

1 **IN THE GRAND COURT OF THE CAYMAN ISLANDS**
2 **FINANCIAL SERVICES DIVISION**
3

4 **Cause No: FSD 2/2014**

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6 **BETWEEN:**

EXECUTIVE WEALTH MANAGEMENT

PLAINTIFF

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10 **AND:**

THARWA INVESTMENTS S.A.

DEFENDANT

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16 **Appearances:**

**Mr. Ian Huskisson of Travers Thorp
Alberga on behalf of the Plaintiff**

**Mr. Luke Stockdale of Maples & Calder on
behalf of the Defendant**

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22 **Before:**

The Hon. Mr. Justice Charles Quin

23 **Heard:**

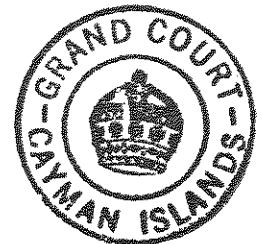
16th July 2014

24 **Plaintiff's Supplementary Submissions**

21st July 2014

25 **Defendant's Supplementary Submissions**

26th July 2014



26
27 **JUDGMENT**
28

29 ***INTRODUCTION***

- 30 1. This is the hearing of the Plaintiff's Summons issued on the 1st April 2014 for
31 Summary Judgment pursuant to GCR O.14 in relation to the Plaintiff's claim and
32 the Defendant's Counterclaim and, further, that the Defendant do pay the Plaintiff's
33 costs of the proceedings.

BACKGROUND

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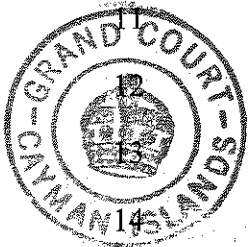
2. The Plaintiff is a Company incorporated in Guernsey, with its registered office at Frances House, Sir William Place, St. Peter Port, Guernsey GY1-4NQ, whilst the Defendant is a company incorporated in the British Virgin Islands with its registered office at Ankara Building, 24 De Castro Street, Wickhams Cay 1, Road Town, Tortola, British Virgin Islands.

3. The underlying facts are not in dispute and they are set out in the Plaintiff's Statement of Claim issued with the Writ of Summons on the 9th January 2014.

4. By an agreement in writing dated the 27th March 2013 (the "Agreement") between the Plaintiff and the Defendant, the Plaintiff agreed to sell and the Defendant agreed to buy certain of the Plaintiff's shares in Fourwinds Capital Management, a Cayman Islands company, and Fourwinds Capital Management (US) Inc., being a Delaware company. The Shares were defined in the Agreement as the Common Shares of the Cayman company and the US Company Common Shares in the Delaware company.

5. Clauses 3.1 and 3.2 of the Agreement provided, inter alia, that the Defendant would pay the Plaintiff the sum of US\$250,500 as consideration for the Shares.

6. Clause 4.3 of the Agreement provided, inter alia, that 25% of the consideration would be paid on the 27th September 2013, with the balance to be paid on the 27th March 2014 – being dates six and twelve months following completion, respectively.



1 7. Under the section entitled “Warranties and Limitation” of the Agreement Clause
2 5.4 required the Defendant to serve notice of any claim in respect of the warranties
3 provided by the Plaintiff pursuant to the Agreement as soon as possible after the
4 Defendant became aware of such a claim and, in any event, by the 27th March 2014.

5 8. Clause 5.4 reads:

6 *“The Seller shall not be liable in respect of any claim in relation to any of the*
7 *Warranties unless the Buyer gives written notice to the Seller of any matter or*
8 *event which may give rise to the claim as soon as possible after the Purchaser*
9 *becomes aware of such matter or event together with specific details of the*
10 *claim and in any event the Seller shall not be liable in respect of any such*
11 *claim unless the Buyer gives such written notice to the Seller or before the date*
12 *being one year from Completion. Any such claim shall not be enforceable*
13 *against the Seller and shall be deemed to have been withdrawn, and no new*
14 *claim may be made in respect of the facts giving rise to such claim, unless legal*
15 *proceedings in respect of such claim are commenced (by being issued and*
16 *served) within three months of the service such written notice.”*

17 9. Under the section entitled Notices of the Agreement Clause 12.1 reads:

18 *“Any notice or other communication to be given by any Party to the other Party*
19 *under, or in connection with, the matters contemplated by this Agreement shall*
20 *be addressed to the recipient and sent to the address or facsimile number or*
21 *email address of the recipient given below, or such other address or facsimile*
22 *number or email address and/or marked for such other attention as a Party*



1 *may from time to time specify by notice given in accordance with this Clause 12*
2 *to the other Party.”*

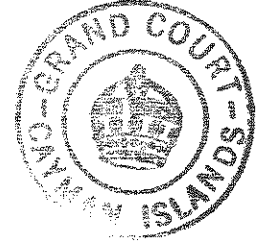
3 **THARWA INVESTMENTS SA**

4 Address: c/o Christian Schmidt, Brevet d’avocat, 16 Promenade de St-Antoine,
5 1204, Geneva, Switzerland.

6 Facsimile: +41(0) 22 737 2021

7 Email: christian.schmidt@bluemail.ch

8 Attention: Christian Schmidt



9
10 **EXECUTIVE WEALTH MANAGEMENT**

11 Address: Frances House, Sir William Place, St. Peter Port, Guernsey GY1-
12 4NQ, Channel Islands.

13 Facsimile: +44 1481 732131

14 Attention: Geoff Gottlieb, Executive Wealth Management

15 Email: geoff.gottlieb@ewmglobal.com

- 16
17 10. Clause 18.1 provides for the Agreement to be governed by the law of the Cayman
18 Islands save in relation to the sale and purchase of the US Company common
19 shares of Fourwinds Capital Management (US) Inc. which are to be governed by
20 the law of the state of Delaware.

1 11. Clause 18.2 provides for the Courts of the Cayman Islands to have exclusive
2 jurisdiction in relation to any claim, dispute or difference concerning the
3 Agreement, and for the parties to irrevocably waive any right they may have to
4 object to an action being brought in the Cayman Islands.

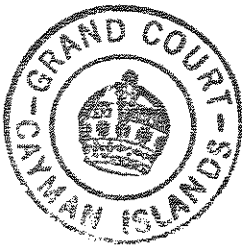
5 12. On or about the 27th March 2013 the Plaintiff transferred its shares to the Defendant
6 and the Plaintiff maintains that it has complied with and continues to comply with
7 all its obligations under the Agreement.

8 13. On the 26th September 2013 the Plaintiff contends that the Defendant served a
9 Claim Notice by letter dated the 26th September 2013 from its Swiss attorney Mr.
10 Christian Schmidt. The Claim Notice was expressed to be served pursuant to Clause
11 5.4 of the Agreement, and referred, inter alia, to the following warranty claims:

12 i. The NAV of investments in the two Funds known as the Acqua Fund
13 and the Phaunos Fund have been overstated;

14 ii. The audited consolidated financial statements for the year ending the
15 31st December 2012 failed to disclose relevant losses and/or were
16 misleading;

17 iii. The combination of certain undisclosed adjustments to the 2013
18 expected revenues and the reimbursement of management fees
19 overcharged in 2012 resulted in a drastic decrease in the 2013 net
20 revenue;



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iv. The Plaintiff failed to disclose that the two largest investors in the underlying fund had elected to redeem their investments by the time of the Agreement;

v. The likelihood of generating substantial income from managing the Zephyr Fund had been overstated.

14. On the 28th November 2013 the Plaintiff's Swiss attorneys wrote to the Defendant's Swiss attorneys stating, *inter alia*, that the sum of US\$60,120 became due on the 27th September 2013, and that payment remained outstanding. The Plaintiff's attorneys added that if the Defendant did not pay the sum due immediately, the Plaintiff would be left with no alternative but to commence proceedings to enforce payment of the money due and in relation to all future payments.

15. On the 19th December 2013 the Defendant's Swiss attorneys wrote to the Plaintiff's Swiss attorneys stating, *inter alia*, that the Defendant can only but re-state the obvious misrepresentations from the Seller and the blunt violation that the warranties in requesting the application of Clause 5.3, that if any warranty is breached, or proves to be untrue or misleading, the Plaintiff should pay to the Defendant on demand the amount necessary to put the Defendant into the position it would have been had the warranties not been breached.



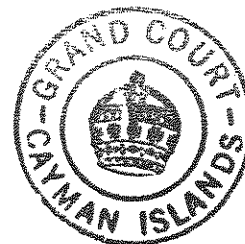
1 *PLAINTIFF'S POSITION*

2 16. The Plaintiff accepts that the alleged claims contained in paragraph 6.1 a-h and t-z
3 of the Defendant's Defence were notified in accordance with the Claim Notice
4 dated the 26th September 2013. The Plaintiff submits that if the Defendant wished
5 to pursue these claims it was obliged to commence proceedings within three months
6 from the service of the Claim Notice i.e. by the 26th December 2013.

7 17. In relation to the second category of breaches of warranties, which are not in the
8 Claim Notice, dated the 26th September 2013, the Plaintiff contends that the
9 Agreement requires the Defendant to provide notice of claims prior to commencing
10 proceedings. The Service of a Claim Notice is a condition precedent to the
11 entitlement to bring claims. As the Defendant has not satisfied the condition
12 precedent, it is not entitled to bring this second category of claims, which are not
13 contained within the Defendant's Claim Notice.

14 18. The Plaintiff submits that the letter dated the 19th December 2013 is simply a letter
15 from the Defendant's attorney to the Plaintiff's attorney, and cannot constitute a
16 Claim Notice pursuant to Clauses 5.4 and 12.1 of the Agreement.

17 19. It is the Plaintiff's case that in breach of the Agreement the Defendant has failed to
18 pay any part of the consideration by the due date, or at all, despite numerous
19 requests for payment.



1 *DEFENDANT'S POSITION*

2 23. On the 19th March 2014 the Defendant filed its defence and counterclaim.

3 24. The Defendant admits that it entered into the Agreement on the 27th March 2013 to
4 buy 167,000 common shares in Fourwinds Capital Management and 167,000 shares
5 in Fourwinds Capital Management (US) Inc.

6 25. The Defendant admits the existence of Clause 5.4 of the Agreement and agrees with
7 the Plaintiff as to its wording, but the Defendant avers that Clause 5.4 of the
8 Agreement relates only to liabilities of the Plaintiff in respect of claims against it
9 and does not in any case prevent the Defendant from advancing defences – to the
10 Plaintiff's Statement of Claim.

11 26. Furthermore the Defendant denies that a "Claim Notice" is a defined term in the
12 Agreement.

13 27. The Defendant denies that Clause 5.4 required it to serve notice of any claim in
14 respect of the warranties provided by the Plaintiff pursuant to the Agreement as
15 soon as possible, or in any event, by the 27th March 2014.

16 28. The Defendant denies that a Claim Notice would not be enforceable and shall be
17 deemed to have been withdrawn unless proceedings are commenced within three
18 months from the date of the Claim Notice.



1 31. Further, and in the alternative, the Defendant pleads that the fair value of the shares
2 at the 27th March 2013 did not exceed US\$12,500 and may, in fact, have been lower
3 than that.

4 32. The Defendant admits that it has not made any payment to the Plaintiff in respect of
5 the purchase of the shares.

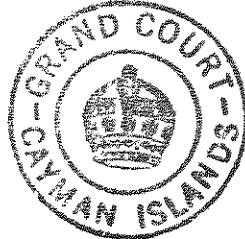
6 33. The Defendant pleads that the so-called "Claim Notice" dated the 26th September
7 2013 does not operate to prevent the Defendant from advancing the Defences set
8 out in its defence.

9 34. By way of Counterclaim, the Defendant pleads that it gave written notice in
10 accordance with Clause 5.4 by letter dated the 19th December 2013 to the Plaintiff
11 of the matters and events giving rise to the breaches of the representations and
12 warranties on behalf of the Plaintiff, and further claims damages for the Plaintiff's
13 breach of the Agreement and interest thereon.

14 35. In both its oral and written submissions, the Defendant argues that the Plaintiff
15 seeks summary judgment based on highly technical arguments ... that the
16 Defendant is barred from raising its defences to the Plaintiff's claim, and submits
17 that the Plaintiff's application for summary judgment is misconceived.

18 36. It is the Defendant's case that Clause 5.4 of the Agreement does not prevent the
19 Defendant relying on the pleaded breaches by way of defence to the Plaintiff's
20 claim.

21



1 37. Mr. Stockdale, counsel for the Defendant, submits that Clause 5.4 uses the word
2 “claim” eight times and does not mention “defence” once. Accordingly, the
3 Defendant’s counsel submits that the parties’ intention was clearly to impose a time
4 limit and to regulate the procedure to be followed by the Defendant when making a
5 warranty claim i.e. when bringing legal proceedings against the Plaintiff, based on a
6 cause of action for breach of the warranties in the Agreement. However, it is the
7 Defendant’s case that Clause 5.4 has no application to the present proceedings.
8 Counsel for the Defendant submits that the Plaintiff is bringing a claim for payment
9 under the Agreement and the Defendant is relying on the breaches of the warranties
10 in the Agreement by way of Defence to that claim.

11 38. In particular, the Defendant relies upon Clause 11.5 of the Agreement which states
12 that: “*Unless specifically provided otherwise, rights arising under this Agreement*
13 *are cumulative and do not exclude rights provided by law.*” As a result of this
14 wording in Clause 11.5 the Defendant submits that the terms of Clause 5.4 do not
15 prevent the Defendant from relying on the breaches set out in its Defence to the
16 Plaintiff’s Claim in these proceedings.

17 39. The Defence submits that there is no entitlement to summary judgment on the
18 Counterclaim and argues that the letter dated the 19th December 2012 from the
19 Defendant’s Swiss attorneys, either on its own, or, when read together with the
20 letter sent by the Defendant on the 14th April 2014, constitute valid notice by the
21 Defendant to the Plaintiff of its breaches as required by Clause 5.4 of the
22 Agreement.

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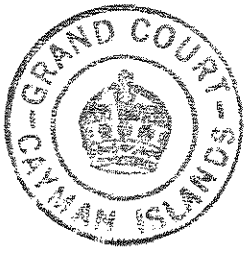
1 40. Furthermore, the Defendant argues that the letter from the Plaintiff's Guernsey
2 attorneys – dated the 28th November 2012 – constituted a written waiver by the
3 Plaintiff in accordance with Clause 11.2 of the Agreement of its right to receive
4 notice of the second and third breaches at the address for notices given in Clause
5 12.1 of the Agreement.

6 41. Accordingly, it is the Defendant's case that this Court should not grant summary
7 judgment or make a GCR O.14A determination in this case on three grounds:

8 (a) There are material facts which may well be in dispute or which have not been
9 proved or admitted for the purposes of GCR O.14A or at least have not been
10 fully fleshed out and tested – including the full and detailed commercial
11 background to the Agreement.

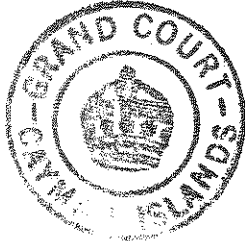
12 (b) There are disputes over the proper construction of the Agreement which require
13 the Court to resolve competing lines of authority.

14 (c) The Defendant has not had an opportunity to be heard in relation to the
15 Plaintiff's expanded case that the letter of the 19th December 2013 is not
16 properly particularized.



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THE LAW
ORDER 14



42. GCR O.14 reads:

“Application by plaintiff for summary judgment (O.14, r.1)

1. (1) Where in an action to which this rule applies a statement of claim has been served on a defendant and that defendant has given notice of intention to defend the action, the plaintiff may, on the ground that the defendant has no defence to a claim included in the writ, or to a particular part of such a claim, or has no defence to such a claim or part except as to the amount of any damages claimed, apply to the Court for judgment against the defendant.

43. The learned editors of the 1999 Supreme Court Practice cite at O.14/1/2 *Home and Overseas Insurance Co. Ltd. v. Mentor Insurance Co. (UK) Ltd. (in liquidation)*¹ in which Parker LJ made it clear at page 158 that the purpose of O.14 is to enable a plaintiff to obtain a quick judgment where there is plainly no defence to the claim. If the Defendant’s only suggested defence is a point of law and the Court can see at once that the point is misconceived (or, if arguable, can be shown shortly to be plainly unsustainable) the Plaintiff is entitled to judgment.

44. Defence counsel acknowledges that summary judgment may be awarded to the Plaintiff where the Defendant has no defence to the claim and further, summary judgment may be awarded to the Plaintiff on the counterclaim under GCR O.14 r.12(a) where the counterclaim has no prospect of success.

¹ [1990] 1 WLR 153

1 45. In *Unilever PLC v. ABC International*², the learned Chief Justice Anthony Smellie
2 Q.C. quoting from Sir George Jessel, Master of the Rolls' classic dicta in *Anglo*
3 *Italian Bank v. Wells*³ stated at paragraph 44 on page 100:

4 *"The purpose of Order 14 is to enable a plaintiff to obtain summary judgment*
5 *without trial, if he can prove his claim clearly, and if the Defendant is unable to*
6 *set up a bona fide defence, or raise an issue against the claim which ought to*
7 *be tried... when the Judge is satisfied not only that there is no defence but no*
8 *fairly arguable point to be argued on behalf of the defendant, it is his duty to*
9 *give judgment for the plaintiff."*

10

11 46. After reviewing the English and Cayman authorities relating to O.14 Vos JA in the
12 Cayman Islands the Court of Appeal case of *Merren v. Cayman National Bank*⁴
13 stated at paragraph 8 on page 435:

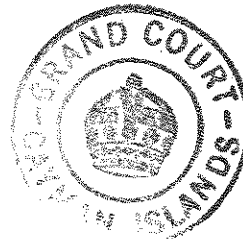
14 *"...I would prefer to regard the test as simply requiring the court to ask*
15 *whether the defendant has shown a fair or reasonable probability that he has a*
16 *real, or bona fide, defence."*

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18 47. This test to be applied by the Court is accepted by both counsel. The question
19 before this Court is whether there is a fair or reasonable probability of the
20 Defendant having a real or bona fide defence to the Plaintiff's claim, or a fair or
21 reasonable prospect of success on the counterclaim.

22

23



² [2008] CILR 87

³ [1878] 38 L.T. at 201

⁴ (2008) CILR 428

1 *CLAIM NOTICE*

2 48. I turn now to examine the issue of the validity and enforceability of the claim notice
3 referred to in Clauses 5.4 and 12.1 of the Agreement.

4 49. The Defence pleads that Clause 5.4 operates only to prevent the Defendant from
5 bringing claims against the Plaintiff, not from raising the claims by way of defence
6 to the Plaintiff's claim in these proceedings. Aside from the claims set out in the
7 Defendant's defence, the Defendant pleads that a letter sent on the 19th December
8 2013 by the Defendant's lawyer to the Plaintiff's Guernsey attorneys raising
9 missing claims and asks the Court to find that this letter from the Defendant's Swiss
10 attorney is a claim for the purpose of Clause 5.4 of the Agreement.

11 50. Clause 12.1 of the Agreement set out in paragraph 9 above sets out the
12 requirements.

13 51. I find that the letter dated the 26th September 2013 from the Defendant's Swiss
14 attorneys complies with the Clause 12.1 notice requirements. The letter is sent to
15 the Plaintiff at the correct address. The letter refers to the clauses in the Agreement.
16 Finally, the Defendant's Swiss attorney makes it unequivocally clear that "*this*
17 *notice is sent to you in application of Clause 5.4 of the Agreement.*"

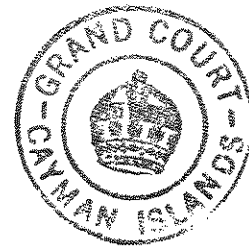


1 52. I agree with the submission by counsel for the Plaintiff that this letter dated the 26th
2 September 2013 clearly was intended to be and was a Claim Notice pursuant to
3 clause 5.4 of the Agreement. As such, clauses 5.4 and 12.1 made it mandatory that,
4 if the Defendant wished to pursue claims it was obliged to commence proceedings
5 within three months from service of the Claim Notice, which was on or before the
6 26th December 2013.

7 53. The Defendant has failed to commence proceedings in accordance with this
8 obligation and consequently the Defendant is barred from bringing proceedings
9 against the Plaintiff in relation to these claims.

10 54. I reject the Defendant's submission that the Defence can somehow use the claims
11 by way of defence – again, because the wording of Clause 5.4 is clear. The
12 Defendant agreed with the Plaintiff that “*any such claim shall not be enforceable*
13 *against the seller and shall be deemed to have been withdrawn...*” By failing to
14 commence proceedings within three months from service of the Claim Notice, any
15 claim by the Defendant is no longer enforceable and shall be deemed to have been
16 withdrawn.

17 55. The Defendant submits that, in the alternative, the letter dated the 19th December
18 2013 by the Defendant's Swiss attorney to the Plaintiff's Guernsey attorney is a
19 missing claim notice for new claims.



1 56. In *Capital Land Holding Ltd. v. Secretary of State for the Environment*⁵ Lord
2 Cullen held that where a notice to terminate a lease was served on a business
3 address rather than on the registered office, it was held not to be a valid notice. The
4 Scottish Court of Session Outer House case demonstrates that the provisions
5 relating to notices must always be strictly construed.

6 57. In the House of Lords case of *Mannai Investment Co. Ltd. v. Eagle Star Life*
7 *Assurance Co. Ltd.*⁶, Lord Goff stated at letter C on page 357:

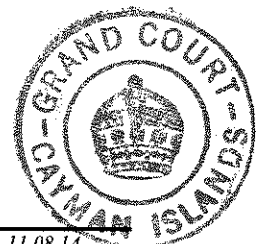
8 *“It is, in my opinion, correct in principle that a notice under such a*
9 *clause will only be effective if it conforms to the specification in the*
10 *clause. The specification in the clause is contained in a document which*
11 *has been agreed between the parties, and so prescribes the requirements*
12 *with which the notice must comply if it is to achieve the desired effect. In*
13 *the case before your Lordships, the notice must (1) be not less than six*
14 *months notice, (2) be in writing, (3) be served on the landlord or its*
15 *solicitors, (4) expire on the third anniversary of the term commencement*
16 *date. It is plain that fulfilment of all four of these requirements is*
17 *essential.”*

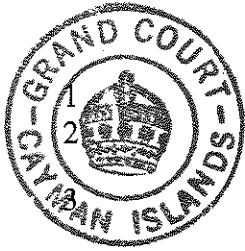
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19 At letter F on the same page Lord Goff states:

20 *“The principle is therefore clear. The agreement between the parties*
21 *provides what notice has to be given to be effective to achieve the*
22 *relevant result. The question in each case is: does the notice which was*
23 *given, properly construed, comply with the agreed specification? If it*
24 *does, it is effective for its purpose. If it does not, it is not so effective; and*
25 *the mere fact that the person serving the notice plainly intended, and was*
26 *trying, to give an effective notice under the clause, and that the recipient*
27 *of the notice realised that he was doing so, makes no difference. This is*
28 *because the notice, properly construed, did not comply with the*

⁵ [1996] SCLR 75

⁶ [1997] 3 All E R 352





agreement between the parties. The key does not fit the lock, and so the door will not open.”

4 58. In a similar vein, and in memorable language, Lord Hoffman stated in the
5 *Mannai* case at letter B on page 377:

6 “If the clause had said that the notice had to be on blue paper, it would
7 have been no good serving a notice on pink paper, however clear it
8 might have been that the tenant wanted to terminate the lease.”

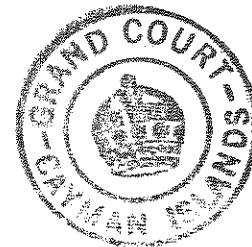
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10 59. It is clear from both Lord Goff and Lord Hoffman’s dicta in *Mannai* that clauses
11 relating to notices must be strictly construed and strictly enforced.

12 60. Counsel for the Defendant submits that the letter sent on the 19th December 2013 by
13 the Defendant’s Swiss attorney to the Plaintiff’s Guernsey Attorney represents a
14 Notice pursuant to Clause 12.1 and relates to the missing claims not set out in the
15 claim Notice dated the 26th September 2014. On the basis of the material before me
16 contained in the pleadings and the affidavits I reject this submission.

17 61. I agree with counsel for the Plaintiff that the Defendant’s Swiss attorneys’ letter
18 dated the 19th December 2013 does not identify the claims now relied on. More
19 importantly, the letter clearly fails to comply with the Notice requirements agreed
20 to between the parties by the wording expressly stated in Clause 12.1 of the
21 Agreement. In particular, the letter is addressed to the wrong addressee and
22 therefore under the principles set out in the Scottish case of *Capital Land Holding*
23 *Ltd.* and the House of Lords decision in *Mannai* it is not a valid notice.

1 62. I find that the letter dated the 26th September 2013 from the Defendants Swiss
2 attorneys, confirming that the Notice was sent in application of Clause 5.4 is a
3 proper Notice and complies with the notice requirements set out in clause 12.1.
4 Adopting Lord Bingham’s dicta in *Dairy Containers Ltd. v. Tasman Orient Line*
5 CV⁷, I find that the words in clauses 5.4 and 12.1 are clear and there is no ambiguity
6 or lack of clarity.

7 63. I follow the principles set by the House of Lords in *Mannai* and adopt Lord Goff’s
8 words - The letter dated the 26th September 2014 complies with the agreed
9 specification and is effective for its purpose. This key fits the lock. The letter dated
10 the 19th December 2013, is merely a letter from the Defendant’s attorneys to the
11 Plaintiff’s attorneys.



⁷ [2005] 1 WLR 215 at 220

1 *CONCLUSION*

2 64. For the above reasons I reject the Defendant's submission that there are material
3 facts which may well be in dispute, or which have not been proved or admitted or at
4 least have not been fully fleshed out and tested.

5 65. Secondly, I reject the Defendant's submission that there are disputes over the
6 proper construction of the relevant terms in the Agreement which require the Court
7 to resolve competing lines of authority.

8 66. I agree with the Plaintiff's counsel that the Defendant has failed to identify any
9 evidence that exists or is likely to exist that would put the contractual material in
10 issue in a different light.

11 67. As I stated above, the terms of the Agreement are clear as to the procedure that had
12 to be followed before warranty claims could be pursued. The Defendant has failed
13 to follow the agreed procedure and therefore cannot bring these claims whether in a
14 defence or in a counterclaim.

15 68. The Plaintiff has transferred the shares to the Defendant and the Defendant has not
16 paid for the shares. On the evidence and material before me I find that the Plaintiff
17 has proved its claim. The Defendant has failed to show that it has a fair or
18 reasonable probability that it has a real or bona fide defence and, accordingly, I find
19 that the Plaintiff is entitled to summary judgment of its claim pursuant to GCR
20 O.14(1).

