IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

CAUSE No: FSD 68 of 2016 (NSJ)

BETWEEN

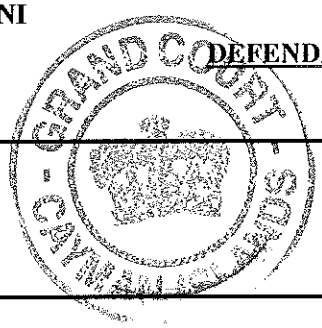
PALLADYNE INTERNATIONAL ASSET MANAGEMENT B.V.

PLAINTIFF

AND

(1) UPPER BROOK (A) LIMITED
(2) UPPER BROOK (F) LIMITED
(3) UPPER BROOK (I) LIMITED
(4) AHMED MOHAMMED JEHANI
(5) ALI JALAL BARUNI

DEFENDANTS



JUDGMENT

Appearances: Richard Millett QC instructed by Walkers for the Plaintiff

Peter McMaster QC of Appleby (Cayman) Limited for the Defendants

Introduction

1. This is my judgment on the defendants' (together the ***Defendants***) summons dated 28 4th September August for an order that the proceedings commenced by the Plaintiff ***(PIAM)*** by way of an originating summons dated 20 May 2016, as amended on 14 June (the ***Originating Summons***) should proceed as if commenced by writ and PIAM's summons for directions for the future conduct of such proceedings.

2. After careful consideration of the written skeleton arguments and submissions made at the hearing by Mr McMaster for the Defendants and Mr Millett for PIAM, and the evidence filed by the parties, I have concluded as follows:

   (a). that the proceedings issued by PIAM should proceed as if commenced by writ.

(b). that this is required primarily because pleadings are, in my view, needed to clarify how PIAM's case based on, and its assertions of, breaches of the statutory instrument giving effect in Cayman to the U.N. sanctions in relation to Libya are formulated and what facts are in dispute so as to ensure that the Defendants know precisely what is being alleged against them and have a proper opportunity to defend the proceedings. This is necessary to do justice as between PIAM and the Defendants and secure a fair trial. The proceedings as currently constituted give rise to too many ambiguities and uncertainties which make them oppressive, as that term is used in the authorities to which I refer below.

(c). that the need for clarity and the particularisation through pleadings of the facts relied on and asserted with respect to each Defendant is particularly important in this case where the sanctions based claims (on which PIAM relies to invalidate the shareholder resolutions which it challenges in these proceedings) allege the deliberate and knowing commission of criminal offences and misconduct which is at least very close to an allegation of fraud, even if, for the reasons I explain below, not fraud in the sense used by GCR O.5, r.2(b).

(d). that the evidence filed on behalf of the Defendants identifies a number of material factual disputes which reinforce the need for the proceedings to continue as if commenced by writ.

PIAM's claim and the Originating Summons

3. Various parties were joined as defendants to the Originating Summons. The Defendants are Upper Brook (A) Limited (***A***); Upper Brook (F) Limited (***F***); Upper Brook (I) Limited (***I***); Ahmed Mohammed Jehani (***Dr Jehani***) and Ali Jalal Baruni (***Mr Baruni***). I refer to A, F and I together as the ***Companies***.

4. The Originating Summons relates to written resolutions purportedly signed on behalf of and passed by the shareholders of each of the Companies. The Libyan Africa Portfolio (***LAP***) is the sole shareholder of A; the Libyan Foreign Bank (***LFB***) is the sole shareholder of F and the Libyan Investment Authority (***LIA***) is the sole shareholder of I (although PIAM asserts that LIA is the beneficial owner of LFB's shares in F). LAP, LFB and LIA are Libyan sovereign entities which ultimately hold

their assets for the benefit of the people of Libya (and are together referred to as the ***Shareholders***).

5. Those resolutions (the ***Resolutions***) purported to remove PIAM as a director of each of the Companies and to appoint Dr Jehani and Mr Baruni as directors in PIAM's place (the Resolutions in respect of A and I were signed on 8 July 2014 and the Resolution in respect of F was signed on 18 July 2014 – not in 2015 as stated in the Originating Summons). PIAM now seeks declarations that the Resolutions were invalid and of no effect and that, in consequence, Dr Jehani and Mr Baruni were not validly appointed as directors, and that PIAM was not removed as a director, of the Companies.

6. PIAM's claim is supported by an affidavit sworn by Johan Hendrik Wansink (***Mr Wansink***) dated 11 July 2016.

7. The Originating Summons sets out the declarations sought by PIAM and four grounds for such relief as follows:

   (a). the Resolutions were signed without proper authority of the relevant shareholder, as a matter of Libyan law.

   (b). further or alternatively, the Resolutions were made in breach of UN sanctions as given effect in Cayman, in particular the Resolutions were made in breach of Articles 10 and/or 13 of the Libya (Restrictive Measures) (Overseas Territories) Order 2011 (SI 2011/1080) (the ***Order***), in that (in summary) the shares in and assets of each of the Companies were subject to Article 10 and the Resolutions involved one or more of the Companies, Dr Jehani and Mr Baruni and/or the Shareholders contravening Article 10 of the Order by dealing with the shares by (inter alia) using them or making a change that would enable use; and/or by dealing with the assets by (inter alia) allowing access to the assets and/or making any other change that would enable use of the assets, by placing Dr Jehani and Mr Baruni in, and removing PIAM from, a position in which they could deal with the Companies' assets.

   (c). further or alternatively, the Resolutions were made with the intention of doing any or all of the foregoing and

   (d). further or alternatively, the Resolutions were part of a course of action in which the Companies participated knowingly and intentionally, the object of

which was, directly or indirectly, to circumvent the prohibition on dealing with funds, in breach of Article 13 of the Order.

8. The relevant parts of Article 10 of the Order can be summarised as follows:

(a). a person, unless authorised by a proper licence to do so, *may not deal with funds* which on 16 September 2011 were owned held or controlled directly or indirectly by a person referred to in paragraph 15 of Security Council resolution 2009 (2011); were located outside Libya and were frozen under the asset freeze imposed under paragraph 22 of Security Council resolution 1973 (2011) read with paragraph 17 of Security Council resolution 1970 (2011) [emphasis added] (see paragraph (1) of Article 10).

(b). "Funds" are defined in Article 2 of the Order as meaning "financial assets and benefits of every kind, including (but not limited to) ..... publicly and privately traded securities and debt instruments, including stocks and shares, certificates representing securities, bonds, notes, warrants, debentures and derivative contracts; [and] interest, dividends or other income on or value accruing from or generated by assets."

(c). a person who contravenes the prohibition in paragraph (1) of Article 10 is guilty of an offence under the Order (see paragraph (2) of Article 10).

(d). in proceedings for an offence under Article 10, it is a defence for a person to show that they did not know and had no reasonable cause to suspect that they were dealing with funds owned or controlled, directly or indirectly, by a designated person or persons acting on their behalf or at their direction or by persons controlled by them (see paragraph 3 of Article 10).

(d). to "deal" is defined as meaning in respect of funds "(i) to use, alter, move, allow access to or transfer; (ii) to deal with in any other way that would result in any change in volume, amount, location, ownership, possession, character or destination; or (iii) to make any other change that would enable use, including portfolio management (see paragraph (4) of Article 10).

9. The relevant parts of paragraph 13 of the Order provide that a person shall be guilty of an offence under the Order if they participate, knowingly and intentionally, in activities the object or effect of which is, directly or indirectly, to

(a). circumvent a prohibition in Article 10(1) of the Order or

(b). enable or facilitate the commission of an offence under Article 10(2) of the Order.

10. The Originating Summons sets out the basis on which PIAM claims that the shares in the Companies (the ***Shares***) and the Companies' assets (the ***Assets***) are "funds" which are covered and frozen by the Order, namely that on 16 September 2011 the Shares and the Assets were located outside Libya and were owned, held or controlled directly or indirectly by LIA or LAP (on PIAM's case, as noted above, LIA is the beneficial owner of LFB's shares in F), who were the legal or beneficial owners of the Shares (so that the conditions set out in paragraph (1)(b) of Article 10 were satisfied).

11. In his affidavit Mr Wansink sets out the factual background to PIAM's claim and exhibits the documents on which PIAM relies. The matters covered by his affidavit can be summarised as follows. He refers to the circumstances surrounding the investment by the Shareholders in PIAM and the Companies (which were incorporated by PIAM); the entry by each of the Companies into an investment management agreement with PIAM (the ***Investment Management Agreement***); the appointment by each of the Companies of Intertrust (Cayman) Limited as administrator pursuant to an administration agreement; the appointment of custodians to hold the Assets (now Deutsche Bank in Germany and State Street in London, with the former holding approximately 98.5% of the Assets); the establishment by PIAM of Palint Stichting (***Palint***), a foundation established according to the law of the Netherlands, in connection with the appointment of Deutsche Bank (Palint is the party to the custody agreement with Deutsche Bank); the imposition of U.N. sanctions on Libya; the request by LAP in February 2014 to redeem the shares in A and various licence applications made by LAP; the purported appointment by the chairman of LAP of Dr Jehani as his attorney in fact "in the matter of resolving all issues related to [A]"; a meeting of the board of LIA on 4 May 2014 at which LIA's investment in and strategy for dealing with the Companies was discussed, including the proposal and steps required to change the boards of the Companies and appoint Dr Jehani and Mr Baruni "with the consideration that they are required to adopt certain resolutions required by [LIA] in order to liquidate [the Palladyne] Portfolio"; the subsequent purported appointment by the CEO of LFB of Dr Jehani as his attorney in fact "in the matter of resolving all issues related to [F]" in similar terms to the power of attorney given in relation to A; the passing of the Resolutions; the subsequent resignation of Mr Murugesu as a director of A and I; the termination by the Companies of each

Investment Management Agreement, pursuant to decisions taken by Dr Jehani and Mr Baruni purportedly acting as directors and on behalf of the Companies; the purported appointment by Dr Jehani and Mr Baruni, acting in the same capacity, of new legal advisers to the Companies, who were allegedly acting at the time for LIA; the events and uncertainties surrounding the control of and authority to act for LIA in view of the rival governments in Libya and the proceedings commenced in the District Court of Amsterdam by the Companies, purportedly represented by Dr Jehani and Mr Baruni, first in March 2015 against Palint, to whom it was alleged the Assets had been transferred, seeking the removal of its directors and subsequently in February 2016 against Palint and PIAM seeking injunctive relief preventing either Palint or PIAM dealing with the Assets, both of which sets of proceedings were unsuccessful (the description of the 2016 proceedings given by Mr Wansink is very brief and I have here followed the further details provided in the Defendants' evidence).

12. In particular, Mr Wansink states in his affidavit that [emphasis added]:

(a). "PIAM believes *that actions* taken by the [Companies], the Shareholders and Dr Jehani and Mr Baruni] are invalid both because these actions had not been authorised as required under Libyan law and because they violate United Nations and Cayman Islands sanctions law… The *principal matter* of concern is the making of [the Resolutions]." [paragraph 1.5]

(b). "PIAM is of the opinion that the [Resolutions] are void/invalid for two reasons:

(a). ***lack of authority:*** those who purportedly acted for [the Shareholders] lacked the necessary authority to pass the [Resolutions] (this is *in part* a matter of Libyan law on which PIAM will in due course hand over expert evidence); and

(b). ***sanctions breaches:*** the [Resolutions] contravened Article 10 [of the Order] because they constituted a prohibited "dealing" with frozen funds/assets *or formed part of activities* whose object was to circumvent those restrictions (in breach of Article 13 of the Order) .." [paragraph 1.6]

(c). "At the time that Palint was established this structure was mandatory for certain regulated investment funds in the Netherlands to ensure assets segregation in the event of bankruptcy of the fund manager." [paragraph 3.6]

(d). "... To the best of my knowledge, the [Companies] have not under the de facto management of Dr Jehani and Mr Baruni obtained any sanctions licences or taken any steps to appoint a new fund manager. Only PIAM has a sanctions licence but the Custodians are not settling any trades apparently as a result of Enyo having conveyed its view of the current position to the Custodians (I have not seen Enyo's correspondence .. but Enyo confirmed in its letter to Dechert dated 29 July 2014 .. that this had happened) .. The Assets are therefore held in suspension with no ability to settle trades .." [paragraph 6.31]

(e). "The [Resolution] relating to [I] was signed by LIA's acting chairman, Mr Benyezza; the [Resolutions for A and F] were signed by Dr Jehani purportedly acting under a power of attorney from LAP's Chairman and LFB's CEO. PIAM will provide evidence from an expert in the field of Libyan law that will show *that in order for any of the [Resolutions] on behalf of the LIA, LAP or the LFB to be valid these persons would need the prior approval of the Board of the entity concerned ... This did not take place for any of the [Resolutions].*" [paragraph 7.2]

(f). "... as our legal submissions will demonstrate the [Resolutions] *and subsequent conduct* breach sanctions. The [Resolutions] are an unlawful "dealing" in the [Shares] ... and in [the] [Assets] .. which is prohibited by the [Order] .... (b) the [Resolutions] *and subsequent conduct* which I have summarised allowed the LIA and LAP to deal in the [Assets] .. by allowing access to them and enabling use of the [Assets] .." [paragraph 7.3]

(g). ".... it seems to PIAM that the *object and purpose* of the [Resolutions] *and subsequent conduct* was to allow .. LIA and LAP access to frozen funds. The purported removal of PIAM .. the purported termination of the [Investment Management Agreement] and the *other steps taken by Dr Jehani and Mr Baruni have the potential* to make it easier for.. LIA and LAP to gain access to the [Assets], *rendering the [Companies]in effect subsidiaries of .. LIA* .. In particular:

(a). before the [Resolutions], the [Companies] were under the control of directors who operated at arm's length from the targets of the sanctions, namely .. LIA and LAP. After the purported changes in directorships, the (purported) directors of the [Companies] are Dr

Jehani and Mr Baruni, i.e. .. LIA employees installed on the LIA's orders *with a mandate given by .. LIA*;

(b). before the purported termination of the [Investment Management Agreements] the Assets .. were managed by PIAM, which operated at arm's length from .. LIA and LAP. At the present time, the Assets are held in suspension as described in paragraph 6.31 [of the affidavit];

(c). before the change in representation of the [Companies] Ogier represented them and Enyo and the other jointly instructed lawyers represented the LIA. If and insofar as the purported appointment was valid, the jointly instructed lawyers would now be acting for both the [Companies] and LIA …"

[paragraph 7.4]

(h). "The consequence of the [Resolutions] *and the subsequent steps taken by Dr Jehani and Mr Baruni, purportedly as directors,* is that .. LIA (and LAP) *subject only to the caution of the [custodian banks]* have access to the [Assets] .. early in 2014 PIAM made it clear to LAP that sanctions prohibit redemption (without a licence). Apparently, .. LIA and LAP subsequently decided to try to sidestep that prohibition and gain access to the Assets .. themselves, without having the required licences. They did so *by a course of action* whose object was to avoid the asset freeze; they decided to liquidate the [Assets] themselves. As PIAM sees it, the appointment of Dr Jehani and Mr Baruni was an integral part of *that plan and intended to support .. LIA's objective of liquidating the [Assets].*" [paragraph 7.5]

The Defendants' summons for an order under GCR O.28, r.8

13. On 4th August the Defendants issued a summons seeking an order under GCR O.28, r.8 that the proceedings commenced by the Originating Summons shall proceed as if commenced by writ and directions as to the future conduct of the proceedings thereafter. The summons was supported by an affidavit of Abdulmagid Breish (***Mr Breish***), who is the Chairman of the Board of Directors and CEO of LIA.

14. In his affidavit Mr Breish:

(a). states that he is not seeking "to address all aspects of [Mr Wansink's] affidavit .. for the simple reason that [Mr Breish does] not believe that this is

a matter which is appropriate for litigation by affidavit. But instead there "are certain key issues which [he] believe[s] must be addressed at this point in order to correct the record, given the gravity of the allegations, or else because they illustrate the reason why the Defendants have made their application." [paragraph 6]

(b). notes that PIAM's claim relies on very serious allegations of breaches and/or intended breaches of UN sanctions which are criminal acts punishable by imprisonment and argues that the claim is based on an allegation of fraud ('which is what PIAM's claims amount to'). [paragraph 5]

(c). deposes that the ownership of the Shares and Assets is not in dispute. [paragraph 8]

(d). denies that any of the Shareholders had "any intention to breach the relevant sanctions let alone [that there was] any actual breach." [paragraph 22]

(e). states that the Shareholders took steps to remove PIAM as a director and investment manager of the Companies because of dissatisfaction with PIAM's performance of its duties and responsibilities and because of suspicions regarding the possible diversion of assets of I. Mr Breish states that "LIA was deeply unsatisfied with PIAM at the time of the [board meeting on 4 May 2014]. PIAM was charging unusually high management fees while the [Companies] were performing extremely poorly... PIAM was also failing to provide the LIA with basic asset statements and other standard disclosures. The Directors of the LIA also considered it inappropriate that Libyan public sector assets be controlled by PIAM at a time when PIAM and its principals and related persons were being investigated by the Dutch and Swiss authorities for possible money laundering offences." The reference to an investigation is to a report prepared by the Dutch Fiscal Intelligence and Investigation Service which Mr Breish says states that there is a reasonable suspicion that a Mr Abudher, induced by PIAM, had channelled money in a fraudulent manner to himself and his family at the expense of I. An extract from the report is exhibited to Mr Breish's affidavit but is in Dutch and has not been translated into English (save for a single paragraph quoted in the affidavit); "the purpose of the LIA's desire to liquidate the portfolios managed by PIAM was to move those assets out of PIAM's control so that

their value would be preserved and not continue to suffer from poor management and high management fees." [paragraph 11]

(f). disputes that the minutes of the board meeting on 4 May 2014 provide, when properly understood, evidence of an intention to breach the sanctions and the Order and asserts that PIAM's claim appears to be based on a misunderstanding of the record of comments made at the meeting contained in those minutes. [paragraphs 4, 17, 20 and 21]

(g). asserts that it is necessary for the thinking of the directors attending the board meeting and of those acting on behalf of the Shareholders to be fully examined by reference to proper evidence including witness statements and cross-examination. [paragraph 23]

(h). refers to evidence which he says demonstrates that the directors at the 4 May 2014 board meeting and the Shareholders were fully aware of the sanctions and Order and had taken various steps to ensure compliance. In particular, he states that the "LIA directors have always understood and supported the need to comply with the UN sanctions, and continue to do so. We fully comprehend the effect of the UN sanctions on dealings with assets owned by the LIA (given that a significant portion of LIA assets are sanctioned). I personally have sent formal notices to the relevant regulators supporting the maintenance of the sanctions and requesting vigilance in their enforcement." And he refers to copies of certain correspondence with the U.N. Sanctions Committee in New York and the Financial Secretary of the Cayman Islands, sent in September 2015 which are exhibited to his affidavit. [paragraph 37] He also refers to (and exhibits) a letter dated 18 September 2014 from the Financial Secretary at the Cayman Ministry of Finance and Economic Development in response to an enquiry and letter from Appleby, the attorneys to the Defendants, containing a confirmation that the dismissal of PIAM as investment manager of the Companies, the dismissal of PIAM as a director of F and the appointment of Dr Jehani and Mr Baruni were not subject to a sanctions licence and were not illegal acts in the absence of such a licence. He asserts that "There is no reason why .. LIA would ever try to breach or circumvent UN sanctions" and that the amounts held through the Companies represents only a very small part of the funds controlled by LIA. [paragraphs 36-42]

(i). denies that even after the Resolutions were passed and Dr Jehani and Mr Baruni had been appointed as directors of the Companies, and PIAM's role as investment manager had been terminated, any action would be taken which could result in a breach of the sanctions and the Order. He says that "the assets of the [Companies were] entrusted to independent reputable third party banks (custodians) for safekeeping [Deutsche Bank and State Street], each of whom have always been on notice of the fact that [the Assets] are sanctioned assets and can only be dealt with by a licenced party. Each of these custodians is a large international bank and I would not expect either to have acted on instructions which were in breach of UN sanctions and regulations, thereby committing a criminal act. None of the steps contemplated – either conversion to cash or active management by a new licensed manager – would have resulted in the assets leaving the custody and safekeeping of those banks." [paragraph 36]

(j). denies that the use of Palint by PIAM was a legal requirement. [paragraph 34]

(k). asserts that the dispute between the rival governments of Libya regarding who was entitled to control LIA has no relevance to these proceedings since such dispute only arose after the action taken to remove PIAM as a director and investment manager of the Companies; [paragraphs 43-47] and that he, Mr Bouhadi and Mr Benyezza (representing three out of the seven board members, including the chairman and deputy-chairman, recorded as being in attendance) were undisputed members of the board of directors of LIA at the time of the 4 May 2014 board meeting. [paragraph 46]

(l). denies PIAM's assertions about the underlying intentions of and the circumstances surrounding the Resolutions, the proposed dealings with the Assets, and the authority of the LIA to pass the Resolutions, as well as the relationship between PIAM and Palint, and argues that these issues will all need to be assessed with reference to relevant contemporaneous documentary evidence (which will require disclosure of relevant documents from all parties), as well as evidence from and examination of witnesses of fact, without which there cannot be a fair trial of this dispute. [paragraph 50]

15. Mr Breish exhibits to his affidavit a letter to the Rechtbank in Amsterdam, the Dutch Court, dated 24 May 2016 from PIAM's solicitors, Messrs Dechert LLP in which Dechert summarises in a simplified and non-exhaustive manner for the Dutch Court

the case which PIAM intends to make in these, the Cayman, proceedings. The letter makes it clear that it is not part of or produced for the purpose of these proceedings and PIAM has not referred to or made use of the letter in connection with this hearing (the letter was not referred to in or exhibited to Mr Wansink's affidavit nor was it referred to in the written skeleton of Mr Millett). Accordingly, it seems to me that I should place no reliance on it for the purpose of dealing with the two summonses before me. PIAM's position needs to be considered by reference to its Originating Summons and its evidence and the submissions filed and made on its behalf in this Court.

The Defendants' submissions

16. Mr. Peter McMaster QC on behalf of the Defendants submitted that:

(a) GCR O.5, r.4(2)(b) and the relevant authorities established that in a case commenced by Originating Summons if the Court can see that there will be a substantial dispute of fact (and unless the Court concludes that a substantial dispute of fact is *unlikely*) then it should make an order that the proceedings shall be continued as if commenced by writ; and

(b). it was "blindingly obvious" that there is a substantial dispute of fact in the present case. This, he submits, is a case in which construction is not the sole or principal issue and in which it is impossible credibly to suggest that it is likely that there will be no substantial dispute of fact. It is sufficient that this is a case in which PIAM alleges intentional criminal wrongdoing (and that breaches of the Order were intentionally and knowingly committed) and that these allegations are hotly contested. There is a dispute as to the Defendants intention and knowledge and as such there are substantial disputes of fact.

(c). furthermore, since PIAM's claim was based on (at least in part), and PIAM claimed that the Defendants had committed, intentional breaches of the criminal law, the Defendants were entitled to insist on having the protection of the writ procedure which would require a pleading that would particularise the facts asserted and relied on and thereby allow the Defendants to know the case they had to answer.

17. In his written skeleton argument Mr McMaster did not rely, as Mr Breish appears to do in his affidavit, on GCR O.5, r.2(b), although he refers to it. GCR O.5, r.2(b) states that proceedings in which any claim by the plaintiff is based on an allegation of fraud

must be begun by writ. Mr Breish, as I have noted, states in his affidavit that he has been advised that PIAM's claim is, or amounts to, a claim based on an allegation of fraud (I also note that Mr McMaster does not refer to or rely on GCR O.5, r.2(a) which relates to a claim for any relief or remedy for any tort).

18. As regards the applicable GCRs and the authorities Mr McMaster:

(a). argued that this is a case which involves substantial disputes of fact and, in accordance with GCR O.5, r.4(2)(b), is therefore not an appropriate case to be begun or continued by originating summons. GCR O.5, r.4(2) states that:

"*Proceedings -*

(a). in which the sole or principal question at issue is, or is likely to be, one of the construction of any Law or of any deed, will, contract or other document, or some other question of law; or

(b). in which there is unlikely to be any substantial dispute of fact,

are appropriate to be begun by originating summons ..."

(b). relied on the following dictum of Buckley J in *In re Sir Lindsay Parkinson & Co. Ltd Settlement Trusts* [1965] 1 WLR 372, which was a case in which a claim for breach of trust was brought by the plaintiff using the originating summons procedure. In determining that this procedure was not appropriate, Buckley J. said (at pages 26-27) the following:

"*Under rule 4 it was, I think, open to the plaintiffs to institute these proceedings either by originating summons or by writ; by the terms of the rule the matter is left in the discretion of the plaintiffs. But I desire to say that in my view clearly proceedings by beneficiaries against trustees of a contentious nature, charging the trustees with breach of trust or with default in the proper performance of their duties, whether the matters with which the trustees are charged are matters of commission or omission ought normally to be commenced by writ and not by originating summons, for in such proceedings it is most desirable that the trustees should know before trial precisely what is alleged against them. The appropriate form of proceedings, therefore, in my view, is proceedings by writ in which the issues between the parties will be clearly defined in the pleadings; under which the parties can, if they wish, seek further and better particulars of the matters alleged by their opponents; and in which there is full discovery. For where allegations of this kind are made against trustees, I think it is right that the trustees should have available to them the full machinery which exists in the case of proceedings instituted by writ and conducted on pleadings, of discovering precisely what the charges are that are levelled against them. I say that because I do not want it to be thought that these proceedings constitute a precedent of the way*

in which, in normal circumstances, proceedings raising matters of the kind which the plaintiffs seek to raise in these proceedings should be instituted. The reason why in the present action the proceedings were brought by originating summons rather than by writ was, I think, the fact that at the time when the proceedings were issued the matters in issue between the parties had become of great urgency, and it was thought that proceedings instituted by originating summons could be got before the court more speedily than proceedings instituted by writ. I am not saying that that was not a reasonable view to take.

I have said what I have said merely in order to make clear that I think in ordinary circumstances proceedings by way of originating summons ought not to be regarded as appropriate in such a case as the present."

(c). submitted that the following propositions can be derived from this passage in the judgment:

(i). a plaintiff has the right to commence his proceedings by using an originating summons but he does not have the right to continue if his is not an appropriate case for the procedure;

(ii). proceedings alleging contentious breaches of trust should be begun by writ because it is important that:

(A). the trustees should know precisely what is being alleged.

(B). the issues are defined by pleadings;

(C). the parties should have an opportunity to seek particulars; and

(D). that there should be full discovery.

(iii). it is wrong to deprive the trustee (in the words of Buckley J) of "*the machinery which exists in the case of proceedings instituted by writ and conducted on pleadings, of discovering precisely what the charges are that are levelled against them*".

(d). submitted that the present proceedings in which what is alleged is not breach of trust but intentional breaches of the criminal law is an *a fortiori* case?

(e). further submitted that a plaintiff's not unreasonable desire to have the matter come on quickly does not justify the use of the originating summons procedure where it is otherwise not suitable.

(f). relied on the decision and dicta of Quin J in Cayman in *Eden v Eden & Ebanks* [2008] CILR 354 (in which *Parkinson* was applied), a case involving a claim against an administratrix making *"serious allegations; namely, breach of trust and breach of fiduciary duty"* brought by originating summons. The respondent submitted that hostile, controversial and adversarial allegations of the sort being made meant that she should have "*the inherent protection afforded by a writ action"* and after considering *Parkinson* (at paragraph 11), Quin J ordered that the matter proceed by way of writ action noting (at paragraph 14) that the nature of the allegations, their seriousness, were crucial to the decision.

"I have given careful consideration to this question. First, the nature of the dispute and the seriousness of the allegations of fraud are compelling reasons for the matter to be continued by writ" (emphasis added) [and that there was] *no prejudice caused to any parties in converting [the matter] to a writ action*"

(g). submitted, in reliance on the judgment of Quin J, that the Court should make an order for a writ action when it was satisfied that it was needed as a matter of basic fairness to the respondent. At paragraph 15 of the judgment Quin J said:

"*For the above reasons, and in order to do justice between the petitioner and the first respondent, and to secure a fair trial between them, I find this petition should proceed as if commenced as a writ action"* (emphasis added).

(h). submitted, in reliance on the judgment of Stanley Burnton L.J. in *ING Bank NV v Ros Roca SA* [2011] EWCA Civ 353, [2012] 1 W.L.R. 472, CA, at 493, a case dealing with the Part 8 procedure under the English Civil Procedure Rules, that:

(i). the originating summons procedure was only appropriate in cases in which the parties "*seek the Court's decision only on questions which are unlikely to involve a substantial dispute of fact"*; and

(ii). pleadings should be required in any case in which they are needed to clarify how the case was formulated and what facts were in dispute, since considerations of justice and fairness go beyond the need to ensure that a defendant should know precisely what is being alleged against it and have the opportunity to seek particulars, but require that

issues are properly defined to guide the Court's decision-making process.

Stanley Burnton LJ had said as follows:

"In the present case, the parties should have agreed or applied for directions for the exchange of pleadings on the estoppel issue. Pleadings would have clarified precisely how Ros Roca put its case and what facts were in dispute. In the event, this court has been able to determine the issue of estoppel on the basis of the judge's findings of fact. However, his determination of the factual issues would have been easier, and the risk of injustice less, if the parties had pleaded their respective cases."

19. As regards the application of these propositions and principles to the present case Mr McMaster submitted that:

(a). there is a substantial dispute of fact because there is dispute as to the reasons for the Shareholders' decision to remove PIAM as a director and investment manager (as demonstrated by Mr Breish's evidence on this issue). This factual dispute is relevant to PIAM's claim that the Resolutions involved a breach of the Order (which is based in part on the Defendants' knowledge and intentions in deciding the pass the Resolutions);

(b). PIAM's claim as set out in the Originating Summons is insufficiently particularised to enable the Defendants to understand clearly the case made against them and how to respond.

20. As regards the first point, Mr McMaster says that Mr Breish in his evidence is quite clear that the intention of the Defendants all along has been to comply strictly with the law and therefore puts in issue the facts which establish the Defendants' intentions.

21. As regards the second point, Mr McMaster:

(a). argues that PIAM's case is broadly formulated and relies on allegations of criminal conduct by the Defendants and a criminal state of mind without identifying precisely and particularising whose conduct and state of mind, what conduct and what state of mind are relied on as constituting the criminal conduct and the breach of articles 10 and 13 of the Order.

(b). submits that PIAM's claim ranges from a bare assertion (a claim in which the issue in dispute would be primarily one of law) that any vote in favour of the Resolutions would be an ipso facto breach of the Order (which Mr McMaster accepts might if it stood on its own be suitable for the originating summons procedure) to a much wider claim that the motives and intentions behind the Resolutions are criminal and invalidate them and that the effect of the Resolutions (and the changes made by them) was criminal because they allowed or enabled use of the Assets in a way that infringes the prohibition in Article 10.

(c). argues that in paragraph (b)(ii) of the Originating Summons PIAM fails to identify or particularise precisely whose conduct or intentions resulted in a breach of article 10. The Originating Summons simply states that *"the resolutions involved one or more of the Defendants and/or the [Shareholders]contravening Article 10 [by a dealing with the Shares and/or Assets]."* Is this an allegation, Mr McMaster asks, that the breach arose from the conduct or state of mind of just one of the Defendants, or a combination of more than one Defendant, or a combination of some or all of the Defendants and some or all of the Shareholders?

(d). submits that, furthermore, the Originating Summons fails to identify with sufficient particularity precisely what facts are relied on and asserted in support of the allegation that a change of directors enables use of the Assets or allows access to them, particularly as regards the manner in which the Assets are held and the position and attitude (in particular to instructions to deal with the Assets) of the custodian of the Assets (on what basis is it alleged that the custodians would permit any action which gave rise to a breach of the Order?). Mr McMaster says that it may well be necessary to make decisions about whether to call evidence from the custodians in the light of what is pleaded and disclosed.

PIAM's submissions

22. Mr. Millett QC for PIAM submitted as follows:

(a). the plaintiff's choice of originating process should be respected in this case. There was no requirement to commence proceedings by way of writ and the

originating summons procedure is appropriate and permits a full and fair hearing of all relevant issues.

(b). GCR O.28, r.4 states that the Court may give directions as to the conduct of originating summons proceedings as it thinks "*best adapted to secure the just, expeditious and economical disposal thereof*", including as regards any disputes of fact and provision for cross-examination. This is a case in which PIAM's principal case involves pure points of Libyan and Cayman law and, so far as PIAM's case involves any factual inquiry, the compass of the relevant factual disputes is very narrow and likely to be limited to a dispute as to Libyan law. Accordingly, there is a disagreement as to the legal consequences which arise from facts which are largely undisputed so that the originating procedure is appropriate.

(c). to the extent that the Defendants (as intimated in Mr Breish's affidavit) argue that the claim is based on an allegation of fraud, so that GCR O.5, r.2(b) applied, they are wrong since PIAM's claim does not assert that there was fraud nor was fraud a necessary ingredient for establishing the relief claimed. PIAM does not allege fraud, deceit or dishonesty (and the reliance on allegations of serious misconduct was also insufficient).

(d). Mr Breish is wrong to argue that PIAM's reliance on the minutes of and the comments made at the board meeting of 4 May 2014 requires that the case should proceed by writ (because the writ procedure is necessary to determine "*the intentions and circumstances surrounding the resolutions*").

(e). the minutes, Mr Millett argues, and the facts relating to the board meeting, are not relevant to PIAM's primary sanctions case (by which I take him to refer to the claim based paragraph (b) of the Originating Summons which relies on a dealing with the Shares and/or the Assets and a breach of article 10 of the Order) but only to the secondary sanctions case (by which I take him to refer to the claim based paragraphs (c) and (d) of the Originating Summons which relies on the intention of the directors who voted for the Resolutions and a course of action whose object was to circumvent the prohibition on such a dealing and in which the Companies knowingly and intentionally participated and breaches of article 13 of the Order). The facts establishing the secondary sanctions case can be adequately established within the originating summons procedure by reference to the documents (the minutes) and the parties

evidence as to their meaning, including responsive evidence and cross-examination where necessary (the Court already has the relevant documents being the Resolutions and the minutes and Mr Wansink's evidence as to the relevant background circumstances). Furthermore, Mr Breish's evidence fails to identify specific issues or primary facts in dispute, with the requisite precision or clarity, so as to demonstrate that there is an area of disputed primary fact of substance (between the version of events offered by the parties).

(f). none of the four factual matters identified by Mr Breish require the case to proceed by writ:

(i). While Mr Breish's evidence indicates that there is a dispute about the LIA's, LAP's and LFB's authority under Libyan law the position under Libyan law is a matter for Libyan law experts and can be resolved justly and proportionately by a direction under GCR O.38 rules 36–39 for the parties to agree the issues and for experts to exchange reports and provide reports in reply (with cross-examination if necessary);

(ii). The assertion by Mr Breish (at paragraph 50) that a writ procedure is needed to examine "*the proposed dealings with the assets*" is also misconceived since it is not clear to which dealings and assets he refers.

(iii). the dispute regarding the reason for using Palint and the relationship between PIAM and Palint and Dutch investment law is irrelevant as Mr Breish admits and therefore cannot justify the use of the writ procedure.

(iv). Mr Millett submits (as I have already noted) that the dispute regarding the Shareholders' intention in passing the Resolutions (in particular the LIA's intention, including the LIA directors' understanding of and support for sanctions) is not relevant to the claim based on a breach of article 10 (PIAM's primary sanctions claim), in relation to which the relevant facts are common ground (namely that the shares were frozen and subject to the Order and that the Resolutions purported to remove PIAM and appoint Dr Jehani and

Mr Baruni) leaving just the legal issues as to whether the Resolutions constitute a dealing with the Shares or the Assets for the purpose of the Order.

(v). as regards the secondary sanctions case based on article 13, Mr Millett says in his skeleton that 'It may be that there is disagreement about the relevance of .. LIA's intentions (as opposed to those of the Defendants). Even if .. LIA's intentions are relevant to any legal argument in these proceedings, they would be only one of several pieces of evidence and any dispute about .. LIA's intentions can and should properly be dealt with under GCR O.28 rules 4(3)–(4). As Mr Wansink's affidavit makes clear PIAM relies on contemporaneous documents, which he exhibits: applications for sanctions licences, letters, emails, minutes, decisions, notes of discussions and purported resolutions. Mr Breish does not suggest that there is any factual dispute about any of these documents or the circumstances they show to exist, except the LIA board minutes.'

(g). the argument of Mr Breish and the Defendants that the writ procedure should be used in this case because there is a need for discovery is misconceived. Mr Millett submits that there is no basis for a discovery order because PIAM is unlikely to have documents relevant to the surrounding intentions (other than those exhibited to Mr Wansink's affidavit), in particular the LIA's intention, including the LIA directors' understanding of and support for sanctions, which are the only intentions and circumstances Mr Breish suggests to be relevant; Dr Jehani and Mr Baruni have not suggested they have any relevant documents and Mr Breish does not suggest that he or LIA has relevant documents (in addition to those he exhibits) and, since neither is a party, discovery would not result in the court having their documents in any event. All the documents and evidence will, he submits, emerge from the Defendants' side, not PIAM's. PIAM was not involved in LIA's board meeting and will not be likely to have any documents to disclose other than those already disclosed by Mr Wansink, or any witness evidence concerning the Resolutions. Accordingly, if the Defendants wish to put factual material before the Court that they consider relevant to the relief sought by PIAM then they are free to do so in the form of affidavit evidence exhibiting the

documents they say are relevant. The originating summons procedure contemplates that.

23. As regards the authorities:

(a). Mr Millett relied in particular on the Court of Appeal's judgment in *Cayman Islands News Bureau Ltd v Cohen* [1987] CILR 370 to establish various propositions:

(i). that "Unless a claim of fraud is actually pleaded or proof of fraud is a necessary ingredient for establishing a right to the relief claimed, r 3A cannot be invoked." (page 379, noting that there is no material difference between the old rule 3A and the current GCR O.5, r. 2).

(ii). that the fact that allegations are serious does not mean that they must be made by writ. In *Cohen*, allegations of breach of fiduciary duty proceeded by originating summons. Mr Millett also relied on *Brown v Rivlin*, an English case applied in *Cohen*, (unreported, England and Wales Court of Appeal, Civil Division, 1 February 1983) in which allegations that the defendant manipulated the payees on and himself drew upon cheques were held not to amount to fraud.

(iii). that it is insufficient for the defendant to assert in general terms that there are substantial disputes of fact; instead the defendant's evidence must identify the different primary facts on which it relies and thereby identify and demonstrate the significance of particular factual disputes.

(b). Mr Millett relied on in *Re Downs Wine Bar Ltd* [1990] BCLC 839 (Ch) 842 (Harman J) for the proposition that fraud for the purposes of GCR O.5, r. 2 should be understood narrowly. In that case Harman J held that "fraud" in RSC Order 5 rule 2(b) "*mean[s] an action based on the tort of deceit and does not mean an action based on the exception to the rule in Foss v Harbottle*".

(c). Mr Millett also relied on the decision of the Privy Council in *Eldemire v Eldemire* (1990) 38 WIR 234 (PC) 238–9 to demonstrate that the Court should adopt a flexible approach to challenges to the use of the originating summons procedure and whenever possible make appropriate orders within

that procedure to meet the needs of the case rather than require the use of the writ procedure. Mr Millet referred to the comments made by Lord Templeman, in the context of objections to the use of the originating summons procedure that: "*the modern approach is to save expense without taking technical objection, unless it is necessary to do so in order to produce fairness and clarification.*"

Discussion and decision

24. Three main matters fall to be dealt with:

(a). first, is a writ required in the present case under GCR O.5, r.2(b), because these proceedings include a claim by PIAM based on an allegation of fraud (the ***Order 5 point***)?

(b). second, if not, is it nonetheless appropriate that the Court should order, under GCR O.28, r.8, that the proceedings should continue as if the cause or matter had been begun by writ and if so what procedural orders should be made (the ***Order 28 Rule 8 point***)?

(c). thirdly, if not, what procedural orders should the Court make ***(the Form of Order point)***?

The Order 5 point

25. As regards the Order 5 point:

(a). as I have already noted while Mr Breish in his evidence states that PIAM's claim is based on an allegation of fraud, Mr McMaster did not submit in his skeleton argument that a writ was mandatory in the present case and required by GCR O.5, r.2(b). Nonetheless the point needs to be dealt with since it has been raised and would, if correct, preclude the use of an originating summons.

(b). there are two sub-issues:

(i). does PIAM's claim involve "fraud"?

(ii). if it does, has fraud "actually [been] pleaded or is proof of fraud a necessary ingredient for establishing [the] right to the relief claimed" (as Georges JA said in *Cohen*)?

(c). as regards the meaning of "fraud" for these purposes:

(i). only a few authorities were, as I have noted, cited to me. The note to O.5, r.2 in *The Supreme Court Practice 1999*, para. 5/2/3, at 33 refers only to three cases. One is *Re Downs Wine Bar Ltd,* which was relied on by Mr Millett, in which, as we have seen Harman J held that "fraud" in RSC Order 5 rule 2(b) "*mean[s] an action based on the tort of deceit and does not mean an action based on the exception to the rule in Foss v Harbottle.*" Another case was *Re Deadman* [1971] 1 WLR 426 in which Stamp J was prepared to assume without deciding that a claim based on undue influence was based on an allegation of fraud and *Re 462 Green Lane, Ilford, Gooding v Borland* [1971] 1 All ER 315 which involved two claims commenced by originating summons, one based on fraud and the other involving a plea of non-est factum turning on the same facts. Ungoed-Thomas J held that a "non-est factum plea itself does not necessarily involve an allegation of fraud" but since it was based on exactly the same facts as those relied on for the alternative allegation of fraud, he would deal with both claims in the same manner and required them to be brought by way of writ, staying the originating summons. (Stamp J doubted this aspect of the decision on the procedural point, as a stay was not required).

(ii). in the present case, the Originating Summons, in paragraphs (b), (c) and (d), asserts that the Resolutions were made in breach of UN sanctions and the Order. Paragraph (b) alleges a deliberate breach by reason of a dealing with the Shares or Assets (by "one or more of the Defendants and/or the [Shareholders]"). Paragraph (c) alleges that the Resolutions were made "with the intention of doing any or all of [the matters referred to in paragraph (b)], that is with the intention of taking action which involved a dealing with the Shares or Assets. Paragraph (d) alleges that the Resolutions were "part of a course of action in which [the Companies] participated knowingly and intentionally" with the object of circumventing the prohibition on dealing in article 10.

(iii). Mr Millett submits, as I have noted, that PIAM does not allege fraud, deceit or dishonesty. It is clearly correct that the Originating

Summons does not explicitly rely on or allege dishonesty. However, in my view a claim that alleges a deliberate and knowing breach of the Order which breach gives rise to a criminal offence does involve an allegation of dishonesty. Neither Mr Millett nor Mr McMaster cited or relied on any authorities dealing with the meaning of dishonesty for these purposes but I take dishonesty to connote conduct by a defendant which fails to conform to generally accepted standards of honest conduct and which the defendant realises by was by those standards dishonest (see *R v Ghosh* [1982] Q.B. 1053). A claim based on a deliberate breach of the Order and a deliberate and knowing commission of a criminal act seems to me to involve a claim of dishonesty.

(iv). however, is a claim that the defendant has acted dishonestly by deliberately and knowingly committing a criminal offence which offence does not directly involve a misrepresentation a claim "based on an allegation of fraud" for the purposes of GCR O.5, r.2(b)? Does fraud inevitably imply an element of misrepresentation and the deception of a particular victim or can there be fraud without this? Harman J's dictum in *Re Downs Wine Bar Ltd* suggests that fraud should be confined to cases involving a misrepresentation but I am not convinced, as presently advised, that Harman J was intending to give an exhaustive definition of fraud limited to deceit as opposed to deciding that a claim based on a fraud on the minority was different and not fraud for these purposes. I note the discussion of whether non-deceptive conduct can amount to fraud (in the context of conspiracy to defraud at common law) in Aldridge and Parry on Fraud (Fifth edition, 2016, Sweet & Maxwell, paragraphs 7-011-7-018) and the argument (at paragraph 7-026) that "the deliberate evasion of statutory restrictions is in itself fraudulent, whether effected by deception of the official responsible or by other means. .. fraudulent objectives include not only the infliction of financial loss but also the evasion of statutory prohibitions."

(v). in the present case, PIAM appears to claim that one of the Defendants or the Shareholders, or an as yet un-particularised combination of the

Defendants or the Shareholders or the Defendants and the Shareholders, intended to breach the Order by:

(A). as regards the Shareholders, exercising their rights in respect of the Shares, to put in office directors selected by them who would have the power to control and dispose of the Assets and, presumably, had agreed to or were likely to act so as to breach the Order in accordance with the wishes or directions of the Shareholders (see paragraph 7.5 of Mr Wansink's affidavit which alleges that Dr Jehani and Mr Baruni were "installed on LIA's orders with a mandate given to them by the LIA).;

(B) as regards Dr Jehani and Mr Baruni, by acting or agreeing to exercise their powers as directors in such a manner or, in Dr Jehani's case, by acting as the attorney in fact for LAP and LFB;

(C) as regards the Companies, by dealing (presumably through Dr Jehani and Mr Baruni) with the Assets in breach of the Order and

(D) as regards all of them, by acting together as part of a "course of action" with the objective of breaching the Order.

I say "appears to claim" and "presumably" because the details are not clear from the manner in which the Originating Summons is drafted or the evidence of Mr Wansink.

(vi). it seems to me at least arguable that the claims made in paragraphs (b), (c) and (d) of the Originating Summons are claims based on an allegation of fraud, adopting the wider meaning of fraud discussed above. However, I consider that (i) it would be wrong to decide this point since the issue has not been fully argued, some of the key authorities and textbook materials have not been cited and counsel has not had an opportunity to make submissions on these and (ii) in any event I do not need to do so in view of my decision explained below that I should, in any event, and in the exercise of my discretion

to do so, order that the proceedings continue as if the cause had been begun by writ.

The Order 28 Rule 8 point

26. The next question is whether, even though I have concluded that a writ is not mandatory in these proceedings, I should nonetheless order that the proceedings should continue as if the cause or matter had been begun by writ.

27. There are two principal grounds on which the Defendants rely in support of their application for such an order:

(a). the originating summons fails to provide the Defendants with sufficient and adequate particulars of the basis of PIAM's claim and the facts on which PIAM relies – pleadings are required properly to define the issues and ensure that the Defendants can obtain proper discovery and to ensure a full and fair hearing of all relevant issues.

(b). is a case which involves substantial disputes of fact and, in accordance with GCR O.5, r.4(2)(b), is inappropriate for the originating summons procedure and should be commenced and continued by writ the existence of a counterclaim.

28. This is a case in which the claims are based on a limited number of events taking place during a limited period (namely the passing of the Resolutions in July 2014 and the action taken by Dr Jehani and Mr Baruni shortly thereafter). The primary facts relating to the signing and passing of the Resolutions, the termination of the Investment Management Agreements, the replacement of the administrator and the Companies' legal advisers, the communications with Intertrust and the commencement of the Dutch proceedings are not in dispute. Furthermore, PIAM relies heavily on written documents (in particular the Resolutions, the minutes of LIA's board meeting of 4 May 2014, the written resolutions signed by Dr Jehani and Mr Baruni purporting to act as directors of the Companies and certain correspondence) and the disputes that exist with respect to these (in particular as to whether they establish the requisite intention and knowledge on the part of the Defendants and the Shareholders) relate to the construction of and inferences to be drawn from the documents (to use Georges J.A's phrase in *Cohen* "[there are] factual disputes .. in the area of the inferences to be drawn from primary facts which

essentially would be established by documents which would be available for interpretation" (at page 378)).

29. However, the claim has been widely and in some respects loosely formulated in the paragraphs (b), (c) and (d) of Originating Summons and the evidence in support so that:

(a). the Originating Summons asserts that the alleged breach of Article 10 was committed by acts of "one or more of the Defendants and/or the [Shareholders]" (paragraph (b) states that "the [Resolutions] *involved* one or more of the Defendants and/or the [Shareholders] contravening Article 10 [by dealing with the Shares and/or Assets]") but does not clearly specify the acts of each Defendant and Shareholder which it asserts constitutes the dealing or makes the Defendant or Shareholder concerned liable for a breach of the Order or the facts relied on for demonstrating concerted action or an agreement that would make the Defendants or Shareholders liable because they acted together or who had an agreement to do what.

(b). the Originating Summons asserts (in paragraph (c)) that the Resolutions were made "with the intention of [taking action amounting to a dealing under the Order with the Shares and/or the Assets]" but once again it fails to specify which of the Defendants' and the Shareholders' had the requisite intention and the facts relied on to establish such intention;

(c). the Originating Summons asserts (in paragraph (d)) that the [Resolutions] "were part of a course of action in which the [Companies] participated knowingly and intentionally" and that "the object of [such course of action] was "directly or indirectly to circumvent the prohibition in dealing [in Article 10 thereby committing a breach of Article 13] but fails to specify what actions taken by the Companies (separately or collectively) or individuals on their behalf are relied on to give rise to the asserted course of action and what facts are relied on for establishing the requisite knowledge and intention of the Company or individuals concerned.

(d). as regards the Article 10 claim, Mr Wansink asserts (in paragraph 7.3(b) of his affidavit) that the Resolutions "and subsequent conduct which [he has] summarised allowed LIA and LAP to deal in the [Assets] by allowing access to them and enabling use of the [Assets]" but it is not clear which actions

covered by his earlier description of the post-Resolution events he is relying on.

(e). Mr Wansink also (in paragraph 7.4(b)) asserts that the "object and purpose of the [Resolutions] and subsequent conduct was to allow LIA and LAP access to the [Assets] ... in particular [because] after the purported changes in directorships the (purported) directors of the [Companies] are Dr Jehani and Mr Baruni i.e. LIA employees installed on the LIA's orders with a mandate given them by the LIA." Once again the subsequent conduct referred to and relied on is not clearly specified nor is the basis for asserting, and the facts relied on to establish, the existence and nature of the "mandate".

(f). Mr Wansink also refers (in paragraph 7.4(c)) to the manner in which the Assets are being or can be managed following the purported appointment of Dr Jehani and Mr Baruni as directors of the Companies and the position of Deutsche Bank and State Street as custodians and asserts that the Assets are "held in suspension". These assertions are based on a letter from Appleby dated 11 August 2014 but Mr Wansink does not explain why the inability or decision not to seek to deal with the Assets supports PIAM's case of a breach of the Order or precisely what actions by Dr Jehani and Mr Baruni are asserted and relied on to establish a breach of which provision of the Order, nor is there any statement of the extent to which the position and actions of the custodians are relied on and what facts are relied on to establish that the custodians must or are intending to act in a manner that will permit or result in a breach of the Order.

30. In these circumstances it seems to me that the Defendants face a serious and real difficulty in properly understanding the case against them and in determining the facts relied on by PIAM which need to be rebutted. I accept that it is possible to see the broad contours of, and find in Mr Wansink's affidavit the broad factual basis for, PIAM's claims. The Article 10 claim is mainly based on the effects of the Resolutions if otherwise valid and the subsequent removal of PIAM as investment manager (and others who might exercise rights with respect to the Assets) together with the powers of directors of the Companies to give instructions to and control the Companies' relationship with the custodians, combined with the comments contained in the board minutes (set out in paragraph 6.3 of Mr Wansink's affidavit) regarding LIAs intentions and the statement regarding the basis on which Dr Jehani and Mr Baruni were being appointed ("with the consideration that they are required to adopt certain

resolutions required by [LIA's] lawyer in order to liquidate the Portfolio"). The Article 13 claim is based on the asserted purpose of the Shareholders, and LIA in particular, the comments in the board meeting and the alleged agreement or understanding with Dr Jehani and Mr Baruni (whose intentions and actions are to be attributed to the Companies). However, I agree with Mr McMaster that the Defendants need to have greater specificity and to see a clear and precise statement of the particular actions alleged to have been taken by particular individuals and the basis for asserting that particular individuals had the alleged intention and state of mind (assuming that the subjective state of mind of any of the individuals concerned is relevant, which it appears to be). In my view the manner in which the claims are currently formulated fails to specify sufficiently clearly which of the facts referred to in the general account of events contained in Mr Wansink's affidavit are relied on to establish the alleged breaches of the Order and leaves a number of critical matters, as I have explained above, unclear or ambiguous.

31. As Harman J noted in *Re Downs Wine Bar* proceedings should proceed by writ followed by ordinary pleadings when necessary to avoid "*oppression to the defendant who cannot [otherwise] get proper particulars and who cannot get proper discovery since the issues are never defined by pleadings*" (at 842b). The same point is made by Stanley Burnton LJ in *ING,* quoted above, when he said that pleadings should be required when they "*would [clarify] precisely how [the plaintiff] put its case and what facts were in dispute. .... [The] determination of the factual issues would have been easier, and the risk of injustice less, if the parties had pleaded their respective cases*." It seems to me that these comments and reasons for requiring the use of the writ procedure apply to the present case. The use of the writ procedure and the requirement for proper pleadings in which PIAM will need to spell out and properly particularise its case and the facts upon which it relies for each element of the claims based on breaches of the Order claims will ensure that the Defendants can prepare a proper defence and that the issues will be properly defined. I also note and rely on the comments made by Quin J in *Eden v Eden,* noted above. I reach this conclusion after having taken into account the "modern approach" explained by Lord Templeman in *Eldemire v Eldemire* and the flexibility available within the originating summons procedure, as Mr Millett discussed in his skeleton argument.

32. It seems to me that, while PIAM's claims are, as Mr Millett submitted, based to a material extent on undisputed facts and documents, they are also based on generalised and unparticularised assertions that make it difficult for the Defendant to understand

what actions they are alleged to have taken resulting in the alleged breaches of the Order and therefore identify what facts and matters will enable them to rebut and defend themselves against these claims.

33. I do not accept Mr McMaster's submission that the writ procedure is required in every case where allegations are made of serious misconduct. The authorities cited by Mr Millett, to which I have referred in paragraph 23 above, establish that this is so and *Cohen* in particular makes it clear that the assessment of whether the plaintiff's choice of originating process should be overridden in order to protect the position of the Defendant must be made on a case by case basis by reference to the claims made, and the factual disputes established, and whether the proceedings require to be conducted by way of an action in which the issues are clearly defined (and if appropriate in which there should be full discovery by each side to the other of all documents that each side holds related to those issues as so defined). But in the present case, the claims based on breaches of the Order involve assertions of the deliberate and knowing commission of criminal offences by representatives of a foreign State which must be based on evidence as to the knowledge and intention (possibly the subjective intention although the extent to which *mens rea* as understood by the criminal law is required has not yet been discussed) of (at least) the directors of the Shareholders (and LIA in particular) and Dr Jehani and Mr Baruni. As I have noted above, on one view these claims should be treated as involving allegations of fraud. But even if they do not come within "fraud" as understood for the purpose of GCR O.5, r.2, they are sufficiently close to justify, in the exercise of the Court's discretion, a similar procedural approach to that required in cases of fraud as so understood.

34. As regards the extent of the factual disputes that have been established and shown to exist on the basis of the Originating Summons and the evidence filed by PIAM and the Defendants, I note that Mr Breish in his evidence does not dispute that the Resolutions were passed or that Dr Jehani and Mr Baruni, following their purported appointment, have taken the steps that Mr Wansink refers to. However, he does dispute:

(a). that any of the Defendants or the Shareholders acted (including acting to remove PIAM as a director) with the intention of breaching articles 10 or 13 (and the sanctions regime).

(b). PIAM's account of the reasons why the Resolutions were passed and PIAM was removed from its positions as director and investment manager (which he

says were entirely to do with the failure by PIAM to perform its duties properly and for reasonable fees).

(c). the correctness of the written record of (including the English translation of the statements actually made by him at) the 4 May 2014 board meeting.

(d). that the LIA's directors intended to breach articles 10 or 13 (and the sanctions regime).

(e). that LIA ever intended or could take action to remove the Assets from the control of the custodians.

(f). that Dr Jehani and Mr Baruni took any action, or intended to take any action, which breached or would result in a breach of articles 10 or 13 (or the sanctions regime) – and, it follows, I think, from Mr Breish's evidence that he disputes the allegation that Dr Jehani and Mr Baruni had any mandate from or understanding or agreement with or would accept instructions from the Shareholders to take action in breach of articles 10 and 13 (or the sanctions regime).

(g). that Dr Jehani and Mr Baruni were in a position to take any action which breached or would result in a breach of articles 10 or 13 (or the sanctions regime).

(h). that LAP when seeking to redeem its shares in A intended to proceed without the necessary licences and approvals.

35. It is true that Mr Breish couches his denials and disputes the facts asserted by Mr Wansink in general terms and that it would have been preferable if he had been more precise and specific in identifying the primary facts which he says are in dispute (I have already noted that Mr Breish states that he did not intend to be comprehensive at this stage in the proceedings but it still seems to me that he could have identified more precisely the particular facts and statements made by Mr Wansink that he was disputing). However, it seems to me that his evidence does establish the areas of disputed primary facts with adequate clarity and that, on balance, the disputes can be said to be sufficient to justify the use of the writ procedure.

36. I should add that Mr McMaster also relied on the possibility that the Companies may have claims against PIAM arising out of alleged breaches of duties and losses caused to the Companies. He submitted that while a counterclaim can be accommodated with

the originating summons procedure the existence of a possible counterclaim was a (supporting) reason for ordering that the main proceedings continue by way of writ. But the Companies had not undertaken to or confirmed that they would issue a counterclaim and the basis on which such a counterclaim would be made was only summarised in the most general terms. In these circumstances I have placed no weight on the prospects of there being and the procedural impact of the filing of a counterclaim.

The Form of order point

37. I have given careful consideration to the order I should make. I have noted and considered the proposal made by PIAM shortly before the hearing to the effect that a different process and procedural timetable be established for litigating the no-authority claim set out in paragraph (a) of the Originating Summons, to allow that claim to be progress while the breach of sanctions claims set out in paragraphs (b), (c) and (d) of the Originating Summons be deferred. This proposal was rejected by the Defendants and I consider that it would not be the appropriate way to proceed (consistent with the need to give effect to the overriding objective set out in the preamble to the GCR – see also paragraph A4 of the FSD Guide, Second edition).

38. I have also noted Mr Millett's submissions regarding the need for an order for discovery. He submitted that there was no proper basis for a discovery order in the present circumstances. However, in view of my conclusions as explained above it seems to me that a discovery order is needed in order to deal fairly with the present dispute. If Mr Millett is right there will only be a limited number of relevant documents in PIAM's possession, custody or power to be listed and produced, and therefore the additional cost and delay will be minimal, although the position will only become clear once the issues have been clarified in the pleadings.

39. I propose to make an order in the following terms, based principally on the orders proposed and set out in the Defendants summons dated 4 August:

(a). orders in the terms set out in paragraphs 1-4 of the summons;

(b). the provisions of GCR Order 24 shall apply to these proceedings (on the basis that the Defendants summons dated 4 August shall be treated as the summons for directions in the action) and without limitation, each party shall make discovery in accordance with GCR O.24, r.2(1) and provide inspection of documents in accordance with GCR O.24, r.9 and r.10.

(c). an order in the terms set out in paragraph 6 of the summons (for non-expert witnesses).

(d). orders in the terms of paragraphs 5-8 of the draft order provided by Mr Millett and attached to his skeleton argument, dealing with leave for the parties to instruct one expert in the field of Libyan law; for the parties to seek to agree the issues to be considered by the experts failing which they must each give separate instructions (and the experts shall identify the disagreement as to the disagreement as to relevant Libyan law issues in their reports if they are able to do so) and for the exchange of reports and for the preparation and exchange of reply reports. I would invite Mr Millett and Mr McMaster to consider and seek to agree whether they wish to include provision for a meeting of the experts before the preparation of reply reports and the timetable for the filing of the expert reports (and any meeting of the experts). If they are unable to agree, they can let me know their respective positions and I shall make the requisite order.

(e). an order in the terms set out in paragraph 7 of the summons.

(f). an order that after completion of the exchange of witness statements and of the experts' reply reports a trial is to be set for the first available date.

(g). an order that any party shall have liberty to apply on seven days' notice.

(i). an order that the Plaintiff do pay the costs of the summonses in any event to be taxed on the standard basis if not agreed.

40. I would hope, as I say, that Mr Millett and Mr McMaster will be able to agree the form of the order in light of my judgment and the indications I have given in paragraph 39 above. I will review the draft form of order that they propose and in the event of any disagreement resolve such matters on the papers.

THE HONOURABLE JUSTICE SEGAL
JUSTICE OF THE GRAND COURT
16 December 2016