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5/9/2007

1 IN CHAMBERS  
2 IN THE GRAND COURT OF THE CAYMAN ISLANDS

3  
4 CAUSE NO: 355/07

5  
6 BETWEEN:

7 RSM CAYMAN ISLANDS (A FIRM)

8 Plaintiff/Respondent

9  
10 AND:

- 11 (1) CHRISTOPHER STRIDE
- 12 (2) KENNETH KRYS
- 13 (3) KRYS & ASSOCIATES CAYMAN LTD (formerly known
- 14 as RSM Cayman Islands Ltd.)

15 Defendants/Applicants

16  
17 BEFORE: The Honourable Madam Justice Levers

18  
19 APPEARANCES:

20 Mr. G. Halkerston, Mr. W. Sykes of Appleby for the  
21 Plaintiff/Respondent

22 Mr. M. Imrie, Mr. B. Stueck, Mr. C. Lynch of Maples and Calder for  
23 the Defendants/Applicants

24  
25 HEARD: 23<sup>rd</sup> August 2007



26  
27 JUDGMENT



28  
29  
30 Levers J.

31  
32 An application by the Defendants in this matter was made for the  
33 following relief, prior to this hearing:

1

2 (1)The application for the Orders at 8-13 below be heard by  
3 Levers J. on an *inter partes* basis on the Return Date;

4 (2)Cause Number 355 of 2007 be stayed until the Return Date;

5 (3)Upon the provision of an undertaking as to damages by the  
6 Defendants, the Plaintiff be restrained from disclosing, or  
7 disclosing the contents of, the Statement of the Claim filed on  
8 the 14<sup>th</sup> August 2007 to any third party until the Return Date;

9 (4)By a date in August 2007 the Plaintiff deliver to the Defendants  
10 a list of any third parties to which the contents of the Statement  
11 of Claim filed on the 14<sup>th</sup> August 2007 have been disclosed;

12 (5) The Court file in respect of Cause Number 355 of 2007 be  
13 sealed pending the Return Date;

14 (6)Such further or other orders as the Court deems fit;

15 (7)Costs be provided for.

16

17 The interim relief above came before this Court as a matter of  
18 urgency and the Court granted a seal of the Court file in Cause  
19 Number 355 of 2007 until the 23<sup>rd</sup> August 2007 adjourning all other  
20 relief sought until the matter was heard *inter partes*. On the 23<sup>rd</sup>  
21 the Court considered on an *inter partes* basis the following relief:

1

2 1) The Writ of Summons and Statement of Claim filed on the 14<sup>th</sup>  
3 August 2007 be struck out for constituting an abuse of process;

4 2) Further and/or in the alternative Cause Number 355 of 2007 be  
5 stayed pending the earlier of the final determination of Cause  
6 Number 321 of 2007 or such further order of the court;

7 3) The Plaintiff be restrained from disclosing, or disclosing the  
8 contents of the Statement of Claim filed on the 14<sup>th</sup> August  
9 2007 to any third party;

10 4) The Court file in respect of Cause Number 355 of 2007 be  
11 sealed;

12 5) Such further or other orders as the Court deems fit;

13 6) Finally Costs be provided for.

14

15 **Background to this case:**

16

17 This court has had this matter before it on a few occasions in the past  
18 in order to deal with a dispute that has arisen between RSM Cayman  
19 Islands (a firm) and Kenneth Kryss, Christopher Stride and now Kryss

1 and Associates Cayman Ltd. The reason for saying 'now' Kry's and  
2 Associates Cayman Ltd is simply that the Plaintiff in this matter (355  
3 of 2007) RSM Cayman Islands, objected to Kry's and Associates  
4 using the name, RSM Cayman Islands Ltd. Mr. Kenneth Kry's  
5 changed the name to Kry's and Associates Cayman Ltd in order to get  
6 a trade and business licence.

7

8 In this matter the significant dispute between the parties is as to the  
9 terms of the contract that govern the rights and obligations of  
10 Kenneth Kry's and Christopher Stride while working for RSM Cayman  
11 Islands (a firm). Both Kry's & Associates Cayman Ltd and RSM  
12 Cayman Islands are in the service of providing liquidation services to  
13 the public. They are involved in several liquidations and the court has  
14 ordered that the creditors be consulted with a view to choosing  
15 whether they go with Christopher Stride and Kenneth Kry's or stay  
16 with RSM Cayman Islands (a firm). During the course of the  
17 employment and at the break away stage by Kenneth Kry's and  
18 Christopher Stride allegations are that monies were taken, equipment  
19 was taken and no notice was given to the employees as to

1 termination: It is alleged that as they were fiduciaries they are in  
2 breach of their fiduciary duty.

3

4 On the 30<sup>th</sup> July 2007 Mr. Kryz and Mr. Stride filed a writ of Summons  
5 and a separate Statement of Claim in Cause Number 321 of 2007  
6 against RSM Cayman Islands,(a firm), or Robson Rhodes LLP and  
7 Grant Thornton UK LLP in which they seek damages and declaratory  
8 relief concerning:

9

- 10 1) The ongoing existence of the RSM Cayman Islands  
11 partnership;
- 12 2) Whether Mr. Kryz and Mr. Stride are subject to enforceable  
13 restrictive covenants;
- 14 3) Whether Mr. Kryz and Mr. Stride were entitled to amounts paid  
15 to them by RSM Cayman Islands in April 2007;
- 16 4) Mr. Kryz and Mr. Stride's contractual entitlements.

17

18 RSM Cayman Islands has acknowledged service of the Statement of  
19 Claim in Cause Number 321 of 2007. Appleby, who act generally for

1 RSM Cayman Islands, RSM Robson Rhodes and Grant Thornton  
2 (these are firms that become involved as a result of mergers), have  
3 indicated that they do not have instructions to accept service on  
4 behalf of RSM Robson Rhodes and Grant Thornton, although they  
5 did act for them in other matters. RSM Cayman Islands (a firm) has  
6 been served. It is I think relevant for purposes of this application that  
7 the details of the relief claimed are set out:

8

9 **RELIEF SOUGHT**

10 76 The Plaintiffs seek:

11

12 76.1 Declarations that:

13 (a) The Defendants have committed one or more repudiatory  
14 breaches of the Partnership Agreement.

15 (b) The Partnership Agreement has been discharged.

16 (c) The Partnership has been dissolved.

17 (d) Mr. Kryz and/or Mr. Stride were constructively dismissed

18 and/or have validly terminated their employment agreements

19 and/or such agreements have been discharged.

1 (e) The Krys restrictive covenants were not incorporated as  
2 terms of the Krys' Employment Terms.

3 (f) Alternatively, the Krys restrictive covenants are void and  
4 unenforceable.

5 (g) The Stride restrictive covenants were not incorporated as  
6 terms of the Stride employment terms.

7 (h) Alternatively, the Stride restrictive covenants are void and  
8 unenforceable.

9 (i) Alternatively, the Stride restrictive covenants do not restrain  
10 Mr. Stride from providing services other than auditing  
11 services.

12 (j) The Plaintiffs were entitled to the amounts paid to them by  
13 the Partnership on 30 April 2007.

14 (k) The Defendants are estopped from asserting that they are  
15 able to Claim recovery, and/or from Claiming recovery, of the  
16 amounts paid by the Partnership to the Plaintiffs on 30 April  
17 2007.

18 76.2 Damages to be assessed.

19

1 On the 14<sup>th</sup> August 2007, the Applicants in this matter allege that  
2 without notice RSM Cayman Islands (a firm) filed and served a  
3 separate Writ of Summons with the Statement of Claim endorsed  
4 thereon seeking the following relief:-

5  
6

7 As against Mr. Krys:

- 8 (i) An Account;
- 9 (ii) A declaration that monies and/or assets held by Mr. Krys  
10 are held on trust for the benefit of the Partnership;
- 11 (iii) An order for the transfer to the Partnership of monies  
12 and/or assets held by Mr. Krys on trust for the benefit of the  
13 Partnership;
- 14 (iv) A declaration that Mr. Krys' shareholding in Krys &  
15 Associates Cayman Ltd is held for the benefit of the  
16 Partnership;
- 17 (v) All necessary orders to effect the transfer or Mr. Krys'  
18 shareholding in Krys & Associates Cayman Ltd to the  
19 Partnership and to amend Krys & Associates Cayman  
20 Ltd's share register to reflect the same;

- 1 (vi) Damages;
- 2 (vii) Disgorgement damages;
- 3 (viii) Equitable compensation;
- 4 (ix) Interest pursuant to statute or equity at such rate and for
- 5 such period as the Court thinks fit;
- 6 (x) All further accounts, orders and enquiries to effect the relief
- 7 sought herein;
- 8 (xi) Costs.

9

10 As Against Krys & Associates Cayman Ltd

11

- 12 (i) The appointment of a receiver over the receivables of Krys &
- 13 Associates Cayman Ltd in respect of each of the
- 14 Appointments with power to distribute to the Partnership all
- 15 profits earned by the Defendants and each of them in
- 16 respect of the same and then to distribute any remainder to
- 17 the Defendants as appropriate;
- 18 (ii) An Account;
- 19 (iii) An order that Krys & Associates provide a detailed audit of
- 20 all property retained by them;

- 1 (iv) A declaration that monies and/or assets held by Krys &  
2 Associates Cayman Ltd are held on trust for the benefit of  
3 the Partnership;
- 4 (v) An order for the transfer to the Partnership of monies and/or  
5 assets held by Krys & Associates Cayman Ltd on trust for  
6 the benefit of the Partnership;
- 7 (vi) Damages;
- 8 (vii) Disgorgement damages;
- 9 (viii) Equitable compensation;
- 10 (ix) Interest pursuant to statute or equity at such rate and for  
11 such period as the Court thinks fit;
- 12 (x) All further accounts, orders and enquiries to effect the relief  
13 sought herein;
- 14 (xi) Costs.

15

16 Similar claims were made against Mr. Stride.

17

18 Based on the above Mr. Imrie of Maples and Calder on behalf of the  
19 Applicants submits that the filing of the second Writ based on the  
20 same facts is an abuse of process and should be struck out. Or, in

1 the alternative, in view of the case management and the procedure  
2 followed by the Grand Court rules, RSM Cayman Islands should file a  
3 Defence and Counterclaim, especially in view of public policy the  
4 second Writ should be stayed and the matter proceed to be  
5 determined under the umbrella of Cause Number 321 of 2007, (in  
6 which the RSM Cayman Islands should now be filing a Defence and if  
7 necessary file a Counterclaim seeking the very same relief that is in  
8 the Writ of Summons and Statement of Claim that has been filed  
9 under Cause Number 355 of 2007). He also submits very  
10 strenuously that the contents of the Statement of Claim in Cause  
11 Number 355 of 2007 is not credible and that in the very document  
12 that has alleged dishonest conduct, although not specifically, the  
13 facts show that monies alleged to have been stolen have in fact been  
14 paid back. He therefore says that the motive behind the filing of the  
15 second Writ is purely to prejudice and portray Mr. Stride and Mr. Krys  
16 in a bad light to the creditors and that, if the Court does not seal the  
17 documents, this Writ of Summons will be published both in the media  
18 and to the various creditors. He submits that it should be struck out  
19 or stayed and sealed.  
20

1 On the other hand, Mr. Halkerston of Appleby on behalf of the Plaintiff  
2 in Cause Number 355 of 2007 submits that his client is the true  
3 Plaintiff, that it has to prove breach of fiduciary duty and that the  
4 burden is greater on it. Therefore it should be allowed to proceed  
5 and Cause Number 321 of 2007 should be stayed. He further  
6 submits that the fear of bad publicity or adverse comment about Mr.  
7 Stride and Mr. Krys is not really a valid one because of the fact that  
8 he can claim the very same relief in a Counterclaim that will be filed in  
9 Cause Number 321 of 2007, and that file will not be sealed. The  
10 Counterclaim can be published to anyone and inspected by anyone.  
11 Mr. Halkerston's one submission which perhaps can be disposed of  
12 at this stage is that he submits no case has been cited which bars or  
13 stays a claim on the basis that it should have been brought as a  
14 counterclaim. There is no authority he says for such a proposition  
15 because the proposition is wrong. He says most of the cases cited  
16 are either a matter commenced in civil courts and criminal courts  
17 contemporaneously where proceedings have been stayed or where  
18 claims have been brought in a superior court and an inferior court. I  
19 do not believe that Mr. Imrie is submitting that this Claim should be  
20 barred or stayed on the basis that it should have been brought as a

1 Counterclaim. That, with respect, is a total misunderstanding of Mr.  
2 Imrie's submission. Mr. Imrie submits that in view of many factors  
3 including the fact that there are similar proceedings in the same  
4 jurisdiction based on the same facts, unless the court can find there  
5 are very special circumstances, the court must be guided by the case  
6 management procedures, public policy requirements, and the  
7 administrative difficulties in pursuing such a course and therefore  
8 should stay the proceedings. The question of an abuse of process is  
9 an entirely different legal principle. The fact that there is no authority  
10 does not necessarily mean the Court does not have jurisdiction to  
11 grant such a relief. There is no question in my mind that this Court  
12 has jurisdiction to allow the relief sought. Whether the relief sought  
13 has any merit is an entirely different matter.

14

15 **The principles on which the Court will be guided.**

16

17 Being successor to the old Common Law Courts, the High Court has  
18 inherent jurisdiction to control its procedures to ensure its  
19 proceedings are not used to achieve injustice. Perhaps the most  
20 important statement on this subject is that of Lord Diplock in *Bremer*

1 *Vulkan Schiffbau und Maschinenfabrik v. South Indian Shipping*  
2 *Corporation Ltd* [1981] (A.C. 909 at 977, H.L.), where his Lordship  
3 said “the High Court [has] a general power to control its own  
4 procedure so as to prevent its being used to achieve injustice. Such  
5 a power is inherent in its constitutional function as a court of justice.  
6 Every civilised system of government requires that the state should  
7 make available to all its citizens a means for the just and peaceful  
8 settlement of disputes between them as to their respective legal  
9 rights. The means provided are courts of justice to which every  
10 citizen has a constitutional right of access in the role of plaintiff to  
11 obtain the remedy to which he claims to be entitled in consequence of  
12 an alleged breach of his legal or equitable rights by some other  
13 citizen. Whether or not to avail himself of this right of access to the  
14 court lies exclusively within the plaintiff’s choice; if he chooses to do  
15 so, the defendant has no option in the matter; his subjection to the  
16 jurisdiction of the court is compulsory. So, it would stiltify the  
17 constitutional role of the High Court as a court of justice if it were not  
18 armed with powers to prevent its process being misused in such a  
19 way as to diminish its capability of arriving at a just decision of the  
20 dispute”. It has been held that the Court’s inherent jurisdiction in an

1 area may be ousted by subsequent statutory provisions dealing with  
2 the matter but that is not so in this case. The overriding objective in  
3 case management must be:

4

5 a) The rules and procedural codes in place are with the  
6 object of enabling the court to deal with cases justly;

7 b) Dealing with the case justly includes, so far as is  
8 practicable:

9 (1) ensuring that the parties are on equal footing;

10 (2) saving expense;

11 (3) dealing with the case in ways which are

12 proportionate to the amount of money involved,

13 to the importance of the case, to the complexity

14 of the issues, and to the financial position of each

15 party;

16 (4) ensuring it is dealt with expeditiously and fairly;

17 (5) allotting to it an appropriate share of the Court's

18 resources whilst taking into account the needs to

19 allow resources to other cases.

20

1 The Court has a general power to make orders and directions of its  
2 own initiative and may require parties to provide further information  
3 about the issues or evidence in the case or about the progress made  
4 in the case. **The result is that, although litigation is conducted in**  
5 **an adversarial manner, the parties are not at liberty to do as they**  
6 **wish but must conduct their cases within a framework controlled**  
7 **by the Court.** Those would be the guiding principles for case  
8 management.

9  
10 The Court's power to strike out a Statement of Claim which is an  
11 abuse of the Court's process cannot be questioned. This is a power  
12 "which any court of justice must possess to prevent misuse of its  
13 procedure in a way which, although not inconsistent with the literal  
14 application of its procedural rules would nevertheless be manifestly  
15 unfair to a party to litigation before it, or would otherwise bring the  
16 administration of justice into disrepute amongst right-thinking people"  
17 (per Lord Diplock in *Hunter v. Chief Constable of the West Midlands*  
18 *Police* (1982) A. C. 529 and 536). There are several examples of  
19 abuse of process which the Court deals with. The example that  
20 would be applicable to the facts of this case and, as resubmitted by

1 Mr. Imrie, are that it is an abuse of process where the Statement of  
2 Claim as in this case is incurably incapable of proof. Usually that  
3 submission is made where it becomes apparent after disclosure of  
4 documents or after exchange of witness statements but in this case  
5 Mr. Imrie submits it is evident on the very Statement of Claim and he  
6 says that I should take the draconian step of striking it out because  
7 there are clearly hopeless allegations made in several instances in  
8 the Statement of Claim. The example he gives is a claim for  
9 US\$150,000. It is couched in such a way, he submits, that it is  
10 alleged that Mr. Krys took that money and has not repaid it. The  
11 factual situation he says is (and it is confirmed by the Statement of  
12 Claim) that the US\$150,000 was taken by Mr. Krys as part of his  
13 bonus, but on enquiry being made by the Plaintiff in 355 of 2007, he  
14 said he was holding it in trust and repaid it. The Plaintiff's position is  
15 simple, Mr. Halkerston says US\$150,000 may have been paid but the  
16 Plaintiff has a choice to apply it towards whatever it wishes and not  
17 necessarily take it as a repayment of the amount taken as part bonus.  
18 Without going into the merits of such a claim, it would appear that that  
19 particular claim may not succeed at trial but it is entirely a matter for  
20 the trial judge and the evidence that will be laid before him. This is an

1 example, however, of Mr. Imrie's submission that gives rise to the  
2 striking out application. A question for the Court also is whether issue  
3 estoppel arises on these facts. It is my view supported by the  
4 authority of *Mulkerrins PricewaterhouseCoopers* (2003) 1 W.L.R.  
5 1937 that where the parties in the two claims are not the same issue  
6 estoppel does not apply and in this case it would appear that whether  
7 this matter proceeds or a Counterclaim is filed on 321 of 2007 there  
8 would be a party added to the Counterclaim in 321 of 2007. I do not  
9 therefore believe that issue estoppel arises in this case. Whether a  
10 claim is vexatious depends on "all the circumstances of the case".  
11 The categories are not closed and the considerations of public policy  
12 and the interest of justice may be very material, Stuart-Smith LJ in  
13 *Ashmore v. British Coal Corporation* [1990] 2 Q.B. 338.

14

15 I now turn to the principles which will guide this court in granting a  
16 stay if it is merited. There is a general public interest in avoiding a  
17 multiplicity of claims. Sometimes it is simply an abuse of process to  
18 bring a duplicate set of proceedings with the result that the latter  
19 proceedings will be struck out (see *Buckland v. Palmer* [1984] 1  
20 W.L.R. 1109. Where a claim stops a little short of being suitable for

1 striking out stays may be imposed instead. For example where the  
2 dispute should be dealt with by arbitration rather than by litigation or  
3 where the dispute should be dealt with abroad forum non conveniens  
4 or where the dispute should be stayed until the resolution of  
5 connected pending criminal proceedings.

6

7 I bear in mind Mr. Halkerston's submissions that whilst the Plaintiff is  
8 not alleging dishonesty it is alleging conduct which was not honest. I  
9 find the difference is a little difficult to understand. He submits  
10 therefore that the burden on his client is the greater as it is alleging  
11 breach of fiduciary duty which is why his client is the appropriate  
12 Plaintiff. He submits that his client is also alleging the removal of  
13 trust funds and asking for the appointment of a receiver. Initially he  
14 submitted that his client was not alleging prejudice. When the court  
15 pursued the matter he admitted that he is in fact now alleging  
16 prejudice. He submits that if his client had to file a counterclaim to  
17 the Writ filed by Mr. Krys and Mr. Stride he would not be opening the  
18 case and his submissions would be at the close of the case second to  
19 the Plaintiffs who would therefore have an advantage over his client.  
20 His main thrust however is that the burden is not equal, that his client

1 has a greater burden as it has to have the preponderance of  
2 evidence required to prove this case. He also asks the court to look  
3 at the actual claim and say that if in fact this claim is not to be  
4 published for any reason and sealed then it would be against public  
5 policy because the creditors are entitled to know what is happening.

6

7 On the other hand, Mr. Imrie responds to this and submits that the  
8 Plaintiff in this Writ, RSM Cayman Islands, has dreamt up a fanciful  
9 cause of action. He says it is a simple case of a interpretation of a  
10 contract and the questions to be answered are 'Was there a fiduciary  
11 duty'? 'What were its terms'? 'Would a claim, a defence and a  
12 counterclaim be the way to proceed?' He submits there are three  
13 questions to answer:

14

15 1) What are the terms of the partnership agreement?

16 2) Did Mr. Kryz and Mr. Stride breach them?

17 3) If so what are the damages?

18

19 The burden of proof he says is no greater than on his clients than on  
20 the others.

1

2 What Mr. Halkerston, on behalf of RSM Cayman Islands, is really  
3 saying is the court does not necessarily have to stay Cause Number  
4 321 of 2007, (it has not asked for that declaration), but he admits that  
5 the two cases cannot run together and submits that because he has a  
6 greater burden, his client is the true Plaintiff.

7

8 This Court believes that this is a most unfortunate case. It is  
9 destructive to the image of the Cayman Islands. It is of concern to  
10 the Court that this litigation between a liquidation service provider and  
11 two officers of the Court who have been appointed as such in the  
12 liquidations is extremely hostile. Allegations have been made by  
13 RSM Caymans Islands about communications between Mr. Krys and  
14 a journalist in his capacity as such which as it transpires is not totally  
15 accurate as the journalist was in fact a creditor. On the other hand,  
16 Mr. Dickson himself has spoken with a journalist and he is the Court  
17 appointed liquidator appointed at the request of RSM Cayman  
18 Islands. The question of public policy and the publication of these  
19 allegations are factors that bear heavily on this Court.

20

1 I therefore find that, based on all the authorities that have been  
2 submitted to me and based on the case management policy in this  
3 jurisdiction and based on the fact that there will be little or no  
4 prejudice to the Plaintiff in Cause Number 355 of 2007 (Defendants  
5 can open), that Cause Number 355 of 2007 should be stayed. The  
6 Defendants in Cause Number 321 of 2007 should now proceed to file  
7 a Defence and Counterclaim if they so desire seeking to join any  
8 parties that they may wish to join. As the Court has already indicated  
9 the Counterclaim is likely to be published I will not seal any of the  
10 papers.

11

12 I therefore make the following orders:

13

14 1) Cause Number 355 of 2007 should be stayed pending the early  
15 hearing of the final determination of Cause 321 of 2007;

16 2) That the Defendants in Cause Number 321 of 2007 be given 14  
17 days from the filing of the formal order in this application to file  
18 their Defence and Counterclaim if any;

19 3) The costs of this application be the costs of the Defendants (In  
20 Cause 355 of 2007).



1 Dated this 5<sup>th</sup> day of September 2007

2 

3 Judge of the Grand Court

