In The Supreme Court of Bermuda

CIVIL JURISDICTION
COMMERCIAL COURT
2018: No. 390

BETWEEN:

(1) BCT LIMITED
(as Trustee of the A. Eugene Brockman Charitable Trust)
(2) SPANISH STEPS HOLDINGS LTD

Plaintiffs

-and-

(1) EVATT ANTHONY TAMINE

(2) TANGARRA CONSULTANTS LIMITED

Defendants

Before: **Hon. Chief Justice Hargun**

Appearances: **Mr Keith Robinson of Carey Olsen Bermuda Limited, for the Plaintiffs**

Mr David Brownbill QC and Mr Paul Harshaw of Canterbury Law Limited, for the Defendants

Dates of Hearing: **28 February 2022**

Date of Judgment: **6 May 2022**

JUDGMENT

Application to withdraw admissions made in the Defence; principles to be applied

HARGUN CJ

A. Introduction

1. There are three summonses before the Court whereby the parties make a number of applications. First, there is the Defendants' summons issued on 12 January 2021, whereby the Defendants seek leave to (i) amend their Defence and add to it claims against Spanish Steps Holdings Ltd, the Second Defendant ("**SSHL**"), and against Robert Theron Brockman ("**Mr Brockman**"); and (ii) serve the amended Defence and Counterclaim out of the jurisdiction on Mr Brockman.

2. Second, the summons issued on behalf of the First Plaintiff, BCT Limited ("**BCT**") on 29 October 2021, seeking leave to amend the Statement of Claim.

3. Third, the summons issued on behalf of the Plaintiffs dated the 23 February 2022 seeking judgment to be entered in favour of SSHL pursuant to RSC Order 27 rule 3 on admissions of fact made by the Defendants in their Defence in relation to the three payments which are the subject of these proceedings: US $5.395 million received by Evatt Tamine, the First Defendant (**"Mr Tamine"**), in relation to the acquisition of the Bewdley property ("**the US $5.395 million Payment**"); US $16.8 million paid to Mr Tamine as an advance on his remuneration package ("**the US $16.8 million Payment**"); and GBP 5 million paid to Herbert Smith Freehills ("**HSF**")("**the GBP 5 million Payment**").

4. The applications made by the parties have the following elements to them and it is convenient to deal with these applications in the following order.

5. First, the Defendants wish to amend their Defence to the claims brought against them by the Plaintiffs so as (i) to advance their positive case in respect of the payments and in so doing (ii) to change their proposal to repay the monies. In order for this application to succeed, the Defendants need the leave of this Court to withdraw the admissions which are pleaded in the existing Defence whereby the Defendants agreed to repay the three amounts

to the Plaintiffs. The application to withdraw the admissions made in the Defence is disputed by the Plaintiffs. The Plaintiffs contend that the Court should refuse to give leave to the Defendants to withdraw the admissions made and in addition, should enter judgment in favour of SSHL for the amounts claimed and interest thereon.

6. Second, Mr Tamine wishes to bring a counterclaim against SSHL for declaratory relief in respect of his entitlement to indemnification in respect of his legal fees under the articles of association of SSHL.

7. Third, Mr Tamine wishes to bring a counterclaim against Mr Brockman in respect of (i) US $5.395 million Payment, to the extent that it is found to fall to be repaid to SSHL, and (ii) his own costs and any costs and interest which he is ordered to pay in these proceedings, pursuant to the indemnity arising under his employment agreement with Mr Brockman.

8. Fourth, if Mr Tamine is given leave to bring a counterclaim against Mr Brockman, he seeks leave to serve a counterclaim out of the jurisdiction on Mr Brockman in the United States of America.

9. Fifth, BCT's application for leave to amend the Statement of Claim by substituting its name in place of St John's Trust Company (PVT) Limited ("**SJTC**").

B. Factual background

10. The Defendants' application for leave to amend the Defence in this matter is supported by Mr Tamine's third affidavit dated 4 January 2021 ("**Tamine 3**"). Mr Tamine says that he first became aware of Mr Brockman when he was working as an attorney at Cox Hallett Wilkinson between 1999 and 2001. Mr Tamine was invited to attend a meeting with Mr Brockman at his office in Houston. In the course of that meeting, Mr Tamine states that he entered into an employment agreement with Mr Brockman, pursuant to which Mr Tamine agreed to take up a role working in Bermuda in respect of the A. Eugene Brockman Charitable Trust ("**the Brockman Trust**")and various other structures connected with Mr

Brockman (“**the Employment Agreement**”).

11. Mr Tamine says that he was advised to set up a company in order to obtain a work permit in Bermuda for the purposes of this new role. Accordingly, Mr Tamine incorporated a Bermuda company named Tangarra Consultants Limited, the Second Defendant (“**Tangarra**”), on 23 July 12, 2003. Pursuant to the Employment Agreement, Mr Tamine states that he moved to Bermuda in January 2004 to formally begin his new role. He says that he was paid through the Second Defendant throughout the course of his employment with Mr Brockman.

The US $5.395 million Payment

12. Mr Tamine states that at the time of the US $5.395 million Payment, his remuneration under the Employment Agreement (recorded in a memorandum dated 13 July 2015) had been fixed by Mr Brockman as comprising a salary of US $750,000 dollars, bonus potential of US $850,000 and an annual contribution of US $1 million towards a retirement fund.

13. According to Mr Tamine, during the course of 2015, Mr Brockman and Mr Tamine began to discuss potential locations for the headquarters of the Brockman Trust. The property that was eventually chosen was Bewdley, a Bermudian property then owned by Mr Tamine’s wife’s family through a trust. According to this evidence, Mr Brockman and Mr Tamine resolved that Mr Tamine would purchase Bewdley, renovate the property to make it suitable for use as the headquarters of the Brockman Trust, and then lease the property to SJTC.

14. In March 2016, Mr Tamine was paid the sum of US $5.395 million from SSHL. It is Mr Tamine’s sworn evidence that this sum comprised monies which had not been paid by Mr Brockman under his Employment Agreement and a loan from SSHL in the amount of US $2.495 million which was thereafter set off against Mr Tamine’s remuneration under the Employment Agreement. It is Mr Tamine’s evidence that “*Mr Brockman agreed in Mr Tamine’s performance review meeting at the end of 2017 that the amount had been repaid*.”

The US $16.8 million Payment

15. It is Mr Tamine's evidence that during the course of 2017, he and his wife decided to move to the United Kingdom. Mr Tamine's family moved out to the UK in April 2018 and he intended to join them in September 2018.

16. Mr Tamine says that he was advised that, in order to structure his remuneration in the most tax efficient way, Mr Brockman should pay him an advance of six years' salary (being the amount of time he intended to live in the UK), which he could then lawfully remit to the UK as needed. He would then pay tax on the remitted sum as a non-domiciled resident of the UK.

17. Mr Tamine says that his annual remuneration package at that time amounted to US $2.6 million. A six-year advance of that sum amounted to US $15.6 million. It is Mr Tamine's sworn evidence that Mr Tamine raised the proposal of an advance payment of a salary in a telephone conversation with Mr Brockman in spring of 2018. In August 2018, Mr Tamine says that Mr Brockman agreed to the proposal.

18. Apparently, on 15 August 2018, a search warrant was executed on the home of Mr Kepke, a US tax attorney, who had previously provided advice to Mr Brockman in respect of the Brockman Trust. In light of this development, Mr Tamine became concerned that the Brockman Trust structure would come under challenge by the US authorities and that, if such a challenge materialised, he would require access to funds to cover his legal expenses. Mr Tamine therefore took the decision to make provision for an indemnity fund of US $1.2 million. Accordingly, Mr Tamine took steps to cause SSHL to transfer the sum of US $16.8 million to his accounts.

19. Mr Tamine accepts that US $15.6 million constituted an advance payment made in respect of work as Mr Brockman's employee and as he has not carried out work, he is not entitled to retain that sum. However, Mr Tamine contends that as Mr Brockman may have a claim in respect of this sum, he should not be required to pay that sum to SSHL. Mr Tamine

intends to bring an application for interpleader relief to determine that question.

The GBP 5 million Payments

20. According to Mr Tamine, following the execution of the search warrant on Mr Tamine's home on 5 September 2018, these payments were made to cover Mr Tamine's legal costs in respect of the United States Department of Justice ("**DoJ**") investigation upon his retention of HSF in New York and London. Mr Tamine says that both payments were authorised by James Gilbert, a director of SJTC, on 6 September 2018 and 8 September 2018.

C. Defendant's application to amend the Defence in relation to the 3 payments and SSHL's application for judgment in relation to the same payments

(i) The existing pleaded case in relation to the three payments

21. The Plaintiffs point out that following the amendment of the Writ, a Defence was filed on behalf of the Defendants on 31 October 2019. This Defence contained a number of core admissions. By paragraph 4 of the Defence, the Defendants agreed to repay the following three amounts without prejudice to their case that the payments were made and received in good faith:

    (a) A payment of US$5.395 million transferred from SSHL to the Second Defendant in March 2016;

    (b) A payment of US$16.8 million transferred from SSHL to the Second Defendant in August 2018; and

    (c) Payments totalling GBP 5 million paid to HSF in New York and the United Kingdom.

(ii) Admissions in relation to the US $5.395 million Payment

22. The key paragraphs in respect of US $5.395 million Payment are paragraphs 8-10 of the Statement of Claim (combined with paragraphs 86-94 which spell out the various legal bases for the claim to be entitled to repayment) and paragraphs 7-10 of the Defence (combined with paragraph 68 which responds to paragraphs 86-94). These paragraphs of the Statement of Claim and the Defence read as follows:

Statement of Claim:

"*Payment by the Second Plaintiff to the Second Defendant on 30 March 2016*

8. On or around 9 March 2016, a wire transfer of USD 5.395 million was made from the Second Plaintiff's account with Mirabaud to its account with Bermuda Commercial Bank ("BCB").

9. On 14 March 2016, Melanie Marsh of BCB emailed the First Defendant regarding the wire transfer stating that further due diligence was required and asking for confirmation of the source of funds, purpose of payment and duration for which the funds would remain with BCB.

10. Later the same day, the First Defendant responded to that email stating, amongst other things, that the funds would only be with BCB until 31 March 2016 "when they will be transferred to [the Second Defendant] as a loan... in due course I will provide you with a full copy of the loan agreement."

Defence:

"***Payment from Second Plaintiff in March 2016***

7. Paragraphs 8 to 10 are admitted.

8. As to paragraph 11:

8.1 The first sentence is admitted.

8.2 As to the second sentence, the Plaintiffs' knowledge and belief is correct.

8.3 The relevance of the third sentence is denied.

9. The USD 5.395m Payment was made in good faith and with the knowledge and express approval of Mr Brockman.

10. Nonetheless, the Defendants agree to repay the sum of USD 5.395m to the Second Plaintiff."

Paragraph 68 reads as follows:

"*As to paragraphs 86 to 94, paragraphs 9 to 10 above are repeated. In circumstances where the Defendants are willing to make repayment of the US$ 5.395 million, paragraphs 86 to 94 are not relevant and* ***the Defendants do not respond to the allegations therein****. For the avoidance of doubt, the allegations of breach of duty and dishonesty are denied.*"

23. Under the RSC a failure to respond specifically to an allegation in a statement of claim amounts to an admission of that allegation. Here the failure to respond amounts to an admission that the sum is due. The Defendants refused to plead to the Plaintiffs' case set out in paragraphs 86 to 94 of the Statement of Claim.

24. The proposed Amended Defence withdraws this admission on the basis that:

    (a) US$2.9m of the payment was already due to Mr Tamine in respect of his remuneration and pension, pursuant to an "employment agreement", which is alleged to have been an oral contract made between Mr Tamine and Mr Robert Brockman; and

(b) The remaining US$2.495m was a loan, which was repaid by Mr Tamine through deductions from his remuneration in 2016 and 2017.

25. The Defendants also seek to amend the Defence to plead that this payment was a distribution from the Brockman Trust to Mr Brockman, which was then paid to Tangarra rather than just being a payment made from SSHL to Tangarra with the knowledge and approval of Mr Brockman.

(iii) Admissions in relation to the US$ 16.8m Payment

26. The key paragraphs in respect of this pleading are paragraphs 13-16 of the Statement of Claim (combined with paragraphs 77-85 which spell out the various legal bases for the claim to be entitled to repayment) and paragraphs 12-15 of the Defence (combined with paragraph 67 which responds to paragraphs 77-85). These paragraphs of the Statement of Claim and the Defence are as follows:

<u>Statement of Claim</u>

"*<u>The First Defendant instructs the transfer of $16.8 million from the Second Plaintiff to the Second Defendant - 17 August 2018</u>*

13. On 17 August 2018, 2 days after the search of Mr Kepke's property, the First Defendant gave two instructions by email from his @tangarra.com email account to Mr Etienne d'Arenberg ("Mr d'Arenburg") of Mirabaud ("the 17 August Email"). By the first instruction, the First Defendant, purportedly in his capacity as a director of Point, requested the transfer of USD 20 million from Point's Mirabaud account to the Second Plaintiff's Mirabaud account. ***The description of the transfer was "Redemption from Point Investments Ltd****."*

14. By the second instruction, the First Defendant requested the transfer of USD 16.8 million from the Second Plaintiff's Mirabaud account to the Second Defendant's

Mirabaud account ("the Instruction" and "the USD 16.8m Funds" respectively). ***That same day, the First Defendant explained to Mr d'Arenburg over the telephone that the transfer of the USD 16.8m Funds was to satisfy amounts that the Second Plaintiff owed to him under a contract with the Second Defendant, and was based on a percentage of assets****. Pursuant to the Instruction, on or around 20 August 2018, Mirabaud transferred this amount from the Second Plaintiff's account to the Second Defendant's account, taking the balance of the Second Plaintiff's account from USD 20,205,273.11 (following the transfer from Point) to USD 3,405,723.11.*

15. *Following the appointment of Mr Gilbert as a director of the Plaintiffs and of Point, it was the habit of the First Defendant to copy Mr Gilbert on any instructions he gave to Mirabaud for the transfer of funds from the Second Plaintiff's account or from Point's account. In particular:*

    (1) *Between 1 July 2017 and 31 August 2018, the First Defendant emailed Mirabaud 28 times making a total of 48 requests for the transfer of funds by the Second Plaintiff or Point, and copied Mr Gilbert on 20 of these emails;*

    (2) *In 2018, the First Defendant emailed Mirabaud 16 times requesting the transfer of funds by the Second Plaintiff or Point, and copied Mr Gilbert on all but two of those emails (one of these two being the email containing the requests set out at paragraphs 13 and 14 above).*

16. ***The First Defendant did not copy his co-director Mr Gilbert on either of the instructions on 17 August 2018, or otherwise inform him of them.*** *Mr Gilbert first discovered the transactions when he reviewed bank statements from Mirabaud in mid-September 2018 after being appointed to manage all aspects of the ongoing investigations. However, the First Defendant did copy Mr Gilbert on an email he sent to Mirabaud on 24 August 2018, requesting two transfers from the Second Plaintiff's account (one to Baylor College of Medicine, and one to the South*

Carolina Research Foundation at the University of South Carolina, both on account of grants from the Brockman Medical Foundation)."

Defence

"***Payment from the Second Plaintiff in August 2018***

12. Paragraph 13 is admitted, save that:

12.1 the Defendants have no direct knowledge of what searches may have been carried out at Mr Kepke's property or when, and no admission is made in this regard; and

12.2 the First Defendant in fact validly instructed (and did not merely purport to instruct) the transfer of US$ 20 million from Point to the Second Plaintiff.

12. Paragraph 14 is admitted:

13.1 Of the US$ 16.8 million, US$ 15.4 million was a payment which was made in good faith and with the knowledge and express approval of Bob Brockman. The payment was made as an advance in relation to services that it was envisaged that the First Defendant would provide in future (over a period of 6 years). It was paid before the First Defendant's intended relocation to the United Kingdom.

13.2 The balance of US$ 1.4 million was a payment in respect of anticipated legal costs in connection with the Investigations in respect of which the First Defendant believed (and continues to believe) in good faith that he would be entitled to an indemnity pursuant to Article 76 of the Second Plaintiffs Articles of Association and/or bye-law 62 of the First Plaintiffs

bye-laws.

13. ***The Defendants agree to repay US$ 16.8m to the Second Plaintiff, without prejudice to the First Defendant's case that such payment was properly made***.

14. *The relevance of paragraphs 15 to 18 is denied.* ***In circumstances where the Defendants have agreed to repay US$ 16.8m to the Second Plaintiff it is not necessary for the Defendants to plead to those paragraphs and they do not do so***."

27. Paragraph 67 reads as follows: -

    "*As to paragraphs 77 to 85, paragraphs 13 to 14 above are repeated****. In circumstances where the Defendants are willing to make repayment of the US$ 16.8 million, paragraphs 77 to 85 are not relevant and the Defendants do not respond to the allegations therein. For the avoidance of doubt, the allegations of breach of duty and dishonesty are denied***."

28. The Plaintiffs contend that the failure to respond to these paragraphs amounts to an admission that the sum was repayable to SSHL. The Defendants refuse to respond to any of the allegations made in paragraph 77 to 85 of the Statement of Claim. In the proposed Amended Defence, the Defendants maintain the agreement to repay US$15.6m of the US$16.8m on the basis that this constituted an advance payment of remuneration for work that has not been done. However, the Defendants seek to withdraw the admission that this sum should be repaid to SSHL. Rather, they assert that they intend to seek interpleader relief so that the court may determine whether the sum of US$15.6m ought to be repaid to SSHL or to Mr Brockman.

29. The Defendants further seek, by the proposed Amended Defence, to withdraw the admission that the remaining US$1.2m should be repaid at all on the basis that Mr Tamine was owed that sum pursuant to a "litigation indemnity" alleged to have been agreed with

Mr Brockman in 2014 in respect of any legal expenses incurred in the course of defending the Brockman Trust and its related entities. By an amendment regarding the nature of the payment, it is also sought to be pleaded that the entire US$16.8m was a distribution from the Brockman Trust to Mr Brockman, which was then paid to Tangarra, notwithstanding the original admission that this comprised Brockman Trust monies.

30. It is also noteworthy that the Defendants' pleaded Defence accepted the averment at paragraph 14 of the Statement of Claim that Mr Tamine:

> "*…explained to Mr d'Arenburg over the telephone that the transfer of the USD 16.8m Funds was to satisfy amounts that the Second Plaintiff owed to him under a contract with the Second Defendant, and was based on a percentage of assets.*"
> Subject only to the clarification that the payment was an advance for services he would *"provide in future*".

31. However, the relevant admission is that Mr Tamine told Bank Mirabaud that these funds were paid pursuant to a contract with SSHL. This admission is intended to be withdrawn in the proposed Amended Defence which pleads at 4T-4AA that the monies relate to an "employment agreement" Mr Tamine made orally with Mr Brockman.

(iv) GBP 5m Payment

32. The key paragraphs in respect of these payments are paragraphs 22-25 of the Statement of Claim (combined with paragraphs 69-74 which spell out the various legal bases for the claim to be entitled to repayment) and paragraphs 19- 23 of the Defence (combined with paragraph 67 which responds to paragraphs 69-74). These paragraphs of the Statement of Claim and Defence are as follows:

> ***Statement of Claim***
>
> "*Payment of £5 million from the First Plaintiff to the First Defendant*

22. *On or around 5 September 2018, the First Plaintiff's US lawyers, M&C (who had also been acting for the First Defendant personally since June 2018 with regards to the known scope of the investigation) referred the First Defendant to Herbert Smith Freehills for the purposes of his receiving separate personal legal representation in respect of an investigation being undertaken by the United States Department of Justice ("the DoJ").*

23. *At the request of the First Defendant, on 6 September 2018, the Second Plaintiff, on behalf of the First Plaintiff as trustee of the Trust, transferred the sum of £1.5 million to the client account of Herbert Smith Freehills… on account of the First Defendant's anticipated legal fees in respect of the investigations by the Bermuda Police Service and the United States Internal Revenue Service ("the Investigations") and purportedly pursuant to the First Defendant's rights under bye-law 62 of the First Plaintiff's bye-laws.*

24. *At the request of the First Defendant, and pursuant to emails of the 6th, 7th and 8th of September 2018 between HSF UK/ Herbert Smith Freehills NY LLP ("HSF NY") and Mr. Gilbert, on 8 September 2018 the Second Plaintiff, on behalf of the First Plaintiff as trustee of the Trust, transferred the sum of £3.5 million (converted into US dollars) to the client account of HSF NY (being Citizens Bank, ABA 021313103, Swift Code CTAZIUS33, Account 4011254621, Federal Tax ID 98-1062435, D-U-N-S# 078686571), again on account of the First Defendant's anticipated legal fees in respect of the Investigations and purportedly pursuant to the First Defendant's rights under bye-law 62 of the Plaintiff's bye-laws.*

25. *The sums of £1.5 million transferred to HSF UK and £3.5 million transferred to HSF NY are referred to below as "the Trust Monies".*

Defence

"***Payment of £5 million to HSF NY and HSF UK***

19. As to paragraph 22, it is denied that M&C had been representing the First Defendant personally only since June 2018, or that such representation had been limited to "the known scope of the investigation". M&C had been acting for the First Defendant personally in relation to any and all matters arising out of an investigation into Robert Smith since 2016, when the First Defendant first made M&C aware of the investigation. Otherwise, paragraph 22 is admitted.

20. As to paragraphs 23 and 24, no admission is made as to whether the sums of £1.5 million and/or £3.5 million were paid by the Second Plaintiff on behalf of the First Plaintiff or otherwise as to the relationship between the First and Second Plaintiffs in relation to the payments. The "Investigations" were also being undertaken by the United States Department of Justice and references in this Defence to the Investigations should be read accordingly.

21. Paragraph 25 is noted. Notwithstanding the use of the defined term "Trust Monies", it appears that the sums transferred belonged to the Second Plaintiff, rather than to the First Plaintiff as trustee of the Trust.

22. The Indemnity Monies were requested and received in good faith because the First Defendant believed (and continues to believe) that he is entitled to an indemnity pursuant to Article 76 of the Second Plaintiffs Articles of Association and/or bye-law 62 of the First Plaintiffs bye-laws for legal costs incurred in relation to the Investigations.

*23. **The Defendants agree to repay the Indemnity Monies, without prejudice to the First Defendant's case that such payments were properly made**."*

33. Paragraph 61 reads as follows:

"*The Defendants do not plead to paragraphs 69 to 74. The First Defendant has already agreed to the repayment of the Indemnity Monies without prejudice to his case that those payments were properly made*."

34. The Plaintiffs contend that the failure to plead to these paragraphs amounts to an admission that these sums were repayable to SSHL. In the proposed Amended Defence, the Defendants seek to withdraw the admission that these sums should be repaid to SSHL on the basis that it is denied that these monies have ever been impressed with a trust in favour of the First Plaintiff. It is now to be said that they were received lawfully and in good faith because Mr Tamine was entitled to an indemnity pursuant to SSHL's Articles of Association and/or SJTC's bye-laws for legal costs incurred in relation to the investigations.

(v) Reasons for withdrawal of admissions

35. It is common ground that the brief reasons in support of the application to withdraw the admissions are set out in paragraphs 15-17 of Tamine 3:

> "*... I initially decided to offer to repay all of the money without prejudice to the fact that there had been no wrongdoing. That was the position stated in my and the Second Defendant's Defence.*
>
> *I made this offer for two main reasons:*
>
> > *(1) First, when these proceedings were initially brought against me, I did not have access to copies of the emails and other documentation which would prove the basis of the USD 5.395m Payment and the USD 16.8m Payment. I explain the reason for this further below, but it was not until copies of these documents were provided to me by the BPS pursuant to the order made by the Chief Justice in proceedings with the case number 2020: No 37 that I had access to the critical documentary evidence*

establishing the inaccuracy of the assertions made against me.

(2) Second, I had hoped that, having agreed to repay the monies received from Spanish Steps, Mr Brockman and his associates would cease making offensive accusations against me. That has, regrettably, not been the case. Mr Brockman and his associates (and the lawyers to whom they have provided instructions) have continued to repeat these allegations, accusing me of theft and dishonesty when they have no proper basis for doing so. I cannot allow these accusations to continue to be levelled against me, and it is right and fair that I have an opportunity to respond fully to the claims brought against me in these proceedings, especially in light of the fact that I now have access to the documentary evidence that supports my case."

(v) Discussion

Legal principles

36. Legal principles in relation to withdrawal of admissions are not in dispute and are summarised by Sumner J in *Braybrook v Basildon & Thurrock University NHS Trust* [2004] EWHC 3352 QB at [45]:

> ***[45]*** *From these cases and the CPR I draw the following principles.*
>
> *(1) In exercising its discretion the court will consider all the circumstances of the case and seek to give effect to the overriding objective.*
>
> *(2) Amongst the matters to be considered will be:*
>
> > *(a) the reasons and justification for the application which must be made in good faith;*

(b) the balance of prejudice to the parties;

(c) whether any party has been the author of any prejudice they may suffer;

(d) the prospects of success of any issue arising from the withdrawal of an admission;

(e) the public interest, in avoiding where possible satellite litigation, disproportionate use of court resources and the impact of any strategic manoeuvring.

(3) The nearer any application is to a final hearing the less chance of success it will have even if the party making the application can establish clear prejudice. This may be decisive if the application is shortly before the hearing.

37. At [38] of his judgment, Sumner J referred to the judgment of Waite LJ in *Gale v Superdrug Stores plc* [1996] 1 WLR 1089, as to the appropriate approach for the court to take where an application is made for leave to withdraw an admission:

> *"More importantly, I think, some explanation is necessary. If a mistake has been made the court would, in my view, tend to the view that the victim of the error must be relieved if the other side can be properly protected.* ***If some new evidence has been discovered which puts a different complexion on the case, that is in the nature of a mistaken assessment of the case.*** *For my part I would be anxious to assist a party who has made an honest error and not hold that a party to a liability which, if the error had not been made, he would not have been under.* ***The only explanation tendered in this case, as we are told, is that there had been a decision in 1984 made by insurers on economic grounds that they would not fight these cases****, ie the amount that they might expect to have to pay is such that it was not*

worth incurring the costs of fighting the issue of liability and having it decided by the court . . . ***Speaking for myself, having regard to all the other factors, I cannot regard that as a sufficient explanation which would justify the grant of leave****.”* (emphasis added).

38. The mere fact that there has been a reappraisal or tactical reassessment by the legal advisers is not ordinarily a sufficient justification for withdrawal of an admission. Thus, Ralph Gibson LJ in *Bird v. Birds Eye Walls Ltd.*, The Times, 24 July 1987, held:

> *“The civil justice system is under stress and far-reaching reforms are in prospect. There is a public interest in excluding from the system unnecessary litigation and a consequent need to curb strategic manoeuvring. Here the plaintiff presented the defendants' insurers with the choice of an admission of liability or service of writ. The defendants' insurers, presumably advisedly, chose to admit liability. That admission was the foundation of over two years of continuing search for a compromise on quantum. As Mr. Soole submitted, had the plaintiff insisted upon obtaining a consent judgment on the issue of liability before embarking on that protracted negotiation the defendants would have protested that it was a proposal to incur costs to no purpose. I share Judge Wroath's opinion that against that background the defendants explanation for resiling from their admission was “really a very weak one.”*

39. To the same effect is the judgment of His Honour Judge Halliwell in *Conn v Ezair* [2019] EWHC 1722 (Ch) at [35]:

> “*35. CPR PD14 Para 7.2 provides guidance in relation at least to some of the relevant circumstances. I shall address these now using the same sub-paragraph designation.*
>
> > *(a)* ***Mr Ezair seeks to withdraw the Admissions following legal reappraisal or, at least, a tactical re-assessment by his lawyers; it is not based on new***

> ***evidence***. *Whilst Mr Ezair mentioned in his fifth witness statement, that he wished to leave it to his lawyers to discuss the effect of the relevant transactions, he was well capable of describing his own understanding of them at the time.*
>
> …
>
> *d) No doubt, Mr Ezair will be prejudiced if not permitted to withdraw the Admissions.* ***However, in all the circumstances, it will be difficult to avoid the conclusion that he will have brought it on himself.***
>
> *e) Mr Ezair sought permission to withdraw the Admissions very late, during the Trial itself.*
>
> *f) The Admissions relate to a critical aspect of the case and are thus capable of having a significant bearing on the outcome of the proceedings.*
>
> *g)* ***Mr Ezair's admissions are consistent with the evidence as a whole.*** *To hold him to the admissions would not be contrary to the administration of justice. By placing minor limits on the evidence and precluding Mr Ezair from re-opening issues, it is also consistent with the requirements of the overriding objective*." (emphasis added).

40. These principles were applied by Kawaley AJ in *Wong v Grand View Private Trusts Co Ltd and Ors* [2021] Bda LR 18 where the learned Judge, in the particular circumstances, did not find that the reasons and justification for withdrawing the admission were convincing.

Reasons and justifications

41. As set out at [35] above Mr Tamine advances two reasons for admitting liability in the Defence and agreeing to repay the entire amounts claimed by SSHL against the Defendants. First, he says that at the point at which proceedings were brought, Mr Tamine

did not have access to the copies of the emails and other documentation which would prove their lawful basis for the payments. Secondly, he says that he had hoped that his offer to repay the monies would bring to an end the offensive accusations made against him by Mr Brockman and his associates.

42. The Court finds both of these explanations entirely unconvincing. As the Court indicated to Mr Brownbill QC during argument, it is incredible that someone in the position of Mr Tamine should admit liability and agreed to pay an amount in excess of US $29 million unless he and his legal advisers genuinely believed that there was no reasonably arguable legal defence to the claim. It is wholly unconvincing that Mr Tamine agreed to admit liability of an amount in excess of US $29 million because "*he hoped that his offer to repay the monies would bring an end to the offensive accusations being made against him by Mr Brockman and his associates*."

43. In relation to **the US $5.395 million Payment** to purchase the Bewdley property, the defence sought to be advanced is set out in paragraph 106 of Tamine 3:

> "*…until I was notified of the present proceedings in which USD 5.395m Payment was claimed, I had considered that the outstanding loan had been repaid by the end of 2017, having been offset against my remuneration for 2016 and 2017.* ***Mr Brockman also considered that the full amount has been repaid as we discussed and agreed in my performance review at the end of 2017*** *how much the payments in respect of my remuneration had to be reduced to take into account the repayment of the loan from Spanish Steps*."

44. However, Mr Tamine and his legal advisers must have known of all these matters when he made the admission and agreed to repay this entire amount in his Defence dated 31 October, 2019. There is no written document which records that "*Mr Brockman also considered that the full amount has been repaid…*" There is no additional evidence which was not available to Mr Tamine and his legal advisers when he filed his Defence on 31 October 2019.

45. In relation to **the US $16.8 million Payment**, the defence to this claim is set out in paragraphs 112, 119, 120, 122 and 123 of Tamine 3:

> "*112. I therefore took tax advice in late 2017…as to how my remuneration could be structured in the most tax efficient way. The upshot was that the most tax efficient way forward was for Mr Brockman to pay me an advance of six years' salary (since I was planning to remain in the UK for six years) which I could then, entirely lawfully, remit to the UK as needed and upon which remitted sum I would pay tax as a non-domiciled resident of the UK. Since my total annual remuneration package at that time amounted to USD 2.6 million, an advance of six years' salary amounted to USD 15.6 million.*
>
> *…*
>
> *119. In the days after the raid of Mr Kepke's offices, Mr Brockman and I had a number of conversations via the secure telephone application, Silent Phone, about Mr Kepke and the potential ramification of that development…*
>
> *120. During one of those conversations on either 16 or 17 August 2019 (I cannot now recall which day it was), as the matter was time critical, I pressed for an answer to the request set out in my email of 11 August 2018.* ***Mr Brockman agreed to the proposal and authorised the payment of USD 15.6 million and he said something along the lines of "in the circumstances, it is the right thing to do****"…*
>
> *122. However, given how worried Mr Brockman sounded on the phone when I spoke to him in the aftermath of the raid on Mr Kepke, I became concerned that the Brockman Trust structure could be challenged by the US authorities. I knew that if that happened, I would need substantial funds (as I had previously discussed with Mr Brockman) to cover legal expenses, but this could become difficult if the assets of the Brockman Trust structure were ever frozen in the course of an investigation.*
>
> *123.* ***I therefore took the decision, in accordance with the Litigation Indemnity, to withdraw additional funds of USD 1.2 million, in addition to the US to 15.6***

> ***million which was an advance on my remuneration, for the purposes of establishing a litigation contingency fund***." (emphasis added).

46. The essence of the defence to this claim is that during one of the telephone conversations Mr Tamine had with Mr Brockman, Mr Brockman agreed and "*authorised the payment of the USD 15.6 million."* There is no documentation which memoralizes this agreement by Mr Brockman. There is no additional evidence which "*proves*" the defence which was not available to Mr Tamine and his legal advisers in October 2019, when he made the relevant admissions and agreed to repay this entire amount to SSHL.

47. In relation to the GBP 5 million Payment, the defence to this claim is set out in paragraphs 130 - 131 of Tamine 3:

> "*130. Whilst Mr Gilbert caused this claim to be brought against me by SJTC and Spanish Steps, he himself personally authorised the HSF Payments…*
>
> *131. I consider that I am entitled to these monies pursuant to the indemnification provisions referred to above. I therefore wish to amend my Defence to reflect my case that Spanish Steps is not entitled to the return of these sums*."

48. The essence of the defence to this claim is that Mr Gilbert agreed to make these payments on behalf of SSHL and that Mr Tamine was entitled to an indemnity in any event. There is no suggestion that the basis of this defence was not known to either Mr Tamine or his legal advisers when he made the relevant admissions and agreed to repay in full this amount to SSHL when his Defence dated 31 October 2019 was filed.

49. In the circumstances, the Court is not satisfied that there is any relevant additional evidence, in relation to the defence of the claims made in relation to the three Payments, which was not available to Mr Tamine and his legal advisers when the original Defence dated 31 October 2019 was filed and agreed to repay all three Payments in full to SSHL.

Inconsistencies in the explanations

50. In relation to the US $5.39 5 million Payment, it is said in the Defendants' Submissions (at paragraph 18) that Mr Tamine's remuneration under the alleged "Employment Agreement" with Mr Brockman comprised:

> "… a salary of USD 750,000, a bonus of USD 850,000 and an annual contribution of USD1 million towards a retirement fund".

51. Reliance is placed on an email dated 26 March 2016 from Mr Tamine to Mr Brockman in which Mr Tamine attaches a draft loan agreement between SSHL and Mr Tamine in the amount of $2,600,000, an unsigned promissory note and a "spreadsheet" that sets out a purchase price of $4,800,000 for Bewdley. There is no document purporting to be a reply to this email whether from Mr Brockman or otherwise.

52. As noted earlier, there is no documentary "proof" of how Mr Tamine now says that there is no obligation to repay the US$5.395m which the Defendants had previously agreed to repay.

53. On the contrary, $3,000,000 of the alleged "sources" or "repayments" set out in the spreadsheet is said to be the "… annual contribution of USD1M towards a retirement fund".

54. However, in the Memo from SJTC to Mr Tamine dated 6 April 2014 it was stated that:

> *A separate retirement fund will be established into which a $1,000,000 per year contribution will be made every December. The investments of this fund will be at your direction.* ***Five percent of this fund will become vested for each year of service.*** *At the end of 20 years, it will be 100% vested. If you depart prior to 20 years for any reason, the percentage vested will be computed as the years of service from 2014 forward x 5%.*

55. The reply from Mr Tamine in which he accepts the basis for the retirement fund contribution is that dated 5 April 2014 in which he states as follows:

> *I think the proposal you have made for the pension fund is reasonable (subject to the next paragraph) provided that the litigation contingency fund is satisfactory. If we cannot agree a suitable litigation contingency fund, then this component must also address the risk element. In the pension fund there are no provisions in the event you decide you no longer need my service or I die. There needs to be some guarantee that the contributions to the fund would continue for the full 20 years if you dismiss me (unless you dismiss me for cause)…*

56. There is no explanation provided in Tamine 3 or any provided in the Defendants' Submissions as to how the $3,000,000 contributions to the retirement fund of which only 5% per annum would have vested can suddenly have become an asset of Mr Tamine.

Merits of the proposed Amended Defence and Counterclaim

57. The proposed Amended Defence seeks to justify payment from assets of the Trust on the basis that Mr Tamine was entitled to the sum taken pursuant to an oral "Employment Agreement" between him and Mr Brockman. It is averred at paragraph 4G of the proposed Amended Defence and Counterclaim that it was an implied term of the Employment Agreement that Mr Brockman would indemnify or reimburse Mr Tamine against all expenses, losses, and liabilities incurred by Mr Tamine in the execution of Mr Brockman's instructions, or within the authority granted to him by Mr Brockman, or during the reasonable performance of his employment. The arrangements in relation to the Employment Agreement are set out at paragraphs 40 to 46, 150 to 152 of Tamine 3, and at paragraphs 4D to 4L of the proposed Amended Defence and Counterclaim. As set out at [82] to [103] below, the Court has concerns as to whether the alleged Employment Agreement is lawful and enforceable having regard to sections 60, 61(1) and (1A), 64, 65 and 141 of the Bermuda Immigration and Protection Act 1956 (the "**1956 Act**")

58. Secondly, the Defendants now rely, in support of all the payments, on the allegation that they represented some form of "informal distribution" out of the Brockman Trust to Mr Brockman, an allegation which is made for the first time in support of the proposed amendments. However, as Mr Robinson, for the Plaintiffs, correctly points out, the distribution could only be made out of the Brockman Trust by the Trustee in proper exercise of its powers. SJTC was the sole trustee at the time but there is no evidence of any board resolution of that company to make the distributions. Mr Tamine was a director of SJTC between 2010 and 2018 and Mr James Gilbert became a director of SJTC in 2017. It is a disturbing and undisputed fact that Mr Gilbert knew nothing about these payments.

59. Furthermore, the case Mr Tamine seeks to advance by the proposed amendments is that these payments were made to benefit Mr Tamine personally, who not only was not a beneficiary of the Brockman Trust and therefore an object of SJTC's powers, but was one of the directors of the company which was the sole trustee of the Brockman Trust. Mr Robinson contends that if there had been a resolution of SJTC to make these payments out of the Brockman Trust, that would have been the most egregious fraud on SJTC's powers.

60. The Court accepts Mr Robinson's submissions that the circumstances of the request to withdraw the admissions in reality points to a "change of heart" as to what the Defendants' personal and commercial interests are, as opposed to a material change of circumstances that could not reasonably have been foreseen when the Defence was filed. In these circumstances, it is submitted that the Court ought not to allow the withdrawal of an admission where the application was based on a legal or strategic re-appraisal rather than the emergence of new evidence (see ***Conn v Ezair, Re Charlotte Street Properties*** [2019] EWHC 1722 (Ch)). The Court accepts that the decision to seek to withdraw the admissions and seek leave for the proposed amendments represents strategic maneuvering by the Defendants in litigation that has already taken up disproportionate use of the Court resources.

Prejudice

61. A feature of this case which greatly concerns the Court is that the proposed case which Mr Tamine seeks to advance in relation to the three payments and against Mr Brockman is entirely based upon his "oral agreements" with Mr Brockman for which there is no documentation which memorializes those agreements. The Employment Agreement, which is the foundation of the proposed amendments, was allegedly orally agreed by Mr Brockman at his office in Houston in 2003 but there is no documentation memorializing that significant agreement in the succeeding 15 years. In relation to the US $5.395 million Payment, Mr Tamine states that Mr Brockman confirmed in 2017 that the full amount has been repaid. In relation to the US $16.8 million Payment, Mr Tamine says that Mr Brockman agreed to the payment during a telephone call with Mr Tamine on either the 16 or 17 August 2019. There is no documentation which memorializes that agreement.

62. It is also a matter of concern to the Court that there is an issue as to whether Mr Brockman currently has the mental capacity to stand trial in the United States. A ruling on Mr Brockman's mental capacity to stand trial in the criminal proceedings against him in the United States is pending. Clearly, it will be highly unsatisfactory if Mr Brockman does not have the mental capacity to give instructions in relation to fundamental issues which are the subject matter of these proceedings.

63. The Court accepts Mr Robinson's submission that the Plaintiffs will be significantly prejudiced if the Defendants are allowed to withdraw the admissions as they would face a situation where the entirety of the monetary claim on behalf of the Brockman Trust is now in dispute. In this regard, even though the Defendants maintain the concession that US$15.6m of the funds currently held by the English High Court Funds Office should be repaid, there would now be a dispute as to whether this should be paid to SSHL or Mr Brockman, this despite the fact that Mr Brockman has never made any claim to these funds.

64. The Court also accepts Mr Robinson's further submission that any prejudice claimed by the Defendants is entirely of their own making in circumstances where the admissions were

freely made with the benefit of legal advice.

65. Having regard to all the facts and circumstances outlined above, the Court concludes that this is not an appropriate case where the Defendants should be given leave to withdraw their admissions that all three Payments would be paid in full by the Defendants to SSHL.

66. In light of this conclusion, the Court turns to consider the application made by summons dated 23 February 2022 for an order that judgment be entered pursuant to RSC 27 rule 3 on admissions of fact made by the Defendants in their Defence for GBP 5 million; US $5.395 million; and US $16.8 million in favour of SSHL.

67. Considering the Court's decision not to allow the Defendants to withdraw their admissions and their agreement (set out in paragraph 4 of the Defence) the Court determines and orders that judgment be entered in favour of SSHL in the amount of US $5.395 million; US $16.8 million; GBP 5 million. The issue whether, and if so at what rate, interest should be awarded on the sums is reserved to a later hearing.

68. The Court wishes to record that in giving judgment in favour of SSHL and against the Defendants in the amount of US $16.8 million, the Court does not consider that any party other than SSHL has a legitimate claim in relation to this sum. The basis of the claim by SSHL is that at this sum was wrongfully transferred, at the direction of Mr Tamine, from the account of SSHL. Further, the Defendants agreed to transfer this amount to SSHL under the agreement set out in paragraph 4 of the Defence.

D. Mr Tamine's counterclaim against SSHL

69. The counterclaim against SSHL, the Second Plaintiff, is for a declaration that Mr Tamine is entitled to indemnification under SSHL's articles of association for costs he has incurred in respect of (i) the Investigations (defined in the pleadings as encompassing the investigations by the Bermuda Police Service, United States Internal Revenue Service, and the United States Department of Justice), and (ii) the present proceedings.

70. In all the circumstances, the Court considers that leave should be given to Mr Tamine to pursue this counterclaim against SSHL and the Court so orders.

E. Mr Tamine's counterclaim against Mr Brockman and leave to serve outside the jurisdiction

71. The claim against Mr Brockman is for:

    (a) Payment of US $5.395 million, to the extent that the Defendants' primary case does not succeed. If the Defendants are not entitled to retain the US $5.395 million Payment, then Mr Tamine asserts that Mr Brockman will owe that sum to him under the Employment Agreement, that sum having been set off against his remuneration.

    (b) Indemnification for (i) his own costs of the claims brought in respect of the US $5.395 million Payment and US $16.8 million Payment, (ii) any interest Mr Tamine is ordered to pay in respect of those payments, to the extent that they fall to be repaid, and (iii) any of SSHL's costs in respect of those payments which he is ordered to pay.

72. Mr Tamine claims that this latter indemnification flows from an implied term of the Employment Agreement, which was that Mr Brockman (as employer) would indemnify or reimburse Mr Tamine (as employee) against all expenses, losses, and liabilities incurred by Mr Tamine in the execution of Mr Brockman's instructions, or within the authority granted to him by Mr Brockman, or during the reasonable performance of his employment.

73. In the event Mr Tamine is granted leave to bring a counterclaim against Mr Brockman, he also seeks leave to serve that counterclaim out of the jurisdiction or Mr Brockman, who, as far as Mr Tamine is aware, lives in Houston, Texas.

74. As noted earlier, Mr Tamine's case in relation to the Employment Agreement is that Mr

Brockman agreed to the Employment Agreement in Houston in 2003 but there is no documentation in the succeeding 15 years which memorializes that agreement.

75. To the extent that there is any relevant documentation exhibited to the various affidavits, it appears that Mr Brockman was careful to ensure that he himself was not assuming contractual obligations. Thus, Mr Brockman was the author of the Performance Review of Mr Tamine dated 6 April 2014. However, that Performance Review is not signed by Mr Brockman, but it is said to be "*On Behalf of St John's Trust Company (PVT) Ltd*." It does not appear that Mr Tamine took issue with the fact that his performance review was not signed by his employer, Mr Brockman, but was signed on behalf of SJTC.

76. On 6 April 2014, a Compensation Memorandum was sent to Mr Tamine in relation to his employment in Bermuda. That Compensation Memorandum is not signed by Mr Brockman as his employer but is signed "*On behalf of St John's Trust Company (PVT) Ltd*." In relation to that Compensation Memorandum, Mr Tamine sent a three-page response thereto to Mr Brockman. However, it does not appear that Mr Tamine queried as to why the Compensation Memorandum was not signed by his employer, Mr Brockman, but instead was signed on behalf of SJTC.

77. On 13 July 2015, Mr Brockman appears to have sent to Mr Tamine another Compensation Memorandum advising him that "*Accordingly your bonus will be $800,000 plus another $100,000 for your excellent efforts on the workout of the Founding Partners investment*." However, the Compensation Memorandum again was not signed by Mr Brockman, as his employer, but "*On Behalf of St John Trust Company (PVT) Ltd.*"

78. The events which led to the Employment Agreement and these steps taken by Mr Tamine in order to discharge his obligations under the Employment Agreement are set out at Tamine 3 at paragraphs 41-46 and 150:

> "*40. As stated at paragraph 4E of the proposed Amended Defence and Counterclaim, this oral agreement in Mr Brockman's office constituted an*

*employment agreement between myself and Mr Brockman (the "**Employment Agreement**"). As stated at paragraph 4G of the proposed Amended Defence and Counterclaim, it was an implied term of that agreement that Mr Brockman would indemnify or reimburse me against all expenses, losses, and liabilities incurred by me in the execution of Mr Brockman's instructions, or within the authority granted to me by Mr Brockman, or during the reasonable performance of my employment.*

*41. Mr Brockman told me that Mr Don Jones used a company named Pilot Management Limited to employ him so that he could obtain a work permit in Bermuda. Don Jones advised me to set up equivalent arrangements. **Therefore, for the purpose of my new role working for Mr Brockman I incorporated Tangarra on 23 July 2003 which was the entity that formally employed me so that I could obtain a Bermudian work permit. I understand this to be a commonly used arrangement for obtaining a work permit in Bermuda**.*

42. Tangarra in turn had a consultancy agreement with Wedge Consulting Limited, another company owned by Don Jones which was ultimately owned by Don Jones' family trust, although I ultimately reported directly to Mr Brockman and was in very regular contact with him by email and telephone. I also had face-to-face meetings with Mr Brockman about three or four times a year. Until he settled into retirement, Mr Jones was generally at these meetings.

43. Subsequently, in around January 2004, I moved to Bermuda to start my new role formally.

*44. **Between 2004 and October 2007, I was based in Bermuda** although the role always involved a lot of international travel. Between October 2007 and August 2010, I was based in Geneva where my wife was working for a Swiss law firm**. In around August 2010 we moved back to Bermuda and I was based there until, as explained below, we decided to relocate to England in the course of 2018.***

45. In the period between 2004 and August 2010 I was paid, through Tangarra, by entities associated with Mr Brockman which were outside of the Brockman Trust structure. From August 2010, when I became a director of SJTC, a part of my salary was paid directly to me from SJTC for the work I was carrying out in Bermuda as director of SJTC.

46. Throughout my employment with Mr Brockman I acted in accordance with his instructions, or through Mr Jones. Every year Mr Brockman would review my performance and determine my remuneration.

…

150. ***Under the Employment Agreement, it was agreed that I was to move to Bermuda to work for Mr Brockman.*** *A significant part of the role involve assisting Mr Brockman with the management of the Brockman Trust, which was ostensibly governed by Bermuda law and had a Bermudian company (SJTC) acting as trustee, of which I was later to become a director as part of my role.* ***My role was originally and predominantly based in Bermuda where I lived between 2004 and 2018****, save for a three-year period when I lived in Geneva for reasons connected with my wife's work and not to my own. The Employment Agreement happened to be made only in Houston, Texas, but the reason for that was my former employment with UCS no my new employment in respect of the Brockman trust and Mr Brockman's other entities*."

79. In the circumstances not only is there no written support for the Employment Agreement and that Mr Brockman went to great lengths to ensure that he was not seen as the employer, but the parties implemented a legal structure which made it clear that Mr Tamine's employer was Tangarra, the Second Defendant, and not Mr Brockman.

80. The agreement by the parties that Mr Tamine should incorporate a company (Tangarra) and that company should enter into a consultancy agreement with Wedge Consulting Limited recognised that there could be no employer/employee relationship between Mr Brockman (or his companies) and Mr Tamine. The parties must have accepted this illegal

reality when they created this structure in 2003/2004 which has been in existence ever since. The parties did not change the structure when Mr Tamine obtained spouse's employment rights in October 2007 or when he acquired Bermudian status on 14 November 2017. The implementation and existence of the structure during the period January 2004 to 2018 is strong evidence against the suggestion now made that throughout this period there existed direct legal relationship of employer and employee between Mr Brockman and Mr Tamine.

81. It is clear to the court as noted at [60] above that there has been a strategic shift in the legal strategy in relation to Mr Tamine's dispute with Mr Brockman and the Brockman Trust entities. The shift in strategy involves asserting a direct employer/employee relationship between Mr Brockman and Mr Tamine during the entire period of January 2004 to 2018 (which the parties appreciated and accepted they could not do under Bermuda law in 2004). In all circumstances, the Court is not satisfied that the assertions made by Mr Tamine in relation to the existence of the Employment Agreement in 2003/2004 raise a serious issue to be tried and on that basis alone would refuse leave to amend and service out of the jurisdiction on Mr Brockman in the United States.

Employment Agreement and the 1956 Act

82. Furthermore, Mr Tamine and his legal advisers appear not to have sufficiently taken into account that the assertion of the Employment Agreement and its performance in Bermuda from January 2004 to October 2007 may place Mr Tamine and the Second Defendant in breach of the 1956 Act.

83. Reflecting the sworn evidence of Mr Tamine as set out above, the proposed Amended Defence and Counterclaim pleads the Employment Agreement **and its performance in Bermuda** at paragraphs 4D to 4L. For present purposes the following averments are to be noted:

> *"4E. At that meeting, Mr Brockman and the First Defendant entered into an oral contract, which Mr Brockman agreed to employ the First Defendant and the First*

*Defendant agreed to serve Mr Brockman in a role assisting Mr Brockman in the management of his offshore entities, including the Trust and its various connected entities (the "**Employment Agreement**"). **The First Defendant was required to re-locate to Bermuda for the role which was to be carried out alongside another employee of Mr Brockman**, Mr Donald Jones, with the potential that the First defendant would replace Mr Jones upon his retirement.*

*4H. **As part of the First Defendant's employment by Mr Brockman, Mr Brockman instructed the First Defendant to incorporate the Second Defendant, inter-alia for the purpose of receiving payments of remuneration on behalf of the First Defendant. The Second Defendant was accordingly incorporated on 23 July 2003.***

Performance under the Employment Agreement

*4I. **In around January 2004, the First Defendant moved to Bermuda and began his employment under the Employment Agreement**." (emphasis added).*

84. At paragraph 60 of the written submissions of the Defendants dated 24 February 2020, it is urged upon the Court that the Court should take into account that Mr Tamine moved to Bermuda in 2004 **in order to perform his duties and obligations under the Employment Agreement with Mr Brockman**.

"60. The factors in this case overwhelmingly point towards Bermudian law as the proper law of the contract:

> ***(a) Mr Tamine agreed that he would move to Bermuda to take up the role to which he was appointed under the Employment Agreement**.*
>
> ***(b) Mr Tamine then lived in Bermuda whilst performing his role between 2004 and 2018, save for a 3-year period where he lived in Geneva for***

reasons connected to his wife's employment, and not his own.

(c) ...

(d) ... The matters concerning Mr Tamine's role are therefore of principal significance, rather than the fact that the contract happened to be concluded at UCS's offices in Houston (which was, in any event, merely due to Mr Tamine's former role working for UCS rather than the role he assumed under the Employment Agreement). (emphasis added).

85. In the Supplemental Written Submissions filed on behalf of Mr Tamine and dated 22 April 2022, it is accepted that between January 2004 to 20 October 2007 Mr Tamine, as a restricted person within the meaning of the 1956 Act, required the specific permission of the Minister (i.e. a work permit) to engage in gainful occupation in Bermuda, as provided by section 60(1) of the 1956 Act. It is said that during the period 21 October 2007 to 13 November 2017, Mr Tamine had "*spouse's employment rights*" and was therefore entitled to engage in gainful occupation without specific permission of the Minister and from 14 November 2017 Mr Tamine possessed Bermudian status under section 19A of the 1956 Act.

86. The Supplemental Written Submissions further explain that in respect of the first period, January 2004 to October 2007, though Mr Tamine's Employment Agreement with Mr Brockman (as set out in Mr Tamine's proposed Amended Defence and Counterclaim) subsisted, all work done by Mr Tamine whilst in Bermuda was done pursuant to his employment agreement with the Second Defendant, in accordance with his work permit obtained under section 61 of the 1956 Act. This assertion does not sit comfortably with Tamine 3 and the proposed amendments to the Amended Defence and Counterclaim.

87. The arrangements and their performance in Bermuda, set out in Tamine 3 and as pleaded in paragraphs 4D to 4L of the proposed Amended Defence and Counterclaim, raise issues as to whether the arrangements infringed provisions of the 1956 Act.

88. Part V of the 1956 Act concerns the regulation of engagement in gainful occupation in Bermuda. Section 57(2A) of Part V defines *"work permit"* as *"written confirmation of the Minister's grant of permission to engage in gainful occupation granted to a person under this Part."* To *"engage in gainful occupation"* is defined in section 57(2) *inter alia* as to take and continue in any employment; to practise any profession; to carry on any trade; or to engage in local business for reward or profit or gain.

89. Section 57(6) *inter alia* provides that for the purposes of section 57(2) any employment profession, trade or local business shall be deemed to be taken or continued, practised, carried on or engaged in (as the case may be) for reward, profit or gain if such employment, profession or trade or local business is ordinarily in Bermuda continued, practiced, carried on, or engaged in for reward, profit or gain, notwithstanding that no reward, profit or gain may be obtained or obtainable in the circumstances of the particular case.

90. Section 60(1) provides exceptions to the rule that no person shall, while in Bermuda, engage in gainful occupation without specific permission by or on behalf of the Minister. One of the exceptions to this rule is a person who has *"spouse's employment rights"*. This latter term is defined in section 60(3) *inter alia* as a person who is married to a person possessing Bermudian status and living as husband and wife with that person's Bermudian spouse, and the Bermudian spouse is ordinarily resident in Bermuda.

91. Section 61(1A) provides that any application under section 60 shall be made on behalf of the applicant by his prospective employer who shall be responsible for ensuring that the application is complete and accurate in accordance with Guidelines issued by the Minister for the purposes of this section.

92. Section 64 provides that it is an offence under the 1956 Act to engage in gainful occupation in contravention of any provisions set out in sections 57 to 63.

93. Section 65 similarly provides *inter alia* that it is an offence under the 1956 Act for a person to employ another person in contravention of any provisions set out in sections 57 to 64.

94. Section 141 of the 1956 Act provides that a person who commits an offence under the 1956 Act shall be punishable by way of a fine or imprisonment. In doing so it sets out a recurrent penalty imposed as often as the act is done increasing from $10,000 and/or 3 months imprisonment for the first offence; $25,000 and/or 12 months imprisonment for a second or subsequent offence; and $500 for each day during which an offence continues.

95. It is of course possible under the 1956 Act for Mr Tamine to be employed by a local company and for that local company to enter into a consulting agreement with a body or person outside the jurisdiction. This assumes that the actual position is as reflected in the legal agreements entered into by the relevant parties. Under these arrangements Mr Tamine would be employed by the local company to whom the Minister has granted the work permit to employ Mr Tamine. Mr Tamine is only entitled to engage in gainful employment in Bermuda in accordance with the permission granted to Mr Tamine's employer in Bermuda. That is exactly what is reflected in the legal arrangements implemented by Mr Tamine in 2003/2004.

96. However, the positive case now asserted by Mr Tamine is that whilst the Minister had given permission to the Second Defendant to employ Mr Tamine so that Mr Tamine could engage in gainful employment in Bermuda, he was in substance and reality discharging his duties under the Employment Agreement with Mr Brockman. Mr Brockman held no ownership interest in the Second Defendant. The Second Defendant is entirely owned by the First Defendant. As noted earlier, neither Mr Brockman nor Mr Tamine had any relevant permission from the Minister allowing Mr Tamine to seek to discharge any of his duties to Mr Brockman under the Employment Agreement in Bermuda. The new case proposed to be advanced by Mr Tamine positively asserts that in 2004 he relocated to Bermuda to discharge his duties to Mr Brockman under the Employment Agreement. Thus:

(1) Paragraph 4I of the proposed Amended Defence and Counterclaim positively asserts that: "***In or around January 2004, the First Defendant moved to Bermuda and began his employment under the Employment Agreement***". Neither Mr Brockman nor Mr Tamine had any relevant permission from the Minister of Immigration under the 1956 Act so as to allow Mr Tamine in January 2004 to begin his "*employment under the Employment Agreement*." Any such activities on the part of Mr Tamine would be in breach of section 64 of the 1956 Act. If the Second Defendant made an application to employ Mr Tamine in January 2004 with the knowledge of the matters set out by Mr Tamine in paragraphs 37 to 47 and 150 to 152 of his third affidavit, the Second Defendant would have done so in the breach of section 61(1A) and section 65 of the 1956 Act.

(2) Paragraph 4E positively asserts that as part and parcel of his duties under the Employment Agreement: "***The First Defendant was required to re-locate to Bermuda [in January 2004] for the role which was to be carried out alongside another employee of Mr Brockman****, Donald Jones, with a potential that the First Defendant would replace Mr Jones upon his retirement*."

(3) Paragraph 4H again positively asserts that: "**As part of the First Defendant's employment Mr Brockman, Mr Brockman instructed the First Defendant to incorporate the Second Defendant, *inter alia* for the purpose of receiving payments of remuneration on behalf of the First Defendant**."

(4) In his third affidavit dated 4 January 2021, Mr Tamine asserts under oath the following facts:

(i) "In the meeting [June 2003], Mr Brockman asked me if I would be interested in taking up a new role working directly for him which he told me would involve working with Don Jones in Bermuda…" (Paragraph 38).

(ii) "As stated at paragraph 4E of the proposed Amended Defence and Counterclaim, this oral agreement in Mr Brockman's office constituted an employment agreement between myself and Mr Brockman (the "**Employment Agreement**"). (Paragraph 40).

(iii) "Mr Brockman told me that Don Jones used a company named Pilot Management Ltd to employ him so that you could obtain a work permit in Bermuda. Don Jones advised me to set up equipment arrangements. **Therefore, for the purpose of my new role working for Mr Brockman I incorporated Tangarra** on 23 July 2003 which was the entity that formally employed me so that I could obtain a work permit." (Paragraph 41).

(iv) "**Subsequently, in around January 2004, I moved to Bermuda to start my new role formally**." (Paragraph 43).

97. This new case outlined above involves the assertion that whilst the Second Defendant obtained a work permit for Mr Tamine to engage in gainful employment in Bermuda, Mr Tamine was in reality discharging his employment obligations to Mr Brockman under the Employment Agreement. The new case necessarily involves the assertion Mr Tamine had a direct employment relationship with Mr Brockman whilst he was present in Bermuda during the period January 2004 to 20 October 2007; he was seeking to discharge those employment obligations during this period and was being paid "*through*" the Second Defendant. To the extent that Mr Tamine was seeking to discharge his obligations under the Employment Agreement with Mr Brockman, he would be acting in breach of section 64 of the 1956 Act. In the Court's view, the pleaded case in paragraphs 4D to 4L of the proposed Defence and Counterclaim would place Mr Tamine in breach of section 64 of the 1956 Act. To the extent that the Second Defendant knew of these arrangements, the Second Defendant would be in breach of sections 61(1A) and 65 of the 1956 Act. In this regard it is to be noted that the Second Defendant is a company wholly owned by Mr Tamine and of which he is a director.

98. Given that at the 1956 Act makes it unlawful (at least for the period January 2004 to 20 October 2007) for Mr Tamine to perform his obligations under the Employment Agreement, can Mr Tamine nevertheless seek to enforce the Employment Agreement in this Court? The editors of *Chitty on Contracts*, 33rd edition, suggest at 18-194 that where the Act does not expressly deprive the plaintiff of a civil remedy under the contract the appropriate question to ask is whether, having regard to the Act and the evils against which it was intended to guard and the circumstances in which the contract was made and to be performed, it would in fact be against public policy to enforce it (citing *Shaw v Groom* [1970] 2 QB 504; *Ailion v Spiekermann* [1976] Ch 158; *Geismar v Sun Alliance and London Insurance Ltd* [1978] QB 383).

99. In considering whether a particular contractual arrangement is prohibited by a particular statute it has been suggested that "*… not a bad test to apply is to see whether the penalty in the Act is imposed once for all, or whether it is recurrent penalty imposed as often as the act is done. If it is the latter, then the act is a prohibited act*" (*Victorian Daylesford Syndicate Ltd v Dott* [1905] 2 Ch 624, 630).

100. Whilst the 1956 Act prescribes criminal penalties for breach of section 141, it does not expressly state its effect on contracts affected by the breach. However, it is to be noted that section 141(1C) clearly imposes a recurrent penalty imposed as often as the act is done pointing to the conclusion that an employment agreement in breach of Part V is a prohibited act.

101. The Court accepts Mr Robinson's submission that having regard to the prohibitory nature of the 1956 Act, the Court shouldn't consider the trio of factors identified in *Patel v Mirza* [2017] AC 467 by way of interpretive aid namely: the underlying purpose of the prohibition that was transgressed, any other public policies the effectiveness of which would be affected by the denial of the claim, and the issue of proportionality.

102. The Court accepts that there can be no doubt that the public policy purpose of Part V of the 1956 Act is to control immigration to Bermuda by making it unlawful for non-Bermudian persons to be employed in Bermuda save with the express permission from

the Minister or in certain limited circumstances. The Court also accepts that there is no other public policy whose efficacy would be affected by a finding of illegality here. In considering whether it would be just and proportionate to refuse to enforce the Employment Agreement, the Court must keep in mind the wholly exceptional circumstances of this case. First, according to Mr Tamine the parties agreed that the performance of the Employment Agreement had to take place in Bermuda. Second, both parties appreciated that Mr Tamine could not engage in gainful employment in Bermuda without a work permit from the Minister of Immigration. Third, both parties appreciated that Mr Brockman could not obtain a work permit as the employer, given that he had no relevant connections with Bermuda. Fourth, appreciating these legal impediments, the parties agreed upon alternative legal arrangements whereby Mr Tamine would be employed by the Second Defendant and the Second Defendant would enter into a consultancy agreement with Wedge Consulting Ltd. In the circumstances, refusal by this Court to enforce the Employment Agreement not only supports the public policy of this jurisdiction but also upholds what the parties themselves must have appreciated was an alternative lawful arrangement to achieve the same end.

103. Accordingly, the Court will refuse leave to amend and service outside the jurisdiction on the additional ground that the Employment Agreement is unenforceable in circumstances where its performance in Bermuda necessarily entailed breach of the 1956 Act.

F. BCT's application to amend the Statement of Claim

104. The Plaintiffs' Summons dated 29 October 2021 seeks leave from the Court to amend the Statement of Claim in the manner sought by the proposed Amended Statement of Claim. The amendments are merely consequential on the substitution of BCT for SJTC in its capacity as trustee of the Brockman Trust, leave to make these amendments not having been included in the 19 August 2021 Order substituting BCT for SJTC. The amendments are thus limited to substituting BCT for SJTC, and removing claims made by SJTC in its own right, as opposed to claims which BCT is now pursuing in its capacity as trustee of

the Brockman Trust. A Re-Re-Amended Generally Endorsed Writ of Summons has also been filed reflecting these amendments.

105. At paragraphs 62-93 of the Defendants' Submissions, they seek to attack certain paragraphs of the Plaintiffs' proposed Amended Statement of Claim which was filed with the Plaintiffs' First Summons dated 29 October 2021.

106. The Defendants' Submissions say at paragraph 63 that (emphasis added): "**Many of the proposed amendments are uncontroversial and simply update the Statement of Claim to reflect the fact that BCT has now replaced SJTC as trustee of the Brockman Trust**. However… there are three categories of amendment which are opposed by Mr Tamine." (emphasis added).

107. Contrary to this submission, the Plaintiffs contend, and the Court accepts, that <u>all</u> of the proposed amendments reflect the fact that there has been a change of trustee. No new or amended claims are advanced that were not advanced by SJTC. The Defendants have had more than two and a half years to complain about these pleadings or apply against SJTC to strike them out.

108. In this regard, it is to be noted that the Court ordered on 19 August 2021 that BCT be substituted for SJTC in its capacity as trustee of the Brockman Trust. This Order was not opposed by the Defendants and pursuant to this Order, a Re-Re-Amended Generally Endorsed Writ of Summons was filed.

109. The claims about which the Defendants now complain are reflected in the detailed endorsement to the Re-Re Amended Generally Endorsed Writ of Summons.

110. The Plaintiffs complain that the Defendants' objections, which were first foreshadowed by a letter dated 7 February 2022, are in fact an application to strike out parts of the pleaded claim both in the Re-Re Amended Generally Endorsed Writ of Summons and in the proposed Amended Statement of Claim on the ground that the claims are devoid of a proper

cause of action or are otherwise unsustainable. However, the Court accepts that these claims have been in the Statement of Claim from the outset and all that has changed is the identity of the person entitled to bring those claims as trustee of the Brockman Trust following a change in the trusteeship. The amendments merely seek to reflect this change.

111. The Court accepts Mr Robinson's submission that the proper course for this Court to take is that the Plaintiffs' Summons dated 29 October 2021 ought to be granted to make what are consequential amendments to the change of first named Plaintiff as Trustee. If the Defendants believe they are entitled to have any parts of the pleaded claim struck out under Order 18, Rule 19, then they can make the appropriate application to which the Plaintiffs should be given a proper opportunity to respond. The Court accepts that this case is to be distinguished from cases where a party seeks to raise a new claim or defence by amendment which the Court may refuse if satisfied that the new claim or defence is hopeless.

112. In the circumstances, the Court grants leave to the Plaintiffs for the limited amendments to the Statement of Claim in accordance with the Summons dated 29 October 2021 and the Defendants are at liberty to make an application to set aside any part of the amended pleading in accordance with the Rules.

G. Conclusion

113. Having regard to all the facts and circumstances, the Court concludes that this is not an appropriate case where the Defendants should be given leave to withdraw their admissions that all three Payments would be paid in full by the Defendants to SSHL.

114. In light of the Court's decision not to allow the Defendants to withdraw their admissions and their agreement (set out in paragraph 4 of the Defence), the Court determines and orders that judgment be entered in favour of SSHL in the amount of US $5.395 million; US $16.8 million; GBP 5 million. The issue whether, and if so at what rate, interest should be awarded on the sums is reserved to a later hearing.

115. In all the circumstances, the Court considers that leave should be given to Mr Tamine to pursue his counterclaim against SSHL and the Court so orders.

116. The Court dismisses Mr Tamine's applications seeking leave (i) to amend the Defence by pleading the Counterclaim against Mr Brockman; and (ii) to serve the proceedings outside the jurisdiction upon Mr Brockman pursuant to RSC Order 11(1)(d)(iii).

117. The Court grants leave to the Plaintiffs to amend the Statement of Claim in accordance with the Summons dated 29 October 2021 and the Defendants are at liberty to make an application to set aside any part of the amended pleading in accordance with the Rules.

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

Dated this 6th day of May 2022

NARINDER K HARGUN

CHIEF JUSTICE