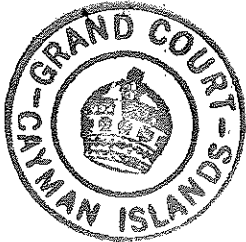


1 **IN THE GRAND COURT OF THE CAYMAN ISLANDS**  
2 **FINANCIAL SERVICES DIVISION**

3 **CAUSE NO FSD: 26 OF 2013 (AJJ)**

4 **Before The Hon Mr Justice Andrew J. Jones QC**

5 **In Chambers, 12<sup>th</sup> April 2013**



6  
7 **BETWEEN:**

8 **PORTA REEF**

9 First Plaintiff

10  
11 **INDIA ENTERTAINMENT CITY**

12 Second Plaintiff

13  
14 **AND:**

15  
16 **MS FATENAH HASHIM SAWAN**

17 Defendant

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21 **Appearances:** Mr James Eldridge and Ms Victoria Lissack of Maples and Calder for the Plaintiffs

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27 **REASONS**  
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31 **Introduction and factual background**

32 1 This is an *ex parte* application by Porta Reef and India Entertainment City (which I shall refer  
33 to individually as Porta Reef and "IEC" and collectively as "the Funds" or "the Plaintiffs"),  
34 made pursuant to GCR Order 11, for leave to serve an originating summons out of the  
35 jurisdiction upon Ms Fatenah Hashim Sawan ("Ms Sawan"), a citizen of Saudi Arabia who is  
36 resident in the Kingdom of Bahrain.

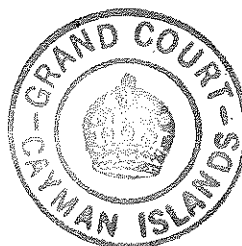
1 2 The Funds are companies incorporated in the Cayman Islands on 23<sup>rd</sup> May 2007 and 10<sup>th</sup>  
2 March 2008 respectively and they carry on business as "closed ended" private equity funds in  
3 the manner described in their respective private placement memoranda. They were promoted  
4 by Abu Dhabi Investment House PJSC ("ADIH"), an investment adviser and fund manager  
5 whose principal place of business is in Abu Dhabi, but it also has a representative office in  
6 Bahrain. The Funds are managed by ADIH in consideration for management fees,  
7 performance and placement fees, as described in the private placement memoranda. Their  
8 boards of directors are comprised of ADIH employees. There are no independent directors.  
9 Nor is there any independent administrator. It follows that ADIH is responsible for making all  
10 investment management decisions and performing all the administrative functions for the  
11 Funds, including the conduct of this litigation. Porta Reef was promoted for the principal  
12 purpose of developing a specific residential real estate project on Reef Island in Bahrain. IEC  
13 was promoted to invest in a multi-faceted infrastructure project in India's first "entertainment  
14 city" near Mumbai.

15 3 Ms Sawan invested in both Funds. By an undated subscription agreement (executed some  
16 time in June or July 2007) she subscribed US\$250,000 for the issue of 25,000 ordinary shares  
17 of US\$0.01 in the capital of Porta Reef. By a subscription agreement dated 26<sup>th</sup> June 2008 she  
18 subscribed US\$1 million for 100,000 ordinary shares of US\$0.01 in the capital of IEC. For  
19 present purposes, it is not necessary to distinguish between these subscription agreements and  
20 I shall refer to them collectively as "the Subscriptions Agreements." The shares were duly  
21 issued and Ms Sawan is recorded as a shareholder in each Fund's register of members. The  
22 Funds are described as "closed ended", meaning that their shares are not redeemable at the  
23 option of the shareholders and will be redeemed or repurchased only at the option of the  
24 companies. Ms Sawan signed the Subscription Agreements personally. They are written in  
25 both English and Arabic and investors are invited to elect the language in which they wish to  
26 correspond. She elected to correspond in English. They are expressed to be governed by  
27 Cayman Islands law and contain express (non-exclusive) submissions to the jurisdiction of  
28 this Court.



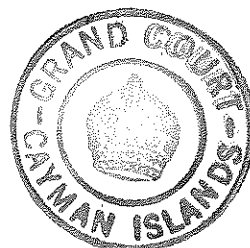
1 4 Construction of the Porta Reef development has been completed, but the sale of the  
2 apartments progressed much more slowly than was envisaged by the private placement  
3 memorandum. On 27<sup>th</sup> December 2009 ADIH wrote to investors (including Ms Sawan) on  
4 behalf of Porta Reef informing them that, as a result of delay to the project beyond its control,  
5 it had decided to buy back 25% of each investor's shares at the subscription price, on the basis  
6 that the remaining capital and profit share would be paid out when all the apartments have  
7 been sold. Ms Sawan replied on 4<sup>th</sup> January 2010 to the effect that ADIH's letter raised  
8 numerous issues about the project which ought to be addressed properly and not in what she  
9 regarded as a perfunctory and dismissive manner. ADIH addressed her concerns in a letter  
10 dated 10<sup>th</sup> January 2010. She appears to have been satisfied with the response because she  
11 returned her original share certificate and accepted payment of US\$62,500 without raising any  
12 further questions or complaint. The result is that her shareholding in Porta Reef was reduced  
13 from 25,000 to 18,750 shares. Further 10% partial redemptions took place in March and June  
14 2011. In May 2012 ADIH wrote to investors informing them that a number of apartments  
15 remained unsold and that they would be offered the option of swapping their shares for  
16 apartments as a means of realising the company's assets more quickly. Finally, on 4<sup>th</sup>  
17 November 2012 investors were informed that swap transactions had been concluded in  
18 respect of all the remaining apartments with the result that the company can now be liquidated  
19 and its net assets distributed. The investors will realise a substantial loss. ADIH subsequently  
20 informed Ms Sawan that she is likely to receive a total return amounting to about 61% of the  
21 funds originally invested.

22 5 The IEC project has also encountered delays and difficulties which have been disclosed to  
23 investors in quarterly investments reports. The September 2012 Investor Report states that its  
24 NAV was US\$8.86 per share as at 30<sup>th</sup> June 2012, reflecting an unrealised negative return for  
25 Ms Sawan of around 11.5%. The report says that ADIH has appointed a new management  
26 team in India and engaged an investment bank to help implement a proposed two stage exit  
27 strategy which involves finding a local joint venture partner as a means of attracting a new  
28 institutional investor who might buy out the existing shareholders.



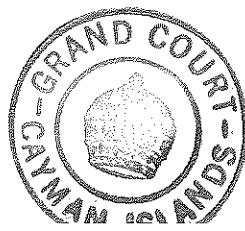
1   **The Bahraini proceedings**

2   6     On 12<sup>th</sup> November 2012 Ms Sawan’s Bahraini lawyers wrote a letter to ADIH in which it is  
3     asserted that ADIH’s solicitation of Ms Sawan to subscribe for shares in the Funds was  
4     unlawful, with the result that she is entitled to claim a refund of US\$1,250,000 and  
5     compensation for “loss of opportunities”. Four specific grounds are relied upon in support of  
6     this assertion. Firstly, it is said that ADIH was registered in the Kingdom of Bahrain only as a  
7     representative office and, as such, had no authority pursuant to the relevant regulatory laws to  
8     undertake any regulated financial services. Secondly, it is said that ADIH marketed the shares  
9     in the Funds without registering the private placement memorandum with the Central Bank of  
10    Bahrain. Thirdly, it is said that the solicitation of Ms Sawan to invest in Porta Reef was a  
11    breach of the terms of its private placement memorandum which barred Bahraini citizens and  
12    residents from investing in its shares. Fourthly, it appears to be said that ADIH was in breach  
13    of duty by marketing shares in the Funds to an unsophisticated investor such as Ms Sawan, for  
14    whom it was an unsuitable investment. ADIH’s lawyers replied by a letter dated 13<sup>th</sup>  
15    December 2012 in which they rejected each of these allegations. Firstly, it is said that ADIH  
16    was authorised under the applicable regulatory laws to market securities issued by foreign  
17    domiciled issuers such as the Funds. Secondly, as I understand it, the argument is that ADIH  
18    was not itself in breach of the requirement to submit the private placement memoranda to the  
19    Central Bank for its approval, but this seems to miss the point that ADIH was acting as  
20    manager on behalf of the Funds. It is also said that this rule does not apply because the shares  
21    were not offered “for public subscription”. Thirdly, it is said that the bar against soliciting  
22    investments in Porta Reef from Bahraini residents is merely contractual and therefore capable  
23    of being waived. Furthermore, it is said that ADIH did not “solicit” any investment from Ms  
24    Sawan. Finally, it is said that she would be treated as a “sophisticated investor” for the  
25    purposes of Cayman Islands law. A meeting between the lawyers took place but the matters in  
26    dispute were not resolved and on 23<sup>rd</sup> December 2012 Ms Sawan commenced proceedings  
27    against ADIH in the Bahraini court, although Mr Waltner says that it was not actually served  
28    until 23<sup>rd</sup> January 2013.



1 7 An English translation of Ms Sawan's "Claim Statement" has been put in evidence but I do  
2 not have the benefit of any expert evidence which explains the causes of action and I infer  
3 from the content of his affidavits that Mr Waltner, ADIH's general counsel, is probably  
4 qualified as a lawyer in England rather than Bahrain. This pleading appears to assert two  
5 distinct claims. Firstly, it claims an order "Voiding all the transactions and contracts between  
6 [ADIH] and [Ms Sawan] regarding the investments in the two projects" on the ground that  
7 ADIH's failure to comply with the applicable regulatory and licensing requirements under  
8 Bahraini law. In this regard, I think that the statement of claim probably does no more than  
9 repeat the claims asserted in the letter before action. Mr Waltner makes the point, which has  
10 been emphasised by counsel, that the Funds are not themselves named as defendants but it  
11 seems to me that Ms Sawan must be contending, *inter alia*, that the Subscription Agreements  
12 are void (or voidable) by reason of the regulatory breaches allegedly committed by ADIH  
13 with the result that she is entitled to have her money back. However, I note from her reply that  
14 she denies the existence of any contracts with the Funds and asserts her claims only against  
15 ADIH. Secondly, Ms Sawan is claiming (in the alternative) the same relief "due to fraud".  
16 She appears to be alleging that what she was told by ADIH's (unidentified) representative  
17 and/or what he deliberately omitted to tell her, created a false impression about the true nature  
18 of the investments, with the result that she is entitled to have her subscription money returned.  
19 I sympathise with Mr Waltner's complaint that this allegation is expressed in the most  
20 generalised way which would not be acceptable under the rules applicable in this Court.

21 8 ADIH served its defence in time for a procedural hearing on 13<sup>th</sup> March. It makes three  
22 points. First, it is contended that the Bahraini court has no jurisdiction and that the appropriate  
23 forum for Ms Sawan's claims is this Court. Second, it is said that the case should be  
24 dismissed because ADIH "lacks capacity" in the sense that it is not party to the Subscription  
25 Agreements and that the Funds themselves are the only proper parties. Third, and  
26 alternatively, ADIH contends that the case should be dismissed on the merits for lack of  
27 evidence and proof. Ms Sawan served a further pleading in reply for a hearing on 9<sup>th</sup> April in  
28 which she appears to accept that she did sign the Subscription Agreements but denies having  
29 any contractual relationship with the Funds. For present purposes, I characterise the Bahraini

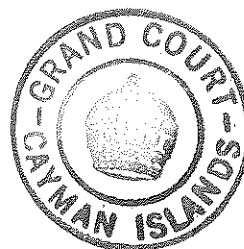


1 proceeding as a claim by Ms Sawan that the Subscription Agreements are void or voidable by  
2 reason of various breaches of the Bahraini financial services regulations and, alternatively, by  
3 reason of fraudulent misrepresentation and/or material non-disclosure, with the result that  
4 ADIH is liable to repay her original subscriptions of US\$1,250,000.00.

5 9 As part of its response to the Bahraini proceedings, ADIH issued the originating summons  
6 against Ms Sawan in the name of the Funds, by which they both seek declarations that (1) the  
7 Subscription Agreements are valid and binding contracts between Ms Sawan and the Funds;  
8 (2) pursuant to these Subscription Agreements, the Funds duly issued shares to Ms Sawan  
9 which are properly recorded in their respective registers of members; (3) as a registered owner  
10 of shares Ms Sawan is bound by the Funds' memoranda and articles of association (which I  
11 think are in identical form) including the provisions governing the redemption and repurchase  
12 or cancellation of shares; and (4) in the circumstances, there is no legal or factual basis on  
13 which Ms Sawan can require the Funds to cancel her shares. Taken as a whole, I characterise  
14 the relief sought in this Originating Summons as a declaration that there is no legal or factual  
15 basis upon which Ms Sawan is entitled to rescind the Subscription Agreements and claim  
16 repayment of the subscription money.

17 **The legal test for allowing service out of the jurisdiction**

18 10 The test for leave to serve out of the jurisdiction is well settled. Before making an order  
19 granting the Plaintiffs leave to serve their originating summons on Ms Sawan in Bahrain, the  
20 Court must be satisfied that the Funds have demonstrated a good arguable case that the  
21 pleaded claim falls within one or other of the categories specified in GCR Order 11, rule 1(1)  
22 and therefore has an appropriate nexus to the Cayman Islands. The Court must also be  
23 satisfied that the originating summons and supporting affidavits disclose a serious issue to be  
24 tried on the merits. In the present context, this means that I need to be satisfied that there is an  
25 arguable basis upon which the Court could properly exercise its discretionary jurisdiction to  
26 grant the declarations sought by the Plaintiffs. Finally, the Court should not exercise its  
27 discretion to grant leave unless it appears that the case is a proper one for service out of the  
28 jurisdiction.



1 11 Counsel argues that the case falls within GCR Order 11, rules 1(1)(d) and/or (ff) which  
2 provide as follows :-

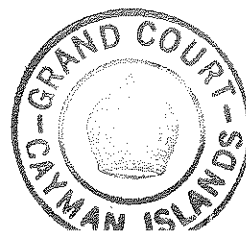
3 “(d) the claim is brought to enforce, rescind, dissolve, annul or otherwise affect a contract or  
4 to recover damages or other relief in respect of the breach of a contract being (in either case) a  
5 contract which ... (iii) is by its terms, or by implication, governed by the law of the Islands; or  
6 (iv) contains a term to the effect that the Court shall have jurisdiction to hear and determine  
7 any action in respect of the contract”.

8 “(ff) the claim is brought against a person who is or was ..... a member of a company  
9 registered within the jurisdiction ..... and the subject matter of the claim relates in way to ....  
10 the status, rights or duties of such .... member ...in relation thereto”.

11 12 Paragraphs 1.1 and 1.2 of the originating summons seek declarations that the Subscription  
12 Agreements are valid and binding contracts between the Funds and Ms Sawan. The  
13 Subscription Agreements are expressed to be governed by Cayman Islands law and they  
14 contain terms that this Court shall have jurisdiction to determine any action in respect of  
15 them. However, the Plaintiffs do not allege that Ms Sawan has acted in breach of contract.  
16 There is no claim to “enforce, rescind, dissolve or annul” the Subscription Agreements. This  
17 claim can only fall with rule 1(1)(d) if it can be said that a claim for a negative declaration  
18 that the contracts are not liable to be rescinded “otherwise affects the contracts.” The English  
19 High Court considered the meaning of this phrase (which is derived from the former RSC  
20 O.11(1)(f) ) in *BP Exploration Co (Libya) Ltd v. Hunt* [1976] 3 All ER 879. Kerr J observed  
21 that the words “otherwise affect” are very wide and held that a claim for a declaration that a  
22 contract had been discharged by frustration is a claim which “affects” the contract in question.  
23 Similarly, I think that a claim for a declaration that a contract has not been rescinded falls  
24 within this rule.

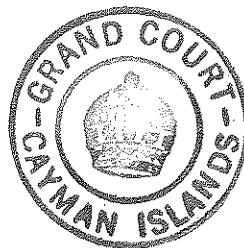
25 **Is there an arguable case for the grant of declarations sought by the Plaintiffs?**

26 13 Having decided that the first limb of the test is satisfied, I now turn to ask myself whether the  
27 originating summons and supporting evidence discloses any arguable basis upon which this  
28 Court could properly exercise its discretion to grant the declarations sought. Although the first  
29 limb of the claim is expressed as a positive declaration that the subscription agreements are



1 valid and binding contracts, taken as a whole I characterise it as a claim for a declaration that  
2 there is no legal or factual basis on which Ms Sawan is entitled to rescind the Subscription  
3 Agreements and claim a refund of the subscription money. Although not expressed as such, in  
4 reality it is a claim for declarations that the Funds are not liable to repay the subscription  
5 money and that her right is limited to participating as a shareholder in any capital distribution.  
6 It is a claim for a negative declaration made in circumstances where Ms Sawan has already  
7 commenced proceedings, albeit against the Funds' manager rather than the Funds themselves,  
8 in which she claims that the "transactions and contracts" pursuant to which she paid  
9 US\$1,250,000 to ADIH are void. During the course of argument, I asked counsel whether he  
10 intended to put his case on the assumption that the facts alleged by Ms Sawan in relation to  
11 regulatory breaches and fraud are true. He said that he would not proceed in this way. The  
12 intention is to ask this Court to declare that there is no legal and factual basis for rescinding  
13 the Subscription Agreements and claiming repayment of the subscription money. I accept  
14 that this Court has jurisdiction to make a negative declaration, even when the matter is already  
15 pending before a foreign court, but I do not think that the Plaintiffs' originating summons and  
16 supporting affidavits disclose an arguable case for such relief for the following reasons.

17 14 First, I think that the Funds' claim is based, at least in part, upon hypothetical facts in the  
18 sense that Ms Sawan has not yet been required by the Bahraini court to particularise her  
19 allegations of fraud. The relief sought in her statement of claim includes "Voiding all the  
20 transactions and contracts between [ADIH] and [Ms Sawan] regarding the investments in the  
21 two projects named "India's Entertainment City and Porta Reef", due to fraud,..." The  
22 factual narrative in this pleading does not contain any statement of the representations alleged  
23 to have been made and the reasons why they were false. Nor does it set out any legal and  
24 factual basis upon which ADIH could be liable for non-disclosure. In the absence of any  
25 particularised claim, I find it impossible to envisage this Court being able to declare that there  
26 is "no legal or factual basis on which [Ms Sawan] can require [the Funds] to cancel the  
27 shares" based upon fraudulent misrepresentation and/or fraudulent non-disclosure. The Funds  
28 cannot obtain a declaration of non-liability (to repay the subscription money) so long as Ms

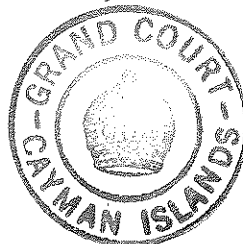


1 Sawan does not formulate her claim in a way which is capable of being rebutted. The Funds  
2 cannot obtain a negative declaration by default. In his written submission counsel stated that –

3 “The Funds are not aware of anything which could be said to amount to a "fraud". Even with  
4 their duty of full and frank disclosure firmly in mind, it would not be appropriate for the  
5 Plaintiffs to engage in free-range speculation as to what exactly Ms Sawan has alleged, or  
6 what she might propose to allege in the future. The Plaintiffs would not propose to  
7 "box at shadows". Of course, should leave to serve be granted, Ms Sawan will have every  
8 opportunity in these proceedings to make such allegations as she sees fit, provided she does so  
9 on a proper evidentiary basis and with an appropriate degree of particularity.”

10 To my mind, counsel has explained exactly why his claim must fail. He will be left in the  
11 position of “boxing at shadows”.

12 15 To the extent that Ms Sawan’s claim is based upon the allegation that the Funds’ shares were  
13 marketed by ADIH in a manner which contravened the applicable Bahraini regulatory laws, it  
14 cannot be said to lack particularisation. It is set out in a specific way in both the letter before  
15 action and in her statement of claim. On any view, the Bahraini court is best placed to  
16 determine whether or not there has been a breach of the Bahraini regulatory laws and counsel  
17 says that he is not asking this Court to determine the issue. The starting point for this part of  
18 his argument is the proposition that the material or essential validity of a contract is governed  
19 by its proper law. The proper law of the Subscription Agreements is expressed to be Cayman  
20 Islands law. He says that there is nothing unlawful about these contracts from the perspective  
21 of Cayman Islands law. An exception to this principle is that a contract which is lawful by its  
22 proper law may still be invalid, in so far as the performance of the contract would be unlawful  
23 by the law of the country where the contract is to be performed (the *lex loci solutionis*). It  
24 follows that, even if Ms Sawan can make good her allegations that ADIH breached any  
25 Bahraini regulatory rules when marketing the Funds' shares, this exception would not apply to  
26 invalidate the Subscription Agreements. Counsel argues that the Subscription Agreements  
27 were not *performed* in Bahrain. "Performance" includes doing in a foreign country something  
28 that it is illegal to do. Even if the original marketing of the shares was done in breach of the  
29 Bahraini regulatory laws, the performance of the Subscription Agreements does not require  
30 either party to do anything in Bahrain. However, in answer to my question, Counsel

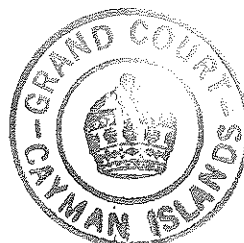


1 specifically said that he does *not* intend to ask this Court to make a declaration that, as a  
2 matter of Cayman Islands law, the Subscription Agreements are binding and enforceable in  
3 accordance with their terms notwithstanding that ADIH acted in breach (or is assumed to have  
4 acted in breach) of the regulatory laws as alleged in Ms Sawan’s letter before action and/or  
5 statement of claim. This would seem to leave the Court in the position of being asked to  
6 declare that there is no legal or factual basis upon which the Subscription Agreements could  
7 be rescinded on grounds of fraudulent misrepresentation and/or non-disclosure, which I  
8 regard as a hypothetical exercise because it would involve “boxing at shadows”.

9 16 Second, there appears to be no arguable basis upon which it can be said that the declarations  
10 sought in the originating summons would achieve any useful objective. The requirement that  
11 a declaration must be of some utility is described in Zamir & Woolf’s *The Declaratory*  
12 *Judgment* (3<sup>rd</sup> Edition) in the following way (at paragraph 4.096) –

13 “The requirement that a declaration must serve some useful purpose does not mean that the  
14 claimant should be in a position to demonstrate that he will benefit in a material or tangible  
15 way as a result of the declaration. Utility only requires that the declaration of the court should  
16 solve a real difficulty with which the claimant or applicant is faced. .. It may be sufficient if  
17 the declaration, though not absolutely necessary, will be convenient and useful.”

18 Counsel argues that the Funds need to know that their share registers are accurate and that the  
19 declaration sought will definitively determine that Ms Sawan will not be entitled to the return  
20 of her subscription money, at least from the Funds, and that she will only be entitled to the  
21 same capital distributions as the other shareholders. The difficulty with this argument is that  
22 there is no expert evidence before the Court from which to infer that the declarations sought  
23 in this proceeding might be recognised as a defence to the claims made against for ADIH in  
24 the Bahraini proceeding. The difficulty facing Porta Reef in particular, is that it needs to  
25 determine its NAV in order to make a final capital distribution, for which purpose its needs to  
26 know whether or not to make a provision for re-paying Ms. Sawan’s subscription money  
27 and/or indemnifying ADIH in the event that the Bahraini court finds that it is personally liable  
28 to repay her. The declarations sought in this proceeding will only help resolve this difficulty if  
29 they can be relied upon as a defence by ADIH. For present purposes, I need only be satisfied



1 that, *arguably*, they could be relied upon as a defence, but I do not think that I can properly  
2 reach such a conclusion in the absence of any expert evidence of Bahraini law.

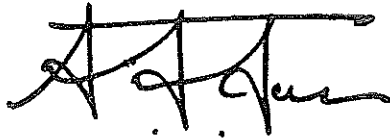
3 **Conclusion**

4 17 For these reasons I do not think that the Plaintiffs have demonstrated an arguable case for the  
5 grant of declarations in the terms sought by their originating summons. It follows that I should  
6 not grant leave for it to be served out of the jurisdiction. Accordingly, this application is  
7 dismissed.

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10 DATED this 26<sup>th</sup> day of April 2013

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18 **The Hon. Mr. Justice Andrew J. Jones, QC**  
19 **JUDGE OF THE GRAND COURT**

