In The Supreme Court of Bermuda

CIVIL JURISDICTION
COMMERCIAL COURT
2015: No. 16

BETWEEN:

THE MAJURO INVESTMENT CORPORATION
(a company incorporated in the Marshall Islands)

Plaintiff

-v-

(1) VASILE TIMIS (also known as FRANK TIMIS)
(2) DERMOT COUGHLAN
(3) CRAIG COUGHLAN
(4) EDEN DERVAN (also known as ADEN DERVAN)
(5) GLOBAL IRON ORE, LIMITED (a company incorporated in Cyprus, in Liquidation)
(6) FERRERO LAW FIRM
(7) AFRICAN MINERALS LIMITED (a company incorporated in Bermuda, in Administration)
(8) TONKOLILI IRON ORE (SL) LIMITED (a company incorporated in Sierra Leone)

Defendants

RULING ON APPLICATION TO SET ASIDE SERVICE

(in Chambers)

Date of hearing: November 4-6, 2015
Date of Ruling: December 4, 2015

Mr Delroy Duncan and Ms Nicole Tovey, Trott & Duncan Limited, for the Plaintiff ("P")
Mr. Alex Potts, Sedgwick Chudleigh Limited, for the 1st Defendant ("D1")

Introductory

1. On January 15, 2015, P issued a Generally Endorsed Writ of Summons accompanied by a 'Particulars of Claim'. P claimed equitable compensation or damages in the amount of $50.5 million from, *inter alia*, D1. From paragraph 1 of P's pleading, it was clear that P brought the claim as a shareholder of the 7th Defendant ("D7"), a Bermudian company, and its subsidiary the 8th Defendant ("D8"), a Sierra Leonean company, on behalf of D7 and D8. The final paragraph of the pleading averred as follows:

> "*81. No relief is sought against* [D7] *and* [D8]*, who have been joined as Defendants solely for the purposes of their being parties to any order made in respect of this claim.*"

2. On the same date as the Writ was issued, P issued an Ex Parte Summons seeking injunctive relief against the Fifth Defendant and Sixth Defendant ("D5" and D6") and directions for service on the Defendants generally outside of the jurisdiction. This Ex Parte Summons was heard before Hellman J in Chambers on January 21, 2015. He granted both the injunctive relief sought against D6, which P's counsel addressed first in oral argument; Hellman J also granted leave to serve out against, *inter alia*, D1.

3. On page 27 of a Skeleton Argument which ran to just over 33 pages, P's case for obtaining leave to serve all foreign Defendants out of the jurisdiction was set out in a single paragraph in the following terms:

> "*86. The Company is located within this jurisdiction and accordingly the claim can be served upon it without permission. Each of the Defendants, all of whom are located outside of the jurisdiction, are necessary and/or proper parties to the claim. They are necessary and proper parties for the reasons already set out in [*Mr Memarian's] *affidavit. Thus the requirements of* RSC Ord.11,r.1(1)(c) *are fulfilled in respect of each of the Defendants located outside of the jurisdiction. The requirements of RSC Ord.11, r.4(1) have been set out by* [Mr Memarian] *in* [his] *affidavit.*" [CHECK]

4. In paragraph 5 of the 2nd Memarian Affidavit, it was averred that there was a "real issue" between D7 and D1 because he had been "*involved in the management of*" D7 and had "*voluntarily elected to become*" a director of a company "*the administration of which is governed by the laws of Bermuda*". The oral presentation in relation to the application for leave to serve out took place at the tail-end of the injunction application, and was described by Mr Duncan as "*pretty standard*".

5. The central thesis advanced by Mr Potts in support of the present application (by Summons issued on June 8, 2015) to set aside the service authorised by the January 21 2015 Ex Parte Order, was that the ex parte application was very far from being a "standard" one in jurisdictional terms. It was, in fact, a wholly misconceived application. He sought to set aside service on D1 on various carefully formulated grounds, which can be distilled into the following two main complaints:

    (a) P had no standing to pursue a derivative claim against D1 as a shareholder of D7; and/or

    (b) P's claim against D1 as a shareholder of D7, the 'anchor defendant', did not fall within Order 11 rule 1(1)(c) of the Rules.

6. As the present application can fairly be disposed of by navigating these two main legal thoroughfares, no need arises to explore each and every side street along the way.

Findings: standing of P to pursue a derivative action on behalf D7 against D1

Factual basis of derivative claim

7. Mahmood Memarian is the ultimate beneficial owner of P which was incorporated on December 22, 2014 in the Marshall Islands for the specific purpose of commencing the present action. He asserts in his First Affidavit that his motivation for pursuing the present claim is his belief that, but for the alleged misconduct of D1, D7 would be a profitable company. His knowledge of D7's affairs was acquired in prior dealings with D5, which has brought two claims against him.

8. The status of P's interest in D7 is explained by David MacLauchlan, the sole director of P, in his First Affidavit (sworn on January 14, 2015):

> "*8. On 6 January 2015, the Plaintiff became a shareholder in the Company by the purchase, through its nominee Peter MacLauchlan, of 20,000 of its shares on the U.S. Over the Counter (OTC) market. As explained in further detail below, the trading of the Company's shares on the Alternative Investments Market stock exchange ('AIM') in London has been suspended.*

> *As a consequence of that, the Plaintiff acquired shares in the Company through a broker in San Antonio, Texas. The Plaintiff is undertaking the necessary steps to transfer the legal title to the shares from its nominee to the Plaintiff, and to have it recorded upon the register of members. I understand that this process will take a few weeks.*"

9. Nearly nine months later at the beginning of the hearing of the present application, no further evidence had been filed in relation to P's status as a shareholder of D7. Further evidence of the share purchase was hastily filed on the second day of the hearing, which merely confirmed that P is still not a registered shareholder of D7.

10. In paragraph 16 of the Particulars of Claim, it is averred that:

> "*16. Although not a majority shareholder of the Company,* [D1] *has de facto control…due to the fractured shareholding of the Company, which consists of numerous very small shareholders, and the fact that he is the largest shareholder and…the only entrenched executive officer of the Company.*"

11. It is now common ground that D7 was placed into administration in London on March 25, 2015 on an application made by the Board of Directors. Ian Wormleighton and Barry Kahn of Deloitte were appointed. D7 is insolvent but the administration aims to rescue the company as a going concern. According to the Joint Administrators' May 12, 2015 Report, unsecured creditors' claims are estimated to total £463.2 million. It is no longer possible to process transfers of shares.

12. D7 is clearly no longer, if it ever was, under the control of the alleged wrongdoer, D1. P has never been and cannot become a registered shareholder of D7 as long as the Company is in administration in England and Wales. It appears from the Affidavits (including the First PM Affidavit sworn on November 5, 2015, which I grant leave to P to rely upon) as follows. P purchased 20,000 shares in D7 for $3200 on January 6, 2015 shortly before the Ex Parte Order of January 21, 2015 was obtained.

Legal requirements for maintaining a derivative claim

13. It was common ground that the substantive and procedural requirements for the bringing of a derivative action on behalf of a company are governed by common law rules which are consistent with the English common law position prior to its statutory modification by the Companies Act 2006 (UK). D1 submitted through his counsel's Skeleton Argument:

> "*As a matter of common law, a minority shareholder in a Bermuda company may bring a derivative claim in the exceptional circumstance where he can establish both (a) 'fraud on the minority' and (b) 'wrongdoer control' which prevents the company itself from bringing an action in its own name.*"

14. Mr Duncan sensibly conceded that because the 'wrongdoer control' limb of the preconditions for bringing a derivative claim could no longer be met, P no longer had standing to pursue the claim. He sought a stay of the proceedings instead, based on the approach adopted in *Breckland Group Holdings Ltd.-v- London and Suffolk Properties Ltd* (1988) 4 BCC 542, and in *Fargro Ltd-v- Godfroy* [1986] 1 WLR 1134.

15. There is accordingly no need for me deal more than summarily with the interesting argument as to whether or not a derivative claim can only be brought by a registered shareholder, as D1's counsel contended, or whether having an equitable interest in the Company's shares is enough, as P's counsel contended. It seemed to me to be quite clear on the authorities referred to that:

    (a) the almost invariable rule is that the derivative claimant must be a registered shareholder: see e.g. *Svanstrom-v-Jonasson* [1997] CILR 192 (Telford Georges JA, Zacca P and Kerr JA concurring);

    (b) in exceptional circumstances, for instance where the wrongdoer is preventing beneficial owners from registering their shares, a beneficial owner may have sufficient standing to maintain a derivative claim: see e.g. *Jafari-Fini-v- Skillglass Limited* [2004] EWHC 3353 (Rich J); [2005] EWCA Civ 356 (per Chadwick LJ at paragraph 56).

16. P is neither a registered shareholder nor an equitable owner able to contend that it would, in effect, be inequitable for its non-registration to be a bar to its advancing a derivative claim. Accepting Mr Duncan's submission that P's evidence should be accepted on its face at this interlocutory stage, the reason why P cannot become registered is that the board of directors of D7 have placed that company into administration. An act of placing a company beyond the alleged wrongdoer's control which destroys another limb of a derivative claimant's standing can hardly be relied upon to support an equitable owner's standing rights.

17. It was accordingly ultimately common ground that P could no longer pursue the present action and that, assuming this Court had jurisdiction over D1, the only question was whether the proceedings should be stayed or dismissed. I will return to this question after resolving the question of whether jurisdiction over D1 exists.

The legal requirements of Order 11 rule 1(1)(c)

18. Order 11 rule 1(1) (c) provides a jurisdictional basis for service abroad where:

> "(c) *the claim is brought against a person duly served within or out of the jurisdiction and a person out of the jurisdiction is a necessary or proper party thereto…*"

19. Having regard to the Anglicisation of the present proceedings, beginning with the use of the modern English moniker for a plaintiff's pleading ('Particulars of Claim') rather than the Bermudian 'Statement of Claim', Mr Potts was right to point out that our rule is distinguishable from the modern English rule. Our Rules require service to have been effected on the 'anchor defendant' ("*a person duly served*") before the application for leave to serve out is made. This procedural requirement was not complied with in the present case, although this non-compliance was not necessarily fatal. D7 was not served until April 2, 2015, but the time for so doing could potentially have been extended under Order 3, if required.

20. However, probably as a result of amendments introduced here in January 2006, the Bermudian Order 11 rule 1(c), unlike the Manx counterpart considered by the Privy Council in *Altimo Holdings and Investment Ltd-v-Kyrgyz Mobil Tel Ltd* [2012] 1 WLR 1804 at 1812, has extended the reach of Order 11 rule 1(1) (c) to embrace claims not only brought against "*a person duly served within… the jurisdiction*", but also to claims against persons duly served "*out of the jurisdiction"* as well. This latter and broader limb of the rule was not relied on in the present case, but is important to understanding the true scope of the rule. The central controversy, however, was whether a derivative claim brought <u>on behalf of</u> an anchor defendant qualified as a "claim" for Order 11 rule 1(1) (c) purposes.

21. The Judicial Committee of the Privy Council decision on an Isle of Man appeal was heavily relied upon by Mr Potts both for the broad policy approach to the rule and for the need to scrutinize the claim against the anchor defendant. He rightly pointed out that the opinions of Lord Collins on conflict of law matters should generally be given particular deference. In *Altimo Holdings and Investment Ltd-v-Kyrgyz Mobil Tel Ltd* [2012] 1 WLR 1804 at 1822-1823, Lord Collins explained the test an applicant had to meet for seeking leave to serve out in its broader canvass as follows:

> "*71. On an application for permission to serve a foreign defendant (including an additional defendant to counterclaim) out of the jurisdiction, the claimant (or counterclaimant) has to satisfy three requirements: 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. The current practice in England is that this is the same test as for summary judgment, namely whether there is a real (as opposed to a fanciful) prospect of success: e.g. Carvill America Inc v Camperdown UK Ltd [2005] EWCA Civ 645, [2005] 2 Lloyd's Rep 457, at [24]. 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. In this context "good arguable case" connotes that one side has a much better argument than the other: see Canada Trust Co v Stolzenberg (No 2) [1998] 1 WLR 547, 555-7 per Waller LJ, affd [2002] 1 AC 1; Bols Distilleries BV v Superior Yacht Services [2006] UKPC 45, [2007] 1 WLR 12,*

[26]-[28]. Third, the claimant must satisfy the court that in all the circumstances the Isle of Man 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."

22. The crucial general requirement which was in dispute on the present application was whether "*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.*" The policy reasons for a cautious approach to the specific rule relied upon by P in the present case was explained by Lord Collins (at 1823-1824) as follows:

> "*The necessary or proper party head of jurisdiction is anomalous, in that, by contrast with the other heads, it is not founded upon any territorial connection between the claim, the subject matter of the relevant action and the jurisdiction of the English courts: The Brabo [1949] AC 326, 338, per Lord Porter. Piggott, Foreign Judgments and Jurisdiction (3rd ed, 1910), Pt III, p238, said: "This is perhaps the most important of the sub-rules, for it throws the net of jurisdiction over a wider area; and the principle of considering the nature of the cause of action which pervades the whole subject, appears here to be ignored." Consequently as Lloyd LJ said in The Goldean Mariner [1990] 2 Lloyd's Rep 215 at 222:*
>
> > *'I agree … that caution must always be exercised in bringing foreign defendants within our jurisdiction under O.11 r.1(1)(c). It must never become the practice to bring foreign defendants here as a matter of course, on the ground that the only alternative requires more than one suit in more than one different jurisdiction.'* "

23. In response to the criticism made by Mr Potts of the fairness of the presentation made to Hellman J on this issue at the ex parte hearing, I would only interject that Order 11 rule (1) (c) has not to my knowledge been subjected to similar scrutiny in the local courts before. I have myself without adverting to the principles relied upon by D1 here granted many ex parte orders under this rule which have never been challenged. Lord Collins proceeded to reach the following two conclusions about the nature of the claim against the anchor defendant which Order 1 rule 1(c) required:

    (1) "*79… the fact that D1*[the anchor defendant] *is sued only for the purpose of bringing in the foreign defendants is a factor in the exercise of the discretion and not an element in the question whether the action is "properly brought" against D1, provided that there is a viable claim against D1*";

    (2) "*80. Second, the action is not properly brought against D1 if it is bound to fail: The Brabo [1949] AC 326, 338-9, per Lord Porter. He also put the point (echoing Witted v Galbraith [1893] 1 QB 577) on the basis that leave will not be granted if the lack of a plausible cause of action against D1 shows that the presence of D1 in the jurisdiction is being used as a*

device to bring in D2. See also Multinational Gas and Petrochemical Co. v Multinational Gas and Petrochemical Services Ltd. [1983] Ch 258, 268, 273-274."

24. The subtle yet simple and fundamental point relied upon in attacking the plausibility of the claim against the anchor defendant in the present case is that it is not really a claim against the anchor defendant (D7) at all. D7 is really joined on the substantive basis that it is itself a 'necessary and proper party' to a claim brought on its behalf by P. Using a necessary and proper party to a substantive action against another defendant (who is not himself duly served) as an anchor defendant is completely circular. It is a classic case of 'pulling oneself up by one's own bootstraps', to use the colloquial but vividly illustrative phrase. This ultimately unanswerable point was best and most clearly illustrated by Mr Potts' reliance on the following passage from the judgment of Sir Wilfrid Greene MR in a case concerning another derivative action, *Beattie-v- E & F Beattie Ltd* [1938] Ch 708 at 718:

> "*The claim which the plaintiff is seeking to enforce in the action-I am now only dealing with the new matter which it is sought to introduce-is, and must be, in a representative action of this character, a claim of the company itself, because a minority shareholder suing in a representative action is suing to enforce the rights of the company. The reason the action takes that form is that the minority shareholder is not in a position to see that the action is brought in the name of the company itself to enforce the company's rights. Nevertheless, the action is, in reality, an action to enforce the rights of the company and of nobody else. The essence of the claim is that the plaintiff is seeking to enforce the company's right to recover from Mr Ernest Beattie moneys of the company, which, as it is alleged, have been paid away by him. The company of course is a necessary defendant because the order, if an order is made, will be an order for the payment to the company, the moneys being the company's moneys.*" [emphasis added]

25. The proposition that the claim against the anchor defendant for Order 11 rule 1(1) (c) purposes must be an adversarial one is not just consistent with the natural and ordinary meaning of the words of that rule. It is reinforced by the related evidential requirements of rule 4(1)(d) of Order 11, which require an affidavit stating:

> "(d) where the application is made under rule 1(1)(c), *the grounds for the deponent's belief that there is between the plaintiff and the person on whom a writ has been served a real issue which the plaintiff may reasonably ask the Court to try*…" [emphasis added]

26. I say that D1's argument that the requirements of Order 11 rule (1) (c) were not met was unanswerable because P's counsel was understandably unable to raise any coherent response to it. Conjuror-like, Mr Duncan sought to make the fatal argument disappear by repeating the word 'fraud' (like a ritual incantation) and focussing on peripheral concerns. Allegations of fraud do not generate self-sustaining bases of jurisdictional competence exercisable by this Court. References made to derivative action case law (e.g. *Crouch-v- The Credit Foncier of England, Limited* (1873) LR 8 QB 374 and *Spokes-v-Grosvenor Hotel Company Ltd* (1897) 2 QB 124) only fortified

D1's point. The company in a derivative action is itself a necessary party to a claim brought on its behalf. The fact that Bermuda is arguably the appropriate forum because the claim concerns the internal management of a Bermudian company (*Reeves-v-Specher* [2008] EWHC 583 (Ch) at paragraph 5, Richard Sheldon QC) is not responsive to this fundamental jurisdictional point. Mr Duncan's submission that Bermuda ought to assert a broad jurisdiction over the internal affairs of its company was more of a law reform point[1] than an argument on the proper construction of the existing rules.

27. The clarity of the terms of Order 11 rule 1(1)(c) as read with rule 4(1)(d) was such that the ability to deploy secondary policy aids to construction, such as those deployed in construing a limitation provision by Sir Duncan McMullin in *515 South Orange Grove Owners Association-v-Orange Grove Partners* [1995] CKHC 9, does not properly arise. Order 11 rule 1(1)(c) can potentially be engaged in support of real causes of action asserted against anchor defendants served both in Bermuda and abroad as well. The scope of this jurisdictional gateway appears to me to be sufficiently broad to meet, to some extent at least, the public policy concerns posited by P's counsel[2].

28. Applying the cautious approach to Order 11 rule 1 (1)(c) jurisdiction which I have found informs proper entry through this specific jurisdictional gateway together with a straightforward reading of the unambiguous terms of the rule, I find that P has failed to establish a good arguable case for granting leave to serve out against D1. There is no substantive claim asserted against D7, the anchor Defendant, which this Court is required to adjudicate upon. The Ex Parte Order of January 21, 2015 granting leave is accordingly liable to be set aside.

Findings: should the claim against D1 be dismissed or stayed?

29. It follows from the above analysis, and the resultant jurisdictional findings, that the claim against D1 should be dismissed. The only claim advanced was a claim on the part of D7 against D1 who is resident in England and Wales. P's counsel identified no other jurisdictional gateway under Order 11 rule 1 (rule 1(1)(c) apart) through which D7's Joint Administrators could potentially access the jurisdiction of this Court in prosecution of the present claim against D1.

30. Mr Potts objected to my considering a letter dated November 5, 2015 tendered to the Court by the Administrators' local counsel. Ms Faiella made it clear that she was not formally appearing, nor were her clients submitting to the jurisdiction of this Court.

[1] The Eastern Caribbean CPR (rule 7.3(7)) provides for service abroad in relation to the following claims:

> "*(a) the constitution, administration, management or conduct of the affairs; or*
>
> *(b) the ownership or control of a company incorporated within the Jurisdiction.*"

[2] A gap admittedly exists where a company is wholly or substantially managed from outside Bermuda so that the misconduct complained of does not afford access to the local court through an alternative jurisdictional gateway.

This letter was, subject to reviewing its contents, clearly potentially relevant to the exercise of this Court's discretion to grant a stay rather than dismissing the proceedings altogether and so I reserved the right to review its contents and decide whether or not to take them into account.

31. The letter essentially explains that the Joint Administrators have limited funds and had not yet had an opportunity to decide whether or not to intervene in the present proceedings on behalf of the Company. It invites the Court to afford them an opportunity to consider whether they wished to intervene in the proceedings on D7's behalf by not discharging the injunction granted on January 21, 2015 against D6. This request in my judgment has no relevance to the exercise of this Court's discretion to dismiss or stay the case against D1.

32. The November 5, 2015 letter does at its highest reveal that the Joint Administrators are investigating the transactions which underpin P's claims in the present action and that the Joint Administrators have not yet formed a view on whether D7 may or may not wish to pursue similar claims. It is hoped that funds frozen due to litigation which may be disposed of in December 2015 will be released to permit them, at some future uncertain date, to complete their investigations. That quandary is understandable and might well have potentially afforded grounds for acceding to P's stay application if:

    (a) there was some basis for concluding that there was a realistic prospect of the Joint Administrators being able to viably pursue P's claim; and

    (b) the Joint Administrators had identified a practical reason why the interests of D7's creditors would be prejudiced if the case against D1 (which does not involve an asset-freezing injunction at all) is dismissed.

33. The cases cited by Mr Duncan in support of the grant of a stay were cases where a derivative claimant was found to lack standing to pursue an otherwise viable claim. In *Breckland Group Holdings Ltd.-v- London and Suffolk Properties Ltd* (1988) 4 BCC 542, Harman J crucially found as follows:

> "*Thus, it seems to me, the action was, as is admitted, wrongly brought; it cannot at present be known whether the board will adopt it or ratify it on 3 August. If the board do not adopt it, a general meeting would have no power whatever to override that decision of the board and to adopt it for itself. Thus at the moment there can be no certainty whatever as to what would happen. It seems to me that in those circumstances I ought to restrain further steps in this action pending a decision as to whether the company will by its proper organ, that is the board, adopt it. It may do so. If so it will be valid and ratified and adopted form its initiation.*"

34. Implicit in this decision was the fundamental assumption that the relevant action could viably be pursued by the company in place of the derivative claimant[3]. In *Fargro Ltd-v- Godfroy* [1986] 1 WLR 1134, a derivative claim which was commenced by a shareholder was held to be liable to be dismissed. Walton J's decision to permit the liquidators to apply to reconstitute the proceedings again was reached in circumstances where it was clear that the liquidator could viably pursue the relevant claim. Walton J opined (at 1138) as follows:

> "*So there is clear authority in the Privy Council as to the vast distinction that there is between the position where the company is a going concern and the minority shareholders' action can be brought, and a case when it goes into liquidation where there is no longer any necessity for bringing a shareholders' action. Because, subject if necessary to obtaining the directions of the court, which is in itself an excellent thing as acting as a filter against bringing any totally wrong-headed action, the action can be brought directly by the company as it ought to be brought….*
>
> *…It turns out that the action as at present constituted is improper and therefore, subject to any further discussion as to what is now to be done, that part of the action could properly be struck out. I will not expatiate on the matter further but, but having got as far as we have got in the action it will I think be a thousand pities and a great disservice to everybody if the action cannot be now be reconstituted…in such a manner as to enable it to continue without at any rate too long an adjournment and thus be brought to a satisfactory conclusion.*"

35. In practical terms, the only way the present proceedings could be pursued by D7 acting by its Joint Administrators (or Bermudian provisional liquidators, should any be appointed) is by entirely reconstituted proceedings which engaged an entirely new jurisdictional gateway. Even P's counsel, despite advancing an array of arguments in support of an ultimately hopeless jurisdictional cause, lacked the ingenuity to postulate some alternative potentially viable jurisdictional foundation for the present claim. That is a strong indicator that any jurisdictionally viable claim D7 could assert in Bermuda would have to be recast in an entirely new mould, as opposed to simply changing the name of the Plaintiff. It is an even stronger indicator that it is wholly implausible that the Joint Administrators would ever wish to take over the existing proceedings at all.

36. For these reasons I am bound to conclude that the present proceedings against D1 should be dismissed rather than stayed.

Conclusion

37. P admittedly lacks the standing to pursue a derivative claim on behalf of D7 because after the January 21 Ex Parte Order was made granting leave to serve D1 out of the jurisdiction, D1 (the alleged wrongdoer) ceased to have control of the Company.

[3] The injunction granted by Harman J restraining the further prosecution of the proceedings was subsequently set aside on appeal on technical jurisdictional grounds: *Breckland Group Holdings Ltd.-v- London and Suffolk Properties Ltd* [1988] EWCA Civ J0803-2.

Further and in any event, P lacks standing to pursue a derivative claim because it is not a registered shareholder of D7 and no sufficient grounds have been made out for treating its beneficial interest in its shares in D7 as an adequate basis for pursuing a derivative claim. The January 21, 2015 Order is liable to be set aside on the grounds that P has failed to establish that there is a serious issue to be tried on the merits of its claim against D1.

38. Further and in any event, P has failed to establish a good arguable case that this Court has jurisdiction over D1 within the sole jurisdictional gateway relied upon, Order 11 rule 1(1) (c). This jurisdictional limb of Order 11 rule 1 requires reliance upon a viable adverse claim against the 'anchor defendant'. P has merely joined D7 as a nominal defendant on the explicit basis that its real and substantive interest in the litigation is as a passive plaintiff. This is a novel finding in Bermudian law terms. The fact that this point was not adequately explored at the ex parte stage is regrettable but unsurprising.

39. The Ex Parte January 21, 2015 Order granting leave to serve out is liable to be set aside on this further ground. In these circumstances there is no rational basis for staying the present proceedings to see if the UK Joint Administrators of D7 wish to take them over, rather than dismissing the proceedings altogether. No other potential jurisdictional gateway was posited as a potential alternative ground for suing D1 in Bermuda.

40. Accordingly, subject to hearing counsel on the precise terms of the final Order if required, the claim against D1 is dismissed. Unless either party applies within 21 days by letter to the Registrar to be heard as to costs, the costs of the present application shall be awarded to D1 to be taxed if not agreed.

Dated this 4th day of December, 2015 _____
IAN RC KAWALEY CJ