

1 **IN THE GRAND COURT OF THE CAYMAN ISLANDS**
2 **HOLDEN AT GEORGE TOWN, GRAND CAYMAN**

3
4 **IN CHAMBERS**

5 **CAUSE NO. 344 OF 2006**
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8 **IN THE MATTER OF THE EVIDENCE (PROCEEDINGS IN OTHER JURISDICTIONS)**
9 **(CAYMAN ISLANDS) ORDER 1978**

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11 **AND IN THE MATTER OF ORDER 70 OF THE GRAND COURT RULES 1995**

12
13 **AND IN THE MATTER OF A CIVIL ACTION NOW PROCEEDING IN THE UNITED**
14 **STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA,**
15 **CIVIL ACTION NO. 06-CV-1994 (MMB), BETWEEN C. CLARK HODGSON, JR.,**
16 **RECEIVER FOR PHILADELPHIA ALTERNATIVE ASSET MANAGEMENT**
17 **COMPANY, LLC AND RELATED ENTITIES, AS PLAINTIFF, AND MAN FINANCIAL**
18 **INC., THOMAS GILMARTIN AND OTHERS, AS DEFENDANTS**
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21 **Appearances:** **Mr. Alistair Walters and Ms. Melanie Crinis of Campbells for**
22 **UBS Fund Services (Cayman) Ltd, Mr. Jason Perras, Mr. Guy Martell,**
23 **Mr. Brian Burkholder and Mr. Pearse Griffith**
24 **Mr. Kenneth Farrow of Quin & Hampson for Mr. Thomas Gilmartin,**
25 **Man Financial Inc., Mr. Sep Alavi, Mr. William Wambach & Mr.**
26 **Timothy Braun, Ms. Jody McMillan, Mr. James Zamora and**
27 **Ms. Monica Rodriguez**
28 **Ms. Rosie Whittaker-Myles of Charles Adams, Ritchie & Duckworth**
29 **for C. Clark Hodgson, Receiver for Philadelphia Alternative Asset**
30 **Management Company, LLC and its partners, affiliates, subsidiaries**
31 **and related entities**
32 **Mr. Matthew Crawford of Maples & Calder for Mr. David Lashbrook**
33 **and Mr. Scott Sommerville**
34 **Mr. Anthony Akiwumi of Stuarts Walker Hersant for Mr. Edward**
35 **Gobora and Mr. John Wallace**
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38 **Before:** **Hon. Justice Henderson**
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41 **Heard:** **February 12, 2007**
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1 **RULING**

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3 Jason Perras, Brian Burkholder, Pearse Griffith, Guy Martell and UBS Fund Services (Cayman)
4 Limited seek an order discharging an order of this Court on October 18, 2006 giving effect to
5 certain letters of request. The named individuals were at all material times employees of UBS.
6

7 There is ongoing litigation in the United States between Clark Hodgson, receiver of Philadelphia
8 Alternative Asset Management Company LLC, and certain related entities including Man Financial
9 Inc. and Thomas Gilmartin. Mr. Gilmartin was at all material times an employee of Man.
10

11 On July 5th 2006, Man brought on an unopposed motion before His Honor Judge Baylson, who is
12 seized with the litigation in the United States. Man asked for letters of request to take the evidence
13 of the individuals I have named, together with others, in the Cayman Islands. Man said in its
14 motion (at paragraphs 11 and 12) that the evidence was sought for use at trial. Man's application
15 was unopposed even though Ms. Doherty for Man Financial had advised Judge Baylson earlier (on
16 June 4th, 2006) that she was contemplating adding UBS as a third party.
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18 On June 11th 2006, His Honor issued letters of request to this Court. Those letters are atypical in
19 that they do not assert affirmatively that the evidence is for use at trial. Such an assertion should be
20 included in the letters of request, but there is no absolute requirement.
21

22 The letters of request set out the nature of the complaint in broad terms and attach the complaint
23 itself. It is alleged that Paul Eustace was chief executive officer of an investment management
24 company which managed investments in three funds. One of those was an offshore fund which

1 opened commodity trading accounts at Man Financial. Eustace is alleged to have concealed from
2 the investors more than \$147 million in trading losses suffered by the offshore fund in a period of
3 only six months. The complaint alleges that Man and its employees were involved improperly in
4 the fraud of Eustace. During that time, UBS Cayman was responsible for reporting the results of
5 the offshore trading to investors. It did not take these losses into account. It seems clear they were
6 not reported to UBS.

7
8 Did UBS ask enough questions? Was it appropriately diligent, given the nature and scope of its
9 retainer? Is the fraud a consequence in whole or in part of the negligence of UBS, rather than of
10 some act or omission on the part of Man Financial? These are the questions which, in broad terms,
11 Man raises in its defence.

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13 The letters of request were ratified by this Court without opposition. The evidence has now been
14 taken and one transcript has been signed by the examiner and by the witness and transmitted to the
15 US Court. It is conceded by these applicants that they had material evidence to give. The nature of
16 the UBS reporting, the information on which it was based, and the questions asked by UBS about
17 what it was being told are all relevant to the issues in the US proceeding.

18
19 Man Financial has now applied to add UBS as a third party on a claim of contribution and
20 indemnity. UBS feels betrayed. It says that Man pretended to view UBS as a victim, not a
21 perpetrator, to obtain UBS's consent to the letters of request. It claims that Man always intended to
22 add UBS but concealed that intention until it was too late for UBS to oppose the request or to seek

1 appropriate constraints upon it. UBS says that discovery for the purpose of building a case against
2 UBS and adding it as a third party was the true dominant purpose of the letters of request.

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4 The evidence before me does not support this contention. Any attorney reading the complaint
5 would appreciate that UBS was in jeopardy of being sued. Whether UBS was to be sued or not,
6 their employees' evidence was needed at trial. The request, like most such requests, has been
7 initiated for a dual purpose: for the purpose of obtaining evidence for use at trial and also the
8 purpose of determining whether UBS should be added as a party.

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10 Which of those is the dominant purpose? I consider that it must be the former - evidence for use at
11 trial.

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13 The proper resolution of the issues between the receiver and Gilmartin and Man requires a
14 consideration of the role played by UBS and the flow of information to and from that entity. The
15 trial cannot be completed satisfactorily without that evidence. That is the dominant reason for
16 which the evidence is sought.

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18 The evidence is also needed by Man for any possible claim against UBS for contribution and
19 indemnity. Such a claim might be advanced within the confines of the action presently before
20 Judge Baylson or it might be advanced in a separate action later on. In any event, the advancement
21 of the third-party claim is, I find, a secondary purpose.

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1 In light of this finding I need not address the other issues raised. Mr. Farrow has argued that I am
2 without jurisdiction at this stage to review and set aside the order, even on the ground that it was
3 obtained by fraud. I have reached this decision by assuming, but without deciding, that I do have
4 jurisdiction to review and set aside the order.

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6 For these reasons the application and the collateral relief requested in the summons of January 15,
7 2007 is dismissed.

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9 Dated this 14th day of February, 2007

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12 Henderson, J.
13 Judge of the Grand Court