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

Appearances:	Richard Millett QC instructed by Walkers for the Plaintiff
	Peter McMaster QC of and instructed by Appleby for the Defendants
Before:	The Hon. Justice Segal
Heard:	18 May 2017
Draft judgment circulated:	23 May 2017
Released for Publication:	23 May 2017

GRAND COURT · CAYMAN ISLANDS ·

HEADNOTE

Summons for split trial in respect of claim and counterclaim and case management orders in relation to challenge to the Court's jurisdiction to hear the counterclaim

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JUDGMENT ON THE CASE MANAGEMENT SUMMONS AND THE JURISDICTION SUMMONS

Introduction

1. This is my judgment on the Plaintiff's case management summons and jurisdiction summons, both of which were heard on 18 May.

2. Pleadings closed in these proceedings on 17 March. The following pleadings have been filed: Points of Claim; Points of Defence and Counterclaim; Reply and Defence to Counterclaim and Reply to Defence to Counterclaim. The two summonses filed by the Plaintiff relate to the Defendant's counterclaim, in particular whether there should be a separate trial of the counterclaim and when to hear the Plaintiff's objection to jurisdiction in relation to the counterclaim.

3. The case management summons was issued on 24 March. It seeks orders, under GCR O.33, r.3-4, O.15, r.5 and the Court's inherent jurisdiction, that:

   (a). the jurisdiction summons is heard after the trial of the Plaintiff's claim or alternatively at the trial of that claim; and

   (b). the counterclaim is otherwise stayed until the Plaintiff's claim is determined or further order (with modifications to the directions I made on 10 January to achieve this).

4. The jurisdiction summons was also issued on 24 March. It seeks in the alternative a declaration that:

   (a). the Court does not have jurisdiction over the counterclaim and an order setting aside service of the counterclaim; or

   (b). the counterclaim has been brought in breach of the exclusive jurisdiction agreements contained in the investment management agreements entered into between the Plaintiff and the First, Second and Third Defendants and an order that further steps in the counterclaim are prohibited and the counterclaim stayed.

5. It has not been necessary to consider the substance of the jurisdiction summons but only the time at which it should be heard.

The counterclaim

6. The counterclaim is short and I set it out in full below:

> *"134. The Plaintiff was removed and replaced as a director of each of the Funds by the Balanced, Advanced and Diversified resolutions as rehearsed in the Defence above.*
>
> *135. Notwithstanding its removal as a director of the Funds, the Plaintiff has continued to behave as a director of each of Fund purporting to dispose of assets and enter into transactions and engagements on its behalf as directors. In acting de facto as director of the Funds after it was removed from office the Plaintiff's conduct has been unlawful. The Plaintiff is liable to the Funds for the consequences of its unlawful behaviour on the basis that its actions are breaches of fiduciary duty.*
>
> *136. Without discovery the Defendants do not have access to the material facts and are not able to provide a particularised account of the Plaintiff's unlawful activities. The Plaintiff has (the Court will be invited to infer) caused the Funds:*
>
> *(1) To pay it monies purportedly as remuneration either as a director or under the investment management agreements set out at paragraph 10 of the Points of Claim or both. If assets under management are $700 million and the management fee is 2.5%, then that amounts to some &17.5 million a year:*
>
> *(2). To pay monies either to itself or to third parties in respect of its legal costs and expenses of bringing these proceedings and proceedings in the Netherlands.*
>
> *(3). To pay monies either to itself or to third parties in respect of other costs or expenses purportedly incurred by it and chargeable to the Funds.*
>
> *137. The Funds seek orders requiring an explanation of transactions entered into by each Fund and of things done by the Plaintiff in relation to the Fund while acting as de facto director as well as an order for delivery up of all documents and other property of the Defendants in the Plaintiff's possession custody or power. The Funds reserve the right to make claims in the future for financial or other remedies upon being apprised of the relevant facts.*
>
> *And the Defendants counterclaim:*
>
> *(1). Declarations in relation to each Fund that on the passing of the Disputed Resolutions:*
>
> *(a). the Plaintiff ceased to be a director; and*
>
> *(b). Dr Jehani and Mr Baruni became directors.*
>
> *(2). An injunction restraining the Plaintiffs from acting or purporting to act as director or in any other manner on behalf of the Funds.*

(3). An order that the Plaintiffs do provide in respect of the period following the Disputed Resolutions:

(a). a full explanation of every transaction entered into by each Fund:

(b). a full explanation of all things done by the Plaintiff in relation to the Fund;

(c). delivery up of all documents and other property of the Defendants in the Plaintiff's possession, custody or power.

(This prayer for relief is made without prejudice to the Defendants' right to seek further relief or remedies on being apprised of the relevant facts)."

The Plaintiff's submissions

7. Mr Millett QC for the Plaintiff submitted as follows:

(a). in the circumstances it was appropriate, proportionate and just to, and that the Court should, order that the Plaintiff's claim be determined separately from the Defendants' counterclaim.

(b). the Plaintiff claims that it is and has remained a director of the First to Third Defendants (the **Funds**) despite and after the action taken to effect its removal from office. That claim requires a review and consideration of that action all of which took place in the period between February and July 2014. The claim raises issues of Libyan and Cayman law in relation to the authority of those taking, and the validity of, the relevant action.

(c). the counterclaim, by contrast, potentially requires consideration of every transaction carried out by the Plaintiff relating to the Funds from July 2014 to date. It also raises legal issues not raised by the claim, namely breaches of fiduciary duty and *quantum meruit*.

(d). the Plaintiff has an objection to the jurisdiction of the Court to hear the counterclaim. That objection raises issues of submission to jurisdiction and whether under the law governing the investment management agreements, which is Dutch law, the terms of the these agreements prevent the Funds from bringing the counterclaim.

(e). in these circumstances the Plaintiff seeks an order that its claim be determined first and separately because:

(i). the claim and counterclaim (and the jurisdictional objection to the counterclaim) each require examination of distinct facts, in a different period and distinct legal issues – there is no overlap.

(ii). the counterclaim and jurisdictional objection raise detailed, substantial new issues and require further factual and expert evidence and (on the counterclaim) further discovery in relation to all the Plaintiff's actions in relation to the Funds from July 2014 to date (which matters and period are not relevant to the Plaintiff's claim).

(iii). the counterclaim arises only if the Plaintiff does not succeed on its claim and does not succeed on the jurisdictional objection (which will also be unnecessary if the Plaintiff succeeds on its claim) – a judgment in the Plaintiff's favour on either point disposes of the counterclaim, so a separate determination is likely to save significant time and cost.

(iv). the counterclaim is vague and widely pleaded, inadequately particularised and unlikely to be resolved entirely if heard with the Plaintiff's claim.

8. Mr Millett argued that the relief sought in the counterclaim goes beyond relief to which the Defendants would be entitled simply as a result of their successful defence of the claim and a decision by the Court on the claim (such relief being referred to during the hearing as "flip side" relief) that the Plaintiff was effectively removed as a director (and investment manager) of the Funds. He said that the relief sought was premised on wrongdoing and required the Defendants to establish by reference to relevant evidence and the applicable law that the Plaintiff had committed a breach of (fiduciary) duty (or some other unlawful act) and was not entitled under the applicable law (which would be Dutch law) to a *quantum meruit* claim. Mr Millett submitted that the Defendants were asking the Court to make an order for an account

as a remedy for wrongdoing (rather than seeking a common account to which any party to whom a fiduciary duty was owed was entitled as of right without the need to establish a breach of duty or other wrongdoing). In a supplementary note filed shortly before the hearing and during his oral submissions he cited extensively from the relevant authorities which discuss the distinction between the different types of account and the matters which need to be proved in order to show an entitlement to each type of account.

9. Mr Millett also referred to the pleadings and noted that they demonstrated that there was a live dispute over most of the claims made in the counterclaim and the factual and legal allegations on which they are based. There was a dispute as to whether the Plaintiff, even if it had been removed in the manner claimed by the Defendants, had committed any breach of duty or other wrong; what costs and expenses it had incurred and paid, as to the action which it had taken and in what capacity and its entitlement to and the amount of a *quantum meruit* claim (he referred in particular to paragraphs 79 and 80 of the Reply and Defence to Counterclaim and paragraph 2 to the Reply to Defence to the counterclaim). He also noted that as currently drafted these allegations were unclear and inadequately particularised.

10. During the hearing I asked Mr Millett whether the Plaintiff would object to the counterclaim being heard at the same time as its claim if the counterclaim simply sought flip side relief, that is relief that was consequential on a decision by the Court that the Plaintiff had been effectively removed so that litigating the counterclaim with the claim would not involve additional discovery, expert evidence or further legal issues to be dealt with at the trial of the claim. He indicated that he thought that the Plaintiff would not object to the counterclaim being heard with the claim if the counterclaim was limited on that basis although he would not concede that the Defendants would be entitled to, and reserved the right to argue that the Court should not grant, the declaratory or injunctive relief (or an account to be taken on the basis of a breach of fiduciary duty or other wrongdoing) that the Defendants sought in the counterclaim. He also noted that in correspondence (which was in evidence) the Plaintiff's attorneys, Walkers, had written to the Defendants' attorneys, Appleby, requesting that the Defendants amend the counterclaim so as to make it clear that this was the only type of relief that was being sought and to remove the claims based on breach of fiduciary duty and other wrongdoing. However, this request had been

refused.

11. As regards the jurisdiction summons, Mr Millett argued that the counterclaim as currently formulated brings claims that arise from or are connected with the investment management agreements and therefore the jurisdiction clauses in each of those agreements are engaged (each of the clauses is in identical terms and states that "*any disputes which may arise from or in connection with this agreement shall be brought before the competent court in Amsterdam ..*").

12. Mr Millett referred to paragraph 136(1) of the counterclaim which, as I have noted above, asserts that the Plaintiff has caused the Funds to make payments to itself "*purportedly as remuneration either as a director or under the investment management agreements..*" Mr Millett also argued that the other claims based on unlawful payments made by the Plaintiffs could also be based on action alleged to be taken by the Plaintiff as investment manager and therefore engage the investment management agreements.

13. The Plaintiffs objected to the Court exercising jurisdiction in relation to claims arising from or connected with the investment management agreements and that asserted breaches of those agreements. Mr Millett noted that the Plaintiff did not accept that it had waived its rights under, elected not to enforce or was estopped from enforcing the exclusive jurisdiction clauses as a result of having issued its claim in Cayman.

14. Mr Millett further noted that if the Defendants were to confirm that the counterclaim only related to flip side relief then no jurisdiction question arose.

The Defendants' submissions

15. Mr McMaster for the Defendants in his submissions (both in writing and at the hearing) made (as I understood him) four main points:

(a). the counterclaim when properly understood did no more than seek flip side relief, that is relief to which the Defendants would be entitled if their defence was successful at trial, without the need for further issues to be dealt with or additional disclosure or evidence.

(b). it would therefore be unjust for the Court to stay the counterclaim until after trial of the claim since the Defendants would be deprived of the relief to which they would be entitled at the end of the trial.

(c). it was therefore also the case that there was no need to order, or justification for ordering, a separate trial of the counterclaim and the Court should not exercise its discretion to do so under GCR O.15, r.5 (or any of the other bases on which the Plaintiff relied).

(d). the counterclaim did not engage the jurisdiction clauses in the investment management agreements and therefore there was also no need to have, or basis for ordering that, the jurisdiction summons heard before the counterclaim.

16. Mr McMaster argued that the counterclaim only ensured that the Defendants would be entitled to the relief that they would need in the event that they were successful at the trial of the Plaintiff's claim and that trying the counterclaim with the claim would not involve any (or any material amounts of) further discovery since the pleadings demonstrated that they key allegations on which the counterclaim was based were admitted or not in dispute. He sought to argue that in substance the counterclaim only sought flip side relief and did not require any further issues of fact or law to be dealt with. The Plaintiff was seeking to fetter the Court's hands so that even if the Court held that the Plaintiff had been removed it would be unable to grant the consequential relief to which the Defendants would then be entitled without the need for further directions, disclosure and hearings. This would be unfair to the Defendants and inconsistent with the need to conduct the proceedings justly.

17. Mr McMaster summarised his argument on this point as follows in his written submissions:

"The claim and counterclaim mirror one another:

(1) The only substantive relief sought in the claim are declarations that certain

*resolutions (**Disputed Resolutions**) removing the Plaintiff as directors of the first, second and third Defendants (**D1, D2, D3**) are void so that:*

*(a). the fourth and fifth Defendants (**D4, D5**) were not validly appointed as directors of Ds 1 to 3; and*

(b). P was not removed as a director of Ds 1 to 3 (see the prayer [in the counterclaim])

(2) The only relief sought in the counterclaim [is]:

(a) declarations that:

(i). D4 and D5 were validly appointed as directors of Ds 1 to 3; and
(ii). P was removed as a director of Ds 1 to 3;

(b) consequent on the making of those declarations:

(i). an injunction to restrain P from purporting to act as director or in any other manner on behalf of any of the Funds;

(ii). an order that P provide in respect of the period following the Disputed Resolutions an account of what they had done during the time they had wrongly purported to be directors and delivery up of documents and other property belong[ing] to the Defendants that in Ps possession custody or power. See the prayer at [in the counterclaim]."

18. Mr McMaster noted that the counterclaim did not seek any financial remedy but only declaratory and injunctive relief and orders for an account of what the Plaintiff had done in the period after its (asserted) removal from office.

19. Furthermore, Mr McMaster argued that the counterclaim could be disposed of on the basis of the admissions in the pleadings and without the need for any further (or at least without the need for significantly further discovery). In his written submissions Mr McMaster said the following:

> "*In correspondence P's attorneys have said that it would be wasteful of time and money to consider the counterclaim before the main claim is determined because the counterclaim is very broad, and seeks to place in issue the entirety of P's actions in connection with the relevant funds from July 2014 to the present. P says it significantly widens disclosure and relevant evidence. Even if correct, that would not be a reason not to deal with the counterclaim as it is an obvious and proper response to the claim itself. In fact it is not correct and the suggestion that the counterclaim widens disclosure and the factual inquiry is yet another misconceived suggestion.*
>
> *The Defendants' counterclaim is very brief. It is correct that it brings into issue P's conduct after the date it was removed as a director of the Funds, but only for two limited purposes. First it alleges that P has continued to act as if it were a director (see paragraph 135 of the Defence and Counterclaim ... That factual*

allegation is the basis for the claim to injunct P from continuing to act and for the claim to receive an account of what has been done purportedly as a director. As that allegation is admitted (see paragraph 79.4 of the Defence to Counterclaim), there is no factual dispute over it and no factual enquiry to conduct. If it is determined that P was validly removed then it should follow that the Court should consider whether to grant an injunction to prevent P from continuing to behave as a director (an injunction might not be necessary if P gives a suitable undertaking) and that the Court should require P to give an account of what it had done purportedly as director when in fact not entitled so to act.

To the extent that is being suggested that to deal with the Counterclaim P must provide detailed disclosure and evidence dealing with all of its activities over the years since it was removed, that is simply disingenuous. The Counterclaim itself makes it perfectly clear that this is part of the relief sought on the claim, only if it be determined that the removal and appointment were valid"

20. Mr McMaster also noted, in response to the criticisms made by Mr Millett (and Walkers in the correspondence) to the effect that the assertions that the drafting of the counterclaim was vague and unparticularised, that the Plaintiff had not requested further particulars of the pleading nor that disclosure be limited.

21. As regards the jurisdiction summons, Mr McMaster argued that the counterclaim did not involve any claims arising under or connected with, or engage, the investment management agreements. In his written submissions he said that: "*The [investment management agreements] are not mentioned or engaged at all. It is nowhere suggested by either side that any term of the [investment management agreements] impacts on the question over [sic] the removal and appointment.*" He further submitted that even if this was incorrect, the counterclaim should not be restrained by reason of the jurisdiction clauses in the investment management agreements. This was because since the Plaintiff had brought the claim in Cayman it was estopped from relying or should be treated as having waived its right to rely on the jurisdiction clauses or as having made an election that all issues relating to the claim be litigated in Cayman. Alternatively, since the Court had a discretion as to whether to grant the relief sought by way of enforcement of the jurisdiction clause, it was open to the Court to, and the Court should, refuse to do so. In the circumstances of this case:

"*The Court in looking at this question would take into account how and why it is that proceedings have been brought in Cayman (because P chose to do so), the stage that proceedings have reached in Cayman and the expenditure of resources in getting there. It is submitted that it is nearly inconceivable that the Court would allow two sets of proceedings and nearly inconceivable that in deciding what should be the single set of proceedings the Court would decide against Cayman.*"

The case management summons and the jurisdiction summons – discussion and decision

22. While Mr McMaster did suggest in his written submissions that it would not be right for the Court to order a separate trial in relation to the counterclaim even if dealing with the claim and counterclaim in a single trial would significantly widen the disclosure to be given and the evidence to be filed, he did not press this point and argued instead that as a matter of drafting it was clear that the counterclaim did no more than assert and claim that the Plaintiff had not been properly appointed and sought certain forms of consequential relief to which the Defendants would be entitled following the claim being dismissed, without the need to establish anything further. Having carefully reviewed the drafting of the counterclaim I must say that I do not accept this or consider that the drafting of the counterclaim is as clear as Mr McMaster makes out.

23. Paragraphs 134 and 137 of the counterclaim are consistent with this view but paragraphs 135 and 136 of the counterclaim are not:

(a). paragraph 135 asserts a claim that the Plaintiff is liable by reason of a breach of fiduciary duty. It is correct, as Mr McMaster pointed out, that the counterclaim does not, as presently formulated, seek an order for compensation for breach of fiduciary duty (although the Defendants have reserved the right to seek additional relief). But the key issues for present purposes are what is asserted in the cross claim; what is in issue; what would need to be disclosed in discovery and what needs to be proved by evidence? The assertion of a breach of duty is (or at least appears on the drafting to be) included so as to establish the cause of action for which the requested relief (the account and perhaps the injunction) is the remedy. Therefore, proving the existence of such a duty and its breach is a necessary precondition to establishing the entitlement to the requested account (and injunction). As Mr Millett correctly pointed out, it does not follow, merely from the fact that a person has been removed from office but continued to act on the basis and in the belief that he has remained in office and to perform the functions of a director that his actions constitute a breach of fiduciary duty. To establish such a breach it would be necessary to examine the nature of the Plaintiff's position following its removal and the Plaintiff's actions in light of the evidence relating thereto, including perhaps his own account as to what it knew and did and why it did it. Therefore discovery concerning and evidence of such actions would be needed if this part of the counterclaim were to be adjudicated on at the trial of the claim. If it was not, such discovery and evidence would be avoided and not be needed.

(b). in paragraph 136 the Defendants note that "*without discovery*" they are unable to provide a particularised account of the Plaintiff's "*unlawful*" activity (unlawful apparently, in view of the drafting of paragraph 135, by reason and on the basis of a breach of fiduciary duty) and instead identify certain payments which they invite the Court to infer that the Plaintiff has caused the Funds to make (and which were the result of such a breach). The Defendants reserve the right to make further claims for financial and other remedies "*upon being apprised of the relevant facts*" and it is far from clear, in view of the earlier reference in the paragraph to the need for discovery (in order to be properly apprised of the facts), that the Defendants are not requiring and anticipating that there will need to be discovery and evidence on the actions taken and payments made by the Plaintiff in the period after its alleged removal as part of and in order to dispose of the counterclaim.

24. I do not see how these difficulties are cured by the admission made by the Plaintiff in the pleadings. In his written submissions, quoted above, Mr McMaster referred to paragraph 79.4 of the Plaintiff's Defence to Counterclaim (which responds to paragraph 135 of the counterclaim) and argued that the admission contained therein meant that there was no live dispute (nor the need to conduct a factual enquiry) as to the Plaintiff's conduct relevant to the Defendants' claim to an account (and an injunction). Mr McMaster submitted that there was no dispute over the Defendants' factual allegation in the counterclaim that the Plaintiff has continued to act as if it was a director and this allegation was the basis for the claim to the account and the injunctive relief. Paragraph 79.4 states that:

> "*It is admitted and averred that [the Plaintiff] continued to act as a director of each Fund and as investment manager of each Fund.*"

But this admission does not relate to the facts required to establish a breach of fiduciary duty, which as I have noted would need to be proved by evidence in order to establish the Defendants' claim to an account, as formulated in the counterclaim. Further facts would need to be proved and evidence filed as to the transactions and payments made and the conduct and knowledge of the Plaintiff.

25. It was accepted by both Mr Millett and Mr McMaster that the Court has a wide discretion to split the issues arising out an action (and the trial of a claim and counterclaim). I do not need to discuss in detail the relevant authorities but would make the following brief points:

(a). I note the requirements of the overriding objective and the need to deal with every matter in a just, expeditious and economical way (see the Preamble to the GCR). A key question is what is required in the interest of justice.

(b). I also note the following general comments made by Mr Justice Laddie in *Philips Electronics NV v Ingman Ltd* [1998] 2 CMLR 839 at [6].

> *"The court has a wide discretion to split the issues arising in an action and to order them to be tried separately. Where issues overlap, separate trials may result in some duplication of work and raise the possibility of inconsistent decisions. In most cases it will be quicker and cheaper in the long run for all issues to be tried together. I think that before the court decides to exercise its discretion to split issues it must be persuaded that some significant benefit would flow from taking that course."*

(c). I further note it is relevant to consider whether there is a *"clear line of demarcation"* between the issues to be separately tried (see *Polskie Towarzystwo v Electric Furnace Co Ltd* [1956] 1 WLR 562 (CA) 567 (Jenkins LJ). In the present case the issue is whether there is a clear line of demarcation between the claim and counterclaim (at least in so far as the counterclaim includes a cross-claim and relief based on breach of a fiduciary duty).

(d). In *Coenen v Payne* [1974] 1 WLR 984 (CA) Lord Denning said (at 988):

> *"In future the courts should be more ready to grant separate trials than they used to do. The normal practice should still be that liability and damages should be tried together. But the courts should be ready to order separate trials wherever it is just and convenient to do so.... In this case there is this strong point to be made in favour of separate trials. It is the time and expense which will be involved in trying the issue of damages. It will take four or five days to try; witnesses will have to come from Germany and surgeons and experts from London. All will be*

unnecessary if the plaintiff should fail."

And Lord Justice Stephenson said (at 990):

> *The court has inherent jurisdiction to make any use of the relevant provisions in the Rules of the Supreme Court which are now Ord. 33, rr. 2, 3, 4, and Ord. 37, rr. 1 and 4. If the court thinks it just and convenient to order separate trials of separate F issues, or to give judgment for damages to be assessed by another court, the court can and should do so without treating ancient decisions as limiting its powers. In a personal injuries case the courts will not depart from the normal practice except for good reason; but though I appreciate the plaintiff's desire to be heard on liability and damages by the same judge, I think that in this special case the issue of damages is likely to take so much time and expense to try that it could more conveniently, G and without injustice, be tried after liability has been decided, it may be in such a way as to make a trial on the issue of damages unnecessary."*

26. Largely for the reasons set out by Mr Millett in his submissions (and after taking into account the terms of GCR O.15, r.5, GCR O.33, r.3-4, the basis on which the inherent jurisdiction of the Court is to be exercised together with the authorities cited to me that establish the principles to which the Court should have regard when exercising its discretion under these rules and the Court's inherent jurisdiction and its case management powers) I have concluded that the just, expeditious and economical way to proceed is to stay the proceedings on the counterclaim save in relation to the claim for the declarations set out in paragraph (1) of the prayer in the counterclaim. The cross-claim for declarations is based solely on the Plaintiff having been removed from office (and as investment manager) and a ruling by the Court to dismiss the claim and that the Plaintiff was removed from office. The remainder of the counterclaim can be dealt with, if necessary after judgment is given on the claim. This approach offers, as it seems to me, significant benefits. There is a reasonable prospect, if this approach is adopted, that time and expense will be saved while protecting the legitimate interests of the Defendants. The cross-claim for the declarations can conveniently be heard with the claim without giving rise to the need for further discovery and evidence or additional expense and delay. If the claim succeeds, the counterclaim will require no further consideration. If the claim fails and is dismissed, the Court will be able to make declarations at the same time as it hands down judgment on the claim. The Defendants' cross-claims (in the counterclaim) for further relief, and the directions required to enable such cross-claims to be determined by the Court, can be considered immediately following the handing down of the judgment on the claim. If the full

counterclaim, as currently drafted, were to be dealt with at the trial of the claim it is likely to result in discovery and evidence being needed and given as to the post July 2014 actions of the Plaintiff, all of which will result in additional issues arising, further expense and delays and which would be irrelevant if the claim is successful.

27. In particular it seems to me that:

(a). the counterclaim should be heard with the claim to the extent that the claims made and relief sought in the counterclaim can conveniently be dealt with at the trial of the claim and in the Court's judgment on the claim. This means that the trial will deal with the Defendants claims to the declarations, set out in paragraphs (1) of the prayer to the counterclaim. Such relief would be available in the event that the Court decides and should follow the Court's decision to dismiss the Claim (and to hold that the Plaintiff had been removed as a director and investment manager of the Funds).

(b). all further proceedings on the counterclaim should be stayed until after judgment on the claim. If the Court decides in favour of the Plaintiff the other claims in the counterclaim will not need to be considered. If the Court dismisses the claim, then at or immediately following the handing down of the Court's judgment there will need to be a hearing to decide on the orders to be made consequential upon the Court's judgment on the claim. At such hearing the Court is likely to give directions for the filing of further evidence and written submissions so as to enable it to deal with the Defendants' claims for injunctive relief and an account. The Court will not need, when determining the claim, to decide the question as to the effect of the removal of the Plaintiff on its status and the nature of the Plaintiff's obligations, liabilities and rights following such removal. The parties may agree that the Plaintiff became a de facto director of the Funds and that its obligations, liabilities and rights are to be determined on that basis. But that question does not, on the approach I have decided to adopt, fall to be dealt with at the trial of the claim (and is not, in my view, disposed of by the Plaintiff's admission in paragraph 79.4 of the Defence to Counterclaim). If the parties have agreed as to the status and position of the Plaintiff, having regard if relevant to the Court's conclusions as to why the Plaintiff had been removed from office, then the Court will be in a position to make an order for an account which reflects that status and agreement. If there is no such agreement, the Court will probably need to give directions for the determination of that question. I anticipate that the Court would give directions for further submissions on the effect of the Plaintiff's removal on its status, obligations, liabilities and rights and on the type of account, and the form of the order for an account, which it should make. To the extent that the Defendants seek an account or other remedy based on the Plaintiff's breach of fiduciary duty, it will also be necessary for directions to be given for the determination of that claim.

(c). the jurisdiction summons should also be heard after the Court has delivered judgment on the Plaintiff's claim. Once again, if the Plaintiff is successful, the jurisdiction summons will not need to be heard or dealt with. If, however the Court decides to dismiss the claim and decides that the Plaintiff was removed from office, the Defendants' counterclaim, as I have noted above, will then need to be dealt with and the issue of whether the cross- claims made and relief sought in the counterclaim engage and give rise to a breach of the jurisdiction clauses in the investment management agreements will then need to be dealt with. As I have also already noted, I have not at this stage considered the merits of the jurisdiction summons. I would say that while Mr McMaster submitted that no reference to the investment management agreements were made in the counterclaim this, as Mr Millett pointed out, is clearly wrong. The allegation in paragraph 136(1) appears to be that (the inference is to be drawn is that) the Plaintiff has caused the Funds to make payments to it by way of remuneration and such payments could have been made to it as investment manager and that the Plaintiff would have been acting unlawfully in causing the Funds to make payments under or by reference to the investment management agreements. Such a claim arguably would be covered by the jurisdiction clauses. In any event, as matters currently stand, it seems to me that Mr McMaster is not right to say that no issue arises under the jurisdiction clauses and the extent to which they are engaged and the relief to be granted if they are will need to be considered if the claim is dismissed and the remainder of the counterclaim falls to be dealt with.

28. I would be grateful if Mr Millett and Mr McMaster could prepare and seek to agree a form of order giving effect to this judgment and let me know how they wish to deal with consequential matters (such as costs). If it is not possible to agree a form of order, each party should submit to me their drafts and I shall then decide on and issue the appropriate order.

Segal

The Hon. Justice Segal
Justice of the Grand Court, Cayman Islands

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