any other judgment [(apart from those described in section 2(a) and (b))], whether final or interlocutory, if in the opinion of the Court, the question involved in the appeal is one which, by reason of its great general or public importance, or otherwise, ought to be submitted to Her Majesty in Council for decision."* [emphasis added].

49. The question for this Court on this application thus became whether the Appellants meet these requirements for the grant of leave.

50. The strict nature of the requirements is a matter of settled practice. As was recently noted by the Jersey Court of Appeal on an application for leave[8], the standard which is adopted by the Judicial Committee of the Privy Council itself pursuant to paragraph 3.3.3 (a) of its Practice Direction 3 provides that permission to appeal to the Privy Council is granted:

> *"in civil cases for applications that, in the opinion of the Appeal Panel, raise an arguable point of law of general public importance which ought to be considered by the Judicial Committee at that time, bearing in mind that the matter will already have been the subject of judicial decision and may have already been reviewed on*

[8] In **Boru Hatlari Ile Petrol Tasima AS and Others v Tepe insaat Sanayii AS and Others** [2016] JCA 199 D, at [9].

appeal; an application which in the opinion of the Appeal Panel does not raise such a point of law is refused on that ground."

51. Persuasive attempts at a more compendious explanation of what is meant by a "*question of great general or public importance*" have been made in the case law.

52. It will be apparent that leave should not be given where there is, on proper analysis, no genuine dispute as to the applicable principles of law. This is especially important to emphasize in the present case in light of the Appellants' arguments to be examined below, where, as will be discussed, there appears to be a confusion between a dispute as to the applicable principles of law and a dispute as to the applicability of settled principles of law to the facts of the case in dispute.

53. Counsel for the Respondent have helpfully extracted and cited passages from some of these cases in their written submissions.

54. Dictum from a judgment in 2018 of the British Virgin Islands Court of Appeal in ***Renaissance Ventures Ltd v Comodo Holdings***[9] is particularly instructive:

> *"Where there is no dispute on the applicable principles of law underlying the question which the appellant wishes to pursue on his or her proposed appeal, a question of great general or public importance does not ordinarily arise, especially where the principle of law is settled either by the highest appellant court or by longevity of application. Where the principle is one established by this Court but is either unsettled, in the sense that there are differing views or conflicting dicta, or there is some genuine uncertainty surrounding the principle itself, or it is considered to be far reaching in its effect, or given to harsh consequences, of for some other good reason would benefit from consideration at the final appellate level, this Court would be minded to*

[9] [2018] ECSC J1008-3 (decided on 8 October 20180 at [10]

> *seek guidance of their Lordships' Board.* ***Where, however, the real question on the proposed appeal is the way this Court has applied settled and clear law to the particular facts of the case, or whether a judicial discretion was properly exercised, leave will ordinarily not be granted on this ground.*** *In such a case, the question on the proposed appeal may be of great importance to the aggrieved applicant, but it would not for that reason alone be a question of great general or public importance."* [Emphasis added].

55. Statements to similar effect appear from other Commonwealth Caribbean cases. In ***Martinus Francois v Attorney General of St Lucia***[10], on an application for leave to appeal to the Privy Council from the Court of Appeal for St Lucia, Saunders AJ (as he then was) held that:

> *"Leave under this ground is normally granted when there is a difficult question of law involved. In construing the phrase "great general or public importance", the Court usually looks for matters that involve a serious issue of law; a constitutional provision that has not been settled; an area of law in dispute, or a legal question the resolution of which poses dire consequences for the public".*

56. Likewise, in ***Pacific Wire and Cable Company v Texan Management and Others***, an application for leave to appeal to the Privy Council from the Court of Appeal for the British Virgin Islands, Carrington AJ held[11]that :

> *"... there can be no issue of great general or public importance where there is no genuine dispute on the principles of law and their applicability to the facts... the question in the appeal should have the quality of being of great general or public importance".*

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[10] Civil Appeal N0. 37 of 2003, St Lucia (decided on 7 June 2004) at [13]

[11] Civil Appeal No. 19 of 2006, British Virgin Islands (decided on 6 October 2008) at [13], citing with approval a decision of the Court of Appeal of Trinidad and Tobago in ***Attorney General of Trinidad and Tobago v Lennox Phillip*** Civil Appeal No. 155 of 2006 (decided on 6 June 2007).

"Or Otherwise"

57. In the event that his grounds fail to meet the "great general or public importance" requirement for leave to appeal, Mr Potts argued that leave should nonetheless be given under this final limb of the section 2 (c) test.

58. He submitted that there are otherwise important reasons for the grant of leave: Athene is one of Bermuda's biggest life insurance companies and issues of law which will have far-reaching effect across the sector have arisen which have not yet, from the point of view of their applicability in Bermuda, been canvassed at the Privy Council level. More especially, he pointed to the issues raised in the Appellant's Grounds of Appeal to be examined below: (i) the pleading issue on breach of confidentiality; (ii) the issue on privity of interest between Athene and Apollo which he submits should operate to bar Athene from bringing its claims in Bermuda in light of the outcome of the Second JAMS Arbitration; (iii) whether Athene should be able to rely on the exclusive jurisdiction clause of its Bye-law 84 as said to have been incorporated into Mr Siddiqui's and Mr Cernich's terms of employment with Athene; and (iv) the meaning in law of a 'maturing business opportunity', as the concept lies at the heart of Athene's claims against the Appellants for injunctive relief in relation to the alleged abuse of Athene's confidential information and breach of duties of confidence.

59. These considerations (except (iv) in respect of which Mr Potts has properly not sought to develop a separate ground of appeal, doubtless because the question of whether there was really a maturing business opportunity interfered with is highly fact-sensitive) will be examined below in the context of the Grounds for Appeal which Mr Potts seeks to advance as meeting the "great general or public importance" requirement.

60. If, as we have found, that requirement has not been met, it cannot be right that leave should be given on the basis of the "or otherwise" limb.

61. Important as it is to the parties themselves and interesting as it may be to the wider business community for all its wider implications, this is at core a private dispute about *forum conveniens* between a Bermuda company and other privately interested parties – one of its former directors and one of its former officers/employees, and a private Bermuda company which those individuals established; ie Caldera.

62. A finding that in these circumstances there are "otherwise" good reasons for the grant of leave to appeal, could readily become a charter for frustration and delay by way of future *forum* contests, regardless of well-settled principles of governing law.

The Grounds for Leave to Appeal.

63. There are six grounds presented by Mr Potts on behalf of the Appellants which appear in his Grounds of Appeal after the following introductory remarks:

> "1.1 *The law applicable in Bermuda to the circumstances in which the Supreme Court of Bermuda has, or should exercise, personal jurisdiction over individual defendants resident if foreign jurisdictions and/or over exempt companies conducting international business rather than local business (whether by the "necessary and proper" party gateway or by reference to an alleged "exclusive jurisdiction clause" in a Plaintiff exempt company's own Bye-laws) has not been the subject of a reasoned decision by the Privy Council. There is considerable tension that arises (both in this Case and more generally) between the Privy Council's decision in* ***Nilon Limited v Royal Investments SA*** *[(above)] (on appeal from the BVI) (which acknowledged that a share ownership dispute involving shares in a BVI company should not be litigated in the BVI if it could not be shown that the BVI was clearly the appropriate forum by reference to all other circumstances), the House of Lord's judgment in* ***Donohue v Armco*** *[2001] UKHL 64 (which acknowledged that even an exclusive jurisdiction clause might not be enforced if there are strong reasons not to do so), and certain reported cases of the Supreme Court*

of Bermuda and the Court of Appeal of Bermuda, including (but not limited to), the interlocutory judgments in this litigation to date (as well as two other reported interlocutory judgments at first instance involving Athene Holding Ltd and other parties)[12] which seem to suggest that the mere facts of incorporation as an exempt company in Bermuda and/or presence of an exclusive jurisdiction clause in a Plaintiff exempt company's Bye-laws are perceived by the Supreme Court of Bermuda and the Court of Appeal for Bermuda to outweigh conclusively all other relevant considerations (including the presence of foreign governing law provisions and foreign jurisdiction agreements in relevant contracts between or amongst parties, such as the First Appellant's Settlement Agreement and Release, the Second Appellant's Separation Agreement and Release and the Advisory Services Agreement).

1.2 Further or alternatively, the law applicable in Bermuda to the fair and proper pleading and particularization of claims asserting misuse of confidential information and/or alleged diversion of maturing business opportunities has not been the subject of a reasoned decision by the Privy Council, and, as matters stand, the court of Appeal for Bermuda and the Supreme Court of Bermuda appear to have permitted a claim to be issued and served outside of the jurisdiction of Bermuda by reference to a Statement of Claim that has been pleaded "in headline form and in broad terms" , apparently contrary to the requirements of RSC Order 18 and well-settled English case law, but on unusual theory that the want of particularity can "be addressed by an application for particulars later".

1.3 Further or alternatively, as between the parties to this particular dispute (and as between related parties, such as Apollo Global Management LLC and Company A 0, the value and importance of the commercial issues in dispute are sufficiently great to warrant further review by the Privy Council of the Appellants'

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[12] But which were not the subject of this Appeal: **Athene Holding Ltd v Cambria County Employee Retirement System** [2019] SC Bda 63 Com and **Athene Holding Ltd v Central Laborers Pension Fund** [2019] SC Bda 62 Com.

jurisdictional challenges and the Third Appellant's strike-out application".

64. Then follow the six grounds of appeal which will be summarized and addressed in turn, as follows.

65. The first ground is that this Court[13] wrongly placed weight (or undue weight) on the fact that the Third Appellant Caldera (as a Defendant) and the Plaintiff (as a Plaintiff) are each incorporated in Bermuda. In so doing the Court wrongly failed to follow and apply the decision of the Privy Council in ***Nilon Limited v Royal Investments SA*** (above) (while preferring ***National Iranian Oil Company v Ashland, Sino-JP Fund Company Ltd v Pacific Electric Wire*** and ***Arabian American Insurance Co (Bahrain) EC V Al Amana Insurance*** (all above).

66. This ground fundamentally misunderstands the basis upon which the Judgment proceeded on this issue of leave to serve out. While it was regarded as very significant that Caldera and Athene as opposite parties are both incorporated in Bermuda, that fact proved conclusive only when taken with all the other factors pointing to Bermuda as the appropriate forum. These were factors which distinguished this case from the circumstances of the BVI company considered in the ***Nilon*** case, the subject of the Appellant's critique above, and in which the factor singularly and erroneously relied upon by the BVI Courts for regarding BVI as the proper forum, was the fact of incorporation there. This was noted by this Court in the Judgment as distinguishing the circumstances of ***Nilon*** from those of the present case [76].

67. There is no genuine dispute as to the law applicable in Bermuda to circumstances in which the Courts will exercise jurisdiction over foreign defendants. The test an applicant must meet when seeking leave for service out

[13] At [54] to [60], [70], and [74] to [77] of the Judgment.

of the jurisdiction is the same test as that settled by the Privy Council in ***Altimo Holdings v Kyrgyz*** (above) and which, as also discussed above, was applied properly by Hellman J when granting leave to serve out against Mr Siddiqui and Mr Cernich, and by Hargun CJ in agreeing with Hellman J.

68. And, in this regard, it is worth noting that in the Hargun CJ Ruling, the Chief Justice stated [95] that while he regarded the exclusive jurisdiction clause of Bye-law 84 as very likely applicable, he would have concluded that Bermuda is the appropriate forum "*even in the absence of the exclusive jurisdiction clause*". This Court expressly agreed [145][14].

69. Nor is there, as the Appellants postulate, any real tension between ***Donohue v Armco*** and ***Nilon*** on the subject of leave to serve out of the jurisdiction as regards the applicability of those decisions to the circumstances of the present case.

70. In the former, Lord Bingham in his lead judgment on behalf of the House of Lords acknowledged that an exclusive jurisdiction clause might not be invariably conclusive of a forum issue.

71. The question arose in its starkest form in that case in relation to a multi-partite dispute where one party in particular, a Mr Donohue, was entitled to invoke an exclusive jurisdiction clause in favour of England instead of New York, even while New York was otherwise, in many clear respects, the proper forum and preferred by other parties. An anti-suit injunction had been granted by the Court of Appeal at the behest of Mr Donohue to restrain the plaintiffs from proceeding against him in New York.

[14] Where the reference to "Caldera" should read "Athene".

72. Lord Bingham acknowledged that the exclusive jurisdiction clause was in wide terms and that the practice of the English courts is to give such clauses, as between the parties to them 'a generous interpretation.' However, after also acknowledging that the action properly already underway in New York would proceed there properly as between all the other parties, it was decided that the anti-suit injunction should be discharged (subject to an undertaking from the Plaintiffs that certain potentially punitive RICO claims not justiciable in England would not be pursued against Mr Donohue). This conclusion was reached after the familiar and purely orthodox weighing of the various factors which militated in favour of New York and being wary of, as the Court was most concerned to prevent, in Lord Bingham's words :"*A procedure which permitted the possibility of different conclusions by different tribunals, perhaps made on different evidence, would in my view run directly counter to the interests of justice.*"

73. And so, even from that cursory examination of the leading cases of ***Nilon*** and ***Donohue v Armco*** it is simply wrong to suggest that either generally or in the context of the treatment in this case of the principles which they decided, there is a point of "*great general or public importance*" arising from them which is requiring of clarification by the Privy Council.

74. The second ground complains that this Court was wrong to hold[15] that Apollo was not acting as the Respondent's (Athene's) agent in bringing the JAMS Arbitration, or that the Respondent was not a relevant privy of Apollo (whether in interest[16] or otherwise) , so far as the First Appellant is concerned. Hellman J had already acknowledged that "it is a reasonable and obvious inference that Apollo and Athene are working together", and that "Apollo brought the arbitration proceedings, in part at least on Athene's behalf"[17], and this was in

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[15] At [57], [60] and [185] of the Judgment.
[16] Citing ***Resolution Chemicals*** (above) and the decision of the Privy Council in ***Nana Ofori Atta II v Nanu Aba Bonsra II*** [1958] AC 58 at pages 102-3.
[17] [6] of the Hellman J Ruling.

any event obvious from the pleadings and chronology of events, in circumstances where the Respondent also participated in the JAMS Arbitration through discovery of documents and/or through the evidence of witnesses.

75. Mr Potts prefaced this ground with a number of assertions in his written submissions that "*Athene (in these proceedings) and Apollo (in the JAMS Arbitration, acting on its own behalf and on behalf of the Respondent) have sought the same or substantially the same relief based on the same alleged facts, the same or substantially the same alleged confidential information and/or the same alleged conduct (contrary to RSC Order 15, rule 4(2)), in circumstances where the JAMS Arbitration has established, after extensive forensic investigations, (a) that the First Respondent (Mr Siddiqui) and the Third Respondent (Caldera) has not used (or misused) any relevant confidential information for the purpose of acquiring or doing business with Company A, and (b) the Respondent's alleged interest in acquiring Company A was not a maturing business opportunity at any relevant time.*"

76. It would suffice for the falsification of these assertions simply to make reference to the Arbitrator's own observations as quoted above herein [44], on the relationship between the proceedings before him and these proceedings. It can hardly be sustainable to rely upon the conclusions of a tribunal as constituting an estoppel when the tribunal itself declares to the contrary. These assertions from Mr Potts' submissions might be regarded as further falsified by the misrepresentation in them of the Hellman J Ruling as finding that Athene and Apollo had been acting in unison in pursing the claims in the JAMS Arbitration. In fact, Hellman J made no such finding but was simply, at [60], reciting the arguments then raised before him by Mr Potts on behalf of the Appellants.

77. However, given that Mr Potts also asserts that the circumstances of the two different types of proceedings sufficiently coincide to give rise, as a matter of

law, to a privity of interest as between Apollo in the JAMS Arbitration proceedings and Athene in these proceedings, this argument will be addressed, however briefly.

78. It is important, in this regard, to note what this Court actually found[18], contrary to the Appellants' assertions and arguments, which is that:

> *"Athene is not bound by any findings (or lack of them) in an award in an arbitration to which it was not a party and at which it made no case... It is entitled to have the opportunity to make its own case in Bermuda, with disclosure from all three defendants.*
> ...
> *It is apparent from the Award that Mr Siddiqui has been squirreling away and transmitting Apollo and Athene's confidential information and has made false statements under oath. That does not encourage a conclusion that Athene's complaint of the misuse of its confidential information is ill founded. And it renders less compelling any claim that there has been inadequate particularization."* (this last being a reference to a complaint by the Appellants which has become the subject of the third ground of appeal to be next discussed).

79. The premise of those findings in the Judgment is not only based on the facts and circumstances of this case but comports with the settled case law as presented by the very cases cited by the Appellants.

80. In ***Resolution Chemicals,***(above) Lord Justice Floyd in his judgment on behalf of the Court of Appeal, after a comprehensive review of the earlier case law, including the decision of the Privy Council in ***Nana Ofori v Nana Aba*** (above)(per Lord Denning) and that of Sir Robert Megarry V-C in ***Gleeson v J***

[18] At [185] and [190]

Wippel & Co[19] , settled upon the following guidance for the application of the principle of privity of interest as a species of issue estoppel:

> *"Drawing this [the various dicta] together, in my judgment a court which has the task of assessing whether there is privity of interest between a new party and a party to previous proceedings needs to examine (a) the extent to which the new party had an interest in the subject matter of the previous action; (b) the extent to which the new party can be said to be, in reality, the party to the original proceedings by reason of his relationship with that party, and (c) against this background to ask whether it is just that the new party should be bound by the outcome of the previous litigation."*

81. The Award in the Second JAMS Arbitration (as combined in the further arbitration) was, as already noted, not delivered until after the Hellman J Ruling and the Hargun CJ Ruling. The Appellants' argument for privity of interest (then as yet unsupported by the case law later cited on their leave to appeal application) came to be considered by this Court for the first time and was dealt with in the Judgment on that basis.

82. As shown by the extract from the Judgment above, the argument was dealt with as the fact-sensitive issue that it is without misapplication of the legal principle. In short, as the case law shows, it was open to this Court to conclude as it did, that (i)*"Athene and Apollo are two distinct entities. Neither is the alter*

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[19] [1977] 1 WLR 510, where at 515 A, the Vice-Chancellor described privity of interest as a "*somewhat narrow*" doctrine and where, at 515-6, he went on to explain three principles, the second of which came later to be approved by the House of Lords (per Lord Bingham) in ***Johnson v Gore Wood*** [2002] 2 AC 1 and which I extract here: "Second, it seems to me that the substratum of the doctrine is that a man ought not to be allowed to litigate a second time what has already been decided between himself and the other party to the litigation. This is in the interest both of the successful party and of the public. But I cannot see that this provides any basis for a successful defendant to say that the successful defence is a bar to the plaintiff suing some third party, or for that third party to say that the successful defence prevents the plaintiff from suing him, unless there is a sufficient degree of identity between the successful defendant and the third party. I do not say that one must be the alter ego of the other: but it does seem to me that having due regard to the subject matter of the dispute, there must be a sufficient degree of identification between the two to make it just to hold that the decision to which one was party should be binding in proceedings to which the other is party. It is in that sense that I would regard the phrase 'privity of interest'.

ego, nominee or agent of the other[20]" and (ii) in circumstances where Athene could not have been and was not a party to the arbitrations (arising as they did by virtue of contract variously between Apollo on the one side and Mr Siddiqui, Mr Cernich or Mr Ming Dang on the other); where the relief sought by Athene in the present action could not have been granted and in which two of the present defendants (Mr Cernich and Caldera) could not have been joined by Athene, there was no privity of interest to bar Athene's claims in the present action.

83. As Mr Taylor submits, the Second JAMS Arbitration concerned duties owed by Mr Siddiqui to Apollo, including under a contract to which Athene was not a party, as opposed to these proceedings which concern Bermuda law duties owed by Messrs Sidddiqui and Cernich to the Respondent, and the participation in the breach of those duties by Caldera.

84. As matters presently stand, we find that any corporate relationship between Athene and Apollo is of no real relevance to these proceedings. The Appellants disagree but if they are correct in this regard, it will be open to them to apply to join Apollo in these proceedings under RSC Order 15 r.4 , rather than, as they have sought, to wield that rule as a foil to Athene's claims.

85. The third ground of appeal complains that "*Th(is) Court*[21] *wrongly affirmed the Hellman J Ruling and the Hargun CJ Ruling that sufficient particulars of the allegedly confidential information had been pleaded by the Respondent in its (Amended) Statement of Claim, subject only to any future requests for further and better particulars, and in doing so, the Court failed to follow or apply legal principles that are well-established in English law, as set out for example in* ***Ocular Sciences Ltd et al v Aspect Vision Care.***"[22]

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[20] [187]
[21] At [116] to [122] of the Judgment
[22] [1997] RPC 289 (at [359] to [360]).

86. Here again it is appropriate to note that the statement of legal principle cited by the Appellants is not in doubt nor is its applicability to the case to be disputed. The passages cited from the judgment of Laddie J are illustrative in this regard:

> *"The rules relating to the particularity of pleadings apply to breach of confidence actions as they apply to all other proceedings. But it is well recognized that breach of confidence actions can be used to oppress and harass competitors and ex-employees. The courts are therefore careful to ensure that the plaintiff gives full and proper particulars of all confidential information on which he intends to rely in the proceedings. If the plaintiff fails to do this the court may infer that the purpose of the litigation is harassment rather than the protection of the plaintiffs rights and may strike out the action as an abuse of process."*

87. What is said is that in upholding the Hellman J and Hargun CJ Rulings, this Court *"failed to follow or apply legal principles that are well established"*. This criticism is not one that meets the requirements of the test for leave to appeal to the Privy Council, as examined above.

88. Nonetheless, it is just as well to note that the Judgment[116] actually quoted this passage and more extensively from ***Ocular Sciences*** *(above)*. It also quoted what is described [119] as the Chief Justice's helpful summary of the particulars of Confidential Information set out in paragraphs 12 – 18 of the Amended Statement of Claim and this is considered in the further context of the extensive pleadings of the claims themselves as set out at [36] of the Judgment and as earlier summarized in the Hargun CJ Ruling. It is against all that background that the following unsurprising conclusion appears at [122] of the Judgment on the question of particularity of pleading:

> *"I would not regard it as right to reject the claim at this stage for want of further and better particularity, which can, itself, be addressed by an application for*

particulars later. Further, as the Chief Justice pointed out [113] the discovery process may reveal the extent to which the individual defendants have removed confidential information and the extent to which (if at all) they have made use of information confidential to Athene. The email exchanges exhibited to Mr McCosker's affidavit [(and put before the arbitrator)] suggest that, whilst Mr Siddiqui was still a director and officer of Athene, he and Mr Cernich were exchanging emails regarding the business of Athene. Athene contends, with some force, that they were disclosing confidential information in breach of their fiduciary duties and duties of confidence."

89. The remaining grounds of appeal (set out at 2.2.4 of the Grounds of Appeal) are in effect, a recitation of the complaints about reliance in the Hargun CJ Ruling and in the Judgment, upon the exclusive jurisdiction clause in Bye-law 84 as a factor pointing to Bermuda as the appropriate forum. The arguments do not improve by repetition as grounds for leave to appeal.

90. Nor, in light of the conclusions on the substantive grounds, may an application for leave to appeal against the refusal of the Appellants' stay application, fare any better.

91. For all the foregoing reasons, the application for leave to appeal is dismissed.

COURT OF APPEAL FOR BERMUDA

Smellie JA

Clarke P

Bell JA