

IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION



CAUSE NO. FSD 114 OF 2016 (IKJ)

TORCHLIGHT GP LIMITED

Plaintiff

-and-

(1) MILLINIUM ASSET SERVICES PTY LIMITED
(2) MILLINIUM CAPITAL MANAGERS LIMITED
(3) THOMAS JAMES WALLACE
(4) GREGORY PHILIPPE MARSHALL

Defendants

IN OPEN COURT

Appearances:

Mr John Wardell QC of counsel and Mr Andrew Mold QC of counsel,
Mr Ben Hobden, Mr Erik Bodden and Mr Jordan McErlean of
Conyers Dill & Pearman on behalf of the Plaintiff

Mr Roger Stewart QC of counsel and Mr David Herbert of counsel
and Mr Christopher Levers and Mr Luke Burgess-Shannon of
Mourant Ozannes on behalf of the 1st to 3rd Defendants (“D1-3”/
“MAS Parties”)

Before: The Hon. Justice Kawaley

Heard: 21 – 24 January 2020

Draft Judgment
Circulated: 19 October 2020

Judgment Delivered: 27 October 2020

HEADNOTE

Application by plaintiff to strike-out portions of Defence on issue estoppel and/or abuse of process- legal effect of judgment delivered in public interest after parties had reached settlement of related proceedings-application by defendants to strike-out portions of Statement of Claim based on points of law and pleading complaints after close of pleadings-principles governing exercise of discretion to strike-out-foreign defendants making and withdrawing jurisdictional challenge-whether subsequent strike-out application debarred by res judicata or as an abuse of process



RULING

INTRODUCTORY

1. The Plaintiff is the General Partner of Torchlight Fund LP (“the Cayman Partnership”). It was the respondent in winding-up proceedings commenced against it in this Court on or about June 18, 2015 in Cause No. FSD 103 of 2015 (RMJ) (the “Petition Proceedings”). Those proceedings were commenced on June 18, 2015. The co-petitioners in the Petition Proceedings were the former 5th Defendant herein, Accident Compensation Corporation of New Zealand (“ACC”), the former 7th Defendant herein, Crown Asset Management Limited (“CAML”) and Aurora Funds Management Limited (“Aurora”).
2. The present proceedings were commenced against the 1st to 7th Defendants on July 26, 2016. D1-3 were all served abroad (pursuant to the Order of McMillan J dated September 15, 2016. On October 25, 2017, they withdrew a Summons seeking to set aside service on them, implicitly accepting that there was a serious issue to be tried on the merits of the claims asserted against them by the Plaintiff in the original Statement of Claim. On, November 1, 2017 the Amended Writ and Statement of Claim was filed (the “ASOC”). The amendments primarily related to the addition of Gary Traveller and Sharon Burleigh as 8th and 9th Defendants to the present action. The 5th to 7th Defendants made a jurisdictional challenge to the said McMillan J September 16, 2016 Order which I rejected on January 17, 2018¹.
3. The Petition proceedings came to a somewhat unusual end. The substantive hearing of the Petition lasted for 41 days, commencing in February 2017 and concluding on December 1, 2017 before McMillan J. Less than a week before the draft Judgment was circulated to the parties for editorial comments, the parties notified the Court that a settlement had been reached. By a Consent Order dated July 11, 2018, the Petition was withdrawn with no Order as to costs. The Judge circulated the draft of a judgment running to 366 pages to the parties on July 16, 2018. The *magnum opus* itself was formally delivered two months later: *In Re Torchlight Fund LP*, FSD 103/2015 (RMJ), Judgment dated September 25, 2018 (unreported) (the “Petition Judgment”). At the beginning of the Petition Judgment, McMillan J explained why he had proceeded to deliver it despite a settlement having been reached:

¹ *Torchlight GP Limited -v- Millinium Asset Services Pty Limited and Others* [2018 (1) CILR 244].
201027 *In the matter of Torchlight GP Limited v Millinium Asset Services PTY Limited – FSD 114 of 2016 (IKJ) Ruling - final*



“2. On 10 July 2018, at a time when the Court had essentially completed but not circulated its Judgment in these proceedings to the Parties, the Court was informed that a confidential settlement had been reached between the Parties. As a result, the Court was invited, and agreed, to withdraw the Petition with no order as to costs. In such circumstances, the Court has an independent discretion to decide whether to deliver its Judgment or not. Having carefully considered the views of the parties and the relevant authorities such as the Court of Appeal’s judgment in Barclays Bank v Nylon Capital LLP [2012] ALL ER (Comm) 912, the Court determined that there were two specific reasons that weighed in favour of this Judgment being published. First, Mr. George Kerr and Mr. Russell Naylor have been heavily criticised by the Petitioners in the course of these proceedings and their professional standing has been consistently impugned. Not only are Mr. Kerr and Mr. Naylor entitled to know that they have been exonerated but the public is entitled to know it as well. This is a matter of human rights as much as it is a matter of commercial law, and in this context public access to justice is paramount. Secondly, there has arisen a number of issues of law which in the opinion of the Court are of general significance both to the legal profession and to the public at large. Accordingly, there is a strong public interest that these rulings of the Court be made public and the Court has therefore determined in its discretion to issue this Judgment.”

4. D1-3 issued a Summons for Directions herein on July 3, 2019. D1-3 filed an Amended Defence on September 3, 2019. The Plaintiff filed a Reply to the Defence of the First to Third Defendants on September 24, 2019. Paragraph 58 of the Reply averred as follows:

“58. The contents of Appendix I are liable to be struck out on the basis that the allegations contained therein: seek to go behind findings in the Petition Judgment; are irrelevant to the present claims, and are embarrassing for their lack of particularity or scandalous ...”



5. On September 30, 2019, the Plaintiff issued a Summons (the “Plaintiff’s Strike-out Summons”) which sought relief principally as follows:

“1. That parts of the First to Third Defendants Amended Defence be struck out in accordance with the enclosed schedule.”

6. These two Summonses were initially listed for hearing on November 5, 2019 when directions were given in relation to the Plaintiff’s Summons and the Summons proposed to be issued by D1-3. D1-3 subsequently issued a Summons under GCR Order 24 rule 10 on December 23, 2019 seeking production of the agreement evidencing the settlement of the Petition Proceedings (“Production Summons”/“Settlement Agreement”). At the beginning of the hearing on January 21, 2020, the Plaintiff’s counsel indicated that they did not object to an Order in terms of paragraph 1 of the Production Summons. D1-3 sought the costs of their Summons and I directed that the costs of the Production Summons should be dealt with as part of the costs of the Plaintiff’s Strike-out Summons. D1-3 also issued their own strike-out Summons on November 15, 2019 (“D1-3’s Strike-out Summons”).
7. The relief sought under D1-3’s Strike-out Summons was described in the supporting Skeleton Argument as follows:

“1.1. To strike out the Conspiracy Proceedings in their entirety as against the 2nd Defendant, Millinium Capital Managers Limited (“MCM”) pursuant to GCR O.18, r.19(1)(a) as disclosing no reasonable cause of action; and

1.2. Further or alternatively, to strike-out as against each of the MAS Parties the following parts of the Amended Statement of Claim:

1.2.1. The claim for breach of contract;

1.2.2. The claim in the tort of unlawful interference; and

1.2.3. The claim for procuring and/or inducing a breach of confidence.”



8. Judgment was reserved on January 24, 2020 in relation to the Plaintiff's and D1-3's respective Strike-out Summonses.

OVERVIEW OF PLEADINGS

The Amended Statement of Claim ("ASOC")

9. The Indorsement of Claim on the Amended Writ summarises the Plaintiff's claims as being for the following relief:

"1. That it be compensated by way of damages for its causes of action relating to:

- a. unlawful means conspiracy;*
- b. breach contract and/or breach of confidence;*
- c. procuring or inducing a breach of contract and/or breach of confidence;*
- d. unlawful interference."*

10. The pleading is not a threadbare one; it runs to 69 pages. The ASOC avers that the Plaintiff sues on its own behalf and on behalf of the Cayman Partnership (Paragraph 1). D1 ("MAS") is said to be a subsidiary of D2 ("Millinium"); both are Australian companies. It is alleged that at all material times D1-2 acted by D3 ("Mr Wallace"), whose knowledge and intentions are to be imputed to each company. MAS is said to have been a competitor of the Cayman Partnership competing in relation to a company in which both MAS and the Cayman Partnership had interests, the Lantern Hotel Group ("Lantern") (paragraph 3). The main allegations, as against D1-3, include the following:

- (a) the Defendants conspired together to replace the Plaintiff as General Partner with MAS and to further D1-2's competing strategy in relation to Lantern (paragraph 9). The acts of conspiracy relied upon are particularised (paragraph 10) ;
- (b) it is explained that the conspiracy allegations are relied upon as a defence to the Petition (paragraph 11);
- (c) the factual basis of the case against D1-2 in relation to Lantern, allegedly using confidential information received from the Cayman Partnership in furtherance of their competing strategy is set out(paragraphs 50-60);



- (d) specific acts of Mr Wallace are described (paragraph 64);
- (e) the conducting of a media campaign against the Cayman Partnership using its confidential information is described (paragraphs 66-67A);
- (f) pressure said to have been put on the Cayman Partnership's auditors is set out (paragraphs 68-70, 89);
- (g) averments are made in relation to the attempt to take over the Cayman Partnership (paragraphs 71-78);
- (h) attempts to apply pressure on the Plaintiff are also pleaded (paragraphs 81-82, 85-87);
- (i) further competitive conduct in relation to Lantern is also set out (paragraph 88); and
- (j) the complaints about the commencement of the Petition Proceedings are particularised (paragraph 91).

The Amended Defence

11. In a fulsome pleading (106 pages long with 40 pages of Appendices), D1-3 denied that MAS or any of the MAS Parties was a competitor of the Cayman Partnership, denied the conspiracy allegations, denied misusing confidential information and disclaimed any responsibility for what the Petitioners did in the Petition Proceedings (paragraphs 6, 12, 16-17). In relation to the present applications, it is pertinently averred that:

- (a) the Petition Judgment was inadmissible in the present proceedings and could not be relied upon by the Plaintiff (paragraph 18);
- (b) the tort claims are inadequately pleaded because the Plaintiff must show that the Defendants are liable under Australian (New South Wales) law and New Zealand law as well as under Cayman Islands law. New South Wales law does not recognise the tort of unlawful interference. And neither Cayman Islands nor New South Wales law recognises the tort of procuring or inducing a breach of confidence, so those claims should be struck-out as causes of action in their own right and as heads of unlawful conduct in support of the conspiracy claim (paragraph 6.14);
- (c) no relevant contract or duty of confidence is pleaded against D1-3 so the breach of contract and breach of confidence claims and the



averments of breach of contract/confidence in support of the conspiracy claim should be struck-out (paragraphs 6.15-6.16);

- (d) the fourth sentence of paragraph 3 of the ASOC is liable to be struck-out for want of particularity (paragraph 12.1);
- (e) paragraph 12.2 of the Plaintiff's pleading is liable to be struck-out because they disclose no reasonable cause of action because the relevant claims are inadequately particularised (paragraph 19.2);
- (f) paragraph 96.3.4 of the ASOC is liable to be struck-out because no unlawfulness is pleaded in relation to the conspiracy claim (paragraph 132.3);
- (g) in relation to the breach of contract claim, paragraphs 96.3.1 and 100-104 are said to be liable to be struck-out for want of particularity. In relation to the breach of confidence claim and ASOC paragraphs 96.3.1 and 105-106, it is alleged that those paragraphs should be struck-out because no duty of confidence or breach of confidence is pleaded. In relation to procuring or inducing a breach of contract, it is averred that no such tort exists and that paragraph 96.3.2 of the ASOC should be struck-out. In relation unlawful interference, it is alleged that paragraphs 112-112 of the ASOC are legally flawed and/or inadequately pleaded and should be struck-out (paragraphs 136-137, 140, 144);
- (h) MAS acted properly as Trustee of the Bear Fund in scrutinizing the Bear Fund's sole investment, which was its interest in the Cayman Partnership of which it was a Limited Partner. The MAS Parties' concerns were described as the "LP Concerns". These related to various management matters and concerns about the "Cayman Migration" (Appendix I).

THE PLAINTIFF'S STRIKE-OUT SUMMONS

Overview

12. The sole ground of the Plaintiff's Strike-out Summons is that Appendix 1 to the Amended Defence, together with the other Amended Defence identified in the Schedule to the Plaintiff's Summons, should be struck-out because it seeks to re-litigate issues determined by the Petition Judgment. To my mind the legal context in which this application arises is strikingly unusual because of the unique circumstances in which the Petition Judgment came to be delivered. This raised a broad issue of principle as to whether the usual principles of *res judicata* and/or abuse of process were engaged, assuming that they would have been engaged in the absence of the Settlement Agreement and the Consent Order.

The Plaintiff's submissions

13. In their Skeleton Argument, the Plaintiff's counsel firstly explained the basis on which there was an evidential overlap:

“11. The allegations made against the Plaintiff in the Petition Proceedings overlap significantly with issues raised by the MAS Parties in the Defence in the present proceedings. The extent of the overlap is evident from the Schedule [B/6], including, for example, the same allegations of:

11.1. related party transactions;

11.2. imprudent borrowing;

11.3. the failure to convene a meeting of partners;

11.4. delay in producing audited accounts;

11.5. an unjustified in specie distribution;

11.6. improper payment of fees and capitalisation of fees;

11.7. the production of inaccurate or inconsistent financial information; and

11.8. destruction of value.”

14. In broad-brush terms, the overlap between many of the issues raised by way of defence in the Petition Proceedings and in support of the Petitioner's claims in the present action was self-evident. What was disputed by D1-3, primarily, was (a) whether the Petition Judgment had “preclusive effect”, and /or (b) whether D1-3 as non-parties to the Petition Proceedings could be bound by the Petition Judgment as “privies” in any event. The Plaintiff's main Skeleton Argument essentially relied on the generally applicable legal principles on issue estoppel. It was submitted, *inter alia*:

“29. In Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd Lord Sumption characterised res judicata as a portmanteau term which is used to describe a number of different legal principles with different juridical origins.

29.1. In relation to issue estoppel, Lord Sumption said (at [17]):

‘Fourth, there is the principle that even where the cause of action is not the same in the later action as it was in the earlier one, some issue which is necessarily common to both was decided on the earlier occasion and is binding on the parties...’.



29.2. *Lord Sumption considered (at [22]) that the Arnold decision was authority for the following characterisation of issue estoppel:*

‘Except in special circumstances where this would cause injustice, issue estoppel bars the raising in subsequent proceedings of points which (i) were not raised in the earlier proceedings, or (ii) were raised but unsuccessfully. If the relevant point was not raised, the bar will usually be absolute if it could with reasonable diligence and should in all the circumstances have been raised.’”

15. The need to meet the objection that D1-3 were not parties to the Petition Proceedings was obvious and so the Plaintiff’s counsel in their initial Skeleton addressed the “privies” issue quite fully. The most concise statement of the relevant principles which were advanced was the following:

“32. In Resolution Chemicals Ltd v H Lundbeck A/S [2013] EWCA Civ 924, Floyd LJ addressed the question of privity of interest (at [22] to [32]) and summarised the position in the following terms: ‘Drawing this together, in my judgment a court which has the task of assessing whether there is privity of interest between a new party and a party to previous proceedings needs to examine (a) the extent to which the new party had an interest in the subject matter of the previous action; (b) the extent to which the new party can be said to be, in reality, the party to the original proceedings by reason of his relationship with that party, and (c) against this background to ask whether it is just that the new party should be bound by the outcome of the previous litigation.’”

16. As regards the strike-out jurisdiction in general terms, the Plaintiff’s counsel submitted:

“36. In the recent decision of Arnage Holdings Ltd. et al. v. Walkers, a Firm, Chief Justice Smellie (applying the guidance in the notes to the RSC at 18/19/18) summarised the Court’s general jurisdiction to strike out pleadings/claims as an abuse of process as follows: ‘466. The Court has a well settled jurisdiction – both as a matter of its inherent powers and expressly from GCR Order 18 r 19 – to strike out claims which amount to an abuse of its process. 467. The categories of conduct which might render a claim liable to strike out for being frivolous, vexatious or otherwise an abuse of process are not closed but depend on all the relevant circumstances and, for this purpose, considerations of public policy and the interests of justice may be very material. 468. The term “abuse of process of the Court” connotes that the process of the Court must be used bona fide and properly and must not be abused. The Court will prevent the improper use of its machinery, and will, in a proper case, summarily prevent its machinery from being used as a means of vexation and oppression in the process of litigation by striking out the offending pleading. See Notes to the RSC (ibid), citing



Castro v Murray; Dawkins v Prince Edward of Saxe Weimar, Willis v Earl Beauchamp.”

17. As regards abuse of process in the specific context of re-litigation, it was argued:

“40. It is important to note that the Court has jurisdiction to strike out a claim involving the re-litigation of issues even if the established forms of res judicata are not established. 40.1. In Miller v Gianne [2007 CILR 18] at [46] Smellie CJ explained: ‘An action may be struck out or stayed for being an abuse of the process of the court in the sense that it seeks to re-litigate matters which have already been decided, even though the matters are not strictly res judicata: Stephenson v. Garnett [1891] 1 Q.B. 677.’ 40.2. In House of Spring Garden, Stuart-Smith LJ stated (at 251H): ‘...I have no doubt whatever that, even if the judgment of Egan J did not create an estoppel, it would be an abuse of process for the Waites to relitigate the very same issue in the English courts upon which they failed in Ireland...’ 40.3. Similarly, even if proceedings do not amount to a collateral attack, they may none the less amount to abusive re-litigation (Johnson v Gore Wood & Co per Lord Bingham at 31-C).”

18. The Plaintiff’s Supplemental Skeleton cited several authorities on the jurisdiction to deliver a judgment post-settlement, but was compelled to deal with the issue estoppel implications of such a judgment in a somewhat general and indirect way:

“17. It is well established that proceedings which are compromised can give rise to estoppels: see, for example, Johnson v Gore-Wood & Co [2002] 2 AC 1 at 32H-33A. If this is the position where litigation is compromised without a judgment being delivered, it would be perverse to suggest that where litigation is compromised and a full judgment delivered following trial, no estoppels could arise. Yet, this is what the MAS Parties are driven to argue...

21...Two final points should be made: first, if the law treated a judgment delivered after the parties had settled as being qualitatively different to an ‘ordinary’ judgment, the jurisprudence on a judge’s ability to give a judgment would be radically different. Secondly, and in any event, it is not open to the MAS Parties to go behind McMillan J’s decision that he did in fact have power to deliver a judgment.”

19. *Johnson v Gore-Wood & Co [2002] 2 AC 1 at 32H-33A* only provided general and indirect support for the Plaintiff’s contentions as to the effect of the Petition Judgment, because what was under consideration in that case was the effect of a settlement agreement, by reference to its terms, not the effect of a judgment delivered after a settlement agreement. Moreover, there was no readily apparent basis for the implication that the legal rules permitting the delivery of post-settlement judgments embodied a corresponding principle that any findings made had binding effect.



20. In the Plaintiff's Supplemental Skeleton, it was also submitted that its case on why D1-3 were "privies" was "compelling" because there was "indisputable contemporaneous evidence that the Petition Proceedings were for all intents and purposes, the creation of Mr Wallace and it is clearly just that the MAS Parties be bound by findings made in the Petition Judgment" (paragraph 22).
21. In the Plaintiff's Supplemental Skeleton Argument, reliance was placed on McMillan J's own preliminary Judgment explaining why he considered he had jurisdiction to deliver the Petition Judgment post-settlement ("Jurisdiction Judgment"):

"19. In deciding to publish the Petition Judgment, McMillan J had to determine whether he had jurisdiction to do so or was functus. The argument now made by the MAS Parties (at para 39.5 and 39.7.1 of the MAS Parties' Skeleton) that McMillan lacked jurisdiction was put forward to, and rejected, by McMillan J himself. This is clear from his lordship's Publication Judgment...:

19.1. McMillan J had to grapple with the submission that where a case had been settled before a draft judgment had been circulated, the Court did not retain the ability to publish its judgment because there was then no lis in being, and the Court was functus.

19.2. McMillan J considered the leading authorities of Barclays Bank v Nylon Capital LLP [2012] All ER (Comm) 912, Prudential Assurance Company Ltd v McBains Cooper & Ors [2001] 3 All ER 1014, HFC Bank Plc v HSBC Bank Plc and Toby v Allianz Global Risks US Insurance Company (Cause No FSD 152 of 2013).

19.3. In Nylon Capital, Lord Neuberger MR stated (at [74]):

'Where a case has been fully argued, whether at first instance or on appeal, and it then settles or is withdrawn or is in some other way disposed of, the court retains the right to decide whether or not to proceed to give judgment.'

19.4. In rejecting a submission that Lord Neuberger's principles in Nylon Capital should not be adopted, McMillan J stated (at [15]) that:

'Lord Neuberger as Master of the Rolls is stating a broad general principle that where a case has been disposed of, as indeed the instant case has been disposed of, nonetheless the Court not merely has the right to decide whether or not to proceed to give judgment, but actually "retains" that right after disposal.'



McMillan J continued (at [17] and [18])

‘Mr Lowe relies on the fact that a final Order was made withdrawing the Petition in this case before the Court’s draft Judgment was circulated, arguing at paragraph 19 of his Submissions that at the time when the draft Judgment was circulated the Court was no longer seized of any dispute in respect on which a judgment was required. Therefore in the absence of a lis pendens “the Court does not retain power to hand down judgment in these circumstances”.

However, this broad and even sweeping conclusion is directly contradicted by the express words of Lord Neuberger themselves and I consider that the conclusion is wrong for that reason.’

19.5. McMillan J also referred to the decision of Greenwich Inc Ltd (in administration) v Dowling [2014] EWHC 2451 which supported his approach.

19.6. Despite their extensive reference to authority on other points in their skeleton argument and notwithstanding the MAS Parties having a copy of the Publication Judgment, the MAS Parties have only referred to the Prudential case in their skeleton argument. Their approach is misconceived for the reasons given by McMillan J in the Publication Judgment.”

22. In oral argument, further noteworthy submissions advanced by Mr Wardell QC included the following:

- (a) he referred to documentary evidence potentially establishing that Mr Wallace was a prime mover behind the Petition Proceeding and that, but for the Plaintiff’s denial of MAS’ status as a Limited Partner, MAS would likely have been a Petitioner. This evidence, it was argued, supported a finding that it was obvious that D1-3 were privies;
- (b) he referred to the findings made by McMillan J and the context in which they were made in support of the submission that it was clearly wrong that such findings should be reopened;
- (c) as regards the legal test for when a non-party was bound by findings as a “privy”, he relied heavily on *Gleeson-v- J Wippel Co. Ltd* [1977] 1 WLR 510 (Cook J). Mr Wardell QC invited the Court to reject the wholly different approach that Australian courts had adopted.

23. The Court was also taken through various judicial and text authorities

D1-3's submissions

24. D1-3 submitted that the issue estoppel issue could not be properly adjudicated without analysis of the Settlement Agreement (which was only ordered to be disclosed in the course of the hearing). In their *'Skeleton Argument in Response to the Plaintiff's Strike-Out Application and in Support of the MAS Parties' Application under GCR Order 24 rule 11'*, it was submitted:

"20. The relevance of the settlement documents was highlighted by the Court itself at the hearing on 5 November 2019. The Court raised the question of the production of the documents as being relevant to the question of res judicatae: namely, what in fact had been the parties' intentions in entering into a compromise of the Petition Proceedings? In particular were the issues as between the Petitioners and Torchlight (which are said to create issue estoppels when determined by the Judge) compromised as between the parties so as to make it clear that they were capable of creating res judicatae as between themselves? Or rather were they capable of being re-opened by the parties to the Petition Proceedings (and thus incapable of doing so)? With respect, we consider this is what the Court meant when it referred to the question of whether the issues had been settled 'with prejudice' or 'without prejudice'.

21. The issue of the parties' intentions when settling litigation in the context of res judicata was addressed by Lewison LJ in Spicer v Tuli. 11 In that case the Court of Appeal was prepared to look at the parties' underlying agreement when effecting a consent order dismissing the first proceedings. Having looked at the totality of the parties' discussions the Court of Appeal found that the real agreement was that the proceedings would only be withdrawn in order to allow the claimants' further time to investigate defences raised late in the day, and accordingly there was no issue estoppel/abuse of process. Lewison LJ referred to the judgment of Dyson LJ in Ako v Rothschild Asset Management Limited: 12 "A person may withdraw a claim or (in litigation) consent to judgment for many different reasons. He may do so because he has accepted advice that his claim will fail; or because he cannot afford to continue; or because he wants to defer proceedings until some other avenue of resolving the matter has been explored; or because he has decided that he is not yet in a position to proceed; or that he ought to proceed before a different tribunal (as in Sajid) or add another party (as in the present case). In some cases, the reasons will indicate that the party has decided to abandon the claim. In others not so. In relation to the question whether a dismissal following withdrawal (or a consent judgment) gives rise to a cause of action or issue estoppel, I consider that the reasons for the withdrawal or consent are not relevant, unless they shed light on the crucial issue of whether the person withdrawing the application or consenting to judgment intended thereby to abandon his claim or cause of action..." [Emphasis added]"



25. However, dealing with the most important threshold issue, bearing in mind the Plaintiff's application relied solely on the effect of the Petition Judgment itself, it was submitted:

“39. The Petition Judgment is not a judgment capable of having any preclusive effect, and thus is incapable of creating any issue estoppels, for the following reasons:

39.1. The Petition Judgment was delivered after the parties had settled their disputes, and where that settlement had been embodied not only in a confidential deed (which the Plaintiff has failed to produce), but also in a consent order, whereby the Petition itself was withdrawn. For the reasons that follow that means it does not possess the status or qualities capable of creating any res judicatae.

39.2. It is trite that where parties have settled their differences the settlement extinguishes the original dispute – ‘An unimpeached compromise represents the end of the dispute or disputes from which it arose. Any issues of fact or law that may have formed the subject matter of the original decision are buried beneath the surface of the compromise.’ Similarly, ‘As soon as you have ended a dispute by a compromise you have disposed of it.’ Accordingly, there was no lis for the Court to decide, and no issue upon which to base an issue estoppel. As the cases regarding academic appeals make clear, where there is no lis the Court is not determining or deciding any issues of fact or law – it is merely expressing a view. The Petition Judgment thus had no juridical effect.

39.3. It is also trite that for a judgment to have preclusive effect, it must involve a decision: ‘There must be a decision or adjudication – judicial in character – which determines a question of law, fact or both fact and law.’”

26. In addition to the ambitious argument that McMillan J had no jurisdiction to hand down the Petition Judgment at all, the following submission more closely connected to the contextual application of the general issue estoppel/abuse of process principles was advanced on behalf of D1-3:

“39.7.2 The handing down represented a fundamental breach of the MAS Parties’ constitutional rights where substantial criticisms, including as to their probity and honesty, were made against them – as non-parties – without due opportunity to respond. They were not joined to the proceedings as parties following the circulation of a draft judgment, which as a bare minimum justice dictated. They were not even invited to provide submissions as to the appropriateness of handing down the judgment.”

27. This argument seemed somewhat melodramatic, because it appeared on the face of it to be extremely implausible that McMillan J would have recorded adverse findings against parties who were not actively involved, albeit as non-parties, in the Petition Proceedings. But the submission did raise fundamental fairness concerns, nonetheless. In addition to setting out substantive legal arguments in relation to the law on “privies” suggesting that legal policy favoured a restrictive approach to binding non-parties, the following submission (which I considered to be potentially dispositive as to whether the point could fairly be determined at this stage) was set out:

“40.5 Whether a party is a privy or a deemed party is fact sensitive. To the extent there is disputed evidence the matter should not be determined against the MAS Parties on an interlocutory basis, but stood over to trial.”

28. In oral argument, Mr Stewart QC advanced, *inter alia*, the following further noteworthy arguments:

- (a) although the authorities were ambivalent about the effect of withdrawing a petition, it was clear one could analyse a settlement agreement;
- (b) having analysed the Settlement Agreement in the present case, it was clear that the Petitioners had been paid out and ceased to be limited partners so they could not file another petition on the same facts;
- (c) the Plaintiff’s position was anomalous in that it contended the MAS Parties were privies for the purposes of the Judgment but not privies for the purpose of the Consent Order. If D1-3 were not privies to the Consent Order (as Mr Wardell QC interjected that he accepted that they were not), then it was clear that the subsequent Petition Judgment had no effect;
- (d) in order to get to issue estoppel, you need to identify what was essential for the decision [*Blair-v-Curran* [1939] 62 CLR 464 at 530-532 (High Court of Australia)] and unless one has an operative decision, one did not enter *res judicata* territory;
- (e) the general rule was that a Consent Order only bound the parties to it. [*Spencer Bower & Handley’s Res Judicata*, (5th Ed, 2019) paragraph 2.19] Only in Alice Wonderland could D1-3 be bound by the Settlement Agreement which by its terms carved out the rights of the settling Defendants and only applied to them;
- (f) it was extraordinary and fundamentally unjust for, e.g., Mr Wallace to be bound by ‘findings’ made against him in his personal capacity on the basis that he was a privy which would prevent him from



advancing a defence to the Plaintiff's claims. The law on privies clearly did not embrace persons in the position of the MAS Parties in relation to the Petition. The capacity had to be the same in the first and subsequent proceeding;

- (g) the suggestion that Mr Wallace should be deemed to have had an opportunity to meet the allegations made against him in the Petition Proceedings had an "Alice in Wonderland" air to it.

29. Again, the Court was carefully taken through various judicial and text authorities.

FINDINGS: JURISDICTION TO DELIVER THE PETITION JUDGMENT POST-SETTLEMENT

Preliminary

- 30. Mr Stewart QC submitted that McMillan J had no jurisdiction to deliver the Petition Judgment after the Settlement Agreement and the Consent Order had brought the Petition Proceedings to an end, a submission which was unsurprisingly contested by Mr Wardell QC. Although neither side sought a formal declaration as to the status of the Petition Judgment in general terms, this threshold issue cannot be ignored. I have little difficulty in concluding that McMillan J did have jurisdiction to deliver the Petition Judgment, on the basis and in the circumstances that he did and explained most fully in the Jurisdiction Judgment.
- 31. As a preliminary matter, no clear jurisprudential basis was advanced for this Court to impugn the validity of one its own earlier decisions. This Court has no jurisdiction to judicially review its own decisions. The Cayman Islands Court of Appeal has exclusive (appellate) jurisdiction to judicially review this Court's decisions. This Court can only set aside its own interlocutory orders on the grounds of a material change of circumstances or fraud. No such application was, unsurprisingly, made in relation to McMillan J's jurisdictional decision.
- 32. The most elementary basis on which I would reject the submission that McMillan J was wrong to conclude that he had jurisdiction to hand down judgment post-settlement is that his decision (recorded in the Jurisdiction Judgment) is as a matter of law valid until set aside. In *Hunte and Khan-v-The State* [2008] UKPC 33, Lord Toulson opined as follows:

*"It is a characteristic of a superior court of record that it is validly authorised to make a binding determination as to its jurisdiction, subject only to its decision being set aside by a higher court. A recent statement of the principle that the orders of a superior court of record are valid until set aside, even if made in excess of jurisdiction (whether on constitutional or other grounds), is to be found in the decision of the High Court of Australia in *State of NSW v Kable (No 2)* [2013] HCA 26, (2013) 298 ALR 144. Without such a principle the judicial power of adjudication of rights and*



liabilities would be seriously defective, because those who acted on the faith of the validity of a court order would be at risk of a later finding that the order never had force because the court had exceeded its jurisdiction.”
[Emphasis added]

33. Since Mr Wardell QC elected to engage with the merits of the jurisdiction decision in relation to the delivery of the Petition Judgment, I will consider the respective arguments which were advanced.

The merits of McMillan J’s decision that he had jurisdiction to deliver the Petition Judgment

34. *In Re Torchlight Fund LP*, FSD 103 of 2015 (RMJ), Judgment dated September 13, 2018 (unreported), a reserved judgment following an *inter partes* hearing devoted to the specific issue of whether the Petition Judgment could be delivered, McMillan J found that he had jurisdiction to deliver it. He concluded:

“24. The Court affirms that it has the overarching discretion to proceed to give a full Judgment notwithstanding the prior disposal of a case. The Court also rules that it has jurisdiction to do so, and in the particular circumstances of these proceedings for the specific reasons identified it is in the interests of justice to give the Judgment.”

35. The attack which Mr Stewart QC launched on this jurisdictional decision has, on reflection, an entirely surreal air to it. It invites the Court to approach the issue as if I was considering a similar jurisdictional question to what arose in the Petition Proceedings and required to decide whether or not I should follow or depart from a relevant previous decision of this Court. If that was the case, which it is not, the usual approach of this Court as regards whether to follow or depart from its own previous decisions was explained by Mangatal J in *Re Qunar Cayman Islands Limited*, FSD 76 of 2017 (RJP), Judgment dated August 8, 2017 (unreported) as follows:

“53. On the other hand, it is well known, that even though the Court has the power to award interest on, for example, damages claims in respect of a road traffic accident, pursuant to section 34 of the Judicature Law (2013 Revision), this does not mean that in appropriate circumstances an interim payment cannot be ordered under Order 29, rule 11. However, all told, I find the reasoning of Quin J regarding the applicability of the GCR and the interim payment rules to section 238 proceedings, in terms of a lack of carve-out provision, very clear. I think that another point that would support Quin J’s decision in Qihoo is that there is in fact primary legislation, and not just simply rules, that govern interim payments, notably the Grand Court Law. At paragraph 98 of Halsbury’s Laws of England, Volume 11, 5th Ed. (2009) which was cited at paragraph [53] of



the Lornameade decision, and also at paragraph 60 of my decision in China Shanshui, the learned authors express the relevant considerations regarding decisions of co-ordinate courts as follows:

‘98. Decision of co-ordinate courts. There is no statute or common law rule by which one court is bound to abide the decision of another court of co-ordinate jurisdiction. Where, however, a judge of first instance after consideration has come to a definite decision on a matter arising out of a complicated and difficult enactment, the opinion has been expressed that a second judge of co-ordinate jurisdiction should follow that decision; and the modern practice is that a judge of first instance will usually follow the decision of another judge of first instance unless... convinced that that judgment was wrong...’ (My emphasis)

54. In my view it is appropriate to follow the approach set out in paragraph 98 of Halsbury’s Laws of England and by Gloster J in Lornameade at paragraph [56]. Thus, in circumstances where: (i) Quin J’s decision (a) was made after full argument on the points in issue, over the course of a day, where the parties were represented by eminent Queen’s Counsel, (b) was set out in a cogent and fully reasoned judgment, with its conclusions expressed in the clearest terms and (ii) Quin J’s decision was clearly a “definite decision on a matter arising out of a complicated and difficult enactment” (or more accurately, on the meaning and interplay of the Law and the GCR), and (iii) there are clearly strong arguments contrary to those presented by the Company, as accepted by Quin J in Qihoo (including as referred to in paragraphs 23-25 above), I am not convinced that Quin J was wrong on the issue of jurisdiction. I am of the view that I should accordingly follow his decision as to the



Court's jurisdiction to grant interim payments in section 238 proceedings."

36. McMillan J himself was guided on the jurisdiction question in part by an earlier decision of this Court, the reported judgment of Mangatal J in *Toby-v-Global Allianz Risks US Insurance Company* [2018 (2) CILR 202]. This represented seemingly the first time a Cayman Islands court had delivered a post-settlement judgment. In that case the parties jointly sought to prevent the judgment being delivered and published, having reached a partial settlement after the draft judgment had been circulated. The parties seemed to accept that jurisdiction to deliver the judgment existed in general terms, but invited the Court to decline to exercise such jurisdiction with a view to facilitating the completion of a settlement. It was this operational limb of the jurisdiction question which McMillan J was concerned with; *Toby* was considered to be distinguishable on the jurisdictional competence question because a draft judgment had already been circulated before the settlement was reached.
37. The central issue before McMillan J was whether this Court could deliver a judgment in circumstances where:
- (a) the parties had concluded a settlement before delivery of a judgment and/or receiving a draft of a reserved judgment; and
 - (b) the action had already been discontinued by an Order of the Court.
38. Two important English authorities were considered which dealt specifically with this issue. The first was *Barclays Bank v. Nylon Capital LLP* [2012] All ER (Comm) 912. In that case Lord Neuberger (MR, as he then was) opined as follows:

"73. I turn now to deal with a very different issue. After Thomas LJ had prepared his judgment in draft, and circulated it to Etherton LJ and me, the parties notified the court that they had reached agreement and effectively requested the court not to give judgment.

74. Where a case has been fully argued, whether at first instance or on appeal, and it then settles or is withdrawn or is in some other way disposed of, the court retains the right to decide whether or not to proceed to give judgment. Where the case raises a point which it is in the public interest to ventilate in a judgment, that would be a powerful reason for proceeding to give judgment despite the matter having been disposed of between the parties. Obvious examples of such cases are where the case raises a point of law of some potential general interest, where an appellate court is differing from the court below, where some wrongdoing or other activity should be exposed, or where the case has attracted some other legitimate public interest.



75. *It will also be relevant in most cases to consider how far the preparation of any judgment had got by the time of the request. In the absence of good reason to the contrary, it would be a highly questionable use of judicial time to prepare a judgment on an issue which was no longer live between the parties to the case. On the other hand, where the judgment is complete, it could be said (perhaps with rather less force) that it would be a retrospective waste of judicial time and effort if the judgment was not given.*

76. *The concerns of the parties to the litigation are obviously also relevant and sometimes very important. If, for their own legitimate interests, they do not wish (or one of them does not wish) a judgment to be given, that request should certainly be given weight by the court. (Of course, in some cases, the parties may request a judgment notwithstanding the fact that there is no longer an issue between them).*

77. *Where there are competing arguments each way, the court will have to weigh up those arguments: in that connection, the reasons for any desire to avoid a judgment will be highly relevant when deciding what weight to give to that desire.*

78. *In this case, I consider that the argument for handing down our judgments is compelling. First, by the time we were informed that the parties had settled their differences, the main judgment, representing the views of all members of the court, had been prepared by Thomas LJ, in the form of a full draft which has been circulated to Etherton LJ and me. Secondly, a number of the issues dealt with in that judgment are of some general significance. Thirdly, although we are upholding the judgment below, we are doing so on a rather different basis, so it is right to clarify the law for that reason as well. Fourthly, so far as the parties' understandable desire for commercial privacy is concerned, we have not said anything in our judgments which are not already in the public domain, thanks to the judgment below. Finally, so far as the parties' interests otherwise are concerned, no good reason has been advanced for us not giving judgment.” [Emphasis added]*

39. The facts in *Barclays Bank* were clearly analogous to those in the Petition Proceedings, so far as the timing of the settlement and the circulation of the draft judgment are concerned. McMillan J lucidly summarised the principle established by this case as follows:

“15. Lord Neuberger as Master of the Rolls is stating a broad general principle that where a case has been disposed of, as indeed the instant case



has been disposed of, nonetheless the Court not merely has the right to decide whether or not to proceed to give judgment, but actually ‘retains’ that right after disposal.”

40. I would merely add to this summary, for completeness, that the Court retains the discretion to proceed to give judgment “*in the public interest*” (per Lord Neuberger at paragraph 74).
41. The second important case relied upon by McMillan J as a source of primary jurisdiction for exercising a discretion to deliver a judgment post-settlement was *Greenwich Inc Ltd (in administration) v. Dowling and others* [2014] EWHC 2451. Although judgment had been delivered pre-settlement in this case, so the relevant *dicta* may for present purposes be regarded as strictly *obiter*, the broader principles were helpfully analysed. Also considered were pre-*Barclays Bank* decisions suggesting that the discretion to deliver a judgment was only retained if settlement post-dated the commencement of the judgment delivery process. Peter Smith J critically and persuasively opined as follows:

“131. There is clearly an inconsistency in the various decisions. The clearest decision, in my view, is that of Lord Neuberger in the Barclays Bank case. It is to my mind artificial to have a situation that a judgment can in effect be stopped by the parties by an agreement made before they see the draft judgment but not afterwards. I can see no logical reason for that. It is true to say that the early authorities were not cited to the Court of Appeal in Barclays Bank, but as a matter of policy it seems to me that the reasoning in Lord Neuberger’s judgment must plainly be correct in the modern environment. The court must retain a general discretion whether before or after the parties have seen a draft judgment to continue to deliver a judgment where it is appropriate so to do.”

42. In my judgment McMillan J was clearly right to be guided by the decision of Lord Neuberger in *Barclays Bank v. Nylon Capital LLP* [2012] All ER (Comm) 912. Moreover, he correctly and explicitly identified the open justice principle as the overarching public policy principle which was engaged in the discretion to deliver a judgment jurisdiction. This is a principle which was only implicitly embedded in the reasoning of Lord Neuberger in the *Barclays Bank* case. In paragraph 1 of his Judgment on jurisdiction (quoting his earlier directions ruling), McMillan J held:

“...Not only are Mr. Kerr and Mr. Naylor entitled to know that they have been exonerated but the public is entitled to know it as well. This is a matter of human rights as much as it is a matter of commercial law, and in this context public access to justice is paramount.”



43. As an aside, the Cayman Islands Court of Appeal (in a case which was not referred to in the course of argument) has affirmed the importance of both the open justice principle and a need for a flexible approach to its application. In *International Banking Corporation BSC-v- Ahmad Hamad Algozaibi Brothers and Company* [2018(2) CILR 18], Newman JA opined as follows:

“18 The Chief Justice reviewed the cases with great care. He highlighted the important trilogy of GIO Personal Inv. Servs. Ltd. v. Liverpool & London SS. P. & I. Assn. Ltd. (3), Barings plc v. Coopers & Lybrand (2) and Guardian News (6). In Guardian News, Toulson, L.J. (as he then was) rejected the contention ([2012] 3 W.L.R. 1343, at para. 78) that “the open justice principle is satisfied if the proceedings are held in public and reporting of the proceedings is permitted” because it was (ibid., at para. 79) “based upon too narrow a view of the purpose of the open justice principle.” It should be noted that for much of the trial TIBC took the opportunity provided by the trial being in public and had a person present in court to listen and take notes. Toulson, L.J. explained the rationale (ibid.):

‘The purpose is not simply to deter impropriety or sloppiness by the judge hearing the case. It is wider. It is to enable the public to understand and scrutinize the justice system of which the courts are the administrators.’

19 This observation can be seen to have been prompted by a statement by Viscount Haldane in Scott v. Scott (7) to the effect that there are exceptions to the principle of open justice but they had to be justified by some even more important principle. Toulson, L.J. echoed Viscount Haldane stating that “the most common example occurs when the circumstances are such that openness would put at risk the achievement of justice which is the very purpose of the proceedings” (Guardian News ([2012] 3 W.L.R. 1343, at para. 4)). In the next paragraph (ibid., at para. 5) the Lord Justice observed:

‘While the broad principle and its objective are unquestionable, its practical application may need reconsideration from time to time to take account of the way that society and the courts work. Unsurprisingly there may be differences of view about such matters.’

20 It is a truism that the strength of the common law system is that it is flexible and can take account of changes in the way society works. There is a continuing requirement for an examination to be made of the way in which the court works and handles the changing conditions and demands to which litigation gives rise. Recognizing and meeting challenges to the administration of justice as they evolve is critical to the quality of justice which can be delivered. Previous case law can provide guidance but there



are hazards in regarding the approach taken in a previous case as a strong determining influence in the conclusion to be reached in a later case. The facts in one case are rarely on all fours with those present in another and where the law calls for an intensive, fact-sensitive inquiry into any evolving circumstances which may have created a need for change, it is the principle which can be extracted from the earlier cases which is of value.” [Emphasis added]

44. Since McMillan J incorporated *Barclays Bank v. Nylon Capital LLP* [2012] All ER (Comm) 912 into Cayman Islands law, this English Court of Appeal decision has also been followed in similar circumstances by Hong Kong Final Court of Appeal in a panel on which Lord Neuberger himself sat. This later decision (which was not referred to in the course of argument and which is merely supportive of the decision I would in any event have decisively reached) also suggests that a similar approach had pre-*Barclays Bank* been followed in Australia and New Zealand. In *Zhang Hong Li and Others-v- DBS Bank Limited and Others* [2019] HKCFA 45, Ribeiro PJ, Fok PJ and Neuberger NPJ opened their Joint Judgment as follows:

“1. At the conclusion of the hearing of this appeal on 22 October 2019, the Court reserved its judgment and indicated that it would hand down its judgment on a date to be advised to the parties. On 5 November 2019, the parties wrote to the Registrar to inform him that they had reached an in principle agreement to settle the appeal. By that time, a draft judgment had already been completed and was in the final stages of preparation in readiness for handing down. The Registrar replied, telling them that the judgment had been prepared and would soon be ready for delivery, and indicating that if informed by the parties that they had concluded a settlement agreement, the Court would decide whether to proceed to hand down its judgment.

2. The parties subsequently confirmed that they had settled the appeal and submitted a consent summons for the appeal to be stayed on terms agreed by the parties. The Court duly made the order sought. For the reasons which follow, the Court has decided that notwithstanding the settlement, judgment should be handed down.

3. The question of the scope of a court’s discretion to deliver judgment in a case notwithstanding the settlement of a case after argument but before judgment is delivered has not previously arisen



in any reported decision in Hong Kong. However, in England and Wales, the applicable principles were established by the Court of Appeal's decision in Barclays Bank plc v Nylon Capital LLP,² stated by Lord Neuberger of Abbotsbury MR (as his Lordship then was)... Barclays Bank was adopted by the Supreme Court of Victoria in Clarke v Great Southern Finance Pty Ltd³ and similar principles were applied by the Queensland Court of Appeal in Voss v Suncorp-Metway Limited (No.1).⁴ Principles similar to those laid down in Barclays Bank, were also applied by the Supreme Court of New Zealand in Osborne v Auckland Council.⁵

4. We are satisfied that the principles set out in the citation from Barclays Bank at [3] above should be adopted in this jurisdiction in exercising the Court's discretion whether or not to deliver judgment in an appeal notwithstanding the parties' settlement.

5. The present case involves issues of law of general importance and, as was pointed out in argument, has attracted considerable public interest in Hong Kong and internationally. The draft judgment was completed and in the final stages of preparation for handing down when the parties informed the Registrar of the impending settlement. As will be seen in the reasons which follow, we are differing from the judgments appealed from and consider it necessary to correct certain erroneous propositions accepted below. Publication of this judgment will not impinge on any issues regarding confidentiality or privacy as it does not go beyond the detailed account of the parties' dealings set out in the judgments below. The parties have not made any submissions indicating any opposition to the judgment being handed down. For all these reasons, we consider that in the proper exercise of our discretion, we should hand down our judgment notwithstanding the settlement.”⁶

² [2011] EWCA Civ 826; [2012] Bus LR 542. It has been applied in *Greenwich Inc Ltd v Dowling* [2014] EWHC 2451 (Ch) at [131] and [134] and in *Re Dalnyaya Step LLC (In Liquidation) (No.2)* [2017] EWHC 3153 (Ch); [2019] BCC 23; and has overtaken the earlier decision in *Prudential Assurance Co Ltd v McBains Cooper (A Firm) & Ors* [2000] 1 WLR 2000.

³ [2014] VSC 516 per Croft J at [23].

⁴ [2004] 1 Qd R 212; [2003] QCA 252.

⁵ [2014] 1 NZLR 766 at [39]-[44].

⁶ Footnotes 3 to 6 above are reproduced from the quoted Judgment.



45. On the assumption that it is open to me to review the merits of the jurisdictional ruling in the Petition Proceedings, and my primary finding is that it is not, I resoundingly endorse McMillan J's determination that he had jurisdiction to deliver the Petition Judgment after the Petition had been withdrawn by consent pursuant to the Settlement Agreement.

Summary on jurisdiction issue

46. It is not open to this Court to judicially review or set aside McMillan J's decision that he had jurisdiction to deliver the Petition Judgment after the Petition had been withdrawn pursuant to the Consent Order and the Settlement Agreement. Legal chaos would reign if decisions which have not been set aside on appeal could be retrospectively invalidated in separate subsequent proceedings based on different views of the applicable law. Further and in any event, I would reach the same conclusion as McMillan J as to the existence of jurisdictional competence to deliver the Petition Judgment in the circumstances in which he did.
47. An open justice advocating placard writer might, perhaps, have put all of the above far more pithily: "McMillan J rules O.K.!"

FINDINGS: DOES THE PETITION JUDGMENT HAVE PRECLUSIVE EFFECT?

Preliminary

48. Despite the absence of any direct and/or unambiguous authority on the point, Mr Stewart QC's broad submission that the Petition Judgment did not have the same effect for the purposes of issue estoppel as a judgment which decided a live dispute appeared at first blush to be compelling. Mr Wardell QC, with his vigorous foray into the secondary topic of privies, disarmingly conveyed the impression that the threshold question of the legal effect of the Judgment could disdainfully be swept aside. On closer scrutiny, he advanced no coherent answer to his opponent's pivotal submission.
49. It is ultimately clear that McMillan J delivered the Judgment on terms which expressly signified its non-binding effect. The Petition Judgment concluded with the following critical words:

"1199. Below follow the orders that the Court would have made, had it not made an order by consent withdrawing the Petition with no order as to costs:

- 1. The Amended Petition is refused.*
- 2. The Default Notices issued by the GP to Aurora, ACC and CAML are deemed to be valid.*



3. *The Court will hear the parties as to costs.* [Emphasis added]

50. I will explain below why I have found this straightforward acknowledgement that the Petition Judgment was not intended to have the same legal effect as an ordinary judgment is consistent with the discretionary jurisdiction pursuant to which the Judgment was delivered.

Does the Petition Judgment qualify as a “judgment” for issue estoppel purposes?

51. Mr Stewart QC most significantly submitted that the Petition Judgment could not be relied upon for issue estoppel purposes because it did not actually decide the case. It therefore did not have “preclusive effect”. I was regretfully compelled to resort to my own online resources to clarify my vague sense of the meaning of this term:

*“Res judicata (RJ) or res iudicata, also known as claim preclusion, is the Latin term for ‘a matter decided’ and refers to either of two concepts in both civil law and common law legal systems: a case in which there has been a final judgment and is no longer subject to appeal; and the legal doctrine meant to bar (or preclude) relitigation of a claim between the same parties.”*⁷
[Emphasis added]

52. It is ultimately self-evident that at the heart of the *res judicata* doctrine is the notion that the judgment or order sought to be used to found an issue estoppel or cause of action estoppel has decided the relevant issue or claim. In his oral submissions, the Defendants’ counsel submitted that the Petition Judgment “*decided nothing*”. In support of the submission that the Petition Judgment did not qualify, Mr Stewart QC relied most importantly on ‘*Spencer Bower Handley’s Res Judicata*’ (5th edition, 2019):

“1.01 A res judicata is a decision pronounced by a judicial or other tribunal with jurisdiction over the cause of action and the parties, which disposes once and for all of the fundamental matters decided, so that, except on appeal, they cannot be re-litigated between persons bound by the judgment. A judgment in personam binds the parties and their privies...A judgment in rem is binding on the so-called world, party, privy or otherwise.

1.02 A party setting up a res judicata as an estoppel against his opponent’s claim or defence, or as the foundation of his own, must establish its constituent elements, namely that:

⁷ https://en.wikipedia.org/wiki/Res_judicata.



(i) *the decision, whether domestic or foreign, was judicial in the relevant sense;*

(ii) *it was in fact pronounced;*

(iii) *the tribunal had jurisdiction over the parties and the subject matter;*

(iv) *the decision was:*

(a) *final;*

(b) *on the merits;*

(v) *it determined a question raised in the later litigation; and*

(vi) *the parties are the same or their privies, or the earlier decision was in rem.”...*

6.01 *A judicial decision must be ‘on the merits’ before it can constitute a res judicata...*

6.02... *In The Sennar No. 2⁸...Lord Diplock said:*

‘What it means in the context of judgments delivered by courts of justice is that the court has held that it has jurisdiction to adjudicate on an issue raised in the cause of action to which the particular set of facts give rise.’”

53. That a judgment relied upon to found an estoppel must actually be determinative of an issue can be demonstrated at a more basic level by reminding oneself of that the words “*res judicata*” literally mean “a matter adjudicated (or decided)”. However, this element of the common law concept was further elucidated by another text authority placed before the Court, Schaffstein’s ‘*The Doctrine of Res Judicata before International Commercial Arbitral Tribunals*’ (Oxford University Press: Oxford, 2016). The elements of the English law doctrine of *res judicata* which are relevant for present purposes are summarised as follows:

“1.08 A judicial decision A judicial decision for res judicata purposes is a decision which determines a question of law, fact or both law and fact. This can be any judicial adjudication, including judgments, orders, decrees, sentences, bankruptcy adjudications, judicial declarations, and arbitral awards. It is of no importance whether the judgment is right or wrong...

⁸ [1985] 1 WLR 490.

1.14...a decision ‘on the merits’ is generally a decision that finally determines the issue submitted to the court...what is decisive for purposes of issue estoppel is whether the prior court clearly and finally decided an issue submitted to it for its determination...”
[Emphasis added]

54. Mr Wardell QC insisted that if a court had jurisdiction to deliver a judgment, its legal status was the same as any other judgment. The case law which existed on the jurisdiction to deliver judgments post-settlement would not exist if such judgments did not have full effect. These beguiling submissions on reflection do not simply offer an overly attractive solution of simplicity. They also entice the Court to take a sharp detour around the terrain upon which the foundations of *res judicata* are erected and the legal context in which post-settlement judgments are made.
55. The suggestion that “a judgment is a judgment, is a judgment, is a judgment” ignores the reality that whenever reliance is placed on a judgment for any purposes, different parts of a judgment have different legal effects. As far as the law of precedent is concerned, for instance, only the *ratio decidendi* is binding; *obiter dicta* are not. Even when previous decisions are relied upon merely for their persuasive value, nuanced assessments are always made about the extent of their persuasive effect. Did the earlier tribunal have the benefit of full argument? How similar was the statutory provision which was being construed? The suggestion that the context in which and purpose for which a post-settlement judgment is delivered should be ignored in assessing its general legal effect must be rejected.
56. I find that there is nothing in the post-settlement judgment jurisprudence upon which the Plaintiff’s counsel relied which supports the proposition that there is not even any potential juristic distinction between a judgment which adjudicates a live and subsisting dispute and a one which does not. It must be acknowledged that in some legal contexts, there may be no material distinction between a post-settlement judgment and an ordinary judgment which determines a dispute in general terms. For instance, in *Barclays Bank v Nylon Capital LLP* [2012] All ER (Comm) 912 at 932, Lord Neuberger explained the main reasons for the Court of Appeal deciding to deliver its judgment despite a prior settlement as follows:

“78. In this case, I consider that the argument for handing down our judgments is compelling. First, by the time we were informed that the parties had settled their differences, the main judgment, representing the views of all members of the court, had been prepared by Thomas LJ, in the form of a full draft which has been circulated to Etherton LJ and me. Secondly, a number of the issues dealt with in that judgment are of some general significance. Thirdly, although we are upholding the judgment below, we are doing so on a rather different basis, so it is right to clarify the law for that reason as well.”

57. Where a considered judgment is delivered after hearing full argument, but post-settlement, in order to publicize legal findings on points of general interest and to clarify the law, there will logically be little difference in terms of precedential effect

between a post-settlement judgment and an ordinary judgment, as far as the relevant statements of legal principle are concerned. It is not necessary for me to decide for present purposes whether an appellate ‘decision’ in such a judgment would be strictly binding on lower courts, or merely highly persuasive. The distinction in practice would probably in most cases make little difference. I see no reason why the precedential weight of legal findings recorded in a considered post-settlement judgment should be any less simply because the main purpose of publishing the judgment is not clarifying the law. Such a judgment would reflect the same degree of judicial deliberation as an ordinary judgment.

58. In stark contrast, the question of whether or not a judgment qualifies as providing a potential foundation for a plea of *res judicata* necessarily requires an analysis of whether the judgment meets the essential legal pre-requisites for advancing such a plea. And the most basic pre-requisite of all is the requirement that the relevant judgment must have decided (or adjudicated) the issue upon which the issue estoppel plea seeks to rely. Where a post-settlement judgment is delivered, the pivotal question will generally be what is the legal effect of the compromise? Mr Wardell QC referred the Court to ‘*Foskett on Compromise*’, 9th edition, but his submissions seemed to me to impermissibly blur the important distinction between the legal status of the Consent Order and the Petition Judgment. According to *Foskett* (at 6.01-6.02, 6.05) dealing with the effects of a compromise between the parties):

“An unimpeached compromise represents the end of the dispute or disputes out of which it arose. Any issues of fact or law that may have formed the subject matter of the original dispute are buried beneath the surface of the compromise. The court will not allow them to be raised afresh in the context of a new action...”

Where the compromise is embodied in a judgment or order, both aspects are present, the former finding particular expression in the doctrine of res judicata. This doctrine applies to a judgment or order notwithstanding that it is made pursuant to an agreement between the parties. However, the nature and content of the agreement or compromise will be of particular relevance to the application of the doctrine in this context, both in its narrow and wider sense...

In the normal course of events, a consent or judgment must be construed, as with the agreement it embodies, without direct evidence of the parties’ intentions, although evidence of ‘surrounding circumstances’ may be admissible. The consent order itself may furnish evidence of the dispute or disputes it resolves. Sometimes the parties will have drawn up an agreement which, it was proposed, should be effectuated by the order. Reference to that agreement may be made to determine the extent of the disputes compromised...”

59. Far from seeking to rely upon the fact that the Consent Order read with the Settlement Agreement supported the Plaintiff’s case on issue estoppel, the Plaintiff



relied upon the Petition Judgment standing by itself despite the fact that it clearly did not adjudicate any factual or legal issues because:

- (a) the issues raised in support of and in opposition to the Petition were disposed of before the Petition Judgment was delivered by the Settlement Agreement and the Consent Order;
- (b) it was conceded that the Settlement Agreement was only binding on the parties to it; and
- (c) the Petition Judgment on its face did not purport to decide any issues, but merely recorded findings which the Court “*would have made, had it not made an order by consent withdrawing the Petition*”.

60. I find that the Plaintiff is unable to rely upon the Petition Judgment to found its issue estoppel arguments.

61. This does not mean that no reliance can be placed at all on the exculpatory findings which McMillan J felt it was in the public interest to record. It is generally permissible for a litigant to invite one Judge to take into account findings made by another Judge in relation to the same evidential matters in other proceedings. If this can be done in relation to interlocutory findings, as it often is (see e.g. *Arcelormittal USA LLC-v- Essar Global Fund Limited and Essar Capital Limited*, FSD 2 of 2019 (IKJ), Judgment dated March 29, 2019 (unreported) at paragraph 31⁹), it is a forensic tool which ought in principle to be more readily available in relation to final findings. However, the weight to be attached to such findings (if any) will surely be context-sensitive and subject to argument at trial. I express only provisional views on this matter at this stage, merely reiterating the doubts I expressed in the course of the hearing in response to Mr Stewart QC’s “all or nothing approach”¹⁰.

Summary: the Petition Judgment does not qualify as a judgment for the purposes of the doctrine of res judicata and lacks preclusive effect

62. The findings in the Petition Judgment in favour of the Plaintiff and its principal may not be relied upon as a basis for striking-out portions of the Amended Defence of D1-3 on the grounds of issue estoppel. The Judgment did not have the adjudicative status which the doctrine of *res judicata* requires. It is understandable that the Plaintiff should wish to rely on those findings in the way it sought to do. But, on

⁹ In similar vein, a variety of interlocutory decisions by other Judges (including the decisions of this Court) were considered in related English proceedings: *Arcelormittal USA LLC-v- Mr Ravi Rua and Others* [2020] EWHC 740 (Comm) at paragraphs 185-201.

¹⁰ In commenting on a draft of the present Judgment, counsel pointed out that an agreement had in fact been reached at the November 2019 directions hearing that the Petition Judgment would not be admissible at trial. A selective review of the recording of counsel’s submissions in January did not reveal that such an agreement existed. The provisional views expressed above reflect my provisional views on the general effect of a judgment which does not have preclusive effect.



Careful analysis, its strike-out case was unsupported by legal principle and was only (as I see it) spurred on by “vaulting ambition which o’erleaps itself and falls on th’other” side.

FINDINGS: ARE D1-3 PRIVIES OF THE PETITIONERS?

Preliminary

63. Having found that the Petition Judgment cannot be relied upon by the Plaintiff to strike-out portions of the Amended Defence on *res judicata* grounds, there is no need to consider the question of whether the Defendants despite being non-parties are bound by the relevant findings as “privies”.
64. I will however, in deference to the breadth and depth of the arguments deployed on each side on this topic record my findings somewhat summarily below, based on the assumption that, contrary to my primary holding above, the Petition Judgment’s findings do potentially qualify as “judicial” for *res judicata* purposes.

The factual matrix of the Petition Proceedings

65. The Petitioner sought an “*order for the winding up of the Partnership pursuant to section 92 (e) of the Companies Law (2013 Revision) (“the Companies Law”) and section 36 (3) (g) of the Exempted Limited Partnership Law, 2014 (“the Law”)*” (Petition Judgment, paragraph 4).
66. The Petition Judgment described the Petitioners as follows:

“4. The Petitioners are Aurora Funds Management Ltd (“Aurora”), Crown Asset Management Ltd (“CAML”) and Accident Compensation Corporation of New Zealand (“ACC”). They are all respective Limited Partners in the Partnership.

5. Aurora is trustee of the Bear Real Opportunities Fund (“the Bear Fund”). The Bear Fund is an investment vehicle for three Australian managed investment schemes. They are the van Eyk Blueprint Fund, the van Eyk Blueprint High Growth Fund and the van Eyk Blueprint Capital Stable Fund (“the Blueprint Funds”). Aurora used to have van Eyk Research Pty Ltd (“van Eyk”) as its investment manager. The principal asset of the Bear Fund is its interest in the Partnership. The total amount invested by the Bear Fund in the Partnership is said to be some AU\$55 million. The sole beneficiary of the Bear Fund is Macquarie Investment Management Ltd. (“MIML”), the responsible entity of the Blueprint Funds. MIML is a division of Australia’s largest investment bank, Macquarie Group Ltd.”



67. The Petition Judgment also records that an application for D1 (MAS) to be joined as a co-Petitioner was filed shortly before the scheduled commencement of the trial and was not pursued. This happened in circumstances where a falling out between the Petitioners and their intended witness Mr Wallace (D3), who verified the Petition, seems to have occurred (paragraphs 86-97). It appears to be common ground that the Plaintiff's position was that MAS was not a limited partner of the Partnership and therefore lacked standing to join the Petition. A significant finding recorded in the Petition Judgment is the following (as it relates to the privies issue):

“884. It is essentially undisputed that the Petitioners associated themselves with a campaign on the part of Mr. Wallace and Mr. Marshall to undermine and ultimately replace the GP, thereby enriching Mr. Wallace and Mr. Marshall and it would also seem expediting the early exit of the Petitioners from the Partnership.”

68. It seems clear that by the time of closing submissions, the Petitioners had disavowed Mr Wallace (and arguably, by implication, D1-2 as well) (Petition Judgment paragraph 888). This is in contrast with the earlier position: *“Aurora was at the relevant time when the Petition was brought subject to the influence and direction of Mr. Wallace”* (Petition Judgment, paragraph 1135).
69. The Petition Judgment concluded by recording that the relief sought by the Petitioners as limited partners would have been refused, but for the withdrawal of the Petition by consent. It is also clear that the Petitioners were seeking relief in their capacity as limited partners and that the Petition Judgment was analysing whether their rights as such had been infringed.

The relevant provisions of the Amended Defence

70. The Schedule to the Plaintiff's Strike-out Summons identifies those portions of the Amended Defence which are liable to be struck-out because they seek to re-litigate issues determined by the Petition Judgment. In tabular form, the impugned paragraphs of the Amended Defence were listed next to the paragraphs of the Petition Judgment which the Plaintiff relied upon. Because the way the application was argued and the basis on which I propose to decide it, no need for detailed scrutiny of the respective averments and “findings” arises. What is important is to identify the general purport of the relevant portions of the Amended Defence and the general purport of the relevant portions of the Petition Judgment. Because the central thesis of the Plaintiff's application is that D1-3 seek to re-litigate issues which have already been decided. The following summary should, for these purposes, suffice:
- (a) the finding (Petition Judgment paragraph 341) that Mr Wallace, together with Mr Marshall, conceived and executed a plan to replace the Plaintiff as General Partner (“GP”) of the Partnership for their own enrichment is relied upon to strike-out paragraph 16.3.1 of the



Amended Defence, which avers that the MAS Parties had no improper motives in seeking to replace the Plaintiff as GP;

- (b) the finding that MAS competed with the Partnership in relation to Lantern in an injurious manner (paragraphs 632-633, 872 and 1003) is relied upon to strike-out 20 paragraphs/sub-paragraphs of the Amended Defence which aver that no competing strategy was pursued;
- (c) various findings in relation to the improper motivations of the Petitioners (paragraphs 1068-1069, 1075-1076, 1136-1137 and 1154) are relied upon to strike-out paragraphs 14, 14.3, 129 and Appendix I of the Amended Defence, which assert that e.g. MAS and Aurora were properly motivated in relation to presenting the Petition and that the Petitioners generally had genuine concerns.

71. It may thus readily be seen that although the application as a whole depends upon the central thesis that the Petition Judgment qualifies as a judgment for *res judicata* purposes, the findings relied upon fall into different categories:

- (a) some findings relate specifically to the MAS Parties, and appear very arguably to form part of the chain of reasoning which leads to findings being made against the Petitioners;
- (b) some findings relate specifically to the MAS Parties, but it not so clearly arguable that they form part of the decision on the merits of the Petition;
- (c) some findings relate exclusively to the Petitioners and to clearly form part of the merits of the decision against the parties to the Petition.

72. It is self-evident that all findings made in relation to the MAS Parties were recorded in relation to their role in relation to furnishing support for a just and equitable winding-up petition. The findings were made in the Petition Proceedings to which they were not parties and in relation to which no need or opportunity properly arose to challenge the assertions made against them in those proceedings or to advance defences to the tort claims asserted against them herein.

The Plaintiff's case on privies distilled

73. The Plaintiff's Supplementary Skeleton Argument provided as follows:

“22. The case for finding that the MAS Parties are privies is compelling and has been set out at length in the Plaintiff’s First Skeleton and Mr Naylor’s affidavits. In short, there is indisputable contemporaneous evidence that the Petition Proceedings were for all intents and purposes, the creation of Mr Wallace and it is clearly just that the MAS Parties be bound by findings made in the Petition Judgment. The attempt in both Mr Wallace’s evidence and the MAS Parties’ Skeleton to downplay his role in relation to the Petition Proceedings is feeble and lacks any credibility.

23. By way of reality check, one can test the MAS Parties’ current position that they lacked a sufficient interest in the Petition Proceedings by reference to Mr Wallace’s own affidavit evidence. Thus, in Mr Wallace’s affidavit of 17 February 2017 [C1/1/167] (i.e. on the eve of the commencement of the Petition hearing), he stated: ‘MAS considers it is incumbent upon it to seek to be joined as a party to the Petition to ensure that its interest and those of its stakeholders are properly represented’.

24. Having taken this position, it does not now lie in the MAS Parties’ mouths to say that they lacked an interest in the Petition Proceedings and should not be bound by the findings in the Petition Judgment.

25. A similar sense check can be made by asking rhetorically, if Mr Wallace’s role was as limited as the MAS Parties would now have the Court believe, why was Mr Wallace the individual who swore an affidavit verifying the Petition? Of course, the answer is because the Petition was his litigation more than anyone else’s. As stated above, the only reason MAS was not a named Petitioner was because it had not been recognised as a limited partner.”

74. Various authorities were referred to and it appears to be the case that Mr Wardell QC was right to suggest that a more flexible approach is taken in England to the “privies” rule than it is in Australia. This was certainly the view of the High Court of Australia in *Tomlinson-v-Ramsey Food Processing Pty* [2015] HCA 28 (at paragraph 17). The categories of privity are blood, title and interest. However, where, as is the case here, “interest” is relied upon, one finds that the term has not been precisely judicially defined. *Spencer Bower Handley* (at paragraph 9.42) described the following test as “circular”. I consider this an unfair criticism of a judicial formulation which is clearly intended to be a flexible one. In *Gleeson-v-Whipple* [1977] 1 WLR 510 at 514-515, Megarry V-C stated:

“... it seems to me that the substratum of the doctrine is that a man ought not to be allowed to litigate a second time what has already been decided between himself and the other party to the litigation. This is in the interest both of the successful party and of the public. But I cannot see that this provides any basis for a successful defendant to say that the successful defence is a bar to the plaintiff suing some third party, or for that third party to say that the successful defence prevents the plaintiff from suing him, unless there is a sufficient degree of identity

between the successful defendant and the third party. I do not say that one must be the alter ego of the other: but it does seem to me that, having due regard to the subject matter of the dispute, there must be a sufficient degree of identification between the two to make it just to hold that the decision to which one was party should be binding in proceedings to which the other is party. It is in that sense that I would regard the phrase 'privity of interest'"

75. This was perhaps the broadest formulation of privity of interest upon which the Plaintiff's counsel relied.

D1-3's case on privies distilled

76. Mr Stewart QC described his opponent's submissions on privies as "*charmingly airy*" and retorted that the facts of the present case were "*a million miles away*" from what was required by the law in this respect. He referred to later passages in *Spencer Bower Handley* (at paragraph 9.42) suggesting that a more rigorous approach to privies has been adopted since Megarry V-C's seemingly flexible test. However, he commended to the Court a later passage in Megarry V-C's own judgment in *Gleeson-v-Whipple* [1977] 1 WLR 510 at 515:

"Any contention which leads to the conclusion that a person is liable to be condemned unheard is plainly open to the gravest of suspicions. A defendant ought to be able to put his own defence in his own way, and to call his own evidence. He ought not to be concluded by the failure of the defence and evidence adduced by another defendant in other proceedings unless his standing in those other proceedings justifies the conclusion that a decision against the defendant in them ought fairly and truly to be said to be in substance a decision against him."

77. This passage was also relied upon in answer to the abuse of process ground addressed below. The need for a more rigorous approach to the privies doctrine was supported by reference to a more recent case cited in the same paragraph of *Spencer Bower Handley*. In *Standard Chartered Bank (Hong Kong) Ltd -v-Independent Power Tanzania Ltd* [2015] EWHC 1640 (Comm), Flaux J, after quoting from *Gleeson-v-Whipple*, summarised the law on privies as follows:

"140. This formulation of the test for privity of interest was approved by Lord Bingham of Cornhill in Johnson v Gore Wood [2002] 1 AC 1 at 32. The earlier authorities were also considered and usefully summarised by Arnold J in Resolution Chemicals v Lundbeck A/S [2013] EWHC 739 (Pat) at [100]:



'The conclusions which I draw from this survey of the authorities are as follows:

i) The test for privity of interest is whether, having due regard to the subject of the matter of the dispute, there is a sufficient degree of identification between the relevant persons to make it just to hold that the decision to which one is party should be binding in the proceedings to which the other is party: Gleeson v Wippell approved in Johnson v Gore Wood.

ii) Where someone who has knowledge of the earlier proceedings and a legal interest in their outcome sits back and allows another person with the same legal interest in the outcome to fight his battle, he will be a privy with the other person: House of Spring Gardens. But this is a narrow exception to the general rule that a person will not be bound by the outcome of proceedings to which he is not a party: Skyparks v Marks, Powell v Wiltshire, Seven Arts v Content.

iii) A direct commercial interest in the outcome of the litigation is insufficient to make someone a privy: Kirin-Amgen v Boehringer Mannheim.

iv) Whether members of the same group of companies are privies or not depends on the facts: Special Effects."

141. That decision was upheld in the Court of Appeal ([2013] EWCA Civ 924; [2014] RPC 5) where, having reviewed the earlier authorities, Floyd LJ at [31]-[32] formulated the test in a more general way, but one which still suggests that a mere commercial interest in the outcome of the litigation will not suffice to make someone a privy:

'31 It is not necessary for the purposes of this appeal to seek to define precisely what interest in the subject matter of the previous litigation is required. The sort of interest dismissed by Sir Robert Megarry in Gleeson in his first principle is clearly inadequate. There are passages in the judgment of Aldous L.J. in Kirin-Amgen Inc v Boehringer Mannheim GmbH [1997] FSR 289 which suggest that a legal interest may be necessary in the subject matter of the previous action as opposed to a commercial interest: see pp.307–309. I have not found that a particularly helpful criterion in the present case which is solely concerned with successive revocation actions. At one level Arrow and Resolution had the same legal interest in the revocation of the Patent, but that was a legal



interest which they shared with all the world. If Resolution is to be bound, it must I think be possible to identify some more concrete consequence for its business which revocation of the Patent would have achieved. Unless that is so, although it can be said that Resolution could have joined the 2005 proceedings, there is no reason to hold that they should.

32 Drawing this together, in my judgment a court which has the task of assessing whether there is privity of interest between a new party and a party to previous proceedings needs to examine (a) the extent to which the new party had an interest in the subject matter of the previous action; (b) the extent to which the new party can be said to be, in reality, the party to the original proceedings by reason of his relationship with that party, and (c) against this background to ask whether it is just that the new party should be bound by the outcome of the previous litigation.”¹¹

Summary findings on privies

78. The question to be determined is whether, by virtue of D1-3’s interest in the subject-matter of the Petition Proceedings and their connections with the Petitioners, it is just that they be bound by the relevant findings recorded in the Petition Judgment. Of course, an essential precondition for non-parties being bound includes the same requirement for parties to be bound: the prior determinations must relate to the same issues which arise in the subsequent proceedings. In assessing whether this precondition has been met, I apply the legal test the Plaintiff’s counsel commended to the Court, which relied, *inter alia*, on the following dicta of Lord Wilberforce in *Carl Zeiss Stiftung-v-Rayner & Keeler Ltd. (No.2)* [1967] A.C. 853 at 965 A-C:

“Mr Spencer Bower, in his work on Res Judicata states the principle as being ‘that the judicial decision was, or involved, a determination of the same question as that sought to be controverted in the litigation in which the estoppel is raised (Res Judicata, p.9)-a formulation which invites the inquiry how what is ‘involved’ in a decision is to be ascertained. One way of answering this would be to say that any determination is involved in a decision if it is a ‘necessary step’ to the decision or a ‘matter which it was necessary to decide, and which was actually decided, as the groundwork for the decision’...” [Emphasis added]

¹¹ This legal analysis was subsequently approved by the Court of Appeal: [2016] EWCA Civ 411.

201027 In the matter of Torchlight GP Limited v Millinium Asset Services PTY Limited – FSD 114 of 2016 (IKJ) Ruling - final



79. I find that it is not just that the relevant findings should bind the MAS Parties in all the circumstances of the present case, having particular regard to the following considerations:

- (a) D1-3's interest in the subject-matter of the Petition Proceedings appears to have been merely commercial at the outset (the Plaintiff's case in the Petition Proceedings was that Mr Wallace was the "*chief instigator*" of the Petition-Petition Judgment, paragraph 1004). Their interest in the subject-matter by the time of trial and judgment, if any, is tenuous in the extreme;
- (b) the Plaintiff's general stance as Petitioner in the Petition Proceedings appears to have been that MAS was not entitled to become a party because it was not a limited partner of the Partnership. MAS abandoned its attempt to formally join the Petition Proceedings before the trial and the Petition Judgment (see e.g. paragraphs 86-97) appears to have determined that Mr Wallace was no longer directing the conduct of the Petition at trial. There is accordingly no or no tenable basis for concluding that D1-3 were, in effect, *de facto* parties to the Petition Proceedings at all material times. In my judgment the stages which are material for issue estoppel purposes must include the end of the litigation as well as the beginning;
- (c) there is in general terms no sufficient alignment between the findings made on the merits of grounds for a just and equitable winding-up and the proposed defences to the tortious claims asserted in the present action. The essential elements of the Plaintiff's claims herein were neither expressly nor by necessary implication decided by the Petition Judgment. D1-3 were neither parties to those proceedings nor directing them at trial. It is not enough to demonstrate, as the Plaintiff has succeeded in doing, that the two sets of proceedings cover common ground. The same issues were not decided in the Petition Proceedings as far as findings in relation to the MAS Parties are concerned;
- (d) where the Amended Defence makes averments which are inconsistent with findings made against the Petitioners, (assuming, contrary to my primary findings that they do qualify as adjudicative for *res judicata* purposes), such findings *prima facie* meet the "same issue" test. However, D1-3 are not bound by such *in personam* findings in any event because they are not the Petitioners' privies; and
- (e) overall justice considerations would favour the Defendants in any event. In the present context it is almost dispositive in terms of the general justice of the position that a positive case management decision was clearly made that the two actions should be separately tried. No directions were given for issues arising in this Writ action to



be determined in the Petition Proceedings; such directions could have been sought and (potentially at least) given.¹²

FINDINGS: WOULD PERMITTING D1-3 TO ADVANCE THE RELEVANT ASPECTS OF THEIR DEFENCE CONSTITUTE AN ABUSE OF PROCESS?

Preliminary

80. It was common ground that even if the privies requirement could not be met, it might be argued on broader grounds that re-litigation of issues which had previously been determined could be restrained this constituted an abuse of process.
81. However, in the present case, it is difficult to see how an abuse of process argument can be sustained in circumstances where the MAS Parties have been found not to be the privies of the Petitioners in the Petition Proceedings. This would require the Court to find that reliance upon the impugned portions of the Amended Defence involved re-litigating the same issues which were determined by the Petition Judgment so as to amount to a collateral attack on the Petition Judgment.

The Plaintiff's case on abuse of process distilled

82. Perhaps the broadest statement of the rule to which the Plaintiff's counsel referred in his oral argument was *Aldi Stores Limited-v-WSP Group plc and others* [2007] EWCA Civ 1260. In the latter case, dealing with the question of privies and abuse of process, Thomas LJ (as then was) held as follows:

“7. Although Mr Thomas QC on behalf of Aldi accepted that the approach was to be a broad merits-based judgment, he contended that there was an essential or threshold requirement before that broad merits-based judgment could be applied. The threshold requirement was that there had to be a sufficient degree of identity between the defendants to the original action and the defendants to the new action which the defendants were seeking to strike out; without such a degree of identity, the abuse application was bound to fail and the court would never reach the stage of making the broads merits-based judgment. It followed that as Aldi had only brought its action in 2001 against Holmes and had not made any claim against WSP and Aspinwall, the present proceedings brought in 2005 were against different parties; there was no identity at all between either of them and Holmes.

8. The submission was founded on a passage in the speech of Lord Bingham in Johnson v Gore-Wood. Counsel for Mr Johnson had argued that his client

¹² Paragraph 24 of the Defence to the Amended Petition foreshadowed an application to consolidate this action (when it was commenced) with the Petition Proceedings so that the defence of the Petition and the conspiracy claims could be tried together. Any such application, if made was either refused or not pursued.

could bring the claim as he had not been the plaintiff in the first action against the defendants; this argument was rejected on the basis that a formulaic application of the rule would be mistaken. The plaintiff in the first action had been the corporate embodiment of Mr Johnson who had made the decisions and given the instructions on its behalf; he could have brought his claim at the same time. Lord Bingham observed that the correct approach was that formulated by Sir Robert Megarry V-C in *Gleeson v Wippell* [1977] 1 WLR 510 at 515:

‘Second, it seems to me that the substratum of the doctrine is that a man ought not to be allowed to litigate a second time what has already been decided between himself and the other party to the litigation. This is in the interest both of the successful party and of the public. But I cannot see that this provides any basis for a successful defendant to say that the successful defence is a bar to the plaintiff suing some third party, or for that third party to say that the successful defence prevents the plaintiff from suing him, unless there is a sufficient degree of identity between the successful defendant and the third party. I do not say that one must be the alter ego of the other: but it does seem to me that, having due regard to the subject matter of the dispute, there must be a sufficient degree of identification between the two to make it just to hold that the decision to which one was party should be binding in proceedings to which the other is party. It is in that sense that I would regard the phrase ‘privity of interest ...’

9. Mr Thomas QC contended that, as the passage in the judgment of Sir Robert Megarry had been expressly approved by the House of Lords, then, as it had been made clear by Sir Robert Megarry that there had to be a sufficient identity between the defendants if an abuse of process application was to succeed, it could not succeed in this case as there was no identity between the defendants to the original claim and the present claim. Aldi had brought proceedings only against Holmes; WSP and Aspinwall were entirely different companies.

10. I cannot accept this argument. Lord Bingham made clear in his speech that the approach should be a ‘broad merits-based judgment’ and not formulaic. It is clear he was approving the passage in the judgment of Sir Robert Megarry as the ‘correct approach’ and not as a statement of rigid application. The fact that the defendants to the original action and to this action are different is a powerful factor in the application of the broad-merits based judgment; it does not operate as a bar to the application of the principle. This was plainly the view of Clarke LJ in *Dexter* in the passage I have set out with which I agree.” [Emphasis added]

83. In his oral submissions Mr Wardell QC urged the Court to accept that it would be manifestly abusive for the Plaintiff to have to re-litigate issues determined in the



Petition Proceedings, applying a “broad-based merits approach”. These submissions adopted a broad-based approach to the findings in the Petition Judgment, which implied that a “one-size fits all” approach was merited.

D1-3’s case on abuse of process distilled

84. The Defendants advanced the following cogent submissions in their Skeleton Argument:

“54. Resort to the principle of abuse of process is entirely inapt in the circumstances of these proceedings.

55. Abuse of process is a procedural rule ‘based on the need to protect the court from abuse and the defendant from oppression’. It is aimed at preventing the litigation of matters which could and should have been litigated in earlier proceedings. It is difficult to conceive of a scenario where a person who is involuntarily joined to proceedings as a defendant, can properly be said to be acting abusively or oppressively by defending the claim he faces, on the basis of findings made in previous proceedings and to which he was not a party and/or on the basis that he could and should have raised those issues in the earlier proceedings.

56. Further it can hardly be an abuse where the Court has refused to consolidate the second set of proceedings with the first, and thus by necessity has considered the question of its own process – and whether that process was being abused – in the context of multiple and overlapping claims. In those circumstances it must be the case that the Court has approved the multiplicity of proceedings.”

Summary findings on abuse of process

85. In all the circumstances of the present case, the MAS Parties’ Amended Defence is not liable to be struck-out to the extent that it seeks to advance defences which overlap with findings recorded in the Petition Judgment adverse to D1-3. This is primarily because:

- (a) there is no sufficient connection between the MAS Parties and the parties against whom the Petition Judgment was made. Whatever commercial interest they had in the Petition when it was presented, it seems clear (from the Petition Judgment itself) that they were not involved in the prosecution of the Petition at the end of the proceedings;
- (b) the Petition Judgment did not to any legally material extent deal with the same issues as are raised by the present action Writ action, as regards findings made against the MAS Parties. The case



management of this action and the Petition Proceedings, with each matter assigned to a separate Judge, presupposed that different issues fell to be determined in separate proceedings;

- (c) it was not open to the MAS Parties as non-parties to the Petition Proceedings to defend themselves in those proceedings against the allegations advanced by the Plaintiff herein. Any suggestion that they did has, as Mr Stewart QC rightly contended, an ‘Alice in Wonderland’ quality to it; and
- (d) having regard to the fact that the Petitioners’ case at the trial of the Petition Proceedings apparently entailed “throwing Mr Wallace under the bus”, it would be grotesquely unfair for D1-3 to be bound as privies by the adverse findings made against them in the Petition Judgment.

86. As far as findings made in relation to the Petitioners are concerned, again assuming the Petition Judgment to have “full” juridical effect, it would more arguably be an abuse of process to launch a collateral attack on those findings. However, such findings are likely to be peripheral to the Plaintiff’s claims and the Defendants’ defence to those claims. It is the MAS parties’ conduct which is most significantly in issue in the present action. They were not parties to the Petition Proceedings and I have found above that they have not been shown to be privies. It is accordingly far from “plain and obvious” at this stage that pursuit of such slender strands of their Amended Defence which relate to findings in the Petition Judgment (which are on the alternative hypothesis that the Petition Judgment has adjudicative effect binding on the parties to those proceedings) would amount to an abuse of process in this action.

D1-3’S STRIKE-OUT APPLICATION

Preliminary

87. At the beginning of the hearing of the Defendants’ Strike-Out Summons, I asked Mr Stewart QC whether it was not odd for an application to strike-out an action to be launched at such a late stage. The Summons was issued more than three years after the action had been commenced (on July 21, 2016), more than two years after a substantial Defence had been filed (July 10, 2018) and shortly after D1-3 had filed an Amended Defence (September 3, 2019) which ran to more than 100 pages (plus more than 40 pages of Appendices). It was difficult to avoid viewing this application, issued on November 15, 2019, as something of a “tit-for-tat” response to the Plaintiff’s Strike-Out Summons issued on September 30, 2019.

88. The Plaintiff’s opposition raised two main points of principle, apart from vigorously engaging with the merits of the strike-out complaints:



- (a) The complaints made were inappropriate for summary determination in the strike-out context; and
- (b) the appropriate remedy for any pleading deficiencies was to serve a request for further and better particulars.

89. It was clear by the end of the hearing that the strike-out application should be refused on discretionary case management grounds because:

- (a) none of the legal points raised were suitable for summary determination; and
- (b) the appropriate remedy for the pleading complaints was to serve a request for further and better particulars.

D1-3's Strike-Out Summons and the relevant Grand Court rule

90. The Summons sought the following main orders:

“1. That the Statement of Claim dated 26 July 2016 and amended on 1 November 2017 be struck out as against the 2nd Defendant pursuant to GCR O.18, r.19 (1)(a) as disclosing no reasonable cause of action.

2. Further or alternatively that the parts of the Amended Statement of Claim identified in the schedule hereto be struck out as against the 1st to 3rd Defendants on the grounds set out therein.”

91. The Schedule sought to strike-out specified paragraphs of the ASOC on the grounds that they disclosed no reasonable cause of action, were vexatious and/or embarrassing (the breach of contract claim and claim for procuring and/or inducing a breach of contract) and additionally (as regards the claim for unlawful tortious interference) on the grounds of insufficient pleading.

92. GCR Order 18 rule 19 provides as follows:

“Striking out pleadings and indorsements (O.18, r.19)

19. (1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that –

(a) it discloses no reasonable cause of action or defence, as the case may be; or

(b) it is scandalous, frivolous or vexatious; or



(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of the court, and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

(2) No evidence shall be admissible on an application under subparagraph (1) (a).

(3) This rule shall, so far as applicable, apply to an originating summons and a petition as if the summons or petition, as the case may be, were a pleading.”

93. Although the rule expressly permits an application to be made “*at any stage of the proceedings*”, “*still the application should always be made promptly, and as a rule before the close of pleadings*”: *Supreme Court Practice 1999*, paragraph 18/19/3. Because it is unusual for a strike-out application to be made, absent a ground-changing new development, after pleadings have been exchanged, the lateness of the present application from the outset seems to warrant heightened scrutiny of its merits. This preliminary view must be qualified in light of the following considerations. The Defence filed and presumably served in July, 2018 at various junctures did aver that specified paragraphs of the ASOC were liable to be struck-out because they either “*disclose no reasonable cause of action, are vexatious and abusive and should be struck out*” (Amended Defence, paragraph 144.3) or “*should be struck out because they are insufficiently pleaded*” (Amended Defence). Mr Stewart QC explained that these points could and should have been addressed in the Plaintiff’s Reply dated September 24, 2019. When they were not addressed, the following application was pursued. He illustrated a late strike-out application being considered based on developments in the case by reference to *AHAB v Saad* [2013 (1) CILR 202] at paragraph 95.
94. The Plaintiff’s counsel understandably emphasised the exceptional nature of the strike-out jurisdiction and its use being limited to “plain and obvious” cases. D1-3 in their Skeleton emphasised the importance of pleading with particularity, citing *AHAB v Saad* [2013 (1) CILR 202] where Smellie CJ opined as follows:

“29 It is axiomatic that a plaintiff must plead clearly all the facts necessary to give rise to its claim (see GCR, O.18, r.12). An insufficiency of pleading in regard to an important issue can result in the action being struck out.

30 The purpose of a pleading is to ensure that the parties and the court know what the matters in issue are. This is settled law, most recently reaffirmed by this court in TMSF v. Wisteria Bay Ltd. (37) (2007 CILR 310, at para. 18).

31 The requirement to give adequate particulars reflects the overriding principle that litigation, and particularly the trial itself, should be conducted fairly, openly, free from surprise and without unnecessary delay



or expense. A clear discussion of this equally settled proposition is presented in *Aktieselskabet Dansk Skibsfinansiering v. Wheelock Marden & Co. Ltd.* (2). 32 In that judgment, delivered by Bokhary, J.A. on behalf of the Hong Kong Court of Appeal, the following passage of general applicability appears ([1994] 2 HKC at 269–270):

‘ . . . [T]here are a number of things which pleadings should do. Ideally, they would do them from the outset. In any event, they must do them by the time they have been properly particularized—whether particularized on the pleader’s own initiative, upon the other side’s request, or pursuant to the court’s order. What those things are is to be gathered from the decided cases. That exercise has been performed by the learned editors of the 1993 Supreme Court Practice. And, as one sees from note 18/12/2 at pp 307–308 of Vol 1 thereof, the things which properly particularized pleadings must do are to:

(1) inform the other side of the nature of the case they have to meet as distinguished from the mode in which that case is to be proved;

(2) prevent the other side from being taken by surprise at the trial;

(3) enable the other side to know what evidence they ought to be prepared with and to prepare for trial;

(4) limit the generality of the pleadings, the claim and the evidence;

(5) limit and define the issues to be tried, and as to which discovery is required; and the hands of the party so that he cannot without leave go into any matters not included (although if the opponent omits to ask for particulars, evidence may be given which supports any material allegation in the pleadings).”

95. This is somewhat sobering guidance, in an era in which the historical emphasis on pleadings has clearly waned, for Judges who (as my own observations in the course of argument reflected) might be inclined to view pleadings as serving a merely formal function. Although pleadings typically play a silent role at trial, they play an important function in mapping out the course of the litigation. They are the primary source from which lists of issues are drawn. Pleadings also inform what witnesses should be called and what matters they should address in their witness statements. The Defendants’ pleading complaints cannot be breezily brushed aside. However, to the extent that D2-3 have sought to demonstrate on the basis of affidavit evidence that any claim is hopeless, in the exercise of my discretion I decline to make any such determinations at the interlocutory stage having regard to the nature of the claims asserted in this action. The evidential merits of the Plaintiff’s claims can only safely be assessed with the benefit of a full adjudication at trial.

Findings: the relevance of the failure to apply to set aside service on jurisdictional grounds

96. Mr Wardell QC submitted in oral argument that the right to challenge the sustainability of any claims had been lost because these Defendants had filed a summons seeking to challenge, *inter alia*, whether there was a serious issue to be tried and then withdrawn that Summons by a Consent Order dated October 25, 2017. He relied, in particular, on the principles articulated by Buckley LJ in *Chanel Ltd v F W Woolworth & Co Ltd* [1981] 1 WLR 485 at 492H, which was cited by Nugee J in *Holyoake-v-Candy* [2016] EWHC 3065 (Ch) at paragraph 13:

“The defendants are seeking a rehearing on evidence which, or much of which, so far as one can tell, they could have adduced on the earlier occasion if they had sought an adjournment, which they would probably have obtained. Even in interlocutory matters a party cannot fight over again a battle which has already been fought unless there has been some significant change of circumstances, or the party has become aware of facts which he could not reasonably have known, or found out, in time for the first encounter. The fact that he capitulated at the first encounter cannot improve a party’s position.” [Emphasis added]

97. Mr Stewart QC rhetorically asked: *“has the battle been fought?”* I accept the submission that the mere fact that a defendant is served abroad and accepts this Court’s jurisdiction over the dispute does not preclude a subsequent strike-out application on grounds which have been deployed in partial support of a jurisdictional challenge. This general proposition should stand whether or not the foreign defendant has simply voluntarily submitted to the jurisdiction at the outset or filed a jurisdictional challenge which has been withdrawn before it was heard. Where a plaintiff asserts multiple causes of action and a foreign defendant forms a view that a jurisdictional challenge is unlikely to succeed overall, withdrawal of such challenge ought not in principle to preclude such defendant from subsequently contending that one or more claims asserted against it does not disclose a reasonable cause of action.

98. In certain circumstances it might not be permissible to re-litigate jurisdictional points which were explicitly raised and then abandoned, for instance where the withdrawal of a jurisdictional challenge occurs after skeleton arguments are exchanged and the withdrawal is made without any reservation of rights. Here, reference was made to Mr Wallace’s First Affidavit which averred that *“there is no serious issue to be tried...and...such claims are devoid of merit”* (paragraph 102). This Affidavit (at paragraph 103) did not explicitly identify many of the legal points raised in the context of the present application; however there is broad overlap between the “serious issue to be tried” and “strike-out” grounds. Litigants withdrawing jurisdictional challenges but wishing to reserve the right to make arguably similar strike-out challenges may well be advised, *ex abundante cautela*, to expressly reserve such rights.



99. I find nonetheless that D1-3 are neither estopped nor guilty of abuse of process in pursuing their “no reasonable cause of action” points in all the circumstances of the present case. The merits of jurisdictional challenges invariably raise complex issues the merits of which are rarely easy to quickly assess. The Court should be slow to penalize foreign litigants who have understandably filed jurisdictional challenges somewhat precipitously, and then thought better of it, for voluntarily electing to submit to this jurisdiction of this Court. Nor should foreign litigants be deterred from preserving their right to pursue a potentially meritorious jurisdictional challenge from filing an application before the merits of it can be comprehensively assessed. Further and in any event, this Court’s case management powers under the Preamble to the GCR and GCR Order 18 rule 19 should not be fettered in the absence of clear grounds for doing so. A plaintiff cannot insist on pursuing a case which should be struck-out to trial merely based on the exigencies of litigation steps taken in the past.

Findings: paragraph 1 of D1-3’s Strike-out Summons

Overview

100. In the ‘Skeleton Argument of the MAS Parties in Support of their Strike-out Summons of 15.11.29’, the following submissions were advanced:

“3.1 In respect of the claim against MCM, no particulars whatsoever are given of any of the necessary elements of any of the claims asserted against it: it is trite that any claim should be properly particularised so as to allow a Defendant to know the case it has to meet; the position is a fortiori when the pleading involves fraud or dishonesty. Further, the pleading does not meet the requirement that, in the case of fraud or dishonesty, it must disclose a case which is consistent only with dishonesty...”

Contract claim

101. The case against D2 (referred to in the ASOC as “Millinium” and in the Amended Defence as “MCM”) was then addressed by reference to each category of claim. As regards the contract claim, it was submitted:

“13. The claim MCM breached the Cayman Partnership Agreement can and should be struck-out without the need for detailed analysis: it is not pleaded that MCM was a party to the Cayman Partnership Agreement (which it was not) and nor are particulars provided of any acts of MCM said to have breached the agreement, still less which provisions of it were breached by MCM’s acts. The claim is thus hopeless.”

102. Paragraph 100 of the ASOC states: *“The Defendants breached the Cayman Partnership Agreement in the manner set out below”*. It is clear on a straightforward reading of paragraphs 101-104 of the ASOC that no breach of contract claim is



pleaded against MCM or any of the MAS Parties. A claim is asserted against former Defendants 5 and 6 and Mr Marshall, the 4th Defendant for breaching the relevant contract. There is no claim to be struck-out, absent an obtuse reading of the word “Defendants” in the prefatory context of paragraph 100 (and indeed paragraphs 12.1 and 96.3.1) of the ASOC as including D1-3. This strike-out ground is accordingly refused.

Conspiracy claim

103. A fulsome critique of the pleading of the conspiracy claim (which persuasively identified a lack of particularity in pleading the basis of Millinium’s agreement to participate in the fraud and intent to injure, as well as a lack of coherence in terms of attribution of knowledge) is set out in the Skeleton and was persuasively advanced in oral argument. D1-3’s Skeleton concludes with the following submission:

“The conspiracy claim should be struck out because – for the above reasons – it has not been properly put. There is no case in conspiracy against MCM that has been ‘specifically and distinctly pleaded with the utmost particularity’”.

104. Mr Wardell QC’s most effective response to this fulsome attack was to contend that further and better particulars should be requested and that striking-out was inappropriate. I agree. It is not plain and obvious that the want of particularity cannot be cured and that this claim is hopeless or bound to fail. For the avoidance of doubt, I express the provisional view that D1-3 are entitled to further particulars of the matters somewhat broadly described in their Skeleton at paragraphs 14-18 and. Most importantly, explaining the basis of the Plaintiff’s case on attribution of knowledge. In concluding in relation to this and other strike-out grounds that further and better particulars may be sought, I do not ignore the fact that the Amended Defence foreshadowed the present strike-out complaints and that the Plaintiff could have, to some extent, addressed them in its Reply. On balance, however, I find that bearing in mind the fact that D1-3 were able to prepare a fulsome Amended Defence, they should have deployed the conventional weaponry of particulars requests before resorting to the nuclear option of applying to strike-out.

Procuring or inducing a breach of the Cayman Partnership Agreement

105. The MAS Parties’ Skeleton (at paragraph 20.3) complains about a lack of particularity in the case against Millinium for procuring or inducing a breach of the Partnership Agreement, it being implicitly accepted that some acts on Millinium’s part have been pleaded. On the face of this complaint, it is far from plain and obvious that the claim is hopeless and should be struck-out. The appropriate recourse is for further and better particulars to be sought.



Unlawful interference

106. A more subtle point is advanced in relation to the Plaintiff's unlawful interference pleas in the MAS Parties' Skeleton Argument:

“20.6 The pleaded case as to acts of unlawful interference is put at paragraph 111.2. It is entirety derivative on the other pleaded causes of action, and thus circular: it is said, ‘The Defendants caused such harm to the Cayman GP and/or the Cayman Partnership through unlawful means actionable at the suit of the Cayman Partnership and/or Cayman GP, namely: (1) unlawful means conspiracy ..., (2) breach of contract and/or confidence ..., (3) procuring/inducing a breach of contract and/or confidence’.

20.7 As the pleas that MCM is liable for any of the torts said to constitute its acts of unlawful interference are improperly pleaded (if at all), so it follows that there can be no properly pleaded case of unlawful interference.

20.8 The pleaded case as to MCM's intention in respect of this tort is as set out above: no separate intention is pleaded, and the on state of the pleadings Plaintiff cannot rely on the doctrine of attribution for the reasons set out above.”

107. This is, on careful analysis, simply another arguably valid pleading complaint for which the appropriate remedy is a further and better particulars request.

Procuring or inducing a breach of confidence

108. D1-3 contend (Skeleton, paragraph 21) that:

“...specifically it should further be struck out against MCM because no acts of procuring or inducing are alleged against it. The case is also put at paragraph 108.1. For the same reasons as set out above, there are no specific acts pleaded against MCM of requesting, encouraging or persuading any of ACC, CAML or van Eyck to breach any relevant duty of confidence.”

109. It is expressly pleaded in paragraph 108.1 of the ASOC that Millinium (together with MAS and Mr Wallace) “requested and/or encouraged and/or persuaded” certain person to provide them with confidential information about the Cayman Partnership. This complaint, narrowly read, is misconceived; however if the real complaint is that further particulars should be given, these may be sought.



Findings: paragraph 2 of D3-4's Strike-out Summons

Breach of contract

110. The MAS Parties make the same point they make about the lack of any pleaded case against Millinium for breach contract. I agree no case is pleaded but also find there is no claim to strike-out.

Unlawful interference

111. The critique of the Plaintiff's unlawful interference claim as against all the MAS Parties was somewhat intricate:

"24.1 The relevant paragraph is 111.1 of the ASOC where it is alleged that the 'Defendants caused such harm to the Cayman GP and/or the Cayman Partnership through unlawful means actionable at the suit of the Cayman Partnership and/or the Cayman GP';

24.2 The elements of the tort are set out at paragraph 20.7 above – it is essential that there is a wrongful interference by the Defendant with the actions of a third party in which the plaintiff has an economic interest.

24.3 Thus in order for there to be a tort it would have to be alleged either:

24.3.1 that the Defendants caused harm to the Cayman GP actionable at the suit of the Cayman Partnership; or

24.3.2 that the Defendants caused harm to the Cayman Partnership actionable at the suit of the Cayman GP;

24.4 The second possibility cannot be contended for – the Cayman GP has no right to recover, for itself, loss suffered by the Cayman Partnership. It stands as a trustee to the partnership.

24.5 The first possibility also cannot stand. The Cayman Partnership cannot itself sue for loss suffered by the GP.

24.6 No explanation is set out in the pleading as to how the Cayman GP could stand as a third party in relation to the Cayman Partnership or vice versa. Such explanation requires as an essential element an explanation as to how the unlawful acts have affected the freedom of the Cayman GP to deal with the Cayman Partnership; or have affected the freedom of the Cayman Partnership to deal with the Cayman GP. As set out in Emerald Supplies: '...the unlawful acts must affect the freedom of the third party to deal with the claimant. This reflects the rationale as explained by Lord Lindley in Quinn v Leatham [1901] AC 495. If that freedom remains, the tort is not committed even though the defendant acts unlawfully and thereby makes a profit at the expense of the claimant who therefore suffers damage.'



24.7 Where the Cayman Partnership can only act through its trustee, the Cayman GP, neither of them has any liberty to deal with the other in any meaningful sense. Accordingly, there can have been no such interference with the Cayman GP's liberty to deal the Cayman Partnership (or vice versa).

24.8 Further, as this is a tort, in order to succeed the double-actionability principle applies in accordance with the common law as applied in England as set out in Rules 202 and 203 in Dicey & Morris..."

112. Mr Wardell QC submitted that the short answer to the submissions at paragraph 24.2 (*et seq*) was that the Plaintiff had a separate economic interest to that of the Partnership and had suffered indirect loss in respect of its fees as a result of damage caused to the Partnership. Mr Stewart QC in reply submitted that this response was legally deficient and that it appeared the Plaintiff's was standing by its pleadings. Having regard to the range of other issues before me I am unable to form a clear view of the merits of a somewhat nuanced legal point, one way or the other. In short, I am unable to determine at this stage that it is plain and obvious that the pleaded case discloses no reasonable cause of action or is bound to fail. In my judgment the Defendants should be at liberty to request further particulars and to renew this point, if needed, at a later stage after the Plaintiff has had an opportunity to improve the clarity of its case. This strand of the strike-out ground is accordingly refused. However, it remains to consider the double actionability points raised in relation to this and other claims.

The double actionability rule

113. In relation to both the unlawful interference and procuring and/or inducing a breach of confidence claim, D1-3 relied upon the following governing principles from *Dicey & Morris*:

"RULE 202

Whether an act done in a foreign country is or is not a tort (i.e. a wrong for which an action can be brought in England) depends upon the combined effect of the law of the country where the act is done (lex loci delicti commissi) and the law of England (lex fori) or in exceptional circumstances on the law of another country if this has the most significant relationship with the occurrence and the parties.

RULE 203 (1) As a general rule, an act done in a foreign country is a tort and actionable as such in England, only if it is both (a) Actionable as a tort according to English law, or in other words is an act which, if done in England, would be a tort; and (b) Actionable according to the law of the foreign country where it was done. (2) But a particular issues between the parties may be governed by the law of the country which, with respect to that issue, has the most significant relationship with the occurrence and the parties."



114. The MAS Parties submitted:

“24.9 The events relied on occurred almost exclusively in Australia or New Zealand;

24.10 No foreign law is pleaded despite the requirement that the same be pleaded;

24.11 Such a pleading is particularly important given the uncertain nature of the tort in either Australia or New Zealand and the fact that there has been no recognition of such a tort at all in Australia.

25. In relation to the allegations concerning the procurement or inducement of breach of confidence:

25.1 The double-actionability rule again applies;

25.2 The alleged tort is not recognised in Cayman; 25.3 No particulars of foreign law are, again, supplied; and

25.4 The tort is not recognised in Australia or New Zealand.

26. No case has been found where this tort has been recognised in the Cayman Islands; and similarly no case has been found where the tort has been recognised in England.”

115. The Plaintiff’s position set out in its Reply on the need to plead foreign law was as follows:

“57. The Plaintiff is not required to plead or prove particulars of Australian or New Zealand law because it does not contend that the laws of those jurisdictions differ materially from the law of the Cayman Islands.”

116. The directions Order did not grant leave for expert evidence on foreign law to be adduced. However, in support of their strike-out application, the MAS Parties adduced Expert Reports on Australian (New South Wales) law (Ms Alexandra White) and New Zealand law (Ms Wendy Kemp). The Plaintiff produced Expert Reports on Australian law (Mr Alan Sullivan QC) and New Zealand law (Mr Rhys Harrison QC) in response. Mr Sullivan QC disagrees with Ms White’s opinions that procuring or inducing a breach of confidence and unlawful interference are not recognised under Australian law. He concedes the former claim’s status is uncertain, but cites authority expressly recognising the latter cause of action. Mr Harrison QC disagrees with Ms Kemp’s opinion that procuring or inducing a breach of confidence is not a tort recognised by New Zealand law. He accepts the position is unclear but describes this area of law as developing on an incremental basis and opines that the Plaintiff’s specific claim would likely be recognised. It is self-evidently not plain and obvious that the Plaintiff’s claims are on legal grounds unsustainable; this point is inappropriate for determination in the context of a strike-out application. This strike-out ground must also be refused.

CONCLUSION

117. The Plaintiff's Strike-out Summons is dismissed on the primary ground that although McMillan J's decision that he had jurisdiction to deliver the Petition Judgment after the Petition Proceedings had been settled and withdrawn cannot be challenged and was correct in any event, the Petition Judgment did not have preclusive effect for *res judicata* purposes. D1-3's Strike-out Summons is dismissed on the primary ground that the Defendants have not established any grounds for striking-out the impugned portions of the ASOC. To the extent that arguably valid pleading points have been advanced, their remedy is to serve further and better particulars requests.
118. Unless either party applies by letter to the Court to be heard as to costs within 21 days of the delivery of this Ruling, the following Orders shall be made as to costs. The Plaintiff shall pay the Defendants' costs of the Plaintiff's Strike-out Summons to be taxed if not agreed on the standard basis. D1-3 shall pay the Plaintiff's costs of their Strike-out Summons to be taxed if not agreed on the standard basis.



THE HONOURABLE MR JUSTICE IAN RC KAWALEY
JUDGE OF THE GRAND COURT