IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

CAUSE NO. FSD 0323 OF 2022 (DDJ)

BETWEEN:

TAIPING TRUSTEES LIMITED (ON ITS OWN BEHALF AND ON BEHALF OF VALLEY STONE INDUSTRY FUND, L.P. (IN VOLUNTARY LIQUIDATION))

Plaintiff

VALLEY STONE INDUSTRY FUND LTD (IN ITS OWN CAPACITY AND IN ITS CAPACITY AS GENERAL PARTNER OF VALLEY STONE INDUSTRY FUND, L.P. (IN VOLUNTARY LIQUIDATION))

AND

First Defendant

HUARONG INTERNATIONAL ASSET MANAGEMENT LIMITED

Second Defendant

HUARONG INTERNATIONAL FINANCIAL HOLDINGS LIMITED

Third Defendant

Before:	The Hon. Justice David Doyle
Appearances:	Tom Lowe KC, Christopher Levers and Corey Byrne of Ogier for the Plaintiff Vernon Flynn KC, Andrew Johnstone, Luke Fraser and Moesha Ramsay-Howell of Harney Westwood and Riegels for the Defendants
Heard:	13 December 2023
Draft Judgment circulated:	24 January 2024
Judgment delivered:	29 January 2024

HEADNOTE

Determination of various jurisdictional issues including appropriate forum and whether a stay of the Cayman proceedings should be granted in favour of proceedings progressing in Hong Kong – consideration of relevant evidence, submissions and law and balancing various competing connecting factors, the irrelevance of public policy considerations and the use of the word "exorbitant"

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JUDGMENT

Introduction

1. The jurisdictional issue presently in dispute between the parties which arises for this court's determination is whether the substantive dispute between the parties should be heard and determined by the Grand Court of the Cayman Islands or the High Court of Hong Kong.

2. My primary task is to identify the forum in which this case can be suitably tried for the interests of all the parties and for the ends of justice. The "natural" or appropriate forum is that with which the case has the most real and substantial connection (see for example *Spiliada Maritime Corporation v Cansulex Ltd* [1987] 1 AC 460; *Insurco International Limited v Gowan Company* 1994-95 CILR 210; *Insurco International Limited v Voluntary Purchasing* Group 1999 CILR 532; *Brasil Telecom SA v Opportunity Fund* 2008 CILR 211; *Altimo Holdings and Investment Ltd v Kyrgyz Mobil Tel Ltd* [2011] UKPC 7; [2012] 1 WLR 1804; *Lungowe v Vedanta Resources plc* [2019] UKSC 20; [2020] AC 1045, *SatFinance Investment Limited v Athena Art Finance Corp* [2020] EWHC 3527 (Ch), *FS Cairo (Nile Plaza) v Brownlie* [2021] UKSC 45 and *Loudmila Bourkakova v Hermitage One Limited* [2022] EWHC 1269 (Ch)). For reasons which follow I have decided that Hong Kong is that forum.

The law on connecting factors

3. Lord Neuberger in *VTB Capital plc v Nutritek International Corps* [2013] UKSC 5; [2013] 2 AC 337 at paragraph 81 in respect of a court determining an appropriate forum procedural issue stated that "where it is common ground that the parties would have a fair trial in the competing jurisdictions, the exercise will normally involve the court weighing up a number of different factors, and deciding where the balance lies". In the case presently before this court it is not submitted that the parties cannot receive a fair trial in the Cayman Islands or in Hong Kong. The difference between the parties is whether their dispute should be determined in the Cayman Islands or in Hong Kong.

4. As required by the authorities I have conducted a summary examination of the connecting factors between the case and the Cayman Islands and Hong Kong. I have considered all the relevant

circumstances and the connecting factors including those of practical convenience such as accessibility to the courts in each jurisdiction for parties and witnesses and any availability of a common language so as to minimise the expense and potential for distortion involved in the translation of evidence. Although these factors are important, they are not necessarily conclusive (see Lord Briggs at paragraph 66 of *Lungowe*).

5. Connecting factors also include matters such as the system of law which will be applied to decide the issues, the place where the wrongful acts or omissions occurred and the place where the harm occurred.

6. At first instance in *VTB* Arnold J succinctly stated that the court will consider the personal connections which the parties have to the countries in question; the factual connections which the events relevant to the claim have with those countries; factors affecting convenience or expense such as the location of the witnesses of documents and the applicable law. The consideration of these factors as relevant factors was not criticised at appellate level.

7. Chadwick P in *AHAB v SAAD* 2010 (2) CILR 289 at page 322 described former Chief Justice Smellie's approach, in the context of an application to set aside an order for service out of the jurisdiction and grant a stay, in respect of the applicable law and consideration of the competing factors advanced by the parties, the weight to be attached to such factors and the determination of which side the scales come down as "a textbook example of the correct approach." I therefore make no apology for considering that case in some detail.

8. In that case AHAB brought claims against Mr Al Sanea, a resident in Saudi Arabia, and companies controlled by him in respect of an alleged fraud. The Grand Court (Henderson J) granted leave to serve the writ on Mr Al Sanea out of the jurisdiction and he subsequently applied to discharge the service out order. In the alternative he sought an order that the proceedings against him be struck out or stayed on *forum non conveniens* grounds, submitting that Saudi Arabia was the appropriate forum for the trial of the issues. Several of the defendant companies incorporated in the Cayman Islands supported a stay. The Grand Court (Smellie CJ as he then was) declined to set aside the service court order and dismissed the applications for a stay. However it held that Saudi Arabia, if an available forum, might be the more appropriate forum for the trial of the underlying allegations of fraud against Mr Al Sanea and ordered a temporary case management stay to enable a Saudi Committee to reach a conclusion and or allow AHAB to petition the Saudi courts. Allowing the appeal in part it was held that the dismissal of the application to discharge the service out order

would stand. The former Chief Justice had taken the correct approach and applied the correct test. He did not fall into error of thinking that his finding that Mr Al Sanea was a necessary or proper party was determinative of the question of the appropriate forum, as had been submitted before him. Rather he had correctly held that Mr Al Sanea being a necessary and proper party went a long way to "virtually concluding" the issue, but nonetheless needed to be considered alongside other relevant competing factors. The weight to be given to the various competing factors was a matter within the judge's discretion and with which the appeal court would not interfere on the appeal. The court allowed AHAB's appeal against the temporary case management stay.

9. Chadwick P at paragraph 20 stated that it was necessary "to identify the claims in the action and the issues that are likely to require determination at a trial." He therefore went through the statement of claim in some considerable detail.

10. At paragraph 67 Chadwick P referred to the former Chief Justice's reference to the observations of Cooke J in *Credit Agricole Indosuez v Unicof Ltd* [2004] 1 Lloyd's Rep 196 at paragraph 19 that "the fact of continuing proceedings in England against other defendants on the same or closely allied issues virtually concludes the question, since all courts recognize the undesirability of duplication of proceedings …". In the case presently before the court if a stay is granted there would, of course, be no duplication. All the claims could be dealt with in Hong Kong together at the same time, as indeed they could be if dealt with in the Cayman Islands so the duplication point in the circumstances of this case is of no real relevance.

11. The "text book" approach of the former Chief Justice is clear from the judgment. The former Chief Justice referred to various factors pointing to Saudi Arabia as the more appropriate forum including:

(1) "The most central and many of the other relevant witnesses are in or near Saudi Arabia";

(2) "The relevant communications between the central figures would have been in the Arabic language, although … they are to varying degrees, competent in the English language and apparently conducted commercial transactions in English. There would therefore inevitably be the need for translation of documentation from Arabic to English were Cayman to be the forum for trial of the main allegations of fraud which underlie the dispute. While that is possible, the need for translation and the possible loss of nuance of important documents and oral testimony detracts from Cayman as the appropriate forum.";

(3) there would be practical difficulties in taking evidence by video link: not least the time difference of eight hours between Saudia Arabia and Cayman;

(4) much of the relevant documentary evidence would be in Saudi Arabia or Bahrain;

(5) the professional advisers were said to be in Saudi Arabia or Bahrain;

(6) Sauda Arabian law applied to issues at the heart of the fraud dispute;

(7) the need in the Cayman courts for expert evidence as to Saudi law; and

(8) the claims against the Cayman companies were "only the tip of the iceberg".

12. The former Chief Justice identified and addressed the factors which pointed to Cayman as the more appropriate forum including:

(1) the Cayman Islands were the only forum in which all the claims in the proceedings could be tried at the same time;

(2) Mr Al Sanea's choice of the Cayman Islands as the base for his offshore operations. As the former Chief Justice put it "To allow him to disavow those connections would be to allow him to use the Cayman Islands as a flag of convenience.";

(3) travel and accommodation costs would be no less significant if the trial were to be in Saudi Arabia and there would be no significant difference in legal costs;

(4) the relevant documents would be as readily available in the Cayman Islands as they would be in Saudi Arabia;

(5) English speaking expert witnesses could more easily testify in the Cayman Courts than through interpreters in the courts of Saudi Arabia; and

(6) the availability in civil proceedings in the Cayman Islands of cross-examination, discovery and compulsion of foreign witnesses.

13. As Kerr JA noted in *Insurco International v Gowan* at page 218 the generality of the legal test "demands consideration of all relevant factors, the weight to be attached to each factor having regard to all the attendant circumstances and the cumulative effect of these factors one way or the other."

14. I should add that in service out of the jurisdiction applications the burden of proof rests on the plaintiff whereas in *forum non conveniens* cases that burden rests on the defendant (*AHAB v SAAD* 2010 (2) CILR 289 at paragraph 18).

15. Each case depends to a large extent on its context, facts and circumstances. At the end of the day the court is involved in a balancing exercise in weighing up the various connecting factors and identifying the appropriate forum.

Background

16. On 2 June 2023 I made, on an *ex parte* basis, an order (the "Service Out Order") pursuant to Order 11 rule 1(1)(c) of the Grand Court Rules granting the Plaintiff, a company incorporated under the laws of Hong Kong, leave to serve the Writ and connected documents upon the Second and Third Defendants out of the jurisdiction in Hong Kong. The First Defendant is a company incorporated under the laws of the Cayman Islands and is sued "in its own capacity and in its capacity as general partner of Valley Stone Industry Fund LP (in Voluntary Liquidation) (the "Fund")." The Plaintiff says that it is sole limited partner of the Fund. The Plaintiff says that the First Defendant is the general partner of the Fund (the "General Partner"). The Second Defendant is a company incorporated in Hong Kong and licensed by the Securities and Futures Commission of Hong Kong to carry out Type 9 (asset management) regulated activities. It is stated to have been appointed by the General Partner as investment manager under an Amended and Restated Limited Partnership Agreement dated 23 December 2016.

17. The Third Defendant is a company incorporated under the laws of Bermuda and registered in Hong Kong as an overseas company whose principal place of business in Hong Kong is in Wanchai. It is also a publicly listed company traded on the Hong Kong Stock Exchange ("HKSE").

18. On 22 December 2022 the Plaintiff filed a writ in Hong Kong (the "Hong Kong Writ") against the same defendants as those in the Cayman proceedings. The Plaintiff says that the Hong Kong Writ brings substantially similar claims to, and relates to the same factual circumstances as those in the pleadings in the Cayman Islands. The Plaintiff says that the Hong Kong Writ was filed on a protective basis and no steps have been taken to serve it on the Defendants and there is no intention for it to be so served unless the jurisdictional challenge in Cayman is successful. The validity of the Hong Kong Writ has been extended to 21 December 2024 but it has not yet been served on the Defendants.

The September 2023 Application

19. By summons dated 13 September 2023 (the "Application") the First, Second and Third Defendants seek the following relief:

(1) a stay of proceedings against the First Defendant;
(2) a discharge of the Service Out Order;
(3) a declaration that in the circumstances of the case the court has no jurisdiction over the Second Defendant and/or the Third Defendant in respect of the subject matter of the claim or the relief or remedy sought in the action.

The Claims

20. The Amended Statement of Claim filed on 14 June 2023 in the Cayman proceedings runs to some 77 pages. In short summary the Plaintiff, a Hong Kong legal entity, seeks to recover loss that it says it suffered as a result of its investment in the Fund. The Plaintiff says that references to the "Fund" are not references to an entity but to "an undertaking comprising the assets that were held by the First Defendant (as general partner) on a statutory trust for the limited partners on the terms of a Limited Partnership Agreement and the Exempted Limited Partnership Act (the "ELP Act")."

21. The Plaintiff says it invested a total of HK$950 million in the Fund which made only one known investment, consisting of two linked loans in the amount of HK$475 million each. The Plaintiff adds that neither of the loans have been repaid and there are no real prospects of recovery with respect to each.

22. The Plaintiff's pleaded case is that it is entitled to bring the claims on its own behalf against:

(1) the Defendants for breaches of various agreements governing the Plaintiff's investment in the Fund requiring the Defendants to pay certain amounts due under those agreements;

(2) the First Defendant, a Cayman entity, by reason of the breaches of statutory, equitable, common law and contractual duties that the First Defendant owed to the Plaintiff as the only limited partner of the Fund requiring the First Defendant to pay damages or compensation to restore the Fund's assets;

(3) the Second Defendant, a Hong Kong entity, by reason of the breaches of equitable, common law and contractual duties that the Second Defendant owed to the Fund and/or to the Plaintiff as the only limited partner of the Fund requiring the Second Defendant to pay damages or compensation to restore the Fund's assets;

(4) the Second Defendant for wrongfully and intentionally procuring breaches of duties owed by the First Defendant requiring the Second Defendant to pay damages to restore the Fund's assets;

(5) the Third Defendant, another Hong Kong based entity (albeit incorporated in Bermuda), for wrongfully and intentionally procuring breaches of duties owed by the First Defendant and/or by the Second Defendant requiring the Third Defendant to pay damages to restore the Fund's assets;

(6) the Second Defendant and the Third Defendant for conspiracy by unlawful means with the First Defendant to cause injury to the Plaintiff and/or the Fund requiring the Second Defendant and the Third Defendant to pay damages to restore the Fund's assets; and

(7) the Second Defendant and the Third Defendant for making negligent misrepresentations in certain transaction documents relating to the investment made by the Fund, including as to the ownership and quality of the investment.

23. The Plaintiff further pleads in the alternative that to the extent that the claim in respect of restoration of the Fund's assets are properly to be regarded as a derivative claim made on behalf of the Fund and/or a claim which must be brought as such, the Plaintiff should be permitted to proceed with

them on behalf of and in the name of the Fund as the First Defendant, without cause, has failed to initiate proceedings on behalf of the Fund in relation to the claims (and there is no real prospect of it doing so) such that the requirements of section 33(3) of the ELP Act are satisfied.

24. The Plaintiff in its pleading refers to various agreements including:

(1) An agreement dated 23 December 2016 between the Plaintiff and the First Defendant as General Partner supplemented by an agreement dated 29 December 2016 (the "LPA");

(2) Agreements on 23 December 2016 and on 29 December 2016 together defined as the Fund Agreements.

(3) These included:

(1) a subscription agreement dated 23 December 2016 between the Plaintiff and the General Partner (the "Subscription Agreement");
(2) an investment management agreement dated 23 December 2016 between the General Partner and the Second Defendant (the "Second Defendant's Investment Management Agreement");
(3) an investment management agreement dated 23 December 2016 between the General Partner and Taiping Assets Management (HK) Company Limited;
(4) a deed of undertaking dated 29 December 2016 (the "Deed of Undertaking"); and
(5) a comfort letter dated 29 December 2016 (the "Comfort Letter").

25. I have noted the proper law and jurisdiction clauses in the various documents put before the court.

26. At this relatively early stage of the proceedings, although liability appears to be in issue, it is difficult to ascertain exactly what will be the precise disputed issues between the parties and what issues will be agreed. It is important to note that the Defendants have conceded the issue of standing to bring the derivative claims under Cayman law.

27. Unsurprisingly Mr Lowe focused on the claims relating to the LPA (governed by the law of the Cayman Islands) and Mr Flynn submitted that logically and chronologically the misrepresentation claims (governed by Hong Kong law) were the starting point as there would have been no

investment without the alleged misrepresentations. Mr Flynn added that the contractual claims under the Hong Kong contracts are governed by the laws of Hong Kong. Mr Flynn submitted that most important is the unifying conspiracy claims which are governed by the laws of Hong Kong and added that the alleged breaches of the LPA are not at the centre of the dispute.

28. In their written and oral submissions both sides endeavoured to frame the relevant case for eventual determination by the appropriate court in their own terms, no doubt to suit their own purposes, although I have to say it was difficult to understand why the Plaintiff was so keen not to have this case determined in Hong Kong. The Plaintiff sought to stress that this was very much a Cayman case. The Defendants sought to stress that this was very much a Hong Kong case. Both sides put a very different emphasis on the case, and the jurisdictional connecting factors.

29. Taylor JA in *Brasil Telecom v Opportunity Fund* 2008 CILR 211 at paragraph 51 stated:

> "In the context of modern conflict of laws principles, it does not seem proper that resolution of a forum choice dispute should turn on the way in which the plaintiff chooses to frame the case."

30. I note how the Plaintiff frames and pleads its case. Having said that I also have full regard to how the Defendants suggest the legal issues for determination in this case should be framed. At the end of the day I must consider all the relevant factors, decide how much weight should be attached to the various competing factors and identify the forum in which the case can be suitably tried for the interests of all the parties and for the ends of justice

The evidence in respect of the connecting factors

31. I have considered the evidence in respect of the connecting factors.

32. Chen Dongxia ("Ms Chen") in her first affirmation of 25 May 2023 gives her address as an address in North Point in Hong Kong and says that she is a director of the Plaintiff and makes the affirmation on behalf of the Plaintiff. She provides from her perspective a summary of the parties, a summary of the facts, the background to the claims and details the claims against the Second and Third Defendants.

33. Ms Chen refers to a total investment of HK$ 950 million and states that the loans "were purportedly advanced to finance a residential property development in Hong Kong". Ms Chen refers to (1) a Private Placement Memorandum provided in December 2016; (2) the Subscription Agreement and (3) the LPA. She also refers to the Deed of Undertaking and the Second Defendant's Investment Management Agreement under clause 5.1 of which the Second Defendant was provided with the "full power, authority and right to exercise the functions, duties, powers and discretions exercisable by the General Partner under [the LPA]".

34. Ms Chen refers to the Ho Man Tin Development in Kowloon and Mr Pan Sutong ("Mr Pan") who was subsequently the subject of a bankruptcy order made on 8 July 2022 by the High Court of Hong Kong.

35. In her second affirmation of 31 May 2023 Ms Chen refers to the Hong Kong Writ.

36. In his affirmation of 13 September 2023 Zhang Miao ("Mr Zhang") refers to his address as an address in Wanchai in Hong Kong and says that he is a director of the Second Defendant and that he makes his affirmation on behalf of the Defendants. He says that the proceedings arise out of an investment in a property development project in Hong Kong. He adds that the Fund was established as the investment vehicle for subsidiaries of two state-owned groups in the People's Republic of China ("PRC") namely (i) the group of Taiping Financial Holdings Company Limited, of which the Plaintiff is a part, a state-owned insurance company which is ultimately owned by the PRC and (ii) the Huarong group, one of the four major state-owned financial asset management companies in the PRC headed by China Huarong Asset Management Co, Ltd which is listed on the HKSE and is the parent of the Third Defendant which is also listed on the HKSE and in turn is the parent of the Second Defendant and the General Partner, the First Defendant.

37. Mr Zhang at paragraph 24 says that "All the key parties, witnesses and documents are likely to be in Hong Kong …important documents are likely to be in Chinese languages, or in both Chinese and English languages, and … there are likely to be witnesses who speak only a Chinese language, or whose first language is a Chinese language, it is desirable for the proceedings to be conducted in Hong Kong where they could be conducted before a bilingual judge fluent in both the English and Chinese languages."

38. Mr Zhang descends into a submission at paragraph 25 where it says this is particularly significant because the Plaintiff relies on alleged implied misrepresentations arising from documents in Chinese.

39. Mr Zhang says (at paragraph 26) that all the directors of the General Partner are based in Hong Kong and it was managed from Hong Kong on a day-to-day basis. Mr Zhang says that the claims against the General Partner are of far less significance than those against the Second and Third Defendants as the General Partner "has no known assets."

40. Mr Zhang at paragraph 28 says that "the Defendants' position is that a significant majority of the claims, and all of the claims against [the Second Defendant] and [the Third Defendant] (which are the commercially significant claims), will be either subject to Hong Kong law or will need to be established under both Hong Kong law and Cayman Islands law. I have been advised that these include matters in which the law is uncertain and developing."

41. Mr Zhang at paragraph 32 states that the connecting factors in relation to the Plaintiff's claim "including factors affecting convenience or expense of the parties, the nature of the dispute, the legal and practical issues involved, the law governing the relevant transactions, the places where the parties respectively reside or carry on business, the places where the alleged wrongful act or omission occurred and where the loss was suffered, all point to Hong Kong being the most appropriate forum for the resolution of such claims."

42. Mr Zhang at paragraph 48 refers to the time difference of 13 hours between Hong Kong and the Cayman Islands and at paragraph 50 says that there will be undoubted time and costs efficiencies in the dispute being heard in the Hong Kong court.

43. At paragraph 51 Mr Zhang says that it is likely that some witnesses may only speak Mandarin or Chinese and for those witnesses who do speak English, Mandarin or Cantonese may be their first language meaning they may prefer giving evidence in their native tongue (being Mandarin or Cantonese) and would be able to give evidence more swiftly and effectively in that language.

44. At paragraph 56 Mr Zhang says that a number of the relevant documents are drafted in the Chinese language only or are drafted in both Chinese and English. He says that the two investment proposals are in Chinese only with the deed of undertaking and the comfort letter being both in Chinese and English with the English text stated to prevail in case of any inconsistencies. He says

that various relevant emails are in the Chinese language only. Mr Zhang adds that it is likely that other underlying documents will be in the Chinese language only.

45. Mr Zhang stresses at paragraph 58.1 that the Deed of Undertaking and the Comfort Letter (under which the Plaintiff brings certain claims) both provide that they are to be governed and construed in accordance with the laws of Hong Kong, although they do not contain a Hong Kong jurisdiction clause.

46. Mr Zhang also stresses that the Second Defendant's Investment Agreement (which the Plaintiff claims under) is expressed to be governed by Hong Kong law and is subject to the non-exclusive jurisdiction of the Hong Kong court.

47. Mr Zhang says that over 10 relevant agreements (see paras 58.3-58.11) are governed by Hong Kong law and subject to the non-exclusive jurisdiction of the Hong Kong court.

48. Mr Zhang at paragraph 59 states "the Defendants will say that a significant majority of [the Plaintiff's] claims will either be governed by Hong Kong law or will be subject to the double actionability principle so will need to be established under both Hong Kong and Cayman law."

49. The Defendants say that this is the case for:

(1) the tortious claims namely (a) the conspiracy claims against all the Defendants (b) the claims against the Second and Third Defendants for allegedly procuring breaches of duty and (c) the alleged misrepresentation claims;

(2) the breach of duty claims against the Second Defendant which are based on the Second Defendant's Investment Management Agreement which contains a Hong Kong governing law clause;

(3) the claim against the Second Defendant under the Deed of Undertaking which contains a Hong Kong governing law clause and

(4) the claim against the Third Defendant under the Comfort Letter which also contains a Hong Kong governing law clause.

50. Mr Zhang at paragraph 61 states that the only claims which will be subject to only the law of the Cayman Islands will be the breach of duty claims against the General Partner and the claims under the LPA against the General Partner. Mr Zhang adds that these claims are "by far the least

commercially significant, given that the GP has no known assets and its most recent accounts show it to have overall net liabilities. In any event, I understand that such claims can properly be dealt with before the Hong Kong court with the assistance from the parties' appointment of Cayman law experts."

51. Mr Zhang says at paragraph 64 that there are only two connecting factors in favour of the Cayman Court namely (i) the General Partner is incorporated in the Cayman Islands and (ii) a limited number of the claims will be governed by the law of the Cayman Islands.

52. Ms Chen in her fourth affirmation of 4 October 2023 at paragraph 7.1 says that the central agreement is the LPA which is governed by the law of the Cayman Islands and has a Cayman Islands non-exclusive jurisdiction clause. She says that the other agreements "are parasitic upon, or ancillary to, the Plaintiff's claims under the LPA". At paragraph 9 Ms Chen says that the conduct of the General Partner is central to the Plaintiff's claims. At paragraph 12 Ms Chen says that the difference in the translations are "a matter of stylistic differences" and the Plaintiff takes no issue with most of the suggested amendments.

53. I note Mr Zhang's second affirmation of 25 October 2023 and his statement at paragraph 17 that "the Defendants do not object to rendering assistance to [the Plaintiff] in order for the Hong Kong courts to remain an available forum for the resolution of the parties' dispute which the Defendants contend should be more properly determined by the Hong Kong courts."

54. I have considered the Private Placement Memorandum dated "December 2016" stated to be "based on the law and practice currently in force in the Cayman Islands" and indicates that it has "not been reviewed by any regulatory authority in Hong Kong." In the directory there are references to entities in the Cayman Islands and Hong Kong. There is reference to the Fund being constituted as a Cayman Islands exempt limited partnership.

55. The Project Proposal dated 22 December 2016 appears to be in a Chinese language with an English translation. There are references to an investment by an entity owned by Mr Pan in respect of a development project of residential property situated above the Hong Kong MTR.

56. The Subscription Booklet has a Cayman law and non-exclusive Cayman jurisdiction clause.

57. Clause 14.15 of the LPA, much relied upon by the Plaintiff, provides:

"14.15 **Governing Law**

This Agreement shall be construed in accordance with the laws of the Cayman Islands and the parties hereto hereby submit to the non-exclusive jurisdiction of the courts of the Cayman Islands. The parties hereto waive all right to trial by jury in any action, suit or proceeding to enforce or defend any rights or remedies arising under or in connection with this Agreement."

58. The Second Defendant's Investment Management Agreement, much relied upon by the Defendants, provides:

"**Law and Jurisdiction**

15.1 This Agreement shall be governed by and construed in accordance with Hong Kong law.

15.2 The parties hereby submit to the non-exclusive jurisdiction of the courts of Hong Kong provided always that any party shall be at liberty to take proceedings against any other party in any other relevant jurisdiction."

59. The Deed of Undertaking from the Second Defendant to the Fund at (5) provides that in the case of any inconsistency between the English and Chinese text of the Deed of Undertaking the English text shall prevail and at (6):

"The validity, construction and performance of the Deed of Undertaking shall be governed by and construed in accordance with the laws of Hong Kong."

There is no jurisdiction clause.

60. The Comfort Letter from the Third Defendant to the Plaintiff as an investor in the Fund at clauses 5 and 6 contains similar inconsistency and governing law clauses.

The case through the eyes of the parties

61. Seen through the eyes of the Plaintiff this is very much a Cayman case. In advancing its arguments it seems to suit the Plaintiff to exaggerate the significance of the Cayman connections and down play the significance of the Hong Kong connections. The Plaintiff says that the LPA is the core document and that the claim against the First Defendant is the core claim, with the claims against the Second and Third Defendants being "parasitic or interrelated" on or to the main Cayman claim.

62. Seen through the eyes of the Defendants this is very much a Hong Kong case concerning a dispute between two PRC state-owned groups about a joint venture to develop property in Hong Kong. The Defendants add that:

(1) all the parties are based in, or managed from, Hong Kong;

(2) all the relevant events occurred in Hong Kong and none in the Cayman Islands;

(3) if any tort or wrong has been committed it would have been in Hong Kong;

(4) any loss suffered would have been suffered in Hong Kong and not in the Cayman Islands;

(5) all the relevant witnesses and documents are in Hong Kong and/or the PRC and none in the Cayman Islands;

(6) key documents are in Chinese languages;

(7) it is likely that there will be witnesses who will be native Chinese speakers;

(8) key entities are based in Hong Kong;

(9) many of the key contracts and security documents are governed by Hong Kong law;

(10) there is no suggestion that any party has any assets in the jurisdiction and realistically any judgment would need to be enforced in Hong Kong; and

(11) Hong Kong has bilingual judges which will assist in the conduct of the hearing.

63. The Defendants say that the only points said to favour the Cayman Islands as the appropriate forum are that one of the defendants (the General Partner) is incorporated in Cayman (albeit managed from Hong Kong) and that some of the claims are subject to the law of the Cayman Islands (although they add that more of the claims, and all the key claims, are subject to Hong Kong law).

64. The Defendants say that it is not in dispute that Hong Kong is an available forum, as demonstrated by the fact that the Plaintiff has commenced proceedings before the Hong Kong courts. The Defendants have indicated their preparedness to render assistance to ensure that the Hong Kong courts remain an available forum for the resolution of the dispute including by offering to undertake not to challenge the jurisdiction of the Hong Kong courts and to appoint solicitors to accept service on behalf of each of the Defendants in Hong Kong.

65. The Defendants stress that it would be a very rare case where the governing law of some of the claims could outweigh all the other factors, particularly where they all pointed to a single foreign forum, as they do here according to the Defendants.

66. The Defendants say that Hong Kong is plainly the most appropriate forum for any trial.

67. The Plaintiff says that these proceedings concern the loss of the Plaintiff's investment in a Cayman exempted limited partnership as a result of the conduct of the Defendants. The Plaintiff contends that the Cayman Islands is clearly and distinctly the appropriate jurisdiction for the dispute. It says that Cayman is plainly the most appropriate forum for a claim against the General Partner against whom the proceedings are commenced as of right. The Plaintiff says that the claims against the Second Defendant and the Third Defendant are (in an oft repeated mantra in the Plaintiff's skeleton argument) parasitic or interrelated to the claims against the General Partner, who is the subject of the Plaintiff's primary claim. The Plaintiff says that its investment, the subject matter of these proceedings, was governed by the LPA which is governed by Cayman law and has a Cayman Islands non-exclusive jurisdiction clause. The Plaintiff stresses that it is uncontroversial that the duties of the General Partner fall to be determined as a matter of Cayman Islands law. The Plaintiff says that this renders it desirable for the Cayman Court (as opposed to a foreign court) to determine the issues in these proceedings relating to the scope and discharge of those duties.

Law on public policy in the context of jurisdictional issues

68. In his skeleton argument dated 6 December 2023 Mr Lowe raised "public policy" arguments (see especially paragraphs 60 and 62) and referred to *Re Cairnwood Global Technology Fund Limited* 2007 CILR 193 and *TCB Recoveries Limited v Arthur Andersen LLP* 2007 CILR Note 14. I deal with these arguments in the determination section of this judgment.

69. It is natural for judges to be precious about the jurisdiction in which they preside over cases as judges but they need to be take care not to adopt an insular over-protective approach and they must, in accordance with their judicial oaths, apply the law even if the heavens fall or if there may potentially be adverse economic consequences for that jurisdiction.

70. In *Cairnwood Global* Foster Ag J at paragraph 34 stated:

> "In my opinion, the Cayman Islands are *prima facie* the appropriate forum for the trial of the Fund's claims. The Fund is incorporated in the Cayman Islands and acts by its independent Cayman liquidators. The management agreement with the ninth defendant, Cairnwood Capital Management LLC, is expressly governed by Cayman law. The basis of the Fund's claims is the relationship between the Fund and its directors and officers and their duties as such under Cayman law. The Fund also claims breach of a Cayman agreement and for breach of trust, which may or may not be familiar in this context to the Georgia court. In principle, such matters are most appropriately dealt with by the Cayman courts and this view is recognized by the learned Chief Justice in the *KTH Capital Management Ltd* case (8) and by the Court of Appeal in the *Telesystem Intl. Wireless Inc.* case (14) …"

71. Foster Ag J at paragraph 35 and 36 added:

> "35. Having regard to the position of the Cayman Islands as an international financial centre, it is in principle particularly desirable that the courts of this jurisdiction determine issues such as the duties and responsibilities of directors or officers of Cayman companies. This is now well established as a matter of Cayman public policy and law. Of course, that factor may be outweighed by other factors in any particular case and of course, in a case where the proceedings cannot be served as of right within the jurisdiction, the onus is on

the plaintiff to satisfy the court that the Cayman Islands are clearly the appropriate jurisdiction for the trial of the issues in the interests of justice and of all the parties. Nonetheless, it seems to me that this is a factor of great weight in the discretionary balance.

36. It was argued by the defendants that the connection between the Fund and the Cayman Islands is minimal and purely formal. None of the defendants is resident in the Cayman Islands. The Fund's business, apart from corporate formalities, was conducted outside the Cayman Islands, largely from the Cairnwood offices in Georgia. It is said that most of the Fund's business records were kept there and that the connection between the Fund and this jurisdiction is of no practical relevance in the context of determining the appropriate forum for trial of the Fund's claims. While these are factors taken into account in this context, in my view, they do not as such, in the circumstances of this case and having regard to the nature of the Fund's claims, outweigh the particular significance in this jurisdiction of the public policy (which has no equivalent in England) as expressed by the Cayman Court of Appeal, as emphasized again by the learned Chief Justice and as implicitly reflected in the (apparently unique to the Cayman Islands) additional ground on which it is permissible, with leave of the court, to serve proceedings out of the jurisdiction provided for in the Grand Court Rules O.11, r.1(1)(ff). "

72. The note to *TCB Creditor Recoveries* refers to the judgment of Levers J delivered on 1 August 2007 and records the following:

"*Conflict of Laws – jurisdiction – forum conveniens*

The public policy of the Cayman Islands is a factor to be taken into account when considering an action to stay Cayman proceedings on the ground of *forum conveniens* (*KTH Capital Management Ltd v China One Fin Ltd,* 2004-05 CILR 213, applied; *Contadora Enterprises S.A. v Chile Holdings (Cayman) Ltd.*, 1999 CILR 194, applied; *Lubbe v Cape Plc (No. 2)*, [2000] 1 W.L.R. 1545, distinguished). The Cayman Islands have a special status as a tax-free jurisdiction, and a company wishing to obtain a commercial benefit from conducting business in the Islands must therefore be prepared to subject itself to the jurisdiction of the Cayman courts. In particular, allegations of a tort committed here by a firm of auditors ought to be judged by Cayman standards, regulations and laws, as otherwise the effect would be to defeat the regulations provided by the Cayman

> Islands Monetary Authority, with consequent damage to the reputation of the Islands. In considering whether there is another more appropriate forum, however, the court will always look for the country with which the action has the most real and substantial connection and will refuse a stay if, in all the circumstances of the case, justice requires that it should not be granted."

73. In *Aspect Properties* I granted leave to serve proceedings out of the jurisdiction in a case involving parties in Australia, Hong Kong and Japan. At paragraph 88 I noted the contents of the *ex tempore* judgment delivered at the *ex parte* stage at paragraph 11 as follows:

> "It is plainly in the public interest (and to safeguard the international reputation of the Cayman Islands) that claims involving allegations of conspiracy against companies incorporated under the law of the Cayman Islands, and the use by individuals resident out of the jurisdiction of such companies, are properly dealt with by the Courts of the Cayman Islands."

74. At paragraph 97 I stated:

> "The plaintiff's case is that the foreign defendants used the Cayman defendants to perpetrate the conspiracy and cause damage to the plaintiff. There are clearly strong and significant connections with the Cayman Islands. No other forum appears suitable. There are no proceedings in any other jurisdiction ….".

75. In my *ex tempore* judgment delivered on 2 June 2023 in the case presently before the court I stated:

> "I note the connections with Hong Kong and Hong Kong law and indeed, a Writ dated 22 December 2022 was filed in Hong Kong but has not been served. I note all the Hong Kong connections, but this dispute at its core seems to centre around a fund incorporated under the laws of the Cayman Islands and Cayman law questions of duties of fund management arise. Moreover, it is important that jurisprudence in respect of ELPs and the statutory trust, and derivative claims in this context should be developed in the Cayman Islands by the Cayman Islands courts. This factor also provides a very strong connection to the Cayman Islands."

76. In *Maples FS Limited v B&B Protector Services Limited* (FSD unreported judgment 14 July 2022) at paragraph 125 I referred to the importance of the vibrant Cayman trust industry to the jurisdiction but added:

> "… no doubt the English courts in the English Proceedings will have full regard to the fact that the MF Trust is expressly governed by the laws of the Cayman Islands (including the Firewall Provisions) and apply such laws where relevant and appropriate."

I also stressed that the well-established principles of private international law and the concept of *forum non conveniens* must be respected and applied.

77. These authorities must be read in light of a local Court of Appeal authority (which was not cited in *Aspect* or *Maples FS*) and it is to that important higher authority, which establishes in effect that in this jurisdictional context public policy considerations should not be taken into account, to which I now refer.

78. In *Brasil Telecom SA v Opportunity Fund* 2008 CILR 211 Mottley J.A. sitting in the Court of Appeal referred at paragraph 36 to the "comprehensive speech" of Lord Hope in *Lubbe v Cope Plc (No 2)* [2000] 1 WLR 1545 where Lord Hope at 1566 expressed the opinion that "the principles on which the doctrine of forum non conveniens rest leave no room for consideration of public interest or public policy which cannot be related to the private interest of any of the parties or the ends of justice in the case which is before the court … if the interest of all parties and the ends of justice require that the action in this country should be stayed, a stay ought to be granted however desirable it may be on the grounds of public interest or public policy that the action should be tried here."

79. The public policy point in *Brasil Telecom* can be taken from the note of counsel's submissions in the headnote:

> "The judge had failed to take into account public policy considerations when choosing the appropriate forum, such as the damage to the reputation of the Cayman Islands within the international financial community if it were seen as powerless to intervene to prevent an abuse of its own laws by a company incorporated here simply in order to take the advantage of those laws."

80. In *Lubbe,* Lord Bingham agreed with Lord Hope adding at 1561 that "public interest considerations not related to the private interests of the parties and the ends of justice have no bearing on the decision which the court has to make … It is important that the focus should remain on the principle so clearly stated by Lord Kinnear: in applying this principle questions of judicial amour propre and political interest or responsibility have no part to play."

81. Mottley JA in *Brasil Telecom* referred at paragraph 32 to the following comments of Collett JA in *Contadora Enterprises SA v Chile Holdings (Cayman) Ltd* 1999 CILR 194 at 206:

> "There is one further factor not specifically mentioned by the learned judge but which, by reason of the somewhat robust language of his judgment, must, I think, have been well at the forefront of his mind when considering the exercise of his discretion. Here is a case of the alleged fraudulent mismanagement of a Cayman international company. The reputation of Cayman international business is to some extent at issue in these proceedings. Furthermore, a judicial system which perceived itself as powerless to intervene effectively to prevent the proceeds of such a fraud from disappearing overseas would inevitably invite disparagement from the international financial community. There are, therefore, strong public policy considerations here which, in my judgment, were rightly taken into account by the learned judge."

82. Mottley JA, in somewhat understated terms, added:

> "The approach adopted by Collett, J.A. would tend to suggest that the judge should take public policy considerations into account in reaching his decision."

83. At paragraph 33 Mottley JA stated:

> "In my view, the observation by Collett, J.A. must be taken as being *obiter*, as the Justice of Appeal did not provide any reasons for reaching this conclusion."

84. Mottley JA at paragraph 34 referred to the principles applicable to *forum non conveniens* and the comments of Lord Kinnear in *Sim v Robinow* (1892) 19R (Ct of Sess) 655 at 668 to the need for the court to be "satisfied that there is some other tribunal having competent jurisdiction in which

the case may be tried more suitably for the interest of all parties and for the ends of justice" and at paragraph 35 the comments of Lord Goff in *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460.

85. Mottley JA concluded on this "public policy" point at paragraph 39 as follows:

> "39 With respect, I decline to follow the earlier statement expressed by Collett, J.A., on the ground that it was *obiter*. I accept the ruling and reasoning of Lord Hope of Craighead in *Lubbe v. Cape PLC (No 2)* (3). To take account of the public policy considerations as contended by the appellant, would, in my view, be another way of placing additional weight to the factor that jurisdiction to institute proceeding in the Cayman Islands has been founded as of right, because the respondent is incorporated and is domiciled in the Cayman Islands. To do so would make more onerous the burden on the respondent (to show that the Cayman Islands are not the natural forum, but that Brazil is the appropriate forum, having the most real and substantive connection with the action). It would be giving undue weight to one factor, at the behest and interest of the appellant, to the detriment of the respondent. Such public policy considerations cannot co-exist, in this case, with the interest of the parties and the ends of justice, or fall within the *Spiliada* principles."

86. As Cayman law presently stands I must follow the observations in *Brasil Telecom* (which in turn followed English law) on the issue of public policy in jurisdiction cases. It may be in the future that the Court of Appeal and the Judicial Committee of the Privy Council may revisit this point and reflect on whether it suits offshore jurisdictions to take a different approach to onshore jurisdictions on public policy issues in this area of the law. The reputations of offshore jurisdictions such as the Cayman Islands are vital to their continued existence and their jurisprudence is best developed by local offshore judges.

87. However to the extent that my decision at the *ex parte* hearing relied on public policy grounds and consequently placed too much weight on the Cayman connection it was wrong so to do.

The use of the word "exorbitant"

88. Just as care has to be exercised in respect of generalised public policy arguments care must also be taken in respect of the use of the word "exorbitant" in this context.

89. The Defendants in their skeleton argument dated 6 December 2023 at paragraph 36 refer to Lord Diplock's judgment in *Amin Rasheed Shipping Corp v Kuwait Insurance Co* [1984] AC 50 at 65-66 and the description of the service out jurisdiction as "an exorbitant jurisdiction."

90. Chadwick P in *AHAB v SAAD* 2010 (2) CILR 289 at paragraph 18 also used the word "exorbitant" and added that "special regard must be had for the fact stressed by Lord Diplock in the *Amin Rasheed* case [1984] AC 50, 65 that the jurisdiction exercised under Order 11 may be "exorbitant". This has long been the law." Those comments must, with respect, be read in light of the following authorities.

91. Lord Goff in *Spiliada* at page 481 also referred to Lord Diplock's comment in the *Amin Rasheed* case [1984] AC 50, 65 and that the jurisdiction to serve out may be "exorbitant". Lord Goff added:

> "I myself feel that the word "exorbitant" is, as used in the present context, an old-fashioned word which perhaps carries unfortunate overtones …".

92. More recently Lord Mance in *VTB* at paragraph 13 reiterated Lord Goff's comment that caution was necessary in respect of the word "exorbitant".

93. Lord Sumption (with whom Lord Neuberger, Lord Reed and Lord Carnwath agreed) in *Abela v Baadarani* [2013] UKSC 44 at paragraph 53 also referred to the "traditional" characterisation by others of the jurisdiction to serve out of the jurisdiction being an "exorbitant" jurisdiction and stated:

> "This is no longer a realistic view of the situation. The adoption in English law of the doctrine of *forum non conveniens* and the accession by the United Kingdom to a number of conventions regulating the international jurisdiction of national courts, means that in the overwhelming majority of cases where service out is authorised there will have been either a contractual submission to the jurisdiction of the English court or else a substantial

> connection between the dispute and this country. Moreover, there is now a far greater measure of practical reciprocity than there once was. Litigation between residents of different states is a routine incident of modern commercial life. A jurisdiction similar to that exercised by the English court is now exercised by the courts of many other countries… It should no longer be necessary to resort to the kind of muscular presumptions against service out which are implicit in adjectives like "exorbitant". The decision is generally a pragmatic one in the interests of the efficient conduct of litigation in an appropriate forum."

The continuing importance of the locality of the parties, documents and witnesses in the modern world of relative ease of travel and technology

94. Mr Lowe emphasised my comments in *Maples FS Limited v B & B Protector Services* (FDS unreported judgment 14 July 2022) at paragraph 114 namely:

> "With the relative ease of modern travel, the development and utilization of electronic communications and digital technology, including the ease of remote hearings and electronic data provision, the importance in forum challenges of the physical location of the parties, witnesses and documents is rapidly decreasing, as both counsel wisely accepted in this case. The physical location of the parties, witnesses and documents are not determinative of the issue of appropriate forum in this case."

95. Mr Lowe submitted that common sense tells us that these convenience factors no longer have the same significance they had 50 years ago.

96. I should note however that these "convenience" factors still appear in judgments at appellate level (see for example *Longowe*, *VTB*, *Insurco International v Gowan* and *AHAB v SAAD*) and certainly cannot be ignored. Indeed, I am bound to take them into account as relevant factors to be weighed in the balance. They are important factors but not necessarily conclusive.

The proper or necessary party gateway

97. In *Aspect Properties Japan Good Kaisha v Cheng* 2022 (1) CILR 685 at pages 701 to 703 I referred to the relevant law on the necessary or proper parties gateway (c) and I do not repeat it all again in this already over-lengthy judgment but have full regard to it.

98. It is important to note that the Defendants have conceded that the necessary or proper gateway (c) has been established, their argument was on appropriate forum. They did however remind me that this gateway is anomalous and that it should be treated cautiously. The Defendants submitted in effect that as the Plaintiff had to resort to this gateway it reflected the lack of other gateways being available and the lack of Cayman connecting factors. The Defendants submitted that the fact the Plaintiff can only rely on this gateway is a factor which points against Cayman as the appropriate forum rather than in its favour. The Defendants submitted that the real commercial claims were being made against the foreign defendants and the anchor defendant appeared to have no assets to enforce against. In turn Mr Lowe submitted that if the necessary or proper gateway was established this in itself was a strong connecting factor with the Cayman Islands. I take the competing submissions into account but this point is not determinative of the issues presently before the court.

99. There was some argument as to the presence of the First Defendant as the anchor defendant. On the material presently before the court I am unable to conclude that the anchor defendant has only been sued to enable the other foreign defendants to be served out of the jurisdiction. There are plainly real issues to be tried between the Plaintiff and the First Defendant.

Determination

100. I now turn to my main determinations in respect of the contested issues presently before the court.

General

101. In arriving at my determination as to Hong Kong as the appropriate forum I considered the evidence before the court, the submissions and the relevant law.

102. Mr Flynn, at the outset of his submissions, helpfully made it clear that the Defendants only challenge jurisdiction on the grounds that Hong Kong is the appropriate forum. The Defendants

do not challenge real prospects of success on the merits. The Defendants accept that the requirements of the necessary or proper party gateway have been satisfied but the issue of proper forum remains. The Defendants do not dispute the fact that the LPA has a Cayman law and jurisdiction clause but say that almost everything else points to Hong Kong as clearly and distinctly the appropriate jurisdiction in which the action has its most real and substantial connection.

The Cayman Fund and the LPA

103. I agree with Mr Lowe that the existence of the Fund in Cayman and the LPA are significant connecting factors for the court to consider. The position and role of the Second Defendant must be weighed in the balance also. In short, I do not however think that the use of a Cayman fund structure with a Cayman law and jurisdiction clause in the LPA , the existence of one defendant within the jurisdiction (albeit an entity that is managed from Hong Kong), the role, activities and potential liabilities and indemnities of the Second Defendant and some of the issues in dispute being governed by Cayman law outweigh the other weighty factors which connect this case with Hong Kong.

The overwhelming Hong Kong connecting factors

104. It is no exaggeration to state that the Hong Kong connecting factors are overwhelming:

(1) this is in essence a dispute between two PRC state entities concerning an investment in assets in Hong Kong;

(2) all the parties are based in, or managed from, Hong Kong;

(3) the relevant events occurred in Hong Kong;

(4) if any tort or wrong law has been committed as alleged by the Plaintiff it would have been committed in Hong Kong and any loss would have been suffered in Hong Kong;

(5) the relevant witnesses and documents are in Hong Kong and/or the PRC;

(6) a lot of the documents are in the Chinese language and for some witnesses it is likely that a Chinese language will be their first language; and

(7) many of the relevant documents are governed by Hong Kong law and the Second Defendant's Investment Management Agreement includes a Hong Kong jurisdiction clause.

Location of parties, documents and witnesses

105. I have previously noted the location of the parties. Apart from the First Defendant the other parties are in Hong Kong. Mr Lowe sensibly accepted at the hearing that the location of documents and witnesses is likely to be Hong Kong (paragraph 68 of his skeleton argument dated 6 December 2023). At paragraph 65 it was stated:

> "It is of course obvious that the claim involves facts which occurred in Hong Kong and that there will be witnesses and documents there."

106. The real substantive presence of most of the parties, documents and witnesses is Hong Kong.

107. I accept that this case looks likely to develop into a lengthy and fact heavy case with serious factual disputes requiring determination and where it would be desirable that evidence be given in person and not by videolink. Moreover the 13 hour time difference between the Cayman Islands and Hong Kong and the PRC could present serious logistical challenges in a lengthy case.

Chinese and English language factors

108. The Plaintiff (at paragraph 68 of its skeleton argument dated 6 December 2023) accepted that documents are likely to be in a mix of the English and Chinese languages. Mr Lowe did not accept that the evidence indicated that some of the witnesses would be non-English speakers and require translators. Mr Zhang's evidence did however, without descending into detail or providing corroboration (described by Mr Lowe as "bare assertion"), refer to the likelihood of Chinese speakers and Ms Chen did not take substantial issue with that in her evidence. It appears from the English language content of their affirmations, however, that neither Ms Chen nor Mr Zhang had any difficulties with the English language, although their affirmations had the distinct flavour of being drafted by lawyers but they were both content to sign up to them.

109. I accept as submitted by Mr Lowe that some language and/or translation issues are likely to exist whether the proceedings are held in Hong Kong or the Cayman Islands. In my judgment however the difficulties would be more acute in the Cayman Islands than in Hong Kong. I also note the respective submissions on bilingual Hong Kong judges.

110. Mr Lowe pointed to certain agreements where the English language was to prevail. Be that as it may it would be foolish to assume that the Chinese language and the need for translators and the possibility of bilingual judges in Hong Kong are not relevant factors to consider in the balancing exercise. Smellie CJ (as he then was) in *KTH Capital Management Limited v China One Financial Limited and others* 2004-05 CILR 213 had to deal with submissions that (1) "Hong Kong judges are better placed than judges of this court to try issues of Chinese law because … there are likely to be judges among them who speak Mandarin, the official Chinese language, and which at least some witnesses, including legal experts, would be likely to speak." (para 40); and (2) "a Hong Kong judge would also be more readily able to assess the demeanour and understand the nuances of meaning of those witnesses" (para 41) and at paragraph 43 gave such submissions somewhat short shrift:

> "43. Even if one were to accept the existence of such advantages – and given their intangible nature they are certainly moot – the case remains, to my mind, one of a straight forward allegation of fraud certain to revolve around documentary evidence. Were the invoices false and known to be false to the persons presenting them or not? That will be the central issue. The resolution of such factual issues is the standard calling of judges throughout the common law world. And as to the linguistic gap – while this court like the Hong Kong court would rely upon interpreters, albeit in varying degrees – the use of interpreters will be essential in any event, for the further reason that the representatives of the parties themselves do not speak Mandarin."

111. The former Chief Justice in *AHAB v SAAD* had recognised, in a case involving Saudi Arabia, that "… the need for translation and the possible loss of nuance of important documents and oral testimony detracts from Cayman as the appropriate forum" but other factors attracted him to Cayman as the appropriate forum in that case and the Court of Appeal supported such conclusion.

112. Having presided over a number of trials involving translations and interpretations of Chinese languages I do not underestimate the difficulties that can arise when a solely English speaking judge (such as myself) receives evidence via translation of a Chinese language and the importance of an appreciation of the cultural nuances.

Proper law of contracts

113. I have noted the proper law of the contractual documentation. The majority of the claims are Hong Kong law governed claims. In *Insurco International v Gowan Company* 1994-95 CILR 210 Kerr JA at page 226 stated:

> "… the decided cases illustrate that the proper law of the contract, through a relevant factor, is neither decisive nor determinant of that question [the more appropriate forum question] …"

and at page 234 he added:

> "There is really but one factor in favour of the Cayman Islands, namely my provisional finding that the proper law of the contract is the law of the Cayman Islands. Assuming for present purposes that, either from judicial comity or from applying its own conflict of laws approach, the California court would accept or hold that the law of the Cayman Islands was the proper law of the contract, it would need no more than one expert witness of the requisite learning and experience to give credible evidence of the relevant Cayman law."

The Court of Appeal was of the view that the court of California was clearly the more appropriate forum (see page 235).

114. In *Insurco International v Voluntary Purchasing Group* 1999 CILR 532 Georges JA at page 548 stated:

> "The fact that the proper law of the contract is the law of the Cayman Islands, though of some importance, is not decisive of *forum non conveniens*. One needs to review the

pleadings, identify the issues and evaluate as best one can, having regard to the relevant evidence to be called, which jurisdiction appears to be the most convenient for the trial."

115. In the case presently before the court one important document (the LPA) is expressed to be governed by the laws of the Cayman Islands, whereas other important documents (including the Second Defendant's Investment Management Agreement) are expressly stated to be governed by the laws of Hong Kong.

Place of commission of torts

116. In respect of the tort claims the place of commission of the torts is "a relevant starting point" (see paragraph 51 of Lord Mance's judgment in *VTB*). Lord Mance added:

> "…viewed by itself and in isolation, the place of commission will normally establish a prima facie basis for treating that place as the appropriate jurisdiction. But, especially in the context of an international transaction like the present, it is likely to be over-simplistic to view the place of commission in isolation or by itself, when considering where the appropriate forum for the resolution of any dispute is. The significance attaching to the place of commission may be dwarfed by other countervailing factors."

117. Parker J in *Ritchie Capital Management LLC v Lancelot Investors Fund Limited* 2021 (1) CILR 128 at paragraph 249 stated:

> "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."

118. The Defendants say that the key claims in this case are subject to Hong Kong law whereas the Plaintiff emphasises its reliance on the claims against the General Partner and the claims under the Cayman LPA. The Defendants stress that any representations if made would have been made in Hong Kong, received in Hong Kong and acted upon in Hong Kong. The torts (including the misrepresentation claims, the negligence claims, the claims for procuring a breach of duty and the conspiracy claims) would have been committed in Hong Kong. All elements of any tort would have occurred in Hong Kong.

119. I agree that the proper law of the majority of the claims will be Hong Kong law, either alone or together with Cayman law under the double actionability principle. The claims for misrepresentation, breaches of the Second Defendant's Investment Management Agreement, the claims under the Deed of Undertaking and the Comfort Letter will all be under Hong Kong law. The conspiracy claims against all the Defendants would be governed by Hong Kong law. Again the wrongful procurement claims would either be governed by Hong Kong law alone or subject to the double actionability principle.

"Public Policy" arguments

120. At paragraph 60 of the Plaintiff's skeleton argument dated 6 December 2023 the following was stated:

> "60 Whilst the view held by this Court that it is appropriate for policy reasons for issues relating to the duties of Cayman directors to be determined in this jurisdiction, there is no principled reason why they should not equally apply to all fiduciaries of Cayman Islands investment vehicles, including general partners and investment managers of ELPs. As held by Foster J in *Re Cairnwood Global Technology Fund Limited* [2007 CILR 193], it is desirable that the duties of Cayman officers be determined by the Cayman Islands Courts and this factor may outweigh other countervailing factors such as, for example, the presence of otherwise limited territorial connections to this jurisdiction.[52]"

Footnote 52 read:

> "[52] *Re Cairnwood Global Technology Fund Limited* [2007 CILR 193] at [34], [36]

121. At paragraph 62 of his skeleton argument Mr Lowe submitted that "the Cayman Court is uniquely well-placed to consider the proper scope of the obligations and duties of general partners and investment managers. It is submitted that as a matter of Cayman public policy, it is desirable for the Cayman Court to determine issues such as the duties and responsibilities of a general partner and investment manager of a Cayman ELP and the standing in which claims by a limited partner can be brought. The Defendants made a conscious choice when deciding to set up the Fund as a Cayman ELP and should have known any dispute arising in relation to the Fund would be governed

by Cayman law and subject to the jurisdiction of the Cayman courts. The Defendants should not now be permitted to wholly disown this conscious choice and seek to litigate in Hong Kong."

122. On this latter point it is interesting to note that Lord Collins in *Altimo Holdings and Investment Ltd v Kyrgyz Mobil Ltd* [2011] UKPC 7; [2012] 1 WLR 1804 at paragraph 145 stated:

> "… while it is true that the KFG Companies were sophisticated entities who had voluntarily chosen to make a sizeable investment in Kyrgyzstan, that does not mean that they are bound to accept that all disputes arising out of that investment should be heard in Kyrgyzstan. In particular, they had agreed that disputes arising out of their sale of BITEL should be heard in a London arbitration under English law."

123. The fact that a party chooses to invest in a jurisdiction or chooses to use that jurisdiction's legal vehicles for investment purposes does not automatically mean that such party will be bound to litigate all claims arising under such a structure in that jurisdiction. The court must consider and weigh up all other relevant connecting factors.

124. Mr Flynn astutely pointed out that at paragraph 68.3 of the Plaintiff's skeleton argument dated 26 May 2023 (for the *ex parte* hearing on 2 June 2023) it was stated:

> "68.3 Taiping Trustees acknowledges that there are no issues of public policy.[39]"

Footnote 39 read:

> "See *Brasil Telecom v Opportunity Fund* [2008] CILR 211 [AB17]"

125. At paragraph 68.2 the Plaintiff had stated:

> "The Cayman Court is uniquely well-placed to consider the proper scope of the obligations and duties of general partners and investment managers."

126. Reminded of *Brasil Telecom* (which did not feature in his skeleton argument dated 6 December 2023 which cited very many other authorities) Mr Lowe wisely and realistically conceded towards the end of his oral submissions that the position on public policy may have been "overstated" in the Plaintiff's skeleton argument dated 6 December 2023. Mr Lowe proceeded to develop what he

described as more nuanced submissions. Mr Lowe's more nuanced submissions came to little more than a suggestion that where parties use a Cayman structure they voluntarily create important connections with the jurisdiction and these connecting factors must be taken into account when a court is determining the appropriate forum. I agree but add that they must, of course, be placed in the scales with all the other relevant connecting factors.

127. Although Mr Lowe abandoned his public policy arguments he maintained his submission that the issues arising in respect of the use of Cayman structures and the duties of general partners and those who take on their duties and potential liabilities raised important connections to the jurisdiction of the Cayman Islands.

128. In the circumstances of this case I do not attach significant weight on the fact that it would be better for the Cayman courts to be involved in any consideration of duties and exempt limited partnerships under Cayman law. The Hong Kong courts would be well able to deal with such issues with the assistance, if necessary, of any expert evidence. Although it would be of benefit to this jurisdiction for Cayman courts to determine issues relating to Cayman exempt limited partnerships (described as "the new kid on the block" by Field J.A. at paragraph 77 of *Aquapoint LP v Fan;* CICA unreported judgment 4 October 2023) such "public policy" considerations insofar as they are not related to the private interest of any of the parties or the ends of justice in this case cannot legitimately be taken into account. I do however note that the existence of the Cayman Fund and the LPA are significant connecting factors.

129. Mr Lowe's submissions to the effect that it is the Cayman courts rather than the Hong Kong courts that should deal with Cayman law issues did not persuade me that I should dismiss the Application. These submissions had a hollow ring to them especially considered in light of Mr Lowe's double-edged sword submissions that the Cayman courts could deal with the Hong Kong law issues which arise in this case. In my judgment, the Hong Kong courts will be well able to deal with any disputed issues of Cayman law, if need be with the assistance of expert evidence, just as Cayman courts are able to deal with issues of Hong Kong law (the latter as sensibly acknowledged by Mr Lowe in this oral submissions). In this context it is also worthy of note that Mr Flynn on behalf of the Defendants conceded the derivative claim standing point. The real dispute in this case will be in relation to the facts rather than the law.

130. There was some force in Mr Flynn's submission that if in this case, with all the Hong Kong connecting factors, the court was to refuse a stay on the basis that it involved a Cayman Fund and an LPA with a non-exclusive Cayman jurisdiction clause this would mean that in every other case with a Cayman Fund and a LPA with a non-exclusive jurisdiction clause, no matter the overwhelming connecting factors with another jurisdiction the case would always be dealt with in Cayman. That is not the law and cannot be right. The mere fact of the existence of a Cayman Fund and a LPA with a non-exclusive Cayman jurisdiction clause does not automatically mean that Cayman is the appropriate forum.

131. Mr Lowe in effect submitted that if this case were not dealt with in the Cayman Islands then not many ELP disputes would be litigated here as most of the activity always occurs overseas.

132. In my judgment the existence of the LPA and its non-exclusive Cayman jurisdiction clause and the roles of the First Defendant and the Second Defendant do not dwarf or trump the significant Hong Kong connecting factors. Moreover the resolution of the issues likely to be in dispute in this case is likely to depend on the determination of disputed facts rather than on disputed points of law.

133. At the risk of unnecessary repetition I again stress that the parties plainly have obvious and significant connections with Hong Kong. The factual events relevant to the claims took place in Hong Kong. Factors of convenience and expense in respect of the location of witnesses and documents point heavily to Hong Kong. Although Cayman law will be applicable to the claims alleging breaches under the LPA, significant tort claims will be governed by Hong Kong law.

134. Mr Lowe referred to public policy as being an "unruly horse" which brought back memories of Lord Denning's judgment in *Enderby Town Football Club Ltd v The Football Association Ltd* [1971] Ch 591 at 606 and Hobart CJ's comment over 350 years ago. When dealing with jurisdictional issues I must take care not to be distracted or misled by this "unruly horse" of public policy and instead focus on the evidence, the submissions, the relevant and well established legal principles and the relevant connecting factors.

Late authorities

135. The Plaintiff and the Defendants produced additional authorities late in the day.

136. Late on 11 December 2023 the Defendants filed two further authorities namely (1) the Official Languages Ordinance of Hong Kong and (2) an 87 page English first instance judgment in *Terre Neuve SARL v Yewdale Limited* [2020] EHWC 722 (Comm) without even highlighting upon filing what they regarded as the relevant sections of such documents. After a request from my PA, Harneys sent an email on 12 December 2023 highlighting sections 3 and 5 of the Official Languages Ordinance in relation to the languages used in Hong Kong courts (English and Chinese) and paragraph 46(3)(a) of *Terre Neuve SARL* "A person who is *not party* to a jurisdiction agreement is not bound by that agreement." It appears that *Global Partners* was not referred to in *Terre*.

137. Belatedly at 6.51am on the morning of the hearing the attorneys acting for the Plaintiff in response produced two additional authorities namely *KTH Capital Management Limited v China One Financial Limited* 2004-05 CILR 213 where at paragraphs 40-46 there was a discussion of the linguistic advantages of a Hong Kong court versus a Cayman court in the context of Mandarin speaking witnesses (a discussion I have already duly noted) and *Global Partners Fund Limited v Babcock & Brown Limited (in liquidation)* [2010] NSWCA 196 where at paragraphs [71]-[80] there was a discussion on the approach to jurisdiction clauses involving non-parties to the contract containing the jurisdiction clause.

138. I appreciate that as a hearing gets closer human minds inevitably become more focused but I deprecate the increasing tendency of some attorneys to produce on the day of or during the hearing additional authorities which, if they were to be properly relied upon, should have been referred to in their skeleton argument and list of authorities filed in accordance with the FSD Guide and/or a court order. Avoidable last minute surprises do not assist the administration of justice and can sometimes cause an injustice. Arguments based on the authorities filed late by the Plaintiff were not foreshadowed in the Plaintiff's skeleton argument. To say the least, that was unhelpful and unsatisfactory. It could have had the potential of causing unfairness to the Defendants but fortunately Mr Flynn was able to deal with the points on his feet and no injustice arose on this occasion.

Oral arguments not foreshadowed in skeleton arguments

139. Faced with the overwhelming Hong Kong centric factors Mr Lowe had to resort on his feet to oral arguments not even foreshadowed in his *ex parte* or *inter partes* skeleton arguments. It is

undesirable for an attorney to take the other side by surprise by referring, in oral submissions, to new arguments not previously foreshadowed in a skeleton argument. Again this runs the risk of causing an injustice but Mr Flynn was able to robustly dismiss these oral arguments in reply and no injustice arose in this case. I cover these new arguments below.

Implied submission to the jurisdiction?

140. In his oral submissions Mr Lowe submitted that because the manager (the Second Defendant) is, in the unusual circumstances of this case, the delegate of the General Partner that the manager is in effect the General Partner and it has "impliedly" submitted to the jurisdiction and its obligations under the LPA are Cayman obligations and this is an important connecting factor. Mr Lowe submitted (without referring to any authorities in support) that the Second Defendant has expressly or impliedly submitted to the jurisdiction of the Cayman court. Mr Lowe submitted that by undertaking duties and taking the benefit of indemnities the Second Defendant has submitted to the jurisdiction. I found these submissions entirely unconvincing. There has been no express or implied submission to the jurisdiction by the Second Defendant. In any event these belated submissions presented very much as an after-thought did not lead me to conclude that such required the case to be dealt with in the Cayman Islands. Insofar as the conduct and activities of the Second Defendant were concerned any resultant Cayman connecting factors were of little weight when balanced with the real and significant Hong Kong connecting factors.

Implied adoption of Cayman non-exclusive jurisdiction clause?

141. Moreover, I was unconvinced by Mr Lowe's further argument that by taking on the role of General Partner and taking benefits under the LPA the Second Defendant "impliedly" adopted the non-exclusive jurisdiction clause in the LPA and was bound by it. Mr Lowe referred to *Global Partners*, an Australian case, and emphasised the point that "there are non-parties and non-parties". *Global Partners* does not assist me in the circumstances of the case presently before me. Suffice to say I am entirely unconvinced that the Second Defendant is bound by the non-exclusive jurisdiction clause in the LPA an agreement to which it is not a party to. The Second Defendant is a party to the Second Defendant's Investment Management Agreement and it has Hong Kong law and jurisdiction clauses.

142. On behalf of the Plaintiff it was stated that paragraphs [71]-[80] of *Global Partners* were cited by the Supreme Court of the United Kingdon in *VTB Capital plc v Nutritek International Corporation* [2013] 2 AC 337 at [106]. In *VTB* clause 35 of the facility agreement contained a non-exclusive jurisdiction in favour of the courts of England and that no party would argue that such courts were not the most appropriate and convenient forum and that such clause was for the benefit of VTB only (see paragraph 102 of Lord Neuberger's judgment). At paragraph 104 of his judgment Lord Neuberger referred to Arnold J describing clause 35 as "a pointer to England but not a strong one given that the claim is a tort claim and not a contract claim". In the case presently before me there are claims for breach of contract and claims in tort. At paragraph 105 Lord Neuberger agreed with Arnold J. Lord Neurberger referred to a comment on a similar point from Rix J (as he then was) in *Credit Suisse First Boston (Europe) Ltd v MLC (Bermuda) Ltd* [1999] 1 ALL ER (Comm) 237, 252 that it would be "far fetched" to suggest that a provision such as clause 35 could be invoked by VTB to require a claim it brings solely against non-parties to be heard in London, even if the claim related to the agreement containing the clause. Lord Neuberger added that such was not a reason for concluding that clause 35 cannot be a factor, or, to use Arnold J's word, a pointer, in connection with the first question namely the appropriate forum.

143. Lord Neuberger at paragraph 106 stated:

> "106 There may well be circumstances in which such a factor is a powerful one. An example is to be found in the decision of the New South Wales Court of Appeal in *Global Partners Fund Ltd v Babcock & Brown Ltd* (2010) 79 ACSR 383: see especially at paras 71-80. I do not consider that that decision helps VTB: for a number of reasons, it was a very different case."

144. Lord Neuberger in paragraphs 107 to 110 outlined some of the differences and at paragraph 111 concluded:

> "111 What I do accept is that the existence of the clause in an agreement, in which Mr Malofeev was in some respects involved (to use a neutral word) in negotiating, renders it hard for him to contend that England is an inappropriate forum for the proceedings which are concerned with the agreement, but I do not see it going much further than that on its own. To hold otherwise would, I think, involve effectively treating Mr Malofeev as bound by the clause."

145. In my judgment *Global Partners* (which, of course, is not binding upon this court) pushed the traditional contractual boundaries to the extreme and is a very different case to *VTB* and the case presently before this court. One only needs to refer to the relevant contractual provision in *Global Partners* to appreciate that. In *Global Partners* there was an "exclusive jurisdiction" clause in 18.11 of the Limited Partnership Agreement dated 1 July 2005. As is apparent from paragraph 22 of the judgment it read:

> "This Agreement and the rights, obligations and relationships of the parties hereto under this Agreement and in respect of the Private Placement Memorandum shall be governed by and construed in accordance with the laws of England and all the parties irrevocably agree that the courts of England are to have exclusive jurisdiction to settle any disputes which may arise out of or in connection with this Agreement or the Private Placement Memorandum or the acquisition of Commitments, whether or not governed by the laws of England, and that accordingly any suit, action or proceedings arising out of or in connection with this Agreement or Private Placement Memorandum or the acquisition of Commitments shall be brought in such courts. The parties hereby waive, to the extent not prohibited by applicable law, and agree not to assert by way of motion, as a defence or otherwise, in any such proceeding, any claim that it is not subject personally to the jurisdiction of such courts, that any such proceedings brought in such courts is improper or that this Agreement or the Private Placement Memorandum, or the subject matter hereof or thereof, may not be enforced in or by such court."

146. The New South Wales Court of Appeal at paragraph 71 under the heading "Party Scope" stated "there are judgments which have interpreted an exclusive clause to bind a party with respect to proceedings against a non-party" (and cited *Donohue v Armco Inc* [2001] UKHK 64, "although the issue was not argued in the House of Lords. See at [14] per Lord Bingham" and *Winnetka Trading Corp v Julius Baer International* [2008] EWHC 3146). The New South Wales Court of Appeal added: "On the other hand, the exclusive jurisdiction clauses have been interpreted as applying only to proceedings between the parties" (and cited by way of examples *Credit Suisse First Boston (Europe) Ltd v MLC (Bermuda) Ltd* [1999] 1 Lloyd's Rep 767 at 777-778; *Morgan Stanley & Co International plc v China Haisheng Juice Holdings Co Ltd* [2010] 1 Lloyds L Rep 265 at [21]-[30] noting the observations with respect to Lord Scott's judgment in *Donohue* at [30]).

147. That each case depends on its own facts and circumstances is highlighted by the New South Wales Court of Appeal where it is stated at paragraph 72 that:

> "Each contract must be interpreted in its context. Similar, even identical, words do not necessarily have the same meaning in different contexts."

148. The court at paragraph 74 noted that there were "non parties and non parties" and that the first three respondents were not "strangers to the LPA" as there were various provisions of the LPA that directly referred to the involvement of the members of the BB Group in the decision making process of the Partnership and at paragraph 77 noted that each respondent was entitled to the benefit of the indemnity provisions in the LPA.

149. When I asked Mr Flynn if the Second and Third Defendants were referred to in the LPA in this case he responded in the negative. Mr Lowe in effect submitted that Mr Flynn was wrong to do so as the LPA contained numerous references to non-parties.

150. I take into account all these matters in my consideration and balancing of the connecting factors but I am not convinced that the Cayman non-exclusive jurisdiction clause in this case is binding against the Second and Third Defendants who are non-parties to the LPA (and noting that the Second Defendant has the benefit of a Hong Kong jurisdiction clause in the Second Defendant's Investment Management Agreement). Even if they were bound by the clause such would not be determinative although I accept it would be another connecting factor to weigh in the balance and would be entitled to perhaps significant weight. I would hold it in the balance, but with all the other strong Hong Kong connecting factors, it would not tip the scales in favour of the Cayman Islands.

151. After hearing Mr Flynn's well focused and robust reply I was satisfied that there was nothing in these fresh points raised by Mr Lowe. At best from the Plaintiff's perspective, the arguments simply had the flavour of giving the impression that although the Second Defendant was a Hong Kong company in taking on various activities arising under the Cayman law governed LPA it was becoming connected to the jurisdiction of the Cayman Islands and to that extent I take the "connection" into account but attach little weight to it in comparison to the real and significant countervailing Hong Kong connections.

Submission by conduct?

152. Mr Lowe submitted (again without authority in support) that the Second Defendant by its conduct in taking on all the duties of the General Partner has submitted to the jurisdiction. Frankly this was another unpersuasive point and I have no hesitation in rejecting it. I asked Mr Lowe to direct me to authority in support of it. The best he could do was to offer to, in effect, throw one of his "Briggs" books at me. I declined the offer. I indicated I was aware of caselaw in respect of submissions to the jurisdiction by taking a step in the proceedings after proceedings had been issued. This however is a very different case. The Second Defendant has not submitted to the jurisdiction by its conduct. It has made it crystal clear that it is disputing jurisdiction.

153. Mr Lowe submitted that if the court was not with him that the Second Defendant should be taken as submitting to the jurisdiction and was bound by the non-exclusive Cayman jurisdiction clause in the LPA (even though the Second Defendant was not a party to the LPA) that his submissions as to the role accepted by the Second Defendant, the assumption of the liabilities of the General Partner and obtaining the indemnity were all strong connecting factors with Cayman. I accept that such can loosely be described as connecting factors but they are, in my judgment, not weighty connecting factors.

The centre of gravity of the dispute

154. At the *ex parte* hearing, without the benefit of evidence and submissions from the Defendants, I concluded in effect that the core or centre of gravity of this case was in the Cayman Islands. My decision, to a certain extent, was based on inappropriate public policy grounds. I had not been addressed in detail on *Brasil Telecom*, although in fairness to Mr Lowe it did appear at footnote 39 of his *ex parte* skeleton argument and at paragraph 68.3 it was stated that the Plaintiff "acknowledges that there are no issues of public policy." Having now had the benefit of evidence and submissions from the Defendants I have concluded that the centre of gravity of this dispute is in Hong Kong.

155. The relevant substantive events of which complaint is made took place in Hong Kong. This is a fight between two PRC state-owned groups about a joint venture to develop property in Hong Kong. The material matters relevant to this claim, in the main, all took place in Hong Kong. The

investment was in respect of assets in Hong Kong. The losses were incurred in Hong Kong. The two main protagonists are much more connected to Hong Kong than Cayman. This, in reality and substance, is a Hong Kong case not a Cayman case.

156. The centre of gravity of the dispute between the parties is in Hong Kong. The factual focus will be on facts arising in Hong Kong. The issues and the evidence will be focused overwhelmingly on matters which happened in Hong Kong and the oral and documentary evidence is likely to be overwhelmingly Hong Kong connected and to be found in Hong Kong. Insofar as it is in the Chinese language it could be adduced in the Hong Kong proceedings without translators and without the difficulties which sometimes arise with the use of translators. I note however Mr Lowe's point that some of the documents provide in effect that the English language shall prevail where there is a conflict but such contractual provisions in just two of the many documents before the court are not determinative. The court, however, has regard to the practicalities of foreign language evidence and the disadvantages when translators, remote or otherwise, have to be employed. Any alleged misrepresentations were made in Hong Kong and the investments (the main subject matter of the dispute) were in Hong Kong. If any wrongdoing is established it is best that the wrongdoers are brought to justice in the place where such wrongdoing occurred and in the place of the location of the wrongdoers.

157. The numerous Hong Kong connections are of such strength and importance that despite the existence of the Cayman Fund and the non-exclusive Cayman jurisdiction clause in the LPA and the roles and positions of the First Defendant and the Second Defendant, it is clear to me that the appropriate forum is Hong Kong. Having weighed up all the competing factors in my judgment the balance lies firmly in favour of Hong Kong.

158. In my judgment, the main road in this case leads to Hong Kong as being the appropriate forum and the existence of the Cayman Fund and the non-exclusive Cayman jurisdiction clause in the LPA do not amount to a "Stop" or "No Entry" sign on the main road to Hong Kong. I do not think that the existence of the Cayman Fund and the LPA can trump the overwhelming connecting factors with Hong Kong. That would, in the words of Mr Flynn, be to allow "the Cayman tail to wag the giant Hong Kong panda". In reality and in substance this is a Hong Kong case and it should be dealt with in Hong Kong. In a nutshell, I am driven to the conclusion on the law, the evidence and the submissions that this case can and should be suitably tried for the interests of all the parties and for

the ends of justice in Hong Kong. Hong Kong is the jurisdiction with which the case has the most real and substantial connection.

Defendants' undertakings and concession on standing

159. I add that the Defendants, through Mr Flynn, indicated that they were content to include in any order what was stated in their attorney's letter dated 30 November 2023 namely that the Defendants will (i) not oppose any application to serve the Hong Kong Writ out of the jurisdiction and (ii) instruct a Hong Kong firm of solicitors to accept service of the Hong Kong writ in order to facilitate Hong Kong as an available forum for the resolution of the Plaintiff's claims.

160. Mr Zhang, a director of the Second Defendant, in his affidavit sworn on 13 September 2023 (on behalf of all Defendants in support of the Application) stated at paragraph 34 that "the GP would undertake not to challenge jurisdiction of the Hong Kong Writ in the event that this application is acceded to and that the proceedings against it before this Honourable Court are stayed in favour of the Hong Kong Court." I have also recorded earlier in this judgment that the Defendants also conceded the standing point.

161. These undertakings and the concession on standing should be recorded in the draft order which the attorneys should present for my approval agreed as to content and form within the next 7 days.

The Orders

162. I make orders staying the proceedings against the First Defendant, discharging the Service Out Order and declaring that in the circumstances of the case the court has no jurisdiction over the Second Defendant and/or the Third Defendant in respect of the subject matter of the claim or the relief or remedy sought.

Ancillary applications

163. Any ancillary applications (such as costs) should be filed and served together with concise (no more than 5 pages) written submissions in support within the next 14 days with any concise (no more than 5 pages) written submissions in response being filed and served within 14 days thereafter. I

intend to determine any ancillary applications on the papers without the need for any further hearings.

David Doyle

THE HON. JUSTICE DAVID DOYLE
JUDGE OF THE GRAND COURT

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