IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO: FSD 37 OF 2023 (IKJ)
(FORMERLY G 34 OF 2023)

BETWEEN:

ROYAL PARK INVESTMENTS SA/NV

PLAINTIFF

AND

(1) S&P GLOBAL, INC.
(2) STANDARD & POOR'S INTERNATIONAL, LLC.
(3) S&P GLOBAL UK LTD

DEFENDANTS

IN CHAMBERS

Before:	The Hon. Justice Kawaley
Appearances:	Mr David Allison KC of counsel with Mr Rupert Bell, Ms Harriet Ter Berg and Ms Jamie Brislane of Walkers for the Defendants Mr Tom Smith KC of counsel with Mr Stephen Leontsinis, Ms Annalisa Shibli and Ms Kirsten Bailey of Collas Crill for the Plaintiff
Heard:	16-18 April 2024
Draft Ruling Circulated:	22 May 2024
Ruling Delivered:	3 June 2024

Application to set aside ex parte order granting leave to serve a writ out of the jurisdiction - tort claim - whether claim falls within applicable gateway - whether serious issue to be tried - appropriate forum - whether breach of duty of full and frank disclosure occurred - Grand Court Rules (2023 Revision), Order 11 rule 1 (1) (f) and 4 (2), Order12 rule 8

RULING ON JURISDICTION

Introductory

1. The Defendants apply by Summons dated 27 November 2023 to set aside the Ex Parte Order dated 23 May 2023 herein (the "Ex Parte Order") granting the Plaintiff leave to serve the Amended Writ of Summons dated 4 May 2023 herein (the "Writ") on them out of the jurisdiction.

2. The hearing lasted for three days. Over 20 ring binders were delivered to the Court. The Defendants' inappropriately titled 'Skeleton Argument' ran to 87 pages. The Plaintiff's aptly styled 'Written Submissions' ran to over 92 pages. Silky submissions were advanced with skill and conviction on each side. The contrast between the level of presentation made at the *inter partes* hearing and that made at the *ex parte* hearing (which lasted for only 1 hour) seemed to be an unusually stark one. It seemed surprising, almost a year later, that at the end of the initial 23 May 2023 hearing I thanked junior counsel for "*a very thorough application*".

3. By the time of Mr Allison KC's reply at the end of the third day's hearing on 18 April 2024, I felt as if my provisional views had been so shaken and stirred that I would have to get to grips with the case completely anew. As it happens, the Defendants submitted that, in a practical sense, their application was a rehearing of the *ex parte* application.

Overview of the issues

4. A high-level view of the Plaintiff's case can be stated briefly. The Plaintiff, or RPI, is a Belgian special purpose entity, ultimately owned by the Belgian Government. It was created *inter alia* to acquire toxic assets purchased by Fortis Bank through its Cayman Islands branch, prior to the 2008 Global Financial Crisis, in reliance upon ratings issued by the Defendants. The purchases made were Collateralised Debt Obligations ("CDOs") issued to Fortis Bank as an initial purchaser between 2006 and 2007. Of the eight issuers, seven were Cayman Islands companies (the "Securities"). The Securities were assigned AAA ratings by the Defendants who are alleged to have

known that the tools they were using to evaluate the default risk of asset backed securities (in particular the CDO Evaluator) was seriously flawed. This allegedly constituted the tort of deceit.

5. As far as the jurisdictional requirements for obtaining leave are concerned, the Plaintiff's case can be summarised as follows:

(a) there was a good arguable case that the claim fell within Order 11 rule 1 (1) (f) on the grounds that a tort was committed and "*damage was sustained…within the jurisdiction*" (with masterful understatement, the Plaintiff's Written Submissions acknowledged that identifying where this occurred "*is not necessarily straightforward*");

(b) there was a serious issue to be tried in relation to the controversial issues of (1) standing (by reference to New York and/or Belgian law), and (2) limitation. The Court should avoid conducting a mini-trial at the interlocutory stage;

(c) the Cayman Islands was the most appropriate forum because the tort was committed here, damage sustained here, and the claim was, accordingly, governed by local law. No other available forum could be said to be more appropriate.

6. The Plaintiff contended that it discharged its fair presentation duties at the *ex parte* hearing.

7. The Defendants contended:

(a) there was no good arguable case that damage was sustained by Fortis Bank in the Cayman Islands, because there was no tangible evidence that anything relevant to the claim actually occurred here. The applicable gateway test was not met;

(b) there was not a serious issue to be tried because (1) it was clear as a matter of New York law, in particular, that RPI was not assigned the right to pursue the tort claim from Fortis Bank, and (2) its claim was clearly time-barred;

(c) the Plaintiff had not established that the Cayman Islands was the most appropriate forum. The starting point in tort claims is that the jurisdiction where the tort was committed is the natural forum. That was clearly not the Cayman Islands.

8. Finally, the Defendants contended that the Ex Parte Order ought in any event to be set aside on the grounds of material non-disclosure and/or an unfair presentation.

9. Before considering the merits of the contentious jurisdictional issues, it is important to identify the governing legal principles in relation to how the Court should approach:

(a) the relevant Order 11 rule 1 (1) gateway;

(b) the question of whether there is a serious issue to be tried on the merits of the Plaintiff's claim (Order 11 rule 4 (2)); and

(c) the appropriate forum requirement (Order 11 rule 4 (2)).

10. There was no material dispute as to the general content of the governing legal principles. Controversy centred on how those principles should be applied.

Grand Court Rules (2023 Revision) ("GCR") Order 11 rule 1 (1) (f): the approach to the gateway

11. Three issues call for attention. Firstly, the parameters of the relevant gateway, secondly, the evidential requirements for establishing that a claim falls within those parameters and, thirdly, the legal requirements for establishing the most contentious limb of the rule.

The parameters of the gateway

12. GCR Order 11 rule 1 (1) provides that "*service of a writ out of the jurisdiction is permissible with the leave of the Court if in the action begun by the writ*":

> "*(f) the claim is founded on a tort, fraud or breach of duty whether statutory at law or in equity and the damage was sustained, or resulted from an act committed, within the jurisdiction;…*"

The evidential requirements for establishing that the gateway requirements are met

13. It is well settled that the plaintiff relying on a particular gateway for obtaining leave to serve out must establish a "*good arguable case*" that the claim falls within the relevant gateway. What that means in practice has often been stated in somewhat cryptic terms. For instance, Lord Collins in *Altimo Holdings v Kyrgyz Mobil Tel Ltd* [2012] 1 WLR 1804, where this requirement was not a significant concern, held:

> "*71…In this context 'good arguable case' connotes that one side has a much better argument than the other: see Canada Trust Co v Stolzenberg (No 2) [1998] 1 WLR 547, 555-7 per Waller LJ, affd [2002] 1 AC 1; Bols Distilleries BV v Superior Yacht Services [2006] UKPC 45, [2007] 1 WLR 12, [26]-[28]…*"

14. Both counsel accordingly commended the following passage in the case of *Brownlie-v-Four Seasons Holdings Inc.* [2018] 1 WLR 192 (UKSC) to the Court:

> "*7…What is meant is (i) that the claimant must supply a plausible evidential basis for the application of a relevant jurisdictional gateway; (ii) that if there is an issue of fact about it, or some other reason for doubting whether it applies, the Court must take a view on the material available if it can reliably do so; but (iii) the nature of the issue and the limitations of the material available at the interlocutory stage may be such that no reliable assessment can be made, in which case there is a good arguable case for the application of the gateway if there is a plausible (albeit contested) evidential basis for it. I do not believe that anything is gained by the word 'much', which suggests a superior standard of conviction that is both uncertain and unwarranted in this context.*"

15. I accept this helpful and highly persuasive judicial guidance in relation to the factual dimensions of applying the relevant gateway test. The Defendants' counsel relied further on Lord Collins' encouragement to courts to determine, if it is possible to do so, questions of law which arise in relation to jurisdictional challenges generally, in *Altimo Holdings* (at paragraph 81). The relevant *dictum* was approved by Males LJ in *Airbus SAS -v- Generali Italia SpA* [2019] Bus LR 2997:

> *52. Sometimes, however, it will be sensible, when a question of law arises on an application to challenge jurisdiction, for the court to decide it rather than merely deciding whether it is sufficiently arguable. This is well established, as Lord Collins of Mapesbury explained in Altimo Holdings & Investment Ltd v Kyrgyz Mobil Tel Ltd [2011] UKPC 7, [2012] 1 WLR 1804 at [81]:*
>
> > *'A question of law can arise on an application in connection with service out of the jurisdiction, and, if the question of law goes to the existence of jurisdiction, the court will normally decide it, rather than treating it as a question of whether there is a good arguable case: E F Hutton & Co (London) v Mofarrij [1989] 1 WLR 488, 495; Chellaram v Chellaram (No 2) [2002] 3 All ER 17, para 136.'*"

16. It was then argued:

> "*127. In the present case, the key issue is whether the facts pleaded by RPI are sufficient in law to demonstrate that the jurisdictional gateway under Order 11, r.1 (1) (f) is applicable. That is an issue of law that the Court can and should determine at this hearing.*"

17. This submission in my judgment mischaracterises the relevant dispute because it imports into the context of a jurisdictional dispute a pleadings–based analysis. Why in this case, but not others, the Court should decide the gateway test issue (as opposed to whether there is a serious issue to be tried) based purely on the pleadings is not explained.

18. I find that any evidential issues relevant to the gateway test should be determined by the good arguable case test. However, where an important element of the gateway test is essentially a question of law rather than fact, which can be determined at the interlocutory stage because all relevant facts can fairly be ascertained at this stage, the question of law should be finally determined on its merits. The critical dispute in the present case is whether the Plaintiff has established that damage from the alleged tort was sustained within the jurisdiction. In my judgment this requires the Court to determine:

    (a) as a matter of tort law, where damage in relation to an economic tort is potentially sustained; and

    (b) applying the relevant legal test, whether the Plaintiff has established a good arguable case (i.e. a case with a plausible evidential basis) that it sustained damage within the jurisdiction.

19. An important overarching consideration must also be taken into account when considering whether the gateway test has been made out, as the Defendants' counsel rightly submitted. The gateway requirement should be applied strictly because a person outside the Court's general jurisdiction should not be lightly subjected to the jurisdiction of a foreign court: *Ahmad Hamad Algosaibi and Brothers Company -v- Saad Investments Company Limited* [2010 (2) CILR Note 6] (Smellie CJ, as he then was). In the course of argument, the Defendants' counsel referred to Lord Goff's famous judgment in *Spiliada Maritime Corp -v- Cansulex Ltd*. [1987] 1 A.C. 460 at 480G-481C where three key elements of the Order 11 jurisdiction were summarised:

"*The first is that, as Lord Wilberforce indicated, in the Order 11 cases the burden of proof rests on the plaintiff, whereas in the forum non conveniens cases that burden rests on the defendant. A second, and more fundamental, point of distinction (from which the first point of distinction in fact flows) is that in the Order 11 cases the plaintiff is seeking to persuade the court to exercise its discretionary power to permit service on the defendant outside the jurisdiction. Statutory authority has specified the particular circumstances in which that power may be exercised, but leaves it to the court to decide whether to exercise its discretionary power in a particular case, while providing that leave shall not be granted "unless it shall be made sufficiently to appear to the court that the case is a proper one for service out of the jurisdiction" (see R.S.C., Ord. 11, r.4 (2)).*

Third, it is at this point that special regard must be had for the fact stressed by Lord Diplock in the Amin Rasheed case [1984] A.C. 50, 65, that the jurisdiction exercised under Order 11 may be "exorbitant." This has long been the law. In Societe Generale de Paris v. Dreyfus Brothers (1885) 29 Ch.D. 239, 242-243, Pearson J. said:

> *'It becomes a very serious question .... whether this court ought to put a foreigner, who owes no allegiance here, to the inconvenience and annoyance of being brought to contest his rights in this country, and I for one say, most distinctly, that I think this court ought to be exceedingly careful before it allows a writ to be served out of the jurisdiction."'*

20. This same passage was cited with approval by the Cayman Islands Court of Appeal (Chadwick P, at paragraph 18) in *Ahmad Hamad Algosaibi and Brothers Company -v- Saad Investments Company Limited* [2010 (2) CILR 289]. I am guided by these overarching principles.

Economic torts: where damage is potentially sustained

21. Overall, the authorities cited in argument provided no pat test as to where damage is sustained. Rather, they provide a clear steer in the direction of the need for a more restrictive approach to economic damage than might be appropriate in relation to torts occasioning physical damage. I accept the Defendants' submissions in this regard and reject the Plaintiff's contention that a broad approach should be taken. As regards the form damage would potentially take, the most obvious examples of damage being sustained as a result of misrepresentation would probably be:

(a) receiving the misrepresentations; and

(b) making the payments induced by the alleged misrepresentations.

22. This Court is bound by *Contadora Enterprises SA -v- Chile Holdings (Cayman) Ltd* [1999 CILR 194]. In that case Gerald Collett JA trenchantly held as follows:

> "*Sub-paragraph (f) requires a plaintiff to show both that 'the claim is founded on a tort, fraud or breach of duty' and that 'the damage was sustained, or resulted from an act committed, within the jurisdiction.' Leaving aside the question whether the claim here is so founded, it became obvious during the hearing of the appeal that no damage was either sustained or resulted from any act committed in the Cayman Islands. The acts of the defendant directors were all committed either in Panama or France and the only basis relied upon for asserting that the damage was sustained by the respondents in the Cayman Islands was that those companies are incorporated here. Since the test under the sub-paragraph must apply alike to personal and to corporate plaintiffs, this amounts to an assertion that wherever in the world a person resident in these Islands suffers damage, he suffers it in Cayman, a conclusion that would render that part of sub-para. (f) otiose. The contention is also directly contrary to authority: see Société Comm. de Réassurance v. Eras Intl. Ltd., a decision of the English Court of Appeal. It plainly cannot be supported*." (Emphasis added)

23. This unanimous decision of the Cayman Islands Court of Appeal is authority for the proposition that positive evidence of tortious damage being sustained in the Cayman Islands is required for this gateway. The mere fact that the claimant is resident in the Cayman Islands is not enough. Since that decision was handed down, GCR Order 11 has been amended to widen the jurisdiction of this Court where the defendant is linked with this forum by virtue of their connection to a local company or partnership with the following additional gateway:

> "*(ff) the claim is brought against a person who is or was a director, officer or member of a company registered within the jurisdiction or who is or was a partner of a partnership, whether general or limited, which is governed by the laws of the Islands and the subject matter of the claim relates in any way to such company or partnership or to the status, rights or duties of such director, officer, member or partner in relation thereto;…*" [Emphasis added]

24. This suggests that the Rules Committee explicitly considered the extent to which jurisdiction in relation to commercial entities based in the Cayman Islands should be expanded, and limited the

expansion to claims against directors, officers, shareholders or partners of Cayman-based entities, persons who in many cases would be resident abroad and exposed to claims by, *inter alia*, entities based here. The claims must also relate to the Caymanian entity. No attempt was made to create a 'long-arm' jurisdiction over claims relating to Cayman-based entities *simpliciter*. Accordingly, the concerns expressed by Gerald Collett JA in *Contadora Enterprises SA* a quarter of a century ago about adopting any overly broad approach to where tortious damage is deemed to occur potentially still holds good today. Those concerns were based on an invocation of Order 11 rule 1 (1) (f) based merely on the fact the plaintiff was incorporated here. The same policy concerns can hardly operate with lesser force in the present case where the Plaintiff is the successor in title of an entity which merely had a branch office in the Cayman Islands.

25. Mr Smith KC for the Plaintiff relied heavily on a broader approach adopted by the UK Supreme Court in *FS Cairo (Nile Plaza) LLC v Lady Brownlie* [2021] 3 WLR 1011 where Lord Lloyd-Jones (with whom Lords Reed, Briggs and Burrows agreed), rejecting the proposition (contended for by the minority in '*Brownlie I*'[1]) that "damage" was limited to direct damage, opined as follows:

> "*49. To my mind, this approach is unduly restrictive. We are concerned here not with the completion of a cause of action in tort, a matter of substantive law, but with the scope of a jurisdictional rule which is intended to identify the appropriate forum for the adjudication of the resulting claim. In my view there is no justification in principle or in practice, for limiting 'damage' in paragraph 3.1(9)(a) to damage which is necessary to complete a cause of action in tort or, indeed, for according any special significance to a place simply because it was where the cause of action was completed. First, while damage is an essential element of many torts including negligence, many other torts, including trespass to the person and trespass to goods, are actionable per se, without proof of damage. There is therefore no warrant for reading paragraph 3.1(9)(a), which is a rule of general application to claims in tort, in such a restrictive way….*
>
> *51…damage is likely to be relevant to the identification of an appropriate jurisdiction for the adjudication of a claim in tort not because it may complete a cause of action but, more generally, because the damage actually suffered by the victim may, depending on all the circumstances of the case, serve to link the wrongdoing to a particular jurisdiction. In my view, therefore, there is no reason to read "damage" in paragraph 3.1(9)(a) as limited to the damage which violates the claimant's right and which completes the cause of action. On the contrary, the word in its ordinary and natural meaning and when considered in the*

[1] [2018] 1 WLR 192.

light of the purpose of the provision extends to the physical and financial damage caused by the wrongdoing, considerations which are apt to link a tort to the jurisdiction where such damage is suffered. Moreover, this reading is supported by the omission of the definite article in the current article of the rule, an amendment which was intended to reflect the decision in Metall und Rohstoff that it is sufficient that some significant damage has been sustained in the jurisdiction. (See Brownlie I per Lord Wilson at para 64, per Lord Clarke at para 68.)…

82. The wider reading of damage within the meaning of the tort gateway, which I favour, does not confer on all claimants in personal injury cases a right to bring proceedings in the jurisdiction of their residence. The courts will be astute in ascertaining whether the dispute has its closest connection with this jurisdiction and the principle of forum non conveniens will provide a robust and effective mechanism for ensuring that claims which do not have their closest connection with this jurisdiction will not be accepted here."

26. Mr Allison KC rightly submitted that a distinctive approach was required in economic loss cases, based on a later passage in Lord Lloyd-Jones' same judgment:

"*75. Secondly, as Mustill LJ expressly acknowledged in the Eras Eil Actions (at p 590), there is an important difference in this regard between physical damage and 'the financial consequences of a tort which itself is wholly economic in nature'. The nature of pure economic loss creates a need for constraints on the legal consequences of remote effects and can give rise to complex and difficult issues as to where the damage was suffered, calling for a careful analysis of transactions. As a result, the more remote economic repercussions of the causative event will not found jurisdiction. By contrast the tort alleged in the present case is not 'wholly economic in nature'. The damage sustained by Lady Brownlie in the present case is simply not comparable to that in cases such as the Eras Eil Actions and ABCI.*

76. I would certainly not disagree with the proposition, supported by the economic loss cases, that to hold that the mere fact of any economic loss, however remote, felt by a claimant where he or she lives or, if a corporation, where it has its business seat would be an unsatisfactory basis for the exercise of jurisdiction…" [Emphasis added]

27. The latter passage could not provide clearer support for the almost identical observations of Collett JA in the Cayman Islands Court of Appeal in *Contadora,* over 25 years ago. In short, there must be clear evidence of economic loss sustained in a jurisdiction which is not too remote from the "*causative event*".

28. What of the wider reading of 'damage' in the tort gateway which Lord Lloyd-Jones favoured, and contended (at paragraph 82 of the *Lady Brownlie* case, as set out above) could be constrained by the *forum non conveniens* doctrine, upon which the Plaintiff relied? Those observations must be read subject to the qualifications he had earlier expressed, distinguishing a personal injuries case from a pure economic loss case. Most importantly, they are explicitly articulated in relation to "*personal injury cases*". The Plaintiff's counsel in their Written Submissions also relied in this regard on what I found to be a somewhat evocative passage from Professor Adrian Briggs' '*Civil Jurisdiction and Judgments*', Seventh Edition[2], at paragraph 24-18:

> "*In the result, the sensible approach is not to be too clever or analytical when it comes to the location of intangible, or financial, losses, but to rely on the principle of forum non conveniens to screen out those cases in which the damage connection with England is too weak or tenuous to justify service out.*"

29. The weight I would otherwise attach to these views is diminished somewhat by the fact that they were expressed without reference to the leading case in England and Wales on this point, *FS Cairo (Nile Plaza) LLC v Lady Brownlie*, which had probably not yet been decided when the book was published[3]. However, in my judgment there is still considerable force to Professor Briggs' quoted advice, which (ironically) encourages judges and practitioners not to be too academic. It encourages us rather to be more practical when dealing with this potentially esoteric and technical issue. Accepting Lord Lloyd-Jones' view in *Lady Brownlie* that the need for caution in economic tort cases applies in particular in cases where the damage is extremely remote from the "*causative event*" of the tort, however, there is likely to be (in many cases at least) a strong correlation between:

(a) the factors which are determinative of whether the damage is too remote; and

(b) the factors (or at least some of them) which are determinative of the *forum conveniens* issue.

[2] Informa Law from Routledge: London, 2021.
[3] My own researches suggest that the e-book was published on 26 April 2021, nearly six months before the Supreme Court's decision in the *Lady Brownlie* case was delivered on 20 October 2021.

30. The Plaintiff's counsel submitted that:

> "*55. It would obviously be incongruous if, in relation to a tort committed in the Cayman Islands, there was no gateway for permitting service on the tortfeasor out of the jurisdiction. This supports the view that Gateway 1(1)(f), and in particular the concept of where the damage is sustained, ought to be construed broadly.*"

31. I accept the first sentence in that paragraph but reject the second sentence as entirely circuitous. The need to consider supplementary factors such as where the tort is committed arises from a narrow construction of the rule. A broad construction would eliminate the need to be concerned about the remoteness of damage issue altogether so the incongruity of damage being found to be too remote to satisfy the gateway test even in relation to torts committed here would never arise.

32. I shall return to another observation of Professor Briggs, which does not appear in any way to warrant reconsideration in light of the *Lady Brownlie* case, when considering the merits of the gateway test issue below. However, to summarise the general legal principles about where tortious damage is sustained for jurisdiction purposes in an economic tort case, the damage sustained in the jurisdiction must be:

(a) significant, i.e. more than the mere fact that the claimant has a personal or business presence within the jurisdiction; and

(b) not too remote from the relevant tort's "*causative event*".

The merits of the gateway issue

33. It is helpful to examine how the Plaintiff summarised its case on damage being sustained within the jurisdiction at the *ex parte* and *inter partes* hearings before considering the adequacy of the evidence filed. The Plaintiff's Written Submissions at the *ex parte* stage set out the relevant rule, cited the *Lady Brownlie* case, and then argued:

> "*14 It is submitted that the deceit complained of in the Writ clearly has a real and substantial connection with the Cayman Islands, and provides a legitimate basis for this Honourable Court to assume jurisdiction because:*
>
> *(a) Fortis Cayman was a Cayman Islands banking corporation with its principal place of business at 802 West Bay Road, Grand Pavilion Commercial Centre, Grand Cayman KY1-1104 (see paragraph 17 of Frans 1);*
>
> *(b) At all material times Fortis Cayman maintained a Class B banking license*

issued by the Cayman Islands Monetary Authority under License Number 100090. In relation to that license, Fortis Cayman paid the necessary fees (see paragraph 17 of Frans 1) and maintained compliance with other regulatory requirements such as minimum capital or net worth, annual audits of its accounts, and minimum numbers of directors;

(c) All of Fortis Cayman's administrative functions operated in the Cayman Islands (see paragraph 106 of Frans 1);

(d) All but one of the issuers of the Securities were Cayman Islands incorporated companies (see paragraph 104 of Frans 1);

(e) Fortis Cayman 'warehoused' the underlying collateral for most of the Securities as part of its Cayman Islands domiciled business (see paragraph 105 of Frans 1);

(f) The Securities were bought by Fortis Cayman, in reliance on the Ratings, as part of Fortis Cayman's business as a foreign registered bank in the Cayman Islands; and

(g) *The losses resulting from the defendants' deceit were suffered by Fortis Cayman alone, distinct from Fortis Bank SA/NV (see paragraph 22 of Frans 2).*" [Emphasis added]

34. The damage was said to have been suffered by "Fortis Cayman" because this entity was a licensed Cayman Islands bank which was administered here. The other jurisdictional connecting factors relied upon were essentially the facts that (a) the Securities were mostly purchased from Cayman Islands issuers and (b) the "*underlying collateral*" was "*warehoused*" here as part of Fortis Cayman's business. Why the deceit itself was substantially connected with the Cayman Islands was not directly explained. However, reliance was also placed on the following forum arguments:

> "*18. In this regard, it is important to consider that the business of CDOs was, at the time, a very Cayman-centric industry. As explained at paragraph 111 of Frans 1, the CDOs that issued the Securities were bankruptcy remote special purpose vehicles incorporated in the Cayman Islands. This structure was extremely common since institutional investors took advantage of the tax efficiency of the Cayman Islands, and the sophistication and predictability of the jurisdiction's legal system.*
>
> *19 Given that the infrastructure of this jurisdiction was integral to, and facilitated, the growth of the CDO industry, RPI asserts that this case is the perfect example of a matter which should properly be determined by this Honourable Court. It is further submitted that, for the jurisdiction to maintain the trust and confidence of those who continue to structure their investment business in the Cayman Islands, it is in the public interest for the matter to be determined by the Courts of this jurisdiction.*

> *20 The considerations listed at paragraph 14 in relation to the applicability of Gateway 1(1) (f), are also relevant in illustrating that, notwithstanding that some of the contracts relevant to the background of the Claim are governed by the laws of other jurisdictions, in all the circumstances the Cayman Islands is the appropriate jurisdiction for the trial of the Claim.*"

35. These submissions did not accurately identify the critical legal test for the gateway, although the need for more than residential connections was emphasised. They elided the need for some connection between the place where the tort was committed and the place where damage was sustained, with connecting factors peripheral to the claim (e.g. the corporate domicile of all but one of the issuers of the Securities) and the place where damage was sustained. In oral argument Mr Leontsinis added that reliance occurred here because the ratings were published here, submitting (in answer to my query about what law governed the tort) that the claim on this basis was governed by Cayman Islands law.

36. In the Plaintiff's Written Submissions for the *inter partes* hearing, it was argued that the tort was committed within the Cayman Islands because this is "*the place where the representations were received*" (paragraph 50). Dealing with the gateway, Mr Smith also relied on Professor Briggs' following statement earlier in the same paragraph of '*Civil Jurisdiction and Judgments*' which is cited above:

> "*If the claimant becomes legally liable to pay out money within the jurisdiction, it seems that he does sustain damage, in the sense of economic loss, within the jurisdiction, and this may be so whether or not he actually pays it.*"

37. This was a potentially significant legal elaboration of why it was contended that Fortis Bank's Cayman branch's alleged presence here meant that damage was sustained here. Additionally, it was now pleaded in the Amended Statement of Claim ("ASOC") that the relevant losses flowing from the deceit were recorded in the Cayman branch accounts. The proposition that the tort was committed within the jurisdiction was also legally fortified by reference to authorities such as *Diamond-v-Bank of London and Montreal Ltd* [1979] QB 333 at 346, *Metall und Rohstoff-v-Donaldson Lufkin & Jenrette* [1990] 1 QB 391 at 441 and *Newsat Holdings Ltd-v-Zani* [2006] EWHC 342 (Comm) at paragraph 30. The principle described in the latter case, as well as recognised as a matter of English law, was that "*fraudulent misrepresentation is committed in the place where the misrepresentation was received and acted upon*".

38. As regards both the primary question of whether damage was sustained in the jurisdiction and the ancillary question of whether a bare residential nexus was supplemented by the more substantive connecting factor of the tort being committed here, the Defendant centrally contended that there was no plausible evidential basis for the Plaintiff's case. And the merits of the gateway question accordingly depend fundamentally on an evidential analysis of the following key allegations advanced in support of the Plaintiff's jurisdictional case:

(a) Fortis Bank had a Cayman branch with a local office and was accordingly resident here;

(b) Fortis Bank, through its Cayman branch, purchased the Securities here and became liable to pay the purchase monies for the Securities in the Cayman Islands;

(c) the purchases were recorded in the books of the Cayman branch and accordingly, losses incurred were booked here; and

(d) the fraudulent representations were received here and acted upon here.

39. As to these factors, I find in summary that:

(a) Fortis Bank had a license to conduct banking business outside of the Cayman Islands and a local address. This was a presence in the jurisdiction similar to, though more tenuous than, a company incorporated here. I find there is a plausible evidential basis for this connecting factor;

(b) it was not disputed that the Securities were in seven out of eight cases purchased from Cayman Islands special purpose vehicles. The issuers are not the alleged tortfeasors, so this factor is of marginal relevance in and of itself. To the extent that it is implied that, although the branch had no separate legal identity, but Cayman–based staff negotiated or consummated the purchases here, I find that there is no plausible evidential foundation for this proposition;

(c) the Plaintiff relied on paragraph 22 of the Second Frans Affidavit ("Frans 2") in support of the potentially relevant assertion that the losses were incurred in the Cayman Islands because they were recorded in the books of the Cayman branch. A book-keeping entry made abroad and merely allocated to part of the Bank's business tenuously linked to the Cayman Islands has no jurisdictional impact. To the extent that it was being implied

that the books were actually kept in the Cayman Islands, I find there is no plausible evidential foundation for this part of the Plaintiff's case;

(d) the Plaintiff's Written Submissions invites the Court to infer from (a) to (c) that the fraudulent misrepresentations were received and acted upon here by Fortis Bank through its Cayman branch. I find there is no plausible evidential foundation for this potentially significant part of the Plaintiff's gateway case; and

(e) to the extent that it is suggested that Fortis Cayman became liable to pay the purchase monies for the Securities in the Cayman Islands, thus siting the damage here, the cogency of the jurisdictional connection would not be enhanced because (without more) it would be based no more than on the sort of formal corporate connection (a legal as opposed to a substantive place of business here) which the Cayman Islands Court of Appeal in *Contadora Enterprises SA-v- Chile Holdings (Cayman) Ltd* [1999 CILR 194] found failed to meet the gateway test. The legal nexus is itself more tenuous than that in *Contadora* in any event.

40. Indeed, the Defendants argued that there were "four basic questions" relevant to where damage was sustained (Written Submissions, paragraph 151):

(a) where did Fortis Bank take the decision to purchase the Securities;

(b) where was the bank account used by Fortis Bank to fund the purchase;

(c) where did Fortis Bank take the decision to sell the Securities; and

(d) where did it receive the purchase price?

41. The insubstantial, gruel-like nature of the direct evidence of Cayman Islands connections as regards both where damage was sustained and where the tort was committed is more clearly revealed by the way the Plaintiff was compelled to advance its case. Firstly, the failure to rely on the first limb of the gateway ("*act committed, within the jurisdiction*") betrayed a lack of conviction that this ground could be established. Secondly, the way in which the limited direct evidence was presented came very close to being itself a serious misrepresentation. In fact it was submitted in the Defendants' Skeleton Argument:

> "*138. Regrettably, Mr Frans misled the Court at the Ex Parte Hearing by giving false evidence as to the status of the so-called Cayman Islands branch of Fortis Bank SA/NV. His sworn evidence was that the so-called Cayman Islands branch (which he misleadingly*

defined as 'Fortis Cayman') was a 'banking corporation organized under the laws of the Cayman Islands'. This evidence is simply untrue. It is extraordinary that such a fundamental detail was misstated by Mr Frans (particularly on an application for leave to serve a writ out of the jurisdiction, heard without notice to the S&P Parties)."

42. As I observed in the course of argument, the repetition of the term "*Fortis Cayman*" in the Plaintiff's ex parte written and oral submissions had an almost hypnotic effect. It caused the reading and listening Judge to conjure up images of a real, as opposed to notional, corporate presence within the Cayman Islands. An office with employees, who conducted transactions, took cigarette and coffee breaks and held staff parties. However, the First Affidavit of Danny Frans ("Frans 1") supported none of this. It expressly averred that Fortis Bank had a branch in the Cayman Islands (paragraph 13 (a)). I was not referred to any averment by Mr Frans that "Fortis Cayman" was "*a banking corporation organized under the laws of the Cayman Islands*", although the source of this language is explained below. In fact, it was averred in Frans 1:

"17. *Fortis Cayman was a banking corporation with its principal place of business at 802 West Bay Road, Grand Pavilion Commercial Centre, Grand Cayman, KY1-1104 and maintained a Class B banking licence issued by the Cayman Islands Monetary Authority under License Number 100090…*

106. The Initial Purchaser of super-senior (AAA rated) tranches in each of the CDOs, Fortis Cayman, was a Cayman Islands licensed banking branch which had all of its administrative functions in this jurisdiction."

43. The accusation of false and misleading evidence was not justified. It prompts one to recall the cynical characterisation of the law by the French post-Impressionism artist Paul Cézanne. He foreswore his parents' chosen career in favour of art, describing the law as "*that tangled talkers' trade*"[4]. Had he not abandoned his study of the law, Cézanne would doubtless have discovered that there is room in that honourable profession, particularly in the litigation sphere, for artistic forms of expression. Impressionistic statements can fairly be deployed without any improper deception or obfuscation, but they will always ultimately be subjected to the scrutiny of objective forensic analysis. Indeed, counsel advancing unfair presentation complaints legitimately deploy presentational artistry of their own. Most importantly, it is necessary to remember that it is rarely straightforward to judicially establish that any assertion is definitively true or false. As Lady Rose

[4] Nathaniel Harris, 'The Art of Cezanne' (Chancellor Press: London, 1996) page 14.

has observed extra-judicially[5]:

> "*'The truth is rarely pure and never simple.' So says the society wit and cynic Algernon Moncrieff in Oscar Wilde's sparkling comedy The Importance of Being Earnest. Most people, and I would guess every trial judge across the world and throughout the centuries, would agree that the truth is nuanced and multi-faceted. It is often mixed with other elements like personal perspective or subconscious bias…*"

44. This is not to suggest that I consider the unfair presentation complaints the Defendants advanced were naïve or entirely misconceived, as will be seen when I address this topic in its own right below. This *ex parte* application sailed very close to the wind in fair presentation terms. The most valid criticism of the potentially pivotal averment that Fortis Bank had a Cayman branch with a "*principal place of business…which had all its administrative functions in this jurisdiction*" which Mr Allison KC advanced was that these were bare assertions unsupported by any tangible facts.

45. It is, however, understandable if bare assertions are made at the *ex parte* stage, particularly in applications made in some haste and where a claimant has limited resources (this matter was initially commenced as a Civil General matter and subsequently transferred to the FSD List). Here the need for expedition was not prompted by a need for urgent relief, but by the staleness of the claim. The Defendants' Jurisdiction Summons was filed on or about 27 November 2023. The main factual supporting Affidavit was the First Affidavit of Jason Mang ("Mang 1"). Section D of Mang 1 (paragraphs 21-46) is entitled "***THE NATURE OF FORTIS BANK SA/NV, CAYMAN ISLANDS BRANCH***". He explains investigations into the branch and avers, most significantly:

(a) although Fortis Bank was registered here as an overseas company and notionally had a local branch, he has seen nothing to suggest that Fortis Bank "*had at any relevant time any actual operations in the Cayman Islands*" (paragraph 34);

(b) it appears from the Park Lane Agreement of 24 June 2008 that the branch was managed from New York and "*was essentially an internal ledger within Fortis Bank SA/NV and not a branch that did anything of substance in the Cayman Islands*" (paragraph 37); and

(c) it appears from Fortis Bank's published annual reports for 2005-2007 that all directors were resident in Belgium, Netherlands, France or Luxembourg (paragraph 39). (The Securities were purchased by Fortis Bank, on the Plaintiff's pleaded case, between 2006 and 2007).

[5] '*The Art and Science of Judicial Fact-Finding*', Queens College Cambridge, 14 July 2023.

46. This Affidavit afforded Mr Frans an opportunity, by way of reply, to add flesh to the bare bones of his initial description of the branch's jurisdictional ties. Moreover, there can be no suggestion with the gateway test that fuller analysis ought to be postponed until trial. Before considering his reply, however, it is important to consider what his likely knowledge of the Cayman connections at the time would have been.

47. He was by his own account at the relevant time (2006-2007) "*Senior Portfolio Manager at Fortis Bank SA/NV…serving in the Structured Credit Portfolio group which was responsible for the daily management of the Asset-Backed Securities…investment portfolio*" (Frans 1, paragraph 4). His description of the commercial context in which the Securities were purchased appears, save where it is otherwise stated, to be based on his own knowledge because the Securities were purchased as part of the Asset-Backed Securities portfolio he was involved in managing. In Frans 1, he further averred:

> "*Fortis Cayman's principal roles in the global structured credit business of Fortis Bank and its then parent, Fortis Holding ('Fortis Holding') were to (i) be the "warehouse" in connection with ramping up CDOs, meaning that Fortis Cayman would purchase and hold asset-backed securities, primarily RMBS, specified by the CDO manager, until the CDO launched, and (ii) act as the Initial Purchaser of the top-most ('super-senior') tranches of CDOs when they launched.*
>
> *37 In Its capacity as the 'warehouse', Fortis Cayman purchased and held asset-backed securities for 6-8 months, during which time it took the interim risk on those assets before enough collateral was built up to launch a CDO. Once the CDO was launched, Fortis Cayman took the super-senior tranche position which bears the least amount of risk…*
>
> *43. Fortis Cayman purchased the following CDO tranches at issue in this case for a total of US$6,738,000,000.00 in reliance on the credit ratings provided by S&P ('Securities'): […]*
>
> *44. Fortis Cayman was the Initial Purchaser of the Securities, as evidenced by internal Fortis Bank documents, including for example an internal document known as a 'Position Report.*"

48. Accordingly, Mr Frans seems clearly to be the man who is best placed to describe what actually

transpired on the ground in the Cayman Islands in the critical respects. But even if he is not himself "the man", he ought to be well placed to (in the words of the UK Automobile Association commercial) "*know a man who can*". In the Third Frans Affidavit ("Frans 3"), the deponent neither pleads ignorance of the Cayman operations nor suggests that vital records have been lost which might otherwise elucidate the true position. Section C of his Affidavit (paragraphs 22-29, "***THE NATURE OF FORTIS BANK SA/NV, CAYMAN ISLANDS BRANCH***") responds to Mang 1 in relation to this topic. The response is, in essence, the familiar sort of evidence provided by an honest and dutiful former employee, doing their best to assist a former employer without compromising their own integrity. In summary, he:

(a) explains that paragraph 17 of Frans 1 was based on a case filed in the Southern District of New York by "*Fortis Bank SA/NV, Cayman Islands Branch*", *which described itself as a* "*banking corporation organized under the laws of the Cayman Islands*". Although he does not make this point, it is clear that he avoided in Frans 1 incorrectly suggesting that the branch was a Cayman Islands corporation. (Seemingly it was this language in the US pleading which was incorrectly attributed to Mr Frans in the Plaintiff's Skeleton Argument);

(b) exhibits four credit agreements entered into as lender by Fortis Bank using the name "Fortis Bank SA/NV Cayman Islands Branch";

(c) exhibits a guarantee entered into by Fortis Bank using the address "*principal office at Grand Pavilion Commercial Centre, 802 West Bay Road, Grand Cayman, Cayman Islands*";

(d) avers that Fortis Bank's Class B banking license in the Cayman Islands "*necessitated that it maintained, amongst other things, a principal place of business in the Cayman Islands as well as complied without various other regulatory requirements*" (paragraph 29);

(e) states that Mr Mang is incorrect to contend that Fortis Bank "*did not do anything of substance in the Cayman Islands*" (paragraph 28) without providing a single example of one substantive thing actually done here in tangible terms; and

(f) fails to elaborate upon the bare assertions initially made that the loss was suffered in the Cayman Islands.

49. It is readily apparent why the Plaintiff did not have the temerity to rely on the first limb of the sub-paragraph (f) gateway, and contend that the tort was actually committed in the Cayman Islands. It is nothing more than wishful thinking on the Plaintiff's part to suggest that the Securities were actually purchased in the Cayman Islands and that the financial loss was suffered here. The mere fact that the Securities were issued by (mostly) Cayman Islands entities and that the purchases were attributed by Fortis Bank to its Cayman branch may well have had significance which a tax lawyer could explain. Mr Smith KC effectively invited the Court to engage in legal alchemy and transform these theoretical connections with this forum into tangible jurisdictional connections in real world terms. After all, sophisticated commercial players who wish to anchor commercial transactions to a particular jurisdiction can very easily take overt calculated action designed to achieve that end. Those steps include:

(a) conducting business through substantive (even if only "cheap and cheerful") local offices in the desired forum;

(b) financing transactions through banks in the desired forum (it appears Fortis Bank actually had a Cayman Islands subsidiary).

50. None of that seemingly happened here in relation to the purchase of the Securities (which is of little or no relevance to where the tort, which forms the subject of the Plaintiff's claim, or the damage flowing from it, occurred). Nor, more pertinently, were steps taken to anchor the manner in which Fortis Bank carried out the business it allocated to its Cayman Islands branch to this jurisdiction in tangible terms. Fortis Bank clearly (based on the evidence placed before this Court) took no tangible steps to ensure (or even attempt to ensure) that its Cayman Islands branch activities would be subject to this Court's jurisdiction on the grounds that it was conducting business abroad from a substantive base located here. Had it done so, Mr Frans should have been able to describe what those steps were.

51. It is true that Frans 3 also addresses the "*Business of S&P in the Cayman Islands*" (paragraphs 18-21). The deponent infers from the fact that a 5 December 2006 ratings letter was sent to Nassau CDO I, that all of the other Cayman-based issuers received ratings letters at their Cayman Islands registered offices. Accepting this assumption to be right, it falls short of demonstrating even that the misrepresentations were both received and acted upon by the issuers, let alone by Fortis Bank, in the Cayman Islands.

52. The gateway test of establishing a "good arguable case" that the Plaintiff suffered tortious damage

within the jurisdiction can only be met by producing a "*plausible evidential foundation*" for the proposition that the Plaintiff suffered damage which is not too remote from the causative event within the Cayman Islands. Properly analysed, the Plaintiff's evidence fails to make out an arguable case that the Plaintiff suffered any significant economic damage in the Cayman Islands flowing from the fraudulent misrepresentations it complains of in the present proceedings (i.e. misrepresentations received by and acted upon by Fortis Bank, the Plaintiff's predecessor in title). Having an address for the purpose of a banking license is not enough in circumstances where the Plaintiff has also failed to adduce any tangible evidence that the relevant tort was committed here.

53. Mr Smith KC, in oral argument, further advanced what appeared to me to be a straw-clutching point. Reliance was placed on the fact that an S&P letter was actually sent to one of the Cayman-based issuers, a document by which I was somewhat influenced at the *ex parte* hearing. It was seemingly contended that those representations could be viewed as being passed on to Fortis Bank by the relevant issuer. I found this point to be somewhat impenetrable in the course of the hearing, but the authority to which counsel referred does potentially support a legal finding that it matters not if the Defendants never directly sent the impugned ratings to the Plaintiff. Professor John Cartwright in '*Misrepresentation, Mistake and Non-Disclosure*', Sixth Edition, (at paragraph 5-06) opines:

> "*To succeed in the tort of deceit the representee must show that a representation was made to him by which he was deceived. Such communication may generally be through the medium of words spoken or written to him; but it can equally well be in the representee's interpretation of the meaning of the defendant's conduct.*"

54. I see no reason not to assume for the purposes of the present application that this somewhat esoteric point is correct, not least because it was not disputed that there was a serious issue to be tried on the substantive merits of the Plaintiff's deceit claim. But the merits of the substantive claim are, for present purposes, beside the point. Not only was there no evidence that the recipient of the email was in the Cayman Islands, whatever impact that might have. There was, more critically, simply no evidence that any servant or agent of the Plaintiff's predecessor in title actually considered and/or acted upon the AAA ratings assigned to the Securities in the Cayman Islands.

55. Accordingly, I am bound to find that the Plaintiff has not made out a good arguable case that its claim passes the GCR Order 11 rule 1 (1) (f) tort gateway test because there is no plausible evidence supporting its case that it suffered tortious damage within the Cayman Islands.

GCR Order 11 rule 4 (2): the approach to the appropriate forum requirement

56. Order 11 rule 4 (2) provides:

> "*(2) No such leave shall be granted unless it shall be made sufficiently to appear to the Court that the case is a proper one for service out of the jurisdiction under this Order.*"

57. The governing principles in relation to the appropriate forum (or *forum conveniens*) requirement were not in dispute. In relation to a tort claim, the clearest and most concise recently reported local guidance is provided by Justice Raj Parker's decision in *Ritchie Capital Management LLC et al-v-Lancelot Investors Fund Limited* [2021 (1) CILR 128] where he held:

> "***Appropriate forum***
>
> *245 Ritchie has to show that this court is clearly the appropriate forum for the resolution of the cases against Lancelot and GE on the assumption (contrary to the court's findings) that Ritchie had a realistic prospect of success against each of them.*
>
> ***Legal principles***
>
> *246 The well-known test is to identify the forum in which the case can be suitably tried for the interests of all the parties and for the ends of justice.*
>
> *247 Ritchie bears the burden to persuade the court that the Cayman Islands is clearly the most appropriate forum and that in all the circumstances the court should exercise its discretion to permit service out.*
>
> *248 The court examines the connecting factors which include matters of practical convenience and the system of law which will be applied to decide the issues, the place where the wrongful act or omission occurred, and the place where the harm occurred.*
>
> *249 It is at least a starting point to consider where the substance of an alleged tort is committed and the governing law which would be applied to identify the appropriate forum.*"

58. In the present case, the Plaintiff (RPI) has to show that the Cayman Islands is clearly the most appropriate forum. There is considerable alignment in the peculiar circumstances of this case

between the gateway test and the appropriate forum test, and it follows logically from my findings in relation to the gateway test that the Plaintiff has not demonstrated that the connecting factors to this jurisdiction make it clearly the most appropriate forum.

59. The Plaintiff's deceit claim is factually most closely aligned with those in *Clurname Pty Limited-v-McGraw-Hill Financial Inc* [2017] FCA 1319 where the Federal Court of Australia (Wigney J) held:

> "*66. Standard and Poor's submitted that when one looked at the events and asked where in substance the act took place, the answer would be New York because that was the place where Standard & Poor's determined its ratings methodologies, criteria and model assumptions. That submission is rejected. That is because the relevant tortious conduct was Standard & Poor's making the S&P Ratings Representations and the S&P Independence Representations in circumstances where it knew and authorised the communication of those representations to investors in Australia, or where it knew or could reasonably expect that the representations would be received and relied on by investors in Australia.*
>
> *67. There could be no doubt that Clurname's existing causes of action based on the allegation that the relevant representations (the S&P Ratings Representations and the S&P Independence Representation) were misleading and deceptive are governed by Australian law because the relevant conduct, the representations, occurred in Australia. Standard & Poor's did not contend otherwise. That the representations were false or misleading because of events or circumstances that occurred outside Australia, for example the assignment of the ratings and the circumstances relied on by Clurname to establish that the relevant representations arising from the ratings were false, is irrelevant: ABN AMRO Bank NV v Bathurst Regional Council [2014] FCAFC 65; (2014) 224 FCR 1 at [739]-[744]. So too is the fact that the senior employees of Standard & Poor's whose knowledge of the falsity of the representations can, on Clurname's case, be imputed to Standard & Poor's, may have been situated outside Australia.*"

60. In *Clurname*, no question arose about whether or not the plaintiffs had a sufficient connection with Australia. It was not disputed that the claims were governed by Australian law because the claimants received and acted upon the misrepresentations there. In the present case, there is no proper basis for concluding that Cayman Islands law applies to the Plaintiff's claims. There are no other connecting factors (such as the location of witnesses or documents) which make this forum more appropriate than any of the other potential fora (notably New York or Belgium, whose laws clearly apply to the standing issues).

61. On the other hand, if I was required to find that there was a good arguable case that significant non-remote tortious damage was sustained by the Plaintiff here and that the claim was governed by Cayman Islands law, I would find instead in relation to this jurisdictional ground that the Cayman Islands was the most appropriate forum in all the circumstances. The application of Cayman Islands law, the fact that English is the only common language and the possible unavailability of New York for limitation reasons would in my judgment override the fact that documents and witnesses are not located here.

62. One further point raised by the Plaintiff deserves further consideration, notwithstanding my primary actual finding that the Plaintiff has not demonstrated this to be the most appropriate forum. This point also only arises if I am wrong to have concluded that the relevant gateway test is not met. Should this Court accept jurisdiction on the fall-back basis that no other forum is actually available? The Plaintiff plausibly contends, quite understandably without unreservedly conceding the point, that any New York claim would now likely be time-barred under stricter limitation rules.

63. Mr Smith KC referred the Court to the following passage in Lord Goff's judgment in *Spiliada* where (at 483D - 484B) the extent to which legitimate juridical advantages to the plaintiff could be taken into account was under consideration:

> "*Again, take the example of cases concerned with time bars. Here a special problem arises from the fact that, in English law, limitation is classified as a procedural rather than as a substantive matter. Let me consider how the principle of forum non conveniens should be applied in a case in which the plaintiff has started proceedings in England where his claim was not time-barred, but there is some other jurisdiction which, in the opinion of the court, is clearly more appropriate for the trial of the action, but where the plaintiff has not commenced proceedings and where his claim is now time-barred. Now, to take some extreme examples, suppose that the plaintiff allowed the limitation period to elapse in the appropriate jurisdiction, and came here simply because he wanted to take advantage of a more generous time bar applicable in this country; or suppose that it was obvious that the plaintiff should have commenced proceedings in the appropriate jurisdiction, and yet he did not trouble to issue a protective writ there; in cases such as these, I cannot see that the court should hesitate to stay the proceedings in this country, even though the effect would be that the plaintiff's claim would inevitably be defeated by a plea of the time bar in the appropriate jurisdiction. Indeed a strong theoretical argument can be advanced for the proposition that, if there is another clearly more appropriate forum for the trial of the action, a stay should generally be granted even though the plaintiff's action would be time-barred there. But, in my opinion, this is a case where practical justice should be done. And*

practical justice demands that, if the court considers that the plaintiff acted reasonably in commencing proceedings in this country, and that, although it appears that (putting on one side the time bar point) the appropriate forum for the trial of the action is elsewhere than England, the plaintiff did not act unreasonably in failing to commence proceedings (for example, by issuing a protective writ) in that jurisdiction within the limitation period applicable there, it would not, I think, be just to deprive the plaintiff of the benefit of having started proceedings within the limitation period applicable in this country." [Emphasis added]

64. This *dictum* is not at first blush easy to apply to the present case, even on the assumption that the gateway test was in fact met. Because based on my view of the applicable legal requirements, the gateway test would only be met if there were, simultaneously, facts and matters demonstrating that this was clearly the most appropriate forum. On that hypothesis, the Plaintiff would not need to rely upon this residual "practical justice" point at all.

65. This point would only arise on the hypothesis that I am held to be wrong to have defined the gateway test so narrowly so that I am required to assume that the test was met in circumstances where the forum factors do not clearly point to the Cayman Islands as the natural forum. Most pertinently, if in fact damage was sustained within the jurisdiction but the tort was not governed by Cayman Islands law. There are some situations, and this may be one of them, where the recording of alternative findings has only symbolic significance because in all likelihood the Court of Appeal would, having set aside my gateway findings, conclude that I was unable to properly consider the forum issue in what was effectively an evidential and legal vacuum. I therefore deal with this hypothetical alternative scenario summarily.

66. Assuming that I was required to find that the gateway test was met, does the fact that the claim in New York was likely time-barred and there was no other more natural forum mean that the practical availability of this forum justified the Court assuming jurisdiction? Mr Frans, as noted above, failed to describe Fortis Bank's commercial connections to the Cayman Islands with any particularity. However, the following facts and matters clearly indicate that New York (the strongest candidate for a more appropriate forum) is not an available forum and that the Plaintiff acted reasonably in belatedly bringing proceedings here rather than earlier there:

(a) paragraphs 45-48 of the Fourth Affidavit of Danny Frans ("Frans 4"); and

(b) the decision of the Federal Court of Australia in *Clurname* (discussed further below in relation to limitation limb of the serious issue to be tried ground) that the publicly

available information in the US about similar claims did not provide a basis for asserting the bespoke claims asserted in those proceedings based on newly discovered internal S&P documentation.

67. In Frans 4, a coherent explanation as to why the Plaintiff has not sued earlier in New York and cannot now expect to be able to pursue a viable claim is set out:

> "*45. At paragraph 74 of Mang 2, S&P asserts for the first time that "S&P believes that the more appropriate forum for the determination of the issues is either New York or Belgium". Since S&P only suggested that New York was an available forum for the first time in its evidence in reply, the expert evidence of New York law presently before the Court does not consider this issue. I therefore set out my own understanding of the position below. In particular, I consider that it is entirely disingenuous for S&P to contend that New York is an available or appropriate forum since it is overwhelmingly likely that, if RPI was to now seek to bring this claim in New York, S&P would contend that it was time-barred as a matter of New York law.*
>
> *46 In this respect, I understand that New York procedural law employs a much stricter 'discovery rule' than under Cayman Islands law that would likely preclude the claims raised here by application of New York's statute of limitations.*
>
> *47. With respect to New York's statute of limitations, a key element of RPI's claim is the fact that RPI lacked sufficient basis to plead fraud claims against S&P until new evidence was revealed through the Clurname litigation in Australia. However, I am advised that New York courts have frequently dismissed cases, including cases against S&P involving CDO ratings, due to a very strict application of New York's 'discovery rule'.*
>
> *48. My understanding is that New York courts apply this rule very narrowly and frequently dismiss claims on statute of limitations grounds based on findings that the plaintiff could have 'discovered the fraud' based merely on the existence of other lawsuits (regardless of their particular allegations or success), or simply that the ratings of the securities at issue had been downgraded. Indeed, a case filed in 2016 against S&P relating to misconduct in CDO ratings (Grika v McGraw et al) was dismissed on statute of limitations grounds because of a previously filed "lawsuit in January of 2009 alleging breaches of fiduciary duties in connection with S&P's RMBS and CDO ratings during the July 2006 and March 2008 time period.*"

68. Accordingly, on the assumption that the Order 11 rule 1 (1) (f) gateway test was met in circumstances where New York was the natural forum, I would (in all the circumstances of the present case where that forum is likely unavailable) accept jurisdiction to achieve practical justice for the Plaintiff.

Serious issue to be tried: the relevant legal test and the requisite approach to the issue

69. Having resolved the gateway and forum issues against the Plaintiff, the serious issue to be tried limb of the jurisdictional case also falls to be considered on the assumption that those findings are wrong.

70. How the Court should determine whether the Plaintiff has established a serious issue to be tried on the merits of its claim was common ground. What was controversial was the nature of the inquiry the Court should properly undertake in the context of an interlocutory jurisdictional application.

71. *Altimo Holdings and Investment Limited and Others (Appellants) v Kyrgyz Mobil Tel Limited and Others* [2012] 1 WLR 1804 (PC), Lord Collins opined as follows:

> "*71. On an application for permission to serve a foreign defendant (including an additional defendant to counterclaim) out of the jurisdiction, the claimant (or counterclaimant) has to satisfy three requirements: Seaconsar Far East Ltd. v Bank Markazi Jomhouri Islami Iran [1994] 1 AC 438, 453-457. First, the claimant must satisfy the court that in relation to the foreign defendant there is a serious issue to be tried on the merits, i.e. a substantial question of fact or law, or both. The current practice in England is that this is the same test as for summary judgment, namely whether there is a real (as opposed to a fanciful) prospect of success: e.g. Carvill America Inc v Camperdown UK Ltd [2005] EWCA Civ 645, [2005] 2 Lloyd's Rep 457, at [24]…*"

72. The reference to the summary judgment test in this case assumes the plaintiff to be required to respond to a summary judgment dismissal application, and being required to show that the claim is not liable to be summarily dismissed because it has real prospect of success. Before considering the forensic approach to this limb of the jurisdictional requirements under Order 11, it is helpful to summarise what the contentious issues are. They fall into two categories.

73. Firstly, does the Plaintiff have the right to sue? Its pleaded case is that:

(a) under the 24 June 2008 Park Lane Agreement, Fortis Bank transferred all rights relating to the Securities, including the right to sue to Fortis Park Lane under New York

law; and

(b) Fortis Park Lane transferred all of those rights to the Plaintiff under a Portfolio Transfer Agreement dated 12 May 2009 ("PTA") under Belgian law; alternatively

(c) if title to sue was not transferred under New York law, Fortis Bank retained the right to sue and transferred the right to sue to the Plaintiff under the PTA or, alternatively the 30 April 2013 Letter under Belgian law (the "April 2023 Letter"). This alternative case was advanced by way of an amendment the Defendants contend the Plaintiff had no entitlement to make.

74. Secondly, the Defendants contend that the Plaintiff's claim is time-barred in any event applying the standard six-year limitation period. The Plaintiff relies on the extension of the usual period in cases of fraud under section 37 (1) of the Limitation Act pursuant to which "*the period of limitation does not begin to run until the plaintiff has discovered, or could with reasonable diligence have discovered, the fraud concealment or mistake.*"

75. In essence, the correct approach to the question of whether there is a serious issue to be tried requires the Court to follow the general rules applicable to determining whether an issue of fact or law is suitable for summary determination. The governing principles themselves were not controversial; the critical question again was how they should be applied in relation to the specific factual and legal issues in controversy in the present case. In the Plaintiff's Written Submissions, three helpful judicial statements were set out which I gratefully adopt. Firstly, Lord Hamblen in *Okpabi v Shell* [2021] 1 WLR 1294 stated:

> "*22. Where, as will often be the case where permission for service out of the jurisdiction is sought, there are particulars of claim, the analytical focus should be on the particulars of claim and whether, on the basis that the facts there alleged are true, the cause of action asserted has a real prospect of success. Any particulars of claim or witness statement setting out details of the claim will be supported by a statement of truth. Save in cases where allegations of fact are demonstrably untrue or unsupportable, it is generally not appropriate for a defendant to dispute the facts alleged through evidence of its own. Doing so may well just show that there is a triable issue.*"

76. Secondly, Lord Briggs in *Lungowe v Vedanta Resources Plc* [2020] AC 1045 stated:

> "*9. Jurisdiction challenges frequently raise questions about whether the claim against one*

or more of the defendants raises a triable issue. As it is now common ground, this broadly replicates the summary judgment test. Issues of this kind are, regardless whether contained within jurisdiction disputes, subject to a similar requirement for proportionality, the avoidance of mini-trials and the exercise of judicial restraint, in particular in complex cases…

45. This poses a familiar dilemma for judges dealing with applications for summary judgment. On the one hand, the claimant cannot simply say, like Mr Micawber, that some gaping hole in its case may be remedied by something which may turn up on disclosure. The claimant must demonstrate that it has a case which is unsuitable to be determined adversely to it without a trial. On the other, the court cannot ignore reasonable grounds which may be disclosed at the summary judgment stage for believing that a fuller investigation of the facts may add to or alter the evidence relevant to the issue."

77. Thirdly, and most concisely, Parker J in *Folkvang Limited v Valorte Capital*, FSD 199/2023, Judgment dated 29 February 2024 (unreported) held:

"*96. …e) the court should not perform a mini trial without the benefit of discovery and the cross examination of witnesses, to decide the case on written material alone. Applications should not be granted when there is any serious conflict as to the material facts or any real difficulty as to the law.*

f) the facts as pleaded must generally be assumed to be true unless there are good reasons against this assumption."

78. As to the third point, I also take the following guidance from *Ritchie Capital Management LLC vLancelot Investors Fund, Ltd (in Official Liquidation)*, CICA (Civil) 8/2021, Judgment dated 18 July 2022 (unreported). Leave to appeal was refused from Parker J's dismissal of a case on jurisdictional grounds following a six-day hearing, based on grounds which included issue estoppel and limitation. Sir Alan Moses JA noted that one ground of appeal was that the Judge had wrongly summarily determined issues which should have been left to trial, which ground was arguable. He then noted:

"*12. However, it seems to me that there were two grounds for decision where it is not possible for Ritchie reasonably to contend that the judge disposed summarily of issues, which ought properly to have been left for trial. Those grounds related to the appropriate forum and Ritchie's breaches of its obligations to make full and frank disclosure on its ex*

parte application."

79. This judicial guidance indicates that jurisdictional challenges ought primarily to be about jurisdictional issues, and the Court should be wary of being lured into summarily deciding merits issues unless it is clear that the comparatively low threshold of a pleaded case which has realistic prospects of success has not been met. Focus ought ordinarily to be upon the basic jurisdictional requirements the plaintiff must meet, not issues which can potentially be raised, but have not yet been formally pleaded, by way of defence.

Serious issue to be tried: limitation

80. This issue falls to be considered on the assumption that the Plaintiff has met the gateway and forum tests. The critical questions are:

(a) whether the Plaintiff could, with reasonable diligence, have discovered facts sufficient to plead a claim more than six years before the present proceedings were commenced in 2023; and

(b) whether there is no serious conflict of fact or law about the issue which warrants a full inquiry rather than a summary determination at the interlocutory stage.

81. In my judgment there are serious conflicts of fact in relation to the following five issues identified by Mr Smith KC in oral argument:

(a) what did the Plaintiff know;

(b) when did it know;

(c) what steps were taken to investigate;

(d) were those steps adequate; and

(e) what could have been discovered?

82. The colourful tour that the Court was taken on by the Defendants' counsel of the publicly available evidence was most striking for its generality. Documents published as a result of the Senate Inquiry and Department of Justice investigation over 10 years ago, for instance, clearly put the Plaintiff on inquiry about a possible claim against the Defendants. At a high level, this material prompts the reflection that the Global Financial Crisis might, at a high level, fairly be viewed as the culmination of a financial roller coaster ride. A ride which (in the popular imagination at least) began in 1987, with Gordon Ghekko in '*Wall Street*' proclaiming "*greed is good*"; and ended two decades later

when those charged with maintaining the safety of the roller coaster decided they wanted themselves to enjoy the ride. In these circumstances, I am bound to accept that it ought to have been obvious to the Plaintiff years ago that it had a potential claim for deceit in relation to the Securities in general terms. However, it was far from clear what steps it ought to have taken which would have yielded information furnishing a basis for a claim which could be validly pleaded, which is the relevant legal requirement: see e.g. *Seedo v El Gamal* [2023] EWCA Civ 330 (at paragraphs 45-49).

83. No information specific to the Securities in the present case appears clearly to have surfaced before the discovery obtained in the *Clurname* proceedings. Those proceedings had been initially commenced based on claims in relation to another class of asset-based securities. An instinctive feeling that the Plaintiff, a special purpose vehicle seemingly established to mitigate the losses attributable to toxic assets, did not make sufficient inquiries is insufficient to support an interlocutory finding that the Plaintiff has no realistic prospects of defeating a limitation defence. Even if the risk assessment modelling problems relating to different classes of securities, in light of the allegations advanced by way of amendment in *Clurname*, in hindsight appear to be somewhat generic, it is far from clear that the case advanced in the present proceedings could have been validly advanced merely based on speculative extrapolations based on defects in similar models used in relation to other types of assets.

84. A difficult legal issue which was not satisfactorily addressed is the question of what legal remedies were available to the Plaintiff to obtain pre-action discovery. The Defendants did not contend, for instance, that information about their CDO Evaluator system could have been obtained from some innocent third party in, for instance, the United Kingdom, under the *Norwich Pharmacal* jurisdiction. What similar remedies were potentially available in New York or elsewhere was also unclear.

85. The way the Court in *Clurname Pty Limited v McGraw-Hill Financial Inc* [2017] FCA 1319 disposed of essentially the same limitation challenge to the viability of the proposed new claim in that case (on which the present claim is substantially based) provides a clear steer as to the way I should resolve the limitation issue. Wigney J in that case held:

> "*93. The submission that Clurname or Ms Banton could have discovered and pleaded the deceit claim against Standard & Poor's by August 2015 the basis of the discovery in the Swan proceedings, the allegations made in the United States proceedings, and the findings in the US Senate report is rejected.*"

86. The Court in that case actually decided the limitation issue and resolved it in favour of the plaintiff having heard oral examination and "*at length*" cross-examination (see paragraph 92). I do not consider it appropriate in the absence of cross-examination to actually determine the limitation issue. But I have little difficulty in concluding, in light of the conclusions reached after a full inquiry covering broadly similar evidential terrain in *Clurname*, that there is indeed a serious issue to be tried in relation to the Plaintiff's proposed answer to the limitation defence.

87. In the exercise of my case management discretionary powers under the Preamble to the Grand Court Rules and this Court's inherent jurisdiction, I would find (if required to deal with this issue) that the merits of the Defendants' limitation issue could not properly be adjudicated in the context of their Jurisdiction Summons and would reject this limb of their jurisdictional challenge.

Serious issue to be tried: title to sue

Preliminary

88. Based on my findings that the Plaintiff has not satisfied the gateway test and has failed to establish that the Cayman Islands is the appropriate forum for its claim, there is again no need for me to deal with the title to sue limb of the serious issue to be tried, required by the jurisdictional ground.

89. I deal somewhat summarily with issues that were the subject of extensive argument, the main focus of which was whether or not the title issues governed by foreign law were sufficiently clear to justify the Court determining them on an interlocutory basis without hearing oral evidence from the foreign law experts.

90. The case for dealing substantively with the New York law issues from the outset seemed stronger than the corresponding position under Belgian law. This was reflected to some extent in the fact that the Defendants' primary argument in relation to the Plaintiff's Belgian law case on title was that this case could not be advanced by way of amendment at all. It was argued that the application ought to be determined based solely on the pleaded case upon which the Plaintiff relied when it obtained the Ex Parte Order.

New York law

91. Mr Allison KC centrally submitted in oral argument that the New York law position on the type of language required to validly assign the right to sue was not only settled, the Plaintiff's New York law Expert had not advanced a coherent response to the Defendants' Expert's New York law analysis at all.

92. The Expert Report of Robert S Smith, a former Associate Judge of the New York State Court of Appeals, was the primary evidence the Defendant relied upon. Judge Smith's credentials are on their face impressive, in academic, professional and judicial terms. He opines that New York law applies the "plain meaning rule" of contractual construction, which favours applying unambiguous language strictly without regard to extraneous matters. He agrees that a claim in the tort of deceit is assignable.

93. As regards the effect of the New York law governed Park Lane Agreement, Judge Smith expresses the following critical opinions:

(a) a transfer of all "*right, title or interest*" in property does not include tort claims;

(b) this rule is a longstanding New York law rule, established by the case of *State of Cal. Pub. Employees' Retirement Sys. v Shearman & Sterling*, 95 N.Y.2d 427 (2000) ("CalPERS");

(c) the Park Lane Agreement's language, transferring "*all…right, title and interest in and to the Securities*" is almost identical that in the instrument construed in CalPERS ("*all right, title and interest in, to and under the [loan] …documents*".

94. Professor Robert Filler is an Emeritus Professor of Law and a former member of the District of Columbia, Illinois and New York Bars. He was admitted to the New York Bar in 1993 after moving there to work with Lehman Brothers Inc. His academic specialty since 2008 has been in the general field of financial law. In his Expert Report, he pivotally opines that New York law takes a different approach to loan documents, at issue in *CalPERS*, and securities such as those involved in the present case. He cites, *inter alia*, *Cavendish Traders Ltd v Nice Skate Shoes Ltd.*, 117 F Supp. at 399 as an example of a case where the words "*all rights, title and interests*" in promissory notes were effective to pass tort claims.

95. In his Reply Report, Judge Smith opined that Professor Filler had relied mainly on cases based on legislation (which would not apply to the Securities) rather than common law claims. The *Cavendish Traders Ltd*. case was said to be a Federal Court decision dealing with the assignment of contractual rather than tort claims. Can a Cayman Islands Judge properly resolve summarily a dispute between two New York law experts about, *inter alia*, the weight to be attached to Federal decisions in contrast with State Court decisions, whether State legislation applies to the Securities or not and whether the approach to assigning the right to sue under contractual claims is different to the assignment of tort claims? The question provides its own answer.

96. The Defendants also relied heavily upon a New York decision upheld on appeal which was said to be capable of settling the matter: see *Royal Park Investments SA/NV v Morgan Stanley* (12 April 2017, New York Supreme Court, Judge Ramos). This decision, incidentally, seemingly concerned the same Belgian law PTA concerned in the present case, but, on the basis that New York law applied to issues of standing, it was found that the Plaintiff lacked standing to bring that claim. Reference was also made to a California District Court case of *Royal Park Investments SA/NV–v-Bank of America Corp*, Case No. 2:11-ML-02265-MRP, 14 July 2014, the Court held:

"*New York law…requires an explicit assignment of fraud claims.*"

97. These cases were placed before the Court as an Exhibit to Mang 2. Without the benefit of the views of the Plaintiff's New York law Expert, I was invited based on oral submissions by English Leading Counsel to form my own conclusion that the New York law position was crystal clear. I feel compelled to resist the strong temptation to summarily determine what is, in my judgment, not an entirely straightforward question of foreign law based on the Expert Reports themselves. The fact that I instinctively feel the point may well ultimately be found to be clear-cut is not a sound foundation for summarily determining an issue which does not have to be determined at the interlocutory stage. There may be cases where a foreign law point about the title to sue may be sufficiently clear-cut to justify resolving it in the context of a jurisdiction challenge: e.g. *WWRT v Zhevago* [2024] EWHC 122 (Comm). The present case perhaps comes very close, but on balance I find it is not such a case. Indeed, there may also be some judges who adopt a robust approach to making summary determinations on foreign law issues; I am not one of them.

98. There are wider administration of justice concerns linked to the need to ensure that this Court's finite resources are only deployed in relation to determining issues which undoubtedly require adjudication. Unless trial judges follow appellate injunctions against turning jurisdictional applications into mini-trials, litigants will be encouraged to routinely conduct such applications in a disproportionate manner. The title to sue issue under New York law is, perhaps narrowly, inappropriate for summary determination. If the Plaintiff had passed the gateway test and met the appropriate forum requirements, I would find that there is a serious issue to be tried on the Plaintiff's title to sue under New York law. Based on the Plaintiff's pleaded case and documentary expert evidence as to the foreign law position, I would find that the Plaintiff has a realistic and more than fanciful prospect of success.

Belgian law

99. The corresponding Belgian law title controversy was even more obviously inappropriate for summary determination in favour of the Defendants. If required to consider this issue, I would find that there was a serious issue to be tried on the Plaintiff's title to sue under Belgian law. The competing positions can be summarised concisely as follows:

(a) The Defendants' Expert (who has practised Belgian law specialising in, *inter alia*, civil litigation and arbitration for 39 years) opines that the Defendants have good grounds for challenging the validity of the alleged assignment of the title to sue both on the basis of the Plaintiff's initially pleaded case and on the alternative case, under Belgian law (the Expert Report and the Supplemental Report submitted by Koen Van den Broeck run to 27 and 20 pages, respectively, with over 350 and nearly 100 pages, respectively, of exhibits, with most documents in either Dutch, German or French);

(b) the Plaintiff's Expert Report submitted by Johan Verbist (who has been practising Belgian law, primarily as a litigator, for 48 years and is one of only 20 lawyers admitted to the Belgian Court of Cassation) opines that the Plaintiff has good title to sue under Belgian law under the PTA or the 2013 Letter (his Report runs to 25 pages with exhibits running to more than 400 pages, most of which are in one of Belgium's three official languages).

100. Mr Allison KC submitted that the Defendants' Expert's Reports (including paragraphs 54-58 of his Supplemental Report) were "*compelling*". However, the most seemingly compelling criticism laid at the door of the Plaintiff's Expert Report (submitted by Johan Verbist) was that the Expert had failed to disclose the fact that he had previously testified as an Expert for the Plaintiff. I viewed this as more of a boxer's jab than an attempt to deliver a knock-out blow to the evidence altogether. There is a difference between giving expert evidence for a party on more than one occasion and not being sufficiently independent to be an expert at all. And the main purpose of paragraph 5 (a) of the First Verbist Affidavit, fairly read, was to aver that he had never acted as a lawyer for the Plaintiff, rather than disclaiming any prior expert engagements.

101. In short, if required to consider this Belgian law evidence at all, I would find no basis for ignoring the Plaintiff's seemingly coherent Belgian law expert evidence altogether and/or for summarily determining that the Plaintiff did not acquire title to sue under the Belgian law instruments.

The Plaintiff's ability to rely on the new alternative Belgian law case

102. The Defendants advanced two objections to the alternative case advanced in the ASOC about the basis on which the assignment occurred under Belgian law. I deal with these points only on the assumption that I am found to have wrongly acceded to the Defendants' Jurisdiction Summons on the first two jurisdictional grounds.

103. Firstly, the Plaintiff could not rely on new facts which did not exist at the date when the *Ex Parte* Order was obtained: *Goldman Sachs International v Novo Banco SA* [2018] 1 WLR 3683 (at paragraph 9, per Lord Sumption). Nor was it possible, it was submitted, to plead a new legal case. In *Metall & Rohstoff v Donaldson Inc* [1990] 1 QB 391 Slade LJ held (at page 436):

> "*In our judgment, if the draftsman of a pleading intended to be served out of the jurisdiction under Ord. 11, r. 1(1)(f) (or indeed under any other sub-paragraph) can be reasonably understood as presenting a particular head of claim on one specific legal basis only, the plaintiff cannot thereafter, for the purpose of justifying his application under Ord. 11, r. 1(1)(f), be permitted to contend that that head of claim can also be justified on another legal basis (unless, perhaps, the alternative basis has been specifically referred to in his affidavit evidence, which it was not in the present case). With this possible exception, if he specifically states in his pleading the legal result of what he has pleaded, he is in our judgment limited to what he has pleaded, for the purpose of an Order 11 application. To permit him to take a different course would be to encourage circumvention of the Order 11 procedure, which is designed to ensure that both the court is fully and clearly apprised as to the nature of the legal claim with which it is invited to deal on the ex parte application, and the defendant is likewise apprised as to the nature of the claim which he has to meet, if and when he seeks to discharge an order for service out of the jurisdiction.*"

104. As regards the new evidence point, I would readily accept the Plaintiff's response that the amendment is not based on new evidence at all. As regards the prohibition of "*an alternative legal basis*" being advanced after leave has been obtained at the *ex parte* stage, it is necessary to clarify precisely what the English Court of Appeal had in mind. In my judgment it is clear from the passage quoted, read in light of the decision as a whole, that what an Order 11 applicant may not do is to obtain leave to serve out on one legal basis for invoking a particular gateway, and then assert a new basis later when it is clear the initial basis has failed. *Metall & Rohstoff* was a case where the plaintiffs relied on one tort initially and then sought to rely on a different tort which altered the basis on which the court's jurisdiction was being invoked. No such change to the basis of the

jurisdictional case has occurred here. Indeed, this rule is no doubt why Mr Smith KC emphatically foreswore relying on the argument that the tort was committed here as one of the Plaintiff's gateway grounds.

105. Finally, a more technical objection was made based on a supposed breach of this Court's Rules. The Plaintiff, in its Written Submissions, described it and responded to it in the following way:

> "*85 By letter dated 1 March 2024, the Defendants nevertheless objected to the Amendment on the basis that GCR O.18 r.15 (2) provides that 'a statement of claim must not contain any allegation or claim in respect of a cause of action unless that cause of action is mentioned in the writ of summons or arises from facts which are the same as, or include or form part of, facts giving rise to a cause of action…' The Defendants thereafter argued that it is necessary for the Plaintiff to seek the leave of the Court for the amendment.*
>
> *86 The Defendants' position is incorrect, both substantively and procedurally:*
>
> *(a) substantively, because they are incorrect that the Plaintiff was not entitled to make the amendment; and*
>
> *(b) procedurally, because GCR O.20 r.4 provides the route by which the Defendants should have objected to the amendment, for which they are now (and were by 1 March 2024) out of time.*
>
> *87 The Defendants' argument in their 1 March 2024 letter appears to be based on the premise that the nature of the assignment of the Legal Claim Rights is one of the ingredients of the cause of action such that the amendment can be said to amount to the introduction of a new cause of action. That is incorrect: the cause of action in these proceedings is deceit. The issue of the assignment relates to the transfer of the rights relating to that cause of action but not does go to the existence of the cause of action itself.*"

106. I would (a) reject what I consider to be a makeweight argument and, to the extent that leave to amend were to be required, (b) accede to Mr Smith KC's oral application for leave to amend in any event.

Material non-disclosure/unfair presentation

107. In the course of the *inter partes* hearing, I observed that it would be unlikely for me to set aside the Ex Parte Order on unfair presentation grounds alone if all other jurisdictional challenges were rejected. This was because both at the end of the *ex parte* hearing and by the beginning of the *inter partes* hearing, my instinctive sense was that no serious non-disclosure had occurred. By the end of the *inter partes* hearing, however, it seemed that layers of previously submerged complexities had been revealed. Having considered the present Judgment, it is now clear that much of what was revealed on the 'serious issue to be tried' title to sue questions under New York and Belgian law were not significantly material at all.

108. The unfair presentation complaints which remain for consideration on the assumption that my primary findings that this Court has no jurisdiction are wrong are those that relate to the pivotal issues of the tort gateway and forum requirements. In brief, if those key requirements had been met, it would (in all the circumstances of the present case) follow that I was not misled so seriously that the Ex Parte Order should be set aside on unfair presentation grounds alone. I have already set out my preliminary views on this topic above (paragraphs 41-44).

109. I should also, because of their general importance, briefly consider the unfair presentation complaints in light of my primary jurisdictional findings. In summary, I consider that the Plaintiff's *ex parte* application came very close to seriously misleading me by creating a misleading impression of the substance of the connecting factors while taking scrupulous care to avoid positively misstating the facts. The central averments (that the Securities were purchased on terms that referenced the Cayman Islands Branch of Fortis Bank, Fortis Bank had a banking license and (as a matter of law) a principal address here) were fundamentally accurate. Even the assertion that the Branch was administered in the Cayman Islands was supported, albeit in an abstract legal sense, by the regulatory implications of banking license which the Bank attributed to the operations of a Cayman Branch. Moreover in the Plaintiff's Submissions for the *ex parte* hearing, it was expressly pointed out (at paragraph 56 (a)) that "*Fortis Cayman was in fact managed by Fortis Bank, New York [with employees based in New York]…*" This followed the earlier explicit acknowledgment that:

> "*54. It is possible that the Defendant might seek to argue that the Cayman Islands is not the forum conveniens for the Claim. One potential argument is that neither RPI nor the Defendants are Cayman Islands entities. Fortis Cayman was also not a Cayman incorporated Company, and was managed by individuals based in the United States.*"

110. The legal presentation was more pivotal to the outcome of the application. The main criticisms to be made are:

(a) the failure to explicitly identify the policy of restraint in connection with subjecting foreign parties not subject to this Court's jurisdiction;

(b) the failure to explicitly address the persuasive authorities relating to where tortious damage is sustained; and

(c) the failure to expressly address the governing law of the claim (save in response to questioning from the Court).

111. Following the *inter partes* hearing, I have rejected the Plaintiff's submissions to the effect that (a) was not a relevant consideration because the approach to the gateway is a broad one. As regards (b), I have found that there is no good arguable case on damage within the jurisdiction, but only after full argument regarding a difficult issue which has not been fully considered by a local Court before. As regards (c), I have found no basis for finding that Cayman Islands law governs the claim. But the assertion that it did apply was not part of the Plaintiff's prepared *ex parte* application. On what basis was the law addressed? The approach to the law on damage and the gateway test more generally involved submitting there was no binding local case law on the issue while properly disclosing that real and substantive links were required:

> "*12. While it is established that registration or incorporation in the jurisdiction is not sufficient*[6]*, the court has not provided an exhaustive list of the circumstances in which it could be said that damage was sustained in the jurisdiction. Justice Doyle in the Aspect Properties case refers to the UK Supreme Court decision of FS Cairo (Nile Plaza) LLC v Lady Brownlie where Lord Leggatt in discussing the requirement in the context of the application of the equivalent gateway in England (though in the minority on this issue) comes to the following conclusion:*
>
> *'[t]he English courts should do as we would be done by and interpret the tort gateway in a way which gives effect to its purpose of requiring a real and substantial connection with the jurisdiction and which provides a legitimate and stable basis for the assumption of jurisdiction over a foreign defendant'.*"

[6] *Aspect Properties Japan Good Kaisha v Jonathan Cheng & ors* (Unreported, 27 April 2022, Doyle J) at paragraph 51], applying *Contadora Enterprises SA v Chile Holdings (Cayman) Limited* 1999 CILR 194 [This footnote appeared in the Plaintiff's Submissions].

112. I was in fact implicitly told at the *ex parte* hearing about the policy of restraint under Order 11, because the importance of substantive links between the tort and the jurisdiction was explicitly addressed. The fact that mere incorporation is not enough to found jurisdiction and the leading local case on point was mentioned, and it was made clear that "Fortis Cayman" was not incorporated here. While a misleading impression of the jurisdictional links Fortis Cayman was proffered, it was also fairly disclosed that Fortis Bank was in reality managed from New York. It was not positively asserted that Cayman law would govern the claim, and it was effectively made clear that there were potentially serious challenges to jurisdiction which might be made.

113. In these circumstances, the failure to explicitly address the weakness of the case on the critical damage requirement of the gateway, it being rightly contended that the forum requirement was a safety valve, was material but did not seriously mislead the Court. Overall, despite my sense at the end of the *inter partes* hearing that I had heard an entirely new case, I think I was right at the *ex parte* stage to conclude that Mr Leontsinis had delivered what was viewed, as a whole, as a fair presentation, or certainly one which was not substantially unfair. I accordingly reject this complaint as a freestanding ground for setting aside the Ex Parte Order.

114. For the avoidance of doubt, lest it be thought that I am setting the bar too low for *ex parte* applicants, I do not ignore the importance of the fair presentation duties articulated in the cases upon which the Defendants' counsel relied included: *Fundo Soberano de Angola v Dos Santos* [2018] EWHC 2199 (Comm) at paragraph 52; *Cowan v Equis Special LP*, FSD 22/2018 (IMJ) Judgment dated 3 October 2019 (unreported at paragraph 78); *Raier v Correa*, FSD 50/2022 (DDJ), Judgment dated 9 June 2023 (unreported); *Ritchie Capital Management LLC v Lancelot Investors Fund, Ltd (in Official Liquidation)*, CICA (Civil) 8/2021, Judgment dated 18 July 2022 (unreported, at paragraph 25); *Banca Turco Romana SA v Cortuk* [2018] EWHC 662 (Comm) at paragraph 45.

115. In the latter case, Popplewell J held:

> "*The importance of the duty of disclosure has often been emphasised. It is the necessary corollary of the court being prepared to depart from the principle that it will hear both sides before reaching a decision, which is a basic principle of fairness. Derogation from that basic principle is an exceptional course adopted in cases of extreme urgency or the need for secrecy. If the court is to adopt that procedure where justice so requires, it must be able to rely on the party who appears alone to present the evidence and argument in a way which is not merely designed to promote its own interests, but in a fair and even-handed manner, drawing attention to evidence and arguments which it can reasonably anticipate the absent party would wish to make. It is a duty owed to the court which exists*

in order to ensure the integrity of the court's process. The sanction available to the court to preserve that integrity is not only to deprive the applicant of any advantage gained by the order, but also to refuse to renew it. In that respect it is penal, and applies notwithstanding that even had full and fair disclosure been made the court would have made the order. The sanction operates not only to punish the applicant for the abuse of process, but also, as Christopher Clarke J observed in ***Re OJSC ANK Yugraneft v Sibir Energy PLC*** *[2010] BCCC 475 at [104], to ensure that others are deterred from such conduct in the future. Such is the importance of the duty that in the event of any substantial breach the court inclines strongly towards setting aside the order and not renewing it, even where the breach is innocent. Where the breach is deliberate, the conscious abuse of the court's process will almost always make it appropriate to impose the sanction.*"

116. When an unfair presentation constitutes an abuse of process in an Order 11 case will obviously be shaped by all the relevant circumstances. Those circumstances include the need to balance deterring the abuse of *ex parte* applications with the need to avoid deterring litigants from seeking access to the Court. Here, a number of factors coalesce to justify giving the Plaintiff a generous margin of appreciation as regards the somewhat misleading impression it gave of the legal merits of its jurisdictional case at the *ex parte* hearing:

(a) the Plaintiff was seeking substantive relief for deceit and it was not disputed that there was a serious issue to be tried on the substantive merits of its claim;

(b) there was no clearly available and more appropriate other forum for the Plaintiff to commence proceedings in when it belatedly discovered a basis for its claim many years after the tort was allegedly committed;

(c) the Plaintiff was not a private litigant seeking to pursue a stale claim for private profit. It was a publicly owned litigant which ought fairly to be presumed to acting pursuant to a public duty to pursue all potentially viable claims;

(d) the Court was not deliberately misled in the context of an application which pivotally raised difficult and previously undecided questions of Cayman Islands law;

(e) the Court was not seriously misled at all by a presentation in which most material matters which undermined the application were disclosed. The unfairness which did occur essentially entailed exaggerating the strengths of the jurisdictional case rather than misstating the law or facts.

Conclusion

117. For the above reasons, the Defendants are entitled to the primary relief they seek through their Jurisdiction Summons, namely an Order setting aside the Ex Parte Order I granted on 23 May 2023 under Order 11 rule 1 (1) (f) of the Grand Court Rules granting leave to serve the Writ herein on them out of the jurisdiction. I find that:

(a) the Plaintiff has failed to establish a good arguable case that it has sustained tortious damage within the jurisdiction to the standard required by the gateway upon which the Plaintiff relied;

(b) the Plaintiff has failed to establish that the Cayman Islands is the most appropriate forum for the trial of the tort of deceit claim;

(c) there is a serious issue to be tried on the merits of the Plaintiff's claim. I decline the Defendants' invitation to summarily determine that the claim is time-barred and /or that the Plaintiff lacks title to sue under New York, alternatively, under Belgian law; and

(d) although the presentation at the ex parte hearing on 23 May 2023 was in some respects unfair, the unfairness was not sufficiently serious to justify setting aside the Ex Parte Order on this ground alone.

118. It is difficult to see why costs should not follow the event. However, my provisional view is that the costs of the present application were disproportionately increased by the Defendants' unsuccessful pursuit of the limitation and standing issues which I have found (somewhat narrowly as regards title to sue under New York law) were not suitable for summary determination. Approximately a third of the Defendants' Skeleton Argument appears to have been dedicated to addressing those three issues, two of which appear clearly to me to have been unreasonably pursued. A proportional reduction of the Defendants' costs in the region of 25% appears to me to be appropriate.

119. I will hear counsel if required as to costs and the terms of the Order to be drawn up to give effect to this Judgment.

THE HONOURABLE MR JUSTICE IAN RC KAWALEY
JUDGE OF THE GRAND COURT