

IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO. 22 OF 2019

BETWEEN                    **DAIWA CAPITAL MARKETS EUROPE LIMITED**  
**PLAINTIFF**

AND                         **MR. MAAN ABDUL WAHED AL SANEA**  
**DEFENDANT**

IN CHAMBERS  
BEFORE THE HON. ANTHONY SMELLIE, CHIEF JUSTICE  
11 JULY 2019

APPEARANCES:     Mr. Sam Dawson and Mr. Tim Baidam of Carey Olsen, Attorneys-at-Law for the Plaintiff

*Action for recovery of an indemnity and/or contribution or for equitable subrogation on the basis of joint tortfeasor liability – action brought both in England and in Cayman – whether permissible to obtain leave to serve out in such circumstances on the basis that Cayman could become the proper forum for trial of the claims – Limitation Defence – whether available to former director who acted in fraudulent breach of trust.*

**REASONS FOR JUDGMENT**

1. In these proceedings, the Plaintiff, Daiwa Capital Markets Europe Limited ("Daiwa"), the London subsidiary of a Japanese investment bank and brokerage firm,<sup>1</sup> claims against the Defendant, Mr. Al Sanea, for an indemnity and/or contribution under the Torts (Reform) Law (1996 Revision) (the "Torts Law") and/or at common law, alternatively, for equitable subrogation.



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<sup>1</sup> Daiwa Securities SMBC Co. Ltd.

2. Daiwa's claims against Mr. Al Sanea arise out a judgment of Mrs. Justice Rose in the English High Court dated 16 February 2017 (“the English Judgment”) in proceedings brought by Singularis Holdings Ltd (In Official Liquidation) ("Singularis"), a Cayman Islands company. Singularis is one of the Saad Group of Companies established by Mr. Al Sanea in this jurisdiction and which have been in liquidation proceedings before this Court for several years at the instance of various creditors.
3. Mr. Al Sanea was a director of Singularis before its liquidation and before the time of the institution of those proceedings tried by Mrs. Justice Rose (the “Singularis English Proceedings”). He wholly owned and controlled Singularis.
4. Mrs. Justice Rose found that Mr. Al Sanea nonetheless breached his fiduciary duties to Singularis in instructing Daiwa to transfer USD204 million of Singularis' funds to companies owned or controlled by him, and that Daiwa was liable to Singularis for negligence in processing the transfers.
5. Daiwa asserts in these proceedings that it and Mr. Al Sanea are both liable to Singularis in respect of this loss, and that it would be just and equitable given that the transfers were made on his directions and for his benefit, for Daiwa to claim a complete indemnity from Mr. Al Sanea.
6. The Writ in these proceedings (“the Writ”) was issued on 14 February 2019, and by way of an *ex parte* Summons dated 11 June 2019 (the "Summons") Daiwa sought:
  - (a) Permission to serve the Writ and other documents in the proceedings out of the jurisdiction on Mr. Al Sanea in the Kingdom of Saudi Arabia pursuant to GCR Order 11, rule 1(1)(ff); and



- (b) An extension to the validity of the Writ for a period of six months to allow service of the Writ on Mr. Al Sanea in Saudi Arabia to take place.
7. At the *ex parte* hearing on 11 July 2019, I accepted Daiwa's submissions that the Court should grant leave to serve the Writ on Mr. Al Sanea out of the jurisdiction and the requested extension to the validity of the Writ to allow service to occur. These are the reasons for my decision.

### **Background to the proceedings**

8. Mr. Al Sanea is a prominent Saudi Arabian national who owned or controlled the insolvent Saad Group of Companies (including Singularis) which, along with Mr. Al Sanea himself, has been the subject of very high stakes and complex litigation here<sup>2</sup> and in other jurisdictions.
9. In October 2017, Mr. Al Sanea was arrested in Saudi Arabia pursuant to a Royal Order for non-compliance with judgment enforcement orders, and he remains in custody in a place of detention in Saudi Arabia. Claims against him have previously been dealt with by a special enforcement Court in Saudi Arabia which appointed a consortium of advisers to locate, value and sell his assets. A trustee in bankruptcy has recently been appointed in Saudi Arabia in relation to a central company in the Saad Group called Saad Trading, Contracting and Financial Services Company, and in relation to Mr. Al Sanea himself.
10. Daiwa's claims in these proceedings (as did Singularis' in the Singularis English Proceedings) arise out of a stock-lending arrangement between Daiwa and Singularis.



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<sup>2</sup> In particular, in FSD 0054 of 2009 – *AHAB v SICL, Al Sanea, et al*; judgment delivered 31 May 2018.

Daiwa financed the acquisition by Singularis of shares in well-known banks – HSBC Holdings Plc, BNP Paribas SA, and JP Morgan Chase & Co. – and held a margin of a certain percentage of the total value of the shares lent to Daiwa under the terms of the arrangement. The transaction was terminated in June 2009 and Daiwa was left holding USD204 million for the account of Singularis (the "Funds"). Singularis (acting through Mr. Al Sanea, who had authority to give instructions to Daiwa in relation to the arrangement) instructed Daiwa to make a series of payments to other entities owned or controlled by Mr. Al Sanea and his family (the "Payments"). Daiwa acted in accordance with the instructions that it received and the funds were paid out.

11. Singularis subsequently went into official liquidation under the supervision of this Court and Joint Official Liquidators (the "JOLs") were appointed. The JOLs contended that the Payments constituted a misapplication of Singularis' funds to the detriment of Singularis and its creditors. Mr. Dawson, on behalf of Daiwa, explained to me that the JOLs had sought to recover the amount of the Payments as follows:

- (a) First, the JOLs issued proceedings against Mr. Al Sanea in this Court on 31 August 2012, in which Singularis alleged that Mr. Al Sanea had breached his fiduciary duties to Singularis in instructing Daiwa to effect the Payments and was liable to compensate Singularis accordingly. Singularis was granted permission to serve the writ on Mr. Al Sanea out of the jurisdiction on 23 October 2012, by way of substituted service. Mr. Al Sanea having failed to file a defence, Singularis obtained a default judgment in April 2013 and final judgment following a damages assessment at an open Court hearing in July 2013 against Mr. Al Sanea for the full amount of the Payments of USD204



million (the "Cayman Judgment"). Mr. Dawson explained that, so far as Daiwa is aware, the JOLs have not recovered anything from Mr. Al Sanea pursuant to this judgment.

- (b) Second, the JOLs commenced proceedings against the Al Sanea related recipients of the Payments in Saudi Arabia and in England and Wales. Those proceedings led to a relatively modest recovery of approximately US\$753,000.
- (c) Third, the JOLs commenced the English proceedings against Daiwa in the English High Court for dishonest assistance in relation to Mr. Al Sanea's breaches of fiduciary duty and/or negligence, in giving effect to the instructions received from Mr. Al Sanea. By the English Judgment, Mrs. Justice Rose held that, whilst Mr. Al Sanea had breached his fiduciary duties to Singularis in instructing Daiwa to make the Payments, Daiwa was not liable for dishonest assistance as it had not acted dishonestly in processing the Payments. However, the English Judgment held that Daiwa was liable to Singularis for breach of contract and in negligence (subject to a reduction for contributory negligence of 25% to US\$152,804,925). That decision, which was upheld by the English Court of Appeal, is currently on appeal to the Supreme Court.



### **Indemnity and/or contribution**

12. Daiwa's claims in these proceedings against Mr. Al Sanea for an indemnity and/or contribution are brought under section 6 of the Torts Law, which provides that:

*"6(1): Where damage is suffered by any person as a result of a tort (whether or not such tort is also an offence)- [...] (c) any tort-feasor liable in*

*respect of such damage may recover contribution from any other tort-feasor who is, or would, if sued, have been liable in respect of the same damage, (whether as a joint tort-feasor or otherwise) so, however, that no person shall be entitled to recover contribution under this section from any person entitled to be indemnified by him in respect of the liability in respect of which contribution is sought.*

6(2): *In any proceedings for contribution under this section, the amount of the contribution recoverable from any person shall be such as may be found by the court to be just and equitable having regard to the extent of that person's responsibility for the damage, and the court shall have power to exempt any person from liability to make contribution, or to direct that the contribution to be recovered from any person shall amount to a complete indemnity."*



13. As explained above, the premise of Daiwa's claim under these provisions, is the finding in the Singularis English Proceedings that Daiwa is a joint tortfeasor with Mr. Al Sanea and liable in respect of the same damage but that it is just and equitable that Daiwa should be fully indemnified by him.

**Limitation issue**

14. Section 12(1) of the Limitation Law (1996 Revision) (the "Limitation Law") provides that claims under section 6 of the Torts Law must be brought within two years from the date on which the right to recover contribution accrued. Section 12(3) of the Limitation Law states that if the person is held liable by a judgment given in civil proceedings, then the relevant date for calculating the limitation period for contribution claims is the

date on which the judgment is made. In the present case, the English Judgment holding Daiwa liable to Singularis was dated 16 February 2017, and Daiwa issued the Writ on 14 February 2019, and so within the limitation period.

**The English Proceedings**

15. An issue I had to consider on this application was that on the same day as the Writ was issued on 14 February 2019, Daiwa also issued proceedings in the English High Court seeking contribution, an indemnity or equitable subrogation, from Mr. Al Sanea the "Daiwa English Proceedings. The relief sought in the present proceedings is identical to that sought in the Daiwa English Proceedings. On 9 April 2019, Daiwa obtained permission to serve the Daiwa English Proceedings on Mr. Al Sanea in Saudi Arabia and is currently awaiting service to be completed. This situation gives rise to the issue of the appropriate forum for the determination of Daiwa's claims.
16. In this regard, Mr. Dawson frankly submitted that Daiwa's primary position is that England is the most appropriate forum in which to determine its claims against Mr. Al Sanea, and Daiwa intends to pursue the Daiwa English Proceedings. However, as a precautionary measure, Daiwa issued the present proceedings in order to protect its position on limitation in the event of a successful challenge by Mr. Al Sanea to the jurisdiction of the English Courts. Mr. Dawson submitted that the Cayman Islands would be the appropriate jurisdiction to determine the claims if Mr. Al Sanea successfully challenges the jurisdiction of the English Courts on the basis that another jurisdiction would be a more appropriate forum for Daiwa's claims to be heard.
17. Mr. Dawson further explained that if Mr. Al Sanea does not successfully challenge the jurisdiction of the English Courts, then Daiwa will apply to stay these proceedings in



deference to the Daiwa English Proceedings. Daiwa does not intend to pursue the Daiwa English Proceedings and the present proceedings in parallel, and Mr. Al Sanea will not, therefore, be required to defend two sets of proceedings. Daiwa accepts that the case will ultimately be tried in the appropriate jurisdiction for the trial of the issues which is in the interests of justice and of all the parties. This is, of course, a matter of central importance to the question to which I next turn, which is whether service out of these proceedings upon Mr. Al Sanea, should be directed.

### **The legal test for service out of the jurisdiction**

18. GCR Order 11, rule 1(1)(ff) provides that service of a writ out of the jurisdiction is permissible with the leave of the Court if:

*"the claim is brought against a person who is or was a director, officer or member of a company registered within the jurisdiction or who is or was a partner of a partnership, whether general or limited, which is governed by the laws of the Islands and the subject matter of the claim relates in any way to such company or partnership or to the status, rights or duties of such director, officer, member or partner in relation thereto".*



19. GCR Order 11, rule 4(2) states that no leave for service out shall be granted unless it shall be made sufficiently to appear to the Court that the case is a proper one for service out of the jurisdiction. This requires the Court to apply the doctrine of *forum conveniens* and the principles enunciated by Lord Goff in the House of Lords in *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460, in order to identify the "*forum*

*in which the case can be suitably tried for the interests of all the parties and for the ends of justice"* (*Spiliada*, at 480F).

20. The principles in the *Spiliada* judgment have been adopted and frequently considered by the Cayman Islands Courts (for example, in the Court of Appeal judgment in *Ahmad Hamad Algosaibi and Brothers Company v Saad Investments Company Limited & Others* [2010 (2) CILR 289] at paragraphs 16-17).
21. GCR Order 11, rule 1(1)(ff) (above) has no equivalent in the English Rules of the Supreme Court. However, this provision, which recognises that service out of the jurisdiction may be appropriate having regard to a proposed party's relationship to a company or partnership domiciled in Cayman, has been considered on several occasions by the Cayman Islands Courts. For example:

- (a) The Court of Appeal held in *Telesystem International Wireless Incorporated v CVC/Opportunity Equity Partners L.P. & Others* [2002 CILR Note 21] that the Courts, in deciding whether to grant leave to serve outwith, will take into account the status of the Cayman Islands as an advanced and reputable international financial centre, and a jurisdiction dealing frequently with international disputes involving Cayman companies, in considering issues of *forum conveniens*. In my judgment in *KTH Capital Management Limited v China One Financial Limited & Others* [2004-05 CILR 213], I held that "*The choice of domicile of a company does, however, carry its own practical significance, in recognizing the benefits and advantages – real or perceived – of incorporation in an established international financial centre such as the Cayman Islands. Implicitly, this includes the reasonable expectation that the*



*courts here are competent and able to resolve any complex dispute that may arise in an efficient and just manner. Those are also practical considerations which always arise when one seeks to determine or choose the appropriate forum for the trial of a matter. Our Court of Appeal has recognized them to be relevant considerations on grounds of public policy: Telesystem Intl. Wireless Inc. v. CVC/Opportunity Equity Partners L.P."* (paragraph 23). The decision in *KTH Capital* (above) was applied by Levers J in *TCB Creditor Recoveries Limited v Arthur Andersen LLP* [2007 CILR Note 14].

- (b) The Judgment of Acting Justice Foster (as he then was) from *In re Cairnwood Global Technology Fund Ltd* [2007 CILR 193], held that the Court had jurisdiction to hear the claim against directors and officers of the plaintiff for breach of trust and breaches of contractual and fiduciary duties on the basis of the provisions of GCR Order 11, rule 1(1)(ff); notwithstanding the defendants' submissions that the connection between the plaintiff fund in that case and the Cayman Islands, was minimal and purely formal. The plaintiff fund was incorporated in the Cayman Islands and was in official liquidation. The decision referred to "*the particular significance in the jurisdiction of the public policy*" underpinning GCR Order 11, rule 1(1)(ff) (paragraph 36). The Judge also stated:

*"Having regard to the position of the Cayman Islands as an international financial centre, it is in principle particularly desirable that the courts of this jurisdiction determine issues such as the duties and responsibilities of directors or officers of Cayman companies. This is now well established as a matter of Cayman public policy and law. Of course, that factor may be outweighed by other factors in any particular case and of course, in a case where the proceedings cannot be served as of*



*right within the jurisdiction, the onus is on the plaintiff to satisfy the court that the Cayman Islands are clearly the appropriate jurisdiction for the trial of the issues in the interests of justice and of all the parties. Nonetheless, it seems to me that this is a factor of great weight in the discretionary balance" (paragraph 35).*

### **Daiwa's submissions on the service out application**

22. Relying on the foregoing case law, Mr. Dawson submitted on behalf of Daiwa, that the gateway test for service out of the jurisdiction under GCR Order 11, rule 1(1)(ff) is met in this case. Daiwa claims against Mr. Al Sanea, who was a director and member of Singularis, which is a company registered within the Cayman Islands. Further, the subject matter of the claim relates to the rights and duties of Mr. Al Sanea as a director of Singularis, as Daiwa relies on Mr. Al Sanea's breaches of fiduciary duty in establishing its claim for contribution and/or equitable subrogation, and the claim relates to Singularis and its funds.

23. He submitted further that the following relevant connecting factors point to the Cayman Islands Court as being the appropriate forum for the determination of the matters raised in the Writ (in the event that England is held not to be the appropriate forum), and that this is a proper case for service out of the jurisdiction, as required by GCR Order 11, rule 4(2):

- (a) In light of the connection between Singularis and Mr. Al Sanea as explained above, the claim satisfies the gateway for service of a writ out of the jurisdiction in GCR Order 11, rule 1(1)(ff);
- (b) Daiwa's claim against Mr. Al Sanea relates to losses suffered by Singularis as a result of Mr. Al Sanea's breaches of fiduciary duty owed to Singularis;



- (c) Mr. Al Sanea's liability to Singularis has been established by the Cayman Islands Court in terms of the Cayman Judgment in the proceedings brought by the JOLs of Singularis against Mr. Al Sanea. The English Judgment holds that Daiwa is liable to Singularis for the same loss;
- (d) Mr. Al Sanea's liability to Singularis is governed by the law of the Cayman Islands, in particular in relation to his breaches of fiduciary duty;
- (e) Singularis is subject to official liquidation under the supervision of the Grand Court. Furthermore, a number of other civil proceedings against Mr. Al Sanea and the Saad Group of companies have been determined by the Cayman Courts, as mentioned above.

24. I am satisfied that the affidavit filed by Daiwa in support of the Summons – the First Affidavit of Mr. Jonathan William Gale<sup>3</sup> dated 11 June 2019 – explains evidentially Daiwa’s case and fulfils the statutory requirements for the grant of leave for service out, as set out in GCR Order 11, rule 4(1).

25. In keeping with his duties of full and frank disclosure owed to this Court, Counsel for Daiwa also drew the Court's attention to the following connections to other jurisdictions:

- (a) England, as summarised above in relation to the English Proceedings. Furthermore, Mr. Dawson explained that certain aspects of Daiwa's claim against Mr. Al Sanea may actually be governed by English law. This is, however, not necessarily determinative of England as the proper forum. He



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<sup>3</sup> A solicitor of the Senior Courts of England and Wales and partner in the firm of Ashurst LLP having responsibility of Daiwa’s claims in this matter.

cited Mr. Justice Henderson's comments in *Helmsman Limited and Hotham Trustee Company Limited v Bank of New York Trust Company (Cayman) Limited* [2009 CILR 490] that:

*"Foreign law is always a question of fact and must be proved by evidence like any other fact. However, the Cayman Islands is a British overseas territory, English law was received here some considerable time ago, and in most areas our law differs very little from that of England and Wales. I doubt that a trial judge in the Cayman Islands would view English law as "foreign law" and require that it be proved as a fact. That has not been the practice here"* (paragraph 18).

This then points to Cayman being as appropriate a forum as England, if the choice had to be made.

(b) Saudi Arabia:

(i) As already mentioned, on 18 February 2019, the First Commercial Circuit in Dammam, Saudi Arabia, granted an application by Saad Trading, Contracting and Financial Services Company ("**Saad Trading**"), a company in the Saad Group, for financial reorganisation under section 4 of the Saudi Bankruptcy Law and appointed a trustee in bankruptcy. The financial reorganisation procedure relates to both Saad Trading and Mr. Al Sanea himself. Daiwa submitted a claim in the financial reorganisation procedure on 23 May 2019 in respect of its contribution/indemnity claim

(ii) However, Mr. Dawson (relying on Mr. Gale's affidavit), submitted that Saudi Arabia is not the appropriate forum, because: (a) the scope of the Saudi financial reorganisation process is not clear; (b) the process has not been recognised in England or the Cayman Islands; (c) the process



does not result in a stay of the Daiwa English Proceedings or the present proceedings; and (d) under Saudi Arabian law, Daiwa filing a claim in the financial reorganisation procedure does not constitute a submission to the jurisdiction of Saudi Arabia.

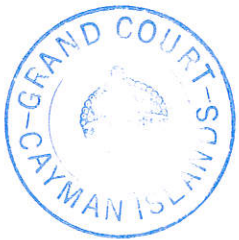
(iii) Further, Mr. Al Sanea is resident and domiciled in Saudi Arabia, and some of the Payments were made to a company which was incorporated there. However, Mr. Dawson explained (again by reliance on Mr. Gale's affidavit) that contribution claims are not available as a matter of Saudi law and bringing proceedings against Mr. Al Sanea there would be complex, given his current legal situation in Saudi Arabia.

26. Notwithstanding the connections to England and Saudi Arabia, Mr. Dawson submitted that this is a proper case for the grant of leave for service out of the jurisdiction and there is no other more appropriate connection with any other relevant jurisdiction.
27. Mr. Gale's affidavit also sets out Daiwa's belief, as required by GCR Order 11 rule 4(1)(b), that if its appeal of the English Judgment to the Supreme Court should be unsuccessful, it will have a good cause of action here and the claims against Mr. Al Sanea will have (at least) a reasonable prospect of success on the merits.
28. In this regard, it is Daiwa's case that, without prejudice to its appeal to the U.K. Supreme Court, it and Mr. Al Sanea are both liable to Singularis in respect of the same damage in terms of the loss of the Funds. Daiwa's liability to Singularis is (subject to Daiwa's appeal) established pursuant to the English Judgment, and there is a reasonable prospect of Daiwa successfully establishing that Mr. Al Sanea is also liable to



Singularis for the loss of the Funds. In particular, Mr. Dawson submitted on behalf of Daiwa that:

- (a) the Singularis JOLs had already obtained the Cayman Judgment against Mr. Al Sanea for breach of fiduciary duty in relation to the Payments. Mr. Al Sanea has not filed any appeal in respect of that judgment or sought to overturn it;
- (b) Daiwa's liability to Singularis is premised on a finding in the English Judgment that Mr. Al Sanea deliberately breached his fiduciary duties to Singularis by instructing Daiwa to make the Payments;
- (c) Mr. Al Sanea was not party to the proceedings between Singularis and Daiwa in the English Courts. Accordingly, the English Judgment is not binding on him. However, Daiwa is entitled to rely upon it for the purposes of showing a reasonable prospect of success on this interlocutory application in respect of its contribution/indemnity claim: see paragraphs 206-207 of *Sabbagh v Khoury* [2014] EWHC 3233 (Comm) citing the judgment of the English Court of Appeal in Joint Stock Co. *Aeroflot-Russian Airlines v Berezovsky* [2013] EWCA Civ 784 and distinguishing the judgment of the Privy Council in *Calyon v Michailaidis and others* [2009] UKPC 34<sup>4</sup>.
- (d) The documents relied on in the English Judgment make out a clear case against Mr. Al Sanea for breach of fiduciary duty. Mrs. Justice Rose held that there was no legitimate basis for the Payments and there was found to be overwhelming evidence that Singularis was insolvent, or in a precarious



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<sup>4</sup> While *Sabbagh v Khoury* was overturned on appeal, this was without reference to this point: [2017] EWCA Civ 1120 at [59] to [72] and [213] to [216].

financial position heading towards insolvency, when the Payments were made. See the English Judgment as reported at [2017] EWHC 257 (Ch); upheld on appeal [2018] EWCA 84 (Civ)

**Daiwi's claim in Cayman**

29. Daiwa therefore contends that this Court has the power to order Mr. Al Sanea to pay Daiwa an amount by way of contribution, pursuant to section 6 of the Torts Law, and that this is an appropriate case for a complete indemnity pursuant to section 6(2) of the Torts Law. Daiwa asserts that Mr. Al Sanea acted dishonestly (and Daiwa did not), the Payments were made to companies owned or controlled by Mr. Al Sanea and his family, and it is therefore to be inferred that he benefitted from the Payments (and, again, Daiwa did not). Alternatively, Daiwa claims such contribution as is just and equitable in the circumstances having regard to each party's responsibilities for the damage in question.
30. Daiwa further claims an indemnity and/or contribution at common law, on the basis that Daiwa and Mr. Al Sanea are jointly and severally liable to Singularis in respect of the same loss. If Daiwa is required to compensate Singularis in respect of that loss, Daiwa states that Mr. Al Sanea's liability to do the same will be discharged to the same extent, and Mr. Al Sanea would be unjustly enriched at Daiwa's expense if he were not required to bear the ultimate financial burden for his conduct. Daiwa submits that a claim for contribution (by way of a 100% recoupment) arises at common law and Daiwa is entitled to restitution at common law by way of an indemnity for the entirety



of its liability to Singularis, in reliance on *Niru Battery Manufacturing Company v Milestone Trading (No 2)* [2004] 1 CLC 882<sup>5</sup>.

31. Daiwa alternatively claims that it is entitled to be subrogated to Singularis' rights as against Mr. Al Sanea for breach of fiduciary duty, applying *Banque Financière de la Cité v Parc (Battersea) Ltd* [1999] 1 AC 221 and *Niru Battery* (above).
32. These, I accept, are all seriously triable claims which substantiate the belief attested to by Mr. Gale in his affidavit that Daiwa has a good cause of action for the purposes of Order 11 rule 4(1) and pointing to Cayman as the *forum conveniens*.

#### **Full and frank disclosure**

33. On an *ex parte* application such as this, the applicant has a duty of full and frank disclosure, which requires the applicant to identify all defences that may be available to the respondent. In this case, Mr. Dawson on behalf of Daiwa frankly submitted that Mr. Al Sanea may seek to oppose the Court granting permission to serve the Writ out of the jurisdiction on the basis of the following (possible) defences to the contribution claim, in addition to the potential *forum conveniens* arguments addressed above:

- (a) Mr. Al Sanea was the sole shareholder of Singularis and may argue that he ratified the Payments thereby making them authorised in keeping with the Articles of Association. However, the English Judgment held that Mr. Al Sanea must have known that Singularis was insolvent or on the verge of insolvency at the point the Payments were made, and Daiwa contends that Mr. Al Sanea acted in bad faith in putting the assets beyond the reach of Singularis'

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<sup>5</sup>A judgment of the English Court of Appeal on appeal from a judgment of Moor-Bick J in contribution proceedings.



creditors, and that Mr. Al Sanea is therefore not entitled to ratify the breaches of duty and the Payments.

- (b) Mr. Al Sanea may argue that the Payments constituted repayment of debts owed to him. However, Mr. Al Sanea has not previously sought to justify the Payments on this basis, and if he sought to do so, the Payments would constitute unlawful preferences under section 145 of the Companies Law (2018 Revision), given Singularis' state of insolvency at the time.
- (c) Mr. Al Sanea may allege that he had beneficial title to the Funds. However, his contributions to Singularis were accounted for as shareholder loans rather than money held beneficially for him, and the shares acquired subject to the stock-lending arrangement, were held in the name of Singularis.
- (d) There is also an indemnity for its directors under Singularis' Articles of Association providing that no director shall be liable to the company except for liability arising from that director's "fraud or wilful default". Daiwa through Mr. Dawson submits, however, that Mr. Al Sanea's breaches of duty amount at least to wilful default, and that it is impermissible for officers of a company to claim an indemnity from the company against losses arising from the officers' wilful breach of fiduciary duty, following my decision in *In Re Bristol Fund Limited* [2008 CILR 317].
- (e) Mr. Al Sanea may assert that any claims brought by Singularis (to which Daiwa could be subrogated) against him would now be time barred. However, Singularis has previously brought proceedings against him in the Cayman Islands, and obtained the Cayman Judgment against him in relation to the



misappropriation of the Funds. Further, section 27(1) of the Limitation Law provides that no period of limitation applies to an action by a beneficiary under a trust in respect of a fraudulent breach of trust or to recover trust property or its proceeds from the trustee. I referred counsel at the hearing to my decision in *Ministry of National Defence of the Republic of China (Taiwan) v Chuan Pu Wang & Others* (11 July 2014, Cause No. G 276 of 2013, unreported, paragraphs 142-145), in which I held that section 27(3) of the Limitation Law affords the ordinary statutory limitation defence of six years to trustees, unless section 27(1) regards the case as being a fraud, fraudulent breach of trust, or misappropriation of trust property, in which case no statutory period of limitation arises. In that decision, I also held that the fraud, fraudulent breach of trust, or misappropriation of trust property "*must have been committed by someone who is indeed a trustee in the true sense, having come into possession of trust property in that capacity*", rather than as a constructive trustee, applying the English Supreme Court decision in *Williams v Central Bank of Nigeria* [2014] 2 WLR 355.

- (f) However, the English Supreme Court has also considered the scope of section 21 of the English Limitation Act 1980, which is in the same terms as section 27(1) of the Limitation Law, in *Burnden Holdings (UK) Ltd v Fielding* [2018] AC 857, and held that this provision is applicable by analogy to company directors who are entrusted with the stewardship of the company's property and owe fiduciary duties to the company as beneficiary of the trust. That



would be the position of Mr. Al Sanea here and so he would not be able to invoke the limitation defence.

(g) Mr. Dawson also pointed out that it is also possible that Mr. Al Sanea may allege that since Daiwa has obtained permission to serve the English Proceedings out of that jurisdiction, permission to serve the Writ in these proceedings out of the jurisdiction should be refused. However, the Courts have held that it is permissible for a plaintiff to commence proceedings in two separate jurisdictions to protect its position specifically on limitation, and that it is permissible for a plaintiff to seek leave to serve out of the jurisdiction on a conditional basis (i.e. in this case on the basis that this Court would be the appropriate forum in the event of a successful challenge to the jurisdiction of the foreign court):

(i) In *HM Attorney General v Arthur Andersen & Co & Others* (The Times, 13 October 1987), the English High Court stated that the plaintiff's approach in issuing proceedings in two jurisdictions in order to protect its position in relation to limitation in the event of a successful challenge to the New York court's jurisdiction was "*perfectly proper and reasonable*". This dictum was upheld by the Court of Appeal (in [1989] ECC 224 per Mustill LJ).

(ii) In *Excalibur Ventures v Texas Keystone* [2011] 2 CLC 338, Gloster J stated that: "*The usual approach where a claimant is seeking a stay of proceedings brought by it is therefore to refuse the stay, but an exceptional case may be made out where the proceedings sought to be*



*stayed were started purely to protect the claimant's limitation position: see Attorney-General v Arthur Andersen & Co" (paragraph 77).*

- (iii) Similarly, in *Heraeus Medical GmbH & Others v Biomet UK Healthcare Ltd* [2016] EWHC 1369 (Ch), the plaintiff had commenced proceedings in both Germany and England on the basis that England would be the proper forum if the plaintiff was wrong about the territorial effect of the German proceedings. The Court, per Justice Mann, rejected the defendant's application to set aside service out of the jurisdiction, holding that:

*"Such an element of conditionality does not seem to me to be contrary to principle, and if managed properly it will not cause injustice. It might matter to a claimant to have proceedings on foot here at an earlier rather than a later date – for example, in order to avoid the effect of limitation. A claimant may be able legitimately to say that if an issue in a foreign jurisdiction goes against him or her then England and Wales becomes the appropriate forum but that that is not yet clear. When clarity is obtained, the question can then be answered clearly" (paragraphs 86-87).*

### **Findings on the service out application**

34. I accepted Daiwa's submissions as summarised above in relation to the application for permission to serve the Writ on Mr. Al Sanea out of the jurisdiction in Saudi Arabia. I am satisfied that the Writ satisfies the gateway test in GCR Order 11, rule 1(1) (ff) and that this case is a proper one for service out of the jurisdiction. Daiwa has established that it *prima facie* has a good cause of action against Mr. Al Sanea, with reasonable prospects of success.



35. I also accept that whilst Daiwa has issued two sets of proceedings in the Cayman Islands and in England seeking the same relief against Mr. Al Sanea, it was reasonable for Daiwa to do so in order to protect its position on limitation in the claims against Mr. Al Sanea, in reliance on *HM Attorney General v Arthur Anderson; Excalibur v Texas Keystone*, and *Heraeus Medical* referred to above. The Court can manage the proceedings so as to avoid any injustice to Mr. Al Sanea, in accordance with the overriding objective.
36. I also considered that the factors outlined by Mr. Dawson on behalf of Daiwa as part of its duty of full and frank disclosure on this *ex parte* application, are not sufficient for me to refuse Daiwa permission to serve the Writ on Mr. Al Sanea out of the jurisdiction.
37. As requested by Daiwa, I am prepared to order that, pursuant to GCR Order 11, rule 4(3), a reasonable time limit for Mr. Al Sanea to acknowledge service of the Writ is 28 days after service, and that service of other documents in these proceedings can be effected on Mr. Al Sanea out of the jurisdiction to avoid successive applications for permission.

**Legal test for extension to the validity of the Writ**

38. Daiwa also applied for an extension of six months to the validity of the Writ, in order to allow service of the Writ to be effected within its period of validity.
39. GCR Order 6, rule 8 empowers the Court to extend the validity of a writ by up to four months, and by a longer period not exceeding 12 months if the Court is satisfied that, despite the making of all reasonable efforts, it may not be possible to serve the Writ within a further four months.



40. In *G Davidson & Others v Moualem & Others* [2014 (1) CILR 99], at paragraph 21, the Court of Appeal followed the House of Lords decision in *Baly v Barrett* [1988] N.I. 368, which held that:
- (a) The power to extend the validity of a writ should only be exercised for good reason;
  - (b) Whether there is a good reason depends on the circumstances of the case, and "*Difficulties in effecting service of the writ may well constitute good reason, but it is not the only matter which is capable of doing so*";
  - (c) The balance of hardship between the parties can be a relevant matter for the Court to take into account in the exercise of the discretion.
41. The Court of Appeal in *Davidson* also emphasised that GCR Order 6, rule 8 must be read in conjunction with the overriding objective.

**The basis for Daiwa's application for an extension to the validity of the Writ**

42. Daiwa seeks an extension of six months to the validity of the Writ on the basis that, due to Mr. Al Sanea's incarceration, Daiwa intends to effect service on him through the Saudi Arabian Government as set out in GCR Order 11, rule 6, which will take approximately five to six months to be completed. Therefore, it will not be possible for the Writ to be served during the current period of validity.
43. Daiwa explained that, in order to comply with its duties of full and frank disclosure on this *ex parte* application, the Court should be aware that it may be possible for Daiwa to serve Mr. Al Sanea through the warden of the prison in which he is held, rather than serving the Writ through the Saudi Arabian Government. However, this method would involve a number of unpredictable risks, such as the warden refusing to accept service.

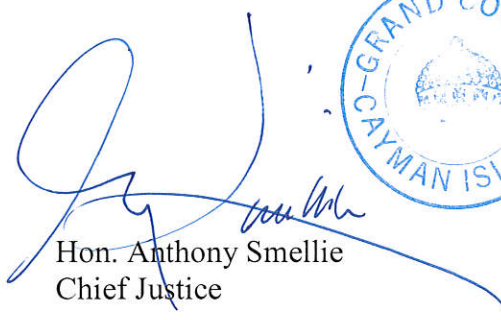



44. Daiwa through Mr. Dawson also acknowledged that Mr. Al Sanea may assert that the validity of the Writ should not be extended on the basis that it would extend the validity beyond the two-year limitation period under section 12 of the Limitation Law for Daiwa's claim for contribution against Mr. Al Sanea.
45. However, the Court has jurisdiction to extend the validity of a writ in circumstances where the application is made when the writ is still valid but the relevant limitation period has expired, provided that there is a good reason to do so (see *Davidson* above). Similarly, in *JSC BTA Bank v Ablyazov* [2011] EWHC 2900 (Comm), the English High Court granted an extension to the validity of a claim form as it was estimated to take one to two years to serve the defendant in Russia, notwithstanding that there were limitation issues to be considered. The Court held that the length of the service process was a sufficiently good reason to justify the extension, despite the limitation issues (paragraphs 29-30).
46. In relation to the balance of hardship between the parties, Mr. Dawson submitted that, if the extension to the validity of the Writ is not granted, it would result in Daiwa's cause of action falling away and Daiwa would be unable to pursue the current proceedings against Mr. Al Sanea in the event that the jurisdiction of the English Court is successfully challenged in the Daiwa English Proceedings. For cases such as this where there are limitation issues and where service cannot be effected during the initial validity of the Writ, refusing to grant an extension to the validity of the Writ would preclude the plaintiff from serving proceedings on the defendant. On the other hand, the hardship to Mr. Al Sanea if the extension is granted is that he will be the defendant to two sets of legal proceedings seeking the same relief against him; however, this



hardship can be avoided if the present proceedings are stayed in favour of the Daiwa English Proceedings. As a matter of good case management and in furtherance of the overriding objectives, the imposition of a stay in such circumstances would be appropriate.

47. I accepted Daiwa's evidence that it will not be possible for the Writ to be served during its current period of validity and that an extension of six months is appropriate in the circumstances. I was satisfied that an extension would have been necessary even if Daiwa had brought this application sooner, and that it was reasonable for Daiwa to seek to progress service of the Daiwa English Proceedings before bringing this application. I further note that the Summons was filed within the initial period of the validity of the Writ and two months before the validity of the Writ was due to expire.
48. Accordingly, I granted an extension of six months to the validity of the Writ and ordered that, once service is effected, that the proceedings be stayed, pending further directions from the Court.
49. I thank Counsel on behalf of Daiwa for their very full, frank and helpful submissions.

  
Hon. Anthony Smellie  
Chief Justice



August 19, 2019