In The Supreme Court of Bermuda

CIVIL JURISDICTION

2018: No. 149

BETWEEN:

ATHENE HOLDING LTD

Plaintiff

-and-

(1) IMRAN SIDDIQUI
(2) STEPHEN CERNICH
(3) CALDERA HOLDINGS LTD.

Defendants

Before: **Hon. Chief Justice Hargun**

Appearances: Mr. Kevin Taylor and Benjamin McCosker, Walkers, for the Plaintiff
Mr. Alex Potts, QC, Kennedys Chudleigh Ltd, for the Defendants

Dates of Hearing: **26th – 28th November 2018**

Date of Judgment: **14 January 2018**

RULING

Service outside the Jurisdiction pursuant to RSC O 11, r (1)(b) (injunction restraining from doing anything within the Jurisdiction); O 11, r(1)(c) (necessary or proper parties); requirement of a good arguable case under O 11; requirement of a serious issue to be tried on the merits; application of doctrine of forum non conveniens; relevant factors to be considered; relevance of exclusive jurisdiction clause; relevance of parallel related arbitration and court proceedings in the foreign jurisdiction; the requirement of full and frank disclosure; leave to appeal against a discretionary ruling

A. Introduction

1. There are three applications before the Court.

2. The first application is made on behalf of Mr Imran Siddiqui and Mr Stephen Cernich, the First and Second Defendants, in this action. The application is made by Summons dated 29 June 2018, for orders that the Concurrent Writ be set aside, as against them, and/or the *ex parte* Order dated 17 May 2018 granting leave to the Plaintiff to serve the First and Second Defendants outside of the jurisdiction be set aside, pursuant to RSC Order 12, rule 8.

3. The second application is made by Caldera Holdings Ltd. ("Caldera"), the Third Defendant, by paragraph 3 of its Summons dated 17 May 2018, for an order that the Writ and the Statement of Claim be struck out pursuant to RSC Order 18, rule 19 and under the Court's inherent jurisdiction.

4. The third application is made by Caldera, by its Notice of Motion for Leave to Appeal dated 12 July 2018, for leave to appeal against the Ruling of Mr Justice Hellman dated 28 June 2018.

B. Procedural Background

5. These proceedings were commenced by Athene Holding Ltd. ("Athene"), the Plaintiff, by Specially Indorsed Writ of Summons ("the Writ") filed on 3 May 2018. By that Writ, Athene sought injunctive relief and damages from the Defendants for their breaches of various duties owed to the Plaintiff. The Writ alleged that Mr Siddiqui and Mr Cernich have unlawfully, in breach of their fiduciary duties and/or their duty of confidence and/or duties under contract owed to Athene, used the Plaintiff's trade secrets and other protected confidential and proprietary information for the benefit of the Third Defendant and for themselves, and to the detriment of the Plaintiff.

6. Caldera is an exempt company incorporated in Bermuda under the Companies Act 1981. Caldera was served with the Writ on 8 May 2018.

7. Following the service of the Writ on the Third Defendant the Plaintiff sought and obtained on an *ex parte* basis leave to serve the First and Second Defendants out of the jurisdiction.

8. By Summons dated 17 May 2018, Caldera sought leave to enter a conditional appearance, which was granted by an order dated 22 May 2018. Following the entry of its conditional appearance Caldera sought an order, pursuant to RSC Order 12, rule 8 and/or the Court's inherent jurisdiction, setting aside, staying or striking out the writ on the grounds of *forum non conveniens,* or alternatively an order staying the Writ on case management grounds. By the same Summons, Caldera sought, without prejudice to its applications based upon *forum non-conveniens* or case management grounds, an order that the Writ be struck out and/or summarily dismissed as against Caldera pursuant to RSC Order 18, rule 19 and/or the Court's inherent jurisdiction, on the grounds that (a) the claims asserted by Athene against Caldera disclosed no reasonable cause of action; (b) the claims asserted by Athene against Caldera are frivolous; (c) the claims asserted by Athene against Caldera are embarrassing (for want of necessary particularity); and/or (d) the claims asserted by Athene against Caldera are an abuse of process of the Court.

9. By an Order dated 22 May 2018 the Court ordered that Caldera's application to strike out pursuant to RSC Order 18, rule 19 be adjourned until such time as the Court had heard and substantively determined the applications based upon *forum non-conveniens* and case management grounds.

10. Caldera's application for the striking out and or staying of these proceedings against Caldera based upon *forum non-conveniens* and case management grounds was heard on 8 June 2018. By his Ruling dated 20 June 2018, Hellman J. dismissed Caldera's applications on these grounds. At the hearing before Hellman J. the Court had the benefit of the First and Second Affidavits of James Belardi dated 10 May 2018 and 29 May 2018 filed on behalf of Athene, and the First, Second and Third affidavits of Mr Siddiqui dated 21 May, 1 June and 22 June 2018 and the First Affidavit of Mr Cernich dated 1 June 2018, filed on behalf of Caldera.

11. Following the Ruling of Hellman J., the Court gave directions by Order dated 26 July 2018 in relation to (a) the filing of evidence with respect to the First and Second Defendants' Summons dated 29 June 2018; (b) filing of additional evidence with respect to Caldera's Summons dated 17 May 2018 relating to striking out the Writ pursuant to RSC Order 18, rule 19; and (c) the hearing of Caldera's Notice of Motion for Leave to Appeal dated 12 July 2018.

C. Parties

12. I gratefully adopt the description and background to the parties set out in the Ruling of Hellman J.:

(1) Athene

13. Athene is incorporated in Bermuda as an exempt company. Since December 2016, it has been registered on the New York Stock Exchange. Mr Cernich states in his affidavit that prior to that it was a private company owned in its majority by an affiliate of a company known as Apollo Global Management LLC ("Apollo").

14. Athene's annual filing with the US Securities and Exchange Commission ("SEC") for the year ended 31st December 2017, on what is known as a Form 10-K, was relied upon, at the hearing before Hellman J., by counsel for both parties as a reliable source of information about the company.

15. Athene, together with its consolidated subsidiaries, is: "a leading retirement services company that issues, reinsures and acquires retirement savings products designed for the increasing number of individuals and institutions seeking to fund retirement needs." It is based in Bermuda, with its US subsidiaries' headquarters located in Iowa. [Form 10-K, page 9.]

16. Athene, together with its consolidated subsidiaries, has a "strategic relationship" with Apollo, whose indirect subsidiary, Athene Asset Management LP ("AAM"), serves as Athene's investment manager. The Apollo Group (comprising Apollo and its affiliates) controls 45% of the total voting power of Athene and five of Athene's 12 directors are employees or consultants of Apollo, including its Chairman, Chief Executive Officer ("CEO") and Chief Investment Officer, who is a dual employee of both Athene and AAM. [Form 10-K, page 10.]

17. As of 1 January 2018, Athene, together with its consolidated subsidiaries, had approximately 1,125 employees located in Bermuda and the US. It had subsidiaries licensed to carry on insurance business in all 50 States of the US and the District of Columbia. They were subject to regulation and supervision by those States. The subsidiaries were organised and domiciled in one of Delaware, Iowa or New York. [Form 10-K, page 23.]

18. As of 31st December 2017, Athene, together with its consolidated subsidiaries, employed 24 non-Bermudians in its Bermuda office (other than spouses of Bermudians, holders of permanent residents' certificates, and holders of working residents' certificates). [Form 10K, page 55.]

19. Athene is currently intended to operate in a manner which would not cause it to be treated as being engaged in a trade or business within the US or subject to US federal income taxation on its net income. [Form 10-K, page 62.]

20. Athene is a holding company with limited operations of its own. Its primary subsidiaries are insurance and reinsurance companies that own substantially all of its assets and conduct substantially all of its operations. [Form 10-K, page 68.]

21. Documents relating to Athene's 2016 share incentive plan gave Athene's address as c/o an Iowa subsidiary. [Eg Form 10-K, exhibit 10.26.2.]

22. James Belardi ("Mr Belardi") swore affidavit evidence on behalf of Athene. He stated that he has served as the Chairman, CEO and Chief Investment Officer of Athene since 2009. In his role as CEO he is responsible for Athene's overall strategic direction and management.

23. He stated that Athene has a real and significant presence "on the ground" in Bermuda. It leases an office in Bermuda at which services are performed for it. The vast majority of its board meetings and official executive meetings are held in Bermuda. All of its annual general meetings of shareholders take place in Bermuda.

(2) <u>Mr Siddiqui</u>

24. Mr Siddiqui has sworn affidavit evidence in which he stated that he is a US citizen, currently resident in New York. He was formerly a partner and employee of Apollo, which he joined in 2008. He was appointed as an Apollo-nominated director of Athene in July 2009 and resigned in March 2017, although he was not an employee of Athene. Almost all his work for Athene was performed in his capacity as director of Athene and a partner and employee of Apollo, and almost all of it was carried out in the State of New York, where Apollo is domiciled. Athene maintained offices in New York and Iowa. At all material times, Mr Siddiqui worked out of Apollo's New York office.

25. However Mr Belardi noted that, from 2012 until Mr Siddiqui resigned as a director of Athene, Mr Siddiqui travelled to Bermuda 20 times for Athene board meetings. Mr Belardi stated that Athene does not lease or own a New York office or any office in the US. Some of Athene's US subsidiaries had US offices, but not Athene.

26. Mr Siddiqui noted that all the officers of Athene, as identified on its website, lived in the US, including New York. He stated that in his own experience, the day-to-day operations of Athene, including the vast majority of the business

decisions and business activities, took place by way of its officers carrying out their functions in the US.

(3) Mr Cernich

27. Mr Cernich is a US citizen currently resident in Kentucky. Mr Siddiqui's affidavit evidence explained that Mr Cernich was employed by Athene and its affiliates from 2009 to June 2016 in various positions, including Chief Actuary and Executive Vice President.

28. Mr Cernich stated in his affidavit that he believed that, during his tenure with Athene, the majority of strategic and other "decision-making efforts" took place at meetings in New York, Iowa and Los Angeles, not Bermuda. The meetings often involved representatives of Apollo. He further stated that Athene's principals maintained assigned office space in the US for which Athene reimbursed its subsidiaries. Mr Belardi noted that, from 2012 until Mr Cernich left Athene, Mr Cernich travelled to Bermuda 14 times for Athene board meetings. However Mr Cernich drew a distinction between board meetings, and management meetings, which took place in the US.

29. On his departure from Athene, Mr Cernich entered into a Separation Agreement and General Release dated 20 October 2016 with Athene and AAM ("the Release").

    (1) Para 3 of the Release acknowledged that Mr Cernich had been granted and/or purchased a number of shares in Athene under various share agreements.

    (2) Para 7 of the Release acknowledged that the Protective Covenants contained in the share agreements were necessary to protect, *inter alia*, Athene's confidential and proprietary information.

(3) Para 18 of the Release stated: "This Agreement shall be construed and interpreted in accordance with the internal laws of the State of New York, without regard to its choice of law rules".

(4) Caldera

30. Caldera was incorporated in Bermuda as an exempt company in or about July 2017. Mr Siddiqui and Mr Cernich are its sole directors and shareholders and Mr Cernich is its CEO. Athene and Caldera are rivals for the hand of another company which was referred to in these proceedings as Company A. They both want to acquire or combine with it, and only one (or neither) of them can succeed. This rivalry has given rise to various court and arbitral proceedings in Bermuda and the US between, in each case, one or more of Athene, Apollo, and their affiliates on the one hand and one or more of Mr Siddiqui, Mr Cernich and Caldera on the other.

31. Mr Siddiqui gave affidavit evidence that the vast majority of potential witnesses and relevant documents relating to the dispute between Athene and the Defendants in relation to Company A are located in New York, as are the legal and financial advisors for both Caldera and Company A. He stated that it was from New York that he: "communicated in connection with the transaction at issue by Athene's claim".

D. Court and Arbitration Proceedings

(1) Bermuda Court Proceedings

32. In the Bermuda proceedings commenced on 3 May 2018, Athene claims that:

(a) Since its inception in 2009, Athene has targeted potential acquisitions and strategic transactions with insurance companies that write fixed annuities. Athene's unique business model involves acquiring and

managing US insurance companies and re-insuring fixed annuity liabilities to its Bermuda affiliates.

(b) Periodically from 2009 to the present, Athene and the target company identified as Company A, which writes fixed annuities, have discussed potential plans for an acquisition or other business combination. On multiple occasions including in 2010, 2012, 2014, and 2016, Athene reviewed acquisition transactions in respect of Company A in which Mr Siddiqui and Mr Cernich directly prepared, assessed and managed Athene's plans for the acquisition of same, including Athene's underwriting of Company A's financial position, pricing, reserves, distribution capabilities and operational capacity, as well as Athene's plans to finance the acquisition of Company A through reinsurance to Bermuda. Mr Siddiqui and Mr Cernich were both aware that Company A remained Athene's principal acquisition prospect up to the time they were no longer affiliated with Athene.

(c) As an example of the extent of the involvement of both Mr Siddiqui and Mr Cernich in Athene's potential acquisition of Company A, on 18 February 2016, Mr Cernich delivered a presentation to 22 of the most senior officers and executives of Athene, including Mr Siddiqui, regarding the potential acquisition of Company A. Mr Cernich's presentation incorporated 35 detailed slides discussing, among other topics, Athene's valuation of Company A and the methodology used to reach that valuation, Athene's assessment of the key risks and potential benefits of the acquisition of Company A, and Athene's assessment of the tax consequences and reinsurance opportunities associated with acquiring Company A. The presentation also discussed recommended approaches for Athene to take in pursuing an acquisition of Company A.

(d) In January 2017, whilst Mr Siddiqui was still a director of Athene, Mr Cernich, with the knowledge of Mr Siddiqui, gave instructions to Bermuda attorneys to incorporate Caldera. Mr Siddiqui and Mr

Cernich have used, and are continuing to use, the confidential information to assist in their attempt to cause Caldera to acquire Company A.

(e) During the period in which Mr Siddiqui and Mr Cernich were directors and officers of Athene (and in certain respects, thereafter), they owed certain fiduciary duties to Athene. These duties included the duties set out in section 97 of the Companies Act 1981. Given that Mr Siddiqui and Mr Cernich were spearheading the relevant negotiations for the acquisition of Company A, they were bound by the fiduciary duties to abstain from obtaining for themselves, either secretly or without the informed approval of Athene, any property or business advantage belonging to the Athene.

(f) The relevant fiduciary duties did not come to an end upon Mr Siddiqui's and Mr Cernich's resignation or termination of their respective offices and in particular the acquisition of Company A was a maturing business opportunity which belonged to Athene.

(g) During the period in which Mr Siddiqui and Mr Cernich were officers of Athene, and in all the time which has elapsed thereafter, Mr Siddiqui and Mr Cernich owed a duty of confidence to Athene in respect of the confidential information. Caldera, as agent and/or nominee of Mr Siddiqui and Mr Cernich, owed an obligation of confidence to Athene not to use or disclose the confidential information.

(h) The original Writ also pleaded contractual duties of good faith and fidelity to Athene as implied terms of the contract of employment/service but that plea in respect of contractual duties has been deleted in the Amended Specially Endorsed Writ of Summons dated 16 October 2018. The Amended Writ was filed pursuant to RSC Order 20, rule 3.

(i) The Amended Writ also pleads that prior to their separation from Athene, Mr Siddiqui and Mr Cernich formed an intention to remove the confidential information from the Plaintiff and to incorporate a new corporate vehicle, Caldera, to hold said confidential information and compete with Athene for the acquisition of Company A.

(j) By way of relief Athene claims an order that (a) each of the Defendants be permanently enjoined from using any of the confidential information obtained about Company A and/or disclosing such information to others; (b) an order that each of the Defendants be permanently enjoined from making attempts to acquire or combine with Company A; (c) alternatively, damages; and (d) continuing legal costs, fees and expenses incurred in pursuit of these proceedings.

(2) <u>First JAMS Arbitration</u>

33. According to Mr Siddiqui, he was contacted by US lawyers acting for Apollo who threatened to seek injunctive relief against him and Caldera, on the grounds that his activities were allegedly in breach of certain restrictive covenants to which he was said to be subject, including but not limited to, his misuse of confidential information held by Apollo.

34. Having failed to reach a consensual settlement Apollo commenced arbitration proceedings on 9 January, 2018. The arbitration proceedings were commenced pursuant to an arbitration agreement contained in a Partnership Agreement between Apollo Global Management, LLC and other Apollo entities and Mr Siddiqui. Athene was not a party to that Partnership Agreement or the arbitration agreement contained in that document.

35. In the First JAMS Arbitration, Apollo alleged that Mr Siddiqui was: (a) engaging in work with Caldera that violated his non-compete obligations; and (b) improperly touting new business that was "superior to Athene". Apollo further claimed that Caldera and Mr Siddiqui misappropriated Athene's strategies for purchasing assets in the insurance space and disparaged Apollo

and Athene by suggesting a misalignment of interests and potential regulatory risk with respect to the unique business model used by Apollo with respect to Athene.

36. This arbitration proceeding resulted in a settlement, the terms of which were set out in a document headed SETTLEMENT AGREEMENT AND MUTUAL RELEASE dated 21 February 2018 ("the Settlement Agreement"). Athene is not a party to the Settlement Agreement. The Settlement Agreement provided, *inter alia*, that (a) Apollo releases Mr Siddiqui and any company formed by Mr Siddiqui from all claims, complaints, demands or causes of action which were the subject matter of the arbitration proceedings; (b) "the parties further acknowledge and agree that Apollo shall not take any action to encourage or support Athene Holding Ltd. or its subsidiaries or affiliates in asserting any claims covered by or relating to this release or related to the facts alleged in the Action [arbitration proceedings]"; (c) Mr Siddiqui releases Apollo from all claims, complaints, demands or causes of action relating to the arbitration proceedings; (d) Mr Siddiqui shall continue to be subject to the modified post termination covenants set out in paragraph 7; and (e) the Settlement Agreement shall be governed by and construed in accordance with the laws of the state of New York and any dispute that may arise in connection with the Agreement shall be resolved exclusively by arbitration conducted before a single arbitrator in New York in accordance with, and pursuant to, the Employment Arbitration Rules and Procedures of JAMS.

(3) <u>Second JAMS Arbitration</u>

37. On 3 May 2018, Apollo commenced a Second JAMS Arbitration against Mr Siddiqui alleging wrongful use and disclosure of Apollo's confidential information in violation of the Settlement Agreement. In this arbitration Apollo contends that as part of the Settlement Agreement, Apollo agreed to waive certain of Mr Siddiqui's post- employment restrictive covenants with respect to some of his competitive activities. At the same time, however, Apollo and Mr Siddiqui explicitly agreed that Mr Siddiqui would continue to be bound by the

provisions of his post- employment restrictive covenants governing his obligations regarding Apollo's confidential information.

38. The second JAMS arbitration is being pursued by the parties pursuant to paragraph 12 of the Settlement Agreement which sets out the arbitration agreement between the parties. Athene is not a party to the arbitration agreement contained in this document.

39. The sole arbitrator in the Second JAMS arbitration has given directions that: (a) all document discovery is to be completed on or before 30 November 2018; (b) experts are to be designated on or before 14 December 2018; (c) counter experts are to be designated on or before 24 December 2018; (d) all depositions are to be completed by 11 January 2019; (e) dispositive motions, if any, must be filed on or before 14 January 2019; (f) prehearing witness and exhibit lists are to be filed on or before 21 January 2019; (g) written statements of position are to be filed on or before 1 February 2019; and (h) the arbitration hearing is to commence on 8 February 2019 and continue (if necessary) until 13 February 2019.

(4) <u>New York Action</u>

40. On 3 May 2018, Caldera Holdings Ltd, Caldera Life Reinsurance Company and Caldera Shareholder, LP commenced proceedings in the Supreme Court of the State of New York County of New York against Apollo Global Management, LLC, Apollo Management, LP, Apollo Advisors VIII, LP, Apollo Capital Management VIII, LLC, Athene Asset Management, LP, Athene Holding Ltd, and Leon Black.

41. These proceedings were commenced by a two-page document headed SUMMONS WITH NOTICE filed on 3 May, 2018. The document states that; "The case arises out of the Defendants' conspiracy to manipulate the market for acquisitions of insurance companies. Defendants' misconduct includes, but is not limited to, unfair business practices, unfair competition, tortious interference

with commercial relationships, commercial disparagement and other blatantly anti-competitive activities".

42. In this action the Plaintiffs seek damages in an amount to be determined at trial, "but in any event no less than $300 million".

43. On 23 May 2018, the Defendants, other than Athene, filed a Notice of Appearance and Demand for Complaint. Athene filed a Demand for Complaint on 24 May 2018, "*expressly reserving all of its rights and defences, including, without limitation, that service of the summons with notice was ineffective, and that there is no personal jurisdiction over Athene"*

44. Certain of the defendants have moved to dismiss the Caldera New York action summarily for alleged failure to state a claim. To date, a hearing date has not yet been set in the Caldera New York action.

E. First Application: Jurisdictional Challenge to leave to serve out of Jurisdiction by Mr Siddiqui and Mr Cernich

45. The general principles relating to service out of jurisdiction are set out in the judgment of Lord Collins in *Altimo Hodings v Kyrgyz Mobil Tel Ltd.*[2012] 1 WLR 1804 at [71]:

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

court that there is a good arguable case that the claim falls within one or more classes of case in which permission to serve out may be given. In this context "good arguable case" connotes that one side has a much better argument than the other: see *Canada Trust Co v Stolzenberg (No 2*) [1998] 1 WLR 547, 555-7 per Waller LJ, affd [2002] 1 AC 1; *Bols Distilleries BV v Superior Yacht Services* [2006] UKPC 45, [2007] 1 WLR 12, [26]-[28]. Third, the claimant must satisfy the court that in all the circumstances the Isle of Man is clearly or distinctly the appropriate forum for the trial of the dispute, and that in all the circumstances the court ought to exercise its discretion to permit service of the proceedings out of the jurisdiction"

(1) Serious issue to be tried on the merits

46. The content of the requirement to demonstrate that there is a serious issue to be tried on the merits was considered by Walker J. In *Standard Bank PLC v Just Group LLC et al* [2014] EWHC 2687 at [97-98]:

> "97. Permission to serve a claim form out of the jurisdiction under CPR 6.36 will be set aside if, as regards that claim, the claimant cannot show that there is a serious issue to be tried. It is common ground that this test is equivalent to the test when, in response to an application by a defendant for summary judgment under CPR 24, a claimant contends that there is a real prospect of succeeding on the claim in issue."
>
> 98. Aspects of that test were set out by Lewison J in *EasyAir Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15]. Those which are key for present purposes are the first four:
>
> (i) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: *Swain v Hillman* [2001] 2 All ER 91;
>
> (ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable:

ED & F Man Liquid Products v Patel [2003] EWCA Civ 472 at [8];

(iii) In reaching its conclusion the court must not conduct a "mini-trial": *Swain v Hillman*;

(iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents*: ED & F Man Liquid Products v Patel* at [10];"

47. In broad outline the case against Mr Siddiqui and Mr Cernich, the First and Second Defendants served out of the jurisdiction, is as follows:

    (a) As officers of Athene, Mr Siddiqui and Mr Cernich owed fiduciary duties to Athene both at common law and under section 97 of the Companies Act 1981. As part of those fiduciary duties they were under an obligation not to exploit maturing opportunities which belonged to Athene after their retirement as officers and directors of Athene. This is particularly so in relation to business opportunities which they had personally developed for Athene whilst they were officers of Athene. Mr Siddiqui and Mr Cernich's involvement in developing the corporate opportunity to acquire Company A is set out in detail at paragraphs 10 to 15 of the Statement of Claim. In paragraph 22 it is pleaded that Mr Siddiqui and Mr Cernich were bound, as a result of the fiduciary duties they owed to Athene, to abstain from obtaining for themselves, either secretly or without the informed approval of Athene, any property or business advantage belonging to Athene about which Athene had been negotiating. It is pleaded that this obligation was particularly pronounced in the circumstances where Mr Siddiqui and Mr Cernich were themselves spearheading the relevant negotiations for the acquisition of Company A.

(b) As officers of Athene, Mr Siddiqui and Mr Cernich owed a duty of confidence to Athene not to disclose any confidential information acquired by them in their capacity as officers of Athene to a third party and in particular not to use that confidential information for their own personal benefit. Caldera, as an agent or nominee of Mr Siddiqui and Mr Cernich, owes an obligation of confidence to Athene not to use or disclose the confidential information.

(c) In the Amended Writ of Summons it is claimed that prior to their separation from Athene, Mr Siddiqui and Mr Cernich formed an intention to remove the confidential information from Athene and to incorporate a new corporate vehicle, Caldera, to hold the confidential information and compete with Athene for the acquisition of Company A.

(a) <u>Breach of Fiduciary Duty and Maturing Opportunity</u>

Fiduciary duties owed after resignation

48. It is contended on behalf of Mr Siddiqui and Mr Cernich that any fiduciary duties which they may have owed to Athene in their capacity as directors and officers of Athene came to an end once they resigned as officers and directors. It is said on their behalf that they were free to compete with Athene in any way they thought fit after their relationship with Athene had ended. They say that they were free to compete with Athene in relation to the possible acquisition of Company A. Whilst it may be correct as a matter of analysis that fiduciary duties come to an end upon resignation, it is strongly arguable that an officer is not entitled to exploit a business opportunity which he had developed on behalf of a company for his own personal benefit after resignation from that company. This issue is addressed in the judgment of Cockerill J in *Recovery Partners v Rukhadze & Ors* [2018] EWHC 2918 at [70-73]:

"70. The starting point, which was not in issue is that: i) It is not a breach of fiduciary duty for a fiduciary to resign from his post, regardless of how

much damage it causes the company; CMS Dolphin at [87], [95]. British Midland Tool at [89]. *Shepherd Investments Ltd v Walters* [2007] FSR 15, *Balston v Headline Filters Ltd* [1990] FSR 385 at 412. ii) In general, fiduciary duties do not extend beyond the end of the relevant relationship: "We do not recognize the concept of a fiduciary obligation which continues notwithstanding the determination of the particular relationship which gives rise to it. Equity does not demand a duty of undivided loyalty from a former employee to his former employer": *Attorney General v Blake* [1998] Ch 439 at 453. iii) As Snell puts it at 7-013, a fiduciary is not barred from "resigning and exploiting opportunities within the market in which his principal operates, where he did not resign from his fiduciary position with a view to exploiting such opportunities and where the opportunity was not one which his principal was pursuing at the time of resignation or thereafter."

71. This rule prevents what would otherwise be an unattractive situation: that, purely by virtue of having been a fiduciary of a company and having become aware of a business opportunity in that capacity, a director is the only person in the whole world who is forever prohibited from taking up that opportunity.

72. Nonetheless, in order to prevent the emasculation of fiduciary duties, a fiduciary may be found to have breached fiduciary duties by reference to what he later does. Resignation will not avoid liability where the fiduciary uses for their own benefit property or information which they have acquired while a fiduciary; this will be a breach of the "no profit rule": see Snell at 7-013 and Ultraframe at [309]. This ensures that he does not resign the fiduciary position in order to do what the fiduciary doctrine would otherwise bar the fiduciary from doing: see Snell at 7013 and Boles & British Land Company's Contract [1902] 1 Ch 244 at 246 – or that if he does do so, he pays the price for so doing.

73. The underlying basis of the liability of a fiduciary who exploits after his resignation a maturing business opportunity of the company is that the

opportunity is to be treated as if it were property of the company in relation to which the fiduciary owed fiduciary duties. By seeking to exploit the opportunity after resignation he is appropriating for himself that property: CMS Dolphin at [96].”

49. Athene’s factual case is set out in the Statement of Claim which is verified by the sworn evidence of Mr Belardi (second affidavit [42]). It is said that during the period whilst Mr Siddiqui and Mr Cernich were officers of Athene, they managed the assessment and evaluation of potential transactions and business opportunities for Athene, including, in respect of Company A. They were substantially responsible for and had significant oversight of Athene’s confidential and proprietary business plans and trade secrets, including, but not limited to, its method of valuation, transaction structuring, accounting, capitalisation, sources of capital, intercompany financing arrangements, reserving strategies, reinvestment opportunities, tax status, operational environment and capacity and reinsurance.

50. During 2016 and 2017, Mr Cernich and Mr Siddiqui vacated their offices with Athene and caused Caldera to be incorporated in or about July 2017, for purposes that included acquiring an interest in Company A. It is said that Caldera is utilising the confidential information acquired by Mr Siddiqui and Mr Cernich whilst they were officers of Athene.

Mr Siddiqui's reliance on Bye Law 56 and 57.1

51. Mr Siddiqui further argues that any fiduciary duties that he might have owed to Athene, including the statutory duties under section 97 of the Companies Act 1981, were expressly limited in scope as a result of the fact that he was Apollo’s nominated director and in that regard he expressly relies upon Bye Law 56 and Bye Law 57.1 of Athene’s Bye Laws.

52. Bye Law 56.1 indemnifies a director and officer of Athene in respect of any action taken against him and Athene waives any claim or right of action against a director and officer to take any action in the performance of his duties

"*provided that such waiver shall not extend to any matter in respect of any fraud or dishonesty in relation to the Company or its Subsidiaries which may attach to such Covered Person*". It is strongly arguable that the pleaded conduct of Mr Siddiqui and Mr Cernich of (a) knowingly diverting a maturing opportunity of Athene (developed by them whilst they were officers and directors of Athene) for their personal benefit after the resignation; (b) utilising the confidential information of Athene to achieve that purpose; and (c) prior to their separation from Athene forming an intention to remove the confidential information from Athene and to incorporate a new corporate vehicle to hold the confidential information and compete with Athene for the acquisition of Company A, is conduct which is "dishonest" within the meaning of Bye Law 56.

53. Bye Law 57.1, in material part, provides that "*any officer, employee or agent of the Company, or any director, officer, employee or agent of any of the Company's subsidiaries, who is also, and is presented such business opportunity in his or her capacity as an officer, director, employee, managing director, general or limited partner, manager, member, shareholder, agent or other Affiliate of any member of the Apollo Group… shall have no duty (statutory, fiduciary, contractual or otherwise) to communicate or offer such business opportunity to the Company and, to the fullest extent permitted by Applicable Law, shall not be liable to the Company or any of its Subsidiaries, other than its Insurance Subsidiaries, for breach of any statutory, fiduciary, contractual or other duty, as a director, officer, employee or agent of the Company, or a director, officer, employee or agent of any of the Company's Subsidiaries, as the case may be, or otherwise, by reason of the fact that such Specified Party pursues or acquires such business opportunity, directs such business opportunity to another Person or fails to present or communicate such business opportunity, or information regarding such business opportunity, to the Company or its Subsidiaries. Notwithstanding the foregoing, the Company and its Subsidiaries do not renounce any right, interest or expectancy in any business opportunity offered to a Specified Party who is a director or officer if such business opportunity is expressly offered for the Company or its*

Subsidiaries to such person solely in his or her capacity as a director or officer".

54. The intended scope of Bye Law 57.1 appears to be narrower then suggested on behalf of Mr Siddiqui. Given the close relationship between the Apollo Group and Athene and given the fact that certain directors of Athene are nominated by the Apollo Group there is clearly a need to clarify in express terms the rights and obligations of the Apollo nominated directors when they are presented with business opportunities in their capacity as directors and officers of the Apollo Group. The first part of Bye Law 57.1 clarifies the position that when a director or officer is presented with a business opportunity in his capacity as an officer, director or employee of the Apollo group, he is not obliged to offer that business opportunity to Athene and if he fails to do so, he will not be in breach of any fiduciary duty which he may owe to Athene. He is allowed to pass the business opportunity to another member of the Apollo Group. However, if the business opportunity is presented to a director or officer, in his capacity as a director or officer of Athene, then he is duty-bound to present that opportunity to Athene. Bye Law 57.1 does not appear to allow an Apollo nominated director of Athene to divert business opportunities for his personal interest. Bye Law 57.1 appears to have no application to the factual situation where a director and officer of Athene, who is actively engaged in pursuing a business opportunity on behalf of Athene, diverts that opportunity for his personal benefit.

Settlement Agreement with Mr Siddiqui

55. Mr Siddiqui further argues that any breaches of fiduciary duties he may have owed to Athene have been settled as a consequence of the Settlement Agreement and Mutual Release dated 21 February 2018. The Settlement Agreement is governed by New York law and its precise scope may depend upon the niceties of New York law. However, the Settlement Agreement is with Apollo Global Management LLC and other members of the Apollo Group. Athene is not a party to that Settlement Agreement and as a consequence cannot be said to have settled any of its rights. It is to be noted that under paragraph 3 dealing with mutual releases, it is expressly provided that: "*the parties further*

acknowledge and agree that Apollo shall not take any action to encourage or support Athene Holding Ltd. or its subsidiaries or affiliated in asserting any claims covered by or relating to this release are related to facts alleged in the Action". This provision relating to the position of Athene appears to acknowledge that the facts alleged in the arbitration proceedings which gave rise to the Settlement Agreement may provide independent causes of action on the part of Athene and that those causes of action on the part of Athene have not been compromised.

Separation Agreement and General Release with Mr Cernich

56. Mr Cernich claims that by its terms, the Release dated 20 October 2016 represents "*the full and complete agreement*" and as a result Athene has compromised any and all causes of action which it may have had against Mr Cernich. The Release is governed by New York law and as such all issues of interpretation of the agreement are matters of New York law. However, on the face of the document it appears to be an agreement whereby Athene agrees to make certain payments to Mr Cernich in relation to his termination of employment and Mr Cernich in return agrees to provide a general release to Athene. On the face of the document there does not appear to be a release of any causes of action which Athene may have against Mr Cernich.

57. The general release is dealt with in paragraph 8 of the Agreement. The relevant part provides that: "*In consideration for the compensation and benefits provided hereunder and conditioned upon the Company satisfying its obligations hereunder, you, and anyone claiming through you, agree fully, finally and forever waive, release and discharge the Company, AAM and any and all of their parents, divisions, subsidiaries, partnerships, affiliate and/or other related entities… (Collectively, the "Released Parties"), from any and all claims, whether known or unknown, which you have or have ever had against any of the Released Parties arising from or related to any act, omission, or thing occurring or existing at any time prior to or on the date of your signing this Agreement including, but not limited to, any and all claims that in any way result from, or relate to, your employment, compensation, other terms and*

conditions of employment, or termination from employment with the Company or any of the other Released Parties".

58. Having regard to its terms and structure the Release does not appear to have any impact upon any causes of action which Athene may have against Mr Cernich in relation to the matters pleaded in the Statement of Claim.

Issues of credibility

59. It is said on behalf of Mr Siddiqui and Mr Cernich that allegations made in the Statement of Claim are not particularised and as such the Court should accept the sworn evidence of Mr Siddiqui and Mr Cernich and conclude that the claims advanced by Athene are bound to fail. In the context of this application the Court is not conducting a mini trial and can only reject affidavit evidence where it is inherently improbable or conflicts with contemporaneous documents. The Court is unable to accept this invitation to summarily reject the case advanced by Athene. Indeed there are aspects of Mr Siddiqui's evidence which are clearly in conflict with contemporaneous correspondence.

60. In paragraph 35 of his first affidavit Mr Siddiqui states that "*After I had departed from both Athene and from Apollo in 2017 (but only afterwards), I also began to develop a business plan of my own. I then decided to join Mr Cernich, and together we founded Caldera Holdings Ltd. as an exempt company in Bermuda. As I have indicated, Caldera was incorporated on 11 July 2017, nearly 4 months after I had ceased acting as a director of Athene, and nearly a month after my resignation at Apollo became effective after a period of gardening leave".* The clear impression sought to be given is that the idea of incorporating Caldera only materialised after Mr Siddiqui had left Athene on 20th of March 2017. However, recent documentation disclosed in the affidavit of Benjamin McCosker casts doubt on this assertion. Mr McCosker discloses an email chain which shows that in January 2017 Mr Cernich was instructing Conyers Dill and Pearman, Bermuda attorneys, to incorporate an exempt company and had selected the name Caldera Holdings Ltd. Mr Cernich

forwarded this email chain to Mr Siddiqui on 27 January 2017. Accordingly, it seems reasonably clear that Mr Siddiqui was at the very least aware in January 2017, whilst he was a director and officer of Athene, that his former colleague Mr Cernich was incorporating Caldera. It also seems reasonably clear that Mr Siddiqui had already decided in January 2017 to join Mr Cernich in this new venture. It appears that Mr Siddiqui was less than frank in his first affidavit in relation to this issue.

61. Mr McCosker discloses further emails which show that in January 2017, whilst Mr Siddiqui is a director and officer of Athene, he was communicating with Mr Cernich in relation to the business affairs of Athene using his private Gmail address. These emails suggest that Mr Siddiqui's current business association with Mr Cernich started before Mr Siddiqui terminated his relationship with Athene. The Court accepts that there is a reasonable inference to be drawn that the email exchanges were intended to be hidden from Athene at a time when Mr Siddiqui was a director and officer of Athene.

62. In paragraph 65 of his first affidavit Mr Siddiqui states that: "*I should also say that I was not even aware, during my tenure at Apollo, of any substantive negotiations ever taking place between Apollo or Athene and the target company regarding any potential acquisition by Apollo or Athene of Company A".* This statement by Mr Siddiqui is in direct conflict with the verified Statement of Claim. In paragraph 11 it is asserted that on multiple occasions including, at least, in 2010, 2012, 2014 and 2016 Athene reviewed acquisition transactions in respect of Company A in which Mr Siddiqui and Mr Cernich directly prepared, assessed and managed Athene's plans for the acquisition of Company A . In paragraph 15 it is stated that on 18 February 2016, Mr Cernich delivered a presentation to 22 of the most senior officers and executives of Athene, including Mr Siddiqui, regarding the potential acquisition of Company A. Mr Cernich's presentation incorporated 35 detailed slides discussing, among other topics, Athene's valuation of Company A and the methodology used to reach that valuation. The presentation also discussed recommended approaches for Athene to take in pursuing an acquisition of Company A. The Court is

unable to reject this detailed evidence as inherently unreliable bearing in mind Mr Siddiqui and Mr Cernich have not dealt with these specific allegations.

(b) <u>Confidential Information</u>

63. It is said on behalf of Mr Siddiqui and Mr Cernich that the Statement of Claim lacks the particularity in detail that is necessary for alleged claims of breach of confidence. In support of that argument reliance is placed on a passage in the judgment of Laddie J. in *Ocular Sciences Ltd. et al v Aspect Vision Care* [1997] RPC 289, at 359-360:

> "*… It is well recognised that breach of confidence actions can be used to oppress and harass competitors and ex-employees. The courts are therefore careful to ensure that the Plaintiff gives full and proper particulars of all confidential information on which he intends to rely in the proceedings. If the Plaintiff fails to do this the Court may infer that the purpose of the litigation is harassment rather than the protection of the Plaintiff's rights and may strike out the action as an abuse of process…*
>
> *… Just as it may be an abuse of process to fail properly to identify the information on which the Plaintiff relies, it can be an abuse to give proper particulars of information which is not, in fact, confidential, the claim based even in part on wide and unsupportable claims of confidentiality can be used as an instrument of oppression or harassment against a Defendant. It can be used to destroy an ex-employee's ability to obtain employment or a competitor's ability to compete…"*

64. The particulars of confidential information and Mr Siddiqui's and Mr Cernich's involvement in Athene's efforts to analyse and potentially require Company A are set out in paragraphs 12 to 18 of the Statement of Claim. In paragraph 13 it is pleaded that Mr Siddiqui and Mr Cernich together managed the assessment and evaluation of potential transactions and business opportunities for Athene, including in respect of Company A, and was substantially responsible for and had significant oversight of Athene's confidential and proprietary business plans

and trade secrets, including its method for valuation, transaction structuring, accounting, capitalisation, sources of capital, intracompany financing arrangements, reserving strategies, reinvestment opportunities, tax status, operational environment and capacity and reinsurance. This information is referred to by Athene as confidential information and it is said that it took the form of not only physical and electronic information and documents, but also intangible, intrinsic knowledge imparted to Mr Siddiqui and Mr Cernich (and ultimately then on to Caldera) by virtue of their intimate involvement in Athene's designs for the acquisition of Company A.

65. In paragraph 18 of the Statement of Claim, it is explained that Athene competes with Company A in certain areas and, as a result, has developed confidential evaluation, analysis and models with respect to overlapping business areas. As officers of Athene, Mr Siddiqui and Mr Cernich were privy to this confidential information, which by way of specific example included quarterly reports containing confidential information about Athene's activities in these overlapping areas.

66. As stated by Hellman J. in his Ruling, whilst there is force in the submission that Athene should be required to provide further particulars, the confidential information is pleaded with sufficient particularity for the Court to understand in broad terms the nature of Athene's case, which is sufficient for the present hearing.

(c) Prior Design

67. In paragraph 3 of the Amended Statement of Claim it is asserted that prior to their separation from Athene, Mr Siddiqui and Mr Cernich formed an intention to remove the confidential information from Athene and to incorporate a new corporate vehicle – Caldera – to hold the confidential information and compete with Athene for the acquisition of Company A.

68. This new allegation of a prior agreement, would appear to be supported by the new email disclosure exhibited to the affidavit of Benjamin McCosker. The

documents disclosed appear to show that Mr Siddiqui was corresponding with Mr Cernich and others in January 2017 in relation to the incorporation of Caldera. This was at a time when he was a director and officer of Athene. He was corresponding using his private email address. He was also discussing other business opportunities and disclosing, what Athene contends, was its confidential information. Mr Siddiqui denies that the information was confidential or related to the acquisition of Company A. Mr Siddiqui accepts that after he left Athene proposals were made by Caldera to acquire Company A. In his first affidavit he says Caldera submitted various proposals to Company A beginning in or about September 2017.

69. Having regard to all these issues the Court concludes that there is a serious issue to be decided between Athene and Mr Siddiqui and Mr Cernich in the sense that Athene has a realistic prospect of success in relation to the pleaded claims against these defendants who are out of the jurisdiction.

(2) <u>RSC Order 11 Gateways</u>

70. In order for the Court to give leave to serve outside the jurisdiction Athene must show that there is a "*good arguable"* case that the proposed claim by Athene against Mr Siddiqui and Mr Cernich falls within one of the jurisdictional gateways set out in RSC order 11.

71. In *Canada Trust Co. v Stolzenberg (No 2)* [1998] 1 WLR 547, Waller LJ considered the requirement of a good arguable case in the context of an *inter partes* hearing to set aside the ex parte order giving leave to serve out. At 555 E-G Waller LJ said:

> " It is also important to remember that the phrase which reflects the concept "good arguable case" as the other phrases in *Korner* "a strong argument" and "a case for strong argument", were originally employed in relation to points which related to jurisdiction but which might also be argued about at the trial. The court in such cases must be concerned not even to appear to express some concluded view as to the merits, e.g. as to whether the contract

existed or not. It is also right to remember that the "good arguable case" test, although obviously applicable to the ex parte stage, becomes of most significance at the inter partes stage where two arguments are being weighed in the interlocutory context which, as I have stressed, must not become a "trial". "Good arguable case" reflects in that context that one side has a much better argument on the material available. It is the concept which the phrase reflects on which it is important to concentrate i.e. of the court being satisfied or as satisfied as it can be having regard to the limitations which an interlocutory process imposes that factors exist which allow the court to take jurisdiction."

72. Athene was given leave to serve out of the jurisdiction by Hellman J. on two grounds: (1) under Order 11, rule 1(1)(b):*" an injunction is sought ordering the defendant to… refrain from doing anything within the jurisdiction"*; and (2) under Order11, rule 1(1)(c): "*the claim is brought against a person duly served within or out of the jurisdiction and a person out of the jurisdiction is a necessary or proper party thereto"*

An injunction restraining from doing anything within the jurisdiction

73. It is argued on behalf of the Defendants that this rule addresses injunctions seeking to restrain conduct by the relevant defendant <u>within</u> the jurisdiction of Bermuda (not conduct outside the jurisdiction of Bermuda, nor conduct by another party).

74. In *Rosler v Hilbery* [1925] 1 Ch 250, an action was commenced in England against an English and a foreign defendant claiming an injunction against the English defendant from parting with certain funds in circumstances where the English defendant, a solicitor, had given an undertaking not to part with the funds until further order of the court. An order was subsequently obtained by the plaintiff *ex parte* giving him leave to serve the proceedings out of the jurisdiction on the foreign defendant. The Court of Appeal held that having regard to the undertaking given by the English solicitor, the injunction was not really part of the relief sought and was wholly unnecessary, and was asked for only to found the jurisdiction of

the Court to make an order for substituted service, and accordingly that the substance of the case did not fall within Order 11, rule 1(1)(f).

75. *Watson & Sons v Daily Record (Glasgow), Limited* [1907] 1 KB 853 was a case where an action was sought to be brought against a newspaper company registered in Scotland and carrying on business solely in that country. The plaintiff claimed damages for alleged libel in a newspaper belonging to the defendant and also an injunction against the repetition of the alleged libel within the jurisdiction. The circulation of the newspaper was practically confined to Scotland, although a few copies were sold on the bookstalls at railway stations just within the English border. The defendant disclaimed any intention of repeating the alleged libel in the newspaper, but intended to justify them at trial. The Court of Appeal held that although their claim of injunction against the repetition of the alleged libel was within the jurisdiction, and the plaintiffs had technically brought the case within the provisions of order 11, rule 1(1)(f), the Court, in the exercise of its judicial discretion, ought to refuse leave to issue a writ for service out of the jurisdiction, there being, under the circumstances, no reasonable probability that the plaintiffs would obtain an injunction at the trial of the action.

76. Mr Siddiqui and Mr Cernich argue that there is no possible basis for Athene to assert that they or Caldera are taking relevant steps within the jurisdiction of Bermuda that should properly be restrained by this Court. They argue that the proposed acquisition of Company A (being a US company), and all associated acts and events, are likely to take place in the United States and not in Bermuda.

77. Athene argues that it is seeking an order in good faith that Caldera be permanently enjoined from using any of the confidential information obtained about Company A or disclosing such information to others. Athene contends that it will be seeking an injunction against Caldera in terms claimed in the Writ of Summons at the trial of this action. However, the relevant gateway under order 11 requires that the injunction is sought ordering the defendant to do or refrain from doing *anything within the jurisdiction*. Athene argues that in the context of the transaction acquiring Company A, it is likely to be necessary for Caldera to instruct Bermuda counsel to draft the necessary Board resolutions and give the necessary legal

opinions. It is suggested that Caldera may also have to instruct Bermuda accountants to advise it in relation to tax consequences of acquiring Company A.

78. Having considered the competing arguments the Court is of the view that even if technically the proceedings against Caldera can be said to come within Order 11 rule 1(1)(b), they do not come within the spirit of what is intended by this sub-rule. Accordingly, the Court concludes that Athene should not be given leave to serve out of the jurisdiction notice of the Writ of Summons upon Mr Siddiqui and Mr Cernich under this sub-rule.

Necessary or Proper Party

79. In *AK Investment CJSC v Kyrgyz Mobil Tel Ltd* [2012] 1 WLR 1804 PC, Lord Collins set out the principles applicable to the "necessary or proper party" head of jurisdiction. He summarised those points in *Nilon Limited v Royal Westminster Investments SA* [2015] UKPC 2 at [15]:

> "(1) The necessary or proper party head of jurisdiction was anomalous, in that, by contrast with the other heads, it was not founded upon any territorial connection between the claim, the subject matter of the relevant action and the jurisdiction of the English courts.
>
> (2) Caution must always be exercised in bringing foreign defendants within the jurisdiction under that head, and in particular it should never become the practice to bring in foreign defendants as a matter of course, on the ground that the only alternative requires more than one suit in more than one different jurisdiction.
>
> (3) The fact that the defendant within the jurisdiction (D1 or the "anchor defendant") is sued only for the purpose of bringing in the party outside the jurisdiction (D2) is not fatal to the application for permission to serve D2 out of the jurisdiction, but it is a factor in the exercise of the discretion.

(4) The action is not properly brought against D1 if it is bound to fail.

(5) If a question of law arises on the application which goes to the existence of jurisdiction, the court will normally decide it, rather than treating it as a question of whether there is a good arguable case.

(6) The question of the merits of the claim is relevant to the question of whether the claim against D1 is "bound to fail" and to the question whether there is a "serious issue to be tried" in relation to the claim against D2; and there is no practical difference between the two tests, and they in turn are the same as the test for summary judgment.

(7) In considering the merits of the claim, whether the claim against D1 is bound to fail on a question of law should be decided on the application for permission to serve D2 (or to discharge the order), but it would not normally be appropriate to decide a controversial question of law in a developing area, particularly because it is desirable that the facts should be found so that any further development of the law should be on the basis of actual and not hypothetical facts.

(8) The question whether D2 is a proper party is answered by asking: "supposing both parties had been within the jurisdiction would they both have been proper parties to the action?"

80. It is argued on behalf of Mr Siddiqui and Mr Cernich that on Athene's own Statement of Claim and taking into account Athene's evidence (when contrasted with the Defendants' evidence), there is no proper basis for characterising Caldera as a legitimate "*anchor defendant"*, against whom Athene has a viable claim or a plausible cause of action.

81. The Court has already concluded that there is a serious issue to be tried between Athene and Mr Siddiqui and Mr Cernich. Caldera is being sued in its own right on the basis that it is wrongfully utilising confidential information which belongs to

Athene. It is also being sued, again, in its own right, for liability incurred as an agent or nominee of Mr Siddiqui and Mr Cernich in seeking to divert the maturing business opportunity (the acquisition of Company A) for its own benefit (see paragraph 109 to 112 below). Independent liability incurred by Caldera as an agent of Mr Siddiqui and Mr Cernich is sufficient for the purposes of serving Caldera within the Jurisdiction as an "anchor defendant" for the purposes of RSC, Order 11, rule 1(1)(c). These claims raise a serious issue to be tried as against Caldera. This is not a case where proceedings against Caldera are bound to fail or where Caldera has been sued as a device to obtain jurisdiction over Mr Siddiqui and Mr Cernich.

82. Mr Siddiqui and Mr Cernich are clearly necessary or proper parties. If all parties were subject to the jurisdiction of the Bermuda court, it would be perfectly proper, and indeed likely, that all three Defendants would be sued in the same proceedings. Accordingly, the Court concludes that service of the Notice of Writ of Summons in these proceedings upon Mr Siddiqui and Mr Cernich properly comes within the necessary or proper gateway.

(3) Forum Conveniens

83. It is common ground that Athene is obliged to demonstrate that Bermuda is clearly and distinctly the proper place, or appropriate forum, for determining its claims against Mr Siddiqui and Mr Cernich. In *VTB Capital plc v Nutritek International Corp* [2013] UKSC 5, Lord Mance explained the general principle involved in following terms at [12]:

> "12. The locus classicus in relation to issues of appropriate forum at common law is *Spiliada Maritime Corpn v Cansulex Ltd* [1987] AC 460, where Lord Goff of Chieveley gave the leading speech. He identified as the underlying aim in all cases of disputed forum, "to identify the forum in which the case can be suitably tried for the interests of all the parties and for the ends of justice" (p 480G). But he also identified the important distinction in the starting point and onus of proof between cases where permission is required to serve proceedings out of the jurisdiction and situations where service is

possible without permission: p 480G-H. The present case falls into the former category. In cases within that category, permission was not to be granted under the former rules of court "unless it shall be made sufficiently to appear to the court that the case is a proper one for service out" (RSC Ord 11, r 4(2)), and, as Lord Goff noted, the jurisdiction being exercised "may be 'exorbitant'" (p 481A-D). On this basis, Lord Goff concluded that:

> "The effect is, not merely that the burden of proof rests on the plaintiff to persuade the court that England is the appropriate forum for the trial of the action, but that he has to show that this is clearly so" (p 481E)"

84. On behalf of Athene it could be said that the following factors indicate that Bermuda is clearly the appropriate forum for the trial of the action.

(1) At the heart of the Bermuda action is the breach of duties owed by directors and officers (Mr Siddiqui and Mr Cernich) to a company incorporated in Bermuda pursuant to the Bermuda Companies Act 1981. Athene leases an office in Bermuda at which services are performed for Athene. In the period from2012 to 2017 Mr Siddiqui travelled to Bermuda 20 times to attend meetings of the Board of Directors of Athene and that in the period 2012 to 2016 Mr Cernich travelled to Bermuda on 14 occasions to attend the Board of Directors' meetings.

(2)The breach of fiduciary duty alleged in relation to the diversion of a maturing business opportunity belonging to Athene is likely to be governed by Bermuda law and in particular the scope and interpretation of section 97 of the Bermuda Companies Act 1981. Common law fiduciary duties owed by a director to a company incorporated in Bermuda would in principle be governed by Bermuda law. In *Base Metal Trading v Shamurin* [2005] 1 WLR 1157, Arden LJ summarized the postion at [69]: "*In my judgment, the law of the place of incorporation applies to the duties inherent in the office of director and it is irrelevant that the alleged breach of duty was committed, or the loss*

incurred, in some other jurisdiction". The relevance of the governing law of the Release between Athene and Mr Cernich and the Settlement Agreement between the Apollo Group and Mr Siddiqui is considered below.

(3) Mr Siddiqui and Mr Cernich have incorporated a company in Bermuda (Caldera) and are now its shareholders and directors and officers. Caldera seeks to acquire Company A in competition with Athene and is named as the Third Defendant in the Bermuda proceedings. Caldera, incorporated in Bermuda under the Companies Act 1981 is subject to the jurisdiction of Bermuda and has been served with process as of right. This in itself is a strong connection with Bermuda. As Bingham LJ remarked in *Banco Atlantico v BBME* [1990] 2 Lloyd's Rep 504 a510: "*Although the Judge described BBME's connection with this forum as not a fragile one, it is in truth a very solid indeed. It must be rare that the Corporation resists suit in its domiciliary forum. Rarely would this court refuse jurisdiction in such a case. In my judgment very clear and weighty grounds for doing so were not shown".*

(4) In paragraph 9(b) of his fourth affidavit sworn on 16 November 2018 Mr Siddiqui says that any fiduciary duties he may owe under Bermuda law including section 97 of the Companies Act 1981 were expressly limited in time to the period of his directorship and expressly limited in scope as a result of the fact that he was an Apollo nominated director. In support of that assertion Mr Siddiqui relies upon, inter alia, the wording of Bye Law 56 of Athene's Bye Laws. Bye Law 56 seeks to (a) indemnify the directors and officers of Athene against any claims made against the directors and officers; and (b) waive any right of action which the shareholders and/or Athene may have against its directors and officers unless the particular director or officer acted fraudulently and/or dishonestly in relation to Athene. The meaning and scope of Bye Law 56 is governed by Bermuda law.

(5) In the same paragraph 9(b) Mr Siddiqui asserts that the scope of any fiduciary duties which he may owe to Athene under Bermuda law is also limited by Bye Law 57.1. Bye Law 57.1 deals with business opportunities presented to the directors of Athene. Given that some of the directors of Athene are nominated by the Apollo Group, Bye Law 57.1 seeks to address the position when a business opportunity is presented to an Apollo director in his capacity as an Apollo director. It seeks to provide that in such circumstances a director would not be in breach of fiduciary duties owed to Athene if that director directed the business opportunity to another entity within the Apollo Group. The precise scope of Bye Law 57.1 is likely to be a matter of argument but that argument will likely take place on the basis that the Bye Law is to be interpreted by reference to Bermuda law.

(6) Bye Law 84 of Athene's Bye Laws contains a significant provision in the context of considering whether Bermuda is clearly an appropriate forum for the resolution of this dispute. It provides that: "*In the event that any dispute arises concerning the Act or out of or in connection with these Bye-laws, including any question regarding the existence and scope of any Bye-law and/or whether there has been any breach of the Act or these Bye-laws by an Officer or Director (whether or not such a claim is brought in the name of a Shareholder or in the name of the Company), any such dispute shall be subject to the exclusive jurisdiction of the Supreme Court of Bermuda".*

85. In relation to the last point, terms contained in the Bye Laws may, in appropriate circumstances, be enforced by directors and officers as contractual terms. In *Globalink Telecommunications Ltd v Wilmbury* [2003] 1 BCLC154, Burnton J explained at [30]:"*The articles of association of the company are as a result of statute a contract between the members of the company and the company in relation to their membership. The articles are not automatically binding as between a company and its officers as such. Insofar as the articles are applicable to the relationship between a company and its officers, the articles may be expressly or impliedly incorporated in the contract between the company and a*

director. They will be incorporated in the contract between the company and a director. They will be incorporated if the director accepts appointment "on the footing of the Articles", and relatively little may be required to incorporate the articles by implication: per Ferris J at para [26] of his judgment in John v Price Waterhouse [2002] 1 WLR 953]". Globalink has been followed in Bermuda in *Peiris v Daniels* [2015] Bda LR 16. It appears that Hellman J. was not referred to any authority when he was asked to consider whether Bye Law 84 could be enforced by Athene against Mr Siddiqui and Mr Cernich in their capacity as directors and officers of Athene.

86. It would appear that Mr Siddiqui now accepts that the terms of the relevant Bye Laws can be enforced by and against the directors and officers of Athene. Since the Ruling of Hellman J.. Mr Siddiqui has filed further affidavit evidence. As noted above, Mr Siddiqui now relies upon and wishes to enforce the terms of Bye Law 56 and 57.1., which are clearly intended to benefit the directors and officers and the Court can assume, in the absence of contrary evidence, the directors assumed their office on the basis that they could rely upon these Bye Laws as contractual terms. There is no indication that Mr Siddiqui and Mr Cernich took office as directors and officers on the basis of accepting some Bye Laws whilst rejecting others. On the basis that Bye Law 56 and 57.1 constitute contractual terms of the relationship between Athene and Mr Siddiqui, it must follow that Bye Law 84 is likewise enforceable by and against Mr Siddiqui and Mr Cernich.

87. Section 97 of the Companies Act 1981 provides, in part:

Duty of care of officers

97 (1) Every officer of a company in exercising his powers and discharging his duties shall (a) act honestly and in good faith with a view to the best interests of the company; and (b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

(2) Every officer of a company shall comply with this Act, the regulations, and the bye-laws of the company

88. As Kawaley J held *In re First Virginia Reinsurance Ltd* [2003] Bda LR 47 at page 7, the primary duties of directors are set out in section 97(1) of the Companies Act 1981 in provisions which are generally accepted as reflecting common law. Section 97(1) is wide enough to cover the pleaded claims in this case, namely, the claim for breach of fiduciary duty in diverting a maturing business opportunity belonging to Athene for the personal benefit of Mr Siddiqui and Mr Cernich; the misuse of confidential information belonging to Athene for the personal benefit of Mr Siddiqui and Mr Cernich and their agent and nominee, Caldera; and the additional claim pleaded in the Amended Statement of Claim alleging that Mr Siddiqui and Mr Cernich formed an intention to remove the confidential information from Athene and to incorporate a new corporate vehicle, Caldera.

89. It appears that there was no express reference to section 97(1) in the original Statement of Claim. In Athene's *ex parte* Skeleton Argument dated 16 May 2018, in support of the argument on *forum conveniens,* Athene asserted that it will be relying upon "*constitutional documents, its memorandum and bylaws, which will be relevant to the dispute, are governed by Bermuda law".* However, section 97(1) was expressly relied upon by Athene's counsel at the *inter partes* hearing before Hellman J. on 8 June 2018. In any event, express reliance upon section 97(1) is pleaded in the Amended Statement of Claim dated 16 October 2018.

90. On the basis that Bye Law 84 and the exclusive jurisdiction clause is a term of their engagement as officers of Athene, Mr Siddiqui and Mr Cernich are bound to submit to the jurisdiction of Bermuda in relation to disputes which come within the terms of Bye Law 84 unless they can point to exceptional circumstances which could not have been foreseen. As held by Gloster J (as she then was) in *Antec International Ltd v Biosafety USA Inc* [2006] EWHC 47 at {7}: "*the general rule is that the parties will be held to their contractual choice of English jurisdiction unless there are overwhelming, or at least very strong, reasons for departing from this rule".* Whilst the court retains discretion in an exceptional case not to give effect to an exclusive jurisdiction clause, that discretion is only to be exercised in extremely limited exceptional circumstances which could not have been foreseen. In particular, it is not permissible to engage in the conventional *forum non*

conveniens analysis by reliance upon factors such as governing law, location of witnesses and documents and the like. Again as explained by Gloster J. at [7(iii)]:

> "Such overwhelming or very strong reasons do not include factors of convenience that were foreseeable at the time that the contract was entered into (save in exceptional circumstances involving the interests of justice); and it is not appropriate to embark upon a standard *Spiliada* balancing exercise. The defendant has to point to some factor which it could not have foreseen at the time the contract was concluded. Even if there is an unforeseeable factor or a party can point to some other reason which, in the interests of justice, points to another forum, this does not automatically lead to the conclusion that the court should exercise its discretion to release a party from its contractual bargain; see cases cited *supra*. In particular, the fact that the defendant has, or is about, to institute proceedings in another jurisdiction, not contemplated by the non-exclusive jurisdiction clause, is not a strong or compelling reason to relieve a party from his bargain, notwithstanding the undesirability of parallel proceedings. Otherwise a party to a non-exclusive jurisdiction clause could avoid its agreement at will by commencing proceedings in another jurisdiction; see cases cited *supra* and *The El Amria* [1981] 2 Lloyd's Rep. 119; *Breams Trustees Ltd v Upstream Downstream Simulation Services* [2004] EWHC 211 (Ch) per Patten J at paragraphs 27 and 28."

91. In relation to the exclusive jurisdiction clause a brief mention should be made of the Advisory Services Agreement between Apollo and Athene dated 23 August 2016. This agreement and the sixth affidavit of Mr Siddiqui were submitted after the hearing had concluded and Athene has not had an opportunity to respond to it. This Agreement seeks to provide indemnification by Athene to Apollo and Apollo's employees in respect of the services rendered to Athene. However, the scope of this Agreement and the scope of the indemnity contained in Bye Law 56 is materially different. Bye Law 56, in broad terms, provides indemnity to directors and officers in relation to all actions and/or omissions unless the covered

person acted fraudulently and dishonesty in relation to Athene. The Advisory Services Agreement on the other hand will not provide indemnity if the liability arose as a result of an indemnitee's "*wilful misconduct, gross negligence or fraud"*. In other words, the Agreement does not provide indemnity if the conduct of the relevant employee is "*grossly negligent".* Secondly, paragraph 4(b) of the agreement provides that the rights of the indemnitee to indemnification under the agreement will be in addition to any rights any such person may have under any other agreement or instrument to which such an indemnitee is or becomes a party (whether pursuant to contract, bye laws and charter or otherwise). Furthermore, in Bye Law 56.12 Athene acknowledges that the indemnitees have certain rights to indemnification as members of the Apollo Group separate from the indemnity provided for under Bye Law 56 and Athene agrees that it is the indemnitor of first resort and the obligations of Apollo Group are secondary. In the circumstances the Advisory Services Agreement provides no real assistance for present purposes.

92. In light of the exclusive jurisdiction clause in Bye Law 84 the significance of related arbitration and court proceedings in New York is questionable. However, it should be noted that the New York action, commenced by Caldera, is at a very early stage and whether it proceeds to trial is a matter for speculation. Athene does not accept that the New York court has jurisdiction over it. The subject matter of the New York proceedings appears to be an allegation of conspiracy amongst the Apollo Group and Athene to the market acquisition, insurance and tortious interference in commercial relationships.

93. In relation to the arbitration proceedings, the Second JAMS arbitration is between the Apollo Group and Mr Siddiqui. It is being pursued as a result of a written arbitration agreement between the Apollo Group and Mr Siddiqui. Athene is not a party to that arbitration agreement. Furthermore, the subject matter of the arbitration is the breach of post termination contractual covenants on the part of Mr Siddiqui, as set out in paragraph 7 of the Settlement Agreement.

94. It is argued on behalf of Mr Siddiqui and Mr Cernich that the following factors demonstrate that Bermuda is not clearly the more appropriate forum. They argue that the appropriate forum is New York.

1. The Bermuda action duplicates the claims brought in the Second JAMS arbitration by Apollo. It is said that the JAMS arbitration deals with the same alleged facts, same allegedly confidential information and that same alleged conduct. However, the fact remains that the Second JAMS arbitration is being conducted under the arbitration agreement contained in the Settlement Agreement between the Apollo Group and Mr Siddiqui. Athene is not a party to that Settlement Agreement. It was argued on behalf of the Defendants that as the Bermuda action and the Second JAMS arbitration are so closely related on the facts Athene can establish that it comes within the arbitration clause, on the basis that it is "*claiming through or under"*. In this regard reliance was placed upon the judgment of Graham J in *Roussel-Uclaf v Searle* [1978] 1 Lloyd's Rep 225. However, the fact remains that the causes of action which Athene seeks to pursue in the Bermuda proceedings are not derived from or related to the causes of action which Apollo Group seeks to pursue in the Second JAMS arbitration. Furthermore, the English Court of Appeal has held in *The Mayor and Commonality and Citizens of the City of London* [2008] EWCA 1283 that *Roussel-Uclaf* was wrongly decided and should not be followed. The Court agrees that *Roussel-Uclaf* should not be followed in this respect.

2. It is argued that the most plausible aspect of the claims against Mr Siddiqui and Mr Cernich are to be found in respectively the Settlement Agreement and the Separation Agreement, both governed by the laws of the State of New York. However, it is to be noted that the Settlement Agreement is between the Apollo Group and Mr Siddiqui. It does not purport to affect those causes of action which arise as a result of the relationship of Mr Siddiqui and Athene. As noted in paragraph 56 to 58 above, the Release is limited in scope and does not appear to affect the causes of action, which Athene alleges against Mr Cernich.

3. It is argued that New York is the centre of gravity for Athene's claims. It is said that Athene has many substantial connections with New York. For

example, its shares are publicly listed on the New York Stock Exchange, it is regulated by the SEC, and the Defendants contend that it has presence in New York

4. It is also said that the New York action will proceed in any event and it is undesirable for the Bermuda court to hear a duplicate action involving the same or substantially the same issues, witnesses and documents and giving rise to a real risk of conflicting judgments. As noted above, the action is not dealing with the same subject matter as the Bermuda action and Athene has not submitted to the jurisdiction of the New York court.

95. Having regard to all the circumstances of this case and the factors outlined above, I have come to the view that Bermuda is clearly the more appropriate forum for the trial of this action. I would have taken that view even in the absence of the exclusive jurisdiction clause. However, the result of the exclusive jurisdiction clause is that Mr Siddiqui and Mr Cernich are contractually bound to submit to the jurisdiction of this Court and Caldera has been sued in this jurisdiction as of right. On the basis that Mr Siddiqui and Mr Cernich are bound by the exclusive jurisdiction clause, they have to show exceptional circumstances which could not have been foreseen which justify departure from the agreed forum. In this respect they have, in my judgment, failed to do so.

(4) Full and frank disclosure

96. Caldera complains that Athene's affidavit evidence, skeleton argument and oral submissions at the *ex parte* hearing on 17 May 2018 fell far short of a fair presentation, and that they did not provide full and frank disclosure.

97. A plaintiff making an *ex parte* application seeking leave of the court to serve notice of proceedings outside the jurisdiction owes a duty to the court to make full and frank disclosure of all material facts. Falwell CJ in *The Hagen* [1908] P. 189 stated the general rule at page 201: "*Inasmuch as the application is made ex parte, full and fair disclosure is necessary, as in all ex parte applications, and a failure to make such full and fair disclosure would justify court in discharging*

the order, even though the party might afterwards be in a position to make another application".

98. Specifically, Caldera complains that (1) there were no documents whatsoever exhibited to Mr Belardi's first affidavit and the affidavit completely failed to disclose, address or explain the existence of overlapping proceedings in a foreign jurisdiction (including in arbitration) between the same or related parties; (2) Athene's Skeleton Argument dated 16 May 2018 positively misstated RSC Order 11 rule 1(1)(b), and Athene failed to address the Court on any of the reported authorities dealing with the application of that rule; and (3) Athene sought to rely on a wholly unparticularised pleading in support of the proposition that there is a real issue to be tried.

99. In relation to the complaint that Athene failed to disclose other overlapping proceedings, Athene points out that counsel provided Hellman J. with a copy of the letter from Kennedys, attorneys acting for Caldera in Bermuda, dated 11 May 2018. In that letter Kennedys outlined Caldera's position in relation to the issues of jurisdiction and *forum non conveniens* and specifically asserted:

> *"(1) The alleged claims against our client Caldera Holdings Ltd. are (a) specious and /or (b) entirely parasitic on (or derivative to) the alleged claims against Mr Siddiqui and Mr Cernich. In the circumstances, Caldera Holdings Ltd. cannot properly be described as the "anchor defendant" for jurisdictional or procedural purposes, given the specious and derivative nature of the allegations made against it.*
>
> *(2)… Mr Siddiqui is resident in New York, in the United States of America, and Mr Cernich is resident in Kentucky, in the United States of America: i.e., they are both outside the jurisdiction of Bermuda.*
>
> *(3)… your client seeks to rely – at least in part – upon foreign law (presumably New York state law), since the allegations that our client is an "alter ego" of Mr Siddiqui and Mr Cernich are legally incoherent as a matter of Bermuda law…*

(4)…the dispute between our respective clients will necessarily require an examination of various contractual relationships between various overseas parties… Including Apollo Global Management LLC, Apollo Management LP, Apollo Capital Management VIII, LLC, Apollo Advisors VIII, LP…, as well as Mr Siddiqui and Mr Cernich, which are subject to foreign law; and or subject to foreign jurisdiction and or foreign arbitration agreements; and/or subject to pending litigation and or arbitration in a foreign jurisdiction…

(5)… our client has commenced proceedings against Apollo and your client, Athene Holding Limited, in the Supreme Court of the State of New York, asserting claims which raise, for proper determination by that Court similar and overlapping issues to those which would arise for determination in these proceedings in the event that our client becomes obliged to file and serve a Defence and Counterclaim (and which are issues that are to a large extent governed by New York law).

(6)… Apollo has commenced two sets of arbitration proceedings against Mr Siddiqui under the supervision of JAMS in New York (the first of which was the subject of a compromise under the Settlement Agreement and Mutual Release dated 21 February 2018… The second of which has reached the stage of Mr Siddiqui filing a Response to the Statement of Claim and presenting a Petition for Emergency Relief). The claims raise for determination by the JAMS arbitration tribunal also raise certain similar and overlapping issues (notwithstanding the differences in the identity of the parties).

(7) Many of the relevant potential witnesses, whether employed by Apollo, Athene, our client [Caldera], or third parties, are based in (or likely to be based in) the United States, and more specifically New York.

(8) Your client's shares are listed on the New York Stock Exchange.

(9) Company A is not a Bermuda company, but a US company.

… We would suggest that you draw this letter the attention of the Court in the event that you make any ex parte application for leave to serve out, given your client's obligations of full and frank disclosure of any such application."

100. As requested, the Kennedys letter was brought to the attention of the Court. A copy of the letter (with its annexures) was handed up to Hellman J.. Having reviewed the letter, Hellman J. remarked, as shown in the transcript, "*Well, it seems to me there is very much a live issue as to what the appropriate forum is".* In all the circumstances it appears that Hellman J. was fully aware of the points made in the Kennedys letter as to why the Court should decline to give leave to serve the proceedings outside the jurisdiction.

101. Athene accepts that there was indeed a typographic error in its Skeleton Argument which was before the Court. Specifically, there was a misquotation of the relevant provision of RSC Order 11, rule 1(1)(b), which should have referenced acts "*within the jurisdiction"* but instead referred to acts "*out of the jurisdiction".* However, the error was immediately recognised by Hellman J. and counsel for Athene confirmed the correct wording of RSC Order 11, rule 1(1)(b). Accordingly, Athene contends and it appears to be the case that Hellman J. was not misled by this error.

102. In relation to the assertion that the Statement of Claim was wholly unparticularised, Hellman J. had the document before him and could take his own view in relation to it. It is to be noted that even after full argument in relation to the issue that the Statement of Claim was wholly unparticularised, Hellman J. took the view that "*The confidential information is pleaded with sufficient particularity for me to understand in broad terms the nature of Athene's case, which is sufficient for the present hearing. The factual allegations at the root of the statement of claim – that Caldera is the vehicle through which Mr Siddiqui and Mr Cernich are misusing confidential information to acquire Company A – is consistent with Caldera being the agent or nominee".*

103. In all circumstances the Court is satisfied that Caldera did not fall far short of a fair presentation, or full and frank disclosure in relation to the *ex parte* hearing on 17 May 2018.

F. **Second Application: Application to Strike Out the Writ and the Statement of Claim by Caldera**

104. By its summons dated 17 May 2018, without prejudice to its application to strike out and or stay these proceedings on a jurisdictional basis, Caldera seeks an order that the Writ and the Statement of Claim be struck out pursuant to RSC order 18, rule 19 and/or the Court's inherent jurisdiction, on the grounds that: (a) the claims asserted by Athene against Caldera disclose no reasonable cause of action; (b) the claims are frivolous; (c) the claims are embarrassing (for want of necessary particularity); and/or (d) the claims are an abuse of the process of the Court.

105. As a preliminary matter Athene raises the point whether Caldera can seek to strike out these proceedings under RSC Order 18 rule 19, which necessarily implies submission to the jurisdiction of this court, and at the same time seek to pursue an appeal on the grounds that this Court should have struck out and/or stayed these proceedings on the grounds of case management and/or that Bermuda is not a convenient forum. Caldera argues that there is no inconsistency in seeking a stay on case management and *forum non conveniens* grounds on the one hand and striking out these proceedings under RSC Order 18 rule 19 on the other. In both cases, Caldera argues that it is maintaining a consistent position, namely, the issues raised in these proceedings should not be tried in Bermuda. It is not necessary for this Court to rule upon the alleged inconsistency. The alleged inconsistency may have to be considered by the Court of Appeal if Caldera seeks to pursue its appeal against the Order of this Court refusing to strike out and/or stay these proceedings on the grounds of case management and or *forum non conveniens*.

106. Caldera argues that it owes no direct, freestanding, or independent duties to Athene, whether in contract, tort, pursuant to statute or in equity. Given the principles of separate and limited liability it is impossible to understand, Caldera argues, the basis upon which it is alleged that it is the alter ego (or the agent or nominee) of Mr Siddiqui and Mr Cernich, absent a properly particularised claim of dishonesty or fraud on the part of Mr Siddiqui and Mr Cernich (which would be (a) necessary to establish primary liability on the part of Caldera; and (b) necessary to establish any "veil piercing" so as to establish secondary or derivative liability on the part of Caldera).

107. In considering this application it is important to remind oneself of the heavy burden of proof assumed by a party seeking to strike out a claim summarily. In *Broadsino Finance Company Limited v Brilliance China Automotive Holdings Limited and Others* [2005] Bda LR 12, the Court of Appeal for Bermuda explained the approach which is to be taken, both as regards evidence and the consideration of the actual merits of the action or defence, as the case may be. At pages 4-5 Stuart-Smith JA said:

> "There is no dispute as to the applicable principles of law. Where the application to strike-out on the basis that the Statement of Claim discloses no reasonable cause of action (Order 18 Rule 19(a)), it is permissible only to look at the pleading. But where the application is also under Order 18 Rule 19(b) and (d), that the claim is frivolous or vexatious or is an abuse of the process of the court, affidavit evidence is admissible. Three citations of authority are sufficient to show the court's approach. In *Electra Private Equity Partners (a limited 40 partnership) v KPMG Peat Marwick* [1999] EWCA Civ 1247, at page 17 of the transcript Auld LJ said: "*It is trite law that the power to strike-out a claim under Order RSC Order 18 Rule 19, or in the inherent jurisdiction of the court, should only be exercised in plain and obvious cases. That is particularly so where there are issues as to material, primary facts and the inferences to be drawn from them, and where there has been no discovery or oral evidence. In such cases, as Mr Aldous submitted, to succeed in an application to strike-out, a defendant must show that there is no realistic possibility of the plaintiff establishing*

a cause of action consistently with his pleading and the possible facts of the matter when they are known….. There may be more scope for an early summary judicial dismissal of a claim where the evidence relied upon by the Plaintiff can properly be characterised as shadowy, or where the story told in the pleadings is a myth and has no substantial foundation. See eg <u>*Lawrence v Lord Norreys*</u> *(1890) 15 Appeal Cases 210 per Lord Herschell at pages 219-220*". In *National Westminster Bank plc v Daniel* [1994] 1 All ER 156 was a case under Order 14 where the Plaintiff was seeking summary judgment, but it is common ground that the same approach is applicable. Glidewell LJ, with whom Butler-Sloss LJ agreed, put the matter succinctly following his analysis of the authorities. At page 160, he said: "*Is there a fair and reasonable probability of the defendants having a real or bona fide defence? Or, as Lloyd LJ posed the test: "Is what the defendant says credible"? If it is not, then there is no fair and reasonable probability of him setting up the defence*".

108. As noted by Hellman J. at [28], the claim advanced against Caldera is tolerably clear: *"The factual allegation at the root of the statement of claim – that Caldera is the vehicle to which Mr Siddiqui and Mr Cernich are misusing confidential information to acquire Company A – is consistent with Caldera being the agent or nominee"* Again as noted by Hellman J. at [65*]: "Caldera has not been sued as a device to bring proceedings against Mr Siddiqui and Mr Cernich, but as an alleged wrongdoer in its own right".*

109. As explained by Lord Sumption in *Prest v Petrodel Resources Limited* [2013] UKSC 34 the actions of a corporate entity, acting as an agent or nominee of the wrongdoer, attract personal and independent liability on the part of the corporate entity.

110. In *Gilford Motor Co Ltd v Horne* [1933] Ch 935 (discussed by Lord Sumption at [29] in *Prest*) the Court of Appeal granted an injunction against both Mr Horne and the company. As against Mr Horne, the injunction was granted on the concealment principle. As against the company, the injunction was granted to ensure that Mr Horne was deprived of the benefit which might otherwise

have derived from the separate legal personality of the company. However, Lord Sumption went on to say: "*It is also true that the court in Gilford Motor Co might have justified the injunction against the company on the ground that Mr Horne's knowledge was to be imputed to the company so as to make the latter's conduct unconscionable or tortious, thereby justifying the grant of an equitable remedy against it".*

111. Lord Sumption also considered the case of *Gencor ACP Ltd v Dalby* [2000] 2 BCLC 734 at [31] in *Prest.* The plaintiff in that case made a number of claims against its former director, Mr Dalby, for misappropriating its funds and also made an independent claim for an account of a secret profit which Mr Dalby procured to be paid to a BVI company under his control called Burnstead. Rimer J considered that that the BVI company was "*in substance little other than Mr Dalby's offshore bank account held in a nominee name "* and "s*imply … the alter ego through which Mr Dalby enjoyed the profit which it earned in breach of his fiduciary duty to* ACP' Lord Sumption considered that in these circumstances the BVI company was independently liable:

> " *[Rimer J's] findings about Mr Dalby's relationship with the company and his analysis of the legal consequences show that both Mr Dalby and Burnstead were independently liable to account to ACP, even on the footing that they were distinct legal persons. If, as the judge held, Burnstead was Mr Dalby's nominee for the purpose of receiving and holding the secret profit, it followed that Burnstead had no right to the money as against Mr Dalby, who had in law received it through Burnstead and could properly be required to account for it to ACP. Burnstead itself was liable to account to ACP because, as the judge went on to point out, Mr Dalby's knowledge of the prior equitable interest of ACP was to be imputed to it. As Rimer J observed, "the introduction into the story of such a creature company is... insufficient to prevent equity's eye from identifying it with Mr Dalby." This is in reality the concealment principle. The correct analysis of the situation was that the court refused to be deterred by the legal personality of the company from finding the true facts about its legal relationship with Mr Dalby. It held that the nature of*

their dealings gave rise to ordinary equitable claims against both. The result would have been exactly the same if Burnstead, instead of being a company, had been a natural person, say Mr Dalby's uncle, about whose separate existence there could be no doubt".

112. It is reasonably arguable that Caldera, incorporated by Mr Siddiqui and Mr Cernich and wholly owned by them, is acting as their agent or nominee for the purposes of acquiring Company A. In those circumstances it is reasonably arguable that Caldera may become independently liable to Athene if it is utilising Athene's confidential information for that purpose. The wrongful conduct complained of on the part of Mr Siddiqui and Mr Cernich is materially no different than the conduct of Mr Horne in the *Horne Motor Co* case. If Caldera is sued within the jurisdiction in relation to causes of action upon which it is independently liable, then it can properly be considered as an anchor defendant. The fact that the causes of action against it are related to the causes of action against other defendants, who are to be served outside the jurisdiction, is not material.

113. In relation to the complaint that Athene has failed to give full and proper particulars of all the confidential information on which it intends to rely, as indicated at paragraph 64 to 66 above, further particulars can be given in due course but he absence of those particulars does not warrant the striking out of the proceedings at this stage. As argued by Athene, the discovery process in this case may reveal the true extent of the breaches of duty by the Defendants and may provide a full picture of the circumstances which led to the incorporation of Caldera and the transmission of confidential information by Mr Siddiqui and Mr Cernich to Caldera.

114. The importance of discovery in this case is demonstrated by the email chains exhibited to the recent affidavit of Mr McCosker. The email chain at pages 1 to 4 of Exhibit BPM 1 shows that, during the period Mr Siddiqui was still a director and officer of Athene, Mr Siddiqui and Mr Cernich were exchanging emails on their "personal" accounts regarding the business of Athene. Athene

contends that they were disclosing its confidential information in breach of their fiduciary duties and duty of confidence owed to Athene.

115. The email chain at pages 5 to 7 of Exhibit BPM 1 shows that during the period Mr Siddiqui was still a director and officer of Athene, both he and Mr Cernich took steps to incorporate Caldera which was intended to compete with Athene for the acquisition of Company A. As noted earlier, this information would appear to be in conflict with Mr Siddiqui sworn evidence that the idea of incorporating Caldera did not materialise until he was no longer a director and officer of Athene.

116. Athene refutes the assertion made on behalf of the Defendants that it does not intend to pursue these proceedings. It maintains that, like the position taken by Caldera, it has not applied for an interim injunction restraining Caldera from using confidential information in its bid for Company A, on the basis that such an application is bound to generate publicity and is likely to damage Company A. However, once the outcome of the bid process is known, Athene asserts that these proceedings will be pursued to trial.

117. In all the circumstances, the Court is not satisfied that the causes of action pursued by Athene against Caldera are hopeless and are bound to fail. Despite the allegations of lack of particularity, the root allegation made by Athene against the Defendants is reasonably clear and does not warrant striking out the entire proceedings. Finally, the Court is not satisfied that these proceedings are being pursued by Athene for an improper collateral purpose. Accordingly, the application by Caldera to strike out these proceedings pursuant to RSC Order 18 rule 19 is dismissed.

G. **Third Application: Leave to Appeal Application By Caldera**

118. By Notice of Motion dated 12 July 2018, Caldera seeks leave to appeal against the Ruling of Hellman J. in relation to his decision to refuse to stay the proceedings against Caldera on the grounds of *forum non conveniens* and/or case management .

119. The decision whether to grant a stay on grounds of *forum non conveniens* or case management is a discretionary one and an appellate court is unlikely to interfere with that decision unless it can be shown that the court below has made an error of law. Sir Alastair Blair-Kerr P. in *Fordingbridge International Agencies Limited v American Centennial Insurance Company* (Bermuda Civil Appeal No. 15 of 1986) outlined the approach of the Bermuda Court of Appeal as follows:

> "Appellate Courts are slow to interfere because, as Lord Brandon said in *The Abidin Daver* [1984] 1 AC 398, the decision whether to allow refuse an application to stay an action is a discretionary decision for the judge of first instance to whom the application is made. The grounds on which an appellate may interfere have often been stated; but bear repetition; and I cannot do better than quote the words of Lord Brandon at p 420:
>
> *"... Where the judge of first instance has exercised his discretion in one way or the other, the grounds on which an appellate court is entitled to interfere with the decision which he has made are of limited character. It cannot interfere simply because its members considered that they would, if themselves sitting at first instance, have reached a different conclusions. It can only interfere in three cases: (1) where the judge has misdirected himself with regard to the principles in accordance with which his discretion had to be exercised; (2) where the judge, in exercising his discretion, has taken into account matters which he ought not to have done or failed to take into account matters which he ought to have done; or (3) where the decision is plainly wrong"*

Forum non conveniens

120. It is said that Judge made a serious error in not determining the applicable law and further that he should have determined that the applicable law in relation to the issues in the Bermuda proceedings was in fact New York law. Reliance is placed on paragraph 66 of the Ruling where the Judge says: "*It is true that one*

aspect of Athene's claims against Mr Cernich is governed by New York law. But on Athene's case the remainder of its claims against all three defendants are not. In any case, the applicable law will be for the trial judge to determine based upon the facts which he (or she) finds".

121. It appears that the judge appreciated that different systems of law applied to different aspects of the case. To the extent that Mr Cernich claimed that he was released from any claims as a result of the Release that issue was governed by New York law because that Agreement was expressly governed by New York law. Likewise to the extent that Mr Siddiqui said that he had been released under the Settlement Agreement, that issue would be governed by New York law because that Agreement was expressly governed by New York law. However, Athene's claims, at least against Mr Siddiqui and Mr Cernich, in respect of breach of fiduciary duties and confidential information, were likely to be governed by Bermuda law. This was Hellman J.'s provisional view of the relevant governing laws which appears to be appropriate having regard to the relevant agreements and the pleaded causes of action.

122. The suggestion that the Judge should have found that all of Athene's causes of action are governed by New York law appears to be unwarranted, having regard to the pleaded causes of action in these proceeding. The issues whether and to what extent Mr Siddiqui and Mr Cernich owed fiduciary and other duties to Athene, in their capacity as directors and officers of Athene, either at common law or under section 97 (1) of the Companies Act 1981, and whether there has been breach of these duties is likely to be governed by Bermuda law. The related issue of whether Athene can maintain an action in light of the indemnity and waiver provided to directors and officers in Bye Law 56 of Athene's Bye Laws, expressly relied upon by Mr Siddiqui, is likely to be governed by Bermuda Law. The scope of the cause of action based upon breach of confidence and whether that has been breached is again likely to be governed by Bermuda Law. Indeed, in relation to the scope of the their duty and the pleading requirement, the Defendants rely upon the decision of Laddie J in *Ocular Sciences Ltd. et al. v Aspect Vision Care* [1997] RPC 289. Finally, the scope of the recently pleaded additional cause of action based upon the assertion that

prior to their separation from Athene, Mr Siddiqui and Mr Cernich formed an intention to remove confidential information from Athene and to incorporate a new corporate vehicle to hold the confidential information for the purpose of competing with Athene, is again likely to be governed by Bermuda law. In the circumstances it does not appear that Hellman J. arguably made an error of law in his treatment of the issue of governing law relating to the pleaded causes of action in the Bermuda proceedings.

123. Secondly, it is said that the Judge failed to place any weight on the location of the parties' directors, officers, employees, agents and service providers. The Judge in fact expressly set out those factors at paragraphs 60 to 63 and, as an exercise of his discretion, he found the submissions made on behalf of Athene to be persuasive. That was his discretionary decision and it is to be assumed that he has taken these factors into account.

124. Third, it is said that the judge wrongly placed weight (or undue weight) on the fact that Caldera is a company incorporated in Bermuda. The issue of how a Bermuda Court should view an exempt company incorporated in Bermuda in its analysis of *forum non conveniens* has been previously considered by the Court of Appeal for Bermuda. In *National Iranian Oil Company v Ashland Overseas Trading Limited* (Bermuda civil appeal number 15 of 1987). DaCosta JA addressed the issue as follows:

> "Mr Crystal had submitted to the learned judge that the connection of AOTL with Bermuda was fragile it was, he submitted, by its nature, as an exempt company, a company with extensive foreign interests; as an exempt company it had to be more than 80% owned by non-Bermudians; it was controlled by non-Bermudians; it was controlled by non-Bermudians and it carried on business outside of Bermuda
>
> It is a trite observation that an exempt company incorporated under the provisions of the Exempted Companies Act, 1950, is a local statutory creature. In order to find out what the statutory creature is and what it is meant to do, one must look at the statutory only (see *Baroness Wenlock v*

River Dee Co (1883) 36 Ch. D. 685 per Bowen LJ). While most of its business activities are carried on or abroad, it does have power to carry on certain specified business activities in Bermuda. It may for example, transact banking business in Bermuda with and through a licenced bank; it may also conclude contracts in Bermuda so far as may be necessary for the carrying on of the business of the company exterior to Bermuda. (see The Exempted Companies Act, 1950 s 7(1)(d)(iv) and (v)). It is firmly anchored in Bermuda though its activities may reach out to the ends of the earth.

125. The Court of Appeal in the *National Iranian* case was expressly invited to say that by the very nature of exempt companies in Bermuda, their connection with the jurisdiction, for the purposes of a *forum non conveniens* analysis, should be considered as fragile. The Court of Appeal rejected that submission. The cases relied upon on behalf of Caldera such as *Nilon Limited v Royal Investments SA [*2015] UKPC 2 and *Livingston Properties Equities Inc. v JSC MCC Eurochem* (Eastern Caribbean Court of Appeal, 18 September 2018) show that other factors may point to another jurisdiction being the more appropriate forum than the place of the defendant.

126. In *Nilon* the formal application before the BVI Court was an application to rectify the share register of a company incorporated in the BVI. However, that application in itself did not make the BVI court clearly the appropriate forum, First, the issues between the parties had little or nothing to do with the plaintiffs' right to registration as members. The issue was whether the defendant had contracted to give the plaintiffs a beneficial interest in *Nilon* and that issue had nothing to do with the BVI. The alleged contract was made in England, the company was to be managed from Jersey, the underlying business was concerned with Nigeria and India, the operating companies would be in Nigeria, and the witnesses would be mainly in England. The documents were in England and Jersey. There was no suggestion that this underlying dispute had any connection with the BVI other than the place of *Nilon's* incorporation. In these circumstances the Privy Council held that the Court of Appeal erred in law in

concluding that the BVI was clearly the appropriate forum for the trial of the action.

127. In this case, the underlying cause of action arises from a relationship between a Bermuda company and its directors and officers and involves breaches of duties owed by them to the company at common law and under the Companies Act 1981. As explained in paragraph 122 above the causes of action pleaded in the Bermuda proceedings are likely to be governed by Bermuda law. Mr Siddiqui and Mr Cernich have incorporated a Bermuda company, Caldera, which is a defendant in these proceedings and is being sued on the basis that it has incurred separate and independent liability towards Athene. The Third Defendant, Caldera, has been served within the jurisdiction as a matter of right. In the circumstances the present case is far removed from the facts in cases such as *Nilon*.

128. Fourthly, it is said the judge failed to give any weight to the relationship between Athene and Apollo and the fact that Athene and Apollo are seeking substantially the same relief in different jurisdictions based substantially on the same facts. The Ruling of Hellman J. makes quite clear that the Judge was fully aware of the relationship and took that into account. At paragraphs 60 (1) of the Ruling, Hellman J. expressly refers to this submission made on behalf of Caldera.

129. In the circumstances it does not appear that Hellman J. failed to take into account relevant factors or gave undue weight to others.

Case management stay

130. Caldera complains that Hellman J.'s decision not to grant a case management stay was wrong in law and a wholly unreasonable exercise of his discretion given the fact that Athene and Apollo were reportedly seeking the same relief based on the same alleged facts. The Judge stated at paragraph 68 that "Neither the New York action nor the second JAMS arbitration, relates only to Mr Siddiqui among the defendants nor to which Athene is not a party, provides a

good reason for me to stay the action and case management". The Judge refused a stay as far as the arbitration proceedings were concerned since neither Athene nor Mr Cernich were parties to the arbitration agreement. Furthermore, as noted above, the causes of action sought to be enforced in the arbitration were the contractual rights between Apollo and Mr Siddiqui. The basis of the Bermuda proceedings is entirely different. As far as the New York proceedings are concerned, neither Mr Siddiqui nor Mr Cernich are parties to it. In the circumstances, it would appear that Hellman J. was entitled to take the view that, in the exercise of his discretion, the Bermuda proceedings should not be stayed.

131. In all the circumstance the Court is not satisfied that Hellman J. fell into an arguable error of law and accordingly, the Court declines to give leave to appeal the Ruling of Hellman J. dated 28 June 2018.

H. Summary

132. In the circumstances the Court (i) dismisses the application by Mr Siddiqui and Mr Cernich that the *ex-parte* Order dated 17 May 2018 granting leave to Athene to serve them outside the jurisdiction be set aside; (ii) dismisses Caldera's application to set aside the Writ and the Statement of Claim pursuant to RSC Order 18, rule 19 and/or under the inherent jurisdiction of the Court; and (iii) refuses Caldera's application seeking leave to appeal the ruling of Hellman J. dated 28 June 2018.

133. The Court will hear any application in relation to the issues of costs.

Dated this 14th day of January, 2019

NARINDER K HARGUN

CHIEF JUSTICE